Roberts at 10:

Roberts's Quiet, But Critical, Votes To Limit Women's Rights

By Brianne Gorod

I. Overview

In the first two "snapshots" of our yearlong "Roberts at 10" project, we have focused on areas of the law in which Chief Justice Roberts has shaped the law not only through his vote, but also through his words. When it comes to federal power, campaign finance, and voting rights, Chief Justice Roberts has not hesitated to write important opinions, the long-term significance of which may lie not just in their holdings, but in their reasoning. In this third "snapshot," we focus on John Roberts and women's rights. In particular, we focus on the two areas of the law affecting women's rights that have been the subject of the most cases during Roberts's tenure on the Court—reproductive freedom and gender discrimination in the workplace. In these two areas, the Chief Justice has written relatively little, but he has often cast a critical fifth vote to limit reproductive freedom and support employers over their female employees. These areas of the law are obviously important in their own right, but they are also likely to be the focus of considerable attention this Term and next, with a major pregnancy discrimination case already on the Court's current docket and the potential for significant abortion cases to be added in the near future.

Although these areas have not seen the same sort of rapid, radical change that we've seen in other areas of the law (such as campaign finance and voting), they have had their share of significant and high-profile decisions during the first nine years of Roberts's tenure as Chief Justice. Indeed, one of the biggest cases last Term was *Burwell v. Hobby Lobby*, in which the Court, by a 5-4 vote (with Roberts in the majority), held that the Affordable Care Act's contraception mandate violated the Religious Freedom Restoration Act.[1] The decision prompted Justice Ginsburg to read a strong dissent from the bench and to subsequently accuse her male colleagues in the majority of having a "blind spot" when it came to issues affecting women.[2] And one of the most controversial cases of Roberts's earliest years on the Court was *Ledbetter v. Goodyear Tire & Rubber Co.*, in which the Court, again in a 5-4 ruling with Roberts in the majority, held that a female plaintiff could not pursue her claim of pay discrimination under Title VII because she had waited too long to bring it.[3] There, too, Justice Ginsburg had

[1] 134 S. Ct. 2751 (2014).
[2] Sean Sullivan, *Justice Ruth Bader Ginsburg Says Male Justices Have a "Blind Spot" on Women's Issues*, Wash. Post, July 31, 2014, http://www.washingtonpost.com/blogs/post-politics/wp/2014/07/31/justice-ruth-bader-ginsburg-says-male-justices-have-a-blind-spot-on-womens-issues/.
[3] 550 U.S. 618 (2007).

harsh words for the Court's majority in a strongly-worded dissent that she read from the bench. Among other things, Justice Ginsburg suggested in her dissent that the Court's decision was inconsistent with the "realities of wage discrimination" and the "real-world characteristics of pay discrimination."[4]

Indeed, much (though not all) of the story of how women have fared during John Roberts's tenure as Chief Justice—specifically in the areas of workplace gender discrimination and reproductive freedom—is reflected in those two cases: 5-4 decisions that have undermined women's rights. While there have been some victories in these areas over the past nine years (most significantly, in cases involving retaliation claims under Title VII), those victories have largely been in cases in which there was little to no disagreement on the Court. Where there has been disagreement, the Court has almost always split on its ideological 5-4 axis, with the Chief Justice joining the Court's majority to limit workplace equality and reproductive freedom, notwithstanding his confirmation hearing assurances that he would respect precedent and that he understood the serious problem posed by gender discrimination. While these decisions cut across different substantive areas of law, it seems fair to say they all do reflect, as Justice Ginsburg put it, a "blind spot" when it comes to issues affecting women's rights and the practical realities of women's lives.

II. Confirmation Hearing

As the Senate prepared to hold Supreme Court confirmation hearings for then-Judge Roberts in 2005, the *Washington Post* published a story about the release of documents related to Roberts's service in the Reagan Administration that touched on a number of different topics, but bore a headline that addressed only one: "Roberts Resisted Women's Rights."[5] According to the story, "Supreme Court nominee John G. Roberts Jr. consistently opposed legal and legislative attempts to strengthen women's rights during his years as a legal adviser in the Reagan White House."[6]

It was thus no surprise that when Judge Roberts appeared before the Senate Judiciary Committee for his confirmation hearing, there was significant interest in his views on issues related to women's rights. Indeed, Senator Dianne Feinstein specifically questioned Roberts about some of the memos he wrote that were discussed in the *Washington Post* story. Roberts took that opportunity to emphasize that he has "always supported and support[s] today equal rights for women, particularly in the workplace,"[7] and he touted a report by the National

[4] *Id.* at 654-55 (Ginsburg, J., dissenting). Congress essentially agreed and passed legislation that effectively overturned the Court's decision in 2009. *See infra* n.56 & accompanying text.
[5] Amy Goldstein et al., *Roberts Resisted Women's Rights*, Wash. Post, Aug. 19, 2005, http://www.washingtonpost.com/wp-dyn/content/article/2005/08/18/AR2005081802041.html.
[6] *Id.*
[7] *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 221 (2005), *available at* http://www.gpo.gov/fdsys/pkg/GPO-CHRG-ROBERTS/content-detail.html [hereinafter Confirmation Hearing].

Association of Women Lawyers that found that he had "always treated women lawyers with respect and equal dignity" and that he "had made special accommodations for life-work issues to ensure that women could continue to progress, for example, at my law firm."[8]

The pre-confirmation concerns about Roberts's views on gender equality may be part of the reason why he affirmatively brought up the Equal Protection Clause at his hearing when asked more generally about his views on originalism. Roberts explained: "[Y]ou do need to be very careful and make sure that you're giving appropriate weight to the words that the Framers used to embody their intent. I think in particular of the 14th Amendment and the Equal Protection Clause. There are some who may think they're being originalists who will tell you, well, the problem they were getting at were the rights of the newly freed slaves . . . . But, in fact, they didn't write the Equal Protection Clause in such narrow terms. They wrote more generally. . . . [T]hey chose to use broader terms, and we should take them at their word, so that it is perfectly appropriate to apply the Equal Protection Clause to issues of gender and other types of discrimination . . . ."[9]

When it came to discussion of the particular topics we focus on here—reproductive freedom and workplace gender discrimination—Judge Roberts offered general assurances that he would respect precedent and that he believed in equal pay, even as he declined to discuss specifics of cases that might come before him. With respect to reproductive freedom, Judge Roberts acknowledged that the Court "with a series of decisions going back 80 years, has recognized that personal privacy is a component of the liberty protected by the Due Process Clause."[10] He also agreed that there was "[c]ertainly" a "liberty right of privacy that extends to women," as then-Senator Joe Biden put it.[11]

When asked about abortion, Roberts repeatedly emphasized the *stare decisis* principles the Court had articulated in *Casey*. As he explained, "[You had the *Casey* decision] in which [the Court] went through the various factors in *stare decisis* and reaffirmed the central holding in *Roe* . . . . So as of '92, you had a reaffirmation of the central holding in *Roe*. That decision, that application of the principles of *stare decisis* is, of course, itself a precedent that would be entitled to respect under those principles."[12] Roberts reiterated the same point later, noting, "[T]he *Casey* decision itself, which applied the principles of *stare decisis* to *Roe* v. *Wade*, is itself a precedent of the Court, entitled to respect under principles of *stare decisis*. And that would be the body of law that any judge confronting an issue in his care would begin with, not simply the decision in *Roe* v. *Wade* but its reaffirmation in the *Casey* decision."[13] He also dismissed the significance of a brief he helped write while serving in the Reagan Administration that said that *Roe* was wrong, explaining that this "was before the Supreme Court issued its decision in

[8] *Id.*
[9] *Id.* at 182.
[10] *Id.* at 146-47.
[11] *Id.* at 186.
[12] *Id.* at 143.
[13] *Id.* at 145.

Casey."[14] Finally, he elsewhere underscored the importance of precedent: "I do think that it is a jolt to the legal system when you overrule a precedent. Precedent plays an important role in promoting stability and evenhandedness. It is not enough—and the Court has emphasized this on several occasions. It is not enough that you may think the prior decision was wrongly decided."[15]

There were fewer questions about workplace discrimination, but when asked, Roberts acknowledged that "gender discrimination is a serious problem. It's a particular concern of mine and always has been. I grew up with three sisters, all of whom work outside the home. I married a lawyer who works outside the home. I have a young daughter who I hope will have all of the opportunities available to her without regard to any gender discrimination."[16] He noted separately that "there is no question of equal pay for equal work."[17]

Thus, although there was limited substantive discussion of the law, one might have hoped based on Judge Roberts's testimony that Chief Justice Roberts would respect precedent and the importance of workplace equality. As the next section discusses, those hopes have thus far not been borne out.

III. Women's Rights During John Roberts's First Decade on the Court

A. Reproductive Freedom

In the context of reproductive freedom, the Supreme Court's two seminal cases are well known: *Roe v. Wade*[18] and *Planned Parenthood v. Casey*.[19] In *Roe*, the Court for the first time recognized that there is a constitutional right to abortion and, in doing so, it adopted a trimester framework that governed the conditions under which regulation of abortion would be permissible at different stages of a pregnancy.[20] Nearly two decades later in *Casey*, the Court unequivocally reaffirmed *Roe* in a decision that said as much about the importance of *stare decisis* as it did about abortion: according to a plurality opinion authored by Justices O'Connor, Kennedy, and Souter, "the reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by the explication of individual liberty we have given combined with the force of *stare decisis*."[21] The Court did, though, "reject the trimester framework" adopted in *Roe* and instead adopted a new test: "Only where state regulation imposes an undue burden on

[14] *Id.* at 206.
[15] *Id.* at 144.
[16] *Id.* at 190.
[17] *Id.* at 232.
[18] 410 U.S. 113 (1973).
[19] 505 U.S. 833 (1992).
[20] As the Court subsequently explained it, under the trimester framework, "almost no regulation at all is permitted during the first trimester of pregnancy; regulations designed to protect the woman's health, but not to further the State's interest in potential life, are permitted during the second trimester; and during the third trimester, when the fetus is viable, prohibitions are permitted provided the life or health of the mother is not at stake." *Id.* at 872.
[21] *Id.* at 853.

a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause."[22]

It was against the backdrop of the "undue burden" standard that the Court in the 2000 case of *Stenberg v. Carhart* considered the constitutionality of a Nebraska law that banned one specific method of abortion. [23] In a 5-4 decision, the Court held that the statute violated the Constitution both because it lacked an exception to preserve the health of the woman, and because it "'impose[d] an undue burden on a woman's ability' to choose [that type of] abortion, thereby unduly burdening the right to choose abortion itself."[24] As the Court further explained, "some present prosecutors and future Attorneys General may choose to [use this law to] pursue physicians who use [that specific] procedure[], the most commonly used method for performing previability second trimester abortions. All those who perform abortion procedures using that method must fear prosecution, conviction, and imprisonment. The result is an undue burden upon a woman's right to make an abortion decision."[25]

Stenberg was decided before John Roberts became Chief Justice, but given the Court's decision in that case, the question it faced in *Gonzales v. Carhart*—during Roberts's second year as Chief Justice—should have been an easy one.[26] In *Gonzales*, the Court considered the constitutionality of a federal law materially identical to the Nebraska law struck down in *Stenberg*. This time, however, the Court upheld the law.[27] In an opinion authored by Justice Kennedy (and joined by Chief Justice Roberts), the Court claimed that a decision holding the law unconstitutional would "repudiate[]" a "premise central to [*Casey*'s] conclusion—that the government has a legitimate and substantial interest in preserving and promoting fetal life."[28] It was a surprising use of precedent, given that it took the case that unequivocally declared that "the essential holding of *Roe v. Wade* should be retained and once again reaffirmed" as a justification for undermining the very right guaranteed by *Roe*.[29] And it was noteworthy that Roberts was willing to agree with that statement and to serve as the decisive vote in this case that contradicted the Court's decision just seven years earlier, given the emphasis he placed on the importance of precedent at his confirmation hearing. As Justice Ginsburg noted in her dissent, the Court's opinion "refuse[d] to take *Casey* and *Stenberg* seriously."[30] It is also worth noting that Roberts, who (as we discussed in our opening chapter) emphasized his concerns

[22] *Id.* at 873-74.
[23] 530 U.S. 914 (2000).
[24] *Id.* at 930 (quoting *Casey*, 505 U.S. at 874).
[25] *Id.* at 945-46.
[26] The Court decided two less significant cases that touched on abortion in Roberts's first year as Chief Justice; both were decided unanimously. *See Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320 (2006) (holding that it is not always necessary to invalidate entirely an abortion law that is unconstitutional under certain circumstances); *Scheidler v. NOW*, 547 U.S. 9 (2006) (holding that the Hobbs Act does not cover violence intended to shut down abortion clinics).
[27] 550 U.S. 124 (2007).
[28] *Id.* at 145.
[29] 505 U.S. at 846.
[30] *Carhart*, 550 U.S. at 170-71 (Ginsburg, J., dissenting).

about the institutional legitimacy of the Court at his confirmation hearing, was willing to cast the critical vote that risked making it look as though the Court's decisionmaking turned not on legal principles, but on its membership.[31] In her oral dissent from the bench, Justice Ginsburg pointedly noted the change in the Court's membership that had occurred since the Court decided *Stenberg*: "Although, today's opinion did not go so far as to discard *Roe* or *Casey* the Court *differently composed than it was when we last considered a restrictive abortion regulation* is hardly faithful to *Casey*'s invocation of the rule of law and the principles of *stare decisis*."[32]

In reaching their ultimate conclusion in *Carhart*, the Justices in the majority also discussed at length their views of the impact that abortion has on women who undergo the procedure. According to the majority, "[w]hether to have an abortion requires a difficult and painful moral decision. While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow."[33] Justice Ginsburg took the majority to task for this reasoning, noting that the Court did not require doctors to inform women of the risks of different procedures—as *Casey* had suggested states might—and instead "deprive[d] women of the right to make an autonomous choice, even at the expense of their safety."[34] As she further explained, *Carhart* marked "the first time since *Roe*[that] the Court blesse[d] a prohibition with no exception safeguarding a woman's health."[35] In her oral dissent from the bench, Ginsburg underscored this point: "In candor, the Partial-Birth Abortion Ban 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 life."[36]

In the years since, the Court has heard only two major cases in the area of reproductive freedom; although neither involves the core constitutional right to an abortion recognized in *Roe* and *Casey*, each has important implications for reproductive freedom (as well as the substantive areas of law at issue in the cases). In *Burwell v. Hobby Lobby*, in an opinion authored by Justice Alito (and joined by Chief Justice Roberts), the Court held that regulations implementing the Affordable Care Act's contraception mandate violate the Religious Freedom Restoration Act of 1993,[37] as applied to for-profit companies whose owners' religious beliefs

[31] *See, e.g.*, Linda Greenhouse, *Justices Back Ban on Method of Abortion*, N.Y. Times, Apr. 19, 2007, http://www.nytimes.com/2007/04/19/washington/19scotus.html?_r=0 (discussing how Justice O'Connor's replacement by Justice Alito was critical to the difference in outcome between *Stenberg* and *Carhart*).
[32] *See* Transcript of Opinion Announcement, *Gonzales v. Carhart,* 550 U.S. 124 (2007) (emphasis added), *available at* http://www.oyez.org/cases/2000-2009/2006/2006_05_380 (last visited Nov. 20, 2014).
[33] *Carhart*, 550 U.S. at 159 (citations omitted).
[34] *Id.* at 184 (Ginsburg, J., dissenting).
[35] *Id.* at 170-71 (Ginsburg, J., dissenting).
[36] Transcript of Opinion Announcement, *Gonzales v. Carhart,* 550 U.S. 124 (2007) *available at* http://www.oyez.org/cases/2000-2009/2006/2006_05_380 (last visited Nov. 20, 2014).
[37] RFRA limits the government's ability to "substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1(a).

proscribe the use of certain contraceptives.[38] After holding that for-profit corporations qualify as "person[s]" within the meaning of RFRA, the Court held that the mandate burdens their religious exercise and is not the least restrictive means for the government to achieve its goal because, among other things, the government could pay for the contraception itself.[39] As Justice Ginsburg made clear in her dissent, this was a decision not just about RFRA or the rights of corporations, it was also a decision about the rights of women. As she explained (quoting *Casey*), "'The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives,'" and Congress provided for "coverage of preventive care responsive to women's needs" when it enacted the ACA.[40] As Justice Ginsburg made clear in the remainder of her dissent, that interest would no longer be fully met as a result of the Court's decision.[41]

In another decision from last Term, *McCullen v. Coakley*, the Court considered whether a Massachusetts law that made it a crime to knowingly stand on a "public way or sidewalk" within 35 feet of an entrance or driveway to any place, other than a hospital, where abortions are performed, violated the First Amendment.[42] This decision marks a departure from what are otherwise common features of the cases covered in this snapshot: 5-4 decisions along predictable ideological lines with the Chief Justice declining to write. In *McCullen*, the Court unanimously held that the Massachusetts law violated the First Amendment, but split in an unusual 5-4 line-up when it came to the reasons why. In an opinion written by Chief Justice Roberts and joined by the Court's more liberal members, the majority held that the law could not survive scrutiny because it was not narrowly tailored; the majority did not, however, explicitly call into question—as the concurring justices did[43]—the Court's 2000 decision in *Hill v. Colorado*, which upheld a Colorado buffer zone law. Indeed, perhaps surprisingly, the Chief Justice's opinion barely mentioned that decision. It is too early to judge with any confidence the broader import of the Court's decision in *McCullen*. Some might say that the decision reflected the Chief Justice's inclination for ignoring precedent rather than overruling it,[44] but that might not be giving Roberts enough credit: after all, the Court's liberals joined his opinion, and the Court's other conservatives would have imposed much more stringent limitations on the ability of states to adopt such buffer zones. In other words, the decision could certainly

[38] 134 S. Ct. 2751 (2014).
[39] *Id.* at 2780. The Court concluded that it was "unnecessary to adjudicate [the] issue" of the government's interest and simply "assume[d] that the interest . . . [was] compelling within the meaning of RFRA." *Id.*
[40] *Id.* at 2787-88 (Ginsburg, J., dissenting) (quoting *Casey*, 505 U.S. at 833).
[41] Although beyond the scope of this snapshot, the Court's decision in *Hobby Lobby* was troubling for other reasons, as well: it gave for-profit corporations a right previously enjoyed only by natural persons, and it establishes a precedent that could allow corporate owners to override the federal rights of their employees based on religious liberty claims.
[42] 134 S. Ct. 2518 (2014).
[43] *Id.* at 2545 (Scalia, J., concurring).
[44] Kevin Russell, *What Is Left of* Hill v. Colorado*?*, SCOTUSblog (June 26, 2014), http://www.scotusblog.com/2014/06/what-is-left-of-hill-v-colorado/; *see* David H. Gans, *Roberts at 10: Campaign Finance and Voting Rights: Easier to Donate, Harder to Vote*, Constitutional Accountability Ctr. 3 (2014), http://theusconstitution.org/sites/default/files/briefs/Roberts-at-10-Easier-to-Donate-Harder-to-Vote.pdf.

have been worse for proponents of reproductive freedom, but it's difficult to count it as a victory.

In short, nine years into John Roberts's tenure as Chief Justice, the core precedents recognizing a constitutional right to abortion still stand; indeed, it might be surprising to some that the Court hasn't done more damage in the abortion context. But there have been significant decisions limiting reproductive freedom, and *Carhart* (and arguably *McCullen*) suggest that Chief Justice Roberts's commitment to precedent may not be quite as strong as Judge Roberts suggested it would be. What that means for the core constitutional right to an abortion may become clearer in the next year or two as cases challenging new state restrictions on abortion are quickly working their way to the Court. Indeed, there is already a *cert.* petition pending in *Humble v. Planned Parenthood Arizona, Inc.*, which involves the constitutionality of state laws regulating medical (*i.e.*, non-surgical) abortion,[45] and other cases involving state abortion restrictions (for example, requirements that doctors performing abortions have hospital admitting privileges and that abortion clinics operate as ambulatory surgical centers) could be at the Court this Term or next.

B. Workplace Gender Discrimination

In the context of workplace gender discrimination, the primary protections are not constitutional, but statutory. In the 1960s, Congress passed laws such as the Equal Pay Act and the Civil Rights Act of 1964 to help promote, at least in part, gender equality in the workplace. Most broadly, Title VII of the Civil Rights Act of 1964 made it an "unlawful employment practice for an employer . . . to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex."[46] It also made it unlawful for an employer to retaliate against an individual for "oppos[ing] any practice made an unlawful employment practice by" Title VII.[47] In the years since these laws were enacted, the Supreme Court has repeatedly been called upon to interpret them—giving definition to the scope of the statutes' protections and the conditions under which plaintiffs could sue to vindicate their rights under those laws. A handful of those cases have been heard during John Roberts's first nine years on the Court[48]—cases that often pit gender equality in the workplace against the

[45] Last year the Court granted *cert.* in a case involving medical abortion, but ultimately dismissed the case as improvidently granted. *See Cline v. Oklahoma Coal. for Reproductive Justice*, 134 S. Ct. 550 (2013) (mem.).
[46] 42 U.S.C. § 2000e-2(a)(1).
[47] *Id.* § 2000e-3(a).
[48] Although every Title VII case implicates gender discrimination because the same basic prohibition applies to all forms of workplace discrimination, *see, e.g.*, Bryce Covert, *Exclusive: 43 Sexual Harassment Cases That Were Thrown Out Because of One Supreme Court Decision*, ThinkProgress (Nov. 24, 2014), http://thinkprogress.org/economy/2014/11/24/3596287/vance-sexual-harassment/ (discussing how a Supreme Court case involving race discrimination has made it more difficult for victims of sexual harassment to sue), this snapshot focuses specifically on those cases involving claims of gender discrimination. Thus, this snapshot does not discuss at length two significant Title VII cases decided in 2013—*University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517 (2013), and *Vance v. Ball State University*, 133 S. Ct. 2434 (2013). In the former,

purported interests of the business community (at least as advanced in filings by the U.S. Chamber of Commerce[49]).

In *Ledbetter v. Goodyear Tire & Rubber Co.*, the Court held, in a 5-4 decision, that a plaintiff could not pursue her Title VII claim of pay discrimination against her employer because she had waited too long to bring it. In an opinion authored by Justice Alito (and joined by Chief Justice Roberts), the Court held that Lilly Ledbetter had not filed her suit in the time period prescribed by the statute because, according to the Court, the "unlawful employment practice" was not the payment of a discriminatory wage, but the earlier salary-setting decision that had resulted in the discriminatory wage. Because Ledbetter had not brought suit within 180 days of that salary setting decision, she could not pursue her claim of unequal pay.

As Justice Ginsburg explained in her dissent, the Court's decision made it "incumbent on Ledbetter to file charges year by year, each time [her employer] failed to increase her salary commensurate with the salaries of male peers."[50] When Ledbetter failed to do so, the pay decision became "a *fait accompli* beyond the province of Title VII ever to repair."[51] Justice Ginsburg objected to the Court's holding because, in part, it "overlook[ed] common characteristics of pay discrimination," including that they often occur in "small increments" and that "cause to suspect that discrimination is at work develops only over time."[52] According to Ginsburg, viewing the relevant unlawful practice as the payment of the discriminatory wage "is more faithful to precedent, more in tune with the realities of the workplace, and more respectful of Title VII's remedial purpose."[53] At the end of her opinion, Justice Ginsburg called on Congress to correct the Court's "cramped interpretation of Title VII."[54] Although Congress's first attempt to pass responsive legislation immediately after the decision failed, the decision became a significant issue in the 2008 presidential campaign,[55] and a new federal law bearing Lilly Ledbetter's name became the first bill signed by President Obama in 2009.[56]

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the Court held, 5-4, that retaliation claims are subject to a stricter standard of proof than other discrimination claims. In the latter, the Court, again in a 5-4 decision, narrowly defined who constitutes a "supervisor" whose discrimination is automatically attributed to an employer. Chief Justice Roberts was in the majority in both cases.

[49] Of course, the Roberts Court's pro-business rulings are an important part of Chief Justice Roberts's legacy. Since 2010, CAC has been tracking the U.S. Chamber of Commerce's litigation record before the Supreme Court, and these reports show that the Chamber has won 70% of its cases overall (85 wins and 36 losses) since Chief Justice Roberts and Justice Alito joined the Court and 80% of its cases over the most recent three Terms. We will explore this aspect of John Roberts's first decade on the Court in a later snapshot. Tom Donnelly, *The U.S. Chamber of Commerce Continues Its Winning Ways*, Constitutional Accountability Ctr. (June 30, 2014), http://theusconstitution.org/text-history/2753/us-chamber-commerce-continues-its-winning-ways.

[50] 550 U.S. at 644 (Ginsburg, J., dissenting).

[51] *Id.*

[52] *Id.* at 645.

[53] *Id.* at 646.

[54] *Id.* at 661.

[55] Editorial, *The Democrats' Secret Weapon: Lilly Ledbetter*, N.Y. Times, Aug. 28, 2008, http://campaignstops.blogs.nytimes.com/2008/08/28/the-democrats-secret-weapon-lilly-ledbetter/.

[56] Pub. L. No. 111-2.

In *Wal-Mart Stores, Inc. v. Dukes*, the Court held, again in a 5-4 decision, that female employees seeking to sue their employer for sex discrimination could not bring their suit as a class action, which means, as a practical matter, that most, if not all, of the plaintiffs' claims won't be brought at all.[57] In an opinion authored by Justice Scalia (and joined by Chief Justice Roberts), the Court held that the plaintiffs had failed to satisfy the "commonality" requirement of the Federal Rules of Civil Procedure, that is, that there be "questions of law or fact common to the class."[58] As the Court explained, "The only corporate policy that the plaintiffs' evidence convincingly establishes is [the employer's] 'policy' of *allowing discretion* by local supervisors over employment matters. On its face, of course, that is just the opposite of a uniform employment practice that would provide the commonality needed for a class action; it is a policy *against having* uniform employment practices. It is also a very common and presumptively reasonable way of doing business . . . ."[59]

In dissent, Justice Ginsburg explained why the district court had concluded that "the plaintiffs easily" satisfied the commonality requirement,[60] and (as in *Ledbetter*) she also noted realities of the workplace that the Court's majority largely dismissed: "[t]he plaintiffs' evidence, including class members' tales of their own experiences, suggests that gender bias suffused [the defendant's] company culture."[61] As Ginsburg further explained, "[t]he practice of delegating to supervisors large discretion . . . has long been known to have the potential to produce disparate effects," and that "risk . . . is heightened when those managers are predominantly of one sex, and are steeped in a corporate culture that perpetuates gender stereotypes."[62] Thus, *Wal-Mart*—like *Ledbetter*—ignored the realities of workplace discrimination to side with employers over their female employees in a way that will make it more difficult for individuals to bring claims of gender discrimination (and other types of discrimination) in court.[63]

That said, the news has not been all bad when it comes to cases involving workplace gender discrimination. Most notably, when it comes to claims that employers have retaliated against individuals who have "oppose[d]" practices made unlawful by Title VII, there have been

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[57] 131 S. Ct. 2541 (2011).

[58] *Id.* at 2550-51 (quoting Fed. R. Civ. P. 23(a)(2)). The Court also held that another aspect of plaintiffs' claims were improperly certified under a different part of the class action rule, *id.* at 2557, but the dissenters agreed with that claim.

[59] *Id.* at 2554.

[60] *Id.* at 2562 (Ginsburg, J., dissenting).

[61] *Id.* at 2563 (Ginsburg, J., dissenting) (internal footnote omitted).

[62] *Id.* at 2564 (Ginsburg, J., dissenting).

[63] Justice Ginsburg also emphasized the importance of combating stereotypes and long-held attitudes about women's role in the workplace in *AT&T Corporation v. Hulteen*, 556 U.S. 701 (2009), a case in which the Court held, 7-2, that an employer could lawfully calculate pension benefits in part under an accrual rule that, as applied prior to the enactment of the Pregnancy Discrimination Act, gave less credit for pregnancy leave than medical leave. In her dissent (joined by Justice Breyer), Ginsburg noted that "[c]ertain attitudes about pregnancy and childbirth, throughout human history, have sustained pervasive, often law-sanctioned, restrictions on a woman's place among paid workers and active citizens." *Id.* at 724 (Ginsburg, J., dissenting).

repeated (and lopsided) victories during John Roberts's tenure as Chief Justice.[64] Indeed, in three separate cases, Roberts has joined all of his colleagues to expand the protections provided by Title VII's anti-retaliation provision. In *Burlington N. & Santa Fe Railway Co. v. White*, the Court unanimously held that Title VII's anti-retaliation provision does not simply forbid harms "related to employment or [those that] occur at the workplace"; rather, it forbids employers from taking any actions that are "harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination."[65] In *Crawford v. Metropolitan Government of Nashville & Davidson County*, another unanimous ruling, the Court held that Title VII's anti-retaliation provision protected an employee who spoke out about sexual harassment not on her own initiative, but instead in response to an employer's investigation.[66] Finally, in *Thompson v. North American Stainless, LP*, the Court once more unanimously construed Title VII's anti-retaliation provision broadly, concluding that firing an employee because his fiancée had filed a discrimination charge with the Equal Employment Opportunity Commission could constitute unlawful retaliation under Title VII.[67]

In sum, although John Roberts and his Court have been willing to expand the protections provided by Title VII's anti-retaliation provision, when it comes to other issues related to workplace gender discrimination, Judge John Roberts's belief that gender discrimination is a "serious problem" doesn't seem to have affected the way Chief Justice Roberts views cases presenting that problem, at least in his first nine years on the High Court. Whether that continues to be true in Roberts's tenth Term on the Court should be evident next year when the Court issues its decision in *Young v. UPS*, a case about the meaning of the Pregnancy Discrimination Act. In *Young*, the Court has been asked to decide whether an employer must provide pregnant women with the same accommodations it provides other employees with disabling conditions who are similar in their ability to work.

IV. Conclusion

When Judge Roberts was nominated to be Chief Justice in 2005, there was significant concern about his views on women's rights. He tried to allay those concerns at his confirmation

[64] There was one other Title VII gender discrimination case in which the Roberts Court made it slightly easier for individuals to sue. In *Arbaugh v. Y & H Corporation*, the Court held, 8-0, that Title VII's requirement that an "employer" have "fifteen or more employees" was not a jurisdictional requirement that a defendant could challenge at any stage in the litigation; instead, a defendant could waive an argument related to that requirement if it did not raise it early enough in the litigation. 546 U.S. 500 (2006).

[65] 548 U.S. 53, 57 (2006).

[66] 555 U.S. 271 (2009).

[67] 562 U.S. 170 (2011). These cases stand in sharp contrast to *Nassar*, the Title VII case mentioned earlier in which the plaintiff claimed that his employer retaliated against him for complaining of racially and religiously motivated harassment. In that case, the Court held, in a 5-4 decision with Roberts in the majority, that a plaintiff making a retaliation claim must prove that his protected activity was the "but-for cause of the alleged adverse action by the employer," rather than simply a "motivating factor," as the plaintiff argued. 133 S. Ct. at 2534. In dissent, Justice Ginsburg chided the majority for an adopting an interpretation of Title VII that "lacks sensitivity to the realities of life at work." *Id.* at 2547.

hearing, but he's done little to allay them in the years since, and much to reinforce them. Although Chief Justice Roberts has written little when it comes to reproductive freedom and workplace gender discrimination, he's said a great deal through his votes, voting to limit reproductive freedom and to deny access to the courts to those alleging workplace gender discrimination, except in cases in which the entire Court was united. But Chief Justice Roberts will have additional opportunities to address both of these topics in the near future, and what he does in these upcoming cases could shape his legacy on these issues as much as what he has already done.