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# Justice Ruth Bader Ginsburg: Champion of the Underdog

Francis Leonard Tartaglia

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## **Introduction**

Throughout her legal career Ruth Bader Ginsburg has been a stalwart defender of the rights of individuals, seeking to secure their personal autonomy and equal citizenship against discriminatory laws and prejudicial practices. Known as the leader of the Supreme Court's "liberal wing"<sup>1</sup>, Justice Ginsburg's life and legal career have focused on ensuring that minorities (especially women) are treated equally under the law.

This paper will discuss how Justice Ginsburg's early life and experiences have helped to shape her legal career and explain how those experiences have shaped Constitutional jurisprudence. Born from humble parentage in Brooklyn, New York, Ruth Bader Ginsburg's greatest role model was her mother, Celia Bader. She impressed upon young Ruth independence and a good education. Ruth Bader Ginsburg took such lessons to heart and excelled in her schooling. While attending law school, Ginsburg began to experience discrimination due to her sex. She had difficulty finding a job, despite a stellar academic record because many judges refused to hire women. When she finally managed to find a job, Ginsburg impressed. She went on to teach at Rutgers and Columbia Law Schools and co-founded the Women's Rights Project of the American Civil Liberties Union. Through the Women's Rights Project, Ginsburg was able to influence American law regarding sex discrimination.

In her years on the Court, Ginsburg has been a strong advocate in ending discrimination in all its form<sup>2</sup> and ensuring equality for all people under the law. Her opinions, and to a greater extent, her dissents reveal her unwavering opposition to unfair treatment. Ever aware of the invidious nature of discrimination, Ginsburg's life experiences and beliefs guide the Court to

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<sup>1</sup> See generally, Adam Liptak, *Court Is 'One of Most Activist,' Ginsburg Says, Vowing to Stay*, N.Y. Times, August 24, 2013.

ensure that every individual is treated equally under the law. Ginsburg favors a cautious judicial approach; one that embraces international law, gender equality, and abortion rights.

Ruth Bader Ginsburg has spent her life championing gender equality. She is the legal architect of the women's movement, and she considers it her life's mission that men and women be treated equally under the law. Ginsburg has advanced her mission of sex equality and changed American society for the better.

## **Biography**

### **Early Life and Education**

Ruth Bader Ginsburg was born in a poor, working class Brooklyn neighborhood on March 15, 1933 to Nathan and Celia Bader.<sup>2</sup> Her father was a Russian-Jewish immigrant and her mother was born in the United States just after her family had emigrated from Austria.<sup>3</sup> Celia Bader, who undoubtedly had the largest influence on Ruth Bader Ginsburg's life and career, taught young Ruth the value of independence and a good education.<sup>4</sup> Instead of attending college, Celia Bader chose to work in a garment factory to help pay for her brother's college education, an act that would stay with Ruth Bader Ginsburg for the rest of her life.<sup>5</sup>

Ginsburg excelled in her studies at James Madison High School in Brooklyn.<sup>6</sup> She spent her summers as a camp counselor in the Adirondack Mountains, where she served as the camp rabbi and offered sermons to the campers.<sup>7</sup> It was here that her public speaking skills began to

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<sup>2</sup> Nichola D. Gutgold, *The Rhetoric of Supreme Court Women: From Obstacles to Options*, 47 (2012).

<sup>3</sup> *Id.* at 47.

<sup>4</sup> *Id.* at 47.

<sup>5</sup> *Id.* at 47.

<sup>6</sup> *Id.* at 47.

<sup>7</sup> *Id.* at 47.

emerge. Unfortunately, Ginsburg's mother developed cervical cancer and struggled through Ruth's high school years, dying the day before Ruth's high school graduation.<sup>8</sup>

Following high school, Ginsburg entered Cornell University, having received numerous academic scholarships.<sup>9</sup> Unsurprisingly, she excelled at Cornell as well, becoming a member of Phi Beta Kappa.<sup>10</sup> She graduated first among the women in her class and first overall in 1954.<sup>11</sup> That same year, she married the love of her life, Martin D. Ginsburg, a fellow Cornell student.<sup>12</sup> After Cornell, Ginsburg did not immediately enroll in law school. Instead, the Ginsburgs relocated to Fort Sill, Oklahoma because Martin Ginsburg had been drafted into the military as an artillery officer.<sup>13</sup> During this time, Ruth Bader Ginsburg worked at the nearby Social Security office and had her first child, Jane.<sup>14</sup>

After Martin Ginsburg's discharge, Ruth Bader Ginsburg entered Harvard Law School where her husband was already enrolled.<sup>15</sup> It was at Harvard Law that Ginsburg first began to experience prejudice because she was a woman. She was one of only eight women in a class of five hundred, and the dean admonished the women students for taking the places of males, who he believed would actually use their legal education.<sup>16</sup> Despite this criticism, Ginsburg excelled academically, becoming the first female member of the Harvard Law Review.<sup>17</sup> Reflecting back, Ginsburg would tell of some of the discrimination she faced at Harvard:

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<sup>8</sup> *Id.* at 47.

<sup>9</sup> *Id.* at 48.

<sup>10</sup> *Id.* at 48.

<sup>11</sup> *Id.* at 48.

<sup>12</sup> *Id.* at 48.

<sup>13</sup> *Id.* at 48.

<sup>14</sup> *Id.* at 48.

<sup>15</sup> *Id.* at 48.

<sup>16</sup> *Id.* at 48.

<sup>17</sup> *Id.* at 48.

When I attended the Harvard Law School, there was no space in the dormitories for women. Women were not admitted to the Harvard Faculty Club dining tables. One could invite one's father but not one's wife or mother to the Harvard Law Review Banquet.<sup>18</sup>

It was during 1956, Ginsburg's second year of law school, that her husband contracted testicular cancer.<sup>19</sup> Impressively, Ginsburg cared for her young daughter, convalescent husband, attended both her own classes and her husband's, took notes for him, and wrote papers at his dictation, all while excelling in her own studies.<sup>20</sup> Martin Ginsburg recovered and accepted a job at a New York City law firm, and Ruth Bader Ginsburg transferred to Columbia Law School to join her husband in New York.<sup>21</sup> Once again Ginsburg was selected to law review, and once again she graduated (tied for) first in her class in 1959.<sup>22</sup>

### Early Legal Career

Even with her sterling academic record, Ruth Bader Ginsburg continued to face sex discrimination. She was refused a Supreme Court Clerkship despite a glowing recommendation from leading Harvard Professor, Albert Sacks.<sup>23</sup> Eventually, Ginsburg was hired as a clerk for District Judge Edmund L. Palmieri.<sup>24</sup> She impressed Judge Palmieri with her hard work and dedication—so much so that he replaced her with another woman at the end of her clerkship.<sup>25</sup>

After her clerkship, Ruth Bader Ginsburg worked at Columbia University's International Procedure Project.<sup>26</sup> During this time she travelled to Sweden and studied the Swedish Judicial

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<sup>18</sup> Linda Bayer, *Ruth Bader Ginsburg: Women of Achievement*, 37-38 (2000).

<sup>19</sup> Gutgold, *supra* at 48.

<sup>20</sup> *Id.* at 48.

<sup>21</sup> *Id.* at 48.

<sup>22</sup> *Id.* at 48.

<sup>23</sup> *Id.* at 48.

<sup>24</sup> *Id.* at 48.

<sup>25</sup> Amy Leigh Campbell, *Raising the Bar: Ruth Bader Ginsburg and the ACLU Women's Rights Project*, 22-23 (2003).

<sup>26</sup> Gutgold, *supra* at 49.

System, eventually co-authoring the book *Civil Procedure in Sweden*.<sup>27</sup> Ginsburg developed an appreciation for international law and continues to see it as a valuable reference when shaping United States law today.<sup>28</sup>

Ginsburg joined the faculty at Rutgers Law School in 1963, becoming the second female on faculty, and one of only twenty female law professors in the entire country.<sup>29</sup> During this time, Ginsburg became pregnant with her second child, James, and during her pregnancy she was forced to wear overly large clothing in order to keep her job.<sup>30</sup> She stayed at Rutgers Law School for nine years, eventually becoming full professor.<sup>31</sup>

During her time at Rutgers Law, Ruth Bader Ginsburg co-founded the Women's Rights Project (WRP) of the American Civil Liberties Union (ACLU). Now, when complaints were made known to the ACLU, they were referred to her because "sex discrimination was a woman's problem" and she felt she needed to "take an active part in the effort to eliminate senseless gender lines in the law."<sup>32</sup> One of Ginsburg's core beliefs about discrimination was that "it was not helpful to the advancement of women or men to be kept from pursuing careers that once were though not to be women's or men's work."<sup>33</sup> She has said:

Generalizations about the way women or men are—my life experience bears out—cannot guide me reliably in making decisions about particular individuals. At least in the law, I have found no natural superiority or deficiency in either sex. In class or in grading papers from 1963 to 1980, and now in reading briefs and

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<sup>27</sup> *Id.* at 49.

<sup>28</sup> See generally, Adam Liptak, *Ginsburg Shares Views on Influence of Foreign Law on Her Court, and Vice Versa*, N.Y. Times, April 11, 2009.

<sup>29</sup> Gutgold, *supra* at 49.

<sup>30</sup> *Id.* at 49.

<sup>31</sup> *Id.* at 49.

<sup>32</sup> Lynn Gilbert and Galen Moore, *Particular Passions: Talks With Women Who Have Shaped Our Times*, 153 (1988).

<sup>33</sup> Gutgold, *supra* at 49.

listening to argument in court for over seventeen years, I have detected no reliable indicator of distinctly male or surely female thinking—even penmanship.<sup>34</sup>

Working for the WRP of the ACLU, Ginsburg was able to write briefs and argue cases before the Supreme Court that changed the national opinion on sex discrimination. At the WRP, she was carefully to select cases that would convince the Supreme Court that discrimination on the basis of sex was similar to racial discrimination and prohibited under the Equal Protection Clause of the Fourteenth Amendment. These were mainly employment cases that “lent themselves to the strategy of sequential presentations leading to incremental advances.”<sup>35</sup> In 1971, the Supreme Court unanimously overturned an Idaho law that gave men preference for appointments as administrators of decedents’ estates.<sup>36</sup> In that case, *Reed v. Reed*, a teenager, Richard Lynn Reed, had committed suicide. Both parents, who had long been separated, requested to be administrators of the state.<sup>37</sup> However, Idaho appointed the father, Cecil Reed, as administrator because “between persons equally entitled to administer a decedent’s estate, males must be preferred to females.”<sup>38</sup> Reflecting on the selection of cases, Ruth Bader Ginsburg noted that:

We needed to take cases that would get attention. The Sally Reed case was a turning point case. Sally Reed, from Boise, Idaho thought that there was something wrong about that and thought that our justice system could right that wrong for her. I gave them examples from lives in a way that they could understand.<sup>39</sup>

Ginsburg’s brief for the *Reed* case was devoted to convincing the Court that gender, like race and alienage, encompassed a class of individuals who encountered legally sanctioned obstacles

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<sup>34</sup> Bayer, *supra* at 65.

<sup>35</sup> Ruth Cowan, *Women’s Rights Through Litigation: An Examination of the American Civil Liberties Union Women’s Rights Project, 1971–1976*, 8 Colum. Hum. Rts. L. Rev. 390 (1976).

<sup>36</sup> Gutgold, *supra* at 50.

<sup>37</sup> *Id.* at 50.

<sup>38</sup> *Reed v. Reed*, 404 U.S. 71 (1971).

<sup>39</sup> Gutgold, *supra* at 50 citing Interview with Justice Ruth Bader Ginsburg (August 19, 2010).

without regard to the individual abilities of members of the group.<sup>40</sup> *Reed* was the first sex discrimination victory for Ginsburg.

After the *Reed* case, Ginsburg left Rutgers and became the first, tenured female professor at Columbia Law School.<sup>41</sup> She taught constitutional law, sex discrimination law, and civil procedure while devoting half her time to the WRP.<sup>42</sup> From 1972-1979, Ruth Bader Ginsburg argued six cases in front of the Supreme Court, winning five of them. Revealing her strategy for arguing these cases, she noted that it was imperative “to keep in mind your mission” and that “it is important to keep your audience in good humor.” “These were men of a certain age in the 1970s. They did not understand the notion of gender discrimination. Racial discrimination was odious, but women were not in a ghetto, they lived side by side with men.”<sup>43</sup>

After the *Reed* case, Ginsburg argued the case of *Frontiero v. Richardson* in front of the Supreme Court. In this case, Sharon Frontiero was a married Air Force officer working as a physical therapist at Maxwell Air Force Base in Alabama.<sup>44</sup> The Air Force provided on-base housing to married male service members but required her to live off base at her own expense.<sup>45</sup> Her husband was a student at the time.<sup>46</sup> Frontiero believed that she should have the same housing benefits as male members of the military.<sup>47</sup> In deciding that benefits given to service members and their families cannot be given out differently because of sex, the Court stated that:

[T]he sex characteristic frequently bears no relation to ability to perform or contribute to society. As a result, statutory distinctions between the sexes often

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<sup>40</sup> Campbell, *supra* at 32.

<sup>41</sup> Gutgold, *supra* at 50.

<sup>42</sup> *Id.* at 50.

<sup>43</sup> *Id.* at 50 citing interview with Justice Ruth Bader Ginsburg (August 19, 2010).

<sup>44</sup> *Frontiero v. Richardson*, 411 U.S. 677 (1973).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members.<sup>48</sup>

Following *Frontiero* was the case of *Weinberger v. Wiesenfeld*. Here, Stephen Wiesenfeld's wife had died in childbirth, and he wanted to care for their infant son but was denied Social Security benefits.<sup>49</sup> The Social Security Act provided survivor benefits to women with children, but not to men with children, even though both paid Social Security taxes at the same rate.<sup>50</sup> Ginsburg argued that this legislation, like many others, appeared to protect women, even though it had the practical effect of denying women workers and their families the protection provided to male workers.<sup>51</sup> The Supreme Court unanimously agreed with Ginsburg, holding this regulation to be unconstitutional, but the Court did not hold that gender-based distinctions were subject to strict scrutiny.<sup>52</sup>

In 1976, Ginsburg filed an influential amicus brief in the case of *Craig v. Boren*. Here, an Oklahoma law allowed women to buy 3.2% alcohol beer at the age of eighteen while men could only purchase 3.2% beer at the age of twenty-one.<sup>53</sup> In this case, the statistics clearly showed that allowing 18-21 year old men to drink posed a far greater public safety risk than allowing 18-21 year old women to drink.<sup>54</sup> Nonetheless, the Court found that even correct stereotypes are still invalid.<sup>55</sup> It instituted a heightened level of scrutiny holding that gender-based classifications

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<sup>48</sup> *Id.* at 686-87.

<sup>49</sup> *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975).

<sup>50</sup> *Id.*

<sup>51</sup> Goldfarb, *supra* at 52.

<sup>52</sup> *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975).

<sup>53</sup> *Craig v. Boren*, 429 U.S. 190 (1976).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

must serve important governmental objectives, and the law must be substantially related to the achievement of those objectives.<sup>56</sup>

In the case of *Califano v. Goldfarb*, a retired federal worker applied for social security survivor benefits after the death of his wife.<sup>57</sup> His application was denied on the ground that he was not receiving at least one-half support from his wife when he died.<sup>58</sup> Mr. Goldfarb was represented by Ginsburg for the ACLU. She once again argued that such “protective” legislation could have an adverse effect on women workers and their families. The Supreme Court agreed, holding that such legislation was in violation of the Due Process and Equal Protection clauses.<sup>59</sup>

Ruth Bader Ginsburg continually argued that laws that draw a distinction based on sex should be subject to strict scrutiny.<sup>60</sup> The problem, Ginsburg explained, was that while “race discrimination was immediately perceived as evil, odious, and intolerable,” laws discriminating against women were often seen as protecting women.<sup>61</sup> Therefore, Ginsburg chose cases that would show how using sex as a basis for different treatment was harmful to both women and men. She did this by carefully selecting cases that would show the inequities to both sexes. Through her diligent efforts and meticulous arguments, Ruth Bader Ginsburg was able to change the standing of women in the eyes of the law.

#### Early Judicial Career

In 1980, Ruth Bader Ginsburg was appointed to the Court of Appeals for the District of Columbia. Before her appointment, there were only eight women on any of the federal courts.<sup>62</sup>

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<sup>56</sup> *Id.*

<sup>57</sup> *Califano v. Goldfarb*, 430 U.S. 199 (1976).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Goldfarb, supra* at 53.

<sup>61</sup> *Id.* at 53.

<sup>62</sup> *Id.* at 54.

During her tenure on the Court of Appeals, Ginsburg made fifty-seven hires for law clerk, intern, and secretary positions, but it was noted that none of those hired had been African-Americans, a fact for which Ginsburg was sharply criticized because she had been a strong supporter of disparate-impact statistics.<sup>63</sup>

After thirteen years on the Court of Appeals, President Clinton nominated Ruth Bader Ginsburg to the Supreme Court to fill the seat of Justice Byron White at the recommendation of then Attorney General Janet Reno.<sup>64</sup> Her confirmation hearings went quickly and smoothly. On the first day of her hearings, though, Ginsburg noted that she would not reveal how she would vote on particular issues. She said: "I come to this proceeding to be judged as a judge....It would be wrong ~~got me to say or preview~~...how I would cast my vote on questions the Supreme Court may be called on to decide."<sup>65</sup> This lack of disclosure was called the "The Ginsburg Rule" by the press.<sup>66</sup> However, Ginsburg gave thoughtful responses on many questions posed by the Senators. She informed the Senators that she favored abortion rights and the Equal Rights Amendment and denounced discrimination against homosexuals.<sup>67</sup> She also answered a range of questions dealing with her judging philosophy, the role of federal courts, and substantive areas of the law. When Senator Edward Kennedy noted that her experience and work with sex discrimination could also sensitize her to racial discrimination, she responded:

Senator Kennedy, I am alert to discrimination. I grew up during World War II in a Jewish family. I have memories as a child, even before the war, of being in a car with my parents and passing a place in [Pennsylvania], a resort with a sign out in front that read: 'No dogs or Jews allowed.' Signs of that kind existed in this

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<sup>63</sup> Ed Whelan, *What Happened to the Consensus-BUILDER?*, National Review Online (May 12, 2010).

<sup>64</sup> Jeffrey Toobin, *The Nine: Inside the Secret World of the Supreme Court*, 82 (2007).

<sup>65</sup> Associated Press. "Ruth Bader Ginsburg is Confirmed Senate Votes 96-3 for Second Supreme Court Justice."

<sup>66</sup> Gutgold, *supra* at 55.

<sup>67</sup> *Id.* at 55.

country during my childhood. One couldn't help but be sensitive to discrimination living as a Jew in America at the time of World War II.<sup>68</sup>

When asked about her support of abortion, Ginsburg noted that it is "something central to a woman's life, her dignity and it is a decision she has to make for herself and when the government makes that decision for her, she is being treated as less than a fully adult human responsible for her own choices."<sup>69</sup> In the end, Senators from both parties praised Ruth Bader Ginsburg for her forthrightness, and she was confirmed quickly by a vote of 96-3.

### Recent Activities

In January 2012, Justice Ginsburg travelled to Egypt for four days of discussions with judges, law school faculty, law school students, and legal experts.<sup>70</sup> Part of the purpose of Ginsburg's visit was to "listen and learn" as Egypt began its transition to democracy.<sup>71</sup> She answered questions about the American justice system and the Constitution and told students at Cairo University that she was inspired by the Egyptian revolution.<sup>72</sup>

In an interview that caused some consternation back in the United States, Ginsburg noted that the first requirement of a new constitution should be that it "safeguard basic fundamental human rights, like our First Amendment."<sup>73</sup> Asked if Egypt should model its constitution on those of other nations, Ginsburg said that Egypt "should be aided by all Constitution writing that has gone on since the end of World War II," noting, "I would not look to the U.S. Constitution, if

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<sup>68</sup> *Id.* at 55 citing transcript of Ginsburg confirmation hearings.

<sup>69</sup> *Id.* at 55 citing transcript from MacNeil-Lehr NewsHour (July 21, 1993).

<sup>70</sup> *U.S. Supreme Court Justice Ginsburg Expresses Admiration for Egyptian Revolution and Democratic Transition.* (Press Release). U. S. Embassy Cairo. (February 1, 2012).

<sup>71</sup> *U.S. Supreme Court Justice Ruth Bader Ginsburg Visits Egypt.* (Press Release). U.S. Embassy Cairo, (January 28, 2012).

<sup>72</sup> *U.S. Supreme Court Justice Ginsburg Expresses Admiration for Egyptian Revolution and Democratic Transition, supra.*

<sup>73</sup> Ariane de Vogue. *Ginsburg Likes S. Africa as Model for Egypt.* ABC News. (February 3, 2012).

I were drafting a constitution in the year 2012. I might look to the Constitution of South Africa. That was a deliberate attempt to have a fundamental instrument of government that embraced basic human rights, had an independent judiciary. ... It really is, I think, a great piece of work that was done. Much more recent than the U.S. Constitution."<sup>74</sup> Ginsburg did emphasize that that United States was fortunate to have a constitution authored by "very wise" men but pointed out that in the 1780s, no women were able to participate in the process and slavery still existed in the U.S.<sup>75</sup>

In an August, 2013 interview, Ginsburg blasted the Supreme Court as being overly activist. She lamented joining the *Northwest Austin Municipal Util. Dist. No. 1 v. Holder* opinion which laid the groundwork for the *Shelby County v. Holder* decision that effectively struck down the heart of the Voting Rights Act of 1965.<sup>76</sup> She believed that the Court was wrong to conclude that protecting minority voters was not needed, noting a line from her dissent that stated: "It is like throwing away your umbrella in a rainstorm because you are not getting wet."<sup>77</sup> Ginsburg also noted that in general, "if it's measured in terms of readiness to overturn legislation, this is one of the most activist courts in history."<sup>78</sup>

Ginsburg received some criticism for her comments, and in an October 2013, *New York Times* article, the journalist noted that "[i]f judicial activism is defined as the tendency to strike down laws, the court led by Chief Justice John G. Roberts Jr. is less activist than any court in the last 60 years."<sup>79</sup> It is likely, however, that Ginsburg was referring to the Court's decisions to

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<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> Adam Liptak, *Court Is 'One of Most Activist,' Ginsburg Says, Vowing to Stay*, N.Y. Times, August 24, 2013.

<sup>77</sup> *Id.* citing *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612 (2013).

<sup>78</sup> *Id.*

<sup>79</sup> Adam Liptak, *How Activist is the Supreme Court*, N.Y. Times (October 12, 2013).

overturn some major pieces of legislation such as the Bipartisan Campaign Reform Act, the Voting Rights Act, and the Defense of Marriage Act. Although Ginsburg herself was in the majority on the case that struck down the Defense of Marriage Act, she said that there was a method behind her votes to strike down some laws and not others.<sup>80</sup> She believes that some laws require special scrutiny, especially when “fundamental rights are at stake, when the political process has been frustrated, or when disfavored minorities are singled out for mistreatment.”<sup>81</sup>

Also of note, Justice Ginsburg became the first Supreme Court justice to officiate a same-sex marriage when she married Kennedy Center President, Michael Kaiser and government economist, John Roberts on August 31, 2013.<sup>82</sup>

#### Future Plans and Retirement

While on the Court, Justice Ginsburg has had to deal with serious health problems, but still remains active. In 1999, Ginsburg was diagnosed with colon cancer, but underwent chemotherapy and radiation therapy and did not miss a day on the bench.<sup>83</sup> Again in 2009, Justice Ginsburg underwent cancer surgery, this time for pancreatic cancer.<sup>84</sup> But once again showing her resilience, Ginsburg was released from the hospital and heard oral arguments four days later.<sup>85</sup> Despite these health concerns, she works out with a trainer twice a week and the National Institute of Health says she is in fine health.<sup>86</sup> She has repeatedly stated that her

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<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Justice Ginsburg Officiates at Same-Sex Wedding*, FoxNews (September 1, 2013).

<sup>83</sup> Stephanie Garry, *For Ruth Bader Ginsburg, Hopeful Signs in Grim News about Pancreatic Cancer*, Tampa Bay Times (February 5, 2009).

<sup>84</sup> Mark Sherman, *Ginsburg Could Lead to Obama Appointment*, MSNBC (February 6, 2009).

<sup>85</sup> *Id.*

<sup>86</sup> Liptak, *Court Is ‘One of Most Activist,’ Ginsburg Says, Vowing to Stay*, N.Y. Times (August 24, 2013).

retirement plans would focus on her health and not on who would appoint her successor, even if it could alter the balance of the Court.<sup>87</sup>

### **Important Opinions, Concurrence, and Dissents**

From her first week on the Court, Justice Ginsburg has never held back, often asking the first question at oral arguments in a way that frames the discussion.<sup>88</sup> Even though Ginsburg has a tendency to ask many questions during oral argument, she rarely departs from the more customary written dissent process.<sup>89</sup> When Ginsburg strongly disagrees with the majority, however, she does not hesitate to read her dissents from the bench as was the case in 2007 and once again in 2012.<sup>90</sup> In 2007, Justice Ginsburg read two dissents, discussed below, from the bench in which she criticized the majority for opinions that she felt jeopardized women's rights.<sup>92</sup> The first case, *Gonzales v. Carhart*, dealt with the Partial-Birth Abortion Ban Act. The second, *Ledbetter v. Goodyear Tire & Rubber Co.*, concerned pay discrimination. Ginsburg's opinions, concurrences, and dissents often concern some type of invidious discrimination, and her writing is potent and impactful.

### **Majority Opinions**

In a case that has been described as a "fitting capstone to her career as an advocate for gender equality," *United States v. Virginia* provided Ginsburg with an opportunity to make plain her views on sex discrimination.<sup>93</sup> She unequivocally stated that: "[n]either federal nor state

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<sup>87</sup> *Id.*

<sup>88</sup> Liptak, *supra*.

<sup>89</sup> Gutgold, *supra* at 57.

<sup>90</sup> *Id.* at 57.

<sup>91</sup> Liptak, *supra*.

<sup>92</sup> Gutgold, *supra* at 57.

<sup>93</sup> Ruth Bader Ginsburg's Opinions,

[http://www1.law.columbia.edu/law\\_school/communications/reports/winter2004/opinions](http://www1.law.columbia.edu/law_school/communications/reports/winter2004/opinions). (Accessed November 20, 2013).

government acts compatibly with equal protection when a law or official policy denies to women, simply because they are women, full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities.”<sup>94</sup>

At the start of the case, Virginia Military Institute (VMI) was the only single-sex school among Virginia’s public colleges.<sup>95</sup> As a result, the United States sued Virginia and VMI, alleging that the exclusively male admission policy violated the Equal Protection Clause of the Fourteenth Amendment.<sup>96</sup> In response to the Fourth Circuit’s order to remedy the Constitutional violation, Virginia proposed a parallel women’s program: Virginia Women’s Institute for Leadership (VWIL), located at Mary Baldwin College, which was a private liberal arts school for women.<sup>97</sup> Both the District Court and Fourth Circuit affirmed after deferentially reviewing Virginia’s plan, noting that providing single-sex educational programs was a legitimate objective.<sup>98</sup> The court did recognize that its analysis might bypass equal protection scrutiny, so, in response, it asked whether VMI and VWIL students would receive “substantively comparable” benefits.<sup>99</sup>

Justice Ginsburg, writing for the majority, held that parties seeking to defend sex-based government action must demonstrate an exceeding persuasive justification for that action.<sup>100</sup> In order to meet that burden, “a state must show at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially

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<sup>94</sup> United States v. Virginia, 518 U.S. 515 (1996).

<sup>95</sup> *Id.* at 515.

<sup>96</sup> *Id.* at 515.

<sup>97</sup> *Id.* at 515.

<sup>98</sup> *Id.* at 515.

<sup>99</sup> *Id.* at 515.

<sup>100</sup> *Id.* at 515.

related to the achievement of those objectives.”<sup>101</sup> Ginsburg wrote that Virginia had not shown an exceedingly persuasive justification for excluding women from the training afforded by VMI.<sup>102</sup> Although Virginia argued that VMI’s male-only admission policy was in furtherance of a state policy of diversity, Ginsburg noted that record showed just the opposite.<sup>103</sup> In response to Virginia’s creation of a parallel program, VWIL, Ginsburg noted that it was extremely lacking. There were methodological differences that Virginia claimed were “justified pedagogically,” based on important differences between men and women.<sup>104</sup> Justice Ginsburg refuted this, however, writing that generalization about women and estimates of what is appropriate for most women, no longer justify “denying opportunity to women whose talent and capacity place them outside the average description.”<sup>105</sup> The VWIL course would not provide women with the same type of rigorous training, facilities, courses, faculty, financial opportunities, reputation and prestige that VMI affords to males.<sup>106</sup> Summing up, Ginsburg wrote that Virginia had “created a VWIL program fairly appraised as a “pale shadow” of VMI in terms of the range of curricular choices and faculty stature, funding, prestige, alumni support and influence.”<sup>107</sup> Ginsburg’s majority opinion in this case allowed her to reinforce existing law that sex-based classifications are virtually indefensible.

Another majority opinion written by Justice Ginsburg was *M.L.B. v. S.L.J.*. In this case, Mississippi Chancery Court permanently terminated a mother’s, M.L.B.’s, parental rights.<sup>108</sup>

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<sup>101</sup> *Id.* at 516 citing *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142 (1980) (internal quotation omitted).

<sup>102</sup> *Id.* at 534.

<sup>103</sup> *Id.* at 539-40.

<sup>104</sup> *Id.* at 549.

<sup>105</sup> *Id.* at 550.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 553.

<sup>108</sup> *M.L.B. v. S.L.J.*, 519 U.S. 102, 106 (1996).

M.L.B. appealed, but Mississippi required that she pay \$2,352.36 for record preparation fees in advance.<sup>109</sup> M.L.B. could not pay the fees, and, as a result, her appeal was dismissed.<sup>110</sup> In her opinion, Ginsburg wrote “[c]hoices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as of basic importance in our society.”<sup>111</sup> She emphasized that M.L.B.’s case, dealing with a state’s authority to permanently sever the parent-child bond, demands close consideration due to the magnitude of such a decision.<sup>112</sup> Relying on prior case law, Ginsburg found that the “Court was unanimously of the view that the interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment.”<sup>113</sup> Against this backdrop, the majority determined that even though the case was civil in nature, this should not deter the Court from denying M.L.B. a right to appeal (due to her indigence) because of the fundamental rights involved and the severity of the penalty.<sup>114</sup> Justice Ginsburg recognized that a mother’s right to parenthood should not be determined by the size of her wallet, and reaffirmed her standing as a beacon of hope against injustice to women.

In the case of *Olmstead v. L.C.*,<sup>115</sup> Ginsburg once again showed that she was a champion of those who have been discriminated against and was sensitive to those who may need extra protection under the law. Here, L.C. and E.W. were mentally handicapped women with a history of treatment in institutional settings.<sup>115</sup> L.C. was voluntarily admitted to the Georgia Regional

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<sup>109</sup> *Id.* at 106.

<sup>110</sup> *Id.* at 106.

<sup>111</sup> *Id.* at 116, citing *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971) (internal quotations omitted).

<sup>112</sup> *Id.* at 116-17.

<sup>113</sup> *Id.* at 119 citing *Santosky v. Kramer*, 455 U.S. 745, 774 (1982) (internal quotations omitted).

<sup>114</sup> *Id.* at 128.

<sup>115</sup> *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999).

Hospital at Atlanta (GRH) and confined for treatment in a psychiatric unit.<sup>116</sup> Shortly after, her condition stabilized, and her treatment team agreed that she could be moved in one of the community-based programs the state supported.<sup>117</sup> Despite this, L.C. remained institutionalized for several more years until the state placed her in a community-based treatment program.<sup>118</sup>

E.W. was voluntarily admitted to GRH and confined to treatment in a psychiatric unit.<sup>119</sup> It was concluded that she could be treated appropriately in a community-based facility, but she remained institutionalized for more than a year after this assessment, until the District Court issued its judgment in the case.<sup>120</sup>

L.C. filed suit while still in a segregated environment, alleging that the state's failure to place her in a community-based program, after it had been determined to be appropriate, violated Title II of the Americans with Disabilities Act (ADA), which required that services be administered to mentally handicapped individuals in the most integrated setting appropriate to the needs of the handicapped individuals.<sup>121</sup> E.W. intervened and stated an identical claim. The state claimed that the segregation was financially based and that requiring immediately transfer in cases such as this would "fundamentally alter" the state's activity.<sup>122</sup> The District Court agreed with the plaintiffs and the Court of Appeals did as well. However, it remanded for reassessment, the state's cost-based argument.<sup>123</sup>

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<sup>116</sup> *Id.* at 581.

<sup>117</sup> *Id.* at 581.

<sup>118</sup> *Id.* at 581.

<sup>119</sup> *Id.* at 581.

<sup>120</sup> *Id.* at 581.

<sup>121</sup> *Id.* at 595.

<sup>122</sup> *Id.* at 594.

<sup>123</sup> *Id.* at 595.

Justice Ginsburg, writing for the majority, held that “[u]njustified isolation...is properly regarded as discrimination based on disability.”<sup>124</sup> In requiring the state to make reasonable accommodation in order to avoid discrimination, the Court did find that the fundamental-alteration allowed for more leeway than the Court of Appeals believed.<sup>125</sup> Ever sensitive to discrimination in all its forms, Ginsburg noted that identification of unjustified segregation as discrimination reflects two judgments: “[i]nstitutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life.”<sup>126</sup> Institutionalization also severely diminishes individuals’ everyday life activities and quality of life by severing connections to family and loved ones.<sup>127</sup> Ginsburg, by seeking to protect those with mental disabilities, demonstrated here that she is acutely aware of the invidiousness of discrimination in all of its forms.

When it comes to criminal cases, Justice Ginsburg often finds herself favoring defendants’ rights. Such was the case in *Ring v. Arizona*, a case which concerned the Sixth Amendment right to a jury trial in capital prosecutions. In that case, Timothy Ring and several others stole an armored van, murdered the security guard, and made off with more than \$833,000 in cash and checks.<sup>128</sup> At trial, the jury found Ring guilty of felony murder.<sup>129</sup> However, under Arizona law, Ring could not be sentenced to death unless further findings were made.<sup>130</sup> Arizona law directed the judge who presided at the trial to conduct a sentencing hearing to determine the

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<sup>124</sup> *Id.* at 597.

<sup>125</sup> *Id.* at 584.

<sup>126</sup> *Id.* at 583.

<sup>127</sup> *Id.* at 583.

<sup>128</sup> *Ring v. Arizona*, 536 U.S. 584, 589 (2002).

<sup>129</sup> *Id.* at 591.

<sup>130</sup> *Id.* at 592.

existence or nonexistence of certain circumstances in order to determine the sentence.<sup>131</sup> The judge found those circumstances to be present since it had come to light that Ring was the one who had shot the security guard, and also that Ring was a major participant in the robbery.<sup>132</sup> Because of this, Ring was sentenced to death.<sup>133</sup>

Ginsburg, once again writing for the majority, found Arizona's sentencing law to violate the Sixth Amendment. She held that: "[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt."<sup>134</sup> Because the judge, and not the jury, found that Ring had shot the security guard and was a major participant in the robbery, Ring could not be sentenced to death. In holding so, Ginsburg wrote that: "the right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death."<sup>135</sup> Ginsburg's Sixth Amendment interpretation now allows defendants to have their sentence determined by a more sympathetic jury when the sentencing determination requires a finding of aggravating factors.

### Concurring Opinions

In the case of *Brogan v. United States*, Ginsburg wrote a concurrence in which she warns that the majority's decision has conferred a great power upon the prosecutor to manufacture crimes. In this case, Brogan received cash payments from a real estate company whose

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<sup>131</sup> *Id.* at 592.

<sup>132</sup> *Id.* at 594.

<sup>133</sup> *Id.* at 595.

<sup>134</sup> *Id.* at 602.

<sup>135</sup> *Id.* at 609.

employees were represented by the union.<sup>136</sup> Federal agents then visited Brogan at his home, identified themselves, and asked Brogan if he would answer some questions.<sup>137</sup> He agreed, and the agents asked him whether he had received any cash or gifts from the union.<sup>138</sup> Brogan told them that he had no, and the agents then disclosed that a search of union headquarters had shown the contrary.<sup>139</sup> Brogan was arrested and charged with accepting unlawful cash payments and making a false statement.<sup>140</sup>

Justice Scalia, writing for the majority, found that 18 U.S.C. § 1001 did not allow for the “exculpatory no” doctrine since the language of the statute was clear and unambiguous.<sup>141</sup> The “exculpatory no” doctrine had previously been looked upon favorably by some Courts of Appeals. In it, a defendant simply denies his own guilt.<sup>142</sup> Scalia noted that the statute covers “any false statement,” and because of this unequivocal language, the doctrine would not apply.<sup>143</sup>

Justice Ginsburg, although concurring in the judgment, wrote to warn against prosecutors now having the ability to manufacture crimes due to this ruling. She provided several answers in which she illustrated the ways in which informal encounters between agents and their target can easily lead to a felony conviction.<sup>144</sup> Justice Ginsburg noted the immense leverage that a prosecutor has with such a weapon in her pocket, and explained that it was doubtful that Congress intended to create such a situation.<sup>145</sup> Keenly aware of the ways in which defendants

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<sup>136</sup> *Brogan v. U.S.*, 522 U.S. 398, 399 (1998).

<sup>137</sup> *Id.* at 399.

<sup>138</sup> *Id.* at 399.

<sup>139</sup> *Id.* at 399-400.

<sup>140</sup> *Id.* at 400.

<sup>141</sup> *Id.* at 408.

<sup>142</sup> *Id.* at 401.

<sup>143</sup> *Id.* at 400.

<sup>144</sup> *Id.* at 410-11.

<sup>145</sup> *Id.* at 411.

may be prejudiced, Justice Ginsburg can be counted upon to bring such situations to light and ensure that all receive a fair chance at justice.

In the landmark *Grutter v. Bollinger* case, Ginsburg joined in the opinion but wrote a separate concurrence in order to express her concerns that the affirmative measures would be unnecessary in twenty-five years. In this case, law school applicants who were denied admission to Michigan Law School challenged the race-conscious admissions policy.<sup>146</sup> Michigan Law School sought a “mix of students with varying backgrounds and experiences who will respect and learn from each other.”<sup>147</sup> Michigan’s admission policy focused on GPA, LSAT score, a personal statement, letters of recommendation, and an essay describing the ways in which the applicant will contribute to the diversity of the law school.<sup>148</sup> In the majority opinion, Justice O’Connor made sure to note that the admissions policy looked beyond grades and test scores to other criteria such as “the enthusiasm of recommenders, the quality of the undergraduate institution, the quality of the applicant’s essay, and the areas and difficulty of undergraduate course selection” in order to achieve “that diversity which has the potential to enrich everyone’s education and thus make a law school class stronger than the sum of its parts.”<sup>149</sup> However, the admissions policy did make special reference to the inclusion of students from groups which have been historically discriminated against, like “African Americans, Hispanics, and Native Americans” in order to reach a “critical mass” of underrepresented minority students.<sup>150</sup>

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<sup>146</sup> *Grutter v. Bollinger*, 539 U.S. 306 (2003).

<sup>147</sup> *Id.* at 314.

<sup>148</sup> *Id.* at 315.

<sup>149</sup> *Id.* at 315.

<sup>150</sup> *Id.* at 316.

Grutter was a white Michigan resident who had applied to the Law School with a 3.8 GPA and a 161 LSAT score.<sup>151</sup> Initially placed on a waiting list, she was later rejected.<sup>152</sup> She filed suit alleging discrimination on the basis of race in violation of the Fourteenth Amendment.<sup>153</sup> Justice O'Connor noted that racial classification must be analyzed under strict scrutiny.<sup>154</sup> This means that when race-based classification is needed to further a compelling governmental interest, this does not violate the Equal Protection Clause as long as the narrow-tailoring prong is also satisfied. The majority then looked to determine whether the Law School's use of race is justified by a compelling state interest.<sup>155</sup> The majority found that the Law School did have a compelling interest in obtaining a diverse student body due to the substantial benefits of breaking down racial stereotypes and helping to better understand persons of different races.<sup>156</sup> Furthermore, the majority found that the admissions program was narrowly <sup>tailored</sup> because it did not use a quota system, but instead used a flexible, holistic approach that considered all elements of diversity.<sup>157</sup> As a result, the Court found that the Law School's admissions policy did not violate the Equal Protection Clause.<sup>158</sup>

Justice Ginsburg, concurring in the judgment, wrote separately to address some of her concerns. She argued that "many minority students encounter inadequate and unequal educational opportunities," and, as a result, such affirmative programs are necessary to ensure equal opportunity.<sup>159</sup> In doing so, Ginsburg expressed doubt as to the majority's view that such

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<sup>151</sup> *Id.* at 316.

<sup>152</sup> *Id.* at 316.

<sup>153</sup> *Id.* at 317.

<sup>154</sup> *Id.* at 326.

<sup>155</sup> *Id.* at 327.

<sup>156</sup> *Id.* at 329-30.

<sup>157</sup> *Id.* at 334.

<sup>158</sup> *Id.* at 343.

<sup>159</sup> *Id.* at 345.

remedial measures would not be necessary in 25 years. In noting this, Ginsburg showed her wisdom and understand<sup>ing</sup> that such cultural changes do not happen overnight, having experience of such discrimination herself. Perhaps because Ginsburg felt the sting of discrimination in her own education, she was especially sensitive to the same happening to others, and, consequently, she felt compelled to write such a pragmatic concurrence.

### Dissenting Opinions

Ginsburg rarely departs from the customary written dissent process, but when she does, it typically involves a major disagreement on the bench regarding women's or minority rights. As an outspoken advocate for women's rights throughout her entire life, Ginsburg saves her most critical dissents for cases in which she believes that these rights are jeopardized.

In *Ledbetter v. Goodyear Tire & Rubber Co.*, Ginsburg wrote a strong dissent that she read from the bench in 2007. In this case, Lilly Ledbetter worked for Goodyear Tire & Rubber Company (Goodyear) at its Alabama plant from 1979 through 1998.<sup>160</sup> Throughout this time, employees were evaluated based on performance and given or denied raises<sup>5</sup> based on these ratings.<sup>161</sup> In 1998, Ledbetter submitted a questionnaire to the EEOC, alleging sex discrimination and filed formal charges.<sup>162</sup> During the trial, Ledbetter introduced evidence that her supervisors had given her poor evaluations because of her sex, that her pay was not increased as much as it would have been if she had been rated fairly, and that the past decisions continued to affect her pay throughout employment.<sup>163</sup> The jury found in Ledbetter's favor and awarded her back pay and damages.<sup>164</sup> On appeal, Goodyear argued that Ledbetter's pay discrimination claim was time

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<sup>160</sup> *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 621 (2007).

<sup>161</sup> *Id.* at 621.

<sup>162</sup> *Id.* at 621.

<sup>163</sup> *Id.* at 622.

<sup>164</sup> *Id.* at 622.

barred because the claimed discrimination did not occur within the 180 days prior to the filing of the EEOC questionnaire, as required by law.<sup>165</sup> The Court of Appeals for the Eleventh Circuit agreed and reversed the District Court's decision.<sup>166</sup>

Writing for the majority, Justice Alito held that "any unlawful employment practice, including those involving compensation, must be presented to the EEOC within the period prescribed by the statute."<sup>167</sup> The Majority relied on prior case law to inform its decision, wrote that the charging period is triggered only when a discrete unlawful practice takes place and that a new violation does not occur (thus triggering a new charging period) upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects relating to the past discrimination.<sup>168</sup> Because the paychecks that Ledbetter did receive within the charging period were found to be nondiscriminatory even though they may have related to past discrimination, the majority found that Ledbetter's claims were time barred.<sup>169</sup>

Ginsburg, clearly in disagreement with the majority, wrote a stinging dissent. She wrote that the "Court's insistence on immediate contest [of discrimination] overlooks common characteristics of pay discrimination."<sup>170</sup> She noted that pay disparities are significantly different than other adverse actions since they occur in small increments, and are thus harder to detect than termination, failure to promote, or refusal to hire.<sup>171</sup> Furthermore, Goodyear kept salaries confidential, making it much harder for Ledbetter to discover the discrimination.<sup>172</sup> Ginsburg advocated for "counting both the pay-setting decisions and that actual payment of a

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<sup>165</sup> *Id.* at 622.

<sup>166</sup> *Id.* at 622.

<sup>167</sup> *Id.* at 642-43.

<sup>168</sup> *Id.* at 628.

<sup>169</sup> *Id.* at 628.

<sup>170</sup> *Id.* at 645.

<sup>171</sup> *Id.* at 645.

<sup>172</sup> *Id.* at 650.

discriminatory wage as unlawful practices.”<sup>173</sup> She felt that this application of Title VII of the Civil Rights Act was much more faithful to the broad remedial purpose of the statute as opposed to the majority’s “cramped” interpretation.<sup>174</sup>

Following the case, Ginsburg said “[s]everal members of Congress responded within days after the [C]ourt’s decision was issued,”<sup>175</sup> and President Obama signed the Ledbetter Fair Pay Act into law.<sup>176</sup> Following Ginsburg’s application of Title VII, the new law allows for acts outside of the 180 day charging period to be incorporated in to a pay discrimination claim if it relates to a present act of discrimination. Justice Ginsburg has a framed copy of the Ledbetter Fair Pay Act hanging in her chambers, and she counts it as one of her proudest achievements.<sup>177</sup>

In *Ricci v. DeStefano*, a disparate-impact discrimination case, Ginsburg’s dissent argued that flaws in the majority’s analysis led to an unjust outcome. In this case, twenty or so white New Haven firefighters and one Latino firefighter alleged Title VII and Equal Protection Clause violations.<sup>178</sup> In 2003, 118 New Haven firefighters took examinations to qualify for promotions.<sup>179</sup> When the examination results showed that white candidates had outperformed the minority candidates, the mayor and city politicians ignored the test results and denied promotions to the candidates who scored well.<sup>180</sup> As a result, the firefighters brought suit.

Justice Kennedy, writing for the majority, concluded that New Haven’s race-based action like ~~New Haven’s~~ is impermissible under Title VII unless it could “demonstrate a strong basis in

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<sup>173</sup> *Id.* at 646.

<sup>174</sup> *Id.* at 646, 661.

<sup>175</sup> Gutgold, *supra* at 58 citing interview with Ruth Bader Ginsburg (August 19, 2010).

<sup>176</sup> *Id.* at 58.

<sup>177</sup> Adam Liptak, *Court Is ‘One of Most Activist,’ Ginsburg Says, Vowing to Stay*, N.Y. Times, August 24, 2013.

<sup>178</sup> *Ricci v. DeStefano*, 557 U.S. 557 (2009).

<sup>179</sup> *Id.* at 562.

<sup>180</sup> *Id.* at 562.

evidence that, had it not taken the action, it would have been liable under the disparate-impact statute.”<sup>181</sup> The majority rejected the argument that New Haven did not discriminate, writing that the city engaged in “express, race-based decisionmaking”<sup>182</sup> because it declined to certify the test scores because of the disparity between whites and minorities. Next, Kennedy sought to determine whether there were any lawful justifications for the discrimination.<sup>183</sup> The majority concluded that “certain government actions to remedy past racial discrimination—actions that are themselves based on race—are constitutional only where there is a ‘strong basis in evidence’ that the remedial actions were necessary.”<sup>184</sup> Because of this, the majority found that once New Haven had established its selection criteria, it could not then invalidate the test results unless there was a strong basis in evidence showing an impermissible disparate impact.<sup>185</sup> Using this standard, Kennedy concluded that “[t]here [was] no evidence — let alone the required strong basis in evidence — that the tests were flawed because they were not job-related or because other, equally valid and less discriminatory tests were available to the City.”<sup>186</sup> He noted that “fear of litigation alone cannot justify an employer’s reliance on race to the detriment of individuals who passed the examinations and qualified for promotions.”<sup>187</sup>

Ginsburg dissented. She noted that the “strong basis in evidence standard” was inapt.<sup>188</sup> She also found that there was substantial evidence that New Haven’s tests were flawed, and that there were better assessment methods, and noted that most municipalities did not evaluate their

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<sup>181</sup> *Id.* at 563.

<sup>182</sup> *Id.* at 579.

<sup>183</sup> *Id.* at 580.

<sup>184</sup> *Id.* at 582 citing *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989) (internal quotations omitted).

<sup>185</sup> *Id.* at 585.

<sup>186</sup> *Id.* at 592.

<sup>187</sup> *Id.* at 592.

<sup>188</sup> *Id.* at 628.

fire-officer candidates as New Haven did.<sup>189</sup> Justice Ginsburg, was acutely aware of how pervasive racial discrimination was in municipal employment<sup>190</sup>, and ever with an eye towards ending such discrimination, sought to show how certain practices could be “fair in form, but discriminatory in operation.”<sup>191</sup>

*Gonzales v. Carhart*, another case in which Ginsburg read her dissent from the bench, dealt with the validity of the Partial-Birth Abortion Ban Act of 2003, a federal statute regulating abortion procedures.<sup>192</sup> In this case, Justice Kennedy, writing for the majority, found that the government “has a legitimate and substantial interest in preserving and promoting fetal life,”<sup>193</sup> and that the ban fit that interest so as to not create an undue burden on the mother.<sup>194</sup> Kennedy also found that a health exception was unnecessary.<sup>195</sup> The majority further held that “ethical and moral concerns”<sup>196</sup>, such as an interest in fetal life, constituted “substantial” state interests, that could be a basis for legislation at all times during pregnancy, as long as those interests would not impose an undue burden on the mother.

In her strong dissent, Ginsburg wrote that the majority’s decision was an “alarming”<sup>197</sup> one that ignored precedent and “refuse[d] to take *Casey* and *Stenberg* seriously.”<sup>198</sup> Focusing on the *Casey* opinion, Ginsburg wrote:

[w]omen, it is now acknowledged, have the talent, capacity, and right to participate equally in the economic and social life of the Nation. Their ability to

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<sup>189</sup> *Id.* at 634

<sup>190</sup> *Id.* at 609.

<sup>191</sup> *Id.* at 644 citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (internal quotations omitted).

<sup>192</sup> *Gonzalez v. Carhart*, 550 U.S. 124, 132 (2007).

<sup>193</sup> *Id.* at 145.

<sup>194</sup> *Id.* at 150.

<sup>195</sup> *Id.* at 168.

<sup>196</sup> *Id.* at 158.

<sup>197</sup> *Id.* at 170.

<sup>198</sup> *Id.* at 170.

realize their full potential, the Court recognized, is intimately connected to their ability to control their reproductive lives. Thus, legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature.<sup>199</sup>

Ginsburg also criticized the lack of health exception, arguing that “the absence of a health exception burdens *all* women for whom it is relevant—women who, in the judgment of their doctors, require an intact D & E because other procedures would place their health at risk.”<sup>200</sup> Ginsburg strongly condemned Congress for substituting their own preferences in place of the “reasoned medical judgments of highly trained doctors.”<sup>201</sup> Noting that the Court was “differently composed than it was when [it] last considered a restrictive abortion regulation,” Ginsburg has said that she thinks “long term, [her] opinion will be the law.”<sup>202</sup>

In another case concerning a major piece of legislation, the Court *Shelby County, Ala. v. Holder* held that the Voting Rights Act (VRA) provision setting forth the coverage formula was unconstitutional. The VRA was first enacted in 1965 to remedy pervasive racial discrimination in voting.<sup>203</sup> It was subsequently modified and reaffirmed as law several times over.<sup>204</sup> One section of the VRA targeted those jurisdictions that “had maintained a test or device as a prerequisite to voting as of November 1, 1964, and had less than 50 percent voter registration or turnout in the 1964 Presidential election.”<sup>205</sup> A “covered” jurisdiction was able to “bail out” of the VRA provisions “if it had not used a test or device in the preceding five years “for the purpose or with

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<sup>199</sup> *Id.* at 171-72 citing *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992) (internal quotations omitted).

<sup>200</sup> *Id.* at 188 citing *Stenberg v. Carhart*, 530 U.S. 914 (2000) (internal quotations omitted).

<sup>201</sup> *Id.* at 187.

<sup>202</sup> Gutgold, *supra* at 58 citing an interview with Justice Ruth Bader Ginsburg (August 19, 2010).

<sup>203</sup> *Shelby County, Ala. v. Holder*, 133 S.Ct. 2612, 2618 (2013).

<sup>204</sup> *Id.* at 2618.

<sup>205</sup> *Id.* at 2619.

the effect of denying or abridging the right to vote on account of race or color.”<sup>206</sup> In those covered jurisdictions, no change in voting procedure could be made unless approved by federal authorities.<sup>207</sup> Chief Justice Roberts, writing for the majority, struck down the coverage formula. He reasoned that the coverage formula conflicted with the principles of federalism and equal sovereignty of the states.<sup>208</sup> The majority argued that this was because “[t]he conditions that originally justified [the coverage formula] no longer characterize voting in the covered jurisdictions.”<sup>209</sup>

In a lengthy dissent, Justice Ginsburg argued that it is not the Court’s place to “substitute its judgment for that of Congress, but to determine whether the legislative record sufficed to show that Congress could rationally have determined that its chosen provisions were appropriate methods.”<sup>210</sup> Ginsburg concluded that there was ample evidence for Congress to determine that the VRA was still necessary, including the DOJ blocking over 700 voting changes because they were discriminatory.<sup>211</sup> Furthermore, with regard to Alabama, it “was found to have “deni[ed] or abridge[d] voting rights on account of race or color more frequently than nearly all other States in the Union.”<sup>212</sup> In an apt metaphor, Ginsburg wrote that “[t]hrowing 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.”<sup>213</sup> Justice Ginsburg continues to recognize that discrimination persists today, and, although it may not be as overt, it is just as damaging to the principles of justice and equality.

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<sup>206</sup> *Id.* at 2620.

<sup>207</sup> *Id.* at 2620.

<sup>208</sup> *Id.* at 2631.

<sup>209</sup> *Id.* at 2631.

<sup>210</sup> *Id.* at 2638.

<sup>211</sup> *Id.* at 2639.

<sup>212</sup> *Id.* at 2645.

<sup>213</sup> *Id.* at 2649.

## **Conclusion**

Ruth Bader Ginsburg has spent her entire legal career championing legal equality. Whether it is women in the workplace or minorities at the voting booth, Justice Ginsburg has always been keenly aware of the ways in which discrimination can affect the nation. In an essay, Harvard professor, Michael J. Klarman wrote that Ginsburg “was an organizer, mobilizer, publicist, and educator for the sex equality movement—just as Thurgood Marshall had been for the civil right movement a generation earlier.”<sup>214</sup> She was the legal architect of the women’s movement, and her work as the leader of the Women’s Rights Project of the ACLU changed American law regarding gender equality. On the Supreme Court, she continues to work toward ensuring every individual is treated equally under the law. Through her intellect, courage, and humanity, Ruth Bader Ginsburg has advanced equality for all in the United States and changed American society for the better.

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<sup>214</sup> Michael Klarman, *Social Reform and Its Challenges: An Essay in Honor of Justice Ruth Bader Ginsburg*, 32 Harvard Journal of Law and Gender, 251 (2009).