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GENDER BIAS AND THE SUPREME COURT OF THE UNITED STATES

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By

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## ABSTRACT

Historically, women have been underrepresented on the Supreme Court; the first woman sworn in was Justice Sandra Day O'Connor in 1981 and only three other women have joined since. This thesis argues that this underrepresentation has led to a bias in Supreme Court decisions regarding women's issues. This paper will study the role of gender on the Court through a case study of five Supreme Court cases dealing with different women's issues: contraception, abortion, sexual harassment, pay equity, and Social Security benefits. Each case will be examined based on the majority and dissenting opinions, looking at the ideologies of the justices and the gender of the justices. The opinions will be analyzed based on the arguments, language, and experiences of justices in each of these cases. This thesis seeks to understand the implications of gender on the Court, particularly in dealing with cases involving women's issues.

Word count: 146



## **Introduction**

The second female justice on the Supreme Court of the United States, Justice Ruth Bader Ginsburg, has said, “People ask me sometimes, when — when do you think it will be enough? When will there be enough women on the court? And my answer is when there are nine (Ginsburg, 2015).” Throughout history, the makeup of the Supreme Court of the United States has been all male until very recently. The first woman to have been appointed to the Supreme Court was Justice Sandra Day O’Connor in 1981. Since Justice O’Connor’s appointment three more women have been nominated and sworn into the Supreme Court. Women have only been on the Court for the last 33 years and only four out of a total 112 Supreme Court Justices have been women. The perspective of women on the Supreme Court has the potential to change and sway decisions made by the Court. Women are more likely to bring new and more informed ideas about women’s issues to the Supreme Court. Previously, only male Justices could address decisions regarding women’s rights. This has the potential to create bias on the Court regarding certain issues considering that only half of the United States population is being represented. These ideas address the importance of descriptive representation versus substantive representation on the Supreme Court. Descriptive representation is the idea that government officials should be representative of their constituencies based on descriptive qualities such as race, gender, religion and class among other things. Substantive representation is the idea that government officials do not need to look like the populous in order to represent their ideals and best interests. Different types of representation can potentially affect whether decisions are representative of the people of the United States. This can also call into question whether equal justice can be found on a Court that only represents part of the population.

The introduction of women to the Supreme Court creates the opportunity to reveal a potential bias in the Supreme Court and their decisions. The question becomes: Are Supreme Court decisions affected by gender bias? My argument is that the under-representation of women on the Supreme Court leads to a bias in rulings made by the Court regarding women's issues. This thesis argues that a majority male court has led to a bias in the representation of women in cases brought to the Supreme Court. Specifically, cases involving women and women's issues will be most affected by this bias. A Court that does not have female representation cannot adequately represent women's issues without bias. The presence of women on the Supreme Court will serve to highlight bias in cases involving women's issues. Through an analysis of Supreme Court cases involving women's issues, this thesis seeks to find bias among decisions written by male justices. The opinions written by female justices in these decisions will highlight the bias that exists on the Court. While the majority decisions may not always reflect changes that women bring to the Court, dissenting opinions will reveal how women view the issue in comparison to men. These dissenting opinions can also show how a lack of representation on the Court might be affecting justice for women in Supreme Court decisions. For example, in the 2007 Supreme Court Case *Ledbetter v. Goodyear Tire and Rubber Company*, Justice Ruth Bader Ginsburg delivered a dissenting opinion that highlighted the injustice of the majority opinion, which was an all male opinion, regarding pay equity for women.

While ideology does play a role in decisions made on cases involving women's issues, the presence of females and gender plays a role as well. I believe that while Justice Sandra Day O'Connor is a conservative female, she will, despite her ideology, vote in favor of women's issues at least part of the time. This will reveal that women do bring a differing perspective on

women's issues that men cannot. In an interview on MSNBC, Justice Ruth Bader Ginsburg (2015) discussed women's rights and gender equality, "Our goal in the '70s was to end the 'closed-door' era. There were so many things that were off limits to women -- policing, firefighting, mining, piloting planes. All those barriers are gone...What's left, what's still with us, and harder to deal with is what I call unconscious bias." Here Justice Ginsburg notes what I am trying to uncover within Supreme Court decisions, an unconscious gender bias that still exists today. Individual experiences and perception will bias the opinions and actions of people. I think this will be prevalent on the Court. Male justices cannot escape their experiences and perceptions to understand what it is like to be a woman. As a result, they will necessarily have a limited scope of understanding when it comes to gender issues. I believe that women on the Court will serve to provide this perspective on the Court and reveal the unconscious bias of the male justices in Supreme Court decisions. In the course of this thesis, I will be arguing that gender bias plays a role on the Supreme Court in cases involving women's issues. This argument will be proved through analyzing the content of decisions made by the Supreme Court on gender issues.

## **Literature Review**

The role and impact of women in the government has been studied extensively across the three branches of government. Various studies have been conducted on the impact of women in Congress and as appointees for both the executive and judicial branches. Women have been shown to impact policies both by bringing women's issues to the agenda and by voting. Research shows that women play a major role in advocating for and representing women's

interests, “issues that are particularly salient to women because they seek to achieve equality for women; they address women’s special needs, such as women’s health concerns or child care; or they confront issues with which women have traditionally been concerned in their role as caregivers, such as education or the protection of children (Swers, 2002).” These findings can speak to the impact women may have in the judiciary. Other studies reveal that women judges do in fact bring different experiences to the court system. These questions and research are important to understanding how representation works in the United States and how it can be improved.

The literature suggests that gender bias manifests in the differing perspectives of the male and female justices and particularly the lack of perspective among male judges. This is visible in the behavioral differences of male and female justices and how the presence of female judges influence male judges. The research also examines whether women in the legislature and judiciary are more likely to pursue women’s issues than their male counterparts. This demonstrates how gender bias is present in the government and particularly the court system. This group of literature will provide a strong background for my research and outlines how gender bias might affect the rulings of the Supreme Court regarding women’s issues.

The introduction of female justices has revealed the potential for gender bias in Supreme Court decisions. In her dissent in *Ledbetter v. Goodyear Tire and Rubber Company*, Justice Ruth Bader Ginsburg highlighted what she believed to be a gender bias of the 5-4 decision in this case. Justice Ginsburg dissented the Court’s decision and described how it has disabled women in future sex-discrimination cases, “Indeed initially you may not know the men are receiving more for substantially similar work. . . . If you sue only when the pay disparity becomes steady and large enough to enable you to mount a winnable case, you will be cut off at the Court’s

threshold for suing too late (Guinier, 2013).” The Court in effect gave women no power to fight pay discrimination in the workplace due to a statute of limitations. Ginsburg points out that it is impossible to mount a winnable case without having a steady history of discrimination to prove it. “As reframed by Justice Ginsburg, Ledbetter’s story was not about a negligent plaintiff who waited an unconscionably long time to sue; it was about an ordinary woman struggling to comprehend and eventually document the pay disparities in her all-male work environment (Guinier, 2013).” Guinier (2013) argued that this dissent reflected the experience and perspective of women in male-dominated workplaces that the Court is missing. Women can better understand the experiences and concerns of women in regards to gender equality. Ginsburg (2001) argued that the judicial system benefits from the diversity of participants and the background and experience of women.

Gender bias is prevalent in some of the opinions made by male justices on the Supreme Court. Hernandez (2011) finds that the perspectives and experiences of justices matter in case law decisions. These decisions “reflect the experiences of the justices of the Court in an almost startlingly way (Hernandez, 2011).” Hernandez (2011) discusses Justice Antonin Scalia’s dissenting opinion in *United States v. Virginia* and his lack of perspective about sex discrimination in education. In regards to the idea of gender inequality Justice Scalia is quoted, “[i]t is hard to consider women a 'discrete and insular minority' unable to employ the 'political processes ordinarily to be relied upon,' when they constitute a majority of the electorate. And the suggestion that they are incapable of exerting that political power smacks of the same paternalism that the Court so roundly condemns (Hernandez, 2011).” Hernandez (2011) finds that Justice Scalia gave no consideration to the opportunities women lost and was not persuaded by the constitutional rights of women. Hernandez (2011) contrasts this with Justice Ruth Bader

Ginsburg's majority opinion; she argues that Justice Ginsburg's experience and awareness of the obstacles facing women is an important perspective that male justices cannot provide. This analysis is also done for the *Ledbetter v. Goodyear Tire and Rubber Company* case, where Justice Samuel Alito wrote the majority opinion and Justice Ginsburg wrote the dissent.

Hernandez (2011) argues that like Justice Scalia, Justice Alito has never had to face the loss of an opportunity based on gender discrimination. A lack of perspective inhibits the Court and as a result the constitutional protections of underrepresented groups.

Male judges do not experience the same discrimination as female judges and therefore lack perspective on those issues and can be blind to the discrimination. Martin, Reynolds, and Keith (2002) find that female judges and attorneys have a greater understanding than their male counterparts of gender relations in legal institutions due to their experiences as women. These findings support the idea that "experiences associated with a subordinated or marginal standpoint give those located in it knowledge of 'how the world works' that those in more privileged positions lack (Martin, Reynolds, & Keith, 2002)." Women, as the unprivileged group, can better identify and understand the discrimination they face. Male justices are therefore at a disadvantage in understanding sex discrimination and can advance ideas in decisions that lack this perspective. Behuniak (2003) finds that narrow perspectives of race, gender, and class on the Supreme Court has developed a precedence of social constructs in areas of law involving privacy rights, race restrictions, and economic regulations. "There is, therefore, a wide array of constitutional law cases where social facts drawn from narrow worldviews can inject race, gender, and class biases into judicial decision making (Behuniak, 2003)." These findings indicate that gender bias has an influence on Supreme Court decisions through social constructs

created by a lack of perspective on the Supreme Court. These gendered social constructs are potentially harmful to the treatment of women in Supreme Court cases.

As gender discrimination becomes more visible, people become more aware of the role the Supreme Court plays in these issues. The history of the Supreme Court and gender discrimination reveals that the decisions of the Court do not always coincide with the opinions of the rest of the country. Lens (2003) studies the history of gender discrimination in the Supreme Court and finds that while the Court was willing to address gender discrimination in various aspects of life, it was also hesitant to push too far. “The hard cases at either end of the equality spectrum, when women asked to enter the roughest domains of men (male prisons and the draft) or asked that their most “womanly” characteristic, pregnancy, be accommodated, proved difficult for the Court (Lens, 2003).” Lens (2003) finds that the Court, in maintaining the differences between men and women in these cases, was careful to emphasize that they were not treating men and women differently; however, their reasoning in these cases became less clear and consistent. The gender stereotyping was more covert and the decisions were not aligned with the opinions of the public (Lens, 2003). The introduction of women, like Justice Ginsburg, to the Court can better represent issues that affect women by representing a woman's perspective in decisions.

Many studies look into the role women play on the Supreme Court and whether they really make a difference, in perspective and decision-making. Behuniak-Long (1992) finds that while Justice Sandra Day O’Connor may not offer the Court a feminist perspective, she does add a feminine perspective. Women bring a different way of thinking to the courts; feminine jurisprudence works to apply general principles to fit the facts, looks at issues in terms of responsibilities rather than rights and as a result creates new ways of resolving disputes

(Behuniak-Long, 1992). Behuniak-Long (1992) argues that feminine jurisprudence differs because it values the concrete over the abstract and responsibilities over rights. This leads to innovation in the way cases are resolved. This research revealed these aspects of feminine jurisprudence in the decisions made by Justice O'Connor. This work reveals that women do bring a difference of perspective to the Court and apply this perspective to decisions made in cases. The difference female judges bring to the Court is not necessarily ideological: it does not necessarily have to be feminist, but can be strictly feminine.

Women have distinct backgrounds and experiences and can use their unique perspectives in advancing women's issues in both politics and the courts. Dolan (2001) argues that legislative scholars have found that women in politics bring different perspectives and are more aware and receptive than their male counterparts to policies and issues that affect women. This research appeals to my argument that women justices can better represent issues concerning women on the Supreme Court. Much of the research of the effects of gender on federal courts has focused on whether female judges decide cases differently and whether the presence of female judges affects the behavior of male judges (Boyd, Epstein, & Martin, 2010). Boyd, Epstein, and Martin (2010) find that female judges approach sex discrimination cases differently than male judges and that male judges are more likely to vote differently when a female judge is sitting on the panel. This model suggests that in issues concerning women, specifically sex discrimination, female judges do make a difference in the outcomes of the case.

Studies show that women in politics are more likely to advance women's issues in policy and legislation. The idea that women will pursue women's interests more than men is central to my argument. Women have a distinct interest in and are sensitive to women's issues because of their experiences as women. Swers (2002) finds that beyond the role of representing

constituencies, female legislators are committed to pursuing policies to benefit women, children, and families. This phenomenon crosses ideological lines as well, moderate Republican female legislators are found to be more likely than their male colleagues to pursue women's interests (Swers, 2002). This could also relate to women in the judiciary and their willingness to advance cases regarding women's interests. MacDonald and O'Brien (2011) find that female legislators push legislation on women's issues more often than their male counterparts. Women offer more representation on women's issues and this increases as the number of women in Congress increases (MacDonald & O'Brien, 2011).

Studies have shown similar findings in the judiciary. Women judges, regardless of their ideology, are more likely than men to be the strongest supporters of women's rights claims regarding sex discrimination cases (Palmer, 2001). Palmer (2001) finds that one of the best predictors of a decision in favor of women is the presence of a female judge. Women tend to prioritize and advance women's issues like sex discrimination, more than men do. Peresie (2005) finds a similar occurrence in sexual harassment cases. The gender of the judge had a more significant impact on the decision in these cases than the ideology of the president who appointed the judge (Peresie, 2005). Peresie also found that the presence of the female judge increased the likelihood of male judges deciding in favor of the women, regardless of ideology. Women judges do matter when deciding cases on sex discrimination and sexual harassment. The study suggests that there is strong evidence that female justices bring new experiences, and backgrounds to the Court and that the Court may be lacking in perspective without the contributions of people with diverse backgrounds.

The literature reveals that women play an influential role in pursuing women's interests and beyond that, do a better job of advancing women's interests than their male counterparts.

Much of the literature is consistent in the affects women have in government and the justice system; however, the degrees of influence vary. The work is evolving as more women are introduced into these fields and the effects become clearer. However, none of this scholarship has examined the Supreme Court as more women have been introduced.

This paper argues that a majority male court has led to a bias in the representation of women in cases brought to the Supreme Court. Specifically, cases involving women and women's issues will be most affected by this bias. A Court that does not have female representation cannot adequately represent women's issues without bias. The presence of women on the Supreme Court will make for more equitable and just decisions regarding women's issues. The decisions of women on the Supreme Court will also highlight the bias that exists on the Court. This research will contribute to and further this scholarship by looking at the evolution of female justices on the Supreme Court and analyzing how women's issues are discussed in cases from different periods of the Court with varying amounts of female justices. This research will examine not only how the presence of a female justice affects the Court and its decisions, but how the increase of female justices has changed the dynamic of the Court in regards to women's issues.

## **Methodology**

This paper examines the role of women on the Supreme Court. Specifically, whether female justices provide experiences and perspectives apart from male justices. I want to understand if these differences exists and whether they play a role in the decisions made by the Supreme Court regarding cases on women's issues. In order to explore whether gender bias

plays a role in the Supreme Court, I will look at issues that can be considered women's issues and examine how those issues are being handled in the Supreme Court based on the presence of females on the Court. My cause will be gender composition on the Court and my effect will be bias in Supreme Court rulings. I will do a case study in which I examine various Supreme Court decisions regarding women's issues during different periods of the Supreme Court. I will measure gender based on the presence of females on the Supreme Court during different periods. In total, I will look at six different periods of the Supreme Court, these periods will have various combinations of male and female justices. This allows me to look at the Supreme Court during the only periods when the gender composition was different and compare them. I think this will reveal that as women have joined the Court they were able to better address women's issues. I will begin with a decision made by an all male court and examine the decision in comparison to various stages of female presence on the court. Second, I will look at a Supreme Court decision with an all male Court and one conservative female, Justice Sandra Day O'Connor. Third, I will examine the Supreme Court with one conservative female, Justice Sandra Day O'Connor, and one liberal female, Justice Ruth Bader Ginsburg. Fourth, I will look at the Court with only one liberal female, Justice Ruth Bader Ginsburg. Fifth, I will examine the Court with the addition of another liberal female, Justice Sonia Sotomayor. Lastly, I will examine the Supreme Court with the addition of another liberal female, Justice Elena Kagan, which established three female justices on the Supreme Court for the first time in history.

In order to determine whether a case involves a women's issue, I will use Michele Swers (2002) definition of women's interests, "issues that are particularly salient to women because they seek to achieve equality for women; they address women's special needs, such as women's health concerns or child care; or they confront issues with which women have traditionally been

concerned in their role as caregivers, such as education or the protection of children.” For each period, I looked for cases involving these type of issues. For the all male period, I chose the case *Califano v. Westcott*, decided on June 25, 1979, two years before Justice Sandra Day O’Connor joined the Court. This case involves equal protection for men and women regarding section 407 of the Social Security Act which provides benefits to dependent children from parents that have become unemployed. The act however left out the unemployment of a mother to which the Court argued was a form of discrimination. This can be described as a women’s issue because it directly involves the equality of women in comparison to men within the Social Security Act. For the second period, with the addition of Sandra Day O’Connor, a conservative female, I chose the case *Bray v. Alexandria Women’s Health Clinic*, decided on January 13, 1993. This case dealt with the Reconstruction Civil Rights Acts involving a woman's right to abortion and the protection of that right. This case can be described as a women’s issue because it addresses women’s equality in the equal protection of the law and addresses women’s special needs regarding health care. For the third period, with the presence of both conservative Justice Sandra Day O’Connor and liberal Justice Ruth Bader Ginsburg on the Court, I chose the case *Burlington Industries, Inc. v. Ellerth*, decided on June 26, 1998. This case involved sexual harassment in the workplace and the Civil Rights Acts of 1964, particularly Title VII. This can be defined as a women’s issue because it deals with equality for women in the workplace and their right to not have to endure harassment or hostile working conditions. For the fourth period, with the presence of Justice Ruth Bader Ginsburg as the sole female on the Court, I chose the case *Ledbetter v. Goodyear Tire & Rubber Co.*, decided on May 29, 2007. This case involves pay equity between men and women under the Civil Rights Act of 1964, particularly Title VII. This case can be defined as a women’s issue because it involves women’s equality in the form of

equal pay for equal work. Due to the short period of time between the appointment of Justice Sonia Sotomayor in 2009 and Justice Elena Kagan in 2010, only 12 months, there were no cases directly involving women's issues for the period of Justice Ruth Bader Ginsburg and Justice Sonia Sotomayor. For this reason, there will not be a case for the fifth period of the Supreme Court outlined above. For the sixth period, with the presence of Justice Ruth Bader Ginsburg, Justice Sonia Sotomayor, and Justice Elena Kagan, I chose the case *Burwell v. Hobby Lobby Stores, Inc.*, decided on June 30, 2014. This case involves the health care coverage for contraception for women in the workplace and the Religious Freedom Restoration Act of 1993. This case can be defined as a women's issues because it addresses women's special needs in the form of health care. These cases involve a wide range of significant women's issues; Social Security, abortion, harassment, pay equity, and contraception. The chart below outlines how each justice voted in each case. These cases can give an idea of the existence of differing perspectives on the Supreme Court due to the presence of women as well as reveal a potential bias.

(Insert Table 1 about here)

Through all these periods of varied female presence on the Supreme Court, I will examine the decisions made on these cases involving women's issues and compare them. I will compare them based on both the presence of the female justices and the various ideologies of those justices. I will look into the role of ideology and gender in decisions made by the Supreme Court on women's issues. I can compare the decisions and evolution of women's issues through the various periods of female influence. I will analyze how these issues are discussed in each

decision and how the presence of females of differing ideologies changes the way they are discussed in decisions. I will look at the decisions themselves as well as dissenting opinions to get an idea of whether or not bias plays a role in Supreme Court decisions. I will look at the language of the opinions and compare the arguments of the majority opinion and dissenting opinion. I think the contrast between the two can serve to reveal bias in the opinions. As the presence of female justices increase, decisions will differ more as the female justices express their opinions in both the majority decisions and dissenting opinions. If the opinions differ significantly in these cases, it will reveal that bias does play a role in the Supreme Court. This finding would inspire many more questions regarding representation on the Supreme Court and in politics in general.

## **Results**

### *Califano v. Westcott (1979)*

For the first period of the Supreme Court, as outlined above, an all male Court decided the case *Califano v. Westcott* which deals with a provision in the Social Security Act that provides benefits to dependent children when the father becomes unemployed. The provision is Section 407 of the Social Security Act. Two families would have qualified for these benefits had the provision been gender neutral; however, it is specified that the benefits only apply to a father. In both families, the females provided the primary income before losing their jobs. As a result, the mothers did not qualify for the benefits because they were not male and the fathers did not have sufficient employment history to be considered unemployed. The United States District

Court for the District of Massachusetts found Section 407 to be unconstitutional because it discriminates based only on sex. Rather than nullify the case, the court extended coverage to all families where either parent is unemployed, with the same qualifications and benefits for both sexes. The case came to the Supreme Court on the basis of two appeals, one from the Secretary of HEW and one from the Commissioner of the DPW. The Secretary appealed the ruling that Section 407 was unconstitutional, while the Commissioner appealed on the basis of changing the language of the provision. The Commissioner filed a motion with the District Court to change the language from either parent to primary breadwinner as to be gender neutral but more cost efficient. The motion was denied on the basis that any changes to the order should be through Congressional action.

Justice Blackmun, joined by Justice Marshall, Brennan, Stevens, and White, delivered the majority opinion in *Califano v. Westcott*. In response to the Secretary's argument that the provision is "gender-based" not "gender-biased", Justice Blackmun argues, "For mothers who are the primary providers for their families, and who are unemployed, [Section] 407 is obviously gender-biased, for it deprives them and their families of benefits solely on the basis of their sex." He goes on to argue that Section 407 discriminates against families in which females are the primary wage earners. The Secretary also argues 407's constitutionality by claiming that "it is substantially related to achievement of an important governmental objective." These objectives being to provide for children deprived of basic necessities due to the unemployment of a parent and to prevent the desertion of a parent. Justice Blackmun denies this claim providing evidence that Section 407 was an attempt to cut spending by preventing families with employed fathers from receiving benefits from unemployed mothers. Justice Blackmun argued, "Apparently, Congress was not similarly concerned about States making benefits available where the father

was out of work, but the mother remained fully employed. From all that appears, Congress, with an image of the ‘traditional family’ in mind, simply assumed that the father would be the family breadwinner, and that the mother’s employment role, if any, would be secondary.” Justice Blackmun directly identifies the preconceived notions of gender in this argument in order to strike down the idea that the gender distinction works to achieve a governmental objective, “We conclude that the gender classification of [Section] 407 is not substantially related to the attainment of any important and valid statutory goals. It is rather, part of the ‘baggage of sexual stereotypes,’...that presumes the father has the ‘primary responsibility to provide a home and its essentials,’...while the mother is the ‘center of home and family life.’”

The Commissioner’s appeal is more technical and discusses the Court’s remedy for the statute. Since it does not deal with gender discrimination or bias, for the purposes of this paper, it will be left out. The dissenting opinion written by Justice Powell, joined by Chief Justice Stewart and Justice Rehnquist, dissenting in part and concurring in part. The dissenting opinion agrees “that this statute constitutes impermissible gender-based discrimination;” however, it disagrees with the chosen remedy for the problem. This all male court did not deny the existence of gender bias and discrimination in Section 407 of the Social Security Act and therefore reveals at least one case in which a lack of female presence on the Court did not result in a biased opinion on the basis of gender. This also reveals that for this particular issue, ideology did not play a role in gender bias. This case provides no obvious evidence of gender or ideology based biases on the Supreme Court regarding women’s issues. However, the case is unique in the sense that it is a fairly clear cut issue with few ambiguities. *Califano v. Westcott* is the shortest of the five cases that I studied and one of the more straightforward issues. The language of the section is obviously discriminatory to women in that mothers are purposefully left out and

therefore the discrimination is harder to deny. In addition, the provision is dealing with Social Security and benefits that would be used to aid children. Extending benefits to women would ensure that needy children are getting the benefits they need. This point is prevalent in the language of the case and may point to the lack of bias in this particular case. As a result, this case may not give the best indication of gender bias or discrimination on the Supreme Court.

*Bray v. Alexandria Women's Health Clinic* (1993)

For the second period of the Supreme Court as outlined above, in which Sandra Day O'Connor was the first and only woman on the Court, the Court decided the case *Bray v. Alexandria Women's Health Clinic*. The majority opinion in this case fails to recognize the gender discrimination prevalent in the actions of the petitioners. This lack of insight uncovers the existence of gender bias within the majority opinion. In *Bray v. Alexandria Women's Health Clinic*, Justice Sandra Day O'Connor dissents from the conservative majority opinion in favor of the protection of women's right to abortion against private conspiracy. This case looks into 42 U.S.C. 1985(3), part of the Civil Rights Act of 1871, and whether it provides protection from people purposefully blocking access to abortion clinics. The District Court held that purposefully blocking access to abortion clinics does violate 42 U.S.C., "1985(3) by conspiring to deprive women seeking abortions of their right to interstate travel (*Bray v. Alexandria Women's Health Clinic*, 1993)." As a remedy, "the court enjoined petitioners from trespassing on, or obstructing access to, abortion clinics in specified Virginia counties and cities in the Washington, D.C., metropolitan area (*Bray v. Alexandria Women's Health Clinic*, 1993)." This decision was affirmed by the Court of Appeals for the Fourth Circuit and was then argued and

reargued in front of the Supreme Court. Justice Scalia wrote the majority opinion with Chief Justice Rehnquist, Justice White, Kennedy, and Thomas joining. Justice Kennedy also filed a concurring opinion and Justice Souter filed an opinion concurring in part and dissenting in part. Justice Stevens and Justice O'Connor each wrote dissenting opinions, both of which were joined by Justice Blackmun.

Justice Scalia rejects the idea that women seeking abortion can be considered a class of people and also rejects the idea that this is discrimination against women in general because abortion is voluntary. He argues, "Whatever one thinks of abortion, it cannot be denied that there are common and respectable reasons for opposing it, other than hatred of, or condescension toward...women as a class-as is evident from the fact that men and women are on both sides of the issue, just as men and women are on both sides of petitioners' unlawful demonstrations." This sentence reveals a bias both in reference to women as a class and abortion as a women's issue. He fails to recognize that abortion is a right protected by law that is being infringed on. Instead he focuses on the controversy of the issue itself as a way to deny the existence of discrimination in the case. It is argued that because the protesters are protesting against the termination of a pregnancy they are not discriminating against or antagonistic to women as a class; however, this fails to acknowledge that women are unfairly affected by this protesting because they are exclusively the ones legally seeking the abortions.

Justice Stevens wrote a dissent in which Justice Blackmun joined. Justice Stevens, as a male, defends the women's issue at hand in this case. This can reflect the presence and influence of the first female on the Court, Justice Sandra Day O'Connor. Justice Stevens argues, "a finding of class-based animus in this case does not require finding that to disfavor abortion is...to discriminate invidiously against women...a particular lawless conspiracy employing force to

prevent women from exercising their constitutional rights...may 'reasonably be presumed to reflect a sex-based intent.'" Here Justice Stevens explains that a class-based animus in this case is not women seeking abortion, but rather women in general because the petitioners are keeping women from practicing their constitutional right to abortion. Justice Scalia and the majority opinion fails to recognize gender discrimination where it obviously exists in this case and under this statute. The majority opinion unfairly limits this case by failing to recognize this class based discrimination. Justice Stevens goes on to say that even if the petitioners' true end game was to save potential life, their immediate goal affects the conduct of women. Justice Stevens sees gender discrimination as a class based discrimination in this case. In response to Justice Scalia's argument that there are reasonable arguments against abortion to explain why women can not be considered a class in this case, Justice Stevens explains that a rational argument against a targeted activity does not keep the targeted class from qualifying under the class-based animus. While the protesters might find their views and actions as a result to be rational, the victims of this protest can find those views and actions to be irrational. Just because an idea seems rational does not detract from its discriminatory qualities, "Opposition to that activity may not be 'irrational,' but violent interference with it is unquestionably 'aimed at' women...That many women do not obtain abortions-that many women *oppose* abortion-does not mean that those who violently prevent the exercise of that right by women who do exercise it are somehow cleansed of their discriminatory intent." These arguments, Justice Stevens asserts, are exactly what section 1985(3) aimed to prevent. Section 1985(3) purpose was to see past rational motives that disguise discrimination in order for discrimination to be "unmasked". These arguments highlight the bias apparent in the majority opinion of the Court which fails to be sensitive to the women's issue at hand. The majority opinion uses rational opposition to abortion as a means to argue that

discrimination does not exist in this case. The failure to recognize the gender discrimination in this case reveals a gender bias in the Court's majority opinion.

This bias is uncovered further by Justice Sandra Day O'Connor's dissenting opinion. Justice O'Connor sees the case as clear cut and within the parameters of the statute. She, agreeing with Justice Stevens, believes the Court to have unnecessarily narrowed the statute in this case. She argues that these statutes are usually used in the Court to encompass the broadest interpretation of their language. However, in this case,

“the Court does just the opposite, precluding application of the statute to a situation that its language clearly covers. There is no dispute that petitioners have ‘conspired’ through their concerted and unlawful activities. The record shows that petitioners’ ‘purpose’ is ‘directly’ to ‘depriv[e]’ women of their ability to obtain the clinics’ services...as well as ‘indirectly’ to infringe on their constitutional privilege to travel interstate in seeking those services...The record also shows that petitioners accomplish their goals by purposefully ‘preventing or hindering’ local law enforcement authorities from maintaining open access to the clinics...In sum, petitioners’ activities fit precisely within the language of both clauses of [section] 1985(3).”

The Court uses precedent from another case to narrow the statute in order to not include this case and Justice O'Connor argues that even the precedent was read narrowly. She also notes that Congress' intent in writing the statute meant to cover all classes nationwide, one senator even noting, “yes, even women.” Justice O'Connor's argument highlights how the Court acted out of character in this case and with an unusually narrow scope to find their opinion. These attempts to find arguments against the respondents reveal bias in the Court's majority opinion in this case.

Their narrow reading of 1985(3) is out of character for civil rights cases and therefore points to a bias in this case regarding gender discrimination.

Justice O'Connor goes on to argue, like Justice Stevens, that women do fall under the category of protected classes outlined in 1985(3) and even so within the narrower precedent used by the majority opinion. The targeted activity is one "unique to the class of women" and therefore qualifies as a class based. She argues that the actions of the petitioners are discriminatory because although they honestly oppose the activity practiced by the abortion clinics, the way they go about expressing their opinion is unlawful, "Petitioners are free to express their views in a variety of ways, including lobbying, counseling, and disseminating information. Instead, they have chosen to target women seeking abortions and to prevent them from exercising their equal rights under law." Justice O'Connor asserts that it was "undeniably petitioners' purpose to target a protected class, on account of their class characteristics, and to prevent them from the equal enjoyment of these personal and property rights under law." The class based discrimination outlined by 1985(3), narrowed by the Court's precedent, "should require no further showing." Justice O'Connor highlights that this case is not about abortion or opposition to abortion, but, "Rather, this case is about whether a private conspiracy to deprive members of a protected class of legally protected interests gives rise to a federal cause of action." By limiting the scope of the statute, the Court denies the gender discrimination in this case. The Court's inability to identify the discrimination and infringement on women's rights in this case highlights the prevalence of gender bias. *Bray v. Alexandria Women's Health Clinic* reveals that gender bias plays a role in Supreme Court decisions. This is evident from Justice Sandra Day O'Connor's dissent from the conservative majority. Justice O'Connor being a conservative female was inclined to dissent in this case. As a woman she understood the implication of the

case for women's rights. She saw the majority opinion's narrowing of the statute to be too restricting and limiting to the point that it would no longer be effective in cases it's language meant to confront. Justice O'Connor recognized the flaws and gender discrimination in this case and, as a result, in the majority opinion.

*Burlington Industries, Inc. v. Ellerth* (1998)

For the third period of the Supreme Court, in which Justice Ruth Bader Ginsburg joined Justice Sandra Day O'Connor as the second woman on the Court, the case *Burlington Industries, Inc. v. Ellerth* was decided. This case deals with sexual harassment in the workplace under Title VII of the Civil Rights Act of 1964. The majority opinion defines the question of the case as follows, "We decide whether, under Title VII of the Civil Rights Act of 1964...an employee who refuses the unwelcome and threatening sexual advances of a supervisor, yet suffers no adverse, tangible job consequences, can recover against the employer without showing the employer is negligent or otherwise at fault for the supervisor's actions." Kimberly Ellerth worked as a salesperson at a Burlington division in Chicago under her supervisor Ted Slowik. Ellerth asserts that she was subjected to constant sexual harassment by Slowik during her time at the company including verbal harassment and crude gestures. She notes three specific times for this case in which the harassment could be described as threatening "to deny her tangible job benefits (*Burlington Industries, Inc. v. Ellerth*, 1998)." Shortly after the third emphasized incident, Ellerth quit citing reasons not related to the sexual harassment she experienced. She did end up sending a letter several weeks later that cited the harassment as the reason she quit. While employed, Ellerth did not file a complaint with Burlington Industries, Inc. The Court of Appeals

reversed a United States District Court decision resulting in eight separate opinions. The judges could not agree on reasoning but did agree on the problem of the case,

“Vicarious liability, not failure to comply with a duty of care, was the essence of Ellerth’s case against Burlington on appeal. The judges seemed to agree Ellerth could recover if Slowik’s unfulfilled threats to deny her tangible job benefits was sufficient to impose vicarious liability on Burlington... With the exception of Judges Coffey and Easterbrook, the judges also agreed Ellerth’s claim could be categorized as one of quid pro quo harassment, even though she had received the promotion and had suffered no other tangible retaliation (*Burlington Industries, Inc. v. Ellerth*, 1998).”

Justice Kennedy wrote the majority opinion in which Chief Justice Rehnquist, Justice Stevens, O’Connor, Souter, and Breyer joined. Justice Ginsburg filed a concurring opinion and Justice Thomas filed a dissenting opinion in which Justice Scalia joined. Both Justice Ginsburg and Justice O’Connor joined the majority opinion so neither wrote extensive opinions of their own regarding the issues of the case.

*Burlington Industries, Inc. v. Ellerth* is relatively noncontroversial case with majority of the justices concurring and only two of the justices dissenting. The opinion was moderate in its language as if to appeal to both liberals and conservatives on the Court. It largely avoided discussing the controversial portions of the case and focused on the technical means defined by Title VII and other precedents. However, the majority opinion helped to reveal biases in the dissenting opinion. Ellerth’s case is defined as a hostile work environment because her claim consists of “only unfulfilled threats...which requires a showing of severe or pervasive conduct.” The Court accepts the District Court’s ruling that the conduct in this case is pervasive or severe and therefore must decide whether a supervisor, in creating a hostile work environment by

making threats but not acting on them, makes an employer vicariously liable. To find the employer liable in a case with supervisor harassment, the Court looks to the Restatement (Second) of Agency (1957) as a guideline. The majority opinion holds that,

“An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense...The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise...No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.”

Under this ruling, “Ellerth should have an adequate opportunity to prove she has a claim for which Burlington is liable.” This ruling means that Burlington is still subject to liability despite the lack of tangible employment action in the case.

The dissenting opinion reveals some gender bias within the Court among two of the conservative, male justices. Justice Thomas wrote the dissenting opinion in which he expresses that the majority opinion creates a rule in which employer liability under Title VII judges sexually and racially hostile work environments differently. He argues, “This rule applies even if the employer has a policy against sexual harassment, the employee knows about that policy, and the employee never informs anyone in a position of authority about the supervisor's conduct...The standard of employer liability should be the same in both instances: An employer

should be liable if, and only if, the plaintiff proves that the employer was negligent in permitting the supervisor's conduct to occur.” Justice Thomas fails to consider the employee’s position and potential fear of retaliation as an inferior to her supervisor. In the first footnote of the dissenting opinion, Justice Thomas points out, “This sequence of events is not surprising, given that the primary goal of the Civil Rights Act of 1964 was to eradicate race discrimination and that the statute's ban on sex discrimination was added as an eleventh-hour amendment in an effort to kill the bill.” This note appears to diminish the importance of sex discrimination in Civil Rights Act of 1964. This also reveals potential bias in the opinion by subtly reducing the importance of protections against sex discrimination in this law.

In the dissenting opinion, Justice Thomas also notes that liability can be found if the plaintiff were to believe that the harasser acted within the scope of his authority and the business of the company. He argues, “In this day and age, no sexually harassed employee can reasonably believe that a harassing supervisor is conducting the official business of the company or acting on its behalf.” This argument overly generalizes and limits the understanding of sexual harassment in the workplace. His lack of insight into a widespread and salient issue today reveals a gender bias in his opinion. The majority opinions highlights this, “The harassing supervisor often acts for personal motives, motives unrelated and even antithetical to the objectives of the employer...There are instances, of course, where a supervisor engages in unlawful discrimination with the purpose, mistaken or otherwise, to serve the employer...(supervisor acting in scope of employment where employer has a policy of discouraging women from seeking advancement and ‘sexual harassment was simply a way of furthering that policy’).” Often sexual harassment is used to keep women from moving up and to keep them in their place. This behavior perpetuates gender stereotypes and encourages gender

bias. To argue that harassment can never be conducted for the benefit of the company is misleading and harmful to women in the workplace and women in general. Statements like Justice Thomas' perpetuates gender bias and gender discrimination by denying their existence.

*Ledbetter v. Goodyear Tire and Rubber Company (2007)*

For the fourth period of the Supreme Court, Justice Sandra Day O'Connor is no longer serving, leaving Justice Ruth Bader Ginsburg as the only female on the Court. It was during this period that *Ledbetter v. Goodyear Tire and Rubber Company* was decided. This case involves pay equity under Title VII of the Civil Rights Act of 1964. In a 5-4 decision written by Justice Alito, the Court ruled in favor of Goodyear Tire and Rubber Company. Lilly Ledbetter worked for Goodyear at a plant in Alabama from 1979 to 1998. Under Title VII, Ledbetter filed a claim against Goodyear on the basis of sex discrimination in the form of pay discrimination.

“Ledbetter introduced evidence that during the course of her employment several supervisors had given her poor evaluations because of her sex, that as a result of these evaluations her pay was not increased as much as it would have been if she had been evaluated fairly, and that these past pay decisions continued to affect the amount of her pay throughout her employment. Toward the end of her time with Goodyear, she was being paid significantly less than any of her male colleagues (*Ledbetter v. Goodyear Tire and Rubber Company 2007*).” A jury found in favor of Ledbetter but this decision was reversed on appeal due to a time bar limiting the filing period for a pay discrimination claim.

The majority opinion uses previous cases as precedent to argue against Ledbetter's claims based on time limitations. These limitations are creating a pattern of discrimination which

employees cannot fight against. Often discrimination is discreet and not visible until later when the adverse consequences of employer actions come to light. At this point, it is too late to file under the statute of limitations outlined by the Court. This is creating a system in which discrimination can exist if it remains hidden or discreet beyond the statute of limitations for discriminatory behavior. After which the Court argues that the discriminatory behavior becomes lawful or treated as lawful and “merely an unfortunate event in history which has no present legal consequences.” The Court is creating a precedent that allows discrimination to flourish unpunished due to an arbitrary statute of limitations. They argue that, “Ledbetter should have filed an EEOC charge within 180 days after each allegedly discriminatory pay decision was made and communicated to her.” This fails to account for the fact that Ledbetter was unaware of this discriminatory actions during her time working for Goodyear until it was too late to file under the limitations outline by the Court. This reveals gender bias through the unwillingness of the Court to act on gender discrimination based on arbitrary rules. The failure of the Court to note the inherent discrimination Ledbetter faced highlights gender bias in the majority opinion.

Justice Ruth Bader Ginsburg wrote the dissent in this case, joined by Justice Stevens, Justice Souter, and Justice Breyer. Justice Ginsburg explains that pay disparities are often different from other discrimination covered under Title VII because it happens,

“in small increments; cause to suspect that discrimination is at work develops only over time. Comparative pay information, moreover, is often hidden from the employee’s view. Employers may keep under wraps the pay differentials maintained among supervisors, no less the reasons for those differentials. Small initial discrepancies may not be seen as meet for a federal case, particularly when the employee, trying to succeed in a nontraditional environment, is averse to making waves. Pay disparities are thus

significantly different from adverse actions ‘such as termination, failure to promote, ... or refusal to hire,’ all involving fully communicated discrete acts, ‘easy to identify’ as discriminatory...It is only when the disparity becomes apparent and sizable...that an employee in Ledbetter’s situation is likely to comprehend her plight and, therefore, to complain.”

Justice Ginsburg notes the difficulties of creating a successful case for gender-based pay discrimination under the current statute. Justice Alito fails to acknowledge this difficulty and sets a precedent to make it virtually impossible to comprehend the discrimination and amass significant evidence of it within the 180 day limitation to file a complaint with the EEOC. Justice Ginsburg responds to the majority opinion’s argument that previous discrimination cannot count if not within the 180 day period by explaining that while the previous pay discrimination cannot be filed as a claim, it is relevant to the case to reveal pay discrimination in the current filing. She asserts that under Title VII, “that the unlawful practice is the current payment of salaries infected by gender-based (or race-based) discrimination—a practice that occurs whenever a paycheck delivers less to a woman than to a similarly situated man.” Here, Justice Ginsburg identifies that, under the precedent of another case, every paycheck that perpetuates the disparity in pay between men and women infects the current payment with gender discrimination. In the majority opinion, Justice Alito denies this claim,

“Bazemore stands for the proposition that an employer violates Title VII and triggers a new EEOC charging period whenever the employer issues paychecks using a discriminatory pay structure. But a new Title VII violation does not occur and a new charging period is not triggered when an employer issues paychecks pursuant to a system that is ‘facially nondiscriminatory and neutrally applied.’”

Justice Alito fails to acknowledge the discriminatory aspects of the pay structure in Ledbetter's case. While the system set up by Goodyear may appear to be neutral, the way it was applied to Ledbetter, as the only female in her position, led to a stark difference in her pay versus the lowest paid male in the same position. The lack of insight and failure to recognize this discrimination in the pay structure of Goodyear points to the gender bias apparent on the Court in this case. Justice Alito referred to Goodyear's pay system as "facially nondiscriminatory and neutrally applied," this grossly understates the discrimination present. While the system in place at Goodyear might appear neutral, it is being applied in a discriminatory fashion based on gender.

The majority opinion unfairly limits Ledbetter's and other women and classes' ability to file a pay discrimination claim on the basis of irrelevant precedent and interpretations. Justice Ginsburg argues that much of the precedent cited by the majority opinion is irrelevant to the case at hand or misinterpreted. Despite Ledbetter's ability to prove to a jury that "She was a member of a protected class; she performed work substantially equal to work of the dominant class (men); she was compensated less for that work; and the disparity was attributable to gender-based discrimination," the Court found that this discrimination was not able to be remedied under Title VII. In light of the evidence presented by Ledbetter, Justice Ginsburg asserts,

"Yet, under the Court's decision, the discrimination Ledbetter proved is not redressable under Title VII. Each and every pay decision she did not immediately challenge wiped the slate clean. Consideration may not be given to the cumulative effect of a series of decisions that, together, set her pay well below that of every male area manager.

Knowingly carrying past pay discrimination forward must be treated as lawful conduct.

Ledbetter may not be compensated for the lower pay she was in fact receiving when she

complained to the EEOC. Nor, were she still employed by Goodyear, could she gain, on the proof she presented at trial, injunctive relief requiring, prospectively, her receipt of the same compensation men receive for substantially similar work. The Court's approbation of these consequences is totally at odds with the robust protection against workplace discrimination Congress intended Title VII to secure."

Justice Ginsburg points out the flawed reasoning in the majority opinion and how it unfairly limits gender discrimination claims involving pay discrimination. She argues that this is not the first time the Court has narrowed the scope of Title VII and in effect has limited the statute's original purpose. The dissent highlights much of the gender bias prevalent in the majority opinion through their unwillingness to acknowledge the discrimination present in Ledbetter's case and their unnecessary narrowing of a statute intended to protect against discrimination in these cases. Justice Ginsburg, as a female, is able to identify bias in the majority opinion and takes on the role of uncovering it in the dissenting opinion.

*Burwell v. Hobby Lobby Stores, Inc.* (2014)

The fifth and final period of the Supreme Court as outlined above is with the addition of Justice Sonia Sotomayor and Justice Elena Kagan. Due to the short period of time (one year) between the swearing in of Justice Sotomayor and Justice Kagan, there were no cases involving women's issues for the period of time after Justice Sotomayor joined and before Justice Kagan joined. This period marks the first time ever with three sitting female justices on the Court. Previously, the Court had only seen one or two sitting female justices at once. This makes the current arrangement arguably the most influenced by women. During this period, the Supreme

Court decided *Burwell v. Hobby Lobby Stores, Inc.* in which all three female justices dissented from the majority opinion. This case involves the coverage of contraception for female employees under health insurance provided by a company whose religious values are against the use of contraception. This case involves the Religious Freedom Restoration Act of 1993 (RFRA) and the contraception mandate under the Affordable Care Act; the question being, “whether the Religious Freedom Restoration Act of 1993 (RFRA)...permits the United States Department of Health and Human Services (HHS) to demand that three closely held corporations provide health-insurance coverage for methods of contraception that violate the sincerely held religious beliefs of the companies’ owners (*Burwell v. Hobby Lobby Stores, Inc.*, 2014).” The United States Court of Appeals for the Third Circuit found “that ‘for-profit, secular corporations cannot engage in religious exercise’ within the meaning of RFRA or the First Amendment...The Third Circuit also rejected the claims brought by the Hahns themselves because it concluded that the HHS ‘[m]andate does not impose any requirements on the Hahns’ in their personal capacity (*Burwell v. Hobby Lobby Stores, Inc.*, 2014).” The Third Circuit recognized that the contraception mandate put forth by the Affordable Care Act, in order to ensure women access to contraception, has no personal effect on the owners of Hobby Lobby and their religious practices. Hobby Lobby as a for-profit, secular corporation cannot practice religion and therefore cannot claim under RFRA. However, the majority opinion, written by Justice Alito, reverses this decision and argues in favor of Hobby Lobby Stores,

“Under RFRA, a Government action that imposes a substantial burden on religious exercise must serve a compelling government interest, and we assume that the HHS regulations satisfy this requirement. But in order for the HHS mandate to be sustained, it must also constitute the least restrictive means of serving that interest, and the mandate

plainly fails that test. There are other ways in which Congress or HHS could equally ensure that every woman has cost-free access to the particular contraceptives at issue here and, indeed, to all FDA-approved contraceptives.”

The dissent in this case highlights the bias in this case because it does what the majority opinion fails to do: it accounts for the negative effect this decision will have on the people within the corporation that do not hold the beliefs of Hobby Lobby’s owners.

The dissenting opinion in *Burwell v. Hobby Lobby Stores, Inc.* was written by Justice Ruth Bader Ginsburg with Justice Sotomayor joining and Justice Breyer and Kagan concurring in part and dissenting in part. The dissent argues that the majority opinion has an impact on people who do not share the beliefs of the owners of the corporation; like women whose rights are being infringed upon by the religious beliefs of Hobby Lobby’s owners. Justice Ginsburg asserts,

“In the Court’s view, RFRA demands accommodation of a for-profit corporation’s religious beliefs no matter the impact that accommodation may have on third parties who do not share the corporation owners’ religious faith—in these cases, thousands of women employed by Hobby Lobby and Conestoga or dependents of persons those corporations employ. Persuaded that Congress enacted RFRA to serve a far less radical purpose, and mindful of the havoc the Court’s judgment can introduce, I dissent.”

She sees the majority opinion as a step in the wrong direction, allowing the owners of a corporation to inflict their religious beliefs on their unwilling employees. In doing so, the Court allows the corporation to limit the rights of their female employees by refusing to offer health insurance coverage of contraception that is mandated by law. The dissent notes, “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...’Congress acted on that understanding when, as part of a nationwide insurance program intended to be comprehensive, it called for coverage of preventive care responsive to women’s needs.” Contraception is an important right for women today and was recognized by Congress when they mandated coverage of contraception. Justice Ginsburg also notes that despite the Court’s argument that Congress intended the RFRA to cover corporations rights that, “The Senate voted down the so-called ‘conscience amendment,’ which would have enabled any employer or insurance provider to deny coverage based on its asserted ‘religious beliefs or moral convictions...’ That amendment, Senator Mikulski observed, would have ‘pu[t] the personal opinion of employers and insurers over the practice of medicine...’Congress left health care decisions—including the choice among contraceptive methods—in the hands of women, with the aid of their health care providers.” This contradicts the majority opinion’s argument that Congress intended the RFRA to cover corporations and that the act should value the religious freedoms of corporations over the rights of their female employees.

The dissent also argues that there is no support for the idea that for-profit corporations can exercise religion, “Until this litigation, no decision of this Court recognized a for-profit corporation’s qualification for a religious exemption from a generally applicable law, whether under the Free Exercise Clause or RFRA...The absence of such precedent is just what one would expect, for the exercise of religion is characteristic of natural persons, not artificial legal entities.” Justice Ginsburg’s argument reveals the Court’s desire to place the religious freedoms of an artificial legal entity above the rights of the female employees working within that entity. The failure of the Court to recognize the importance of a woman’s right to the access of contraception as well as its use of the religious freedoms of a corporation to deny those rights

reveals a gender bias among the Court's all male majority opinion. Justice Ginsburg, as a woman, recognizes bias in the majority opinion and uses the dissenting opinion to highlight the bias and defend women's rights. She argues that the only people who should be making contraception decisions for women are the woman herself and her physician, as with any other medical question. The corporation a person works for should not dictate the medical care they receive. "Any decision to use contraceptives made by a woman covered under Hobby Lobby's or Conestoga's plan will not be propelled by the Government, it will be the woman's autonomous choice, informed by the physician she consults." Decisions about contraception, and all medical decisions, should be at the discretion of the women receiving the treatment and their physicians. Women should have autonomy in their medical choices, these decisions should not be dictated by the religious beliefs of the owners of the corporation they work for. The Court fails to recognize the discrimination apparent in the decision to deny women health coverage, to which they are entitled by law, because of the beliefs of their employers. The Court's inability to recognize the denial of rights to individual women over the religious freedoms of a for-profit corporation point to gender bias on the Court.

## **Conclusion**

The results reveal that the general lack of perspective amongst male justices about women's issues points to gender bias in the cases and on the Supreme Court. The experiences and biases of the justices play an important role in the decisions they make and the opinions they deliver. This can be seen through the lack of perspective of the male justices in these cases. In the cases I examined, all the female justices argued in favor of the women's issue. The female

justices serve to point out the existing bias in decisions made by the Court. As more women appeared on the Court, it was more likely that they would point out existing biases. For instance, in *Burlington Industries, Inc. v. Ellerth*, Justice Kennedy wrote the majority opinion in which Justice O'Connor and Justice Ginsburg joined. This was the only opinion in which one of the female justices did not write an extensive opinion; Justice Ginsburg wrote a short concurring opinion. In this case, Justice Kennedy largely ignored the gender issues and addressed the case on strictly technical terms. Bias in this case was only revealed through Justice Thomas's dissent. In the other cases in which women were present and wrote an opinion, the gender issue was discussed and biases in the differing opinions were pointed out. This shows that women on the Court are working to identify bias in the decisions made by the Court. So while it may seem as though bias is increasing as women have entered the Court, I would argue that women are working to uncover bias and therefore the existing bias is more visible. This could also reflect changing opinions among the public about women's issues as they become more salient in our society. However, this is important because the introduction of women on the Court has served to reveal gender bias in decisions. Without the introduction of women on the Court begs the question of whether gender discrimination and bias would be identified in these decisions. Female justices therefore serve an important role on the Court by highlighting bias where it exists and hopefully working to reverse its prevalence.

Based on my findings, I accept my hypothesis that the underrepresentation of women on the Supreme Court leads to a bias in Supreme Court decisions. With more time, I would have liked to analyze more cases regarding women's issues to better identify and understand the role gender bias plays in Supreme Court decisions. Examining more cases provides the opportunity to reveal a pattern of bias. I would like to look into more cases involving an all male court in

order to see if gender bias is more prevalent in cases that are more subjective than *Califano v. Westcott*. However, my findings uncover that Supreme Court decisions regarding women's issues are affected by gender bias. In every case I analyzed, women, regardless of ideology, voted in favor of the women's issue and in writing their own opinions in these cases were able to identify bias in the opposing opinions. This was not the case for the male justices, who lacked perspective on women's issues both in issuing majority opinions and dissenting opinions. Justice Ginsburg acknowledges this lack of perspective on the Court, believing the Court to have a "blind spot" on these issues in cases like *Ledbetter v. Goodyear Tire and Rubber Company* and *Burwell v. Hobby Lobby Stores, Inc.* In discussing the *Hobby Lobby* decision in an interview, Justice Ginsburg was asked, "Do you believe that the five male justices truly understood the ramifications of their decision?" Justice Ginsburg responded, "I would have to say no. But justices continue to think and can change. So I am ever hopeful that if the Court has a blind spot today, its eyes will be open tomorrow." When followed up with, "But you do in fact feel these five justices had a bit of a blind spot?" Justice Ginsburg responded, "In *Hobby Lobby*, yes...the same kind of blind spot the majority had in *Lilly Ledbetter's* case (Ginsburg, 2014)." I think Justice Ginsburg's awareness and acknowledgement of this blind spot speaks volumes to the argument that Supreme Court decisions are affected by gender bias. This research is important because it finds that gender bias can affect Supreme Court decisions. This is critical to understanding the role of justices and the need for diversity on the Court. Life experiences and opinions will bias opinions made and therefore a variety of viewpoints can help to counteract this.

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## Appendix

Table 1:

	Justices For	Justices Against
<i>Califano v. Westcott</i>	Marshall, Brennan, Stevens White, <i>Blackmun</i>	Stewart, Powell, Burger, Rehnquist
<i>Bray v. Alexandria Women's Health Clinic</i>	Rehnquist, White, <i>Scalia</i> , Kennedy, Souter, Thomas	Blackmun, Stevens, O'Connor
<i>Burlington Industries, Inc. v. Ellerth</i>	Rehnquist, Stevens, O'Connor, <i>Kennedy</i> , Souter, Ginsburg, Breyer	Scalia, Thomas
<i>Ledbetter v. Goodyear Tire &amp; Rubber Company</i>	Roberts, Scalia, Kennedy, Thomas, <i>Alito</i>	Stevens, Souter, Ginsburg, Breyer
<i>Burwell v. Hobby Lobby Stores, Inc.</i>	Roberts, Scalia, Kennedy, Thomas, <i>Alito</i>	Ginsburg, Breyer, Sotomayor, Kagan