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*FEATURE ARTICLE*

**JUSTICE GINSBURG'S  
STRUGGLE TO PRESERVE  
HER LEGACY**

*by* KIRAN MEHTA

MAKING HISTORY: THE WOMEN ON THE HIGH COURT

**D**uring the Presidential campaign in 1980, Republican candidate Ronald Reagan pledged he would nominate the first woman to the United States Supreme Court.<sup>1</sup> Less than a year after his inauguration, he fulfilled his promise with the nomination of Sandra Day O'Connor.<sup>2</sup> Justice O'Connor served on the bench for 12 years with her male colleagues before the appointment of another woman.<sup>3</sup> In 1993, President Bill Clinton nominated Ruth Bader

Ginsburg to the high court.<sup>4</sup> When President Clinton announced her nomination, he stated that “[d]espite her enormous ability and academic achievements, she could not get a job with a law firm in the early 1960s because she was a woman and the mother of a small child. Having experienced discrimination, [Ginsburg] devoted the next 20 years of her career to fighting it and making this country a better place for our wives, our mothers, our sisters and our daughters.”<sup>5</sup>

Indeed, while a professor at Rutgers University, Ginsburg co-founded the Women’s Rights Project (WRP) at the American Civil Liberties Union (ACLU) in 1972.<sup>6</sup> In the early years, the WRP was the major legal entity for gender equality and was recognized as the voice for women’s interests in the Supreme Court.<sup>7</sup> Since its founding, the WRP has been responsible for systematic legal reform through the courts with women’s equality and women’s economic rights.<sup>8</sup> While an attorney at the WRP, Ginsburg argued six landmark cases involving gender discrimination before the Supreme Court and won five of them.<sup>9</sup> Although Ginsburg’s goal was to end discrimination against women, she knew that her target audience comprised of male judges.<sup>10</sup> As a result, she adopted a unique approach, looking for gender discrimination cases where the laws penalized men.<sup>11</sup> Ginsburg successfully argued against these laws to the Supreme Court, which eventually led to the elimination of many more laws that discriminated against women.<sup>12</sup>

At the announcement of her nomination, Ginsburg happily remarked that it was significant “because it contributes to the end of the days when women, at least half the talent pool in our society, appear in high places only as one-at-a-time performers.”<sup>13</sup> Indeed, Ginsburg thought her appointment would signal the end of female tokenism on the Supreme Court. However, after O’Connor’s retirement in 2005, the Court was again left with only one woman.<sup>14</sup> The death of Chief Justice William Rehnquist closely coincided with O’Connor’s retirement, permitting President Bush to make two appointments for the Supreme Court. When O’Connor heard that President Bush nominated John Roberts as the new Chief Justice, she said he was a “brilliant legal mind, a straight shooter, articulate. He’s good in every way, except he’s not a woman.”<sup>15</sup>

In 2006, thirteen years after Ginsburg’s appointment, she vocalized similar sentiments as those in her nomination speech, but this time with a very different tone. What had once been optimism was replaced by the fear of the mes-

sage of one woman on the Court returning to a “one-at-a-time curiosity, not the normal thing.”<sup>16</sup> As the lone female Justice, Ginsburg said, “[t]his is how it was for Sandra’s first 12 years,” the time from O’Connor’s appointment in 1981 to Ginsburg’s arrival in 1993.<sup>17</sup> “Neither of us ever thought this would happen again. I didn’t realize how much I would miss her until she was gone.”<sup>18</sup>

#### AND THEN THERE WAS ONE



Members of the Supreme Court are, seated from left, Anthony Kennedy, John Paul Stevens, Chief Justice John Roberts, Antonin Scalia and David Souter. Standing, from left, are Stephen Breyer, Clarence Thomas, Ruth Bader Ginsburg and Samuel Alito. Bush appointees Roberts and Alito are the newest members. 2006 photo by J. Scott Applewhite, AP.

Not only did O’Connor’s departure affect Ginsburg, but it also had a direct impact on key decisions handed down by the Court in its 2006-2007 term.<sup>19</sup> O’Connor, though appointed by a Republican president, was often considered the Court’s “swing voter,” sometimes voting with her liberal colleagues on key issues, such as abortion.<sup>20</sup> In the Court’s first term after O’Connor’s retirement, Justice Anthony Kennedy filled the role that O’Connor once had as the center of the Court.<sup>21</sup> “Kennedy is very much the median justice now, as Justice O’Connor was, and he is to her right,” said Steven G. Calabresi, a professor at Northwestern University School of Law.<sup>22</sup> It became clear that with Kennedy as the swing vote, the Court became more conservative than it was from the previous term.<sup>23</sup> This shift toward the right was further accom-

plished with the nomination of Samuel Alito to take O'Connor's seat on the bench, as Alito typically votes with his conservative colleagues on important issues affecting women.<sup>24</sup>

## A LEGACY AT STAKE

In 2007, Alito's vote made the key difference in the 5-4 decision in *Gonzales v. Carhart*, which upheld the federal Partial-Birth Abortion Ban Act.<sup>25</sup> It was the first time the Court had upheld a prohibition on a particular abortion procedure and a reversal of course from a previous decision.<sup>26</sup> Just seven years earlier, with Justice O'Connor in the majority, the Court had voted 5-4 to strike down a nearly identical Nebraska law.<sup>27</sup>

In her stinging dissent of *Gonzales*, which she read aloud from the bench, Ginsburg stated, “. . .for the first time since *Roe [v. Wade]*, the Court blesses a prohibition with no exception safeguarding a woman's health.”<sup>28</sup> Referring to O'Connor's absence on the Court as the reason for this relapse, Ginsburg stated:

[T]he Court, differently composed than it was when we last considered a restrictive abortion regulation, is hardly faithful to our earlier invocations of “the rule of law” and the “principles of *stare decisis*” . . . In candor, the Act, and the Court's defense of it, cannot be understood as anything other than an effort to chip away at a right declared again and again by this Court—and with increasing comprehension of its centrality to women's lives.<sup>29</sup>

Dina Lassow, Senior Counsel with the National Women's Law Center, was in the courtroom when *Gonzales* was decided.<sup>30</sup> Lassow remarked how unusual it was for Ginsburg to read her dissents aloud.<sup>31</sup> Typically, a dissenting opinion is not read out loud from the bench, so when it is, Ginsburg believes it represents that “in the dissenters' view, the Court's opinion is not just wrong, but importantly and grievously misguided.”<sup>32</sup> Oral dissents occur only a handful of times per year.<sup>33</sup> In particular, Ginsburg had gone years without reading one and never read more than one in a single term, until her first term as the lone female justice.<sup>34</sup> Lassow stated, “It was horrifying listening to Kennedy read [the majority opinion] and it was obvious how strongly Ginsburg felt and how bitter she was. She spoke in measured tones but her words were very strong. It showed how strongly she felt that the five justices who voted [in the majority] were ignoring the reality that women face. . .”<sup>35</sup> Similarly, Lenora

Lapidus, Director of the ACLU Women's Rights Project, remarked that Ginsburg must have felt like she had to speak out because the majority was heading in a dangerous direction for women and undermining years of advocacy for women's equality.<sup>36</sup>

Even prior to her nomination to the Supreme Court, Ginsburg believed that laws banning abortion were a violation of the Constitution's Equal Protection clause, rather than a violation of the right to privacy, as the majority held in *Roe v. Wade*.<sup>37</sup> In her dissent in *Gonzales*, Ginsburg concluded, "legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature."<sup>38</sup> A total of four justices signed on to this dissent.<sup>39</sup> Ginsburg believes that ". . .the greatest dissents do become court opinions and gradually over time their views become the dominant view. . . that's the dissenter's hope: that they are writing not for today but for tomorrow."<sup>40</sup> With four votes already secured, then, Ginsburg's view may eventually attract the deciding fifth.<sup>41</sup>

Another key 5-4 decision in which Ginsburg read her dissent aloud from the bench was *Ledbetter v. Goodyear*.<sup>42</sup> The petitioner, Lilly Ledbetter worked as a supervisor at Goodyear Tire from 1979 until 1998.<sup>43</sup> Initially, Ledbetter's salary was in line with the salaries of men performing similar work.<sup>44</sup> However, by the time she retired, she began to suspect she was making significantly less than her male colleagues with equal or less seniority than her.<sup>45</sup> Ledbetter's suspicions were confirmed when someone delivered an anonymous note to her mailbox, revealing that Goodyear had been repeatedly giving Ledbetter smaller raises than her male co-managers.<sup>46</sup> Ledbetter was upset by how those pay differences affected her family's quality of life and her retirement, so she took her employer to court.<sup>47</sup> A sympathetic jury found that Goodyear had, in fact, discriminated against Ledbetter in violation of the law, and she was awarded what she was owed.<sup>48</sup>

Goodyear appealed the decision and the Supreme Court ruled against Ledbetter, holding that she did not file her lawsuit against Goodyear in the timely manner specified by Title VII of the Civil Rights Act of 1964.<sup>49</sup> The majority reasoned that Title VII requires that a suit be filed within 180 days after the alleged discriminatory act.<sup>50</sup> However, in her dissent, Ginsburg argued that Ledbetter was discriminated against with *each* paycheck she received, pointing out that the Equal Employment Opportunity Commission, the agency respon-

sible for enforcing Title VII, has interpreted the Act to allow employees to challenge unequal pay with each new paycheck.<sup>51</sup>

Lapidus remarked that the decision ignores the reality of women's lives.<sup>52</sup> In reference to *Ledbetter*, Lapidus stated, "the fact that [Ledbetter] wouldn't know she was being paid less over this long period of time isn't surprising. For the Court to put the onus on her to know she was being discriminated against is an unfair burden."<sup>53</sup>

At the end of her dissent, Ginsburg called on Congress to remedy the majority's decision, stating, ". . .the Legislature may act to correct this Court's parsimonious reading of Title VII."<sup>54</sup> Less than one month after the decision in *Ledbetter*, Congress heeded Ginsburg's advice and drafted the Lilly Ledbetter Fair Pay Act, which sought to overturn the majority's decision.<sup>55</sup> The bill was passed in the House of Representatives, but was defeated in the Senate.<sup>56</sup>

#### LOOKING TO THE FUTURE

As President, Barack Obama may have the opportunity to make two or three Supreme Court appointments in his first term.<sup>57</sup> Currently, five of the nine Supreme Court justices are 70 years old or older.<sup>58</sup> And with the Democrats controlling at least 58 seats in the United States Senate, the President will likely have no problems ushering in his top choices to the Supreme Court.<sup>59</sup> Some predict that Obama will nominate women for early vacancies to bring the Court more in line with women's representation in the general population.<sup>60</sup>

In the meantime, Ginsburg, as the lone woman on the high court, continues to grapple with issues affecting women and struggles to preserve her legacy of ensuring that women have equal rights in the workplace. During the 2008-2009 term, the Court is set to hear *AT&T v. Hulteen*, which will decide whether maternity leave taken before the passage of the 1978 Pregnancy Discrimination Act can be considered in calculating employee pension benefits.<sup>61</sup> In that case, Respondent Noreen Hulteen took maternity leave in 1968, and was hospitalized for a medical condition requiring surgery after giving birth.<sup>62</sup> She missed a total of 240 days of work due to her pregnancy and surgery, but her employer, AT&T, gave her only 30 days of paid leave.<sup>63</sup> When Hulteen retired in 1994, AT&T set her pension benefits by excluding 210 days that it

would have credited if she had initiated her leave because of any disability besides pregnancy.<sup>64</sup>

There is no way to know how the Court will decide this issue, but the lone female justice on the bench intimately understands the challenges that working women face when they become pregnant. In 1963, when Ginsburg became an assistant professor of law at Rutgers University, pregnancy discrimination was still an enormous barrier for women in the workplace.<sup>65</sup> Ginsburg was afraid that her year-to-year contract would not be renewed if her pregnancy showed, so she tried to conceal her growing belly.<sup>66</sup> “I got through the spring semester without detection, with the help of a wardrobe one size larger than mine, borrowed from my mother-in-law,” she recalls. She gave birth before the fall semester began.<sup>67</sup>

Ginsburg’s life-long advocacy for women’s rights has helped women in ways big and small. Women have made great strides legally and professionally, but there is still much more to do to ensure that women are represented in greater numbers in high levels of government, and to completely end discrimination against women. As Justice O’Connor once stated, “[f]or both men and women the first step in getting power is to become visible to others, and then to put on an impressive show. . . . As women achieve power, the barriers will fall. As society sees what women can do, as women see what women can do, there will be more women out there doing things, and we’ll all be better off for it.”<sup>68</sup>

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