

Justice Stevens' Legacy for Women's Legal Rights

During the nearly 35 years that Justice Stevens sat on the Supreme Court, he played a crucial role in ensuring that women have legal rights and protections that have enriched not only women's lives but the fabric of our country. When Justice Stevens joined the Court in 1975, women faced blatant discrimination in all walks of life – state statutes gave married men the right to control marital property, public universities like the Virginia Military Institute excluded women as unfit, and women were eliminated from juries on the basis of gender. Justice Stevens' tenure on the Court spanned many landmark decisions affecting critical legal rights for women, including protections against sex discrimination and sexual harassment at work and at school, important health and safety regulations, and fundamental constitutional rights to privacy and equal protection under law.

Justice Stevens proved to be a major force in these core cases for women's legal rights. In many of these decisions, he was part of five votes which made all the difference in protecting bedrock legal rights and principles. In some of these critical cases, he wrote strong majority opinions. As the senior Associate Justice, he exercised his leadership to assign opinions and shape majorities. And when not in the majority, he frequently wrote or joined dissents when he saw the majority undermine women's legal protections. Many of these cases are described below.

Upholding *Roe v. Wade* and the Constitutional Guarantee of Privacy

Justice Stevens consistently voted to protect individuals against government intrusion into the most personal decisions.

- Justice Stevens has been a stalwart defender of a woman's constitutional right to decide whether to terminate a pregnancy. In *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992), in which the Court reaffirmed the essential holding of *Roe v. Wade*, Justice Stevens wrote a concurrence that stated, "*Roe* is an integral part of a correct understanding of both the concept of liberty and the basic equality of men and women." He wrote the majority 5-4 opinion in *Hodgson v. Minnesota* (1990), which affirmed minors' right to seek an abortion without having to notify both parents without access to a judicial bypass or other protective mechanism. His vote was the crucial fifth decisive vote in cases in which the Court protected women's access to abortion, including decisions affirming women's right to receive abortions without being subjected to state-mandated biased counseling (*Thornburgh v. American College of Obstetricians and Gynecologists* (1986)) and women's right to access to reproductive health clinics without being harassed by anti-choice extremists (*Madsen v. Women's Health Center* (1994)).
- Justice Stevens repeatedly dissented when the Court took steps to limit women's access to abortion. For example, he dissented from cases where the Court, by 5-4 votes: approved a prohibition on funding medically necessary abortions for women in the federal Medicaid program (*Harris v. McRae* (1980)); upheld federal regulations prohibiting health care professionals at family planning clinics from counseling or referring women regarding

abortion (*Rust v. Sullivan* (1991)); and rejected use of a federal civil rights law to protect women from anti-choice blockaders obstructing access to reproductive health clinics (*Bray v. Alexandria Women's Health Clinic* (1993)). Most recently, Justice Stevens dissented in *Gonzales v. Carhart* (2007), where a 5-4 majority of the Court upheld a federal law that prohibits a medically approved abortion method across the nation with no exception to protect a woman's health. Justice Stevens joined Justice Ginsburg's dissent, which objected to the majority's decision to overturn 30 years of constitutional law protecting women's health and decried a lack of respect for women's decisionmaking displayed by the majority. In a 2007 interview, he stated that assigning that dissent to Justice Ginsburg was one of his "best decisions."ⁱ

- Justice Stevens played an important role in protecting the privacy rights of gays and lesbians. He dissented in *Bowers v. Hardwick* (1986), which held 5-4 that a criminal anti-sodomy statute did not violate the right to privacy protected by the Fourteenth Amendment. As the senior Associate Justice, he assigned the majority opinion in *Lawrence v. Texas* (2003), which overturned *Bowers*, to Justice Anthony Kennedy. Some commentators have suggested that, by so doing, Justice Stevens secured Justice Kennedy's vote in that case.ⁱⁱ
- Justice Stevens wrote the majority opinion in *Ferguson v. City of Charleston* (2001), striking down a state hospital's punitive involuntary drug testing of pregnant women as an unreasonable search violating the privacy rights guaranteed under the Fourth Amendment. The decision confirmed that women do not lose their constitutional rights because they are pregnant.

Increasing Diversity in Education

Justice Stevens provided an important vote to uphold the use of race-conscious policies to increase diversity and opportunity in education against constitutional challenges.

- In *Grutter v. Bollinger* (2003), Justice Stevens joined the five-Justice majority to uphold the University of Michigan Law School's admissions policy, which considered race as one of many factors in admissions decisions, against a constitutional challenge. As the senior Justice in the majority, Justice Stevens assigned the opinion to Justice Sandra Day O'Connor, resulting in a decision that stated, in no uncertain terms, that diversity in education is a compelling state interest. In *Gratz v. Bollinger* (2003), however, a 5-4 majority struck down the University of Michigan's undergraduate admissions policy, which took race into account. Justice Stevens dissented from the majority holding. Many years earlier, Justice Stevens had voted to strike down a race-based medical school admissions policy in *Regents of the University of California v. Bakke* (1978).
- Two years after Justice O'Connor, who authored the majority opinion in *Grutter*, retired, the Court considered whether school districts may adopt voluntary integration plans in *Parents Involved in Community Schools v. Seattle School District No. 1* (2007). Although the Court reaffirmed that diversity in education is a constitutionally compelling state interest, a plurality of the Court struck down the voluntary integration plan at issue. Justice Stevens

wrote forcefully in his dissent that “The Court has changed significantly since . . . 1968. It was then more faithful to *Brown* [v. *Bd. of Education*] and more respectful of our precedent than it is today. It is my firm conviction that no Member of the Court that I joined in 1975 would have agreed with today’s decision.”ⁱⁱⁱ

Title IX’s Prohibition on Sex Discrimination in School

Justice Stevens has played an important role in establishing and enforcing protections against sex discrimination in education.

- Justice Stevens wrote the majority opinion in *Cannon v. University of Chicago* (1979), which established that individuals whose rights have been violated under Title IX have a right to go to court to seek a remedy. Without this important decision, students’ ability to challenge sex discrimination in federally funded educational programs would have been drastically curtailed.
- Justice Stevens was a key vote in a number of other Title IX cases as well. He joined the majorities in *Franklin v. Gwinnett Cty.* (1992), which held that Title IX contains a damages remedy for sexual harassment and other forms of sex discrimination in schools and *Davis v. Monroe Cty. Bd. of Educ.* (1999), which held, 5-4, that schools could be liable for student-to-student sexual harassment. He also joined the 5-4 majority in *Jackson v. Birmingham Bd. of Ed.* (2005), which prohibited retaliation by schools against those who protest discrimination. Justice Stevens dissented from *Gebser v. Lago Vista Independent School District* (1998), arguing that the exceedingly high standard for finding school districts liable for sexual harassment imposed by the 5-4 majority thwarted the purpose of Title IX.
- Justice Stevens played an important role in ensuring that constitutional protections are available in addition to those of Title IX. In *Tennessee Secondary School Athletic Association v. Brentwood Academy* (2001), Justice Stevens joined the majority opinion, which held that athletic associations are state actors and are therefore subject to constitutional requirements such as providing equal protection of the law to women and minorities in sports. He also joined the unanimous decision in *Fitzgerald v. Barnstable School Committee* (2009), which held that sex discrimination in schools may be challenged on both constitutional and statutory grounds. (Other constitutional protections in the educational context are discussed below).

Sex Discrimination in the Workplace

Justice Stevens voted to secure many critical protections against sex discrimination, including sexual harassment, in the employment context during his tenure on the Court.

- Justice Stevens joined the plurality opinion in *Price Waterhouse v. Hopkins* (1989), which held that the failure to promote a female employee based on her variation from prevalent stereotypes about women could constitute an actionable claim of sex discrimination under Title VII. Indeed, he voted for protective interpretations of Title VII in many cases

throughout his career, including in *Ledbetter v. Goodyear Tire and Rubber Co.* (2007), dissenting from a five-Justice majority that ignored decades of lower court precedent and held that workers must file pay claims within 180 days of the initial pay-setting decision. As the senior Justice disagreeing with the majority's position, Justice Stevens assigned Justice Ginsburg to write the dissent, which concluded that the majority ignored the realities of the workplace. Justice Stevens also dissented from the Court's recent 5-4 decision in *Gross v. FBL Financial Services* (2009), in which the Court limited the reach of the protections of the Age Discrimination in Employment Act, and argued in his dissenting opinion that the majority failed to abide by its prior decisions.

- Justice Stevens was a key vote in the watershed decision in *Meritor Savings v. Vinson* (1983), in which the court held that sexual harassment that creates a hostile or abusive work environment violates Title VII, and that plaintiffs did not need to establish economic or tangible discrimination to prove such a Title VII violation. Justice Stevens joined the unanimous opinion of the Court in *Oncale v. Sundowner Offshore Serv., Inc.* (1998), which held that same-sex sexual harassment is actionable under Title VII.
- In *Johnson v. Transportation Agency* (1987), the Court upheld voluntary affirmative action plans used by employers to improve the representation of women in fields where they had been historically underrepresented. Justice Stevens wrote a separate concurrence to emphasize that, consistent with Title VII's goal of protecting against discrimination, employers could permissibly take voluntary actions to diversify their workplace.
- Justice Stevens also supported robust protections for workers who face retaliation for complaining of discrimination in the workplace, including in *Burlington Northern v. White* (2006), which held that employers can be held liable for taking actions that would discourage a reasonable employee from complaining of discrimination; *CBOCS v. Humphries* (2008) and *Gomez-Perez v. Potter* (2008), which held that individuals who complain of discrimination under 42 U.S.C. § 1981 and the Age Discrimination in Employment Act are protected against retaliation; and *Crawford v. Metropolitan Government of Nashville* (2009), in which the Court ruled that employees are protected from being subject to retaliation for cooperating with an employer's internal investigation of discrimination.
- Justice Stevens supported protections for pregnant women, dissenting from *General Electric Co. v. Gilbert* (1976), which held that a company did not violate Title VII when its disability benefits plan did not cover pregnancy-related costs. This decision led to the passage of the Pregnancy Discrimination Act of 1978 (PDA). He wrote the Court's opinion in *Newport News Shipbuilding v. EEOC* (1983), which held that the PDA superseded *Gilbert* and that an employer health plan that provided fewer benefits for the pregnant wives of male employees than for pregnant female employees violated the PDA. He joined the Court's opinion in *Automobile Workers v. Johnson Controls* (1991), which held that employer policies that barred women from doing certain jobs on the grounds that their fetuses, or future fetuses, could be harmed violated the PDA. While Justice Stevens concurred in the Court's recent decision in *AT&T Corp. v. Hulteen* (2008), which allowed AT&T to pay women workers less

in pension benefits because of pregnancy leave that they took before the passage of the PDA, he reiterated his view that *Gilbert* was wrongly decided.

The Constitutional Guarantee Against Sex Discrimination

- Justice Stevens voted to recognize strong protection against government-based sex discrimination under the Equal Protection Clause. Soon after he joined the Court, he voted with the majority in *Craig v. Boren* (1976), which held that laws making distinctions based on sex are subject to “heightened scrutiny” and permissible only when the law substantially forwards an important state interest. Over the next five years, he joined majorities on the Court that ruled that numerous state statutes with sex-based distinctions violated the Equal Protection Clause, including ones that provided that husbands, but not wives, could be required to pay alimony pursuant to a divorce decree (*Orr v. Orr* (1978)); provided welfare benefits to families with dependent children where the father, but not the mother, was unemployed (*Califano v. Westcott*, (1979)); treated widowers and widows differently under the worker’s compensation system (*Wengler v. Druggists Mutual Ins. Co.* (1980)); and gave husbands exclusive control over marital property (*Kirschberg v. Feenstra* (1981)). In *Mississippi University for Women v. Hogan* (1982), Justice Stevens supported the holding that a nursing school could not exclude men based on gender stereotypes. Justice Stevens also supported the Court’s holdings in *J.E.B. v. Alabama* (1994) striking down the exclusion of women from juries through peremptory challenges under the Equal Protection Clause, and in *United States v. Virginia* (1996), ruling that women could not be excluded from the Virginia Military Institute based on stereotypes that suggested that they could not succeed at the school.
- Over his 35 years on the Court, Justice Stevens voted to uphold two sex-based distinctions in federal law. He voted with the majority in *Rostker v. Goldberg* (1981), when the Court ruled that the military selective service system did not violate the Equal Protection Clause by excluding women. And in *Nguyen v. INS* (2001), he voted with a 5-4 majority to uphold immigration laws that make it more difficult for unmarried men than unmarried women to confer citizenship on their non-marital children.

Congress’s Power to Protect the Public

Justice Stevens consistently voted in support of robust congressional authority to enact important health and safety regulations, and took a leading role in cases that stemmed the tide of the “Rehnquist revolution.”

- In the late 1990s and early 2000s, Justice Stevens consistently dissented when, by narrow margins, the Court interpreted the Constitution to limit legislative authority to protect public health and safety. Justice Stevens dissented in 5-4 decisions where a majority of the Court took a narrow view of the constitutional authority of Congress’ authority to pass legislation under the Commerce Clause addressing violence against women (*United States v. Morrison* (2000)) and keeping schools free from the dangers of firearms (*United States v. Lopez* (1995)). He also dissented in 5-4 decisions that interpreted the Eleventh Amendment to limit

Congress' ability to give state employees the right to sue for damages for disability discrimination (*Board of Trustees of the University of Alabama v. Garrett* (2001)) or age discrimination (*Kimel v. Florida Bd. of Regents* (2000)). Professor Erwin Chemerinsky termed this line of cases the "Rehnquist revolution," arguing that the revival of federalism as "a constraint on federal power" represented the greatest and most sweeping change in constitutional law during Chief Justice Rehnquist's tenure on the Court.^{iv}

- Justice Stevens concurred in the judgment in *Nevada v. Hibbs* (2003), the first case following these devastating decisions to uphold the enforcement of a damages suit against a state. Six Justices agreed in *Hibbs* that state employees could sue for damages for violations of the Family Medical Leave Act. Justice Stevens then took a leading role in mustering further majorities to put an end to the earlier line of cases discussed above. He wrote the 5-4 majority opinion in *Tennessee v. Lane* (2004), which allowed a damages action to be brought against a state for failing to provide adequate access to state courthouses in violation of the Americans with Disabilities Act. Justice Stevens also wrote the majority opinion in *Gonzales v. Raich* (2005), which helped reaffirm a broad interpretation of Congress' authority to issue health and safety regulations under the Commerce Clause. Many commentators and academics observed that *Gonzales v. Raich* may well have signaled the end of the "Rehnquist Revolution."^v

Individuals' Ability to Enforce Rights in Court

- Justice Stevens has been a strong vote in favor of ensuring that individuals have the ability to enforce federal rights in federal court under Section 1983 (42 U.S.C. § 1983). Section 1983 allows individuals to enforce their statutory as well as constitutional rights to benefits, such as Medicaid, that are especially important to low-income women. In *Maine v. Thiboutot* (1980), Justice Stevens joined the majority that held that the right to welfare benefits under the federal/state Aid to Families with Dependent Children program could be enforced under Section 1983, and in *Wilder v. Va. Hospital Ass'n* (1990), he voted with the 5-4 majority that ruled that individual Medicaid providers could sue under Section 1983 to enforce their right under the Medicaid statute to be paid reasonable and adequate rates by participating states.
- In cases where the Court scaled back individuals' statutory rights under Section 1983, Justice Stevens dissented (*Suter v. Artist M.* (1992) (no private right of action against state child welfare agency for failing to take reasonable steps to preserve and reunite families under federal Adoption Assistance and Child Welfare Act of 1980); *Gonzaga Univ. v. Doe* (2002) (no private right of action against private university for releasing education records to unauthorized persons under federal Family Educational Rights and Privacy Act)). He joined a unanimous Court in *Blessing v. Freestone* (1997) in holding that individuals could not sue a state child support agency under the child support section of the Social Security Act at issue, but did not close the door on such action under other provisions of the Act. Similarly, although Justice Stevens voted with the majority in *City of Rancho Palos Verdes v. Abrams* (2005) that there was no private right of action to enforce the federal communications statute at issue under Section 1983, he was careful to note that only in the exceptional circumstance

should the court rebut the presumption that there is a Section 1983 remedy under a given statute.

Government Benefits

- In a number of important cases, Justice Stevens supported providing access to government benefits for individuals and families in need. He wrote the majority opinion in *Saenz v. Roe* (1999), which held that state regulations that limited the welfare benefits available to new residents violated the Equal Protection Clause. In other cases, he voted to uphold challenges to government actions restricting individuals' benefits. For example, in *Bowen v. Galbreath* (1988), he voted with the majority to hold that the federal Department of Health and Human Services could not withhold a portion of past-due Supplemental Security Income (SSI) benefits to pay attorney fees under Title XVI; in *Sullivan v. Zebley* (1990), he joined the majority's holding that the SSI regulations which determined disability for children were inconsistent with the Social Security Act because they were too restrictive; and in *Sullivan v. Everhart* (1990), he dissented from the majority holding that "netting" regulations, under which the Department of Health and Human Services could recoup overpayments of Social Security benefits, were permissible. In his dissent in *Sullivan*, Justice Stevens argued that the Secretary's recoupment of overpayments were inconsistent with the Social Security Act and would harm beneficiaries. He also dissented in *Schweiker v. Wilson* (1981), which held that the denial of SSI benefits to residents, aged 21 through 64, of public mental institutions that do not receive Medicaid funds for their care did not violate the Equal Protection Clause.

Justice Stevens' Legacy for Women

Justice Stevens has made a profound difference in the lives of women and their families. Because of Justice Stevens, women and their families have more protections against sexual harassment and sex discrimination at work and at school, against retaliation for trying to protect their rights, against government-sanctioned discrimination in a variety of spheres, against government intrusion into personal and private decisions, and against undue limitations on their ability to enforce their rights in court. He has been a giant on the Court.

ⁱ Jeffrey Rosen, *The Dissenter, Justice John Paul Stevens*, N.Y. TIMES MAGAZINE, Sept. 23, 2007, available at <http://www.nytimes.com/2007/09/23/magazine/23stevens-t.html>.

ⁱⁱ See *id.*

ⁱⁱⁱ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 803 (2007) (Stevens, J., dissenting).

^{iv} Erwin Chemerinsky, *The Rehnquist Revolution*, 2 PIERCE L. REV. 1 (2004), available at <http://www.piercelaw.edu/assets/pdf/pierce-law-review-vol02-no1-chemerinsky.pdf>.

^v See, e.g., Linda Greenhouse, *Which Side of History?*, N.Y. TIMES, Mar. 25, 2010, available at <http://opinionator.blogs.nytimes.com/2010/03/25/which-side-of-history/>; Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 FORDHAM L. REV. 101 (2006), available at http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1051&context=schmooze_papers; Ilya Somin, *Gonzales v. Raich: Federalism as a Casualty of the War on Drugs*, 15 CORNELL J. L. & PUB. POL. 507 (2006).