
ESSAYS IN HONOR OF JUSTICE RUTH BADER GINSBURG

INTRODUCTION

*Martha Minow**

To honor Justice Ruth Bader Ginsburg's twenty years of service on the United States Supreme Court so far, Harvard Law School planned a celebration and many individual faculty members wrote reflections on some of her opinions. Those reflections are assembled here along with our community's heartfelt admiration and appreciation. Very few individuals in history come close to the extraordinary and significant role played by Justice Ginsburg in the pursuit of justice before she joined the bench. Her work earned her a faculty post at Rutgers School of Law and then the first tenured post for a female professor at Columbia Law School. As director of the Women's Rights Project of the American Civil Liberties Union, she argued six landmark cases on gender equality before the U.S. Supreme Court and crafted successful challenges to the system of legally enforced gender roles that limited opportunities for both women and men. With vision and brilliance, she earned a place in the history books and on the honor roll of civil rights heroes.

Both as judge on the Court of Appeals for the District of Columbia Circuit and as Associate Justice of the U.S. Supreme Court, she has produced a body of superbly crafted opinions and nurtured a quality of collegiality that represents an equally significant contribution to the administration of justice. And there is more to come.

It is a special privilege and honor for me, as the second woman to serve as Dean, to salute Justice Ginsburg at Harvard Law School. When she was a student here, she faced a class of over 500 men and only seven other women. She juggled her roles as a wife and mother with her work as a law student and faced a Dean who chided female students for taking the places of qualified males. She excelled. She joined the *Harvard Law Review*. When her husband, fellow law student Martin Ginsburg, had to deal with cancer, she took notes for him and helped him recover. And when the Harvard Dean refused her request to earn her degree while moving to New York with her family and completing her final year of schooling at Columbia Law School, she transferred there and promptly rose to the top of the class. She

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gently but rightly resisted the requests of later Harvard Law School Deans to accept a tardy degree from Harvard Law School but finally, in 2011, received a Harvard degree — an honorary doctorate, the university's highest academic honor. It is with joy that we offer these reflections on some of her judicial work.

GRUTTER *v.* BOLLINGER: JUSTICE RUTH BADER
GINSBURG'S LEGITIMIZATION OF THE ROLE
OF COMPARATIVE AND INTERNATIONAL
LAW IN U.S. JURISPRUDENCE

*Deborah E. Anker**

In *Grutter v. Bollinger*,¹ a 2003 decision in which the U.S. Supreme Court upheld the University of Michigan Law School's admissions policy of considering race in order to enhance the school's diversity, Justice Ginsburg wrote a powerful concurrence that applied international and comparative law to the interpretation of U.S. constitutional law. Although she did not agree with the majority's decision to set a firm sunset date for the policy of affirmative action, Justice Ginsburg reasoned that the majority's "observation that race-conscious programs 'must have a logical end point,' accords with the international understanding of the office of affirmative action."² Specifically, Justice Ginsburg noted the consistency between the majority's decision and the principles embraced in international treaties concerning the elimination of racial discrimination and discrimination against women.

In a recent speech, Justice Ginsburg noted the deep American roots of an internationalist approach in, for example, the writings and pronouncements of Professors Roscoe Pound and John Henry Wigmore, as well as President John Adams. She also emphasized the tradition of judicial reference to foreign and international law, stating that "[t]he U.S. judicial system will be the poorer . . . if we do not both share our experience with, and learn from, legal systems with values and a commitment to democracy similar to our own."³ She cited among several contemporary examples the U.S. Supreme Court's decisions in *Atkins v. Virginia*⁴ and *Lawrence v. Texas*.⁵ Justice Ginsburg referenced

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¹ 539 U.S. 306 (2003).

² *Id.* at 344 (Ginsburg, J., concurring) (quoting *id.* at 342 (majority opinion)).

³ Justice Ruth Bader Ginsburg, Address at the International Academy of Comparative Law at American University, "A Decent Respect to the Opinions of [Human]kind": The Value of a Comparative Perspective in Constitutional Adjudication (July 30, 2010).

⁴ 536 U.S. 304 (2002).

⁵ 539 U.S. 558 (2003). In 2002, the U.S. Supreme Court held in *Atkins* that the execution of a mentally retarded person convicted of a crime was unconstitutional, in part, because "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." 536 U.S. at 316 n.21. The following year in *Lawrence*, the Court, citing numerous European Court of Human Rights decisions, held that a Texas statute

the U.S. Declaration of Independence and underscored her belief that “the U.S. Supreme Court will continue to accord ‘a decent Respect to the Opinions of [Human]kind’ as a matter of comity and in a spirit of humility.”⁶ As she has eloquently and succinctly said, “[Y]ou will not be listened to if you don’t listen to others.”⁷

The need for such an internationalist approach is nowhere more pressing than in my own field, international refugee law, where reference to international and comparative law is a matter of statutory, as well as international legal imperative. The Refugee Act of 1980⁸ was enacted with the explicit purpose of implementing the 1967 U.N. Protocol Relating to the Status of Refugees⁹ (U.N. Refugee Protocol), which incorporated the U.N. Convention Relating to the Status of Refugees¹⁰ (U.N. Refugee Convention).¹¹ In particular, Article 1 of the U.N. Refugee Convention defines a refugee and Article 33 enunciates the foundational norm of *non-refoulement*, the prohibition against returning a refugee to the country of anticipated persecution.

In the human rights context, the U.N. Refugee Convention is a unique treaty in that there is no treaty-based international body with explicit norm-interpreting authority. Rather, the treaty is implemented through states parties’ judicial systems in the process of individual determinations of claims to refugee-status eligibility and protection. Thus, states parties (including at times the United States, however haltingly), in a spirit of comity, have relied on each others’ doctrinal interpretations in creating a transnationalized body of international refugee law.¹²

prohibiting consensual intercourse between members of the same sex was unconstitutional. 539 U.S. at 576–77.

⁶ Ginsburg, *supra* note 3 (alteration in original) (quoting THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776)).

⁷ Adam Liptak, *Ginsburg Shares Views of Influence of Foreign Law on Her Court, and Vice Versa*, N.Y. TIMES, Apr. 12, 2009, at A14 (quoting Justice Ginsburg) (internal quotation marks omitted).

⁸ Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 and 22 U.S.C.).

⁹ *Done* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

¹⁰ *Opened for signature* July 28, 1951, 189 U.N.T.S. 150.

¹¹ In 1968, the United States ratified the U.N. Refugee Protocol, which incorporated most of the provisions of the U.N. Refugee Convention, only eliminating certain geographical and temporal limitations. The U.N. Refugee Convention embodies the principle of surrogate or alternative state protection for persons who face serious harm in their home countries based on their status or beliefs when the home country has failed to protect those persons. *See generally* DEBORAH E. ANKER, *LAW OF ASYLUM IN THE UNITED STATES* §§ 1–11 (2013 ed.).

¹² *See* Deborah E. Anker, *Refugee Law, Gender, and the Human Rights Paradigm*, 15 HARV. HUM. RTS. J. 133, 136 (2002) (noting in reference to the international development of refugee law that “several states’ administrative bodies and courts engage in a productive dialog with one another . . . [and] they are beginning to create a complex and rich body of ‘transnationalized’ international law”).

In one of its major internationalist decisions, *INS v. Cardozo-Fonseca*,¹³ the U.S. Supreme Court in 1987 found that interpretation of the U.S. definition of a refugee must be consistent with the treaty upon which the implementing legislation was based. Given this background, Justice Blackmun in his concurrence emphasized that the administrative agency should be guided by international standards when interpreting the Refugee Act and the United States' treaty obligations under the U.N. Refugee Protocol because of the Protocol's "rich history of interpretation in international law and scholarly commentaries."¹⁴

Earlier, in 1985, the Board of Immigration Appeals (BIA or Board) wrote one of the seminal decisions in refugee law, *Matter of Acosta*,¹⁵ which has had broad international reach. In that case, the Board established the "immutable characteristics" paradigm for interpreting the "particular social group" (PSG) ground in the definition of refugee, rooting interpretation in principles of nondiscrimination fundamental to domestic and international law.¹⁶ In recognition of these principles and in a spirit of comity, other states parties' tribunals, including the Supreme Court of Canada and the U.K. House of Lords (now the Supreme Court of the United Kingdom), among others, have adopted the BIA's approach to interpreting the PSG ground. This became a precedent for comity in interpretation of not only this but also other provisions of the Refugee Convention.¹⁷ However, even as this respect for the international nature of the treaty was being recognized broadly by other states parties, the United States backed off of its own *Acosta* precedent, precipitating a prolonged (and ongoing) battle within the United States regarding the meaning of the PSG ground for asylum.

Sadly, the U.S. Supreme Court itself retreated from an internationalist approach in its infamous 1993 decision *Sale v. Haitian Centers Council, Inc.*,¹⁸ regarding the scope of refugee law's fundamental *non-refoulement* or nonreturn obligation, despite extensive briefing that urged a contrary decision, including by the United Nations High Commissioner for Refugees.¹⁹ In short, in the interpretation of a clear-

¹³ 480 U.S. 421 (1987).

¹⁴ *Id.* at 451 (Blackmun, J., concurring).

¹⁵ 19 I. & N. Dec. 211 (B.I.A. 1985).

¹⁶ For an extensive discussion of *Acosta*, and the PSG ground generally, see ANKER, *supra* note 11, §§ 5:39-63.

¹⁷ See Anker, *supra* note 12, at 136.

¹⁸ 509 U.S. 155 (1993).

¹⁹ Several refugee law commentators were critical of the *Haitian Centers Council* decision. See, e.g., JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* 336 (2005) (noting that the majority's arguments in *Haitian Centers Council* "have little substance"); Thomas David Jones, International Decision, *Sale v. Haitian Centers Council, Inc.*, 88 AM. J. INT'L L. 114, 122 (1994) (noting that the analysis in *Haitian Centers Council* "is flawed in numerous respects"); Harold Hongju Koh, Essay, *The "Haiti Paradigm" in United States Human Rights Policy*, 103 YALE L.J. 2391, 2491 (1994) ("*Haitian Centers Council* takes its place atop a

ly international law-based statute, the United States has been both a leader and one of the most significant naysayers in adopting principles from international and comparative law.

In a partial dissent in the 2009 Supreme Court case *Negusie v. Holder*,²⁰ Justice Stevens, joined by Justice Breyer, endorsed the role of comparative sources in interpreting the “persecution of others” bar to asylum. Citing cases from Canada, the United Kingdom, Australia, and New Zealand, Justice Stevens noted that, “[w]hen we interpret treaties, we consider the interpretations of the other courts of other nations, and we should do the same when Congress asks us to interpret a statute in light of a treaty’s language.”²¹ Justice Stevens’s opinion is starting to gain some traction in U.S. asylum law.²²

Scholars and advocates have been trying hard to relegitimize an internationalist approach and especially to reverse the BIA’s undermining of *Acosta*’s interpretation of the PSG ground of asylum. We academics and practitioners in the field of refugee law thank Justice Ginsburg for taking leadership in legitimizing the role of comparative and international law in our national context.

line of recent Supreme Court precedent misconstruing international treaties.”). Since *Haitian Centers Council*, some have said that due to the United States’ refusal to apply the *non-refoulement* principle in international waters, the principle has broken down. For example, the Australian government and the Italian government have both recently refused to admit certain refugees in violation of the principle of *non-refoulement*. In 2011 the High Court of Australia and in 2012 the European Court of Human Rights struck down these actions by the Australian government and Italian government, respectively, but Australia most notably has continued the policy.

²⁰ 129 S. Ct. 1159 (2009).

²¹ *Id.* at 1175 (Stevens, J., concurring in part and dissenting in part).

²² See, e.g., ANKER, *supra* note 11, §§ 6:3–7.

JUSTICE GINSBURG'S INTERNATIONAL PERSPECTIVE

*Susan H. Farbstein**

The value of looking to international and comparative law, in particular on questions related to equality, is one important theme that emerges from Justice Ruth Bader Ginsburg's twenty years on the Supreme Court. This perspective dates to her career as a practicing attorney. The first matter she briefed to the Court, in 1971, included citations to two cases from the then-West German Constitutional Court.¹ Justice Ginsburg has said that she did not expect the Court would cite these cases in its opinion, but rather hoped that they might have "a positive psychological effect. If our Supreme Court noticed what the West German Constitutional Court was doing, the Justices might ponder: 'How far behind can we be?'"² Since that time, she has helped shape our — and the Court's — evolving notion of the place of international and foreign law in U.S. jurisprudence. Her years on the Court have been marked by its growing attentiveness to legal developments around the world, as well as a recognition that the United States should keep pace with these changes.

While always cognizant of the fact that only U.S. law provides a binding precedent for the Court, Justice Ginsburg has provided a crucial voice for looking beyond our borders to "add to the store of knowledge relevant to the solution of trying questions."³ No decision of hers better embodies this approach than her concurring opinion in *Grutter v. Bollinger*.⁴ After being denied admission to the University of Michigan Law School, Barbara Grutter, a white woman, alleged

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¹ Brief for Appellant at 54–55, *Reed v. Reed*, 404 U.S. 71 (1971) (No. 70-4). The case involved an Idaho statute about who could administer a decedent's estate, which provided that "as between persons 'equally entitled to administer [a decedent's estate], males must be preferred to females.'" *Id.* at 5 (quoting IDAHO CODE ANN. § 15-314 (1948) (repealed 1971)). Then-attorney Ginsburg cited two cases in which the West German Constitutional Court held similar laws unconstitutional. The first involved a provision of the German civil code providing that when parents disagree about the raising of a child, the father decides. The other preferred sons over daughters in land inheritance. *Id.* at 55.

² *A Conversation with Justice Ruth Bader Ginsburg*, 53 U. KAN. L. REV. 957, 961 (2005).

³ Justice Ruth Bader Ginsburg, Address at the International Academy of Comparative Law, American University: "A Decent Respect to the Opinions of [Human]kind": The Value of a Comparative Perspective in Constitutional Adjudication (July 30, 2010) [hereinafter Address at the International Academy of Comparative Law], available at http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?Filename=sp_08-02-10.html.

⁴ 539 U.S. 306 (2003).

that she had been discriminated against on the basis of her race and sued to challenge the validity of the school's affirmative action admissions program.⁵ The Court found that the admissions process did not violate the Fourteenth Amendment's equal protection guarantee, and that diversity was a sufficiently compelling interest to permit the consideration of race as practiced by the law school's admissions program.⁶

In her concurring opinion in *Grutter*, Justice Ginsburg relied upon international human rights law, and in particular upon two United Nations Conventions, to support her conclusions. Citing the International Convention on the Elimination of All Forms of Racial Discrimination,⁷ she noted that:

The Court's observation that race-conscious programs "must have a logical end point," accords with the international understanding . . . of affirmative action. The International Convention on the Elimination of All Forms of Racial Discrimination, ratified by the United States in 1994 . . . instructs [that affirmative action measures] "shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved."⁸

Relying further on the Convention on the Elimination of All Forms of Discrimination Against Women,⁹ she noted that affirmative action programs are permissible but must be temporary measures limited to the length of time required to achieve *de facto* equality.¹⁰ In addition, her dissenting opinion in the companion case of *Gratz v. Bollinger*¹¹ referenced her use of international law in *Grutter*. Differentiating between invidious and remedial discrimination, she stated that "[c]ontemporary human rights documents draw just this line; they distinguish between policies of oppression and measures designed to accelerate *de facto* equality."¹²

Justice Ginsburg had been thinking about affirmative action through an international human rights lens long before these cases reached the Court. In a 1999 speech, she noted that affirmative action, both in the United States and abroad, is anchored in the Universal

⁵ *Id.* at 316–17.

⁶ *Id.* at 343.

⁷ *Opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969).

⁸ *Grutter*, 539 U.S. at 344 (Ginsburg, J., concurring) (citation omitted) (first quoting *Grutter*, 539 U.S. at 342 (majority opinion), then quoting International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 7, art. 2(2)).

⁹ *Adopted* Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981).

¹⁰ *Grutter*, 539 U.S. at 344 (Ginsburg, J., concurring).

¹¹ 539 U.S. 244 (2003).

¹² *Id.* at 302 (Ginsburg, J., dissenting).

Declaration of Human Rights¹³ — and appropriately so, given that both affirmative action and the Declaration itself stand at the intersection of the civil/political and economic/social rights regimes. She described how affirmative action programs aim to redress historic and continuing denials of the right to equality, as well as to advance the economic and social well-being of groups disproportionately impacted by poverty, lack of quality education and health care, or unemployment. Reading the Declaration in conjunction with the two associated Conventions that she would later cite in *Grutter*, she stated that the documents “indicate[] that affirmative action is not necessarily at odds with human rights principles, but may draw force from them, in particular, from the prescriptions on equality coupled with provisions on economic and social well-being.”¹⁴ Indeed, the Declaration’s social welfare theme aligns with the idea that a diverse student body could enrich the educational experience of all students. Article 26 states that public education “shall be directed” to “promot[ing] understanding, tolerance, and friendship among all nations, racial or religious groups.”¹⁵ As Justice Ginsburg explained, “Affirmative action so directed might break down more barriers than it raises by enabling members of diverse groups to share in the everyday business of living, working, and learning together.”¹⁶

Justice Ginsburg’s public lectures have championed the practice of looking beyond our borders for guidance: “The U.S. judicial system will be the poorer, I have urged, if we do not both share our experience with, and learn from, legal systems with values and a commitment to democracy similar to our own.”¹⁷ She respects international instruments and the legal judgment of those outside our country, noting that:

Judges in the United States are free to consult all manner of commentary — Restatements, Treatises, what law professors or even law students write copiously in law reviews . . . [W]hy not the analysis of a question similar to one we confront contained in an opinion of the Supreme Court of Canada, the Constitutional Court of South Africa, the German Constitutional Court, or the European Court of Human Rights?¹⁸

¹³ Ruth Bader Ginsburg & Deborah Jones Merritt, Fifty-First Cardozo Memorial Lecture, *Affirmative Action: An International Human Rights Doctrine*, 21 CARDOZO L. REV. 253, 255–58 (1999) [hereinafter Fifty-First Cardozo Memorial Lecture].

¹⁴ *Id.* at 261.

¹⁵ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), art. 26(2) (Dec. 10, 1948).

¹⁶ Fifty-First Cardozo Memorial Lecture, *supra* note 13, at 266.

¹⁷ Address at the International Academy of Comparative Law, *supra* note 3.

¹⁸ Justice Ruth Bader Ginsburg, Speech at the Constitutional Court of South Africa: “A Decent Respect to the Opinions of [Human]kind”: The Value of a Comparative Perspective in Constitutional Adjudication (Feb. 7, 2006), available at http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?Filename=sp_02-07b-06.html.

American attorneys working on human rights issues, whether in the United States or abroad, find her willingness to consider the practices and logic of the international community especially valuable. As Justice Ginsburg herself has noted, this approach aligns with our history.¹⁹ The Framers of our Constitution understood that the country would be bound by international law and granted Congress the authority “[t]o define and punish . . . Offences against the Law of Nations.”²⁰ Our first Chief Justice, John Jay, wrote that “by taking a place among the nations of the earth, [the United States had] become amenable to the laws of nations.”²¹ In *The Paquete Habana*,²² the Supreme Court famously explained that “[i]nternational law is part of our law.”²³

Just as importantly, however, this approach signals our humility, reinforces the value of consultation and comparative dialogue, and recognizes that we have much to learn from others’ innovations as we continue to work together against common injustices. As Justice Ginsburg has so eloquently stated:

[C]omparative analysis emphatically *is* relevant to the task of interpreting constitutions and enforcing human rights. We are the losers if we neglect what others can tell us about endeavors to eradicate bias against women, minorities, and other disadvantaged groups. For irrational prejudice and rank discrimination are infectious in our world. In this reality, as well as the determination to counter it, we all share.²⁴

¹⁹ See Address at the International Academy of Comparative Law, *supra* note 3.

²⁰ U.S. CONST. art. I, § 8, cl. 10.

²¹ *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 474 (1793) (opinion of Jay, C.J.).

²² 175 U.S. 677 (1900).

²³ *Id.* at 700.

²⁴ Fifty-First Cardozo Memorial Lecture, *supra* note 13, at 282.

DISSENTING IN GENERAL:
HERRING v. UNITED STATES, IN PARTICULAR

*Judge Nancy Gertner**

One can describe Justice Ginsburg as a reluctant dissenter. She agrees with Chief Justice Roberts that the Supreme Court provides clearer guidance and its opinions receive more deference when they are unanimous. When deciding whether to write separately, she asks, “Is this dissent or concurrence really necessary?”¹ “Really necessary” dissents would include not only those that force the majority to improve their opinion,² or those that could well become a majority opinion after drafts are exchanged. They involve dissents that have implications beyond the case at hand, and even beyond the court audience. A dissent, she said, can be “an appeal . . . to the intelligence of a future day, when a later decision may possibly correct the error.”³ Beyond the canonically famous dissents, Justice Ginsburg pointed to Justice Breyer’s dissent in *Parents Involved in Community Schools v. Seattle School District No. 1*⁴ and the dissents in *District of Columbia v. Heller*⁵ as those that appeal to posterity. Equally important, some dissents can garner publicity and create pressure for legislative change. As an example, Justice Ginsburg identified her dissent in *Ledbetter v. Goodyear Tire & Rubber Co.*,⁶ which resulted in legislative change in 2009.⁷ In the final analysis, Justice Ginsburg expressed hope that her dissents will be stronger because she had the wisdom to “choos[e] [her] ground.”⁸

Given this philosophy, Justice Ginsburg’s dissent in *Herring v. United States*,⁹ on the surface a garden-variety Fourth Amendment exclusionary rule case, takes on special resonance. In *Herring*, a police officer, suspicious of the defendant, who was seeking to gather something from his impounded truck, requested a warrant check. The of-

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¹ Ruth Bader Ginsburg, Lecture, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 1, 3 (2010).

² For example, Justice Ginsburg credits Justice Scalia’s dissent in *United States v. Virginia*, 518 U.S. 515 (1996), with making her opinion for the Court better. Ginsburg, *supra* note 1, at 3.

³ Ginsburg, *supra* note 1, at 4 (alteration in original) (quoting Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 144 (1990) (quoting CHARLES EVANS HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 68 (1936))).

⁴ 551 U.S. 701 (2007).

⁵ 554 U.S. 570 (2008).

⁶ 550 U.S. 618 (2007).

⁷ See Ginsburg, *supra* note 1, at 5–6.

⁸ Ginsburg, *supra* note 1, at 8.

⁹ 129 S. Ct. 695 (2009).

ficer was told that the computer database in the sheriff's department of a neighboring county showed an active warrant for Herring's arrest. The report was in fact in error; the computer database was at odds with the physical records in the same office. The warrant had been recalled some five months before and was corrected only minutes after Herring was arrested and a search incident to that arrest found an illegal firearm and drugs. That Herring's arrest violated his Fourth Amendment rights was uncontested; the only issue was whether the evidence the police obtained through the unlawful search should have been suppressed.¹⁰

The majority in *Herring* held exclusion was not warranted because the police error "was the result of isolated negligence attenuated from the arrest."¹¹ Consider the concepts: Not only was "negligent" police conduct protected from exclusion, but so too was negligent police conduct that was "isolated" and "attenuated." Trivializing the misconduct, the Court held that it did not implicate the "core concerns" of the Fourth Amendment, as did the earlier exclusionary rule cases which involved flagrant police misconduct.¹² When the police behave only negligently, the Court reasoned, deterrence made no sense. Applying a cost-benefit analysis, and concluding that the costs of exclusion far outweighed its benefits, the Court rejected exclusion.¹³

While the Fourth Amendment exclusionary rule had been narrowed in a host of prior Supreme Court decisions, to Justice Ginsburg, the majority's opinion went too far. A dissent — and a particularly forceful one — was warranted, although clearly not in the hopes of improving the majority's decision or supplanting it. That was unlikely. This was a dissent for posterity — a call to future courts to undo what the majority had done. First, Justice Ginsburg refocused the inquiry on a "more majestic conception" of the Fourth Amendment and its adjunct, the exclusionary rule,¹⁴ as a constraint on the sovereign, and as essential to protecting the integrity of the Court. Indeed, the dissent was buttressed not only by the early suppression cases, like *Mapp v. Ohio*,¹⁵ but also the legendary dissents of Justices Holmes and Brandeis in *Olmstead v. United States*¹⁶ and Justice Brennan in *United States v. Calandra*.¹⁷

¹⁰ See *id.* at 698–99.

¹¹ *Id.* at 698.

¹² *Id.* at 702.

¹³ See *id.* at 703–04.

¹⁴ *Id.* at 707 (Ginsburg, J., dissenting) (quoting *Arizona v. Evans*, 514 U.S. 1, 18 (1995) (Stevens, J., dissenting)).

¹⁵ 367 U.S. 643 (1961).

¹⁶ 277 U.S. 438 (1928).

¹⁷ 414 U.S. 338 (1974).

And then Justice Ginsburg, meeting the majority's decision on its own terms, deconstructed its "cost-benefit" analysis. First, the contention that the exclusionary rule addresses only conduct that is intentional or reckless, not merely negligent, is fundamentally inconsistent with the very premise of tort law that liability for negligence creates an incentive to act with greater care.¹⁸ And such a test narrowed the exclusionary rule to virtually unprovable conduct — reckless or deliberate misconduct on the part of police, and negligent conduct that is not just "isolated" or "attenuated."

Second, this narrowing is particularly troubling in modern police forces with computerized databases. Attentive to the future cases that were sure to come and to future technologies, Justice Ginsburg noted that "[i]naccuracies in expansive, interconnected collections of electronic information raise grave concerns for individual liberty."¹⁹ Finally, the costs here were minimal, not the cost of letting the prisoner go free as the majority touted, echoing then-Judge Cardozo's famous critique of the exclusionary rule ("The criminal is to go free because the constable has blundered."²⁰). Rather, the costs were the costs of compliance, of creating incentives to check the database for accuracy, which was no less critical when the issue was the misconduct of bureaucrats who were just not paying attention.

To be sure, Justice Ginsburg's critique could well have been even more pointed. Fourth Amendment scholar Wayne R. Lafave compared the *Herring* decision to a "*surströmming*, which (as any Swede can tell you) is touted as a 'delicacy' but is actually attended by both a loathsome smell that 'grows progressively stronger' and a dangerous capacity to 'explode' beyond its existing boundaries."²¹ The majority's position enabled the police to evade the exclusionary rule when one officer in good faith relied on another officer's bad faith, hiding behind the bureaucracy rather than holding "the police" accountable as an entity. Moreover, this was the first exclusionary rule case, as the petitioner argued, where the Court excused police failure, not the failure of other actors in the criminal justice system.²² And, rather than creating a bright line, it encouraged litigation in the lower federal courts about when negligent conduct is "attenuated" or "isolated" and when it is not.²³

¹⁸ See *Herring*, 129 S. Ct. at 708 (Ginsburg, J., dissenting).

¹⁹ *Id.* at 709.

²⁰ *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926).

²¹ Wayne R. Lafave, Recent Development, *The Smell of Herring: A Critique of the Supreme Court's Latest Assault on the Exclusionary Rule*, 99 J. CRIM. L. & CRIMINOLOGY 757, 758 (2009) (quoting Bob Brooke, *Surstromming: One of the World's Strangest Dishes*, ALL SCANDINAVIA, <http://www.allscandinavia.com/surstromming.htm> (last visited Sept. 29, 2013)).

²² See Brief for Petitioner at 24, *Herring*, 129 S. Ct. 695 (No. 07-513).

²³ See, e.g., *United States v. Julius*, 610 F.3d 60, 67 (2d Cir. 2010) (remanding case for consideration of whether *Herring*'s cost-benefit analysis justified suppression).

But, without name calling — maligning the poor “*surströmming*” — the point was made. The dissent was really, *really* necessary, underscoring themes that would then be revisited in subsequent Supreme Court Terms, as the majority narrowed the Fourth Amendment’s exclusionary rule still further.²⁴

²⁴ See, e.g., *Davis v. United States*, 131 S. Ct. 2419, 2440 (2011) (Breyer, J., dissenting) (citing *Herring*, 129 S. Ct. at 707 (Ginsburg, J., dissenting)).

COURTING THE PEOPLE: DEMOSPRUDENCE
AND THE LAW/POLITICS DIVIDE

*Lani Guinier**

America's first black President signed his first major piece of legislation on January 29, 2009: the Lilly Ledbetter Fair Pay Act.¹ Since the Act carried Lilly Ledbetter's name, she fittingly stood beaming by President Obama's side during the signing ceremony.² For nineteen years, however, this seventy-year-old grandmother had less reason to be joyful, working in supervisory blue-collar jobs in a Goodyear Tire and Rubber plant in Gadsden, Alabama, and earning fifteen to forty percent less than her male counterparts. This pay gap, which resulted from receiving smaller raises than the men, "added up and multiplied" over the years.³ But Ledbetter did not discover the disparity until she was nearing retirement and "only started to get hard evidence of discrimination when someone anonymously left a piece of paper" in her mailbox listing the salaries of the men who held the same job.⁴ Ledbetter sued and a federal jury awarded her \$223,776 in back pay and more than \$3 million in punitive damages, finding that it was "more likely than not that [Goodyear] paid [Ledbetter] a[n] unequal salary because of her sex."⁵ The Supreme Court nullified that verdict. The five-Justice majority held that Ledbetter waived her right to sue by failing to file her complaint within 180 days of the first act of discrimination.⁶ In Ledbetter's words, the Court "sided with big busi-

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¹ Pub. L. No. 111-2, 123 Stat. 5 (2009) (amending scattered sections of 29 and 42 U.S.C.).

² See Richard Leiby, *A Signature with the First Lady's Hand in It*, WASH. POST, Jan. 30, 2009, at C1 ("It seemed to be all about Lilly Ledbetter at the White House yesterday — her name was enshrined in history, affixed to the first piece of legislation signed by President Obama.")

³ *Justice Denied? The Implications of the Supreme Court's Ledbetter v. Goodyear Employment Discrimination Decision: Hearing Before the H. Comm. on Educ. & Labor*, 110th Cong. 10 (2007) [hereinafter *Justice Denied?*] (statement of Lilly Ledbetter); see also Lilly Ledbetter, Address to the Democratic National Convention (Aug. 26, 2008) [hereinafter Ledbetter, Address], available at http://www.pbs.org/newshour/bb/politics/july-deco8/ledbetter_08-26.html.

⁴ *Justice Denied?*, *supra* note 3, at 10. Ledbetter's salary was \$3727 a month. The salary of the lowest-paid man, with far less seniority, was \$4286. *Id.* at 12.

⁵ Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 644 (2007) (Ginsburg, J., dissenting) (alterations in original) (quoting trial court) (internal quotation marks omitted).

⁶ *Id.* at 621 (majority opinion).

ness. They said I should have filed my complaint within six months of Goodyear's first decision to pay me less, even though I didn't know that's what they were doing."⁷ By contrast, the Lilly Ledbetter Fair Pay Act sided with ordinary working women across the nation.

Justice Ruth Bader Ginsburg, on behalf of herself and three colleagues, dissented from the Court's May 2007 decision.⁸ A leading litigator and advocate for women's equality before taking her seat on the Court,⁹ Justice Ginsburg read her dissent aloud from the bench — an act that, in her own words, reflects “more than ordinary disagreement.”¹⁰ Her oral dissent, which made the front page of the *Washington Post*,¹¹ signaled that something had gone “egregiously wrong.”¹² In a stinging rebuke to the Court majority, she used the personal pronoun, speaking not to her colleagues but directly to the other “you's” in her audience — women who, despite suspecting something askew in their own jobs, were reluctant to rock the boat as the only women in otherwise all-male positions:

Indeed initially you may not know the men are receiving more for substantially similar work. . . . If you sue only when the pay disparity becomes steady and large enough to enable you to mount a winnable case, you will be cut off at the Court's threshold for suing too late.¹³

Justice Ginsburg's dissent reflected an acute sense, missing from the majority's opinion, of the circumstances surrounding women in

⁷ Ledbetter, Address, *supra* note 3; see also *Justice Denied?*, *supra* note 3, at 10.

⁸ *Ledbetter*, 550 U.S. at 643 (Ginsburg, J., dissenting).

⁹ In an interview with the ACLU, Ginsburg's cocounsel described the first case Ginsburg argued before the Court: “I've never heard an oral argument as unbelievably cogent as hers. . . . Not a single Justice asked a single question; I think they were mesmerized by her.” *Tribute: The Legacy of Ruth Bader Ginsburg and WRP Staff*, ACLU (Mar. 7, 2006), <http://www.aclu.org/womensrights/gen/24412pub20060307.html>.

¹⁰ Justice Ruth Bader Ginsburg, The 20th Annual Leo and Berry Eizenstat Memorial Lecture: The Role of Dissenting Opinions (Oct. 21, 2007) [hereinafter Ginsburg, Eizenstat Lecture], available at http://www.supremecourt.gov/publicinfo/speeches/sp_10-21-07.html.

¹¹ Robert Barnes, *Over Ginsburg's Dissent, Court Limits Bias Suits*, WASH. POST, May 30, 2007, at A1 (“Speaking for the three other dissenting justices, Ginsburg's voice was as precise and emotionless as if she were reading a banking decision, but the words were stinging.”). Barnes noted that Justice Ginsburg's oral dissent was a “usually rare practice that she has now employed twice in the past six weeks to criticize the majority for opinions that she said undermine women's rights.” *Id.*

¹² Justice Ruth Bader Ginsburg, Celebration Fifty-Five: A Public Conversation Between Dean Elena Kagan '86 and Justice Ruth Bader Ginsburg '56-'58 at the Harvard Law School Women's Leadership Summit (Sept. 20, 2008) (from notes taken by and on file with author) [hereinafter Ginsburg, Leadership Summit]; see also Ginsburg, Eizenstat Lecture, *supra* note 10 (“A dissent presented orally . . . garners immediate attention. It signals that, in the dissenters' view, the Court's opinion is not just wrong, but importantly and grievously misguided.”).

¹³ Oral Dissent of Justice Ginsburg at 4:25–:51, *Ledbetter*, 550 U.S. 618 (No. 05-1074), available at http://www.oyez.org/cases/2000-2009/2006/2006_05_1074#opinion; see also Lani Guinier, *The Supreme Court, 2007 Term — Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 40–41 (2008).

male-dominated workplaces. In a job previously filled only by men, women “understandably may be anxious to avoid making waves.”¹⁴

Justice Ginsburg was *courting* the people.¹⁵ Her oral dissent and subsequent remarks hinted at a democratizing form of judicial speech that, were it heard, could be easily understood by those outside the courtroom.¹⁶ By speaking colloquially — using the personal pronoun “you” to address her audience — Justice Ginsburg signaled to ordinary women that the majority should not have the last word on the meaning of pay discrimination. Her goal was to engage an external audience in a conversation about our country’s commitment to equal pay for equal work.¹⁷

While Justice Ginsburg spoke frankly to and about the Lilly Ledbetters of the world, her real target was the legislature. Appalled by the Court’s “cramped interpretation” of a congressional statute to justify its decision nullifying the favorable jury verdict, Justice Ginsburg explicitly stated that the “ball again lies in Congress’s court.”¹⁸ During a public conversation in September 2008, then-Harvard Law School Dean Elena Kagan asked Justice Ginsburg to describe her intended audience in *Ledbetter*. Ginsburg replied: “[I]t was Congress. Speaking to Congress, I said, ‘You did not mean what the Court said. So fix it.’”¹⁹

Democrats in Congress responded quickly. Initially called the Fair Pay Restoration Act, the House-passed bill would have eliminated the Court-sanctioned time limit.²⁰ That bill, however, died in the Senate, where Republicans — including Senator John McCain — publicly denounced it.²¹

As the initial Fair Pay Restoration Act languished in Congress, Lilly Ledbetter emerged as a real presence in the 2008 election cam-

¹⁴ Oral Dissent of Justice Ginsburg, *supra* note 13, at 8:30–37; *see also* Guinier, *supra* note 13, at 41.

¹⁵ By “courting” I mean enlisting or inspiring rather than wooing or currying favor with.

¹⁶ Guinier, *supra* note 13, at 40.

¹⁷ Cf. Timothy R. Johnson, Ryan C. Black & Eve M. Ringsmuth, *Hear Me Roar: What Provokes Supreme Court Justices to Dissent from the Bench?*, 92 MINN. L. REV. 1560, 1579–81 (2009) (finding that Supreme Court Justices use their oral dissents strategically to signal strong disagreement as well as the need for action by third parties to change the majority decision). As is her practice, Justice Ginsburg handed out her bench announcement right after the delivery of her oral dissent. The press release-style opening paragraphs in her opinions are intended to help reporters under tight deadlines get it right.

¹⁸ Oral Dissent of Justice Ginsburg, *supra* note 13, at 10:17–58; *see also* Guinier, *supra* note 13, at 41 n.179.

¹⁹ Ginsburg, Leadership Summit, *supra* note 12.

²⁰ H.R. 2831, 110th Cong. (2007).

²¹ The initial bill passed the House in July 2007 but never came up for a vote in the Senate. *H.R. 2831: Lilly Ledbetter Fair Pay Act of 2007*, GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=h110-2831> (last visited Sept. 11, 2013); *see also* Carl Hulse, *Republican Senators Block Pay Discrimination Measure*, N.Y. TIMES, Apr. 24, 2008, at A22.

paign.²² Despite her initial misgivings about partisan campaigning, she was infuriated by John McCain's refusal to support a congressional fix. She cut an ad²³ for Barack Obama that had a "stratospheric effect" when poll-tested by Fox News's political consultant Frank Luntz.²⁴ In August 2008, Ledbetter was a featured speaker at the Democratic National Convention in Denver.²⁵ There, as well as in her testimony before Congress, she acknowledged the significance of Justice Ginsburg's dissent both in affirming her concerns and in directing attention to a legislative remedy.²⁶

In her testimony before Congress, for example, Ledbetter echoed Justice Ginsburg's emphasis on the isolation many women feel when they first integrate the workplace.²⁷ Both Ledbetter and Justice Ginsburg used the pronoun "you" to speak directly to other women. At the same time that Ledbetter's story animated Justice Ginsburg's dissent, Justice Ginsburg's dissent amplified Ledbetter's own voice. Suitably emboldened, this Alabama grandmother went before Congress to speak directly to women about their shared fears of making waves in a male-dominated environment:

Justice Ginsburg hit the nail on the head when she said that the majority's rule just doesn't make sense in the real world. You can't expect people to go around asking their coworkers how much they are making.

Plus, even if you know some people are getting paid a little more than you, that is no reason to suspect discrimination right away. Especially when you work at a place like I did, where you are the only woman in a male-dominated factory, you don't want to make waves unnecessarily. You want to try to fit in and get along.²⁸

Justice Ginsburg also continued to engage in an unusually public discourse about the *Ledbetter* case and her role as an oral dissenter. In an October 2007 speech posted on the Supreme Court website, she parodied the majority's reasoning: "'Sue early on,' the majority counseled, when it is uncertain whether discrimination accounts for the pay disparity you are beginning to experience, and when you may not

²² *Morning Edition: Fair Pay Law Strikes a Blow for Equal Pay* 2:30, 4:07 (National Public Radio broadcast Jan. 29, 2009), available at <http://www.npr.org/templates/story/story.php?storyId=99995431> (describing Ledbetter's prominent role and reporting that Ledbetter's husband, a retired National Guard Sergeant Major, voted for a Democratic President for the first time in fifty years when he cast his ballot for Barack Obama).

²³ In the ad, Ledbetter says, "John McCain opposed a law to give women equal pay for equal work. And he dismissed the wage gap, saying women just need education and training. I had the same skills as the men at my plant. My family needed that money." *Id.* at 2:44-58.

²⁴ *Id.* at 3:07-18.

²⁵ Ledbetter, Address, *supra* note 3.

²⁶ *Justice Denied?*, *supra* note 3, at 10.

²⁷ *Id.* at 11.

²⁸ *Id.* at 10; see also Ledbetter v. Goodyear Equal Pay Hearing: Lilly Ledbetter, YOUTUBE (June 14, 2007), <http://www.youtube.com/watch?v=jRpYoUu5XH0>.

know that men are receiving more for the same work. (Of course, you will likely lose such a less-than-fully baked case.)”²⁹ As reframed by Justice Ginsburg, Ledbetter’s story was not about a negligent plaintiff who waited an unconscionably long time to sue; it was about an ordinary woman struggling to comprehend and eventually document the pay disparities in her all-male work environment. Justice Ginsburg frankly acknowledged the zigzag trajectory of change, especially given the real-world employment challenges such a woman faces. In “propel[ling] change,” her oral dissent had to “sound an alarm” that would be heard by members of Congress, Lilly Ledbetter, and women’s rights advocates more generally.³⁰ Her dissent had “to attract immediate public attention.”³¹

Eventually social activists, legal advocacy groups, media translators, legislators, and “role-literate participants” (in Reva Siegel’s terminology)³² not only heard but acted upon the alarm bells Justice Ginsburg sounded. Marcia Greenberger of the National Women’s Law Center was one of those “role-literate participants” who helped carry Justice Ginsburg’s message forward. Greenberger characterized Justice Ginsburg’s oral dissent as a “clarion call to the American people . . . that the court is headed in the wrong direction.”³³ Lilly Ledbetter became another such participant as her story, with Justice Ginsburg’s assistance, helped ground and frame the discourse.³⁴ And

²⁹ Ginsburg, Eizenstat Lecture, *supra* note 10, at 6.

³⁰ *Id.* Justice Ginsburg’s willingness to participate in a more expansive conversation is not entirely unexpected, given her view that conversation should run both ways. “If we don’t listen we won’t be listened to.” Ginsburg, Leadership Summit, *supra* note 12.

³¹ Ginsburg, Eizenstat Lecture, *supra* note 10; *see also* Johnson, Black & Ringsmuth, *supra* note 17, at 1581.

³² Guinier, *supra* note 13, at 51 (internal quotation marks omitted); *see also* Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1339–48 (2006).

³³ *Ginsburg’s Famous White Gloves Finally Come Off*, MOTHER JONES (May 31, 2007, 22:19 PST), http://www.motherjones.com/mojoblog/archives/2007/05/4556_ginsburgs_famou.html (alteration in original) (quoting Marcia Greenberger) (internal quotation marks omitted).

³⁴ Justice Ginsburg’s dissent and Lilly Ledbetter’s public statements converge on a common explanation for Ledbetter’s delay in filing her lawsuit, an explanation that influenced both the media coverage and the Obama campaign’s framing of the case. *See, e.g.*, Adam Liptak, *Justices Hear Bias Case on Maternity, Pensions, and Timing*, N.Y. TIMES, Dec. 11, 2008, at B7; 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>. Their mutually reinforcing explanation for Ledbetter’s delay in filing her lawsuit, their joint outreach to Congress, and their success in sparking favorable media coverage of the new legislation became key talking points on conservative blogs. *See, e.g.*, Hans Bader, *Distorting the News, to Obama’s Advantage: Ledbetter v. Goodyear and the Lilly Ledbetter Fair Pay Act*, OPENMARKET.ORG (Mar. 4, 2009), <http://www.openmarket.org/2009/03/04/distorting-the-news-to-obamas-advantage>; Orin Kerr, *Justice Ginsburg Urges Congressional Action Once Again*, VOLOKH CONSPIRACY (Mar. 9, 2009), <http://volokh.com/posts/1236629897.shtml>; Ed Whelan, *More of Justice Ginsburg’s Political Activism*, NAT’L REV. ONLINE (Mar. 9, 2009), <http://www.nationalreview.com/bench-memos/50407>

for the first time in more than a decade, Congress pushed back against the Supreme Court. In January 2009, Lilly Ledbetter's name was enshrined in history when Congress passed and President Barack Obama signed the Lilly Ledbetter Fair Pay Act.³⁵

In her *Ledbetter* dissent and subsequent remarks, Justice Ginsburg was courting the people to reverse the decision of a Supreme Court majority and thereby limit its effect. In Robert Cover's "jurisgenerative" sense,³⁶ she claimed a space for citizens to advance alternative interpretations of the law. Her oral dissent and public remarks represented a set of *demosprudential* practices for instantiating and reinforcing the relationship between public engagement and institutional legitimacy.

In Justice Ginsburg's oral dissent we see the possibilities of a more democratically oriented jurisprudence, or what Gerald Torres and I term *demosprudence*.³⁷ *Demosprudence* builds on the idea that lawmaking is a collaborative enterprise between formal elites — whether judges, legislators, or lawyers — and ordinary people. The foundational hypothesis of *demosprudence* is that the wisdom of the people should inform the lawmaking enterprise in a democracy. From a *demosprudential* perspective, the Court gains a new source of democratic authority when its members engage ordinary people in a productive dialogue about the potential role of "We the People" in lawmaking.³⁸

Demosprudence is a term Professor Torres and I initially coined to describe the process of making and interpreting law from an external — not just internal — perspective. That perspective emphasizes the role of informal democratic mobilizations and wide-ranging social movements that serve to make formal institutions, including those that regulate legal culture, more democratic.³⁹ *Demosprudence* focuses on

/more-justice-ginsburgs-political-activism/ed-whelan. Indeed, Lilly Ledbetter soon came to symbolize a populist message. Ledbetter not only was present at the signing ceremony for the bill named in her honor, but also sat with First Lady Michelle Obama during President Obama's first address to a joint session of Congress. Michael Falcone, *Guests of the First Lady, Reflecting Main Themes of the Speech*, N.Y. TIMES, Feb. 25, 2009, at A16.

³⁵ The Act passed the Senate with "Yea" votes from every present Democrat and all four female Republicans. See 155 CONG. REC. 1400-01 (2009).

³⁶ See generally Robert M. Cover, *The Supreme Court, 1981 Term — Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983) (conceptualizing the law as normative in nature).

³⁷ See Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Social Movements*, 123 YALE L.J. (forthcoming 2014) (manuscript at 1).

³⁸ Guinier, *supra* note 13, at 48 ("The *demosprudential intuition* is that democracies, at their best, make and interpret law by expanding, informing, inspiring, and interacting with the community of consent, a community in constitutional terms better known as 'we the people.'").

³⁹ See, e.g., Guinier & Torres, *supra* note 37 (manuscript at 1). Torres and I explain:

We coin the term *demosprudence* . . . as a critique of lawmaking that is historically preoccupied with moments of social change as if they occur primarily within an elite enterprise. *Demosprudence* is a philosophy, a methodology, and a practice that views lawmaking from the perspective of informal democratic mobilizations and disruptive so-

the ways that “the demos” (especially through social movements) can contribute to the meaning of law.

Justice Ginsburg acted demosprudentially when she invited a wider audience into the conversation about one of the core conflicts at the heart of our democracy.⁴⁰ She grounded her oral dissent and her public remarks in a set of demosprudential practices that linked public engagement with institutional legitimacy. Those practices are part of a larger demosprudential claim: that the Constitution belongs to the people, not just to the Supreme Court.

The dissenting opinions, especially the oral dissents, of Justice Ginsburg and other members of the Court are the subject of my 2008 Supreme Court foreword, *Demosprudence Through Dissent*.⁴¹ The foreword was addressed to judges, especially those speaking out in dissent, urging them to “engage dialogically with nonjudicial actors and to encourage them to act democratically.”⁴² The foreword focuses on oral dissents because of the special power of the spoken word, but Justices can issue demosprudential concurrences and even majority opinions, written as well as spoken.⁴³ Moreover, true to its origins, demosprudence is not limited to reconceptualizing the judicial role. Lawyers and nonlawyers alike can be demosprudential, a claim that I foreshadow in the foreword and which Torres and I are developing in other work on law and social movements.⁴⁴

Supreme Court Justices can play a democracy-enhancing role by expanding the audience for their opinions to include those unlearned in the law. Of the current Justices, Justice Antonin Scalia has a particular knack for attracting and holding the attention of a nonlegal audience. His dissents are “deliberate exercises in advocacy” that “chart new paths for changing the law.”⁴⁵ Just as Justice Ginsburg welcomed

cial movements that serve to make formal institutions, including those that regulate legal culture, more democratic. Although democratic accountability as a normative matter includes citizen mobilizations organized to influence a single election, a discrete piece of legislation, or a judicial victory, we focus here on democratic responsiveness to popular, purposive mobilizations that seek significant, sustainable social, economic, and/or political change. In this lecture, therefore, we discuss demosprudence primarily as the jurisprudence of social movements.

Id.

⁴⁰ See *id.* (manuscript at 14).

⁴¹ Guinier, *supra* note 13.

⁴² *Id.* at 50; see also *id.* at 10 (describing Justice Breyer’s passionate oral dissent in *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007), where he “hinted at a new genre of judicial speech” that could resonate with a less-educated audience were his oral dissent more widely distributed). Demosprudential dissents are those that (1) probe or question a particular understanding of democracy (2) using an accessible narrative style to (3) reach out to an external audience — beyond the other Justices or litigants in the case. *Id.* at 51, 90–92, 95–96.

⁴³ *Id.* at 52–56.

⁴⁴ *Id.* at 102–07, 113 & nn.517–18.

⁴⁵ *Id.* at 110.

women's rights activists into the public sphere in response to the Court majority's decision in *Ledbetter*, Justice Scalia's dissents are often in conversation with a conservative constituency of accountability.⁴⁶ By writing dissents like these, both Justices have acknowledged that their audience is not just their colleagues or the litigants in the cases before them. Both exemplify the potential power of demosprudential dissents when the dissenter is aligned with a social movement or constituency that "mobilizes to change the meaning of the Constitution over time."⁴⁷ Thus, Justice Ginsburg speaks in her "clearest voice" when she addresses issues of gender equality.⁴⁸ Similarly, Justice Scalia effectively uses his originalist jurisprudence as "a language that a political movement can both understand and rally around."⁴⁹ Both Justices Ginsburg and Scalia are at their best as demosprudential dissenters when they encourage a "social movement to fight on."⁵⁰

Dean Robert Post reads my argument exactly right: "[C]ourts do not end democratic debate about the meaning of rights and law; they are participants within that debate."⁵¹ As Post explains, the "meaning of constitutional principles are forged within the cauldron of political debate," a debate in which judges are often important, though not necessarily central, actors.⁵² Law and politics are in continuous dialogue, and the goal of a demosprudential dissenter is to ensure that the views of a judicial majority do not preempt political dialogue. When Justice Ginsburg spoke in a voice more conversational than technical, she did more than declare her disagreement with the majority's holding. By vigorously speaking out during the opinion announcement, she also appealed to citizens in terms that laypersons could understand and to Congress directly.⁵³ This is demosprudence.

⁴⁶ See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting).

⁴⁷ Guinier, *supra* note 13, at 114.

⁴⁸ *Id.*

⁴⁹ *Id.*; see also Reva B. Siegel, *The Supreme Court, 2007 Term — Comment: Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 192 (2008).

⁵⁰ Guinier, *supra* note 13, at 112; see also Ginsburg, Eizenstat Lecture, *supra* note 10; cf. Siegel, *supra* note 49, at 196, 237–38.

⁵¹ Robert Post, *Law Professors and Political Scientists: Observations on the Law/Politics Distinction in the Guinier/Rosenberg Debate*, 89 B.U. L. REV. 581, 582 (2009).

⁵² *Id.*

⁵³ My claim in the foreword that Justices, not just Justice Ginsburg, use their oral dissents strategically to appeal to third parties is consistent with the findings of a recent study by several political scientists. See Johnson, Black & Ringsmuth, *supra* note 17, at 1579–81.

*LEE v. KEMNA: FEDERAL HABEAS CORPUS
AND STATE PROCEDURE*

*Vicki C. Jackson**

Many of the Supreme Court's cases involving the federal habeas claims of prisoners convicted in state court in the years since the Warren Court find that the prisoner's constitutional challenge cannot be heard on the merits for one or more threshold reasons, often of procedure. In academic debate, some argue that habeas corpus for state-court-convicted prisoners "cannot be justified as a case-by-case remedy for individual violations of federal constitutional rights."¹ *Lee v. Kemna*,² holding that a federal habeas petitioner's constitutional challenge to the basic fairness of his trial could and should be heard by the federal district court sitting on his federal habeas corpus petition, is a departure from the larger pattern. It is restorative of an understanding of federal habeas corpus as a valuable, if in some respects "redundant,"³ check on unconstitutional conduct leading to severe deprivations of human liberty; its reasoning is tempered by an appreciation of the importance, and the challenges, of judges exercising sound judgment in making and reviewing procedural decisions in criminal cases.

Charged with having participated in a first-degree murder in Kansas City in August 1992, Lee (at his state court trial) sought to present an alibi defense that he was in California at the time of the murder. Three members of Lee's family had come from California to testify that he had been visiting with them in California during this period. During his trial, which spanned only three days, there was considerable discussion of the alibi defense. The defendant's lawyer told the jury during voir dire, and again in his opening statement, that they would hear the defendant's alibi witnesses;⁴ an alibi charge was discussed by

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¹ Joseph L. Hoffmann & Nancy J. King, *Right Problem; Wrong Solution*, 1 CALIF. L. REV. CIRCUIT 49, 50 (2010), <http://www.californialawreview.org/assets/pdfs/Circuit/King31.pdf>.

² 534 U.S. 362 (2002).

³ On the idea of jurisdictional redundancy, see Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639 (1981). See also Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 840 (1984) (discussing "procedural redundancy").

⁴ During his opening statement to the jury,

defense counsel said three close family members would testify that Lee came to visit them in Ventura, California, in July 1992 and stayed through the end of October. Lee's mother and stepfather would say they picked him up from the airport at the start of his visit and returned him there at the end. Lee's sister would testify that Lee resided with

both counsel with the judge. On the third day of trial, the three family members were sequestered in a room at the courthouse first thing in the morning, and they were there at the morning recess. However, after the lunch recess they were not there and could not be located.

Following the lunch recess, Lee sought a brief adjournment to find his witnesses, who were under subpoena. Out of the presence of the jury, Lee testified that he had seen them in the courthouse that morning, first thing, and again at the morning recess, that he did not know where they were, and that he could not telephone his uncle's home because it had no phone; he also said that he believed the witnesses were in town because they had come to testify for him and had plans to engage in "some ministering" in town that evening.⁵ However, as the Court explained, "[t]he trial judge denied the motion, stating that it looked to him as though the witnesses had 'in effect abandoned the defendant' and that, for personal reasons [(his daughter's hospitalization)], he would 'not be able to be [in court the next day] to try the case.'"⁶ The trial court judge indicated that further delay would not be possible, because "he had 'another case set for trial' the next weekday."⁷ The trial resumed "without pause," and without the testimony of Lee's alibi witnesses.⁸ Both defense and prosecution referred to the absent witnesses in their closings; the jury convicted Lee after deliberating three hours, and he was sentenced to life.⁹

Lee's motion for a new trial and his motion for post-conviction relief on this issue in the state courts were denied (the post-conviction court concluding that such trial errors were reviewable only on direct appeal).¹⁰ On his consolidated appeals, the Missouri appellate courts refused to address the merits of his federal constitutional claim that the court's failure to allow time to find the witnesses deprived him of his constitutional due process rights.¹¹ The state appellate courts relied, not on the reasons stated by the trial judge, but on two rules of procedure requiring that motions for continuance be made in writing and that they contain representations (for example, about what the missing witnesses would say and the defendant's diligence in his ef-

her and her four children during this time. All three would affirm that they saw Lee regularly throughout his unbroken sojourn.

Lee v. Kemna, 534 U.S. at 367-68.

⁵ *Id.* at 369 (quoting Joint Appendix at 18, Lee v. Kemna, 534 U.S. 362 (No. 00-6933)).

⁶ *Id.* at 365-66 (third alteration in original) (quoting Joint Appendix, *supra* note 5, at 22).

⁷ *Id.* at 366 (quoting Joint Appendix, *supra* note 5, at 22).

⁸ *Id.*

⁹ *Id.* at 370-71.

¹⁰ *Id.* at 371.

¹¹ *Id.* at 371-73.

forts to procure their testimony), which Lee, the appellate court said, had not complied with.¹²

The federal district court, to which Lee turned for federal habeas relief after exhausting his state court remedies, held that the state court's judgment rested on an independent and adequate procedural ground barring review in habeas corpus.¹³ The Eighth Circuit affirmed in a very brief per curiam opinion, finding that Lee had procedurally defaulted his claim.¹⁴ Chief District Judge Mark Bennett, sitting by designation, wrote a substantial dissent.¹⁵

Justice Ginsburg's opinion for the Court agreed with Chief Judge Bennett's dissent that the state court judgment did not rest on an adequate state procedural ground.¹⁶ The case was remanded for a merits decision on the habeas corpus petition in the federal district court.¹⁷ After reviewing the alibi witnesses' testimony in videotaped depositions, the district judge granted the writ of habeas corpus, vacating the conviction.¹⁸ The district judge (the same judge who had previously denied Lee's habeas corpus petition) concluded, in a reasoned opinion, that "a recess was required by due process, on the record as articulated, and that petitioner had and has three generally credible witnesses for an alibi defense."¹⁹

Justice Ginsburg's opinion for the Court in *Lee v. Kemna* is one I have always enjoyed teaching in Federal Courts, for four reasons.

First, *Lee v. Kemna* belies the idea that cases meriting Supreme Court review will necessarily arrive with all the "bells and whistles" of a major public law dispute. No experienced Supreme Court litigators sought certiorari here; nor was there an obvious circuit conflict. The Eighth Circuit had written a very brief per curiam affirmance of the district court's dismissal of the habeas petition, notwithstanding a long, and strong, dissent by a district court judge sitting by designation. And petitioner Lee was able to obtain justice at the Supreme Court despite having to represent himself at numerous critical stages,

¹² *Id.* at 372–73.

¹³ *Id.* at 374. The district court also held at that time that affidavits from the three witnesses could not be considered because they had not been offered to the state courts. *Id.*

¹⁴ *Lee v. Kemna*, 213 F.3d 1037 (8th Cir. 2000).

¹⁵ *Id.* at 1039–49 (Bennett, D.J., dissenting).

¹⁶ *See Lee v. Kemna*, 534 U.S. at 381.

¹⁷ *Id.* at 387.

¹⁸ *Lee v. Kemna*, No. 98-0074-CV-W-HFS, 2004 U.S. Dist. LEXIS 13356, at *17 (W.D. Mo. July 8, 2004) (vacating and permanently setting aside the conviction and sentence unless a new trial was begun within ninety days).

¹⁹ *Id.*; *see also id.* at *12 ("Unlike some cases involving family witnesses, the three in this case testify in a very credible manner, and I doubt that a jury would view them as willful perjurers."). The district court also felt there were weaknesses and deficiencies in their testimony but that the jury could have been persuaded that Lee was in California at the time of the murder. *Id.* at *12, *15; *see also id.* at *2 (stating that the witnesses' depositions had been taken).

including in his petition for certiorari.²⁰ (As the Court noted, Lee also had to proceed pro se initially in his state post-conviction proceedings²¹ and again in filing his petition for habeas corpus relief in the federal district court.²²) The Supreme Court is both “supreme” and a “court.” As a “supreme” court, it necessarily cannot sit as a court of errors to correct all mistakes of federal law in the lower courts, state and federal; but as a “court,” hearing claims of serious injustice, even in an otherwise “small” case, it can appropriately affirm the link between justice and judging.

Second, the opinion illustrates the importance of the facts, and the impact of factual circumstances on individual behavior, in litigation (as elsewhere). One of the signal features of common law systems of adjudication has been a focus on the facts, and this closely reasoned opinion is well grounded in Justice Ginsburg’s evident respect for facts and the record. She wrote, for example, that the record revealed no support for the trial judge’s assumption that the witnesses, who had come from California, had simply abandoned the defendant.²³ The dissent, by contrast, hypothesized that the alibi witnesses might have had “second thoughts” about testifying and possibly committing perjury, in light, *inter alia*, of the prosecution’s evidence; the dissent also suggested that defense counsel had perhaps decided to abandon the alibi defense, fearing its collapse.²⁴ Justice Ginsburg rebutted both arguments by further considering the record and the “realities of trial.”²⁵ When these three witnesses were finally heard by a judge (two years after the Supreme Court’s decision), that federal district judge — who had previously denied relief — concluded that the witnesses were “very credible.”²⁶ Given the finding of the witnesses’ general credibility (and their willingness to testify by deposition in the habeas proceedings that followed the Supreme Court’s decision), Justice Ginsburg’s reading of the factual record appears to be more accurate as to the facts accounting for the witnesses’ disappearance. In opinions across

²⁰ See *Lee v. Kemna*, 534 U.S. at 375.

²¹ *Id.* at 371.

²² *Id.* at 373.

²³ *Id.* at 381 (agreeing with the dissenting judge in the Eighth Circuit that there was not a “scintilla” of evidence supporting that supposition (quoting *Lee v. Kemna*, 213 F.3d 1037, 1040 (8th Cir. 2000) (Bennett, D.J., dissenting))); see also 534 U.S. at 373 n.6 (noting that all three witnesses had previously indicated, in essence, that a court officer had informed them, mid-day, that their testimony would not be needed until the next day).

²⁴ *Id.* at 402–03 (Kennedy, J., dissenting).

²⁵ *Id.* at 381 n.12 (majority opinion).

²⁶ *Lee v. Kemna*, No. 98-0074-CV-W-HFS, 2004 U.S. Dist. LEXIS 13356, at *12 (W.D. Mo. July 8, 2004). To be sure, there remains a mystery about who told the court official to tell the family that they could leave. The district court judge found no evidence that the prosecution had done so, but engaged in what he called “speculation” about whether defense counsel himself (at odds with the defendant and acting “disingenuous[ly]”) may have done so. *Id.* at *15–16 & n.8.

areas including gender equality, race equality, and reproductive freedom, Justice Ginsburg's attention to the facts is a welcome font of common law judicial sensibility.

Third, the opinion reflects a willingness to empower appellate judges to identify "exceptional" cases involving "exorbitant application" of rules, and to make the judgments such a standard requires. The Court explained that there are "exceptional cases in which exorbitant application of a generally sound rule renders the state ground inadequate to stop consideration of a federal question" and concluded that this was such an exceptional case.²⁷ In a sense, this standard is one that involves trusting judges to decide when literal noncompliance with written rules should not bar consideration of claims. While it may seem strange to talk about trusting judges (given that the trial judge's ruling was found to be in error), the Court's decision is, in a sense, brave enough to trust the appellate process to recognize truly "exorbitant" applications of otherwise sensible rules. Such a willingness to allow recognition of "exorbitant" or grossly undue application of valid rules runs against the grain of a formalism that, as Justice Frankfurter put it in his dissent in *Staub v. City of Baxley*,²⁸ favors enforcing rules even when "the reason for the rule does not clearly apply."²⁹ And it ventures beyond the apparent protection that formalist adherence to rules offers those who are judges by insisting that some further element of judgment may be called for. Application of such a standard plainly depends on trust in the judgment of other judges. A standard that involves trusting judges to distinguish exorbitant from other applications of legitimate rules may be understood as expressing a commitment to the justice-seeking role of being a judge. But, if not wisely used, it might pose a potential threat to the orderly application of procedural rules to produce legitimately stable decisions; condemning an exorbitant application of a procedural rule in one case might lead to condemning a less exorbitant application in another (by following a broadly stated principle attributed to the first case). This brings me to my last point.

This opinion indicates that constitutional values of procedural justice can be vindicated without threat to state procedural systems. The decision in *Henry v. Mississippi*³⁰ concerned some judges and scholars insofar as they believed it opened the door (on direct federal review) to second-guessing of the need to apply legitimate rules of procedure in the state courts. *Lee v. Kemna*, however, is carefully cabined, repeat-

²⁷ *Lee v. Kemna*, 534 U.S. at 376.

²⁸ 355 U.S. 313 (1958).

²⁹ *Id.* at 333 (Frankfurter, J., dissenting).

³⁰ 379 U.S. 443 (1965).

edly emphasizing its own limitations.³¹ The Court did not simply say this at a general level, but gave three reasons that “in combination” explained why the case was special and the state court application of procedural rules “exorbitant”: the reasons given by the trial judge could not have been affected by perfect compliance with the procedural rules; the Missouri rules had never been applied in a case as unusual as this, where subpoenaed witnesses, who had been present in the courthouse the very day of their planned testimony, mysteriously disappeared (on the last day of trial); and finally, “given ‘the realities of trial,’ Lee substantially complied with Missouri’s key Rule” by virtue of Lee’s testimony that day and the information about the alibi witnesses repeatedly presented to the court over the three days of the proceedings.³² An ultimately successful due process claim, never heard by the state appellate courts or the federal habeas court prior to the Supreme Court’s decision, was thus allowed to be heard and federal constitutional rights vindicated in the federal habeas corpus proceeding after the Supreme Court’s decision.

Would it have been better had the state appeals courts heard the federal constitutional question in the first instance? Undoubtedly so. But this opinion invites the state court system to continue to develop and enforce procedural rules to assure the orderly conduct of trials, and trusts them — appellate as well as trial judges — to apply those rules with sensitivity to the possibility that on rare occasions an application will be so exorbitant that adherence to the procedural values of our constitutional justice system should allow adjudication on the merits. It invites state court judges, too, to share in the responsibility of judgment, to avoid such exorbitant applications in the future.

In 2004, David Shapiro wrote that *Lee v. Kemna*, like others of Justice Ginsburg’s decisions, “evinces a pragmatism emphasizing the particular context and focusing on what works best in that context in the interests of both judicial efficiency and fairness to litigants.”³³ Professor Shapiro described *Lee v. Kemna* as one of his “favorites.” Mine too.

³¹ Whatever else might be said, it would be difficult to argue that the state court’s application, in *Henry*, of the “contemporaneous objection” rule was “exorbitant,” and the majority in *Henry* did not so argue. See *id.* at 449 (indicating that where “enforcement of the [state procedural] rule . . . would serve no substantial state interest,” the Court would not bar review of the federal claim).

³² *Lee v. Kemna*, 534 U.S. at 382 (citation omitted); see *id.* at 381–85.

³³ David L. Shapiro, *Justice Ginsburg’s First Decade: Some Thoughts About Her Contributions in the Fields of Procedure and Jurisdiction*, 104 COLUM. L. REV. 21, 25 (2004).

NORFOLK & WESTERN RAILWAY *v.* AYERS,
538 U.S. 135 (2003)

*Richard J. Lazarus**

*Norfolk & Western Railway v. Ayers*¹ would not make the list of any Supreme Court scholar's top twenty (or one hundred) opinions authored by Justice Ruth Bader Ginsburg during her twenty terms on the Court. But her opinion for the Court in that 2003 case speaks volumes about the kind of Justice she is, and the profound difference her voice has made on the Court.

Norfolk was not on first, second, or third glance a case anyone would have supposed warranted Supreme Court review. The case arose under the Federal Employers Liability Act² (FELA) and neither of the questions presented by the petition for certiorari was remotely certworthy, especially given the absence of any written opinion, published or unpublished, by a lower court on either issue. A state trial judge had denied, without written opinion, Norfolk & Western Railway's objections to two jury instructions and declined to adopt Norfolk's proposed jury instructions. In the first instruction, the judge allowed the jury to award the plaintiffs for their reasonable fear of cancer but only as that fear related to their suffering from asbestosis. The second instruction allowed for joint and several liability.³

The jury awarded \$5,810,606 in total damages for all six plaintiffs,⁴ but without any suggestion that any of that award was for fear of cancer rather than just for the serious, debilitating asbestosis from which all six were admittedly suffering. Norfolk's appeals in West Virginia state court produced no written opinion. There was no intermediate state appellate court and the state supreme court denied discretionary review.⁵ In short, the lower court record consisted of nothing more than a bare-bones general jury verdict for a relatively inconsequential amount. No meaningful precedent of any kind had been made, in legal or practical effect.

Yet, not only did the Court defy conventional wisdom by granting review in the first instance, but the Court then incongruously affirmed rather than reversed the lower court judgment. Where, as in *Norfolk*,

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¹ 538 U.S. 135 (2003).

² 45 U.S.C. §§ 51–60 (2006).

³ See *Norfolk*, 538 U.S. at 143.

⁴ See Joint Appendix at 621, *Norfolk*, 538 U.S. 135 (No. 01-693).

⁵ *Norfolk*, 538 U.S. at 144.

the Court grants review in a plainly uncertworthy case, it does so almost always for one reason: to reverse a judgment the Justices believe to be lacking any possible merit, typically on a summary basis without full briefing and oral argument. But in *Norfolk*, the Court instead granted plenary review and then affirmed on the merits.

In an opinion authored by Justice Ginsburg, the Court first ruled that the state trial judge had acted reasonably in declining to grant the defense counsel's request that the plaintiffs not be allowed to recover damages based on reasonable fear of cancer related to their asbestosis. The majority reasoned that the jury instruction was reasonable and entirely consistent with long-standing common law tort doctrine because, as expressly instructed, the plaintiffs' emotional distress injuries were limited to those parasitic to a physical injury (asbestosis).⁶ The trial judge therefore had not, contrary to settled tort doctrine (and Supreme Court FELA precedent), permitted a "stand-alone" claim for emotional distress injuries. On the second issue, the Court ruled unanimously that FELA expressly provides for joint and several liability, and therefore Norfolk was liable for all the damages even though certain plaintiffs may have been exposed to asbestos fibers in other workplaces as well.⁷

Neither of the Court's rulings established significant new precedent. For most readers of the opinion, its most intriguing aspect was likely the unusual breakdown of Justices on the first issue and the contrasting unanimity on the second. Justice Ginsburg's majority opinion on the fear-of-cancer issue was joined by Justices Stevens, Scalia, Souter, and Thomas. The oddity of the split provides at most the basis for an amusing question for a Supreme Court trivia contest: the only common denominator for those in dissent (Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Breyer) is that they, unlike any of the Justices in the majority, attended Stanford University for either law school or their undergraduate education.

What makes the case so revealing of Justice Ginsburg, however, are neither the rulings themselves nor the unusual vote lineups of the Justices. What is instead most remarkable is the final word of the Court's opinion — "affirmed" — because the Court's actual opinion on the fear-of-cancer issue could instead have readily supported a reversal on that ground.

Embedded in the Court's ruling on the threshold fear-of-cancer issue was the Court's express qualification that "it is incumbent upon [the plaintiff] . . . to prove that his alleged fear is genuine and seri-

⁶ *Id.* at 145–48.

⁷ *Id.* at 162–66.

ous.”⁸ The problem for the plaintiffs was that the jury instructions in *Norfolk* required no such proof and the plaintiffs never purported to offer such proof. Just the opposite. The plaintiffs had instead argued at trial that no such threshold showing of objective significance was required to sustain the reasonable-fear-of-cancer jury instruction. The plaintiffs argued the same before the Court. The *Norfolk* majority further questioned the likely sufficiency of plaintiffs’ proof of a reasonable fear of cancer by describing the plaintiffs’ proof as “notably thin” and by acknowledging that the jury instruction “might well have succumbed to a straightforward sufficiency-of-the-evidence objection.”⁹

The Court, however, then stepped back from disturbing the verdict by characterizing the nature of Norfolk’s objections at trial as not embracing these particular infirmities. But the majority could have concluded otherwise. The Court could have readily ruled that Norfolk’s broader objections to the jury instruction fairly included the lesser claim that the proof must establish the severity of the fear and therefore the jury verdict could not be sustained.

The question is, why did the Court decline to insist on the fullest possible application of its opinion and to credit Norfolk’s broad objection. As counsel who represented the plaintiffs in this case, I think I know what drove Justice Ginsburg in crafting the Court’s opinion. Not anything I did as an advocate. Nor the kind of finer point of civil procedure that Justice Ginsburg indeed loves. It was because of the kind of Justice she is: how she thinks about the law, how she approaches cases before the Court, and how she is able to argue persuasively as an advocate within the Court just as she once did as an advocate before the Court.

Justice Ginsburg knows the Court’s cases are ultimately about people, their lives, and their livelihoods. The Justice, throughout her career, has been a true intellectual and champion of legal doctrine promoting social justice. But she also understands that the cases before the Court are far more than debates about abstract legal propositions. They are about people like Sally Reed in *Reed v. Reed*.¹⁰ About Lilly Ledbetter in *Ledbetter v. Goodyear Tire & Rubber Co.*¹¹ And about the young women who in August 1997 became the first female cadets at the Virginia Military Institute in the aftermath of the Court’s ruling in *United States v. Virginia*.¹² The Justice is well known for reminding her law clerks of the biblical command, “Justice, justice shall you pursue,”

⁸ *Id.* at 157.

⁹ *Id.* at 158.

¹⁰ 404 U.S. 71 (1971).

¹¹ 550 U.S. 618 (2007).

¹² 518 U.S. 515 (1996).

which she keeps on the wall of her chambers.¹³ And she never loses sight of the fundamentally human aspect of the Court's work.

In *Norfolk*, the Court affirmed the jury's verdict notwithstanding, rather than in light of, the full import of the Court's ruling because of its appreciation for what any other ruling would have meant in an immediate and concrete way for the six individual plaintiffs: Freeman Ayers, Carl Butler, Doyle Johnson, John Shirley, James Spangler, and Clifford Vance. These six individuals were suffering from asbestosis, a serious and progressive respiratory illness, and had been for decades. Because, moreover, the jury had issued its judgment as a general verdict, there was no way to know whether they had been awarded *all* or *none* of their total of \$5,810,606 damages based on their allegations of fear of cancer. Norfolk's concerns about the impact of the fear-of-cancer instruction on the total damages awarded by the jury were therefore potentially grounded only in theory rather than in reality.

But what was clear and not at all theoretical was what would have been the practical effect of a judicial remand for a new trial based on inadequate jury instructions: none of the six plaintiffs would have received any relief for their harm within a meaningful time frame, if ever, before they were no longer alive. When the Court ruled in March 2003, the plaintiffs were then 74, 70, 69, 73, 77, and 81 years old and each was in poor and deteriorating health. More than a decade had transpired since many had filed their original complaints. Anything other than a straightforward affirmance of the jury verdict would most likely have ended their case for all meaningful purposes.

The *Norfolk* opinion also reflects Justice Ginsburg's humility and modesty regarding the role of the Court itself. The ruling is respectful not only of the plaintiffs themselves, but also of the state court system, extending to the state trial judge, the individual members of the jury, and their verdict. Such a verdict warrants the Court's utmost respect and should not be disturbed merely because it could be, but only if it must be. The opinion is a sincere and genuine application of judicial restraint.

Justice Ginsburg crafted an opinion that allowed for a change in legal doctrine as needed to address the concerns of the Justices about excessive damage awards to victims of asbestosis. But quietly and carefully in a case far below the spotlight, she ensured that the Court's ruling remained kind, just, and respectful in its application to the parties before the Court. And also in its deference to the state court system.

That's a Justice pursuing justice in all respects.

¹³ *Ginsburg on Faith*, N.Y. TIMES (Oct. 19, 2004), <http://www.nytimes.com/2004/10/19/politics/19justice.html> (quoting *Deuteronomy* 16:20) (internal quotation marks omitted).

JUSTICE GINSBURG AND THE NEW LEGAL PROCESS

*John F. Manning**

Justice Ginsburg exemplifies the New Legal Process style of interpretation. The old Legal Process course — which Justice Ginsburg (and three of her current colleagues) took in law school¹ — taught us three basic things. First, “[t]he idea of a statute without an intelligible purpose is foreign to the idea of law and inadmissible.”² Second, in our constitutional system, interpreters must “[r]espect the position of the legislature as the chief policy-determining agency of the society, subject only to the limitations of the constitution.”³ Third, it follows that judges faced with a statutory question should ask “what purpose ought to be attributed to the statute” and then “[i]nterpret the words of the statute immediately in question so as to carry out the purpose as best [they] can.”⁴

All of this made good sense — so much so that the Legal Process school effortlessly dominated post–New Deal thinking about statutes for generations.⁵ But embedded in this purposive philosophy was a tension. With no acknowledgment of the contradiction, the Legal Process materials developed by Harvard Professors Henry Hart and Albert Sacks presented two conflicting techniques for effectuating statutory purpose. Option A said that in ascertaining purpose, interpreters must ultimately respect the text: “The words of the statute are what the legislature has enacted as law, and all that it has the power to enact.”⁶ So, whatever else they do, judges must not “give the words . . . a meaning they will not bear.”⁷ Option B seemed to assume that if the text did not capture the law’s true purpose, the former must yield: “The meaning of words can almost always be narrowed if the context seems to call for narrowing.”⁸ And judges could legitimately

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¹ Justices Scalia, Kennedy, and Breyer also took the course. William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term — Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 27 (1994).

² HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS* 1124 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

³ *Id.* at 1374.

⁴ *Id.*

⁵ See William N. Eskridge, Jr. & Philip P. Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691, 698–99 (1987).

⁶ HART & SACKS, *supra* note 2, at 1375.

⁷ *Id.*

⁸ *Id.* at 1376.

extend the reach of a statutory policy to situations “seemingly within [a statute’s] purpose but not within any accepted meaning of its words.”⁹

Though Hart and Sacks were apparently of two minds about the text, the post–New Deal Court was not. It took Option B. Because laws are complex and legislators are human, judges might have to go beyond the text to get at what legislators really meant to achieve. In searching for this legislative purpose, nothing was out of bounds. As the Court unanimously wrote in *United States v. American Trucking Ass’n*¹⁰:

[W]hen the plain meaning . . . produce[s] . . . an unreasonable [result] “plainly at variance with the policy of the legislation as a whole” this Court . . . follow[s] that purpose, rather than the literal words. When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no “rule of law” which forbids its use, however clear the words may appear on “superficial examination.”¹¹

In the five decades after *American Trucking*, the Court did not hesitate to reshape a statute’s text to reflect the background intentions or purposes that the Justices perceived in the statements of pivotal legislators or the telling changes made to successive drafts of a bill.¹²

The Court, however, now takes a different approach. I am not referring to textualism, which would exclude *all* legislative history on the grounds that it is unenacted, unrepresentative, and thus illegitimate *per se*.¹³ Whatever the merits or demerits of that position, it has not captured the Court’s center. Instead, the consensus now seems to have clustered around Hart and Sacks’s Option A. The new approach, like the old, still considers anything that might cast light on a statute’s objectives — including its legislative history. What’s new is this: the semantic meaning of the enacted text, when clear, now sets a hard cap on the judge’s discretion. Justice Ginsburg is at the epicenter of this New Legal Process approach.

Consider her opinion for the Court in *Koons Buick Pontiac GMC, Inc. v. Nigh*.¹⁴ As is true of many classic statutory opinions, *Nigh* does not involve a headline-grabbing issue. The Truth in Lending Act¹⁵ (TILA) requires creditors to disclose to consumers certain information

⁹ *Id.* at 1194.

¹⁰ 310 U.S. 534 (1940).

¹¹ *Id.* at 543–44 (footnotes omitted) (first quoting *Ozawa v. United States*, 260 U.S. 178, 194 (1922), next quoting *Bos. Sand & Gravel Co. v. United States*, 278 U.S. 41, 48 (1928), and finally quoting *Helvering v. N.Y. Trust Co.*, 292 U.S. 455, 465 (1934)).

¹² See, e.g., *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 452–55 (1989); *United Steelworkers v. Weber*, 443 U.S. 193, 201–02 (1979); *Train v. Colo. Pub. Interest Research Grp., Inc.*, 426 U.S. 1, 9–10 (1976).

¹³ See generally John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673 (1997) (summarizing the tenets of modern textualism).

¹⁴ 543 U.S. 50 (2004).

¹⁵ 15 U.S.C. §§ 1601–1667f (2012).

pertaining to interest rates, finance charges, and the rights of borrowers.¹⁶ Because actual damages from nondisclosure may be difficult to prove, TILA accomplishes its remedial purposes through specific formulae that assess “statutory” damages based on the kind of transaction.¹⁷ Prior to 1995, the key provision — 15 U.S.C. § 1640(a) — prescribed the following formulae for statutory damages:

(2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, or (ii) in the case of an individual action relating to a consumer lease . . . , 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than \$100 nor greater than \$1,000¹⁸

That is, where a lender or lessor failed to make the required TILA disclosures, § 1640(a)(2)(A) called for statutory damages equal to twice the amount of the finance charge (in the case of consumer credit) or one-quarter of monthly payments (in the case of a consumer lease). As the lower courts uniformly held, the final clause — the \$100/\$1000 proviso — set a floor and a ceiling for the amounts that could be recovered under *either* of the specified transactions — loans or leases.¹⁹

Nigh arose out of a 1995 amendment that added yet another provision — one setting higher limits for statutory damages arising out of certain loans secured by real property — namely, closed-end credit requiring repayment at a fixed time, as opposed to revolving lines of credit.²⁰ Congress inserted this proviso as a new clause (iii) at the end of the existing provision, which then read as follows:

(2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, (ii) in the case of an individual action relating to a consumer lease . . . , 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than \$100 nor greater than \$1,000, or (iii) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than \$200 or greater than \$2,000²¹

Nigh alleged that Koons Buick had failed to make required TILA disclosures in an auto financing transaction *and* that, after the 1995 amendment, the \$100/\$1000 proviso no longer applied to the routine finance charges governed by clause (i). Why? Based on the post-amendment *structure* of § 1640(a)(2)(A), the \$100/\$1000 proviso seemed

¹⁶ See *id.* §§ 1631–1632, 1635, 1637–1639.

¹⁷ See *Riggs v. Gov’t Emps. Fin. Corp.*, 623 F.2d 68, 71 (9th Cir. 1980).

¹⁸ 15 U.S.C. § 1640(a) (1976).

¹⁹ See *Nigh*, 543 U.S. at 55–56.

²⁰ Compare THOMAS P. FITCH, *DICTIONARY OF BANKING TERMS* 90 (4th ed. 2000) (defining closed-end credit), *with id.* at 328 (defining open-end credit).

²¹ 15 U.S.C. § 1640(a) (2000).

logically to apply only to clause (ii) — the one governing consumer leases. Again, the proviso states that the \$100/\$1000 limitation governs “the liability under *this subparagraph*.” But once Congress added clause (iii), one could no longer comfortably read “this subparagraph” to mean § 1640(a)(2)(A) as a whole; to do so would also be to apply the \$100/\$1000 proviso to the subset of transactions that § 1640(a)(2)(A)(iii) now subjected to the specific new \$200/\$2000 proviso. Nor would it make structural sense to read “this subparagraph” to refer to *both* § 1640(a)(2)(A)(i) and (ii), as Koons Buick urged. In contrast, if one were to read “subparagraph” to refer to the statutory subdivisions marked off by Roman numerals, then the phrase “under *this subparagraph*” would presumably refer only to the Roman numeral subdivision in which the proviso actually appeared — that is, § 1640(a)(2)(A)(ii) and its damages rule for consumer leases.

Justice Ginsburg’s opinion for the Court, however, did not reach that conclusion. Rather, she reasoned that restricting the \$100/\$1000 proviso to consumer leases would go beyond the evident purposes of the 1995 amendment. Prior to 1995, as noted, § 1640(a)(2)(A) applied that proviso to all credit transactions. And Justice Ginsburg found it most unlikely that by inserting a \$200/\$2000 proviso for a subset of transactions secured by real property, Congress intended to *uncap entirely* the statutory damages for all other credit transactions. Nothing in the legislative history of the 1995 amendment suggested that Congress meant to perform such radical surgery on the statutory damages scheme in such an indirect way.²² Nor could the Court see any apparent policy justification for Congress to impose a \$2000 cap on damages for a subset of secured credit transactions — but no cap at all for other kinds of credit.²³ Reading the statute in light of its drafting history and a common-sense assessment of legislative policy, Justice Ginsburg held that the specific \$200/\$2000 proviso applied only to transactions specified by clause (iii), while the more general \$100/\$1000 proviso reached all other transactions encompassed within subparagraph (2)(A).

So Justice Ginsburg relied heavily on statutory purpose. But in contrast with the Old Legal Process approach that once prevailed, her approach did not treat purpose as a freestanding concept. Rather, she deemed it necessary first to ensure that the statute’s semantic meaning could bear the meaning ascribed to it by the Court. How did she do this? She asked whether “subparagraph” was a term of art. It turns out that it is. In a world in which a statutory provision can have as

²² *Nigh*, 543 U.S. at 63 (discussing the legislative history of the 1995 amendment).

²³ *Id.* (“It would be passing strange to read the statute to cap recovery in connection with a closed-end, real-property-secured loan at an amount *substantially lower* than the recovery available when a violation occurs in the context of a personal-property-secured loan or an open-end, real-property-secured loan.”).

many tiers as § 1640(a)(2)(A)(ii), the legislative drafting community has developed uniform conventions for identifying each tier:

“To the maximum extent practicable, a section should be broken into —

- “(A) subsections (starting with (a));
- “(B) paragraphs (starting with (1));
- “(C) subparagraphs (starting with (A));
- “(D) clauses (starting with (i))”²⁴

Accordingly, Justice Ginsburg could say that semantic convention, as well as evident statutory purpose, supported her conclusion that the phrase “this subparagraph” in the \$100/\$1000 proviso reached every part of § 1640(a)(2)(A) — except the one to which the more specific \$200/\$2000 proviso explicitly applied.

This put Justice Ginsburg smack in the Court’s center, with a majority of her colleagues. In dissent, Justice Scalia argued that if one read the provision cold, one would not expect to find “a purportedly universal [proviso] at the end of the second item in a three-item list.”²⁵ Since the text would be clear to an ordinary reader, the drafting history just did not come into play. In a concurrence, Justice Stevens, joined by Justice Breyer, lamented the Court’s new tendency to consult extrinsic evidence of legislative intent or purpose only where semantic meaning permitted.²⁶ For them, it seemed “wiser to acknowledge that it is always appropriate to consider all available evidence of Congress’ true intent when interpreting its work product.”²⁷ Justice Ginsburg’s opinion walked a line between the two.

Though I have written much about the virtues of textualism, I also find a great deal to admire in the middle course taken by Justice Ginsburg and the New Legal Process. It seems to me that she was quite right to think that Congress would not have made such a radical change in such an indirect way. Her sensitivity to Congress’s evident purpose made sense of the likely legislative outcome and deftly avoided a result that seems quite evidently to have been the product of awkward drafting. At the same time, by considering those factors only *after* verifying that the text allowed it, Justice Ginsburg welded her purposivism to the idea of legislative supremacy that our constitutional order has long embraced. Congress acts purposively but does not express its purposes in the abstract. Through the rules it embeds in the

²⁴ *Id.* at 60 (alteration in original) (quoting OFFICE OF THE LEGISLATIVE COUNSEL, U.S. HOUSE OF REPRESENTATIVES, HLC No. 104-1, HOUSE LEGISLATIVE COUNSEL’S MANUAL ON DRAFTING STYLE 24 (1995)).

²⁵ *Id.* at 72 (Scalia, J., dissenting).

²⁶ *Id.* at 65 (Stevens, J., concurring).

²⁷ *Id.*

statutory text, Congress tells us how far the majority wishes to go in pursuit of its purposes and what it is willing to pay to achieve them. As the Court wrote in an opinion that marked the beginning of its shift from the Old to the New Legal Process approach:

Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises. Invocation of the “plain purpose” of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise²⁸

Justice Ginsburg’s statutory jurisprudence — nicely typified by *Koons Buick Pontiac GMC, Inc. v. Nigh* — reflects that reality. Congress legislates to make policy, and a judge who wishes to show fidelity to Congress must take policy into account — but only to the extent that a statute allows. Justice Ginsburg has followed that course for two decades, and the law is better for it.

²⁸ Bd. of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp., 474 U.S. 361, 374 (1986).

M.L.B. v. S.L.J., 519 U.S. 102 (1996)

*Martha Minow**

With few exceptions, the Supreme Court has rejected arguments that the Constitution guarantees affirmative rights that cost public resources, and many Justices have expressed concern that recognizing such guarantees would produce a slippery slope without clear lines to divide constitutionally guaranteed rights from others. Against this backdrop, Justice Ruth Bader Ginsburg's opinion in *M.L.B. v. S.L.J.*¹ — holding that a state may not deny an indigent parent the chance to appeal judicial termination of her parental rights by requiring payment to prepare the trial court record — is a work of great craftsmanship as well as a just and compassionate decision.

NO HEIGHTENED SCRUTINY REGARDING
DISCRIMINATION AGAINST THE POOR

The United States Constitution does not accord rights to government services or subsidies, with extremely limited exceptions: the state must supply counsel for individuals facing imprisonment as a criminal sanction (*Gideon v. Wainwright*²);³ a state cannot deny free trial transcripts to indigent criminal defendants seeking appellate review of their convictions (*Griffin v. Illinois*⁴);⁵ nor may a state impose a poll tax effectively barring those who cannot pay from state and local elections (*Harper v. Virginia Board of Elections*⁶).⁷ When the Supreme Court rejected in 1973 the claim that discrimination against the poor deserves heightened scrutiny under the Fourteenth Amendment,⁸ it was in fact affirming a prior decision to use rational basis review in cases challenging “economics and social welfare” laws.⁹ A rational ba-

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¹ 519 U.S. 102 (1996).

² 372 U.S. 335 (1963).

³ *Id.* at 339.

⁴ 351 U.S. 12 (1956).

⁵ *Id.* at 19.

⁶ 383 U.S. 663 (1966).

⁷ *Id.* at 666.

⁸ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 18 (1973) (finding no basis for applying suspect classification or fundamental interest analysis to a challenge to reliance on local property taxes to support public education).

⁹ *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (applying rational basis review to uphold a cap on welfare benefits regardless of family size). The Court also rejected the claim of an Equal

sis could be supplied by a state's desire to save costs. That is what Mississippi asserted when a woman, known to the Court as M.L.B., sought to appeal a decree terminating her parental rights to two minor children but faced the barrier of an estimated \$2352.36 fee for preparing the record required for the appeal.¹⁰ Because M.L.B. had no ability to pay that fee, the appeal was dismissed.

Not only did M.L.B. face the general rule of no constitutional right to a free transcript in a noncriminal matter, but there was no plausible constitutional claim of a right to an appeal at all. And the Court had already rejected the argument that termination of parental rights posed at least as serious a deprivation as incarceration when a mother sought court-appointed counsel. In *Lassiter v. Department of Social Services of Durham County*,¹¹ the Court held that indigent parents have no categorical right to a government-appointed lawyer when facing termination-of-parental-rights proceedings.¹² There, the Court did indicate that a due process analysis in individual cases could support appointment of counsel in a particular case where important to avoid likely error, but the Court went on to find no such need in Mrs. Lassiter's case, despite multiple indications of Mrs. Lassiter's inability to present her case.¹³ In a noncriminal matter with no guaranteed appeal or counsel, how could M.L.B. persuade the Court that the Constitution called for a right to preparation of the trial record that would cost the state \$2352.36 to provide?

BUILDING ACCESS OUT OF PUZZLE PIECES

Justice Ginsburg's opinion proceeded carefully and without frontal challenges to the constraining precedents. It treated as unquestioned the guideposts that a state need not establish avenues for appellate review and that a state need not make counsel available in any cases but those where incarceration is at stake. Without disturbing these precedents, the opinion nonetheless emphasized that the Court had already prohibited "making access to appellate processes from even [the State's] most inferior courts depend upon the [convicted] defendant's ability to pay"¹⁴ in *Mayer v. City of Chicago*.¹⁵ Moreover, Justice

Protection Clause violation when a federal program denied funding for abortion while paying for childbirth and related medical care costs. *Maier v. Roe*, 432 U.S. 464, 470 (1977).

¹⁰ See *M.L.B.*, 519 U.S. at 106.

¹¹ 452 U.S. 18 (1981).

¹² *Id.* at 31.

¹³ See *id.* at 44-47 (Blackmun, J., dissenting).

¹⁴ *M.L.B.*, 519 U.S. at 112 (alterations in original) (quoting *Mayer v. City of Chicago*, 404 U.S. 189, 197 (1971)) (internal quotation marks omitted).

¹⁵ 404 U.S. 189 (1971).

Ginsburg stressed that in facing criminal fines, defendant Mayer — like M.L.B. — did not face a risk of incarceration.¹⁶

Still adhering to the general rule that the Constitution mandates no provision of government benefits, the opinion nonetheless identified precedents recognizing the special situation of state-controlled determination of family status. Because a state “could not deny a divorce to a married couple based on their inability to pay approximately \$60 in court costs,”¹⁷ and a state “must pay for blood grouping tests sought by an indigent defendant to enable him to contest a paternity suit,”¹⁸ there was already “a narrow category of civil cases in which the state must provide access to its judicial processes without regard to a party’s ability to pay court fees.”¹⁹ Reviewing other contexts in which claims of access failed, the opinion concluded, “[T]ellingly, the Court has consistently set apart from the mine run of cases those involving state controls or intrusions on family relationships.”²⁰

Aligning M.L.B.’s case with not only access-to-court but also other decisions recognizing the significance of family relationships,²¹ the opinion dodged efforts to bar relief for M.L.B. on the grounds that hers was a civil, not criminal, case and that she did not face incarceration. Here, the Court relied on its previous conclusion that forced dissolution of parental rights involves interests “more substantial than mere loss of money.”²² In the hierarchy of interests, M.L.B.’s concerns are even more weighty because she faced not simply “loss of custody, which does not sever the parent-child bond,” but “parental status termination,” which “is ‘irretrievabl[y] destructi[ve]’ of the most fundamental family relationship.”²³ Here the opinion smartly relied on a procedural due process decision requiring a state to demonstrate evidence under the heightened “clear and convincing” burden of proof before terminating parental rights.²⁴ The Court’s strong statements of the private interests at stake there called for careful judicial proceedings, but Justice Ginsburg emphasized how M.L.B. had the same strong private interests.

¹⁶ *M.L.B.*, 519 U.S. at 111–12.

¹⁷ *Id.* at 113 (citing *Boddie v. Connecticut*, 401 U.S. 371 (1971)).

¹⁸ *Id.* (citing *Little v. Streater*, 452 U.S. 1, 13–17 (1981)).

¹⁹ *Id.*

²⁰ *Id.* at 116.

²¹ *Id.* at 116–17 (citing *Turner v. Safley*, 482 U.S. 78 (1987); *Santosky v. Kramer*, 455 U.S. 745 (1982); *Lassiter v. Dep’t of Soc. Servs. of Durham Cnty.*, 452 U.S. 18 (1981); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Moore v. East Cleveland*, 431 U.S. 494 (1977); *Loving v. Virginia*, 388 U.S. 1 (1967); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923)).

²² *Id.* at 121 (quoting *Santosky*, 455 U.S. at 756) (internal quotation marks omitted).

²³ *Id.* (alterations in original) (quoting *Santosky*, 455 U.S. at 753).

²⁴ *Id.* at 118 (citing *Santosky*, 455 U.S. at 769–70).

Those strong private interests — “commanding” and “far more precious than any property right”²⁵ — could supply the basis for waiving record preparation fees at least as well as the risk of multiple fines supplied a basis for a right to a transcript to enable an appeal by individuals facing neither incarceration nor the stigma of a felony conviction. Weightier than the criminal fines at issue when the Court required waiver of transcript costs in *Mayer*, M.L.B.’s interests involved “the most fundamental family relationship.”²⁶ Justice Ginsburg’s opinion pointed to multiple decisions as “acknowledging the primacy of the parent-child relationship.”²⁷ Toward the end of the opinion, the interests at stake are described this way: “[T]ermination adjudications involve the awesome authority of the State ‘to destroy permanently all legal recognition of the parental relationship.’”²⁸ No formal category distinguishing civil and criminal nor any functional category distinguishing jeopardy of incarceration from other liberties could stand in the way of recognizing M.L.B.’s precious interests at the mercy of state power.

And Mississippi’s desire to save money could not outweigh these significant family interests.²⁹ If the state’s “pocketbook interest in advance payment for a transcript” was unimpressive as a reason to bar appeal of a conviction to someone who faced only fines, not incarceration, it surely is not sufficient to bar appeal on similar grounds for a mother facing the permanent end of her “most fundamental family relationship.”³⁰ Even the financial interest is paltry, since the state had faced only a dozen appeals on the merits following parental rights termination decisions.³¹

All of these steps in the analysis are made without specifying whether the analysis depends on due process or equal protection. Given the limitations of the precedents under both doctrines, noted pointedly by the dissenting opinion,³² that is quite a feat. Despite the dissent’s objection that Justice Ginsburg’s opinion fails sufficiently to confine the reach of its reasoning, Justice Kennedy, concurring in the judgment, complimented Justice Ginsburg’s opinion for its “most careful and comprehensive recitation of the precedents.”³³ While confining his endorsement to the due process elements of the analysis, Justice Kennedy further commended Justice Ginsburg’s opinion for the Court

²⁵ *Id.* at 118–19 (quoting *Santosky*, 455 U.S. at 758–59 (citing *Lassiter*, 452 U.S. at 27)).

²⁶ *Id.* at 121.

²⁷ *Id.* at 120.

²⁸ *Id.* at 128 (quoting *Rivera v. Minnich*, 483 U.S. 574, 580 (1987)).

²⁹ *Id.* at 121–22.

³⁰ *Id.* at 121.

³¹ *Id.* at 122.

³² *See id.* at 130–39 (Thomas, J., dissenting).

³³ *Id.* at 128 (Kennedy, J., concurring in the judgment).

because it “well describes the fundamental interests the petitioner has in ensuring that the order which terminated all her parental ties was based upon a fair assessment of the facts and the law.”³⁴

SUBTLE RHETORIC

Justice Ginsburg announces no broad or bold statements of constitutional guarantees; instead, her opinion pieces together exceptions, and threads a needle, connecting M.L.B.’s situation to the exceptional right to fee waiver for appeals from criminal convictions and to the recognition of weighty family interests in waiving fees for divorce and paternity tests and in requiring a heightened burden of proof before a state may terminate parental rights. Almost every sentence depends in critical portions on language quoted from prior opinions. It is as if the opinion had been written entirely through cut-and-pasted quotations, defying any charge of bold expansion of constitutional guarantees.

Yet the words that are Justice Ginsburg’s own make a world of difference. From its first sentence, the opinion laid out the stakes: M.L.B.’s parental rights were “forever terminated” with only the appeal at issue as her remaining hope.³⁵ Later, the opinion explained, the Court approached “M. L. B.’s petition mindful of the gravity of the sanction imposed on her.”³⁶ It is that tone, a kind of hushed awareness of the gravity of the situation, that imbues the opinion with integrity and subtle shifts in emphasis.

Consider the question before the Court. Justice Ginsburg stated it at the start as it was framed by M.L.B.: “May a State, consistent with the Due Process and Equal Protection Clauses of the Fourteenth Amendment, condition appeals from trial court decrees terminating parental rights on the affected parent’s ability to pay record preparation fees?”³⁷ Demonstrating the subtlety of her argumentation, the question is restated later in the opinion as: “Does the Fourteenth Amendment require Mississippi to accord M. L. B. access to an appeal — available but for her inability to advance required costs — before she is forever branded unfit for affiliation with her children?”³⁸

Note what has changed: (1) the focus on due process and equal protection has shifted to simply what the Fourteenth Amendment requires; (2) the appeal conditioned on record preparation fees is now recast as an appeal available but for inability to pay costs; and (3) termination of parental rights is reread as permanent branding of a

³⁴ *Id.* at 129.

³⁵ *Id.* at 106 (majority opinion).

³⁶ *Id.* at 103.

³⁷ *Id.* at 107.

³⁸ *Id.* at 119.

mother as unfit to affiliate with her children. Each of these shifts is well supported by the close reasoning in the paragraphs between the opening statement and later restatement. By the time the question is restated, the conclusion seems nearly assured.

HALTING THE OBJECTIONS

Nearly assured, that is, for two nagging objections remain. Justice Thomas's dissent warned that the Court's view opens the floodgates to further demands for free assistance by civil appellants in other kinds of cases,³⁹ and also objects that the key precedents either do not support the Court's conclusion or should be rejected.⁴⁰ While Justice Kennedy's separate opinion implies a restriction of the Court's decision to family matters, the analysis presented by Justice Ginsburg for the Court leaves open applications to further circumstances. Rather than a weakness, as claimed by the dissenters, this feature is commendable, for Justice Ginsburg's analysis provides reasons — seeing enormous stakes for an individual weigh heavily against the financial concerns of the state — which if duplicated in another context should prevent an arbitrary line barring access to appeal.

The second objection remains a vigorous line of attack by members of the Court who seek to curb equal protection doctrine. Justice Thomas argues that only demonstrations of intentional discrimination should warrant constitutional solicitude and hence asserts no defect in a neutral rule of general applicability — like a requirement that litigants pay for record preparation prior to an appeal.⁴¹ On this reasoning, relying on *Washington v. Davis*,⁴² the dissent would insulate any general fee requirement from challenge by impoverished individuals even if such a requirement effectively bars access to court. Indeed, this line of reasoning would lead to reversing decisions guaranteeing access to court, access to counsel, and access to the ballot box. The dissenters are right to find a tension between the intentional discrimination requirement of *Washington v. Davis* and many equal protection precedents. By securing the endorsement of the Court, Justice Ginsburg's opinion in *M.L.B. v. S.L.J.* places a boulder in the path of the dissent's campaign to extend *Washington v. Davis* — and it undoes the dissent's

³⁹ *Id.* at 129–30 (Thomas, J., dissenting) (“I do not think, however, that the newfound constitutional right to free transcripts in civil appeals can be effectively restricted to this case. The inevitable consequence will be greater demands on the States to provide free assistance to would-be appellants in all manner of civil cases involving interests that cannot, based on the test established by the majority, be distinguished from the admittedly important interest at issue here.”).

⁴⁰ *Id.* at 130–44.

⁴¹ *Id.* at 133–39.

⁴² 426 U.S. 229 (1976). *Washington v. Davis* rejected a disparate impact theory of the Equal Protection Clause altogether.

claims that only old precedents diverge in allowing protection against the impact of neutral rules on the poor.

The United States remains one of a handful of U.N. member states that have not ratified the International Covenant on Economic, Social and Cultural Rights.⁴³ The treaty was signed by President Jimmy Carter in 1977, but the nation has taken no steps toward ratification. Ours is widely understood to be a Constitution of negative, not positive, liberties. The United States is also sadly often a place where the poor are left without support or access to food, shelter, and security. A rising dependence by government agencies on user fees and other charges and a trend toward privatizing what once had been public programs put in jeopardy participation by low-income people in the central institutions of society. In this context, Justice Ginsburg's opinion for the Court in *M.L.B. v. S.L.J.* is truly extraordinary. And it ensures that no parents will be locked out of judicial review of a decision to forever end legal relationships with their children simply because they cannot pay a court fee.

⁴³ *Adopted* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

RAISING THE BAR: *MAPLES v. THOMAS*
AND THE SIXTH AMENDMENT RIGHT TO COUNSEL

*Carol S. Steiker**

My course on the American death penalty has more than its share of dramatic and powerfully engaging issues and cases. Should the death penalty be limited to the crime of murder, as a matter of policy or of constitutional law? Is it constitutional to execute juvenile offenders or those with mental retardation? What role does race play in the capital justice system, and what is its constitutional significance? But I have never seen my students more avid and appalled than last semester, when they encountered the facts underlying the Court's recent decision, per Justice Ginsburg, in *Maples v. Thomas*,¹ issued in January of last year.

The case involved a prisoner on Alabama's death row, Cory Maples, whose conviction and death sentence were upheld on direct appeal. In state post-conviction proceedings, Maples was represented pro bono by two young lawyers from Sullivan & Cromwell in New York — a role that many of my students could imagine themselves playing in the not-too-distant future. These two associates filed Maples's state habeas petition, alleging ineffective assistance of trial counsel among other trial infirmities. While this petition was pending in the Alabama trial court, the two associates left Sullivan & Cromwell for other employment opportunities, but failed to move for substitution of counsel or even to inform the Alabama court or Maples himself of their departure. When Maples's state habeas petition was denied, notices of the court's order were sent to the associates at Sullivan & Cromwell's address in New York, where the mail-room clerk marked them "return to sender" and sent them back, unopened, to the trial court clerk, who attempted no further mailing. After the clock ran out on Maples's chance to file an appeal from the denial of his state habeas petition, the Alabama Attorney General sent a letter directly to Maples informing him — for the first time — of the missed deadline and notifying him that he had four weeks in which to file a federal habeas petition. Maples called his mother, and his mother called Sullivan & Cromwell. The law firm tried to convince the Alabama courts to give them another chance to meet the appeals deadline, going all the way to the Alabama Supreme Court.² But Alabama's position, upheld by its

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¹ 132 S. Ct. 912 (2012).

² See *id.* at 918–20.

courts, was that the trial court clerk had met the state's obligations by sending notice of the trial court's order to the New York lawyers' address of record. The state trial court maintained that it was "unwilling to enter into subterfuge in order to gloss over mistakes made by counsel for the petitioner."³

Having procedurally defaulted his state habeas appeal, however, Maples was then held to be barred from federal habeas corpus review as well. Because state prisoners do not have a constitutional right to counsel on state habeas review, their state habeas counsel's mistakes cannot ordinarily constitute "cause" to excuse a state procedural default, because such counsel is presumed to be acting as the prisoner's agent, rather than as some force "external" to the prisoner. In other words, generally state prisoners are stuck with their lawyers' mistakes on state habeas, where a default will then bar all further review on the merits of their claims in both state and federal courts. In light of this precedent, the federal habeas court denied review of Maples's claims as procedurally defaulted, and the Eleventh Circuit affirmed.⁴

Justice Ginsburg, writing for a 7–2 majority of the Court, noted that while the general rule of habeas counsel "agency" need not be disturbed, a "markedly different situation is presented . . . when an attorney abandons his client without notice."⁵ Abandonment is unlike any other form of attorney negligence or error, in that the rationale of attorney "agency" fails in such circumstances. In Justice Ginsburg's words, "[A] client cannot be charged with the acts or omissions of an attorney who has abandoned him. Nor can a client be faulted for failing to act on his own behalf when he lacks reason to believe his attorneys of record, in fact, are not representing him."⁶ Finding that the circumstances of Maples's case did indeed establish such abandonment, the Court held that "principles of agency law and fundamental fairness point to the same conclusion: There was indeed cause to excuse Maples' procedural default."⁷

This holding is a rather modest and common-sense modification of federal habeas corpus law — so modest and commonsensical that it did not produce the kind of ideologically split decision that one often sees in other habeas or death penalty cases. Not only Justice Kennedy, the usual swing vote, joined the Court's opinion, but Chief Justice Roberts and Justice Alito as well. What makes Justice Ginsburg's

³ *Id.* at 921 (quoting *Maples v. State*, No. CC95-842.60 (Ala. Cir. Ct. Sept. 3, 2003), *reprinted in* *Petition for a Writ of Certiorari app. at 222a, 224a, Maples*, 129 S. Ct. 912 (No. 10-63)) (internal quotation marks omitted).

⁴ *See id.*

⁵ *Id.* at 922.

⁶ *Id.* at 924.

⁷ *Id.* at 927.

opinion for the Court in *Maples* noteworthy — and what made it controversial among the Justices, to the extent that it was — was Justice Ginsburg’s explicit connection of the breakdown of representation in Cory Maples’s case to Alabama’s system of capital representation for indigent defendants.

Justice Ginsburg began her analysis — Part I, Section A of her opinion, front and center — with a description of the conditions facing trial counsel in death penalty cases in Alabama, noting the low eligibility requirements in terms of experience and training for capital defense lawyers, the inadequate compensation provided to such lawyers, and the fact that Alabama is nearly alone among the states in failing to provide indigent capital defendants with court-appointed lawyers on state habeas review. Justice Ginsburg went on to describe the particular circumstances surrounding Maples’s case: Only one of his two lawyers had ever previously served in a capital case, and neither one had ever tried the penalty phase of a capital case. Compensation for each lawyer was capped at \$1000 for out-of-court work preparing Maples’s case, and at \$40/hour for in-court services.⁸

Although Justice Ginsburg simply sketched the basic facts about Alabama’s indigent capital defense system without much editorial comment, the implications were obvious: First, Cory Maples’s post-conviction challenge to the adequacy of his trial counsel — his main claim advanced, and defaulted, on state habeas review — might well have been meritorious given the prevailing conditions. This likelihood heightened the “fundamental fairness” concerns at issue in the case, and by broader implication in all of Alabama’s capital cases. Second, Alabama’s failure to provide counsel for indigent capital defendants on state habeas review was the impetus for the involvement of the Sullivan & Cromwell associates (and many other pro bono counsel from big law firms) in Alabama’s capital defense system. This recognition suggests that Alabama’s choice to require capital defendants to rely on the charity of the public interest and pro bono bar during the crucial stage of state habeas review implies some state responsibility — moral if not legal — for the breakdowns that will inevitably occur in such a system.

These implications were controversial among the Justices. Justice Alito, who joined the Court’s opinion, nonetheless concurred separately in order to absolve Alabama of responsibility for the breakdown of representation in Maples’s case. In Justice Alito’s view, the breakdown was the one-off product of “a perfect storm” of “unique circumstances.”⁹ He failed to see, he wrote, “any important connection between what happened in this case and Alabama’s system for providing

⁸ *Id.* at 917–18.

⁹ *Id.* at 929 (Alito, J., concurring).

representation for prisoners who are sentenced to death.”¹⁰ Justice Scalia, who dissented along with Justice Thomas, was even more dismissive of the implied connection between Alabama’s indigent defense system and Maples’s case, describing the portion of the Court’s opinion detailing Alabama’s indigent defense procedures as “inexplicable.”¹¹

But the great strength of Justice Ginsburg’s opinion — and of her opinions and votes in other right-to-counsel and death penalty cases — is the recognition that the larger problem of which Cory Maples’s case is only a part is not one of bad apples or “perfect storms.” Rather, there are systemic failures across the country in the provision of defense counsel services to the indigent. Justice Ginsburg has been an influential voice on the Court in addressing these problems, both by expanding the situations in which the right to counsel obtains and by policing the implementation of the right. Justice Ginsburg wrote the majority opinions in *Alabama v. Shelton*,¹² which required counsel in cases where the defendant receives a suspended sentence of incarceration, and in *Halbert v. Michigan*,¹³ which required counsel for defendants who seek to appeal guilty pleas, the primary engine of disposition in our current criminal justice system. In a rare recognition by the Court of the implication of systemic failures, Justice Ginsburg wrote a majority opinion in a constitutional speedy trial case holding that delay resulting from “systemic ‘breakdown in the public defender system’” should be charged to the state rather than to the defendant.¹⁴ Moreover, she has been a staunch supporter of maintaining performance standards for indigent defense counsel, penning a lone concurrence in *Harrington v. Richter*¹⁵ to argue that counsel was deficient for failing to consult blood experts in Richter’s noncapital murder trial, and joining majorities (some of them slim) to require adequate investigation of mitigating evidence by defense counsel in a series of important capital cases.¹⁶

My students are transfixed by Cory Maples’s case — in large part, perhaps, by the scary spectacle of seeing two recent law grads fail so egregiously and so publicly. But many of my students are also outraged by the window the case opens onto the structure of indigent criminal defense in Alabama, especially in capital cases. Justice Ginsburg helps us make sense of the view by situating the injustice in

¹⁰ *Id.* at 928.

¹¹ *Id.* at 934 (Scalia, J., dissenting).

¹² 535 U.S. 654 (2002).

¹³ 545 U.S. 605 (2005).

¹⁴ *Vermont v. Brillon*, 129 S. Ct. 1283, 1292 (2009) (quoting *State v. Brillon*, 955 A.2d 1108, 1111 (Vt. 2008)).

¹⁵ 131 S. Ct. 770, 793 (2011).

¹⁶ *Id.* at 793 (Ginsburg, J., concurring); see *Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams v. Taylor*, 529 U.S. 362 (2000).

Maples's case in the larger capital justice system. By doing so, she urges all of us in the legal profession to keep our eyes on these systemic injustices, as she continues to do, vigilantly, from the high Court.

“A MORE EGALITARIAN RELATIONSHIP AT HOME AND
AT WORK”: JUSTICE GINSBURG’S DISSENT IN
COLEMAN v. COURT OF APPEALS OF MARYLAND

*Julie C. Suk**

I feel deeply honored to have this opportunity to present this Essay to Justice Ginsburg. I am among the many feminists who have found wisdom and inspiration in her scholarship, her advocacy, her judicial opinions, and her life. Her work has also inspired me as a scholar and teacher of comparative law and civil procedure. Her early engagement of Swedish civil procedure helps us see the value of thinking transnationally to understand the trajectory of American law.

Justice Ginsburg took her oath of office as a U.S. Supreme Court Justice on August 10, 1993, five days after the Family and Medical Leave Act of 1993¹ (FMLA) went into effect. Thus, 2013 marks not only the twentieth anniversary of Justice Ginsburg’s tenure on the Court, but also the twentieth birthday of a law that aspired to help Americans “balance the demands of the workplace with the needs of families.”² Both events were important triumphs for legal feminism in the United States, which Justice Ginsburg played such a tremendous role in shaping and inspiring. In Justice Ginsburg’s words, the FMLA was supposed to “make it feasible for women to work while sustaining family life.”³ While social scientists, legal scholars, and working moms can attest that this endeavor remains a work in progress,⁴ Justice Ginsburg’s dissenting opinion in *Coleman v. Court of Appeals of Maryland*⁵ envisions constitutional sex equality as entailing “a more egalitarian relationship at home and at work.”⁶ It implicitly critiques the limits of law in vindicating this ambitious commitment.

The FMLA guarantees employees twelve weeks of job-protected leave to care for a newborn or ill family member, or to care for one’s

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¹ 2 U.S.C. §§ 60m–60n (2012); 5 U.S.C. §§ 6381–6387 (2012); 29 U.S.C. §§ 2601–2654 (2006 & Supp. V 2011).

² 29 U.S.C. § 2601(b)(1) (2006).

³ *Coleman v. Court of Appeals of Md.*, 132 S. Ct. 1327, 1349 (2012) (Ginsburg, J., dissenting).

⁴ See, e.g., ARLIE HOCHSCHILD WITH ANNE MACHUNG, *THE SECOND SHIFT: WORKING FAMILIES AND THE REVOLUTION AT HOME* (rev. ed. 2012); PAMELA STONE, *OPTING OUT? WHY WOMEN REALLY QUIT CAREERS AND HEAD HOME* (2007); JOAN C. WILLIAMS, *RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER* (2010).

⁵ 132 S. Ct. 1327.

⁶ *Id.* at 1350 (Ginsburg, J., dissenting).

own serious health condition.⁷ A decade ago, the Supreme Court held that the family-care provision of the FMLA was a valid exercise of Congress's power to enforce the Equal Protection Clause. In *Nevada Department of Human Resources v. Hibbs*,⁸ the Court upheld the family-care provisions because a statutory guarantee of such leave to men and women alike would undercut employers' incentive to discriminate against women based on their perceived likelihood of taking maternity leaves.⁹ In *Coleman*, by contrast, five Justices concluded that the self-care provision was not a valid exercise of the Fourteenth Amendment section 5 power. The plurality declared that, "[w]ithout widespread evidence of sex discrimination or sex stereotyping in the administration of sick leave, it is apparent that the congressional purpose in enacting the self-care provision is unrelated to these supposed wrongs."¹⁰ For the plurality, the FMLA's gender-neutral sick leave guarantee grew out of a "concern for the economic burdens on the employee and the employee's family resulting from illness-related job loss," which it explicitly distinguished from sex discrimination.¹¹

Justice Ginsburg's disagreement with her colleagues on this point stems from her recognition that the legal path toward a "more egalitarian relationship at home and at work" is immensely complicated and demanding. Digging through the legislative history of the FMLA, she recounted numerous stories of women who lost their jobs when they got pregnant or took a few weeks' maternity leave.¹² These stories show us, without telling us, that women's full participation in the workplace requires legitimate, adequate, and sustainable institutional arrangements for pregnancy and maternity leaves. Yet, in 2012, the State of Maryland was arguing in *Coleman* that a state's refusal to provide pregnancy leave to its employees was not unconstitutional.¹³

In confronting Maryland's argument, Justice Ginsburg proposed revisiting the almost-forty-year-old constitutional understanding that pregnancy discrimination is not sex discrimination.¹⁴ Yet, if pregnancy discrimination were held to violate the Equal Protection Clause, would it follow that the state's failure to provide pregnancy leave to its employees is unconstitutional? Throughout the 1980s, as Justice Ginsburg recounted, American feminists debated whether and how the

⁷ See 29 U.S.C. § 2612(a)(1) (2006 & Supp. V 2011).

⁸ 538 U.S. 721 (2003).

⁹ *Id.* at 730–32.

¹⁰ *Coleman*, 132 S. Ct. at 1335 (plurality opinion).

¹¹ *Id.*

¹² See *id.* at 1342–44 (Ginsburg, J., dissenting) (citing testimony by women in congressional hearings and statements in Senate reports).

¹³ *Id.* at 1344.

¹⁴ See *id.*

law should guarantee pregnancy and childbirth leaves.¹⁵ “Equal-treatment” feminists wanted maternity leave to be a form of gender-neutral disability leave, and viewed special maternity leaves as sex discrimination. But, consistent with the views of “equal-opportunity” feminists, a 1978 California law protected maternity leave specially. Although the Supreme Court did not invalidate the California law on equal protection grounds, Justice Ginsburg’s dissent reminds us that “equal-treatment” feminism became the conceptual frame of the federal FMLA.

Alternatively, many European countries provide female employees with extremely generous paid maternity leaves that last longer than the meager twelve unpaid weeks guaranteed by the FMLA.¹⁶ These special protections undoubtedly help working mothers reconcile the demands of work and family. But they don’t disrupt the gendered patterns of working and caring that reinforce the inegalitarian relationship at home and at work.¹⁷ American feminists had a more ambitious vision for the FMLA: It guaranteed medical leave in a gender-neutral fashion not only to treat men with illnesses fairly, but also to disrupt the rational dynamics of discrimination against women. Entitling men to job-protected leave for illness would lead employers, when employing men, to incur costs roughly equal to the costs of employing women who might become pregnant and give birth. According to the equal-treatment theory, if women need pregnancy leave in order to be full participants in the workplace, giving men a similar benefit for illness could equalize the costs of hiring men and women and would thus render it economically irrational for employers to prefer men.

As Justice Ginsburg pointed out, Congress agreed with this theory in enacting the self-care provision of the FMLA.¹⁸ Enacting a family-care leave without a self-care leave would be less effective in combating discrimination against women, due to the sex-role stereotype that family

¹⁵ *Id.* at 1340–41.

¹⁶ For example, France provides sixteen weeks of paid job-protected leave, CODE DU TRAVAIL [C. TRAV.] art. 1225-17 (Fr.), consistent with a European Union directive requiring fourteen weeks of paid leave, *see* Council Directive 92/85/EEC of 19 October 1992 on the Introduction of Measures to Encourage Improvements in the Safety and Health at Work of Pregnant Workers and Workers Who Have Recently Given Birth or Are Breastfeeding, art. 8, 1992 O.J. (L 348) 1, 4 (EC).

¹⁷ For a more detailed account of these dynamics, see Julie C. Suk, *Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work-Family Conflict*, 110 COLUM. L. REV. 1, 49–66 (2010).

¹⁸ *See Coleman*, 132 S. Ct. at 1340–42 & n.4 (Ginsburg, J., dissenting) (discussing and citing the briefs filed in *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272 (1987)).

caregiving is women's work.¹⁹ Rightly or wrongly, employers widely assume that women are the primary consumers of "parental" leave, regardless of its availability to both genders. By contrast, since all human beings face a wide range of serious health conditions at one time or another, pregnant women are not presumed to be the primary consumers of medical leave. Thus, because the FMLA's family leave mandate could increase the incentive to discriminate against women, the self-care medical leave mandate was necessary to undercut that incentive.

What emerges is a highly pragmatic, yet complicated and pluralistic portrait of what constitutes sex discrimination and how it should be eliminated. Workplace discrimination includes, but should not be limited to, employers' irrational preference for men over women based on false predictions about women's likely behaviors after they give birth. Allowing women to sue for such straightforward discrimination is not a solution, largely because it is difficult to prove discrimination.²⁰ According to Justice Ginsburg's account, workplace discrimination against women also includes actions that well-meaning and rational employers adopt to avoid the real costs of pregnancy and child rearing. Congress can thus combat discrimination by making it as expensive to employ men as it is to employ women. Justice Ginsburg wrote: "Essential to its design, Congress assiduously avoided a legislative package that, overall, was or would be seen as geared to women only. Congress thereby reduced employers' incentives to prefer men over women, advanced women's economic opportunities, and laid the foundation for a more egalitarian relationship at home and at work."²¹ As reflected in these words, the project of gender justice will not succeed if it is geared to women only; it is a comprehensive reordering of men's and women's roles. Quoting a Senate Report, Justice Ginsburg pointed out that the FMLA "address[es] the dramatic changes that have occurred in the American workforce in recent years. . . . The once-typical American family, where the father worked for pay and the mother stayed at home with the children, is vanishing."²² The "more egalitarian relationship at home and at work" will involve changing

¹⁹ *Id.* at 1347 (citing *Family and Medical Leave Act of 1989: Hearing on S. 345 Before the Subcomm. on Children, Family, Drugs & Alcoholism of the Comm. on Labor & Human Res.*, 101st Cong. 39 (1989) (statement of Carol Ball, U.S. Chamber of Commerce)).

²⁰ Justice Ginsburg quoted Don Butler, one of the plaintiffs in *California Federal Savings & Loan Ass'n v. Guerra*, 479 U.S. 272, who argued that California's pregnancy leave law would lead employers to hire men instead of women. In response to the proposition that such discrimination would be illegal, he replied, "Well, that is illegal, but try to prove it." *Id.* (quoting *Family and Medical Leave Act of 1987: Joint Hearing on H.R. 925 Before the Subcomm. on Civil Serv. and the Subcomm. on Compensation & Emp. Benefits of the H. Comm. on Post Office and Civil Serv.*, 100th Cong. 36 (1987)) (internal quotation marks omitted).

²¹ *Coleman*, 132 S. Ct. at 1350 (Ginsburg, J., dissenting).

²² *Id.* at 1349 (quoting S. REP. NO. 102-68, at 25 (1991)).

men's roles so that *both* mothers and fathers work for pay *and* care for the children equally. Congress laid a foundation, which the Court should not have undone, and the rest of the work is up to the people.

What is most striking about Justice Ginsburg's *Coleman* dissent is that she uses her own words sparingly. The egalitarian vision that emerges in this opinion is not written solely in her voice. It is largely a collective chorus of stories and debates from the testimony of women workers and advocates before Congress, Congress's findings, and legislative text. It illustrates the nature of her ongoing commitment to a comprehensive gender equality, which will arrive not only through the enforcement of rights by courts, but also through a democratic constitutionalism that can be supported, reframed, and encouraged by a wise judicial voice.²³

²³ Shortly before her nomination to the Supreme Court, then-Judge Ginsburg invoked the good judge's ability to recognize the "felt need to act only interstitially," which "affords the most responsible room for creative, important judicial contributions." Ruth Bader Ginsburg, Madison Lecture, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1209 (1992) (quoting Professor Gerald Gunther's remarks at her own investiture in 1980) (internal quotation mark omitted).

RESPECTING DISSENT: JUSTICE GINSBURG'S CRITIQUE OF THE TROUBLING INVOCATION OF APPEARANCE

Laurence H. Tribe*

Justice Ginsburg is alone on the Court in resisting the pro forma flourish of declaring respect for majority opinions that she carefully demolishes,¹ but she neither shrinks from voicing dissent² nor does so casually.³ It is the care with which she decides when to disagree, and the precision with which she expresses disagreement, that bespeaks the respect for her colleagues and the institution that others sometimes honor only in form. I focus here on Justice Ginsburg's dissents in two cases, *Baze v. Rees*⁴ and *Gonzales v. Carhart*,⁵ to show how she selects and frames her departures from majority judgments. My aim is to expose the way the majorities in this pair of cases too casually invoked *appearances* to justify their holdings — and the way Justice Ginsburg used her role as a dissenter to undermine the legitimacy of that reckless judicial methodology.

Baze, as Justice Ginsburg forcefully demonstrates, indefensibly cast aside the availability of alternative lethal injection monitoring procedures as a relevant factor in Eighth Amendment analysis.⁶ And *Carhart*, as she makes plain, departed without justification from the Court's previously consistent demand, rooted in "a woman's autonomy to determine her life's course," that a health exception be included in any abortion restriction.⁷ In both cases, a particularly troubling feature of the majority's conclusion was a much too casual willingness to sacrifice important rights for the sake of preserving appearances.

Regulation for the sake of appearances occupies a place of great complexity in constitutional discourse. So, for instance, the way government labels some conduct as criminal might do constitutionally cognizable harm by stigmatizing some groups in society for no better

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¹ Note, *From Consensus to Collegiality: The Origins of the "Respectful" Dissent*, 124 HARV. L. REV. 1305, 1324 (2011).

² Ruth Bader Ginsburg, Madison Lecture, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1194 (1992).

³ See Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 142–44 (1990).

⁴ 553 U.S. 35 (2008).

⁵ 550 U.S. 124 (2007).

⁶ See *Baze*, 553 U.S. at 114 (Ginsburg, J., dissenting).

⁷ *Carhart*, 550 U.S. at 172 (Ginsburg, J., dissenting).

reason than that it deems them less worthy than others.⁸ Or, the way government elevates some symbols for public celebration might offend constitutional principles by signaling its endorsement of certain religious beliefs.⁹ More rarely, otherwise problematic government actions might be *saved* by attention to how things appear — like insisting on a jury trial for a defendant whose unpopularity might have made a bench trial fairer,¹⁰ or restricting the role of money in politics to avoid the self-reinforcing impression that those who wield political power depend more on their funders than on their constituents.¹¹

But such appearance-based defenses are uniquely difficult to corroborate and uniquely tempting to accept. Lest they become trumps too easily played in constitutional argument, courts must scrutinize their deployment with great care to ensure that they are not just post hoc rationalizations or excuses for deceiving the public¹² and do not in fact serve to conceal serious constitutional violations.

Justice Ginsburg's dissents in *Baze* and *Carhart* represent small — but important — steps in developing such scrutiny of appearance-based argument. In *Baze*, the Court had accepted the state's defense of including a new drug in its lethal injection protocol, despite the drug's risk of inflicting immense pain unless properly administered, because the drug suppressed involuntary movements and, therefore, preserved the "dignity" of the procedure while ensuring that viewers would not erroneously mistake spasms for signs of pain.¹³ But of course those spasms could instead *accurately* signal excruciating suffering,¹⁴ and in any event, as Justice Ginsburg noted in her meticulous dissent, the appearance argument provided no excuse for failing to employ various safety checks to protect against mistakes if the drug was to be used at all.¹⁵

In *Carhart*, the Court rested in part on the degree to which the "partial birth" abortion procedure Congress had outlawed resembled infanticide and might thus jeopardize public confidence in the medical community.¹⁶ Not only was this appearance argument hard to test em-

⁸ See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 574–76, 578–79 (2003).

⁹ See, e.g., *Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 626–27 (1989) (O'Connor, J., concurring in part and concurring in the judgment).

¹⁰ See *Singer v. United States*, 380 U.S. 24, 35–36 (1965); see also *United States v. Moon*, 718 F.2d 1210, 1218 (2d Cir. 1983).

¹¹ See generally LAWRENCE LESSIG, *REPUBLIC, LOST* (2011); Lawrence Lessig, *A Reply to Professor Hasen*, 126 HARV. L. REV. F. 61 (2012), http://www.harvardlawreview.org/media/pdf/forvol126_lessig.pdf.

¹² Cf. FYODOR DOSTOYEVSKY, *THE BROTHERS KARAMAZOV* 275 (Constance Garnett trans., Sovereign World Classics 2012) (1880) ("The Grand Inquisitor").

¹³ *Baze v. Rees*, 553 U.S. 35, 57–58 (2008).

¹⁴ See *id.* at 73 (Stevens, J., concurring in the judgment).

¹⁵ *Id.* at 121 (Ginsburg, J., dissenting).

¹⁶ *Gonzales v. Carhart*, 550 U.S. 124, 158–59 (2007).

pirically but, as Justice Ginsburg noted in her dissent, not even *Congress* had treated it as weighty enough to justify overriding constitutional rights: other late-term methods of terminating pregnancy by delivering an intact fetus that appear no less brutal had been left untouched.¹⁷

Few will remember the Court's partial reliance upon appearance justifications in *Baze* and *Carhart* without recalling their gripping and precise refutation in Justice Ginsburg's dissenting opinions. By depriving defenses based on appearances of the cumulative weight of unexamined endorsement, Justice Ginsburg's opinions in this pair of life-and-death cases demonstrate the quiet power of cautious dissent.

¹⁷ *Id.* at 182 (Ginsburg, J., dissenting).

THE DISSENT IN *NATIONAL FEDERATION OF
INDEPENDENT BUSINESS v. SEBELIUS*

*Mark Tushnet**

Justice Ginsburg's dissent in *National Federation of Independent Business v. Sebelius*¹ (*NFIB*) gave the Chief Justice a gentle lesson in legal analysis and in the politics of enacting statutes. She gave a more pointed lesson in economics to those of her colleagues who found the Patient Protection and Affordable Care Act² (ACA) an unconstitutional exercise of Congress's power to regulate commerce among the several states.

The Chief Justice's opinion made much of the fact that Congress had never previously imposed affirmative obligations on Americans under the Commerce Clause.³ Justice Ginsburg observed that Congress had imposed similar obligations under other clauses — a duty to report for jury duty, to register for the draft, to buy guns for use in the militia, to turn in gold coins for paper currency, and to file a tax return.⁴ The Chief Justice responded that those duties were “based on constitutional provisions other than the Commerce Clause.”⁵

In any law school classroom, an instructor would have responded to the Chief Justice, “But, that's just like saying those cases were different because they were decided on Tuesdays.” What he needed to supply was a reason for thinking that those other provisions somehow conferred greater power on Congress than did the Commerce Clause. One candidate reason seems ruled out by general considerations of constitutional structure: it would be hard to defend the proposition that those powers were somehow “more plenary” than the Commerce Clause.

Another candidate might seem more promising at first. Straining only with respect to the requirement that people surrender their gold coins, one might say, as some of the litigants had,⁶ that those powers

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¹ 132 S. Ct. 2566 (2012).

² Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 25, 26, and 42 U.S.C.).

³ See, e.g., *NFIB*, 132 S. Ct. at 2586 (opinion of Roberts, C.J.).

⁴ *Id.* at 2627 n.10 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

⁵ *Id.* at 2586 n.3 (opinion of Roberts, C.J.).

⁶ See, e.g., Brief for Private Respondents on the Individual Mandate at 58, *NFIB*, 132 S. Ct. 2566 (Nos. 11-393, 11-398, 11-400) (arguing that Congress has respected the distinction between action and inaction except for certain duties of citizenship).

deal with fundamental aspects of citizenship in the United States. Here the difficulty is subtler, though not much. Those who pursued that argument would have to explain why the Court — rather than Congress — was the institution entitled to specify what powers implicated fundamental aspects of citizenship. The case for lodging that entitlement in Congress is reasonably strong, with respect to both the ACA itself and the Commerce Clause more broadly. And, in any event, the issue raises the general questions about the relationship between constitutional review and congressional power that are the bedrock of constitutional law. On those questions, the Chief Justice's response was among the weaker available: "Our respect for Congress's policy judgments thus can never extend so far as to disavow restraints on federal power that the Constitution carefully constructed."⁷ One can readily agree with that observation and yet note that the whole point of the litigation was to determine what those restraints were.

Justice Ginsburg was too polite to respond to the Chief Justice's discussion of other congressionally imposed mandates. She also was astutely silent when the Chief Justice addressed her argument with respect to the Medicaid extension. According to the Chief Justice, Congress could not threaten the states with the withdrawal of large grants when it adopted a "new" program.⁸ Justice Ginsburg replied that on the Chief Justice's view, Congress could achieve the same result by the technique of repealing the existing program and reenacting it as part of the new, larger program to which the Court objected.⁹ The Chief Justice responded not by denying the accuracy of her analysis of the doctrine he set out, but by invoking political considerations: "Practical constraints would plainly inhibit, if not preclude, the Federal Government from repealing the existing program and putting every feature of Medicaid on the table for political reconsideration."¹⁰ That depends, though, on timing. It's hardly clear that had Congress known in 2009 and 2010 that "repeal and reenact" was the only way to expand Medicaid as substantially as it wanted to do in a comprehensive program of health care insurance reform, Congress would have faced "practical" obstacles to doing so — or, at least, any greater practical obstacles than it faced over the adoption of the ACA. Things had changed as of 2012, of course, and the repeal-and-replace strategy was unavailable then. But, I wonder why the Chief Justice and his colleagues felt themselves entitled to predicate a holding of unconstitutionality on their not obviously correct assessment of practical politics.

⁷ *NFIB*, 132 S. Ct. at 2579.

⁸ *Id.* at 2605 (plurality opinion).

⁹ *Id.* at 2629 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

¹⁰ *Id.* at 2606 n.14 (plurality opinion).

In contrast to her silence on these questions, Justice Ginsburg did spend some time on the economics of health insurance, rebuking her colleagues for failing to understand elementary economics.

The joint dissent made much of the fact that young people were required to purchase an insurance package that covered a standard set of conditions, some of which they would never experience. So, the dissenters argued, young people were subsidizing older ones.¹¹ When Justice Ginsburg first encountered that argument in a question from Justice Alito at the oral argument, she could hardly contain herself: “If you’re going to have insurance, that’s how insurance works.”¹² She restated the point in more detail in her dissent. Insurance works by lumping people into groups and charging each member of the group a fee — the “price” of the insurance — based on the risks, here the likely consumption of health care, the group faces. There’s nothing “natural” about the groups lumped together for insurance purposes: Smokers and nonsmokers face different risks of lung cancer, but an insurance package might lump them together by providing everyone with coverage against “life-threatening ailments” for the same fee. The nonsmokers “subsidize” the smokers, but, as Justice Ginsburg put it, “[i]n the fullness of time,” we expect things to even out.¹³ The healthy young, lumped together with the ailing old, appear to subsidize the latter, but eventually the young become old and they get back what they paid earlier, and perhaps even more, in the form of the health care they need when old.

Justice Ginsburg made the point in another way. When you insure your house against the risk that it will be destroyed by fire, it’s silly to complain that you’re wasting money each year your house doesn’t burn down. You’re buying a guarantee that in the event your house does burn down, you’ll be able to rebuild it. Similarly with health care insurance. The healthy young “are assured that, if they need it, emergency medical care will be available, although they cannot afford it.”¹⁴

Then there’s the “broccoli” problem, which the Court’s conservatives made much of.¹⁵ Justice Ginsburg made two points. The Chief Justice offered a reasonably sophisticated version of the broccoli argument by tying a mandate about broccoli to health problems associ-

¹¹ See *id.* at 2645 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

¹² Transcript of Oral Argument, Mar. 27, 2012, at 10, *NFIB*, 132 S. Ct. 2566 (Nos. 11-393, 11-398, 11-400).

¹³ *NFIB*, 132 S. Ct. at 2620 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

¹⁴ *Id.*

¹⁵ See *id.* at 2588–89, 2591 (opinion of Roberts, C.J.); Transcript of Oral Argument, *supra* note 12, at 13 (comments of Justice Scalia).

ated with obesity: upholding the ACA on the ground that Congress thought that requiring people to purchase health care insurance would eliminate the free ride given to those who counted on emergency services and the like for health care would, the Chief Justice said, allow Congress to address the free ride given obese people, who consume “too much” health care, by requiring that they buy broccoli.¹⁶ Justice Ginsburg responded sensibly enough that such a requirement would fail minimal standards of rationality, which everyone agreed applied to congressional action.¹⁷ The core of her point was simple: requiring people to buy broccoli was different from requiring them to eat it.

The broccoli problem had a less sophisticated version. Those who raised it thought that requiring people to buy health care insurance would imply that Congress could require people to buy broccoli or cars.¹⁸ Justice Ginsburg carefully explained why insurance, as a product, differed from broccoli or cars, because insurance was affected by moral hazard and adverse selection problems not associated with broccoli or cars. Assume that Congress did mandate that the people buy a car every five years. The car’s price isn’t affected by the timing of the purchase: The fact that you need a car sometime soon, though not so imminently that the seller can milk you for all you’re worth, doesn’t lead car sellers to raise their prices (under the ordinary circumstances economists assume exist).¹⁹ Again in Justice Ginsburg’s words, if someone eventually wants to buy a car, “she will be obliged to pay at the counter before receiving the vehicle.”²⁰

Health care insurance is different. Last week you were fine, and the price of the health care insurance you could get would be based on the group of which you were a member — under the ACA, your local community as a whole. Today, though, an ambulance takes you to the emergency room after you’ve been in a car accident. The “insurance” you’d have to buy at that moment is the cost of the health care you’re about to get — a much higher amount.²¹ With insurance companies required to issue insurance to everyone at the community rate, waiting to buy the insurance is a terrific deal.

There is much more in Justice Ginsburg’s dissent in *NFIB*. It is a masterful exposition of law and economics, the more so because she

¹⁶ *NFIB*, 132 S. Ct. at 2588–89 (opinion of Roberts, C.J.).

¹⁷ *Id.* at 2624 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

¹⁸ See, e.g., Brief of the Washington Legal Foundation and Constitutional Law Scholars as *Amici Curiae* in Support of Respondents (Individual Mandate Issue) at 20–21, *NFIB*, 132 S. Ct. 2566 (Nos. 11-397, 11-398, 11-400).

¹⁹ See *NFIB*, 132 S. Ct. at 2619–20 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

²⁰ *Id.* at 2620.

²¹ See *id.*

understood which targets to pick for her most direct analysis, and which to leave unaddressed because of their obvious weaknesses. The dissent shows us a judge at the height of her powers.