

NOTES

#JOINTHEDISSSENT: RUTH BADER GINSBURG AND THE
HOBBY LOBBY EFFECT

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*"I don't see that my majority opinions are going to be undone
I do hope that some of my dissents will one day be the law."*¹

I. INTRODUCTION

It is just after ten o'clock in the morning on June 30, 2014, and the unofficial Supreme Court of the United States Blog (SCOTUSblog) has logged over forty thousand readers on the website's interactive live blog of Supreme Court decisions.² It is the last day of the Court's June Term,³ and readers and commentators alike are awaiting the opinion on the final and perhaps most controversial and anticipated decision left on the Court's docket: *Burwell v. Hobby Lobby Stores*,

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¹ Adam Liptak, *Court Is 'One of Most Activist,' Ginsburg Says, Vowing to Stay*, N.Y. TIMES (Aug. 24, 2013), <http://www.nytimes.com/2013/08/25/us/court-is-one-of-most-activist-ginsburg-says-vowing-to-stay.html> (internal quotation marks omitted).

² Amy Howe, *#waitingforLyle: Live Blog of Opinions*, SCOTUSBLOG (June 30, 2014, 10:07 AM), http://live.scotusblog.com/Event/Live_blog_of_opinions_June_30_2014?Page=0 [hereinafter *Live Blog*]. SCOTUSblog, founded in 2002 by two law professors, is a blogging website that exclusively provides in-depth coverage on the yearly calendar of the United States Supreme Court. See *About Us*, SCOTUSBLOG, <http://www.scotusblog.com/about/> (last visited Dec. 29, 2015).

³ Adam Liptak, *Supreme Court Rejects Contraceptives Mandate for Some Corporations: Justices Rule in Favor of Hobby Lobby*, N.Y. TIMES (June 30, 2014), <http://www.nytimes.com/2014/07/01/us/hobby-lobby-case-supreme-court-contraception.html> [hereinafter *Supreme Court Rejects Contraceptives Mandate*].

*Inc.*⁴ The decision, that closely-held corporations cannot be required to provide contraception coverage to their employees,⁵ was finally handed down at 10:17 a.m., and just eight minutes later, as the blog commentators summarized the key elements of the opinion, the SCOTUSblog website views skyrocketed to over sixty thousand.⁶ The decision, described by the commentators as a “monster” of an opinion, included a forty-nine page majority opinion by Justice Samuel Alito, and a colossal thirty-five page dissent by Justice Ruth Bader Ginsburg.⁷ The announcement of Ginsburg’s dissent was then followed by what is still seemingly rare in Supreme Court jurisprudence: her oral dissent from the bench.⁸ Within minutes Justice Ginsburg became an internet icon for women’s autonomy;⁹ her dissenting opinion becoming the “symbolic battle cr[y] in a larger culture war over contraception, women’s bodies, and sexual freedom, rather than a carefully crafted argument in an intensely complicated legal case.”¹⁰

The Court’s October 2013 Term saw unprecedented unanimity, with sixty-five percent of the orally argued cases resulting in a unanimous decision, a record high since 1953.¹¹ However, this current makeup of the Court sits decisively divided along party lines,

⁴ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

⁵ *Id.* at 2759.

⁶ *Live Blog*, *supra* note 2.

⁷ *Id.*

⁸ *Id.*; see also Rob Silverblatt, *Justice Ginsburg’s Record-Breaking Day*, U.S. NEWS & WORLD REP. (June 25, 2013, 1:15 PM), <http://www.usnews.com/news/articles/2013/06/25/justice-ginsburgs-record-breaking-day> (discussing the unusual nature of Justice Ginsburg’s reading of her dissent from the bench).

Oral dissents have seen a revival in more recent years as significantly more justices have read their dissenting opinions from the bench, with well over twelve since Chief Justice John Roberts took his position in September of 2005. Lani Guinier, *The Supreme Court, 2007 Term: Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 15 (2008).

⁹ Justice Ginsburg’s dissent swept the through the mainstream media, going as far as sparking an internet campaign by Planned Parenthood in protest of the majority ruling, entitled “Join the Dissent.” See *Join the Dissent*, PLANNED PARENTHOOD https://secure.ppaction.org/site/Advocacy?cmd=display&page=UserAction&id=18069&s_src=S_COTUSDecisions_0614_c4_pptw&s_subsrc=4NALD1412S1N1V (last visited Jan. 02, 2016). This would later morph into a Twitter campaign, of which the title of this note is based off of. *Join the Dissent-to the Supreme Court*, DAILY KOS (June 30, 2014, 2:04 PM), <http://www.dailykos.com/story/2014/06/30/1310710/-Join-the-Dissent-to-the-Supreme-Court#>; see also #joindthedissent, TWITTER, <https://twitter.com/search?f=realtime&q=joindthedissent&src=typd> (providing numerous Twitter posts which use the hashtag “#joindthedissent”).

¹⁰ Emma Green, *Blame it on the Patriarchy*, THE ATLANTIC (July 3, 2014), <http://www.theatlantic.com/national/archive/2014/07/blame-it-on-the-patriarchy/373900/>.

¹¹ Adam Liptak, *Compromise at the Supreme Court Veils Its Rifts*, N.Y. TIMES (July 1, 2014), <http://www.nytimes.com/2014/07/02/us/supreme-court-term-marked-by-unanimous-decisions.html> [hereinafter *Compromise at the Supreme Court*].

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and even in unanimously decided cases, the “familiar lines of division” can be seen.¹² No different is the *Hobby Lobby* opinion; Ginsburg was joined in her dissent, at least in part, by the notoriously liberal wing of the Court—Justices Breyer, Sotomayor and Kagan.¹³ Similarly, Justice Ginsburg’s position did not surprise legal scholars. Since her appointment to the Court in 1993, Justice Ginsburg’s jurisprudence has been grounded in the assurance of opportunity and equality, with a focus specifically on gender equality and women’s rights.¹⁴

This note will consider three interwoven themes: the jurisprudence of Justice Ruth Bader Ginsburg, the role of the dissenting opinion, and the role of women’s autonomy in their own bodies as seen through the lens of two specific Supreme Court opinions. Viewed in the lens of Justice Ginsburg’s jurisprudence, her dissenting opinions—most specifically *Gonzales v. Carhart*¹⁵ and the abovementioned *Burwell v. Hobby Lobby Stores, Inc.*—act as a vehicle in which the Justice’s beliefs and principles in regard to both women’s autonomy and equality are furthered. Though resting upon many of the same foundational principles as *Gonzales*, the *Hobby Lobby* decision came during the “perfect storm”—a time in which feminist ideals were thrust to the forefront of American ideology—thereby enabling the dissenting opinion, and Ginsburg’s beliefs as a whole, to have a greater impact on the majority opinions of the future. Part II will discuss Justice Ginsburg’s jurisprudence that has developed in her twenty-one years on the Supreme Court. It will first provide a brief overview of the road Justice Ginsburg paved on her way to the Supreme Court, and explore the reputation she has made for herself thus far on the bench. Particular attention will be paid to the events and milestones in Ginsburg’s life that prefaced her appointment to the Supreme Court and shaped the realm of her jurisprudence. This part will also discuss Justice Ginsburg’s own words on the power of the dissenting opinion, as well as explore her statistics in both dissenting opinions, and reading those opinions from the bench. Part III will discuss Justice Ginsburg’s dissenting opinion in *Gonzales v. Carhart*, offering a brief background of the case before delving into the language and sentiment of the dissent. It will

¹² *Id.* (internal quotation marks omitted).

¹³ See *Supreme Court Rejects Contraceptives Mandate*, *supra* note 3.

¹⁴ See Deborah Jones Merritt & David M. Lieberman, *Ruth Bader Ginsburg’s Jurisprudence of Opportunity and Equality*, 104 COLUM. L. REV. 39, 40 (2004).

¹⁵ *Gonzales v. Carhart*, 550 U.S. 124 (2007).

touch upon Ginsburg's reading of the dissent from the bench, the effect that had on the public at large, and how the public and legal community alike responded to the oral dissent. It will also consider the *Gonzales* dissent within the realm of Justice Ginsburg's philosophy. Part IV will address Justice Ginsburg's most recent dissent in the area of women's equality and autonomy, *Burwell v. Hobby Lobby Stores, Inc.* It will provide a brief resuscitation of the facts and backdrop of the case, before discussing the biting language Justice Ginsburg uses in her dissent. This part will also offer a discussion on the "*Hobby Lobby* effect" and how it differs from the aftermath of the *Gonzales* decision. Part V will discuss the potential outlook for the future, and how the *Hobby Lobby* dissent can impact this area moving forward. Through this discussion, it will become evident that Justice Ginsburg's dissenting opinions in the area of reproductive rights, as well as a female's rights to autonomy over her own body, provide more of an impact in the area of women's equality than her majority opinions. The impact of Ginsburg's dissenting opinions in this specific area, together with her inclination to read these dissenting opinions from the bench, proves that she is attempting to use her minority opinion as a tool to educate and appeal to the students of the future, in the hope that someday, her dissenting opinions will become the majority.

II. RUTH BADER GINSBURG'S JURISPRUDENCE

A. Ginsburg's Background

Justice Ginsburg's focus on women's equality began long before that of her legal career. Despite acceptance into law school after her graduation from Cornell University, a twenty-one-year-old Ginsburg followed her husband to Oklahoma, where he had recently been transferred due to the draft.¹⁶ It was here that Ginsburg first experienced gender inequality when, after revealing that she was pregnant to her superiors at her job at the local Society Security office, she was deemed ineligible for a promotion she was otherwise qualified for, and instead received a demotion with considerably less pay.¹⁷

She fared little better after returning home to Boston with her

¹⁶ Carey Olney, *Better Bitch than Mouse: Ruth Bader Ginsburg, Feminism, and VMI*, 9 *BUFF. WOMEN'S L.J.* 97, 103, 104 (2001).

¹⁷ *Id.*

husband after his military service. Although she had been accepted into Harvard Law School, Ginsburg, and the handful of other women who had been accepted in the mid-1950s, faced constant criticism at the hands of their professors.¹⁸ Women were, more often than not, called upon during class lectures solely to provide comic relief, and even questioned on how they felt taking spots in the class away from men.¹⁹ By the end of her legal education, however, Ginsburg was regarded as an academic scholar—attending two highly ranked law schools, graduating from Columbia Law School as a Kent Scholar (where she was tied for first in her class), as well as the first woman to obtain membership on two law reviews.²⁰

The most defining moment in Ginsburg's legal career came in her quest for employment post-graduation.²¹ Ginsburg was not offered a position at any of the top law firms in New York City, despite the exceptional abovementioned academic credentials.²² In 1960, on recommendation from a Dean at Harvard Law School, Ginsburg was passed upon as a law clerk by then Supreme Court Justice Felix Frankfurter, who told the professor, "while the candidate was impressive, he just wasn't ready to hire a woman."²³ Ginsburg was also turned down for a position with Learned Hand, then judge on the United States Court of Appeals for the Second Circuit, before finally being hired by Edmund L. Palmieri, judge on the United States District Court for the Southern District of New York.²⁴

¹⁸ *Id.*

¹⁹ *Id.* at 104–05.

²⁰ *See id.* at 105. During the Ginsburgs' time in Boston, Martin, Justice Ginsburg's husband, became sick with cancer, and Ruth attended class for the both of them, taking care of both her husband and her pre-school-aged daughter. *Ruth Bader Ginsburg*, OYEZ, http://www.oyez.org/justices/ruth_bader_ginsburg (last visited Oct. 8, 2015). Once Martin recovered and eventually graduated law school, he accepted a job at a firm in New York City, and Ruth transferred to Columbia Law School. *Id.*

²¹ *See Olney, supra* note 16, at 105 (recounting challenges the young attorney faced in spite of her outstanding qualifications).

²² *Id.* When asked of this later, Ginsburg noted, "In the fifties, the traditional law firms were just beginning to turn around on hiring Jews But to be a woman, a Jew, and a mother to boot, that combination was a bit much." Malvina Halberstam, *Ruth Bader Ginsburg: The First Jewish Woman on the United States Supreme Court*, 19 CARDOZO L. REV. 1441, 1446 (1998) (quoting LYNN GILBERT & GAYLEN MOORE, PARTICULAR PASSIONS: TALKS WITH WOMEN WHO HAVE SHAPED OUR TIMES 158 (1981)) (alteration in original) (internal quotation marks omitted).

²³ Neil A. Lewis, *The Supreme Court: Woman in the News; Rejected as a Clerk, Chosen as a Justice: Ruth Joan Bader Ginsburg*, N.Y. TIMES (June 15, 1993), <http://www.nytimes.com/1993/06/15/us/supreme-court-woman-rejected-clerk-chosen-justice-ruth-joan-bader-ginsburg.html>.

²⁴ Olney, *supra* note 16, at 105. Judge Hand based his refusal of Ginsburg for the clerkship position on the fact that he had "too salty a tongue." David Margolick, *Trial by Adversity Shapes Jurist's Outlook*, N.Y. TIMES (June 25, 1993), <http://www.nytimes.com/1993/06/25/us/>

Ginsburg continued on into a myriad of legal endeavors in the beginning of her legal career, all the while keeping her budding feminism²⁵ at the center of her being. Ginsburg became a professor at Rutgers University Law School, where she was heavily affiliated with the New Jersey chapter of the American Civil Liberties Union (ACLU), where she fought for women's right to maternity leave for schoolteachers in New Jersey.²⁶ She became the first tenured woman hired at Columbia Law School in 1972, and that same year, was selected as the first director of the ACLU's Women's Rights Project.²⁷

Earning the nickname the "Thurgood Marshall of gender equality law," Ginsburg argued six women's rights cases before the Supreme Court within a three-year span, winning all but one, and leaving a lasting impact on women in the eyes of the law.²⁸ Her successes eventually led to her nomination by President Carter to the United States Court of Appeals in the D.C. Circuit in 1980, where she served from 1981 until 1993.²⁹ When Justice Byron White announced his retirement from the Supreme Court, then President Bill Clinton nominated Ginsburg to fill the position, praising her "pioneering work in [sic] behalf of the women of this country."³⁰

B. Guiding Principles of Ginsburg's Judicial Philosophy

It is from this backdrop that Justice Ginsburg refined the

trial-by-adversity-shapes-jurist-s-outlook.html. This excuse, however, proved to be just that, as Hand was not afraid to curse freely in front of Ginsburg as she carpooled with him and Judge Palmieri to work every day. *Id.* Sitting behind him on the ride to the courthouse, Ginsburg asked the difference, and Hand responded, "here I am not looking you in the face." *Id.* (internal quotation marks omitted).

²⁵ Ginsburg describes herself as being a "late-blooming feminist." *Id.*

²⁶ Olney, *supra* note 16, at 106, 107 n.31; *Ruth Bader Ginsburg*, *supra* note 20.

²⁷ *Ruth Bader Ginsburg*, *supra* note 20.

²⁸ Lewis, *supra* note 23. President Clinton also referenced this nickname in his nomination speech, stating, "[s]he herself argued and won many of the women's rights cases before the Supreme Court in the 1970's. Many admirers of her work say that she is to the women's movement what former Supreme Court Justice Thurgood Marshall was to the movement for the rights of African-Americans." President William J. Clinton, Remarks Announcing the Nomination of Ruth Bader Ginsburg to Be a Supreme Court Associate Justice (June 14, 1993), (transcript available at <http://www.presidency.ucsb.edu/ws/?pid=46684%20>). These cases presented both due process and equal protection issues involving the disfavor of women in areas such as jury service, receipt of military benefits, receipt of property tax exemption, and receipt of Social Security benefits. See *Duren v. Missouri*, 439 U.S. 357, 363-64 (1979); *Califano v. Goldfarb*, 430 U.S. 199, 201-02 (1977); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 645 (1975); *Kahn v. Shevin*, 416 U.S. 351, 355-56 (1974); *Frontiero v. Richardson*, 411 U.S. 677, 678-79 (1973).

²⁹ *Ruth Bader Ginsburg*, *supra* note 20.

³⁰ Clinton, *supra* note 28.

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jurisprudence that would follow her judicial path. Throughout her career as an appellate advocate, Justice Ginsburg “developed a strategy of chipping away precedent, establishing new principles step-by-step.”³¹ This approach has appeared both in her judging and in her judicial principles, and while she has been categorized more on the liberal side of the bench throughout her judicial career, Ginsburg has “tempered these beliefs . . . by her emphasis on procedure and precedent and by her commitment to the doctrine of judicial restraint.”³² Linda Greenhouse, the Pulitzer Prize winning New York Times reporter who has covered the Supreme Court for the past three decades³³, described Ginsburg as a “rare creature in the modern judicial lexicon: a judicial-restraint liberal” in a New York Times piece just two days after her Supreme Court confirmation hearing.³⁴ Greenhouse later qualified that statement, citing Ginsburg’s open-minded viewing of a broad and all-encompassing Constitution “coupled with a pragmatist’s sense that the most efficacious way of achieving the Constitution’s highest potential as an engine of social progress is not necessarily through the exercise of judicial supremacy.”³⁵

This “judicial-restraint liberal” mentality has allowed Justice Ginsburg to surpass the traditionally drawn lines of political ideology on the Court, engaging both the conservative- and the liberal-minded justices, and garnering the respect of all of her colleagues.³⁶ In that vein, it was quite shocking to Supreme Court commentators when the traditionally conservative Chief Justice William Rehnquist³⁷ authored a concurrence in Justice Ginsburg’s majority opinion in *United States v. Virginia*,³⁸ which held Virginia Military Institute’s

³¹ Henry J. Reske, *Two Paths for Ginsburg: The Trailblazing Women’s Rights Litigator Becomes a Moderate Judge*, A.B.A. J., Aug. 1993, at 16.

³² Sarah E. Valentine, *Celebrating the Jurisprudence of Justice Ruth Bader Ginsburg*, 7 N.Y. CITY L. REV. 391, 394 n.19 (2004).

³³ *Talk to the Newsroom: Supreme Court Reporter*, N.Y. TIMES (July 14, 2008), <http://www.nytimes.com/2008/07/14/business/media/14askthetimes.html?pagewanted=1&r=0>.

³⁴ Linda Greenhouse, *The Supreme Court; A Sense of Judicial Limits*, N.Y. TIMES (July 22, 1993), <http://www.nytimes.com/1993/07/22/us/the-supreme-court-a-sense-of-judicial-limits.html> [hereinafter *A Sense of Judicial Limits*].

³⁵ Linda Greenhouse, *Learning to Listen to Ruth Bader Ginsburg*, 7 N.Y. CITY L. REV. 213, 217–18 (2004) [hereinafter *Learning to Listen*].

³⁶ *Id.* at 218.

³⁷ *William H. Rehnquist*, OYEZ, http://www.oyez.org/justices/william_h_rehnquist (last visited Dec. 18, 2015).

³⁸ *United States v. Virginia*, 518 U.S. 515, 519, 558 (1996).

all-male admissions policy unconstitutional.³⁹ Chief Justice Rehnquist's majority opinion in *Nevada Department of Human Resources v. Hibbs*,⁴⁰ which upheld the Family and Medical Leave Act, seemed to emulate Justice Ginsburg, highlighting the clichéd assumption that women are the only ones equipped to handle emergencies that arise in the home, and would have to leave the workplace in order to do so.⁴¹

Ginsburg was the second female justice appointed to the Supreme Court, and for a stretch of three years after Sandra Day O'Connor's retirement, was the sole woman flanked by a bench of eight men.⁴² When asked how it felt in those three years as the only female Justice, Ginsburg equated it back to her time as one of nine girls at Harvard Law School, stating that it constantly felt as though she was the center of attention, with all eyes on her; that with every question asked, she was speaking for the entire female gender.⁴³ As the only woman, she was "different and the object of curiosity."⁴⁴ What Ginsburg found most concerning, however, was the American public's perception of there being only one female voice on the nation's highest court—in Ginsburg's own words, "[i]t just doesn't look right in the year 2009."⁴⁵

The reputation Justice Ginsburg has created for herself on the bench centers on her judicial opinions in the area of women's equality. Her first opinion as a Supreme Court Justice came as a concurrence in the 1993 decision *Harris v. Forklift Systems*,⁴⁶ a case centering on a Title VII claim for sexual harassment in the workplace, where she affirmed the need for equal opportunity and

³⁹ *Id.* at 555–56; *Learning to Listen*, *supra* note 35, at 218.

⁴⁰ *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 724 (2003).

⁴¹ *See Hibbs*, 538 U.S. at 736, 737; *Learning to Listen*, *supra* note 35, at 218–19.

⁴² Emily Bazelon, *The Place of Women on the Court*, N.Y. TIMES MAG. (July 7, 2009), http://www.nytimes.com/2009/07/12/magazine/12ginsburg-t.html?_r=0.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* Two nominees by President Barack Obama, Justices Sonia Sotomayor and Elena Kagan, would assume the bench in August 2009 and August 2010, respectively, bringing the Court's total female minority to an all-time high. *See Biographies of Current Justices of the Supreme Court*, SUPREME COURT OF THE U.S., <http://www.supremecourt.gov/about/biographies.aspx> (last visited Dec. 18, 2015). To Justice Ginsburg, the addition of these two strong-minded women makes all the difference; they are dynamic in oral arguments and are not afraid to contribute and speak their minds. *See* Jessica Weisberg, *Supreme Court Justice Ruth Bader Ginsburg: I'm Not Going Anywhere*, ELLE (Sept. 23, 2014), <http://www.elle.com/life-love/society-career/supreme-court-justice-ruth-bader-ginsburg>. With Kagan on her left and Sotomayor on her right, Ginsburg states, "we look like we're really part of the court and we're here to stay." *Id.*

⁴⁶ *Harris v. Forklift Sys.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring).

impartiality, a notion that she would grow to become known for.⁴⁷ Her majority opinion in *United States v. Virginia* followed the same principle, relying heavily again on a broad reading of the Constitution and focusing on the notion of opportunity ground in the Equal Protection Clause, as well as “the extension of constitutional rights and protections to people once ignored or excluded.”⁴⁸ In twenty-three of the most prolific women’s equality cases to come to the Supreme Court since her placement on the bench in 1993,⁴⁹ Justice Ginsburg has offered seven written opinions, including two concurrences,⁵⁰ two majority opinions,⁵¹ and three dissents.⁵² Two of these dissents, focusing on the issue of reproductive rights, are the focus of the remaining discussion.⁵³

C. Ginsburg & the Dissent

There is a certain freedom for Justices on the Supreme Court who are not under the constant pressure of re-election and while that freedom is more often seen in majority opinion writing, it also plays an important role in that of the dissent.⁵⁴ Dissenting opinions are grounded in the same deeply rooted constitutional principles as majority opinions and—perhaps even more so than their counterpart—spark ongoing debate amongst the public in the wake of an especially close or controversial decision.⁵⁵ Although they do not become “the law” in the same sense of the word as the majority opinion, the purpose of a dissenting opinion is still to educate.⁵⁶ Essentially, dissents are “important to the extent they influence the actions of judicial majorities twenty years from now or broaden the

⁴⁷ See *Harris*, 510 U.S. at 18–19, 25, 26; Merritt & Lieberman, *supra* note 14, at 40, 41.

⁴⁸ Merritt & Lieberman, *supra* note 14, at 42 (quoting *United States v. Virginia*, 518 U.S. 515, 557 (1996)).

⁴⁹ See *Major Supreme Court Decisions on Women’s Rights*, AM. CIVIL LIBERTIES UNION, https://www.aclu.org/files/interactive/womensrights_scotus_0303a.html (last visited Oct. 10, 2015) (providing a list of cases in the area of women’s rights that have made their way to the Supreme Court from 1971 to 2006); *Biographies of Current Justices of the Supreme Court*, *supra* note 45.

⁵⁰ See *Stenberg v. Carhart*, 530 U.S. 914, 951 (2000) (Ginsburg, J., concurring); *Harris*, 510 U.S. at 25 (Ginsburg, J., concurring).

⁵¹ See *M.L.B. v. S.L.J.*, 519 U.S. 102, 106 (1996); *United States v. Virginia*, 518 U.S. at 519.

⁵² See *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2787 (2014) (Ginsburg, J., dissenting); *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 643 (2007) (Ginsburg, J., dissenting); *Gonzales v. Carhart*, 550 U.S. 124, 169 (2007) (Ginsburg, J., dissenting).

⁵³ See discussion *infra* Parts III and IV.

⁵⁴ Guinier, *supra* note 8, at 12.

⁵⁵ See *id.*

⁵⁶ *Id.* at 14.

jurisprudential range. . . of the next generation.”⁵⁷ A Justice’s reading of a dissenting opinion aloud from the bench at the end of a Term adds an element of theatrics that is not otherwise seen in opinion reading.⁵⁸ Exceedingly rare in practice, not only does the oral dissent confirm that particular Justice’s viewpoint that the majority opinion is mistaken, it takes it a step further and implies that they are overwhelmingly incorrect.⁵⁹

The pattern Justice Ginsburg generally follows in her dissents is one of moderate restraint—only willing to fervently speak up against the majority when they severely impinge upon her beliefs.⁶⁰ In her dissents leading up to the 2006–2007 Term, Ginsburg was more likely to diverge from the majority opinion when she believed that they have (1) reached an unnecessarily far-reaching result; (2) neglected to account for previously binding precedent set by the Court; or (3) denied the proper respect for another court, law, or branch of the government.⁶¹ In her forty-nine total dissenting opinions pre-dating 2003,⁶² Ginsburg had not, unlike many of her colleagues, used her dissenting opinions as a vehicle to belittle the thought process of her fellow Justices or attack their opinions;⁶³ “[i]n defeat as in victory, she remain[ed] a voice of moderation and restraint.”⁶⁴

In her keynote address at the 2008 Bar Convention in Alaska, Justice Ginsburg noted that when a Justice not only authors a dissenting opinion, but further reads that opinion from the bench, the public’s attention has immediately peaked, especially since separate opinions are generally only summarized within the reading of the majority opinion.⁶⁵ Ginsburg stressed that from the dissenter’s point

⁵⁷ *Id.*

⁵⁸ See Linda Greenhouse, *Oral Dissents Give Ginsburg a New Voice on Court*, N.Y. TIMES (May 31, 2007), <http://www.nytimes.com/2007/05/31/washington/31scotus.html> [hereinafter *Oral Dissents*].

⁵⁹ *Id.*

⁶⁰ See Laura Krugman Ray, *Justice Ginsburg and the Middle Way*, 68 BROOK. L. REV. 629, 655 (2003).

⁶¹ *Id.* at 655, 656.

⁶² Supreme Court watchers were generally surprised in the high number of dissenting opinions Justice Ginsburg issued, refraining from her general jurisprudence of “collegial restraint.” *Id.* at 654. This statement comes in response to Ginsburg’s comments as a circuit court judge where she observed, “United States appellate judges might profitably exercise greater restraint before writing separately.” *Id.* (quoting Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 134 (1990)) (internal quotation marks omitted).

⁶³ Ray, *supra* note 60, at 656.

⁶⁴ *Id.*

⁶⁵ Justice Ruth Bader Ginsburg, Keynote Address at the 2008 Alaska Bar Association

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of view, an oral reading of the dissent does more than reveal that the justice believed the Court to be incorrect in its ruling; it instead shows they believed the court to be severely mistaken.⁶⁶ Further, and perhaps most obviously, it detracts from the Court's, sometimes lofty, ambition to speak in unanimity and as one voice.⁶⁷

The oral dissent had not necessarily been Ginsburg's "style" until the late 2000s.⁶⁸ She had gone years without delivering an oral dissent, and in her then fifteen-year tenure on the Court, had never delivered more than one per Term.⁶⁹ But the 2006–2007 Term sparked a turning point for Ginsburg, as she began to realize that many of the ideals of equality she had fought so tirelessly for throughout the course of her legal career were in jeopardy.⁷⁰ In the wake of the majority's decision in *Gonzales*, as Greenhouse noted, Ginsburg "found her voice, and used it."⁷¹

III. GONZALES V. CARHART

A. *The Majority & the Dissent*

The *Gonzales* case targeted the Partial-Birth Abortion Ban Act of 2003 ("the Act"), a federal statute that regulated abortion methods, focusing on both instances when the procedure could be performed and the particular coverage it allowed for.⁷² The Act criminalized any physician who knowingly performed a partial-birth abortion⁷³ by imposing either a fine or imprisonment.⁷⁴ The opinion consolidated

Convention: The Role of Dissenting Opinions (2008), in AK BAR RAG, June 2008, at 1 [hereinafter Keynote Address].

⁶⁶ *Id.*

⁶⁷ *Id.* at 6.

⁶⁸ *Oral Dissents*, *supra* note 58.

⁶⁹ *Id.*

⁷⁰ *See id.*

⁷¹ *See Gonzales v. Carhart*, 550 U.S. 124, 169 (2007) (Ginsburg, J., dissenting); *Oral Dissents*, *supra* note 58.

⁷² *Gonzales*, 550 U.S. at 132, 133.

⁷³ Defined in the statute as:

[A]n abortion in which the person performing the abortion[,] deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and performs the overt act, other than completion of delivery, that kills the partially delivered living fetus.

Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531(b)(1)(A)–(B) (2003).

⁷⁴ 18 U.S.C. § 1531(a).

the appeals from the Eighth and Ninth Circuits,⁷⁵ where both circuit courts affirmed the decisions of the lower courts, each holding that the Attorney General was prohibited from enforcing the Act.⁷⁶ The Court held in a 5–4 decision, in a majority opinion written by Justice Anthony Kennedy, that the Act was not as unclear as the state statute at issue in the previous *Stenberg v. Carhart*,⁷⁷ and was not broad enough that it imposed an “undue burden” on a woman who sought to have an abortion.⁷⁸ Justice Kennedy emphasized both the ethical and moral apprehensions related to abortion, stating that holding the Act unconstitutional would disaffirm the central premise in the paramount case of *Planned Parenthood of Southeastern Pennsylvania v. Casey*⁷⁹ “—that the government has a legitimate and substantial interest in preserving and promoting fetal life.”⁸⁰

Justice Ginsburg authored the opinion for the four dissenting voices; joining her in disagreement were Justices Breyer, Souter, and Stevens.⁸¹ Ginsburg’s language is stern; after recounting the holdings in the Court’s previous decisions on abortion and women’s autonomy, Justice Ginsburg stated:

Today’s decision is alarming. It refuses to take *Casey* and *Stenberg* seriously. It tolerates, indeed applauds, federal intervention to ban nationwide a procedure found necessary and proper in certain cases by the American College of Obstetricians and Gynecologists (ACOG). It blurs the line, firmly drawn in *Casey*, between previability and postviability

⁷⁵ *Gonzales*, 550 U.S. at 133. The appeal from the Eighth Circuit involved four doctors from Nebraska who performed second-trimester abortions. *Id.* Alleging that the Partial-Birth Abortion Ban Act was unconstitutional, they brought suit against the United States Attorney General and sought a permanent injunction against its enforcement. *Id.* In the appeal from the Ninth Circuit, Planned Parenthood Federation of America, Inc., Planned Parenthood Golden Gate, and the City and County of San Francisco brought suit in California, seeking to enjoin enforcement of the Act. *Id.*

⁷⁶ *Id.*

⁷⁷ *Stenberg v. Carhart*, 530 U.S. 914 (2000). This opinion involved the same Leroy Carhart from the *Gonzales* opinion, in this case challenging the Nebraska state statute that prohibited the performance of partial-birth abortions as a violation of the Federal Constitution. *See Id.* at 922. The Court held that the state statute provided an undue burden to a woman’s right to an abortion. *Id.* at 945–46. Justice Ginsburg wrote a concurring opinion, focusing on the constitutionality of the procedures used by the physicians. *See id.* at 951–52 (Stevens, J., concurring).

⁷⁸ SUPREME COURT DECISIONS AND WOMEN’S RIGHTS: MILESTONES TO EQUALITY 208 (Clare Cushman ed., 2d ed. 2011).

⁷⁹ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

⁸⁰ *Gonzales*, 550 U.S. at 145, 158.

⁸¹ *Id.* at 169 (Ginsburg, J., dissenting).

abortions. And, for the first time since *Roe*,⁸² the Court blesses a prohibition with no exception safeguarding a woman's health.⁸³

To Justice Ginsburg, the holding in *Gonzales* was entirely out of the realm of the previous rulings of the Court in this area.⁸⁴ While she acknowledged that the majority opinion did not necessarily overrule the holdings—and thereby the progress made by women in *Roe* or *Casey*—Ginsburg asserts that the decision barely follows within the previous jurisprudence set by the Court and is not faithful to the “principles of *stare decisis*.”⁸⁵ She referred to the majority's moral and ethical considerations behind the ruling as “flimsy and transparent justifications” that uphold a ban without “any exception to safeguard a woman's health.”⁸⁶ In response to Justice Kennedy's claim that the Court's holding furthered the legitimate government interest laid out in *Casey*, Justice Ginsburg seemed to come to the opposite conclusion: “[T]he Act scarcely furthers that interest: The law saves not a single fetus from destruction, for it targets only a *method* of performing abortion. And surely the statute was not designed to protect the lives or health of pregnant women.”⁸⁷

Justice Ginsburg fervently noted that the Court was, in essence, denying women the right to make autonomous decisions with regard to their own body, even at the expense of their safety.⁸⁸ The ideology that the majority had adopted mirrored the primitive ideas of a woman's role in the family, and a Constitution that the Court had long distanced itself from.⁸⁹ Moreover, Ginsburg stated, “[a] decision

⁸² *Roe v. Wade*, 410 U.S. 113 (1973) *overruled in part by Gonzales*, 550 U.S. 124, 146, and *Casey*, 505 U.S. 833, 873.

⁸³ *Gonzales*, 550 U.S. at 171 (Ginsburg, J., dissenting).

⁸⁴ SUPREME COURT DECISIONS AND WOMEN'S RIGHTS, *supra* note 78, at 208.

⁸⁵ *See Gonzales*, 550 U.S. at 190–91 (Ginsburg, J., dissenting). Justice Ginsburg did acknowledge the differing makeup of the Court between the earlier decisions of *Roe*, *Casey*, and perhaps most importantly, *Stenberg* and the *Carhart* decision. *See id.* Making a major difference was the death of Chief Justice William Rehnquist in 2005, and the retirement of Justice Sandra Day O'Connor in 2006, replaced by Chief Justice Roberts and Justice Alito respectively—both conservative Catholics. SUPREME COURT DECISIONS AND WOMEN'S RIGHTS, *supra* note 78, at 208. Justice Kennedy, who had authored one of four dissents in *Stenberg*, took over Justice O'Connor's role as “the swing vote” after her retirement, casting the deciding vote in closely contested arguments. *See* Anthony V. Agudelo, *Gonzales v. Carhart – The Supreme Court's Recent Abortion Decision: What it Means Now and May Mean for the Future*, 9 SEC. REV. MASS. BAR ASS'N, no.3, 2007, at 24. Here, Kennedy was able to swing his dissent into the majority opinion. *Id.*

⁸⁶ *Gonzales*, 550 U.S. at 181 (Ginsburg, J., dissenting).

⁸⁷ *Id.* (citation omitted).

⁸⁸ *Id.* at 184.

⁸⁹ *Id.* at 185. In furtherance of her point, Justice Ginsburg cites a series of cases from the

so at odds with our jurisprudence” should not be able to have a lasting effect on the legal system.⁹⁰ The idea that the Act furthered any sort of legitimate government interest was “quite simply, irrational.”⁹¹

In Justice Ginsburg’s opinion, the majority’s sheer opposition to the former holdings in *Roe* and *Casey* is not at all camouflaged.⁹² To this point, her dissent heavily questions, in an almost criticizing manner, the language of the majority opinion, commenting specifically on Justice Kennedy’s preference for referring to the obstetricians, gynecologists, and surgeons that perform abortions not by their professional medical titles, but by simply referring to them as “abortion doctor[s].”⁹³ On the other hand, fetuses are referred to sympathetically as an “unborn child” and a “baby.”⁹⁴

Ginsburg asserted: “In candor, 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.”⁹⁵ In her oral dissent from the bench, Justice Ginsburg announced that she and Justices Stevens, Souter, and Breyer “strongly dissent[ed]” from the majority’s holding.⁹⁶ Lasting just over nine minutes and speaking on behalf of her and her liberal-minded colleagues, Ginsburg reiterated much of her thirteen-page dissent, speaking in a calm, yet unwavering voice.⁹⁷ Coverage of the oral dissent described her as reading “at a slow pace that caused every syllable to resonate.”⁹⁸ Another article described her words as “incandescent, shimmering with rage and steely reason.”⁹⁹

late 19th and early 20th centuries through the 1990s to show the progression of the Court in discrediting the idea of the “traditional role of the woman.” *Id.* Within her string cite, Ginsburg cites to a case she successfully argued before the Supreme Court in 1977 (*Califano*) and one she wrote the majority opinion for in 1996 (*United States v. Virginia*). *See id.*; Linda Greenhouse, *Justices Back Ban on Method of Abortion*, N.Y. TIMES (Apr. 19, 2007), http://www.nytimes.com/2007/04/19/washington/19scotus.html?n=Top%2FReference%2FTime%20Topics%2FPeople%2FG%2FGreenhouse%2C%20Linda&_r=0 [hereinafter *Justices Back Ban on Method of Abortion*].

⁹⁰ *Gonzales*, 550 U.S. at 191 (Ginsburg, J., dissenting).

⁹¹ *Id.*

⁹² *See id.* at 186.

⁹³ *Id.* at 186–87.

⁹⁴ *Id.* at 187.

⁹⁵ *Id.* at 191.

⁹⁶ Oral Dissent of Justice Ginsburg at 7:27, *Gonzales*, 550 U.S. 124 (No. 05-380), http://www.oyez.org/cases/2000-2009/2006/2006_05_380.

⁹⁷ *See id.* (transcribing Justice Ginsburg’s reading of her dissent from the bench).

⁹⁸ *Justices Back Ban on Method of Abortion*, *supra* note 89.

⁹⁹ Rebecca Traister, *Hell Hath No Fury like Ruth Bader Ginsburg*, SALON (Feb. 6, 2009), http://www.salon.com/2009/02/06/ruth_bader_ginsburg/.

*B. The Gonzales Dissent and Ginsburg*1. The *Gonzales* Effect and the Decision to Dissent

In addition to a sheer disagreement in the law and policy implications, “Justice[s] [are] more likely to write separately in an opinion when [they feel] ideologically distant from [their] colleagues.”¹⁰⁰ To say that Justice Ginsburg felt ideologically distant from her fellow members of the Court after the *Gonzales* decision would be an understatement. *Gonzales* served as the first major setback in abortion rulings by the Supreme Court.¹⁰¹ For the first time in over thirty years, the Court legitimated statutory restrictions on a woman’s right to choose and refrained from asserting that protecting women’s health is a valid state interest.¹⁰² For Justice Ginsburg, however, this was more than just a ruling that she did not agree with; it was an assault on everything she’d spent her legal career working for.¹⁰³ Ginsburg had spent a majority of her legal career advocating for, and on behalf of, women and their right to effectively choose—whether it be in terms of sheer equality in the workplace or autonomy in their bodies—and once she was appointed to the Supreme Court, was able to help foster that ideology into the majority, dissenting, and concurring opinions she authored.¹⁰⁴ *Gonzales* spiraled that work into reverse; states would now be permitted to place restrictions on abortions, and while a full ban on the practice was not set into place, the decision “fail[ed] to safeguard the preservation of a woman’s health as part of her constitutional right to personhood.”¹⁰⁵

The task of authoring the dissent hung heavy on Ginsburg’s shoulders. Extensive background in the area of women’s equality aside, the makeup of the Court during the 2007 Term provided for no one else. At the time the *Gonzales* decision was handed down in 2007, Justice Ginsburg was the only female justice, surrounded by eight men who, because they were male, would never have to face the

¹⁰⁰ Timothy R. Johnson, et al., *Hear Me Roar: What Provokes Supreme Court Justices to Dissent from the Bench?*, 93 MINN. L. REV. 1560, 1570 (2009).

¹⁰¹ See Martha K. Plante, “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, 389 (2008).

¹⁰² *Id.*

¹⁰³ *Justices Back Ban on Method of Abortion*, *supra* note 89.

¹⁰⁴ See discussion *supra* Parts II.A, II.B.

¹⁰⁵ Plante, *supra* note 101, at 389.

consequences of the decision they had just rendered.¹⁰⁶ Just three months before the Court published the opinion, Justice Ginsburg, speaking at an assembly at Suffolk Law School, stated that she felt lonely in Justice O'Connor's absence.¹⁰⁷ While Justice Ginsburg surely missed having someone to girl talk with on lunch breaks, her loneliness was undoubtedly more than that. Justice O'Connor had retired two years prior, and although they sat on different ends of the political spectrum, Justice Ginsburg declared that in O'Connor's absence she missed someone to share "certain sensitivities that [their] male colleagues lacked."¹⁰⁸ Justice Ginsburg acknowledged that even though the two were often divided on many of the important issues they faced during their time on the Court, they still shared a single important trait: they were both women, and therefore, they both shared the same experiences in attempting to forge a legal career in a male-dominated profession.¹⁰⁹ While it is possible that O'Connor would have fallen along party lines in the holding,¹¹⁰ there was still the lingering possibility that she may have taken those common experiences into account when rendering a decision.¹¹¹ But with O'Connor gone, the opportunity to attempt to transform this unfavorable decision into a teaching vehicle for the future of women's autonomy fell into Ginsburg's ready hands. As the

¹⁰⁶ See Traister, *supra* note 99.

¹⁰⁷ Ken Maguire, *Ginsburg Laments Solitary Role on Court*, WASH. POST (Jan. 26, 2007), http://www.washingtonpost.com/wpdyn/content/article/2007/01/26/AR2007012602037_pf.html.

¹⁰⁸ *Id.*; Traister, *supra* note 99.

¹⁰⁹ See Maguire, *supra* note 107. In an interview with Linda Greenhouse, Ginsburg disclosed that throughout the twelve years she sat with O'Connor on the Court, lawyers would often call her Justice O'Connor and vice versa. Ruth Bader Ginsburg with Linda Greenhouse, *A Conversation with Justice Ginsburg*, 122 YALE L.J. ONLINE 283, 299 (2013), <http://yalelawjournal.org/forum/a-conversation-with-justice-ginsburg> [hereinafter *A Conversation with Ginsburg*]. Eventually, the National Association of Women Judges presented the two female judges with shirts; O'Connor's read, "I'm Sandra, Not Ruth," while Ginsburg's read "I'm Ruth, Not Sandra." *Id.* Ginsburg stated that a similar phenomenon happened while she was serving as a judge on the D.C. Circuit, where lawyers knew there was a female judge on the bench, and referred to her as her predecessor, Judge Wald. *Id.*

¹¹⁰ The 5-4 decision seemingly fell along party lines, with conservative bloc of the Court (Roberts, Scalia, Thomas, Alito and Kennedy) siding with the majority, and the liberal bloc (Ginsburg, Stevens, Souter, and Breyer) were the minority. See Oral Dissent of Justice Ginsburg, *supra* note 96.

¹¹¹ Much like Ginsburg, O'Connor graduated in the top of her class at Stanford Law School and yet still found herself turned down by at least forty different law firms solely because she was a woman. *'Out of Order' at the Court: O'Connor on Being the First Female Justice*, NPR (Mar. 5, 2013), <http://www.npr.org/2013/03/05/172982275/out-of-order-at-the-court-oconnor-on-being-the-first-female-justice>. Additionally, although she did not necessarily enjoy the term, O'Connor was often regarded as the "swing vote" in many decisions, siding sometimes with the conservative bloc and other times with the liberal bloc. *Id.*

lone woman, she knew that her dissent would be speaking on behalf of the entire American female population, and she was ready for her voice to be heard.¹¹²

2. *Gonzales* Dissent Within the Realm of Ginsburg's Jurisprudence

Following in the pattern that she seemingly set for herself, Ginsburg's dissent in *Gonzales* represents a divergence from a majority opinion that both reaches an unnecessarily far result and neglects to account for previously binding precedent set in *Casey* and *Roe*.¹¹³ In that respect, the *Gonzales* dissent fits neatly within Ginsburg's prior jurisprudence. The opinion, however, is not a picture perfect model of dissents past. The tone that Ginsburg elicits in *Gonzales* is in stark contrast to the dissenting opinions she authored predating 2003. Straying from her established candor of moderation and collegiality,¹¹⁴ Ginsburg instead attacks her opposing justice's rationale, using terms like "flimsy," "transparent," and "irrational" to describe the majority's argument.¹¹⁵

The *Gonzales* dissent did what feminists—those striving for equality among the sexes—and Ginsburg herself had been waiting for the Justices to do. From her decades as a lawyer to her time as a Supreme Court Justice, Ginsburg viewed the laws that deny women power in their own bodies, i.e., whether and when they decide to have children, as questions of not only equality, but also liberty and privacy.¹¹⁶ Ginsburg and other budding feminists like her centered their arguments on the fact that "the state may not deprive women of control over the decision to become mothers without depriving them of equal citizenship."¹¹⁷ Well before her appointment to the Court, she wrote that, eventually, the Court would have to take all of these taboo "consequences" of being a woman—abortion, having children out of wedlock, pregnancy, and other explicit gender-based

¹¹² See Bazelon, *supra* note 42; Keynote Address, *supra* note 65, at 1, 6; *Oral Dissents*, *supra* note 58. Ginsburg herself found Greenhouse's statement that the Justice had "found her voice" quite comical, going as far to say that the appraisal surprised not only her family and clerks, but also her colleagues on the Court, as, at some point or another, all of them had heard her voice—"sometimes to stirring effect." Keynote Address, *supra* note 65, at 1, 6; *Oral dissents*, *supra* note 58.

¹¹³ See Ray, *supra* note 60, at 655.

¹¹⁴ *Id.*

¹¹⁵ *Gonzales v. Carhart*, 550 U.S. 124, 181, 191 (2007) (Ginsburg, J., dissenting).

¹¹⁶ Reva B. Siegel, *Equality and Choice: Sex Equality Perspectives on Reproductive Rights in the Work of Ruth Bader Ginsburg*, 25 COLUM. J. GENDER & L. 63, 63 (2013).

¹¹⁷ *Id.*

disparities—out of these separate compartments, acknowledge that they were part of a common problem, and then treat that problem as a single gender equality issue.¹¹⁸ Ginsburg’s own writings came to fruition in her *Gonzales* dissent, fusing equal protection sex discrimination case law with other equality arguments found within the realm of the Equal Protection Clause.¹¹⁹

As with all dissenting opinions, Justice Ginsburg undoubtedly authored *Gonzales* with the belief that her words would be the spark that ignited a future majority; that given the right fact pattern, this segment of the gender equality issue she had fought for so long would be settled once and for all. Not even six years later, the Tenth Circuit reversed an Oklahoma District Court opinion and granted a preliminary injunction from compliance with the contraceptive mandate embedded in the recently passed Patient Protection and Affordable Care Act.¹²⁰ On November 26, 2013, the Supreme Court granted a writ of certiorari, and women’s autonomy again fell in the hands of the nine justices.¹²¹

IV. BURWELL V. HOBBY LOBBY STORES, INC.¹²²

A. *The Majority & the Dissent*

At its core, the *Hobby Lobby* case centered on the hotly contested portion of the Affordable Care Act known as the contraceptive mandate, which required employers to provide health insurance coverage for certain FDA-approved contraceptives, including two types of morning-after pills and two intrauterine devices.¹²³ The opinion consolidated decisions from two divided appellate courts,¹²⁴

¹¹⁸ Ruth Bader Ginsburg, *Sex Equality and the Constitution*, 52 TUL. L. REV. 451, 462 (1978).

¹¹⁹ Siegel, *supra* note 116, at 74.

¹²⁰ See *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1120–21, 1147 (10th Cir. 2013), *aff’d sub nom.* *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014).

¹²¹ *Sebelius v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 678, 678 (2013).

¹²² *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). In April 2014, then Secretary of Health and Human Services, Kathleen Sebelius, whom Hobby Lobby named as defendant to their suit two years prior, resigned from her position amidst fallout from the Affordable Care Act. Michael D. Shear, *Sebelius Resigns After Troubles Over Health Site*, N.Y. TIMES (April 10, 2014), <http://www.nytimes.com/2014/04/11/us/politics/sebelius-resigning-as-health-secretary.html>.

¹²³ See *Hobby Lobby*, 134 S. Ct. at 2765.

¹²⁴ *Id.* 2765, 2766. In addition to Hobby Lobby’s claim, the opinion examined a decision from the Third Circuit, which held that a for-profit corporation—Conestoga Wood Specialties—could not exercise “religion” for purposes of either the Religious Freedom Restoration Act or the First Amendment. *Id.* at 2765. The Third Circuit also rejected the belief that the contraceptive mandate imposed restrictions on the owners of the corporation—the Hahn family—in their

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but focused much of its attention on the Green family and their company, Hobby Lobby Stores, Inc., which they ran very much in tune with their devout Christian faith.¹²⁵ In a 5–4 decision, the Court held that the Religious Freedom Restoration Act of 1993 (RFRA) did not allow the Department of Health and Human Services (HHS) to compel closely held corporations to comply with the contraceptive mandate when it infringed upon the beliefs of the corporate owners.¹²⁶ Family-run corporations would not be forced to set aside their religious beliefs, and could, by law, deny contraceptive coverage to their employees.¹²⁷ The majority opinion, penned by Justice Samuel Alito, essentially set out three important points: (1) RFRA applied to corporations; (2) the contraceptive mandate targeted corporations like Hobby Lobby, saddling them with a substantial burden,¹²⁸ and (3) the government failed to employ the “least restrictive means to further [their] compelling governmental interest.”¹²⁹ While Justice Alito conceded that the contraceptive mandate did serve a compelling governmental interest, he stressed that there were other ways either Congress or HHS could ensure that all woman had effective and equal access to free contraceptives.¹³⁰

In Justice Alito’s own words, the holding in *Hobby Lobby* is “very specific.”¹³¹ Failing to acknowledge Justice Ginsburg by name, the majority downplays the distress of the “principal dissent,” stating that “[t]he effect of the HHS-created accommodation on the women employed by Hobby Lobby and the other companies involved in these cases would be precisely zero.”¹³² Women, he asserted, were still

personal capacity. *Id.*

¹²⁵ *Id.* at 2765–66. Every staff meeting began with a reading from the Bible, a Christian-based mediation program was used to settle disputes, and all stores across the country were closed on Sundays. Stephanie Mencimer, *Are You There God? It’s Me, Hobby Lobby*, MOTHER JONES (Mar. 21, 2014), <http://www.motherjones.com/politics/2014/03/hobby-lobby-supreme-court-obamacare>.

¹²⁶ *Hobby Lobby*, 134 S. Ct. at 2759.

¹²⁷ See John Schwartz, *Between the Lines of the Contraception Decision* N.Y. TIMES (June 30, 2014), <http://www.nytimes.com/interactive/2014/06/30/us/annotated-supreme-court-hobby-lobby-contraception-decision.html>.

¹²⁸ The “substantial burden” referenced by the majority opinion does not focus solely on the burden placed on the individual (or family, in this situation) through the corporation, but also centers on whether a substantial burden was placed upon the corporate owner’s religious beliefs. See *Hobby Lobby*, 134 S. Ct. at 2779. The majority further noted that Hobby Lobby would have to pay upwards of \$475 million a year if they failed to comply with the mandate, thereby constituting a substantial burden on the company’s religious beliefs. *Id.*

¹²⁹ See Schwartz, *supra* note 127.

¹³⁰ See *Hobby Lobby*, 134 S. Ct. at 2759.

¹³¹ *Id.* at 2760.

¹³² *Id.*

permitted to obtain the FDA-approved contraceptives, just simply without the cost-sharing feature.¹³³

Justice Ginsburg authored the primary opinion on behalf of the minority; a dissent that comprised thirty-five pages and forced the entire decision to be delivered to the press room in two boxes.¹³⁴ The language Ginsburg chooses for her opening line sets the tone for the entire piece: “[i]n 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.”¹³⁵ While a large portion of Justice Ginsburg’s analysis focuses on the interplay of RFRA, the Free Exercise Clause of the First Amendment, and the alleged religious beliefs of the corporate entity,¹³⁶ she does emphasize the larger issue at hand—the underlying foremost consequence of the majority’s ruling: the effect the decision has on women. Ginsburg again relies upon the Court’s holding in *Casey* in an attempt to illustrate how much of a significant regression the majority’s holding is in the area of women’s autonomy; this time, Ginsburg relies on the Court’s language in *Casey* as an effort to lay the foundation for the necessity of the contraceptive mandate: “The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.”¹³⁷ Against this principle, she provides the framework for the contraceptive mandate within the Affordable Care Act—an attempt to “enlighten the Court’s resolution of these cases.”¹³⁸

Any effect the contraceptive mandate would have on the exercise of religion, Justice Ginsburg asserts, would be at best incidental.¹³⁹ The mandate was prefaced as a safeguard of women’s health, and the decision “den[ies] legions of women who do not hold their employers’

¹³³ *Id.*

¹³⁴ *Live Blog*, *supra* note 2.

¹³⁵ *Hobby Lobby*, 134 S. Ct. at 2787 (Ginsburg, J., dissenting).

¹³⁶ *See id.* at 2787, 2791–98.

¹³⁷ *Id.* at 2787–88 (quoting *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 856 (1992)) (internal quotation marks omitted).

¹³⁸ In its original form, the Affordable Care Act lacked coverage for preventative services that many women’s health supported believed to be critical. *Hobby Lobby*, 134 S. Ct. at 2788 (Ginsburg, J., dissenting). The Women’s Health Amendment corrected this oversight, requiring insurance plans to include coverage of women’s preventative services, as an effort to combat the statistical evidence that women spend up to sixty-eight percent more than men in out of pocket health care expenses. *Id.*

¹³⁹ *Id.* at 2790.

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beliefs access to contraceptive coverage that the ACA would otherwise secure.”¹⁴⁰ The majority omits an essential inquiry in its opinion—an analysis of the correlation between the families’ religious oppositions and the required contraceptive coverage under the ACA.¹⁴¹ For Ginsburg, the connection is far too attenuated to categorize as substantial.¹⁴² The mandate does not require companies like Hobby Lobby or Conestoga to directly provide their employees with any of the contraceptives they deem controversial or religiously offensive, but instead, calls for them to place money into certain funds that would support contraceptive coverage without cost sharing, just as is required with other preventative services.¹⁴³ Ginsburg cites that if a female employee shares in the religious beliefs of her employer, she is under no obligation to use the preventative coverage in question.¹⁴⁴ Herein lies Ginsburg’s distress with the majority opinion as a whole, and relying upon a dissenting opinion from the Seventh Circuit, she balks at the majority’s suggestion that women should be denied control over their reproductive rights: “No individual decision by an employee and her physician—be it to use contraception, treat an infection, or have a hip replaced—is in any meaningful sense [her employer’s] decision or action.”¹⁴⁵ She continues:

It is doubtful that Congress, when it specified that burdens must be “substantia[l],” had in mind a linkage thus interrupted by independent decisionmakers (the woman and her health counselor) standing between the challenged government action and the religious exercise claimed to be infringed. Any decision to use contraceptives made by a woman covered under Hobby Lobby’s or Conestoga’s plan will not be propelled by the Government, it will be the woman’s autonomous choice, informed by the physician she consults.¹⁴⁶

Assuming that the companies were able to meet this substantial burden requirement, Justice Ginsburg focuses on the correlation between the contraceptive mandate and the Government’s

¹⁴⁰ *Id.* (citing *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 93 (Cal. 2004)).

¹⁴¹ *See Hobby Lobby*, 134 S. Ct. at 2799 (Ginsburg, J., dissenting).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* (second alteration in original) (quoting *Grote v. Sebelius*, 708 F. 3d 850, 865 (7th Cir. 2013) (Rovner, J., dissenting)) (internal quotation marks omitted).

¹⁴⁶ *Hobby Lobby*, 134 S. Ct. at 2799 (Ginsburg, J., dissenting) (alteration in original).

compelling interest behind it—women’s well-being and public health.¹⁴⁷ Here, she cites the “wealth of empirical evidence” in the Government’s favor: enabling women to evade health problems associated with unintended pregnancies, safeguarding women against pregnancies that may be hazardous to their health, and ensuring benefits not related to pregnancy, like cancer prevention.¹⁴⁸

In Ginsburg’s opinion, the majority’s holding is far from narrow in its scope.¹⁴⁹ In that vein, she questions how limited in scope this decision could be when, under the precedent the Court set forward, an employer could claim that coverage of vaccines, paying minimum wage, or even affording women equal pay was in opposition of their religious beliefs.¹⁵⁰ The Justice ends her dissent with a tone just as biting as in her opening: “The Court, I fear, has ventured into a minefield.”¹⁵¹

In her oral dissent from the bench, Justice Ginsburg proclaimed that she, along with Justices Breyer, Sotomayor, and Kagan found “in [RFRA] no design to permit the opt-outs in question.”¹⁵² Justice Ginsburg echoed much of her thirty-five-page dissent in her nearly fifteen minute oral reading, asserting that by reading RFRA “expansively,” the majority opinion is forced to ask a lot of “me-too-questions”—one of which being, “[w]hat if the employer whose religious faith teaches that it is sinful to employ a single woman without her father’s consent or a married woman without her mother’s consent?”¹⁵³ The examples she provides, she notes, are not hypothetical.¹⁵⁴

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *See id.* at 2760 (majority opinion).

¹⁵⁰ *Id.* at 2802 (Ginsburg, J., dissenting) (citing *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 303 (1985); *Dole v. Shenandoah Baptist Church*, 899 F. 2d 1389, 1392 (1990)).

¹⁵¹ *Hobby Lobby*, 134 S. Ct. at 2805 (Ginsburg, J., dissenting).

¹⁵² Oral Dissent of Justice Ginsburg at Part 2, 0:50, *Hobby Lobby*, 134 S. Ct. 2751 (2014) (No. 13-354), http://www.oyez.org/cases/2010-2019/2013/2013_13_354.

¹⁵³ *See id.* at 1:37. The “single woman/married woman” question Ginsburg poses in this section addresses the consequences that the majority holding would have on other federal statutes; here she is specifically referencing Title VII’s ban on gender discrimination in employment. *Id.* at 2:04.

¹⁵⁴ *Id.* at 2:46.

B. The Hobby Lobby Dissent and Ginsburg

1. The Decision to Dissent

Ginsburg's ideological distance from her colleagues post-*Hobby Lobby* undoubtedly mirrored that of the *Gonzales* decision seven years prior.¹⁵⁵ The idea fortifying Justice Alito's majority opinion centered on the belief that the thousands of women who worked for Hobby Lobby could seek new employment with a company more in tune with their beliefs and needs.¹⁵⁶ A woman's right to choose comes into question, and while that choice still exists, the multitude of restrictions placed upon that right eliminates any sort of options for women.¹⁵⁷ Not only was the majority opinion a direct onslaught against Justice Ginsburg's livelihood, but it also negated the principles behind the *Gonzales* dissent.

In a rare interview with Yahoo's Global News Anchor Katie Couric not even a month after the decision, Justice Ginsburg spoke candidly about her dissent.¹⁵⁸ She, quite frankly, asserted:

Contraceptive protection is something that every woman must have access to to control her own destiny. I certainly respect the belief of the Hobby Lobby owners; on the other hand they have no constitutional right to force that belief on the hundreds and hundreds of woman who work for them who don't share that belief.¹⁵⁹

Until the majority's interpretation, she had never heard the Free Exercise Clause construed in such a way.¹⁶⁰

Faced with a situation similar to that of *Gonzales*, an all-male majority handed down a decision that has consequences that affect only women.¹⁶¹ Ginsburg stated outright that she does not believe the male judges fully understand the severe implications that their decision has on American women.¹⁶² She acknowledged that her male

¹⁵⁵ See Johnson et al., *supra* note 100, at 1570–71.

¹⁵⁶ See Ann Friedman, *What a Woman's Choice Means to the Supreme Court and Social Conservatives*, N.Y. MAG. (July 1, 2014), <http://nymag.com/thecut/2014/07/what-a-womans-choice-means-to-the-supreme-court.html>.

¹⁵⁷ *Id.*

¹⁵⁸ *Exclusive: Ruth Bader Ginsburg on Hobby Lobby, Roe v. Wade, Retirement and Notorious R.B.G.*, YAHOO NEWS (July 31, 2014), <http://www.news.yahoo.com/video/exclusive-ruth-bader-ginsburg-hobby-091819044.html> [hereinafter YAHOO NEWS VIDEO].

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*; see also *supra* text accompanying note 110 (describing the vote in *Gonzales*).

¹⁶² *Id.*

counterparts did indeed have a “blind spot” when it came to rendering the decision in *Hobby Lobby*, one that had not been seen in this area since the *Ledbetter v. Goodyear Tire & Rubber Co.*¹⁶³ decision seven years prior.¹⁶⁴ Still, Ginsburg stated—with a little trepidation—that she was “ever hopeful that if the Court has a blind spot today, its eyes could be open tomorrow.”¹⁶⁵

2. The *Hobby Lobby* Effect

To understand the effect that the *Hobby Lobby* decision had upon the American political and legal landscape entails a comparison of that dissent to the one Justice Ginsburg delivered in *Gonzales*. At their core, both chastise an all-male majority for prohibiting a woman from accessing certain preventative procedures, and thereby, restricting her from exercising autonomy in her own body. In essence, they stand for the same principles and evoke the same feelings. The *Hobby Lobby* decision, however, was issued during the “perfect storm”—the rebirth of the modern feminist movement. Within the past five years, the once negative connotation attached to the feminist term has been turned on its head, thanks in part to the characterization of women in the media and increasing restrictions based upon women’s everyday lives, as well as the growing number of celebrities who have taken up the cause.¹⁶⁶ No longer is feminism

¹⁶³ *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).

¹⁶⁴ YAHOO NEWS VIDEO, *supra* note 158. The *Ledbetter* case marks another notable dissent based upon a controversial decision within Justice Ginsburg’s Supreme Court legacy. In that case, a divided Court ruled that Lilly Ledbetter, the sole female supervisor at a Goodyear Tire plant, did not file her lawsuit against the corporation in a timely manner in accordance with Title VII of the Civil Rights Act, and thereby, could not sue the company over unequal pay caused by past alleged discrimination. Robert Barnes, *Over Ginsburg’s Dissent, Court Limits Bias Suits*, WASH. POST (May 30, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/05/29/AR2007052900740.html>.

¹⁶⁵ YAHOO NEWS VIDEO, *supra* note 158.

¹⁶⁶ See Marisa Meltzer, *Who Is a Feminist Now?*, N.Y. TIMES (May 21, 2014), http://www.nytimes.com/2014/05/22/fashion/who-is-a-feminist-now.html?_r=0; *The New Do: Calling Yourself a Feminist*, GLAMOUR MAG. (Sept. 16, 2013), <http://www.glamour.com/inspired/2013/09/the-new-do-calling-yourself-a-feminist> [hereinafter *The New Do*]. While the resurgence of feminism cannot and should not solely be credited upon celebrity endorsement, it has without a doubt been thrust into the limelight, especially within the past year. See *The New Do, supra*. High profile, and equally highly influential musician Beyoncé featured excerpts from Nigerian novelist Chimamanda Ngozi Adichie’s acclaimed 2013 TED talk, “We Should All Be Feminists” in her 2014 hit song, “Flawless.” Meltzer, *supra*. The year 2014 also saw the global launch, primarily through social media, of actress Emma Watson’s #HeForShe campaign, which engages men in the conversation. Shelley Zalis, *Modern Fe-MEN-ism: Why Today’s Feminist Movement Must Include Men*, HUFFINGTON POST (Feb. 22, 2014, 5:59 AM), <http://www.huffingtonpost.com/shelley-zalis/modern-femenism-why-todays-feminist->

a word riddled with negative connotations or stereotypes, immediately conjuring thoughts of a threat to manhood or scathing aggression.¹⁶⁷ The resurgence, instead, has been widespread, filtering further than mere celebrity endorsements and settling in the rebranding of popular women's magazines like *Elle* and *Cosmopolitan*—who have recently deemed themselves feminist productions—and even into areas of modern culture that theoretically fuel the idea of women's insecurity and imperfection: the fashion world.¹⁶⁸ With “feminism” the theme of major fashion house Chanel's spring 2015 collection, the pursuit of gender equality has almost become “trendy.”¹⁶⁹ The number of women who have identified as “feminist” has gone up at least twelve percent between the years of 2006 and 2012, and around forty-two percent of women under thirty celebrate the fact they are feminists.¹⁷⁰

It was against this backdrop that the *Hobby Lobby* decision was rendered, and a dissent of such magnitude by Justice Ginsburg was in a much better position to gain traction in mainstream media than just a few years prior. Where the *Gonzales* dissent was featured as front-page news in many of the nation's leading newspapers,¹⁷¹ the *Hobby Lobby* dissent received that and more. In addition to the Twitter hashtag—from which the title of this paper comes—the dissent sparked a myriad of unconventional media coverage, including song lyrics featuring quotes from the opinion.¹⁷² In addition to the aforementioned Planned Parenthood petition and

movement-must-include-men_b_6368440.html.

¹⁶⁷ See Kristin Kalsem & Verna L. Williams, *Social Justice Feminism*, 18 UCLA WOMEN'S L.J. 131, 140–41 (2010).

¹⁶⁸ See Callie Beusman, *What Does It Mean for Feminism if Feminism Becomes Trendy?*, JEZEBEL (Feb. 23, 2014, 4:30 PM), <http://jezebel.com/what-does-it-mean-for-feminism-if-feminism-becomes-tren-1501305340>; Robin Givhan, *What Does a Feminist Look Like? At Paris Fashion Week, She's Wearing Chanel*, WASH. POST (Sept. 30, 2014), <https://www.washingtonpost.com/news/style-blog/wp/2014/09/30/what-does-a-feminist-look-like-at-paris-fashion-week-shes-wearing-chanel/>.

¹⁶⁹ Givhan, *supra* note 168. The finale of the runway show featured the models marching with picket signs stating, “Feminist but Feminine,” “Be Your Own Stylist,” “History Is Her Story,” and “Boys Should Get Pregnant, Too” set to the backdrop of Chaka Khan's “I'm Every Woman.” *Id.*

¹⁷⁰ *The New Do*, *supra* note 166.

¹⁷¹ See, e.g., Robert Barnes, *High Court Upholds Curb on Abortion*, WASH. POST (Apr. 19, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/04/18/AR2007041800710.html>; *Justices Back Ban on Method of Abortion*, *supra* note 89.

¹⁷² Nia-Malika Henderson, *How Justice Ginsburg's Hobby Lobby Dissent Helps Shape the Debate About Reproductive vs. Religious Rights*, WASH. POST (July 1, 2014), <http://www.washingtonpost.com/blogs/she-the-people/wp/2014/07/01/how-justice-ginsburgs-hobby-lobby-dissent-helps-shape-the-debate-about-reproductive-and-religious-rights/>.

Katie Couric interview,¹⁷³ Justice Ginsburg was also the subject of a 5,000-word piece in *Elle* Magazine, discussing not only her rise and role on the Court, but also the ramifications of the *Hobby Lobby* decision.¹⁷⁴ In that article, when asked to name the decision from her tenure on the Court that would be most significant in fifty years, Ginsburg responded:

Well, I think 50 years from now, people will not be able to understand *Hobby Lobby*. Oh, and I think on the issue of choice, one of the reasons, to be frank, that there's not so much pro-choice activity is that young women, including my daughter and my granddaughter, have grown up in a world where they know if they need an abortion, they can get it. Not that either one of them has had one, but it's comforting to know if they need it, they can get it. The impact of all these restrictions is on poor women, because women who have means, if their state doesn't provide access, another state does. I think that the country will wake up and see that it can never go back to [abortions just] for women who can afford to travel to a neighboring state¹⁷⁵

Ginsburg's dissent in *Hobby Lobby*, undoubtedly, did not come without criticism. According to some legal experts, the dissent acts as its own "self-fulfilling prophecy. By stating that the opinion is much broader than the majority claims it to be, [Ginsburg] may be providing lower-court judges with a stronger foundation to provide more religious exemptions in the future."¹⁷⁶ In essence, Justice Ginsburg's broad application of the decision provides the necessary dicta to further the application of more religious restrictions.¹⁷⁷ The dissent was also accused of overstating the majority opinion, a misreading of Justice Alito's application that was transformed into a women's issue, when in actuality, the decision simply spoke on whether an employer must pay something that is in violation of its religious beliefs.¹⁷⁸ As senior counsel at the National Women's Law Center, Gretchen Borchelt, stated, "[this] tension will contribute to raising this next generation of questions about what the decision

¹⁷³ See *supra* notes 9, 158–65 and accompanying text.

¹⁷⁴ Weisberg, *supra* note 45.

¹⁷⁵ *Id.* (alterations in original).

¹⁷⁶ Adam Serwer, *Why Ginsburg's Hobby Lobby Dissent Might Backfire*, MSNBC (July 1, 2014), <http://www.msnbc.com/msnbc/why-ginsburgs-hobby-lobby-dissent-might-backfire>.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

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really means.”¹⁷⁹

V. CONCLUSION

Similar in subject matter, Justice Ginsburg’s dissenting opinions in both *Gonzales v. Carhart* and *Burwell v. Hobby Lobby* sought to shape the future of legal challenges to women’s autonomy. Although Ginsburg’s call for reform was not answered in the wake of *Carhart*, the “blind spot” that sits within the male majority of the Roberts Court is closer to being broken down than it was in 2007. How the lower courts will interpret the *Hobby Lobby* decision has yet to be seen, but with the current state of the wider legal community, a challenge to the decision—whether it be directly in terms of contraceptive coverage or of a “me too” question—cannot be far from the forefront. What is apparent, however, is that the current feminist revival serves as the perfect backdrop to propel the *Hobby Lobby* dissent to the forefront of the legal landscape. More so than in the wake of *Gonzales*, the twenty-something generation is taking note of the lack of control women have in reproductive and preventative care, and they are rallying behind the *Hobby Lobby* dissent. There is no guarantee that this “perfect storm” rebirth of the feminist movement will last longer than the feminist waves of the past; however, casting the pros and cons of the coined term aside, this “trendy feminism” has created the perfect breeding ground for movement in the area of women’s autonomy in the legal system. This swell of new feminists, backed by the unadulterated sway of the pop culture medium, will not allow for a repeat of the *Gonzales* aftermath. If there is one thing that the dissenting opinion stands for in our legal jurisprudence it is the belief that these opinions will educate and influence the legal decisions of the future. And if not *Hobby Lobby*, Justice Ginsburg—flanked by the growing number of women on the Court—stand poised and ready to speak on behalf of the minority. In Justice Ginsburg’s own words: “[A]lthough I appreciate the value of unanimous opinions, I will continue to speak in dissent when important matters are at stake.”¹⁸⁰

¹⁷⁹ Henderson, *supra* note 172.

¹⁸⁰ Justice Ruth Bader Ginsburg, Presentation to the Harvard Club of Washington D.C.: The Role of Dissenting Opinions (Dec. 17, 2009), in 95 MINN. L. REV. 1, 7 (2010).