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Justice Ruth Bader Ginsburg: 20 Years of Supreme Court Jurisprudence

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Before becoming the second female to sit on the United States Supreme Court, Ruth Bader Ginsburg established herself as a fighter in the face of adversity. She lost her mother at an early age, was one of nine females in her law school class and was rejected from countless law firms and clerkships as a young attorney on account of gender. Despite this, Ginsburg developed a renowned legal career as an attorney for the American Civil Liberties Union (ACLU). There, she argued gender equality cases in front of the Supreme Court and her work was influential in persuading the Court to raise the standard of review for gender-based classifications to intermediate scrutiny.

In 1980, President Carter appointed Ginsburg to the Court of Appeals for the District of Columbia. In 1992, just one year before being nominated to the Supreme Court, Ginsburg delivered a lecture in which she identified two dominant themes in her jurisprudential approach. The first, collegiality in decision-making, emphasized the importance of collegial relationships between members of the Court, specifically as it applied to opinion writing. The second, measured motions, stressed judicial restraint and the use of stare decisis as a means of restricting judges from letting personal views distract from impartial decision-making. Ginsburg's view that the Constitution is a living document has also influenced her jurisprudential approach, particularly as it colors her perspective of fair treatment under the law.

In her twenty years on the court, Ginsburg has remained largely consistent in adjudicating cases narrowly and has adhered to the view that the Constitution is a living document. However, in recent years her stance on collegiality towards her colleagues seems to be shifting, leaving many wondering if Ginsburg has finally found her voice. This change likely arises from two parallel factors. The first, is the departure of Justice John Paul Stevens from the Court in 2010. For the majority of Ginsburg's tenure on the Court, Stevens was the senior most liberal Justice

and was responsible for assigning authorship of decisions, particularly those that fell along party lines. As a result, Stevens often wrote many of the blockbuster decisions on behalf of the liberal block of the Court. With his departure, Ginsburg inherited this role. As Ginsburg selects the opinions she wishes to author, we may be seeing a new voice emerge in a way that was not possible in prior terms. The second factor is Ginsburg's view that this Court is on track to become one of the most activist in recent history, if measured by the willingness to overturn legislation enacted by Congress. Because judicial activism stands in direct opposition to Ginsburg's adherence to measured motions, one might view her changed tone as an expression of distinct disagreement with the trajectory of the Court. Ginsburg has indicated that she has no current plans to retire and will likely to continue to voice opposition if her prediction about judicial activism comes true. No stranger to adversity, this may be Ginsburg's last public battle before retiring.

This paper will explore Ginsburg's rise to Supreme Court Justice and evaluate if she has adhered to her jurisprudential approach since being appointed to the Court. Part I explores Ginsburg's early life, career as a litigator, and transition into a Judge. Part II examines Ginsburg's jurisprudential approach. Part III evaluates landmark opinions authored by Ginsburg and explores if she has remained true to her hallmark jurisprudential approach.

I. Justice Ginsburg's Early Life and Career

Joan Ruth Bader¹ was born on March 15, 1933 in Brooklyn, New York to Nathan and Cecilia Bader. She was their second child and was lovingly nicknamed Kiki.² Ginsburg grew up

¹ Despite the fact that Ginsburg is widely to as referred Ruth Joan Bader, Confirmation Hearing records indicate that her given name is Joan. *Nomination of Ruth Bader Ginsburg, to be Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary, 103rd Cong. 57 (1994)* [hereinafter Confirmation Hearing] available at <http://www.loc.gov/law/find/nominations/ginsburg/hearing.pdf>.

in the working-class immigrant neighborhood of Flatbush, which was mostly populated by Italian, Jewish and Polish families. Her father was of Russian decent and emigrated to the United States when he was thirteen years old.³ He was regarded as a gentle man with a sly sense of humor, who developed a business manufacturing low-cost furs.⁴ Her mother was born in the United States and was a strong educational advocate and prolific reader.⁵ Ginsburg's older sister, Marilyn, tragically passed away from meningitis when Ginsburg was two years old.⁶

To Ginsburg, Cecilia passed on the values of independence, education, and drive to make the most of her abilities.⁷ Cecilia graduated from high school at the age of fifteen but did not attend college.⁸ Instead, she worked in a garment factory to help finance her brother's college education.⁹ Unbeknownst to many, Cecilia was diagnosed with cervical cancer when Ginsburg entered James Madison High School.¹⁰ However, despite being frequently bedridden and in pain, Cecilia never ceased in promoting Ginsburg's studies.¹¹ She ensured that Ginsburg did her homework, practiced piano, and she regularly took Ginsburg to the public library.¹² Cecilia passed away when Ginsburg was seventeen years old, on the day before Ginsburg's high school graduation.¹³ Ginsburg was graduating sixth in her class but did not attend the school's Forum

² Phil Schatz, *Hon. Ruth Bader Ginsburg Associate Justice, Supreme Court of the United States*, FED. LAW., May 2010, at 24.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Interview by Brian Lamb with Ruth Bader Ginsburg, C-SPAN, in Wash., D.C. (June 1, 2009) [hereinafter Lamb Interview] available at supremecourt.c-span.org/assets/pdf/RBGinsburg.pdf.

of Honor because of her loss.¹⁴ Ginsburg recalls that, “[It] was one of the most trying times in my life, but I knew that she wanted me to study hard and get good grades and succeed in life, so that’s what I did.”¹⁵

Ginsburg entered Cornell in 1950 and pursued a major in Government.¹⁶ While at Cornell, Ginsburg met her future husband, Martin Ginsburg. She recalls that, “he was the first boy I ever met who cared that I had a brain.”¹⁷ Early in their relationship, the couple determined that they would become lawyers together.¹⁸ In 1953, Martin graduated from Cornell and began his law degree at Harvard Law School, while Ginsburg remained at Cornell to complete her senior year. In 1954, Ginsburg graduated from Cornell first in her class.¹⁹

Approximately halfway through his first year of law school, Martin received a draft notice for the United States Army.²⁰ After Ginsburg’s Cornell graduation, the pair married and Ginsburg deferred her acceptance to Harvard Law School so that she and Martin could move to Fort Sill, Oklahoma, where he was stationed.²¹ In 1955, while living in Oklahoma, Ginsburg gave birth to their daughter, Jane.²² Their second child, James, was born ten years later.²³ In 1956, after two years of service, the couple returned to Boston to attend law school.²⁴

¹⁴ *Ruth Bader Ginsburg*, The Oyez Project at IIT Chicago-Kent College of Law, http://www.oyez.org/justices/ruth_bader_ginsburg [hereinafter Oyez Project] (last visited Dec. 2, 2013).

¹⁵ Lamb Interview, *supra* note 13.

¹⁶ Schatz, *supra* note 2, at 26.

¹⁷ Interview by Larry Josephson with Ruth Bader Ginsburg, *Only in America: 350 Years of the American Jewish Experience*, in Wash., D.C. (Sept. 2, 2004), available at <http://onlyinamerica.cc/ginsburg.shtml>.

¹⁸ *Id.*

¹⁹ Ruth Bader Ginsburg, <http://www.biography.com/people/ruth-bader-ginsburg-9312041> (last visited Dec. 2, 2013).

²⁰ Schatz, *supra* note 2, at 26.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

Despite the fact that Harvard Law School had started admitting women in 1953, there were still relatively few females at the law school.²⁵ In Ginsburg's class of 500 students, only nine were women²⁶ and the general assumption was that they were there trolling for husbands.²⁷ With just two women per section,²⁸ Ginsburg recalls that it often felt as though every eye in the class was on her when she answered a question and that it felt as if she was answering on behalf of the gender as a whole.²⁹ Moreover, during her time at Harvard, Dean Griswold reportedly asked the female students how it felt to take up a limited space in the class that could have gone to a deserving male applicant.³⁰ Ginsburg has since defended Dean Griswold, arguing that he was a supporter of admitting women to the law school and that his intention was to learn from the women what they anticipated doing with their law degrees.³¹ Despite facing challenges in the law school because of her gender, Ginsburg persevered with her studies, earning high grades and the title of first female on the Harvard Law Review.³²

During Ginsburg's first year of law school, Martin was diagnosed with advanced testicular cancer.³³ To treat the disease, Martin underwent two surgeries and radiation, which effectively left him incapacitated for an entire semester.³⁴ Ginsburg responded by assisting him with his studies, while completing her own. She attended classes on his behalf and typed his

²⁵ Gerald Gunther, *Ruth Bader Ginsburg: A Personal, Very Fond Tribute*, 20 U. HAW. L. REV. 583 (1998).

²⁶ Schatz, *supra* note 2, at 26.; Emily Bazelon, *The Place of Women on the Court*, N.Y. TIMES (Jul. 7, 2009), http://www.nytimes.com/2009/07/12/magazine/12ginsburg-t.html?_r=0.

²⁷ Schatz, *supra* note 2, at 26.

²⁸ Bazelon, *supra* note 26.

²⁹ Interview by Walter Dellinger with Ruth Bader Ginsburg, Duke Law School, in Durham, N.C. (Jan. 31, 2005) [hereinafter Dellinger Interview] available at <http://law.duke.edu/video/great-lives-law-justice-ruth-bader-ginsburg/>.

³⁰ *Ruth Bader Ginsburg: Makers Profile*, U.S. Supreme Court Justice, MAKERS, <http://www.makers.com/ruth-bader-ginsburg> [hereinafter Makers Profile] (last visited Dec. 2, 2013).

³¹ Ruth Bader Ginsburg & Linda Greenhouse, *A Conversation with Justice Ginsburg*, 122 YALE L.J. ONLINE 283, 286 (2013) [hereinafter Greenhouse Conversation].

³² Makers Profile, *supra* note 30.

³³ Schatz, *supra* note 2, at 26.

³⁴ *Id.*

papers as he dictated them.³⁵ Martin survived the treatment and graduated in 1958.³⁶ Upon graduation, he took a job as a tax lawyer in New York City.³⁷ To stay together, Ginsburg transferred to Columbia Law School where she graduated at the top of her class³⁸ and became the first female to serve on both the Columbia Law Review and the Harvard Law Review.³⁹

During a time where many law firms and judges did not want to hire women, Ginsburg faced difficulties securing a job.⁴⁰ She knew that she had three strikes against her, she was a female, she was Jewish and she was a mother.⁴¹ She recalls that, “if a door would have been open a crack in either of the first two cases, the third one was too much.”⁴² Ginsburg was ultimately denied employment by numerous law firms,⁴³ including Paul, Weiss, Rifkind, Wharton and Garrison, with whom she had worked as a summer associate during her second year summer.⁴⁴

As an alternative, Ginsburg pursued a clerkship with a federal district judge. Her professor at Columbia, Gerald Gunther, was instrumental in securing her a clerkship with Judge Edmund L. Palmieri of the United States District Court for the Southern District of New York. However, this too was an uphill battle. When Gunther proposed Ginsburg as a candidate for the clerkship, the Judge was taken aback by the suggestion.⁴⁵ He questioned how he could hire a

³⁵ Oyez Project, *supra* note 14.

³⁶ Schatz, *supra* note 2, at 26.

³⁷ *Id.*

³⁸ *Id.*

³⁹ Colleen Walsh, *Ginsburg Holds Court*, HARVARD GAZETTE (Feb. 6, 2013), <http://news.harvard.edu/gazette/story/2013/02/ginsburg-holds-court/>.

⁴⁰ Justice Ruth Bader Ginsburg, *A Conversation with Associate Justice Ruth Bader Ginsburg*, 84 U. COLO. L. REV. 909, 912 (2013) [hereinafter Colorado Conversation].

⁴¹ Stephanie B. Goldberg, *The Second Woman Justice; Ruth Bader Ginsburg Talks Candidly About A Changing Society*, ABA J., Oct. 1993, at 40, 41.

⁴² *Id.*

⁴³ Dellinger Interview, *supra* note 29.

⁴⁴ Debra Bruno, *Justice Ginsburg Remembers her First Steps in the Law*, LAW.COM (Nov. 13, 2007), <http://www.law.com/jsp/article.jsp?id=1194861838591%20&slreturn=20131102134227>.

⁴⁵ Gunther, *supra* note 25, at 584.

woman, stating that it would look improper when he worked late in his Chambers.⁴⁶ In order to secure the clerkship, Gunther made arrangements for the Judge to release Ginsburg if he found it impossible to work with her.⁴⁷ With that arrangement in place, Judge Palmieri acquiesced and hired her.

When Ginsburg completed her clerkship in 1961, she returned to Columbia for a two-year position on the Project on International Procedures.⁴⁸ In this capacity she served first as a research associate and then as Associate Director.⁴⁹ During her time on the project, Ginsburg undertook a study of Swedish civil procedure and co-authored a book on the topic, requiring her to learn Swedish.⁵⁰ In 1963, Ginsburg was hired as an assistant professor at Rutgers School of Law where she taught civil procedure, remedies, and a comparative procedure seminar.⁵¹

In the late 1960's, Ginsburg's work began to shift towards women's rights. The ACLU of New Jersey, began receiving complaints from women who were being forced into unpaid maternity leaves when their pregnancy was beginning to show and from women who were unable to get health insurance benefits for their families.⁵² The ACLU of New Jersey

⁴⁶ *Id.*

⁴⁷ *Id.* Justice Ginsburg was also rejected from other clerkships. In 1960, The Dean of Harvard Law School, Albert Sachs, proposed Ginsburg as a law clerk to Justice Frankfurter. He did not extend her the offer on account that he was not ready to hire a woman. Neil A. Lewis, *The Supreme Court: Woman in the News; Rejected as a Clerk, Chosen as a Justice: Ruth Joan Bader Ginsburg*, N.Y. TIMES (June 15, 1993), <http://www.nytimes.com/1993/06/15/us/supreme-court-woman-rejected-clerk-chosen-justice-ruth-joan-bader-ginsburg.html>. Ginsburg was also denied a clerkship from Judge Learned Hand, who refused to hire her because of his preference to use "salty language." Dahlia Lithwich, *Dahlia Lithwich on Female Supreme Court Justices*, NEWSWEEK (Apr. 10, 2009), <http://mag.newsweek.com/2009/04/10/women-truly-the-fairer-sex.html>.

⁴⁸ Herma Hill Kay, *Ruth Bader Ginsburg, Professor of Law*, 104 COLUM. L. REV. 1, 10 (2004).

⁴⁹ *Id.*

⁵⁰ Sarah E. Valentine, *Ruth Bader Ginsburg: An Annotated Bibliography*, 7 N.Y. CITY L. REV. 391, 397 (2004).

⁵¹ Kay, *supra* note 48, at 11.

⁵² Interview by Sandy Ogilvy with Ruth Bader Ginsburg, National Archive of Clinical Legal Education, at Columbus School of Law, in Wash., D.C. (Aug. 17, 2007) [hereinafter Ogilvy Interview] available at <http://lib.law.cua.edu/nacle/transcripts/ginsburg.pdf>.

approached Ginsburg for assistance in litigating these cases.⁵³ Simultaneously, Ginsburg was approached by a group of female law students who asked her to teach a course on women and the law.⁵⁴ Ginsburg accepted both requests and formed a clinic program to assist her work with the ACLU.⁵⁵ Ginsburg volunteered to act as co-counsel in briefing *Reed v. Reed*,⁵⁶ a case being heard by the Supreme Court. *Reed* concerned an equal protection challenge to an Idaho Law that gave preference to men over women in administering a decedent's estate.⁵⁷ Ginsburg's brief was instrumental in convincing the Burger Court that equal protection required that laws concerning gender must have a fair and substantial relationship to the legislation, so that similarly circumstanced people be treated alike.⁵⁸ This was the first Supreme Court decision to invalidate a law on the basis of gender.⁵⁹

After her success in *Reed*, Ginsburg co-founded the Women's Rights Project (WRP) with the ACLU in 1972.⁶⁰ The Project's mission was to develop a litigation strategy that promoted women's equality through the Equal Protection Clause of the Fourteenth Amendment.⁶¹ As director of the WRP, Ginsburg selected gender discrimination cases that challenged the common belief that sex-based laws operated benignly in a woman's favor.⁶² To Ginsburg, the notion of barring women from certain jobs, like jury duty or bartending, was not a protection, but rather a barrier for women.⁶³ Accordingly, Ginsburg sought to demonstrate that gender discrimination

⁵³ *Id.*

⁵⁴ Schatz, *supra* note 2, at 26.; Ogilvy Interview, *supra* note 52.

⁵⁵ Ogilvy Interview, *supra* note 52.

⁵⁶ 404 U.S. 71 (1971).

⁵⁷ *Id.*

⁵⁸ *Id.* at 76.

⁵⁹ Schatz, *supra* note 2, at 27.

⁶⁰ *Id.*

⁶¹ Carol Pressman, *The House That Ruth Built: Justice Ruth Bader Ginsburg, Gender and Justice*, 14 N.Y.L. SCH. J. HUM. RTS. 311, 314 (1997).

⁶² Schatz Profile, *supra* note 2, at 27.

⁶³ Interview by Nina Totenberg with Ruth Bader Ginsburg, NOW with Bill Moyers, PBS, (May 3, 2002) [hereinafter Totenberg Interview] available at http://www.pbs.org/now/transcript/transcript116_full.html.

affected both genders equally.⁶⁴ She showed this by selecting strong cases in which the plaintiffs were both male and female.⁶⁵ Ultimately, the project's goal was to succeed in getting the Court to regard gender-based classifications with strict scrutiny.⁶⁶ While working with the WRP, Ginsburg helped author thirty-four briefs and personally argued six cases before the Supreme Court.⁶⁷ Out of the six cases she argued, she won five.⁶⁸

Ginsburg's work is also credited with changing the language of the law by introducing the term gender discrimination, in the place of sex discrimination.⁶⁹ The term emerged while Ginsburg was working on a brief that was being submitted to a panel of all male judges. Ginsburg's secretary proposed the change, suggesting that "[T]he first association of those men with the word 'sex' is not what you are talking about."⁷⁰ From that point forward, the term gender discrimination was used to ward off any distracting associations.⁷¹

In 1980, President Jimmy Carter named Ginsburg to the United States Court of Appeals for the District of Columbia. Ginsburg has compared appellate judging to teaching law, stating that in both occupations, you must teach your position to your colleagues in an effort to have

⁶⁴ Schatz, *supra* note 2, at 27.

⁶⁵ Schatz, *supra* note 2, at 27; Ogilvy Interview, *supra* note 52.

⁶⁶ Ogilvy Interview, *supra* note 52.

⁶⁷ Schatz, *supra* note 2, at 27.

⁶⁸ *Makers Profile*, *supra* note 30. Ginsburg won the following cases: *Duren v. Missouri*, 439 U.S. 357 (1979); *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Craig v. Boren*, 429 U.S. 190 (1976); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Frontiero v. Richardson*, 411 U.S. 677 (1973).

⁶⁹ Adam Liptak, *Ginsburg Shares Views on Influence of Foreign Law on Her Court and Vice Versa*, N.Y. TIMES (Apr. 11, 2009),

<http://www.nytimes.com/2009/04/12/us/12ginsburg.html?partner=rss&emc=rss&pagewanted=print>.

⁷⁰ *Id.*

⁷¹ *Id.*

them join your opinion.⁷² While on the Appeals Court, Ginsburg had a reputation as a swing voter, who often sided with her Republican-appointed colleagues than her Democratic ones.⁷³

In 1993, Ginsburg was nominated by President Bill Clinton to fill the vacancy left by Justice Byron White. President Clinton identified three reasons as to why he believed that Ginsburg made the ideal candidate. First, because of her reputation as a balanced and fair judge.⁷⁴ Second, because of Ginsburg's accomplishments in the field of gender discrimination as a litigator.⁷⁵ And lastly, because of Ginsburg's perceived ability to be a consensus-builder on the Court, as she had demonstrated while on the Court of Appeals.⁷⁶ Throughout her confirmation hearings, Ginsburg made an effort to portray herself as a moderate judge.⁷⁷ She described her judicial approach as "neither liberal nor conservative. Rather it is rooted in the place of the judiciary, as judges, in our democratic society."⁷⁸ Ginsburg was frank throughout the hearings but refused to predict how she would rule on hypothetical cases.⁷⁹ In Ginsburg's view, it would be injudicious to do this because it would show disregard for the particular case and demonstrate disdain for the judicial process.⁸⁰ Ultimately, her refusal to answer hypotheticals did not impair

⁷² Greenhouse Conversation, *supra* note 31, at 300.

⁷³ Carey Olney, *Better Bitch Than Mouse: Ruth Bader Ginsburg, Feminism and VMI*, 9 BUFF. WOMEN'S L. J. 97, 115 (2001); See Joyce Ann Baugh et. al., *Justice Ruth Bader Ginsburg: A Preliminary Assessment*, 26 U. TOL. L. REV. 1, 4-5 (1994).

⁷⁴ *The Supreme Court; Transcript of President's Announcement and Judge Ginsburg's Remarks*, N.Y. TIMES (June 15, 1993), <http://www.nytimes.com/1993/06/15/us/supreme-court-transcript-president-s-announcement-judge-ginsburg-s-remarks.html?pagewanted=all&src=pm>.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Baugh et. al., *supra* note 73, at 7.

⁷⁸ Confirmation Hearing, *supra* note 1, at 51.

⁷⁹ Schatz, *supra* note 2, at 27.

⁸⁰ *Id.*

her nomination. On August 3, 1993 the Senate confirmed her by a vote of 96-3 after four days of hearings.⁸¹

Today, Ginsburg questions if she would have been nominated to the Court, opining that her ACLU connection would likely disqualify her.⁸² Since being on the Court, Ginsburg has survived two cancer diagnoses. In 1999, she was diagnosed with colon cancer and in 2009, with pancreatic cancer.⁸³ Despite the diagnoses, Ginsburg did not miss a day on the bench, even after she was forced to undergo chemotherapy and radiation treatments.⁸⁴ She heard oral arguments less than three weeks after enduring cancer related surgery in 2009.⁸⁵ Since then, Ginsburg has been working out with a personal trainer, acknowledging that she is up to twenty push-ups.⁸⁶ Ginsburg recently made headlines when she became the first Supreme Court Justice to officiate a same-sex wedding.⁸⁷

II. Justice Ginsburg's Jurisprudential Approach

A. Collegiality in Decision Making

Throughout her career, Ginsburg has emphasized the importance of collegial relationships between members of the Court, voting blocks, judges of other systems and other

⁸¹ Linda Greenhouse, *Senate, 96-3, Easily Affirms Judge Ginsburg as a Justice*, N.Y. TIMES (Aug. 4, 1993), <http://www.nytimes.com/1993/08/04/us/senate-96-3-easily-affirms-judge-ginsburg-as-a-justice.html>; Schatz, *supra* note 2, at 27.

⁸² Steve Benen, *It's Amazing Ginsburg is Even on the Bench*, WASH. MONTHLY (Aug. 30, 2011, 4:45 PM), http://www.washingtonmonthly.com/political-animal/2011_08/its_amazing_ginsburg_is_even_o031893.php.

⁸³ Adam Liptak, *Ginsburg has Surgery for Pancreatic Cancer*, N.Y. TIMES (Feb. 5, 2009), http://www.nytimes.com/2009/02/06/washington/06ginsburg.html?_r=0.

⁸⁴ *Id.*

⁸⁵ Robert Barnes, *Justice Ginsburg Returns to Work*, WASH. POST, (Feb. 24, 2009), http://articles.washingtonpost.com/2009-02-24/news/36781302_1_pancreatic-cancer-justice-ruth-bader-ginsburg-oral-arguments.

⁸⁶ Ann E. Marimow, *Personal Trainer Bryant Johnson's Clients Include Two Supreme Court Justices*, WASH. POST, (Mar. 19, 2013), http://www.washingtonpost.com/local/personal-trainer-bryant-johnsons-clients-include-two-supreme-court-justices/2013/03/19/ea884018-86a1-11e2-98a3-b3db6b9ac586_story.html.

⁸⁷ *Justice Ginsburg Officiates at Same-Sex Wedding*, FOX NEWS.COM (Sept. 1, 2013), <http://www.foxnews.com/politics/2013/09/01/justice-ginsburg-officiates-at-same-sex-wedding/>.

branches of government. Ginsburg believes that when adjudicating cases, judges must put aside their own egos and work together for the good of the court⁸⁸ in order to uphold the public's respect in the institution.⁸⁹ She describes the Court as the most collegial place that she has ever worked⁹⁰ and while she acknowledges that the Court often shows its fundamental disagreements in closely split decisions, Ginsburg maintains that in some terms, the Court's agreement rate is actually higher than the disagreement rate.⁹¹ She laments the fact that agreement on the Court does not make news, acknowledging that, "agreement is boring. Nobody writes about that. Disagreement is interesting."⁹²

On the current court, Ginsburg has played a large role in uniting the four liberal justices on the Court and is credited with encouraging the liberal block of the Court to speak in unison, particularly when writing in dissent.⁹³ To Ginsburg, dissents are significant because they appeal to a future Court to rectify the perceived error in the majority's opinion.⁹⁴ Ginsburg also recognizes that a unified opinion heightens the public's comprehension of the legal issue.⁹⁵

Ginsburg's goal of collegiality is largely demonstrated through her writing. Ginsburg's style of opinion writing calls for restraint in form and tone.⁹⁶ She advises that when writing, judges should be sensitive to the convictions of their colleagues, even if that means avoiding

⁸⁸ Interview by John Hockenberry with Ruth Bader Ginsburg, *The Takeaway*, in Wash., D.C. (Sept. 12, 2013) [hereinafter Hockenberry Interview] available at <http://www.thetakeaway.org/story/transcript-interview-justice-ruth-bader-ginsburg/>.

⁸⁹ Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1191 (1992) [hereinafter *Judicial Voice*].

⁹⁰ Colorado Conversation, *supra* note 40, at 927.

⁹¹ *Id.*

⁹² *Id.*

⁹³ Interview by Jeffery Rosen with Ruth Bader Ginsburg, CEO, Nat'l Constitution Ctr., in Phila., Pa. (Sept. 6, 2013) [hereinafter Rosen Interview] available at <http://www.c-spanvideo.org/program/Rulingsa>.

⁹⁴ Hon. Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 1, 4 (2010).

⁹⁵ *Ruth Bader Ginsburg: The Supreme Court's 'Heavyweight'*, N.P.R. (Mar. 6, 2013) [hereinafter *Heavyweight*], <http://wap.npr.org/news/U.S./173466698>.

⁹⁶ Laura Krugman Ray, *Justice Ginsburg and the Middle Way*, 68 BROOK. L. REV. 629, 632 (2003).

certain arguments, authorities or even certain words.⁹⁷ She advocates for a writing style that does not attack or attribute bad motives to the majority of the Court, and does not insinuate incompetence or prejudice.⁹⁸ While using strong language may give temporary satisfaction, Ginsburg believes that it ultimately harms the relationships of the Justices.⁹⁹ Despite admitting that a dissent can be more fun to write than a majority opinion, Ginsburg advocates for a writing style that concentrates on the legal arguments and skips the “distracting denunciations of my colleagues.”¹⁰⁰

Ginsburg also believes that collegiality is achieved when the Justices write unanimous opinions. She warns that overindulgence in separate opinion writing threatens the reputation of the judiciary and the respect afforded to Court opinions.¹⁰¹ By writing separately too frequently, the Court fails to act as a collegial body and damages the consistency, clarity, stability and predictability of the Court.¹⁰² Notwithstanding, Ginsburg recognizes that unanimity is not always attainable.¹⁰³ In light of this reality, she acknowledges the value of dissenting and concurring opinions when written to express an independent legal argument.¹⁰⁴ Therefore, Ginsburg tends to only write separately if she perceives that the majority has reached an unnecessarily sweeping result, the majority has disregarded precedent or hasn't given respect to another Court or branch of Government.¹⁰⁵ When a separate opinion is warranted, Ginsburg

⁹⁷ *Judicial Voice*, *supra* note 89, at 1194.

⁹⁸ *Id.* (citing Roscoe Pound, *Cacoethe Dissentiendi: The Heated Judicial Dissent*, 39 A.B.A. J. 794, 795 (1953)).

⁹⁹ *Judicial Voice*, *supra* note 89, at 1195.

¹⁰⁰ Totenberg Interview, *supra* note 63.

¹⁰¹ *Judicial Voice*, *supra* note 89, at 1191.

¹⁰² *Id.*

¹⁰³ *Id.* at 1193.

¹⁰⁴ Krugman Ray, *supra* note 96, at 633.

¹⁰⁵ *Id.* at 655.

believes that it should not “generate more heat than light.”¹⁰⁶ The most effective dissent in the eyes of Ginsburg, is one that stands on its own legal footing and highlights the differences, without damaging the collegiality of the judicial panel or the public’s confidence in the judiciary.¹⁰⁷

B. Measured Motions

Ginsburg has famously stated that, “[M]easured motions seem to me right, in the main, for constitutional as well as common law adjudication. Doctrinal limbs too swiftly shaped, experience teaches, may prove unstable”¹⁰⁸ Thus, in Ginsburg’s view, judges should exercise judicial restraint and act moderately when adjudicating cases. Ginsburg advocates for deciding cases narrowly, focusing on the facts of the case and the legal issue in question. Because judges play an interdependent role in democracy, they do not shape legal doctrine on their own, but rather participate in dialogue with other parts of the government and society at large.¹⁰⁹ When crafting legal doctrine, Ginsburg believes that the Courts should follow in, but not lead, the changes taking place in society.”¹¹⁰

Ginsburg’s aversion for sweeping decisions is evidenced in her critique of the *Roe v. Wade*¹¹¹ decision. While Ginsburg agreed with the Court’s determination that the Texas abortion law was unconstitutional under the Due Process Clause of the Fourteenth Amendment, she believed that the Court erred by going beyond the law in question, to craft their own set of rules

¹⁰⁶ *Judicial Voice*, *supra* note 89, at 1194.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 1198.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 1208.

¹¹¹ *Roe v. Wade*, 410 U.S. 113 (1973).

pertaining to abortions.¹¹² To Ginsburg, the Court had taken the issue away from the legislators and stepped too far in front of the political process.¹¹³

Because the Court is an institution that is responsible for its own power, Ginsburg relies on stare decisis to act as a restraint from allowing personal judgments to permeate into decision-making.¹¹⁴ To Ginsburg, “judges should not discard precedent simply because they later conclude it would have been better to have decided the case the other way.”¹¹⁵ Accordingly, Ginsburg’s opinions tend to clearly identify which progeny of cases she has relied on in coming to a conclusion. As a result, Ginsburg tends to write opinions that rely heavily on case precedent and focus only on the legal question before the Court.

This approach to decision making is reminiscent of Ginsburg’s incremental litigation strategy that she utilized at the ACLU.¹¹⁶ There, she argued narrow cases that would create strong precedent upon which to build, instead of advocating for one sweeping change.¹¹⁷ Instead of asking the Court to find that all differences in treatment based on gender to be unconstitutional, Ginsburg focused on each individual law to obtain localized victories.¹¹⁸

C. The Constitution as a Living Document

Ginsburg views the Constitution as a living document that is “belonging to a global 21st century, not as fixed forever by 18th- century understandings.”¹¹⁹ At the birth of the Constitution, many members of society were not included in the Founding Father’s definition of “We the

¹¹² *Judicial Voice*, *supra* note 89, at 1199; Rosen Interview, *supra* note 93.

¹¹³ *Judicial Voice*, *supra* note 89, at 1206.

¹¹⁴ Confirmation Hearing, *supra* note 1, at 197.

¹¹⁵ *Id.*

¹¹⁶ See *Heavyweight*, *supra* note 95.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ Ruth Bader Ginsburg, *A Decent Respect to the Opinions of [human]kind: The Value of a Comparative Perspective in Constitutional Adjudication*, CAMBRIDGE L.J., 64(3), 575-592, 585 (2005) [hereinafter *A Decent Respect*].

People,”¹²⁰ including slaves, women, Native Americans and men who did not own property.¹²¹ However in Ginsburg’s view, equality is at the heart of the Constitution and this ideal is advanced through constitutional amendments and judicial interpretation.¹²² To Ginsburg, the genius of the Constitution is its ability to become increasingly embracive over time.¹²³

Moreover, Ginsburg’s view of the living Constitution is furthered by her willingness to look to international Constitutions and other sources of international law. She has stated that, “[T]he notion that it is improper to look beyond the borders of the United States in grappling with hard questions has a certain kinship to the view that the U.S Constitution is a document essentially frozen in time as of the date of its ratification.”¹²⁴ She applauds younger constitutions like the Canadian Charter of Rights and Freedoms, the South African Constitution and the European Convention on Human Rights as being more reflective of modern times.¹²⁵ Ginsburg finds significance in these other documents because “[E]very constitution written since the end of World War II includes a provision to the effect that men and women are citizens of equal stature. Ours does not.”¹²⁶ While not binding, Ginsburg views foreign legal materials as relevant when confronting novel issues in the law and emphasizes that we can learn from other democratic legal systems.¹²⁷

III. Significant Judicial Opinions Authored by Justice Ginsburg

¹²⁰ U.S. CONST. pmb1.

¹²¹ Rosen Interview, *supra* note 93.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ Anne E. Kornblut, *Justice Ginsburg Back Value of Foreign Law*, N.Y. TIMES (Apr. 2, 2005), <http://www.nytimes.com/2005/04/02/politics/02ginsburg.html>.

¹²⁵ *Ginsburg to Egyptians: I Wouldn’t Use U.S. Constitution as a Model*, FOX NEWS (Feb. 6, 2012), <http://www.foxnews.com/politics/2012/02/06/ginsburg-to-egyptians-wouldnt-use-us-constitution-as-model/>.

¹²⁶ Dellinger Interview, *supra* note 29.

¹²⁷ *A Decent Respect*, *supra* note 119, at 580.

A. *United States v. Virginia*¹²⁸

In 1995, the Virginia Military Institute (VMI) was the sole remaining single-sex public institution of higher learning in Virginia.¹²⁹ VMI's objective was to create citizen-soldiers who would excel in civilian life and military service.¹³⁰ To educate the students, VMI utilized the adversative method, which "endeavors to instill physical and mental discipline in its cadets and impart to them a strong moral code."¹³¹ The United States sued VMI and the State of Virginia alleging that their male-only admission policy was in violation of the Fourteenth Amendment's Equal Protection Clause, after a female student sought admission to the school.¹³² The District Court ruled in favor of VMI, finding that VMI's male-only educational environment yielded substantial benefits and brought diversity to an otherwise entirely coeducational school system.¹³³ The Court of Appeals vacated this judgment and ordered VMI to remedy the violation, by either establishing a parallel institution for women, admitting women or abandoning State support altogether.¹³⁴

In response, VMI created a parallel program for women, the Virginia Women's Institute for Leadership (VWIL).¹³⁵ The school was located at Mary Baldwin College and retained VMI's mission of creating citizen-soldiers.¹³⁶ However, the VWIL program differed from VMI in its academic offerings, strategies of education, and financial resources.¹³⁷ VMI went back to the Court, seeking approval of the new institution. The District Court held that VWIL satisfied the

¹²⁸ 518 U.S. 515 (1996).

¹²⁹ *Id.* at 520.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 523.

¹³³ *Id.* at 523-24.

¹³⁴ *Id.* at 525-26.

¹³⁵ *Id.* at 526.

¹³⁶ *Id.*

¹³⁷ *Id.* at 527.

constitutional violations.¹³⁸ The Court of Appeals affirmed the decision¹³⁹ and the Supreme Court granted certiorari on the matter.

In writing for the majority, Ginsburg made three significant holdings. First, she held that in order to defend a gender-based government action, the party must show an exceedingly persuasive justification for that action.¹⁴⁰ Next, she found that VMI's male-only admission policy was in violation of the Equal Protection Clause.¹⁴¹ Lastly, she held that VWIL was not a constitutional cure for the violation.¹⁴²

In addressing the standard of review, Ginsburg presented an overview of the Court's jurisprudence governing gender discrimination. She demonstrated that over time, the Court had established that it must review gender-based differential treatment under the exceedingly persuasive standard.¹⁴³ Thus, the defender of the action must show that the classification in question serves an important governmental objective and that the means employed are substantially related to the achievement of those objectives.¹⁴⁴ Moreover, the justification must be genuine and not hypothesized or invented in response to the litigation, or rely on generalizations or stereotypes about the differing abilities of males and females.¹⁴⁵

Ginsburg next rejected the justifications offered by VMI in defense of the single gender education program. First, VMI argued that single-sex education yields significant educational benefits.¹⁴⁶ She rejected that argument largely based on the fact that there was no evidence to

¹³⁸ *Id.*

¹³⁹ *Id.* at 528-29.

¹⁴⁰ *Id.* at 531.

¹⁴¹ *Id.* at 534.

¹⁴² *Id.*

¹⁴³ *Id.* at 531-33.

¹⁴⁴ *Id.* at 532-33.

¹⁴⁵ *Id.* at 533.

¹⁴⁶ *Id.* at 535.

support that the male-only policy was in furtherance of diversity.¹⁴⁷ Secondly, VMI argued that the adversative method could not be made available to women without modification.¹⁴⁸ Ginsburg also rejected this argument, relying on expert testimony that indicated that at least some women could meet the standards imposed on men.¹⁴⁹ Moreover, Ginsburg found that the notion that the adversative method was not appropriate for women was more of a prediction than a fact and was primarily based on gender stereotypes.¹⁵⁰

In the last phase of the opinion, the Court held that the remedial plan offered by VMI was not sufficient.¹⁵¹ In order to be constitutional, the tendered remedy must be one that places the person denied of an opportunity or advantage in the same position they would have been in, had the discrimination not occurred.¹⁵² In examining VWIL, the Court found that this program did not offer women the same rigorous military training that VMI was famous for.¹⁵³ Moreover, the student body, faculty and benefits associated with VMI's prestige were not available to the women of VWIL.¹⁵⁴

Ginsburg closed her opinion by noting that the Constitution is a story of the extension of rights and protections to people who were once unprotected.¹⁵⁵ Accordingly, by allowing the admission of women, who were equally as capable as the male students, VMI would be fulfilling a Constitutional goal and assisting in the creation of a more perfect Union.¹⁵⁶

¹⁴⁷ *Id.* at 536.

¹⁴⁸ *Id.* at 540.

¹⁴⁹ *Id.* at 542-43.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 553.

¹⁵² *Id.* at 547.

¹⁵³ *Id.* at 548-49.

¹⁵⁴ *Id.* at 552-53.

¹⁵⁵ *Id.* at 557.

¹⁵⁶ *Id.* at 558.

The VMI case is a significant opinion because it highlights all three of Ginsburg's jurisprudential approaches. First, Ginsburg's preference for moderation is demonstrated by her reliance on stare decisis. In opening the opinion, Ginsburg immediately invokes court precedent, stating that cases like *J.E.B. v. Alabama ex rel. T.B.*¹⁵⁷ and *Mississippi Univ. for Women v. Hogan*¹⁵⁸ serve as the "pathmarking decisions"¹⁵⁹ that guide her analysis of VMI's actions. She outlines a long history of the Court's evolving position on gender discrimination, which ultimately led her to the current standard of review employed by the Court, intermediate scrutiny.¹⁶⁰ Her reliance on stare decisis is demonstrative of how this principle acts as a bar, that prohibits the Justices from letting their own opinions permeate into their opinions. It was noted that Ginsburg did not take this opportunity to raise the standard of review for gender discrimination cases to strict scrutiny, despite the fact that she had argued for its application before this same Court in years prior.¹⁶¹ By adhering to the structure laid out to her by previous Courts, Ginsburg was unable to consider any of her personal experience in determining the outcome of the case. Instead, VMI stands for the proposition that a good judge must be able to put aside personal opinions on the matter and examine each argument presented to the Court.¹⁶²

Moreover, the VMI decision can be seen in accordance with Ginsburg's own litigation strategy employed at the ACLU. As a litigator, Ginsburg preferred to focus on the specific gender discriminatory law at issue, instead of advocating for sweeping change. In deciding the case, Ginsburg focused on the precise issue presented in the lawsuit and did not stray from the confounds of this question.

¹⁵⁷ 511 U.S. 127 (1994).

¹⁵⁸ 458 U.S. 718 (1982).

¹⁵⁹ *Virginia*, 518 U.S. at 531.

¹⁶⁰ *Id.* at 534.

¹⁶¹ Toni J. Ellington, et. al., *Justice Ruth Bader Ginsburg and Gender Discrimination*, 20 U. HAW. L. REV. 699, 755 (1998).

¹⁶² *Id.* at 763.

Secondly, the tone of the opinion carries significance. While it may have been tempting, if not vindicating, to write the opinion in a zestier tone, Ginsburg instead opted to write the opinion in a way that made its points effectively, without drawing any attention to the author's history or deep understanding of gender discrimination.¹⁶³ Throughout, Ginsburg chose to address her colleagues with respect. She relegated her discussion of nineteenth century justifications for excluding women from education - including harm to their health and reproductive capacity to a footnote, instead of ridiculing these now-discredited theories in the body of the opinion.¹⁶⁴ She referred only twice to Justice Scalia, the lone dissenter. Once, in a footnote where she suggested that, "the dissent sees fire where there is no flame"¹⁶⁵ and again in the text of the opinion soliciting his agreement that it was just as probable that many men would opt not to be educated in the environment offered by VMI.¹⁶⁶

Lastly, Ginsburg's view of the Constitution as a living document is evident throughout the opinion. Both at the opening and the close of her opinion, she directly referenced the notion that the Constitution is an evolving document. She lamented the fact that at the birth of the Constitution, women were not afforded the same rights as property owning men and highlighted the fact that for many years, gender discrimination was only subject to rational basis review.¹⁶⁷ At the close of her analysis, Ginsburg outright stated that our Constitutional history is the story of extending constitutional rights and protections to those who were once excluded.¹⁶⁸ It is through this underlying belief in the Constitution that Ginsburg is able to adjudicate the case and ensure that the female students were afforded equal protection under the law.

¹⁶³ Krugman Ray, *supra* note 96 at 644.

¹⁶⁴ *Virginia*, 518 U.S. at 536 n.9.

¹⁶⁵ *Id.* at 535 n.8; Krugman Ray, *supra* note 96 at 643.

¹⁶⁶ *Virginia*, 518 U.S. at 525.

¹⁶⁷ *Id.* at 531.

¹⁶⁸ *Id.* at 557.

B. *Arizona v. Evans*¹⁶⁹

In January 1991, a police officer observed Isaac Evans driving the wrong way on a one-way street and pulled him over.¹⁷⁰ When the officer look up Evans in the computer terminal in his cruiser, the officer learned that there was an outstanding misdemeanor warrant for Evans.¹⁷¹ Based on this information, Evans was arrested.¹⁷² While being handcuffed, he dropped a hand rolled marijuana cigarette.¹⁷³ A subsequent search of his car revealed a bag of marijuana and Evans was charged with possession.¹⁷⁴ Shortly thereafter, it was revealed that the warrant on which the officer had relied upon to arrest Evans, had been quashed seventeen days prior, but because of an error had not been properly reflected in the system.¹⁷⁵ Evans argued that because his arrest was based on a nullified warrant, the marijuana seized during the arrest was the fruit of an unlawful arrest and should be suppressed. Evans put forth two main arguments to advance this. First, he alleged that the Court lacked jurisdiction to hear the case because the Arizona Supreme Court had based its decision entirely on state law.¹⁷⁶ Second, he argued that the good faith exception to the exclusionary rule did not apply because police, not judicial error, had caused his invalid arrest.¹⁷⁷

The Court's majority disagreed. They held that the Court had jurisdiction to hear the case and that the exclusionary rule did not warrant suppression of evidence in violation of the Fourth Amendment where the erroneous information resulted from clerical errors.¹⁷⁸ To address the

¹⁶⁹ 514 U.S. 1 (1995).

¹⁷⁰ *Id.* at 4.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 7.

¹⁷⁷ *Id.* at 4.

¹⁷⁸ *Id.* at 14.

jurisdictional argument, the Court found that *Michigan v. Long*¹⁷⁹ guided. There, the Court held that, “when a state court decision fairly appears to rest primarily on federal law, or to be interwoven with federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believes that the federal law required it to do so.”¹⁸⁰ Thus, because it was not clear on its face that the Arizona Court had relied entirely on state law, the majority held that the case was appropriate for Supreme Court review.¹⁸¹ The Court also held that the exclusionary rule existed to deter police misconduct, but did not serve to deter court employees.¹⁸² The Court reasoned that applying the rule in this fashion, would have no true deterrent effect as court personnel had no stake in the outcome of criminal prosecutions.¹⁸³

Ginsburg issued a dissenting opinion that argued that the majority had injudiciously disposed of the novel issue of increased computer technology usage in law enforcement.¹⁸⁴ With the expanded use of this technology, came benefits, but also the possibilities of inaccuracies due to computer malfunction and user error.¹⁸⁵ Ginsburg suggested that as recordkeeping became increasingly computerized, it became difficult to see court personnel and police officers as compartmentalized actors.¹⁸⁶ Instead, she suggested that the court staff and the officers functioned together “to carry out the State’s information-gathering objectives.”¹⁸⁷ In direct opposition to the majority, Ginsburg suggested that applying the exclusionary rule to court clerks

¹⁷⁹ 463 U.S. 1032 (1983).

¹⁸⁰ *Evans*, 514 U.S. at 7 (internal quotation marks omitted).

¹⁸¹ *Id.* at 10.

¹⁸² *Id.* at 14.

¹⁸³ *Id.* at 15.

¹⁸⁴ *Id.* at 23.

¹⁸⁵ *Id.* at 26.

¹⁸⁶ *Id.* at 29.

¹⁸⁷ *Id.*

would “supply a powerful incentive to the State to promote the prompt updating of computer records.”¹⁸⁸ To effectively make her point, Ginsburg cited to a passage from the Arizona Supreme Court opinion, which found that, “[I]t is repugnant to the principles of a free society that a person should ever be taken into police custody because of a computer error precipitated by government carelessness.”¹⁸⁹ To Ginsburg, the issue of whether the exclusionary rule should be expanded had been determined too quickly, without consideration for the ways in which this technology broadly impacted the criminal justice system and constitutional rights.

Moreover, Ginsburg found that this Court erred in finding the Arizona Supreme Court’s opinion was rooted in federal law.¹⁹⁰ In fact, Ginsburg went one step further and proposed abandoning the *Long* presumption altogether.¹⁹¹ To Ginsburg, the *Long* presumption was an “imperfect barometer of state courts’ intent”¹⁹² and departed from the traditional notion that federal courts are without jurisdiction unless “the contrary appears affirmatively from the record.”¹⁹³ She suggested that it was challenging for state courts to know when their opinion triggered the presumption because its application is based on soft requirements, which were challenging for the states to self-apply.¹⁹⁴ Accordingly, Ginsburg found that this case was improperly before the Court.¹⁹⁵

The *Evans* opinion is consistent with Ginsburg’s preference for collegiality between her fellow Justices and judges of other systems. A significant part of Ginsburg’s dissent is rooted in her disagreement with the majority’s willingness to vacate the judgment of a State Supreme

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 25.

¹⁹⁰ *Id.* at 34.

¹⁹¹ *Id.*

¹⁹² *Id.* at 31.

¹⁹³ *Id.* at 32-33 (citing *Delaware v. Van Arsdall*, 475 U.S. 673 (1986)) (internal quotation marks omitted).

¹⁹⁴ *Id.* at 31.

¹⁹⁵ *Id.* at 34.

Court. Ginsburg's opinion consistently affords respect to the findings made by the Arizona Supreme Court and affords the State Court the presumption that it had ruled for its own people, under its own Constitution.¹⁹⁶ Ginsburg's opinion is rooted in the notion that State Courts are well situated to enforce their citizen's rights and that it was in violation of federalism to intrude too deeply into the area traditionally regulated by the State.¹⁹⁷

Evans also emphasizes Ginsburg's belief that a dissenting opinion should rest on independent legal basis. In believing that the majority has misunderstood the law, Ginsburg writes to offer a differing view. She focuses on the problems with increasing technology and the reality that law enforcement and court personnel are becoming increasingly enmeshed as technology develops. She challenges the majority's assumption that there is no incentive to court personnel if the evidence was excluded. As aforesaid, Ginsburg also challenges the case law that the majority relied upon, suggesting that it be abandoned. However, despite her deviation from her colleagues, the opinion lacks any colorful language or accusations at her colleagues. Instead, it rested on independent authority and bases of law.

This case ~~serves~~ also serves as an example of Ginsburg's desire to work in measured movements. As a firm believer in gradual change, Ginsburg emphasized that this case represented a novel legal issue that would continue to morph as reliance on technology in police investigations continued. In a footnote, Ginsburg highlighted that when faced with frontier legal issues, the Court can benefit from "periods of percolation,"¹⁹⁸ in which the state and federal appellate courts, who are better informed to tackle these issues, and can assist in yielding a "better informed and more enduring final pronouncement by this Court."¹⁹⁹ She issued a strong

¹⁹⁶ *Id.* at 24.

¹⁹⁷ *Id.* at 30.

¹⁹⁸ *Id.* at 23 n.1.

¹⁹⁹ *Id.*

objection to the majority's unnecessary swiftness in resolving an issue that required more consideration.²⁰⁰ Relying on the evidence admitted by the Arizona Supreme Court, Ginsburg acknowledged that the use of computerized records in law enforcement presented new dangers to individual liberties and that the government's increasing reliance on computerized records had potential for "Orwellian mischief."²⁰¹ While recognizing that computerized records offered new benefits, Ginsburg worried that the increased use of technology also presented new problems, not yet conceived of by the Court. Consequently, she believed that this novel issue needed more time in the lower courts instead of being swiftly decided by the Supreme Court.

This case also demonstrates that Ginsburg's adherence to the principle of stare decisis is not absolute. Ginsburg was not satisfied that the *Long* presumption accurately spoke to a state court's intent and advocated for abandoning the presumption altogether.²⁰² We see that while Ginsburg relies heavily on case precedent in coming to conclusions about the law, she does not believe that the Court should continue to adhere to doctrines that do not work. To Ginsburg, the *Long* presumption interfered with a state court's ability to adjudicate new issues facing its citizens and improperly conferred jurisdiction to the high court.²⁰³ Thus, Ginsburg felt that the doctrine should be abandoned.²⁰⁴

C. *Florida v. J.L.*²⁰⁵

On October 13, 1995, an anonymous caller reported to the Miami-Dade police Department that a young black male standing at a certain bus stop and wearing a plaid shirt was

²⁰⁰ Krugman Ray, *supra* note 96, at 659.

²⁰¹ *Evans*, 514 U.S. at 25.

²⁰² *Id.* at 32.

²⁰³ *Id.* at 33.

²⁰⁴ *Id.* at 34.

²⁰⁵ 529 U.S. 266 (2000).

carrying a gun.²⁰⁶ Responding to the tip, two police officers arrived at the bus stop in question.²⁰⁷ Upon arrival, the officers observed three black males.²⁰⁸ There were no firearms in sight and the men were not making any unusual movements.²⁰⁹ One of the men, J.L., was wearing a plaid shirt. The officers approached J.L., frisked him and found a gun in his pocket.²¹⁰

J.L. moved to suppress the gun as the fruit of an unlawful search.²¹¹ The Supreme Court granted certiorari to address the issue of whether an anonymous tip that a person is carrying a gun, without more information is sufficient to justify a stop and frisk of that person.²¹² The State of Florida argued that the search had been valid for two reasons. First, the State contended that the tip was reliable because the description of the visible attributes of J.L. had proven to be accurate.²¹³ Next, Florida argued that stop and frisk jurisprudence should be modified to include a firearm exception.²¹⁴ This exception would justify a stop and frisk whenever the police received a tip about an illegal firearm.²¹⁵ In a unanimous decision authored by Ginsburg, the Court held that the search had been a violation of J.L.'s Fourth Amendment rights.²¹⁶

In rejecting Florida's argument, Ginsburg's opinion opened by stating exactly which progeny of cases her decision relied on. Starting with *Terry v. Ohio*,²¹⁷ Ginsburg reiterated the Court's position that a *Terry* stop is warranted only where an officer reasonably concludes that there may be criminal activity afoot and that the person in question may be armed and

²⁰⁶ *Id.* at 268.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.* at 269.

²¹² *Id.* at 268.

²¹³ *Id.* at 271.

²¹⁴ *Id.* at 272.

²¹⁵ *Id.*

²¹⁶ *Id.* at 269.

²¹⁷ 392 U.S. 1 (1968).

dangerous.²¹⁸ Ginsburg also relied on *Alabama v. White*,²¹⁹ which placed a limit on *Terry* stops based on anonymous tips, unless further evidence is collected to suggest that the tipster has inside knowledge about the suspect.²²⁰

Next, Ginsburg applied the facts of J.L.'s case to the applicable case law. She rejected Florida's argument that the tip was reliable and found that the tip in question did not have any of the indicators of reliability that were present in *White*.²²¹ She suggested that the mere fact that the allegation about the gun happened to be true, did not provide an independent basis for suspecting J.L. of engaging in unlawful conduct.²²² In order to be a valid search, the reasonableness of the search must be measured by the information that the officers had before they conducted the search, not after.²²³ In the case at hand, the tip gave the police no basis to believe that the tipster had inside information about J.L.²²⁴

Ginsburg next rejected the inclusion of a fire exception to the *Terry* doctrine on the basis that it was too broad.²²⁵ To Ginsburg, this exception would allow people to harass one another and "set in motion an intrusive, embarrassing police search of the targeted person simply by placing an anonymous call falsely reporting the target's unlawful carriage of a gun."²²⁶ More than that, Ginsburg feared that this exception would eventually justify the expansion of the exception beyond guns to illegal drugs.²²⁷

²¹⁸ *J.L.*, 529 U.S. at 269-70 (quoting *Terry*, 392 U.S. at 30).

²¹⁹ 406 U.S. 325 (1990).

²²⁰ *J.L.*, 529 U.S. at 270 (citing *White*, 406 U.S. at 332).

²²¹ *Id.* at 271.

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.* at 272.

²²⁶ *Id.*

²²⁷ *Id.*

In limiting the decision, the majority did not extend this holding to areas in which Fourth Amendment privacy is already diminished, such as airports and restricted the holding to situations where the officer's authority to make the initial stop was at issue.²²⁸ Notably, Ginsburg declined to speculate about how this case might impact a situation where the danger predicted in an anonymous tip was so substantial as to justify a search without a showing of reliability.²²⁹

Ginsburg's analysis of *J.L.* is reflective of Ginsburg's preference to issue narrow holdings that focus on the facts of the case in question. First, the case limits how anonymous tips are to be used by police. Aware of the grave intrusion implicit in a search, Ginsburg refused to allow police officers to effectuate searches based on anonymous tips without indicators of reliability. Second, the case is limiting in its refusal to adopt a firearm exception to the *Terry* doctrine. Ginsburg recognized that allowing this expansion would open a Pandora's box, allowing for future expansion of this doctrine in way unanticipated and not presented before the Court. She surmised that a firearm exception could eventually lead to the inclusions of other inherently dangerous objects, such as narcotics or perhaps even other weapons. Lastly, Ginsburg limited the holding by refusing to speculate or explain how the holding might influence other dangers identified by anonymous tips, such as reports of bombs.²³⁰ Ginsburg seems to find a unique balance in this opinion. By refusing to allow for sweeping change in the Court's jurisprudence, Ginsburg demonstrated her preference to simply adjudicate the case before the Court. However, in limiting the holding to the facts of this case, she is cautious not to foreclose future legal questions.

²²⁸ *Id.* at 274.

²²⁹ *Id.* at 273-74.

²³⁰ *Id.* at 273.

Ginsburg's preference for unanimous opinion writing is also demonstrated in this case. In writing for the Court, it is interesting to speculate on the types of language or theories of law that Ginsburg may have avoided in order to promote unanimity. Moreover, this opinion represents Ginsburg's view that collegiality is best achieved when the Court can agree on the outcome of the case. Through unanimity, the Court's legitimacy and role in society is preserved and predictability in the law is accomplished.

D. Harris v. Forklift Systems, Inc.²³¹

In this case, the Court resolved a circuit split as to whether a hostile work environment exists if it does not seriously affects a plaintiff's well-being or cause the plaintiff to suffer injury.²³² Teresa Harris worked as a manager at Forklift Systems, Inc. from April 1985 until October 1987.²³³ During her employment, Harris was the recipient of insults and unwanted sexual innuendos because of her gender at the hands of Charles Handy, the company's President.²³⁴ In August 1987, Harris complained to Handy about the conduct.²³⁵ He apologized for the behavior and promised that it would stop.²³⁶ Based on this promise, Harris continued her employment, however, within one month, the behavior resumed.²³⁷ Examples of Handy's conduct included calling Harris a "dumb ass woman"²³⁸ and asking Harris and other female employees to get coins out of his front pant pocket.²³⁹ He also regularly made sexual innuendos

²³¹ 510 U.S. 17 (1993).

²³² *Id.* at 20.

²³³ *Id.* at 19.

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

about Harris' and other female staff's clothing.²⁴⁰ In response, Harris quit and sued Forklift Systems alleging that Handy had created an abusive work environment because of her gender.²⁴¹

The District Court found in Forklift's favor. The Court reasoned that while Handy's comments were offensive, they did not rise to a level that could seriously affect Harris' psychological well-being.²⁴² The case made its way to the Supreme Court and the majority held that Title VII protections can be invoked in hostile work environment cases where there is no showing of severe psychological impact because the discriminatory work environment detracts from job performance, discourages employees from continuing their employment and keeps employees from advancing in their positions.²⁴³ Accordingly, the Court held that the District Court had used the wrong standard when evaluating Harris' claim.²⁴⁴

The Court determined that in order to evaluate if a hostile work environment exists, the lower courts must utilize a totality of the circumstances test.²⁴⁵ The Court directed the lower courts to weigh the frequency of the conduct, the severity of it, whether the conduct is physically threatening or humiliating, whether the statement merely an offensive utterance and whether the conduct unreasonably interferes with an employees work performance.²⁴⁶

Ginsburg authored a short concurring opinion in which she reframed the legal issue of hostile work environment cases to whether members of one sex are exposed to disadvantageous condition of employment that members of the other sex are not exposed to.²⁴⁷ She emphasized that the inquiry should center dominantly on whether the discriminatory conduct had

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.* at 20.

²⁴³ *Id.* at 22.

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 23.

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 25.

unreasonably interfered with the plaintiff's work performance.²⁴⁸ In Ginsburg's view, the plaintiff only needed to establish that the harassing conduct made it more difficult to complete the job in order to prevail.²⁴⁹

Stylistically, Ginsburg's concurrence is short and pointed. She demonstrates that her view is in harmony with the majority opinion and concurs with the intention of giving additional guidance and clarity to the lower courts to determine whether or not a hostile work environment exists.²⁵⁰ Consistent with Ginsburg's belief in crafting narrow holdings, this concurrence can be seen as an attempt to clarify and focus the majority's totality of the circumstances test. Her desire to focus the majority's test is also consistent with Ginsburg's view that separate opinions should only be written when the author has an independent viewpoint that has been overlooked by the majority.

While Ginsburg's career was largely focused on establishing gender equality through the Equal Protection Clause of the Fourteenth Amendment, her personal experience facing gender discrimination in the work place is evidenced in this opinion. When Ginsburg faced the legal job market, Title VII had not yet been enacted²⁵¹ and she faced grave discrimination and difficulty finding a job because of her gender. With the enactment of Title VII, greater protections were afforded to women in the work place. Ginsburg's desire to focus the lower court's inquiry on whether or not the harassing conduct makes the job more difficult, is likely indicative of her desire to ensure that Title VII is upheld and that the maximum protections of the law are afforded to women while on the job. By reframing the legal issue and clarifying the legal standard, Ginsburg may have believed she was accomplishing this goal.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 25.

²⁵¹ Title VII was enacted in 1964.

E. M.L.B. v S.L.J.²⁵²

In 1992, M.L.B. and S.L.J. divorced. Pursuant to an agreement, their two children remained with S.L.J. and his new wife, J.P.J.²⁵³ Approximately one year later, S.L.J. and J.P.J. petitioned the Court to terminate M.L.B.'s parental rights so that J.P.J. could legally adopt the children.²⁵⁴ After a hearing, M.L.B.'s parental rights were terminated and the Court ordered that J.P.J., the adopting parent, be named as the mother of the children on their birth certificates.²⁵⁵ M.L.B. filed a timely appeal but was required to pay fees amounting to \$2,352.36, pursuant to a Mississippi law that required the appellant to pay for the cost of preparing and transmitting the record.²⁵⁶ Unable to pay the costs, M.L.B. sought to proceed *in forma pauperis* but the Supreme Court of Mississippi denied her request, reasoning that ~~the~~ this right only existed at the trial level.²⁵⁷ M.L.B. appealed, arguing that since she was utilizing the Courts to secure a fundamental right, fairness and equal protection guaranteed both by the State and Federal Constitutions demanded that she be afforded the right to appeal even if unable to pay the costs of review in advance.²⁵⁸

The Supreme Court declared the law unconstitutional. In writing for the majority, Ginsburg opened the opinion by recognizing that “[C]ourts have confronted, in diverse settings, the age old problem of providing equal justice for poor and rich, weak and powerful alike.²⁵⁹ She also acknowledged that choices about marriage, family and rearing children are fundamental

²⁵² 519 U.S. 102 (1996).

²⁵³ *Id.* at 107.

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 107-08.

²⁵⁶ *Id.* at 108.

²⁵⁷ *Id.* at 109.

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 110 (internal quotation marks omitted).

rights warranting Fourteenth Amendment protection.²⁶⁰ In striking down the law, Ginsburg found *Griffin v. Illinois*²⁶¹ to be particularly salient. In *Griffin*, the Court struck down an Illinois law that effectively conditioned criminal conviction appeals on the defendant's ability to procure a transcript of the trial proceedings as violative of the Due Process and Equal Protection Clauses of the Fourteenth Amendment.²⁶² Ginsburg also cited to *Mayer v. City of Chicago*,²⁶³ which expanded the *Griffin* principle to petty offenses that did not carry the risk of imprisonment, on that basis that these types of convictions also carried serious long-term consequences.²⁶⁴

Ginsburg then turned to a narrow category of civil cases where the state must provide judicial access.²⁶⁵ She cited *Boddie v. Connecticut*,²⁶⁶ a case where the Court held that the State could not deny a divorce to a married couple where they could not pay the court fees.²⁶⁷ Ginsburg emphasized that this case had warranted special attention because of the fundamental right at stake.²⁶⁸

After evaluating several other civil cases, Ginsburg turned to the case at hand. Ginsburg acknowledged that the termination of parental rights is a grave civil sanction that permanently ended the parental bond to the child.²⁶⁹ In relying heavily on case law, specifically *Mayer*, Ginsburg determined that ~~that~~ issues at stake for M.L.B. were substantial²⁷⁰ and carried serious consequences similar to those faced by appellants seeking review of petty offense convictions.²⁷¹

²⁶⁰ *Id.* at 116.

²⁶¹ 351 U.S. 12 (1956).

²⁶² *Id.*

²⁶³ 404 U.S. 189 (1971).

²⁶⁴ *Id.* at 197.

²⁶⁵ *M.L.B.*, 519 U.S. at 113.

²⁶⁶ 401 U.S. 371 (1971).

²⁶⁷ *M.L.B.*, 519 U.S. at 113.

²⁶⁸ *Id.*

²⁶⁹ *Id.* at 116.

²⁷⁰ *Id.* at 120-21.

²⁷¹ *Id.* at 121.

The Court was particularly concerned with the fact that the State had to prove M.L.B.'s unfitness by clear and convincing evidence. This high level of proof demonstrated the extreme consequences inherent in terminating parental rights and signaled to the majority that M.L.B.'s case was more analogous to the line of cases affording appellate protection in criminal convictions, than ordinary civil matters.²⁷² Thus, the Court found that due process could not be halted because of an appellant's inability to pay for the record in advance in a termination matter.²⁷³

The Court limited its holding to cases involving the termination of parental rights, noting that these actions are "decrees apart from mine run civil actions, even from other domestic relations matters such as divorce, paternity and child custody."²⁷⁴ Because the termination of parental rights is a unique deprivation, it cannot be compared to other civil matters modifiable by the state.²⁷⁵ Accordingly, the case holding is limited to the issue of procuring transcripts for appellate review of termination of parental rights cases.

In writing for the majority, Ginsburg's principle of collegiality guides. In writing for six Justices, she chose a tone that avoided dramatics or emotional rhetoric.²⁷⁶ Her opinion does not discuss the significance of the parental bond, the sanctity of the family, or the emotional impact of terminating parental rights. Instead, she acknowledged the importance of the right at stake and placed it in a distinctly legal context.²⁷⁷ She approached the case mindful of the severity of the sanction and in light of court precedent.²⁷⁸ In using calm language she articulated the values

²⁷² *Id.*

²⁷³ *Id.* at 128.

²⁷⁴ *Id.* at 127.

²⁷⁵ *Id.* at 127-28.

²⁷⁶ *Krugman Ray, supra* note 96, at 644.

²⁷⁷ *Id.* at 644-45.

²⁷⁸ *M.L.B.*, 519 U.S. at 117.

invoked in the case and their serious implications. Again, Ginsburg refers to her dissenters only once in the opinion, in a neutral manner to address their concerns.²⁷⁹

M.L.B. is also reflective of Ginsburg's desire to decide only the case in front of her and avoid sweeping judgments. In the opinion, she is cautious to limit the holding of the case to extend only to cases involving the termination of parental rights.²⁸⁰ She clearly establishes that termination decrees are dissimilar to other civil matters because of the invocation of the "awesome authority of the State"²⁸¹ to abolish all legal recognition of the parental relationship.²⁸² Accordingly, *M.L.B.* does not have a wide application in civil matters. Moreover, Ginsburg's respect for stare decisis is evidenced in this decision. The decision is largely rooted in applying a wide range of case precedent to the facts of *M.L.B.*'s case. Accordingly, Ginsburg was confined to previous case law, instead of allowing any personal judgments that she may have had to enter the decision.

Additionally, this decision is rooted in Ginsburg's belief that the Constitution is based on the promotion of equality. While no provision of the Constitution requires that judicial access must be afforded to litigants, Ginsburg likely sees this position as imbedded in the Constitution's promotion of equality. At the start of her opinion, Ginsburg acknowledged that the Court regularly grappled with the issue of providing equal access to the judiciary. Extending *M.L.B.*'s rights to appeal is a fitting example of Ginsburg's belief that the Constitution's goal is to protect those who may be disenfranchised and that this purpose is furthered through judicial interpretation.

²⁷⁹ *Id.* at 127.

²⁸⁰ *Id.*

²⁸¹ *Id.* at 128.

²⁸² *Id.*

F. *Grutter v. Bollinger*²⁸³

Barbara Grutter, a white student from Michigan, filed a lawsuit against the University of Michigan Law School after they denied her admission.²⁸⁴ Grutter had a 3.8 grade point average and had scored 161 on the Law School Admission Test.²⁸⁵ She alleged that the School had discriminated against her on the basis of her race, in violation of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, and 42 U.S.C. §1981.²⁸⁶ Specifically, Grutter claimed that she had been denied admission because the Law School had used race as a predominant factor in their selection process.²⁸⁷ This allowed applicants in certain minority groups a greater chance of admission than similarly situated students from disfavored racial groups.²⁸⁸ Additionally, she argued that the School had no compelling interest to justify the use of race in the admission process.²⁸⁹

In response, the Law School argued that it had a compelling interest in enrolling a critical mass of minority students to the school and that its policy sought to achieve student body diversity in compliance with *Regents of Univ. of Cal. v. Bakke*.²⁹⁰ The Law School maintained that its program was narrowly tailored and considered “race or ethnicity only as a plus in a particular applicant’s file, without insulat[ing] that individual from comparison with all other candidates for all available seats.”²⁹¹

²⁸³ 539 U.S. 306 (2003).

²⁸⁴ *Id.* at 316.

²⁸⁵ *Id.*

²⁸⁶ *Id.* at 317.

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ 438 U.S. 265 (1978) (holding that race may be one of multiple factors considered in a school’s application process)

²⁹¹ *Id.* (internal quotation marks omitted).

The Court held that the School had narrowly tailored their use of race in the admissions process to further their goal of obtaining the benefits that come from a diverse student body. The Court found that the admission program advanced by the School was flexible enough to ensure that every applicant was evaluated as an individual, without having race or ethnicity as a defining feature of the application.²⁹² The Court was satisfied that the School continued to engage in an individualistic and holistic review of each applicant's file and gave serious considering to the various ways that the applicant could contribute to the educational environment.²⁹³ Accordingly, the Court held that the School's actions were not in violation of the Equal Protection Clause, Title VI, or §1981.²⁹⁴

Near the close of the opinion, the majority stated that affirmative action programs would soon no longer be needed to ensure a crucial mass in institutions of higher learning.²⁹⁵ The Court highlighted that over the twenty-five years since the Court first approved the use of race to further the goal of obtaining a diverse student body, minority applicants' test scores and grades had increased.²⁹⁶ The Court believed that this was indicative "that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."²⁹⁷

Ginsburg wrote a concurring opinion in response to the majority's expectation that race conscious programs at the university level would be eliminated in twenty-five years.²⁹⁸ Ginsburg conceded that race-conscious programs must have a logical end point but suggested that this point was not appropriate until the objective for which the programs were instituted had

²⁹² *Grutter*, 539 U.S. at 336-37.

²⁹³ *Id.* at 337.

²⁹⁴ *Id.* at 343-44.

²⁹⁵ *Id.* at 343.

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ *Id.* at 344.

been achieved.²⁹⁹ She supported this proposition by relying on the International Convention of the Elimination of all Forms of Racial Discrimination and the Convention of the Elimination of All of Forms of Discrimination against Women, which both proscribe logical end points for programs created to protect certain racial groups.³⁰⁰

Ginsburg argued that in the time since *Bakke*, conscious and unconscious racial bias still pervaded society.³⁰¹ She argued that, “[I]t was only 25 years before *Bakke* that this Court declared public school segregation unconstitutional, a declaration that after prolonged resistance, yielded an end to a law-enforced racial caste system, itself the legacy of centuries of slavery.”³⁰² Relying on data from public schools, Ginsburg argued that students continued to attend largely non-diverse schools.³⁰³ She also demonstrated that schools located in minority communities continued to lag behind other schools.³⁰⁴ Ginsburg concluded that so long as these inequalities persisted, affirmative action programs would continue to be needed. She concluded by stating, “[F]rom today’s vantage point, one may hope, but not firmly forecast, that over the next generations’ span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action.”³⁰⁵

Ginsburg’s concurrence is rooted in the understanding that so long as social injustices continue to exist in our society, the goal of constitutional interpretation must be geared towards ensuring equal opportunities for all races and ethnicities. However, Ginsburg seems to alter the

²⁹⁹ *Id.*

³⁰⁰ *Id.* (citing Annex to G.A. Res. 2106, 20 U.N. GAOR, 20th Sess., Res. Supp. (No. 14), p. 47, U.N. Doc. A/6014, Art. 2(2) (1965); Annex to G.A. Res. 34/180, 34 U.N. GAOR, 34th Sess., Res. Supp (No.46), p.194, U.N. Doc A/34/46, Art.4(a)(1) (1979)).

³⁰¹ *Id.* at 345.

³⁰² *Id.*

³⁰³ *Id.* (citing statistics that demonstrate that 71.6% of African American children and 76.3% of Hispanic children attended schools where minorities made up the majority of the student body).

³⁰⁴ *Id.* at 345.

³⁰⁵ *Id.* at 346.

justification for affirmative action from a focus on diversity, to a focus on societal injustices.³⁰⁶ To Ginsburg, affirmative action programs need not only be justified by their aspiration to achieve diversity, but also as a means of remedying injustices committed against minority groups.³⁰⁷ This belief may stem from Ginsburg's view that the Constitution was not an inherently equal doctrine at ratification and the impacts of this are still felt today. Accordingly, Ginsburg will continue to support programs that remedy these impacts and promote equality.

Her reliance on international law is also inherently linked to her view of the Constitution. By using international law to support her view, she demonstrated why the Court had erred in predicting an end point for affirmative action programs. Her use of international law is a firm pronouncement that she is unafraid to look beyond American jurisprudence if other international sources of law can help effectuate the Constitution's goal of equality.

G. Ledbetter v. Goodyear Tire & Rubber Co., Inc.³⁰⁸

Lilly Ledbetter was employed as a supervisor at Goodyear Tire & Rubber in Alabama from 1979 to 1998.³⁰⁹ During her time there, she worked as an area manager and was one of few females in this position.³¹⁰ Initially, her compensation was in line with the similarly situated men who shared her job, but over time her pay paled in comparison to her male counterparts with equal or less seniority than her.³¹¹ At her retirement, she was earning \$3,727 monthly.³¹² In contrast, the lowest paid male manager earned \$4,286 monthly and the highest paid manager,

³⁰⁶ Shira Galinsky, *Returning the Language of Fairness to Equal Protection: Justice Ruth Bader Ginsburg's Affirmative Action Jurisprudence in Grutter and Gratz and Beyond*, 7 N.Y. CITY L. REV. 357, 378 (2004).

³⁰⁷ *Id.*

³⁰⁸ 550 U.S. 618 (2007).

³⁰⁹ *Id.* at 643.

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² *Id.*

who was also male, earned \$5,236 monthly.³¹³ Ledbetter suspected that the difference in pay was because of her status as a female and in March 1998, she filed a formal complaint with the Equal Employment Opportunity Commission (EEOC) alleging that Goodyear had paid her a discriminatory low salary.³¹⁴

The case was tried by a jury, which found in Ledbetter's favor and awarded her a judgment for back pay, damages, counsel fees, and costs.³¹⁵ The Court of Appeals for the Eleventh Circuit reversed, on the basis that her claim was time barred.³¹⁶ The Court of Appeals held that in order to pursue a Title VII claim, the complaint must be filed 180 days after the alleged unlawful employment practice.³¹⁷ Therefore, the Court of Appeals found that in order to pursue her claim, Ledbetter would have had to have filed her claim within 180 days of the day in which Goodyear had failed to increase her salary commensurate to her male peers.³¹⁸ The Supreme Court granted certiorari and the majority opinion affirmed this holding.³¹⁹

Ginsburg dissented and opened her opinion by highlighting the uniqueness of pay disparity discrimination cases. Unlike discriminatory acts involving discrete acts, pay disparity cases build slowly and over time.³²⁰ Ginsburg pointed out the challenges inherent in bringing pay disparity suits. She noted that at first, the initial discrepancy may be too small to warrant a federal case.³²¹ Ginsburg also highlighted that most employers keep comparative pay information confidential, making it virtually impossible for an employee to know that the

³¹³ *Id.*

³¹⁴ *Id.* at 643-44.

³¹⁵ *Id.* at 644.

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ *Id.* at 643.

³²⁰ *Id.* at 645.

³²¹ *Id.*

discrimination is occurring.³²² Lastly, she noted that where the discrepancy seems small at first, a female employee in a male dominated environment may be “averse to making waves”³²³ and likely will not bring the matter to her superiors.

Instead, Ginsburg proposed that in the case of pay disparity, the actual payment of the discriminatory wage was the unlawful practice.³²⁴ Under this view, each paycheck “infected by sex-based discrimination constitutes an unlawful employment practice.”³²⁵ Ginsburg found that this view was “more in tune with the realities of the workplace, and more respectful of Title VII’s remedial purpose.”³²⁶ She asserted that Ledbetter had not been time barred because the discrimination continued to renew itself every time Ledbetter was paid.³²⁷

Ginsburg largely relied on Congressional intent when amending Title VII to demonstrate that Congress never intended to “immunize forever discriminatory pay differentials unchallenged within 180 days of their adoption.”³²⁸ She suggested that the application of the law in this matter led to an illogical conclusion since pay disparity claims will only grow over time, especially if raises are determined by a percentage of the current salary.³²⁹ Ginsburg also found guidance in Title VII’s backpay provisions that allow for backpay for a period of up to two years before the action is filed.³³⁰ She reasoned that since Congress had expressly limited the amount of damages to a particular time period, it was indicative that the 180 day time period in question was not designed to be a limitation on the conduct that could be considered.³³¹

³²² *Id.*

³²³ *Id.*

³²⁴ *Id.* at 646.

³²⁵ *Id.*

³²⁶ *Id.*

³²⁷ *Id.* at 655.

³²⁸ *Id.* at 654.

³²⁹ *Id.*

³³⁰ *Id.*

³³¹ *Id.* (citing *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002)).

For more support of her position, Ginsburg looked to the EEOC, the agency responsible for enforcing Title VII, to demonstrate that they too had interpreted the Act “to permit employees to challenge disparate pay each time it is received.”³³² Ginsburg concluded her opinion by leaving the ball in Congress’ court to remedy the erroneous reading of the statute in the majority opinion.³³³ Shortly after the decision was rendered, Congress amended the Act consistent with Ginsburg’s opinion and the Lilly Ledbetter Fair Pay Act of 2009 was the first bill signed by President Obama.³³⁴

Ginsburg’s passionate dissent likely stems from the fact that in many ways, she was telling her own story. Ginsburg’s own experiences as a female in a male dominated field, likely fueled her deep understanding of the realities of discrimination in the workplace and why it would have been unrealistic for Ledbetter to pursue a claim in the window of time prescribed by the majority. In an opinion largely based on the realities of the work place, Ginsburg identified the conundrum that a woman in Ledbetter’s position faces. If a woman immediately raises questions about the pay disparity, she will be seen as making waves³³⁵ and the employer will simply be able to say that the female employee does not do her job as well as her male counterpart.³³⁶ If to dispute this allegation, the female employee stays on the job as a means of demonstrating her good performance, she will be time barred from filing a suit.³³⁷ When Ginsburg was battling gender discrimination after law school, there were no laws on the book to protect women in the work place. As in *Harris*,³³⁸ we see Ginsburg seeking to ensure that the

³³² *Id.* at 655.

³³³ *Id.* at 661.

³³⁴ Sheryl Gay Stolberg, *Obama Signs Equal-Pay Legislation*, N.Y. TIMES (Jan. 29, 2009), http://www.nytimes.com/2009/01/30/us/politics/30ledbetter-web.html?_r=0.

³³⁵ *Ledbetter*, 550 U.S. at 645.

³³⁶ Rosen Interview, *supra* note 93.

³³⁷ *Id.*

³³⁸ *See supra* Part III.D.

legal protections afforded by Title VII are interpreted in a way that ensures the maximum protection under the law for those who are victims of workplace discrimination.

In evaluating Ginsburg's other opinions, *Ledbetter* is unique in that this opinion is not directed towards the other members of the court, or even a future court, but rather to Congress directly. This case demonstrates Ginsburg's belief that the Court must engage in dialogue with the legislature to effectuate change.³³⁹ Because Ginsburg's dissent was written for Congress, and to a lesser degree, the public at large who elect members of Congress, we see a departure in Ginsburg's traditional approach to opinion writing. While Ginsburg relies on some case law to demonstrate the majority's misinterpretation of the statute, her decision is primarily focused on explaining the realities of the workplace and Congress' intention in enacting the statute. She makes an effort to clearly spell out the problem of amassing pay disparity cases with other discriminatory acts and goes to great effort to demonstrate how Congress intended the statute to be read. Instead of relying primarily ^{on} case precedent, she also relies on Congressional intent and the EEOC to strengthen her position and call for action.

Given Ginsburg's personal connection with *Ledbetter's* plight, it is not surprising that Ginsburg read this dissent from the bench,³⁴⁰ despite having abstained from this practice for many years.³⁴¹ Ginsburg has stated that she is very proud of this dissent³⁴² and keeps a framed copy of bill, inscribed by President Obama, in her chambers.³⁴³

³³⁹ Greenhouse Conversation, *supra*, note 31, at 298.

³⁴⁰ Linda Greenhouse, *In Dissent, Ginsburg finds her Voice at Supreme Court* N.Y. TIMES (May 31, 2007), <http://www.nytimes.com/2007/05/31/world/americas/31iht-court.4.5946972.html>.

³⁴¹ *Id.*

³⁴² Rosen Interview, *supra* note 93.

³⁴³ Jeffery Toobin, *Will Ginsburg's Ledbetter Play Work Twice?* THE NEW YORKER (June 25, 2013), <http://www.newyorker.com/online/blogs/comment/2013/06/ruth-bader-ginsburg-ledbetter-play.html>.

H. *Bush v. Gore*³⁴⁴

After the 2000 election, The Florida Division of Elections reported that presidential candidate George W. Bush had claimed the lead by 1,784 votes over Al Gore.³⁴⁵ Because of the small margin of Bush's victory, an automatic machine recount was conducted pursuant to Florida law.³⁴⁶ After the recount, Bush remained in the lead, but by a diminished margin.³⁴⁷ In accordance with Florida law, Gore sought to have a manual recount in four counties.³⁴⁸ However the Secretary of State declined to waive the statutory imposed November 13, 2000 deadline for recount.³⁴⁹ The Florida Supreme Court stepped in and imposed a manual recount deadline of November 26, 2000.³⁵⁰ On the November 26 deadline, the Secretary of State certified the election for Bush.³⁵¹ Gore contested the election results.³⁵² The action went before the Florida Supreme Court, who ruled in favor of a manual recount for all the ballots that had been cast, but not properly counted because of malfunctioning voting machines.³⁵³ Bush filed an emergency application for a stay to the Supreme Court of the United States arguing primarily, that the manual recount ordered by the Florida Supreme Court was in violation of the Equal Protection and Due Process Clauses.³⁵⁴

In a 5-4 decision, the majority held there had been a violation of the Equal Protection Clause.³⁵⁵ The majority took issue with the lack of set standards to ensure the equal application

³⁴⁴ 531 U.S. 98 (2000).

³⁴⁵ *Id.* at 100-01.

³⁴⁶ *Id.* at 101.

³⁴⁷ *Id.*

³⁴⁸ *Id.*

³⁴⁹ *Id.*

³⁵⁰ *Id.*

³⁵¹ *Id.*

³⁵² *Id.*

³⁵³ *Id.* at 102.

³⁵⁴ *Id.* at 100, 103.

³⁵⁵ *Id.* at 103.

of the recount and the Court found that this lack of standards had led to an unequal evaluation of the ballots.³⁵⁶ The majority was swayed by evidence that the standards applied to the recount varied from precinct to precinct and county to county, even where identical types of ballot machines were used.³⁵⁷ Thus, the lack of uniform standards put in place by the Florida Supreme Court to discern the intent of the failed ballots violated the Equal Protection Clause.³⁵⁸

The Court also held that it was not appropriate to remand the case to the Florida Supreme Court to develop a constitutionally sound remedy because it could not conceivably be implemented by the December 12, 2000 safe harbor deadline.³⁵⁹ Thus, the holding terminated the recount, effectively resulting in Bush assuming the presidency.

Ginsburg authored a dissent that largely questioned why the Court was refusing to pay deference to the Florida Supreme Court on an issue of state law.³⁶⁰ She wrote, "I might join the Chief Justice were it my commission to interpret Florida law. But disagreement with the Florida court's interpretation of its own State's law does not warrant the conclusions that the justices of that court have legislated."³⁶¹ She suggested that the Court regularly affirmed statutory and constitutional interpretations with which it disagrees.³⁶² Ginsburg emphasized that when the Court reviews challenges to administrative law, the Court commonly defers to the agency's interpretation of the law so long as their interpretation does not violate an expressed intent of Congress.³⁶³ She suggested that "the Constitution does not call upon us to pay more respect to a

³⁵⁶ *Id.* at 106-07.

³⁵⁷ *Id.* at 106-07,134.

³⁵⁸ *Id.* at 106.

³⁵⁹ *Id.* at 110. The safe harbor provision provides that States may appoint their electors, without Congressional interference, if done at least six days before the time set for the meeting of the electors. 3 U.S.C.A. § 5 (West).

³⁶⁰ *Id.* at 136.

³⁶¹ *Id.*

³⁶² *Id.*

³⁶³ *Id.*

federal administrative agency's construction of federal law than to a state high court's interpretation of its own state's law."³⁶⁴ Moreover, Ginsburg contended that even when this Court must examine a state law in order to protect federal rights, the Court has done so in a manner that affords respect to the interpretations of state law by the State's highest court.³⁶⁵ Ginsburg further demonstrated the Court's esteem of state court's expertise by reminding the majority that the Court frequently used the certification device, a process by which a state high court informs the Supreme Court on matters of local law.³⁶⁶

Ginsburg argued that contrary to the majority's assertion, this Court rarely outright rejected a state court's interpretation of its law.³⁶⁷ She criticized the choice of cases that the Chief Justice invoked to suggest that this practice was commonplace.³⁶⁸ Instead, she argued that the cases that the Chief Justice relied upon were rare, embedded in historical context, and dissimilar to the current case.³⁶⁹ Notably, Ginsburg highlighted that two of the aforementioned cases discussed overturning laws enacted during the Civil Rights era, where the state had used law to harm its citizens.³⁷⁰ Ginsburg suggested that the Court "surely should not be bracketed with the state high courts of the Jim Crow South."³⁷¹

Additionally, Ginsburg believed that the majority's concern about the safe harbor deadline was misplaced, arguing that if the deadline were to pass, Florida would still be entitled to deliver its electoral votes.³⁷² Accordingly, she disagreed with the Court's determination that an adequate remedy could not be implemented if sent back to the Florida Court. Ginsburg

³⁶⁴ *Id.*

³⁶⁵ *Id.* at 137-38.

³⁶⁶ *Id.* at 139.

³⁶⁷ *Id.*

³⁶⁸ *Id.* at 140.

³⁶⁹ *Id.*

³⁷⁰ *Id.*

³⁷¹ *Id.* at 141.

³⁷² *Id.* at 143.

concluded her opinion by stating, “[I]n sum, the Court’s conclusions that a constitutionally adequate recount is impractical is a prophecy the Court’s own judgment will not allowed to be tested. Such an untested prophecy should not decided the Presidency of the United States.”³⁷³

In a dissent uncharacteristic in form and tone, Ginsburg slammed her colleagues for overturning a reasoned interpretation of Florida law by members of Florida’s High Court. She mocked the majority for its decision, reminding the Court that they regularly affirm state statutory and constitutional interpretations with which it disagrees.³⁷⁴ She stopped short of accusing her colleagues of hypocrisy³⁷⁵ and suggested that if her colleagues acted as they typically did, in a matter mindful of the system of dual sovereignty, than surely they would affirm the decision of the Florida Supreme Court.³⁷⁶ She was particularly critical of Chief Justice Rehnquist’s attempt to justify the majority position by citing dissimilar case law and invoked the Country’s racist past to further accentuate her point.

It was widely noted that Ginsburg ended her decision with the words “I dissent,”³⁷⁷ omitting the word ‘respectfully,’ which traditionally separates the two words. It has been suggested that her choice to omit the word may have been indicative of her true dissatisfaction with the majority’s outcome of the case.³⁷⁸ However, others have contended that her omittance of the word was a choice made for “economy of style”³⁷⁹ rather than to convey anger.³⁸⁰ Despite the varying opinions on Ginsburg’s choice, or lack thereof, of words in concluding her dissent, it

³⁷³ *Id.* at 144.

³⁷⁴ *Id.* at 136.

³⁷⁵ Krugman Ray, *supra* note 96, at 663.

³⁷⁶ *Bush*, 531 U.S. at 142-43.

³⁷⁷ *Id.* at 144.

³⁷⁸ Hugh Baxter, *Justice Ginsburg’s Dissent in Bush v. Gore*, 43 NEW ENG. L. REV. 711, 722 (2009).

³⁷⁹ Linda Greenhouse, *Bush v. Gore: A special Report.; Election Case a Test and a Trauma for Justices*, N.Y. TIMES (Feb. 20, 2001), <http://www.nytimes.com/2001/02/20/us/bush-v-gore-a-special-report-election-case-a-test-and-a-trauma-for-justices.html?pagewanted=all&src=pm>.

³⁸⁰ *Id.*

is apparent that this case marks a distinct change in the tone of Ginsburg's opinions. The dissent challenges the reasoning of her colleagues and attributes bad motives to their opinion. It is a preview of the biting tone that Ginsburg is capable of and her ability to use colorful language to call into question the intentions her colleagues.

However, as in *Evans*,³⁸¹ Ginsburg's dissent spoke to theme of collegiality and deference to judges of other systems.³⁸² Ginsburg takes issue with Court's willingness to override the expertise of the Florida High Court in the arena of state law. To emphasize this point she invokes basic principles of federalism and suggests that the extraordinary nature of this case had obscured traditional judicial principles.³⁸³ Thus, despite the tone taken with her colleagues, *Bush* adheres to Ginsburg's view that collegiality and respect runs to judges of other systems.

Ginsburg has been vocal about her role as a consensus builder among the liberal Justices of the Court and often makes efforts to work with her colleagues to come together to write unified opinions.³⁸⁴ However, the split decisions that emerged from *Bush* demonstrate that cohesive opinions are not always attainable. Ginsburg has acknowledged that the American people struggled to understand the case's outcome because of the Court's splintered opinions.³⁸⁵ She has since explained that due to the timing of the case, there was no time for the Court to come together to form a unified opinion because the Court agreed to hear the case on a Saturday and rendered their decision on that following Tuesday.³⁸⁶ Perhaps with more time, the public would have received a more unified opinion, which would have achieved Ginsburg's goal of promoting stability and predictability in the Court.

³⁸¹ See *supra* Part III.B.

³⁸² Krugman Ray, *supra* note 96, at 664.

³⁸³ *Bush*, 531 U.S. at 142.

³⁸⁴ Rosen Interview, *supra* note 93.

³⁸⁵ *Id.*

³⁸⁶ *Id.*

I. Nat'l Fed'n of Indep. Bus. v. Sebelius³⁸⁷

In 2010, Congress enacted the Patient Protection and Affordable Care Act (ACA) to increase access to health insurance and to decrease the cost of healthcare.³⁸⁸ A key provision was the individual mandate, which required most Americans to maintain a minimal amount of health insurance coverage.³⁸⁹ Thus, individuals, who were not receiving health insurance from their employer or by other means were required to purchase insurance from a private company.³⁹⁰ Starting in 2014, those who did not comply with the mandate would be obligated to make a shared responsibility payment to the Federal Government.³⁹¹ The ACA also expanded the scope of Medicaid program funding and increased the number of individuals that the states were required to cover.³⁹² Twenty-six states and a group of private individuals and businesses filed a lawsuit against the Health and Human Department Services, Treasury, and Labor Departments and their Secretaries challenging the constitutionality of the individual mandate and the Medicaid expansion.³⁹³

Chief Justice Roberts wrote for the majority and held that the individual mandate provision of the ACA was constitutional under the power vested in Congress to lay and collect taxes.³⁹⁴ However, Roberts rejected the argument that the Act was constitutional under the Commerce Clause and the Necessary and Proper Clause.³⁹⁵ The majority also held that the Medicaid expansion exceeded Congress' power under the Spending Clause and was thus

³⁸⁷ 132 S. Ct. 2566 (2012).

³⁸⁸ *Id.* at 2580.

³⁸⁹ *Id.*

³⁹⁰ *Id.*

³⁹¹ *Id.*

³⁹² *Id.* at 2581.

³⁹³ *Id.* at 2580.

³⁹⁴ *Id.* at 2601.

³⁹⁵ *Id.* at 2589, 2592.

unconstitutional.³⁹⁶ Ginsburg concurred with the judgment that the individual mandate was constitutional and dissented with the Chief Justice's determination that the Medicaid expansion was violative of the Constitution.

Despite her agreement with the Chief Justice, Ginsburg authored a powerful concurrence arguing that the mandate was also constitutional under the Commerce Clause and the Necessary and Proper Clause.³⁹⁷ Ginsburg boldly opened her opinion by stating that the healthcare market is one in which every individual invariably participates in.³⁹⁸ In her view, every person in the United States will at some point, visit a doctor or healthcare professional.³⁹⁹ By providing medical services to the uninsured, it raises the price of health insurance⁴⁰⁰ and in turn, healthcare providers pass these costs to the government and private insurance companies, who then shift the cost to those purchasing insurance.⁴⁰¹ Thus, the failure to purchase insurance has profound impacts on the healthcare market.⁴⁰² To Ginsburg, the Commerce Clause authorized Congress to enact the individual mandate to remedy the economic and social problems caused by the number of residents who are unable or unwilling to obtain health insurance.⁴⁰³

To support her legal footing, Ginsburg's opinion provided a detailed history of the Commerce Clause. She asserted that the Court has long viewed the Commerce Clause as granting Congress the power to regulate ~~to~~ economic activities that substantially impacted interstate commerce.⁴⁰⁴ She also asserted that the Court had long afforded Congress respect when it

³⁹⁶ *Id.* at 2603-04.

³⁹⁷ *Id.* at 2609.

³⁹⁸ *Id.* at 2610.

³⁹⁹ *Id.*

⁴⁰⁰ *Id.* at 2611, 2617.

⁴⁰¹ *Id.* at 2611.

⁴⁰² *Id.* at 2611-12.

⁴⁰³ *Id.* at 2614-15.

⁴⁰⁴ *Id.* at 2616.

enacted economic and social legislation⁴⁰⁵ and accordingly when reviewing legislation, the Court must “ask only (1) whether Congress had a rational basis for concluding that the regulated activity substantially affect interstate commerce, and (2) whether there is a reasonable connection between the regulatory means selected and the asserted ends.”⁴⁰⁶

To Ginsburg, the application of the aforementioned principles clearly demonstrated that Congress had a rational basis in concluding that those without medical insurance substantially affected interstate commerce.⁴⁰⁷ She identified that the uninsured consumed billions of dollars of healthcare products and services annually.⁴⁰⁸ These goods, Ginsburg argued, are produced, sold, and distributed by national and regional companies who regularly transact interstate business.⁴⁰⁹ Moreover Ginsburg found that the individual mandate had a reasonable connection to Congress’ goal of protecting the healthcare market from the problems caused by uninsured individuals.⁴¹⁰

In Ginsburg’s view, the Court had abandoned its long-standing precedent regarding the Commerce Clause. She lambasted the Chief Justice for his abandonment of commerce clause jurisprudence to a pre-*Lochner* era.⁴¹¹ Relying on *Wickard v. Filburn*⁴¹² and *Gonzales v. Raich*,⁴¹³ Ginsburg demonstrated that the Court had a long history of recognizing Congress’ ability to regulate the conduct an individual because of prophesied future activity.⁴¹⁴ She also rejected the Chief Justice’s argument that those who are not purchasing insurance are not active

⁴⁰⁵ *Id.*

⁴⁰⁶ *Id.* (internal quotation marks omitted).

⁴⁰⁷ *Id.* at 2617.

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.*

⁴¹¹ The *Lochner*-Era was a period in the early 20th century during which courts regularly struck down laws on the basis that the Government could only interfere with the freedom to contract or personal liberty if it served a valid police purpose. ERWIN CHEMERISNKY, *CONSTITUTIONAL LAW PRINCIPLES AND POLICIES* 630-31 (4th ed. 2011). See *Lochner v. New York*, 198 U.S. 45 (1905) (where the Court declared unconstitutional a New York law that set the number of hours that bakers could work).

⁴¹² 317 U.S. 111 (1942).

⁴¹³ 545 U.S. 1 (2005).

⁴¹⁴ *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2619.

in the market by citing to statistics to demonstrate that almost everyone will participate in the healthcare market.⁴¹⁵

The bulk of Ginsburg's argument rested on the uniqueness of the healthcare market. She rejected popular arguments comparing the healthcare market to the car market or to a market that required the purchase of broccoli. The Chief Justice had proposed that an individual is not deemed active in the car market simply because one day he may decide~~d~~ to buy a car. Ginsburg responded by declaring the analogy inapt⁴¹⁶ based on the unpredictable and inevitable need for medical care.⁴¹⁷ To Ginsburg, although one day you may buy a car, there is no certainty that you ever will do so.⁴¹⁸ Moreover, if at that that future point, the individual decided that they wanted a car or "has a craving for broccoli,"⁴¹⁹ the individual would be forced to pay at the counter before receiving the goods, unlike in the healthcare market.⁴²⁰

Ginsburg also dismissed claims that allowing the individual mandate to pass constitutional muster under the Commerce Clause would give Congress a *carte blanche* to enact other purchase mandates.⁴²¹ Relying on the argument that the healthcare market is unique, Ginsburg again turned to the broccoli example and rejected the Chief Justice's suggestion that Congress would be authorized to adopt a mandate on eating a healthy diet.⁴²² In a widely cited paragraph, Ginsburg stated,

[C]onsider the chain of inferences the Court would have to accept to conclude that a vegetable-purchase mandate was likely to have a substantial effect on the health-care costs borne by lithe Americans. The Court would have to believe that individuals

⁴¹⁵ *Id.* at 2618.

⁴¹⁶ *Id.* at 2619

⁴¹⁷ *Id.*

⁴¹⁸ *Id.* at 2619-20.

⁴¹⁹ *Id.* at 2620.

⁴²⁰ *Id.*

⁴²¹ *Id.* at 2623.

⁴²² *Id.* at 2624.

forced to buy vegetables would then eat them (instead of throwing or giving them away), would prepare the vegetables in a healthy way (steamed or raw, not deep-fried), would cut back on unhealthy foods, and would not allow other factors (such as lack of exercise or little sleep) to trump the improved diet. Such “pil[ing of] inference upon inference” is just what the Court refused to do in *Lopez* and *Morrison*.⁴²³

To Ginsburg, the uniqueness of the healthcare market generated a unique free-riding problem not present in any other market.⁴²⁴ Because other individual choices would not affect interstate commerce in the same way as the healthcare market, Ginsburg rejected the notion that the individual mandate would give Congress unbridled power in passing mandates.⁴²⁵

In arguing that the individual mandate was constitutional under the Necessary and Proper Clause, Ginsburg reminded the Court that Congress enacted the ACA to stop the industry practice of charging higher prices or outright denying coverage to individuals with preexisting medical conditions.⁴²⁶ Because the Commerce Clause allowed Congress to ban this practice, Ginsburg argued that the individual mandate provision was reasonably adapted to achieving Congress’ ultimate goal and thus valid under the Necessary and Proper Clause.⁴²⁷

Ginsburg dissented from the portion of the Chief Justices’ opinion that struck down the Medicaid penalty provisions. She argued that since Medicaid’s implementation, States have agreed to amend their Medicaid plans in accordance with Federal law and that States have a long history of receiving Medicaid funds contingent on terms set by Congress.⁴²⁸ Accordingly, Ginsburg argued that the expansion was consistent with the Spending Clause.

⁴²³ *Id.* at 2624.

⁴²⁴ *Id.* at 2623.

⁴²⁵ *Id.* at 2624.

⁴²⁶ *Id.* at 2626.

⁴²⁷ *Id.* at 2628.

⁴²⁸ *Id.* at 2630.

When reading Ginsburg's opinion, it is easy to forget that it is not simply a dissenting opinion. In a manner uncharacteristic of her writing, Ginsburg takes a striking tone in attacking the Chief Justice's opinion and reasoning. She states that the Chief Justice's opinion suffers from "multiple flaws"⁴²⁹ and that the decision uses inapt analogies.⁴³⁰ She accuses him of writing an argument that is "difficult to fathom"⁴³¹ and accepting of "specious logic."⁴³² Moreover, she calls his opinion long on rhetoric and short on substance.⁴³³ Ginsburg mocks the Chief Justice for invoking the healthy-eating mandate and market as a comparative to the healthcare market. Her ability to play with these metaphors is an effective tool to cast doubt on the reasoning of the Chief Justice and highlights, in a seemingly comedic way, how far the Chief Justice has strayed from the Court's jurisprudence.

There is no question that this opinion represents a departure from Ginsburg's typically collegial tone and is likely a reflection of her true disagreement with the Chief Justice's rejection of decades of Commerce Clause jurisprudence. More than that, this opinion seems to highlight a larger issue that Ginsburg sees emerging on the current Court. In a recent interview, Ginsburg stated that she believes the Robert's Court is becoming "one of the most activist courts in history."⁴³⁴ To Ginsburg, activism is measured by the Court's readiness to overturn legislation.⁴³⁵ She has expressed that she is troubled that the Court is not hesitant to overturn laws enacted by Congress and cites to this case as a prime example, despite the fact that the

⁴²⁹ *Id.* at 2618.

⁴³⁰ *Id.* at 2619.

⁴³¹ *Id.* at 2621.

⁴³² *Id.* at 2625.

⁴³³ *Id.* at 2626.

⁴³⁴ Adam Liptak, *Court is 'One of Most Activist,' Ginsburg Says, Vowing to Stay*, N.Y. TIMES (Aug. 24, 2013), <http://www.nytimes.com/2013/08/25/us/court-is-one-of-most-activist-ginsburg-says-vowing-to-stay.html?smid=pl-share>; Rosen Interview *supra* note 93.

⁴³⁵ *Id.*

individual mandate was saved by the taxing power.⁴³⁶ Ginsburg has long believed that the Judiciary must work together with the other branches of government and defer to Congress when appropriate. The notion of an activist court is directly in conflict with Ginsburg's view on the role of the judiciary and likely was the impetus for this strong and uncharacteristic opinion.

Additionally, when this opinion was written, another major change had occurred in the Court. For most of Ginsburg's years on the Court, Justice John Paul Stevens was the most senior liberal Justice on the bench. In that role, he was in charge of assigning authorship of opinions divided on traditional liberal or conservative lines. Often, Stevens would keep many of the high profile cases for himself.⁴³⁷ With his departure, Ginsburg inherited this role and in turn was granted the ability to write on her choice of issues.⁴³⁸ It seems as though Ginsburg's new role may also have factored into her new voice by granting her the opportunity to write on her choice of issues.

Despite her lack of collegiality towards a fellow Justice, Ginsburg has been vocal about the efforts she made to unite the liberals of the Court in this opinion.⁴³⁹ She placed great importance on ensuring that the separate opinion spoke on behalf of all the liberal Justices, out of her belief that it would be easier for the public to comprehend one unified opinion.⁴⁴⁰ Ginsburg met with her liberal colleagues for nearly three hours to discuss how the opinion should be written and gave her liberal colleagues a draft of the opinion before it was circulated to the rest of the Justices.⁴⁴¹ Thus, we see some tension between Ginsburg's long-standing belief in collegiality. Certainly, there is no question that she wanted to work with her colleagues to create

⁴³⁶ Rosen Interview *supra* note 93.

⁴³⁷ *Id.*

⁴³⁸ *Id.*

⁴³⁹ *Id.*

⁴⁴⁰ *Id.*

⁴⁴¹ *Id.*

a unified opinion, but the same can not be said about the tone taken with her more conservative colleagues, specifically the Chief Justice.

The tone of Ginsburg's opinion is interconnected with her predilection to work in measured motions, instead of sweeping strokes. Another reason she may have been so vocal in this opinion is because of her complete disagreement with the Chief Justices' abandonment of Commerce Clause jurisprudence, in one fell sweep. Ginsburg rejects these types of far-reaching changes and likely purposefully delegated a large portion of her opinion to highlight the Court's long-standing jurisprudence on the matter. To Ginsburg, the individual mandate was a rational extension of the Commerce Clause, since it was inevitable that the future activity of participating in the healthcare market would occur.⁴⁴² Thus, the more aggressive tone of her opinion is likely intertwined with her view that there had been unprecedented broad reform of Commerce Clause jurisprudence, back to the *Lochner*-era, long abandoned by this Court.⁴⁴³

J. *Shelby Cnty., Ala. v. Holder*⁴⁴⁴

The Voting Rights Act (VRA) of 1965 was enacted in response to entrenched racial discrimination in voting in certain parts of the United States.⁴⁴⁵ Section 4 of the Act designated the jurisdictions that were covered by the Act based on their history of implementing barriers to minority voters.⁴⁴⁶ Section 5 of the Act provided that the aforementioned covered jurisdictions could not change their voting procedures without first getting preclearance from the federal government.⁴⁴⁷ While only implemented as a temporary measure, Congress reauthorized the

⁴⁴² *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2618.

⁴⁴³ *See supra* note 411.

⁴⁴⁴ 133 S. Ct. 2612 (2013).

⁴⁴⁵ *Id.* at 2619.

⁴⁴⁶ *Id.*

⁴⁴⁷ *Id.* at 2620.

VRA several times.⁴⁴⁸ Most recently, the Act was reauthorized in 2006 for an additional twenty-five years.⁴⁴⁹ Congress did not make any changes to the coverage formula delineated above and amended section 5 to prohibit a broader range of conduct.⁴⁵⁰

Shelby County, a covered jurisdiction, brought a suit seeking a declaratory judgment finding that sections 4(b) and 5 of the VRA were facially unconstitutional.⁴⁵¹ They also sought a permanent injunction against their enforcement.⁴⁵² The Court granted certiorari and held that section 4(b) of the VRA was unconstitutional and could no longer be used as a basis for subjecting certain jurisdictions to preclearance.⁴⁵³ The majority rested its argument on the notion that significant progress has been made in eliminating the first generation barriers in voting and that since the VRA was enacted, there had been an increase in registered minority voters and minority representation in government.⁴⁵⁴ The Court held that the coverage formula of section 4(b) was based on old data that was not representative of the current state of affairs in the Country.⁴⁵⁵ In overturning section 4(b) the majority stated that, “[T]oday the Nation is no longer divided along those lines, yet the Voting Rights Act continues to treat it as if it were.”⁴⁵⁶

Ginsburg authored the dissenting opinion in which she largely relied on history and deference to Congressional action to support her disagreement with the majority opinion. The opinion started with the presumption that voting discrimination is an issue that is alive and well.⁴⁵⁷ Ginsburg outlined the history leading to the development of the VRA and the

⁴⁴⁸ *Id.* at 2620-21

⁴⁴⁹ *Id.* at 2621.

⁴⁵⁰ *Id.*

⁴⁵¹ *Id.* at 2621-22.

⁴⁵² *Id.* at 2622.

⁴⁵³ *Id.* at 2622, 2631.

⁴⁵⁴ *Id.* at 2625.

⁴⁵⁵ *Id.* at 2629.

⁴⁵⁶ *Id.* at 2627.

⁴⁵⁷ *Id.* at 2633.

mechanisms within it to protect jurisdictions with histories of voting discrimination.⁴⁵⁸ She distinguished between two types of voter's discrimination: first-generation and second-generation barriers. First-generation barriers are those that block minority voters from the polls in direct ways.⁴⁵⁹ These barriers are generally experienced through low minority voter turnout and low minority representation in government.⁴⁶⁰ Alternatively, second-generation barriers are less obvious methods that seek to eliminate the potency of a minority's vote through mechanisms like racial gerrymandering, at large voting systems, and discriminatory annexation.⁴⁶¹ Ginsburg suggested that the VRA has been successful in reducing first-generation barriers but that the Act's continued importance lay in its ability to adapt and protect against emerging second-generation ones.⁴⁶²

When Congress re-authorized the VRA in 2006, extensive evidence and hearings were amassed, leading Congress to conclude that the VRA continued to hold significance in light of the fact that second-generation barriers continued to block minority voters from full participation in the electoral process.⁴⁶³ Accordingly, the VRA was necessary to ensure that minority voters were not deprived of their right to vote or to have their votes diluted.⁴⁶⁴ Ginsburg argued that when reviewing Congressional action, the Court is required to utilize rational basis review.⁴⁶⁵ Thus, the Court must only evaluate whether Congress had employed rational means to remedy the Constitutional prohibition of racial discrimination in voting.⁴⁶⁶ Ginsburg found that the

⁴⁵⁸ *Id.* at 2633-34.

⁴⁵⁹ *Id.* at 2634.

⁴⁶⁰ *Id.*

⁴⁶¹ *Id.* at 2635.

⁴⁶² *Id.* at 2634-35.

⁴⁶³ *Id.* at 2636.

⁴⁶⁴ *Id.*

⁴⁶⁵ *Id.* at 2637.

⁴⁶⁶ *Id.*

Congressional record demonstrated that Congress had properly evaluated the evidence supporting reauthorizing met the requirements of the rational basis test.⁴⁶⁷

To illustrate her point, Ginsburg presented a long and thorough evaluation of the evidence that Congress relied upon when making its decision to continue the preclearance remedy of the VRA.⁴⁶⁸ She quoted statistics to demonstrate that between 1982 and 2006, the Department of Justice had blocked more than 700 voting changes on the basis that they were discriminatory.⁴⁶⁹ She also repeated characteristic examples of blocked proposals, including a case out of Dallas County, Alabama, which sought to purge its voter registry of many of its black voters.⁴⁷⁰ These stories sought to illustrate that while first-generation voting discrimination had decreased, the discrimination had evolved into second-generation barriers and that the jurisdictions that had a “unique history of problems with racial discrimination in voting”⁴⁷¹ required assistance in ensuring that their voting procedures lack discriminatory intent.⁴⁷²

Ginsburg found further constitutional support for the VRA in its permissive sections, which allowed jurisdictions to bail out of coverage after demonstrating compliance with the Act for ten years and bail into the Act upon an appropriate finding of voter discrimination.⁴⁷³ Ginsburg argued that these provisions were effective mechanisms to respond to discrimination and demonstrated the VRA’s ability to self-regulate and respond to current conditions in the Country.⁴⁷⁴

⁴⁶⁷ *Id.* at 2639.

⁴⁶⁸ *Id.*

⁴⁶⁹ *Id.*

⁴⁷⁰ *Id.* at 2641.

⁴⁷¹ *Id.* at 2642.

⁴⁷² *Id.*

⁴⁷³ *Id.* at 2644; Rosen Interview, *supra* note 93.

⁴⁷⁴ Rosen Interview, *supra* note 93.

Like the Affordable Care Act Case,⁴⁷⁵ Ginsburg's dissent is vocal about her disapproval of the majority's willingness to overturn an act of Congress. Her opinion deliberately spells out the evidence that Congress considered before overwhelmingly re-authorizing the Act to demonstrate just how much evidence the majority overlooked in coming to its conclusion. The use of the evidence is also a tool that Ginsburg uses to show that the VRA passed constitutional muster under rational basis review. She accuses the majority of substituting its judgment for that of Congress and abandoning long-standing precedent that dictates that Congress may use any rational means to exercise its power in the arena of combating racial discrimination in voting.⁴⁷⁶ In Ginsburg's view, the elected officials of Congress have greater insight into how this legislation affects their constituents, than the unelected Justices of the Court.⁴⁷⁷ For that reason, the Court should defer to Congressional action unless the Court finds that Congress has not employed rational means for reauthorizing the statute.⁴⁷⁸ To Ginsburg, it is not the place of the Court to step so far in front of the national mood and overturn legislation.

Ginsburg's tone in the dissenting opinion is also notable for its lack of collegiality and fiery attack on the majority. In the opinion, Ginsburg accused the majority of demonstrating hubris⁴⁷⁹ and writing a decision that lacked in sound reasoning.⁴⁸⁰ She charged the Court of being careless in overlooking much of the evidence presented to Congress, suggesting that "[O]ne would expect more from an opinion striking at the heart of the Nation's signal piece of civil-rights legislation."⁴⁸¹ Moreover, she exposed what she deemed a "sad irony"⁴⁸² in the

⁴⁷⁵ See *supra* Part III.I.

⁴⁷⁶ *Shelby Cnty., Ala.*, 133 S.Ct. at 2637-38.

⁴⁷⁷ Rosen Interview, *supra* note 93.

⁴⁷⁸ *Shelby Cnty., Ala.*, 133 S.Ct. at 2637-38.

⁴⁷⁹ *Id.* at 2648.

⁴⁸⁰ *Id.* at 2644.

⁴⁸¹ *Id.*

⁴⁸² *Id.* at 2651.

majority's writing for their inability to see the grander context of the VRA's enactment.⁴⁸³ By overturning the coverage formula in section 4(b), Ginsburg stressed that history would repeat itself, and that as subtle second-generation barriers emerged, preclearance played a vital role in protecting minority voters and preventing backsliding.⁴⁸⁴

Ginsburg also used several metaphors to color her opinion and draw out the sheer hypocrisy of striking down the pre-clearance mechanism. In describing the VRA's importance in stopping voter discrimination before it happens, Ginsburg wrote that, "[J]ust as buildings in California have a greater need to be earthquake-proofed, places where there is great racial polarization in voting have a greater need for prophylactic measures to prevent purposeful racial discrimination."⁴⁸⁵ She suggested that abolishing pre-clearance because of its success was a backward proposition and stated that, "[T]hrowing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet."⁴⁸⁶

This lively style of writing is becoming increasingly regular in Ginsburg's dissenting opinions and departs from Ginsburg's earlier jurisprudence in which she tended to shy away from using the language of her opinion to attack her colleagues. Instead, this decision likely speaks to Ginsburg's perceived view of and opposition to judicial activism on the current Court. Ginsburg has described the VRA as the worst example of judicial activism and questions a judge's ability to overturn acts of Congress without consequence.⁴⁸⁷ Her strong writing is likely a tool to draw attention to this emerging problem and a subtle call to action to change the

⁴⁸³ *Id.*

⁴⁸⁴ *Id.*

⁴⁸⁵ *Id.* at 2643.

⁴⁸⁶ *Id.* at 2650.

⁴⁸⁷ Rosen Interview, *supra* note 93.

direction of the Current Court. Thus, if the Court continues down this path, we can anticipate more decisions in this tone in the future.

Conclusion

In the twenty years that Ginsburg has been a Supreme Court Justice, she has demonstrated consistent adherence to two of her jurisprudential philosophies. Ginsburg continues to advocate for narrow holdings that do not make bold changes in the law, but rather contribute to the body of precedent developed by this Court. She is typically unwilling to effectuate holdings that will have a broader impact than the facts immediately before the Court, believing that substantive change should come from the elected branches of government. Moreover, Ginsburg's outlook that the Constitution is a living document drives her view that it should be interpreted to promote equality and become increasingly embrative over time.

Significantly, Ginsburg's preference towards collegiality has been in flux in recent years. Early in her career, Ginsburg advocated for collegiality amongst her colleagues on the bench. She achieved this by authoring opinions that demonstrated restraint in tone. Ginsburg wrote in a style that focused on the legal theory and the case at hand and avoided writing fiery opinions that attacked or ridiculed her colleagues. However, in recent years, we are seeing a change in the tone in Ginsburg's opinions. Starting with *Bush*, but ultimately culminating in the last two terms, Ginsburg's writing style has dramatically changed. She is increasingly willing to attack her colleagues when she believes that they are in the wrong and has began writing in a bold tone that emits emotion and disdain for her colleagues.

Two simultaneous events have likely fueled this change, Ginsburg's role as the most senior liberal Justice on the bench and her view that judicial activism is on the rise on the Supreme Court. The first factor has given Ginsburg the freedom to decide which opinions she wants to author. However, the second factor is likely the primary force behind his change. Since

the most recent term ended, Ginsburg has given several interviews in which she has cited her concern for the newfound trend of judicial activism on the Court. Ginsburg fears that the Roberts Court has changed the trajectory of the Court by adopting a stance that is increasingly willing to overturn Congressional Acts. Ginsburg has cited to *Fed'n of Indep. Bus. v. Sebelius* and *Shelby Cnty., Ala. v. Holder* as the primary cases that demonstrate this trend. It is thus not surprising, that when writing separately in both cases, Ginsburg authored two of her boldest, liveliest and aggressive opinions, using colorful language, sarcasm and metaphors to highlight the errors in the majority's reasoning.

Her changed tone may be representative of her frustration with her colleagues and the direction of the Court. Or, she may also be using strong language as a means of attracting the public's attention to her growing concern in an effort to curb the behavior. With this new trend underway, it remains unknown if this tone is here to stay. However, Ginsburg's career has demonstrated that when she is faced with adversity, she fights. As Ginsburg prepares to battle judicial activism on the Court, one can not help but wonder if her new found voice will be the weapon that she uses to counteract this trend.