



The Death of Justice Ruth Bader Ginsburg: Initial Considerations for Congress

September 21, 2020

On [September 18, 2020](#), Justice Ruth Bader Ginsburg, the second woman to serve on the Supreme Court of the United States, passed away at the age of eighty-seven, vacating a seat on the High Court that she had held for twenty-seven years. Nominated to replace Justice Byron White in 1993, Justice Ginsburg [already had](#) a trailblazing career as a law school professor; Supreme Court litigator; co-founder of the [American Civil Liberties Union's](#) Women's Rights Project; and judge on the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) for thirteen years. Several of her opinions have been consequential, including her 1996 majority opinion in [United States v. Virginia](#), holding that women could not be denied admission to the Virginia Military Institute on the basis of their sex. Justice Brett Kavanaugh said in a recent [statement](#) that “no American has ever done more than Justice Ginsburg to ensure equal justice under law for women.”

Justice Ginsburg was also noted for her pointed dissents, including in [Shelby County v. Holder \(2013\)](#), where the Court struck down a key provision of the Voting Rights Act of 1965, and in [Ledbetter v. Goodyear Tire & Rubber Co. \(2007\)](#), where the Court rejected a [Title VII](#) employment discrimination claim. In more recent years, Justice Ginsburg gained recognition in popular culture, becoming known by the moniker “the notorious RBG.” She was the subject of [books, movies, and an opera](#), and in 2015, was named one of *Time* magazine's [one hundred most influential people](#).

But popular characterizations of Justice Ginsburg as a “[liberal firebrand](#),” frequently at odds with the Court's conservative wing, may paint an incomplete picture of the Justice's tenure on the Court. According to [one study](#), Justice Ginsburg authored more majority opinions than any other Justice on the bench during the same period as her. And despite attention garnered by her dissents, Justice Ginsburg authored fewer dissents than Justices Stephen Breyer, Antonin Scalia, John Paul Stevens, and Clarence Thomas during that time. Justice Ginsburg's majority opinions, moreover, rarely involved closely divided disputes on hot-button social and political topics. Instead, these (frequently unanimous) opinions addressed more esoteric issues like securities law (e.g., [Tellabs, Inc. v. Makor Issues & Rights, Ltd. \(2007\)](#)), criminal sentencing procedures (e.g., [Ring v. Arizona \(2002\)](#)), and various complex civil procedure issues (e.g., [Goodyear Dunlop Tires Operations, S.A. v. Brown \(2011\)](#); [Exxon Mobil Corp. v. Saudi Basic Industries Corp. \(2005\)](#); [Porter v. Nussle \(2002\)](#); [New Hampshire v. Maine \(2001\)](#); [Amchem Products, Inc. v. Windsor \(1997\)](#)).

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It is likely that Justice Ginsburg's views in closely decided Supreme Court cases will be of most interest to Members of Congress as the Senate considers a nominee to fill her seat, as those cases may illustrate how the Court may change in her absence. This Legal Sidebar highlights several areas of law where Justice Ginsburg—either by authoring or joining a majority opinion or a notable dissent—proved consequential to the trajectory of Supreme Court jurisprudence. In so doing, this post provides a broad overview of key legal issues Congress (and, more specifically the Senate through its advice-and-consent role) may consider as it reflects on Justice Ginsburg's jurisprudence and how her eventual successor might shape the future of the Court.

Justice Ginsburg's Jurisprudence

During her more than quarter-century on the Court, Justice Ginsburg encountered nearly every major flashpoint of modern American legal debate—from abortion, to voting rights, to key civil liberties issues. In a [statement](#) issued shortly after Justice Ginsburg's death, her colleague, Justice Elena Kagan, stated that Justice Ginsburg worked every day “to ensure that this country's legal system lives up to its ideals and extends its rights and protections to those once excluded.”

The following highlights Justice Ginsburg's approach to several issues that have traditionally resulted in a closely divided Court:

- **Abortion:** During and [prior to](#) her three decades on the High Court, Justice Ginsburg was a consistent opponent of measures that she viewed as unduly restricting abortion access. While the Court's 1973 decision in *Roe v. Wade* recognized that the Constitution protects a woman's decision to terminate her pregnancy, it rooted this protection in privacy interests protected by the Fourteenth Amendment's Due Process Clause. In her various speeches and writings on abortion, including her dissenting opinion in *Gonzales v. Carhart* (2007), Justice Ginsburg [contended](#) that the constitutional infirmity of abortion restrictions instead “center[s] on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature.” In recent years, Justice Ginsburg was part of five-Justice majorities in *June Medical Services LLC v. Russo* (2020) and *Whole Woman's Health v. Hellerstedt* (2016), which struck down various state regulations of abortion providers.
- **Administrative Law:** In recent years, [some Justices](#) have called for the Court to narrow the degree of judicial deference given to agencies' interpretations of the statutes and regulations they administer. Justice Ginsburg was among those members of the Court who favored maintaining its existing doctrinal approach to these issues. In her majority opinion in *EPA v. EME Homer City Generation, L.P.* (2014), where the Court reversed a decision authored by then-D.C. Circuit Judge Kavanaugh, Justice Ginsburg cited *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, which she called “the pathmarking decision [that] . . . bears a notable resemblance to the cases before us,” for the proposition that the Court “accord[s] dispositive effect to an agency's reasonable interpretation of ambiguous statutory language.” She also was part of the five-Justice majority in *Kisor v. Wilkie* (2019), which affirmed the continued application of the *Auer* doctrine, which generally instructs courts to defer to agencies' reasonable construction of ambiguous regulatory language. That said, Justice Ginsburg was part of a five-four majority in several cases that invalidated specific executive branch actions as violating general administrative law principles. These included *Department of Commerce v. New York* (2019), rejecting the Commerce Secretary's attempt to include a citizenship question on the 2020 census, and *Department of Homeland Security (DHS) v. Regents of the University of California* (2020), ruling that DHS acted improperly when it rescinded the Deferred Action for Childhood Arrivals initiative.

- **Affirmative Action:** The High Court considered several significant cases involving race-conscious policies during Justice Ginsburg’s tenure. In these cases, Justice Ginsburg authored or joined opinions that argued that the government has wide latitude to address historical and systemic discrimination against racial minorities. For example, she dissented from the Court’s ruling in *Adarand Constructors, Inc. v. Peña* (1995), which held that even “benign” race-based classifications by the federal government intended to help disadvantaged groups are subject to “strict scrutiny.” In several closely divided cases, Justice Ginsburg joined majorities in upholding race-conscious school admission policies, such as those at issue in *Grutter v. Bollinger* (2003) and *Fisher v. University of Texas at Austin* (2016), and dissented in another case, *Gratz v. Bollinger* (2003), where a bare majority held a different race-conscious college admission policy invalid. Justice Ginsburg was also one of four dissenting Justices in *Parents Involved in Community Schools v. Seattle School District No. 1* (2007), where a fractured Court invalidated two school districts’ assignment plans, which sought to improve racial diversity by considering a student’s race as a factor in determining which school the child could attend.
- **Criminal Law & Procedure:** Criminal law and procedure is an area where Supreme Court alignments are not divided neatly between the Court’s more conservative and liberal wings, and Justice Ginsburg was an important vote in many such cases. In *Mont v. United States* (2019), for example, Justice Ginsburg authored an opinion joined by four members of the Court’s conservative wing, holding that a criminal defendant’s period of supervised release following incarceration may be tolled if the defendant is later charged with another crime and placed in pretrial detention. She authored several of the Court’s opinions in recent decades on criminal sentencing matters (e.g., *Oregon v. Ice* (2009); *Kimbrough v. United States* (2007); *Cunningham v. California* (2007); *Ring v. Arizona* (2002)). And in *United States v. Booker* (2005), Justice Ginsburg cast deciding votes for the case’s controlling opinions that held that the federal sentencing guidelines’ mandatory enhancements were unconstitutional and the remaining guidelines were thereby rendered “effectively advisory.” On Fourth Amendment matters, Justice Ginsburg frequently joined opinions constraining the government’s ability to conduct warrantless searches, including controlling or concurring opinions that recognized technology-assisted surveillance as posing unique threats to privacy expectations (e.g., *Carpenter v. United States* (2018); *United States v. Jones* (2012); *Kyllo v. United States* (2001)). Justice Ginsburg also joined Court opinions prohibiting the imposition of capital punishment against juvenile offenders (*Roper v. Simmons* (2005)) and the cognitively disabled (*Atkins v. Virginia* (2002)), as well as sentences of life imprisonment without parole for juveniles (*Peugh v. United States* (2013)). She was also one of three Justices who, in a dissenting opinion in *Glossip v. Gross* (2015), argued that the death penalty was incompatible with the Eighth Amendment’s prohibition on cruel and unusual punishment.
- **Elections & Voting Rights:** Justice Ginsburg also weighed in on issues related to the integrity of elections and protection of voting rights, frequently in dissent. She dissented from the Court’s per curiam decision in *Bush v. Gore* (2000), which found that “the use of standardless manual recounts” in Florida during the contested 2000 presidential election violated the Equal Protection Clause. Justice Ginsburg acknowledged that the Court’s construction of Florida law was “reasonable,” but asserted that the Court should have deferred to the Florida Supreme Court’s interpretation of its own state’s law and allowed the recount to proceed. In another landmark case, *Citizens United v. Federal Election Commission* (2010), a five-Justice majority held that a statute prohibiting independent election expenditures by corporations and unions violated the First Amendment’s free

speech protections. Justice Ginsburg joined [Justice Stevens's opinion](#) dissenting from this holding, arguing that it “threatens to undermine the integrity of elected institutions across the Nation.” With regard to voting rights, in [Shelby County v. Holder \(2013\)](#), the Court struck down a preclearance provision of the Voting Rights Act of 1965 as exceeding Congress's authority to enforce the Fourteenth and Fifteenth Amendments. In her dissent, Justice Ginsburg surmised that “throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.” In addition to her dissents, in [Buckley v. American Constitutional Law Foundation \(1999\)](#) Justice Ginsburg authored a majority opinion striking down certain Colorado regulations related to ballot initiatives as violating the First Amendment because they were “excessively restrictive of political speech.” More recently in [Arizona State Legislature v. Arizona Independent Redistricting Commission \(2015\)](#), Justice Ginsburg authored a five-four opinion that held it was constitutionally permissible for Arizona voters, through a ballot initiative, to transfer redistricting authority from the state legislature to an independent commission.

- **Environmental Law:** Justice Ginsburg authored or joined several consequential opinions in environmental law cases during her time on the High Court. Two of her major opinions concerned the justiciability of environmental claims. In [Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc. \(2000\)](#), she wrote that constitutional standing requirements were satisfied in a suit alleging that the defendant's discharge of pollutants injured plaintiffs' “recreational, aesthetic, and economic interests.” And in [American Electric Power Co. v. Connecticut \(2011\)](#), Justice Ginsburg wrote for a unanimous court that the Clean Air Act foreclosed any federal common law public nuisance claims that plaintiffs might otherwise raise against carbon monoxide-emitting power plants. Justice Ginsburg was also involved in several cases that more closely divided the Court. In [EPA v. EME Homer City Generation, L.P. \(2014\)](#), Justice Ginsburg authored an opinion upholding an EPA rule under the Clean Air Act related to air pollution crossing state lines. In the landmark environmental case [Massachusetts v. EPA \(2007\)](#), Justice Ginsburg was part of a five-Justice majority ruling that greenhouse gases fit within the Clean Air Act's definition of “air pollutant,” and that states could challenge the EPA's failure to regulate those emissions adequately. Justice Ginsburg joined the Court's more liberal wing to dissent in [Michigan v. EPA \(2015\)](#), which held that the EPA unreasonably deemed cost irrelevant with respect to certain regulations of power plants. In the Court's fractured decisions concerning “waters of the United States” governed by the Clean Water Act, Justice Ginsburg was part of a four-Justice dissenting bloc that argued that the term should be interpreted broadly to permit regulating agencies to address pollution not only affecting navigable waters, but also wetlands adjacent to those waters' tributaries ([Rapanos v. United States \(2006\)](#); [Solid Waste Agency of Northern Cook County v. U.S. Corps of Army Engineers \(2001\)](#)).
- **Freedom of Religion:** Justice Ginsburg has, in some cases, expressed concern about protecting religious freedoms, particularly those of religious minorities. In 1984, as a judge on the D.C. Circuit, she was joined by her colleague, then-Judge Scalia, in [arguing](#) that the appellate court should have reconsidered the claim of an Air Force officer who wanted to wear a yarmulke on duty, calling the military's decision not to accommodate his religious faith “callous.” In her dissenting opinion in the fractured case of [American Legion v. American Humanist Ass'n \(2019\)](#), she argued that a state violated the Establishment Clause by displaying a large Latin cross as a war memorial. She rejected the state's claims that the cross could be seen as a secular symbol, [observing](#) it had never been “perceived as an appropriate headstone or memorial for Jewish soldiers and others

who did not adhere to Christianity.” At the same time, Justice Ginsburg has [argued](#) against “religion-based opt-outs” from generally applicable laws. Dissenting from the Court’s five-four opinion in *Burwell v. Hobby Lobby Stores, Inc.* (2014), she would have denied a religious accommodation for a corporation that objected to having to provide health-insurance coverage for certain methods of contraception—also the subject of Justice Ginsburg’s last dissent in *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania* (2020). She also rejected religious objections to complying with nondiscrimination policies—a [recurring issue](#) before the Supreme Court—in her majority five-four opinion in *Christian Legal Society v. Martinez* (2010) and her dissent in *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (2018).

- **National Security:** The Court has considered numerous cases implicating national security matters in recent decades. In these cases, many of which closely split the Court, Justice Ginsburg aligned with those Justices who were less deferential to judgments of the political branches, and in particular the executive branch. Recently, in *Trump v. Hawaii* (2018), a five-Justice majority afforded broad deference to presidential security determinations in upholding the Trump Administration’s “Travel Ban” on certain foreign travelers from Muslim-majority countries. Justice Ginsburg, however, [joined a dissent](#) that argued the action was unconstitutionally motivated by religious animus. Justice Ginsburg also dissented from Court opinions that effectively foreclosed various lawsuits related to counterterrorism policies pursued in the aftermath of the September 11, 2001 terrorist attacks (*Ziglar v. Abbasi* (2017); *Clapper v. Amnesty International USA* (2013); *Ashcroft v. Iqbal* (2009)). With regard to the President’s war powers, Justice Ginsburg was part of a majority of Justices who questioned the Executive’s ability to [detain indefinitely](#) “enemy combatants” on U.S. soil without review; they also ruled that [military tribunals](#) established by presidential order to try enemy belligerents were invalid because they failed to afford baseline statutory protections. Justice Ginsburg also joined the Court’s opinion in *Boumediene v. Bush* (2008), which held that the constitutional writ of habeas corpus extended to foreign nationals held as enemy belligerents at the Guantanamo Bay detention facility.
- **Powers of Congress:** Arguably one of the most notable aspects of Justice Ginsburg’s jurisprudence was her opposition to the trajectory of the Court’s opinions during the Rehnquist and Roberts eras that served to limit the reach of congressional power. Justice Ginsburg joined dissents in two key decisions of the Rehnquist Court that established parameters on the exercise of Congress’s commerce power: *United States v. Lopez* (1995) and *United States v. Morrison* (2000). In a partial dissent in *National Federation of Independent Business v. Sebelius* (2012), moreover, she expounded on her views regarding the broad scope of Congress’s power to regulate commerce, urging judicial deference to congressional judgments “in the economic and social welfare realm.” She likewise dissented in two major decisions that limited Congress’s powers under the Reconstruction-era amendments, *City of Boerne v. Flores* (1997) and *Shelby County v. Holder* (2013), writing in *Shelby County* that Congress’s findings regarding the appropriateness of voting rights legislation were entitled to “substantial deference” and should prompt “unstinting approbation” by the Court. Justice Ginsburg also joined or authored dissents to Court opinions that barred congressional directives to state executive and legislative officials (*Murphy v. NCAA* (2018); *Printz v. United States* (1997)) and limited Congress’s power to subject state governments to monetary damages remedies (e.g., *Seminole Tribe of Florida v. Florida* (1996); *Alden v. Maine* (1999)). On Congress’s powers to limit the President’s ability to fire subordinates, Justice Ginsburg dissented in several narrowly divided cases where the Court recognized constitutional limits to

Congress's ability to shield certain executive officials from at-will removal by the President or a superior officer (e.g., *Seila Law LLC v. Consumer Financial Protection Bureau* (2020); *Lucia v. Securities & Exchange Commission* (2018); *Free Enterprise Fund v. Public Co. Accounting Oversight Board* (2010)). A notable exception to Justice Ginsburg's deference to Congress involved laws she believed impeded upon the constitutional rights of individuals. For example, in the immigration field—where congressional power is substantial—Justice Ginsburg joined the majority opinion in *Zadvydas v. Davis* (2001), where a closely divided Court recognized that substantive due process considerations prevent immigration authorities from indefinitely detaining a deportable alien. She also joined four other Justices in *Sessions v. Dimaya* (2018), concluding that a term in a statutory provision for alien removal was unconstitutionally vague.

- **Second Amendment:** Although Justice Ginsburg was not a prominent author of decisions involving the Second Amendment, she was part of a four-Justice bloc that dissented from the Court's ruling in *District of Columbia v. Heller* (2008), which held that the Second Amendment protects an individual (as opposed to a collective) right to bear and keep arms. She also joined the dissenting Justices two years later in *McDonald v. City of Chicago* (2010), where the Court held that the Second Amendment applied to state and local governments through the Fourteenth Amendment. Justice Ginsburg later joined other Justices in declining opportunities to revisit *Heller*'s application, including in the denial of ten certiorari petitions this past term that called for the Court to review (and possibly invalidate) challenged state concealed-carry laws, handgun permit requirements, and so-called "assault weapons" and handgun restrictions.
- **Sex & Gender:** As noted, three years after joining the Court, Justice Ginsburg authored the majority opinion in *United States v. Virginia* (1996), ruling that Virginia Military Institute violated the Equal Protection Clause by refusing to admit women. Over a decade later, Justice Ginsburg dissented from the Court's ruling in *Ledbetter v. Goodyear Tire & Rubber Co.* (2007), which rejected Ledbetter's Title VII employment discrimination claim. Justice Ginsburg argued that Ledbetter proved she received lower pay because of her sex, and called on Congress to correct the majority opinion's "parsimonious reading" of Title VII. Congress passed the *Lilly Ledbetter Fair Pay Act* in 2009, seeking to reverse the majority's opinion. She was part of five-Justice majorities in *United States v. Windsor* (2013) and *Obergefell v. Hodges* (2015) that struck down federal and state laws barring recognition of same-sex marriage. And this past term, in *Bostock v. Clayton County* (2020), she joined the majority in construing Title VII's prohibition on sex discrimination to cover discrimination because of sexual orientation or gender identity.

Nomination & Confirmation Process

As Justice Ginsburg's predecessor Justice White once noted, "every time a new justice comes to the Supreme Court, it's a different court." Article II of the Constitution gives the President the authority to appoint judges to the Supreme Court with the Senate's advice and consent. Prior to the unexpected death of Justice Antonin Scalia in February 2016—creating a vacancy filled by Justice Neil Gorsuch in April 2017—the last such vacancy during a presidential election year occurred in 1968, when Chief Justice Earl Warren submitted a resignation letter less than six months before the general election. Chief Justice Warren's seat was not filled until the following year. The last time a Supreme Court vacancy arose in an election year and the Senate approved a new appointee to the Court in that same year was 1932, when the seat vacated by the retirement of Justice Oliver Wendell Holmes, Jr. in January of that year was filled by Justice Benjamin Cardozo two months later.

On September 9, 2020, President Trump released a [list of possible Supreme Court nominees](#), the fourth such list he has issued since his presidential campaign in 2016. In a statement shortly after Justice Ginsburg’s passing, [Senate Majority Leader, Mitch McConnell](#), stated that “President Trump’s nominee will receive a vote on the floor of the United States Senate.” President Trump has indicated that the nominee will likely be a [woman](#).

As with [past vacancies](#) on the High Court, CRS will be preparing products examining the vacancy created by Justice Ginsburg’s passing and any nominee to fill her seat on the Court. CRS has also published products reviewing [procedural issues](#) caused by vacancies and products related to congressional hearings on judicial nominees, including the [appointment process](#) and the [questioning of nominees](#).

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