WRITTEN TESTIMONY OF PROFESSOR ADERSON BELLEGARDE FRANÇOIS
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INTRODUCTION

Mr. Chairman and members of the Committee: Thank you for the opportunity to appear before you today. My name is Aderson Bellegarde François. I am a professor of constitutional law and director of the Civil Rights Clinic at Howard University School of Law. The Civil Rights Clinic at Howard University School of Law engages in trial and appellate impact litigation in the service of human rights, social justice, economic fairness, and political equality. The Clinic provides *pro bono* services to indigent, prisoner, and *pro se* clients in federal and state courts on a range of civil rights matters, including but not limited to employment and housing discrimination, voting rights, police brutality, unconstitutional prison conditions, *habeas corpus*, and unfair procedural barriers to the courts.

The question I respectfully plan to address in my testimony today is whether and how the United States Supreme Court under Chief Justice John Roberts has kept or broken faith with the constitutional ideal and congressional mandates of respect for civil and human rights and equality. In attempting to answer this question, the clinic[1] has analyzed, with few exceptions, every single civil rights decision the Court has issued beginning with the 2005 Term.[2] Our analysis shows that during the period from 2005 until the present, while the Court has certainly issued its share of decisions that can be fairly characterized as hostile to the advancement of civil rights and equality, it is probably premature to conclude that the Court has been—or will be—consistently anti civil rights. Rather, on the evidence of the last four terms, it may be more accurate to say that, when interpreting the Constitution, the Court has adopted an interpretive stance and jurisprudential philosophy on such constitutional subjects as federalism, Eleventh Amendment state sovereign immunity, the commerce clause, the state action doctrine, the enforcement provisions of the Reconstruction Amendments, that tend to both limit the rights of civil rights plaintiffs and curtail congressional power. However, when interpreting congressional statutes, the Court has been both more solicitous toward individuals seeking redress of violations of their civil rights and deferential to Congress, unless the Court determines – as it has done on key occasions – that a particular exercise of legislative power infringes upon the Court's own judicial review prerogative to determine the ultimate meaning of the Constitutional. In this way, Chief Justice Roberts'

[1] The following student members of the clinic provided invaluable assistance in researching and drafting the analysis of the Court's most four recent terms: Yasmin Gabriel, George Gardner, Dwayne Sam, Caren Short, and Natalie Wheatfall.

[2] For purposes of the analysis, the Clinic excluded Habeas Corpus and other criminal justice cases. While matters of criminal procedural justice do speak to the broader topic of human liberty and freedom, our analysis limited the definition of the term civil rights to the more or less fixed set of personal, political, and property individual liberty and equality interests that are constitutionally or legislatively protected from government and, at times, private interference.

tenure—at least so far—has not been that terribly different from that of the late Chief Justice Rehnquist. That is to say, the Court's civil rights jurisprudence over the last four terms does not support the conclusion that, as an institution, the Court has taken a radically more hostile stance toward civil rights enforcement, though, of course, given the Supreme Court's poor record in matters of civil rights over the last 20 years, the continuation of the Rehnquist Court jurisprudence under Justice Roberts has indeed left civil rights enforcement in a fragile and precarious position.

The discussion below proceeds in four parts. Part I summarizes the conclusions drawn from the analysis of the Court's civil rights jurisprudence during its four most recent terms. Part II presents a brief analysis of each civil rights decision of the last four terms. Part III presents a selected preview of significant civil rights cases pending before the Court during its 2009-2010 term. Part IV concludes with a brief assessment of the challenges this Committee faces in addressing the Court's civil rights jurisprudence.

I.

THE COURT'S CIVIL RIGHTS JURISPRUDENCE HAS BEEN DEFERENTIAL TO CONGRESSIONAL POWER AND SOLICITOUS TOWARD CIVIL RIGHTS PLAINTIFFS WHEN INTERPRETING STATUTORY TEXT BUT FAR LESS SO WHEN INTERPRETING CONSTITUTIONAL TEXT

In recent years, when analyzing the record of the Supreme Court in general and its civil rights jurisprudence in particular, commentators have often claimed that the Court is split along a 5-4 ideological axis, with Justice Anthony Kennedy serving as the pivot for determining whether the split favors the so-called conservative or liberal side of the split. According to that view, the Court ideological allies consist of Justices Chief Justice Roberts and Justices Scalia, Thomas, and Alito on one side, and Justices Stevens, Ginsburg, Breyer, and former Justice Souter on the other. While there is some truth to that statement, it is also true that in order to support the thesis of an irreconcilable ideological split, many scholars and other court observers have tended to focus rather selectively on a narrow set of decisions that command public attention. Thus, ***Parents Involved in Community Schools v. Seattle School District No. 1*** and ***Ledbetter v. Goodyear Tire & Rubber Co.*** decided during the 2006 term, ***District of Columbia v. Heller*** during the 2007 term, and ***Ricci v. DeStefano*** and ***Gross v. FBL Financial Services., Inc.*** during the 2008 term were indeed all 5-4 decisions.

However, a complete statistical review of the Court's decisions for each term shows that the notion that the Court is irredeemably split along a 5-4 ideological line is probably a little exaggerated. In the 2005 Term, there were eighty-one decisions. Of those, fifty-five or 79.7% were decided by a 6-3 margin or higher, including thirty-six, or 49%, unanimous decisions. By contrast, only while sixteen decisions, or 21.3%, were decided by a 5-4 or 5-3 margin. In the 2006 Term, the Court was somewhat more divided, but still showed a relatively high level of agreement. There were seventy-one decisions, including four *per curiam* opinions. Twenty-eight decisions, or 39.4%, were

unanimous. Forty-nine decisions, or 69%, were 6-3 or higher, while the number of 5-4 decisions stood at twenty-two or 31%. In the 2007 Term, the Court again showed a high level of agreement among the justices. There were seventy written decisions, including three *per curiam* opinions. Twenty-two decisions, or 30.55%, were unanimous, and twenty-four more were decided by votes of 8-1 or 7-2. So, forty-six out of the seventy decisions, or 63.88%, were unanimous or near-unanimous, while the number of 5-4 decisions in the 2007 Term was only twelve out of seventy, or 15.27%.

The relatively high level of agreement among the justices is also reflected in areas of civil rights jurisprudence where one would normally expect an ideological split. For example, during the 2005 term, in *United States v. Georgia*, in a decision written by Justice Scalia, the Court unanimously held that Congress had properly abrogated the states' Eleventh Amendment immunity in creating a private right of action under Title II of the Americans with Disabilities Act. During the 2006 term, in *Winkelman v. Parma City School District*, in a 7-2 decision, the Court held that a non-lawyer parent of a child with a disability may prosecute claims under the Individuals with Disabilities Education Act (IDEA), *pro se*, in federal court because the Act provided parents with independent, enforceable civil rights. During the 2007 term, in *CBOS West, Inc. v. Humphries*, again in a 7-2 decision, the Court broadened the reach of §1981 to encompass employment retaliation claims. During the 2008 term, in *Fitzgerald v. Barnstable School Committee*, in a 6-3 decision, the Court held that a comparison of the substantive rights and protection guaranteed under Title IX and under the Equal Protection Clause supports the conclusion that Congress did not intend Title IX to preclude §1983 constitutional suits, and that Congress did not intend for Title IX to be the sole means of vindicating the constitutional right to be free from gender discrimination perpetrated by educational institutions.

This is not to say that the Court has not had its share of sharply divided decisions, particularly on such topics as privacy and abortion, race-based affirmative action remedies in employment, and voluntary race-based measures to achieve integration in public schools. Nor is it to say that the Court has not in recent terms issued its share of decisions that deserve close congressional scrutiny and eventual revision, including, among others, ***Gross v. FBL Financial Services., Inc.***, and ***Hein v. Freedom from Religion Foundation, Inc.*** Rather, it is to say that the Court's civil rights jurisprudence cannot be fairly evaluated, for better or for worse, through the prism of the popularly-known ideological split. In civil rights questions involving interpretation of statutory text, the Court's traditional ideological split rarely holds up. Quite often, in decisions ranging from unanimous to 7-2 or 6-3 splits, the Court has shown a willingness to afford relief to civil rights plaintiffs while respecting congressional intent.

Unfortunately, in civil rights questions involving interpretation of constitutional text, the Court's ideological lines have hardened into the traditional 5-4 split, resulting in a civil rights jurisprudence that has 1) placed severe limits upon Congress' Commerce Clause power to enact civil rights legislation, 2) used federalism to shift civil rights enforcement to state courts, 3) reaffirmed a state action doctrine dating back to the post-reconstruction and Jim Crow era, and 4) expanded the reach of Eleventh Amendment state sovereign immunity to deny access to the courts to civil rights litigants.

Thus, unlike decisions such as ***Ledbetter***, which Congress could—and did—easily fix with amendments to statutory text, the far more difficult and consequential challenge the Roberts Court has placed before this Committee and Congress comes to this: Is there a valid congressional corrective to the Court's cramped constitutional—as opposed to statutory—civil rights jurisprudence?

II

ANALYSIS OF THE SUPREME COURT'S CIVIL RIGHTS DECISIONS FROM THE 2005 TERM TO THE 2008 TERM

2005-2006 TERM

Americans with Disabilities Act

In ***United States v. Georgia*** **(9-0)** [3], the Court considered the question of "whether a disabled inmate in a state prison may sue the State for money damages under Title II of the Americans with Disabilities Act of 1990 (ADA)."[4] The case centered around Tony Goodman, a paraplegic inmate in the Georgia prison system.[5] Originally, Goodman filed a *pro se* complaint in the United States District Court for the Southern District of Georgia challenging the conditions of his confinement.[6] He named as defendants the State of Georgia, the Georgia Department of Corrections, and several individual prison officials.[7] He brought claims under Rev. Stat. § 1979, 42 U.S.C. § 1983, Title II of the ADA, and the Eighth Amendment to the United States Constitution.[8] Specifically, Goodman alleged that:

> [h]e was confined for 23-to-24 hours per day in a 12-by-3-foot cell in which he could not turn his wheelchair around. He alleged that the lack of accessible facilities rendered him unable to use the toilet and shower without assistance, which was often denied. On multiple occasions, he asserted, he had injured himself in attempting to transfer from his wheelchair to the shower or toilet on his own, and, on several other occasions, he had been forced to sit in his own feces and urine while prison officials refused to assist him in cleaning up the waste. He also claimed that he had been denied physical therapy and medical treatment, and denied access to virtually all prison programs and services on account of his disability.[9]

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[3] 546 U.S. 151 (2006).
[4] *Id.* at 153 (citations omitted).
[5] *Id.* at 154.
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.* at 156.

The District Court dismissed Goodman's § 1983 claims as 'vague,' without allowing him an opportunity to amend his complaint.[10] The District Court also dismissed his Title II claims against all individual defendants.[11] On appeal to the United States Court of Appeals for the Eleventh Circuit, the Court determined that the District Court had erred in dismissing all of Goodman's § 1983 claims and that Goodman "had alleged actual violations of the Eighth Amendment by state agents."[12] However, because the Eleventh Circuit did not address the sufficiency of Goodman's allegations under Title II, the United States Supreme Court granted certiorari to consider "whether Title II of the ADA validly abrogates state sovereign immunity with respect to the claims at issue here."[13] Writing for the majority, Justice Scalia held that "insofar as Title II creates a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity."[14] Central to the Court's rationale is the notion that "Section 5 authorizes Congress to create a cause of action through which the citizen may vindicate his Fourteenth Amendment rights."[15] However, the Court left unresolved the question of whether state officials could be sued for damages under the ADA based on claims that do not otherwise violate the Constitution, as no such claims were presented for consideration.

Individuals with Disabilities Education Act

In ***Schaffer v. Weast*** **(6-2)** [16], the Court considered the question of who bears the burden of proof at an administrative hearing assessing the appropriateness of an Individualized Education Plan ("IEP"), under the Individuals with Disabilities Education Act (IDEA).[17] The case concerned educational services due to petitioner Brian Schaffer under the IDEA.[18] Brian suffered from learning disabilities and speech-language impairments.[19] After the Montgomery County Public Schools System produced what the Schaffer's felt was an inadequate IEP, they enrolled Brian in a private school and initiated a due process hearing challenging the IEP and seeking compensation for the cost of Brian's subsequent private education.[20]

After a three-day hearing, the administrative law judge ("ALJ") presiding over the case ruled in favor of the school district, holding that the parent bore the burden of persuasion.[21] However, in a reversal of fortunes, the ALJ reconsidered the case, deemed the evidence truly in "equipoise," and ruled in favor of the parents.[22] Thereafter, the Fourth Circuit vacated and remanded the appeal so that it could consider the burden of

[10] *Id.* at 155.
[11] *Id.*
[12] *Id.* at 157.
[13] *Id.* at 156.
[14] *Id.* at 159.
[15] *Id.*
[16] 546 U.S. 49 (2005).
[17] *Id.* at 56 (citations omitted).
[18] *Id.* at 55.
[19] *Id.* at 54.
[20] *Id.* at 54-55.
[21] *Id.* at 55.
[22] *Id.*

proof issue along with the merits on a later appeal.[23] The District Court reaffirmed its ruling that the school district has the burden of proof.[24] On appeal, a divided panel of the Fourth Circuit reversed.[25] The United States Supreme Court finally granted certiorari, to determine which party bears the burden of persuasion at an IEP hearing.[26]

Writing for the majority, Justice O'Connor explained that "[t]he burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief."[27] Central to the majority's holding is the longstanding jurisprudential notion that "plaintiffs bear the risk of failing to prove their claims."[28] Thus, while the holding in this case may serve to limit the ability of future civil rights litigants to recover, the rule applies with equal effect to school districts if they seek to challenge an IEP before an ALJ.

In ***Arlington Central School District Board of Education v. Murphy*** **(6-3)**[29], the Court considered the question of whether the provision of the Individuals with Disabilities Education Act (IDEA) that entitles prevailing plaintiffs to recover attorney's fees includes the right to recover the cost of expert witnesses.[30] Specifically, the Act provides that a court "may award reasonable attorneys' fees as part of the costs" to parents who prevail in an action brought under the Act.[31]

In that case, the respondents, Pearl and Theodore Murphy of LaGrange, New York, sued the petitioner, Arlington Central School District, seeking to require them to pay for their child's private school tuition under IDEA. The Murphys were successful, and the decision in their favor was upheld on appeal.[32] The Murphys then sued to require that the School District pay for the $29,350 in experts' fees incurred during the course of the trial.[33] The District Court granted their request in part, reducing the maximum recovery to $8,650.[34] The Court of Appeals for the Second Circuit affirmed, while acknowledging that other Circuits had taken the opposite view.[35] The United States Supreme Court granted certiorari to resolve the conflict among the Circuits with respect to whether Congress authorized the compensation of expert fees to prevailing parents in IDEA actions.[36]

Writing for the majority, Justice Alito began with the proposition that the IDEA was enacted pursuant to the Spending Clause and therefore subject to the clear statement

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[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.* at 56.
[27] *Id.* at 62.
[28] *Id.*
[29] 548 U.S. 291 (2006).
[30] *Id.* at 294.
[31] 20 U.S.C.A. § 1415(i)(3)(B) (2005).
[32] 548 U.S. at 294.
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.* at 295

rule.[37] He then found that the obligation to pay expert witness costs to a prevailing plaintiff was not clearly stated in the statute but that conversely, the terms of the IDEA overwhelmingly support the conclusion that prevailing parents may not recover the costs of experts or consultants.[38] However, the majority's opinion drew a sharp rebuke from Justices Breyer, Stevens, and Souter who reasoned that the Act's participatory rights and procedural protections may be seriously diminished if parents are unable to obtain reimbursement for the costs of expert witnesses.[39] Additionally, the dissenters suggested that the majority's holding flew in the face of some strongly suggestive language in the conference report.

Religious Freedom Restoration Act

In ***Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal (UDV)***[40] **(8-0)**, the Court considered the question of whether the federal Controlled Substances Act (CSA) violates the rights of a small Brazilian religious sect, under the Religious Freedom Restoration Act of 1993 (RFRA) to import a hallucinogenic tea used as a sacrament in religious ceremonies.[41]

More specifically, members of the respondent church *UDV*, received communion by drinking *hoasca*, a tea brewed from plants unique to the Amazon Rainforest that contains DMT, a hallucinogen regulated under Schedule I of the Controlled Substances Act.[42] After U.S. Customs inspectors seized a *hoasca* shipment to the American UDV and threatened prosecution, the UDV filed a suit for declaratory and injunctive relief, alleging, *inter alia*, that applying the Controlled Substances Act to the UDV's sacramental *hoasca* use violates RFRA.[43] At trial, the District Court concluded held that "the Government had failed to demonstrate a compelling interest justifying what it acknowledged was a substantial burden on the UDV's sincere religious exercise."[44] Accordingly, the court entered a preliminary injunction prohibiting the Government from enforcing the Controlled Substances Act with respect to the UDV's importation and use. The Government appealed the preliminary injunction and a panel of the Court of Appeals for the Tenth Circuit affirmed, as did a majority of the Circuit sitting en banc.[45]

Chief Justice Roberts wrote the opinion for a unanimous Court of eight justices.[46] There, the Court held that the lower courts "did not err in determining that the Government failed to demonstrate, at the preliminary injunction stage, a compelling interest in barring the UDV's sacramental use of *hoasca*."[47] Central to the Court's reasoning is the fact that the RFRA was passed by Congress in direct response to the

[37] *Id.*
[38] *Id.* at 300.
[39] *Id.* at 313.
[40] 546 U.S. 418 (2006).
[41] *Id.* (citations omitted).
[42] *Id.* at 423.
[43] *Id.* at 425-26.
[44] *Id.* at 427.
[45] *Id.*
[46] *Id.* at 422.
[47] *Id.* at 439.

Employment Div., Dept. of Human Resources of Ore. v. Smith[48], in which the Court ruled that unemployment benefits could be denied to two Native Americans fired for using *peyote*.[49] Accordingly, the congressional exception for use of *peyote* undermined the Government's argument calling for uniform enforcement of the CSA.[50] Additionally, the Court held that the "RFRA makes clear that it is the obligation of the courts to consider whether exceptions are required under the test set forth by Congress," and that the CSA is amenable to judicially crafted exceptions.[51]

This case is significant because it adjudicated the question of whether the RFRA is constitutional as applied to the federal government. Notably, in *City of Boerne v. Flores*, the Court struck down the Act as applied to the states, on the grounds that Congress had overstepped its Fourteenth Amendment authority to proscribe state conduct.

Title VII of the 1964 Civil Rights Act

In ***Ash v. Tyson Foods***[52] **(9-0)**, a unanimous Court ruled in a *per curiam* opinion, that the Eleventh circuit had improperly reversed a jury verdict for the plaintiffs in this employment discrimination case.[53] The facts giving rise to the claim were that two African-American Petitioners, Anthony Ash and John Hithon, superintendents at a poultry plant owned and operated by respondent Tyson Foods, Inc.,[54] applied for promotions to fill two open shift manager positions, but two white males were chosen instead.[55] Alleging that Tyson had discriminated on account of race, petitioners sued under 42 U.S.C. § 1981, and Title VII of the Civil Rights Act of 1964.[56]

At the close of trial, the United States District Court for the Northern District of Alabama granted Tyson's motion for judgment as a matter of law pursuant to Rule 50(b) and, in the alternative, ordered a new trial as to both plaintiffs under Rule 50(c).[57] On appeal, the United States Court of Appeals for the Eleventh Circuit affirmed in part and reversed in part.[58] Specifically, the court found that the evidence pertaining to Ash was insufficient to show pretext and that the evidence pertaining to Hithon was enough to go to the jury.[59] However, on appeal to the United States Supreme Court, held that the Court the Court of Appeals erred in two respects. Accordingly, the Supreme Court vacated the lower court's judgment and remanded the case for further consideration.[60]

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[48] 494 U.S. 872 (1990).
[49] *Id.* at 424.
[50] *Id.* at 434.
[51] *Id.*
[52] 546 U.S. 454 (2006).
[53] *Id.* at 458.
[54] *Id.* at 455.
[55] *Id.*
[56] *Id.* (citations omitted).
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id.* at 456.

The first error identified by the Court was that the Eleventh Circuit dismissed the significance of the fact that a plant manager referred to one of the plaintiffs as "boy."[61] While conceding that the term is not always probative of racial animus, the Court rejected the notion that it is never probative of bias standing alone.[62] Second, the Eleventh Circuit held that a discrimination plaintiff seeking to establish that an employer's race–neutral explanation for a challenged hiring decision is pretextual must show that "the disparity on qualifications [between the plaintiff and the person selected for the job] is so apparent as to virtually jump off the page and slap you in the face."[63] The Court summarily rejected that standard as "unhelpful and imprecise."[64]

In ***Arbaugh v. Y & H Corporation***[65] **(8-0)**, the Court considered the question of "whether the numerical qualification contained in Title VII's definition of "employer" affects federal-court subject-matter jurisdiction or, instead, delineates a substantive ingredient of a Title VII claim for relief."[66]

In that case, Petitioner Arbaugh sued her former employer, respondent Y & H Corporation ("Y & H"), in Federal District Court, alleging sexual harassment in violation of Title VII and averring related state-law claims.[67] The case was tried to a jury, which returned a $40,000 verdict in Arbaugh's favor.[68] Two weeks after the court entered judgment on that verdict, Y & H moved to dismiss the entire action for want of federal subject-matter jurisdiction, asserting, for the first time, that it had fewer than 15 employees on its payroll and therefore was not amenable to suit under Title VII.[69] Although the district Court recognized that granting the motion would be "unfair and a waste of judicial resources," the District Court, citing Federal Rule 12(h)(3), considered itself duty-bound to do so because it believed the 15-or-more-employees requirement to be jurisdictional.[70] Accordingly, the court vacated its prior judgment and dismissed Arbaugh's Title VII claim with prejudice and her state-law claims without prejudice. On appeal, the Fifth Circuit affirmed the ruling, based on its precedent holding that "unless the employee-numerosity requirement is met, federal-court subject-matter jurisdiction does not exist."[71]

The United States Supreme Court granted certiorari to "resolve conflicting opinions in Courts of Appeals on the question whether Title VII's employee-numerosity requirement, 42 U.S.C. § 2000e(b), is jurisdictional or simply an element of a plaintiff's claim for relief."[72] Writing for the majority, Justice Ginsburg, along with seven other Justices unanimously reversed the Fifth Circuit's decision, holding that the threshold

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[61] *Id.*
[62] *Id.*
[63] *Id.* at 456-57.
[64] *Id.*
[65] 546 U.S. 500 (2006).
[66] *Id.* at 503.
[67] *Id.* at 503-04.
[68] *Id.* at 504.
[69] *Id.*
[70] *Id.*
[71] *Id.* at 509.
[72] *Id.*

number of employees for application of Title VII is an element of a plaintiff's claim for relief, not a jurisdictional issue.[73] The Court's holding underscores the importance of judicial economy and insures that civil rights litigants are afforded a measure of fairness throughout the litigation process.

In ***Burlington Northern and Santa Fe Railway Co. v. White***[74] **(9-0)**, the Court considered the question of 1) whether Title VII's anti-retaliation provision forbids only those employer actions and resulting harms that are related to employment or the workplace; and 2) how harmful an act of retaliatory discrimination must be in order to fall within the provision's scope.[75]

Title VII of the Civil Rights Act of 1964 forbids employment discrimination based on "race, color, religion, sex, or national origin," 42 U.S.C. § 2000e-2(a), and its anti-retaliation provision forbids "discriminat[ion] against" an employee or job applicant who, *inter alia*, has "made a charge, testified, assisted, or participated in" a Title VII proceeding or investigation, § 2000e-3(a).[76] In this case, the Respondent, White, the only woman in her department, operated the forklift at the Tennessee Yard of petitioner Burlington Northern & Santa Fe Railway Co. ("Burlington").[77] After she complained to Burlington officials, her immediate supervisor, Bill Joiner was disciplined for sexual harassment.[78] However, White was removed from forklift duty to standard track laborer tasks.[79] In response to this, White filed a complaint with the Equal Employment Opportunity Commission ("EEOC"), alleging that the reassignment was unlawful gender discrimination and retaliation for her complaint about Joiner.[80] Following a disagreement with her immediate supervisor, White was suspended without pay for insubordination.[81] However, internal grievances procedures later revealed that White had not been insubordinate.[82] Thereafter, Burlington reinstated her, and awarded her backpay for the 37 days she was suspended.[83] White subsequently filed another EEOC complaint as a result of the suspension.[84] After exhausting her administrative remedies, White filed suit against Burlington in federal court, asserting that Burlington's actions were tantamount to unlawful retaliation under title VII.[85]

At trial, a jury found in White's favor and awarded her $43,000 in compensatory damages.[86] On appeal, the Sixth Circuit, sitting en banc, affirmed the lower court's

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[73] *Id.* at 516.
[74] 548 U.S. 53 (2006).
[75] *Id.* at 61.
[76] *Id.* at 56.
[77] *Id.* at 57.
[78] *Id.* at 58.
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *Id.* at 59.
[85] *Id.*
[86] *Id.*

ruling but differed as to the proper standards to apply.[87] Given the court's ambivalence and the existing Circuit split, the Supreme Court granted Certiorari to resolve the issue.[88] In an opinion written by Justice Breyer, eight members of the Court held that the appropriate test for judging retaliation under Title VII is whether a reasonable employee under the circumstances would be deterred from reporting discrimination.[89] In refusing to adopt the narrower standards adopted by the Fifth and Eighth Circuits, the Court strengthened the ability of a civil rights litigant to recover damages. To be sure, in a separate concurrence, Justice Alito took a narrower view, arguing that the retaliation must be employment related in order to violate Title VII.[90]

42 U.S.C. § 1981

In ***Domino's Pizza, Inc. v. McDonald***[91] **(8-0)**, the Court considered the question of "whether a plaintiff who lacks any rights under an existing contractual relationship with the defendant, and who has not been prevented from entering into such a contractual relationship, may bring suit under Rev. Stat. § 1977, 42 U.S.C. § 1981."[92]

In this case, respondent McDonald, a black man, was the sole shareholder and president of JWM Investments, Inc. ("JWM").[93] McDonald brought suit against petitioners (collectively Domino's) under 42 U.S.C. § 1981, alleging, *inter alia,* that JWM and Domino's had entered into several contracts, that Domino's had broken those contracts because of "racial animus toward McDonald, and that the breach had harmed McDonald personally by causing him to suffer monetary damages and damages for pain and suffering, emotional distress, and humiliation."[94] At trial, the District Court granted Domino's motion to dismiss on the ground that "McDonald could bring no § 1981 claim against Domino's because McDonald was party to no contract with Domino's."[95] On appeal, the Ninth Circuit reversed, acknowledging that while an "injury suffered only by the corporation" would not permit a shareholder to bring a § 1981 action, when there are injuries distinct from those of the corporation, "a nonparty like McDonald may nonetheless sue under § 1981."[96] The Court of Appeals acknowledged that its holding was a departure from that of other Circuits, and the Supreme Court granted certiorari to resolve this burgeoning Circuit split.[97]

Writing for the majority, Justice Scalia and seven other Justices unanimously held that that 42 U.S.C. § 1981 only applies to those who have enforceable rights under the contract.[98] As Justice Scalia explained for the Court, § 1981 protects the rights to make

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[87] *Id.*
[88] *Id.* at 60.
[89] *Id.* at 68.
[90] *Id.* at 79.
[91] 546 U.S. 470 (2006).
[92] *Id*. at 472.
[93] *Id.*
[94] *Id.* at 473.
[95] *Id.* at 474.
[96] *Id.*
[97] *Id.*
[98] *Id.* at 476.

and enforce contracts and therefore extends only to those who have rights under the contract. In this case, the plaintiff was acting as an agent for the corporation.[99] In his capacity as an agent, he was not personally liable for any breach of the contract and could not legally claim any benefit under it.[100] In reaching its holding, the Court effectively placed limits on a civil litigants ability to recover damages on behalf of his principal.

Voting Rights Act of 1965

In ***LULAC v. Perry***[101] **(5-4)**, the Court considered a series of challenges to a mid decade redrawing of congressional lines by the Texas State Legislature. Specifically, the Court considered the question of "whether it was unconstitutional for Texas to replace a lawful districting plan 'in the middle of a decade, for the sole purpose of maximizing partisan advantage.'"[102]

In that case, the Republican-dominated Texas legislature devised a new set of congressional districts to increase Texas Republicans' representation in Congress.[103] As part of the plan, a majority-Latino district in southwestern Texas, District 23, was redrawn to include more Republican Anglo voters and exclude Democratic Latino.[104] Although the plan reduced the number of Latinos in District 23, it placed additional Latino voters in the nearby District 25, which contained another community of Latino voters.[105] Critics of the plan averred that it was unconstitutional and violated section II the Voting Rights Act because it diluted racial minority voting strength and was designed to produce a partisan advantage.[106]

By a 7-2 vote, the Court first ruled that the redistricting plan was not unconstitutional as a partisan gerrymander even though it was undertaken for the "sole purpose" of increasing Republican representation. A majority of the Court agreed that partisan gerrymander claims are not "justiciable," but for the third time in three decades the Court was unable to agree on any judicially manageable standards. By separate 5-4 majorities, the Court then upheld a vote dilution claim under § 2 of the Voting Rights Act raised by Latino voters in a redrawn district outside Houston, but rejected a § 2 claim raised by African-American voters in a redrawn district outside Dallas.

Federalism

In ***Gonzalez v. Oregon***[107] **(6-3)**, the Court considered the question of "whether the Controlled Substances Act allows the United States Attorney General to prohibit doctors

[99] *Id.*
[100] *Id.* at 475.
[101] 548 U.S. 399 (2006).
[102] *Id.* at 456.
[103] *Id.* at 411-13.
[104] *Id.*
[105] *Id.*
[106] *Id.* at 427.
[107] 546 U.S. 243 (2006).

from prescribing regulated drugs for use in physician-assisted suicide, notwithstanding a state law permitting the procedure."[108]

In 1994, Oregon became the first State to legalize assisted suicide by enacting the Oregon Death With Dignity Act (ODWDA).[109] However, "the drugs Oregon physicians prescribe under ODWDA are regulated under a federal statute, the Controlled Substances Act (CSA or Act)."[110] In 2001, an Interpretive Rule issued by the Attorney General determined that "using controlled substances to assist suicide is not a legitimate medical practice and that dispensing or prescribing them for this purpose is unlawful under the CSA."[111]

Writing for the majority, Justice Kennedy ruled that the Attorney General had exceeded his authority under the federal Controlled Substances Act (CSA) by threatening to suspend the federal license of any doctor who prescribed narcotic drugs as part of a physician-assisted suicide under Oregon's Death With Dignity Act.[112] The Court rejected the Attorney General's assertion that the CSA "delegates to a single Executive officer to effect a radical shift of authority from the States to the Federal Government to define general standards of medical practice in every locality."[113]

2006-2007 TERM

§ 1988—Attorney's Fees

In ***Sole v. Wyner***[114] **(9-0),** the Court addressed the question of whether a plaintiff who secures a preliminary injunction after an abbreviated hearing, but later is denied a permanent injunction at a dispositive adjudication on the merits, qualifies as a "prevailing party" that may obtain attorney fees under § 1988(b). The plaintiff desired to organize an anti-war protest that included a group of people forming a peace symbol, while nude, on a Florida beach. The beach, however, had a Bathing Suit Rule that required all attendees' genitals be covered. The plaintiff filed for a preliminary injunction two days before the demonstration. The District Court granted the temporary relief, with the understanding that the demonstration would take place behind a cloth barrier, which would cover the demonstration for those who might be offended by the nudity. The demonstration was held the next day, but the participants ignored the screen and used other parts of the beach in the nude after the demonstration.

The plaintiff returned to court, hoping to obtain a permanent injunction against the Bathing Suit Rule in order that she may hold another nude demonstration the following year at the same beach. This time, noting that the plaintiff's group had ignored

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[108] *Id.* at 248.
[109] *Id.* at 249 (citations omitted).
[110] *Id.* at 249 (citations omitted).
[111] *Id.*
[112] *Id.* at 274-75.
[113] *Id.* at 273.
[114] 551 U.S. 74 (2007).

the barrier in the previous demonstration, the District Court granted summary judgment to the defendant, reasoning that the beach's rule was no more restrictive than it needed to be to protect the visiting experiences of others at the beach. The Supreme Court held that the plaintiff was not a prevailing party, because she had not achieved an "enduring change in the legal relationship" between her and the state officials she sued.[115] The court noted, in addition, that although the plaintiff obtained a judgment that allowed her to complete the demonstration, she did not obtain the ultimate relief she sought—a judgment that the state officials had denied her the right to engage in constitutionally protected speech. Justice Ginsburg wrote the opinion for a unanimous Court.

Individuals with Disabilities Education Act (IDEA)

In ***Winkelman v. Parma City School District***[116] **(7-2),** the Court addressed whether a non-lawyer parent of a child with a disability may prosecute claims under the Individuals with Disabilities Education Act (IDEA), *pro se*, in federal court. The plaintiffs were parents of a child with autism and were covered by the IDEA. They disagreed with the placement of their son in a public elementary school, arguing that it was a violation of the IDEA's requirement that the school district provide him with a "free and appropriate public education."[117] The Court held that the parents could sue under the IDEA, because the Act provided parents with independent, enforceable rights to do so. Justice Scalia, joined by Justice Thomas, concurred and dissented in part in the judgment. While Justice Scalia would have held that parents have the right to sue *pro se* under the IDEA, he specified that he would not so hold "when they seek a judicial determination that their child's free appropriate public education (of FAPE) is substantively inadequate."[118]

Title VII of the Civil Rights Act of 1964

In ***Ledbetter v. Goodyear Tire & Rubber Co.***[119] **(5-4),** the Court addressed whether a plaintiff may bring an action under Title VII of the Civil Rights Act of 1964 for illegal pay discrimination when the disparate pay is received in the statutory limitations period, but is the result of intentionally discriminatory pay decisions made outside the limitations period. The plaintiff, Lilly Ledbetter, produced evidence at trial that during the course of her employment, she received poor evaluations because of her sex and that such discriminatory evaluations caused her to receive, over the period of almost 20 years, considerably lower paychecks relative to her male colleagues. She argued that discriminatory acts that occurred prior to the charging period were given effect by each paycheck during the charging period. Rejecting Ledbetter's claim, the Court reasoned that the only act of intentional discrimination occurred with the initial pay-setting decision, and that intent could not be imputed to the subsequent paychecks, which only reflected the initial decision and were not in themselves performed with bias or discriminatory motive.

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[115] *Id.* at 86.
[116] 550 U.S. 516 (2007).
[117] *Id.* at 520.
[118] *Id.* at 535-36.
[119] 550 U.S. 618 (2007).

Right to Privacy—Abortion

In ***Gonzales v. Carhart***[120] **(5-4), t**he Court took up the question of whether the Partial-Birth Abortion Ban Act of 2003 was unconstitutional on its face. The Act imposed criminal sanctions for the performance of what is called an "intact dilation & evacuation" or "intact D & E" procedure. Essentially, intact D & E is an abortion procedure performed sometime after a woman's first three months of pregnancy—that is, in the second trimester. The procedure seeks to remove the fetus whole, as opposed to the standard D & E procedure, which removes the fetus in parts. The plaintiffs in the case claimed that the Act was void for vagueness, imposed an undue burden on a woman because of its overbreadth, and that it was invalid on its face for not providing an exception for a woman's health.

In upholding the constitutionality of the Act, the Court reasoned that doctors had a "reasonable opportunity"[121] to know what is prohibited by the Act and that the Act was not too broad, because it clearly prohibited a doctor from intentionally performing only the "intact D & E" procedure and not the D & E procedure in which the fetus is removed in parts. Second, the Court held that to the extent that the Act allows a commonly used and generally accepted procedure, the standard D & E procedure, the Act did not impose an undue burden on a woman's abortion right. Finally, based on the premise that "the Court retains an independent constitutional duty to review [Congress's] factual findings where constitutional rights are at stake," the Court held that "the 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."[122]

First Amendment

In ***Morse v. Frederick***[123] **(6-3), t**he Court addressed whether a school principal violates the First Amendment when she confiscates a student's banner, which apparently promotes illegal drug use at an off-campus, school sponsored-event. When the Olympic Torch Relay passed through Juneau, Alaska, students at Juneau-Douglas High School were allowed to watch from the sidewalk as the relay passed by their school. As torchbearers passed by, the plaintiff unfurled a banner, which read, "BONG HiTS 4 JESUS."[124] Believing that the message promoted illegal drug use, the school principal immediately confiscated the banner and suspended the student responsible for it. In holding that the principal's actions did not violate the First Amendment, the court reasoned that the "special characteristics" of the school environment and the governmental interest in stopping student drug abuse, "allows schools to restrict student expression they reasonably regard as promoting illegal drug use."[125]

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[120] 550 U.S. 124 (2007).
[121] *Id.* at 149.
[122] *Id.* at 165, 166-67.
[123] 551 U.S. 393 (2007).
[124] *Id.* at 397.
[125] *Id.* at 408.

First Amendment—Standing

In ***Hein v. Freedom from Religion Foundation, Inc.***[126] **(5-4),** the Court considered whether an organization could bring a taxpayer suit to challenge "faith-based initiatives," which were funded by general Executive Branch appropriations, as a violation of the Establishment Clause. The plaintiffs, members of an organization opposed to government endorsement of religion, claimed that the White House Office of Faith-Based and Community Initiatives violated the Establishment Clause by "organizing conferences at which faith-based organizations . . . 'are singled out as being particularly worthy of federal funding.'"[127] Under the Court's 1968 decision in *Flast v. Cohen*, the Court held that taxpayers have standing to challenge the use of federal funds in a way that allegedly violates the Establishment Clause.

In that case, however, Justice Alito—who announced the judgment of the court and wrote for a three-justice plurality—stated that the plaintiffs did not have standing as taxpayers, because Congress did not specifically authorize the funds used for the "faith-based initiatives." Observing as critical the fact that the initiatives were funded by "general Executive Branch appropriations,"[128] the plurality reasoned that the expenditures resulted from executive discretion, not congressional action. Thus, the plurality rejected what they saw as an invitation to question the wisdom of Executive action. A four-Justice dissent, authored by Justice Souter, equated the Establishment Clause with a "right to conscience," which a taxpayer may invoke whenever the Government, whether the Congress or the Executive, uses identifiable sums of tax money for religious purposes. Thus, the Dissent viewed the plaintiff's suit not as an extension of the holding in *Flast*, but an application of it.

Fourth Amendment

In ***Scott v. Harris***[129] **(8-1),** the Court addressed whether a law enforcement official can, consistent with the Fourth Amendment, attempt to stop a fleeing motorist by ramming the car from behind, when the motorist's flight may endanger the public. During a high-speed chase, the defendant officer, in attempting to stop the plaintiff, rammed the back of the plaintiff's vehicle. As a result, the plaintiff lost control of the vehicle, crashed, and sustained injuries that rendered him a quadriplegic. The Court held that, under the Fourth Amendment, the officer's actions were "objectively reasonable," and thus did not violate the Fourth Amendment.[130] The Court reasoned that the officer's interest in protecting the public from the reckless driving of the plaintiff, outweighed the danger posed to the plaintiff by ramming the back of his car. Only Justice Stevens dissented from the judgment.

[126] 551 U.S. 587 (2007).
[127] *Id.* at 595.
[128] *Id.* at 593.
[129] 550 U.S. 372 (207).
[130] *Id.* at 381.

In ***Brendlin v. California***[131] **(9-0),** the Court addressed whether, in the context of a traffic stop, a passenger in a car is "seized" within the meaning of the Fourth Amendment and may therefore challenge the constitutionality of the stop. Early one morning, the police officer pulled over a car. Upon asking the driver for her license, the officer noticed that a passenger, the petitioner here, dropped out of parole supervision. After confirming that the petitioner had an outstanding warrant, the officer arrested the petitioner and eventually found drug paraphernalia on him. The petitioner later moved to suppress the results of the search, but the California Supreme Court denied his ability to do so, because he was a passenger in the car and could not rightfully claim that he was seized as a result of the officer stopping the driver. The Court vacated the California court's judgment, holding that the petitioner was seized within the meaning of the Fourth Amendment, because the officer performed the stop "without adequate justification" and "any reasonable passenger would have understood the police officers to be exercising control to the point that no one in the car was free to depart without police permission."[132] the Court addressed whether, in the context of a traffic stop, a passenger in a car is

In ***Wallace v. Kato***[133] **(7-2),** the Court addressed the issue of when the statute of limitations begins to run against a plaintiff's § 1983 claim seeking damages for an unlawful arrest in violation the Fourth Amendment. Two days after a murder, the Chicago police detained the plaintiff and transported him to the police station for questioning, which lasted several hours. As a result of the interrogation, the plaintiff signed a confession regarding the murder; however, the charges against the plaintiff were dropped after several years of litigation. Less than one year after the charges were dropped, the plaintiff commenced a § 1983 claim for an unlawful arrest, based on the fact that the officers detained and questioned him without a warrant for his arrest.

The Court began by noting that ruling on a case such as this required looking to the common law of torts, and the Court determined that his claim was most analogous to one for false imprisonment. Accordingly, the Court held that the statute of limitations began to run against the plaintiff when his false imprisonment ended. The Court reasoned that since false imprisonment consists of "detention without legal process," the false imprisonment ends when legal process begins—in this case, when the plaintiff appeared before a magistrate and was arraigned on charges.[134] Also using state law as a guide for the limitations period for a false imprisonment claim, in this case two years, the court noted that his claim was well beyond the limitations period and held that his § 1983 claim was time barred.

In ***Los Angeles County, California v. Rettele***[135] **(9-0)** the Court considered whether officers, executing a search warrant, act reasonably within the meaning of the Fourth Amendment, when they enter a home and briefly detain persons that clearly do not match the description of the suspects for which the officers are looking. The

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[131] 551 U.S. 249 (2007).
[132] Brendlin, 551 U.S. at 257.

[133] 549 U.S. 384 (2007).
[134] *Id.* at 389.
[135] 550 U.S. 609 (2007).

defendants were Los Angeles County sheriffs who obtained a search warrant to search two houses for three African American suspects in a fraud and identity-theft crime ring. One of the houses, however, had been sold to the plaintiff, and he had moved in with his girlfriend and her son three months prior to the execution of the warrant. On the morning the warrant was executed, seven officers entered the plaintiff's home with guns drawn, ordered the plaintiffs out of bed, and made them stand nude for several minutes—even though the plaintiffs were Caucasian and not the African American suspects. After completing a search of the house, the officers apologized and left within fifteen minutes of arriving.

In a *per curiam* opinion, the Court held that the police officers acted reasonably while executing the search warrant. The Court reasoned that, although it was clear that the plaintiffs were not the suspects, officers executing a search warrant "may take reasonable action to secure the premises and to ensure their own safety and the efficacy of the search."[136] The Court also noted that the detention was not prolonged, and thus did not render the search unreasonable. Justice Stevens wrote a concurring opinion, in which Justice Ginsburg joined, to indicate that he found it unnecessary to decide the constitutional question and would find that the defendants were entitled to qualified immunity.

Fourth Amendment—Bivens Action

In ***Wilkie v. Robbins***[137] **(7-2),** the Court addressed whether a commercial landowner could maintain a *Bivens* action against employees of the Bureau of Land Management (BLM) for alleged extortion in an attempt to compel the owner to grant an easement to the BLM. The plaintiff was the owner of a commercial guest resort spanning about 40 miles of mostly contiguous land. The land surrounded a place that the Court describes as a "place of great natural beauty" and, in order to provide public access to it, the BLM sought to gain an easement over a portion of the plaintiff's land.[138] When the plaintiff refused, BLM employees, allegedly in order to get the plaintiff to grant the easement, engaged in a series of activities, including unfavorable agency actions, charges brought against him, and even tort-like conduct, which the plaintiff claimed violated his Fourth and Fifth Amendment rights.

The Court held that a *Bivens* action was not available to him, because he had administrative and judicial remedies "for vindicating virtually all of his complaints." In addition, the Court noted that the Government "may stand firm on its rights and use its power to protect public property interests."[139] Finally, the Court expressed its concern about creating a new *Bivens* remedy, but invited Congress to make the decision. Thus, the Court stated: "We think accordingly that any damages remedy for actions by Government employees who push too hard for the Government's benefit may come better, if at all, through legislation. 'Congress is in a far better position than a court to

[136] *Id.* at 614.
[137] 551 U.S. 537 (2007).
[138] *Id.* at 542.
[139] *Id.* at 557.

evaluate the impact of a new species of litigation' against those who act on the public's behalf."[140]

Fifth Amendment—Due Process (Punitive Damages)

In ***Phillip Morris v. Williams***[141] **(5-4), t**he Court addressed whether, consistent with the Due Process Clause, a jury may award punitive damages based, in part, on its desire to punish the defendant for harming persons not before the court. The plaintiff was a widow of a heavy smoker and, upon success in the underlying suit for her husband's death, received approximately $800,000 in compensatory damages and $79 million in punitive damages. Phillip Morris then sought certiorari, claiming that the state courts unconstitutionally permitted it to be punished for harming nonparty victims. A five-justice majority of the court—including Justices Breyer, Roberts, Alito, Kennedy, and Souter—held that the purpose of a punitive damages award is to punish unlawful conduct and to deter its repetition. Thus, a jury may consider harm visited upon nonparties, only to the extent necessary to gauge the reprehensibility of the defendant's conduct.

A punitive damages award based directly on harm to nonparties, however, lacks adequate notice to the defendant, promotes uncertainty in the calculation of the award, and risks arbitrariness—which together endanger fundamental due process concerns. Accordingly, a punitive damages award designed to punish the defendant for harm to parties not before the court constitutes a taking of property from the defendant without due process. Justices Stevens, Thomas, and Ginsburg authored separate dissenting opinions. Justice Ginsburg's dissent, joined by Justices Scalia and Thomas, argued that no evidence was introduced at trial or charge delivered to the jury that was inconsistent with the purpose of considering harm to nonparties for the purpose of determining the reprehensibility of Phillip Morris' conduct.

Fourteenth Amendment—Equal Protection

In ***Parents Involved in Community Schools v. Seattle School District No. 1***[142] **(5-4),** the Court addressed whether two school districts' student assignment plans, which endeavored to make the schools reflect the racial makeup of the district overall, violated the Equal Protection Clause of the Fourteenth Amendment. In an effort to address the effects of racially identifiable housing patterns, the Seattle school district used race as one of three tiebreakers to place students in high schools that too many incoming ninth graders have selected as their first choice. If the school was not within ten percent of the district's overall white/nonwhite ratio, the district used race to bring the school within racial balance. The Seattle school district sought to facilitate this racial integration although it never operated a school system that was racially segregated by law. The Jefferson County school district, which had operated a racially segregated school system but eventually achieved unitary status, used a student assignment plan that aspired to keep nonmagnet elementary schools to a minimum of 15 percent black enrollment and a maximum of 50 percent black enrollment.

[140] *Id.* at 562.
[141] 549 U.S. 346 (2007).
[142] 551 U.S. 701 (2007).

Based on these assignment plans, plaintiffs from both school districts were unable to enroll at their first-choice school. A majority of the Court held that the assignment plans did not pass strict scrutiny; that is, the plans did not demonstrate a compelling state interest in remedying a history of segregation or using race as a decisive factor in student selection. Moreover, the plans were not narrowly tailored, because the plans were directed toward only racial balance. Despite the court's judgment, Justice Kennedy's concurring opinion created a five-justice majority that approved the consideration of race in certain limited circumstances to encourage a diverse student body.

2007-2008 TERM

Equal Protection

In ***Egquist v. Oregon Dept. of Agriculture***[143] **(6-3)**, the question presented to the Court was whether a public employee can claim that her equal protection rights had been violated because she was arbitrarily treated differently from similarly situated coworkers without claiming membership to a protected class. The plaintiff public employee was denied a promotion and was subsequently terminated. The plaintiff claimed that these adverse employment actions were "without any rational basis and solely for arbitrary, vindictive or malicious reasons."[144] At the district court, the jury found that the plaintiff had been terminated for irrational reasons and that her Fourteenth Amendment Equal Protection rights had been violated. The Ninth Circuit reversed the jury's decision, stating that while the "class of one" under the Equal Protection Clause had been recognized by the Court against a government is its legislative capacity by ***Village of Willowbrook v. Olech***[145], recognizing the "class-of-one" against a government as an employer "would lead to undue interference in state employment practices."[146] The Supreme Court affirmed the circuit court's decision. The Court held that while a plaintiff can sustain an equal protection claim without alleged class based discrimination, this does not apply to government employers because it compromises the public employers ability to exercise discretion in its termination decisions.

Fourth Amendment

In ***Virginia v. Moore***[147] **(9-0)**, the question presented to the Court was whether a police officer violated the Fourth Amendment by conducting a search subsequent to an arrest that was illegal, but based on probable cause. Police officers arrested the defendant for driving with a suspended license. While the officers had probable cause to believe the defendant was driving on a suspended license, the arrest itself was illegal insofar as the police were authorized to only issue a summons to the driver with a suspended license. Subsequent to the arrest, the police searched the defendant and found 16 grams of crack

[143] 128 S. Ct. 2146 (2008).
[144] *Egquist v. Oregon Dept. of Agriculture*, 128 S.Ct. 2146, 2149 (2008).
[145] 528 U.S. 562 (2000).
[146] *Id*. at 2150.
[147] 128 S. Ct. 1598 (2008).

cocaine and $516 on his person. The defendant was charged with possession of cocaine with intent to distribute. The state trial court convicted the defendant of this charge. The appellate court reversed the conviction based on a violation of the Fourth Amendment, however, the appellate court, sitting en banc, upheld the conviction. The state Supreme Court reversed the en banc decision, stating that because the police should have issued the defendant a citation,and the Fourth Amendment does not allow for searches based on a citation, the search was unlawful. The Supreme Court reversed the state supreme court's decision. The Court held that an arrest need not be lawful to satisfy the requirements of the Fourth Amendment and that even if an arrest violates state law, if it is supported by probable cause any subsequent search comports with the Constitution.

Second Amendment

In ***District of Columbia v. Heller***[148] **(5-4)**, the question presented to the Court was whether the District of Columbia's ban on handguns in the home violates the Second Amendment. In this case, the District of Columbia had enacted a law that made it illegal to carry unregistered firearms and prohibited the registration of hand guns. The law also required that guns be unloaded and disassembled at all times or be bound by a trigger lock. The plaintiff gun owner sought to register a handgun he intended to keep in his home and was refused registration. The plaintiff filed suit claiming the DC law violated his rights under the Second Amendment. The District Court dismissed the plaintiff's complaint. The Circuit Court reversed the trial court's decision, stating that a law that bans an individual from using a firearm for the purposes of self defense in the home violates the Second Amendment.

The Supreme Court affirmed the Circuit Court decision. The Court held that (1) regardless of the prefatory clause of the Second Amendment ("a well regulated Militia, being necessary to the security of a free state…") an individual has a right to possess a firearm for legal purposes, such as sport or self defense; (2) states continue to have the discretion to regulate the possession of firearms, but states cannot ban firearms entirely; and (3) the DC handgun law violated the Second Amendment because it completely banned the use of handguns rather than just restricting and regulating the possession of handguns.

Voting Rights

In ***Crawford v. Marion County Election Board***[149] **(6-3)**, the Court considered the question of whether a state statute that requires voters possess a government issued ID in order to vote at the polls violates the constitutional right to vote. The district court granted the defendant county summary judgment because, after discovery, the court ruled that there was insufficient evidence that the law compromised the right to vote on its face. The Seventh Circuit affirmed, stating that the law did not rise to the strict standard of scrutiny employed for facially violative statutes.

[148] 128 S. Ct. 2783 (2008).
[149] 128 S. Ct. 1610 (2008).

The Supreme Court affirmed the Circuit Court's decision in a plurality opinion. According to the opinion written by Justice Stevens, joined by Justices Kennedy and Roberts, a state law that burdens any particular class of voters must be justified by relevant and legitimate state interests. The plurality opinion held that the interest in deterring voter fraud was legitimate enough to burden voters who do not have a government issued ID. This opinion also held that the burden of submitting the required paperwork and posing for a photograph does not qualify as a substantial burden on the right of individuals to vote.

The dissent, written by Justice Souter and joined by Justice Ginsburg, reasoned that a balancing of interests test should be employed in deciding whether a law that restricts the right to vote should be imposed. The dissent also stated that any interests of the state in restricting the right to vote, no matter how legitimate, must be supported by evidence illustrating the actual effect that the restriction will have in serving the state's interest. Based on these standards, the dissent would have found that the state law in question violates the constitutionally protected right to vote.

Age Discrimination in Employment Act

In ***Federal Express Corporation v. Holowecki***[150] **(7-2)**, the question presented to the Court was whether the Form 283 Intake Questionnaire submitted to the EEOC constitutes a "charge" for the purposes of § 626(d) of the ADEA. The plaintiff claimed that her employer discriminated against her and other employees over 40 on the basis of their age. The plaintiff filed the Form 283 along with an affidavit to support her claim of age discrimination. The plaintiff and other employees subsequently filed suit against their employer under the ADEA alleging age discrimination. The defendant employer moved to dismiss the case, arguing that the plaintiff had not filed the "charge" necessary under § 626(d) of the statute to file an ADEA claim. The district court found in favor of the defendant and dismissed the case. The circuit court reversed the trial court decision.

The Supreme Court held that, in accordance with EEOC internal directives, a submission is considered a "charge" under the statute when it can be reasonably construed that the filing is a request for the agency to take remedial action to protect the employee's rights or otherwise settle a dispute between the employer and employee. The Court went on to state that because the EEOC considered the plaintiff's Form 283 and affidavit sufficient to be considered a charge under its own policy, the Court must defer to the agency's determination.

In ***Gomez-Perez v. Potter***[151] **(6-3),** the question presented to the Court was whether retaliation is prohibited under § 633a(a) of the ADEA. The plaintiff, an United States postal employee, filed an administrative equal employment opportunity complaint for age discrimination after she was denied a transfer to a different post office. Subsequent to her filing the complaint, the plaintiff allegedly experienced retaliatory behavior from her coworkers and supervisors. The plaintiff brought a suit against the

[150] 128 S. Ct. 1147 (2008).
[151] 128 S. Ct. 1931 (2008).

Post Office for retaliation under § 633(a)(a) of the ADEA, which applies to the conduct of federal employers.

The district court granted the defendant's motion for summary judgment. The First Circuit affirmed the district court's decision, holding that this provision of the ADEA does not cover retaliation claims. The Supreme Court reversed the circuit court decision, holding that because parallel language in other civil rights statutes such as § 1982 and Title IX has been interpreted to include retaliation claims, the ADEA must be similarly interpreted.

In ***Meacham v. Knolls Atomic Power Laboratory***[152] **(7-1)**, the question presented was whether an employer defendant against a disparate impact ADEA claim must not only produce evidence of reasonable factors other than age, but also persuade the fact-finder of their merit. Plaintiff brought an ADEA claim against the defendant employers, claiming that the criteria with which the employer justified its termination decision to reduce its workforce had a disparate impact on employees over the age of 40 (30 of the 31 employees terminated were over 40). The case went to trial and the jury found in favor of the plaintiff because the employer was not able to satisfy the "business necessity" standard to defend its termination criteria. The circuit court initially affirmed the decision, but later vacated the judgment and remanded the case because it held that a reasonableness standard should have been applied and the plaintiff bears the burden to persuade the fact-finder that the employer's conduct was unreasonable.

The Supreme Court reversed the circuit court decision. The Court held that the defendant has the burden to produce evidence of reasonable factors other than age and also to persuade the court of the merit of these factors. The Court stated that within the structure of the statute, the reasonable factors other than age are considered an affirmative defense and as such the defendant must persuade the court that they are valid to avoid liability.

In ***Kentucky Retirement Systems v. EEOC***[153] **(5-4)**, the question presented was whether a retirement system that allows individuals who become disabled to add the years they could have worked if not for the disability up to age 55 violates the ADEA when individuals who become disabled over 55 are not credited years they could have worked but for their disability. The state retirement plan in question allowed employees in hazardous positions to be credited years of work up to age 55 if they were rendered unable to because of a disability if the years they are credited did not exceed the years they actually worked. The years were credited up to 55 because that was when police officers in this jurisdiction reached pension status. The claimant police officer became disabled after reaching the age of 55 and was unable to receive credit for years he could have possibly worked in the future. The EEOC filed suit on the claimant's behalf. The district court found in favor of the defendant employer. The Sixth Circuit reversed the district court's decision, hearing the case en banc.

[152] 128 S. Ct. 2395 (2008).
[153] 128 S. Ct. 2361 (2008).

The Supreme Court held that this retirement system did not violate the ADEA because the differentiation is not based on age, but on pension status. The Court went on to state that in situations in which pension status is used as a proxy of age, there could be an ADEA violation, however, that was not the case here.

Section 1981

In ***CBOS West, Inc. v. Humphries***[154] **(7-2)**, the question presented to the Court was whether § 1981 encompasses employment retaliation claims. The plaintiff claimed that he was dismissed by his employer because of racial bias and because he complained about the dismissal of another black employee. The plaintiff filed suit, alleging that his former employer violated his § 1981 equal rights to make and enforce contracts. The district court granted the defendant's motion for summary judgment. The Seventh Circuit affirmed the district courts decision on the plaintiff's racial bias claim, but reversed and remanded the district court's decision regarding the retaliation claim.

The Supreme Court held that § 1981 does encompass employment retaliation claims. In so holding, the Court reasoned that because §§ 1981 and 1982 are interpreted similarly, and § 1982 encompasses claims of retaliation, § 1982 must also encompass retaliation. The Court also pointed out that in *Patterson v. McLean Credit Union*, the Court struck down the application of § 1981 during the period after the initial formation of a contract, which would be the time during which retaliation would occur. However, because Congress superseded this decision in the Civil Rights Act of 1991, § 1981 currently applied to conduct occurring after the formation of the contract and the statute does in fact apply to retaliation claims.

2008-09 TERM

Individuals with Disabilities Education Act

Forest Grove School District v. T.A. **(6-3)**[155] required the Court to interpret the Individuals with Disabilities Education Act (IDEA), which provides that states receiving federal funding must make a free appropriate public education (FAPE) available to all children with disabilities living in the state.[156] The Court had held in prior decisions that "when a public school fails to provide a FAPE and a child's parents place the child in an appropriate private school without the school district's consent, a court may require the district to reimburse the parents for the cost of the private education."[157] The issue in ***Forest Grove*** was whether the IDEA "categorically prohibit[s] reimbursement for

[154] 128 S. Ct. 1951 (2008).
[155] 129 S. Ct. 2484 (2009).
[156] *Id.* at 2487 (citing 20 U.S.C.A. § 1412(a)(1)(A) (2005)).
[157] *Id.* at 2488 (citing School Comm. of Burlington v. Dept. of Ed. of Massachusetts, 471 U.S. 359, 370 (1985)).

private-education costs if a child has not 'previously received special education and related services under the authority of a public agency.'"[158]

Respondent T.A. attended public school in the Forest Grove School District from kindergarten through his junior year in high school.[159] After T.A.'s problems paying attention in class worsened, his mother requested counseling, and the school conducted cognitive testing of T.A.[160] The school psychologist concluded that T.A. did not require any further testing and did not qualify for special-education services.[161] T.A.'s parents sought private professional advice and T.A. was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) and a number of other learning disabilities.[162] T.A.'s parents enrolled him in private school that specialized in students with special needs and gave the School District notice of T.A.'s placement.[163] A team including a school psychologist determined that T.A. did not satisfy IDEA's disability criteria "because his ADHD did not have a sufficiently significant adverse impact on his educational performance."[164] At an administrative due process hearing, the hearing officer determined that T.A.'s ADHD did have an adverse effect on his educational performance and ordered the School District to reimburse T.A.'s parents for the cost of the private-school tuition.[165]

The Supreme Court, in a 6-3 decision, held "that IDEA authorizes reimbursement for the cost of private special-education services when a school district fails to provide a FAPE and the private-school placement is appropriate, regardless of whether the child previously received special education or related services through the public school."[166]

Title IX

***Fitzgerald v. Barnstable School Committee* (9-0)**[167] involved peer-on-peer sexual harassment and presented the question of "whether Title IX of the Education Amendments of 1972 precludes an action under 42 U.S.C. § 1983, alleging unconstitutional gender discrimination in schools."[168] The Fitzgerald's daughter told her parents that a male classmate was harassing her on the school bus.[169] The Fitzgerald's alerted school officials, but the school officials concluded there was not enough evidence to warrant school discipline.[170] The Fitzgerald's subsequently drove their daughter to

[158] *Id.*
[159] *Id.*
[160] *Id.*
[161] *Id.*
[162] *Id.*
[163] *Id.*
[164] *Id.* at 2489.
[165] *Id.*
[166] *Id.* at 2496.
[167] 129 S. Ct. 788 (2009).
[168] 129 S. Ct. at 792 (internal citations omitted).
[169] *Id.*
[170] *Id.* The local police department also conducted an investigation, but found insufficient evidence to bring charges against the boy.

school, but she still reported harassment.[171] The school took no action.[172] The Fitzgerald's filed suit against the School Committee alleging violations of Title IX, 42 U.S.C. § 1983, and state law.[173] The District Court dismissed the § 1983 and state law claims, and granted the school committee's motion for summary judgment on the Title IX claim.[174]

On appeal, the First Circuit affirmed the District Court, finding, as to the Title IX claim, that the school committee's response to the reported harassment was "objectively reasonable."[175] As to the § 1983 claim, the First Circuit held that Title IX was "sufficiently comprehensive to preclude use of § 1983 to advance statutory claims based on Title IX itself."[176] The Supreme Court reversed the First Circuit in a unanimous decision, holding that "§ 1983 suits based on the Equal Protection Clause remain available to plaintiffs alleging unconstitutional gender discrimination in schools."[177] The Court concluded that "[a] comparison of the substantive rights and protection guaranteed under Title IX and under the Equal Protection Clause [supports] the conclusion that Congress did not intend Title IX to preclude § 1983 constitutional suits. Title IX's protections are narrower in some respects and broader in others. Because the protections guaranteed by the two sources of law diverge in this way, we cannot agree . . . that Congress saw Title IX as the sole means of vindicating the constitutional right to be free from gender discrimination perpetrated by educational institutions."[178]

Title VII

Crawford v. Metropolitan Government of Nashville & Davidson County (9-0)[179] involved Title VII's prohibition against "retaliation by employers against employees who report workplace race or gender discrimination[]" and presented the question of "whether this protection extends to an employee who speaks out about discrimination not on her own initiative, but in answering questions during an employer's internal investigation."[180]

In 2002, the respondent County began investigating rumors of sexual harassment by School District employee Gene Hughes.[181] During its investigation, it approached petitioner Crawford and two other employees to ask if they had witnessed inappropriate behavior by Hughes.[182] Crawford and the other two employees did report several instances of sexually harassing behavior by Hughes.[183] The County took no action

[171] *Id.*
[172] *Id.*
[173] *Id.*
[174] *Id.* at 793.
[175] *Id.*
[176] *Id.* (citing Fitzgerald v. Barnstable Sch. Comm., 504 F.3d 165, 179 (2007)).
[177] *Id.* at 797.
[178] *Id.* at 796.
[179] 129 S. Ct. 846 (2009).
[180] *Id.* at 849.
[181] *Id.*
[182] *Id.*
[183] *Id.*

against Hughes, but fired Crawford and the other two accusers after the investigation.[184] Crawford claimed the County was retaliating against her report of Hughes' behavior and filed a Title VII suit.[185]

The Supreme Court unanimously held that responding to questions pursuant to an employer's investigation of sexual harassment is covered by the opposition clause of Title VII, which makes it "unlawful . . . for an employer to discriminate against any . . . employe[e] . . . because he has opposed any practice made . . . unlawful . . . by this subchapter."[186] The Court held that Crawford's communication to the investigator that Hughes had engaged in sexually obnoxious behavior constitutes her opposition to the activity.[187] Therefore, she is protected by Title VII and her case against the County should proceed.[188]

Ricci v. DeStefano (5-4)[189] began as a lawsuit against the City of New Haven, Connecticut and some of its officials for failing to certify examination results that would have determined promotions in the fire department.[190] After the examination results showed that no African-American firefighters would be promoted, and out of genuine fear of a Title VII lawsuit, the City determined that it would not certify the test results.[191] Those white and Hispanic firefighters who would have been promoted alleged that the City discriminated against them based on their race, in violation of both Title VII and the Equal Protection Clause of the Fourteenth Amendment.[192] The City defended its action by arguing that if they had used the test results, they would have faced liability under Title VII for "adopting a practice that had a disparate impact on the minority firefighters."[193]

The Court faced the question of "whether the purpose to avoid disparate-impact liability excuses what otherwise would be prohibited disparate-treatment discrimination."[194] The Court, in a 5-4 opinion, adopted the "strong basis in evidence" standard, which states that "certain government actions to remedy past racial discrimination—actions that are themselves based on race—[comply with Title VII] only where there is a 'strong basis in evidence' that the remedial actions were necessary."[195] The Court insisted that applying this standard to Title VII "gives effect to both the disparate-treatment and disparate-impact provisions, allowing violations of one in the name of compliance with the other only in certain, narrow circumstances."[196] Justice Scalia's concurring opinion expressed his view that the constitutionality of the disparate

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[184] *Id.*
[185] *Id.*
[186] 42 U.S.C.A. § 2000e-3 (1972).
[187] *Id.* at 850-51.
[188] *Id.* at 853.
[189] 129 S. Ct. 2658 (2009).
[190] *Id.* at 2664.
[191] *Id.*
[192] *Id.*
[193] *Id.*
[194] *Id.* at 2674.
[195] *Id.*
[196] *Id.* at 2676.

impact provisions of Title VII would need to be determined eventually, and he indicated that they "sweep too broadly."[197]

Justice Ginsburg—writing for Justices Stevens, Souter, and Breyer—dissented, arguing that "context matters."[198] She explained that fire departments across the country have pervasively discriminated against minorities.[199] "It took decades of persistent effort, advanced by Title VII litigation, to open firefighting posts to members of racial minorities."[200] She argued that the majority's decision ignores the intent of Congress when it "formally codified the disparate-impact component of Title VII."[201] Furthermore, the disparate-impact and disparate-treatment provisions of Title VII must not be at odds with one another.[202] It was Congress' intent that employers that reject "selection criteria operating to the disadvantage of minority groups . . . due to reasonable doubts about their reliability can hardly be held to have engaged in discrimination 'because of' race. A reasonable endeavor to comply with the law and to ensure that qualified candidates of all races have a fair opportunity to compete is simply not what Congress meant to interdict."[203]

Pregnancy Discrimination Act

AT&T Corp. v. Hulteen (7-2)[204] involved four women who worked at AT&T and took pregnancy leave before the Pregnancy Discrimination Act (PDA) became law in 1978.[205] This case presented the question of "whether an employer necessarily violates the PDA when it pays pension benefits calculated in part under an accrual rule, applied only prior to the PDA, that gave less retirement credit for pregnancy leave than for medical leave generally."[206] The women who took pregnancy leave received smaller pensions than those who took short-term disability leave during the same period. The Court held, in a 7-2 decision, that the PDA does not apply retroactively.[207]

Section 706(e)(2) prohibits "a seniority system that has been adopted for an intentionally discriminatory purpose . . . when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system . . . ."[208] Since AT&T's system was not discriminatory on its face or intentionally discriminatory when adopted, it does not violate Title VII to calculate pensions based on its parameters.[209]

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[197] *Id.* at 2682.
[198] *Id.* at 2689 (Ginsburg, J., dissenting) (quoting Grutter v. Bollinger, 539 U.S. 306, 327 (2003)).
[199] *Id.* at 2690 (Ginsburg, J., dissenting).
[200] *Id.* (Ginsburg, J., dissenting).
[201] *Id.* at 2698 (Ginsburg, J., dissenting).
[202] *Id.* at 2699 (Ginsburg, J., dissenting).
[203] *Id.* (Ginsburg, J., dissenting).
[204] 129 S. Ct. 1962 (2009).
[205] *Id.* at 1967.
[206] 129 S. Ct. at 1966.
[207] *Id.* at 1971.
[208] *Id.* at 1972.
[209] *Id.*

Justice Ginsburg, joined by Justice Breyer, dissented by arguing that Congress' intent in passing the PDA was to make it clear "that discrimination based on pregnancy *is* discrimination against women."[210] Justice Ginsburg emphasized that the PDA does not apply retroactively, however it "does protect women, from and after 1979 . . . against repetition or continuation of pregnancy-based disadvantageous treatment."[211] She held that "AT&T committed a current violation of Title VII when, post-PDA, it did not totally discontinue reliance upon a pension calculation premised on the notion that pregnancy-based classifications display no gender bias."[212]

Age Discrimination in Employment Act

***14 Penn Plaza LLC v. Pyett* (5-4)**[213] presented the question of whether a provision in a Collective Bargaining Agreement (CBA) that required union members to submit all employment discrimination claims to binding arbitration was enforceable, and whether employees subject to the CBA lose their statutory right to bring a discrimination claim in court.[214] Respondents were night-watchmen in a New York City office building who were replaced with licensed security guards from a security services contractor, assigned to "less desirable positions," and received lower wages.[215] Respondents, who were members of the Service Employees International Union, Local 32BJ ("Union"), asked the Union to file grievances on their behalf alleging, among other things, they had been reassigned because of age.[216] When the grievance process failed to obtain relief, the Union requested arbitration pursuant to the CBA.[217] After the initial arbitration hearing, the Union withdrew respondents claims of age discrimination because it had consented to the contract for new security personnel and felt that it could not "legitimately object to respondents' reassignments as discriminatory."[218]

Respondents then filed a complaint with the Equal Employment Opportunity Commission (EEOC) alleging that petitioners had violated their rights under the Age Discrimination in Employment Act of 1967 (ADEA).[219] After the EEOC notified each respondent of his right to sue, respondents filed suit against petitioners in the United States District Court for the Southern District of New York alleging violations of the ADEA and state and local anti-discrimination laws.[220] The District Court denied petitioners' motion to compel arbitration upon precedent holding that even a clear waiver of a right to litigate certain statutory claims in a judicial forum is unenforceable.[221] The Court of Appeals for the Second Circuit affirmed the District Court's decision, citing the

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[210] *Id.* at 1975 (Ginsburg, J., dissenting).
[211] *Id.* (Ginsburg, J., dissenting).
[212] *Id.* (Ginsburg, J., dissenting).
[213] 129 S. Ct. 1456 (2009).
[214] *Id.* at 1461, 1476.
[215] *Id.* at 1461-62.
[216] *Id.*
[217] *Id.* The CBA was reached between the Union and the Realty Advisory Board on Labor Relations, Inc. (RAB). *Id.* at 1461.
[218] *Id.*
[219] *Id.*
[220] *Id.*
[221] *Id.* at 1462-63.

Supreme Court's decision in *Alexander v. Gardner-Denver Co.*[222], which held that "a collective bargaining agreement could not waive covered workers' rights to a judicial forum for causes of action created by Congress."[223]

The Supreme Court reversed the Second Circuit, holding that "a collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate ADEA claims in enforceable as a matter of federal law."[224] The Court, in a 5-4 decision, held that "Congress has chosen to allow arbitration of ADEA claims" because the National Labor Relations Act (NLRA) granted unions "statutory authority to collectively bargain for arbitration of workplace discrimination claims, and Congress did not terminate that authority with respect to federal age-discrimination claims in the ADEA."[225]

The four dissenting Justices found that the Court's "preference for arbitration . . . leads it to disregard [the Court's] precedent."[226] The dissent emphasized that in *Gardner-Denver*, the Court examined the text and purposes of Title VII of the Civil Rights Act of 1965 and "held that a clause of a collective-bargaining agreement (CBA) requiring arbitration of discrimination claims could not waive an employee's right to a judicial forum for statutory claims."[227] Furthermore, the *Gardner-Denver* Court unanimously held that Title VII rights cannot be waived by the collective-bargaining process, because the collective-bargaining process is meant to protect the collective economic benefits of union members; Title VII, on the other hand, concerns an individual's right to equal employment opportunities.[228] Since the ADEA was derived from Title VII, the analysis in *Gardner-Denver*, the dissent argued, should have been applied in this case. By allowing CBAs to require statutory claims of discrimination be resolved in arbitration, the Court's decision will "thwart the will of Congress in enacting civil rights protections. They undermine the protection of civil rights by preventing victims from getting to court or using the leverage of a potential court claim to obtain appropriate relief."[229]

***Gross v. FBL Financial Services., Inc.* (5-4)**[230] involved 54-year-old Jack Gross who worked for a financial company for thirty years when he was reassigned from the position of "claims administration director" to the position of "claims project director."[231] He considered this a demotion because his former job responsibilities were reallocated to a younger woman.[232] Gross filed suit alleging that his reassignment violated the ADEA. He presented "evidence suggesting that his reassignment was based at least in part on his

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[222] 415 U.S. 36 (1974).
[223] Pyett v. Pennsylvania Bldg. Co., 498 F.3d 88, 92 n.3 (2007) (citing Alexander v. Gardner-Denver Co., 415 U.S. 36, 49-51 (1974)).
[224] 129 S. Ct. at 1474.
[225] *Id.* at 1466.
[226] *Id.* at 1475 (Stevens, J., dissenting).
[227] *Id.* (Stevens, J., dissenting) (citing *Gardner-Denver*, 415 U.S. at 51).
[228] *Id.* at 1477 (Souter, J., dissenting).
[229] ALLIANCE FOR JUSTICE, ALLIANCE FOR JUSTICE SUPREME COURT REVIEW: ANALYSIS OF THE 2008-2009 TERM 4 (2009).
[230] 129 S. Ct. 2343 (2009).
[231] *Id.* at 2347.
[232] *Id.* at 2347-48.

age."[233] The defendant company claimed that its decision was part of a "corporate restructuring."[234] The District Court judge instructed the jury to find for Gross if they found that "age was a motivating factor" in the company's decision.[235] On appeal, the Court of Appeals for the Eighth Circuit overturned the District Court's instructions because such instructions require that the plaintiff present "direct evidence" that age was a substantial factor in the employment decision.[236] Since Gross conceded that he did not present direct evidence of discrimination, the Eighth Circuit held that the jury "should have been instructed only to determine whether Gross had carried his burden of prov[ing] that age was the determining factor in FBL's employment action."[237]

The Supreme Court, in a 5-4 decision, acknowledged that this case presented the question of "whether a plaintiff must present direct evidence of age discrimination in order to obtain a mixed-motives jury instruction in a suit brought under the Age Discrimination in Employment Act of 1967 (ADEA)."[238] However, the Court answered a broader question: "whether the burden of persuasion *ever* shifts to the party defending an alleged mixed-motives discrimination claim brought under the ADEA."[239] The ADEA "makes it unlawful for an employer to discriminate against any employee *because of* that individual's age."[240] The narrow question facing the Court was the interpretation of the words "because of" in the text of the ADEA.[241] The Court held that "a plaintiff bringing a disparate-treatment claim pursuant to the ADEA must prove, by a preponderance of the evidence, that age was the 'but-for' cause of the challenged adverse employment action.[242] The burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision."[243]

The four dissenting Justices criticized "the majority's . . . utter disregard of our precedent and Congress' intent."[244] The majority interpreted the words "because of" in the ADEA as meaning "but for" when previous decisions by the Court have interpreted "because of" to mean that the employee's age, race, gender, or other protected classification was a "substantial" or "motivating" factor in the adverse employment decision.[245] The dissent also criticized the majority's distinction between Title VII and the ADEA. Previous decisions have established that the "relevant language in the two statutes is identical, and we have long recognized that our interpretations of Title VII's language apply with equal force in the context of age discrimination . . . ."[246] This

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[233] *Id.* at 2347.
[234] *Id.*
[235] *Id.*
[236] *Id.* at 2347-48.
[237] *Id.* at 2348 (internal quotations omitted).
[238] *Id.* at 2346.
[239] *Id.* at 2348.
[240] *Id.* at 2353 (citing 29 U.S.C.A. § 623 (2008)).
[241] *Id.* at 2350.
[242] *Id.* at 2352.
[243] *Id.* at 2353.
[244] *Id.* at 2354 (Stevens, J., dissenting).
[245] *Id.* (Stevens, J., dissenting).
[246] *Id.* (Stevens, J., dissenting) (internal quotations omitted).

tougher standard makes it "considerably more difficult for victims of age discrimination to prevail in court."[247]

Voting Rights Act

Bartlett v. Strickland **(5-4)**[248] required the Court to interpret § 2 of the Voting Rights Act of 1965 to determine "whether the statute can be invoked to require state officials to draw election-district lines to allow a racial minority to join with other voters to elect the minority's candidate of choice, even where the racial minority is less than 50 percent of the voting-age population in the district to be drawn.[249]

This case involved a state representative district in North Carolina.[250] District 18 was drawn in 1991 to include portions of four counties, including Pender County, to create a district with a majority African-American voting-age population pursuant to the Voting Rights Act.[251] After the 2000 census, the African-American voting-age population in District 18 fell below fifty percent.[252] North Carolina's "Whole County Provision" requires that district be drawn to keep counties whole when possible; however, state election law requirements may be superseded by federal law.[253] In order to trigger § 2 liability, a minority group must be "sufficiently large and geographically compact to constitute a majority in a single-member district."[254] The question in this case became whether this "requirement can be satisfied when the minority group makes up less than 50 percent of the voting-age population in the potential election district."[255]

The Court held, in a 5-4 decision, that a crossover district—"one in which minority voters make up less than a majority of the voting-age population. . . . [and] the minority population, at least potentially, is large enough to elect the candidate of its choice with help from voters who are members of the majority and who cross over to support the minority's preferred candidate."[256]—is not required by § 2.[257] Therefore, only districts that would constitute a numerical majority of minority voting-age population is required by the Voting Rights Act.[258]

Justice Souter—writing for Justices Stevens, Ginsburg, and Breyer—dissented, arguing that the majority incorrectly interpreted § 2 when it held that "only a district with a minority population making up 50% or more of the citizen voting age population (CVAP) can provide a remedy to minority voters lacking an opportunity to elect

[247] ALLIANCE FOR JUSTICE, *supra* note 229, at 4.
[248] 129 S. Ct. 1231 (2009).
[249] *Id.* at 1238.
[250] *Id.* at 1239.
[251] *Id.*
[252] *Id.*
[253] *Id.*
[254] Thornburg v. Gingles, 478 U.S. 30, 50-51 (1986).
[255] 129 S. Ct. at 1241.
[256] *Id.* at 1242.
[257] *Id.* at 1243.
[258] *Id.*

representatives of their choice."[259] Souter argued that "minority populations under 50% routinely elect representatives of their choice." Furthermore, the "effects of the plurality's unwillingness to face this fact are disturbing by any measure and flatly at odds with the obvious purpose of the Act. If districts with minority populations under 50% can never count as minority-opportunity districts . . . , states will be required under the plurality's rule to pack black voters into additional majority-minority districts, contracting the number of districts where racial minorities are having success in transcending racial divisions in securing their preferred representation."[260]

Northwest Austin Municipal Utility District No. 1 v. Holder (8-1)[261] involved a challenge to § 5 of the Voting Rights Act of 1965 (VRA). Northwest Austin Municipal Utility District No. 1 is a small utility district in Texas that is a "covered jurisdiction" under § 5 of the VRA. Covered jurisdictions are required to submit any changes in election procedures to federal authorities before they can go into effect.[262] The district filed suit to "bailout" of § 5 coverage.[263] Alternatively, the district challenged the constitutionality of § 5 itself.[264]

The narrow question in that case concerned what type of jurisdictions could attempt to bailout of § 5 coverage.[265] Under § 5, only states and "political subdivisions" are allowed to seek bailout.[266] The Court decided to avoid the question of § 5's constitutionality, and instead decided to address the district's ability to seek bailout.[267] It held, in an 8-1 decision, that the district was eligible to seek bailout of § 5 coverage.[268]

Justice Thomas' dissent argued that § 5 is unconstitutional.[269] He insisted that when Congress reauthorized § 5 in 2006, it lacked "sufficient evidence that the covered jurisdiction currently engage in the type of discrimination that underlay the enactment of § 5 undermines any basis for retaining it."[270] Although he was the sole dissenter, Justice Thomas' opinion bears watching as it is likely the position a majority of the Court would take when faced with the constitutionality of § 5 in a future case.[271]

Equal Educational Opportunities Act

***Horne v. Flores* (5-4)**[272] involved a lawsuit against the State of Arizona on behalf of several English Language Lerner (ELL) students that began in 1992, which claimed

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[259] *Id.* at 1250 (Souter, J., dissenting) (internal quotations omitted).
[260] *Id.* (Souter, J., dissenting) (internal quotations omitted).
[261] 129 S. Ct. 2504 (2009),
[262] *Id.* at 2508.
[263] *Id.*
[264] *Id.*
[265] *Id.* at 2510.
[266] *Id.*
[267] *Id.* at 2512-13.
[268] *Id.* at 2516.
[269] *Id.* at 2527 (Thomas, J., dissenting).
[270] *Id.* at 2525 (Thomas, J., dissenting).
[271] *See* ALLIANCE FOR JUSTICE, *supra* note 229, at 3-4.
[272] 129 S. Ct. 2579 (2009).

that the State was violating the Equal Educational Opportunities Act of 1974 (EEOA) by failing "to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs."[273] The District Court found that the State was violating the EEOA because the funding allocated to ELL students was "arbitrary and not related to the actual funding needed to cover the costs of ELL instruction . . . ."[274] The District Court ordered the State to properly fund the state's ELL programs, but the State failed to comply.[275] The District Court imposed fines for every day the State failed to comply with the order.[276] In March 2006, after accumulating over $20 million in fines, the State passed HB 2064, which was designed to create funding solutions to the lack of ELL funding.[277] The District Court determined that HB 2064 was fatally flawed and did not create effective ELL programs.[278] The District Court denied the State's claim that "changed circumstances rendered continued enforcement of the original declaratory judgment order inequitable."[279]

The Supreme Court faced the question of "whether the *objective* of the District Court's 2000 declaratory judgment order—i.e., satisfaction of the EEOA's 'appropriate action' standard—has been achieved."[280] The Court held that the District Court incorrectly focused on whether the State had complied with its 2000 order instead of determining whether the State had complied with the EEOA through other means.[281] In her dissenting opinion, Justice Ginsburg wrote that the Court's opinion "risks denying schoolchildren the English-learning instruction necessary 'to overcome language barriers that impede' their 'equal participation.'"[282]

Federal Preemption of State Law

In *Cuomo v. Clearing House Assn., L.L.C.*[283], New York Attorney General Eliot Spitzer sent requests to several banks requesting certain non-public information about their lending practices in order to determine if they had violated the State's fair-lending laws.[284] The federal Office of the Comptroller of the Currency (Comptroller) and the Clearing House Association, a banking trade group, sued to enjoin the request for information, alleging "that the Comptroller's regulation promulgated under the National Bank Act prohibits that form of state law enforcement against national banks."[285] The Comptroller's regulation prohibited States from exercising "visitorial powers with respect

[273] *Id.* at 2588 (quoting 20 U.S.C.A. § 1703(f) (1974)).
[274] Flores v. Arizona, 172 F. Supp. 2d 1225, 1239 (2000).
[275] *Id.* at 2590.
[276] *Id.* at 2590.
[277] *Id.*
[278] *Id.*
[279] *Id.* The District Court did not address the State's claim of changed circumstances in the original case. On appeal, the Ninth Circuit remanded to the District Court for an evidentiary hearing to determine whether the State's claim of changed circumstances warranted relief. *Id.*
[280] *Id.* at 2595 (emphasis added).
[281] *Id.* at 2598.
[282] *Id.* at 2608 (Ginsburg, J., dissenting) (quoting 20 U.S.C. § 1703(f) (1974)).
[283] 129 S. Ct. 2710 (2009).
[284] *Id.* at 2714.
[285] *Id.*

to national banks, such as conducting examinations, inspecting or requiring the production of books or records of national banks, or prosecuting enforcement actions . . . ."[286] The Supreme Court faced the question of "whether the Comptroller's regulation purporting to pre-empt state law enforcement can be upheld as a reasonable interpretation of the National Bank Act."[287]

In a 5-4 decision, the Court held that the Comptroller's regulation does not comport with the National Bank Act because a state's "visitation" rights are "quite separate from the power to enforce the law."[288] States can enforce their own fair lending and consumer protection laws against national banks.[289] In the majority opinion, Justice Scalia—writing for Justices Souter, Breyer, Stevens, and Ginsburg—found that in instances where state and federal law do not explicitly conflict, states are free to enforce their civil rights laws in court according to their law enforcement power.[290] Otherwise, "[t]he bark remains, but the bite does not."[291]

III

PREVIEW OF THE 2009-2010 UNITED STATES SUPREME COURT TERM

Free Expression

In ***Citizens United v. Federal Election Commission***[292], the Court will take up the constitutionality of the Bipartisan Campaign Reform Act of 2002 (BCRA), which prohibits corporations from using general treasury funds to finance "electioneering communications"—defined as "any broadcast, cable, or satellite communication which refers to a clearly identified candidates for federal office"—within 60 days of a general election or within 30 days of a primary election. The plaintiff, Citizens United, a nonprofit membership corporation that seeks to promote traditional American values, produced "Hillary," a 90-minute documentary presenting a negative view of Hillary Clinton's record as First Lady of the United States and United States Senator. The precise question before the Court is whether the BCRA prohibited Citizens United from making "Hillary" available to subscribers to Video on Demand, a cable television service, within 30 days of a presidential primary in which Senator Clinton was a candidate.

United States v. Stevens[293], takes up the constitutionality of 18 U.S.C. § 48 (1999), which makes it a crime to create, sell or posses a depiction of animal cruelty defined as a "visual or auditory depiction . . . in which a living animal is intentionally

[286] *Id.* at 2715.
[287] *Id.* at 2714-15.
[288] *Id.* at 2716.
[289] *Id.* at 2720-21.
[290] *Id.* at 2717.
[291] *Id.* at 2718.
[292] 530 F. Supp. 2d 274 (D.D.C. 2008).
[293] 533 F.3d 218 (3d Cir. 2008).

maimed, mutilated, tortured, wounded, or killed" with "the intention of placing that depiction in interstate or foreign commerce for commercial gain."[294] The conduct depicted must be "illegal under Federal law or the law of the State in which the creation, sale or possession takes place." Depictions that have "serious religious, political, scientific, educational, journalistic, historical, or artistic value" are exempted from the prohibition.[295]

First Amendment Establishment of Religion

Salazar v. Buono[296]: In 1934, the Veterans of Foreign Wars (VFW) erected a wooden cross on land in southeastern California then under the authority of the federal Bureau of Land Management (BLM). A plaque identified the cross as a memorial to "the Dead of All Wars." The land is now part of the Mojave National Park Preserve. The cross has been replaced several times by private parties and the original plaque has disappeared. The current cross is made of 4-inch diameter metal pipe painted white, and is between 5 and 8 feet high. In 1999, the Park Service indicated intention to remove the cross, designated the cross as a "national memorial" honoring veterans of World War I, and ordered the Secretary of the Interior to install a replica of the original plaque. In suit brought by Buono, a regular visitor to the Preserve, the District Court held that the presence of the cross violated the Establishment Clause. It enjoined the government from displaying the cross at the site. The government covered the cross with a plywood box and appealed. While the appeal was pending, Congress, in 2004, enacted legislation ordering the Secretary to transfer title to the acre in which the cross is located to the VFW, in exchange for 5 privately-owned acres elsewhere in the Preserve, donated by friends of the cross. The Secretary was ordered by Congress to continue to carry out his responsibilities over the transferred acre, and the acre is to revert to the United States if no longer maintained as a war memorial. The Court will consider whether Buono has standing to sue and if so, whether the government must be enjoined from implementing the 2004 legislation.

Attorney's Fees

In ***Kenny A. v. Perdue***[297], a class of parents brought suit under § 1983 against state and local agencies alleging that the foster child services of two Georgia counties were inadequate. The plaintiffs succeeded in obtaining injunctive and other relief through mediation. The District Court awarded attorney's fees using a lodestar consisting of reasonable rate multiplied by time spent on the case. The court then added an upward adjustment to the award based on the excellent performance of the attorneys and the extraordinary results they achieved for their clients. The Eleventh Circuit affirmed the award in a split decision, finding that the District Court had not abused its discretion in the fee and bonus calculation. However, in a portion of the decision not joined by other members of the panel, the author of the opinion provided a roadmap for invalidating any upward adjustments based on quality of performance and results

[294] 18 U.S.C.A. § 48 (a), (c)(1) (1999).
[295] *Id.* at § 48 (b).
[296] 502 F.3d 1069 (9th Cir. 2007).
[297] 547 F.3d 1319 (11th Cir. 2008).

obtained. Thus the question before the Court is whether Congress intended to permit upward adjustments in fee-shifting statutes.

Employment Discrimination

Lewis v. City of Chicago Police Department[298], involves fair access to courts for employees who seek to vindicate their rights under Title VII of the Civil Rights Act of 1964. In 2005, a federal trial court found that the City violated Title VII by using a firefighter hiring exam that illegally discriminated against the Lewis plaintiffs. The Court of Appeals for the Seventh Circuit reversed the trial court's judgment on the grounds that the applicants filed their claims with the Equal Employment Opportunity Commission (EEOC) too late.

Second Amendment

In ***McDonald v. Chicago***[299], barely a year after deciding ***District of Columbia v. Heller***[300], the Court again takes up the Second Amendment in a challenge to Chicago's 27-year-old ban on handgun sales within the city limits. The 2008 ***Heller*** decision, in which the Court struck down a ban on handguns and automatic weapons in Washington, D.C., marked the first time the Supreme Court acknowledged an individual right to bear arms.

Cruel and Unusual Punishment

In ***Graham v. Florida***[301], and ***Sullivan v. Florida***[302], the Court will take up the question of whether it constitutes cruel and unusual punishment to impose a life sentence upon juveniles for offenses such as sexual battery, burglary and assault.

CONCLUSION

I will not presume to provide the Committee with advice on whether and how to counteract what it may perceive as an overly ideological or unnecessarily cramped civil rights jurisprudence on the part of the Roberts Court. Certainly, insofar as the Court has sometimes given less than due deference to congressional intent in interpreting civil rights statutes, there remain quite a few decisions in the last four terms that could and perhaps deserve to be corrected by legislative amendments. However, as important as these legislative fixes may be to civil rights advocates and litigants, it does seem to me that the far more formidable challenge posed by the Court's jurisprudence over the last four terms is not so much its misinterpretation of statutory text but rather its adoption of a constitutional jurisprudence of federalism, Eleventh Amendment Immunity, state action

[298] 428 F. Supp. 2d 783 (N.D. Ill. 2008).
[299] 2008 WL 2741216 (N.D. Ill. July 7, 2008).
[300] 128 S. Ct. 2783 (2008).
[301] 982 So.2d 43 (Fla. Dist. Ct. App. 2008).
[302] 987 So.2d 83, No. 1D07-6433 (Fla. Dist. Ct. App. June 17, 2008) (unpublished table decision).

doctrine, commerce clause power, and equal protection enforcement clause that has severely limited Congress' ability to devise and enact civil rights legislation. While the doctrines of separation of powers and judicial review legitimately limit Congress' ability to revisit the Court's constitutional rulings, it nonetheless seems to me worthwhile for this Committee to consider investigating the ways in which it may begin to challenge the Court to reconsider its rulings on topics as crucial to the advancement of civil rights as federalism, Eleventh Amendment Immunity, state action doctrine, commerce clause power, and equal protection enforcement clause.

Mr. Chairman and members of the Committee thank you for the opportunity to address the Committee and I look forward to assisting the Committee in its continuing work on this important topic.

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