# CIVIL RIGHTS AND RELATED DECISIONS

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*Ledbetter v. Goodyear Tire & Rubber Co.*[1] and *Gonzales v. Carhart*[2] have much in common, even though *Ledbetter* concerns pay disparity claims based on gender and *Gonzales* concerns second trimester abortions. Both are five-four decisions which demonstrate how profoundly the appointment of Justice Samuel Alito to occupy Justice Sandra Day O'Connor's seat has affected the balance of power on the Court. The net result of this shift has been a devastating setback for women's rights. Both decisions prompted Justice Ruth Bader Ginsburg to uncharacteristically read aloud two forceful dissents in which she outlined the development of the law governing women's equality, and admonished the Court for turning back the clock on women's rights.[3]

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[1] 127 S. Ct. 2162 (2007).

[2] 127 S. Ct. 1610 (2007).

[3] *See, e.g.*, *Ledbetter*, 127 S. Ct. at 2187-88 (Ginsburg, J., dissenting).

> Yet, under the Court's decision . . . . Ledbetter may not be compensated for the lower pay she was in fact receiving when she complained to the EEOC. Nor, were she still employed by Goodyear, could she gain, on the proof she presented at trial, injunctive relief requiring, prospectively, her receipt of the same compensation men receive for substantially similar work. The Court's approbation of these consequences is totally at odds with the robust protection against workplace discrimination Con-

This Article will also briefly discuss two other cases: *Winkelman v. Parma City School District*,[4] an Individuals with Disabilities Education Act ("IDEA") case, where the Court upheld the right of parents to go to court without an attorney to challenge a school district's individualized educational plan for their children, and *Long Island Care at Home, Ltd. v. Coke*,[5] where the Court upheld a regulation exempting home health care attendants hired by agencies from the overtime provisions of the Fair Labor Standards Act.

## I. *LEDBETTER V. GOODYEAR TIRE & RUBBER CO.*

The blockbuster employment discrimination case of last Term was *Ledbetter*, which addressed the statutory time period for bringing a pay discrimination claim.[6] While this is a seemingly simple and straightforward issue, it has serious repercussions in most Title VII gender-based pay disparity cases.

Title VII requires that any individual wishing to challenge an employment practice "must file a charge with the Equal Employment Opportunity Commission ("EEOC") within 180 days 'after the unlawful employment practice occurred.' "[7] Where a state has its own human rights agency, the filing deadline is 300 days.[8] Assuming

gress intended Title VII to secure.

*Id.* (internal citations omitted); *Gonzales*, 127 S. Ct. at 1646-47 (Ginsburg, J., dissenting) ("The Court offers flimsy and transparent justifications for upholding a nationwide ban on . . . [this abortion procedure] *sans* any exception to safeguard a women's [sic] health.").

[4] 127 S. Ct. 1994 (2007).

[5] 127 S. Ct. 2339 (2007).

[6] *Ledbetter*, 127 S. Ct. at 2166.

[7] *Id.* at 2179 (Ginsburg, J., dissenting) (quoting 42 U.S.C.A. § 2000e-5(e)(1) (West 2003)).

[8] *Id.* at 2166-67 (majority opinion) ("Such a charge must be filed within a specified period (either 180 or 300 days, depending on the State) 'after the alleged unlawful employment

the claim is timely, the statute authorizes an award of backpay "for a period of up to two years before the discrimination charge is filed."[9]

In 2002, the Court decided *National Railroad Passenger Corp. v. Morgan*[10] which addressed whether employment discrimination claimants may recover for discriminatory acts occurring outside the 180-day limitation. Plaintiff Abner Morgan, an employee for Amtrak, filed suit claiming he was harassed and disciplined more harshly than other similarly situated employees solely because of his race. His discrimination charge, filed with the EEOC, complained of acts that occurred both within and beyond the statutory filing period.[11]

The circuit courts employed different rules for dealing with this problem. Some circuits found the earlier conduct actionable under a continuing violation theory.[12] Other circuits employed a "multifactor test" which considered three questions: "(1) whether the alleged acts involve the same type of discrimination; (2) whether the incidents are recurring or independent and isolated events; and (3) whether the earlier acts have sufficient permanency to trigger the em-

practice occurred . . . .' " (quoting 42 U.S.C. § 2000e-5(e)(1))).

[9] *Id.* at 2184 (Ginsburg, J., dissenting) (citing 42 U.S.C.A. § 2000e-5(g)(1)).

[10] 536 U.S. 101 (2002).

[11] *Id.* at 106.

[12] *Id.* at 106-07. *See* Nat'l R.R. Passenger Corp. v. Morgan, 232 F.3d 1008, 1015-16 (9th Cir. 2000) *aff'd in part and rev'd in part*, 536 U.S. 101, 107 (2002) stating:

> [A] plaintiff can establish a continuing violation in one of two ways. First, by showing a series of related acts one or more of which are within the limitations period-a serial violation. . . . The second way to establish a continuing violation is to show a systematic policy or practice of discrimination that operated, in part, within the limitations period—a systemic violation.

ployee's awareness of and duty to challenge" the conduct.[13]

The Supreme Court, in *Morgan*, distinguished discrete discriminatory acts from acts giving rise to hostile work environment claims.[14] Discrete discriminatory acts are considered to occur on the day they happen, and their occurrence triggers the accrual of the time limitation.[15] Thus, "discrete discriminatory acts are not actionable if time barred" even when those acts are related to other acts that were timely.[16] Each discrete discriminatory act starts the clock running anew.[17] If any prior untimely acts exist, they may be used by the plaintiff as background evidence in support of a timely claim, though these acts are not themselves actionable. Examples of discrete acts are "termination, failure to promote, denial of transfer, or refusal to hire . . . ."[18] Such discrete acts are not actionable on the theory that they are part of a continuing violation. They are considered separate, actionable, unlawful discriminatory practices.[19]

In contrast are acts giving rise to hostile environment claims. Hostile environment claims arise "[w]hen the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's em-

[13] *Morgan*, 536 U.S. at 107 n.3 (citing Berry v. Bd. of Supervisors of L.S.U., 715 F.2d 971, 981 (5th Cir. 1983)).

[14] *Id.* at 115.

[15] *Id.* at 110.

[16] *Id.* at 113.

[17] *Id.*

[18] *Morgan*, 536 U.S. at 114.

[19] *Id.* at 114 ("Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable 'unlawful employment practice.' Morgan can only file a charge to cover discrete acts that 'occurred' within the appropriate time period.").

ployment and create an abusive working environment.' "[20] In contrast to discrete acts of discrimination, a hostile environment claim typically is not based on a single act of harassment. Hostile environment claims, by their very nature, involve repeated conduct that cannot be said to have occurred on a particular day.[21] Since the timely filing rule requires filing within 180 days "after the alleged unlawful employment practice occurred" and since a hostile work environment claim is necessarily comprised of a series of acts that collectively constitute an unlawful employment practice, it does not matter that some of the acts occurred outside the statutory time period, provided an act contributing to the claim occurs within the filing period.[22]

The Court in *Morgan* rejected the rule employed by some circuits that permitted a consideration of earlier acts only when it would be "unreasonable to expect the plaintiff to sue before the statute ran on such conduct."[23] The Court adopted a plaintiff friendly rule that deems an action timely where the employee files a charge within 180 days of any act that is part of the same hostile work environment claim.[24] This is a plaintiff friendly rule because the period covered may extend well beyond the 180 days; the decision makes clear the

[20] *Id.* at 116 (quoting Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993)).

[21] *Id.* at 115 ("Hostile environment claims are different in kind from discrete acts. Their very nature involves repeated conduct.").

[22] *Id.* at 117.

[23] *Morgan*, 536 U.S. at 117-18.

[24] *Id.* at 113. "The charge, therefore, must be filed within the 180- or 300-day time period after the discrete discriminatory act occurred." *Id.* The Court explained, "The existence of past acts and the employee's prior knowledge of their occurrence, however, does not bar employees from filing charges about related discrete acts so long as the acts are independently discriminatory and charges addressing those acts are themselves timely filed." *Id.*

period may extend for a number of years.[25]

In *Ledbetter*, Lilly Ledbetter worked for Goodyear for almost twenty years, from 1979 to 1998, as an area manager and was one of the few women who held this position. Her pay was initially comparable to her male colleagues, but over time there came to be significant discrepancies between her salary and that received by male area managers.[26] By 1997, Ledbetter was the only female area manager and she was paid decidedly less than all of the men. Her pay was $3,727 per month, whereas the lowest paid male manager's monthly salary was $4,286, and the highest paid male manager's monthly salary was $5,236. In other words, the lowest paid male manager was earning fifteen percent more than Ms. Ledbetter, and the highest paid male manager was earning forty percent more than she was.[27]

In 1998, she filed a charge with the EEOC asserting gender-based pay discrimination. The question became whether a plaintiff can bring a Title VII action "alleging illegal pay discrimination when the disparate pay is received during the statutory limitations period, but is the result of intentionally discriminatory pay decisions that oc-

[25] *Id.* at 117.

> The timely filing provision only requires that a Title VII plaintiff file a charge within a certain number of days after the unlawful practice happened. It does not matter, for purposes of the statute, that some of the component acts of the hostile work environment fall outside the statutory time period. Provided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability.

*Id.*

[26] *Ledbetter*, 127 S. Ct. at 2178 (Ginsburg, J., dissenting) ("Ledbetter's salary was in line with the salaries of men performing substantially similar work. Over time, however, her pay slipped in comparison to the pay of male area managers with equal or less seniority.").

[27] *Id.*

curred outside the limitations period."[28] The answer to that question depends on whether the pay disparity is treated as a discrete act separate and apart from prior acts, like a termination, a denial of a promotion, or a refusal to hire, or whether the pay disparity is more properly treated as a recurring act which is cumulative in nature akin to a hostile work environment.[29]

Ms. Ledbetter's discriminatory pay claim was tried before a jury, which found in her favor.[30] The jury concluded that Ledbetter's current pay was discriminatorily low given a series of decisions which reflected pervasive discrimination against women managers. Although the employer defended the pay differential based on job performance, the supervisor admitted that Ledbetter had received a top performance award. There was also testimony that the supervisor whose "evaluation led to [Ledbetter's] most recent raise denial . . . was openly biased against women."[31] Other women who worked as area managers testified that they too were paid less than men in equivalent positions, and that the workplace was permeated with insidious discrimination.[32] Ms. Ledbetter testified that the plant manager explicitly told her the "plant did not need women, that [women]

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[28] *Id.* at 2166 (majority opinion).

[29] *Id.* at 2169.

> In *Morgan*, we explained that the statutory term "employment practice" generally refers to "a discrete act or single 'occurrence' " that takes place at a particular point in time. We pointed to "termination, failure to promote, denial of transfer, [and] refusal to hire" as examples of such "discrete" acts, and we held that a Title VII plaintiff "can only file a charge to cover discrete acts that 'occurred' within the appropriate time period.

*Id.* (internal citations omitted).

[30] *Id.* at 2166.

[31] *Ledbetter*, 127 S. Ct. at 2187 (Ginsburg, J., dissenting).

[32] *Id.*

didn't help it, [and] caused problems."[33] Based on this testimony, the jury found the pay disparity resulted from intentional discrimination and awarded Ms. Ledbetter back-pay, and compensatory and punitive damages totaling over $3,000,000 (remittitur to $360,000).[34]

The Eleventh Circuit Court of Appeals reversed, finding that plaintiff's pay disparity claim was time barred because the discriminatory conduct occurred before the 180-day period prior to the filing of Ms. Ledbetter's EEOC complaint.[35] The Supreme Court granted certiorari and, in a five-four decision authored by Justice Alito, affirmed the ruling of the Eleventh Circuit.[36]

The majority treated pay disparity claims as discrete acts, individually requiring a complaint to the EEOC within 180 days.[37] The Court rejected the argument that each pay check carries forward prior discriminatory pay disparities and constitutes "a separate violation of Title VII."[38] Justice Alito relied on a series of cases which stand for the proposition that the 180-day period is triggered when a discrete unlawful practice occurs.

For example, in *United Air Lines, Inc. v. Evans*,[39] the plaintiff was forced to resign because the airline refused to employ married flight attendants. Ms. Evans filed her EEOC charge years later, when she was rehired and treated as a new employee for seniority purposes.

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[33] *Id.*

[34] *See* Ledbetter v. Goodyear Tire & Rubber Co., No. 99-C-3137-E, 2003 WL 25507253, at *2 (N.D. Ala. Sept. 24, 2003).

[35] 421 F.3d 1169, 1177-78 (11th Cir. 2005).

[36] *Ledbetter*, 126 S. Ct. at 2165.

[37] *Id.* at 2169.

[38] *Id.* at 2175 (citing Brief for Petitioner, *Ledbetter*, 127 S. Ct. 2162 (2007) (No. 05-1074), 2006 WL 2610990.

[39] 431 U.S. 553 (1977).

Her claim was dismissed as untimely.[40] Similarly, in *Delaware State College v. Ricks*,[41] a college librarian was denied tenure, allegedly based on race, but he did not file his EEOC charge until the end of his nonrenewable one year contract. There, too, the Court dismissed the claim as untimely.[42] The *Ledbetter* majority also cited *Morgan*, the 2002 hostile work environment case, as support for the proposition that the 180-day period is triggered when a discrete unlawful practice takes place.[43] But, that begs the question whether cumulative pay disparities should be viewed as discrete acts or as a recurring act with cumulative effect.

The majority distinguished *Bazemore v. Friday*,[44] a pay disparity claim based on race where the Court *did* treat each week's paycheck as an actionable wrong.[45] Justice Alito distinguished *Bazemore* by reasoning the *Bazemore* employer had adopted a facially discriminatory pay structure where black employees were paid less than white employees, and every time the employer issued a paycheck it intended to discriminate.[46] The focus was on a current violation, not carrying forward a past act of discrimination. According to Justice Alito:

> *Bazemore* stands for the proposition that an em-

[40] *Id.* at 558 ("Respondent is correct in pointing out that the seniority system gives present effect to a past act of discrimination. But United was entitled to treat that past act as lawful after respondent failed to file a charge of discrimination within the 90 days then allowed . . . .").

[41] 449 U.S. 250 (1980).

[42] *Id.* at 262 n.17.

[43] *Ledbetter*, 127 S. Ct. at 2169.

[44] 478 U.S. 385 (1986).

[45] *Id.* at 395-96.

[46] *Ledbetter*, 127 S. Ct. at 2173.

> ployer violates Title VII and triggers a new EEOC charging period whenever the employer issues paychecks using a discriminatory pay structure. But a new Title VII violation does not occur and a new charging period is not triggered when an employer issues paychecks pursuant to a system that is "facially nondiscriminatory and neutrally applied."[47]

Thus, the majority rejected the proposition that each paycheck is actionable when it carries forward prior discrimination, as for example, when annual salaries are based on percentage raises. Justice Alito and the majority concluded that recognizing this claim as timely would "distort Title VII's integrated, multistep enforcement procedure" and would fail to give effect to the statutory scheme developed by Congress.[48] Additionally, the majority found it would be unduly onerous to employers, requiring them to defend stale claims for which evidence is no longer easily available.[49] Ultimately, according to the majority, "experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law."[50]

Not surprisingly, Justice Ginsburg, a champion of women's rights in many of the groundbreaking gender discrimination cases of the 1970s, delivered a forceful dissent in *Ledbetter*. Justice Ginsburg uncharacteristically read her dissenting opinion from the bench, the

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[47] *Id.* at 2174 (citing Lorance v. AT&T Techs., 490 U.S. 900, 911 (1989)).

[48] *Id.* at 2170 (quoting Occidental Life Ins. v. EEOC, 432 U.S. 355, 359 (1977)) (internal quotation omitted).

[49] *Id.*

[50] *Id.* at 2171-72 (quoting Mohasco Corp. v. Silver, 447 U.S. 807, 826 (1980)) (internal quotation omitted).

second time this term.[51] The major thrust of her dissent focused on the realities of gender-based pay disparities. Justice Ginsburg explained that pay disparities typically occur in increments too small at first to be noticed, and often hidden from view because of the secrecy that typically surrounds salaries and raises.[52] In fact, one-third of private sector employers have adopted policies that explicitly prohibit employees from revealing their salary to co-employees.[53] Thus, pay disparities differ in a fundamental way from other forms of adverse employment actions like a firing or a refusal to promote or hire—actions that are discrete and completely out in the open.[54] When a worker is denied a promotion, the worker immediately knows it. When a worker receives a modest salary increase, how would that worker know whether it is substantially less than the increase received by others or that it represents sex discrimination?[55]

To the dissent, actionable unlawful employment practices are not restricted to the particular intentional decision to pay women less, rather they encompass every wage payment infected by gender-based discrimination, a practice that "occurs whenever a paycheck delivers less to a woman than to a similarly situated man."[56] To the dissenting

[51] *See* Robert Barnes, *Over Ginsburg's Dissent, Court Limits Bias Suits*, WASH. POST, May 30, 2007, at A1 ("The decision moved Justice Ruth Bader Ginsburg to read a dissent from the bench, a usually rare practice that she has now employed twice in the past six weeks to criticize the majority for opinions that she said undermine women's rights.").

[52] *Ledbetter*, 127 S. Ct. at 2178-79 (Ginsburg, J., dissenting).

[53] *Id.* at 2182 n.3 (citing Leonard Bierman & Rafael Gely, *"Love, Sex and Politics? Sure. Salary? No Way": Workplace Social Norms and the Law*, 25 BERKELEY J. EMP & LAB. L. 167, 168, 171 (2004)).

[54] *Id.* at 2179.

[55] *Id.* (stating an employee who is unaware of her circumstances "should not [be] preclude[d] from later challenging the then current and continuing payment of a wage depressed on account of her sex").

[56] *Id.*

Justices, this approach is more "in tune with the realities of the workplace, and more respectful of Title VII's remedial purpose."[57]

According to the dissent, *Bazemore* provides the operative standard in all pay disparity cases.[58] "Each week's paycheck that delivers less to a black [employee] than to a similarly situated white [employee] is a wrong actionable under Title VII . . . ."[59] Similarly, the dissenters argued, every paycheck that delivers less to a woman than to a similarly situated male is also actionable under Title VII.[60]

The dissent also relies on *Morgan*, where the Court distinguished between discrete acts that are easy to identify as discriminatory and acts that recur and are cumulative in impact.[61] With respect to discrete acts, a charge must be filed within 180 days, but claims based on the cumulative effect of individual acts, such as hostile work environment cases, "cannot be said to occur on any particular day."[62] For these claims, it does not matter if some of the component acts fall outside the statutory period. Pay disparity claims, such as Ms. Ledbetter's, are more akin to hostile work environment claims than to charges of a single episode of discrimination.[63] In the dissent's words, "Over time, she alleged and proved, the repetition of

[57] *Ledbetter*, 127 S. Ct. at 2179 (Ginsburg, J., dissenting).

[58] *See id.* at 2180 (explaining *Bazemore's* recognition that "[p]aychecks perpetuating past discrimination . . . are actionable . . . because they discriminate anew each time they issue").

[59] *Bazemore*, 478 U.S. at 395-96.

[60] *Id.* at 2179 ("Our precedent suggests . . . that the unlawful practice is the *current payment* of salaries infected by gender-based (or race-based) discrimination-a practice that occurs whenever a paycheck delivers less to a woman than to a similarly situated man.").

[61] *Id.* at 2180.

[62] *Morgan*, 536 U.S. at 115.

[63] *Ledbetter*, 127 S. Ct. at 2181 (Ginsburg, J., dissenting) ("Ledbetter's claim, resembling Morgan's, rested not on one particular paycheck, but on 'the cumulative effect of individual acts.' " (quoting *Morgan*, 536 U.S. at 115)).

pay decisions undervaluing her work gave rise to the current discrimination of which she complained. Though component acts fell outside the charge-filing period, with each new paycheck, Goodyear contributed incrementally to the accumulating harm."[64]

This conclusion represents the position taken by the EEOC, the Federal Agency responsible for administering Title VII. The EEOC's Compliance Manual states that "repeated occurrences of the same discriminatory employment action, such as discriminatory paychecks, can be challenged as long as one discriminatory act occurred within the charge filing period."[65] Interestingly, Justice Clarence Thomas, a former chairman of the EEOC, joined the majority which rejected the Agency's interpretation.[66]

The dissent concludes, with a nod to Congress to undo the majority's "cramped" interpretation of Title VII, just as Congress did when it passed the Civil Rights Act of 1991 which legislatively overruled a series of opinions restricting the scope of Title VII.[67] Justice Ginsburg stated, "Once again, the ball is in Congress' court. As in 1991, the Legislature may act to correct this Court's parsimonious reading of Title VII."[68] A bill, entitled The Ledbetter Fair Pay Act of 2007, has passed the House and a similar bill has been introduced in

[64] *Id.*

[65] *Id.* at 2185 (citing EEOC Compliance Manual § 2-IV-C(1)(a), p 605:0024 and n.183 (2006)).

[66] *See id.* at 2165 (majority opinion).

[67] *Id.* at 2188 (Ginsburg, J., dissenting) (" 'A spate of Court decisions in the late 1980's drew congressional fire and resulted in demands for legislative change,' culminating in the 1991 Civil Rights Act." (citing BARBARA LINDERMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 2 (3d ed. 1996))).

[68] *Ledbetter*, 127 S. Ct. at 2188 (Ginsburg, J., dissenting).

the Senate.[69] These bills would legislatively overrule *Ledbetter* and effectuate a paycheck accrual rule which would permit an employee to file a claim within 180 days of any paycheck containing a discriminatory wage.[70] President Bush has announced he would veto any such bill.[71]

The import of *Ledbetter* is enormous. Between 2001 and 2006, there were 40,000 pay discrimination cases.[72] There is no question the *Ledbetter* ruling will render many pay discrimination cases time barred. Not surprisingly, business interests and the United States Chamber of Commerce applauded the decision calling it a "fair decision that eliminates a potential windfall against employers by employees trying to dredge up stale pay claims."[73] Equally unsurprisingly, advocates for women consider the ruling "a very important setback in the ability to eliminate discriminatory pay . . . put[ting] people in a terrible bind."[74] The Co-President of the National Women's Law Center said:

> On the one hand . . . it requires individuals to file a complaint within 180 days of being concerned that their pay may be discriminatory in nature. But having to file that quickly could be counterproductive because people might still be trying to make sure that there really is discrimination and because they still might be

[69] Press Release, Nat'l Org. For Women, House Passes "Ledbetter" Fair Pay Act But Too Soon to Declare Victory (July 31, 2007), http://www.now.org/press/07-07/07-31.html.

[70] *Id.*

[71] *Id.*

[72] Linda Greenhouse, *Justices' Ruling Limits Lawsuits on Pay Disparity*, N.Y. TIMES, May 30, 2007, at A1.

[73] *See* Steven Greenhouse, *Experts Say Decision on Pay Reorders Legal Landscape*, N.Y. TIMES, May 30, 2007, at A18 (quoting Robin Conrad, Executive Vice President of the National Chamber Litigation Center).

[74] *Id.* (quoting Marcia Greenberg, co-President of the National Women's Law Center).

trying to work things out in a conciliatory way.[75]

This is precisely what happened to Ms. Ledbetter. A likely result of this decision will be that people rush to file claims before they are even certain there is discrimination. Attorneys will have to advise their clients to file early to protect that client's interests, which is not necessarily a good result for either employees or employers.

The last point with regard to *Ledbetter* relates to continued uncertainty about the discovery rule. The majority provided no guidance as to when the clock begins to run other than to say when the "discriminatory pay decision was made and communicated . . . ."[76] Does that mean the clock runs when the employer informs the employee of her salary, or does it start to run when the employee discovers the pay disparity? The majority noted the Court has never specified whether or not a discovery rule applies to Title VII claims.[77] Thus, the question of whether the statute of limitations is tolled until the employee has discovered her injury will play out in the lower courts, unless the Ledbetter Fair Pay Act or other corrective legislation resolves the question and survives a presidential veto.

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[75] *Id.*

[76] *Ledbetter*, 127 S. Ct. at 2169.

[77] *Id.* at 2177 n.10. *See also* Shay Dvoretzky & Willis J. Goldsmith, *The U.S. Supreme Court's Labor and Employment Docket*, 238 N.Y. L.J. 11 (2007); Joanna Grossman & Deborah Brake, *Reviving Title VII's Protection Against Pay Discrimination In the Wake of the Supreme Court's Harsh Decision: A Call For Congressional Action*, FINDLAW.COM, July 10, 2007, http://writ.news.findlaw.com/commentary/20070710_brake.html ("[T]he Court simply reiterated that it has never specified whether or not a 'discovery rule' applies to Title VII claims.").

## II. *GONZALES V. CARHART*

The next case that was decided this Term involving women's rights was *Gonzales v. Carhart*.[78] While this abortion decision may only have a direct impact on a relatively few number of abortions, virtually all commentators agree that the significance of the decision is "oceanic" and it promises to completely reframe the abortion debate.[79]

The background to this decision begins in 1973, with *Roe v. Wade*,[80] authored by Justice Harry Blackmun. *Roe* recognized that women have a fundamental constitutional right, grounded in substantive due process, to choose to terminate a pregnancy, a right that cannot be infringed upon by government absent a compelling governmental interest.[81] *Roe* established that a state's interest in protecting potential life becomes compelling at viability—the point at which a fetus could live outside the woman's womb.[82] At that point, abortions could be prohibited, except if necessary to preserve the woman's life or health. The only other compelling state interest was that of protecting maternal health, but only after the first trimester because until then, abortion presents less danger than childbirth. Thus, in the second trimester, abortions cannot be prohibited, but can be regulated to protect maternal health.[83]

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[78] *Gonzales*, 127 S. Ct. 1610 (2007).

[79] *See* Edward Lazarus, *The Supreme Court's Split Decision to Uphold the Federal "Partial-Birth Abortion" Ban: Why, Despite the Court's Disclaimers, It Will be Hugely Influential*, FINDLAW.COM, Apr. 26, 2007, http://writ.news.findlaw.com/lazarus/20070426.html.

[80] 410 U.S. 113 (1973).

[81] *Id.* at 154-56.

[82] *Id.* at 162-63.

[83] *Id.* at 163.

In 1992, the Court decided *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[84] Justices Kennedy, O'Connor, and Souter authored a most unusual "joint opinion" extolling the virtues of stare decisis and declaring, "Liberty finds no refuge in a jurisprudence of doubt."[85] The *Casey* Court reaffirmed *Roe's* "essential holding," which is that the state may not prohibit pre-viability abortions, and post-viability abortion bans must contain an exception to protect the woman's life or health.[86] However, *Casey* radically altered abortion law by announcing a new "undue burden" test: pre-viability abortion regulations would be sustained unless they imposed an undue burden on a woman's access to abortion.[87] The *Casey* Court held that *Roe* had "undervalue[d] the State's interest in [preserving and promoting] potential life" and states are free to "express[] a preference for childbirth over abortion," with abortion regulations reflecting that preference.[88]

In 2000, the Court struck down a Nebraska statute, in *Stenberg v. Carhart*,[89] that criminalized so-called "partial-birth abortions" performed pre-viability. This Article refers to partial-birth abortions as "so-called" because that term is neither used nor accepted by medical professionals. Rather, it is a purposefully provocative term coined by political interest groups.[90]

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[84] 505 U.S. 833.

[85] *Id.* at 844.

[86] *Id.* at 879.

[87] *Id.* at 879.

[88] *Id.* at 873, 883. *Roe*'s trimester framework "was unnecessary and in its later interpretation sometimes contradicted the State's permissible exercise of its powers." *Id.* at 872.

[89] 530 U.S. 914 (2000).

[90] *Gonzales*, 127 S. Ct. at 1641 n.1 ("The term 'partial birth abortion' is neither recog-

The Nebraska statute was struck down primarily for two reasons. First, the law contained no exception to protect women's health, and therefore constituted an undue burden on a woman's right to choose. Second, the statutory language could be interpreted to prohibit a commonly performed type of pre-viability abortion and the state conceded that if interpreted that way, it would undeniably impose an undue hardship on a woman's right to choose.[91]

After the Court struck down Nebraska's partial-birth abortion ban, Congress passed the Partial-Birth Abortion Ban Act of 2003[92] which effectively re-enacted, on a federal level, the statute that was struck down in *Stenberg*. Like *Stenberg*, this statute does not contain an exception to protect maternal health, but instead contains a Congressional conclusion that the procedure is never medically necessary for a woman's health.[93] Unlike *Stenberg*, this statute was clearer in banning only the abortion procedure referred to as intact dilation and extraction ("intact D & E") as opposed to regular D & E, where the fetus is dismembered prior to extraction. If that sounds brutal, it is.

nized in the medical literature nor used by physicians who perform second-trimester abortions. The medical community refers to the procedure as either dilation & extraction (D & X) or intact dilation and evacuation (intact D & E).").

[91] Stenberg, 530 U.S. at 938 ("Nebraska does not deny that the statute imposes an 'undue burden' *if* it applies to the more commonly used D & E procedure as well as to D & X.").

[92] 18 U.S.C.A. § 1531 (West Supp. 2007)

[93] *See* Dorothy Samuels, *Reflections on the New Abortion Ruling and the Roberts Court*, N.Y. TIMES, Apr. 27, 2007, at A26 ("[Justice Kennedy] had genuine concerns about the medical risk to women in certain situations should the court go along with Congress's move to criminalize the intact dilation and extraction method of abortion—the procedure critics call 'partial birth' without providing a health exception."). *See also* Joanna Grossman & Linda McClain, *New Justices, New Rules: The Supreme Court Upholds the Federal Partial-Birth Abortion Ban Act of 2003*, FINDLAW.COM, May 1, 2007, http://writ.news.findlaw.com/commentary/20070501_mcclain.html ("[T]he lack of a health exception in the PBABA was not fatal because Congress made a finding that the banned procedure is never medically necessary.").

Both are. There is no getting around the fact that abortion, definitionally, destroys a fetus. Yet, the only abortion technique made criminal under the federal statute is the intact D & E procedure.

The federal statute was immediately challenged in three different lawsuits. In all three cases, the courts declared the federal statute unconstitutional, on the strength of *Stenberg*, because the statute lacked an exception allowing for the use of the procedure where medically necessary to protect a woman's health.[94] Nevertheless, a "differently composed" Supreme Court upheld the federal statute in a five-four decision—Justice Kennedy writing for the majority, and Justice Ginsburg writing one of the most blistering dissents of her career.[95]

Justice Kennedy, one of the authors of the joint opinion in *Casey*, begins the analysis, not by reaffirming *Casey*, but by "assum[ing] . . . for the purposes of this opinion" *Casey's* principles, which attempted to strike a balance in the abortion debate.[96] The governing principles of *Casey* are that before viability, the state may not prohibit abortions, nor may it impose an undue burden in the path

[94] *See* Ayotte v. Planned Parenthood of N. New England, 546 U.S. 320, 320 (2006) (holding that if New Hampshire's Parental Notification Prior to Abortion Act "would be unconstitutional in medical emergencies, invalidating the statute entirely is not always necessary or justified, for lower courts may be able to render narrower declaratory and injunctive relief"); Planned Parenthood of America v. Ashcroft, 320 F. Supp. 2d 957, 1032-33 (N.D. Cal. 2004), *aff'd sub nom.* Planned Parenthood of Am. v. Gonzales, 435 F.3d 1163, 1176 (9th Cir. 2006), *cert. granted* 126 S. Ct. 2901 (2006) (holding that the Partial-Birth Abortion Ban Act's life exception is constitutionally inadequate given its lack of a health exception to protect the mother's health); Nat'l Abortion Fed'n v. Ashcroft, 330 F. Supp. 2d 436, 483 (S.D.N.Y. 2004), *aff'd sub nom.* Nat'l Abortion Fed'n v. Gonzales, 437 F.3d 278 (2d Cir. 2006) (holding that the Partial-Birth Abortion Ban Act "as a whole cannot be sustained because it does not provide for an exception to protect the health of the mother").

[95] *See Gonzales*, 127 S. Ct. at 1638-53 (Ginsburg, J., dissenting). *See also* Linda Greenhouse, *Oral Dissents Give Ginsburg a New Voice*, N.Y. TIMES, May 31, 2007, at A1.

[96] *Gonzales*, 127 S. Ct. at 1626.

of a woman seeking an abortion prior to viability.[97] However, the state may regulate abortions that " 'express profound respect for the life of the unborn' " if they do not constitute an undue burden.[98] Furthermore, "the [mere] fact that a law . . . has the incidental effect of making it more difficult or more expensive to procure an abortion" is not enough to invalidate it so long as the law serves a valid purpose.[99]

What is the valid purpose this law serves and how can its exclusion of a maternal health exception not constitute an undue burden? Justice Kennedy found three congressional purposes, all having to do with the ethical and moral implications of abortion. First, quoting the congressional findings, Kennedy argued that allowing such a brutal procedure will "coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life, making it increasingly difficult to protect such life."[100] However, that could be said of all abortions. Second, "government 'has an interest in protecting the integrity and ethics of the medical profession' " which would be compromised by permitting such a procedure.[101] That argument could be made to support a ban on other procedures like the

[97] *Casey's* governing principles can be characterized as:

> First . . . a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. . . . Second . . . a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health. And third . . . the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.

*Id.*

[98] *Id.* at 1627 (quoting *Casey*, 505 U.S. at 874).

[99] *Id.* at 1633 (quoting *Casey*, 505 U.S. at 874).

[100] *Id.*

[101] *Gonzales*, 127 S. Ct. at 1633 (quoting Washington v. Glucksberg, 521 U.S. 702, 731 (1997)).

regular D & E procedure that dismembers a fetus. It is the third purpose that has provoked the ire of so many—the need to protect women who may come to regret their decision, particularly upon learning after the fact precisely how the abortion procedure was performed.[102] The Court stated:

> Respect for human life finds an ultimate expression in the bond of love the mother has for her child. . . . Whether to have an abortion requires a difficult and painful moral decision. While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow.[103]

Additionally, Justice Kennedy suggested doctors may be disinclined to tell their patients the details of the procedure they are planning to use, and consequently, a woman's consent may not be informed.[104]

If the concern is that women will choose the procedure without knowing how it is performed and will suffer after the fact by that lack of knowledge, then why not require doctors to fully inform the patient? Justice Ginsburg pointedly recounts in her dissent the paternalism expressed by this rationale, which is a throwback to an era

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[102] *Id.* at 1634. The Court stated:

> It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.

[103] *Id.* (internal citations omitted).

[104] *Id.* "In a decision so fraught with emotional consequence some doctors may prefer not to disclose precise details of the means that will be used, confining themselves to the required statement of risks the procedure entails." *Id.*

where the Court routinely played the role of benevolent protector of women.[105]

Putting aside the paternalism of this decision, the question remains: how does the Court uphold a law that prohibits a pre-viability abortion procedure that does not contain an exception to protect maternal health? The Court acknowledged that "under precedents we here assume to be controlling," the Act would be unconstitutional if it " 'subject[ed] [women] to significant health risks.' "[106] Yet, despite the significant body of medical opinion attesting to the safety advantages of intact D & E, the Court found that where there is a dispute within the medical community about whether the procedure is ever medically necessary, Congress can determine that it is never medically necessary.[107] The Court reaches this conclusion despite acknowledging that many of the congressional findings were factually inaccurate and many of the doctors who had testified that intact D & E was never medically necessary had no training, experience, or basis for their opinions.[108] To the contrary, the trials conducted by

[105] Justice Ginsburg stated, "There was a time, not so long ago, when women were regarded as the center of home and family life, with attendant special responsibilities that precluded full and independent legal status under the Constitution.' " *Id.* at 1641 (Ginsburg, J., dissenting). "This way of thinking reflects ancient notions about women's place in the family and under the Constitution—ideas that have long since been discredited." *Id.* at 1649. One commentator stated that Justice Kennedy's majority decision in *Gonzales* "served up the patronizing fiction that the court was acting for women's own good to protect their mental and moral health." Samuels, *supra* note 94, at A26. *See also* Ronald Dworkin, *The Court & Abortion: Worse Than You Think*, N.Y. REVIEW OF BOOKS, May 31, 2007, http://www.nybooks.com/articles/20215 ("Kennedy's paternalism flatly contradicts the principle that provided the rationale of the three-justice opinion in *Casey*: that people must be left free to make decisions that, drawing on their fundamental ethical values, define their own conception of life.").

[106] *Gonzales*, 127 S. Ct. at 1635 (quoting *Ayotte*, 546 U.S. at 328) (alteration in original).

[107] *Id.* at 1638 (discussing a zero tolerance policy).

[108] *Id.* at 1646 (Ginsburg, J., dissenting).

> [T]he Court brushes under the rug the District Courts' well-supported

the district courts revealed that the majority of highly qualified experts believe the intact D & E procedure is the safest most appropriate second trimester procedure because it decreases the risk of cervical laceration or uterine perforation.[109] One of the district court opinions stated "the oral testimony before Congress was not only unbalanced, but intentionally polemic."[110]

Despite that, the Court concluded "[t]he Act is not invalid on its face where there is uncertainty over whether the barred procedure is ever necessary to preserve a woman's health, given the availability of other abortion procedures that are considered to be safe alternatives."[111] Where there is a difference of opinion within the medical community, the law can withstand a facial challenge. This is patently inconsistent with *Stenberg*, which the Court did not overrule. However, the decision is impossible to reconcile with *Stenberg's* insistence on a health exception whenever there is " 'substantial medical authority support[ing] the proposition that banning a particular

> findings that the physicians who testified that intact D & E is never necessary to preserve the health of a woman had slim authority for their opinions. They had no training for, or personal experience with, the intact D & E procedure, and many performed abortions only on rare occasions.

*Id*. *See also* Samuels, *supra* note 94, at A26 (reproaching the Court's "use of junk science").

[109] *Gonzales*, 127 S. Ct. at 1646 (Ginsburg, J., dissenting). Justice Ginsburg argued in her dissent that the majority "gives short shrift to the records before us, carefully canvassed by the District Courts. Those records indicate that 'the majority of highly-qualified experts on the subject believe intact D & E to be the safest, most appropriate procedure under certain circumstances.' " *Gonzales*, 127 S. Ct. at 1646 (Ginsburg, J., dissenting) (quoting *Planned Parenthood*, 320 F. Supp. 2d at 1034).

[110] *Planned Parenthood*, 320 F. Supp. 2d at 1019. " '[N]one of the six physicians who testified before Congress had ever performed an intact D & E. Several did not provide abortion services at all; and one was not even an obgyn.' " *Id.*

[111] *Gonzales*, 127 S. Ct. at 1638.

abortion procedure could endanger women's health.' "[112] The majority's answer is to invite the individual woman to bring an "as applied" challenge where she can show the Act, as applied to her, presents a health hazard.[113]

Justice Thomas, joined by Justice Scalia, wrote a concurring opinion to repeat their oft-stated position that *Roe* should be overruled.[114] Neither Justice Alito nor Chief Justice Roberts joined the concurring opinion, so the case provides no new information about whether, ultimately, the two newest members of the Court stand prepared to overrule *Roe*.[115] Interestingly, the concurrence notes that Congress' authority to pass this Act under the Commerce Clause is an open question, not raised, briefed, nor decided in this case. That raises the specter, perhaps, of future challenges based on Congress exceeding its constitutional authority.[116] After all, abortion had been, until this case, regulated exclusively by the states.

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[112] *Id.* at 1642 (Ginsburg, J., dissenting) (quoting *Stenberg*, 530 U.S. at 938).

[113] *Id.* at 1638-39 (majority opinion). An as applied challenge "is the proper manner to protect the health of the woman if it can be shown that in discrete and well-defined instances a particular condition has or is likely to occur in which the procedure prohibited by the Act must be used." *Id.* Linda Greenhouse has characterized Justice Kennedy's position on the health exception as follows:

> [I]t was acceptable for Congress not to include [a health exception] because there was 'medical uncertainty' over whether the banned procedure was ever necessary for the sake of a woman's health. . . . [P]regnant women or their doctors could assert an individual need for a health exception by going to court to challenge the law as it applied to them.

Linda Greenhouse, *In Reversal of Course, Justices, 5-4, Back Ban on Abortion Method*, N.Y. TIMES, Apr. 19, 2007, at A1.

[114] *Gonzales*, 127 S. Ct. at 1639 (Thomas, J., concurring, joined by Scalia, J.). *See also* Dworkin, *supra* note 106.

[115] *See* Greenhouse, *supra* note 113, at A1.

[116] *Gonzales*, 127 S. Ct. at 1640 (Thomas, J., concurring, joined by Scalia, J.). "[W]hether the Act constitutes a permissible exercise of Congress' power under the Commerce Clause is not before the Court. The parties did not raise or brief that issue; it is outside the question presented; and the lower courts did not address it." *Id.*

That brings us to Justice Ginsburg's dissent, joined by Justices Stevens, Souter, and Breyer. Justice Ginsburg read portions of her dissent from the bench in a manner reported as "a slow pace that caused every syllable to resonate."[117] Justice Ginsburg pointed out the obvious—that while the Court purports to be adhering to precedent and does not overrule a single case, not even *Stenberg*, the decision is alarmingly at odds with precedent, which, with unmistakable clarity, require that state regulation of access to abortion procedures, even after viability, must protect the health of the woman.[118] Justice Ginsburg stated the Court is "differently composed" than it was when it decided *Stenberg*, and although it does not go so far as to overrule prior cases, its "hostility to the right *Roe* and *Casey* secured is not concealed."[119]

Justice Ginsburg rejected the Court's conclusion that a facial challenge was unwarranted and that as applied challenges are the ap-

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[117] Greenhouse, *supra* note 113, at A1.

[118] Gonzales, 127 S. Ct. at 1640 (Ginsburg, J., dissenting). *See also* John Gibeaut, *Ruling Changes Abortion Debate: Pro-choice Advocates See* Carhart *Opening Door to More Restrictions*, 6 No. 16 A.B.A. J. E-REPORT 1 (Apr. 20, 2007). "The decision represented the first significant foray into abortion by the Roberts court. Abortion-rights proponents ruefully recall Roberts' Senate confirmation hearings in September 2005 when he spoke at length about respect for precedent and said he viewed *Roe*, and by extension *Casey*, as settled law." For an interesting discussion on the Supreme Court and its use of precedent in abortion jurisprudence, see Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007).

> Constitutional scholarship that cautions judges to interpret the Constitution so as to avoid controversy reflects a major shift in the tone of legal scholarship, particularly on the left. No doubt this shift reflects a fear of right-wing activism by new conservative appointees to the federal judiciary. But it also expresses anxiety about the causes of contemporary conservative dominance, which many attribute to the intense popular backlash against *Roe*.

*Id.* at 406 (internal quotation omitted).

[119] *Gonzales*, 127 S. Ct. at 1650, 1652 (Ginsburg, J., dissenting) ("Throughout, the opinion refers to obstetrician-gynecologists and surgeons who perform abortions not by the titles of their medical specialties, but by the pejorative label 'abortion doctor.' ").

propriate vehicle to challenge the law.[120] She points out that virtually all of the Court's abortion cases have been facial challenges.[121] She further states that it makes no sense to reject a facial challenge because a health exception is unnecessary in the majority of cases because the very purpose of a health exception is to protect women in those exceptional cases where her health would be jeopardized.[122] Also, she argued that requiring women to bring as applied challenges is unrealistic and "places doctors in an untenable position."[123] Would doctors really be willing to risk two years in prison if, during the course of the surgery, they exercised their best judgment that this procedure was the safest option for this patient?[124]

Justice Ginsburg reminds us that what is at stake in abortion jurisprudence is a woman's dignity and autonomy, her personhood and destiny, her right to determine her life's course, which is inextricably linked to a woman's ability to enjoy equal citizenship.[125] She criticizes the Court for its paternalism in the name of an "antiabortion shibboleth" that women will come to regret their choice.[126] More-

[120] *Id.* at 1650.

[121] *Id.* at 1650-51. " 'Virtually all of the abortion cases reaching the Supreme Court since *Roe v. Wade* have involved facial attacks on state statutes, and the Court, whether accepting or rejecting the challenges on the merits, has typically accepted this framing of the question presented.' " *Id.* (quoting Richard H. Fallon, *Making Sense of Overbreadth*, 100 YALE L.J. 853, 859 n.29 (2001) (internal citation omitted)).

[122] *Id.* at 1651 (Ginsburg, J., dissenting).

[123] *Id.* at 1652.

[124] *See* Dworkin, *supra* note 106. ("[W]omen cannot wait for the result of lengthy litigation when they need an abortion and few doctors will act on their own judgment of a demonstrable health risk when they know they face jail if a court later disagrees.").

[125] *Gonzales*, 127 S. Ct. at 1641 (Ginsburg, J., dissenting) ("[L]egal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature.").

[126] *Id.* at 1648.

over, the reasoning deprives women of the right "to make an autonomous choice, even at the expense of their safety."[127] She recites the history of equal rights for women under the Equal Protection Clause, a history she herself helped shape, first as a women's rights litigator, and then as the author of major women's rights decisions. She then traces the trajectory of women's rights cases throughout the nineteenth and twentieth centuries. First, she discussed cases from the nineteenth century where the Court would routinely uphold laws ostensibly designed to protect women due to their weak physical structure and to enable them to fulfill their paramount destiny as wife and mother. Then she addresses the shift in the Court's approach in the late twentieth century when the Court repeatedly rejected laws based on " 'archaic and overbroad generalizations' "[128] about the " 'talents, capacities, or preferences' of women[.]"[129] Justice Ginsburg concluded that the majority's decision is a throwback in its concern that "doctors may withhold [vital] information" because of the woman's "fragile emotional state" and "because of the bond of love the mother has for her child."[130] It is a "way of thinking [that] reflects ancient notions about women's place in the family and under the Constitution—ideas that have long since been discredited."[131]

She points out that although the government argues this law is all about protecting potential life, it "saves not a single fetus from de-

[127] *Id.* at 1648-49.
[128] *Id.* (quoting Califano v. Goldfarb, 430 U.S. 199, 207 (1977)).
[129] *Id.* at 1649 (Ginsburg, J., dissenting) (quoting United States v. Virginia, 518 U.S. 515, 533, 542 n.12 (1996)) (internal citations omitted).
[130] *Gonzales*, 127 S. Ct. at 1648 (Ginsburg, J., dissenting).
[131] *Id.* at 1649.

struction, for it targets only a *method* of performing abortion."[132] It can only be understood, she concludes, as "an effort to chip away at a right declared again and again by this Court—and with increasing comprehension of its centrality to women's lives."[133]

As mentioned earlier, most commentators agree that this decision has enormous consequence. President Bush praised the decision as "an affirmation of the progress we have made over the past six years in protecting human dignity and upholding the sanctity of life. We will continue to work for the day when every child is welcomed in life and protected in law."[134] The President of Americans United for Life said, "while the court did not technically overturn" *Stenberg*, this decision "effectively gutted it" which is unquestionably true.[135] Those on the other end of the political spectrum described the decision as "Alice in Wonderland" because abortion is being criminalized to protect women from themselves, ostensibly from their own uninformed decisions.[136] They also point out that the "harm to women" argument has been pressed by anti-abortion groups for some time but this is the first time it has found its way into the Court's decision.[137] Pro-choice groups have been particularly critical of the Court's willingness to ignore mainstream medical views; a criticism reflected in a cartoon recently distributed depicting five members of the Court

[132] *Id.* at 1647.

[133] *Id.* at 1653.

[134] Greenhouse, *supra* note 113, at A1.

[135] *Id.*

[136] Linda Greenhouse, *Adjudging a Moral Harm to Women from Abortions*, N.Y. TIMES, Apr. 20, 2007, at A18.

[137] *Id.* (noting that although there were some signs of the "harm to women" argument in past cases, it has "remained largely under the radar until it emerged full-blown in Justice Kennedy's opinion.").

wearing white doctors coats instead of judicial robes.[138]

There is little question that this decision puts abortion back at center stage in the political arena, both in terms of the upcoming presidential campaign and in terms of inviting a whole new spate of abortion regulations and subsequent judicial challenges. A number of states have already announced their intent to adopt ever more restrictive abortion regulations.[139]

## III. IDEA CASES

*Winkelman v. Parma City School District* addressed "whether a nonlawyer parent of a child with a disability" could go to court without a lawyer to challenge a school district's individualized plan for his or her child's education.[140] The IDEA gives every child the right to a "free appropriate public education" regardless of disability.[141] The question was whether the IDEA granted rights to parents or only to their children. If the Act gave rights to parents, then they are free to represent themselves pro se. However, if the Act only created enforceable rights for children, would the common law rule prohibiting nonlawyer parents from representing minor children prevent the parents from litigating the IDEA claim in federal court without

[138] STLtoday.com, Photos & Pages, http://stltoday.mycapture.com/mycature/enlarge.asp?usephoto=0&image=14670408&thispage=7 ("I'm not a doctor. But I play one on the Supreme Court.").

[139] *See Kansas Lawmakers Agree to Study Abortion*, KAN. CITY STAR, July 6, 2007, *available at* 2007 WLNR 12916545 (stating that Kansas' abortion regulations are being reevaluated, and lawmakers are advocating for more conservative policies). *But see* Danny Hakim, *Spitzer Pushing Bill to Shore Up Abortion Rights*, N.Y. TIMES, Apr. 26, 2007, at A1 (stating governor Spitzer's intentions to update state abortion regulations to ensure protection of women's health in light of the recent Supreme Court decision upholding the Federal Partial-Birth Abortion Ban Act).

[140] *Winkelman*, 127 S. Ct. at 1999.

[141] *Id.* at 1999.

counsel? Most courts held that parents cannot proceed without a lawyer, which had resulted in many cases being thrown out of court because obtaining legal counsel was either too expensive for the parents or they simply could not find representation.[142] In fact, some school districts even initiated prosecutions against the parents for the "unauthorized practice of law."[143]

The Court, in a seven-two decision with Justice Kennedy writing for the majority, concluded that the "IDEA grants parents independent, enforceable rights." Thus, when they challenge a school district's determination, they are representing their own interests rather than acting as unauthorized lawyers for someone else.[144] Given this result, the Court did not resolve "whether [the] IDEA entitles parents to litigate their child's claims" without a lawyer.[145]

Justices Scalia and Thomas dissented, finding that while the IDEA gives parents some enforceable rights, such as the right to a hearing to request reimbursement for private school tuition, it does not create an enforceable right in the parent regarding the adequacy of a school's educational plan for the child.[146]

School districts reacted to the decision by pointing to the increased burdens school districts will have to bear "because [the] parents lack [the] professional experience and judgment" to litigate these claims.[147]

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[142] Linda Greenhouse, *Legal Victory for Families of Disabled Students*, N.Y. TIMES, May 22, 2007, at A14.

[143] *Id.* (internal quotations omitted).

[144] *Winkelman*, 127 S. Ct. at 2005-06.

[145] *Id.* at 2007.

[146] *Id.* at 2007 (Scalia, J., concurring in part and dissenting in part).

[147] Greenhouse, *supra* note 142, at A14.

Before leaving *Winkelman* and the IDEA, there is an important update on the IDEA case from the 2005 Term—*Schaffer v. Weast*,[148] where the Court held that in the absence of state law to the contrary, the party seeking relief in an IDEA proceeding bears the burden of proof. In August 2007, the New York State Legislature enacted a law, effective October 14, 2007, declaring the school district has the burden of proof in IDEA hearings except when the parent has placed the child in a private school and then seeks tuition reimbursement.[149]

The other IDEA update concerns the case argued on the first day of the Term this year—*Board of Education v. Tom F.*,[150] which asked whether parents of special needs children must first try a public school program before seeking private school tuition reimbursement. Just nine days after oral argument, the Court announced that it was split four-four, with Justice Kennedy not participating. The decision affirmed the judgment of the Second Circuit, which had held that the school district must pay private school tuition even if the child has not tried the public school first.[151] The issue has tremendous importance. In New York City alone, the cost of reimbursement for tuition payments has grown to more than $57 million per year, and in 2006, just under one half of the requests for tuition reimbursement came from parents who had not first enrolled their children in public

[148] 546 U.S. 49 (2005). *See also* Eileen Kaufman, *Other Civil Rights Decisions in the October 2005 Term: Title VII, IDEA, and Section 1983*, 22 TOURO L. REV. 1059, 1077-83 (2007).

[149] Phyllis K. Saxe, *Burden of Proof in IDEA Impartial Hearings—Redux*, 238 N.Y. L.J. 3 (2007).

[150] 128 S. Ct. 1 (2007).

[151] *Id.*

school.[152] Recently, a case from Hyde Park raised the same issue and was turned down by the Court because Justice Kennedy again recused himself.[153] This suggests the Court might not be able to resolve this question because it appears that Justice Kennedy has some individual interest that precludes him from sitting on these cases.

## IV. FAIR LABOR STANDARDS ACT

The last case, *Long Island Care at Home, Ltd. v. Coke*, is a case that raises the question whether home health attendants who have been hired by an agency are subject to the Fair Labor Standards Act's minimum wage and overtime requirements. A unanimous Supreme Court rejected the claim of the home health worker, upholding a Department of Labor regulation exempting home care workers hired by agencies from the Act's minimum wage and overtime rules.[154] While the statute, as amended in 1974, clearly exempted home health aides hired directly by the patient, it was unclear whether so-called third-party employees, health care aides hired by an agency, were also meant to be exempt from the minimum wage and overtime provisions. The Department of Labor's most recent regulation exempted such aides from the wage protections and the question in this case was whether that regulation was consistent with the Act and within the Agency's authority.[155] The Court found the federal regulation was entitled to deference because Congress had left

[152] David Stout & Jennifer Medina, *With Justices Split, City Must Pay Disabled Student's Tuition*, N.Y. TIMES, Oct. 11, 2007, at B1.
[153] *Id.*
[154] *Long Island Care*, 127 S. Ct. at 2345-47.
[155] *Id.* at 2344.

a definitional gap in the statute, and the Agency's interpretation was reasonable.[156]

The decision was a huge relief to home care agencies and to government, which to a large extent bear the cost of home health care through Medicaid. New York City filed an amicus brief in the case arguing that covering these workers would result in government paying an additional $250 million dollars per year to the 60,000 home care attendants in the city.[157] The decision was roundly criticized by labor unions and women's groups which pointed to the fact that home care workers, the majority of whom are "low-income women of color," are denied wage protections despite that they provide indispensable services to the elderly and the infirm.[158] Senator Ted Kennedy promised to work to amend the Fair Labor Standards Act to bring home health workers within the wage protections of the Act.[159]

In closing, there are four employment discrimination cases on the docket for this Supreme Court Term. First is *Gomez-Perez v. Potter*,[160] an age discrimination case that raises the issue of whether the Age Discrimination in Employment Act prohibits retaliation against federal employees who complain of age discrimination. The First Circuit held that Congress did not create a retaliation claim in favor of federal employees, although the D.C. Circuit has reached the

[156] *Id.* at 2345-46.

[157] Brief of City of New York & New York State Ass'n of Counties Supporting Petitioners, *Long Island Care*, 127 S. Ct. 2339 (No. 06-593), 2007 WL 460416.

[158] Steven Greenhouse, *High Court Rules Against Home Aide on Wages*, N.Y. TIMES, June 12, 2007, at B3.

[159] *Id.*

[160] 128 S. Ct. 29 (2007).

opposite conclusion.[161] Second is *CBOCS West, Inc. v. Humphries*,[162] a race discrimination case, which asks whether Section 1981 encompasses retaliation claims. In that case, an African-American employee was fired from his job after he complained to supervisors about racial discrimination.[163] Third is *Sprint/United Management Co. v. Mendelsohn*,[164] an age discrimination case questioning the admissibility of so-called "me too" evidence—evidence of similar disparate treatment by different supervisors. Last is *Federal Express Corp. v. Holowecki*[165] which raises the question whether an intake questionnaire submitted to the EEOC satisfies the "charge filing" requirement of the age discrimination statute. These four cases raise significant issues which are likely to be discussed next year.

[161] Gomez-Perez v. Potter, 476 F.3d 54, 59-60 (1st Cir. 2007); Forman v. Small, 271 F.3d 285, 300 (D.C. Cir. 2001).

[162] 128 S. Ct. 30 (2007).

[163] *See* Humphries v. CBOCS West, Inc., 474 F.3d 387, 398 (7th Cir. 2007) (holding that Section 1981 applies to retaliation claims).

[164] 127 S. Ct. 2937 (2007).

[165] 127 S. Ct. 2914 (2007).