

2016

# The “Liberal Lioness”: Associate Justice Ruth Bader Ginsburg and Her Understanding of Equal Protection Under the Constitution

Jamera Sirmans

Follow this and additional works at: [https://scholarship.shu.edu/student\\_scholarship](https://scholarship.shu.edu/student_scholarship)



Part of the [Law Commons](#)

---

## Recommended Citation

Sirmans, Jamera, "The “Liberal Lioness”: Associate Justice Ruth Bader Ginsburg and Her Understanding of Equal Protection Under the Constitution" (2016). *Law School Student Scholarship*. 766.

[https://scholarship.shu.edu/student\\_scholarship/766](https://scholarship.shu.edu/student_scholarship/766)

# The “Liberal Lioness”: Associate Justice Ruth Bader Ginsburg and Her Understanding of Equal Protection Under the Constitution

---

By: Jamera Sirmans

## TABLE OF CONTENTS

I.	BIOGRAPHY.....	3
	A. Early Life .....	3
	B. Life and Love at Cornell.....	4
	C. Cancer Recurrence.....	6
	D. No Women For Hire.....	7
	E. Women’s Rights At Rutgers.....	8
	F. Circuit Court Judge Nomination.....	9
	G. The Supreme Seat.....	10
	H. Cancer Again.....	11
II.	JURISPRUDENCE.....	12
	A. “Equal Citizenship Stature”.....	12
	1. Setting Precedent: Equal Access To The Court.....	13
	2. Equal Protection in Gender.....	17
	a. Sex Discrimination in Education/Equal Opportunity in Education.....	18
	b. Employment Discrimination.....	23
	c. Harassment In The Workplace.....	28
	3. Equal Protection In Race.....	31
	a. Voting Discrimination.....	32
	b. Affirmative Action.....	37
	c. Searches And Seizures.....	41
	4. Equal Protection In Disabilities.....	44
	5. Abortion.....	48
	a. Reproduction Rights.....	48
	b. Religion And Access To Contraceptives.....	51
III.	CONCLUSION.....	55

## I. BIOGRAPHY

### A. Early Life

Joan Ruth Bader, nicknamed “Kiki” was born on March 15, 1933.<sup>1</sup> She grew up in Flatbush, Brooklyn, New York in a family of Jewish immigrants.<sup>2</sup> Her father, Nathan Bader, was an immigrant from Russia<sup>3</sup> who worked as a fur manufacturer, and later in a men’s clothing store.<sup>4</sup> Her mother, Celia Bader, was born in the United States, but originally from Poland.<sup>5</sup> At the tender age of two, Justice Ginsburg became the only child of her parents after her older sister Marilyn died from meningitis.<sup>6</sup> Although tragedy struck the Bader family early on in life, her parents continued to instill love and perseverance into Ruth as a child.

Ruth recalls some of her greatest memories being in the company of her mother who most heavily influenced her life and introduced her to reading and the art of learning.<sup>7</sup> Although her mother did not work outside of the house, her mother continuously stressed the importance of Ruth being independent and to think for herself.<sup>8</sup> Ruth also attended P.S. 238 and James Madison High School in Brooklyn where she both edited and wrote for the high school newspaper, The Highway Herald.<sup>9</sup> Specifically, she wrote articles on the topics of the Bill of Rights and the Magna Carta,<sup>10</sup> which can be argued foreshadowed her career path and success. While Ruth attended high school, her mother was battling with cervical cancer, which she

---

<sup>1</sup> Phil Schatz, *Hon. Ruth Ginsburg Associate Justice, Supreme Court of the United States*, 57-MAY Fed. Law. 24, 25 (2010).

<sup>2</sup> *Id.*

<sup>3</sup> Carey Olney, *Better Bitch Than Mouse: Ruth Bader Ginsburg, Feminism, and VMI*, 9 Buff. Women’s L.J. 97, 103 (2001).

<sup>4</sup> Malvina Halberstam, *Ruth Bader Ginsburg: The First Jewish Woman On The United States Supreme Court*, 19 Cordozo L. Rev. 1441, 1443 (1998).

<sup>5</sup> Schatz, *supra* at 25.

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

<sup>7</sup> Halberstam, *supra* at 1443.

<sup>8</sup> *Id.* (citation omitted).

<sup>9</sup> *Id.* at 1444.

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

ultimately fell victim to in June 1950, the day before Ruth's high school graduation.<sup>11</sup> Although tragedy struck the Bader household again, Ruth continued to soar and excel in school. Ruth survived these heart-wrenching times by focusing on her studies. According to Justice Ginsburg, "I knew that [my mother] wanted me to study hard and get good grades and succeed in life so that's what I did."<sup>12</sup> And it is evident that Justice Ginsburg did just that.

## **B. Life and Love At Cornell**

Upon graduating sixth in her class, Justice Ginsburg received copious amounts of awards including a New York State scholarship and other scholarships to attend Cornell. She ultimately chose to attend Cornell University in 1950.<sup>13</sup> While attending college, she also worked part-time clerical jobs to support herself, in addition to relying on her financial assistance scholarships.<sup>14</sup> She graduated with high honors and a degree in Government and was elected into Phi Beta Kappa.<sup>15</sup> In her freshman year there, she met and fell in love with her future husband Martin ("Marty") David Ginsburg who was a year ahead of her.<sup>16</sup> In recalling her journey with her husband to Harvard Law School, Justice Ginsburg states in an interview, "[Marty] was the first boy I ever met who cared that I had a brain, [and] we decided that whatever we would do, we would both do it."<sup>17</sup> They wed in June 1954 soon after her graduation, and a year after Marty completed his first year at Harvard Law School.<sup>18</sup>

---

<sup>11</sup> *Id.*; Schatz, *supra* at 103.

<sup>12</sup> Ruth Bader Ginsburg, interview by Brian Lamb, C-SPAN, June 1, 2009.

<sup>13</sup> Halberstam, *supra* at 1444; Schatz, *supra* at 26.

<sup>14</sup> *Id.* at 1444.

<sup>15</sup> Schatz, *supra* at 26.

<sup>16</sup> Halberstam, *supra* at 1445.

<sup>17</sup> Ruth Bader Ginsburg, interview with Larry Josephson, *Only in America: 350 Years of the American Jewish Experience* (Sept. 2, 2004), available at [www.onlyinamerica.info/ginsburg.shtml](http://www.onlyinamerica.info/ginsburg.shtml) (accessed Nov. 13, 2014); See Schatz, *supra* at 26.

<sup>18</sup> Halberstam, *supra* at 1445.

Although Justice Ginsburg had also been accepted into Harvard Law, she could not attend immediately because her husband was drafted into the Army.<sup>19</sup> The young couple moved to Fort Sill, Oklahoma for two years. During that time, Justice Ginsburg gave birth on July 21, 1955 to her only daughter Jane Carol,<sup>20</sup> who is now the “Morton L. Janklow Professor of Literary and Artistic Property Law at Columbia University Law School.”<sup>21</sup> It was in Oklahoma that Justice Ginsburg experienced her “first bitter taste of gender based employment discrimination.”<sup>22</sup> Not long after the family’s relocation, the Justice accepted a position working for a local Social Security office.<sup>23</sup> Unfortunately, when she informed her superiors of her pregnancy, the superiors decided that she could not travel to one of the training sessions required for a promotion despite the fact that she was otherwise qualified for the promotion.<sup>24</sup> As a result of her status as a pregnant woman, Justice Ginsburg was forced to accept a lower position and pay, instead of a position that she otherwise qualified for.<sup>25</sup>

Following Marty’s two-year draft into the Army, the Ginsburg family returned to Boston to attend Harvard. Since, “law school was essentially a men’s club in 1956,”<sup>26</sup> Justice Ginsburg’s entering class of 500 students only consisted of nine women.<sup>27</sup> Unfortunately, “[t]he pressure on the few women to prove their entitlement to attend law school was intense,”<sup>28</sup> which proved to be essence of her stay at Harvard following two incidents. Justice Ginsburg recalls the epitome of the academic atmosphere when she states, “You felt that every eye was on you.

---

<sup>19</sup> *Id.*; Schatz, *supra* at 26; Olney, *supra* at 104.

<sup>20</sup> Halberstam, *supra* at 1445.

<sup>21</sup> Schatz, *supra* at 26.

<sup>22</sup> Olney, *supra* at 104.

<sup>23</sup> Toni J. Ellington et al., *Justice Ruth Bader Ginsburg and Gender Discrimination*, 20 U. Haw. L. Rev. 699, 705 (1998).

<sup>24</sup> Halberstam, *supra* at 1445.

<sup>25</sup> Olney, *supra* at 104.

<sup>26</sup> Schatz, *supra* at 26.

<sup>27</sup> Halberstam, *supra* at 1445.

<sup>28</sup> Schatz, *supra* at 26.

Every time you answered a question, you felt that you were answering for your entire sex.”<sup>29</sup> While attending Harvard, Justice Ginsburg was invited to attend a dinner for the nine female first-year students given by Dean Erwin Griswold.<sup>30</sup> During the dinner Dean Griswold demanded that all of the women explain how they justified taking up admissions seats that would have otherwise gone to qualified men.<sup>31</sup> Since it was common during that time for professors to call on women for “comic relief,”<sup>32</sup> Justice Ginsburg responded to Dean Griswold in the least assertive way possible, and stated that she thought that studying law would make her a better wife.<sup>33</sup> Furthermore while on *Harvard’s Law Review*, Justice Ginsburg came face to face with discrimination yet again. A room in Harvard’s Lamont Library was closed to women, which made it impossible for Justice Ginsburg to have access to a periodical that she needed in order to complete her cite-checking assignment for the Law Review.<sup>34</sup> Despite the many challenges Ruth faced she continued to excel academically.

### C. Cancer Recurrence

While as a member of the *Harvard Law Review*, and a mother of a toddler, Justice Ginsburg’s studies were once again interrupted. Cancer made its entrance into Justice Ginsburg’s life yet again, but this time it plagued her husband Marty. Marty was diagnosed with advanced testicular cancer, which left him debilitated for an entire term while in law school.<sup>35</sup> During this time Ruth bore her husband’s studies on top of her own studies, and recalls that,

---

<sup>29</sup> Emily Bazelon, *The Place of Women on the Court*, N.Y. TIMES, July 7, 2009, [www.nytimes.com/2009/07/12/magazine/12ginsburg-t.html](http://www.nytimes.com/2009/07/12/magazine/12ginsburg-t.html) (accessed Nov. 20, 2014).

<sup>30</sup> Halberstam, *supra* at 1445.

<sup>31</sup> Olney, *supra* at 104.

<sup>32</sup> Halberstam, *supra* at 1445 (citation omitted).

<sup>33</sup> Olney, *supra* at 105 (citing David Margolick, *Judge Ginsburg’s Life a Trial by Adversity*, N.Y. TIMES, June 25, 1993, at A1, A9).

<sup>34</sup> Halberstam, *supra* at 1445 (citation omitted); Ellington et al., *supra* at 705.

<sup>35</sup> Schatz, *supra* at 26.

“That’s when I learned to work all night.”<sup>36</sup> Ginsburg continued to defy the odds by attending her husband’s classes and taking his notes on top of all of the work she had to complete for herself, all while ranking among the top ten students in her class at the time.<sup>37</sup> Fortunately, Marty made a full recovery from his cancer and upon his graduation from Harvard Law in 1958 he accepted employment as a tax attorney in New York.<sup>38</sup> This was the foundation to his successful career as he is now deemed as one of the premier tax experts in the United States.<sup>39</sup> Once her husband accepted his position as a tax attorney, Justice Ginsburg transferred to Columbia Law School and yet again she made *Law Review*. Unsurprisingly, she tied for first in her class as a Kent Scholar,<sup>40</sup> and she became the first person, male or female, to make *Law Review* at two major Ivy League schools.<sup>41</sup>

#### **D. No Women For Hire**

In 1959, upon graduating top in her class from Columbia Law School, “not a single law firm in the city of New York” would hire Justice Ginsburg.<sup>42</sup> Her former professor at Harvard Law School, Albert Sacks recommended her as a law clerk for Supreme Court Justice Felix Frankfurter, because of her outstanding academic record.<sup>43</sup> However, although Ginsburg was more than qualified to complete the job, Justice Frankfurter was not willing to hire Ruth simply because she was a woman.<sup>44</sup> Justice Ginsburg explains her challenges during this era when she

---

<sup>36</sup> Debra Bruno, *Justice Ginsburg Remembers Her First Steps in the Law*, LEGAL TIMES, Nov. 13, 2007, [www.law.com/jsp/article.jsp?id=1194861838591](http://www.law.com/jsp/article.jsp?id=1194861838591).

<sup>37</sup> Schatz, *supra* at 26; Olney, *supra* at 105; Halberstam, *supra* at 1445.

<sup>38</sup> *Id.* at 26

<sup>39</sup> Nina Totenberg, *At The High Court, A Tribute To A ‘Chef Supreme,’* WBUR.org, Dec. 12, 2011, available at <http://www.wbur.org/npr/143352409/at-the-high-court-a-tribute-to-a-chef-supreme?ft=3&f=143352409>.

<sup>40</sup> Olney, *supra* at 105.

<sup>41</sup> Ellington et al., *supra* at 706 (citations omitted).

<sup>42</sup> Halberstam, *supra* at 1446 (citation omitted).

<sup>43</sup> *Id.* at 1445.

<sup>44</sup> *Id.* at 1445.

recalls, “In the fifties, the traditional law firms were just beginning to turn around on hiring Jews...But to be a woman, a Jew, and a mother to boot, that combination was a bit much.”<sup>45</sup> Mercifully, she secured a judicial clerkship with the Honorable Edmund L. Palmieri of the Southern District of New York through her mentor, Gerald Gunther.<sup>46</sup>

Following her clerkship, Ruth declined all of her firm offers and instead worked on the Columbia Project on International Civil Procedure at Columbia.<sup>47</sup> While there, she was to research foreign systems of civil procedure and to make suggestions to the United States rules on transnational litigation for improvements.<sup>48</sup> During her duration there she also co-authored a book on Swedish Civil Procedure and in 1969 was awarded an honorary doctorate from the University of Lund.<sup>49</sup>

#### **E. Women’s Rights At Rutgers – Ruth At Rutgers**

In 1963 Justice Ginsburg joined the Rutgers Law faculty in Newark, New Jersey. It was one of the very few schools that were willing to accept women at that time.<sup>50</sup> It was at Rutgers where Ruth initially became directly involved with women’s rights.<sup>51</sup> It was during this time that she became pregnant with her son, James Ginsburg,<sup>52</sup> who is the chief executive officer of Chicago’s classical record company Cedille Records,<sup>53</sup> and gave birth in September 1965. Afraid that she might lose her position as a faculty member, just as she had been demoted in Oklahoma because of her pregnancy, Justice Ginsburg attempted to hide her pregnancy with her

---

<sup>45</sup> *Id.* at 1446 (citation omitted).

<sup>46</sup> Schatz, *supra* at 26.

<sup>47</sup> Halberstam, *supra* at 1446.

<sup>48</sup> Olney, *supra* at 106.

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

<sup>50</sup> Halberstam, *supra* at 1446.

<sup>51</sup> *Id.* at 1447; Olney, *supra* at 106.

<sup>52</sup> Halberstam, *supra* at 1446.

<sup>53</sup> Schatz, *supra* at 26.

son by wearing loose-fitting clothes that she borrowed from her mother-in-law.<sup>54</sup> This demonstrated how her experiences with discrimination influenced her actions and responses to it.

Furthermore, while at Rutgers she became affiliated with the American Civil Liberties Union (ACLU) as gender discrimination cases began to surge during the late sixties.<sup>55</sup> Many of the incoming gender discrimination cases were referred to her, because as she put it, “well, sex discrimination was regarded as a woman’s job.”<sup>56</sup> Her success in the ACLU resulted in Justice Ginsburg founding and becoming a co-director of the ACLU’s Women’s Rights Project (WRP).<sup>57</sup> It was during this time that Justice Ginsburg’s passion for fighting gender inequality propelled her to argue before the Supreme Court, specifically winning five of her six gender discrimination cases.<sup>58</sup> This included: arguing that female lieutenants in the Air Force were entitled to the same housing and medical benefits as her male associates,<sup>59</sup> that a widow is entitled to the same Social Security payments to support his or her son regardless of the gender of the widow,<sup>60</sup> and that a state law in Missouri that made jury duty optional for women was discriminatory because it devalued women’s contributions to society as compared to men.<sup>61</sup>

## **F. Circuit Court Judge Nomination**

In 1980 Justice Ginsburg resigned from her general counsel position for the WRP following her nomination by then President Jimmy Carter to the U.S. Court of Appeals for the District of Columbia.<sup>62</sup> His intention was to increase the number of females in the judiciary in

---

<sup>54</sup> Halberstam, *supra* at 1446.

<sup>55</sup> *Id.* at 1447.

<sup>56</sup> Olney, *supra* at 106 (citation omitted).

<sup>57</sup> *Id.* at 107.

<sup>58</sup> Halberstam, *supra* at 1448.

<sup>59</sup> *Frontiero v. Richardson*, 411 U.S. 677 (1973).

<sup>60</sup> *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975).

<sup>61</sup> *Duren v. Missouri*, 439 U.S. 357 (1979).

<sup>62</sup> Olney, *supra* at 115.

addition to making merit-based appointments.<sup>63</sup> With almost a unanimous decision by the Senate, Ruth Bader Ginsburg became Judge Ginsburg in 1980. Since the Ginsburg family had continuously moved to accommodate Mr. Ginsburg's employment opportunities, he did not hesitate to relocate for his wife's new position. He specifically gave up his tenured position at Columbia Law School and his private practice at a prominent New York City law firm to accompany his wife in Washington, D.C.<sup>64</sup> According to Marty, "I have been supportive of my wife since the beginning of time, and she has been supportive of me. It's not sacrifice; it's family."<sup>65</sup>

### **G. The Supreme Seat**

After nearly thirteen years in the Circuit Court, on June 14, 1993, President Clinton nominated Ruth Bader Ginsburg to be an Associate Justice of the Supreme Court.<sup>66</sup> President Clinton nominated Ruth for the following reasons:

First, in her years on the bench, she has genuinely distinguished herself as one of our nation's best judges, progressive in outlook, wise in judgment, balanced and fair in her opinions.

Second, over the course of a lifetime in her pioneering work on behalf of the women of this country, she has compiled a truly historic record of achievement in the finest traditions of American law and citizenship.

And, finally, I believe that in the years ahead, she will be able to be a force for consensus-building on the Supreme Court just as she has been on the Court of Appeals, so that our judges can become an instrument of our common unity in the expression of their fidelity to the Constitution.<sup>67</sup>

---

<sup>63</sup> see Nancy Sherer, *Diversifying The Federal Bench: Is Universal Legitimacy For The U.S. Justice System Possible?*, 105 Nw U. L. Rev. 587, 588 (2011).

<sup>64</sup> Schatz, *supra* at 27.

<sup>65</sup> Stephen Labaton, *The Man Behind the High Court Nominee*, N.Y. TIMES, June 17, 1993, [www.nytimes.com/1993/06/17/us/the-man-behind-the-high-court-nominee.html?pagewanted=1](http://www.nytimes.com/1993/06/17/us/the-man-behind-the-high-court-nominee.html?pagewanted=1).

<sup>66</sup> Halberstam, *supra* at 1452.

<sup>67</sup> *The Supreme Court: Transcript of President's Announcement and Judge Ginsburg's Remarks*, N.Y. TIMES, June 15, 1993, at A1; see Halberstam, *supra* at 1452-1453.

In her explanation as to wanting to be a member of the Supreme Court, Justice Ginsburg states,

It is an opportunity beyond any other for one of my training to serve society. The controversies that come to the Supreme Court, as the last judicial resort, touch and concern the health and well-being of our Nation and its people. They affect the preservation of liberty to ourselves and our prosperity. Serving on this Court is the highest honor, the most awesome trust, that can be placed in a judge. It means working at my craft—working with and for the law—as a way to keep our society both ordered and free.<sup>68</sup>

Her nomination was confirmed by a Senate 96-3 vote, and she took the bench on August 3, 1993.<sup>69</sup> She became the second woman in American history to be a member on the bench, joining Sandra Day O'Connor, and thus became the first Jewish woman on the bench.<sup>70</sup>

#### **H. Cancer Again...**

In 1999 Justice Ginsburg was diagnosed with colon cancer and almost 10 years later, she was diagnosed with pancreatic cancer.<sup>71</sup> With expected resilience that she has shown since birth, Justice Ginsburg has conquered both cancers.<sup>72</sup> Unfortunately, however, her husband Marty passed away in 2010.<sup>73</sup> Shockingly, the next day following the death of her husband, Justice Ginsburg was in attendance in court and delivered an opinion from the bench.<sup>74</sup> As one of her former law clerks has summed up in reflection of Justice Ginsburg's obstacles,

---

<sup>68</sup> Nomination of Ruth Bader Ginsburg, to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary, 103d Cong. 49 (1994) (statement of Ruth Bader Ginsburg); see Halberstam, *supra* at 1453.

<sup>69</sup> Olney, *supra* at 117.

<sup>70</sup> *Id.*

<sup>71</sup> Richard Wolf, *Ginsburg's Dedication Undimmed After 20 Years on the Court*, USA TODAY, Aug. 1, 2013, <http://www.usatoday.com/story/news/nation/2013/07/31/ginsburg-female-justices-no-shrinking-violets-/2606239/>.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

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

[Justice Ginsburg has] had to ride a lot of ups and downs in her 20 years on the court. Whether it's facing down illness or most recently coping with the death of her husband, [...] she has done it all with an incredible inner strength and a real iron will. She's a very tough person.<sup>75</sup>

This iron will and resilience that Justice Ginsburg has demonstrated in her personal life, mirrors her jurisprudence that she has displayed for over 20 years on the bench.

## II. JURISPRUDENCE

### A. "Equal Citizenship Stature"

Justice Ginsburg's jurisprudence can be coined as one that embraces "Equal Citizenship."<sup>76</sup> As Professor at New England Law, Neil S. Siegel, explains, Justice Ginsburg "recognizes the primacy of engaged citizens, social movements, and legal advocates in determining the ultimate success of any constitutional vision."<sup>77</sup> In her role as a judge she stressed in a 2004 lecture to students who attended the Hofstra Law School summer program in Nice, France that courts "are reactive institutions. We don't create the controversies that come to us, we respond to the problems that are emerging in the society the courts exist to serve."<sup>78</sup> In her view as a Justice, she echoes the ideology that the authority to promote social change lies in the power of the American people, and not the Court itself,<sup>79</sup> thus making her decisions lean more towards the liberal left-wing.

---

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

<sup>76</sup> see Neil S. Siegel, "Equal Citizenship Stature": Justice Ginsburg's Constitutional Vision, 43 New Eng. L. Rev. 799, 810 (2009).

<sup>77</sup> *Id.*

<sup>78</sup> Ruth Bader Ginsburg, *Remarks of Ruth Bader Ginsburg at CUNY School of Law* (Mar. 11, 2004), in 7 N.Y. CITY L. Rev. 221, 232 (2004).

<sup>79</sup> Siegel, *supra* at 811.

Justice Ginsburg’s law clerks have even described her jurisprudence as careful and even cautious when addressing controversial questions that appear before the Court, as opposed to a theoretical approach.<sup>80</sup> Specifically, she is not deemed a judge who strictly interprets the Constitution word-for-word, yet her decisions mirror her ideological “understanding of the cultural ideals that our Constitution is charged with realizing over time.”<sup>81</sup> Importantly, her decisions in effect, address her belief that the meaning of the Constitution changes over time just as society changes over time.<sup>82</sup> She defends that her ideology is not one that strays from the Framers’ original intent, but yet in her view she states, “I think the Framers were intending to create a more perfect union that would become ever more perfect over time.”<sup>83</sup> In essence, Justice Ginsburg’s decisional framework reflects her central purpose to afford “‘equal dignity’ to all Americans, including historically marginalized groups.”<sup>84</sup> This includes: women, previously discriminated against races, individuals suffering disabilities and more just to name a few. 1

### **1. Setting Precedent: Equal Access To The Courts**

In Justice Ginsburg’s exact words, she refers to her ideology of equal protection as, “the idea of essential dignity, that we are all people entitled to respect from our Government as persons of full human statute, and must not be treated as lesser creatures.”<sup>85</sup> In a 6-3 decision, Justice Ginsburg delivered the majority opinion of *M.L.B. v. S.L.J.*,<sup>86</sup> which held that a state may not deny an indigent parent the opportunity to appeal a judicial termination of her parental rights

---

<sup>80</sup> Seigel, *supra* at 814.

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

<sup>82</sup> Seigel, *supra* at 815.

<sup>83</sup> *The Nomination of Ruth Bader Ginsburg, to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 103d Cong. 127 (1993) (statement of J. Ginsburg).

<sup>84</sup> Seigel, *supra* at 816. (citation omitted).

<sup>85</sup> Ruth Bader Ginsburg & Deborah Jones Merrit, *Affirmative Action: An Intentional Human Rights Dialogue*, 21 *Cardozo L. Rev.* 253, 239 (1999).

<sup>86</sup> *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996).

by requiring payment to prepare a trial court transcript. Martha Minow classified this case as, “a work of great craftsmanship as well as a just and compassionate decision.”<sup>87</sup> At the lower court, the Mississippi chancery court terminated petitioner M.L.B.’s parental rights to her two minor children and petitioner was estopped from appealing the termination decree because of her inability to pay for the trial record in advance as required by the Mississippi statute.<sup>88</sup> The Court ultimately held that under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, “just as a State may not block an indigent offender’s access to an appeal afforded to others, so Mississippi may not deny M.L.B., because of her poverty, appellate review of the sufficiency of the evidence on which the trial court found her unfit to remain a parent.”<sup>89</sup>

The biological mother M.L.B. and the biological father S.L.J. divorced after nearly eight years of marriage.<sup>90</sup> There were two children.<sup>91</sup> As per the divorce agreement, the two children remained in their father’s S.L.J.’s custody.<sup>92</sup> Only a few months later the father married respondent J.P.J.<sup>93</sup> The following year, S.L.J. and J.P.J. filed suit in the chancery court seeking to terminate the parental rights of M.L.B. so that J.P.J. could be approved by the court to adopt the children.<sup>94</sup> S.L.J. argued to the court that M.L.B. was in arrears in child support and had not been complying with the visitation decree.<sup>95</sup> On the contrary, M.L.B. counterclaimed by seeking full custody of the children and alleged that S.L.J. had denied her visitation to see her children despite the divorce decree.<sup>96</sup> The Chancellor terminated biological mother M.L.B.’s parental

---

<sup>87</sup> Martha Minow, *Essays in Honor of Justice Ruth Ginsburg: M.L.B. v. S.L.J.*, 519 U.S. 102 (1996), 127 Harv. L. Rev. 461 (2013).

<sup>88</sup> *M.L.B.*, 519 U.S. at 106 (The Mississippi statute required that the petitioner pay roughly \$2,352.36 in advance).

<sup>89</sup> *Id.* at 107 (citations omitted).

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

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

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

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

rights and ordered that stepmother J.P.J.'s name be placed on the birth certificate of the children, because he declared there had been a "substantial erosion of the relationship" between M.L.B. and her children because of her failure to communicate with the minor children.<sup>97</sup> Additionally, the Chancellor held that the father S.L.J. and stepmother met the required standard of clear and convincing evidence without revealing precise evidence as to how he came to that conclusion.<sup>98</sup> Within the following year M.L.B. filed a timely appeal and paid the required filing fee of \$100, but could not produce the prepayment of the transcript as required for civil litigants in Mississippi who wanted to utilize their right to appeal.<sup>99</sup> M.L.B. ultimately sought leave to appeal *in forma pauperis*, but her application was denied because, "the right to proceed *in forma pauperis* in civil cases exists only at the trial level."<sup>100</sup>

Justice Ginsburg writing for the Court began with *Griffin v. Illinois*,<sup>101</sup> the foundation case concerning the general access to appeals. That case involved criminal defendants and their access to appeals only when they could provide transcripts.<sup>102</sup> The Court explicitly took notice that, "[a]lthough the Federal Constitution guarantees no right to appellate review, once a State affords that right, *Griffin* held, the State may not bolt the door to equal justice,"<sup>103</sup> which is the underlying theme of Justice Ginsburg's majority opinion. Justice Ginsburg's opinion did not seek to address or change precedent granting access to transcripts in criminal proceedings. Justice Ginsburg did however identify precedents that emphasized familial status as a compelling

---

<sup>97</sup> *Id.* at 107-9108.

<sup>98</sup> *Id.* at 108.

<sup>99</sup> *Id.*; see Miss. Code Ann. §§ 11-51-3, 11-51-29 (Supp. 1996).

<sup>100</sup> *Id.* at 109.

<sup>101</sup> 351 U.S. 12 (1956) (Holding that a state cannot deny indigent criminal defendants access to free trial transcripts who are seeking appellate review of their convictions.).

<sup>102</sup> *Id.* at 13-14 (plurality opinion).

<sup>103</sup> *M.L.B.*, 519 U.S. at 110 (citations omitted).

governmental interest<sup>104</sup> as it was applicable to this case. As evidentiary support, the Court discussed a line of cases that held that the importance of parental relationships and the familial structure, which implicates the heightened “clear and convincing standard” which the state bears the burden of proving. Moreover according to Martha Minow, “[i]n the hierarchy of interests, M.L.B.’s concerns are even more weighty because she faced not simply loss of custody which does not sever the parent-child bond, but parental status termination, which is irretrievably destructive of the most fundamental family relationship.”<sup>105</sup> Furthermore, although Justice Ginsburg acknowledged that the State may have had a strong interest in keeping costs low, in comparison to M.L.B. and the State, the State’s “pocketbook” interest of advance payment for a transcript to offset the costs of its judicial system is trivial to the dissolution of parental privileges which is at stake for M.L.B.<sup>106</sup>

Justice Ginsburg’s majority opinion invokes her ideology of equal protection irrespective of social class, race, gender, and so-forth. As she writes for the majority she reiterates that this case although not categorized, as “criminal,” falls in line with precedent as the consequences that the Chancellor’s court would have on M.L.B. and her children, does not make it far removed from the *Griffin’s* interpretation.<sup>107</sup> As one scholar explained, indigents like M.L.B, “[were] seeking to defend against devastating invasive action by the state comparable in severity with punishment for crime.”<sup>108</sup> Justice Ginsburg simply shed light on the upshot that had the Chancellor court’s decision been affirmed, the decision would disproportionately forever terminate familial bonds of those who are indigent and therefore in lower social classes, and no

---

<sup>104</sup> Minow, *supra* at 462-63.

<sup>105</sup> Minow, *supra*.

<sup>106</sup> *M.L.B.*, 519 U.S. at 121.

<sup>107</sup> Kenneth L. Karst, *Those Appealing Indigents: Justice Ginsburg and the Claims of Equal Citizenship*, 70 Ohio St. L.J 927, 929 (2009).

<sup>108</sup> Karst, *supra* at 932.

one else, which consequently would not open the floodgate for other cases which the dissent fears.<sup>109</sup>

## 2. Equal Protection In Gender

Justice Ginsburg has been both a critical and important voice in addressing sex discrimination. She has been an advocate for gender equality, evidenced by her long career combating gender discrimination, which proves to be true, as they are motivating factors that have sensitized her to stereotypes on the basis of “congenital and immutable biological traits of birth.”<sup>110</sup> In Justice Ginsburg’s view, the Constitution reflected its potential of growth and a constant cycle of change as the times change when women were finally allowed to vote in the twentieth century, which is also when women were granted access to the political arena.<sup>111</sup> In her experience, specifically involving her extensive involvement in the ACLU Women’s Rights Project, she developed her own effective litigation strategy to combat all forms of sex discrimination.<sup>112</sup> And although she urges the members of the Court to “attend[] to the legal details of cases and materials, not simply the grand principles they may involve,”<sup>113</sup> she does recognize that there are times where the philosophy of her decisions reflect her womanhood. As she puts it, “Maybe there’s a little more empathy. Anybody who has been discriminated against knows what it’s like,”<sup>114</sup> which proves to reflect though her jurisprudence embracing equality for all.

---

<sup>109</sup> Karst, *supra* at 931.

<sup>110</sup> Ellington et al., *supra* at 711.

<sup>111</sup> Ruth Bader Ginsburg, *Constitutional Adjudication in the United States as a Means of Advancing the Equal Stature of Men and Women Under the Law*, 26 Hofstra L. Rev. 263, 265 (1997).

<sup>112</sup> Seigel, *supra* at 817.

<sup>113</sup> Marc Spindelman, *Toward a Progressive Perspective on Justice Ginsburg’s Constitution*, 70 Ohio St. L.J. 1115, 1118 (2009) (citation omitted).

<sup>114</sup> Richard Wolf, *Ginsburg’s Dedication Undimmed After 20 Years on the Court*, USA TODAY, Aug. 1, 2013, <http://www.usatoday.com/story/news/nation/2013/07/31/ginsburg-female-justices-no-shrinking-violets-/2606239/>.

**a. Sex Discrimination In Education/Equal Opportunity in  
Education**

In one of her most important majority opinions, *United States v. Virginia*,<sup>115</sup> Justice Ginsburg held that Virginia's Military Institute's (VMI) male-only admissions policy violated the Constitution's Equal Protection Clause of the Fourteenth Amendment. When this decision was handed down, VMI founded in 1839, was the only single-sex (all-male institution) public college in Virginia.<sup>116</sup> VMI had a distinctive mission to produce "citizen soldiers" through an "adversative" method that featured "physical rigor, mental stress, [...] absence of privacy, minute regulation of behavior, and indoctrination in desirable values."<sup>117</sup> In 1990 following a female high school student's attempt to seek admission into VMI and being denied solely because of her sex, the Attorney General filed a complaint and sued the state of Virginia on the grounds that the exclusively male admission policy was a violation of Equal Protection.<sup>118</sup>

In 1991 the District Court ruled in favor of VMI holding that the all-male institution brought diversity to Virginia's coeducational system, that the only means of achieving diversity was to exclude women, and if women were to be admitted, then the university would have to alter some of its educational methods, thus making VMI less distinctive.<sup>119</sup> Following the District Court's decision, the United States appealed to the Fourth Circuit Court of Appeals in 1992. The Fourth Circuit recognized that denying women admission to the school violated the Equal Protection Clause, however, admitting women would materially affect three aspects of

---

<sup>115</sup> 518 U.S. 515 (1996).

<sup>116</sup> *Id.* at 519.

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

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

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

VMI's program –“physical training, the absence of privacy, and the adversative approach.”<sup>120</sup> Ultimately, the Fourth Circuit reversed the District Court's ruling and ordered the state of Virginia to remedy the constitutional violation,<sup>121</sup> meaning VMI could either establish a “parallel institution” for women or become a private institution.<sup>122</sup> In 1995 Virginia and VMI established the Virginia Women's Institute for Leadership (VWIL), located at Mary Baldwin College,<sup>123</sup> which was approved by both the District Court and Fourth Circuit, which held that VMI and VWIL were “sufficiently comparable.”<sup>124</sup> The Supreme Court with an almost unanimous vote, reversed that decision.

Writing for the majority, Justice Ginsburg adopted a heightened level of intermediate scrutiny in relation to gender discrimination, first addressed in *Mississippi University for Women v. Hogan*,<sup>125</sup> which held, “[p]arties who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive justification’ for that action.”<sup>126</sup> In addressing the required heightened standard for gender discrimination, Justice Ginsburg explained,

The burden of justification is demanding and it rests entirely on the State. The State must show ‘at least that the [challenged] classification serves ‘important governmental objectives and that the discriminatory means employed’ are substantially related to the achievement of those objectives. The justification must be genuine, not hypothesized or invented post hoc in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females. [citations and quotations omitted].<sup>127</sup>

---

<sup>120</sup> *Id.* at 525.

<sup>121</sup> *Id.* at 519.

<sup>122</sup> *Id.* at 525-526.

<sup>123</sup> *Id.* (VWIL was a 4-year-state-sponsored undergraduate program located at Mary Baldwin College, a private liberal arts college for women that would be initially open to about 25-30 students).

<sup>124</sup> *Id.* at 519.

<sup>125</sup> 458 U.S. 718 (1982)

<sup>126</sup> *Id.* at 724 (The Court found that a nursing school that only allowed males to enroll in a female-only nursing school only on an auditing basis was a violation of the Equal Protection Clause because it was not substantially related to an important governmental objective).

<sup>127</sup> 518 U.S. at 533.

Justice Ginsburg ultimately held that based on the facts of the case, the State failed its burden because the remedial program offered through VWIL did “not cure the constitutional violation,”<sup>128</sup> as required.

Virginia argued that VMI’s policy of barring women served the important governmental objective of “diversity in educational approaches,” that there would be no alternative for VMI to maintain its unique “adversative method” of education if it were to admit women, and thus barring women from VMI was substantially related to achieving this goal.<sup>129</sup> However, in response, Justice Ginsburg properly recognized that the State’s argument proffered was merely “a rationalization” for “actions in fact differently grounded.”<sup>130</sup> The Justice first dissects the history of women in education and classifies it as one that is indicative of action more intentional as opposed to aberrant.<sup>131</sup> Furthermore, the Court cautions reviewing courts to take a “hard look” at generalizations similar to those proffered by both Virginia and the District Court,<sup>132</sup> because those same stereotypical predictions were once, “routinely used to deny rights or opportunities”<sup>133</sup> of the oppressed. This is because, state actors who improperly attempt to control the gates of opportunity may not exclude qualified individuals based on “fixed notions concerning the roles and abilities of males and females.”<sup>134</sup> And furthermore, Virginia and VMI’s fears are once again not “solidly grounded” because women have successfully entered

---

<sup>128</sup> *Id.* 534.

<sup>129</sup> *Id.* at 545.

<sup>130</sup> *Id.* at 535-536.

<sup>131</sup> *Id.* at 538 (Justice Ginsburg writes, “First, protection of women against higher education; next, schools for women far from equal in resources and stature to schools for men; finally, conversion of the separate schools to coeducation.”)

<sup>132</sup> *Id.* at 541 (Virginia argued that it feared that the admission of women would destroy the institution’s adversative system).

<sup>133</sup> *Id.* at 541-543.

<sup>134</sup> *Id.* (other citations omitted).

military academies and the military force,<sup>135</sup> which the Court addresses through the historical and current presence of women.

Justice Ginsburg also held that the remedial decree through VWIL was unconstitutional. The Court reasoned that such a proper remedy, “aims to eliminate [so far as possible] the discriminatory effects of the past and to bar like discrimination in the future.”<sup>136</sup> The difference is however, that “Virginia chose not to eliminate, but to leave untouched, VMI’s exclusionary policy,”<sup>137</sup> which fails to show substantial equality between both institutions as required by *Sweatt v. Painter*.<sup>138</sup> In *Sweatt*, Texas was reluctant to admit African Americans into the Texas Law School and in a remedial response they set up a separate law school for African American students. The separate institution originally had no library and lacked accreditation unlike the original law school. It eventually gained a faculty of five full-time professors, a student body of 23 students, and a small library, which was still not comparable to the Texas Law School. The Court unanimously ruled that state of Texas failed to show “substantial equality in the [separate] opportunities” of the two schools. The Court held that the Equal Protection Clause required Texas to admit African Americans to the Texas Law School.<sup>139</sup> Just as the Court in *Sweatt* ruled that the State had failed to show “substantial equality” in the separate opportunities offered, Virginia too failed to meet that threshold. In comparison to *Sweatt*, Ginsburg writes,

Virginia has closed this facility to its daughters and, instead, has devised for them a “parallel program,” with a faculty less impressively credentialed and less well paid, more limited course offerings, fewer opportunities for military training and for scientific specialization. Cf. *Sweatt*, 339 U.S. at 633. VMI, beyond question, “possesses to a far greater degree” than the VWIL program “those qualities which are incapable of objective measurement but which make for greatness in a

---

<sup>135</sup> *Id.* at 544-545.

<sup>136</sup> *Id.* at 547 (quotations and citations omitted).

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

<sup>138</sup> 339 U.S. 629 (1950).

<sup>139</sup> *Id.* at 632-636.

...school,” including “position and influence of the alumni, standing in the community, traditions and prestige.” *Id.* at 634. Women seeking and fit for a VMI-quality education cannot be offered anything less, under the Commonwealth’s obligation to afford them genuinely equal protection.<sup>140</sup>

As per the reflection of this decision, in cases involving gender classifications under equal protection, the Supreme Court applies a heightened scrutiny to determine whether the classification serves an important objective and also whether the policy is substantially related to the achievement of that objective.<sup>141</sup> When addressing the constitutional challenges that accompany gender discrimination, Justice Ginsburg addresses individual merit and rejects the barriers that “deny women equal opportunities and respect as citizens,”<sup>142</sup> as a means to stray away from historical stereotypes of men and women. Her ideology of gender equality hinges on “individual merit, individual achievement, and eliminating barriers that treat women as women, rather than individuals.”<sup>143</sup> This philosophy is sometimes labeled “egalitarian and liberal” as it applies the same treatment to men and women equally.<sup>144</sup>

In the present case, Justice Ginsburg not only went through the history of VMI, but also recognized that the objective of the State has to be an actual state purpose, and not simply a rationalization or a cover-up for what the State is really trying to achieve,<sup>145</sup> which is gender discrimination. Furthermore, she relied on findings that revealed that there were some women,

---

<sup>140</sup> 518 U.S. at 557.

<sup>141</sup> *Id.* at 532-533.

<sup>142</sup> Neomi Rao, *Gender, Race, and Individual Dignity: Evaluating Justice Ginsburg’s Equality Jurisprudence*, 70 Ohio State L. Rev. 1053 (2009).

<sup>143</sup> Rao, *supra*.

<sup>144</sup> Rao, *supra* at 1060.

<sup>145</sup> 518 U.S. at 535-536.

although excluded because of their sex and overbroad generalizations, who could meet the rigorous requirements of VMI and its physical expectations.<sup>146</sup> As one scholar suggested,

The extent of Justice Ginsburg's commitment to liberal, individualist principles can be further appreciated by what she did not require or consider. She did not focus on whether a significant number of women would be admitted under a new policy, nor did she require a different admissions standard for women to promote substantive equality. Rather, the Court simply required that VMI allow women to try to meet the existing standards of the school and emphasized the importance of allowing women with appropriate credentials—the will, capacity, and fitness—the *opportunity* to apply and be admitted to the elite program.<sup>147</sup>

The VMI decision embraced the equality of women through individual opportunities, as it is proven to be “[f]undamental to Ginsburg’s philosophy that all individuals have the constitutional right to be able to use their talents, unencumbered by labels such as [...] gender.”<sup>148</sup> Justice Ginsburg’s majority opinion is deemed a landmark decision because it celebrates “individual dignity of women.” The decision symbolized women’s freedom to choose different opportunities for education, to grant opportunities for one’s future, and to open up any other array of choices to both men and women.<sup>149</sup>

### **b. Employment Discrimination**

In a 5-4 ruling of *Ledbetter v. Goodyear Tire & Rubber Co.*,<sup>150</sup> Justice Ginsburg delivered the dissenting opinion from the bench. The majority decision reversed the long-standing rule that allowed victims of pay discrimination to challenge the discrimination as long

---

<sup>146</sup> *Id.* at 550.

<sup>147</sup> Rao, *supra* at 1062 (citing to *Virginia*, 518 U.S. at 542 (“The issue, however, is not whether ‘women or men—should be forced to attend VMI’; rather, the question is whether the Commonwealth can constitutionally deny to women who have the will and capacity, the training and the attendant opportunities that VMI uniquely affords.”)).

<sup>148</sup> Ellington et al., *supra* at 711.

<sup>149</sup> Rao, *supra* at 1063.

<sup>150</sup> 550 U.S. 618 (2007)

as employee continued to receive lower paychecks than his or her colleagues. Although a pay discrimination case, the gender discrimination undertones were prevalent. The plaintiff, a retired female employee brought a pay discrimination claim under Title VII of the Civil Rights Act of 1964, against her former employer and the plaintiff won a jury award in her favor.<sup>151</sup> However, the U.S. Court of Appeals for the Eleventh Circuit reversed the jury award finding that the plaintiff's claims were barred, and the Supreme Court affirmed that decision.<sup>152</sup>

In reviewing the proper application for the statute of limitations period, the Court reasoned that it had previously held that the proper time for filing a claim of employment discrimination with the Equal Employment Opportunity Commission (EEOC) (including discrete acts of discrimination such as a pay-setting decision), begins at the moment when the discrimination occurs.<sup>153</sup> At trial plaintiff Ledbetter proffered evidence that during the course of her employment, several supervisors had given her poor evaluations due to her sex, that because of those unfair and discriminatory evaluations her pay was not increased as much as it would have been if the evaluations were fair, and that the past pay decisions continued to effect the amount of pay she received during the rest of the course of her employment.<sup>154</sup> Additionally, toward the end of the course of her employment with defendant Goodyear, Ledbetter was being paid less than all of her male colleagues and consequently, at trial, the jury awarded her backpay damages based on the facts presented.<sup>155</sup> On appeal defendant Goodyear argued that Ledbetter's pay discrimination claim was barred, because the EEOC claim was filed after the allotted 180 days – thus 180 days after the unlawful employment practice occurred, and this Court agreed.<sup>156</sup>

---

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

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

<sup>153</sup> *Id.* at 621.

<sup>154</sup> *Id.* at 622.

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

<sup>156</sup> *Id.*

The majority held that Ledbetter had the burden of proving that her employer had “intentionally” discriminated against her when they deprived her of wages, and shockingly did not acknowledge the fact that Ledbetter was deprived of wages from paycheck to paycheck as a means of intentional discrimination.<sup>157</sup> In absence of any policy determinations that could have been made, the majority did not engage in a fact analysis, yet only determined when the statute of limitations would begin to run according to the unambiguous language of the applicable statute.<sup>158</sup>

Although the Court seemed to take a strict interpretation approach of the EEOC statute,<sup>159</sup> Justice Ginsburg in her dissent, chose to focus on the individual merits of the case and decide accordingly. Justice Ginsburg discussed the facts and placed emphasis on the remedial effects the majority decision would have on employees bringing this type of claim. She took note that Ledbetter’s salary was initially in line with the salaries of her male coworkers performing similar work,<sup>160</sup> however over the course of her twenty years of employment, Ledbetter’s salary slipped starkly in comparison to the fifteen males in her profession. Shockingly Ledbetter was being paid \$3,727 per month while the area male managers were receiving between \$4,286-\$5,236 per month.<sup>161</sup> In her dissent from the bench, Justice Ginsburg informed other members of the Court of the realities of cases involving pay discrepancies. Not only is pay discrimination uneasy to

---

<sup>157</sup> *Id.* at 629.

<sup>158</sup> Martha Chamallas, *Ledbetter, Gender Equity and Institutional Context*, 70 Ohio St. L.J. 1037, 1041 (2009); see *Ledbetter*, 550 U.S. at 621, 632 n.4 (referring to Ledbetter’s particular case and factual allegations).

<sup>159</sup> An employee wishing to challenge an employment practice under this particular provision must file the charge with the EEOC. 42 U.S.C. § 2000e-5(e)(1). The charge must then be filed within a specific time period (either 180 days or 300 days depending on the state) after the alleged unlawful employment practice took place, and if the employee does not submit the time EEOC charge, the employment then cannot challenge the alleged unlawful practice in court. 42 U.S.C. § 2000e-5(f)(1).

<sup>160</sup> 550 U.S. at 643.

<sup>161</sup> *Id.* at 643.

identify, but if these discriminatory practices are ever revealed, they are only exposed over time.

She states,

Pay discrepancies often occur, as they did in Ledbetter's case, 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 discrepancies 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. See *National Railroad Passenger Corporation v. Morgan*, 536 U.S. 101, 114, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002). It is only when the disparity becomes apparent and sizable, e.g., through future raises calculated as a percentage of current salaries, than an employee in Ledbetter's situation is likely to comprehend her plight and, therefore, to complain. Her initial readiness to give her employer the benefit of the doubt should not preclude her from later challenging the then current and continuing payment of a wage depressed on account of her sex.<sup>162</sup>

In her attack on the majority for interpreting the statute so narrowly without understanding the detrimental effects that the statute decision would have on women especially those who are employed in a "nontraditional environment" such as Ledbetter, she informs the majority that it is seldom that an employee will raise concerns of pay differences or even question that such unlawful practices are occurring in the workplace.<sup>163</sup> Not only did Goodyear keep the salaries of its employees confidential, but they also ensured that the employees had limited access to the competing salaries of one another, which causes more suspicion leading towards Goodyear's discriminatory practices.<sup>164</sup>

---

<sup>162</sup> *Id.* at 645.

<sup>163</sup> *Id.* at 649.

<sup>164</sup> *Id.* at 650.

Justice Ginsburg informed the majority that under the strict and narrow interpretation of its ruling, “each and every pay decision [Ledbetter] did not immediately challenge wiped the slate clean,” thus failing to give consideration to the fact that the paychecks themselves serve as cumulative evidence that Ledbetter was paid less than her male counterparts simply because she was a female.<sup>165</sup> Furthermore, Justice Ginsburg expressed that in lieu of the narrow decision, that the Court’s approval of Goodyear’s discriminatory practices are in direct conflict with the robust protection against discrimination in the workplace that Congress intended Title VII to safeguard.<sup>166</sup> Ultimately, Justice Ginsburg’s position on this case stemmed from “[t]he realities of the workplace”<sup>167</sup> and the “real-world characteristics”<sup>168</sup> of discrimination within the employment sector. According to one scholar, “[i]t was here that the Justice drew upon her feminist leanings and explained why the majority’s ruling was impractical and unfair.”<sup>169</sup> Her dissenting opinion contended that employees who are victims of employment discrimination should be allotted time to discover the discrimination as it is “easy to identify”<sup>170</sup> and then bring their suits as it will urge employers to correct the inequalities pursuant to the threat of litigation.<sup>171</sup>

This decision was a true reflection of Justice Ginsburg’s strong disagreement with the “majority’s cut back on women’s rights.”<sup>172</sup> The most important part of Justice Ginsburg’s dissent is her challenge to Congress to correct the Court’s ruling as she proclaims, “[o]nce again,

---

<sup>165</sup> *Id.* at 660.

<sup>166</sup> *Id.* at 660-661; See *Albemarle Paper Company v. Moody*, 422 U.S. 405, 418, 95 S. Ct. 2362, 45 L. Ed. 2d 280 (1975) (“It is the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination.”).

<sup>167</sup> *Id.* at 649.

<sup>168</sup> *Id.* at 655.

<sup>169</sup> Chamallas, *supra* at 1042.

<sup>170</sup> 550 U.S. at 645.

<sup>171</sup> Chamallas, *supra* at 1046.

<sup>172</sup> Chamallas, *supra*.

the ball is in Congress's court."<sup>173</sup> And although Justice Ginsburg's opinion was a dissent it was not in vain. Justice Ginsburg recognizes that, "The greatest dissents do become court opinions and gradually over time in their views become the dominant view. So that's the dissenter's hope: that they are writing not for today but for tomorrow,"<sup>174</sup> and this came to fruition. Less than two years following this powerful dissent read directly from the bench, President Obama signed the *Lilly Ledbetter Fair Pay Act*. The initial ruling of the Court both ignored and undermined the realities of discriminatory pay, by unduly restricting the time period in which these victims could bring their claims and seek compensation. However, the purpose of the Act is to allow the opportunity for victims of pay discrimination to introduce evidence of unlawful employment practices that have occurred outside of the time frame for the filing charge of the discriminatory acts,<sup>175</sup> which effectively overrides the *Ledbetter* majority decision.<sup>176</sup>

### c. Harassment In The Workplace

It is important to note that Justice Ginsburg's dedication to combating all forms of discrimination did not "occur in a vacuum," rather it was because of her perception of the countless injustices occurring in her life and around her.<sup>177</sup> And thus, her perceptions of the inequalities laid the foundation for her personal ideology for equal citizenship structure,<sup>178</sup>

---

<sup>173</sup> 550 U.S. at 661; see Nikki Schwab, *Ruth Bader Ginsburg's Greatest Hits*, US NEWS (July 29, 2014) available at <http://www.usnews.com/news/blogs/washington-whispers/2014/07/29/ruth-bader-ginsburgs-greatest-hits> (accessed Nov. 3, 2014) (Justice Ginsburg is not "dissenting just to have a tantrum. She's dissenting to send a telegram to Congress about the necessity of fixing things and the way to do it.").

<sup>174</sup> Interview with Nina Totenberg, Morning Edition, May 2, 2002, <http://www.npr.org/programs/morning/features/2002/may/ginsburg/>.

<sup>175</sup> *Lilly Ledbetter Fair Pay Act of 2009*, 111 P.L. 2, 123 Stat. 5 SEC. 3(A), "For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice."

<sup>176</sup> Chamallas, *supra* at 1049.

<sup>177</sup> Olney, *supra* at 100-102 (2001).

<sup>178</sup> Olney, *supra* at 101.

including cases involving harassment in the workplace. In a 5-4 decision in *Vance v. Ball State University*,<sup>179</sup> the Court addressed who can qualify as a “supervisor” under a Title VII<sup>180</sup> claim for harassment in the workplace. There are different standards of liability depending on whether the harasser is a “supervisor” or a co-worker. Specifically, under Title VII if the harasser classifies as a co-worker, the employer is only liable if it were negligent in the control of the workplace conditions.<sup>181</sup> However, if the harasser is a “supervisor” then,

[H]arassment culminates in a tangible employment action, [and] the employer is strictly liable. But if no tangible employment action is taken, the employer may escape liability by establishing, as an affirmative defense, that (1) the employer exercised reasonable care to prevent and correct any harassing behavior and (2) that the plaintiff unreasonably failed to take advantage of the preventative or corrective opportunities that the employer provided.<sup>182</sup>

The Court held that an employee is classified as a “supervisor” only when the employer can take tangible actions regarding employment against the victim and held that the harasser in this case was not a “supervisor.”<sup>183</sup>

The victim, Ms. Vance was an African American woman who worked as a catering assistant for the defendant harasser. Ms. Vance filed numerous internal complaints with the defendant employers alleging racial discrimination and harassment and discrimination by employee Sandra Davis, who was a white woman.<sup>184</sup> The Court reasoned that since Davis did

---

<sup>179</sup> 133 S. Ct. 2434 (2013).

<sup>180</sup> 42 U.S.C. § 2000e-2(a), It is an “unlawful employment practice for an employer to discriminate against any individual with respect to the terms, conditions, or privileges of employment because of such individual’s race, color, religion, sex, or national origin.” (quotations omitted).

<sup>181</sup> 133 S. Ct. at 2439.

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

<sup>183</sup> *Id.* at 2443 (This includes: “significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.”).

<sup>184</sup> *Id.* at 2439-2440 (It was alleged that Davis would block Vance into the elevator, she gave her weird looks, and would try to intimidate her by slamming pots and pans around her).

not have the power neither to hire nor fire Vance, nor have the authority to take any other tangible actions against Vance, Davis was not a “supervisor” under law, thus the employer was not liable.<sup>185</sup> In coming to its conclusion, the Court relies on its *Ellerth/Faragher*<sup>186</sup> framework to exhibit the mesh between the theory of vicarious liability and the legitimate interests that the employers hold.<sup>187</sup> And although the victim, Vance urges the Court to rely on the general meaning of “supervisor” in legal contexts, the Court chooses otherwise and reasons that the word “supervisor” has different meanings in colloquial settings and in the law, thus making her assertion unsuccessful.<sup>188</sup>

In her dissent, Justice Ginsburg “catalogued the ways in which the Court’s decision turned a blind eye to the realities of the workplace.”<sup>189</sup> She initially starts by expressing her belief that the Court axed out the fact that the Equal Employment Opportunity Commission (EEOC) provided guidelines of harassment after the *Ellerth/Faragher* framework.<sup>190</sup> In her opinion, she writes that since the Court strays away from what the EEOC classifies as “supervisors,” meaning those who, “control the day-to-day schedules and assignments of others, [thus only] confining the category to those formally empowered to take tangible employment actions,” the Court’s ruling is inconsistent with the intentions of the EEOC definition because an individual like Ms. Davis who has the authority to orchestrate an employee’s daily activities constitutes a “supervisor” under Title VII.<sup>191</sup> As proof, Justice Ginsburg notes that the

---

<sup>185</sup> *Id.* at 2439.

<sup>186</sup> *Title VII -- Employer Liability for Supervisor Harassment -- Vance v. Ball State University*, 127 Harv. L. Rev. 398 (2013); see *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 764-65 (1998); see also *Fragher v. City of Boca Raton*, 524 U.S. 775, 807-08 (1998).

<sup>187</sup> 133 S. Ct. at 2444.

<sup>188</sup> *Id.* at 2446.

<sup>189</sup> *Judges & The Courts: Justice Ginsburg’s Twenty Years on the Supreme Court Fact Sheet*, National Women’s Law Center, Oct. 2013, [http://www.nwlc.org/sites/default/files/pdfs/ginsburg\\_20\\_years.pdf](http://www.nwlc.org/sites/default/files/pdfs/ginsburg_20_years.pdf), at 3.

<sup>190</sup> 133 S. Ct. at 2454-2455.

<sup>191</sup> *Id.* at 2454-2455.

distinction that the *Ellerth/Faragher* framework draws between co-workers and supervisors exposes the true realities of the workplace. In her view, not only are there rare instances when the victim can tell a harasser to “buzz off” but the same victim can be subject to retaliation for speaking up, which causes greater problems for the victim.<sup>192</sup> Justice Ginsburg then goes on to list an extensive list of instances of harassment in the workplace, but urges the Court to realize that under the Court’s definition of “supervisor” none of the women in the illustrations would be allowed to bring claims.<sup>193</sup> Despite the precedent set forth, the Court nonetheless holds a narrow reading of a “supervisor” which goes against the EEOC’s definition and intention.<sup>194</sup>

As Justice Ginsburg read the opinion from the bench, she posed an actual hypothetical where a female worker who is employed by a road crew is constantly harassed by a “lead worker” who is in charge of directing the daily operations of the employees, but cannot hire or fire the employees.<sup>195</sup> The *Vance* majority opinion would leave the female worker without a remedy against her employer or supervisor.<sup>196</sup> Furthermore, as she did in the *Ledbetter* decision, Justice Ginsburg calls on Congress to “correct the error into which this Court has fallen, and to restore the robust protections against workplace harassment the Court weakens today.”<sup>197</sup> In line with Justice Ginsburg’s goal of equality for all, she takes the stance that the Court’s determination will “hinder efforts to stamp out discrimination in the workplace,”<sup>198</sup> which effectively goes against the living Constitution.

---

<sup>192</sup> *Id.* at 2456.

<sup>193</sup> *Id.* at 2459-2460.

<sup>194</sup> *Id.* at 2465-2466.

<sup>195</sup> *Id.* at 2459-2460.

<sup>196</sup> Garrett Epps, *Justice Alito’s Inexcusable Rudeness*, THE ATLANTIC, June 24, 2013, available at <http://www.theatlantic.com/national/archive/2013/06/justice-alitos-inexcusable-rudeness/277163/>

<sup>197</sup> 133 S. Ct. at 2466.

<sup>198</sup> *Id.* at 2464.

### 3. Equal Protection In Race

Justice Ginsburg recognizes that, “the word “‘equal’ or ‘equality’ does not appear in the body of the U.S. Constitution or in the Bill of Rights, the first ten amendments,”<sup>199</sup> however her “equal citizenship stature” ideology is mirrored by the progression of the U.S. Constitution. She sees the “Constitutional history of the United States as an extension of the original rights to once excluded groups.”<sup>200</sup> The Founding Fathers’ commitment to equality can be echoed by the fact that in 1868 slavery ended following the Civil War and the U.S. Constitution provided that no State “shall...deny to any person the equal protection of the laws.”<sup>201</sup> Consequently, “In race cases [Justice Ginsburg] has urged the same distinction between keeping a door closed and opening it that she has drawn in gender cases. Lastly, she also has viewed mechanical application of the tiers of scrutiny as impeding realization of the Constitution’s equality command.”<sup>202</sup>

#### a. Voting Discrimination

In her address to the students of Hofstra Law’s summer program Justice Ginsburg alluded to the words of famous historian Richard Morris when she said, “a prime (and still evolving) portion of the history of the U.S. Constitution, and a cause for celebration, is the story of the extension (through amendment, judicial interpretation, and practice) of constitutional rights and protections to once ignored or excluded people: to once ignored or excluded people: to humans

---

<sup>199</sup> *Constitutional Adjudication in the United States as a Means of Advancing the Equal Stature of Men and Women Under the Law*, *supra*. at 264.

<sup>200</sup> Olney, *supra*. at 130 (citation omitted).

<sup>201</sup> *Constitutional Adjudication in the United States as a Means of Advancing the Equal Stature of Men and Women Under the Law*, *supra*. at 265.

<sup>202</sup> Seigel, *supra*. at 823.

who were once held in bondage, to men without property, to the original inhabitants of the land that became the United States, and to women.”<sup>203</sup>

In a 5-4 decision in *Shelby County v. Holder*,<sup>204</sup> the Court ruled that Section 4(b) of the *Voting Rights Act of 1965* was unconstitutional. As expected and in line with her “equality for all” view, Justice Ginsburg read the dissenting opinion from the bench, “an unusual move and sign of deep disagreement.”<sup>205</sup> At issue is the constitutionality of Section 5 and Section 4(b). Section 5 requires the States to obtain permission from the federal government prior to enacting any voting laws.<sup>206</sup> Section 4 applied this requirement to only a select number of states, specifically nine, “—Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia—and to scores of counties and municipalities in other states, including Brooklyn, Manhattan and the Bronx.”<sup>207</sup> The purpose of the Sections of this Act was to address, “an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution.”<sup>208</sup>

The case first came to the Court after Shelby County sued the Attorney General in Alabama, which is a covered jurisdiction under the Act after objecting to some voting changes.<sup>209</sup> The county sued seeking a declaratory judgment that both Section 4(b) and Section 5 of the Voting Rights Act were facially unconstitutional, and seeking a permanent injunction

---

<sup>203</sup> *Constitutional Adjudication in the United States as a Means of Advancing the Equal Stature of Men and Women Under the Law*, *supra*. at 2645-266; see RICHARD B. MORRIS, *THE FORGING OF THE UNION, 1781-1789*, at 193 (1987).

<sup>204</sup> 133 S. Ct. 2612 (2013).

<sup>205</sup> Adam Liptak, *Supreme Court Invalidates Key Part of Voting Rights Act*, N.Y. TIMES, June 25, 2013, <http://www.nytimes.com/2013/06/26/us/supreme-court-ruling.html?pagewanted=all>

<sup>206</sup> 133 S. Ct. at 2618.

<sup>207</sup> Adam Liptak, *Supreme Court Invalidates Key Part of Voting Rights Act*, N.Y. TIMES, June 25, 2013, <http://www.nytimes.com/2013/06/26/us/supreme-court-ruling.html?pagewanted=all>

<sup>208</sup> 133 S. Ct. at 2618 (citation omitted).

<sup>209</sup> *Id.* at 2621.

against enforcing both laws.<sup>210</sup> In holding that Section 4(b) was unconstitutional, the Court reasoned that not only does the Constitution grant the States sovereignty, but there is also a “fundamental principle of equal sovereignty among the States,”<sup>211</sup> resulting in disparate treatments of the States.<sup>212</sup> To illustrate their determination, the majority points out the fact that two neighboring States may have a desire to enact the same law, yet State A would have to wait until they receive preclearance from the federal government, whereas State B could immediately put the law in effect through normal legislative procedures.<sup>213</sup> Furthermore, the majority asserted that the Act “authorizes federal intrusion into sensitive areas of state and local policymaking, and represents an extraordinary departure from the traditional course of relations between the States and Federal Government. As reiterated [...], the Act constitutes extraordinary legislation otherwise unfamiliar to our federal system.”<sup>214</sup>

In addressing its reasons for now ruling that Section 4(b) is unconstitutional, the Court first drew on the distinctions between society as it was prior to the law, and society 50 years later. For the Court, the coverage formula under Section 4(b) made sense 50 years ago because it presented the Court with a problem that warranted a solution. However, according to the majority,

We found that Congress chose to limit its attention to the geographic areas where immediate action seemed necessary. The areas where Congress found evidence of actual voting discrimination shared two characteristics: the use of tests and devices for voter registration, and a voting rate in the 1964 presidential election at least 12 points below the national average. We explained that tests and devices are relevant to voting discrimination because of their long history as a tool for perpetrating the evil; a low voting rate is pertinent for the obvious reason that widespread disenfranchisement must inevitably affect the number of actual voters. We

---

<sup>210</sup> *Id.* at 2622.

<sup>211</sup> *Id.* at 2623 (citations and quotations omitted).

<sup>212</sup> *Id.* at 2624.

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

<sup>214</sup> *Id.* (citations omitted).

therefore concluded that the coverage formula was rational in both practice and theory. It accurately reflected those jurisdictions uniquely characterized by voting discrimination on a pervasive scale, linking coverage to the devices used to effectuate discrimination and to the resulting disenfranchisement. The formula ensured that the stringent remedies were aimed at areas where voting discrimination had been most flagrant.<sup>215</sup>

Although the Court agrees that the law was originally constitutional based on the existing discrimination in society 50 years ago, the Court now asserts that things are “drastically” different today.<sup>216</sup> Justice Ginsburg disagrees.<sup>217</sup> Moreover, to prove its point, the Court alleges that blatant discrimination is rare, minorities hold political positions, literacy tests and the like have been banned, and voter registration has surpassed 50 percent.<sup>218</sup>

The Court next addressed the constitutionality of the coverage formula, which, “looked to cause (discriminatory tests) and effect (low voter registration and turnout), and tailored the remedy (preclearance) to those jurisdictions exhibiting both.”<sup>219</sup> The Court once again using the number of years to drive its decision, reasoned that 50 years ago when there was racial discrimination, the blatant racial disparity in voter registration turnout was a compelling government interest that justified the preclearance requirement and coverage formula.<sup>220</sup> However, since the Court no longer finds a disparity, and statistics exhibit the continuous movement of society away from discriminatory practices, the Act no longer serves a compelling governmental interest.<sup>221</sup> And although the Fifteenth Amendment is supposed to serve its purpose of ensuring a better future, it should not punish those for past mistakes or ignorance<sup>222</sup>

---

<sup>215</sup> *Id.* at 2625 (citations and quotations omitted).

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 2627.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* at 2628.

<sup>222</sup> *Id.* at 2629.

since Section 4(b) divides the States into groups of those with recent voting discrimination and those who do not hold those discriminatory practices, this is unfair and no longer viable according to the majority.<sup>223</sup> In effect, this justification for the Act cannot be based on practices of the past in an effort to be applicable today.

Justice Ginsburg joined by Justice Breyer, Justice Sotomayor, and Justice Ginsburg wrote a powerful dissent in which she attacked the reasoning of the majority. She urges that the Court's ruling hinges on the dormancy of the Act, which is not sufficient to make it therefore unconstitutional. According to Justice Ginsburg, "Voting discrimination still exists; no one doubts that. But the Court today terminates the remedy that proved to be the best suited to block that determination."<sup>224</sup> More importantly, in her attempt to open the eyes of the majority she makes plain and blatant that the Voting Rights Act was a solution to a sickness of a nation that continues to have need to be monitored.<sup>225</sup>

As in most of her voting rights cases, Justice Ginsburg urged the majority to defer to Congress, "which has been given sweeping powers under the Constitution, and especially in amendments passed after the Civil War, to protect such rights."<sup>226</sup> Congress made findings that the Voting Rights Act preclearance requirements and coverage formulas needed to be extended for an additional 25 years, yet the Court unequivocally disregarded those findings.<sup>227</sup> Additionally, voting rights and equality is not over simply because the tactics of those who seek

---

<sup>223</sup> *Id.* at 2628.

<sup>224</sup> *Id.* at 2633.

<sup>225</sup> *Id.* at 2634, ("The Votingg Rights Act became one of the most consequential, efficacious, and amply justified exercises of federal legislative power in our Nation's history.").

<sup>226</sup> John Schwartz, *Between the Lines of the Voting Rights Act Opinion*, N.Y. TIMES, June 25, 2013, [http://www.nytimes.com/interactive/2013/06/25/us/annotated-supreme-court-decision-on-voting-rights-act.html?\\_r=0](http://www.nytimes.com/interactive/2013/06/25/us/annotated-supreme-court-decision-on-voting-rights-act.html?_r=0)

<sup>227</sup> 133 S. Ct. at 2636-2638.

to suppress voting changed,<sup>228</sup> it continues to be a problem and the majority “errs egregiously by overriding Congress’ decision,” in which both Martin Luther King Jr. and the nation have been given a disservice by the Court’s decision.<sup>229</sup> In her dissent from the bench, she powerfully states the words and legacy of Dr. Martin Luther King,

The great man who led the march from Selma to Montgomery and there called for the passage of the Voting Rights Act foresaw progress, even in Alabama, [...]. The arc of the moral universe is long, he said, but it bends toward justice, if there is a steadfast commitment to see the task through to completion.<sup>230</sup>

In yet another blow to the majority’s incorrect ruling on this decision, Justice Ginsburg states, “Consideration for this long history, still in living memory, was altogether appropriate. The Court criticizes Congress for failing to recognize that history did not end in 1965.”<sup>231</sup> But Justice Ginsburg urged the Court to give deference to Congress in their decision to reauthorize the Act in 2006 by large majorities.<sup>232</sup> In closing and in extreme disappointment, Justice Ginsburg focuses on the realities of the Court’s ruling and cautions the majority that, “history repeats itself.”<sup>233</sup>

### **b. Affirmative Action**

Justice Ginsburg’s jurisprudence regarding affirmative action programs “demonstrate[s] less skepticism and greater tolerance for government policies that give preferences to racial

---

<sup>228</sup> John Schwartz, *Between the Lines of the Voting Rights Act Opinion*, N.Y. TIMES, June 25, 2013, [http://www.nytimes.com/interactive/2013/06/25/us/annotated-supreme-court-decision-on-voting-rights-act.html?\\_r=0](http://www.nytimes.com/interactive/2013/06/25/us/annotated-supreme-court-decision-on-voting-rights-act.html?_r=0).

<sup>229</sup> 133 S. Ct. at 2652.

<sup>230</sup> Adam Liptak, *Supreme Court Invalidates Key Part of Voting Rights Act*, N.Y. TIMES, June 25, 2013, a <http://www.nytimes.com/2013/06/26/us/supreme-court-ruling.html?pagewanted=all>

<sup>231</sup> 133 S. Ct. at 2642.

<sup>232</sup> Adam Liptak, *Supreme Court Invalidates Key Part of Voting Rights Act*, N.Y. TIMES, June 25, 2013, <http://www.nytimes.com/2013/06/26/us/supreme-court-ruling.html?pagewanted=all>

<sup>233</sup> 133 S. Ct. at 2651.

minorities.”<sup>234</sup> Her decisions reflecting this ideology take into account the position of particular racial groups in society rather than the singular needs of an individual.<sup>235</sup> Her opinions regarding issues of affirmative action reflect themes of “antisubordination”, which reflect the same themes of equality for all emphasized in her gender discrimination cases.<sup>236</sup> In Justice Ginsburg’s view, before minorities can actually enjoy the true equality of opportunity provided for all under the Constitution, racial barriers have to be knocked down.<sup>237</sup>

In the 7-1 decision of *Fisher v. University of Texas at Austin*,<sup>238</sup> Justice Ginsburg delivered her opinion as the lone dissenter. The majority reversed the decision of the Court of Appeals, stating that it’s ruling was incorrect because it was to apply strict scrutiny to the facts of the case.<sup>239</sup> In this case, the University of Texas considered race as one of many factors in its undergraduate admissions process, as a means for increasing a minority presence on campus.<sup>240</sup> Fisher, a Caucasian female brought this suit against the university after her application was denied, under the presumption that the admissions process was in violation of the Equal Protection Clause of the Fourteenth Amendment.<sup>241</sup>

Following the decisions of *Grutter v. Bollinger*<sup>242</sup> and *Gratz v. Bollinger*,<sup>243</sup> the University of Texas at Austin adopted the disputed admissions program that explicitly

---

<sup>234</sup> Rao, *supra* at 1053.

<sup>235</sup> *Id.*

<sup>236</sup> Rao, *supra* at 1072.

<sup>237</sup> *Id.*

<sup>238</sup> 133 S. Ct. 2411 (2013).

<sup>239</sup> *Id.* at 2415, 2417 (The District Court and Court of Appeals for the Fifth Circuit held that the decision of *Grutter* required courts to give “substantial deference” to universities in their compelling interest of diversity and whether the plan is narrowly tailored to achieve its interest.).

<sup>240</sup> *Id.* at 2415.

<sup>241</sup> *Id.*

<sup>242</sup> 539 U.S. 306 (2003) (holding that the admissions program that used race as one of many other factors was constitutional.).

<sup>243</sup> 539 U.S. 244 (2003) (holding that the admissions that automatically gave applicants a certain number of points due to their racial background was unconstitutional.).

considered race in addition to other factors of the applicant, although the university does not assign a numerical number for race identification.<sup>244</sup> In addressing the question presented, the Court relied on precedent and reasoned that such admissions programs cannot be tailored in such a way that it reflects a quota system.<sup>245</sup> The program however, must be flexible enough so that applicants are reviewed on an individual level in a manner where race is not the essential feature of his or her application.<sup>246</sup> In order for the university to withstand strict scrutiny, it has to prove that its program furthers a compelling interest and that the use of the race classification is necessary to the furtherance of the program's purpose.<sup>247</sup>

Although the majority agreed that the University of Texas at Austin receives deference with respect to its compelling interest of establishing diversity in the classroom,<sup>248</sup> it is then the job of the Court to determine whether using race is necessary for the purpose of diversity.<sup>249</sup> If the Court can find that diversity on campus and in the classroom can be achieved without using race as a factor in the application process, then the university has failed to meet its burden.<sup>250</sup> The majority ultimately found the lower court's ruling incorrect because the courts focused on, "whether [the University's] decision to reintroduce race as a fact in admissions was made in good faith,"<sup>251</sup> which does not reflect the required application of strict scrutiny.

---

<sup>244</sup> 133 S. Ct. at 2416-2417 (the Proposal of the university works as follows:

Once applications have been scored, they are plotted on a grid with the Academic Index on the x-axis and the Personal Achievement Index on the y-axis. On that grid students are assigned to so-called cells based on their individual scores. All students in the cells falling above a certain line are admitted. All students below the line are not. Each college—such as Liberal Arts or Engineering—admits students separately. So a student is considered initially for her first-choice college, then for her second choice, and finally for general admission as an undeclared major.)

<sup>245</sup> *Id.* at 2418.

<sup>246</sup> *Id.*; see *Grutter*, 539 U.S. at 334, 337.

<sup>247</sup> *Id.* at 2418; See *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

<sup>248</sup> *Id.* at 2419.

<sup>249</sup> *Id.* at 2420.

<sup>250</sup> *Id.*

<sup>251</sup> *Id.* (citation omitted).

Writing as the lone dissent, Justice Ginsburg expresses her discontent with the majority's decision. As her jurisprudence reflects, "In cases dealing with race-based affirmative action, [Justice Ginsburg] has associated herself with the long-standing view of Justice Stevens that race is a legitimate consideration for governmental action when it is considered for purposes of inclusion rather than exclusion."<sup>252</sup> In her view, not only does the University of Texas at Austin model its admissions policy after the Harvard program referenced in *Bakke*, but also she notes that the University did not use a quota system.<sup>253</sup> The University carefully modeled its program in a way that would steer clear of infringing on constitutional rights, yet the majority applied a strict scrutiny standard and remanded the case for further fact proceedings. Justice Ginsburg expresses that she appreciates the University's effort because, "[i]t is race consciousness, not blindness to race, that drives such plans."<sup>254</sup> Furthermore, under the majority's ruling, it poses as a concern to Justice Ginsburg, that universities in the future may choose to hide their methods of inclusion in order to maintain minority participation on campus.<sup>255</sup> Justice Ginsburg also expressed that she did not think that there was a need to remand the case back to the lower courts since the University's program passed muster under the Court's holdings in other affirmative action cases.

Justice Ginsburg's goal of equality is clearly present in the current dissent. She does not hesitate to express discontent with the majority, and she emphasizes the need to promote methods of inclusion for minorities as that same ideology is reflected in the progress of the Constitution. As a journalist expressed, "Ginsburg also took the opportunity to reiterate her view

---

<sup>252</sup> Karst, *supra* at 941 (citation omitted).

<sup>253</sup> 133 S. Ct. at 2432-2433 (Ginsburg, J., dissenting).

<sup>254</sup> *Id.* at 2433 (citation omitted).

<sup>255</sup> *Id.* (citation omitted).

that affirmative action is an appropriate way to rectify historical discrimination.”<sup>256</sup> Justice Ginsburg writes, “I have several times explained why government actors, including state universities, need not blind themselves to the still lingering, every day evidence, effects of centuries of law-sanctioned inequality.”<sup>257</sup>

### c. Searches And Seizures

In a unanimous decision, Justice Ginsburg delivered the opinion of the Court in *Fla. v. J.L.*,<sup>258</sup> which addressed questions of criminal procedure, specifically involving searches and seizures under the Fourth Amendment. The question presented before the Court was whether an anonymous tip that an individual is in possession of a gun is sufficient to justify a stop and frisk of that individual without any other information.<sup>259</sup> The Court held that an anonymous tip without anything more is not a valid justification of a stop and frisk.<sup>260</sup>

In this case, an anonymous caller reported that a young African American male was in possession of a gun.<sup>261</sup> The unidentified caller stated that the young male was wearing a plaid shirt and standing at a named bus stop in the Miami-Dade area.<sup>262</sup> Approximately six minutes after the tip was made, two officers ventured to the bus stop and located the young African American male and frisked him, seized the gun, and arrested the respondent J.L.<sup>263</sup> The record states prior to the seizing of the gun, that the gun was not visible on J.L., that J.L. made no threatening or suspicious movements, and that other than the tip the officers had no reason to

---

<sup>256</sup> Rob Silverblatt, *Justice Ginsburg’s Record-Breaking Day*, US NEWS, June 25, 2013, <http://www.usnews.com/news/articles/2013/06/25/justice-ginsburgs-record-breaking-day> (accessed Dec. 1, 2014).

<sup>257</sup> 133 S. Ct. at 2433 (citations omitted).

<sup>258</sup> 529 U.S. 266 (2000).

<sup>259</sup> *Id.* at 268.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

suspect the respondent for carrying a concealed weapon.<sup>264</sup> The respondent, almost 16 at the time, was charged under Florida state law with carrying a concealed firearm without a license, and for possessing such firearm under the legal age of 18.<sup>265</sup>

Writing for the majority, Justice Ginsburg first started with the *Terry v. Ohio*<sup>266</sup> decision, in which the Supreme Court first addressed “stop and frisk,” which allows police officers to conduct searches on the basis of reasonable suspicion which constitutes a lower threshold for reasons of protective measures of society.<sup>267</sup> In the *Terry* case the Court held,

Where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others’ safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.<sup>268</sup>

The Court specifically differentiated the present case from *Terry* in that the officers’ inkling that J.L. was carrying a concealed weapon was not their own observations but solely based on a tip that they cannot even attest to the veracity of the informant and his or her character.<sup>269</sup> The Court however, recognized that the only time when an anonymous tip absent any other information can arise to a constitutional search and seizure is when the anonymous tip

---

<sup>264</sup> *Id.*

<sup>265</sup> *Id.* at 269.

<sup>266</sup> 392 U.S. 1 (1968).

<sup>267</sup> 529 U.S. at 272.

<sup>268</sup> 392 U.S. at 30.

<sup>269</sup> 529 U.S. at 270.

demonstrates, “sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop” as required by *Terry*.<sup>270</sup>

Justice Ginsburg acknowledged that the anonymous tip in the case at bar lacked sufficient reliability to make the search of J.L. constitutional because the call lacked any other predictive information of the respondent’s movements or activities that would allow the officers to test the informant’s credibility.<sup>271</sup> The officers fell short in that they unreasonably relied on a bare bones tip that only accurately described the description of the respondent from an unknown and unascertained individual. There was nothing in the facts to firmly suggest that based on the tip, that the unidentified caller gave, that J.L. was actively engaging in criminal activity at the time he was unconstitutionally searched as required by a *Terry* stop. Lastly, Justice Ginsburg provides a list of situations in which the prerequisite justifications of the veracity of an anonymous tip is not required.<sup>272</sup>

Justice Ginsburg’s approach to search and seizure cases is evidenced as “positive gradualism,” which one scholar describes as, “writing or joining a majority opinion that tries to emulate her incrementally-attained success in gender discrimination cases by moving the Court in a defendant-oriented direction.”<sup>273</sup> Her majority opinion relies on precedent and an activist approach to the protection of rights for all. Additionally, Justice Ginsburg determines her decisions on the level of intrusion the government would have on an individual – meaning the more intrusion the more likely she is to side with the individual defendant. Her goal seems to be to preserve personal liberties of the individual and to ensure that everyone is afforded an

---

<sup>270</sup> *Id.* (citations omitted).

<sup>271</sup> *Id.*

<sup>272</sup> *Id.* at 273-272 (Justifications of reliability does not include situations when an individual is carrying a bomb, or in locations where the Fourth Amendment right to privacy is diminished as in schools and airports).

<sup>273</sup> Christopher Slobogin, *Justice Ginsburg’s Gradualism in Criminal Procedure*, 70 Ohio St. L.J. 867, 878 (2009).

expected level of privacy irrespective of a police officer's discretion regarding criminal activity of the accused. This view falls in line with her jurisprudence regarding race discrimination in that she continues to avow the "equal citizenship stature" in cases involving searches and seizures, specifically the stop and frisk laws that disproportionately effect African Americans, Hispanics, and other minorities.<sup>274</sup> Her view on Fourth Amendment issues of searches and seizures comes within her view of the "Constitution as a dynamic [living] document."<sup>275</sup> She believes "the Framers saw the neutral magistrate as an essential part of the criminal process shielding all of us, good or bad, saint or sinner, from unchecked police activity."<sup>276</sup>

#### 4. Equal Protection In Disabilities

In cases involving individuals with disabilities, Justice Ginsburg continues to "interpret equality-based acts of Congress,"<sup>277</sup> through her decisions. In her jurisprudence, the main purpose of the Americans with Disabilities Act (ADA) of 1990<sup>278</sup> is to reflect the notion that "[i]ncluding individuals with disabilities among people who count in composing 'We the People.'"<sup>279</sup> Her decisions reflect this ideology. In *Bragdon v. Abbott*,<sup>280</sup> the Court vacated the Court of Appeals' judgment and remanded the case for further proceedings, after concluding that the patient's asymptomatic HIV provided protection from discrimination under the ADA as it

---

<sup>274</sup> *Stop and Frisk Facts*, New York City Civil Liberties Union, <http://www.nyclu.org/node/1598>; see Editorial Board, *Racial Discrimination in Stop-and-Frisk*, N.Y. TIMES, Aug. 12, 2013, <http://www.nytimes.com/2013/08/13/opinion/racial-discrimination-in-stop-and-frisk.html>

<sup>275</sup> Slobogin, *supra* at 868 ("At the same time, Justice Ginsburg believes that the Constitution is a dynamic document rather than a frozen text that must be interpreted in light of practices that existed at the time of the Framers.").

<sup>276</sup> *Fernandez v. California*, 133 S. Ct. 2887 (2013) (The Court ruled that when a resident who objects to the search of his residence is removed through a lawful arrest, then the remaining resident who lives in the house may give the police officers consent to search the premises without first demanding a warrant) (dissenting, Ginsburg, J.).

<sup>277</sup> Karst, *supra* at 940.

<sup>278</sup> Codified as 42 U.S.C. § 12101 et seq.

<sup>279</sup> *Tennessee v. Lane*, 541 U.S. 509, 536 (2004) (Ginsburg J., concurring).

<sup>280</sup> 524 U.S. 624 (1998).

was an impairment that substantially limited major life activities in her life. The only way a medical professional could refuse treatment and not suffer any consequences for his or her discriminatory actions was to prove to the Court that he or she or others, would be put at risk for performing medical services. The doctor in this case failed to meet his burden. Justice Kennedy delivered the majority opinion for the Court in which Justice Ginsburg joined as well as delivering a separate concurrence.

In the case at bar the Court addressed the application of the ADA to individuals infected with the human immunodeficiency virus (HIV). In order for individuals such as Abbott and the like, to secure protection from discrimination under the ADA, the individual bears the burden of proving that she or he has an impairment that substantially limits major life activities.<sup>281</sup> In an effort to determine whether Dr. Bragdon discriminated against Abbott when he refused to perform dental work on her using his facilities, thus subjecting her to a greater payment, the Court had to determine if her claim fell within an ADA claim. In doing so, the Court first addressed whether the HIV infection qualifies as a disability under the ADA even when the symptoms have not surfaced and then, determined whether the treatment of the infection constitutes a safety concern to medical professionals, specifically a dentist.

Respondent Abbott had been infected with HIV for approximately 8 years and at the time of the suit her infection had yet to progress into serious symptoms.<sup>282</sup> On September 16, 1994 respondent Abbott went to petitioner Bragdon's (who is a dentist) office where she revealed her HIV status on the patient paperwork.<sup>283</sup> During the dental examination, Dr. Bragdon found a cavity and informed Respondent Abbott of his personal policy of performing dental work for

---

<sup>281</sup> Codified as 42 U.S.C. § 12101 et seq.

<sup>282</sup> 524 U.S. at 628.

<sup>283</sup> *Id.* at 628-629.

HIV patients.<sup>284</sup> Dr. Bragdon informed Abbott that he could fill her cavity at a local hospital instead of his office, for free, however she would be responsible for the hospital fees of using their facilities for the procedure.<sup>285</sup> Abbott declined Dr. Bragdon's offer and sued him for discrimination under § 302 of the ADA for her HIV disability.<sup>286</sup>

The Court first held that Abbott's HIV status constituted a disability under § 12102(2) of the ADA because her infection constitutes, "a physical or mental impairment that substantially limits one or more of the major life activities of such individual."<sup>287</sup> The Court then went through the medical diagnosis of HIV and its life altering effects irrespective of whether the disease is asymptomatic or not. The Court ultimately holds that it satisfies the regulatory definition of a physical impairment during all stages of the disease as it attacks the lymphatic systems.<sup>288</sup> Next, the Court concluded that Abbott's HIV infection limits major life activities, specifically her ability to reproduce, as "reproduction and the sexual dynamics surrounding it are central to the life process itself."<sup>289</sup> The Court recognized that HIV limits Abbott, and therefore constitutes a disability under the ADA in two ways: "First, a woman infected with HIV who tries to conceive a child imposes on the man a significant risk of becoming infected. [...] Second, an infected woman risks infecting her child during gestation and childbirth, *i.e.*, perinatal transmission."<sup>290</sup>

Since the Court agrees that Abbott's disease constitutes as a disability under the ADA, the Court next addresses whether Abbott's infection "posed a threat to the safety of others,"<sup>291</sup> as

---

<sup>284</sup> *Id.*

<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

<sup>287</sup> 42 U.S.C. § 12102(2)

<sup>288</sup> 524 U.S. at 637.

<sup>289</sup> *Id.*

<sup>290</sup> *Id.* at 639-640.

<sup>291</sup> 42 U.S.C. § 12182(b)(3) (A direct threat is, "a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services.").

it would be the only reason Dr. Bragdon could have refused to treat Abbott. In her short and sweet concurrence, Justice Ginsburg candidly writes that HI, “has been regarded as a disease limiting life itself.”<sup>292</sup> She points out that those infected with HIV are limited in their activities of simple things such as obtaining healthcare services because of the reactions of others, like Dr. Bragdon who did indeed act differently toward a patient once the illness was unveiled. Without hesitation and in as few words as possible, she writes, “No rational legislator, it seems to me apparent, would require nondiscrimination once symptoms become visible but permit discrimination when the disease, though present, is not yet visible.”<sup>293</sup> Her concurrence although short, is clear, convincing, and convicting. Notably, her concurring opinions as in the this case, follow a certain format:

[S]he does not engage in a lengthy regurgitation of the majority opinion. Rather, she strikes out on her own legal footing to limit or expound on the Court’s holding in order to prevent its future misuse or misapplication and to raise open questions that she feels the majority opinion should have addressed. Her vision is therefore turned toward the horizon of future cases.<sup>294</sup>

As scholar Neil S. Siegel explains, “[D]isability issues were not new to Justice Ginsburg when she encountered them as a judge,” because, “much of her early work as a legal advocate was concerned with pregnancy, which can interfere with the performance of certain job functions,” thus drawing on Justice Ginsburg’s familiarity with disability cases.<sup>295</sup> According to Professor Bagenstos, Justice Ginsburg endorses the view of disability rights in that “disability was neither a personal tragedy nor a source of inspiration for the nondisabled; disability was a

---

<sup>292</sup> 524 U.S. at 656.

<sup>293</sup> *Id.*

<sup>294</sup> Rebecca L. Barnhart and Deborah Zalesne, *Twin Pillars of Judicial Philosophy: The Impact of the Ginsburg Collegiality and Gender Discrimination Principles on Her Separate Opinions Involving Gender Discrimination*, 7 N.Y. City L. Rev. 275, 297 (2007).

<sup>295</sup> Siegel, *supra* at 826.

minority-group status imposed by a society that was not accessible to individuals with physical or mental impairments that deviated too far from the norm.”<sup>296</sup> Justice Ginsburg’s concurring opinion, “focused directly on an issue that is of major concern to disability rights activists: the way that society, by its reactions to specific impairments, makes those impairments disabling.”<sup>297</sup> In an attempt to exhibit the Framers’ intention to include individuals with disabilities in the “We the People” ideology, Justice Ginsburg through her opinions argues that these individuals are entitled to protection because like gender discrimination and race discrimination, society attempts to limit their opportunities<sup>298</sup>—thus society’s historic response to these issues.<sup>299</sup>

## 5. Abortion

According to Siegel, “The ideal of equal citizenship stature animates Justice Ginsburg’s approach to the permissibility of government regulation of abortion.”<sup>300</sup> Her legal analysis of abortion focuses primarily on “the woman’s equality aspect” in respect to her reproductive rights, which reflect the “equal-regard values involved in cases on abortion,”<sup>301</sup> rather than the actual right to privacy.<sup>302</sup> Such laws that restrict a woman’s access to abortion or other contraceptive methods pose a threat to the equal citizenship of all women,<sup>303</sup> since it “depriv[es] women of the right to make an autonomous choice, even at the expense of their safety.”<sup>304</sup>

---

<sup>296</sup> Samuel R. Bagenstos, *Justice Ginsburg and the Judicial Role in Expanding “We the People”*: *The Disability Rights Cases*, 104 Colum. L. Rev. 49, 51 (2004).

<sup>297</sup> Bagenstos, *supra* at 53.

<sup>298</sup> Bagenstos, *supra* at 53.

<sup>299</sup> Siegel, *supra* at 827.

<sup>300</sup> Siegel, *supra* at 820.

<sup>301</sup> Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 385 (1985).

<sup>302</sup> Siegel, *supra* at 821.

<sup>303</sup> Siegel, *supra* at 823.

<sup>304</sup> *Gonzales v. Carhart*, 127 S. Ct. 1610, 1649 (2007) (Ginsburg, J. dissenting); see Ellington et al., *supra* at 712-713 (“Any imposition of restraints that disadvantages the woman is a denial of her full autonomy and full equality with men. For this reason, [Justice Ginsburg’s] constitutional analysis of reproductive autonomy is premised under

### a. Reproductive Rights

In a 5-4 majority decision of *Stenberg v. Carhart*,<sup>305</sup> Justice Ginsburg provided the necessary fifth vote for the majority opinion, but authored her own concurring opinion, and joined Justice Stevens in his concurring opinion. In this case, the Court addressed the constitutionality of a Nebraska statute that banned “partial birth abortions.” The statute defined a “partial birth abortion” as one where the woman gives birth to a living unborn child vaginally and then kills the child upon completion of the delivery.<sup>306</sup> A violation of such statute yields a prison sentence of up to 20 years and a fine up to \$25,000 as it is classified as a felony.<sup>307</sup> The Court held that the statute was unconstitutional for two specific reasons: (1) the Nebraska ban on “partial birth abortions” does not include a health exception which threatens a woman’s health and (2) the language of the statute “encompasses the most common method of second-trimester abortion, placing a substantial obstacle in the path for women seeking abortions,” thus imposing an undue burden on the women.<sup>308</sup>

The Court began its majority decision by reviewing the basic principles regarding abortion jurisprudence. The Court thus reiterates the established rule that abortion bans must contain a health exception that would permit the abortion to be performed as a means to preserve the health of the mother, which this statute failed to encompass.<sup>309</sup> Additionally, the Court held that a health exception is also required by the Constitution when, “state regulations force women

---

equal protection/sex/discrimination rubric rather than the substantive due process/personal autonomy analysis in *Roe v. Wade*, which is not expressly linked to discrimination against women.) (citations and quotations omitted).  
<sup>305</sup> 530 U.S. 914 (2000).

<sup>306</sup> *Id.* at 922.

<sup>307</sup> *Id.*

<sup>308</sup> *Stenberg v. Carhart: A Legal Analysis*, American Civil Liberties Union, July 1, 2000, <https://www.aclu.org/reproductive-freedom/stenberg-v-carhart-legal-analysis>

<sup>309</sup> 530 U.S. at 930.

to use riskier methods of abortion.”<sup>310</sup> In the Court’s view, “So long as ‘substantial medical authority supports the proposition that banning a particular abortion procedure could endanger women’s health,’ the Constitution ‘requires the statute to include a health exception when the procedure is ‘necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.’”<sup>311</sup>

Next, the Court rejects the argument that the statute does not need an exception because abortions rarely if ever use the specified D&X<sup>312</sup> method.<sup>313</sup> In response the Court recognizes that a statute that altogether forbids a particular procedure, is in itself dangerous irrespective of the rarity of the procedure because allowing the statute creates an enormous health risk to those “rare” women who may have the procedure done.<sup>314</sup> And in addition to finding that the statute is unconstitutional in that it lacks a health exception, the Court further finds that the law is also unconstitutional because the language of the statute regarding banned procedures encompasses both D&X procedures and D&Es<sup>315</sup> which account for more than 95% of second-trimester abortions that are performed.<sup>316</sup> This places an undue burden on the woman.<sup>317</sup>

---

<sup>310</sup> *Id.* at 931.

<sup>311</sup> *Stenberg v. Carhart: A Legal Analysis*, American Civil Liberties Union, July 1, 2000, <https://www.aclu.org/reproductive-freedom/stenberg-v-carhart-legal-analysis>; 530 U.S. at 938 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 879 (1992)).

<sup>312</sup> Dilation and Extraction.

<sup>313</sup> *Stenberg v. Carhart: A Legal Analysis*, American Civil Liberties Union, July 1, 2000, <https://www.aclu.org/reproductive-freedom/stenberg-v-carhart-legal-analysis>

<sup>314</sup> 530 U.S. at 938.

<sup>315</sup> Dilation and evacuation procedures.

<sup>316</sup> 530 U.S. at 924.

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

Justice Ginsburg's concurring opinion joined by Justice Stevens, stresses that the statute itself only targeted a specific method of an abortion procedure, although there is no abortion method that actually saves the fetus from death.<sup>318</sup> According to her,

[T]he law's sole purpose was to place an obstacle in the path of woman seeking an abortion, for in banning a particular method of abortion, it did not seek to protect the health or lives of pregnant women, nor did it 'save any fetus from destruction,' as other methods of abortion remained available in every instance.<sup>319</sup>

Her concurring opinion mirrors her jurisprudence of the Framers' intentions regarding reproductive rights. As more rights were given to women, in Justice Ginsburg's view, the Framers of the Constitution, intending to stress that precedent should not allow moral concerns to override a woman's fundamental right to have autonomy over her body.<sup>320</sup>

#### **b. Religion And Access To Contraceptives**

One of Justice Ginsburg's most famous and recent dissenting opinions was decided this summer. It is no surprise that the decision addressed the exercise of the freedom of religion and the use of contraceptives regarding insurance policies provided by employers. The landmark *Burwell v. Hobby Lobby Stores, Inc.*<sup>321</sup> case specifically permitted for-profit closely held corporations to be exempt from certain laws that the founders and owners of the corporations religiously objected to if there is a less restrictive means of furthering the law's interest. The 5-4 decision delivered by the conservative majority struck down the contraceptive mandate formulated by the U.S. Department of Health and Human Services ("HHS") under the

---

<sup>318</sup> *Id.* at 951.

<sup>319</sup> *Judges & The Courts: Justice Ginsburg's Twenty Years on the Supreme Court Fact Sheet*, National Women's Law Center, Oct. 2013, [http://www.nwlc.org/sites/default/files/pdfs/ginsburg\\_20\\_years.pdf](http://www.nwlc.org/sites/default/files/pdfs/ginsburg_20_years.pdf), at 4.

<sup>320</sup> Seigel, *supra* at 822.

<sup>321</sup> 134 S. Ct. 2764 (2014).

Affordable Care Act (“ACA”),<sup>322</sup> which requires employers to cover certain methods of contraceptives for their female employees. Although the regulations initially denied exempt “religious employers”<sup>323</sup> from complying with the contraceptives mandate of this regulation, the Obama Administration eventually altered the set of accommodations for certain “religious employers.”<sup>324</sup> Moreover, “In addition to the exemption for ‘religious employers,’ the regulations provided that certain religious nonprofits that certified that they qualified for the exemption and objected to some or all of the covered contraceptive services could avoid direct coverage of those services, which would be provided by the insurers.”<sup>325</sup> On the contrary however, “[f]or-profit corporations were ineligible for religious accommodations.”<sup>326</sup>

The contraception mandate was challenged by plaintiffs: Hobby Lobby, Conestoga Wood Specialties, and Mardel as were all closely held corporation companies, whose statement of purpose was that they were to be businesses that operated in a manner that reflects Biblical principles.<sup>327</sup> The companies therefore refuse to facilitate or engage in any behavior that they deem inconsistent with their religious beliefs, and they specifically believe that being required to facilitate the access to certain contraceptive methods violates their religious beliefs.<sup>328</sup> The three companies eventually brought suit against the HHS and other federal agencies to challenge the

---

<sup>322</sup> Paul Horwitz, *The Hobby Lobby Moment*, 128 Harv. L. Rev. 154, 160-161 (2014) (The Affordable Care Act of 2010 mandates employers with at least fifty employees or more, to provide “minimum essential coverage,” through their insurance plans. If they fail to do so, the penalties are very expensive ranging at about \$100-per-day for each affected employee. The minimum coverage requirements include: “FDA approved contraceptive methods, sterilization procedures, and patient education and counseling.”) (citations omitted).

<sup>323</sup> Such as churches and other religious orders. see 45 C.F.R. § 147.131(a) (2013).

<sup>324</sup> Horwitz, *supra* at 161.

<sup>325</sup> Horwitz, *supra* at 161.

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

<sup>327</sup> 134 S. Ct. 2765-2766.

<sup>328</sup> *Id.* at 2766.

mandate to provide contraceptives under the Religious Freedom Restoration Act (“RFRA”) and the Free Exercise Clause of the First Amendment.<sup>329</sup>

As required by law, under RFRA the Government is prohibited from,

Substantially burden[ing] a *person’s* exercise of religion even if the burden results from a rule of general applicability unless the Government demonstrates that application of burden to the *person*—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.<sup>330</sup>

The first question that the majority addressed was whether this provision regulated for-profit corporations,<sup>331</sup> thus deciding whether the corporations are allowed to assert claims under the Free Exercise Clause of the First Amendment.<sup>332</sup> In holding that corporations were “persons” under the RFRA and thus entitled to raise claims, the Court reasoned that RFRA included corporations in their definitions of “persons” which includes shareholders, the officers, and the employees who are all associated with the corporation.<sup>333</sup> Additionally, the Court drew on references from the Fourth Amendment and the Dictionary Act to reason that RFRA included corporations in its definitions of “persons” because the purpose is to protect the rights of the individuals who own and control the corporations.<sup>334</sup> Furthermore, the Court asserted that the RFRA “was designed to provide very broad protection for religious liberty,”<sup>335</sup> and should be read with the same flexibility and with the purpose in mind. And lastly, although the corporations may be collectively paying the penalty, it is the “the humans who own and control

---

<sup>329</sup> *Id.*

<sup>330</sup> *Id.* at 2767; 42 U.S.C. §§ 2000b-1(a), (b).

<sup>331</sup> *Id.* at 2767.

<sup>332</sup> Horwitz, *supra* at 162-163.

<sup>333</sup> 134 S. Ct. at 2768.

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

<sup>335</sup> *Id.* at 2767.

those companies,”<sup>336</sup> who actually “feel the sting of the religious burden,”<sup>337</sup> and thus therefore constitute “persons” under the RFRA.

Next, the Court concluded that the penalties for the corporations for failing to cover the disagreeable contraceptive methods and the like were sufficient to constitute a substantial burden.<sup>338</sup> Although the Court did not question the sincerity of the plaintiff-corporation owner’s, the Court did however agree that the minimum coverage mandate conflicted with religious beliefs in that, “the provision of coverage entailed wrongful cooperation with a grave moral evil.”<sup>339</sup> In holding that the plaintiffs established a substantial burden if they were required to comply with the mandate, the Court next addresses whether HHS has shown that the mandate was in furtherance of a compelling governmental interest and whether it was the least restrictive means of furthering that compelling governmental interest.<sup>340</sup> In response, the Court “assume[s] that the interest in guaranteeing cost-free access to the four challenged contraceptive methods is compelling within the meaning of RFRA.”<sup>341</sup> Furthermore, the Court finds that HHS has failed its burden in showing that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of their freedom of religion.<sup>342</sup>

In her four-member minority, Justice Ginsburg scorns the majority for a “decision of startling breadth,” that was too eager to unfairly require the public to bear the costs of those religious exemptions for for-profit corporations.<sup>343</sup> Conclusively, Justice Ginsburg charges the

---

<sup>336</sup> *Id.* at 2768.

<sup>337</sup> Horwitz, *supra* at 163.

<sup>338</sup> 134 S. Ct. at 2775-2776.

<sup>339</sup> Horwitz, *supra* at 163 (2014); see *Id.* at 2778.

<sup>340</sup> 134 S. Ct. 2781.

<sup>341</sup> *Id.* at 2780.

<sup>342</sup> *Id.* (HHS has not provided the Court with estimates of the average cost per employee to provide access to the objectionable contraceptives, and has not provided statistics about the need of the objectionable contraceptives needed by the employees.).

<sup>343</sup> *Id.* at 2787 (Ginsburg, J., dissenting).

Court with applying RFRA in such a way that departs from rather than reinstates pre-Smith, and in doing so, the majority decision is incorrect because as a result, “the Court falters at each step of its analysis.”<sup>344</sup> In terms of the Court’s holding that the term “persons” under the RFRA encompasses a for-profit corporation, Justice Ginsburg asserts that it does not. Not only is there no case law to support the majority’s conclusion, but “[u]ntil 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.”<sup>345</sup> In her powerful dissent, the lack of precedent clearly suggests that the Free Exercise Clause is indicative of “natural persons, and not artificial entities.”<sup>346</sup> However, Justice Ginsburg does agree that, [s]ome ‘artificial legal entities’ should be protected, because ‘[r]eligious organizations exist to foster the interests of persons subscribing to the same religious faith,’ but the line should be drawn for ‘for-profit corporations.’<sup>347</sup>

Overwhelmingly, Justice Ginsburg’s exposed the faults in the majority’s opinion and shed light on the detrimental effect that the ruling would have on women, as they represent a significant factor in her “equal citizen stature” jurisprudence. In her assertive dissent, she explains that the plaintiff corporations failed to show a substantial burden, because of the “attenuation between any religious claims by the corporate owners and the independent contraceptive choices of their employees.”<sup>348</sup> Not only did Justice Ginsburg find the government’s interest of “public health and women’s well being”<sup>349</sup> clearly compelling, but she

---

<sup>344</sup> *Id.* at 2791-2793.

<sup>345</sup> *Id.* at 2794-2795. (The RFRA makes no mention of for-profit corporation’s qualification for a religious exemption).

<sup>346</sup> *Id.* at 2795.

<sup>347</sup> Horwitz, *supra* at 164-165 (citing 134 S. Ct. at 2795-2796)

<sup>348</sup> Horwitz, *supra* at 165; see 134 S. Ct. at 2798-2799.

<sup>349</sup> Horwitz, *supra* at 165; 134 S. Ct. at 2799.

emphasized that any decision that the female makes pertaining to the use of contraceptives is her autonomous choice under her physician's advice, which is outside of the scope and interest of her employer. In Justice Ginsburg's view, the majority's decision disproportionately harmed women and put them at risk, which cuts against the notion that there is, "[n]o tradition, and no prior decision under RFRA, [that] allows a religion-based exemption when the accommodation would be harmful to others."<sup>350</sup>

### **III. CONCLUSION**

Justice Ginsburg's jurisprudence of ensuring the Framers' intention that ALL individuals are including in "We the People" continues to bring about slow, yet incremental change as a means for actively perfecting the more perfect union. Her opinions either hone in on the flexible interpretation of the living Constitution when writing for the majority, or it powerfully disagrees with the majority when it denies equal protection for citizens. Moreover, all that she has seen, all that she has heard, and all that she has endured in her life, sensitizes her drive for equality. Her passion began with her mother and the sad regret that her mother never lived to see the day where Ruth became that individual woman that she instilled in her to be. And her drive for equality although it is far from over, ends when there is no longer a demand for the service of equality.

In every respect Justice Ginsburg is a lioness, both in the battlefield of the courtroom and in the battlefield of life. As a lioness she can be graceful in that she can deeply sympathize with discrimination, and she does have a defensive side where she can attack the majority for their lack of understanding and intelligence when it comes to attacking the principles that put the

---

<sup>350</sup> *Id.* at 2801.

Framers' intent of equality in jeopardy. Furthermore, as with any lioness, Justice Ginsburg is deemed an activist judge who charges Congress with the task of correcting flawed decisions of the majority. Her decisions reflect its flexibility for the future instead of limiting its applicability to today. She is brave, she stands alone in her dissents if need be, and she reflects how important her position is on the Court although she doesn't let the esteem of her job title limit her ability to identify with issues occurring off of the bench. In essence, she leads...in her opinions, in her dissents, in her early life, in her academic success, and in her hobbies, not follows. She is a lioness and she is liberal.