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I DISSENT: JUSTICE GINSBURG'S PROFOUND DISSENTS†

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† Eds. Note: The *Rutgers University Law Review* is grateful to Dr. Gan for the opportunity to publish this Article as a tribute to the late Justice Ruth Bader Ginsburg. Justice Ginsburg was a Professor of Law at Rutgers Law School from 1963–1972, and her legendary name has graced the pages of the *Rutgers University Law Review* on at least three occasions in 1965, 1970, and finally in 2008. Rutgers University in 2021 dedicated an iconic building comprising part of the Newark, NJ, skyline as "Ruth Bader Ginsburg Hall," and we will continue to find new ways to honor her legacy. Justice Ginsburg's integrity and career have inspired countless classes of Rutgers Law students who have learned many things from her, including the true power of the words "I Dissent."

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INTRODUCTION

Dissents speak to a future age. . . . [T]he greatest dissents do become court opinions and gradually, over time their views become the dominant view. So that's the dissenter's hope: that they are writing not for today, but for tomorrow.[1]

Dissenting opinions are important and can contribute to legal as well as political and social changes.[2] To analyze the power of dissenting opinions this Article coins the terms "soft dissent" and "profound dissent." The former is defined as a concrete disagreement with the majority on the application or interpretation of the law. It is a limited and narrow difference of opinion leading to a different result. The latter is much more than that. It challenges the very basis of the majority's opinion. It offers not only a different conclusion, but an ideological alternative to the majority's opinion. Soft dissent and profound dissent lie on opposite ends of the spectrum of dissent; there are thus dissents that fall in between the two. This Article offers a taxonomy of this sliding scale of dissents in terms of their profoundness.

In order to illustrate this taxonomy of dissents, this Article analyzes Justice Ginsburg's dissenting opinions. Justice Ginsburg was known as a fierce dissenter and would sometimes read her dissenting opinions from the bench while wearing special dissent collars.[3] The analysis in this Article seeks to demonstrate the ways in which Justice Ginsburg's dissents have been deeply influential. Her profound dissents offer an

1. Interview by Nina Totenberg with Ruth Bader Ginsburg, at 03:41 (May 2, 2002), https://www.npr.org/templates/story/story.php?storyId=1142685.

2. I DISSENT: GREAT OPPOSING OPINIONS IN LANDMARK SUPREME COURT CASES xxi (Mark Tushnet ed., 2008).

3. *See, e.g.*, Lani Guinier, *Justice Ginsburg: Demosprudence Through Dissent*, *in* THE LEGACY OF RUTH BADER GINSBURG 206, 206–07 (Scott Dodson ed., 2015); Lani Guinier, *Foreword: Demosprudence through Dissent*, 122 HARV. L. REV. 4, 40 (2008); Vanessa Friedman, *Ruth Bader Ginsburg's Lace Collar Wasn't an Accessory, It Was a Gauntlet*, N.Y. TIMES (Sept. 23, 2020), https://www.nytimes.com/2020/09/20/style/rbg-style.html. *See generally* Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 1 (2010) [hereinafter *The Role of Dissenting Opinions*]; Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133 1990). For Justice Ginsburg's dissents from the bench, see Jeff Bleich et al., *Dissenting from the Bench*, OR. STATE BAR BULL., Oct. 2008.

alternative world view to that of the majority. They challenge the core of the majority's opinion and thoroughly explain why it is deeply wrong, why its basis is erroneous, why its reasoning is flawed, and why its conclusion is mistaken. In other words, Justice Ginsburg's profound dissents not only reach different conclusions than the majority, but indeed create an alternative reasoning, and are based on an alternative perception of society and the law.

An analysis of Justice Ginsburg's profound dissents demonstrates how she worked within the legal system to change it and particularly how she sought to incorporate feminist worldviews into this system. She used her dissents to vigorously challenge the majority and pose an alternative from within the system. Justice Ginsburg authored many dissenting opinions,[4] and it is impossible to include all of them in this Article. Therefore, I will use only a few dissents as illustrative examples of the soft-profound dissents taxonomy, and while this Article will focus in particular on the dissents of Justice Ginsburg, it should be noted that the soft-profound dissents taxonomy is general and relevant to other judges as well.

Though other scholars have argued that dissenting opinions are important and that dissenting judges write separately from the majority in order to convey their ideological disagreement, this Article offers a unique qualitative textual analysis of dissents and a taxonomy of dissents that seeks to enrich the scholarship in this area. A textual analysis of Justice Ginsburg's profound dissents reveals recurring themes: Justice Ginsburg regularly sought to analyze an issue from the point of view of the underprivileged, such as women, minorities, and employees; she issued policy-oriented decisions; she based her decisions on values such as equality and autonomy; and she gave contextual decisions, rich with detailed facts and historical accounts that were sensitive to nuances and to social inequalities.[5]

This Article is made up of five sections. The first section reviews the scholarship on dissenting opinions. The second section introduces the soft-profound dissents taxonomy. The rest of the Article analyzes Justice Ginsburg's dissenting opinions in order to flesh out and demonstrate this taxonomy. The third section examines soft dissents. The fourth section examines dissents that fall in between soft dissents and profound dissents. The fifth section examines profound dissents in various areas,

4. *Writings by Justice Ginsburg*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/supct/justices/ginsburg.dec.html#DISSENT (last visited Mar. 25, 2022).

5. *See generally* Tomiko Brown-Nagin, *In Memoriam: Justice Ruth Bader Ginsburg, the Last Civil Rights Lawyer on the Supreme Court*, 56 HARV. C.R.-C.L. L. REV. 15 (2021).

such as voting rights and racial discrimination, employment discrimination, reproductive rights, and arbitration agreements. It concludes with a demonstration of the deep legal and societal impact of Justice Ginsburg's profound dissents.

I. DISSENTING OPINIONS

There exists a rich and diverse literature on the subject of dissenting opinions, which varies across different disciplines, methodologies, and perspectives. There are economic models of dissents,[6] empirical studies of dissents,[7] historical studies of dissents,[8] and rhetorical studies of

6. *E.g.*, Andrew F. Daughety & Jennifer F. Reinganum, *Speaking Up: A Model of Judicial Dissent and Discretionary Review*, 14 SUP. CT. ECON. REV. 1 (2006); Lee Epstein et al., *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis*, 3 J. LEGAL ANALYSIS 101 (2011); Russell Smyth, *What Explains Variations in Dissent Rates?: Time Series Evidence from the High Court*, 26 SYDNEY L. REV. 221 (2004); Anthony Niblett & Albert H. Yoon, *Judicial Disharmony: A Study of Dissent*, 42 INT'L REV. L. & ECON. 60 (2015).

7. *E.g.*, Andrew Lynch, *Dissent: Towards a Methodology for Measuring Judicial Disagreement in the High Court of Australia*, 24 SYDNEY L. REV. 468 (2002); Mirko Bagaric & James McConvill, *Illusions of Disunity: Dispelling Perceptions of Division in High Court Decision Making*, 78 LAW INST. VICTORIA J. 37 (2004); R. Perry Sentell, Jr., *Dissenting Opinions: In the Georgia Supreme Court*, 36 GA. L. REV. 539 (2002); Jessica N. Clemente, Note, *High Court Studies: The United States Court of Appeals for the Second Circuit: Dissenting at New York's Federal Appeals Court: An Empirical Study of Second Circuit Dissents and the Frequent Dissenter, Judge Rosemary Pooler*, 75 ALB. L. REV. 1121 (2011); Vanessa Baird & Tonja Jacobi, *How the Dissent Becomes the Majority: Using Federalism to Transform Coalitions in the U.S. Supreme Court*, 59 DUKE L.J. 183 (2009); Evan A. Evans, *The Dissenting Opinion–Its Use and Abuse*, 3 MO. L. REV. 120 (1938); Virginia A. Hettinger et al., *Comparing Attitudinal and Strategic Accounts of Dissenting Behavior on the U.S. Courts of Appeals*, 48 AM. J. POL. SCI. 123 (2004); Virginia A. Hettinger et al., *Acclimation Effects and Separate Opinion Writing in the U.S. Courts of Appeals*, 84 SOC. SCI. Q. 792 (2003); Timothy R. Johnson et al., *Hear Me Roar: What Provokes Supreme Court Justices to Dissent from the Bench?*, 93 MINN. L. REV. 1560 (2009); Russell Smyth & Paresh Kumar Narayan, *Hail to the Chief! Leadership and Structural Change in the Level of Consensus on the High Court of Australia*, 1 J. EMPIRICAL LEGAL STUD. 399 (2004); Russell Smyth & Paresh Kumar Narayan, *Multiple Regime Shifts in Concurring and Dissenting Opinions on the U.S. Supreme Court*, 3 J. EMPIRICAL LEGAL STUD. 79 (2006).

8. *E.g.*, M. Todd Henderson, *From Seriatim to Consensus and Back Again: A Theory of Dissent*, 2007 SUP. CT. REV. 283; Alex Simpson, Jr., *Dissenting Opinions*, 71 U. PA. L. REV. 205 (1923); Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267 (2001); John P. Kelsh, *The Opinion Delivery Practices of the United States Supreme Court 1790-1945*, 77 WASH. U. L.Q. 137 (1999); Mark A. Kadzielski & Robert C. Kunda, *The Origins of Modern Dissent: The Unmaking of Judicial Consensus in the 1930's*, 15 UWLA L. REV. 43 (1983); Matthew P. Bergman, *Dissent in the Judicial Process: Discord in Service of Harmony*, 68 DENV. U.L. REV. 79 (1991); Edward C. Voss, *Dissent: Sign of a Healthy Court*, 24 ARIZ. ST. L.J. 643 (1992); Meredith Kolsky, Note, *Justice William Johnson and the History of the Supreme Court Dissent*, 83 GEO. L.J. 2069 (1995).

dissents.[9] Alongside academic scholars, judges themselves have addressed the issue of dissents.[10] There are numerous works written from the perspective of judges that address issues,[11] including the basic question of why a judge might write a dissent.[12] Other works have sought to address the issue from the perspective of the legal system itself,[13] and

9. For rhetoric of dissents, see generally Mark A. Hannah & Susie Salmon, *Against the Grain: The Secret Role of Dissents in Integrating Rhetoric Across the Curriculum*, 20 NEV. L.J. 935 (2020); Michael Frost, *Justice Scalia's Rhetoric of Dissent: A Greco-Roman Analysis of Scalia's Advocacy in the VMI Case*, 91 KY. L.J. 167 (2002); Robert F. Blomquist, *Dissent, Posner-Style: Judge Richard A. Posner's First Decade of Dissenting Opinions, 1981–1991—Toward an Aesthetics of Judicial Dissenting Style*, 69 MO. L. REV. 73 (2004); Robert F. Blomquist, *Judge Posner's Dissenting Judicial Oeuvre and the Aesthetics of Canonicity*, 36 N.M. L. REV. 161 (2006); Carlo A. Pedrioli, *Judicial Neutrality Awash with Ideology: Justice Scalia, Sexual Orientation, and Rhetorical Personae*, 21 TEX. J. ON C.L.-C.R. 183 (2016); Kimberly D. Richman, *Talking Back: The Discursive Role of the Dissent in LGBT Custody and Adoption Cases*, 16 LAW & SEXUALITY 77 (2007).

10. *See generally* William O. Douglas, *The Dissenting Opinion*, 8 LAWS. GUILD REV. 467 (1948).

11. *E.g.*, Stanley H. Fuld, *The Voices of Dissent*, 62 COLUM. L. REV. 923 (1962); William O. Douglas, *The Dissent: A Safeguard of Democracy*, 32 J. AM. JUDICATURE SOC'Y 104 (1948); Michael Boudin, *Friendly, J., Dissenting*, 61 DUKE L.J. 881 (2012); Alex Kozinski & James Burnham, *I Say Dissental, You Say Concurral*, 121 YALE L.J. ONLINE 601 (2012); Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371 (1995); Frank X. Altimari, *Foreword: The Practice of Dissenting in the Second Circuit*, 59 BROOK. L. REV. 275 (1993); Robert G. Flanders, Jr., *The Utility of Separate Judicial Opinions in Appellate Courts of Last Resort: Why Dissents Are Valuable*, 4 ROGER WILLIAMS U.L. REV. 401 (1999); Francis P. O'Connor, *The Art of Collegiality: Creating Consensus and Coping with Dissent*, 83 MASS. L. REV. 93 (1998); A. J. Levin, *Mr. Justice William Johnson, Creative Dissenter*, 43 MICH. L. REV. 497 (1944); Joe W. Sanders, *The Role of Dissenting Opinions in Louisiana*, 23 LA. L. REV. 673 (1963); Robert G. Simmons, *The Use and Abuse of Dissenting Opinions*, 16 LA. L. REV. 497 (1956); Laura Krugman Ray, *Justice Brennan and the Jurisprudence of Dissent*, 61 TEMP. L. REV. 307 (1988); Rory K. Little, *Reading Justice Brennan: Is There a "Right" to Dissent?*, 50 HASTINGS L.J. 683 (1999); Kermit V. Lipez, *Some Reflections on Dissenting*, 57 ME. L. REV. 313 (2005); Bernice B. Donald, *Judicial Independence, Collegiality, and the Problem of Dissent in Multi-Member Courts*, 94 N.Y.U. L. REV. 317 (2019); Freda M Steel, *The Role of Dissents in Appellate Judging*, 67 U. TORONTO L.J. 142 (2017); Jesse W. Carter, *Dissenting Opinions*, 4 HASTINGS L.J. 118 (1953).

12. *E.g.*, Richard B. Stephens, *The Function of Concurring and Dissenting Opinions in Courts of Last Resort*, 5 U. FLA. L. REV. 394 (1952); Peter W. Hogg & Ravi Amarnath, *Why Judges Should Dissent*, 67 U. TORONTO L.J. 126 (2017); Michael A. Musmanno, *Dissenting Opinions*, 60 DICK. L. REV. 139 (1956); Robert S. Smith, Essay, *Dissenting: Why Do It?*, 74 ALB. L. REV. 869 (2011); Nina Varsava, *The Role of Dissents in the Formation of Precedent*, 14 DUKE J. CONST. L. & PUB. POL'Y 285 (2019); Ward Farnsworth, *Dissents Against Type*, 93 MINN. L. REV. 1535 (2009); Walter Stager, *Dissenting Opinions—Their Purpose and Results*, 11 VA. L. REG. 395 (1925); Eva M. Guzman & Ed Duffy, *The (Multiple) Paths of Dissent: Roles of Dissenting Judges in the Judicial Process*, 97 JUDICATURE 105 (2013).

13. *See generally* Kevin M. Stack, *The Practice of Dissent in the Supreme Court*, 105 YALE L.J. 2235 (1996); Indraneel Sur, *How Far Do Voices Carry: Dissents from Denial of Rehearing En Banc*, 2006 WIS. L. REV. 1315; Andrew Lynch, *Is Judicial Dissent*

have examined questions such as the advantages and disadvantages of dissenting opinions[14] and of different judicial traditions, ranging from a unanimous court opinion on the one end to each judge writing his or her own separate opinion on the other, with many systems falling in between these two options.[15] Some works address both dissenting and concurring opinions together.[16]

Scholars have sought to shine a spotlight on decisional dissents;[17] relentless dissents;[18] disrespectful dissents;[19] sustained dissents;[20]

Constitutionally Protected, 4 MACQUARIE L.J. 81 (2004); Andrew Lynch, *'The Intelligence of a Future Day': The Vindication of Constitutional Dissent in the High Court Australia—1981–2003*, 29 SYDNEY L. REV. 195 (2007); Maurice Kelman, *The Forked Path of Dissent*, 1985 SUP. CT. REV. 227; Bernice B. Donald, *The Intrajudicial Factor in Judicial Independence: Reflections on Collegiality and Dissent in Multi-Member Courts*, 47 U. MEM. L. REV. 1123 (2017); Emlin McClain, *Dissenting Opinions*, 14 YALE L.J. 191 (1905).

14. *See generally* Edward McGlynn Gaffney, Jr., *The Importance of Dissent and the Imperative of Judicial Civility*, 28 VAL. U.L. REV. 583 (1994); Roscoe Pound, *Cacoethes Dissentiendi: The Heated Judicial Dissent*, 39 A.B.A. J. 794 (1953); John Alder, *Dissents in Courts of Last Resort: Tragic Choices?*, 20 OXFORD J. LEGAL STUD. 221 (2000); J. Louis Campbell III, *The Spirit of Dissent*, 66 JUDICATURE 305 (1983); Robert W. Bennett, *A Dissent on Dissent*, 74 JUDICATURE 255 (1991); Julia Laffranque, *Dissenting Opinion and Judicial Independence*, 8 JURIDICA INT'L 162 (2003); Hunter Smith, *Personal and Official Authority: Turn-of-the-Century Lawyers and the Dissenting Opinion*, 24 YALE J.L. & HUMANS. 507 (2012).

15. *See generally* Kurt H. Nadelmann, *The Judicial Dissent: Publication v. Secrecy*, 8 AM. J. COMPAR. L. 415 (1959); Arthur J. Jacobson, *Publishing Dissent*, 62 WASH. & LEE L. REV. 1607 (2005); Michael Kirby, *Judicial Dissent — Common Law and Civil Law Traditions*, 123 LAW Q. REV. 379 (2007); J. Lyn Entrikin, *Global Judicial Transparency Norms: A Peek Behind the Robes in a Whole New World—A Look at Global "Democratizing" Trends in Judicial Opinion-Issuing Practices*, 18 WASH. U. GLOB. STUD. L. REV. 55 (2019); Katalin Kelemen, *The Road from Common Law to East-Central Europe: The Case of the Dissenting Opinion*, *in* LEGAL AND POLITICAL THEORY IN THE POST-NATIONAL AGE 118, 118 (Péter Cserne & Miklós Könczöl eds., 2010).

16. *E.g.*, *see generally* R. Dean Moorhead, *Concurring and Dissenting Opinions*, 38 A.B.A. J. 821 (1952).

17. *E.g.*, *see generally* Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745 (2005).

18. *See generally* Michael Mello, *Adhering to Our Views: Justices Brennan and Marshall and the Relentless Dissent to Death as a Punishment*, 22 FLA. STATE U.L. REV. 591 (1995).

19. *See generally* J. Lyn Entrikin, *Disrespectful Dissent: Justice Scalia's Regrettable Legacy of Incivility*, 18 J. APP. PRAC. & PROCESS 201 (2017). *But see* Note, *From Consensus to Collegiality: The Origins of the "Respectful" Dissent*, 124 HARV. L. REV. 1305 (2011).

20. *See generally* Jon G. Heintz, Note, *Sustained Dissent and the Extended Deliberative Process*, 88 NOTRE DAME L. REV. 1939 (2013).

perpetual dissents;[21] solo dissents;[22] radical dissents;[23] administrative dissents;[24] and regulatory dissents.[25] Some scholars have focused on dissenting opinions in specific tribunals such as constitutional courts,[26]

21. *See generally* Allison Orr Larsen, *Perpetual Dissents*, 15 GEO. MASON L. REV. 447 (2008).

22. *See generally* Christine M. Joseph, Research Note, *All but One: Solo Dissents on the Modern Supreme Court of Canada*, 44 OSGOODE HALL L.J. 501 (2006).

23. *See generally* Neha Jain, *Radical Dissents in International Criminal Trials*, 28 EUR. J. INT'L L. 1163 (2017).

24. *See generally* Sharon B. Jacobs, *Administrative Dissents*, 59 WM. & MARY L. REV. 541 (2017).

25. *See generally* Luke N. Roniger, Note, *Regulatory Dissent and Judicial Review*, 2015 COLUM. BUS. L. REV. 390.

26. *See generally* Katalin Kelemen, *Dissenting Opinions in Constitutional Courts*, 14 GERMAN L.J. 1345 (2013); Alpaslan Altan, *The Role of Dissenting and Concurring Opinions in the Turkish Practice*, 4 CONST. L. REV. 125 (2011); Sonja Stojadinovic, *Political Influence on the Constitutional Court in the Republic of Macedonia: Reflections Through the Dissenting Opinions in the Period of 2012-2015*, 5 CONST. REV. 69 (2019); David Vitale, *The Value of Dissent in Constitutional Adjudication: A Context-Specific Analysis*, 19 REV. CONST. STUD. 83 (2014); Benjamin Bricker, *The (Very) Political Dissent: Dissenting Opinions and the Polish Constitutional Crisis*, 21 GERMAN L.J. 1586 (2020); Elena Safaleru, *The Dissenting Opinion of Constitutional Court Judges—One of the Guarantors of the Court's Independence*, 4 CONST. L. REV. 120 (2011); Benjamin Bricker, *Breaking the Principle of Secrecy: An Examination of Judicial Dissent in the European Constitutional Courts*, 39 LAW & POL'Y 170 (2017).

international courts,[27] and arbitration tribunals.[28] Other scholars have focused on the opinions of specific judges.[29]

Dissenting opinions are important and powerful.[30] Some dissents even become part of the canon, and are viewed as significant for their representation of ideological shifts in the Supreme Court's

27. *See generally* R. P. Anand, *The Role of Individual and Dissenting Opinions in International Adjudication*, 14 INT'L & COMPAR. L.Q. 788 (1965); Robin C.A. White & Iris Boussiakou, *Separate Opinions in the European Court of Human Rights*, 9 HUM. RTS. L. REV. 37 (2009); Nancy Amoury Combs, *The Impact of Separate Opinions on International Criminal Law*, 62 VA. J. INT'L L. 1 (2021).

28. *See generally* Peter J. Rees QC & Patrick Rohn, *Dissenting Opinions: Can They Fulfil a Beneficial Role?*, 25 ARB. INT'L 329 (2009); Manuel Arroyo, *Dealing with Dissenting Opinions in the Award: Some Options for the Tribunal*, 26 ASA BULL. 437 (2008); Laurent Levy, *Dissenting Opinions in International Arbitration in Switzerland*, 5 ARB. INT'L 35 (1989); Albert Jan van den Berg, *Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration*, *in* LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN 821 (Mahnoush H. Arsanjani et al. eds., 2011); Hans-Patrick Schroeder & Tanja V. Pfitzner, *Recent Trends Regarding Dissenting Opinions in International Commercial Arbitration*, 2 Y.B. ON INT'L ARB. 133 (2012); C. Mark Baker & Lucy Greenwood, *Dissent—But Only if You REALLY Feel You Must. Why Dissenting Opinions in International Commercial Arbitration Should Only Appear in Exceptional Circumstances*, 7 DISP. RESOL. INT'L 31 (2013); Ylli Dautaj, Note, *Dissenting Opinions in Investment Treaty Arbitration: The Investment Court System*, 17 U. COLL. DUBLIN L. REV. 37 (2017); Ilhyung Lee, *Introducing International Commercial Arbitration and Its Lawlessness, by Way of the Dissenting Opinion*, 4 CONTEMP. ASIA ARB. J. 19 (2011); Inan Uluc & Kristi R. Sutton, *Without Silence, There Is No Golden Rule; Without Dissent, There Is No Progress*, 20 OR. REV. INT'L L. 219 (2018).

29. *See generally* Peter A. Mancuso, Note, *The Independent Jurist: An Analysis of Judge Robert S. Smith's Dissenting Opinions*, 73 ALB. L. REV. 1019 (2010); Kris McDaniel-Miccio, *Tzadek, Tzadek Tirdof—Justice, Justice You Shall Pursue:* Romer*,* Lawrence*, &* Windsor*: A Critique of Justice Scalia's Dissenting Opinions*, 21 CARDOZO J.L. & GENDER 317 (2015); William J. Daniels, *Thurgood Marshall and the Administration of Criminal Justice: An Analysis of Dissenting Opinions*, 6 BLACK L.J. 43 (1978); Michael C. Tedesco, Note, *Conservatism in the Second Circuit: An Analysis of the Dissenting Opinions of Judge Debra Livingston and Judge Reena Raggi*, 75 ALB. L. REV. 1205 (2011); Keith M. Garza, *Carson, C.J., Dissenting*, 43 WILLAMETTE L. REV. 513 (2007); Duncan French, *The Heroic Undertaking? The Separate and Dissenting Opinions of Judge Weeramantry During His Time on the Bench of the International Court of Justice*, *in* 11 ASIAN YEARBOOK OF INTERNATIONAL LAW 35 (B.S. Chimni et al. eds., 2006); Cora Hoexter, *The Importance of Dissent: Two Judgments in Administrative Law*, 2015 ACTA JURIDICA 120; Daryl Lim, *I Dissent: The Federal Circuit's "Great Dissenter," Her Influence on the Patent Dialogue, and Why It Matters*, 19 VAND. J. ENT. & TECH. L. 873 (2017).

30. *See generally* Marie-Claire Belleau & Rebecca Johnson, *Ten Theses on Dissent*, 67 U. TORONTO L.J. 156 (2017); Steven A. Peterson, *Dissent in American Courts*, 43 J. POL. 412 (1981); Colin Starger, *Exile on Main Street: Competing Traditions and Due Process Dissent*, 95 MARQ. L. REV. 1253 (2012); Iman Zekri, *Respectfully Dissenting: How Dissenting Opinions Shape the Law and Impact Collegiality Among Judges*, FLA. BAR J., SEPT.–OCT. 2020, at 8.

jurisprudence.[31] As Justice Brennan noted, dissenting opinions correct the flaws of the majority opinion, challenge and limit the majority's opinion, and most importantly, facilitate the development of the law.[32] Dissents, then, engage in a lively debate over the law, providing both additional rigor and democracy to decision making and sometimes even shaping and changing future decisions.

As Justice L'Heureux-Dube argued, dissenting opinions serve several functions.[33] First, they provide "new and alternative ideas and approaches."[34] Second, they "generate a fruitful dialogue among the courts, academics, legislative assemblies, and future generations of lawyers."[35] Third, they "enhance the judiciary's legitimacy by preserving and strengthening judicial independence, by fostering collegiality among judges and by enhancing the coherence of courts' decisions."[36]

Judge Wood posited the existence of three types of dissents.[37] First, principle-based dissents, wherein the dissent disagrees on "a broad question of [the] law or principle."[38] Second, process-based dissents, wherein the dissent disagrees on the standard of review, procedure or guidance, or other similar institutional reasons.[39] Third, accuracy-focused dissents, wherein the dissent disagrees on the facts themselves.[40]

Roscoe Pound discussed the reconnaissance dissent, in which authors look forward into the future with the hope that the majority opinion will be altered to reflect new and changed conditions.[41] He also spoke of the cautious dissent, which cautions against excessive zeal in adapting the law to changing times.[42] Lastly, he analyzed the exploratory dissent, in

31. *See generally* Anita S. Krishnakumar, *On the Evolution of the Canonical Dissent*, 52 RUTGERS L. REV. 781 (2000); Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243 (1998); Andrew Lynch, *Dissent: The Rewards and Risks of Judicial Disagreement in the High Court of Australia*, 27 MELBOURNE U.L. REV. 724, 726 (2003).

32. William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 430–31 (1986); *see also* Randall T. Shepard, *Perspectives: Notable Dissents in State Constitutional Cases: What Can Dissents Teach Us?*, 68 ALB. L. REV. 337, 338, 344 (2005).

33. *See generally* Claire L'Heureux-Dube, *The Dissenting Opinion: Voice of the Future?*, 38 OSGOODE HALL L.J. 495 (2000).

34. *Id.* at 504.

35. *Id.* at 509.

36. *Id.* at 512–13.

37. *See generally* Diane P. Wood, *When to Hold, When to Fold, and When to Reshuffle: The Art of Decisionmaking on a Multi-Member Court*, 100 CALIF. L. REV. 1445 (2012).

38. *Id.* at 1465–69.

39. *Id.* 1469–73.

40. *Id.* at 1473–75.

41. Roscoe Pound, *Introduction* to MICHAEL A. MUSMANNO, JUSTICE MUSMANNO DISSENTS v, v–vi (1956).

42. *Id.* at vi.

which existing law is interpreted as unreflective of altered political or social circumstance.[43]

Justice Ginsburg noted that dissenting opinions have both in-house and external impact.[44] As for the former, a dissent might "lead the author of the majority opinion to refine and clarify her initial circulation."[45] Sometimes, "a dissent will be so persuasive that it attracts the votes necessary to become the opinion of the Court."[46] As for the latter, a dissent might "appeal . . . to the intelligence of a future day."[47] Some dissents "aim[] to attract immediate public attention and, thereby, to propel legislative change."[48] As Charles Aikin wrote:

> The justice in dissent has acted in a tradition that has stood for more than a century and a half: to lead, to restrain, to criticize, to educate, to warn, to shame and condemn, to create, and to challenge; the justice in dissent can act in hope, and sometimes in anger and in sorrow.[49]

This Article joins the above literature in arguing for the importance of dissenting opinions, but does so from a different perspective. The literature has provided robust institutional rationales regarding the importance of dissents by examining the legal system and the role of the court by focusing on the judicial process in particular and on democracy in a broader sense.[50] This Article seeks to use another methodology, namely, a focus on the text of the dissenting opinion. While these aforementioned works have provided a theoretical basis that underscores the importance of dissenting opinions, this Article seeks to offer a qualitative analysis of dissenting opinions.

This Article will conduct a qualitative textual analysis of dissents by studying the legal analysis of a particular dissent and its relation to the majority opinion.[51] It argues that profound dissenting opinions are

43. *Id.*

44. *The Role of Dissenting Opinions*, *supra* note 3, at 3–4; *see also* Antonin Scalia, *The Dissenting Opinion*, 19 J. SUP. CT. HIST. 33, 40–41 (1994).

45. *The Role of Dissenting Opinions*, *supra* note 3, at 3.

46. *Id.* at 4.

47. *Id.*

48. *Id.* at 6.

49. Charles Aikin, *The Role of Dissenting Opinions in American Courts*, 33 POLITICO 262, 268 (1968).

50. *See, e.g.*, Alexandra V. Orlova, *The Soft Power of Dissent: The Impact of Dissenting Opinions from the Russian Constitutional Court*, 52 VAND. J. TRANSNAT'L L. 611, 612 (2019).

51. For quantitative and qualitative analysis of dissenting opinions, see generally Jacob M. Lashly & Paul B. Rava, *The Supreme Court Dissents*, 28 WASH. U.L. Q. 191 (1943); Manal Totry-Jubran, *Diversity, Dissent and Representation: Lessons from the First Minority Judge in the Israeli Supreme Court*, 0 SOC. & LEGAL STUD. 1 (2021).

particularly important in their role of providing an ideological alternative to the majority opinion. Profound dissents, in this light, are to be seen not only as opposite conclusions, but rather as suggesting a different legal analysis, reasoning and rationale, and different worldview. Profound dissents offer a deep legal and philosophical challenge to the majority. This form of opposition is additionally important in its representation of a plurality of legal opinions. This Article begins from a point of description, exploring differences of opinions and providing a taxonomy of dissents ranging from soft dissents to profound dissents. It also has a normative claim: based on its textual qualitative analysis, this Article will conclude with an argument for the fundamental importance of dissenting opinions and will demonstrate the far-reaching impact of Justice Ginsburg's profound dissents, in particular. Other articles have shown that judges often write dissents on the basis of ideological differences from the majority; this Article seeks to add to this literature a close textual analysis.

II. SOFT DISSENTS AND PROFOUND DISSENTS

This Article joins the scholarship on dissenting opinions explored in the previous section and offers a new taxonomy that distinguishes between "soft" and "profound" dissents. Justice Brennan argued that "all dissents [are] not created equal,"[52] and indeed this distinction between soft and profound dissents acknowledges that.

"Soft dissent" designates a concrete and narrow disagreement with the majority. The dissenter, in this case, disagrees with the majority's interpretation or application of the law, yielding a different conclusion. The difference of opinion in such a case is limited and not acute. Though leading to a different result, the dissent here agrees with most of the analysis in the opinion of the court and parts ways with it in a relatively minor way. The dissenter felt the need to write a separate opinion, yet she still shares common ground with the majority. The dissent, in such a case, willingly walks hand in hand with the majority for a long way before veering off in a different direction. This mode of dissent will be further developed and demonstrated in the next section.

"Profound dissent," on the other hand, is used to mean a deep and broad divergence from the majority. Not only does the dissenter disagree with the opinion of the court, but indeed she sees it as flawed, erroneous, mistaken, and misguided. She challenges not only the conclusion, but also the court's reasoning, rationale, analysis, framing, basic

52. Brennan, Jr., *supra* note 32, at 429.

assumptions, and core values. In so doing, she suggests an ideological alternative to the majority. The different result stems, in such cases, not from a procedural dispute, but rather from an alternative view of law and society. There is a deep gap, in such cases, between the majority and dissent, and the latter stands in direct opposition to the former. This will be further developed and demonstrated in Section V.

This Article will use Justice Ginsburg's dissenting opinions to demonstrate the difference between soft and profound dissents. Though my distinction between soft and profound dissents is general and could be applied to the work of numerous justices, I chose to apply it to Justice Ginsburg's dissenting opinions in particular due to her well-known role as a fierce dissenter.[53] In her years on the Supreme Court, Justice Ginsburg authored many dissenting opinions. In some cases, she read her dissents from the bench while wearing a special dissent collar[54] with which she sought to signal that, in her view, the court's opinion was "not just wrong, but grievously misguided."[55]

Justice Ginsburg called Justice Harlan her hero.[56] Harlan was known as a "great dissenter,"[57] and Justice Ginsburg's dissents similarly cemented her legacy as a great dissenter.[58] Justice Ginsburg did not take the act of writing lightly: "[A] Justice, contemplating publication of a separate writing, should always ask herself: Is this dissent or concurrence really necessary?"[59] In discussing her motivations for writing dissents, Justice Ginsburg said, "although I appreciate the value of unanimous opinions, I will continue to speak in dissent when important matters are at stake."[60] She argued for the importance of dissents by saying, "[t]he most effective dissent, I am convinced, 'stand[s] on its own legal footing'; it spells out differences without jeopardizing collegiality or

53. THE LEGACY OF RUTH BADER GINSBURG, *supra* note 3, at 206.

54. Christine M. Venter, *Dissenting from the Bench: The Rhetorical and Performative Oral Jurisprudence of Ruth Bader Ginsburg and Antonin Scalia*, 56 WAKE FOREST L. REV. 321, 323–24 (2021); Kimberly Strawbridge Robinson & Jordan S. Rubin, *Selected as Consensus Builder, Ginsburg Embraced Dissenting Role*, BLOOMBERG L. (Sept. 18, 2020, 8:29 PM), https://news.bloomberglaw.com/us-law-week/selected-as-consensus-builder-ginsburg-embraced-dissenting-role.

55. *The Role of Dissenting Opinions*, *supra* note 3, at 2.

56. Toni J. Ellington, Note, *Ruth Bader Ginsburg and John Marshall Harlan: A Justice and Her Hero*, 20 U. HAW. L. REV. 797, 797 (1998).

57. TINSLEY E. YARBROUGH, JOHN MARSHALL HARLAN: GREAT DISSENTER OF THE WARREN COURT, at vii (1992).

58. Strawbridge Robinson & Rubin, *supra* note 54; THE LEGACY OF RUTH BADER GINSBURG, *supra* note 3, at 206.

59. *The Role of Dissenting Opinions*, *supra* note 3, at 3.

60. *Id.* at 7.

public respect for and confidence in the judiciary."[61] For these reasons, Justice Ginsburg's dissents aptly illustrate the soft-profound dissent taxonomy, however, this taxonomy is applicable to the work of other justices, conservatives and progressives, liberals and moderates alike.

This Article does not address the particular rhetoric of Justice Ginsburg's dissents[62] but rather focuses on the profoundness of her dissents, that is, the way in which these dissents depart sharply from the majority, posing an ideological alternative to it. This Article is not an empirical quantitative project,[63] rather this is a qualitative textual analysis of Justice Ginsburg's dissenting opinions.

Justice Ginsburg made an enormous legal contribution and had immense legal influence throughout her long legal career as a law professor, a legal scholar, a civil rights lawyer, an advocate for women's rights, and a judge.[64] This Article does not address Justice Ginsburg's concurring opinions, opinions of the Court, briefs, articles, and other legal scholarship. Focusing solely on her dissents, this Article looks at a concrete and narrow aspect of her many achievements and contributions and at a minor part of her seminal writings. Nevertheless, this Article is a tribute to her legacy.

III. SOFT DISSENTS

The following are a few examples of soft dissents written by Justice Ginsburg. Section V reviews Justice Ginsburg's profound dissents.

In *Spokeo, Inc. v. Robins*, Spokeo operated a website that provided information on people.[65] Robins sued Spokeo for providing inaccurate information about him, arguing that this information damaged his ability

61. Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1196 (1992); *see also* Peter J. Rubin, *Justice Ruth Bader Ginsburg: A Judge's Perspective*, 70 OHIO ST. L.J. 825, 836 (2009).

62. For Justice Ginsburg's rhetoric see KATIE L. GIBSON, *Introduction* to RUTH BADER GINSBURG'S LEGACY OF DISSENT: FEMINIST RHETORIC AND THE LAW (3d. ed. 2018); *see also* Gerald Lebovits, *The Notorious R.B.G.: Lessons on Legal Writing from the Legendary Ruth Bader Ginsburg*, N.Y. ST. BAR ASS'N J., Nov. 2020, at 76, 79.

63. For quantitative information on Ginsburg's dissents see *Ruth Bader Ginsburg*, BALLOTPEDIA, https://ballotpedia.org/Ruth_Bader_Ginsburg (last visited Mar. 25, 2022); MICHAEL JOHN GARCIA & KATE R. BOWERS, CONG. RSCH. SERV., R46546, JUSTICE RUTH BADER GINSBURG AS A DECIDING VOTE ON THE SUPREME COURT: SELECT DATA 4–26 (2020), https://crsreports.congress.gov/product/pdf/R/R46546.

64. Jonathan L. Entin, *A Tribute to Ruth Bader Ginsburg: A Law Clerk's Reflections*, 71 CASE W. RSRV. L. REV. 1, 1–2 (2020); John G. Roberts, Jr., *Remembering Ruth*, 121 COLUM. L. REV. 509, 509–10 (2021); Brenda Feigen, *Memoriam: Justice Ruth Bader Ginsburg*, 134 HARV. L. REV. 882, 882–83 (2021).

65. 578 U.S. 330, 335 (2016).

to find employment.[66] The legal question was whether Robins had standing to maintain an action in federal court against Spokeo under the Fair Credit Reporting Act.[67] In order to establish standing, Robins needed to show injury in fact, which is both concrete *and* particularized.[68] Justice Alito wrote the opinion of the Court, which held that the Ninth Circuit court only discussed the concreteness of the injury, but failed to discuss particularization, and thus, the case should be remanded.[69]

Justice Ginsburg's dissent agreed with the holding of the case: standing according to the Fair Credit Reporting Act requires showing injury that is both concrete and particularized, and that concreteness and particularization are two separate requirements.[70] However, based on the facts presented by Robins, she held that these two requirements were satisfied and thus there was no need to return the case to the Ninth Circuit court.[71]

In this case, Justice Ginsburg agreed with the majority's analysis of the law; she reached a different conclusion based on the facts of the case. While the majority left the question of whether Robins suffered injury for the Ninth Circuit court to determine, the dissent was willing to determine that based on the facts. For Robins, there was a difference between going back to the Ninth Circuit or not. However, in terms of legal analysis, there was no difference of opinion between the majority and dissent. The disagreement was narrow and limited, and both the majority and the dissent shared the same legal analysis. The dissent was willing to go the extra mile—holding that Robins's injury was concrete—while the majority held that this determination should be made by the Ninth Circuit. The dissent and majority shared the same understanding and application of the law, and parted ways only around the procedural conclusion of whether to remand to the Ninth Circuit. Justice Ginsburg felt the need to write a dissenting opinion which reached a different result, but the difference of opinion was ultimately minor in terms of legal impact. She did not offer an alternative view of civil procedure or an alternative view on standing.

In *Muscarello v. United States*, the Court considered a case about a provision of the federal criminal code that imposed a five-year mandatory prison term upon a person who uses or carries a firearm during and in relation to a drug trafficking crime.[72] In an opinion delivered by Justice

66. *Id.* at 350 (Ginsburg, J., dissenting).
67. *Id.* at 333 (majority opinion).
68. *Id.* at 334.
69. *Id.* at 333–34.
70. *Id.* at 350–52 (Ginsburg, J., dissenting).
71. *Id.* at 351–52.
72. 524 U.S. 125, 126 (1998).

Breyer, the Court held that the phrase "carries a firearm" applies "to a person who knowingly possesses and conveys firearms in a vehicle, including in the locked glove compartment or trunk of a car, which the person accompanies."[73] It was not limited to the carrying of firearms on the person.[74]

In her dissent, Justice Ginsburg read the word carry narrowly "to indicate not merely keeping arms on one's premises or in one's vehicle, but bearing them in such manner as to be ready for use as a weapon."[75]

The disagreement between the majority and the dissent was limited to the interpretation of one word. It was not a broad difference of opinions. Both the majority and the dissent agreed that the word carry had many different meanings.[76] Both the dissent and the majority relied on the same precedents, and both based their interpretation on Congress's intent.[77] The majority gave a broader interpretation to the word "carry" than did the dissent, but this was a narrow disagreement.[78] Though they came to different conclusions, they both shared the same legal analysis. Surely, for the defendants, there was a huge difference between the majority and the dissent, given that only the former imposed the mandatory prison term.[79] However, the majority and the dissent had much in common, and the legal divergence was limited. The difference in reading of the word "carry" did not reveal a major gap between the majority and the dissent; both shared the same view on punishment of drug-related criminal offenses. Justice Ginsburg did not provide an alternative theory of sentencing or an alternative view on criminology, nor did she provide an alternative theory of interpretation or criminal law. She only offered a slightly narrower reading of the federal criminal code.

IV. IN BETWEEN SOFT DISSENTS AND PROFOUND DISSENTS

It is important to note that "soft dissents" and "profound dissents" should not be understood as binaries, but rather as a continuum that ranges from the former to the latter. Many dissents fall somewhere on

73. *Id.* at 126–27.
74. *Id.*
75. *Id.* at 140 (Ginsburg, J., dissenting).
76. *Id.* at 128, 131 (majority opinion); *id.* at 140, 148–49 (Ginsburg, J., dissenting).
77. *See generally id.*
78. *See id.* at 140 (Ginsburg, J., dissenting). In another soft dissent, Justice Ginsburg gave a broader interpretation to section 9658 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 than Kennedy's majority opinion. *See* CTS Corp. v. Waldburger, 573 U.S. 1, 12–16 (2014); *id.* at 21 (Ginsburg, J., dissenting).
79. *See Muscarello*, 524 U.S. at 145 (Ginsburg, J., dissenting).

the spectrum between these two extremes.[80] In some cases, dissents do not pose an alternative, but they do disagree with the majority's reasoning—the difference of opinion is neither minor or marginal, nor does it constitute a significant theoretical or ideological gap—the dissent shares common ground with the majority despite substantially parting ways. After demonstrating soft dissents in the previous section and before demonstrating profound dissents in Section V, this section seeks to illustrate this sliding scale of dissents. The following are a few examples of dissents written by Justice Ginsburg that fall on the spectrum between soft dissents and profound dissents.

In *Board of Education v. Earls*, the issue was whether a school's policy requiring all students who participate in competitive extracurricular activities to submit to drug testing was constitutional.[81] In an opinion delivered by Justice Thomas, the Court answered in the affirmative.[82] The policy, the Court concluded, balanced between the students' Fourth Amendment right to privacy on the one hand and the legitimate governmental interests in preventing, deterring, and detecting drug use by children and protecting their health and safety on the other.[83] The Court held that the intrusion on the students' privacy was minimal and that the policy was a reasonably effective means with which to achieve these governmental interests, and thus the search in question was both reasonable and legal.[84]

In contrast, Justice Ginsburg concluded in her dissent that the policy was unreasonable, capricious, and perverse—and thus unconstitutional.[85]

Both majority and dissent based their decision on the same precedent, *Vernonia*.[86] However, while the majority saw it as a relevant precedent and applied its logic to the current case,[87] the dissent distinguished between the two cases for several reasons.[88] First, according to the dissent, while in *Vernonia* intrusive suspicionless searches were justified in cases of student athletes, they were unjustified in the current case in that they involved all competitive extracurricular

80. There are also cases where a justice concurs in part and dissents in part. This is a middle ground between two extremes.

81. 536 U.S. 822, 825 (2002).

82. *Id.*

83. *Id.* at 838.

84. *Id.* at 834, 837.

85. *Id.* at 843 (Ginsburg, J., dissenting); Matthew D. Sitton, Comment, *Justice Ginsburg's* Board of Education v. Earls *Dissent: Constitutional Teaching Principles for Kids*, 81 MISS. L.J. 589, 603 (2012).

86. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995).

87. *Earls*, 536 U.S. at 830.

88. *Id.* at 844 (Ginsburg, J., dissenting) (citing *Vernonia*, 515 U.S. at 655–56).

activities.[89] In *Vernonia*, student athletes' expectations of privacy were necessarily attenuated, while in the current case, students participating in choir or an academic team, for example, had higher expectations of privacy.[90] The risks drug use posed to athletes was much higher than those posed to students partaking in the above activities; thus, random drug testing was tailored to the harms in the former case but not to the harms in the latter.[91] Second, while in *Vernonia* the requirement for athletes to provide urine samples ultimately amounted to an insignificant invasion of privacy, in the current case the personal information collected under the school's policy was handled carelessly and with little regard for its confidentiality.[92] Moreover, while in *Vernonia* there was a drug abuse problem that the policy sought to address, there was no similar problem in the current case.[93]

Furthermore, according to Justice Ginsburg, "students who participate in extracurricular activities [were] significantly less likely to develop substance abuse problems than are their less-involved peers."[94] Moreover, some "students might forgo [] extracurricular involvement in order to avoid detection of their drug use."[95] Hence the dissent concluded that the policy in question was both over-inclusive and under-inclusive. To Justice Ginsburg, the current policy was too sweeping to be sheltered by *Vernonia*, and its "unreasonable reach render[ed] it impermissible under the Fourth Amendment."[96]

Though the majority and dissent reached opposite conclusions, they shared the same legal analysis: they both relied on the same precedent; they both balanced between the students' right to privacy and the school's interest in battling drug abuse; and they both analyzed the reasonableness of the search. They applied the same legal rules and the same legal tests. They parted ways in their conclusion by applying these rules and tests differently. Though they both used the same balancing test, they differed in where each drew the line between a constitutional search and an unconstitutional search.

The majority and dissent did differ in the weight they gave each of the competing values: while the majority focused on combating drug abuse, the dissent focused on the right to privacy; while the majority allowed the government to advance its interests in preserving the health

89. *Id.*
90. *Id.* at 846–48.
91. *Id.*
92. *Id.* at 847–49.
93. *Id.* at 849–50.
94. *Id.* at 853.
95. *Id.*
96. *Id.* at 854.

and safety of school children, the dissent restricted the government's actions; while the majority limited the school children's right to privacy, the dissent safeguarded their Fourth Amendment right; while Justice Ginsburg advanced a broad and strong right to privacy, Justice Thomas diminished this right; while Justice Ginsburg limited the power of the school and its discretion, Justice Thomas was less restrictive.[97]

Thus, the disagreement was neither limited nor deep, neither narrow nor broad. Though the dissent came to the opposite conclusion than the majority, it did not pose a strictly ideological opposition. The dissent shared a legal analysis with the majority and neither challenged the majority's framing nor offered an alternative worldview; the dissent did not offer a different theory of the Fourth Amendment. Thus, this is not a profound dissent. At the same time, the dissent did apply the law differently, differed in terms of reasoning and rationale, and put to the fore different values; thus, this is not a soft dissent.

In *Dutra Group v. Batterton*, Batterton was working on a vessel owned by Dutra Group when he was injured.[98] Batterton sued Dutra, asserting a variety of claims, including unseaworthiness, and seeking general and punitive damages.[99] The legal issue at hand was whether punitive damages were available through claims of unseaworthiness.[100] Justice Alito, delivering the opinion of the Court, answered in the negative.[101] He based his decision on the history of unseaworthiness cases, on the Jones Act, and on precedents.[102] Justice Alito also considered the following policy considerations for denying recovery of punitive damages through claims of unseaworthiness: allowing punitive damages would result in inconsistencies in maritime law, would place American shippers at a significant competitive disadvantage, and would discourage foreign-owned vessels from employing American seamen.[103]

Justice Ginsburg dissented and argued for the allowance of punitive damages in unseaworthiness claims.[104] She applied the same precedents as did the majority but came to the opposite conclusion.[105] As for policy

97. For another in between dissent by Justice Ginsburg concerning the Fourth Amendment see generally Nancy Gertner, *Dissenting in General:* Herring v. United States*, in Particular*, 127 HARV. L. REV. 433 (2013).

98. 139 S. Ct. 2275, 2282 (2019).

99. *Id.*

100. *Id.* at 2278.

101. *Id.*

102. *Id.* at 2281.

103. *Id.* at 2286–87.

104. *Id.* at 2288 (Ginsburg, J., dissenting).

105. *Id.* at 2293.

considerations, Justice Ginsburg pointed out that punitive damages served to deter wrongdoing and to punish lawless misconduct.[106]

The majority and the dissent shared the same legal analysis. They both relied on the same precedents, legal rules, maritime law, and the Jones Act. However, they applied the cases differently, read them differently, and interpreted them differently—ultimately coming to opposite conclusions. The dissent neither offered an opposite worldview nor a different analysis. However, the dissent did indicate different policy considerations and emphasized the importance of punitive damages.[107] While the dissent stressed deterring and punishing vessels owners, the majority placed its emphasis on maritime commerce; while the dissent favored the employees, the majority favored the shipowners.[108] The dissent expanded and the majority limited owner's liability to their employees. The dissent offered broader protection to employees and allowed for more comprehensive compensation to employees than did the majority. Where the majority saw "bizarre disparities in the law," the dissent saw no inconsistencies.[109] Where the majority saw differences between suits for maintenance and cure and suits for unseaworthiness, the dissent saw no difference.[110] Where the majority gave a detailed history of the maritime law, the dissent pointed to the dangers and hazards inherent in sea voyages.[111]

The dissent and majority shared common legal grounds. The dissent did not offer an alternative legal analysis or alternative maritime law. The dissent was based on the same precedents and legislation as was the majority. It simply read them differently. Thus, this was not a profound dissent. At the same time, the dissent offered different policy considerations, concentrating on the employees rather than on the owners. Thus, this is not a soft dissent. In this case, the disagreement is once again neither limited nor deep, neither narrow nor broad, falling somewhere in the middle of the spectrum between soft and profound dissents. Having explored soft dissents above, and dissents that fall on the spectrum between soft and profound in this section, the following section will explore the other end of the spectrum: profound dissents.

106. *Id.*
107. *See id.*
108. *Id.* at 2286–87 (majority opinion); *id.* at 2293 (Ginsburg, J., dissenting).
109. *Id.* at 2286–87 (majority opinion); *id.* at 2293 (Ginsburg, J., dissenting).
110. *Id.* at 2287 (majority opinion); *id.* at 2293 (Ginsburg, J., dissenting).
111. *Id.* at 2281 (majority opinion); *id.* at 2293 (Ginsburg, J., dissenting).

V. PROFOUND DISSENTS

Analyzing Justice Ginsburg's profound dissents reveals a set of recurring themes. These dissenting opinions are rich with context; they give not only detailed factual background, but also historical account; they are policy-oriented and not formalistic; they are based on values such as equality and autonomy; they are written from the point of view of the underprivileged, such as women, minorities, and employees. Justice Ginsburg's decisions were based on her perception of social wrongs and inequalities, and how the law can battle these wrongs and promote equality. As Jack M. Balkin explained:

> Critical theories ask how law legitimates power in both senses of the word: how it shapes, channels, and restrains power and how it mystifies, disguises, and apologizes for it. In addition, a critical theory of law asks how the very acts of making, interpreting, and applying law [and thus of legitimation in both senses] produce and proliferate ever-new forms of power, both just and unjust. . . .
>
> . . . .
>
> . . . Law's plasticity and indeterminacy might help disguise and mystify injustices, but they might also promote adaptability and facilitate progress. . . . Even if law is a supple tool of power, law also serves as a discourse of ideas and ideals that can limit, channel, and transform the interests of the powerful, sometimes in unexpected ways that the powerful cannot fully control.[112]

The comparison in this section between the majority opinion and the dissenting opinion reveals this duality of law and demonstrates the claims of critical theories of law. Profound dissenting opinions expose law's indeterminacy: the ways the law served the interests of the powerful and at the same time empowered the underprivileged; the ways the law disguised injustice and at the same time promoted justice; the ways the law legitimized the abuse of power by the privileged and at the same time policed misuse of power. Profound dissenting opinions both provide a critical look at the law and at the same time use the law to promote justice. Justice Ginsburg understood that, and her profound dissents demonstrate that.

112. Jack M. Balkin, *Critical Legal Theory Today*, *in* ON PHILOSOPHY IN AMERICAN LAW 64, 64, 67 (Francis J. Mootz III ed., 2009); *see also* Guyora Binder, *Critical Legal Studies*, *in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 267, 267–77 (Dennis Patterson ed., 2d ed. 2010).

The following analysis demonstrates how Justice Ginsburg used her dissenting opinions to bring about change within the system. Rather than offering an outside critique of the Court's decision,[113] Justice Ginsburg challenged the majority's opinions and posed opposition from within the Court itself. As a Supreme Court Justice, Justice Ginsburg worked to infuse her notions of social equality into her dissents. Many of these dissents articulated a thorough alternative to the majority. Justice Ginsburg authored too many dissenting opinions to be substantively included in the scope of this Article. Instead, I chose four dissents relating to four different subjects, each of which demonstrates the profoundness of Justice Ginsburg's dissents.[114]

A. Voting Rights and Racial Discrimination

In *Shelby County v. Holder*, the legal issue was the Voting Rights Act ("VRA").[115] Section 4 of the VRA provided a "coverage formula," defining the "covered jurisdictions" as states or political subdivisions that had maintained racially discriminatory voting practices in the past.[116] In those covered jurisdictions, section 5 of the VRA provided that "no change in voting procedures can take effect until approved by specified federal authorities in Washington, D.C."[117] Shelby County in Alabama argued that sections 4(b) and 5 were unconstitutional.[118] In regard to 4(b), the majority opinion delivered by Chief Justice Roberts agreed.[119] The dissent, written by Justice Ginsburg, and joined by Justices Breyer, Sotomayor, and Kagan, concluded that the VRA passed constitutional muster.[120]

113. The U.S. Feminist Judgments Project—where feminist legal scholars rewrite key court decisions from a feminist perspective—is an example of such outside critique of courts' decisions by academics. *The U.S. Feminist Judgments Project*, UNLV LAW, https://law.unlv.edu/us-feminist-judgments (last visited Mar. 25, 2022).

114. For analyses of other profound dissents Justice Ginsburg authored, see, for example, Shira Galinsky, Note, *Returning the Language of Fairness to Equal Protection: Justice Ruth Bader Ginsburg's Affirmative Action Jurisprudence in* Grutter *and* Gratz *and Beyond*, 7 N.Y.C. L. REV. 357 (2004); Hugh Baxter, *Justice Ginsburg's Dissent in* Bush v. Gore, 43 NEW ENG. L. REV. 711 (2009).

115. 570 U.S. 529, 534 (2013).

116. *Id.* at 535, 538.

117. *Id.* at 529.

118. *Id.* at 540.

119. *Id.* at 557.

120. *Id.* at 559–60, 594 (Ginsburg, J., dissenting); *see also* Ellen D. Katz, *Justice Ginsburg's Umbrella*, *in* A NATION OF WIDENING OPPORTUNITIES: THE CIVIL RIGHTS ACT AT FIFTY 264, 264 (Samuel R. Bagenstos & Ellen D. Katz eds., 2015); William B. Gould IV, *The Supreme Court, Job Discrimination, Affirmative Action, Globalization, and Class Actions: Justice Ginsburg's Term*, 36 U. HAW. L. REV. 371, 376 (2014).

1. Basic Assumptions

The majority and dissent differed in their basic assumptions and their starting points. According to the majority, racial discrimination was mainly a thing of the past, even though it still existed.[121] According to the dissent, racial discrimination remained pervasive, even though progress had been made.[122] This difference in opinion reflected a gap in the majority's and the dissent's respective visions of society, which, in turn, led to their reaching different conclusion regarding the constitutionality of the VRA.

Both majority and dissent provided data to support their view. The majority provided data showing improvement in minority voting, minority participation in elections, and in the number of African Americans elected to office.[123] The majority relied on this data in order to argue that discrimination was no longer pervasive.[124] Justice Ginsburg referred to the data that was presented to Congress which proved that discrimination still existed, and that section 5's preclearance blocked discriminatory legislation.[125] This data showed that said preclearance worked and succeeded in eliminating discriminatory legislation.

According to the majority, current data showed that societal circumstances had changed since the VRA was enacted, and thus that there remained no need for the VRA's extreme measures.[126] The way Chief Justice Roberts saw it, "[t]hings have changed in the South";[127] "our Nation has made great strides";[128] "today's statistics tell an entirely different story."[129] Based on this social reality, Chief Justice Roberts concluded that, at the time of his writing, the Act's measures were too extreme for the present circumstances.[130] According to Chief Justice Roberts, the discrimination of the 1960's that stood as the basis of the VRA was no longer relevant. In Chief Justice Roberts's words, the VRA "ignores these developments, keeping the focus on decades-old data relevant to decades-old problems, rather than current data reflecting current needs."[131] He described the VRA as "based on decades-old data

121. *Shelby County*, 570 U.S. at 535–36.
122. *Id.* at 565–66 (Ginsburg, J., dissenting).
123. *See id.* at 547–50 (majority opinion).
124. *See id.* at 548–49.
125. *See id.* at 565–66 (Ginsburg, J., dissenting).
126. *Id.* at 535 (majority opinion).
127. *Id.* at 540; *see also id.* at 547 ("[T]hings have changed dramatically"); *id.* at 550 ("[T]here have been improvements on the ground").
128. *Id.* at 549.
129. *Id.* at 556.
130. *Id.* at 552–53.
131. *Id.* at 553.

and eradicated practices"[132] and as reenacting "a formula based on 40-year-old facts having no logical relation to the present day."[133] Furthermore, according to Chief Justice Roberts, the conditions that justified the VRA's passage in 1965 "no longer characterize voting in the covered jurisdictions."[134] According to the majority, the Act punished for the past and relied on the past.[135] Thus, the Act was outdated, irrelevant and unconstitutional.[136]

Justice Ginsburg, on the other hand, saw a radically different social reality. Her dissent focused on the fact that racial discrimination still existed and that the VRA was a powerful and successful tool in combating said discrimination.[137] She stressed that the VRA remained both necessary and effective. She gave a detailed legislative history that sought to put the VRA in context and to support the argument that the law was efficient.[138] To her, "[c]onsideration of this long history, still in living memory, was altogether appropriate."[139]

While the majority claimed that racial discrimination was a matter of the past, Justice Ginsburg reminded us that "the scourge of discrimination was not yet extirpated."[140] In other words, "the Act, to date, surely has not eliminated all vestiges of discrimination against the exercise of the franchise by minority citizens. . . . [B]arriers to minority voting would quickly resurface were the preclearance remedy eliminated."[141] She argued that "racial discrimination in voting in covered jurisdictions [remained] serious and pervasive."[142] Therefore, "the time had not yet come for relaxed vigilance against the scourge of race discrimination in voting."[143] Justice Ginsburg was particularly concerned with "'second-generation barriers' to minority voting."[144] "[V]oting discrimination had evolved into subtler second-generation barriers, and . . . eliminating preclearance would risk loss of the gains that had been made."[145] She concluded that "the Voting Rights Act

132. *Id.* at 551.
133. *Id.* at 554.
134. *Id.* at 535.
135. *See id.* at 553.
136. *Id.* at 557.
137. *Id.* at 560 (Ginsburg, J., dissenting).
138. *Id.* at 560–66.
139. *Id.* at 576.
140. *Id.* at 559.
141. *Id.* at 563 (citing City of Rome v. United States, 446 U.S. 156, 181 (1980)).
142. *Id.* at 575 (alteration in original) (quoting Shelby County v. Holder, 679 F.3d 848, 865 (D.C. Cir. 2012), *rev'd*, 570 U.S. 529 (2013)).
143. *Id.*
144. *Id.* at 563.
145. *Id.* at 575–76.

became one of the most consequential, efficacious, and amply justified exercises of federal legislative power in our Nation's history."[146] Moreover, "the VRA provided a fit solution for minority voters as well as for States."[147] Justice Ginsburg reminded that "Congress was especially mindful of the need to reinforce the gains already made and to prevent backsliding."[148] She echoed the warning that "without the continuation of the Voting Rights Act of 1965 protections, racial and language minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years."[149] Justice Ginsburg critiqued the Court's conclusion that the Act was no longer needed, and warned that "history repeats itself."[150] "[T]he evolution of voting discrimination into more subtle second-generation barriers is powerful evidence that a remedy as effective as preclearance remains vital to protect minority voting rights and prevent backsliding."[151]

Significant progress was made in minority voting as a direct result of the VRA. The majority took this to mean that the VRA was redundant after having achieved its purpose; the dissent took this to mean quite the opposite, namely, that because the VRA was doing a good job in eliminating discrimination, it should be upheld. Justice Ginsburg warned that: "'[V]oting discrimination still exists; no one doubts that' . . . [b]ut the Court today terminates the remedy that proved to be best suited to block that discrimination. The [VRA] has worked to combat voting discrimination where other remedies had been tried and failed."[152] Thus, the majority and the dissent looked at the data showing that progress had been made since the 1960's and came to two opposite conclusions: while the majority concluded that due to this progress the Act was no longer relevant or necessary, the dissent concluded that the Act remained an integral tool in the battle against continued racial discrimination.

This divergence between the majority and dissent reflected a fundamental difference in their respective worldviews. Justice Ginsburg challenged Chief Justice Roberts' perception of American society and articulated an alternative ideological view. For Justice Ginsburg, racial discrimination was an acute social problem, while for Chief Justice

146. *Id.* at 562.
147. *Id.*
148. *Id.* at 576–77.
149. *Id.* at 566 (quoting Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 2(b)(9), 120 Stat. 577, 578 (codified at 52 U.S.C. § 10301)).
150. *Id.* at 592.
151. *Id.* at 593.
152. *Id.* at 560.

Roberts it was ancient history. For Justice Ginsburg, African Americans and other minorities still faced racial inequality, while for Chief Justice Roberts, the United States was an adequately egalitarian society.

2. Framing the Legal Question

Chief Justice Roberts framed the legal issue in this case as one of the relationship between states and the federal government.[153] The legal matter was the balance between federal power, the sovereignty of the states, and equality between the states. According to Chief Justice Roberts, the VRA deviated from fundamental constitutional principles.[154] The majority stressed the constitutional concerns that the VRA raised, which led to the conclusion that the VRA was unconstitutional.[155]

Justice Ginsburg framed the issue before the Court differently: this case was about racial discrimination and the right to vote.[156] This framing led her to conclude that Congress's battle against racial discrimination, using the VRA, was constitutional.[157] At center were the Fourteenth and Fifteenth Amendments, which guaranteed the right to vote free from discrimination on the basis of race.[158] Justice Ginsburg described the VRA as "the heart of the Nation's signal piece of civil-rights legislation."[159] She reminded us that "[t]he grand aim of the Act is to secure to all in our polity equal citizenship stature, a voice in our democracy undiluted by race."[160] Thus, the VRA served an important goal and was constitutional. This fundamental difference between the majority and the dissent went well beyond the debate on whether the statute in question was constitutional.

The majority saw Congress as violating constitutional principles and overstepping its powers. The majority thus viewed the important issue in this case as being one of policing congressional power that intrudes upon equality between the states.[161] Justice Ginsburg, on the other hand, saw Congress as doing a good job in reauthorizing an effective legislation advancing racial equality.[162] For Justice Ginsburg, assuring equal political rights and participation in the democratic process in an inclusive manner were issues of the utmost importance. According to Justice

153. *Id.* at 534–35 (majority opinion).
154. *Id.* at 544.
155. *Id.* at 557.
156. *Id.* at 566 (Ginsburg, J., dissenting).
157. *Id.* at 591–93.
158. *Id.* at 560.
159. *Id.* at 580.
160. *Id.* at 592.
161. *Id.* at 545 (majority opinion).
162. *Id.* at 560 (Ginsburg, J., dissenting).

Ginsburg, "discrimination against minority voters was a quintessentially political problem requiring a political solution."[163] Rather than viewing the question as one of states' autonomy and their relationships with the federal government, Justice Ginsburg saw the central issue as being that of racial discrimination in the right to vote. Rather than being an issue of federal balance, it was the democratic principle of an equal right to vote for all that stood at the heart of this case for Justice Ginsburg.

The dissent not only challenged the premises on which the majority opinion was grounded, but also posed a distinct alternative. This different framework reflected a different legal view. For Justice Ginsburg, this question was not primarily one of federalism, but rather fundamental political rights and equality.

3. The Court's Reasoning

The majority and dissent described the VRA differently and focused on different aspects of the VRA. The majority stressed how the VRA employed "extraordinary measures" [164] and "unprecedented . . . measures,"[165] and that the Act was a "strong medicine";[166] "far from ordinary";[167] a "dramatic departure from the principle that all States enjoy equal sovereignty."[168] The majority focused on the Act's excessive measures that it deemed no longer necessary.

On the other hand, the dissent focused on the efficiency of the Act and maintained that it remained effective. "The [VRA] has worked to combat voting discrimination where other remedies had been tried and failed." [169] Justice Ginsburg stressed that "Congress noted this improvement and found that the VRA was the driving force behind it."[170] Moreover, "[t]he evidence just described, of preclearance's continuing efficacy in blocking constitutional violations in the covered jurisdictions, itself grounded Congress' conclusion that the remedy should be retained for those jurisdictions."[171] Justice Ginsburg warned that "[t]hrowing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet."[172] Criticizing the majority,

163. *Id.* at 561.
164. *Id.* at 534 (majority opinion).
165. *Id.* at 535.
166. *Id.*
167. *Id.* at 555.
168. *Id.* at 535.
169. *Id.* at 560 (Ginsburg, J., dissenting).
170. *Id.* at 575.
171. *Id.* at 576.
172. *Id.* at 590.

she concluded, "[i]n the Court's view, the very success of § 5 of the Voting Rights Act demands its dormancy. . . . The Court today terminates the remedy that proved to be best suited to block that discrimination."[173]

The majority held that VRA's distinction between covered and uncovered jurisdictions was problematic:

> In 1965, the States could be divided into two groups: those with a recent history of voting tests and low voter registration and turnout, and those without those characteristics. Congress based its coverage formula on that distinction. Today the Nation is no longer divided along those lines, yet the Voting Rights Act continues to treat it as if it were.[174]

Justice Ginsburg argued that there were valid reasons for distinguishing between jurisdictions: "The evidence before Congress, furthermore, indicated that voting in the covered jurisdictions was more racially polarized than elsewhere in the country. . . . [P]laces where there is greater racial polarization in voting have a greater need for prophylactic measures to prevent purposeful race discrimination."[175] Justice Ginsburg argued that "the coverage formula continues to identify the jurisdictions of greatest concern,"[176] and thus, "[t]he case for retaining a coverage formula that met needs on the ground was therefore solid."[177] She concluded "that the existing coverage formula was not out of sync with conditions on the ground in covered areas."[178] She explained, "second-generation barriers to minority voting rights have emerged in the covered jurisdictions as attempted substitutes for the first-generation barriers that originally triggered preclearance in those jurisdictions,"[179] and that "racial discrimination in voting remains 'concentrated in the jurisdictions singled out for preclearance.'"[180] The majority held that signaling the covered jurisdiction was no longer justified and violated equality between the states; Justice Ginsburg argued that the Act's limited geographical scope made it narrowly tailored and thus constitutional. In other words, according to the dissent, rather than amounting to a violation of the constitutional notion of federalism, the

173. *Id.* at 559–60.
174. *Id.* at 551 (majority opinion).
175. *Id.* at 578 (Ginsburg, J., dissenting).
176. *Id.*
177. *Id.* at 579.
178. *Id.* at 592.
179. *Id.* (emphasis omitted).
180. *Id.* at 577 (quoting Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 203 (2009)).

VRA's differential treatment of covered jurisdictions was justified and worked for, rather than against, the VRA's constitutionality.

Chief Justice Roberts, writing for the majority, stressed how "[s]ections 4 and 5 were intended to be temporary" and "to expire after five years," yet were extended several times.[181] Not only were they still in effect after nearly fifty years, but indeed, they were "scheduled to last until 2031."[182] According to Chief Justice Roberts, this was problematic. To him, this was an indication that the VRA was no longer relevant.

On the other hand, according to Justice Ginsburg, the fact that Congress set a time for reauthorization showed that Congress was aware of the need to review the data as time passed. This built-in time limitation ensured a periodic examination of whether the law was still necessary.[183] While the majority described the VRA as based on outdated data and thus no longer needed, the dissent stressed that the VRA was reviewed every time the law was extended, so that the extensions themselves proved that the law was still effective and relevant.

Furthermore, Justice Ginsburg pointed out that rather than being "static" and "unchanged" since the 1960's, the VRA allowed for jurisdictions to bail out by showing compliance with the VRA for ten years, and the VRA also allowed for bail-in if violations of voting rights had occurred.[184] Thus, "Congress designed the VRA to be a dynamic statute, capable of adjusting to changing conditions."[185]

The dissent and the majority focused on different aspects of the statute. It was not merely a different reading of the statute but an essentially different view of the VRA itself. Both Justice Ginsburg and Chief Justice Roberts told a story of evolution, but each perceived a different development. According to Chief Justice Roberts, the VRA was found to be constitutional in the past, then serious doubts were raised by the Supreme Court regarding the VRA's constitutionality, and finally, it was no longer constitutional due to social changes. Justice Ginsburg, in turn, pointed out that blatant discrimination had changed into second generation discrimination. This transformation showed the ongoing need for the VRA to vigorously combat discrimination. The evolutions noted by each side were radically different from each other.

181. *Id.* at 538–39 (majority opinion).
182. *Id.* at 535.
183. *Id.* at 569 (Ginsburg, J., dissenting).
184. *Id.* at 579–80.
185. *Id.* at 580.

4. The Court's Intervention

While the majority invalidated an Act of Congress as unconstitutional, the dissent deferred to Congress and would have upheld the VRA. Unlike the majority, which concluded that Congress went too far and employed unwarranted, drastic measures, Justice Ginsburg supported Congress's reauthorization of the VRA. Chief Justice Roberts emphasized that the decision to invalidate the VRA as unconstitutional was not one taken lightly, and that Congress may draft another "formula" based on current data to police voting discrimination.[186] But Justice Ginsburg bluntly concluded that "the Court's opinion can hardly be described as an exemplar of restrained and moderate decisionmaking. Quite the opposite. Hubris is a fit word for today's demolition of the VRA."[187]

Justice Ginsburg stressed that "[t]he question this case presents is who decides whether, as currently operative, §5 remains justifiable, this Court, or a Congress charged with the obligation to enforce the post-Civil War Amendments 'by appropriate legislation.'" [188] She answered this question: "With overwhelming support in both Houses, Congress concluded that . . . §5 should continue in force, unabated . . . .Those assessments were well within Congress' province to make and should elicit this Court's unstinting approbation."[189] This position stood in stark contrast to that of the majority, which concluded that the VRA violated constitutional principles and thus was unconstitutional.

In her dissent, Justice Ginsburg described the legislative process and the data that brought Congress to reauthorize the Act. "Congress approached the 2006 reauthorization of the VRA with great care and seriousness."[190] Specifically in this case, the data on racial discrimination in Alabama shows that the "preclearance requirement is constitutional as applied to Alabama."[191] Furthermore, "[a]fter exhaustive evidence-gathering and deliberative process, Congress reauthorized the VRA, including the coverage provision, with overwhelming bipartisan support."[192] Justice Ginsburg concluded, "[g]iven a record replete with

186. *Id.* at 556–57 (majority opinion).
187. *Id.* at 587 (Ginsburg, J., dissenting).
188. *Id.* at 559. Each of the Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments "contains the same broad empowerment of Congress to enact 'appropriate legislation' to enforce the protected right," giving Congress the lead role to protect "the integrity of the democratic process in federal elections." *Id.* at 567 n.2.
189. *Id.* at 559–60.
190. *Id.* at 580.
191. *Id.* at 582–85.
192. *Id.* at 593.

examples of denial or abridgment of a paramount federal right, the Court should have left the matter where it belongs: in Congress' bailiwick."[193]

Justice Ginsburg explained why the Court should defer to Congress in this case: "When confronting the most constitutionally invidious form of discrimination, and the most fundamental right in our democratic system, Congress' power to act is at its height."[194] Moreover, "Congress' judgment regarding exercise of its power to enforce the Fourteenth and Fifteenth Amendments warrants substantial deference."[195] Justice Ginsburg concluded, "[i]t cannot tenably be maintained that the VRA, an Act of Congress adopted to shield the right to vote from racial discrimination, is inconsistent with the letter or spirit of the Fifteenth Amendment, or any provision of the Constitution read in light of the Civil War Amendments."[196] In other words, "the Constitution vests broad power in Congress to protect the right to vote, and in particular to combat racial discrimination in voting. This Court has repeatedly reaffirmed Congress' prerogative to use any rational means in exercise of its power in this area."[197]

The result of the case was interesting: The conservative judge invalidated the Act of Congress, and the liberal judge upheld the statute. Thus, the activist majority intervened and overruled a law of Congress, while the progressive dissent showed restraint and respect for the legislature.

B. Employment Discrimination

In *Ledbetter v. Goodyear Tire & Rubber Co.*, the majority opinion, delivered by Justice Alito, rejected Ledbetter's employment discrimination claim on the grounds that she did not file it in a timely manner.[198] Ledbetter claimed that "several supervisors [gave] her poor evaluations because of her sex," and her pay raises were based on these unfair evaluations, resulting in her being paid much less than her male colleagues.[199] The Court held that Ledbetter should have filed her Title VII claim within 180 days after Goodyear made its pay decisions, which denied her raises.[200] Since her claim was filed later than that, and since

193. *Id.* at 590.
194. *Id.* at 566.
195. *Id.*
196. *Id.* at 567.
197. *Id.* at 570.
198. 550 U.S. 618, 632 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.
199. *Id.* at 622.
200. *Id.* at 628–29.

she could not show additional discriminatory acts by Goodyear during the relevant 180-day charging period, her claim was dismissed.[201] The dissent, written by Justice Ginsburg and joined by Justices Stevens, Souter, and Breyer, held that Ledbetter's claim was not time-bound.[202] The discriminatory employment practice occurred not only in the evaluation itself, but whenever a payment was made to a woman that was lower than that made to a similarly situated man. Therefore, since Ledbetter filed the claim 180 days after she received the last paycheck, she met Title VII's deadline.[203]

1. The Court's Reasoning

The majority's reasoning was formalistic. An employee making a Title VII claim must file a claim with the Equal Employment Opportunity Commission ("EEOC") in a timely manner. Since the evaluations Ledbetter challenged as discriminatory occurred prior to the EEOC charging period, her claim was dismissed.[204] The majority's rule was strict and rigid: "[T]he EEOC charging period ran from the time when the discrete act of alleged intentional discrimination occurred, not from the date when the effects of this practice were felt."[205] According to Justice Alito, "[w]e apply the statute as written."[206]

The dissent's reasoning, on the other hand, was not formalistic, but rather contextual and policy-oriented. The dissent sketched a detailed picture of employment discrimination, and focused on the characteristics of pay discrimination that made it difficult for employees to meet the statute's deadline.[207] For example, employees like Ledbetter did not know that they were paid less than their male counterparts.[208] When an employee discovered the pay disparity, the Title VII time limitation had already passed, and she was unable to bring charges against her employer.[209] Rather than remaining strictly formalistic, Justice

201. *Id.*

202. *Id.* at 661 (Ginsburg, J., dissenting); *see also* Martha Chamallas, Ledbetter, *Gender Equity and Institutional Context*, 70 OHIO ST. L.J. 1037, 1044 (2009).

203. *See Ledbetter*, 550 U.S. at 646 (Ginsburg, J., dissenting). For a similar employment discrimination decision, see Vance v. Ball State Univ., 570 U.S. 421, 466–68 (2013) (Ginsburg, J., dissenting) (criticizing the majority's truncated conception of supervisory authority "shifted in a decidedly employer-friendly direction" and "will leave many harassment victims without an effective remedy and undermine Title VII's capacity to prevent workplace harassment").

204. *Ledbetter*, 550 U.S. at 632.

205. *Id.* at 627.

206. *Id.* at 642.

207. *See id.* at 645, 648–51 (Ginsburg, J., dissenting).

208. *See id.* at 645.

209. *See id.* at 645, 649.

Ginsburg's dissent centered on the aim of Title VII, and provided a rich description of the workplace and the reality of employment discrimination.[210]

As the majority saw it, the law was clear: "The EEOC charging period is triggered when a discrete unlawful practice takes place. A new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination."[211] A simple application of this rule resulted in a denial of Ledbetter's claim: the alleged intentionally discriminatory conduct accrued prior to the charging period. Goodyear's conduct during the charging period—that involving Ledbetter's raises and her paychecks—had no legal consequences. The majority rejected Ledbetter's arguments, stating they "fail because they would require us in effect to jettison the defining element of the legal claim on which her Title VII recovery was based."[212] Ledbetter's argument, according to the majority, was "squarely foreclosed by our precedents."[213]

Justice Ginsburg read Title VII differently, broadly focusing on its goal and policy aims. According to Justice Ginsburg's dissent, "[p]aychecks perpetuating past discrimination . . . are actionable not simply because they are 'related' to a decision made outside the charge-filing period . . . but because they discriminate anew each time they issue."[214] She explained that "each payment of a wage or salary infected by sex-based discrimination constitutes an unlawful employment practice; prior decisions, outside the 180-day charge-filing period, are not themselves actionable, but they are relevant in determining the lawfulness of conduct within the period."[215] Ledbetter

> charged insidious discrimination building up slowly but steadily. Initially in line with the salaries of men performing substantially the same work, Ledbetter's salary fell 15 to 40 percent behind her male counterparts only after successive evaluations and percentage-based pay adjustments. Over time . . . the repetition of pay decisions undervaluing her work gave rise to the current discrimination of which she complained. Though component acts fell outside the charge-filing period, with each new paycheck,

210. *See id.* at 648–51.
211. *Id.* at 628 (majority opinion).
212. *Id.* at 624.
213. *Id.* at 625.
214. *Id.* at 647 (citations omitted) (Ginsburg, J., dissenting).
215. *Id.* at 646.

> Goodyear contributed incrementally to the accumulating harm.[216]

Justice Ginsburg mentioned that "Ledbetter's evidence demonstrated that her current pay was discriminatorily low due to a long series of decisions reflecting Goodyear's pervasive discrimination against women managers in general and Ledbetter in particular."[217] Justice Ginsburg's broad interpretation was shared by the EEOC, the federal agency enforcing Title VII.[218] This interpretation was "more faithful to precedent, more in tune with the realities of the workplace, and more respectful of Title VII's remedial purpose."[219] The majority's "cramped interpretation of Title VII," was "incompatible with the statute's broad remedial purpose."[220] Justice Ginsburg's application of Title VII centered on the statute's objectives and policy goals, as well as on the social context of employment discrimination.

The majority formalistically relied on a line of precedents which rejected arguments similar to Ledbetter's: the continuing effects of pre-charging period discrimination did not qualify one to file a fresh claim.[221] In all these cases, the late charge rendered the claim merely "an unfortunate event in history which has no present legal consequences."[222] Accordingly, Ledbetter's arguments could not be reconciled with the precedents.[223] Justice Alito read the precedents narrowly and strictly, and rejected the dissent's assertion that a pay discrimination claim was like a hostile environment claim.[224]

According to the majority, "[t]his case calls upon us to apply established precedent in a slightly different context."[225] Ledbetter "asks us to deviate from our prior decisions in order to permit her to assert her claim under Title VII."[226] The conclusion was that her arguments must be rejected.[227] The precedents are clear: "The EEOC charging period is triggered when a discrete unlawful practice takes place. A new violation does not occur, and a new charging period does not commence, upon the

216. *Id.* at 649 (citations omitted).
217. *Id.* at 659.
218. *See id.* at 655.
219. *See id.* at 646.
220. *Id.* at 661.
221. *Id.* at 621 (majority opinion) ("This case calls upon us to apply established precedent in a slightly different context.").
222. *Id.* at 625–26 (quoting United Air Lines v. Evans, 431 U.S. 553, 558 (1977)).
223. *Id.* at 628.
224. *Id.* at 638–39.
225. *Id.* at 621.
226. *Id.*
227. *Id.*

occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination."[228]

Unlike the majority, the dissent held that Ledbetter's claim was supported by precedents.[229] The dissent distinguished the current case from the cases the majority held as binding precedents.[230] Courts of appeals cases and the EEOC Compliance Manual supported the dissent's interpretation of Title VII.[231] The dissent read the precedents with the aim of promoting employment equality in mind. The precedents served the aim of protecting employees from discrimination.[232]

The majority formalistically adhered to the 180-day time limitation in order to bar Ledbetter's claim and did not discuss the rationale behind employment discrimination law.[233] The Court's opinion resulted in weakening anti-discrimination law and making it harder for employees to bring Title VII suits against employers. The majority disregarded this potential impact, addressing a procedural issue without considering its substantive legal policy implications. On the other hand, the dissent focused on Title VII's rationale, policing employer's discriminatory behavior.

Justice Alito's formalistic analysis was also apparent in stating "that the EPA [Equal Pay Act] and Title VII are not the same."[234] Justice Alito read anti-discrimination law narrowly and focused on procedure rather than on the aim of the law, that is, to promote equality.[235] Justice Ginsburg retorted that "the difference between the EPA's prohibition against paying unequal wages and Title VII's ban on discrimination with regard to compensation is not as large as the Court's opinion might suggest."[236] Justice Ginsburg read Title VII broadly in order to make it a forceful tool in battling employment discrimination.

To Justice Alito, Ledbetter's Equal Pay Act claim failed and now Ledbetter wished to bypass this statute by seeking to stretch a Title VII claim beyond its time limitation.[237] Therefore, her claims were rightly rejected, and the Court correctly barred her Title VII action. He similarly

228. *Id.* at 628.
229. *Id.* at 646 (Ginsburg, J., dissenting).
230. *See id.* at 651–53.
231. *Id.* at 655–56.
232. *Id.* at 645.
233. *See id.* at 628–29 (majority opinion).
234. *Id.* at 640.
235. *See id.* at 628–30.
236. *Id.* at 659 (Ginsburg, J., dissenting).
237. *Id.* at 640 (majority opinion).

rejected Ledbetter's reference to the National Labor Relations Act and the Fair Labor Standards Act.[238]

Justice Alito warned that:

> [I]f a single discriminatory pay decision made 20 years ago continued to affect an employee's pay today, the dissent would presumably hold that the employee could file a timely EEOC charge today. . . . The dissent, it appears, proposes that we adopt a special rule for pay cases based on the particular characteristics of one case that is certainly not representative of all pay cases and may not even be typical.[239]

Justice Ginsburg critiqued the narrow reading of the majority:

> [U]nder the Court's decision, the discrimination Ledbetter proved is not redressable under Title VII. Each and every pay decision she did not immediately challenge wiped the slate clean. Consideration may not be given to the cumulative effect of a series of decisions that, together, set her pay well below that of every male area manager. Knowingly carrying past pay discrimination forward must be treated as lawful conduct. Ledbetter may not be compensated for the lower pay she was in fact receiving when she complained to the EEOC. Nor, were she still employed by Goodyear, could she gain, on the proof she presented at trial, injunctive relief requiring, prospectively, her receipt of the same compensation men receive for substantially similar work. The Court's approbation of these consequences is totally at odds with the robust protection against workplace discrimination Congress intended Title VII to secure.[240]

To Justice Ginsburg, the aims of protecting employees from discrimination and guaranteeing equality in the workplace were at the heart of Title VII.

The dissent stressed that though Ledbetter was discriminated against, her claim was barred solely because of a perceived time limitation. According to the majority, Ledbetter should have filed a complaint year after year, each time she received lower pay raises than did her male colleagues. The dissent showed this was an absurd requirement, which struck a blow to the purpose of Title VII, combating

238. *Id.* at 641–42.
239. *Id.* at 639–40.
240. *Id.* at 660 (Ginsburg, J., dissenting).

employment discrimination. Justice Ginsburg critiqued the majority: "The Court's insistence on immediate contest overlooks common characteristics of pay discrimination."[241] According to Justice Ginsburg, "[i]n light of the significant differences between pay disparities and discrete employment decisions . . . the cases on which the Court relies hold no sway."[242] "Each paycheck less than the amount payable had the employer adhered to a nondiscriminatory compensation regime . . . constitutes a cognizable harm."[243] To Justice Ginsburg, the majority's formalistic and narrow reading of Title VII went against Title VII's policy aims of protecting employees from discrimination.

This was a huge gap between the majority and dissent. It was not only a question of reading Title VII narrowly or broadly, or of applying precedents differently. It was a formalistic opinion versus a policy-oriented opinion that sought to reinforce Title VII's goals.

2. Policy Considerations

The majority and dissent based their respective decisions on different policy considerations. The majority focused on the rationale of time limitation. According to Justice Alito, "[s]tatutes of limitations serve a policy of repose."[244] While the majority conceded that the time limitation was short, it argued that this reflected the interest in "prompt resolution of employment discrimination allegations."[245] Discriminatory intent was hard to prove, and "the passage of time may seriously diminish the ability of the parties and the factfinder to reconstruct what actually happened."[246] Thus the majority explained the policy considerations behind Title VII's time limitation.

On the other hand, the dissent reminded us that the rationale behind Title VII was that of "robust protection against workplace discrimination."[247] Unlike the majority, which focused on prompt resolution of employment discrimination disputes, the dissent focused on battling employment discrimination. The focus of the dissent was Title VII as a tool for promoting equality in the workplace. Justice Ginsburg rejected the Court's holding, arguing that the majority's cramped and parsimonious interpretation of Title VII went against the purpose of Title

241. *Id.* at 645.
242. *Id.* at 651.
243. *Id.* at 654.
244. *Id.* at 630 (majority opinion).
245. *Id.*
246. *Id.* at 632.
247. *Id.* at 660 (Ginsburg, J., dissenting).

VII.[248] The dissent called for a broader interpretation that would facilitate employees' use of Title VII and accommodate the policy that stood behind it. Justice Ginsburg blamed the majority for "stray[ing] from interpretation of Title VII with fidelity to the Act's core purpose."[249]

The majority rejected Ledbetter's policy arguments, stating:

> We are not in a position to evaluate Ledbetter's policy arguments, and it is not our prerogative to change the way in which Title VII balances the interests of aggrieved employees against the interest in encouraging the "prompt processing of all charges of employment discrimination," . . . . Ledbetter's policy arguments for giving special treatment to pay claims find no support in the statute and are inconsistent with our precedents.[250]

For Justice Ginsburg, equality in the workplace was at the heart of Title VII; for Justice Alito, such a view constituted an overstepping of Congress' intent.

Justice Alito suggested that Justice Ginsburg's reading of the statute was too broad and set too lenient a time limitation.[251] Justice Ginsburg responded by saying that in cases in which employees were suing for discriminatory acts in the past, their employers may raise defenses such as waiver, estoppel, and laches.[252] These differences in public policy considerations between the majority and dissent not only yielded a different result, but also revealed ideological differences between the majority's and the dissent's perception of employment discrimination. These different policy considerations led Justices Alito and Ginsburg to implement Title VII differently. In that regard, these two decisions stood in stark opposition to one another.

3. Framing the Legal Question

The Court framed the legal question as a narrow procedural one. The issue was "the proper application of the limitations period in Title VII disparate-treatment pay cases."[253] The case was limited to the timeframe of filing a Title VII claim. As such, the majority refused to extend the

248. *Id.* at 661.
249. *Id.* at 659.
250. *Id.* at 642 (majority opinion) (quoting Mohasco Corp. v. Silver, 447 U.S. 807, 825 (1980)).
251. *See id.* at 639–40.
252. *See id.* at 657 (Ginsburg, J., dissenting).
253. *Id.* at 623 (majority opinion).

deadline Congress set.[254] According to the majority, "experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law."[255] The Court rejected Ledbetter's analogy to other statutes—the Equal Pay Act, Fair Labor Standards Act, and National Labor Relations Act—which had different time limitations.[256] Ledbetter's arguments "distort Title VII's 'integrated, multistep enforcement procedure,'"[257] and therefore the Court refused to "extend or truncate Congress' deadlines."[258]

Justice Ginsburg, in turn, framed the legal question as a larger issue of employment discrimination: namely, that of a workplace largely segregated by sex and characterized by a pay disparity between women and men holding the same position.[259] "Ledbetter's petition present[ed] a question important to the sound application of Title VII . . . ."[260] Rather than centering around the question of a time limitation, this case, for Justice Ginsburg, was ultimately about "[t]he problem of concealed pay discrimination."[261]

The dissent provided a rich factual background, one which did not appear in the majority's opinion. For example, the dissent mentioned that at the end of 1997, Ledbetter was the only female area manager, a position that was largely occupied by men.[262] Justice Ginsburg portrayed the reality of employment discrimination, both broader and more pervasive than just pay discrimination, as being the heart of this case. To the majority, focused on the question of time limitation, this contextual description was irrelevant. The reality of employment discrimination went beyond the narrow, procedural issue of the charging period.

The difference of opinions between the majority and dissent was not merely a difference of interpretations of the law or the implementation thereof; rather, it was a dispute that ran far deeper, namely, around the legal and social issue of employment discrimination. It was about the issue before the Court itself: was it a narrow procedural question of time limitation or was it a broad question of pay discrimination? The dissent

254. *Id.* at 632.
255. *Id.* (quoting *Mohasco Corp.*, 447 U.S. at 826).
256. *Id.* at 640–41.
257. *Id.* at 629 (quoting Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 359 (1977)).
258. *Id.* at 630.
259. *Id.* at 643 (Ginsburg, J., dissenting). Ledbetter earned $3,727 per month while her male colleagues earned $4,286 to $5,236 per month. *Id.*
260. *Id.* at 646.
261. *Id.* at 650.
262. *Id.* at 643.

presented an alternative framing to that of the majority and offered an alternative legal analysis, reflecting an alternative view on equality in employment settings and resulting in a different conclusion.

4. Point of View

The majority's opinion was written from the perspective of the employer. "The EEOC filing deadline 'protect[s] employers from the burden of defending claims arising from employment decisions that are long past.'"[263] The majority held that Ledbetter should have filed an EEOC charge on time, and her claim was dismissed because she failed to do so. She did not meet the deadline, and for that she had only herself to blame. The burden, according to the Court, was on the employee to file a Title VII claim in a timely manner,[264] and Alito was oblivious to the difficulties employees face when bringing a suit against their employer.

Contrary to this, the dissent was written from the perspective of the employee. The dissent stressed that it was difficult for an employee to realize that she was paid less than her male colleagues. Justice Ginsburg explained that an employer's policy of keeping salaries confidential might deny an employee such information.[265] Thus, it was due to the employer's policy, and not to Ledbetter's negligence, that Ledbetter did not know that she was paid less, and thus was unable to file a claim within the initial charging period. In this light, Ledbetter's claim was dismissed not because she failed to act in a timely manner, but rather because she gave her employer the benefit of the doubt. Underscoring this point, the dissent mentioned facts that were not addressed by the majority. For example, women other than Ledbetter suffered discrimination by Goodyear.[266] Furthermore, not only was Ledbetter paid less than her male colleagues, despite having received a top performance award, but she was also told bluntly that the "plant did not need women" and that women "caused problems."[267] The dissent was conscious of the difficulties faced by employees and interpreted Title VII in a way to address these difficulties. These issues were only relevant from the employees' point of view; when looking at the issue from the employer's perspective, they carried no weight.

Writing from a different perspective not only yielded a different conclusion, it presented an ideological alternative to the majority.

263. *Id.* at 630 (majority opinion) (alteration in original) (quoting Del. State Coll. v. Ricks, 449 U.S. 250, 256–57 (1980)).

264. *See id.* at 632.

265. *Id.* at 645 (Ginsburg, J., dissenting).

266. *Id.* at 644.

267. *Id.* at 659–60.

Justices Ginsburg and Alito's opinions presented two radically different worldviews regarding employment discrimination, which ran much deeper than a mere different application of the law in a specific case.

C. Reproductive Rights

In *Gonzales v. Carhart*, the majority opinion, written by Justice Kennedy, held that the Partial-Birth Abortion Ban Act, a federal statute regulating abortion procedures in the latter stages of pregnancy, was constitutional.[268] In her dissent, Justice Ginsburg, joined by Justices Stevens, Souter, and Breyer, held that the Act did not pass constitutional muster.[269]

1. Point of View

Justice Kennedy's opinion was written from the point of view of the doctors performing abortions. He cited doctors' and nurses' testimonies about the abortion procedure.[270] He devoted a long part of his opinion to a detailed description of the abortion procedure, concentrating on the doctor's actions.[271] Even when addressing the issue of health risks to women having abortions, his opinion relied on the medical opinions of experts.[272] So too did his opinion rely on medical opinions when discussing whether the statute imposed an undue burden on the right to abortion.[273] Similarly, when discussing the issue of disclosing abortion information to patients before they have an abortion, Justice Kennedy mentioned that some doctors prefer not to describe the procedure to patients rather than focusing on women's right to know the medical information regarding the procedure they are about to undergo.[274] Justice Kennedy, then, told the story of abortion as doctors see it.

Justice Ginsburg's dissent, on the other hand, was written from the point of view of the women seeking abortion.[275] While relegated to the margins of the majority's opinion, women seeking abortion were at the center of the dissenting opinion. Similarly, the rationale of the law was framed as centering around the issues of women's equality, autonomy,

268. 550 U.S. 124, 132–33 (2007).
269. *Id.* at 170–71 (Ginsburg, J., dissenting); *see also* Lauren R. Eversley, Note, *#jointhedissent: Ruth Bader Ginsburg and the* Hobby Lobby *Effect*, 79 ALB. L. REV. 269, 279–82 (2016).
270. *Id.* at 137–40 (majority opinion).
271. *Id.* at 134–40.
272. *Id.* at 161–62.
273. *Id.*
274. *Id.* at 159.
275. *Id.* at 171–73 (Ginsburg, J., dissenting).

and liberty.[276] Women's health stood at the center of the law's constitutionality. Justice Ginsburg brought the lived experience of women to the fore in her opinion.

Justice Kennedy mentioned women in the context of women regretting having an abortion.[277] Justice Ginsburg responded that there was no reliable evidence to support that.[278] A second time Justice Kennedy mentioned women was when he referred to the bond of love between a mother and her child as a reason for doctors withholding information regarding the abortion procedure.[279] Justice Ginsburg critiqued the majority by pointing out that rather than requiring that women have full and adequate medical information about the abortion procedure, "the Court deprives women of the right to make an autonomous choice, even at the expense of their safety."[280] Rather than taking on the point of view of the doctors performing abortions, Justice Ginsburg gave voice to women having abortions.

Furthermore, in Justice Ginsburg's opinion, women were not a homogenous group. Some women have pregnancy-related health conditions.[281] Adolescents, indigent, and poor women face particular difficulties in obtaining abortions.[282] Some pregnancies are unwanted or coerced.[283] Justice Ginsburg brought forth a range of lived experiences of women seeking abortion. Different women face different conditions and have different options, and in her dissenting opinion, Justice Ginsburg sought to represent the diverse perspectives and views of a heterogeneous group. She paid attention not only to privileged women but also to minority, poor, and young women.[284] She painted a complex and nuanced picture of motherhood, pregnancy, and womanhood. Her opinion was contextual. She provided rich and detailed experiences of various women, rather than offering a singular representation of all women.

Instead of focusing on medical information and experts' testimonies, Justice Ginsburg brought women's voices, needs, views, perspectives, and experiences to the center of this case. Rather than offering a detached analysis of constitutionality based on professionals' evidence, Justice

276. *Id.*
277. *Id.* 159–60 (majority opinion).
278. *Id.* at 183 (Ginsburg, J., dissenting).
279. *Id.* at 159 (majority opinion).
280. *Id.* at 184 (Ginsburg, J., dissenting).
281. *See id.* at 172–73.
282. *Id.* at 173 n.3.
283. *Id.* at 184 n.9.
284. *See id.* at 173 n.3.

Ginsburg's opinion was concerned with the human experience of having an abortion.

2. The Court's Reasoning

The focus of the majority was on the abortion procedure and on doctors' opinions. Justice Kennedy began his opinion by writing that "it is necessary here . . . to discuss abortion procedures in some detail."[285] At the center of his description were the doctor and the fetus, and little was said about the patient.[286] The focus was on the procedure conducted by the doctor on the fetus. The woman having the abortion was mentioned only in passing.

Justice Ginsburg, on the other hand, focused on women's needs and experiences.[287] Ginsburg put women patients and their reproductive choices and decisions at the center of her opinion.[288] She concentrated on women's health.[289] The case, for Justice Ginsburg, was about how abortion laws served these interests and values.

Justice Kennedy examined the statute's language and concluded that it was not vague and that it was narrow enough that it did not prohibit all abortions.[290] For example, in order to impose liability according to the statute, an "intent . . . must be proved."[291] He rejected the argument that the statute's language was indeterminate.[292] Justice Kennedy did not discuss the burden the statute placed on women seeking abortion and concentrated instead on the State's interest. Justice Kennedy held that the statute did not ban all second trimester abortions and thus did not impose an undue burden.[293]

For Justice Ginsburg, it was not the statute's language but its effects and purposes that disturbed her. It was not a question of whether the statute was narrowly tailored but a question of whether the statute preserved women's right to abortion, protected women's health, maintained their autonomy, served their reproductive needs, and respected their choices.[294] Justice Ginsburg's was a policy-oriented analysis of the statute rather than a technical, linguistic analysis.[295]

285. *Id.* at 134 (majority opinion).
286. *See id.* at 134–40.
287. *See id.* at 171–72 (Ginsburg, J., dissenting).
288. *See id.*
289. *See id.* at 172–74.
290. *Id.* at 147–50 (majority opinion).
291. *Id.* at 149.
292. *Id.* at 148–50.
293. *Id.* at 150–56.
294. *See id.* at 170–74 (Ginsburg, J., dissenting).
295. *See id.*

Justice Kennedy described an evolution: President Clinton vetoed the statute then President Bush signed the statute.[296] This statute responded to the Supreme Court's precedent, *Stenberg*, which found a similar statute banning partial-birth abortion to be unconstitutional.[297] Thus the current statute was in line with this development and should be upheld.[298] Justice Ginsburg described a different evolution: the Court established the right to an abortion in *Roe*,[299] it affirmed and developed this right in *Casey*,[300] and on this basis, it invalidated the statute in *Stenberg*.[301] The conclusion was that the current statute was similarly unconstitutional.[302] These are two utterly different perspectives on abortion jurisprudence.

3. Policy Considerations

While the dominant policy consideration in Justice Kennedy's opinion was the protection of the life of the fetus, the paramount policy consideration in Justice Ginsburg's opinion was women's equality.

For Justice Kennedy the issue was the State's interest in protecting the life of the fetus.[303] His conclusion was that "[t]he Act expresses respect for the dignity of human life."[304] Justice Kennedy pronounced a pro-life agenda: "The government may use its voice and its regulatory authority to show its profound respect for the life within the woman."[305] The purpose of the law was "to promote respect for life, including life of the unborn."[306] Congress was concerned if the Act drew "a bright line that clearly distinguishes abortion and infanticide . . . The Court has in the past confirmed the validity of drawing boundaries to prevent certain practices that extinguish life and are close to actions that are condemned."[307] Justice Ginsburg responded, "[t]he law saves not a single fetus from destruction, for it targets only a method of performing abortion."[308]

296. *Id.* at 140–41 (majority opinion).
297. *Id.* at 141, 151–52; *see* Stenberg v. Carhart, 530 U.S. 914 (2000).
298. *Gonzales*, 550 U.S. at 132–33, 141–43.
299. Roe v. Wade, 410 U.S. 113 (1973).
300. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).
301. *Gonzales*, 550 U.S. at 169–71 (Ginsburg, J., dissenting).
302. *See id.* at 191.
303. *Id.* at 157–60, 163 (majority opinion).
304. *Id.* at 157.
305. *Id.*
306. *Id.* at 158.
307. *Id.*
308. *Id.* at 181 (Ginsburg, J., dissenting) (emphasis omitted).

For Justice Ginsburg, the health of the woman was the paramount consideration.[309] Justice Ginsburg criticized the Court for disregarding women's health in its ruling.[310] "[A] State must avoid subjecting women to health risks not only where the pregnancy itself creates danger, but also where state regulation forces women to resort to less safe methods of abortion."[311]

Justice Ginsburg framed the issue of abortion not as a privacy issue but as a building block toward women's equality: "[L]egal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature."[312]

Justice Ginsburg stressed women's equality, autonomy, dignity, their right to choose, and their health.[313] She reminded us that women's "ability to realize their full potential . . . is intimately connected to 'their ability to control their reproductive lives.'"[314] According to Justice Ginsburg, abortion was a matter of women's control over their own destiny.[315] She situated this case in the context of women's battle for equality before the law, and she critiqued "ancient notions about women's place in the family and under the Constitution—ideas that have long since been discredited."[316] Abortion was an issue of women's equal participation in social and economic life.[317] Justice Ginsburg gave a historical account of the time in which women lacked "full and independent legal status under the Constitution" and were confined to their domestic chores.[318] This background provided context for the issue of abortion. Justice Ginsburg positioned her opinion along the spectrum of progress women had made.

While Justice Kennedy based his opinion on his perception of the human life of the unborn,[319] Justice Ginsburg based her decision on women's equality and their right to reproductive choice.[320] Each decision was based on a different public policy. They placed different values at the

309. *Id.* at 171–72.
310. *Id.* at 170–71.
311. *Id.* at 172.
312. *Id.*
313. *Id.* at 170–72.
314. *Id.* at 171 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 856 (1992)).
315. *Id.*
316. *Id.* at 171, 185.
317. *Id.* at 171.
318. *Id.* (quoting *Casey*, 505 U.S. at 897).
319. *Id.* at 128 (majority opinion).
320. *Id.* at 169 (Ginsburg, J., dissenting).

basis of their analysis. This difference of opinion not only explained the divergent result, but also stemmed from fundamentally different ideological viewpoints on abortions, which went much deeper than merely being different readings of the statute at issue. While Justice Kennedy's opinion was ahistorical, Justice Ginsburg wove her abortion decision into the broader fabric of gender equality jurisprudence.

4. Following Abortion Jurisprudence

Both the majority and the dissent based their opinions on precedents, such as *Roe* and *Casey*.[321] However, they did so in profoundly different ways, each using precedent to undergird their opposite conclusions.

Based on the precedents Justice Kennedy applied,[322] he concluded that the current statute was different than the one invalidated in *Stenberg* and was thus constitutional.[323] According to Justice Kennedy, "[c]ompared to the state statute at issue in *Stenberg*, the Act is more specific concerning the instances to which it applies and in this respect more precise in its coverage."[324] Contrary to this, Justice Ginsburg held that the current statute was fundamentally similar to the one in *Stenberg* and was thus unconstitutional: "[I]n materially identical circumstances we held that a statute lacking a health exception was unconstitutional on its face."[325]

Justice Kennedy performed a close reading of the Act to determine whether it met the guidelines established by the precedents.[326] He concluded that the Act was not vague or unclear, and that it did not impose an undue burden on women seeking abortion.[327] Justice Kennedy also did a close reading of abortion law.[328]

According to Justice Ginsburg, the majority disregarded abortion jurisprudence.[329] She began her opinion with a review of the Court's abortion jurisprudence from *Roe* to *Casey* to *Stenberg*.[330] She warned that "[t]oday's decision is alarming. It refuses to take *Casey* and *Stenberg* seriously. . . . It blurs the line, firmly drawn in *Casey*, between previability and postviability abortions. And, for the first time since *Roe*,

321. *Id.* at 145–46 (majority opinion); *id.* at 169–70 (Ginsburg, J., dissenting).
322. *Id.* at 143–46 (majority opinion).
323. *Id.* at 151–56.
324. *Id.* at 133.
325. *Id.* at 187 (Ginsburg, J., dissenting) (citing Stenberg v. Carhart, 530 U.S. 914, 930 (2000)).
326. *See id.* at 141–43, 146–56 (majority opinion).
327. *Id.* at 147.
328. *See id.* at 145–46.
329. *See id.* at 169–71 (Ginsburg, J., dissenting).
330. *Id.*

the Court blesses a prohibition with no exception safeguarding a woman's health."[331] Justice Ginsburg critiqued the majority's opinion on the issue of women's health: "Retreating from prior rulings that abortion restrictions cannot be imposed absent an exception safeguarding a woman's health, the Court upholds an Act that surely would not survive under the close scrutiny that previously attended state-decreed limitations on a woman's reproductive choices."[332] Justice Ginsburg also critiqued the majority's standard of review: "Instead of the heightened scrutiny we have previously applied, the Court determines that a 'rational' ground is enough to uphold the Act . . . And, most troubling, *Casey*'s principles, confirming the continuing vitality of 'the essential holding of *Roe*,' are merely 'assume[d]' for the moment rather than 'retained' or 'reaffirmed,' . . . ."[333] Justice Ginsburg also critiqued the majority's opinion regarding the State's interest: "[T]he concerns expressed are untethered to any ground genuinely serving the Government's interest in preserving life. By allowing such concerns to carry the day and case, overriding fundamental rights, the Court dishonors our precedent."[334] She argued that "[t]he Court's hostility to the right *Roe* and *Casey* secured is not concealed."[335] "Though today's opinion does not go so far as to discard *Roe* or *Casey*, the Court, differently composed than it was when we last considered a restrictive abortion regulation, is hardly faithful to our earlier invocations of 'the rule of law' and the 'principles of *stare decisis*.'"[336] Moreover, "the Act, and the Court's defense of it, cannot be understood as anything other than an effort to chip away at a right declared again and again by this Court—and with increasing comprehension of its centrality to women's lives."[337] Justice Ginsburg concluded: "A decision so at odds with our jurisprudence should not have staying power."[338]

While the majority based its decision on the medical record before Congress,[339] the dissent preferred the data before the district court: "The District Courts' findings merit this Court's respect. . . . Today's opinion supplies no reason to reject those findings." [340] "The congressional findings on which the Partial-Birth Abortion Ban Act rests do not

331. *Id.* at 170–71.
332. *Id.* at 171.
333. *Id.* at 187 (alteration in original) (citations omitted).
334. *Id.* at 182.
335. *Id.* at 186.
336. *Id.* at 191.
337. *Id.*
338. *Id.*
339. *See id.* at 134–40 (majority opinion).
340. *Id.* at 179 (Ginsburg, J., dissenting) (citations omitted).

withstand inspection, as the lower courts have determined and this Court is obliged to concede."[341] While the dissent argued that the district court's ruling should be upheld, the majority overruled the lower court's decision.[342] The dissent critiqued the majority for doing this: "Not only does it defy the Court's longstanding precedent affirming the necessity of a health exception, with no carve-out for circumstances of medical uncertainty . . . it gives short shrift to the records before us, carefully canvassed by the District Courts."[343] While Justice Kennedy upheld the Act, Justice Ginsburg argued that "[m]any of the Act's recitations are incorrect."[344] In contrast to Congress, the district court heard extensive evidence from experts.[345] "Based on thoroughgoing review of the trial evidence and the congressional record, each of the district courts to consider the issue rejected Congress' findings as unreasonable and not supported by the evidence."[346] According to Justice Ginsburg, "the Court brushes under the rug the District Courts' well-supported findings."[347] While Justice Kennedy held that there was medical uncertainty,[348] Justice Ginsburg accepted the medical experts' opinions presented before the district court.[349]

Both the majority and dissent followed precedents, but they read those cases utterly differently. While Justice Kennedy read the cases technically, Justice Ginsburg's reading was policy-oriented. Justice Ginsburg's goal was to preserve the right to an abortion and maintain the delicate balance of the State's and women's interests set in abortion law. Both the majority and dissent brought medical data to support their view; however, each based their opinion on different medical information. Justice Kennedy analyzed the language of the Act; Justice Ginsburg went beyond that to the goal of the Act, its implications, its rationale, and its function. Justice Kennedy focused on the fact that the Act only prohibits intact dilation and evacuation, and on the doctor's intent. Justice Ginsburg focused on the Act's regulation of abortion more broadly. Each presented utterly different views of abortion jurisprudence.

341. *Id.* at 174–75.
342. *See id.* at 191; *id.* at 168 (majority opinion).
343. *Id.* at 179 (Ginsburg, J., dissenting) (citations omitted).
344. *Id.* at 175.
345. *Id.* at 177.
346. *Id.* at 178–79.
347. *Id.* at 180.
348. *Id.* at 162 (majority opinion).
349. *See id.* at 177–80 (Ginsburg, J., dissenting).

D. Arbitration Agreements

In *Epic Systems Corp. v. Lewis*, "an employer and employee entered into a contract providing for individualized arbitration proceedings to resolve employment disputes between the parties."[350] Nevertheless, the employees sought class actions in federal court, alleging the employer did not pay them overtime in violation of the Fair Labor Standards Act.[351] The majority, delivered by Justice Gorsuch, enforced the employment agreement providing for individualized proceedings based on the Arbitration Act.[352] In her dissent, Justice Ginsburg, joined by Justices Breyer, Sotomayor, and Kagan, allowed employees to seek class action based on the National Labor Relations Act ("NLRA"), arguing that the contract mandating individualized arbitration was illegal.[353]

1. Basic Assumptions

In enforcing the employment agreement, the majority assumed freedom of contract and sought to honor the parties' intentions. The dissent, on the other hand, refused to enforce the one-sided non-negotiated agreement due to the power imbalance between the parties.

The majority presented the legal question as follows: "Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration? Or should employees always be permitted to bring their claims in class or collective actions, no matter what they agreed with their employers?"[354] The majority then perceived the arbitration term as agreed upon by the parties.[355] By enforcing the contract, the Court gave effect to the intention of the parties.[356] According to the majority, the agreement was lawful and enforceable.[357] The Court refused to override the terms of the contract to which the parties had consented.[358]

But where the majority saw a consensual agreement, the dissent saw a take-it-or-leave-it agreement. According to the majority, the parties entered into an agreement, and despite having agreed to individual arbitration, the employees sued in federal court.[359] The dissent carefully

350. 138 S. Ct. 1612, 1616 (2018).
351. *Id.* at 1620.
352. *Id.* at 1619–20, 1632.
353. *Id.* at 1633 (Ginsburg, J., dissenting).
354. *Id.* at 1619 (majority opinion).
355. *Id.* at 1619–20.
356. *Id.* at 1621, 1632.
357. *Id.* at 1632.
358. *Id.*
359. *Id.* at 1619–20.

noted that the employees were required to sign the arbitration agreements as a condition of employment.[360] The dissent acknowledged the "inequality of bargaining power" between the parties.[361] The dissent held that the agreement was not freely negotiated and was imposed on the employees.[362]

According to the majority, the Court respected and enforced the parties' chosen arbitration procedure.[363] The dissent saw the employees as vulnerable and as falling under the protection of the labor laws.[364] The Court upholding the NLRA was a "retreat from its *Lochner*-era contractual-'liberty' decisions."[365] While the majority enforced the arbitration term, according to the dissent it was unlawful.[366] The dissent argued that "[e]mployees' rights to band together to meet their employers' superior strength would be worth precious little if employers could condition employment on workers signing away those rights. . . . [T]he 'waivers' rank as unfair labor practices outlawed by the NLRA, and therefore unenforceable in court."[367]

The majority told a story of a consensual agreement between the parties to which the Court needed to adhere: "The parties before us contracted for arbitration. They proceeded to specify the rules that would govern their arbitrations, indicating their intention to use individualized rather than class or collective action procedures. And this much the Arbitration Act seems to protect pretty absolutely."[368] The dissent told a totally different story. The basic premise of the dissent's narrative was the inequality of power in the employment setting: "[E]mployees must have the capacity to act collectively in order to match their employers' clout in setting terms and conditions of employment."[369] In this light, the contract at issue was not a consensual contract but rather an instance of "employer-imposed contracts proscribing employees' concerted activity" and an example of "coercive employer practices."[370] The dissent criticized the Court for ignoring the context of employment relations:

> [T]he Court ignores the reality that sparked the NLRA's passage: Forced to face their employers without company, employees

360. *Id.* at 1633 (Ginsburg, J., dissenting).
361. *Id.* at 1637 (quoting 29 U.S.C. § 151).
362. *See id.* at 1633, 1648–49.
363. *Id.* at 1621 (majority opinion).
364. *Id.* at 1634–35 (Ginsburg, J., dissenting).
365. *Id.* at 1635.
366. *Id.* at 1641, 1645.
367. *Id.* at 1641.
368. *Id.* at 1621 (majority opinion).
369. *Id.* at 1634 (Ginsburg, J., dissenting).
370. *Id.* at 1635.

> ordinarily are no match for the enterprise that hires them. Employees gain strength, however, if they can deal with their employers in numbers. That is the very reason why the NLRA secures against employer interference employees' right to act in concert for their "mutual aid or protection."[371]

The majority conceded that "[t]he dissent sees things a little bit differently. In its view, today's decision ushers us back to the *Lochner* era when this Court regularly overrode legislative policy judgments. The dissent even suggests we have resurrected the long-dead 'yellow dog' contract."[372] In fact, the difference of opinions between the majority and dissent went much further than the majority conceded. One saw the employment agreement as a consensual and mutual agreement between two equals, while the other viewed it as a one-sided take-it-or-leave-it agreement embedded in power relations. One side perceived a negotiated agreement that merited the Court's deference and respect, while the other saw an imposed contract that left the employees vulnerable and unprotected by labor laws. The majority understood the case in hand to be one of contractual liberty deserving to be honored by the courts, while the dissent saw an abuse of the power that the employer had over its employees.

2. Legal Context

The majority stated a legal rule applicable to all contracts: "In the Federal Arbitration Act, Congress has instructed federal courts to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings."[373] The majority did not distinguish between different contracts and took an acontextual, monolithic view of contracts.[374] The agreement before the Court was treated like any other contract subject to general defenses in contract law "such as fraud, duress, or unconscionability."[375]

On the other hand, the dissent saw a varied world of contracts, each deserving different treatment by the law. The dissent was contextual in its distinguishing between voluntarily negotiated agreements and take-it-or-leave-it contracts,[376] as well as between commercial contracts and

371. *Id.* at 1640 (quoting 29 U.S.C. §§ 151, 157, 158).
372. *Id.* at 1630 (majority opinion).
373. *Id.* at 1619.
374. *Id.* at 1622.
375. *Id.* (quoting AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011)).
376. *Id.* at 1643 (Ginsburg, J., dissenting).

employment contracts.[377] The dissent acknowledged different contexts and different types of contracts. Rather than a monolithic view of contracts, the dissent portrayed a rich, diverse, and contextual world of contracts.

Furthermore, the dissent highlighted the context of employment relations, including the power imbalance between employers and employees.[378] For example, the dissent emphasized that "[v]iolations of minimum-wage and overtime laws are widespread."[379] Employees often would not sue their employers because "[e]xpenses entailed in mounting individual claims will often far outweigh potential recoveries. . . . Fear of retaliation may also deter potential claimants from seeking redress alone. . . . Further inhibiting single file claims is the slim relief obtainable, even of the injunctive kind."[380] Contrary to the acontextual majority, the dissent situated this case within the context of the realities of the employment world. The dissent warned that since employers save millions by underpaying their employees, "[e]mployers, aware that employees will be disinclined to pursue small-value claims when confined to proceeding one-by-one, will no doubt perceive that the cost-benefit balance of underpaying workers tips heavily in favor of skirting legal obligations."[381] Furthermore, the dissent presented a detailed description of the employment setting, noting that there were different types of employees, some more vulnerable than others.[382] The dissent paid particular attention to employees who are paid minimum wages, as well as to junior accountants.[383] This context was important to understanding the employment agreement before the Court. This context was absent from the majority's opinion, which treated all contracts alike.[384] Where the majority saw "a contract," the dissent saw a rich and varied world of contracts, in which each contract was embedded in a different context.

The dissent described the history of the Arbitration Act's exclusion of employment disputes, noting that the Act was mainly geared toward commercial disputes.[385] The dissent also described the history of the NLRA in the early 20th century.[386] "Aiming to secure better pay, shorter workdays, and safer workplaces, workers increasingly sought to band

377. *Id.* at 1642–43.
378. *Id.* at 1647–48.
379. *Id.* at 1647.
380. *Id.*
381. *Id.* at 1647–48.
382. *See id.* at 1646–48.
383. *See id.* at 1647.
384. *Id.* at 1622 (majority opinion).
385. *Id.* at 1642–43 (Ginsburg, J., dissenting).
386. *Id.* at 1634–35.

together to make their demands effective."[387] The dissent pointed out how important collective action was for employees, on the one hand, and how employers reacted to employees' unions and made it difficult for them to act in concert, on the other: "Employers, in turn, engaged in a variety of tactics to hinder workers' efforts to act in concert for their mutual benefit."[388] Contrary to the ahistorical opinion of the majority,[389] the dissent gave a detailed and rich description of the relevant legislative history. Justice Ginsburg described the "yellow-dog contract[s]," i.e., "agreements, which employers required employees to sign as a condition of employment, typically command[ing] employees to abstain from joining labor unions."[390] Based on this history, Justice Ginsburg warned that the agreements before the Court requiring arbitration had a similar cooling effect on workers' collective actions and might hinder the employees' rights.[391] Justice Ginsburg used legislative history to analyze the current legal question and to warn that a lesson from history must be learned so that history would not repeat itself.[392] Sensitive to the realities of employment, the dissent saw the contract in question not as a mutually beneficial one but rather as one that was the result of the employer's abuse of the power it wielded over its employees.[393] The dissent saw the Court's decision as similar to past decisions which "invalidated the legislation based on then-ascendant notions about employers' and employees' constitutional right to 'liberty of contract.'"[394] As the majority "paints an ahistorical picture,"[395] the dissent warned that the Court's decision would bring us back to the *Lochner* era.[396]

Where the majority saw a generic contract, the dissent saw a varied world made up of a multiplicity of contracts. Where the majority painted an ahistorical and acontextual picture, the dissent provided a detailed, factual description of the context and a rich historical background. While the majority strictly enforced the contract, the dissent stressed that this contract is embedded within a social and legal contextual setting.

387. *Id.* at 1634.
388. *Id.*
389. *Id.* at 1640.
390. *Id.* at 1634.
391. *See id.* at 1648–49.
392. *See id.*
393. *See id.*
394. *Id.* at 1634.
395. *Id.* at 1640.
396. *See id.* at 1630 (majority opinion); *id.* at 1635 (Ginsburg, J., dissenting).

3. Policy Considerations

In the majority opinion, the policy consideration was the advantage of arbitration.[397] In the dissenting opinion, the policy consideration was the protection of employees' rights and safeguarding collective actions of employees.[398]

The majority stressed that arbitration provides quick, informal, simple, and cheap resolutions, thus being more efficient than legal suit, and ultimately benefiting both parties.[399] The dissent noted that this was true regarding commercial disputes, but untrue regarding employment disputes.[400]

The dissent focused on the need to protect employees' rights. The dissent opened by stating:

> [T]he employees in these cases complain that their employers have underpaid them in violation of the wage and hours prescriptions of the Fair Labor Standards Act . . . . Individually, their claims are small, scarcely of a size warranting the expense of seeking redress alone. . . . But by joining together with others similarly circumstanced, employees can gain effective redress for wage underpayment commonly experienced. To block such concerted action, their employers required them to sign, as a condition of employment, arbitration agreements banning collective judicial and arbitral proceedings of any kind.[401]

The dissent explained that due to the imbalance of power between employer and employees, the latter needed to work in concert:

> For workers striving to gain from their employers decent terms and conditions of employment, there is strength in numbers. A single employee, Congress understood, is disarmed in dealing with an employer. . . . The Court today subordinates employee-protective labor legislation to the Arbitration Act. In so doing, the Court forgets the labor market imbalance . . . and ignores the destructive consequences of diminishing the right of employees "to band together in confronting an employer."[402]

397. *Id.* at 1621 (majority opinion).
398. *See id.* at 1634–35, 1648–49 (Ginsburg, J., dissenting).
399. *Id.* at 1621 (majority opinion).
400. *Id.* at 1642–43 (Ginsburg, J., dissenting).
401. *Id.* at 1633 (citations omitted).
402. *Id.* (citations omitted).

With workers' rights in mind, the dissent warned that "[t]he inevitable result of [the Court's] decision will be the underenforcement of federal and state statutes designed to advance the well-being of vulnerable workers."[403] Contrary to the majority, the dissent focused on employees' rights and their need to act in concert, not on arbitration. Indeed, the dissent warned that:

> [I]ndividual arbitration of employee complaints can give rise to anomalous results. Arbitration agreements often include provisions requiring that outcomes be kept confidential or barring arbitrators from giving prior proceedings precedential effect. . . . As a result, arbitrators may render conflicting awards in cases involving similarly situated employees—even employees working for the same employer. Arbitrators may resolve differently such questions as whether certain jobs are exempt from overtime laws. . . .With confidentiality and no-precedential-value provisions operative, irreconcilable answers would remain unchecked.[404]

Both the majority and the dissent based their arguments on precedents. However, while the majority stressed precedents favoring arbitration and the enforcement of arbitration agreements,[405] the dissent stressed precedents protecting employees.[406] For example, the majority followed *Concepcion*,[407] which favored individualized arbitration in consumer contracts.[408] The majority also followed precedents allowing arbitration in line with the Arbitration Act and other federal laws.[409] According to the majority, "[o]ur precedent clearly teaches that a contract defense 'conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures' is inconsistent with the Arbitration Act and its saving clause."[410] The dissent followed a line of cases protecting employees' rights and collective actions: "In stark contrast to today's decision, the Court has repeatedly recognized the centrality of group action to the effective enforcement of antidiscrimination statutes."[411]

403. *Id.* at 1646.
404. *Id.* at 1648.
405. *Id.* at 1620–23 (majority opinion).
406. *Id.* at 1636–38, 1647–48 (Ginsburg, J., dissenting).
407. AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).
408. *Epic Systems Corp.*, 138 S. Ct. at 1622–23.
409. *Id.* at 1627.
410. *Id.* at 1631 (quoting *Concepcion*, 563 U.S. at 336).
411. *Id.* at 1648 (Ginsburg, J., dissenting).

The majority read the NLRA narrowly to exclude collective litigation; the dissent read the NLRA broadly to include collective litigation.[412] This was more than a case of each side respectively reading the statute in a limited or wider manner. This divergent reading stemmed from the policy goals which stood at the heart of each opinion: favoring arbitration or protecting workers' rights.

The majority read the Arbitration Act and the NLRA as existing in harmony with one another.[413] The dissent, too, sought to read the two statutes in harmony,[414] but noted that in cases in which they are inharmonious, the NLRA should win out.[415] The dissent criticized the majority, stating that "[n]othing in the FAA or this Court's case law, however, requires subordination of the NLRA's protections."[416] The dissent also critiqued the majority for elevating the Arbitration Act over federal law protecting the workers' rights.[417] In other words, the harmony posited between the two Acts was a false one. In fact, the two laws were in conflict in this case, and the majority and the dissent disagreed on the question of which law trumps the other. The majority favored the Arbitration Act, and the dissent favored the NLRA. Both the majority and the dissent claimed to follow Congress's laws; however, the majority claimed to enforce arbitration agreements pursuant to the Arbitration Act,[418] and the dissent claimed to protect employees' right to engage in collective actions pursuant to the NLRA.[419]

The majority focused on arbitration as desirable and efficient, and the dissent focused on protecting vulnerable employees; the majority stressed promoting arbitration and the dissent stressed policing power imbalance in the workplace. The majority supported resolving disputes by using arbitration, while the dissent supported the safeguarding of employees' rights.

4. Point of View

The majority took the point of view of the employer, favoring speedy, informal, and individual arbitration; the dissent took the point of view of the employees, favoring a class action in court. Arbitration protected the

412. *See id.* at 1638 (criticizing the majority's narrow reading of the NLRA).
413. *See id.* at 1624–25, 1632 (majority opinion).
414. *See id.* at 1645 (Ginsburg, J., dissenting).
415. *Id.* at 1646.
416. *Id.* at 1642.
417. *Id.* at 1633.
418. *Id.* at 1621 (majority opinion).
419. *Id.* at 1636–39 (Ginsburg, J., dissenting).

interests of the employers, while class action protected the employees' rights.

The majority and the dissent told two utterly different stories. According to the majority, the employees in this case had agreed to arbitration but despite their agreement, brought a collective suit in federal court.[420] According to the dissent, the employees' right to engage in collective activities are protected by the NLRA, but despite this, the employers in this case insisted on individual arbitration.[421]

The majority reasoned that arbitration was a result of the agreement made between the parties. The Court enforced the contract between the parties, arguing that the employees are obligated by the contract they signed.[422] If they wished to retain the right to sue in court, then they should not have entered into such a contract in the first place. Looking at the dispute from the employers' point of view, the Court concluded that the employers were entitled to enforce their contract.[423]

The dissent reasoned that the NLRA protected the employees' rights to collective action.[424] The employers were obligated to provide fair pay, pursuant to the Fair Labor Standards Act, and they were responsible to obey labor laws.[425] They should have paid their employees in accordance with federal law. Looking at the dispute from the employees' point of view, the dissent concluded that the employees were entitled to the NLRA's protection.[426] This was a totally different framing of the dispute than the majority's and revealed a wide gap between the majority and dissent. This gap was the result of each side taking a different perspective. Written from the perspective of the employers, the majority favored arbitration; written from the perspective of the employees, the dissent favored collective action.

E. Profound Dissents' Deep Impact and Importance

It is difficult to overstate the impact of Justice Ginsburg's profound dissents. In some cases, Justice Ginsburg's dissents went so far as to influence Congress's decision to amend the law. For example, her dissent in *Ledbetter* included a plea to Congress: "Once again, the ball is in Congress' court. As in 1991, the Legislature may act to correct this

420. *Id.* at 1620 (majority opinion).
421. *Id.* at 1635–36 (Ginsburg, J., dissenting).
422. *See id.* at 1619–23, 1632 (majority opinion).
423. *See id.* at 1632.
424. *Id.* at 1633 (Ginsburg, J., dissenting).
425. *Id.*
426. *Id.* at 1633, 1648–49.

Court's parsimonious reading of Title VII."[427] Indeed, Congress acted on her plea and enacted the Lilly Ledbetter Fair Pay Act in 2009.[428] This law expanded the time limitation for employees filing their EEOC claim.[429] Ledbetter acknowledged that Justice Ginsburg—who had a framed copy of the law in her chambers—played a critical role in the legislation of the bill bearing Ledbetter's name.[430]

As for Justice Ginsburg's dissent in *Shelby*, a bill—the John Lewis Voting Rights Advancement Act[431]—is now pending to restore a formula determining the jurisdictions subject to preclearance.[432] Justice Ginsburg's warnings about second generation discrimination resurfacing have materialized,[433] which renders the law as necessary today as it was in 2013. As Joyce White Vance aptly put it, "[w]e need a steadfast commitment to guaranteeing the right to vote for all Americans, no matter who they vote for. And a new voting rights act would honor Justice Ginsburg's legacy. She would want us to keep the umbrella open."[434]

Justice Ginsburg's dissent in *Gonzales* attracted significant scholarly attention.[435] In a statement on the 48th anniversary of *Roe v. Wade*,

427. Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 661 (2007) (Ginsburg, J., dissenting).

428. *See generally* Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

429. *See* Carolyn E. Sorock, Note, *Closing the Gap Legislatively: Consequences of the Lilly Ledbetter Fair Pay Act*, 85 CHI.-KENT L. REV. 1199, 1199–1200 (2010); Katie E. Johnson, Note, *A Practical Solution to the Courts' Broad Interpretation of the Lilly Ledbetter Fair Pay Act*, 71 OHIO ST. L.J. 1245, 1261–63 (2010); Charles A. Sullivan, *Raising the Dead?: The Lilly Ledbetter Fair Pay Act*, 84 TUL. L. REV. 499, 523–24 (2010); Megan Coluccio, *Fait Accompli?: Where the Supreme Court and Equal Pay Meet a Narrow Legislative Override Under the Lilly Ledbetter Fair Pay Act*, 34 SEATTLE U.L. REV. 235, 236 (2010).

430. Howard Koplowitz, *'I Lost a Dear Friend and a Champion': Lilly Ledbetter Mourns Ruth Bader Ginsburg*, AL.COM (Sept. 18, 2020, 11:11 PM), https://www.al.com/news/2020/09/i-lost-a-dear-friend-and-a-champion-lilly-ledbetter-mourns-death-of-ruth-bader-ginsburg.html.

431. *See generally* John Lewis Voting Rights Advancement Act, S. 4263, 116th Cong. (2020).

432. *See* Paige E. Richardson, Note, *Preclearance and Politics: The Future of the Voting Rights Act*, 89 U. CIN. L. REV. 1089, 1089–90, 1100–01 (2021); *see also* Andres A. Gonzalez, *Creating a More Perfect Union: How Congress Can Rebuild the Voting Rights Act*, 27 BERKELEY LA RAZA L.J. 65, 74–78 (2017).

433. *See* Brenda Wright, "*Give Us the Ballot": Reflections on the Struggle for the Right to Vote in Honor of the 90th Birthday of Dr. Martin Luther King, Jr.*, 64 VILL. L. REV. 339, 343–44 (2019); Lydia Hardy, Comment, *Voter Suppression Post-*Shelby*: Impacts and Issues of Voter Purge and Voter ID Laws*, 71 MERCER L. REV. 857, 858 (2020).

434. Joyce White Vance, *Ruth Bader Ginsburg Lost Her Battle to Save Voting Rights. Here's How We Can Take Up the Fight and Honor Her Legacy*, TIME (Sept. 21, 2020, 11:05 AM), https://time.com/5890983/ruth-bader-ginsburg-voting-rights/.

435. *See, e.g.*, Morgan Arnett, Comment, *Update: Phasing Out Abortion: One Step Closer to Terminating a Woman's Constitutional Right, in* Gonzales v. Carhart, 24 T.M. COOLEY

President Biden and Vice President Harris announced their commitment to codifying *Roe v. Wade*.[436] In a recent abortion case, Justice Sotomayor concluded her *profound* dissent with a call for a change in abortion law, citing Justice Ginsburg's dissent.[437] As Louise Melling beautifully put it,

> With Justice Ginsburg's death, the fight to protect reproductive freedom is more urgent than ever, as is the need not to settle for what we have now. But Justice Ginsburg taught us how to carry on from here. She taught us how to imagine a world that doesn't exist yet and to fight to bring it into existence. . . . With two words, she taught us how to lead even when we can't win: "I dissent." And she called on us to call out abortion restrictions as gender discrimination. Justice Ginsburg taught us that the only way is forward—and we will continue to follow her there.[438]

Justice Ginsburg wrote at the end of her dissent in *Epic*, "[i]f these untoward consequences stemmed from legislative choices, I would be obliged to accede to them. But the edict that employees with wage and hours claims may seek relief only one-by-one does not come from Congress."[439] Indeed, a bill titled Forced Arbitration Injustice Repeal Act is pending, which would render employer-imposed forced arbitration requirements and collective action waivers invalid and unenforceable.[440] The majority opinion in *Epic* was heavily critiqued by scholars.[441] Justice Ginsburg's dissent also inspired legal activists, some of whom framed her legacy in this case as follows:

L. REV. 597, 614–15 (2007); *see generally* Martha K. Plante, Note, *"Protecting" Women's Health: How* Gonzales v. Carhart *Endangers Women's Health and Women's Equal Right to Personhood Under the Constitution*, 16 AM. U. J. GENDER SOC. POL'Y & L. 387 (2008).

436. Press Release, President Biden & Vice President Harris, 48th Anniversary of *Roe v. Wade*, The White House (Jan. 22, 2021) (available at https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/22/statement-from-president-biden-and-vice-president-harris-on-the-48th-anniversary-of-roe-v-wade/).

437. *See* FDA v. Am. Coll. Obstetricians & Gynecologists, 141 S. Ct. 578, 579, 585 (2021).

438. Louise Melling, *For Justice Ginsburg*, *Abortion Was About Equality*, ACLU (Sept. 23, 2020), https://www.aclu.org/news/reproductive-freedom/for-justice-ginsburg-abortion-was-about-equality/.

439. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1648 (2018) (Ginsburg, J., dissenting).

440. *See generally* Forced Arbitration Injustice Repeal Act, H.R. 1432, 116th Cong. (2019).

441. *See, e.g.*, Priyanka Kasnavia, Comment, *When Courts Turn Arbitration into Arbitrary: How FAA Precedent Inhibits Federal and State Prohibitions on Employment Discrimination*, 58 HOUS. L. REV. 1173 (2021); Stephanie Greene & Christine Neylon O'Brien, Epic *Backslide: The Supreme Court Endorses Mandatory Individual Arbitration Agreements—#TimesUp on Workers' Rights*, 15 STAN. J. C.R.-C.L. 43 (2019).

> Justice Ginsburg understood the power of people, united in pursuit of a common goal, working to make the world a bit better. For proof of this, one need look no further than her dissent in *Epic Systems v. Lewis*—a powerful testament to the strength of our collective strivings. Tonight, we draw inspiration from her faith in the people to unite for progress. Our work continues.[442]

As these examples demonstrate, Justice Ginsburg spoke with an eye toward the future, in hope that today's dissents would become the laws of tomorrow.

In these cases and in many others, Justice Ginsburg's profound dissents presented alternative worldviews and legal analyses to the Court's opinions. These alternatives inspired judges, legislators, and activists to envision social and legal change, and to work to bring about this change. Justice Ginsburg read her dissents from the bench, and they were echoed loudly on social media—as in the case of the Notorious RBG Tumblr[443]—bringing her dissents to the attention of the general public,[444] beyond the boundaries of the legal community. Her dissents had a social impact[445] as well as a legal one. It was not only her Court decisions, such as the famous *United States v. Virginia*,[446] which made an enormous impact; her dissents, too, had a huge effect. Indeed, in addition to her dissents, it should be noted that Justice Ginsburg authored many majority opinions, concurring opinions, articles, briefs, and other writings. She was an inspiration and a role model not only as a fierce dissenter, but also as a judge, lawyer, civil rights activist, scholar, and feminist icon.

442. Molly Coleman, *On Ruth Bader Ginsburg*, PEOPLE'S PARITY PROJECT (Sept. 18, 2020), https://www.peoplesparity.org/rbg/.

443. NYU Law School student Shana Knizhnik created the Tumblr page Notorious R.B.G. in the summer of 2013, after being inspired by Ginsburg's dissent in *Shelby*. Jessica Gresko, *Notorious RBG Goes from Blog to Book*, CCT, https://www.college.columbia.edu/cct/issue/spring16/article/notorious-rbg-goes-blog-book (last visited Mar. 25, 2022).

444. *See, e.g.*, Vivian Manning-Schaffel, *How to Dissent Like RBG*, NBC NEWS (June 10, 2018, 11:57 AM), https://www.nbcnews.com/better/pop-culture/how-dissent-rbg-ncna881316; Interview by Razia Iqbal with Ruth Bader Ginsburg, BBC (Sept. 19, 2020), https://www.bbc.co.uk/programmes/m000dfyt; Kimberly Strawbridge Robinson & Jordan S. Rubin, *Selected as Consensus Builder, Ginsburg Embraced Dissenting Role*, BLOOMBERG L. (Sept. 18, 2020, 8:29 PM), https://news.bloomberglaw.com/us-law-week/selected-as-consensus-builder-ginsburg-embraced-dissenting-role; Guinier, *supra* note 3.

445. *See The Role of Dissenting Opinions*, *supra* note 3; IN DEFENSE OF JUSTICE: THE GREATEST DISSENTS OF RUTH BADER GINSBURG (Sarah Wainwright ed., 2019).

446. 518 U.S. 515 (1996).

CONCLUSION

The taxonomy in this Article situates dissents on a spectrum, ranging from soft dissent to profound dissent. As dissenting opinions are varied and diverse, this taxonomy is a useful tool for evaluating dissenting opinions and for analyzing their importance and impact. Some dissents are powerful, influential, and even canonical, while others are less so. While judges and scholars have alluded to the role of dissenting opinions in forming an alternative to the majority and in encouraging a lively democratic discussion based on a plurality of opinions, this Article utilized a textual qualitative analysis to demonstrate this conclusion.

As a feminist, Justice Ginsburg worked within the legal system to change it. In other words, rather than criticizing the legal system from the outside, she actively incorporated feminist ideas into the law, rendering these ideas as integral parts of the law itself.[447] As this Article has demonstrated, Justice Ginsburg used her dissents to articulate a different legal and social perspective based on different worldviews. Her dissents offered alternative legal analyses, vigorously challenging the majority. Justice Ginsburg clearly articulated a well-reasoned, oppositional voice, an alternative voice that was both wise and sound, a voice that sought to make a change. With her death, Justice Ginsburg's voice will be missed in future cases; however, her unique, profound voice had an enormous impact on the law that continues to reverberate and cannot be silenced.

By deeply challenging majority opinions, profound dissents raise the question of the importance of the identity of the dissenting judge. Do women judges or minority judges bring different perspectives to the Court? Are their opinions more likely to pose an ideological alternative to privileged white male opinions? Are Justice Ginsburg's dissents the result of her lived experience as a woman and as a daughter of Jewish immigrants? Did Justice Ginsburg speak in a woman's voice? Did her taste for collegiality, moderation, and consensus stem from being the second-ever woman justice on the Supreme Court?[448] Justice Ginsburg herself argued that women justices and minority justices bring with them

447. For feminists and feminist ideas incorporated into State power, see generally JANET HALLEY ET. AL, GOVERNANCE FEMINISM: AN INTRODUCTION (2018); GOVERNANCE FEMINISM: NOTES FROM THE FIELD (Janet Halley, Prabha Kotiswaran, Rachel Rebouché & Hila Shamir eds., 2019).

448. *See* Laura Krugman Ray, *Justice Ginsburg and the Middle Way*, 68 BROOK. L. REV. 629, 631–36 (2003); Rebecca L. Barnhart & Deborah Zalesne, *Twin Pillars of Judicial Philosophy: The Impact of the Ginsburg Collegiality and Gender Discrimination Principles on Her Separate Opinions Involving Gender Discrimination*, 7 N.Y.C. L. REV. 275, 283 (2004) (discussing Justice Ginsburg's reputation as a consensus builder circuit judge).

different perspectives.[449] The analysis of her profound dissents supports this assertion. However, this is the subject of a different article.

449. Ruth Bader Ginsburg, *The Supreme Court: A Place for Women*, 32 SW. U.L. REV. 189, 189 (2003); *see also* Tao Dumas, La. State Univ., Gender and State Supreme Courts: Explaining Male and Female Judges' Concurring and Dissenting Behavior (Apr. 2, 2010) (available at https://ssrn.com/abstract=1580487). *But see* Tracy A. Thomas, *The Jurisprudence of the First Woman Judge, Florence Allen: Challenging the Myth of Women Judging Differently*, 27 WM. & MARY J. RACE, GENDER, & SOC. JUST. 293, 297 (2021) (finding that women judge no differently than men). For support of judicial diversity, see Natalie Gomez-Velez, *Judicial Selection: Diversity, Discretion, Inclusion, and the Idea of Justice*, 48 CAP. U.L. REV. 285 (2020).