DISSENTING FOR DEMOCRACY:

WIN OR LOSE, JUSTICE GINSBURG CHARTS A PROGRESSIVE CONSTITUTIONAL COURSE FOR AMERICA

PEOPLE FOR THE AMERICAN WAY FOUNDATION

"The Federalists have retired into the Judiciary as a stronghold … and from that battery all the works of republicanism are to be beaten down and erased."
—Thomas Jefferson, 1803

In the dismal 2013-14 Supreme Court Term in which the conservative majority wiped out aggregate campaign contribution limits (*McCutcheon v. FEC*), undercut the power of unions (*Harris v. Quinn*), and approved lopsided sectarian religious invocations in public meetings (*Town of Greece v. Galloway*), one big consolation was Justice Ruth Bader Ginsburg's devastating indictment of the majority in her seething dissenting opinion from perhaps the worst decision of the Term, *Burwell v. Hobby Lobby*.

In *Hobby Lobby*, of course, the runaway conservative faction, for the first time in American history, determined that for-profit business corporations have *religious rights* and then used this epiphany to grant corporate owners the power to deny contraceptive coverage to female employees under the Affordable Care Act, the major Obama-era accomplishment which the Right reviles and never tires of attacking.

Justice Ginsburg, fighting young at age 81, was having none of it and methodically destroyed the thin arguments of Justice Alito in a 35-page opinion that should be required reading for anyone who still cares about the rule of law in America. The highlights of her comprehensive takedown of the majority show a Supreme Court Justice who richly deserves her title by virtue of her devotion to the rule of law and the rendering of justice and fairness to the people.

But Ginsburg's masterful dissent in *Hobby Lobby* is not a lone shot in the dark; she is likely to complete her tenure on the Court being known as the Great Dissenter from the jurisprudence of the ruling conservative faction. Although Ginsburg obviously prefers to speak for freedom and equal rights when in the majority—see, for example, her magisterial opinion in *United States v. Virginia* (1996), striking down the exclusion of women from the Virginia Military Institute—she does not shy away as a dissenter from blowing the whistle on the logical fallacies, doctrinal inconsistencies and rank hypocrisies that inform the opinions of her colleagues when they are transforming the powers of corporate America or trashing the rights of working people and minority groups.

This report canvasses, in addition to her brilliant dissent from *Hobby Lobby*, some of Ginsburg's most important recent dissenting opinions whose logic still awaits vindication. One blistering dissenting opinion, the one she filed *in Lily Ledbetter v. Goodyear Tire & Rubber Co*. (2007), planted the seeds for a dramatic political and legislative reversal of the Court's conservative majority in Congress. Another notable dissent of Ginsburg's still awaiting change is one in which the oldest member of the Court speaks powerfully for the civil liberties of the youngest Americans in the context of school drug testing, *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls* (2002).

Moreover, from last term, this report examines several forceful opinions Ginsburg lodged in dissent against three appalling anti-civil rights decisions: *Shelby County v. Holder* (2013), which ravaged the Voting Rights Act; and *Vance v. Ball State University* (2013), and *University of Texas Southwestern Medical Center v. Nassar* (2013), both of which undermined Title VII civil rights protections for people in the workplace. Assailing her conservative colleagues' indifference to the situation of working people, castigating them from the bench for their tortured reasoning, and inviting Congress to reverse the damage they inflicted, Ginsburg showed that she remains at the top of her game.

While the Roberts Court majority continues its rampage against the constitutional, reproductive, and civil rights of the American people, Ginsburg not only calls out the real-world implications of this reactionary judicial activism but carefully spells out a path for corrective legislative action and for the elaboration of a principled jurisprudence in the future. Her progressive constitutional philosophy always places the equal rights and liberties of the people at the heart of the Court's work and demonstrates a dynamic respect for Congress' exercise of its enumerated powers to promote strong democracy, robust civil rights, and an inclusive economy.

Baptizing Big Business

BURWELL
v.
HOBBY LOBBY STORES INC.
(2014)

"*In a decision of startling breadth, the Court holds that commercial enterprises, including corporations, along with partnerships and sole proprietorships, can opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs*."

In this well-chosen sentence that opens her dissenting opinion in *Hobby Lobby*, Justice Ginsburg explains how the majority decision, which authorizes business corporations to deny contraceptive care to millions of women employees, also generally rewrites American law to furnish corporations an all-purpose excuse for not complying with public laws.

Of course, the immediate victims of this breathtaking new orthodoxy are women, and Ginsburg, perhaps the greatest women's rights lawyer of the 20th century, emphasizes the gender-based injury of the new doctrine.

"The ability of women to participate equally in the economic and social life of the Nation," she writes, quoting *Planned Parenthood of Southeastern Pa. v. Casey*, "has been facilitated by their ability to control their reproductive lives." Congress acted on this basic understanding when it provided for coverage of women's preventive care in the Affordable Care Act and the Department of Health and Human Services (HHS) followed through by issuing regulations requiring group health plans to cover *all* forms of contraception approved by the Food and Drug Administration (FDA). As Senator Durbin put it, "This bill will expand health insurance coverage to the vast majority of [the 17 million women of reproductive age in the United States who are uninsured] . . . .This expanded access will reduce unintended pregnancies."

Yet, the owners of Hobby Lobby claimed that it would violate the corporation's personal religious rights (I know, this makes no sense) to allow 13,000 employees under the company's group insurance plan to access certain contraceptives, including IUDs, that the corporation's five owners consider to be sinful. The exemption that the owners were granted, Ginsburg writes, will "deny legions of women who do not hold their employers' beliefs access to contraceptive coverage that the ACA would otherwise secure."

Ginsburg demonstrates how the majority's theological joyride depends on an indefensible reading of the Religious Freedom Restoration Act (RFRA). That Act was meant to "restore the compelling interest test for deciding free exercise claims" in the wake of *Employment Division, Dept. of Human Resources of Ore. V. Smith* (1990), but not in any way to begin treating for-profit business corporations like the flesh-and-blood people of the United States when it comes to religious rights.

Ginsburg shows that there is zero support in RFRA's legislative history for the idea that it endowed business companies with the personal rights of religious worship and free exercise. Furthermore, until this brazen litigation was brought, "no decision of the Court recognized a for-profit corporation's qualification for a religious exemption from a generally applicable law, whether under the Free Exercise Clause or RFRA."

Moreover, Ginsburg observes, the "absence of such precedent is just what one would expect, for the exercise of religion is characteristic of natural persons, not artificial legal entities." Then she grabs the bull by the horns, revealing to America that the *Hobby Lobby* opinion is just a farcical copy of the tragic error committed in *Citizens United* (2010), the decision that pretended that corporations have the political free speech rights of citizens in order to endow CEOs with the power to spend treasury money in elections.

She quotes Chief Justice John Marshall's famous statement from the *Dartmouth College* case in 1819 defining a corporation as "an artificial being, invisible, intangible, and existing only in contemplation of law," and Justice Stevens' stinging and obvious words from his dissenting thoughts in *Citizens United*: corporations "have no consciences, no beliefs, no feelings, no thoughts, no desires."

Ginsburg then brushes away Justice Alito's attempt to confuse the issue by citing cases where religious non-profit corporations—that is, churches!—have been granted religious free exercise protection. *Of course* this is the case, she points out, because these are *religious* entities enacting the religious practices and values of the

people who belong to them. The Court's "'special solicitude to the rights of religious organizations . . . is just that," she says. "No such solicitude is traditional for commercial organizations. Indeed, until today, religious exemptions had never been extended to any entity operating in the commercial, profit-making world." (internal citations omitted)

The reason for this is clear. "Religious organizations exist to foster the interests of persons subscribing to the same religious faith," Ginsburg writes. "Not so of for-profit corporations. Workers who sustain the operations of those corporations commonly are not drawn from one religious community. Indeed, by law, no religion-based criterion can restrict the work force of for-profit corporations." Ginsburg thus raises the obvious question: do business corporations now have a RFRA right to discriminate in hiring and firing based on religion? It follows logically from the majority's awful opinion.

Nor does Ginsburg try to hang on to the thin reed offered by the majority at one point to suggest that its reasoning might extend only to "closely held" corporations (which are actually the vast majority of corporations anyway) as opposed to publicly traded ones. "Although the Court attempts to cabin its language to closely held corporations, its logic extends to corporations of any size, public or private," she writes.

After obliterating the central fallacy of the Court's reasoning, Ginsburg proceeds to show how, even if the corporations in the case were "persons" within the meaning of RFRA, they did not have their religious rights violated by the Obamacare contraceptive insurance provisions.

To begin with, those provisions do not "substantially burden" the corporation or corporate owners in the exercise of their religion, which is the rigorous standard Congress established in RFRA. Conceding the sincerity of the *Hobby Lobby* owners' objections to certain kinds of contraceptives, Ginsburg shows that nothing in the ACA makes them use such contraception, change their beliefs about these methods, or alter their religious practices in any way. The owners are in the same position as the Native American father in *Bowen v. Roy* (1986), who lost his case challenging the Government's use of his child's Social Security number as a violation of his sincere religious belief that his child's sacred spirit is profaned by its reduction to a number and by its use in this fashion. There, Ginsburg points out, the sincere religious adherent lost because the Government's administrative mandate and program "*placed no restriction on what the father may believe or what he may do*." (emphasis added, internal citations omitted) Similarly, Hobby Lobby's owners can believe and do whatever they want, except they may not have their company opt out of a federal law that does not impair their own religious practice. Hobby Lobby employees who share the religious views of the owners are under no obligation to use the sinful contraceptive devices, and their use by other employees does not affect the religious worship or practice of the owners, managers, or fellow employees.

Even if you pretend that there is a substantial burden on the company, Ginsburg writes, "the Government has shown that the contraceptive coverage . . . furthers compelling interests in public health and women's well being," a point so concrete, specific and demonstrable that the majority does not even bother to contest it.

So, finally, Ginsburg refutes the majority's claim that the contraceptive coverage requirement fails to satisfy RFRA's "least restrictive means test"—in other words, the claim that the Government could have promoted contraceptive health without this mandate. But, here, Ginsburg is devastating, showing that "there is no less restrictive, equally effective means that would both (1) satisfy the challengers' religious objections to providing insurance coverage for certain contraceptives . . .and (2) carry out the objective of the ACA's contraceptive coverage requirement, to ensure that women receive, at no cost to them, the preventive care needed to safeguard their health and well being." Ginsburg dismantles the majority's reliance on the idea that the government itself should pay for any religiously offensive insurance as a less restrictive means. That solution would force creation of another bureaucracy and a series of "logistical and administrative obstacles" put up in the path of women seeking comprehensive health care.

"And where is the stopping point to the 'let the government pay' alternative?" Ginsburg reasonably wonders. "Suppose an employer's sincerely held religious belief is offended by health coverage of vaccines, or paying the minimum wage, or according women equal pay for substantially similar work? Does it rank as a less restrictive alternative to require the government to provide the money or benefit to which the employer has a religion-based objection?" (case citations omitted)

Ginsburg closes her dissent with a discussion of *United States v. Lee* (1982), a case in which an Amish employer unsuccessfully challenged having to participate in the Social Security system by withholding taxes for his employees. Although the majority dismissed the relevance of this "tax case," the *Lee* Court "made two key points" that Ginsburg shows neatly dispense with all the bogus claims in *Hobby Lobby*.

First: "When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on statutory schemes which are binding on others in that activity." Second: "allowing a religion-based exemption to a commercial employer would 'operate to impose the employer's religious faith on the employees.'"

Mobilizing cases from the past, Ginsburg suggests that the Court's decision opens the door to the discredited but once-popular claims by restaurant chain owners that they should not be forced to serve black patrons if they have a religious objection to race-mixing or by for-profit health clubs that want to discriminate against women working without their husbands' or fathers' consent, not to mention all the suddenly viable claims against the ACA by "employers with religiously grounded objections to blood transfusions (Jehovah's Witnesses); antidepressants (Scientologists); medications derived from pigs, including anesthesia, intravenous fluids, and pills coated with gelatin (certain Muslims, Jews, and Hindus); and vaccinations (Christian Scientists, among others)."

The Supreme Court thus delivers a mess to America in *Hobby Lobby* by carrying over the political fallacy in *Citizens United* to the religious field. Justice Ginsburg renders the mess in its full glory.

Defending Democracy and the Right to Vote

SHELBY COUNTY, ALABAMA, Petitioner
v.
Eric H. HOLDER, Jr., Attorney General, et al.
(2013)

"Congress approached the 2006 reauthorization of the VRA with great care and seriousness. The same cannot be said of the Court's opinion today... Throwing 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 ..."

The most stinging defeat inflicted on voting rights in at least a decade came last term with the majority's invalidation in 2013 of the preclearance coverage formula in the Voting Rights Act of 1965. This decision effectively wiped out the major provision of the most important voting rights law in American history. The ruling revealed the Court's hostility to the institutional infrastructure of African-American political empowerment and the role that Congress has played in securing the right to vote against conservative white resistance.

Joined in dissent by Justices Breyer, Sotomayor, and Kagan, Justice Ginsburg was having none of it. She systematically refuted the majority's distorted view of history, its remarkably cavalier assault on the powers of Congress, and its thoroughgoing illogic. She was unsparing of the radicalism of the majority's error: "It cannot tenably be maintained that the Voting Rights Act, 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. Nowhere in today's opinion ... is there clear recognition of the transformative effect the Fifteenth Amendment aimed to achieve."

Ginsburg painstakingly reconstructed the history of violent and nonviolent suppression of black voting rights after the Civil War and stated, "Early attempts to cope with this vile infection resembled battling the Hydra. Whenever one form of voting discrimination was identified and prohibited, others sprang up in its place." The preclearance mechanism in the Voting Rights Act was the principal instrument for dismantling the ever-changing tactics of racial vote dilution, trickery, and intimidation.

But Justice Ginsburg showed that the attacks on voting rights never ceased and that the reauthorization of the Voting Rights Act in 2006 was based on congressional review of voluminous reports of ongoing assaults on voting rights. Ginsburg wrote:

"Surveying the type of changes stopped by the preclearance procedure conveys a sense of the extent to which § 5 continues to protect minority voting rights. Set out below are characteristic examples of changes blocked in the years leading up to the 2006 reauthorization:

- In 1995, Mississippi sought to reenact a dual voter registration system, 'which was initially enacted in 1892 to disenfranchise Black voters,' and for that reason, was struck down by a federal court in 1987.
- Following the 2000 census, the City of Albany, Georgia, proposed a redistricting plan that DOJ found to be 'designed with the purpose to limit and retrogress the increased black voting strength … in the city as a whole.'
- In 2001, the mayor and all-white five-member Board of Aldermen of Kilmichael, Mississippi, abruptly canceled the town's election after 'an unprecedented number' of African-American candidates announced they were running for office. DOJ required an election, and the town elected its first black mayor and three black aldermen.
- In 2006, this Court found that Texas' attempt to redraw a congressional district to reduce the strength of Latino voters bore 'the mark of intentional discrimination that could give rise to an equal protection violation,' and ordered the district redrawn in compliance with the VRA. In response, Texas sought to undermine this Court's order by curtailing early voting in the district, but was blocked by an action to enforce the § 5 preclearance requirement.
- In 2003, after African-Americans won a majority of the seats on the school board for the first time in history, Charleston County, South Carolina, proposed an at-large voting mechanism for the board. The proposal, made without consulting any of the African-American members of the school board, was found to be an 'exact replica' of an earlier voting scheme that, a federal court had determined, violated the VRA. DOJ invoked § 5 to block the proposal.
- In 1993, the City of Millen, Georgia, proposed to delay the election in a majority-black district by two years, leaving that district without representation on the city council while the neighboring majority-white district would have three representatives. DOJ blocked the proposal. The county then sought to move a polling place from a predominantly black neighborhood in the city to an inaccessible location in a predominantly white neighborhood outside city limits.
- In 2004, Waller County, Texas, threatened to prosecute two black students after they announced their intention to run for office. The county then attempted to reduce the availability of early voting in that election at polling places near a historically black university.
- In 1990, Dallas County, Alabama, whose county seat is the City of Selma, sought to purge its voter rolls of many black voters. DOJ rejected the purge as discriminatory, noting that it would have disqualified many citizens from voting 'simply because they failed to pick up or return a voter update form, when there was no valid requirement that they do so.'

"These examples, and scores more like them, fill the pages of the legislative record. The evidence was indeed sufficient to support Congress' conclusion that 'racial discrimination in voting in covered jurisdictions [remained] serious and pervasive.' 679 F.3d, at 865.5

"Congress further received evidence indicating that formal requests of the kind set out above represented only the tip of the iceberg. There was what one commentator described as an 'avalanche of case studies of voting rights violations in the covered jurisdictions,' ranging from 'outright intimidation and violence against minority voters' to 'more subtle forms of voting rights deprivations.' This evidence gave Congress ever more reason to conclude that the time had not yet come for relaxed vigilance against the scourge of race discrimination in voting."

Ginsburg also displayed a steely resolve to put the facts of real-world race discrimination in the face of a Court that is determined to covers its eyes. Consider this striking report from Justice Ginsburg, drawn from a federal district court case:

> "A recent FBI investigation provides a further window into the persistence of racial discrimination in state politics. See United States v. McGregor, 824 F.Supp.2d 1339, 1344–1348 (M.D.Ala.2011). Recording devices worn by state legislators cooperating with the FBI's investigation captured conversations between members of the state legislature and their political allies. The recorded conversations are shocking. Members of the state Senate derisively refer to African-Americans as "Aborigines" and talk openly of their aim to quash a particular gambling-related referendum because the referendum, if placed on the ballot, might increase African-American voter turnout. See id., at 1345 (legislators and their allies expressed concern that if the referendum were placed on the ballot, '[e]very black, every illiterate' would be 'bused [to the polls] on HUD financed buses'). These conversations occurred not in the 1870's, or even in the 1960's, they took place in 2010. The District Judge presiding over the criminal trial at which the recorded conversations were introduced commented that the 'recordings represent compelling evidence that political exclusion through racism remains a real and enduring problem' in Alabama. Racist sentiments, the judge observed, 'remain regrettably entrenched in the high echelons of state government.'"

Ginsburg's final judgments on the performance of the Court were withering. She did not flinch from linking the regressive nature of the Court's jurisprudence to the return of disenfranchisement and voter suppression, and she revealed her understanding of the tragic side of American history. She wrote:

> "The Court criticizes Congress for failing to recognize that 'history did not end in 1965.' But the Court ignores that 'what's past is prologue.' W. Shakespeare, The Tempest, act 2, sc. 1. And '[t]hose who cannot remember the past are condemned to repeat it.' 1 G. Santayana, The Life of Reason 284 (1905)."

And she openly declared that members of Congress had acted with greater professionalism in reauthorizing the Voting Rights Act than her Supreme Court colleagues in the majority did in dismantling it:

> "Congress approached the 2006 reauthorization of the VRA with great care and seriousness. The same cannot be said of the Court's opinion today."

Defending Laws that Protect the Rights of Women and Men in the Workplace

Because Justice Ginsburg cut her teeth as a lawyer on fighting for equal rights and fairness in the workplace, she knows what having strong federal labor laws means for working-class Americans who report to a boss every day.

Title VII of the Civil Rights Act of 1964 is the essential anti-discrimination law protecting women and racial minority groups at work and establishing a framework for workplace fairness. But Title VII has been under ceaseless attack by right-wing forces ever since it was passed. Today, the five conservatives on the Roberts Court are looking for every opportunity to undermine its essential terms, and the 2012-13 term was especially brutal on the statute. In the following two key cases where the conservatives cut back on the protections available to workers under Title VII, Justice Ginsburg dissented sharply, insisting that congressional intent was being thwarted and the interests of workers thrown under the bus. These dissenting opinions register an echo of what was perhaps Justice Ginsburg's greatest dissent so far, the blisteringly effective opinion she filed in *Lilly Ledbetter v. Goodyear Tire and Rubber Co*. (2007).

Maetta VANCE, Petitioner
v.
BALL STATE UNIVERSITY
(2013)

"*The ball is once again in Congress' court to correct the error into which this Court has fallen, and to restore the robust protections against workplace harassment the Court weakens today*."

Under Title VII, when an employee is subject to workplace harassment at the hands of their supervisor, the employer is liable. This ensures that victims of harassment have a remedy, and it also gives companies a financial incentive to remedy harassment after the fact and take action to discourage it before it occurs.

In *Vance v. Ball State University*, the Court conservatives dealt another blow to Title VII, ruling that the class of "supervisors" held accountable under the statute includes only those managers who have the power to fire employees or reduce their salaries—and not those managers who actually control employees' day-to-day schedules, work assignments, and working environments. In one fell swoop, the conservatives thus lopped off a big chunk of anti-discrimination law, making the workplace a more hostile and dangerous place for Americans, especially women.

Justice Ginsburg, joined by Justices Breyer, Sotomayor, and Kagan, completely demolished the shoddy reasoning of the majority. The decision, she wrote, "ignores the conditions under which members of the work force labor, and disserves the objective of Title VII to prevent discrimination from infecting the Nation's workplaces. ... Until today, our decisions have assumed that employees who direct subordinates' daily work are supervisors."

Using the vivid and appalling language that comes with the territory of sexual harassment, Ginsburg discussed case after case where harassers controlled women's work schedules, workloads, and work lives, showing that the employers in these cases would now escape direct Title VII liability because the harassers did not have the power to hire and fire.

- Ginsburg wrote about elevator mechanic's helper Yasharay Mack, who was mercilessly harassed by James Connolly, the "mechanic in charge," who "commented frequently on her 'fantastic ass,' 'luscious lips,' and 'beautiful eyes,' and, using deplorable racial epithets, opined that minorities and women did not 'belong in the business.' Once, he pulled her on his lap, touched her buttocks, and tried to kiss her while others looked on." Mack's serial harasser "lacked authority to take tangible employment actions against mechanic's helpers, but he did assign their work, control their schedules, and direct the particulars of their workdays. When he became angry with Mack, for example, he denied her overtime hours. And when she complained about the mistreatment, he scoffed, 'I get away with everything.'" The majority decision nullified supervisor liability in cases like this.
- Ginsburg told the grim story of Clara Whitten, an employee at a discount retail store in Belton, South Carolina: "On Whitten's first day of work, the manager, Matt Green, told her to 'give [him] what [he] want[ed]' in order to obtain approval for long weekends off from work. Later, fearing what might transpire, Whitten ignored Green's order to join him in an isolated storeroom. Angered, Green instructed Whitten to stay late and clean the store. He demanded that she work over the weekend despite her scheduled day off. Dismissing her as 'dumb and stupid,' Green threatened to make her life a 'living hell.' Green lacked authority to fire, promote, demote, or otherwise make decisions affecting Whitten's pocketbook. But he directed her activities, gave her tasks to accomplish, burdened her with undesirable work assignments, and controlled her schedule. He was usually the highest ranking employee in the store, and both Whitten and Green considered him the supervisor."
- Ginsburg told the story of Donna Rhodes, a seasonal highway maintainer for the Illinois Department of Transportation responsible for plowing snow during winter months. Michael Poladian, a "Lead Worker," and Matt Mara, a "Technician" at the maintenance yard, harassed Rhodes. "In her third season working at the yard," Ginsburg wrote, "Rhodes was verbally assaulted with sex-based invectives and a pornographic image was taped to her locker. Poladian forced her to wash her truck in sub-zero temperatures, assigned her undesirable yard work instead of road crew work, and prohibited another employee from fixing the malfunctioning heating system in her truck. Conceding that Rhodes had been subjected to a sex-based hostile work environment, the [Illinois] Department of Transportation argued successfully in the District Court and Court of Appeals that

> Poladian and Mara were not Rhodes's supervisors because they lacked authority to take tangible employment actions against her."

Ginsburg was blistering in her judgment of the damage wrought by five conservative male Justices. "As anyone with work experience would immediately grasp, [the harassers in these cases] wielded employer-conferred supervisory authority over their victims. Each man's discriminatory harassment derived force from, and was facilitated by, the control reins he held"; "Exhibiting remarkable resistance to the thrust of our prior decisions, workplace realities, and the EEOC's Guidance, the Court embraces a position that relieves scores of employers of responsibility for the behavior of the supervisors they employ"; "Faced with a steeper substantive and procedural hill to climb, victims like Yasharay Mack, Donna Rhodes, Clara Whitten, and Monika Starke likely will find it impossible to obtain redress. We can expect that, as a consequence of restricting the supervisor category to those formally empowered to take tangible employment actions, victims of workplace harassment with meritorious Title VII claims will find suit a hazardous endeavor. Inevitably, the Court's definition of supervisor will hinder efforts to stamp out discrimination in the workplace ... the Court, insistent on constructing artificial categories where context should be key, proceeds on an immoderate and unrestrained course to corral Title VII."

Ginsburg again demonstrated that her deeply felt professional passion is to serve the cause of constitutional and legal justice, affirmatively calling on congressional lawmakers to continue to "correct this Court's wayward interpretations of Title VII. ... The ball is once again in Congress' court to correct the error into which this Court has fallen, and to restore the robust protections against workplace harassment the Court weakens today."

UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER, Petitioner v. Naiel NASSAR (2013)

"*What sense can one make of this other than 'heads the employer wins, tails the employee loses*?'"

In another decision whose illogic and injustice Justice Ginsburg protested in 2013, the five-justice conservative majority pulled a rabbit out of a hat and found that, under Title VII, workers alleging retaliatory discharge for complaining about job discrimination must show that the retaliatory motive was not just a "motivating factor" in their firing but the "but for" cause, a nearly impossibly stringent standard to meet. The case, which involves egregious ethnic and national origin discrimination against a doctor of Middle Eastern descent, established that plaintiffs facing retaliatory discrimination must essentially not show just that employers acted in order to punish them for exercising their civil rights but that this was essentially the *only* purpose they had.

This decision marked a dramatic departure from the text of Title VII and a coherent reading of its terms. The statute considers it discrimination whenever "race, color, religion, sex, or national origin" is "a motivating factor for any employment practice, even though other factors also motivated the practice." This language was adopted as part of the Civil Rights Act of 1991, which was designed to address a Supreme Court decision that sharply cut back on the scope of Title VII by forcing plaintiffs to prove that they would not have been fired or demoted without the presence of the discriminatory motivation. Congress wanted to be certain that, to be actionable under Title VII, discrimination would have to be only a "motivating factor" in the adverse employment action and not necessarily its "but-for cause." Thus, prior to this ruling, it was considered enough under Title VII to show that discriminatory animus plays some role in a worker's discharge or demotion, because it should be playing none at all. Critically, the rule Congress intended to restore in 1991 was not confined to substantive discrimination but presumably applied as well to retaliatory discrimination—that is, discrimination against workers who exercise their Title VII anti-discrimination rights. This is the way that the Equal Employment Opportunities Commission (EEOC) had always understood the law to operate.

But the Roberts Court majority, in another one of its dismal 5-4 specials, found that the more stringent standard openly repudiated by Congress still operates when it comes to retaliation claims. "In so holding," Justice Ginsburg wrote in dissent, "the Court ascribes to Congress the unlikely purpose of separating retaliation claims from discrimination claims, thereby undermining the Legislature's effort to fortify the protections of Title VII." This holding, she observed, is "at odds with a solid

line of decisions recognizing that retaliation is inextricably bound up with status-based discrimination."

In her comprehensive and devastating dissent, joined by Justices Breyer, Sotomayor, and Kagan, Ginsburg demonstrated that this ruling had no basis in statutory language, legislative history, EEOC practice, or relevant case precedent. Ginsburg tore apart the majority's sloppy, cut-and-paste job of analysis: "It is strange logic indeed to conclude that when Congress homed in on retaliation and codified the proscription, as it did in Title VII, Congress meant protection against that unlawful employment practice to have less force than the protection available when the statute does not mention retaliation. It is hardly surprising, then, that our jurisprudence does not support the Court's conclusion." She showed that the conservatives had turned Title VII on its head: "Jurors will puzzle over the rhyme or reason for the dual standards. Of graver concern, the Court has seized on a provision adopted by Congress as part of an endeavor to strengthen Title VII, and turned it into a measure reducing the force of the ban on retaliation." Nor was she shy about telling us what was really going on with the Court's decision: "In this endeavor, the Court is guided neither by precedent, nor by the aims of legislators who formulated and amended Title VII. Indeed, the Court appears driven by a zeal to reduce the number of retaliation claims filed against employers." Perhaps most blistering and memorable of all was this zinger on the Court's doctrinal somersaults: "What sense can one make of this other than 'heads the employer wins, tails the employee loses?'"

Recognizing again that the rights of workers is what matters the most, not just the terribly weak debating tactics of the majority, Ginsburg called for Congress to come to the rescue again of the nation's major civil rights law in the workplace: "Today's misguided judgment, along with the judgment in Vance v. Ball State Univ., should prompt yet another Civil Rights Restoration Act."

Lilly M. LEDBETTER
v.
The GOODYEAR TIRE & RUBBER CO., INC.
(2007)

"*This is not the first time the Court has ordered a cramped interpretation of Title VII, incompatible with the statute's broad remedial purpose. … Once again, the ball is in Congress' court. As in 1991, the Legislature may act to correct this Court's parsimonious reading of Title VII.*"

If Ginsburg's passionate call to action on Title VII helps inspire Congress to act to reverse its recent mistakes, it will be a replay of Justice Ginsburg's experience dissenting in *Lilly M. Ledbetter v. Goodyear Tire & Rubber Co.* (2007), when the whole country followed her ferociously principled dissent and Congress went to work right away to reverse the Court's disastrous decision.

In *Ledbetter*, the five conservatives found that Goodyear could not be sued for two decades of blatant sex discrimination against Alabama plant supervisor Lilly Ledbetter because Ledbetter failed to bring her claim within 180 days of the first act of pay discrimination in 1979. Of course, Ledbetter did not learn of the discrimination until 20 years later when a colleague in 1998 took pity on her on the occasion of her retirement and told her that she had been making about two-thirds of what her male counterparts made. (Ledbetter made $3,727 per month compared to male colleagues in the same job who made at least $4,286 per month, with some of them making as much as $5,236.) The fact that Ledbetter brought her action as soon as she learned of the discrimination did not satisfy the majority, which felt that the statute of limitations had run and it was just tough luck for Ledbetter

Writing for herself and Justices Stevens, Souter and Breyer, Justice Ginsburg pointed out the absurdity of this interpretation, which rewards discriminators for their deception. She argued that each act of issuing a discriminatory paycheck clearly renews and continues the original discrimination. Ginsburg minced no words: "The Court asserts that treating pay discrimination as a discrete act, limited to each particular pay-setting decision, is necessary to 'protec[t] employers from the burden of defending claims arising from employment decisions that are long past.' But the discrimination of which Ledbetter complained is *not* long past. As she alleged, and as the jury found, Goodyear continued to treat Ledbetter differently because of sex each pay period, with mounting harm." Ginsburg pointed out to the conservatives that it was Ledbetter who was the victim of discrimination in the case—not Goodyear: "Her initial readiness to give her employer the benefit of the doubt should not preclude her from later challenging the then current and continuing payment of a wage depressed on account of her sex." Ginsburg's forceful dissent laid the groundwork

for a huge public education campaign across America in 2008 to reverse the Court's pinched interpretation of Title VII. This campaign helped turn the tide of public opinion against both right-wing economics and right-wing judicial activism. The Lilly Ledbetter Fair Pay Act of 2009 was signed on January 29, 2009, the first bill signed into law by President Barack Obama. By all accounts, Ginsburg's dissenting opinion was instrumental in making it happen.

Protecting Civil Liberties Against Big Brother Bureaucracy

BOARD OF EDUCATION OF INDEPENDENT SCHOOL DISTRICT *NO*. 92 OF POTTAWATOMIE COUNTY
v.
LINDSAY EARLS
(2002)

"*Notwithstanding nightmarish images of out-of-control flatware, livestock run amok, and colliding tubas disturbing the peace and quiet of Tecumseh, the great majority of students the School District seeks to (drug) test in truth are engaged in activities that are not safety sensitive ...*"

In the 21st century, governmental and corporate assaults on personal freedom and privacy are replete and constant. For many conservatives, Big Brother tactics are fine when the people whose rights are being trampled are students, prisoners, workers, criminal defendants, and others who lack the kind of social power the conservatives respect. But Justice Ginsburg stands up for civil liberties across the board, even for high school students, reminding everyone that freedom is at the heart of what it means to be an American under our Constitution and Bill of Rights. At a time when Justice Ginsburg's age is being debated in public, it should not escape notice that she is a great champion on the Court of the rights of young Americans.

In the 2002 case of *Board of Education School District No. 92 of Pottawatomie County v. Lindsay Earls*, Justice Clarence Thomas delivered an opinion for the majority upholding the constitutionality of a high school imposing mandatory drug tests on all high school students in competitive extracurricular activities, including the Future Farmers of America, band, choir, the academic team, and cheerleading. The majority compared this policy to the facts of a 1995 case where the Court upheld random urinalysis drug tests for students involved in school sports, given the risk of immediate physical harm to athletes and those with whom they play, the lessened privacy expectations inherent in public school locker rooms and showers, and the school district's demonstrated drug problem with students in school athletics. Justice Ginsburg had concurred in that case.

But in the 2002 case, joined by Justices Stevens, O'Connor, and Souter, Justice Ginsburg dissented, arguing that the policy violated the Fourth Amendment because it "is not reasonable, it is capricious, even perverse [because it] targets for testing a student population least likely to be at risk from illicit drugs and their damaging effects."

Displaying her famous humor and dry wit, Ginsburg lampooned the majority's effort to liken the situation of students in chorus, orchestra, and Future Farmers of America to varsity football and basketball players, who are engaged in a dangerous, high-risk sport and are used to situations of "communal undress." Responding to the argument that members of the Future Farmers of America "handle a 1500-pound steer" and participants in Future Homemakers of America "work with cutlery," Ginsburg wrote: "Notwithstanding nightmarish images of out-of-control flatware, livestock run amok, and colliding tubas disturbing the peace and quiet of Tecumseh, the great majority of students the School District seeks to test in truth are engaged in activities that are not safety sensitive to any unusual degree."

She also gently but pointedly chided the majority for using reasoning that could apply to all school children, despite the *Vernonia* opinion's having gone out of its way to explain why school sports programs could be distinguished from other elements of going to school: "Had the *Vernonia* Court agreed that public school attendance, in and of itself, permitted the State to test each student's blood or urine for drugs, the opinion in *Vernonia* could have saved many words."

Ever attentive to the real-world implications of the Court's rulings, Ginsburg reproached her colleagues for upholding a policy that is not only repressive but severely counterproductive: "Even if students might be deterred from drug use in order to preserve their extracurricular eligibility, it is at least as likely that other students might forgo their extracurricular involvement in order to avoid

detection of their drug use. Tecumseh's policy thus falls short doubly if deterrence is its aim: It invades the privacy of students who need deterrence least, and risks steering students at greatest risk for substance abuse away from extracurricular involvement that potentially may palliate drug problems."

Conclusion

In our day—as in Thomas Jefferson's and Franklin D. Roosevelt's—conservative forces in the country have turned the Supreme Court and the judiciary into their "stronghold," and from that battery they work to nullify and neutralize progressive legislation and well-established constitutional rights. Given how much progress Americans have made over the last half-century on voting rights, workplace rights, equal pay and civil liberties, the Roberts Court is doing far more damage to democratic progress than any Court since the *Lochner* era, when judicial conservatives wiped out progressive workplace laws and economic regulation.

Justice Ginsburg has emerged as a crucial and powerfully eloquent voice for protecting the legislation produced by the civilizing movements of our time. She has also continued to spell out a constitutional vision that includes robust democracy, an inclusive economy, and ample civil liberty for all of us.

As an impassioned and thorough dissenter, Ginsburg continues a visionary tradition that goes back to Justice William Johnson, who was nominated to the Court by President Thomas Jefferson in 1804 and launched the practice of filing dissenting opinions; Justice John Marshall Harlan, whose dissenting opinion in *Plessy v. Ferguson* (1896) insisted that Jim Crow segregation was unconstitutional because "in view of the Constitution, in the eye of the law, there is no superior, dominant, ruling class of citizens"; and Justice Oliver Wendell Holmes, whose prescient dissent from the fateful *Lochner* decision, which struck down wage and hour legislation (1905), argued that the case was "decided upon an economic theory which a large part of the country does not entertain." Like her constitutional forerunners, Ginsburg painstakingly demonstrates how an errant majority has trampled constitutional justice and equality.

With her stirring rhetoric and sly humor, Justice Ginsburg provides anyone listening in Congress, as well as her colleagues and successors on the bench and, above all, the American people themselves, an alternative "vision of democracy and the Constitution," which is the hallmark of a great dissenter, as Professor Mark Tushnet argued in his book on the subject, *I dissent*. This alternative constitutional vision is essential today because the conservatives routed in the presidential elections of 2008 and 2012 have "retired into the Judiciary as a stronghold," where they try to beat down and erase all progressive legislative and judicial victories just as their forebears did. Ginsburg's vision is the opposite of the constitutional philosophy held by the Roberts Court majority, which defends corporate and government power over individual rights and liberties and always manages to find a reason to discard federal and state laws that seek to promote democracy and the common good. Whenever Justice Ginsburg chooses to leave the Court, it will be a loss to her country. Win, lose, or draw, she never takes her eyes off the prize.