

JUDGES & THE COURTS

FACT SHEET

Justice Ginsburg's Twenty Years on the Supreme Court

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The opening of the October 2013 term marks Justice Ruth Bader Ginsburg's 20th anniversary as an Associate Justice of the United States Supreme Court. Justice Ginsburg's appointment to the Court was historic for many reasons: she had litigated multiple groundbreaking women's rights cases before the Court in the 1970s, establishing that the U.S. Constitution protects against sex discrimination; she is one of the foremost legal minds of our time; and when she joined Justice Sandra Day O'Connor on the bench, she became the second woman ever to sit on the Supreme Court. For more than three years after the resignation of Justice O'Connor, she was the only woman on the Court, and twenty years after her confirmation, she sits as the senior female Justice of three.

Justice Ginsburg has described her trailblazing status as one of the first female Justices as an important aspect of her tenure. As she has said regarding women's representation on the Court, "Women belong in all places where decisions are being made. . . . It shouldn't be that women are the exception."¹ She has repeatedly emphasized the importance of the presence of multiple women on the Court, because when there is more than one woman on the bench, observers can see "that women speak in different voices, and hold different views, just as men do."² As one of three female Justices currently serving, she has noted, "I like the idea that we're all over the bench. It says women are here to stay."³

Although Justice Ginsburg has agreed with Justice O'Connor that "that 'at the end of the day, a wise old man and a wise old woman reach the same judgment,'" Justice Ginsburg further adds, "[but] there are life experiences a woman has that come from growing up in a woman's body that men don't have."⁴ She elaborated: "There are perceptions that we have

because we are women. It's a subtle influence."⁵ While stating that the differences are seldom evident in the outcome of a case, she noted that sometimes, they are.⁶ On a separate occasion, when speaking about what it means to be a woman on the Court, she mused, "Maybe there's a little more empathy. . . . Anybody who has been discriminated against, who comes from a group that's been discriminated against, knows what it's like."⁷

The potential impact of this experience of "growing up in a woman's body" was evident, for example, in *Safford Unified School District v. Redding*.⁸ In that case, argued when Justice Ginsburg was the only woman on the Court, a girl and her mother sued the school district because, when the girl was 13, school officials strip-searched her because they suspected her of hiding ibuprofen. At oral argument, only Justice Ginsburg appeared to comprehend the humiliation and indignity a teenaged girl would have suffered by being forced to strip and even shake out her bra and underwear in front of school officials.⁹ When later asked about her male colleagues' joking and minimizing comments at the argument, she stated, "They have never been a 13-year-old girl. . . . I didn't think that my colleagues, some of them, quite understood."¹⁰ Perhaps when the Justices conferenced after the argument, Justice Ginsburg helped them understand, for while a majority seemed inclined to find the search reasonable during oral arguments, when the decision was announced, eight Justices, including Justice Ginsburg, ruled for the girl and her mother.

During Justice Ginsburg's twenty years on the Court, in a number of notable cases addressing sex discrimination and reproductive rights, she has authored significant decisions, both for the majority and in dissent, often emphasizing the real world impact

of the Court's decisions on women; in other cases, she has provided a crucial fifth vote. A few leading examples are described below.

Equal Opportunity in Education

Justice Ginsburg has been a critically important voice and vote in cases addressing sex discrimination in education.

United States v. Virginia, 518 U.S. 515 (1996). Justice Ginsburg wrote the majority decision holding that the Virginia Military Institute's (VMI) male-only admissions policy violated the Constitution's Equal Protection Clause. "State actors controlling gates to opportunity," Justice Ginsburg emphasized, ". . . may not exclude qualified individuals based on 'fixed notions concerning the roles and abilities of males and females.'"¹¹ VMI had argued that the school's stressful, adversarial atmosphere and approach would not be as effective for women as for men and that this conclusion was based on real gender-based developmental differences, not mere stereotypes. But "generalizations about 'the way women are,' estimates of what is appropriate for most women, no longer justify denying opportunity to women whose talent and capacity place them outside the average description," Justice Ginsburg wrote.¹² In holding that VMI must open its doors to women, Justice Ginsburg's majority opinion emphasized the demanding judicial scrutiny the Constitution requires when a government classifies on the basis of sex. The state actor must demonstrate an "exceedingly persuasive" justification for such classification, showing at least that it serves important government objectives and that the discriminatory means employed is substantially related to the achievement of that objective. Nor may such a justification rely on "overbroad generalizations about the different talents, capacities, or preferences of males and females."¹³

Davis v. Monroe County Board of Education, 526 U.S. 629 (1999). This case held that a student who experiences sexual harassment by her peers that is so severe, pervasive, and offensive that it deprives her of educational opportunities or benefits can recover damages under Title IX, if she can show that school officials knew about the harassment and were deliberately indifferent to it. Justice Ginsburg provided the necessary fifth vote for the majority decision written by Justice O'Connor. The four Justices in dissent would

have held that student-on-student harassment can never violate Title IX.

Jackson v. Birmingham Board of Education, 544 U.S. 167 (2005). Justice Ginsburg provided the necessary fifth vote for the Supreme Court's majority decision, written by Justice O'Connor, holding that Title IX is violated when school officials retaliate against an individual because he or she has complained of sex discrimination in education. The majority decision reasoned that retaliation against someone because he or she has complained of sex discrimination is a form of intentional sex discrimination prohibited by Title IX. The four dissenting Justices would have held that Title IX provided no cause of action for a plaintiff to challenge retaliation.

Protection Against Employment Discrimination

Justice Ginsburg has written surprisingly few majority opinions in sex discrimination in employment cases, but the opinions she has joined and her concurrences have typically urged a broad reading of antidiscrimination statutes consistent with the language, purposes, and intent of those laws, as well as deference to the legal interpretations of those federal agencies primarily responsible for enforcing antidiscrimination protections. Perhaps Justice Ginsburg's most important role in employment discrimination cases, however, has been as the author of dissents that forcefully set out the real world impact of the Court's holdings. As she has explained, "The greatest dissents do become court opinions and gradually over time their views become the dominant view. So that's the dissenter's hope: that they are writing not for today but for tomorrow."¹⁴

Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007). In a 5-4 ruling, the Supreme Court majority reversed the long-standing rule that allowed victims of pay discrimination to challenge the discrimination as long as they continued to receive lower paychecks than their counterparts. Lilly Ledbetter, one of the few women supervisors in a Goodyear tire plant, had worked there for almost twenty years, but for many years had no evidence that she was being paid less than her male coworkers. When she received an anonymous note demonstrating that her salary was lower than all of her 15 male counterparts', including her most junior colleagues, she filed a pay discrimination complaint and won at trial, but the

Supreme Court threw out the case, because she had not filed her complaint within 180 days of Goodyear's decision to pay her less, many years before. As a result of the Court's ruling, Lilly Ledbetter and other women who did not initially know that their employers had decided to pay them less than their male colleagues were left with no remedy when they discovered it, even when the discrimination continued into the present in the form of lower paychecks. Justice Ginsburg wrote a powerful dissent, which she read from the bench when the Court's decision was announced, emphasizing the way pay discrimination occurs in the real world. As Justice Ginsburg explained, employees often do not know how much their coworkers are paid, and indeed employers often take pains to hide that information. Goodyear, for example, had a pay secrecy policy, prohibiting employees from discussing their wages. In addition, small initial pay differentials often grow to significance over time, when raises are calculated as a percentage of current salaries, and as a result may only be discovered long after the initial discriminatory decision. Most importantly, Justice Ginsburg noted, as long as an employee is receiving lower pay because of her sex, she is continuing to experience discrimination. She called upon Congress to remedy the Court's decision. The case and Justice Ginsburg's dissent were galvanizing, and less than two years later, the Lilly Ledbetter Act, restoring pay discrimination victims' ability to go to court, was the first law signed by President Obama.

Wal-mart Stores, Inc. v. Dukes, 131 U.S. 2541 (2011). When women across the country sued Wal-Mart for sex discrimination in pay and promotions, they marshaled evidence that women were 70 percent of the mega-chain's hourly workers, but only 33 percent of its managers, and that Wal-Mart paid women less than men doing the same work in every region of the country, even though on average the women had better performance reviews, more seniority, and fewer disciplinary problems. The plaintiffs described a workplace suffused with gender stereotyping, in which managers had broad, largely unguided authority to set pay and make decisions about promotion. But in a 5-4 decision written by Justice Scalia, the Supreme Court held that the case could not proceed as a nationwide class action, and created a series of new hurdles for workers who wish to come together to challenge discrimination. It also created new incentives

for employers to hand off decision making authority to lower level managers with few checks or restraints, and then disclaim responsibility when managers use this discretion to discriminate. In dissent, Justice Ginsburg pointed out that "[m]anagers, like all humankind, may be prey to biases of which they are unaware" and that the risk that delegating broad, standardless discretion to make personnel decisions will result in discrimination "is heightened when those managers are predominately of one sex, and are steeped in a corporate culture that perpetuates gender stereotypes."¹⁵

Vance v. Ball State University, 133 S. Ct. 2434 (2013). In a 5-4 decision written by Justice Alito, the Court ruled that employers are not legally responsible for a supervisor's harassment of an employee unless the supervisor has the authority to hire or fire the employee. As a result, in order for an employee harassed by her day-to-day supervisor to win a sexual harassment case, she would likely have to show that higher-ups actually knew about the harassment and did not take action to stop it. Writing in dissent, Justice Ginsburg cataloged the ways in which the Court's decision turned a blind eye to the realities of the workplace. She recounted the stories set out in lower court decisions of woman after woman who had experienced grotesque sexual harassment at the hands of supervisors who did not have authority to hire or fire, but who, "[a]s anyone with work experience would immediately grasp," did wield significant employer-conferred authority over their victims.¹⁶ "Each man's discriminatory harassment," she continued, "derived force from, and was facilitated by, the control reins he held," making it appropriate to hold the employer who gave the supervisor this control responsible for the harassment.¹⁷ As she had done in the Ledbetter case, Justice Ginsburg called upon Congress to remedy this decision.

Reproductive Rights

Stenberg v. Carhart, 530 U.S. 914 (2000). Justice Ginsburg provided the necessary fifth vote in this 5-4 case holding that Nebraska's criminalization of a particular abortion method violated the Constitution, because the state law provided no exception permitting the use of the method when necessary to protect the health of the woman and because it imposed an undue burden on a woman's right to terminate her pregnancy. In her concurring opinion, Justice Ginsburg emphasized

that the law's sole purpose was to place an obstacle in the path of a woman seeking an abortion, for in banning a particular method of abortion, it did not seek to protect the health or lives of pregnant women, nor did it "save any fetus from destruction," as other methods of abortion remained available in every instance.¹⁸ As a result, Justice Ginsburg explained, the law was clearly unconstitutional.

Gonzales v. Carhart, 550 U.S. 124 (2007). Seven years after the Stenberg decision, a differently constituted Court upheld by a 5-4 vote a federal ban of an abortion method with no exception permitting the use of the method when necessary to protect the health of the woman. The Court's decision rested in part on the presumption that some women would regret their abortions when they learned additional details about the procedure. Justice Ginsburg wrote an impassioned dissent, stating, "Today's opinion is alarming."¹⁹ At stake in cases challenging abortion restrictions, she emphasized, is "a woman's autonomy to determine her own life's course, and thus to enjoy equal citizenship stature."²⁰ She set out the extensive evidence presented to Congress and the trial court demonstrating that in some instances, the banned procedure was the

safest method for a woman to terminate her pregnancy, and noted that the ban did not forward any interest in preserving fetal life, because other (less safe) methods would remain available to a woman seeking to end her pregnancy. She also took strong issue with the majority's unsupported assertion that the ban protected the mental health of women who would later come to regret their abortions, noting that the Court's solution to this problem was not to require doctors to provide accurate information, but rather to "deprive[] women of the right to make an autonomous choice, even at the expense of their safety."²¹ "[N]either the weight of the scientific evidence to date nor the observable reality of 33 years of legal abortion in the United States comports with the idea that having an abortion is any more dangerous to a woman's long-term mental health than delivering and parenting a child that she did not intend to have."²²

In these cases and many, many others important for women, Justice Ginsburg has provided an important perspective and analysis over twenty years on the Court.

1 Joan Biskupic, *Ginsburg: Court Needs Another Woman*, USA TODAY (Oct. 5, 2009).

2 Ruth Bader Ginsburg, *A Woman's Voice May Do Some Good*, POLITICO (Sept. 25, 2013).

3 Joan Biskupic, *Justice Ginsburg Reflects on Term, Leadership Role*, USA TODAY (June 30, 2011).

4 *Ginsburg Wants Court to Add Second Woman*, COLUMBUS POST-DISPATCH (Apr. 11, 2009).

5 Biskupic, *Ginsburg: Court Needs Another Woman*.

6 *Id.*

7 Richard Wolf, *Ginsburg's Dedication Undimmed After 20 Years on the Court*, USA TODAY (Aug. 1, 2013).

8 557 U.S. 364 (2009).

9 *E.g.*, Dahlia Lithwick, *Search Me*, SLATE (April 21, 2009).

10 Biskupic, *Ginsburg: Court Needs Another Woman*.

11 518 U.S. at 541-42, quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982).

12 518 U.S. at 550.

13 *Id.* at 532-33.

14 Interview with Nina Totenberg, Morning Edition (May 2, 2002), available at <http://www.npr.org/programs/morning/features/2002/may/ginsburg/>.

15 133 S. Ct. at 2564.

16 133 S.Ct. at 2460.

17 *Id.*

18 530 U.S. at 951.

19 550 U.S. at 170.

20 *Id.* at 172.

21 *Id.* at 184.

22 *Id.* at 184 n.7.