

CONTINGENT PEDAGOGICAL SPACES: THE NEWARK REBELLION, THE “PEOPLE’S ELECTRIC LAW SCHOOL,” AND HOW PROFESSOR RUTH BADER GINSBURG BECAME THE NOTORIOUS RBG¹

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Abstract

Justice Ruth Bader Ginsburg began her academic career at Rutgers Law School in Newark (RLSN), where she taught from 1963 to 1972. This period was marked by national upheaval and was especially tumultuous for Newark, which in 1967 experienced a civil uprising—referred to by locals as the “Rebellion”—following the police beating of Black cab driver John “J.W.” Smith. The Rebellion left 26 people dead, including 23 Black Newark residents, and caused over \$10 million in property damage. It arose from Newark’s longstanding political and economic marginalization of its majority Black community, particularly longstanding friction with the predominately White police force. At the time, Rutgers Law School—

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Newark, located just blocks away from the unrest, had only three Black students and no Black faculty members. This article, based on over 30 interviews with former RLSN students, Justice Ginsburg's colleagues, community activists, and John Smith's brother, examines then-Professor Ginsburg's pivotal role in driving rapid, transformative changes at RLSN in response to the Rebellion. Her efforts helped make RLSN one of the most diverse law schools in the country and introduced live-client clinical education on a broad scale as the school adapted its curriculum to engage more fully with its urban environment. As I will argue, the period from 1967 to 1972 proved not only transformative for RLSN and legal education, but Ginsburg's integral role in these changes provided a critical foundation for Ginsburg to develop her pioneering legal work in gender equality and sharpened her ideas about the importance of diverse and inclusive spaces to foster meaningful opportunities. The ideas and experiences gleaned during this period reverberated throughout her 27 years as an Associate Justice on the United States Supreme Court and offers valuable lessons, particularly for workplaces, as we navigate a post-*Students for Fair Admissions v. President and Fellows of Harvard College* world—a case accepted by the Court shortly after Justice Ginsburg's death and one that ultimately curtailed racial diversity as a factor in higher education admissions.

“[I am an] insignificant dude, one little pawn.”

- John “J.W.” Smith²

“When I grow up, I want to be a Supreme Court Judge. When people say, ‘You honor, he did rob the bank, I will say, ‘Be seated.’ And if he doesn’t, I will tell the guard to take him out. Then I will beat my hammer on the desk. Then everybody will be quiet.”

- George Floyd (in second grade)³

“[W]e are not far distant from an overtly discriminatory past, and the effects of centuries of law-sanctioned inequality remain painfully evident in

² Mark Wineka, *July 12, 1967: When a Reluctant Salisburian Collided with History*, SALISBURY POST (July 13, 2017, at 00:00 ET), <https://www.salisburypost.com/2017/07/13/july-12-1967-reluctant-salisburian-collided-history/> [https://perma.cc/7M6Y-P6JA].

³ Jackie Salo, *George Floyd's Childhood Dream Was to Become a Supreme Court Justice*, N.Y. POST (June 11, 2020, at 14:52 ET), <https://nypost.com/2020/06/11/george-floyds-dream-was-to-become-a-supreme-court-justice/> [https://perma.cc/ZF2Y-VAFZ]; see also Mandi Heshmati, *George Floyd as a Child ‘Wanted to Become Supreme Court Judge,’ Teacher Remembers*, FRANCE 24 (Oct. 6, 2020, at 18:01 ET), <https://www.france24.com/en/20200610-george-floyd-as-a-child-wanted-to-become-supreme-court-judge-teacher-remembers> [https://perma.cc/ZF2Y-VAFZ].

our communities and schools. In the wake 'of a system of racial caste only recently ended,' [citation omitted] large disparities endure. Unemployment, poverty, and access to health care vary disproportionately by race. Neighborhoods and schools remain racially divided. African American and Hispanic children are all too often educated in poverty-stricken and underperforming institutions. Adult African Americans and Hispanics generally earn less than whites with equivalent levels of education. Equally credentialed job applicants receive different receptions depending on their race. Irrational prejudice is still encountered in real estate markets and consumer transactions."

- Ruth Bader Ginsburg⁴

"The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."

- Chief Justice John Roberts⁵

⁴ Gratz v. Bollinger, 539 U.S. 244, 298-300 (2003) (Ginsburg, J., dissenting).

⁵ Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007).

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PROLOGUE

On July 12, 1967, John Smith had gotten a late start to the day.⁶ Smith, with his improbable everyman name, would appear on the July 21, 1967, cover of Time Magazine as “Newark Cab Driver John Smith”—an identity that would endure for more than 50 years long after he passed.⁷ To his friends and family, however, he was known as “J.W.” or “Smitty,” a virtuoso jazz trumpeter, and damn could he play.⁸ Smith, later remembered as a cab driver nearly beaten to death by the Newark Police Department in an incident that triggered one of the most explosive urban uprisings of the 1960s, drove a cab only to support his deep passion for music and to pay for dental work needed to repair the damage to his front teeth caused by his avid trumpet playing.⁹

Smith lived alone—unmarried and, as he put it, “all alone in this jungle”—in a small boarding house on the outskirts of Newark’s Ironbound section.¹⁰ Locals referred to the area as “Down Neck” because of its unusual shape and isolation.¹¹ Smith, originally from Salisbury, North Carolina, had lived in Newark for five years, trying to break into its thriving jazz scene¹² as well as that of New York City, just a 20-minute train ride from his home.

For the past five years, Smith had driven Cab 45 for Safety Cab Company to make ends meet as he pursued his jazz dreams.¹³ The company charged him a daily fee of \$16.50 to use the cab, and Smith typically earned only about \$100 per week.¹⁴ Recently, he had lost his cab license due to several accidents but continued working to get by.¹⁵

For Smith, Newark must have felt like jazz heaven. The city was the proud home of jazz legends like Wayne Shorter and the divine vocalist Sarah

⁶ Wineka, *supra* note 2.

⁷ Photograph of John Smith, in TIME MAG., Anatomy of a Race Riot (July 21, 1967), cover photo <https://time.com/4852749/1967-newark-riot/> [<https://perma.cc/U2XD-7N3W>].

⁸ Telephone Interview by David Lopez with James Smith, Brother of John Smith (Aug. 26, 2021) [hereinafter Smith Interview] (recording on file with author).

⁹ Wineka, *supra* note 2; Kimberly B. Siegal, Silent No Longer: Voices of the 1967 Newark Race Riots (March 2006) (B.A. thesis, University of Pennsylvania) (on file with the WRLR).

¹⁰ Smith Interview, *supra* note 8.

¹¹ *About Ironbound*, MAIN ST. COMMONS, <https://mainstcommons.com/about-ironbound.php> [<https://perma.cc/HE9H-6W5J>] (last visited Nov. 28, 2025); *Newark-Ironbound*, ADVISORY COUNCIL ON HISTORIC PRESERVATION, <https://www.achp.gov/preserve-america/community/newark-ironbound> [<https://perma.cc/5C73-5348>] (last visited Nov. 3, 2025).

¹² Rutgers Institute of Jazz Studies, Faces and Places in Newark’s Jazz History: From Savoy Records to Sparky J’s to Sarah Vaughan (unpublished professorial PowerPoint presentation, Rutgers University) (on file with author).

¹³ Wineka, *supra* note 2; Tom Hayden, *A Special Supplement: The Occupation of Newark*, THE N.Y. REV. (Aug. 24, 1967), <https://www.nybooks.com/articles/1967/08/24/a-special-supplement-the-occupation-of-newark/> [<https://perma.cc/6TRN-B7RS>].

¹⁴ Wineka, *supra* note 2.

¹⁵ Jason L. Riley, *Still Living With the ‘Riot Effect,’ 50 Years Later*, WALL ST. J. (July 22, 2017, at 18:32 ET), <https://www.wsj.com/articles/still-living-with-the-riot-effect-50-years-later-1499812338> [<https://perma.cc/4RC6-WAKJ>].

Vaughn, along with many other greats.¹⁶ Newark's downtown Halsey Street boasted several clubs that regularly featured some of the most famous acts of the time, as well as, many like Smith leaning into their Southern and working class roots, many like Smith leveraging the proximity to New York City.¹⁷ At the time, however, "Newark was arguably 'realer' than New York, which is to say more typical of U.S. urban life, than New York, even Harlem"¹⁸

Beyond the music itself, in 1967—the year the city erupted—RLSN, located in the heart of the predominantly African American Central Ward, had just acquired the rights to the largest jazz collection in the United States.¹⁹

Since arriving in Newark, Smith had experienced some modest success, performing at both the Blue Note and Birdland, two of New York City's most renowned jazz venues.²⁰ However, he also cherished the jazz scene in Newark.²¹ He often spoke about playing on Halsey and Broad Streets and the various clubs that formed the heart of the city's thriving jazz community.²²

Smith, born in rural Georgia as the first of seven children, moved with his family to Salisbury when he was young.²³ While he felt a strong connection to his hometown, he recognized early on that he needed to explore the wider world.²⁴ His mother, Mary Emma, worked as a domestic, and his father, Matthew, was employed by the city's sanitation department.²⁵ Music was a constant presence in their home; both parents sang, and his father performed locally with the Freedom Star Quartet, a barbershop group.²⁶

His brother James remembers always feeling inspired and in awe of his intelligence and kind heart.²⁷ Smith loved to read—history, mathematics,

¹⁶ Tammy La Gorce, *How Newark Became One of the Greatest Jazz Cities in the World*, THE GUARDIAN (Nov. 11, 2016, at 11:25 ET), <https://www.theguardian.com/music/2016/nov/11/newark-new-jersey-jazz-institute-njpac-clements-place> [<https://perma.cc/9KLE-V8A5>].

¹⁷ Brianne Ford, *Searching for Sarah Vaughn*, THE NEWARKER, <https://newarkermag.com/2021/04/01/searching-for-sarah-vaughn/#comments> [<https://perma.cc/JAE8-NCYM>] (last visited Nov. 3, 2025); see generally JAMES EDWARD SMETHURST, *BRICK CITY VANGUARD: AMIRI BARAKA, BLACK MUSIC, BLACK MODERNITY 15-57* (University of Massachusetts Press, 2010) (surveying how Newark shaped a unique jazz music scene and inspired Amiri Baraka and Black Arts Movement).

¹⁸ SMETHURST, *supra* note 17, at 41.

¹⁹ About the Institute for Jazz Studies, *History of IJS*, RUTGERS UNIVERSITY LIBRARIES, <https://www.libraries.rutgers.edu/newark/visit-study/institute-jazz-studies/about-ijs/history-ijs> [<https://perma.cc/G8C9-FS44>] (last visited Nov. 3, 2025).

²⁰ Smith Interview, *supra* note 8.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

engineering, and chess—making him “one of the few in the Smith family who could be found with a book.”²⁸ To his younger brother, Smith was “one of the smartest” men he knew.²⁹ He dressed in zoot suits and was always attentive to his appearance.³⁰ Standing at 5’7, he was a true “alpha male” who, according to his brother, sometimes had “a mouth on him.”³¹

Smith graduated from segregated Price High School, which, along with other schools in Salisbury, would not desegregate until 1971.³² He attended North Carolina A&T in nearby Greensboro for one year; this historically Black university was home to some of the first civil rights sit-ins.³³ But, as much as he enjoyed challenging his intellect through books, Smith found that jazz stirred both his mind and his heart.³⁴ To him, jazz equated to life, and life equated to jazz.³⁵

When a local Salisbury musician gifted him a trumpet, Smith gained the “instrument” that would elevate his love of music.³⁶ He enlisted in the U.S. Army, a common path out of his small town, and served as an infantryman in a segregated unit during World War II.³⁷ After the war, he was stationed in the Philippines and fought in the Korean War, where he earned a Combat Infantryman’s Badge.³⁸

Even though he served in combat, Smith’s most memorable story from those years centered on the dreary days spent in the barracks with fellow soldiers, the great “Cannonball” Adderley, as he entertained them with his saxophone.³⁹ Smith often shared stories about how Adderley, most famous for playing with the Miles Davis Quartet, would brighten their days in the barracks by playing the saxophone.⁴⁰

Smith listened to and meticulously studied the greats.⁴¹ He had a record collection of more than 100 albums, including Dave Burns, Miles Davis and

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² Smith Interview, *supra* note 8; David Whisenant, *Monroe Street School, formerly J.C. Price High, to be preserved thanks to \$500,000 grant*, WBTV (May 28, 2020, 11:35 ET), <https://www.wbtv.com/2020/05/28/monroe-street-school-formerly-jc-price-high-be-preserved-thanks-grant/> [<https://perma.cc/GGP6-5W4C>]; see National Historic Register, *Joseph Charles Price High School: 1932-1969*, THE HISTORICAL MARKER DATABASE (Apr. 21, 2010), <https://www.hmdb.org/m.asp?m=238886> [<https://perma.cc/98QL-2YND>].

³³ Smith Interview, *supra* note 8.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

Dave Brubeck—all the masters.⁴² Perhaps he loved Dizzie Gillespie and John Coltrane most of all.⁴³ He often told the story of watching Newark’s own jazz tenor saxophonist Wayne Shorter play with the sublime John Coltrane, staring at him with his mouth “agape,” stunned by Coltrane’s musical gifts.⁴⁴

In many ways, Smith epitomized the latter part of the second Great Migration, which brought millions of African Americans from the South to the North in search of freedom from the racial subordination and violence of Jim Crow and for greater economic opportunities.⁴⁵ Having served in the Korean War, Smith also represented the thousands of African American veterans since World War I who proclaimed the double V—victory abroad and victory over racism at home—and refused to acquiesce to the racism of their hometowns.⁴⁶

According to activist and historian Junius Williams, “Newark became the destination of thousands of African Americans fleeing the Southern states for better jobs and freedom from Jim Crow segregation and violence.”⁴⁷ Salisbury with a population slightly under 20,000, still had a statue of Confederate General in town square when Smith graduated from a high school and went off to college.⁴⁸ However, Smith quickly understood that the town was too small to support his musical ambitions.

Today, it is unclear whether Smith had any work available in Newark other than driving a cab that could meet his meager expenses. Even for a college-educated veteran, the rapid deindustrialization of the 1960s led to an exodus of good-paying jobs, and rampant employment discrimination against Blacks would have further limited Smith’s options.⁴⁹

For several decades, Newark had been a major terminus of the Great Migration, attracting streams of African American migrants from the South, including from Georgia and North Carolina, seeking meaningful opportunities beyond the Jim Crow South.⁵⁰ For Smith, there was the added

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *African Americans, Pt. 3 (First Great Migration)*, RISE UP NORTH NEWARK <https://riseupnewark.com/chapters/chapter-1/african-americans/african-americans-part-3/> [<https://perma.cc/NHA2-449X>] (last visited Dec. 18, 2025).

⁴⁶ *The Double V Victory*, THE NAT’L WORLD WAR II MUSEUM (Oct. 18, 2025), <https://www.nationalww2museum.org/war/articles/double-v-victory> [<https://perma.cc/69BG-9CKQ>].

⁴⁷ RISE UP NORTH NEWARK, *supra* note 45.

⁴⁸ U.S. DEP’T OF COM., BUREAU OF THE CENSUS, SER. PC-2, NO. 10, 1950 CENSUS OF POPULATION OF NORTH CAROLINA (Aug. 14, 1950), <https://www2.census.gov/library/publications/decennial/1950/pc-02/pc-2-10.pdf> [<https://perma.cc/PT8A-Z5QP>]; Smith Interview, *supra* note 8.

⁴⁹ ROBERT CURVIN, *INSIDE NEWARK: DECLINE, REBELLION, AND THE SEARCH FOR TRANSFORMATION* 36 (Rutgers University Press 2014).

⁵⁰ See RISE UP NORTH NEWARK, *supra* note 45; see also *Unit 9 World War I and the Great Migration, 1915-1920*, N.J. STATE LIBRARY,

benefit of being at the heart of a thriving jazz scene and within striking distance of New York City, which, needless to say, knew a thing or two about jazz.

For the rest of the country, the soundtrack of the summer of 1967 included the sweet, soulful falsetto ballad “My Eyes Adore You” by Newark’s own Frankie Valli, an Italian-American, who grew up in Stephen Crane Village, a North Newark housing project that was ethnically mixed but predominately Italian-American.⁵¹ At the same time, Aretha Franklin’s feminist anthem “Respect” dominated the airwaves, crossing over to “white” radio. The mantra “R-E-S-P-E-C-T” took on a broader meaning in Newark, Detroit, and across the country as the summer of 1967 progressed.⁵² The mash-up of the two songs that summer would be emblematic of the coming storm.

We cannot say whether Smith grooved to either song. It is likely that he instead anticipated the impending release from Newark’s own Wayne Shorter. Smith’s massive record collection undoubtedly included the spiritual jazz compositions of “Trane,” who was at the apex of his groundbreaking career with the sublime “Love Supreme,” a chillingly beautiful homage to the transcendental power of love.

By the end of the week, LeRoy Jones, later known as Amiri Baraka, who had recently returned home to Newark to found the Spirit House and the Black Arts Movement,⁵³ had been arrested and beaten during the rebellion. Sitting in solitary confinement, Baraka whistled John Coltrane’s “Love Supreme” to stay sane.⁵⁴ Learning John Coltrane had died while he sat in solitary, Jones (Baraka), in verse, would declare to the death of “Trane” and his transcendental vision of love in the smoldering ashes of Newark:

https://www.njstatelib.org/research_library/new_jersey_resources/highlights/african_american_history_curriculum/unit_9_world_war_i/ [https://perma.cc/F56N-ZBVP] (last visited Dec. 18, 2025).

⁵¹ Old Newark, *Stephen Crane Village*, OLD NEWARK, <https://oldnewark.com/publichousing/cranevillage.php> [https://perma.cc/3535-RDCS] (last visited Nov. 15, 2024).

⁵² Sen. Ronald L. Rice, *Hindsight is 2020: A look back at the unfinished business of 1967*, NORTH JERSEY (June 19, 2020), <https://www.northjersey.com/story/opinion/2020/06/18/newark-nj-violence-1967-still-echoes-parts-city/3219014001/> [https://perma.cc/1B2D-YR96].

⁵³ For a discussion of Baraka and the Spirit House, located blocks from Rutgers in the Central Ward and the home of the Black Arts Movement, see SMETHURST, *supra* note 16, at 40-52. Baraka’s son Ras Baraka has been the Mayor of Newark since 2014. *Office of the Mayor*, CITY OF NEWARK, <https://www.newarknj.gov/161/Office-of-the-Mayor> [https://perma.cc/LP8H-AGGX] (last visited Mar. 18, 2026).

⁵⁴ Jay Lustig, ‘I Love Music (For John Coltrane),’ *Amiri Baraka*, NJARTS.NET: NEWSLETTER (Mar. 16, 2015), <https://www.njarts.net/i-love-music-for-john-coltrane-amiri-baraka/> [https://perma.cc/V7RP-QANB].

A force for real good, trane.
in other words. Feb '67

By July he was dead.
By July, he said in other words
he wanted to be the opposite
but by July he was dead,....⁵⁵

By July, Smith would also be near death, and large portions of his adopted hometown of Newark would be in ruins, in what *Life Magazine* called “A Predictable Insurrection.”⁵⁶ This would form a noxious and deeply unfortunate narrative for a city—famously called “the worst city in the world” by cantankerous entrepreneur Lou Levov, a character in the Pulitzer Prize-winning *American Pastoral*, a novel set against post-Rebellion Newark, written by another Newark-native Philip Roth—a narrative that unfortunately, as I learned during my several years in Newark, for too many would unfairly define the city more than 50 years later.⁵⁷

Tom Hayden, the former President of the Students for a Democratic Society—like Baraka, another big personality making a cameo in this story—who had moved to Newark in an effort to organize low-income residents across racial lines, would chronicle the rebellion in *Rebellion in Newark: Official Violence and Ghetto Response*,⁵⁸ one of the better sources for the chaos of these five days. According to Hayden, “[a]s if to prove its inevitability, the Newark riot began with an ordinary police brutality incident against a man with an ordinary name: John Smith.”⁵⁹

I. PROFESSOR RUTH BADER GINSBURG AT RUTGERS LAW SCHOOL- NEWARK

A. 1963-1967

On July 12, 1967, when Professor Ruth Bader Ginsburg rose in her apartment on the Upper East Side of New York, we can speculate she felt

⁵⁵ “The poem ‘I Love Music’ was written to recall when I was locked up in solitary confinement after the Newark rebellions in 1967,” Baraka once said. “I sat one afternoon and whistled all the Trane I remembered. And then later that afternoon they told me he had died. But I knew even then that that was impossible.” *Id.* (The poem is being read aloud in the YouTube video embedded on the page).

⁵⁶ Lily Rothman & Liz Ronk, *What One Photographer Saw During the Deadly Newark Riots of 1967*, TIME (July 12, 2017) <https://time.com/4848976/newark-riots-1967-photographer/> [<https://perma.cc/D2SG-VHXZ>].

⁵⁷ PHILIP ROTH, *AMERICAN PASTORAL* 60 (1997).

⁵⁸ TOM HAYDEN, *REBELLION IN NEWARK: OFFICIAL VIOLENCE AND GHETTO RESPONSE* (Random House 1967).

⁵⁹ *Id.* at 9.

relief that she did not have to take her arduous three-train commute to Newark. Since 1963, Newark had been Ginsburg's workplace, where she was on the law faculty at Rutgers Law School–Newark (“RLSN” or “Rutgers”). The serious and dedicated 34-year-old Ginsburg taught civil procedure, conflict of laws, and comparative law.⁶⁰ As one of only two female law professors on the nineteen-member faculty, the summer, no doubt, provided her with a welcome opportunity to focus on her scholarship and spend time with her husband Marty, a taxation partner at Wachtel Lipton, one of New York's elite firms, as well as her daughter Jane and infant son James.

Ginsburg, born and raised in Brooklyn, lost her mother at an early age.⁶¹ She would describe her mother as “a woman of great intelligence, a prolific reader, a caring, resourceful individual”⁶² and someone who instilled the value of learning and education from an early age.⁶³ Drawing on these deeply-embedded values modeled during her upbringing, Ginsburg always excelled academically, and law school was no exception. At Harvard Law School, she was one of only nine women enrolled out of 552 students,⁶⁴ and was a member of its prestigious *Harvard Law Review*.⁶⁵ Then, at Columbia Law School, where Ginsburg spent her final year, she graduated tied for first in her class at Columbia and again served as an editor of the school's law review.⁶⁶

But upon graduation, the male-dominated legal profession, resembling the television classic *Mad Men*, systematically excluded women,⁶⁷ and Ginsburg could not break the gender barrier to secure a job at a prestigious corporate firm or, for the most part, a prestigious judicial clerkship—the

⁶⁰ Telephone Interview by Carly Rothman Siditsky with Eva Hanks, Founding Faculty, Cardozo L. Sch. (Mar. 18, 2021) [hereinafter Interview with Eva Hanks] (recording on file with author); see also Interview by Sandy Ogilvy with Ruth Bader Ginsburg, Sup. Ct. J., in D.C. (Aug. 17, 2007) [hereinafter Interview with Ruth Bader Ginsburg].

⁶¹ Courtney Fernald & Julia Kapusta, *Remembering RBG: A Look Back at the Life and Legacy of A Legend, A Year After Her Passing*, 96 FLA. BAR J., Vol. 30, 30 (Jan./Feb. 2022).

⁶² Ruth B. Ginsburg, *Remarks on Women's Progress in the Legal Profession in the United States*, 33 TULSA L. REV. 13, 13 (2013).

⁶³ *Id.*

⁶⁴ *Id.* at 14.

⁶⁵ Linda Grant, *Ruth Bader Ginsburg and Harvard Law: A 64-year journey*, HARV. L. BULL. (Sep. 4, 2020), <https://hls.harvard.edu/today/ruth-bader-ginsburg-and-harvard-law-a-sixty-four-year-journey/> [https://perma.cc/J4B3-D4P5].

⁶⁶ *In Memoriam: Ruth Bader Ginsburg '59*, COLUM. L. SCH. (Sep. 18, 2020), <https://www.law.columbia.edu/news/archive/memoriam-ruth-bader-ginsburg-59> [https://perma.cc/B469-E9BT].

⁶⁷ *The National Organization for Women's 1966 Statement of Purpose*, NAT. ORG. FOR WOMEN, <https://now.org/about/history/statement-of-purpose/> [https://perma.cc/R3TB-LENU] (last visited Nov. 15, 2025).

landing spot for many of her male classmates with comparable, or even less stellar, academic credentials.⁶⁸

With the assistance of a Columbia professor, Ginsburg finally secured a federal judicial clerkship with U.S. District Court Judge Edmund Palmieri, who sat in the Southern District of New York. During the clerkship, Ginsburg began toying with the idea of becoming a law professor.⁶⁹ With this goal in mind, she landed a fellowship with the Columbia Project on International Procedure, allowing her to spend a year in Sweden studying the Swedish legal system.⁷⁰ Her time in Sweden transformed her views on the possibilities for women in the legal system, as she noted the sharp contrast between the broad acceptance of women lawyers and judges in Sweden and the wholesale exclusion of women in the U.S. legal profession.

Despite her stellar academic performance, Ginsburg was not able to secure a job at a law firm which would have given her hands-on legal experience.⁷¹ But in 1962, most law firms shut their doors to women. Ginsburg faced the same figurative door slamming shut on her by most law schools, including her alma maters, Harvard and Columbia.

But she pushed forward, and with the assistance of Gerald Gunther, a colleague at Columbia, she met Eva Morreale (later Hanks), then a first-year law professor at Rutgers Law School in Newark.⁷² Like Ginsburg, Hanks was Jewish and lived on New York's Upper East Side.⁷³ Ginsburg would later learn that when Rutgers hired Hanks in 1962, there were no more than twenty women in tenure-track positions teaching in law schools across the country.⁷⁴ The two would form a lifetime, albeit at times surreptitious, friendship.⁷⁵

Hanks, who held degrees from University of California, Los Angeles (UCLA) and Columbia, was the daughter of a Holocaust survivor.⁷⁶ She is remembered by many students for her gruff exterior and thick German accent, but remembered by Ginsburg for her invaluable friendship and

⁶⁸ Ginsburg, *supra* note 62, at 15; see also Elizabeth Vulaj, *Feminist Fighters: Ruth Bader Ginsburg, Judith Kaye, and the Past, Present and Future of Women in Litigation*, N.Y.S.B.A. (Nov. 5, 2020), https://nysba.org/feminist-fighters-ruth-bader-ginsburg-judith-kaye-and-the-past-present-and-future-of-women-in-litigation/?srsltid=AfmBOorVUkA3zMJGGfdyRGHYPQhx97qeDlzl2IC7JDjbO-H_WlWnJ [https://perma.cc/UH5W-R58Z].

⁶⁹ *In Memoriam: Ruth Bader Ginsburg '59*, *supra* note 66.

⁷⁰ *Id.*

⁷¹ Paul Hond, *The Education of Ruth Bader Ginsburg*, COLUM. MAG., <https://magazine.columbia.edu/article/education-ruth-bader-ginsburg> [https://perma.cc/W2P2-9XLF] (last visited Dec. 17, 2025).

⁷² *In Memoriam: Eva Hanks*, RUTGERS L. SCH. (June 18, 2024), <https://law.rutgers.edu/news/EvaHanksMemoriam> [https://perma.cc/CP8K-2FA4].

⁷³ *Id.*

⁷⁴ Ruth Bader Ginsburg, *In Celebration of Eva Hanks*, 36 CARDOZO L. REV. 407 (2014).

⁷⁵ *In Memoriam: Eva Hanks*, *supra* note 72.

⁷⁶ *Id.*

support during her early years in academia.⁷⁷ Hanks pioneered scholarship focused on environmental law before environmental law became a necessary part of every law school curriculum.⁷⁸

Hanks introduced Ginsburg to Rutgers' Law Dean Willard Heckel. As Hanks recalled: "I then got a letter from Prof. Gunther . . . asking me whether I could help Ruth get a job at Rutgers. We both lived in the city; I went to visit her at her apartment over on the East Side. We hit it off, and I went back to Rutgers and enthusiastically recommended that we hire her."⁷⁹

Dean Heckel, described by one former colleague as "very liberal to radical dean,"⁸⁰ administered the state-institution with a quiet and steady demeanor, grounded in his Presbyterian faith, where he had long-served as a Deacon at his local church. A gay man in an unusually open long-term relationship with Rutgers-Newark Vice-Chancellor Malcolm Talbott, Dean Heckel often displayed support for those facing social disfavor.⁸¹

Heckel invited Ginsburg to interview with the faculty. Hanks, however, as "a lowly assistant professor," could not participate in the interview process and Ginsburg was only vetted by associate or full professors, all of whom were men.⁸²

Ginsburg apparently knocked the interview out of the park and RLSN extended her an offer. Even so, some faculty members still struggled to navigate the novel issue of gender in academia. As Hanks recalls:

All I remember was one of my colleagues, appeared in my office, and sort of shuffled from one foot to the other until I said, 'What do you want?' He said, this is a classic story, 'We wondered if you would be upset if we hired another woman.' After I closed my mouth, which had dropped open, I said, 'Sidney, I brought her to you.' He said, 'Well, we didn't want you to feel somehow slighted.' I said, 'No, I had no problems with hiring—he may have said another girl.'⁸³

Perhaps believing this to be the only chance to enter academia, then 30-year-old Ginsburg accepted the offer. In the fall 1963, Ginsburg would become the second woman law professor at RLSN.⁸⁴

Rutgers was one of only two law schools with two women professors on its faculty, at a time when most law school had none or only a small

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Interview with Eva Hanks, *supra* note 60.

⁸⁰ *Id.*

⁸¹ George W. Conk, *People's Electric: Engaged Legal Education at Rutgers-Newark law School in the 1960s and 1970s*, 40 FORDHAM URB. L. J. 503, 512-513 (2012).

⁸² Interview with Eva Hanks, *supra* note 60.

⁸³ *Id.*

⁸⁴ *In Memoriam: Ruth Bader Ginsburg '59*, *supra* note 66.

handful.⁸⁵ In 1963, a growing feminist consciousness and attentiveness to gender equity slowly emerged and would build momentum as the decade progressed. Betty Friedan had just released her bestseller *The Feminine Mystique*, which documented the frustrations of her educated Smith College classmates as they found few opportunities to apply their education while adhering to the rigid post-war gender roles of wife and mother.⁸⁶ President John Kennedy had convened the Presidential Commission on Women and, as a result of this work, Congress had passed the Equal Pay Act with little fanfare.⁸⁷

But Dean Heckel's pride in his Rutgers leadership, or the likely passage of the Equal Pay Act, did not prevent him from setting Ginsburg's starting salary below her male counterparts.⁸⁸

Even in the 1960s, law school deans had some influence but certainly not full authority over faculty hiring. At RLSN, all hires had to be approved by the entire faculty and once approved, the Dean would negotiate terms. Thus, with Ginsburg, Dean Heckel actively recruited her to Rutgers and, once approved by faculty, infamously offered her a lower salary than her male counterparts.

Ginsburg would recall the conversation several years later. "Dean Willard Heckel, one of the kindest, finest men I have ever known, carefully explained about the State University's limited resources, and then added it was only fair to pay me modestly, because my husband had a very good job."⁸⁹

Ginsburg, however, understood instantly the importance of having a colleague like Hanks. Years later, Justice Ginsburg also would recall how Professor Hanks paved the way for her at Rutgers as, stating, "[t]he excellence of her teaching eased my acceptance by my colleagues. Because of Eva, I was not regarded as a curiosity."⁹⁰

As their friendship developed, Hanks recalled some of their early conversations, which sparked Ginsburg's later passion and mission to use the law as an instrument for gender equity. "I remember her telling me that she learned Swedish, and she went to a court hearing, and she said the judge was a woman, the prosecutor was a woman, and the defense lawyer was a

⁸⁵ See Herma Hill Kay, *Ruth Bader Ginsburg, Professor of Law*, 104 COLUM. L. REV. 1, 5 (2004) (Harvard hired its first tenure-track female professor in 1972, Stanford in 1976, and the University of Michigan in 1982).

⁸⁶ BETTY FRIEDAN, *THE FEMININE MYSTIQUE* (1963).

⁸⁷ *Feminism: The Second Wave*, NAT'L WOMEN'S HIST. MUSEUM (June 18, 2020), <https://www.womenshistory.org/exhibits/feminism-second-wave> [<https://perma.cc/3EP2-79CG>]; see also 29 U.S.C. § 206(d).

⁸⁸ Hill Kay, *supra* note 85, at 12-13.

⁸⁹ *Id.*

⁹⁰ *In Celebration of Eva Hanks*, *supra* note 74, at 407.

woman, one of whom was highly pregnant. The defendant was a man, and she ALMOST felt sorry for him.”⁹¹

Hanks also recalled some suspicion from the faculty wives as gender roles slowly changed and more white women entered the workforce, where a majority of Black women had been for years.

It’s idiotic, but that’s what it was. Is she young? Is she pretty? Those were the inquiries, and apparently the same muttering went on at Rutgers. One of the men told me. I had been there a couple of years. He said, ‘You know, you caused quite a stir when you came here.’ I said, ‘How so?’ He said, ‘The wives all wanted to know, what were you thinking of hiring a young woman?’ I never became friendly with any faculty wives. I met a few, but no there were no friendships.⁹²

In 1963, at the beginning of Ginsburg’s teaching career, the legal profession itself was notoriously sexist and male dominated. In 1966, three years after Ginsburg joined the faculty, the fledgling National Organization for Women, as part of its founding charter, stated:

In all the professions considered of importance to society, and in the executive ranks of industry and government, women are losing ground. Where they are present it is only a token handful. Women comprise less than 1% of federal judges; less than 4% of all lawyers; 7% of doctors. Yet women represent 51% of the U.S. population.⁹³

Two-women on a 19-professor faculty, by today’s standards, should not be viewed as a commendable achievement. However, it was part of a broader pattern for this New Jersey state institution to serve the public more broadly than many private law schools. Indeed, Rutgers had been one of the first law schools to admit women, enrolling two women in its first law school class in 1910.⁹⁴

Even though RLSN may have been somewhat of a trailblazer, it certainly could not be said to be a model. During Ginsburg’s early years, there were

⁹¹ Interview with Eva Hanks, *supra* note 60.

⁹² *Id.*

⁹³ *The National Organization for Women’s 1966 Statement of Purpose*, *supra* note 67.

⁹⁴ Bulletin of Announcement, New Jersey Law School Announcement, published by New Jersey Law School (May 1, 1910) (on file with author); *see also* Elizabeth Blume-Silverstein, NEWARK WOMEN, <http://newarkwomen.com/elizabeth-blume-silverstein/> [<https://perma.cc/VM4Q-DQMR>] (last visited Nov. 15, 2025) (Silverstein, the third-female student at Rutgers Law-Newark, became a trailblazing criminal defense attorney, the first woman to defend a capital case in New Jersey history—she won—and was well respected in the bar).

very few female students enrolled at Rutgers.⁹⁵ Given her emerging concerns about gender inequality and the catalyzing role women students played for her in the later years, Rutgers must have been a somewhat lonely and isolating experience.

Annamay Sheppard, one of the original Newark Legal Services attorneys who later became a member of the Rutgers Law faculty during Ginsburg's tenure, recalls the isolation she experienced as one of the few women law students when she started as an evening student in the Fall of 1954.

No one was more awed than I when I found myself at the doorstep of a great profession, and no one was more terrified. Ivy League credentials notwithstanding, I was an anomaly, a twenty-seven-year-old woman with an infant daughter and a left leaning perspective. In the 1950s, neither of these attributes promised a felicitous entry upon the study of law. Of course, there had been women students at the School and women in the profession before my time, but they were few and far between, and so they remained in 1954.⁹⁶

Welcome to Professor Ginsburg's work world from 1963-1967.

As we consider her time at Rutgers, we must also remember that this period was one of the most tumultuous, momentous, and critical in the nation's history. It encompassed the presidency of John F. Kennedy, the civil rights movement, the enactment of the Civil Rights Act of 1964 and the Voting Rights Act (VRA) of 1965, as well as the Immigration Act of 1965 and urban unrest. This era also included the escalation of the Vietnam War, the increasingly vocal and militant anti-war movement, the Black Liberation struggle, the growing feminist movement, the backlash against it, the rise of George Wallace, and further urban unrest.⁹⁷

During Ginsburg's first five years on the Rutgers faculty, President Johnson announced his decision not to seek re-election, George Wallace emerged as the angry voice of white backlash, police rioted at the 1968 Chicago convention, Richard Nixon was elected President, Congress passed the Equal Rights Amendment (though it would not be ratified), the Vietnam War continued to drag on, costing thousands of lives and dividing the nation,

⁹⁵ Jeannie O'Sullivan, *At Rutgers Law School, Justice Ginsburg's Legacy is Personal*, LAW360 (Sep. 23, 2020, at 18:42 ET), <https://www.law360.com/newjersey/articles/1313122/at-rutgers-law-school-justice-ginsburg-s-legacy-is-personal> [<https://perma.cc/N425-TG2P>].

⁹⁶ Annamay T. Sheppard, *Bricks, Mortar, Heart*, 51 RUTGERS L. REV. 971, 971 (1999).

⁹⁷ See generally RICK PERLSTEIN, *NIXONLAND: THE RISE OF A PRESIDENT AND THE FRACTURING OF AMERICA* (2008); Mary Ann Gwinn, "Nixonland": Author says Nixon architect of country's left-right divide, THE SEATTLE TIMES (May 18, 2008), <https://www.seattletimes.com/entertainment/books/nixonland-author-says-nixon-architect-of-countrys-left-right-divide/> [<https://perma.cc/Y9SP-HP2R>] (describing the social and political turmoil of the 1960s, including the Vietnam War, anti-war protests, and civil rights struggles).

and the Ohio National Guard killed four student anti-war protesters at Kent State University. As Bob Dylan recognizes, "The times they are a changing!"⁹⁸

The cultural trajectory during Ginsburg's nine-year tenure at Rutgers reflects this momentous shift. In 1963, the hokie-camp comedy *The Beverly Hillbillies* and earnest Western *Bonanza* were the highest-rated television shows;⁹⁹ by 1972, Norman Lear's *All in the Family* and *Sanford and Son*, both rooted in biting social commentary, had taken the top spots.¹⁰⁰ The long-forgotten *Tom Jones* won Best Picture at the 1963 Academy Awards, while *The Godfather*, a classic American allegory of amoral capitalism and power, received the same honor in 1972.

Very few Americans were untouched by this rapid change, especially the students and faculty at RLSN, a campus that became a hotbed of civil rights and anti-war activism, located in a city that would become known, in the public mind if not in fact, as ground zero for one of the most traumatic, visible, and violent racial explosions of the decade.

Yet, surprisingly, the numerous biographies about Ginsburg, including her own autobiography, devote little to her nine years at Rutgers and their impact on her life, thinking, and career. Most mention that she was paid less than her male colleagues, disliked the commute, or eagerly accepted the opportunity to move to Columbia Law School.¹⁰¹ One biography even confuses RLSN with Rutgers Law-Camden, which was a completely separate law school located one hundred miles to the south.¹⁰²

Omitting these years overlooks Ginsburg's own words and testimony, as well as a critical narrative of how she transformed her personal experiences with sexism into a pioneering examination of how the law normalizes gender discrimination and can be used to challenge it, fostering meaningful opportunities.

Ginsburg's transformation cannot be separated from the broader narrative of the Newark community and its impact on Ginsburg's work home. This story reveals deeper connections between the interplay of race,

⁹⁸ BOB DYLAN, *The Times They Are A-Changin'*, on *The Times They Are A-Changin'* (Columbia Records 1964); Gwinn, *supra* note 97; see also TODD GITLIN, *THE SIXTIES YEARS OF HOPE, DAYS OF RAGE* (Scribner ed. 1993).

⁹⁹ Robert Jay, *Top 40 Programs from First Nielsens of the 1963-1964 Season*, TELEVISION OBSCURITIES (Nov. 8, 2009), <https://www.tvobscurities.com/2009/11/top-40-programs-from-first-nielsens-of-the-1963-1964-season/> [<https://perma.cc/5WY5-CZGQ>].

¹⁰⁰ Patrick Sauer, *Norman Lear Brought Big Issues to the Small Screen*, SMITHSONIAN MAG. (Dec. 6, 2023), <https://www.smithsonianmag.com/arts-culture/norman-lear-producer-sitcoms-obituary-180983380/> [<https://perma.cc/E85L-T2V8>].

¹⁰¹ Ginsburg, *supra* note 62, at 15, 18.

¹⁰² LINDA HIRSHMAN, *SISTERS IN LAW: HOW SANDRA DAY O'CONNOR AND RUTH BADER GINSBURG WENT TO THE SUPREME COURT AND CHANGED THE WORLD* 386 (Harper Collins 2016).

class, and gender in shaping Justice Ginsburg's perspectives, which she would later address in various forms on the Supreme Court.

In July 1967, as Newark stood on the brink of a major upheaval rooted in the deep-seated history of racism in that community and this county, law school classes were not in session and Ruth Bader Ginsburg, like most of the commuting faculty, was likely absent from the area. However, the "Newark Rebellion," as the unrest of 1967 would be termed, would profoundly impact Ginsburg's career trajectory and life, playing a crucial role in her emergence as a feminist and judicial icon.

We do not know whether Ginsburg grooved to "My Eyes Adore You," "Respect," or Coltrane's "Love Supreme." We know, in 1967, Ginsburg, an opera buff, would have been excited about the Metropolitan Opera's inaugural season at Lincoln Center. As a long-time subscriber, she would have attended what she considered the "marvelous" opening production of Barber's *Antony and Cleopatra*. However, her true passion lay with the New York City Opera's production of Handel's *Giulio Cesar*¹⁰³ (*Julius Caesar*), performed across town at the State Theater. There, fellow Brooklynite Beverly Sills rose from obscurity to superstardom in the role of Cleopatra, the Egyptian queen who ultimately vanquishes her rivals, ascends to power, and reunites with her lover, Julius Caesar. Captivated by the performance, Ginsburg would listen to the recording many times.¹⁰⁴

From 1963 to 1967, during her early years at Rutgers, Ginsburg was known as a meticulous, soft-spoken professor who taught dry subjects like civil procedure and conflict of laws.¹⁰⁵ However, by the time she left Rutgers for Columbia Law in 1972, she had become a nationally recognized scholar and civil rights advocate on her path to the Supreme Court.¹⁰⁶

Ginsburg's academic and parental responsibilities, along with her arduous commute, left her little time to socialize. However, over time, she developed close relationships with other professors, two of whom—both hired after Ginsburg—would become as, if not more, central to the transformation of RLSN.

As mentioned, Ginsburg had a special affinity for Hanks, the other female professor. She found Hanks to be a person of "extraordinary intelligence, diligence, and devotion."¹⁰⁷ According to Ginsburg, "[s]he was

¹⁰³ Alex Ross, *My Favorite Records: Ruth Bader Ginsburg*, NEW YORKER (May 14, 2012), <https://www.newyorker.com/culture/culture-desk/my-favorite-records-ruth-bader-ginsburg> [https://perma.cc/9LHR-MH7Y].

¹⁰⁴ *Id.*

¹⁰⁵ Hill Kay, *supra* note 85, at 11.

¹⁰⁶ *See id.* at 6, 10.

¹⁰⁷ *In Celebration of Eva Hanks*, *supra* note 74, at 407.

a great and good friend, tipping me off to the ways of the brethren here, much as Sandra Day O'Connor did when I was new on the Supreme Court.”¹⁰⁸

The only two female professors on the Rutgers faculty, however, consciously refused to be seen together on campus, concerned, according to our interview with Hanks, that they would be marked as “women” professors.¹⁰⁹ Instead, they often met at Newark’s Penn Station and often commuted back to Manhattan together where they would have the space for more personal discussions.

So Ruth came to Rutgers, and it was a little sad because we made it a point—we never discussed it—but we made it a point never to sit together at faculty meetings. She would sit at one end of the table, and I would sit at the other end. We didn’t want to be addressed as ‘Oh, you GIRLS.’ We once left the building and the associate dean, we went out for coffee, and he came in as we went out, and he said ‘Oh, you girls going for coffee?’ and between gritted teeth we said ‘Yes.’ We were very aware not to buddy up. We always took the same train, we were teaching the same day, we would go to New York together. But we did not visibly pal around in the law school, because—we never discussed it—but I guess neither one of us wanted to hear this business, ‘Oh, you girls.’ Neither one of us were girls, we were grown women.¹¹⁰

Despite their friendship, the two professors had markedly different styles. One male student recalled “just the way she presented herself, [Hanks] was more outgoing than Ginsburg. She kind of strutted around. She dyed her hair blonde; this was in the late sixties. She just presented herself in a way that she didn’t exactly blend in with the guys in gray suits.”

Despite tangible differences in teaching style and personality and their best efforts to be seen as individuals, it perhaps was unavoidable that, on occasion, they would be seen as a unit. A condescending 1970 *Newark Star Ledger* article, focusing on Professors Hanks and Ginsburg, entitled “Two Ladies in Robes,” demonstrated this was a well-founded concern.¹¹¹ The article begins by noting how “[t]wo slim attractive professors could easily be taken for students.”¹¹² Then it notes “[b]oth are lawyers who are married to lawyers, reside in New York City and have distinguished themselves in separate fields of law.”¹¹³

After discussing Professor Hanks’ expertise in water law, the article shifts its focus to Ginsburg, first bolstering her “domestic” credentials. “Ginsburg,” the article notes, “is the wife of Martin Ginsburg, a tax lawyer

¹⁰⁸ *In Memoriam: Eva Hanks*, *supra* note 72.

¹⁰⁹ See Interview with Eva Hanks, *supra* note 60.

¹¹⁰ *Id.*

¹¹¹ Sue Weinstock, *Robes for Two Ladies*, NEWARK STAR-LEDGER (June 4, 1970).

¹¹² *Id.*

¹¹³ *Id.*

and professor at NYU. . . . She is the mother of Jane, 15, and James, four years old.”¹¹⁴ The article moves on to her stellar academic credentials, her three books, and her leadership in the ABA Comparative Law section.¹¹⁵

The article focuses on Professor Ginsburg’s journey to Sweden and her study of comparative law, specifically on the role of the ombudsmen in the Swedish legal system.¹¹⁶ At the time when Ginsburg was making a sharp turn in the trajectory of her research, the article reflects a touch of anxiety regarding the relevance of her work to the challenges facing the United States. Ginsburg is quoted:

One must, however, bear in mind that Sweden is a country with less than eight million people, all with a common background. The troubles dealt with by the ombudsman seem rather trifling in our more complex society. Furthermore, we would never dream of giving a single man so wide a power.¹¹⁷

Still, the article maintains a focus on women professors as a novelty. Both professors agree that being married to lawyers is an excellent arrangement. Ginsburg remarks, “I always believed that it was an ideal relationship to combine home life and professional life. For a while it was a toss-up between Law, Medicine or Business School. When Marty decided which of the three fields he wanted, I followed.”¹¹⁸ Ginsburg then concludes that it was an advantage to be married and be a mother in law school. “I really found my existence at law school was delightful...than the boys who lived in the competitive atmosphere of the dormitories.”¹¹⁹

The article does not address this shift in focus, the challenges women face in academia, or Ginsburg’s emerging work on gender equity issues at that time.

But Hanks was not the only professor with whom Ginsburg would form a personal bond. In 1966, Rutgers Law hired Frank Askin, who had been in Ginsburg’s very first civil procedure class at Rutgers.¹²⁰

Askin, a former reporter from Baltimore, relished the procedural puzzles that Ginsburg would present to her students.¹²¹ With her support, he eagerly

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Interview with Ruth Bader Ginsburg, *supra* note 60.

¹²¹ Frank Askin, *Oral History Interview 2* (July 14, 2014), conducted by Shaun Illingworth et al., Rutgers Oral History Archives, <https://oralhistory.rutgers.edu/explore/alphabetical-index/interviewees/30-interview-html-text/1764-askin-frank-part-1> [https://perma.cc/CR2M-U9WM] (last visited Mar. 26, 2026).

accepted the opportunity to teach Constitutional Law at his alma mater.¹²² Askin brought a strong activist spirit to the law school, having been raised as a self-described “left-wing activism” baby by two avowed communists.¹²³ His commitment to civil rights stemmed from his experiences fighting against segregated recreational facilities in his hometown of Baltimore.¹²⁴

This project has involved interviewing nearly three dozen former students and colleagues from Ginsburg’s time at Rutgers, as well as incorporating many previously unpublished comments from Ginsburg herself about those years. The turmoil of both the place and the time—particularly the events of July 12, 1967, which would profoundly impact the life and dreams of jazz trumpeter John “J.W.” Smith just blocks from the law school—would also breach the pastoral gates of Rutgers Law School.¹²⁵ This moment catalyzed significant changes in legal education and created the necessary support for Ginsburg to become a pioneering voice in civil rights, ultimately leading her to the United States Supreme Court.¹²⁶ Through this narrative, we will revisit the *SFFA* decision and its implications for the workplace.

B. Interlude: The Newark Rebellion

On July 12, 1967, Smith rushed throughout the day, likely hustling for fares.¹²⁷ What happened next is likely to remain forever disputed. While trying to pass a stalled police vehicle on Fifteenth Avenue, Smith was pulled over by two Newark Police officers, John De Simone and Vito Pontrelli.¹²⁸ Smith claimed he flashed the officers to signal that he was passing them, while the officers contended that he had been tailgating them.¹²⁹

The two cops arrested Smith, claiming he had five outstanding tickets and a suspended license, and placed him in the squad car for transport to the 4th precinct.¹³⁰

¹²² David Wildstein, *Frank Askin, Legendary ACLU Counsel and Rutgers Professor, Dies at 89*, N.J. GLOBE (July 6, 2021, at 20:29 ET), <https://newjerseyglobe.com/in-memoriam/frank-askin-legendary-aclu-counsel-and-rutgers-professor-dies-at-89/> [<https://perma.cc/8RR6-KER5>].

¹²³ DUEPROCESS TV, *Due Process - Frank Askin: A People's Prof (Aired 4/23/2016)*, at 15:28 (YouTube, May 24, 2016), <https://www.youtube.com/watch?v=oyUjqOFsdqc> [<https://perma.cc/QC66-4JSN>].

¹²⁴ Wildstein, *supra* note 122.

¹²⁵ FRANK ASKIN, *Interview*, in *A MAYOR FOR ALL PEOPLE* 192, 192 (Robert C. Holmes & Richard W. Roper eds., Rutgers Univ. Press 2020).

¹²⁶ *Id.* at 195.

¹²⁷ See Wineka, *supra* note 2.

¹²⁸ *The Spark*, RISE UP NORTH NEWARK, <https://riseupnewark.com/chapters/chapter-3/part-2/the-spark/> [<https://perma.cc/VD9J-JSAX>] (last visited Oct. 30, 2024).

¹²⁹ *Id.*

¹³⁰ *Id.*

Smith later recalled that the police officers beat him inside the car with a nightstick.¹³¹ The officers testified that they had to subdue Smith when he resisted arrest.¹³² Smith was badly beaten and, by the time they arrived at the 4th precinct, was unable to walk and the two officers dragged him into the station.¹³³ Several residents of the Hayes Homes public housing project across the street, witnessing Smith being pulled up the stairs, believed he had been murdered.¹³⁴ Local cab drivers also spread the rumor over the radio.¹³⁵ Indeed, the police continued to beat him while he was in custody, breaking his ribs and leaving what his brother James described as a gaping hole the size of a baseball where his ribs should be.¹³⁶

After demanding to see Smith, several community activists found him “bleeding, groaning, crying, and curled in pain.”¹³⁷ The group insisted Smith be hospitalized.¹³⁸ As the level of agitation rose, “Smith was rushed to Beth Israel Hospital where he was diagnosed with a ‘hematoma on L-occipital-parietal region skull and a fracture of the right ninth rib in the axillary line with slight displacement at the fracture sight.’”¹³⁹ In other words, he was bleeding from the brain and had several broken ribs on his right side.¹⁴⁰ Smith later recounted that when he entered the Fourth Precinct, “six or seven other officers along with the two who arrested [him] kicked and stomped [him] in the ribs and back. Then they took [him] to a cell and put [his] head over the toilet bowl. . . [and struck] the back of [his] head with a revolver.”¹⁴¹

Smith’s beating triggered protests and some rock throwing at the Fourth precinct police station, but it cannot be said to have triggered the ensuing unrest.¹⁴² “A *Star-Ledger* review of State Police archives, numerous interviews and an examination of film footage also suggest Smith’s designation as the spark of the Newark riots has been overplayed.”¹⁴³ As events started to calm, most residents went home.¹⁴⁴ However, any looting that occurred on the evening of Smith’s arrest and the following morning,

¹³¹ *Id.*

¹³² *Id.*

¹³³ *The Spark*, *supra* note 128.

¹³⁴ MAX ARTHUR HERMAN, SUMMER OF RAGE: AN ORAL HISTORY OF THE 1967 NEWARK AND DETROIT RIOTS 10-11 (2017); *see also The Spark*, *supra* note 128.

¹³⁵ Kimberly Siegal, Silent No Longer: Voices of the 1967 Newark Race Riots, U. PA., COLL. UNDERGRADUATE RSCH. ELEC. J. (July 10, 2006) (senior thesis, University of Pennsylvania) <http://repository.upenn.edu/curej/31> [<https://perma.cc/BJ85-2FW6>].

¹³⁶ *Smith Interview*, *supra* note 8.

¹³⁷ *The Spark*, *supra* note 128.

¹³⁸ *Id.*

¹³⁹ Siegal, *supra* note 135, at 26.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Brad Parks, *Crossroads Pt. 2: 5 Days that Changed a City*, NJ.COM (July 9, 2007, at 04:02 ET), [<https://perma.cc/KU7N-MY79>].

¹⁴³ *Id.*

¹⁴⁴ HAYDEN, *supra* note 58, at 21.

the 13th, was minor and confined to a few stores.¹⁴⁵ Still, the city activated an “emergency command post at the Roseville Armory . . . in case the trouble spread.” Yet by early morning the streets were quiet.¹⁴⁶

The following night at 7:00 p.m., the Newark Police Department released Smith from the hospital, paroling him into the custody of his lawyer John Love.¹⁴⁷ Still, the Smith beating stung community residents. “I think it is very significant to appreciate that we are not talking about . . . an isolated incident,” Dr. Robert (“Bob”) Curvin, then-president of the Newark chapter of the Congress on Racial Equality (“CORE”), later recalled.¹⁴⁸ “[W]e are talking about a pattern that has been witnessed by the community for years, and Smith in my mind represents just a part of that pattern.”¹⁴⁹

Smith, in a rare public comment, said he was “insignificant” and a “pawn.”¹⁵⁰ There is no doubt that the conditions leading up to the impending Rebellion had been the result of a long and slow buildup. The morning following the day the Newark Police Department nearly killed Smith ended in tranquility.¹⁵¹ Yet, the beating of this mere “pawn” proved to be the spark that ignited an earthquake—not only for Smith but also for his adopted city and, for many, perhaps including Ginsburg, who was working or living in the area.

The following night on July 13, community activists organized protests in response to Smith’s beating and to end police brutality.¹⁵² The sweltering heat, rising well into the 90s, set the stage for a quick escalation of anger and unrest. “The event stayed nonviolent until a woman—whose identity remains unknown—stepped out of the crowd with a metal bar in her hand and began methodically bashing out the street-level windows of the 4th Precinct.”¹⁵³

Quickly spinning out of control, the protests escalated to vandalism and looting.¹⁵⁴ Several stores were quickly emptied.¹⁵⁵ Some merchants, African

¹⁴⁵ Parks, *supra* note 142.

¹⁴⁶ HAYDEN, *supra* note 58, at 21; Robert Curvin, *Inside Newark: Decline, Rebellion, and the Search for Transformation*, in RIVERGATE REGIONALS COLLECTION 113-14 (2014).

¹⁴⁷ Siegal, *supra* note 135, at 4.

¹⁴⁸ *The Spark*, *supra* note 128.

¹⁴⁹ *Id.*

¹⁵⁰ Wineka, *supra* note 2.

¹⁵¹ Parks, *supra* note 142.

¹⁵² Siegal, *supra* note 135, at 4.

¹⁵³ Parks, *supra* note 142.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

American and white, escaped damage by writing “soul brother” on the front of their stores.¹⁵⁶ Many in the community chanted “Black Power.”¹⁵⁷

But the police quickly lost control.¹⁵⁸ So many people were arrested that the Newark Police Department could not process them all and had to use a local high school stadium as a detention center.¹⁵⁹ In the chaos, the Newark Police Department arrested Amiri Baraka, charging him with carrying an illegal weapon.¹⁶⁰ The police, whom many viewed as a radical instigator, beat Baraka ferociously and placed him in solitary confinement.¹⁶¹ Baraka was later sentenced to three years in prison.¹⁶²

Reports, of sniper fire, later largely repudiated, quickly escalated the chaos.¹⁶³ One Newark police officer, Anthony Carbo, would later acknowledge there was not any organized plan to respond to the disorder.¹⁶⁴ When the crowd entered the Sears-Roebuck store with its large collection of firearms, Newark Mayor Hugh Addonizio, despite initial reluctance, called Governor Richard Hughes to request assistance. The state sent hundreds of national guardsmen and state police.¹⁶⁵

These young overwhelmingly white Guardsmen from predominately rural areas in Central and South Jersey. Only 1.2 percent of the troopers were Black.¹⁶⁶ Only a few had received any meaningful training for this type of event. Indeed, many had joined the Guard to avoid Vietnam.¹⁶⁷ Yet, as they arrived, “cheering throngs of white residents lined the route from the Armory emphasized their racial solidarity with the troopers and Guardsmen, employing racial epithets to underscore their racialized perception of the situation.”¹⁶⁸

On the second night, Friday, July 14, 1967, a random gunfire killed white Newark Police Detective Fred Toto and Newark Fire Captain Michael

¹⁵⁶ *Id.*; Jack Bogdanski, *Soul Brothers vs. The Man*, NEWARK MEMORIES <https://newarkmemories.com/memories/866.php> [<https://perma.cc/KVK3-TAA2>] (last visited Dec. 17, 2025); see also Lawrence Bush, *July 12: The Newark Riots*, JEWISH CURRENTS (July 12, 2013) <https://jewishcurrents.org/july-12-the-newark-riots> [<https://perma.cc/7A7P-MLC7>]; CURVIN, *supra* note 49, at 108.

¹⁵⁷ HAYDEN, *supra* note 58, at 29.

¹⁵⁸ HERMAN, *supra* note 134, at 154.

¹⁵⁹ *Id.* at 152, 154.

¹⁶⁰ James Barron, *A Poet Looks Back on a Bloody Week in 1967*, N.Y. TIMES (Oct. 10, 2012) <https://www.nytimes.com/2012/10/11/nyregion/amiri-baraka-newark-poet-looks-back-on-a-bloody-week-in-1967.html> [<https://perma.cc/323V-CRLD>].

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ HAYDEN, *supra* note 58, at 40-41.

¹⁶⁴ CURVIN, *supra* note 49, at 107.

¹⁶⁵ *Id.* at 108.

¹⁶⁶ HAYDEN, *supra* note 58, at 45-46.

¹⁶⁷ HERMAN, *supra* note 134, at 167.

¹⁶⁸ *Id.* at 170.

Moran.¹⁶⁹ The City blamed it on sniper fire. Detective Toto's death, Hayden would later write, "stirred shock and anger in the white community. Both Newark papers carried their photographs and background stories of praise for their contribution: no [black] victims were given such newspaper treatment."¹⁷⁰

Law enforcement responded to these deaths personally and with aggressive fury. In the so-called "Soul Brother riots," police, taking advantage of a press conference by the Governor, directed gunfire at black businesses, many with signs stating "Soul Brother" in retaliation for the perceived culpability of the Newark African American community.¹⁷¹ Officer Carbo later admitted the police believed it was "legal" to shoot looters. "We were ready to book off for the night and one of the old-time superiors asked us, 'How was the duck hunting last night fellers?' We responded: 'It went very well last night sir.'"¹⁷²

In the end, no one was charged for the deaths of Toto or Moran, much less sniper fire.¹⁷³ Regardless of whether they were killed by sniper or friendly fire, Detective Toto left behind four children and Lieutenant Moran left behind six children.¹⁷⁴ The City's tragedy had escalated beyond the point of return.

On July 15, law enforcement sealed off an area of 14-square miles as the riot zone. This "riot zone" included Rutgers-Newark, blocks from ground zero. For five nights, gunfire echoed through the night—mostly indiscriminate shooting by law enforcement.

Despite an inflammatory *Life Magazine* article about a purported Newark sniper, most post-mortems, including those by the State of New Jersey, reflect that most of the gunfire resulted from the various police forces responding to each other in the haze and chaos of the unrest.¹⁷⁵ According to

¹⁶⁹ Karen Yi, *Remembering the 26 people who died in the Newark riots*, N.J. TRUE JERSEY (July 12, 2017), https://www.nj.com/essex/2017/07/newark_riots_26_people_killed.html [https://perma.cc/XP2K-6ND7]; HAYDEN, *supra* note 58, at 49-50, 84-88.

¹⁷⁰ HAYDEN, *supra* note 58, at 84.

¹⁷¹ *Id.* at 31-33; HERMAN, *supra* note 134, at 196-97; Parks, *supra* note 142.

¹⁷² CURVIN, *supra* note 49, at 107-08.

¹⁷³ *Michael Moran*, RISE UP NORTH NEWARK, <https://riseupnewark.com/michael-moran/> [https://perma.cc/BW6L-MG9T] (last visited Dec. 17, 2025); *see also* Yi, *supra* note 169; Frederick Toto, RISE UP NORTH NEWARK, <https://riseupnewark.com/frederick-toto/> [https://perma.cc/DR77-LR4Z] (last visited Nov. 2, 2024).

¹⁷⁴ Yi, *supra* note 169 (discusses long-term legacy of Newark Rebellion).

¹⁷⁵ *Id.* ("Individual reports filed by state troopers detail hundreds of man hours spent searching hundreds of buildings. Yet police never found one sniper. And despite ample opportunities to shoot authorities - a total of 1,390 Newark police, 627 state troopers and 5,900 National Guardsmen were committed to riot detail - only Toto and Moran lost their lives. In each case, the source of the fatal shot was never conclusively determined."); *see* James Ridgeway & Jean Casella, "The Myth of the Black Sniper from Newark to New Orleans," MOTHER JONES (July 6, 2007), <https://www.motherjones.com/politics/2007/07/newark-new-orleans-myth-black-sniper/> [https://perma.cc/5VNN-7T9J].

an analysis by the *Newark Star-Ledger*, “[w]ith reporters and cameramen at the press conference, the police attacks on the ‘Soul Brother’ businesses apparently took advantage of the diminished media scrutiny to do their work.”¹⁷⁶ It turned into an “orgy of violent, brutal retaliation against black citizens and business.”¹⁷⁷

Later, as Governor Hughes struggled for a way to end the unrest, he summoned Hayden and Curvin for a meeting with the U.S. Attorney. Both argued that National Guard presence exacerbated the situation. As Curvin recalled, “Tom and I argued there were no snipers and that what was going on was that the police were shooting people and using this argument about snipers to justify the random shooting going on all over the city.”¹⁷⁸ Curvin and Hayden argued the police and National Guard were fueling the combustion and urged “that Hughes could pull out his men and, if trouble flared back up, he could always send them back.”¹⁷⁹

Following a fortuitous call between Governor Hughes and Martin Luther King, arranged by Legal Services Director Oliver Lofton, the Governor ultimately decided to withdraw the state troopers and National Guard after meeting with Curvin and Hayden. Soon after, the unrest began to dissipate, and after five days, the long and challenging process of repairing the damage—which would take more than fifty years—finally commenced.¹⁸⁰

By that time, five days of unrest had resulted in twenty-six deaths, twenty-three of whom were Black, along with \$10 million in damage. Junius Williams, a community activist and Yale Law graduate, documents the numerous Newark residents who lost their lives during the rebellion in the archive *Rise Up Newark*.¹⁸¹

As we will see, the aftershocks from the 1967 Newark Rebellion, sparked by the entrenched marginalization of the city’s majority African American community, reverberated through the RLSN ivory tower, unleashing rapid and sweeping institutional changes at both Rutgers and its Newark home. This environment, in turn, galvanized Ginsburg’s empathy for those affected by discrimination and provided her with the critical space to flourish.

¹⁷⁶ Parks, *supra* note 142.

¹⁷⁷ CURVIN, *supra* note 49, at 107; HAYDEN, *supra* note 58, at 49-50.

¹⁷⁸ HERMAN, *supra* note 134, at 205; Siegal, *supra* note 135, at 99 (quotes a reporter covering the disturbances, as recalling “this running joke we had all these snipers, but none of them could shoot. They must have been shooting themselves. You hear we have police firing because we have snipers, but who are the snipers shooting at? Obviously [it was not at] the cops or the National Guard, because none of them got killed.”).

¹⁷⁹ Parks, *supra* note 142.

¹⁸⁰ HERMAN, *supra* note 134, at 108-10.

¹⁸¹ Yi, *supra* note 169.

C. Ruth Bader Ginsburg at Rutgers: 1967-1972

1. *The Newark Rebellion and the MSP Program*

Prior to the 1967 Rebellion, Rutgers was situated in central Newark, yet it felt also galaxies apart from the surrounding community. Lennox Hinds, an African American law student and activist, described the law school's isolation from its home city. "In the blighted inner city . . . stands the neat glass buildings of Rutgers. . . . Its well-paved and lighted tree-lined streets clearly define the finite nature of the race and class privilege extended to the transient school population."¹⁸²

In 1967, there were only three African American students enrolled in RLSN's entering class. Following the Rebellion, Dean Heckel was part of a Committee of the Concerned formed following the unrest, found policy brutality to have been one of the root causes.¹⁸³ Embarrassed by the absence of diversity at Rutgers, Dean Hecke formed a committee that included Ginsburg, to improve its minority recruitment and retention efforts.

As a result, Rutgers inaugurated its landmark Minority Student Program (MSP) in 1968, committed to building a "critical mass" of minority students by dramatically increasing its admission of African American students and providing them the academic support necessary to succeed. The Committee demanded immediate action. Ginsburg, not only served on the Committee, but would also tutor entering students, an experience, we will learn, she remembered fondly. The late Professor Frank Askin (RLAW '66), who led the committee, recalled Ginsburg, as someone "whose sympathies clearly resided with those who had faced historic discrimination."¹⁸⁴

This program led, almost overnight, to a rapid increase in African American representation at RLSN, many of whom would become leaders in the legal profession and single-handedly desegregate the New Jersey bar.¹⁸⁵ As Rutgers Law became more reflective of its Newark home, the students shifted their attention to whether the curriculum adequately addressed the problems of its community and its increasingly diverse student body.

Addressing this glaring under-representation of Black students attending RNLs would only be the first critical step in the looming transformational shift taking place at Rutgers and in legal education. In the months that followed, students leveraged the more inclusive and representative

¹⁸² Rutgers Report, *The White Law School and the Black Liberation Struggle*, in LAW AGAINST THE PEOPLE: ESSAYS TO DEMYSTIFY LAW, ORDER AND THE COURTS 232, 232 (Robert Lefcourt ed., 1971).

¹⁸³ HAYDEN, *supra* note 58, at 58.

¹⁸⁴ FRANK ASKIN, *Interview*, *supra* note 125, at 192-94.

¹⁸⁵ David Lopez, *Ruth Bader Ginsburg is a legal icon, one that Rutgers should honor*, NJ.COM, <https://www.nj.com/opinion/2021/12/ruth-bader-ginsburg-is-a-legal-icon-that-rutgers-should-honor-opinion.html> [https://perma.cc/N9SW-8YDN] (last updated Dec. 4, 2021).

environment, to press for significant curricular changes, including a pioneering clinical program that engaged with the broader Newark community.¹⁸⁶ According to Askin, “[m]inority students and their female allies together with former Southern civil rights workers who had followed [famed civil rights attorney Arthur Kinoy] to law school began demanding curriculum more suited to producing practicing lawyers who could quickly represent the various communities.”¹⁸⁷

2. The “Indictment”: Rutgers Law School and the Creation of the Community-Based Clinical Program

In 1968, the Rutgers Association of Black Law Students publicly “indicted” the law school for failing to provide educational offerings relevant to its urban setting and its Black students, demanding the law school implement several specific curricular changes.¹⁸⁸ Taking aim at the biases embedded in the Rutgers curriculum, the indictment charged “that the private interests of white society are more thoroughly protected by the curriculum than the private interests of Black people.”¹⁸⁹

In response to student demands, Dean Heckel shifted course, establishing the so-called Tri-Partite Committee made up of students, faculty, and students. This committee, which included Ginsburg, recommended fundamental changes to the law school curriculum. Most notably, Rutgers launched an extensive live-action clinical program, which was founded on the idea of learning through real-life engagement by using “the reality of ongoing problems [in the local community] as fundamental pedagogic tools.”¹⁹⁰

As one former student told me, this reorientation attracted several, more politicized, students, who understood Rutgers had become a trailblazer. “I knew a few people who were at Harvard Law School. I had met someone at a party, I was talking to three or four guys at Harvard Law School, and they said, ‘Go to Rutgers for God’s sake, don’t go to Harvard.’ They just went on and on about the clinics.”¹⁹¹

¹⁸⁶ Telephone Interview by Carly Rothman Siditsky with Paul Tractenberg, (Feb. 22, 2021) [hereinafter Interview with Paul Tractenberg] (on file with author); FRANK ASKIN, *Interview*, *supra* note 161, at 195-96.

¹⁸⁷ FRANK ASKIN, *Interview*, *supra* note 125, at 192-94 (“The result was the establishment in 1970 of the most extensive clinical programs in the country, starting with the Constitutional Litigation Clinic and Urban Legal Clinic in 1970, soon followed by the Women’s Rights Clinic, an Environmental Law Clinic, and a Labor Law Clinic.”).

¹⁸⁸ Lopez, *supra* note 187; Rutgers Report, *supra* note 184, at 237.

¹⁸⁹ Rutgers Report, *supra* note 184, at 237.

¹⁹⁰ *Id.* at 246.

¹⁹¹ Interview by Carly Rothman Siditsky with Charlyne Buss, (Apr. 6, 2021) [hereinafter Interview with Charlyne Buss] (on file with author).

Ginsburg would later lament that Harvard and Columbia failed to offer such clinical programs when she was a law student. “I attended Harvard Law School for my first two years, and the closest thing that they had was a legal aid clinic, run by students with the assistance of a lawyer from Boston. No faculty member was involved. And it was pretty much the same at Columbia, where I finished law school.”¹⁹²

The law school’s new admissions policy also opened the door to a rapid increase in the number of women students.¹⁹³ By “1971, women comprised 40% of the entering Rutgers class, the second-largest percentage in the country.”¹⁹⁴ From 1968-1972, Rutgers—by then affectionately known as the “People’s Electric Law School” for its social justice tilt—emerged as a leader in diversity and clinical education and attracted faculty, such as famed “People’s Lawyer” Arthur Kinoy,¹⁹⁵ and a vibrant student body heavily committed to social justice.

3. Professor Ginsburg becomes Litigator Ginsburg

At the same time, following the Rebellion, Heckel began encouraging the faculty to offer local pro bono services.¹⁹⁶ As a result, Professor Askin connected Ginsburg, who had never practiced law, with the American Civil Liberties Union (“ACLU”)–New Jersey. According to Hanks, “then she wanted to get involved in litigation, and with the ACLU, and I don’t remember. She took her first complaint to Askin, a registered communist [laughed] and said help me draw this complaint. She needed that help only once, of course.”¹⁹⁷ Through this work, she started to build a growing docket of gender equity cases, including *Reed v. Reed*, *Frontiero v. Richardson*, and *Edwards v. Healy*.¹⁹⁸

Askin later introduced Professor Ginsburg to Melvin Wulf, the legal director of the ACLU, but he soon discovered that Ginsburg and Wulf

¹⁹² *Catalogs: Legal Clinics*, RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY, https://catalogs.rutgers.edu/generated/law_1921/pg168.html [<https://perma.cc/PGT2-8CMJ>].

¹⁹³ Lopez, *supra* note 187.

¹⁹⁴ Conk, *supra* note 81, at 505.

¹⁹⁵ See generally Arthur Kinoy, *Rights on Trial* (1984) (discussing his legal career, including how Dean Heckel recruited him to Rutgers).

¹⁹⁶ Lopez, *supra* note 187.

¹⁹⁷ *Id.*

¹⁹⁸ See Anthonay D. Romero, *In Memory of Justice Ruth Bader Ginsburg (1933-2020)*, ACLU (Sep. 18, 2020), <https://www.aclu.org/news/civil-liberties/in-memory-of-justice-ruth-bader-ginsburg-1933-2020> [<https://perma.cc/8NV8-GMZG>]; *Reed v. Reed*, 404 U.S. 71 (1971) (challenged gender discrimination in estate administration and the Court held that administrators of estates cannot be named in a way that discriminates between sexes); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (challenged gender-based benefits for military spouses and the Court ruled that the US. military could not provide different benefits to service members based on their sex); *Edwards v. Healy*, 421 U.S. 722 (1975) (challenged Louisiana law which exempted women from jury service unless they filed a written declaration of desire to serve).

already knew each other from their childhood summers at a camp in upstate New York. Soon, Ginsburg and the ACLU would co-counsel the case of *Reed v. Reed* before the Supreme Court.¹⁹⁹ This case addressed the issue of whether an Idaho law that imposed a preference for the selection of males over females in appointing an administrator of an intestate estate is unconstitutional and led to a unanimous victory for women.²⁰⁰ The Court held that the Fourteenth Amendment's Equal Protection Clause prohibited upholding this law because the law did not pass an intermediate scrutiny analysis.²⁰¹ This, in turn, led to Ginsburg being named the first director of the ACLU Women's Rights Project in 1972.²⁰²

4. *Women in the Law Seminar*

MSP and its reimagining of the admissions process would also have a profound indirect impact on Ginsburg and RLSN, as it also opened the door to a critical mass of women students.²⁰³ As Askin recalled, “[r]acial diversity also quickly expanded to include gender diversity, as second-career women began descending upon the law school.”²⁰⁴

With a critical mass of women law students, an activist spirit among the student body, and an institutional commitment to retooling the curriculum, Rutgers emerged as a natural place for students to advocate for one of the legal academy's first “Women and the Law” seminars, alongside New York University (NYU) Law School. In addition to her emerging interest in gender equity issues, Ginsburg's reputation for meticulous preparation made her an ideal professor for this class.

The inaugural course had ten students.²⁰⁵ Ginsburg recalled the students were “mainly women, [and] a few brave men.”²⁰⁶

In 1970, Ginsburg recalled, “Women students . . . whose consciousness of sex discrimination had awakened at least as much as mine, young women encouraged by a vibrant movement . . . for racial equality, asked for a seminar on Women and the Law.”²⁰⁷ Ginsburg agreed and, summoning the school's Rebellion-induced innovative spirit, used several of her ongoing

¹⁹⁹ Lopez, *supra* note 187.

²⁰⁰ *Reed*, 404 U.S. at 76.

²⁰¹ *Id.* at 77.

²⁰² *The Women Who Made ACLU History*, ACLU (Mar. 9, 2023), <https://www.aclu.org/news/womens-rights/the-women-who-made-aclu-history> [<https://perma.cc/8NV8-GMZG>].

²⁰³ FRANK ASKIN, *Interview*, *supra* note 125, at 192-94.

²⁰⁴ *Id.*

²⁰⁵ Interview with Ruth Bader Ginsburg, *supra* note 60.

²⁰⁶ *Id.*

²⁰⁷ Ginsburg, *supra* note 62, at 16.

cases to teach one of the first such classes in the nation, a class partly clinical in structure.

Ginsburg, recalling the spirit of the times, remembered the lobbying leading to the class as a natural outgrowth of the focus on racial equity that rocked and transformed Rutgers following the 1967 civil unrest. “It is evident that I was in the right place at the right time. Rutgers students sparked my interest and action. Faculty colleagues were supportive and at least indulgent.”²⁰⁸

With this class, as framed by scholar Wendy Williams, “Ginsburg, schooled by the obstacles she had faced in her own personal and professional life, was primed and ready to respond to her students’ requests.”²⁰⁹ Ginsburg recalled,

I went off to the library. There, in the space of a month, I read every U.S. court decision ever published involving women’s legal status, and every U.S. law journal commentary on point. That was not a very taxing undertaking. There were not many decisions, and commentary was slim. There was probably less altogether than today accumulates in six months’ time.²¹⁰

A central part of the course examined the Fourteenth Amendment and sex discrimination. Ginsburg, of course, assigned Pauli Murray’s *Jane Crow*.²¹¹ “Ruth (as everyone called her) led her students on a survey of statutes and pending cases on women’s rights around the country. She drew on the first serious book—Leo Kanowitz’s *Women and the Law: The Unfinished Revolution*. Women’s rights had begun to emerge after the passage of the Civil Rights Act of 1964, which incorporated the rights of women to equal treatment.”²¹²

But the readings went beyond the Fourteenth Amendment. One non-legal reading Ginsburg assigned stands out—Simone De Beauvoir’s, *The Second Sex*.²¹³ Hanks recalled how *The Second Sex*, written by a French existentialist captured Ginsburg’s imagination.²¹⁴ “You know what set Ruth on fire?” Hanks recalled:

²⁰⁸ Ruth Bader Ginsburg, Associate Justice, U.S. Supreme Court, Remarks at Rutgers University School of Law-Newark (Apr. 11, 1995) [hereinafter RBG Remarks at Rutgers Law School] (transcript on file with the WRLR); see also Elizabeth Moore, *Rutgers Dedicates Iconic Building to Ruth Bader Ginsburg*, RUTGERS (Dec. 3, 2021), <https://www.rutgers.edu/news/rutgers-dedicates-iconic-building-ruth-bader-ginsburg> [<https://perma.cc/K8DS-G9BM>].

²⁰⁹ Wendy Williams, *Justice Ruth Bader Ginsburg’s Rutgers Years: 1963-1972*, 31 WOMEN’S RTS. L. REP. 229, 241 (2010).

²¹⁰ Ginsburg, *supra* note 62, at 16-17.

²¹¹ See Williams, *supra* note 209, at 251 n.150.

²¹² Conk, *supra* note 81, at 522-23.

²¹³ *Id.* at 516, 522; SIMONE DE BEAUVOIR, *THE SECOND SEX* (1949).

²¹⁴ Interview with Eva Hanks, *supra* note 60.

She read Simone De Beauvoir. She wrote that book, *The Second Sex*, and Ruth told me she was reading it and that she couldn't sleep at night. She would read through half the night, and go into Jane's, that's her daughter's, bedroom and say, I have to tell you about this. It lit a flame in her.²¹⁵

As the first course of its kind, in preparing for the class, Ginsburg likely introduced academic inquiry and materials in the class that had never been used before at law school. At its core, however, the Women and the Law course should be viewed as a clinical course or, at the very least, as part of the broader curricular changes being implemented at RLSN following the 1967 Rebellion.

Justice Ginsburg recalled “a very great lady named Annamay Sheppard was teaching an urban clinic. Hers was the first clinic at Rutgers, if I remember. And then Askin, together with Kinoy, taught a constitutional litigation clinic” based on “the cases [Kinoy] was doing at the moment.”²¹⁶ Ginsburg recalled, like the Constitutional Law Clinic, that her class “centered on cases in which I was involved.”²¹⁷ Reflecting the law school's institutional shift, which as we have seen Ginsburg helped shape, Ginsburg added, “[s]tudents were taking a course in women and the law, and some of those students enrolled in the clinic, and those students were working with me on whatever cases I was handling at the time.”²¹⁸ Ginsburg added, “[t]hat was the object of being in the clinic, that they would get to work with me on the cases I was handling.”²¹⁹

To Ginsburg, the students were “comparable to associates in a law firm. They worked on what I did. They drafted documents which I then generally rewrote, but then explained to them why what they had done, although a valiant effort, was not what we would want to present to a court. I think it was a very good learning experience, and that pattern developed even more in my years at Columbia.”²²⁰

As we have seen, this approach emerged directly from the demand from the 1969 ABLS indictment that “[e]ach course should be a ‘clinic’ in which each professor of law secures and maintains a docket of cases that he himself is in the process of litigating.”²²¹ It also reflects the space and encouragement provided by the law school to engage in litigation impacting the community.

²¹⁵ *Id.*

²¹⁶ Interview with Ruth Bader Ginsburg, *supra* note 60.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ Rutgers Report, *supra* note 184, at 239.

Some students found the “atmosphere . . . different . . . You can talk about anything that came in your head. It makes you more creative.” The class will “listen to any idea you have.” It is a “very warm experience.”²²²

One male student who took the seminar told us that Ginsburg “quite deliberately patterned her approach and the sequence of cases on that of Thurgood Marshall of the NAACP and Inc. Fund;” her first two or three cases involved a male, not woman, suffering discrimination. He recalls this “reverse” discrimination approach was “not popular with all of the earliest feminists.”²²³

For some women, Ginsburg’s presentation made more of a lasting impression than the substance of the course.²²⁴ Some students recall, “[o]h, sure. The idea of her being an example of how to be a lawyer. She wore a suit, she acted professionally, she acted nice and professional. Substance of the [Women in the Law] class didn’t help at all.”²²⁵

However, some students were less complimentary, emphasizing the ongoing tension between reformist and radical legal strategies, including their cultural dimensions.²²⁶ One student recalls:

I believe I took RBG’s class. Women in the Law. . . . She was a different kind of person. Business like, professional. We were not. We were just out of the mold. . . . She was organized and professional and she dressed in a suit. Not that many people wore a suit. It was not a class. It was a seminar. It was only a couple of credits. I’m not even positive if we even had a test. It was new. She was just writing the whole thing herself.²²⁷

The course would prove influential beyond the Rutgers Law campus, providing Ginsburg and her students the opportunity to explore gender equality and the law, a critical part of her emerging reputation that would take her to the Supreme Court.²²⁸

5. *The Women’s Rights Law Reporter*

In 1971, soon after Ginsburg launched her seminar and started litigating gender equality cases, several Rutgers students approached Ginsburg to

²²² Audio tape: Woman Kind: Interviews with A Group of Women Law Students, by Diane Crothers (1973) [hereinafter Interview with Diane Crothers] (on file with author).

²²³ William Hodes, *Reminiscences from Alumni & Rutgers Colleagues*, IN MEMORIAM OF RUTH BADER GINSBURG: RUTGERS L. SCH., (on file with Rutgers University).

²²⁴ Telephone Interview by Carly Rothman Siditsky with Charlyn Buss (Apr. 6, 2021) [hereinafter Interview with Charlyn Buss].

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ See Ginsburg, *supra* note 62, at 16-17.

become the faculty advisor for the *Women's Rights Law Reporter*, the first legal journal dedicated solely to examining gender issues.²²⁹

Originally, the journal had been conceived as a legal journal focused on gender equity issues independent from any law school affiliation.²³⁰ Anne Marie Boylan, a then recent Rutgers Law School graduate, started the Reporter in her Newark apartment, the first such journal in the country. When the *Women's Rights Law Reporter* published its first issue in the summer of 1971, Boylan served as its editor-in-chief.²³¹

The first issue of the *Women's Rights Law Reporter* featured articles on *Phillips v. Martin Marietta Corp.*, a seminal Supreme Court gender case involving the refusal to hire women with pre-school aged children that was then winding its way through the courts,²³² as well as topics such as women in prison, women lawyers, and case summaries on birth control, abortion, childcare, and poverty—issues that the nation continues to grapple with today.²³³

When the journal ran out of money, it started to search for a law school affiliation.²³⁴ According to Diane Crothers, a first-year Rutgers student at the time, “Ann . . . came to a women’s movement meeting at the Women’s Center on 13th street, and she pitched the *Women's Rights Law Reporter*, and I was there at that meeting and began to work with her.”²³⁵

Crothers recalled “Elizabeth [Langer] was a year ahead of me at Rutgers, but later on, when the WRLR stopped being, when we couldn’t make it as a free-standing publication . . . Elizabeth and some other law students tried to move it into Rutgers Law School, successfully, so that’s when her time with the Reporter starts.”²³⁶

Langer scheduled a meeting with Dean Heckel to discuss hosting the WRLR at Rutgers Law School.²³⁷ “She was told that there were three

²²⁹ Williams, *supra* note 209, at 239.

²³⁰ *See id.*

²³¹ *Id.*

²³² *Id.* at 240; *see generally* Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (refusing to hire pre-school age children violated Title VII’s prohibition against sex discrimination).

²³³ Williams, *supra* note 209, at 239-40; *see generally* Table of Contents, 1 WOMEN’S RTS. L. REP. 1, 3 (1971) (featuring writings on cases and issues surrounding birth control, poverty, childcare, women in prison, and women lawyers); *NWLC List of Issues*, NAT’L WOMEN’S L. CTR., <https://nwlc.org/nwlc-issues/> [<https://perma.cc/AW83-J8CH>] (last visited Dec. 16, 2025) (continuing to focus on legal work related to gender and women’s rights).

²³⁴ Rodrigo Torrejon, *Former Rutgers Law Students Remember Ruth Bader Ginsburg, their Professor and Leader*, NJ.COM (Sep. 20, 2020, at 21:27 ET), <https://www.nj.com/news/2020/09/former-rutgers-law-students-remember-ruth-bader-ginsburg-their-professor-and-leader.html> [<https://perma.cc/R338-7SSF>].

²³⁵ Interview with Diane Crothers, *supra* note 231.

²³⁶ *Id.*

²³⁷ Robin Lally, *Women’s Rights Law Reporter Celebrates 50 Years and First Adviser Ruth Bader Ginsburg*, RUTGERS TODAY (Feb. 24, 2020), <https://www.rutgers.edu/news/womens-rights-law-reporter-celebrates-50-years-and-first-adviser-ruth-bader-ginsburg> [<https://perma.cc/VM5U-3BKV>].

preconditions—space, funding and a faculty adviser. If she could meet all three of those conditions, the dean would agree to give the WRLR a home at Rutgers.”²³⁸

Langer, one of nineteen women who would work on the first Rutgers-issue of the journal, had not yet met Ginsburg, but Ginsburg fully embraced the idea.²³⁹ “The idea of starting a law journal dedicated to women’s rights was a fairly radical idea,” she said. “In 1970 there were no journals dedicated to women’s rights. It wasn’t even a legitimate subject of inquiry.”²⁴⁰ When asked to be one of the faculty advisors, Ginsburg “immediately said yes, which surprised me because it was a big commitment.”²⁴¹ Annamay Sheppard, who had just joined the faculty in the nascent clinical program, also agreed to be an advisor.²⁴²

With two advisors, an advisory board was established, comprising Professor Kinoy and several members from the original independent journal’s advisory board, for the original independent journal.²⁴³ Once the students raised sufficient funding, the law school approved the WRLR and it published its inaugural issue in 1972. Langer would become the first editor-in-chief.²⁴⁴

This journal provided Professor Ginsburg another avenue to explore her developing ideas about law as an instrument of gender equality. According to Langer, Ginsburg “devoted many hours to writing and editing, counseling the staff, attending meetings, and inevitably mediating with the administration when problems arose.”²⁴⁵

Ginsburg “gave us credibility. Gave us legitimacy,” said Langer. She “[d]efended us to faculty members who thought this was ridiculous. And she shepherded us through, along with a lot of enthusiastic law students. Mostly women.”²⁴⁶

And of course, the students were exposed to the legendary Ginsburg diligence and work-ethic. “She was focused, very professional, really smart and a stickler for details,” recalled Langer.²⁴⁷ “She had an incredible sense of the law, a really wonderful grasp of cases.”²⁴⁸

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ Torrejon, *supra* note 234.

²⁴¹ Lally, *supra* note 237.

²⁴² *Id.*

²⁴³ Elizabeth Langer, Seizing The Moments: The Beginnings of the *Women's Rights Law Reporter* and a Personal Journey, 30 WOMEN'S RTS. L. REP. 592, 600 (2008-2009).

²⁴⁴ Lally, *supra* note 237.

²⁴⁵ *Id.* at 239.

²⁴⁶ Torrejon, *supra* note 234.

²⁴⁷ Lally, *supra* note 237.

²⁴⁸ O'Sullivan, *supra* note 95.

In the second edition published at Rutgers Law, Ginsburg wrote a piece about *Reed vs. Reed*, a seminal case on gender equality. Ginsburg would argue the case in the Supreme Court.²⁴⁹ The issue also included an article by Rutgers law graduate, W. William Hodes, “A Disgruntled Look at *Reed v. Reed* from the Vantage Point of the Nineteenth Amendment.”²⁵⁰

Ginsburg’s involvement in the WRLR ensured an ongoing platform for academic discussion about women’s rights under the law and several inspired students to carry the torch. It would also become a fitting close to her final chapter at Rutgers.

6. Ruth Bader Ginsburg and Pay Equity at Rutgers

During her time at Rutgers, Ginsburg also engaged in issues impacting her daily work environment. Her own early experience encountering overt pay discrimination at Rutgers, influenced her subsequent examination of the law as instrumental to shaping and legitimatizing gender norms. As she educated herself on these issues, developed a deeper theoretical perspective, and learned a new vocabulary, one wonders how profoundly her initial experiences with discrimination simmered, particularly as she became more involved in addressing systemic discrimination within her own institution. Ginsburg would bring this perspective to Rutgers when she became involved in the efforts of the female faculty to address systemic pay disparities. Ginsburg recalled:

There was . . . an organization called the Women’s Equity Action League. . . . We were all together in an effort to make things better. There was a class action against Rutgers, a straight equal pay case which was settled amicably after some years, and all of the women got a very large raise. So the women had a network.²⁵¹

Judith Weis, one of the original organizers of the faculty women’s caucus, recalls that the initial organizational efforts grew out of a women’s faculty affinity group. Rutgers, paradoxically, was one of the few universities with enough women to even conduct a meaningful analysis of pay disparities. Weis recalled,

I don’t think it reflects a great deal of enlightenment on the part of the administration at Rutgers Newark. But I came into the department of science that already had three women, which is really remarkable. I didn’t think about it much at the time, but I look back and in 1967, that this department had three

²⁴⁹ *Id.*

²⁵⁰ Williams, *supra* note 209, at 239.

²⁵¹ Ogilvy Interview with Ginsburg, *supra* note 60, at 6.

women, the number of the people in the department might have been around 15.²⁵²

Based on this information, the caucus discovered gender pay disparities and had to make a strategic decision about how to address the situation.

As part of this process, the professors consulted Ginsburg, who had already established a reputation as an expert on gender discrimination, for guidance on how to frame and prepare their complaint. Judith Weis recalls,

We went over, I at least once, I think twice to consult with her as the complaint was being developed. . . . She was already known to us as a high-power person in the law school. Focused on women's rights. So it seemed just appropriate, she was down the street. Let's go talk with her. She was known.²⁵³

Instead of filing a lawsuit, they opted to challenge the discrimination under a new federal Executive Order that prohibited discrimination, including sex discrimination, in federal contracts, and filed a complaint with the Department of Health, Education, and Welfare.²⁵⁴

The prolonged battle finally yielded results after Ginsburg had left. Weis recalled Ginsburg as "very smart, and very supportive, and wanting to help. Our complaint didn't get resolved until after she left. We won and we got pay raises and back pay, and all kinds of restitution, which was a major victory."²⁵⁵

With growing concern about gender equity at Rutgers itself, Ginsburg would be supportive in other ways as well. Weis recalled:

Up through the summer of 1971, . . . undergraduate college, Rutgers College, had been refusing to admit women. That summer, a new president, Edward Bloustein, was coming in. And in September of his first academic year, a letter reached him from Professor Ginsburg. I have this letter from Justice Ginsburg's files, which make clear that she was following up on a letter that she had written him the previous spring. I'll read the key sentence from her September letter, adding my comments in brackets.²⁵⁶

This resulted in a stinging letter from Professor Ginsburg to the new president of Rutgers on September 3, 1971.²⁵⁷ She writes, "unless the Board

²⁵² Telephone Interview by Carly Rothman Siditsky with Judith Weis, Professor of Biological Scis., Rutgers Univ. (Mar. 12, 2021).

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ Fred Strebeigh, *Rutgers School of Law—Newark and the History of Women and the Law*, 31 WOMEN'S RTS. L. REP. 220, 227 (2010).

²⁵⁷ *Id.* at 227-28.

takes affirmative action [to open Rutgers College to women] in September ... the ACLU plans to commence the projected lawsuit [which she has helped prepare].”²⁵⁸

Ruth Bader Ginsburg was ready to sue Rutgers University in order to open Rutgers College to women.²⁵⁹ In fact, “[s]he had the ACLU behind her, and she had plaintiffs ready to go. In that month, Rutgers College announced that it would open to women.”²⁶⁰

7. Ruth Bader Ginsburg Leaves Rutgers

In the Fall of 1972, Ginsburg left the “People’s Electric Law School” for a tenured position at Columbia Law School.²⁶¹ It would be nice to imagine that the decision was motivated as much by the desire to end Ginsburg’s three-train commute as by the prestige of teaching at an Ivy League school and returning to her alma mater, but that is not likely true.

Ginsburg would continue her on-campus activism at Columbia on behalf of custodial workers and others. At Columbia, Ginsburg would draw upon many of the antidiscrimination policies she had developed during her years at Rutgers, believing them to be better conceived and more advanced than those at Columbia. She shared her story:

In the affirmative action wave that hit colleges and universities in the United States at the start of the 1970s, during President Nixon’s first term, I received an invitation to join the law faculty at Columbia University, and was pleased to switch to a school close to my home in New York City. My very first month at Columbia, in September 1972, the University sought to save money in the housekeeping department. Columbia sent layoff notices to 25 maids-and not a single janitor. (Maids were women, janitors were men, but their jobs were not vastly different). I entered that fray, which happily ended with no layoffs, and, as I recall, the union’s first female shop steward.²⁶²

During her time at Columbia, Ginsburg found herself drawing on materials and policies she had prepared years earlier at Rutgers, as one might expect.

At Columbia, Ginsburg served as the Director of the ACLU Women’s Rights Project, working on some of her most significant cases. In 1980, she was nominated by President Jimmy Carter to the D.C. Circuit and confirmed

²⁵⁸ *Id.* at 228.

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ Ginsburg, *supra* note 62, at 14.

²⁶² *Id.* at 18.

unanimously by the Senate.²⁶³ She remarked that being a judge was the position she was born for. In 1993, President Bill Clinton nominated Ruth Bader Ginsburg to be an Associate Justice on the U.S. Supreme Court,²⁶⁴ where she became known as the “Notorious RBG.” Even though she left RLSN in 1972, as I will argue in the next section, this transformative period would help shape her jurisprudence, particularly on issues of diversity in higher education, civil rights, and women’s rights. These decisions, in turn, help us understand how she might have approached the workplace post *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* (“SFFA”).²⁶⁵

II. ECHOES OF RUTGERS NEWARK AT THE SUPREME COURT

Rutgers Law School–Newark profoundly influenced Justice Ginsburg in major and subtle ways. For the first time in her life, she came face-to-face with the nation’s deep racial divide and the consequences of institutional neglect, if not outright hostility, toward large segments of the African American community.

These two societies—“radically unequal” to borrow from the Kerner Commission Report examining the Newark Rebellion and other instances of civil unrest in the 1960s²⁶⁶—would, after a long simmer, spark a rebellion that forced RLSN’s all-white faculty to confront its historic indifference and its potential role in driving change. The devastation of the Newark community, a deep racial fragmentation, would land at the doorstep of Ginsburg’s work home. Ginsburg played a critical part in RLSN’s rapid, if not radical, change. Ginsburg, along with many non-Black women, would also benefit from these more consciously inclusive spaces demanded by the urgency of the moment. This newly forged environment would enable her to channel her life experiences into both pedagogy and litigation with a feminist focus. Specifically, RLSN shaped her voice and worldview in at least three

²⁶³ *Supreme Court Justice Ruth Bader Ginsburg*, CLINTON DIGIT. LIBR., <https://clinton.presidentiallibraries.us/rbg-topical-guide> [<https://perma.cc/3NBY-CWWQ>] (last visited Oct. 23, 2024).

²⁶⁴ *Ruth Bader Ginsburg, 1993-2020*, SUP. CT. HIST. SOC., <https://supremecourthistory.org/associate-justices/ruth-bader-ginsburg-19932020/> [<https://perma.cc/K9DE-NYSU>] (last visited Oct. 23, 2024).

²⁶⁵ *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023) (holding that Harvard University’s race-conscious admissions process violated the Equal Protection Clause under the Fourteenth Amendment).

²⁶⁶ NAT’L ADVISORY COMM’N ON CIV. DISORDERS, REP. ON THE CAUSES, EVENTS, AND AFTERMATHS OF THE CIV. DISORDERS OF 1967, 1 (1967); see generally Alice George, *The 1968 Kerner Commission Got It Right, But Nobody Listened*, SMITHSONIAN MAG. (Mar. 1, 2018), <https://www.smithsonianmag.com/smithsonian-institution/1968-kerner-commission-got-it-right-nobody-listened-180968318/> [<https://perma.cc/L3FS-Z3X7>] (discussing prescience of the Kerner Commission in foreshadowing long persistent issues of racial segregation).

ways that would echo during her twenty-seven years as an Associate Justice of the Supreme Court.

First, Rutgers fundamentally shaped Justice Ginsburg's views of educational equity and opportunity, as she weighed on frequently in the educational affirmative action cases. Second, Ginsburg's embrace of remedial and diversity rationales in her analysis of educational affirmative action also shaped her views in three significant civil rights cases, where she authored notable dissents. Finally, as we have seen, RLSN's gave Justice Ginsburg the opportunity, particularly in the post-Rebellion years, to shift her academic focus toward women and the law.²⁶⁷

Below, I examine each of these areas in turn.

A. Justice Ginsburg and Educational Affirmative Action

In the Court, Justice Ginsburg would be one of the most steadfast supporters of educational affirmative action, arguing that such programs were justified both to remedy ongoing and historical discrimination and to ensure a diversity of voices necessary for a rich intellectual experience. These views, shaped by her lived experience and her time at RLSN, ultimately do not survive the Supreme Court's *SFFA* decision.²⁶⁸

Justice Ginsburg's own statements frequently recalled this commitment to diversity as a cornerstone of her experience at the law school.²⁶⁹ In a message for the University's 250th anniversary, Ginsburg praised the law school's efforts, stating "[t]hrough the years Rutgers has remained steadfast in its commitment to diversity, advancing opportunities to people long left out to aspire and achieve."²⁷⁰ These became her core values.

Likewise, in another speech, Ginsburg stressed this theme in great detail when responding to a question about the future of affirmative action in education.

Rutgers has long been a leader in promoting diversity in legal education. Notably, in April 1998, when other law schools were retreating from affirmative action, the Rutgers faculty passed a resolution stating 'On the occasion of the

²⁶⁷ See discussion *supra* Section I.C.4.

²⁶⁸ See discussion of decision *infra* Section III.A.; see generally Angela Onwuachi-Willig, *POV: Ruth Bader Ginsburg Fought Tirelessly for What She Believed Was Right*, BU TODAY (Sep. 20, 2020), <https://www.bu.edu/articles/2020/ruth-bader-ginsburg/> [<https://perma.cc/BR8Y-BPXF>] (even as a steadfast supporter of affirmative action, Justice Ginsburg was also criticized for hiring only one African American clerk during her tenure on the Court).

²⁶⁹ RUTGERS UNIVERSITY, *Ruth Bader Ginsburg: Celebrating Rutgers' 250th Anniversary*, at 0:55 (YouTube, Nov. 10, 2015), <https://www.youtube.com/watch?v=qa9JpTXpLC8> [<https://perma.cc/4TQJ-KLZN>].

²⁷⁰ *Id.*

30th Anniversary of the Minority Student Program of Rutgers Law School-Newark, the faculty recognizes the enormous contributions the program has made to legal education, to the legal profession and to society, and reaffirms its commitment to the program.' I am pleased to say I had a hand in the development of that program when I served on the Rutgers' faculty, a program designed to enrich the educational experience and advance the liaisons of all participants.²⁷¹

Indeed, her involvement with the Minority Student Program (MSP) was more personal than her involvement on the initial MSP committee. Years later, Ginsburg would recall the impact MSP had on her world view. In a discussion with journalist Jeffrey Rosen about the apparent vulnerability of educational affirmative action in the shifting Supreme Court, Justice Ginsburg argued:

One way or another, I think schools will find a way of providing access to minority group members disabled because their education up to the time of the university has been well below par. That was brought home when I was teaching at Rutgers. In the year of the riots, the school decided to have an aggressive affirmative action program. As one component, any student could get one-on-one tutoring by faculty members. My student scored in the 300s on the LSAT when the top score was 800. He was very bright. No one had taught him to read and write well; it was just that basic. By the end of the year he was on the law review.²⁷²

While some, if not most, of Ginsburg's views may not have survived the *SFFA* decision, the reasons behind these views provide valuable insights as we navigate a post-*SFFA* world in both higher education and the workplace.²⁷³ As we shall see, these reminiscences go beyond mere nostalgia. According to Ginsburg, the struggles for racial equity in the 1960s, including her own involvement with MSP, would help inform her own thinking on cases involving affirmative-action programs in higher education.

For instance, we see her consistent views in the paired cases involving the University of Michigan and University of Texas.

In *Gratz v. Bollinger*, the Court invalidated the University of Michigan's undergraduate admissions system, which used a point-based approach that

²⁷¹ Ginsburg: *Internet Should Bring Us Together, Not Foster Isolation*, 157 N.J.L.J. 1058 (1999).

²⁷² JEFFREY ROSEN, CONVERSATIONS WITH RBG: RUTH BADER GINSBURG ON LIFE, LOVE, LIBERTY, AND LAW 213, 213 (2019).

²⁷³ For a full scholarly discussion, see Deborah Jones Merritt & David M. Lieberman, *Ruth Bader Ginsburg's Jurisprudence of Opportunity and Equality*, 104 COLUM. L. REV. 39 (2004); Shira Galinsky, *Returning the Language of Fairness to Equal Protection: Justice Ruth Bader Ginsburg's Affirmative Action Jurisprudence in Grutter and Gratz and Beyond Celebrating the Jurisprudence of Justice Ruth Bader Ginsburg*, 7 CUNY L. REV. 357 (2004).

automatically awarded points to underrepresented racial and ethnic minorities.²⁷⁴

Ginsburg, in a dissent joined by Justice Souter, emphasized the importance of addressing the enduring effects of past racial discrimination.²⁷⁵ She argued that the university's affirmative action policy served a compelling interest in remedying these effects and fostering diversity.²⁷⁶ Ginsburg acknowledged that race-conscious admissions policies were necessary to level the playing field, given the historical and structural disadvantages faced by underrepresented minority groups.²⁷⁷ She also critiqued the majority's insistence on strict scrutiny of affirmative action policies, noting that such an approach could hinder meaningful progress toward equality.²⁷⁸ In Justice Ginsburg's view, the university's use of race in admissions should not be seen as an impermissible quota but rather as a tool for achieving diversity, which benefits society as a whole.²⁷⁹ Justice Ginsburg reminded us that "we are not far distant from an overtly discriminatory past, and the effects of centuries of law-sanctioned inequality remain painfully evident in our communities and schools."²⁸⁰

In the paired *Grutter v. Bollinger*, the Court upheld the University of Michigan Law School's admissions program which considered race as one of many factors to promote diversity.²⁸¹ In Ginsburg's concurrence, with whom Breyer joined, she agreed with the Court's observation that race-conscious admissions programs "must have a logical end point" and noted it aligned with the international understanding of affirmative action, as reflected in the International Convention on the Elimination of All Forms of Racial Discrimination, ratified by the United States in 1994—a topic she had written about as a professor.²⁸² She expressed hope, though not certainty, that within the next generation, progress toward nondiscrimination and genuinely equal opportunity would allow for the phasing out of affirmative action.²⁸³ "However strong the public's desire for improved education systems may be, [citations omitted] it remains the current reality that many minority students encounter markedly inadequate and unequal educational opportunities."²⁸⁴ Justice Ginsburg continued:

²⁷⁴ *Gratz v. Bollinger*, 539 U.S. 244, 255 (2003).

²⁷⁵ *Id.* at 298.

²⁷⁶ *Id.* at 304.

²⁷⁷ *Id.* at 299-301.

²⁷⁸ *Id.* at 298.

²⁷⁹ *Id.* at 303.

²⁸⁰ *Gratz*, 539 U.S. at 298.

²⁸¹ *Grutter v. Bollinger*, 539 U.S. 306, 343-44 (2003).

²⁸² *Id.* at 344.

²⁸³ *Id.* at 346.

²⁸⁴ *Id.*

Despite these inequalities, some minority students are able to meet the high threshold requirements set for admission to the country's finest undergraduate and graduate educational institutions. As lower school education in minority communities improves, an increase in the number of such students may be anticipated. From today's vantage point, one may hope, but not firmly forecast, that over the next generation's span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action.²⁸⁵

In the two Texas cases, *Fisher I* and *Fisher II*, Justice Ginsburg again articulated the rationale for affirmative action, emphasizing both the impact of past and present discrimination, as well as the importance of diversity. In *Fisher v. University of Texas at Austin (Fisher I)*, the University of Texas at Austin responded to studies indicating that the university lacked a "critical mass" of minority students by implementing an undergraduate admissions program that considered race as one of several factors to increase racial minority enrollment on campus.²⁸⁶ The Court addressed whether the lower court's judgment met the Supreme Court's interpretation of the Equal Protection Clause of the Fourteenth Amendment.²⁸⁷ It held that strict scrutiny was the appropriate standard for all race-based admissions and that no deference was owed to the university's method or manner of considering race.²⁸⁸

Justice Ginsburg dissented, arguing that even when applying strict scrutiny, the University's admission policy is constitutional.²⁸⁹ According to Justice Ginsburg, "[t]he University has steered clear of a quota system like the one struck down in *Bakke*, which excluded all nonminority candidates from competition for a fixed number of seats."²⁹⁰ Further, "Justice Powell's opinion in *Bakke* and the Court's decision in *Grutter* require no further determinations."²⁹¹ The case should not have been remanded as the Court of Appeals had already completed the inquiry to "assess whether the University has offered sufficient evidence [to] prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity."²⁹²

Justice Ginsburg, dissenting alone, called out the hypocrisy of the Court's apparent endorsement of "race neutral" approaches to the same end.

Petitioner urges that Texas' Top Ten Percent Law and race-blind holistic review of each application achieve significant diversity, so the University must be

²⁸⁵ *Id.*

²⁸⁶ *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 306 (2013) [hereinafter *Fisher I*].

²⁸⁷ *Id.* at 303.

²⁸⁸ *Id.* at 313-15.

²⁸⁹ *Id.* at 334-37.

²⁹⁰ *Id.* at 334.

²⁹¹ *Id.* at 336-37.

²⁹² *Fisher I*, *supra* note 286, at 337.

content with those alternatives. I have said before and reiterate here that only an ostrich could regard the supposedly neutral alternatives as race unconscious . . . I have several times explained why government actors, including state universities, need not be blind to the lingering effects of ‘an overtly discriminatory past,’ the legacy of ‘centuries of law sanctioned inequality.’²⁹³

In *Fisher v. Univ. of Tex. at Austin (Fisher II)*,²⁹⁴ the court revisited the University’s race-conscious admissions policy and upheld the constitutionality of the admissions program under a strict scrutiny analysis. The Court found that the university had provided a reasoned and principled articulation of concrete and precise goals for its admissions program, such as promoting cross-racial understanding, preparing students for a diverse workforce, and fostering a robust exchange of ideas.²⁹⁵ The Court emphasized that the university bears a heavy burden to show that it had not achieved the educational benefits of diversity before turning to a race-conscious plan, but the university met this burden by demonstrating through good faith studies that race-neutral policies had not been successful in achieving sufficient racial diversity.²⁹⁶ Ginsburg joined the majority opinion where the Court held “[t]he University has thus met its burden of showing that the admissions policy it used at the time it rejected petitioner’s application was narrowly tailored.”²⁹⁷

B. Justice Ginsburg and Civil Rights Broadly

Justice Ginsburg viewed affirmative action broadly and favorably, believing that she herself had benefited from it.²⁹⁸ As a law professor she wrote:

Affirmative action aims to redress historic and lingering deprivations of the basic civil right to equality, the legacy of slavery in the United States, for example, or of the caste system long entrenched in India. It was also conceived as a means to advance the economic and social well-being of women, racial minorities, and others born into groups or communities that disproportionately experience poverty, unemployment, and ill health. Focusing on affirmative action, we may better comprehend how the two classes of rights (civil and

²⁹³ *Id.* at 335-36.

²⁹⁴ *Fisher v. Univ. of Tex. at Austin*, 579 U.S. 365 (2016) [hereinafter *Fisher II*].

²⁹⁵ *Id.* at 381-82.

²⁹⁶ *Id.* at 383.

²⁹⁷ *Id.* at 388.

²⁹⁸ Paris Inst. of Pol. Studs., *The Value of Diversity*” Ruth Bader Ginsburg’s 2009 Keynote Speech, SCIENCESPO (Sep. 23, 2020), <https://www.sciencespo.fr/en/news/the-value-of-diversity-ruth-bader-ginsburg-at-the-2009-graduation-ceremony/> [<https://perma.cc/BK7V-RAM2>].

economic), though once and still set apart by politicians, jurists, and scholars, commonly relate to promotion of the health and welfare of humankind.²⁹⁹

For Ginsburg, affirmative action was not merely an extra nudge in hiring or admission. When explaining what constituted affirmative action, she would include any program that took positive steps to enhance opportunities for disadvantaged groups. She states:

The steps may be small and encounter little resistance—for example, advertising job openings in newspapers serving minority communities. Or they may be more radical, costly, and controversial, for example, subsidizing childcare for infants and pre-school children and providing paid parental leave for the weeks immediately after childbirth. Also in the affirmative action arsenal are the goals, preferences, and quotas that have provoked powerful opposition.³⁰⁰

For Ginsburg, the need for affirmative action was underscored by the Newark Rebellion and other civil unrest in the 1960s. “The Philadelphia Plan [requiring government contractors to hire minority workers in Philadelphia] was propelled by more than government benevolence. It responded to a crisis in the economic well-being of minority Americans. The 1969 plan followed several years of urban unrest, which a blue-ribbon investigatory commission attributed in part to economic deprivation.”³⁰¹

For Ginsburg, the concept of affirmative action had global salience. “A racially diverse student body, Powell concluded [in *Bakke*], would enrich the educational experience for all students. The Universal Declaration’s prescription, contained in Article 26, states that public education ‘shall be directed’ to ‘promot[ing] understanding, tolerance and friendship among all nations, racial or religious groups.’”³⁰²

From her earliest days, Justice Ginsburg took these views to the Supreme Court. In *Adarand Constructors, Inc. v. Peña*, a 1995 case, the Court considered a set-aside program for government contractors and addressed whether racial classifications imposed by federal, state, and local governments could withstand strict scrutiny analysis.³⁰³ Justice O’Connor for the plurality opinion held that, similar to the Fourteenth Amendment, the Fifth Amendment also requires strict scrutiny analysis for any racial

²⁹⁹ Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 1 RUTGERS RACE & L. REV. 193, 194 (1999).

³⁰⁰ *Id.* at 195.

³⁰¹ *Id.* at 206 (internal citations omitted).

³⁰² *Id.* at 208 (internal citations omitted). Justice Ginsburg also understood the global context along gender line. “More than seventy percent of our planet’s poor are women; women suffer more unemployment than men in every world region; and women outnumber men two-to-one among the 900 million who are illiterate.” Ginsburg & Merritt, *supra* note 299, at 198.

³⁰³ See *Adarand Constructors, Inc., v. Peña*, 515 U.S. 200 (1995).

classification—where any statute or regulation must be narrowly tailored to further compelling government interest.³⁰⁴ The Court thus reconciled one standard for all racial classifications, regardless if by state or federal actor. Previously, racial classification had a two-tier system where state government was subject to strict scrutiny while the federal government was subject to intermediate scrutiny.³⁰⁵

Here, a federal program provided financial incentive for any prime contractors who hired subcontractors controlled by “socially and economically disadvantaged individuals” in the performance of federal government contracts.³⁰⁶ Individuals who qualified as “socially and economically disadvantaged” were presumed to include racial minorities.³⁰⁷ The bid in question was awarded to Gonzales Construction Company under this program, and subcontractor Adarand filed a lawsuit alleging that the rule violated the equal protection component of the Due Process Clause of the Fifth Amendment.³⁰⁸ The case was remanded for consideration under strict scrutiny.³⁰⁹

Justice Ginsburg dissented, marking her first major civil rights dissent in what would be many throughout her tenure. Justice Ginsburg argued minorities still suffer the effects of past discrimination and that Congress is authorized to create affirmative action programs which may be necessary to provide equal protection under the Fourteenth Amendment.³¹⁰

Interrogating closely the formal ideas of “colorblindness,” Justice Ginsburg contextualized Justice Harlan’s often celebrated language in *Plessy v. Ferguson*.³¹¹ She reminds us that Justice Harlan also stated, “[t]he white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty.”³¹² In doing so, she reminds us that formal colorblindness can be and is often used as a facade for racial subordination, emphasizing that sometimes more must be done. Her dissent continued, stating, “Not until *Loving v. Virginia*, 388 U.S. 1 (1967), which held unconstitutional Virginia’s ban on interracial marriages, could one say with security that the Constitution and this Court would abide no measure ‘designed to maintain White Supremacy.’”³¹³ She continued:

³⁰⁴ *Id.* at 227.

³⁰⁵ *Id.*

³⁰⁶ *Id.* at 204.

³⁰⁷ *Id.* at 205.

³⁰⁸ *Id.* at 210.

³⁰⁹ *Adarand Constructors, Inc.*, 515 U.S. at 239.

³¹⁰ *Id.* at 274.

³¹¹ *Id.* at 272.

³¹² *Id.*

³¹³ *See id.*

The divisions in this difficult case should not obscure the Court's recognition of the persistence of racial inequality and a majority's acknowledgment of Congress' authority to act affirmatively, not only to end discrimination, but also to counteract discrimination's lingering effects. (*citation omitted*). Those effects, reflective of a system of racial caste only recently ended, are evident in our workplaces, markets, and neighborhoods. Job applicants with identical resumé's, qualifications, and interview styles still experience different receptions, depending on their race. White and African American consumers still encounter different deals. People of color looking for housing still face discriminatory treatment by landlords, real estate agents, and mortgage lenders. Minority entrepreneurs sometimes fail to gain contracts though they are the low bidders, and they are sometimes refused work even after winning contracts. Bias both conscious and unconscious, reflecting traditional and unexamined habits of thought, keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become this country's law and practice.³¹⁴

More than a decade later, Justice Ginsburg again would weigh in on affirmative action in the employment sphere. Specifically, *Ricci v. DeStefano* addressed whether an employer may consider race under permissible circumstances to address racially disparate results in a standardized firefighters test.³¹⁵ The majority held that an employer could factor race into hiring processes, however, under Title VII, "before an employer can engage in intentional discrimination for the asserted purpose of avoiding unintentional disparate impact, an employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take race-conscious action."³¹⁶ The City of New Haven's decision not to use the firefighter test results was based solely on the racial distribution of the test results, and the city offered no "strong evidence" that using the test results would have constituted disparate-impact discrimination.³¹⁷ Such evidence would include that the test was deficient or that an equally valid but less discriminatory alternative existed. Therefore, the city's consideration of race in hiring violated Title VII.³¹⁸

In a dissent, joined by Stevens, Souter, and Breyer, Justice Ginsburg argued the city acted appropriately when it discarded the firefighter promotion exam after discovering that the results disproportionately favored white candidates.³¹⁹ She emphasized that the city was trying to comply with Title VII, which prohibits both intentional discrimination (disparate

³¹⁴ *Id.*

³¹⁵ *Ricci v. DeStefano*, 557 U.S. 557, 585 (2009).

³¹⁶ *Id.*

³¹⁷ *Id.* at 593.

³¹⁸ *Id.*

³¹⁹ *Id.* at 632.

treatment) and practices that unintentionally disadvantage minorities (disparate impact).³²⁰ Justice Ginsburg criticized the majority for failing to recognize the complexity of this balancing act, arguing that the City's actions were a good faith attempt to prevent unintentional racial bias.³²¹ She warned that the decision would discourage employers from taking proactive measures to ensure fairness and equality in the workplace, undermining efforts to combat racial discrimination.³²²

According to Ginsburg, "Title VII became effective in July 1965. Employers responded to the law by eliminating rules and practices that explicitly barred racial minorities from "white" jobs. But removing overtly race-based job classifications—adopting "color blind" standards—did not usher in genuinely equal opportunity."³²³ Further, reiterating a point made in *Adarand*, "more subtle—and sometimes unconscious—forms of discrimination replaced once undisguised restrictions."³²⁴

She continued, "I would hold that New Haven had ample cause to believe its selection process was flawed and not justified by business necessity. Judged by that standard, petitioners have not shown that New Haven's failure to certify the exam results violated Title VII's disparate treatment provision."³²⁵ She argued that:

The City . . . 'was faced with a prima facie case of disparate-impact liability. The pass rate for minority candidates was half the rate for nonminority candidates, and virtually no minority candidates would have been eligible for promotion had the exam results been certified . . . Its investigation revealed grave cause for concern about the exam process itself and the City's failure to consider alternative selection devices.'³²⁶

Finally, her dissent in *Shelby County v. Holder*,³²⁷ a pivotal voting rights case, stands as among her most memorable dissents. In *Shelby County v. Holder*, Chief Justice Roberts,³²⁸ writing for the majority, struck down

³²⁰ *Ricci*, 557 U.S. at 608.

³²¹ *Id.* at 610.

³²² *Id.* at 625.

³²³ *Id.* at 620.

³²⁴ *Id.*

³²⁵ *Id.* at 632.

³²⁶ *Ricci*, 557 U.S. at 632.

³²⁷ See *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013) (Ginsburg, J., dissenting).

³²⁸ In 1981, John Roberts served as Assistant to the Attorney General during the Reagan administration, where he focused on Sections II and V of the Voting Rights Act of 1965—provisions he believed encroached on state regulations. At one point, he wrote to Judge Friendly, stating, "[t]his is an exciting time to be at the Justice Department, when so much that has been taken for granted for so long is being seriously reconsidered." See Ari Berman, *Inside John Roberts' Decades-Long Crusade Against the Voting Rights Act*, POLITICO (Aug. 10, 2015), <https://www.politico.com/magazine/story/2015/08/john-roberts-voting-rights-act-121222/> [https://perma.cc/KNT5-6YHK].

Sections 4 and 5 of the Voting Rights Act—the Pre-Clearance provisions—as unconstitutional, reasoning the Act sharply departed from the basic principles of equal sovereignty among the states.³²⁹ By requiring only nine states to obtain federal approval “to implement laws that they would otherwise have the right to enact and execute on their own,” the Act infringed upon federalism; nonetheless, “these departures were justified by the ‘blight of racial discrimination in voting’ that had ‘infected the electoral process in parts of our country for nearly a century.’”³³⁰ However, the Court noted that because there was no longer a substantial racial disparity in voter registration or turnout between white citizens and African American citizens in the states covered by the formula contained in § 4(b), the restrictions outlined in Sections 4 and 5 were no longer justified.³³¹

Justice Ginsburg read her dissent from the bench. According to Justice Ginsburg, the VRA had successfully addressed racial discrimination in voting.³³² She noted that the Act had been reauthorized by Congress multiple times with overwhelming bipartisan support, and that it continued to serve a vital role in preventing discriminatory practices.³³³ Justice Ginsburg emphasized that Congress had gathered extensive evidence of ongoing racial discrimination when it reauthorized the VRA in 2006.³³⁴ She believed that the Court should have deferred to Congress’s judgment in deciding that Section 5’s preclearance requirement was still necessary.³³⁵ Justice Ginsburg warned that the preclearance requirement acted as a safeguard against backsliding, preventing states with a history of discrimination from enacting new discriminatory laws.³³⁶ Without preclearance, she argued, there was a risk that these states would revert to discriminatory practices.³³⁷

Justice Ginsburg refuted the Chief Justice’s claim that the nation had changed significantly since the VRA was first enacted and noted “Congress also found that voting discrimination had evolved into subtler second-generation barriers, and that eliminating preclearance would risk loss of the gains that had been made.”³³⁸ She continued:

[T]he Court today terminates the remedy that proved to be best suited to block that discrimination. The Voting Rights Act of 1965 (VRA or Act) has worked to combat voting discrimination where other remedies had been tried and failed.

³²⁹ *Shelby Cnty.*, 570 U.S. at 544.

³³⁰ *Id.* at 544-45.

³³¹ *Id.* at 547.

³³² *Id.* at 560.

³³³ *Id.* at 593.

³³⁴ *Id.* at 565-66.

³³⁵ *Shelby Cnty.*, 570 U.S. at 565-66.

³³⁶ *Id.* at 559-60.

³³⁷ *Id.* at 590-91.

³³⁸ *Id.* at 575-76.

Particularly effective is the VRA's requirement of federal preclearance for all changes to voting laws in the regions of the country with the most aggravated records of rank discrimination against minority voting rights.³³⁹

Then, in one of the most memorable lines from any of her dissents, Justice Ginsburg cautioned, "[t]hrowing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet."³⁴⁰

Like the educational affirmative action cases, these cases re-affirm certain lessons: don't ignore the deep history and current legacies of racial discrimination, understand the presence of ongoing discrimination both cynically or unconsciously hiding behind formal neutrality, and remain vigilant if you truly care about constructing a racially just society. For Justice Ginsburg, these lessons were reaffirmed, if not learned, at Rutgers.

But Justice Ginsburg's commitment to redressing historical and ongoing discrimination, which found voice in the educational affirmative action and other racial justice cases, often extended beyond race and gender. For instance, in *Olmstead v. L.C. by Zimring*, Justice Ginsburg, writing for the majority, held that Title II of the ADA prohibits government entities from discriminating against people on the basis of disability when administering public services.³⁴¹ Implementing regulations provide that public services must be administered in the most integrated setting possible, allowing for meaningful interactions between individuals with disabilities and those without, while also being appropriate to meet the specific needs of individuals with disabilities. As such, unjustified institutionalization is disability-based discrimination. Justice Ginsburg explained that the question in this case is "whether the proscription of discrimination may require placement of persons with mental disabilities in community settings rather than in institutions. The answer, we hold, is a qualified yes."³⁴²

Likewise, in *Burwell v. Hobby Lobby Stores, Inc.*, the Court held that federal regulations which required closely held corporations to provide health insurance coverage for contraception violated the Religious Freedom Restoration Act (RFRA).³⁴³ The Court found that the regulations substantially burdened the exercise of religion by the corporations' owners, who held sincere religious beliefs regarding contraception.³⁴⁴ Additionally, the Court determined that the regulations were not the least restrictive means

³³⁹ *Id.* at 560.

³⁴⁰ *Id.* at 590.

³⁴¹ *Olmstead v. L.C. by Zimring*, 527 U.S. 581, 607 (1999).

³⁴² *Id.* at 587.

³⁴³ *Burwell v. Hobby Lobby Stores*, 573 U.S. 682, 736 (2014).

³⁴⁴ *Id.* at 691.

of serving a compelling government interest.³⁴⁵ Justice Ginsburg, in her dissent, warned that the Court's decision could essentially create a loophole for discrimination.³⁴⁶ By failing to limit religious exemptions to organizations formed for a religious purpose, and instead applying it to organizations "substantially in the exchange of goods or services for money beyond nominal amounts," she believed "[t]he Court, I fear, has ventured into a minefield by its immoderate reading of RFRA."³⁴⁷

C. Justice Ginsburg And Women's Rights

As we have seen, Rutgers Law provided Justice Ginsburg the space and opportunity, especially in the post-Rebellion years, to refocus her academic interests on women and the law. In the Rutgers' 250th anniversary short film, she states, "Rutgers students sparked my interest and aided in charting the course I then pursued . . . less than three years after starting the seminar, I was arguing gender discrimination cases before the Supreme Court."³⁴⁸

Between 1970 and 1972, the synergistic combination of the newly created Women and the Law Seminar, supporting feminist scholarship in the Rutgers Women's Rights Law Reporter, and engaging in burgeoning constitutional litigation significantly expanded the boundaries of constitutional protections for women. The critical mass of women students and the quasi-clinical nature of her class were, in both inception and conception, partly the product of Ruth Ginsburg's allied role, post-Rebellion, in forming MSP and clinical programs that underpinned these spaces.

Justice Ginsburg understood the different rationales for race-based and sex-based affirmative action. She explained:

I would distinguish laws and programs defended as legitimately preferential to or for women from race-based programs in this key respect. Recall that traditional forms of sex discrimination, unlike obviously odious race-based classifications, were once regarded or rationalized as benignly favoring or protecting the second sex— laws that prohibited women from working at night, tending bar, carrying heavy weights, working overtime, for example. Eventually, many women came to see these laws as protecting not women but men's jobs from women's competition. Evaluators of gender-based affirmative action, therefore, must be alert to the difference between measures that genuinely ameliorate the continuing effects of women's historic subordination, and those that perpetuate myths or stereotypes inhibiting women's achievement of their full human potential.³⁴⁹

³⁴⁵ *Id.* at 728,

³⁴⁶ *Id.* at 739-40.

³⁴⁷ *Burwell*, 573 U.S. at 771-72.

³⁴⁸ RUTGERS UNIVERSITY, *supra* note 269, at 00:36.

³⁴⁹ Ginsburg & Merritt, *supra* note 299, at 212.

There is a direct through line during this period—of course running through her many years as a successful litigator for the ACLU Women’s Rights Program—and two of her most famous decisions: *United States v. Virginia*³⁵⁰ and *Ledbetter v. Goodyear Tire & Rubber Co.*³⁵¹

*United States v. Virginia*³⁵² addressed whether Virginia Military Institute (VMI), traditionally all male, could exclude female students. Justice Ginsburg, writing for the majority, held that Virginia Military Institute’s (VMI) male-only admissions policy was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.³⁵³ VMI’s policy was a gender-based government action that needed to meet an “exceedingly persuasive justification.”³⁵⁴ Under the heightened review standard, the State must show “at least that the [challenged] classification serves ‘important governmental objectives and that the discriminatory means employed’ are ‘substantially related to the achievement of those objectives.’”³⁵⁵ However, the exclusionary policy relied on broad, stereotypical assumptions about women’s abilities. “[T]he remedy proffered by Virginia—maintain VMI as a male-only college and create VWIL as a separate program for women—does not cure the constitutional violation.”³⁵⁶

Ginsburg reasoned, “Virginia maintains that methodological differences are justified by the important differences between men and women in learning and developmental needs, but generalizations about ‘the way women are,’ estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description.”³⁵⁷

In *Ledbetter v. Goodyear Tire & Rubber Co.*, the Court addressed whether Lily Ledbetter, who had suffered pay discrimination for several years, could file a charge of discrimination several years after the first discriminatory paycheck when she discovered the disparity.³⁵⁸ The Court held that such a complaint is time-barred.³⁵⁹

In Justice Ginsburg’s dissent, with whom Stevens, Souter, and Breyer joins, she argues that the Court’s decision in *Ledbetter* overlooks the realities of pay discrimination, which often arises gradually and is not easily

³⁵⁰ U.S. v. Virginia, 518 U.S. 515 (1996).

³⁵¹ Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007).

³⁵² Virginia, 518 U.S. at 519.

³⁵³ Id.

³⁵⁴ Id. at 524 (citation omitted).

³⁵⁵ Id.

³⁵⁶ Id. at 534.

³⁵⁷ Virginia, 518 U.S. at 549.

³⁵⁸ Ledbetter, 550 U.S. at 623.

³⁵⁹ Id. at 642–43.

identifiable until it accumulates over time.³⁶⁰ Furthermore, Goodyear's pay information was kept confidential, leaving employees unaware of pay discrepancies.³⁶¹ Ginsburg contends that requiring employees to challenge each pay decision within 180 days is unrealistic, as employees may initially be unaware that discrimination has occurred.³⁶² Instead, she asserts that each paycheck reflecting discriminatory pay is a new violation of Title VII, meaning that employees should be able to challenge pay disparities as long as they continue to receive discriminatory paychecks.³⁶³

Cognizant of the history of Congress legislatively correcting Supreme Court decisions with which it did not agree, Justice Ginsburg wrote "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."³⁶⁴ In 2009, picking up Justice Ginsburg's call, Congress passed the Lilly Ledbetter Fair Pay Act reversing the case.³⁶⁵

D. Justice Ginsburg and Judicial Restraint

Of course, Justice Ginsburg was a lifelong learner, so I do not mean to suggest she stopped learning in 1972 or that her experiences after 1972 did not greatly influence her tenure on the Supreme Court in a myriad of ways. For instance, there is no evidence that Justice Ginsburg's commitment to the values of judicial restraint and modesty—even in cases involving traditionally subordinated communities—was specifically grounded in her years at Rutgers.³⁶⁶ Nevertheless, these values are pertinent to how she might have understood the *SFFA* decision.

Yet, as we have seen, Rutgers had a lasting impact during her tenure on the Supreme Court. In particular, her nine years at Rutgers profoundly shaped her approach to cases involving educational opportunity and equity, influencing the jurist she would become.

³⁶⁰ *Id.* at 650.

³⁶¹ *Id.* at 645.

³⁶² *Id.* at 645-46.

³⁶³ *Ledbetter*, 550 U.S. at 659-60 (citing *Teamsters v. United States*, 431 U.S. 324, 348 (1977)).

³⁶⁴ *Id.* at 661.

³⁶⁵ Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

³⁶⁶ *Shelby Cnty.*, 570 U.S. at 589-92 (Ginsburg, J., dissenting) (arguing the Court should defer to Congress's 2006 reauthorization of the VRA based on an extensive legislative record, an institutional-deference and judicial-modesty stance in a voting-rights case); *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582, 635-36 (2016) (five years before the reversal of *Roe*, Justice Ginsburg concurred, "so long as this Court adheres to *Roe v. Wade* and *Planned Parenthood of Southeastern Pa. v. Casey*, Targeted Regulation of Abortion Providers laws like H.B. 2 that 'do little or nothing for health, but rather strew impediments to abortion,' [], cannot survive judicial inspection.") (citations omitted); cf. *Bush v. Gore*, 531 U.S. 98, 141 (2000) ("Article II can hardly be read to invite this Court to disrupt a State's republican regime.") (urging restraint toward state electoral processes impacting voters).

E. The Summer of 2020 and its Aftermath: The Death of Ruth Bader Ginsburg and the Murder of George Floyd

On September 18, 2020, Justice Ruth Bader Ginsburg died after a long battle with cancer.³⁶⁷ The following day, President Trump made a statement heralding Justice Ginsburg: “[r]enowned for her brilliant mind and her powerful dissents at the Supreme Court, Justice Ginsburg demonstrated that one can disagree without being disagreeable toward one’s colleagues or different points of view.”³⁶⁸

The death of Justice Ginsburg, during a global pandemic, capped a convulsive summer. Three months earlier, on May 25, 2020, during my last year as co-dean at the now merged RLSN campus, as a Great Pandemic raged on, a white Minneapolis police officer killed George Floyd, a 46-year old unarmed African American man accused of passing a bad check, by pinning him to the ground with a knee on the neck for at least eight minutes and fifteen seconds as he desperately pled with the officer at least sixteen times that he could not breathe and called for his mother.³⁶⁹ One police officer stood by to guard against interference as his fellow officer slowly killed George Floyd. Two others helped hold down George Floyd.³⁷⁰ Every second of the gruesome killing was recorded on a smartphone.³⁷¹

The killing of George Floyd sparked a massive, national, multi-racial, multi-ethnic, multi-generational fifty-state uprising, the largest street demonstrations in our nation’s history, persisting over several weeks as the protestors placed at center stage the nation’s history of police violence against the Black community.³⁷² I joined several law students and faculty in marching to the City of Newark City Hall, near a plaque commemorating the Newark Rebellion and the police beating of Smith more than fifty years

³⁶⁷ *The Rights of Women*, RUTGERS MAG. (Nov. 25, 2020), <https://www.rutgers.edu/magazine/fall-2020/rights-women> [https://perma.cc/ENN8-EAJJ].

³⁶⁸ Tamara Keith, ‘Titan of the Law’: Trump Reacts to Ginsburg’s Death, NPR (Sep. 18, 2020), www.npr.org/sections/death-of-ruth-bader-ginsburg/2020/09/18/914666608/trump-reacts-to-justice-ginsburgs-amazing-life-on-tarmac-after-rally [https://perma.cc/S4Z7-JNJZ] (President Trump called Supreme Court Justice Ruth Bader Ginsburg a “titan of the law” in a statement late on the day of her death).

³⁶⁹ Evan Hill et al., *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (July 8, 2020), <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html> [https://perma.cc/UU4J-5ZSE]; Anica C. Law et al., *A Dangerous Myth: Does Speaking Imply Breathing?*, NAT’L INST. OF HEALTH: PUBMED CENTRAL (June 25, 2020), <https://pmc.ncbi.nlm.nih.gov/articles/PMC11036158/> [https://perma.cc/GFE4-L9T8].

³⁷⁰ Elliott C. McLaughlin, *Three Videos Piece Together The Final Moments of George Floyd’s Life*, CNN (June 23, 2020, at 09:14 ET), <https://www.cnn.com/2020/06/01/us/george-floyd-three-videos-minneapolis/index.html> [https://perma.cc/PF69-T4FJ].

³⁷¹ Hill, *supra* note 369.

³⁷² Amy Harmon & Sabrina Tavernise, *One Big Difference About George Floyd Protests: Many White Faces*, N.Y. TIMES (June 12, 2020), <https://www.nytimes.com/2020/06/12/us/george-floyd-white-protesters.html> [https://perma.cc/RX68-LYPN].

earlier. These nationwide, then global, protests expressed anger not only at the killing of George Floyd, but also the history of the structural racism that undergirds the nation's history of police violence against the Black community. As expressed by one young student in Washington, D.C.:

[E]ven when slavery ended, we were pushed towards the worst conditions. We drank the water from sewage while whites drank pure filtered water, we sometimes used holes in the ground just to use the bathroom while the whites had perfectly clean toilets. And even after segregation, we [still] get killed for stupid reasons.³⁷³

Unlike Smith, George Floyd, as a second grader, once dreamed of being on the Supreme Court, but his life was derailed by bad options and bad decisions.³⁷⁴ In response to the murder and protests, many communities stepped up, imagining a moment of lasting change was finally at hand, which had somehow always been elusive.³⁷⁵ Rutgers Law had passed one of the most sweeping statements on the murder and protests,³⁷⁶ and I believed a true reckoning was at hand.³⁷⁷ As part of the response, universities and secondary schools created or redoubled education on issue of racial history and justice, large corporations adopted stronger pipeline and DEI programs, and donated unprecedented sums to racial justice causes.³⁷⁸

Meanwhile, with these racial justice efforts ongoing, the effort to replace Justice Ginsburg was furious. On September 26, 2020, President Trump

³⁷³ The Learning Network, *What Students Are Saying About the George Floyd Protests*, N.Y. TIMES (June 4, 2020), <https://www.nytimes.com/2020/06/04/learning/whatstudents-are-saying-about-the-george-floyd-protests.html> [<https://perma.cc/YH7D-3JGH>].

³⁷⁴ See generally ROBERT SAMUELS & TOLUSE OLORUNNIOA, *HIS NAME IS GEORGE FLOYD: ONE MAN'S LIFE AND THE STRUGGLE FOR RACIAL JUSTICE* (2022) (telling the story of systemic racial discrimination through George Floyd's journey through inadequate and segregated schools, an unforgiving carceral system, and addiction).

³⁷⁵ *Id.*

³⁷⁶ Joe Patrice, *The Rutgers Law School Faculty Response to the George Floyd Killing is What We Need to See More Of*, ABOVE THE LAW (June 24, 2020, at 12:16 ET), <https://abovethelaw.com/2020/06/the-rutgers-law-school-faculty-response-to-the-george-floyd-killing-is-what-we-need-to-see-more-of/> [<https://perma.cc/8DJF-R8ZQ>].

³⁷⁷ See generally David Lopez, *The Great Pandemic and The Great Reckoning: Law and Society in an Emerging World*, 72 RUTGERS L. REV. 1265 (2020) (discussing whether the mass global protests against the over-policing of Black bodies portended an actual shift in the U.S. history of race relations).

³⁷⁸ Alecia Winfield, *How #BLM Has Redefined D&I in the Workplace*, HR EXECUTIVE (Oct. 2, 2020), <https://hrexecutive.com/how-blm-has-redefined-di-in-the-workplace/> [<https://perma.cc/6GGH-FX6G>]; Tracy Jen, Jena McGregor & Meghan Hoyer, *Corporate America's \$50 Billion Promise*, WASH. POST (Aug. 23, 2021), <https://www.washingtonpost.com/business/interactive/2021/george-floyd-corporateamerica-racial-justice/> [<https://perma.cc/GZ5S-UPNZ>]; Candice Norwood, *Racial Bias Trainings Surged After George Floyd's Death. A Year Later, Experts Are Still Waiting For 'Bold' Change*, PBS NEWS (May 25, 2021, at 18:38 ET), <https://www.pbs.org/newshour/nation/racial-bias-trainings-surged-after-george-floyds-death-a-year-later-experts-are-still-waiting-for-bold-change> [<https://perma.cc/B8EC-ZST7>].

rapidly nominated Amy Coney Barrett to replace her and she was confirmed on October 26, 2020, less than two weeks before the general election.³⁷⁹

As history has shown, however, moments of racial progress always spur a backlash.³⁸⁰ On September 22, 2023, Donald Trump issued the Executive Order on Combating Race and Sex Stereotyping.³⁸¹ This Executive Order was predicated on the claim that many people are pushing a different vision of America that is grounded in hierarchies based on collective social and political identities rather than in the inherent and equal dignity of every person as an individual. “This ideology is rooted in the pernicious and false belief that America is an irredeemably racist and sexist country; that some people, simply on account of their race or sex, are oppressors; and that racial and sexual identities are more important than our common status as human beings and Americans.”³⁸² Attacking a straw man, the Order prohibited federal contractors from conducting a training in a range of areas deemed “divisive concepts,” which would soon migrate Critical Race Theory bans.³⁸³

The backlash accelerated. Across the nation, many state legislatures banned Critical Race Theory,³⁸⁴ as divisive. Concurrently there were numerous challenges to educational affirmative action and corporate DEI programs.³⁸⁵ With this backlash as the backdrop, on February 25, 2021, petition for a writ of certiorari in the case *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* was filed, a case involving a head-on challenge to the use of race as a consideration for diversity in higher education admissions.³⁸⁶ Though this case was years in the making, it arrived on the Supreme Court docket during an intensification of the backlash convulsive Black Lives Matter (BLM) marches and renewed commitment of many institutions to ferret out the structural discrimination which had long concerned Ruth Bader Ginsburg.

It soon became apparent that the promise of the “Great Reckoning of 2020” would disappoint, another “dream deferred” in poet Langston

³⁷⁹ Amy Coney Barrett, OYEZ, https://www.oyez.org/justices/amy_coney_barrett [https://perma.cc/J7AV-DYGV] (last visited Oct. 30, 2024).

³⁸⁰ See *infra* I.B.

³⁸¹ Exec. Order No. 13950, 85 Fed. Reg. 60683 (Sep. 28, 2020).

³⁸² *Id.*

³⁸³ *Id.*

³⁸⁴ See generally Athena D. Mutua, *Reflections on Critical Race Theory in a Time of Backlash*, 100 DENVER L. REV. 553 (2023) (discussing the backlash against and restrictions on teaching Critical Race Theory).

³⁸⁵ Kiara Alfonseca & Max Zahn, *How Corporate America is Slashing DEI Workers Amid Backlash to Diversity Programs*, ABC NEWS (July 7, 2023), <https://abcnews.go.com/US/corporate-america-slashing-dei-workers-amid-backlash-diversity/story?id=100477952> [https://perma.cc/BFY7-GJLN]; Scott Detrow, *The Downfall of DEI*, ALL THINGS CONSIDERED: NPR (Sep. 7, 2024, at 17:05 ET), <https://www.npr.org/2024/09/07/nx-s1-5100700/the-downfall-of-dei>. [https://perma.cc/2LS3-86S6].

³⁸⁶ See *Students for Fair Admissions, Inc.*, *supra* note 265.

Hughes' famous words.³⁸⁷ On June 29, 2023, the Supreme Court, three years after the murder of George Floyd and a summer of BLM protests, handed down *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181 (2023). It represented the latest Chief Justice Roberts's decision designed to usher in his vision of a post-racial, colorblind society.³⁸⁸ It was also the first major educational affirmative action case in nearly twenty-five years which did not involve Justice Ruth Bader Ginsburg. It is to this decision and its broader implications, specifically for the workplace, we now turn.

III. *SFFA v. HARVARD* AND ITS IMPACT ON HIGHER EDUCATION AND THE WORKPLACE

In *Students for Fair Admissions, Inc. v. Harvard*, the Supreme Court considered whether the use of race as a factor in college admissions violated the Equal Protection Clause of the Fourteenth Amendment.³⁸⁹ At issue were the undergraduate admissions programs for Harvard University and the University of North Carolina (UNC).³⁹⁰

A. The Decision

Chief Justice Roberts, writing for the majority, held that the admissions practices of Harvard and UNC, which considered race as one factor among others, did not survive strict scrutiny under the Fourteenth Amendment and were thus unconstitutional.³⁹¹ The Court acknowledged that although the Court in *Grutter v. Bollinger* endorsed Justice Powell's view from *Bakke* that student body diversity is a compelling state interest, it also established limits on how universities could consider race in admissions.³⁹² More specifically, universities could not establish quotas for members of specific racial groups nor could it "insulate applicants who belong to certain racial or ethnic groups from the competition for admission."³⁹³ To that end, the Court has permitted race-based college admissions "only within the confines of narrow restrictions," meaning university admissions policies must comply with strict scrutiny, cannot rely on racial stereotypes, and must ultimately end at some

³⁸⁷ Langston Hughes, *Harlem*, POETRY FOUND., <https://www.poetryfoundation.org/poems/46548/harlem> [<https://perma.cc/9LRE-JTVG>] (last visited Nov. 2, 2024).

³⁸⁸ See *Students for Fair Admissions, Inc.*, *supra* note 265.

³⁸⁹ *Id.* at 190.

³⁹⁰ *Id.*

³⁹¹ *Id.* at 213.

³⁹² *Id.* at 211.

³⁹³ *Id.*

point.³⁹⁴ Chief Justice Roberts ultimately concluded that, for several reasons, regardless of the intentions behind the admissions systems of Harvard and UNC, both universities failed to meet each of these criteria.³⁹⁵

First, the asserted compelling interests, including student body diversity, were insufficiently measurable.³⁹⁶ Harvard cited four educational benefits furthering the compelling interest of diversity; “(1) [T]raining future leaders in the public and private sectors; (2) preparing graduates to adapt to an increasingly pluralistic society; (3) better educating its students through diversity; and (4) producing new knowledge stemming from diverse outlooks.”³⁹⁷ Similarly, UNC cited “(1) promoting the robust exchange of ideas; (2) broadening and refining understanding; (3) fostering innovation and problem-solving; (4) preparing engaged and productive citizens and leaders; [and] (5) enhancing appreciation, respect, and empathy, cross-racial understanding, and breaking down stereotypes.”³⁹⁸

According to Roberts, although these goals are “commendable,” it is unclear how they could be measured by the judiciary. For example, “[h]ow is a court to know whether leaders have been adequately ‘train[ed]’; whether the exchange of ideas is ‘robust’; or whether ‘new knowledge’ is being developed?”³⁹⁹ Chief Justice Roberts continued: “Even assuming these goals could be measured more precisely, it is not sufficiently clear how a court would know when they have been reached and “when the perilous remedy of racial preferences may cease?”⁴⁰⁰

Chief Justice Roberts argues “[t]here is no particular point at which there exists sufficient ‘innovation and problem solving,’ or students who are appropriately ‘engaged and productive.’”⁴⁰¹ According to Roberts, “[t]he central question is not about whether to have no diversity or some, rather it asks “[h]ow many fewer leaders Harvard would create without racial preferences, or how much poorer the education at Harvard would be,” which are questions that no court could resolve.”⁴⁰² Unlike discerning whether an employee should receive backpay for example, the questions of whether a particular group of minority students “produces ‘engaged and productive citizens’” or “effectively ‘train[s] future leaders’ is standardless” and thus “imponderable.”⁴⁰³

³⁹⁴ *Students for Fair Admissions, Inc.*, 600 U.S. at 213.

³⁹⁵ *Id.* at 213.

³⁹⁶ *Id.* at 214.

³⁹⁷ *Id.* (internal citations omitted) (internal quotation marks omitted).

³⁹⁸ *Id.* (internal citations omitted).

³⁹⁹ *Students for Fair Admissions, Inc.*, 600 U.S. at 214.

⁴⁰⁰ *Id.*

⁴⁰¹ *Id.* at 214-15.

⁴⁰² *Id.* at 215.

⁴⁰³ *See id.*

Second, the universities failed “to articulate a meaningful connection between the means they employ and the goals they pursue.”⁴⁰⁴ The Court concluded that assigning students into racial categories (Asian, Native Hawaiian or Pacific Islander, Hispanic, White, African American, Native American) and making admissions decisions based on them, did not further the universities’ purported educational benefits.⁴⁰⁵ First, the Court believed the opaque racial categories are imprecise and undermine the universities’ goals.⁴⁰⁶ According to Justice Roberts, “[G]iven the mismatch between the means respondents employ and the goals they seek, it is especially hard to understand how courts are supposed to scrutinize the[se] admissions programs[.]”⁴⁰⁷

However, the Court emphasizes that such deference “must exist ‘within constitutionally prescribed limits’ and that ‘deference does not imply abandonment or abdication of judicial review.’”⁴⁰⁸ In the absence of “an exceedingly persuasive justification that is measurable and concrete enough for judicial review,” neither university satisfied that standard.⁴⁰⁹

Third, the admissions policies used race as a stereotype and did not comply with the twin commands of the Equal Protection Clause, which stipulate “that race may never be used as a ‘negative’ and that it may not operate as a stereotype.”⁴¹⁰ The Court concluded that race was used as a “negative” because certain racial groups were admitted in higher numbers than they otherwise would have been, with Harvard acknowledging that race was a determinative factor for at least some applicants.⁴¹¹ Further, according to Chief Justice Roberts, Harvard’s race-based admissions rely on the “pernicious stereotype that ‘a black student can usually bring something that a white person cannot offer,’” a notion explicitly discouraged in *Grutter*.⁴¹² Examining UNC’s similar claim that “race in itself says something about who we are,” the Court held “that universities may not operate their admissions programs on the belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue.”⁴¹³ As such, both of the university’s admissions policies further stereotypes that are contrary to “the ‘core purpose’ of the Equal Protection Clause.”⁴¹⁴

⁴⁰⁴ *Id.*

⁴⁰⁵ *See Students for Fair Admission, Inc.*, 600 U.S. at 215.

⁴⁰⁶ *Id.* at 216-17.

⁴⁰⁷ *Id.* at 217.

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.* at 217-18.

⁴¹⁰ *Id.* at 218.

⁴¹¹ *Students for Fair Admission, Inc.*, 600 U.S. at 218-19.

⁴¹² *Id.* at 220.

⁴¹³ *See id.* at 219 (internal citations omitted) (internal quotation marks omitted).

⁴¹⁴ *Id.* at 221.

Fourth, the admissions policies lacked a clearly defined logical endpoint.⁴¹⁵ Chief Justice Roberts rejected the universities' argument that their race-based admissions would end when there is "meaningful representation and meaningful diversity on college campuses," a metric that did not involve any "strict numerical benchmark or precise number or percentage."⁴¹⁶ Even if, as the universities contend, periodic review is conducted to determine whether the policies remain necessary, the Court in *Grutter* made it clear that race-based admissions eventually had to end.⁴¹⁷ The Chief Justice compares the dissents in the case to the minority view in *Bakke*, where four Justices would have upheld race-based admissions to remedy the effects of past discrimination.⁴¹⁸ However, he acknowledges that in the years after *Bakke*, the Court has repeatedly held that "ameliorating societal discrimination does not constitute a compelling interest that justifies race-based state action."⁴¹⁹ Using past societal discrimination to justify racial preferences would "open the door to competing claims for 'remedial relief' for every disadvantaged group. Opening that door would shutter another— [t]he dream of a Nation of equal citizens . . . would be lost, we observed, in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs."⁴²⁰ At the same time, Chief Justice Roberts made clear that:

[N]othing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise. But, despite the dissent's assertion to the contrary, universities may not simply establish through application essays or other means the regime we hold unlawful today.⁴²¹

Roberts concluded that many universities have, for too long, evaluated students based on their race rather than their individual experiences, and "in doing so, they have concluded, wrongly, that the touchstone of an individual's identity is not challenges bested, skills built, or lessons learned, but the color of their skin. Our constitutional history does not tolerate that choice."⁴²²

Justice Clarence Thomas, in his concurrence, writes separately to offer an originalist defense of the colorblind Constitution.⁴²³ He states, "while the

⁴¹⁵ *Id.*

⁴¹⁶ *Id.*

⁴¹⁷ *Students for Fair Admissions, Inc.*, 600 U.S. at 225.

⁴¹⁸ *Id.* at 226-27.

⁴¹⁹ *Id.* at 226.

⁴²⁰ *Id.* at 226-27.

⁴²¹ *Id.* at 230 (internal citations omitted) (internal quotation marks omitted).

⁴²² *Id.* at 231.

⁴²³ *Id.* at 232 (Thomas, J., concurring).

1866 Civil Rights Act used the rights of 'white citizens' as a benchmark, its rule was decidedly colorblind, safeguarding legal equality for all citizens 'of every race and color' and providing the same rights to all."⁴²⁴ According to Justice Thomas, the view that the Fourteenth Amendment "forbids only laws that hurt, but not help blacks" is not supported by the original meaning of the Fourteenth Amendment.⁴²⁵ That is why "courts must subject all racial classifications to the strictest scrutiny," even if touted as having beneficial purposes.⁴²⁶ Further, in the 50 years since *Grutter*, neither Harvard nor UNC, nor any *amici* can explain or clearly define the educational benefits of a diverse student body. Given that neither school could explain the link, "then surely its interest in racial diversity cannot be compelling enough to overcome the constitutional limits on race consciousness."⁴²⁷

Justice Gorsuch, in his concurrence, emphasizes that Title VI of the Civil Rights Act of 1964, not just the Equal Protection Clause of the Fourteenth Amendment, does not tolerate race-based admissions.⁴²⁸ Title VI prohibits recipients of federal funds from intentionally discriminating one person worse than another similarly situated person because of his race, color, or national origin. "It does not matter if the recipient can point to 'some other . . . factor' that contributed to its decision to disfavor that individual."⁴²⁹ It is also irrelevant if the discrimination aims to advance some "intention" or "motivation."⁴³⁰ Congress could have taken the law in many directions, but it chose to establish the profound rule that any recipient of federal funds "may never discriminate based on race, color, or national origin—period."⁴³¹ In this same vein, Congress also made it "unlawful . . . for an employer . . . to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin" under Title VII.⁴³² Recognizing that Congress used essentially identical terms, the Court has long held that "when Congress uses the same terms in the same statute, we should presume they have the same meaning."⁴³³ Under this presumption, Justice Stevens also recognized that "[b]oth Title VI and Title VII codify a categorical rule of individual equality, without regard to race."⁴³⁴ Applying these principles, Harvard and UNC, as institutions that

⁴²⁴ *Students for Fair Admissions, Inc.*, 600 U.S. at 235 (Thomas, J., concurring).

⁴²⁵ *Id.* at 246–47 (Thomas, J., concurring).

⁴²⁶ *Id.* at 252 (Thomas, J., concurring).

⁴²⁷ *Id.* at 253–54 (Thomas, J., concurring).

⁴²⁸ *Id.* at 287 (Gorsuch, J., concurring).

⁴²⁹ *Id.* at 289 (Gorsuch, J., concurring).

⁴³⁰ *Students for Fair Admission, Inc.*, 600 U.S. at 289 (Gorsuch, J., concurring).

⁴³¹ *Id.* at 290 (Gorsuch, J., concurring).

⁴³² *Id.* (Gorsuch, J., concurring).

⁴³³ *Id.* (quoting *IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005)) (Gorsuch, J., concurring) (internal quotations omitted).

⁴³⁴ *Id.* (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 416 (1978)) (Gorsuch, J., concurring).

receive federal financial assistance, “intentionally treat some applicants worse than others at least in part because of their race” and this alone, clearly violates Title VI.⁴³⁵

Justice Sonia Sotomayor, in her dissent, argues that the Equal Protection Clause of the Fourteenth Amendment enshrines a guarantee of racial equality and for this reason, the Court has allowed that this guarantee “be enforced through race-conscious means in a society that is not, and has never been, colorblind.”⁴³⁶ For example, in *Brown v. Board of Education*, 347 U.S. 48 (1954), the Court recognized the

constitutional necessity of racially integrated schools in light of the harm inflicted by segregation . . . and for 45 years, the Court extended *Brown*’s transformative legacy [into] higher education, allowing colleges and universities to consider race in . . . limited way[s] to equalize educational opportunities and promote] the . . . benefits of racial diversity.⁴³⁷

By holding that race can no longer be used in a limited way to achieve such critical benefits, “this Court stands in the way and rolls back decades of precedent and momentous progress.... the Court cements a superficial rule of colorblindness as a constitutional principle in an endemically segregated society where race has always mattered and continues to matter.”⁴³⁸

Picking up this theme, Justice Ketanji Brown Jackson, in her dissent, argues that historical racial discrimination created huge gaps in equality with respect to the health, wealth, and well-being of American citizens that still persist today.⁴³⁹ She states, “History speaks. In some form, it can be heard forever. The race based gaps that first developed centuries ago are echoes from the past that still exist today.”⁴⁴⁰ Because these gaps in inequality have not dissipated, this country falls short of actualizing one of its foundational principles—that all are equal under the law—when the Court determines that holistic admissions, like that one UNC employs, are unlawful.⁴⁴¹ As Justice Sotomayor noted, Title VI does not prohibit institutions from taking race into account to ensure the racial diversity of students.”⁴⁴² Picking up the criticism of formalistic reasoning, Justice Jackson continues: “To say that the constitution is colorblind ignores the lengthy history of state-sponsored race based preferences in America.”⁴⁴³ “[T]o say that anyone is now victimized

⁴³⁵ See *id.* at 290-94 (Sotomayor, J., dissenting).

⁴³⁶ *Students for Fair Admission, Inc.*, 600 U.S. at 318 (Sotomayor, J., dissenting).

⁴³⁷ *Id.* (Sotomayor, J., dissenting).

⁴³⁸ *Id.* (Sotomayor, J., dissenting).

⁴³⁹ *Id.* at 384 (Jackson, J., dissenting).

⁴⁴⁰ *Id.* at 393 (Jackson, J., dissenting).

⁴⁴¹ See *id.* at 384-85 (Jackson, J., dissenting).

⁴⁴² *Students for Fair Admission, Inc.*, 600 U.S. at 385 (Jackson, J., dissenting).

⁴⁴³ *Id.* (Jackson, J., dissenting).

if a college considers whether that legacy of discrimination has unequally advantaged its applicants fails to acknowledge the well-documented 'intergenerational transmission of inequality' that still plagues our citizenry."⁴⁴⁴

B. *SFFA*'s Impact on Higher Education?

As expected, the *SFFA* decision shook up the admissions practice of higher education, leading to the extirpation of race as an express plus factor in admissions. Several universities took a closer examination of their recruitment and admissions standards, some with an eye towards maintaining rich eclectic learning environments, identifying those who may have demonstrated particular grit in overcoming obstacles, and, for public institutions, deeper obligations to the broader community.⁴⁴⁵ Until the 2024 election, the consistency of these efforts with the race neutral latitude provided by the Chief Justice's opinion appeared to be destined to be fought one case at a time.⁴⁴⁶

However, in this space, the election of President Trump unleashed a highly aggressive effort to use Title VI's demand for the non-discriminatory use of public funds in higher education as leverage to ensure the most formalistic reading of the *SFAA* decision, glossing over many open questions remaining after the case.⁴⁴⁷

Thus, to implement a series of Executive Orders, the new administration launched a range of administrative investigations actions aimed to determine compliance with the new federal guidelines and purportedly the *SFFA* decision itself. Many of these, in the name of *SFFA*, may profoundly reshape higher education.⁴⁴⁸

⁴⁴⁴ *Id.* (footnote omitted). (Jackson, J., dissenting).

⁴⁴⁵ See generally Denise-Marie Ordway, *Race-Neutral Alternatives to Affirmative Action in College Admissions: The Research*, THE JOURNALIST'S RESOURCE (June 29, 2023), <https://journalistsresource.org/education/race-neutral-alternatives-affirmative-action-college-diversity/> [<https://perma.cc/2TTP-NR84>] (discussing the racially neutral admission criteria used by many universities).

⁴⁴⁶ See Lara A. Flath et al., *The Sup. Ct.'s Affirmative Action Op.: Key Takeaways for Higher Educ. & Beyond*, SKADDEN (Dec. 12, 2023), <https://www.skadden.com/insights/publications/2023/12/2024-insights/esg/the-supreme-courts-affirmative-action-opinion> [<https://perma.cc/H29E-49SY>] (noting that "several recent suits against higher education institutions are noteworthy, as they may allow courts to weigh in on the application and impact of *SFFA*").

⁴⁴⁷ See Vanessa Agudelo et al., *Shifting Guidance and Widespread University Investigations – The Trump Administration's Aggressive First Moves Enforcing Title VI in Education*, COOLEY ED (Mar. 18, 2025), <https://ed.cooley.com/2025/03/18/shifting-guidance-and-widespread-university-investigations-the-trump-administrations-aggressive-first-moves-enforcing-title-vi-in-education/> [<https://perma.cc/HDA7-SUGP>] (discussing the formal requirements needed for racially neutral government funding).

⁴⁴⁸ See *id.* at 2 (discussing administrative investigations to enforce new federal guidelines).

During the first week in office, the administration issued (1) Executive Order No. 14148,⁴⁴⁹ entitled “Initial Rescissions of Harmful Executive Orders and Actions” which rescinded President Biden’s executive orders aimed at increasing support for underrepresented to students; and (2) Executive Order No. 14173,⁴⁵⁰ entitled “Ending Illegal Discrimination and Restoring Merit-Based Opportunity,” which, in part, directs the higher education institutions that receive federal funding or participate in Title IV student aid programs to comply with *SFFA*, something they were of course required to do otherwise. On April 23, 2025, the administration issued Executive Order No. 14279,⁴⁵¹ entitled “Reforming Accreditation to Strengthen Higher Education,” which directed the Secretary of Education and Attorney General to monitor, suspend, deny, or revoke the recognition of accrediting agencies that fail to meet recognition standards or violate federal law, including requiring institutions to engage in D.E.I. practices. Similarly, the Trump administration has taken other potentially consequential administrative actions in the name of the *SFFA* decision. Recently, the Department of Education announced it will end discretionary funding to several Minority-Serving Institutions (MSI), including Hispanic, Alaska Native, Native Hawaiian, Asian American, and Native American Pacific Islander-serving institutions, for “grant programs that discriminate by conferring government benefits exclusively to institutions that meet racial or ethnic quotas.”⁴⁵² These institutions determine funding based on a certain level of protected enrollment at specific institutions. This action follows the U.S. Solicitor General’s determination in July 2025 that the Hispanic-Serving Institutions (HSI) programs “violate the equal-protection component of the Fifth Amendment’s Due Process Clause,” refusing to defend them in ongoing litigation filed by the State of Tennessee and Students for Fair Admissions challenging funding benefits for Hispanic-Serving Institutions, those with at least 25 percent Hispanic enrollment.⁴⁵³

Not surprisingly, these actions have spawned extensive litigation. *American Association of Colleges for Teacher Education v. McMahon* involves a challenge to the Department of Education for terminating over \$600 million in federal grants for teacher preparation programs under

⁴⁴⁹ Exec. Order No. 14148, 90 Fed. Reg. 8237 (Jan. 25, 2025).

⁴⁵⁰ Exec. Order No. 14173, 90 Fed. Reg. 8633 (Jan. 21, 2025).

⁴⁵¹ Exec. Order No. 14279, 90 Fed. Reg. 17529 (Apr. 23, 2025).

⁴⁵² *U.S. Department of Education Ends Funding to Racially Discriminatory Discretionary Grant Programs at Minority-Serving Institutions*, U.S. DEP’T OF EDUC. (Sep. 10, 2025), <https://www.ed.gov/about/news/press-release/us-department-of-education-ends-funding-racially-discriminatory-discretionary-grant-programs-minority-serving-institutions> [https://perma.cc/ESS8-WTS9].

⁴⁵³ *Id.*

Executive Order 14151.⁴⁵⁴ Initially the district court granted a preliminary injunction staying rescission of the grants, but the Court of Appeals for the Fourth Circuit stayed the injunction.⁴⁵⁵ The action is proceeding.

Finally, the administration's efforts received a sharp setback in *Harvard v. Trump*, purportedly aimed at cutting funding for the alleged failure to stem antisemitism, but also directed at the institution's DEI programs and alleged absence of ideological diversity.⁴⁵⁶ The case involved a range of issues, including DEI. The court concluded that the administration unconstitutionally violated the First Amendment, including as it relates to DEI, and also contrary to the Administrative Procedure Act.⁴⁵⁷ "A review of the administrative record makes it difficult to conclude anything other than that defendants used antisemitism as a smokescreen for a targeted, ideologically-motivated assault on this country's premier universities ..."⁴⁵⁸

C. Does *SFFA* Extend Beyond Higher Education to Alter Workplace Anti-Discrimination Doctrine?

As discussed, the *SFFA* decision examined whether universities may consider race as a plus factor to promote diversity in higher education. It did not address hiring practices in the workplace nor cast doubt on any precedents in employment discrimination law. If anything, the decision aligns the constitutional doctrine applicable in higher education more closely with the statutory and constitutional principles governing the workplace.⁴⁵⁹

The *SFFA* decision, which fundamentally changed admissions in higher education, is in harmony with more than 50 years of workplace EEOC litigation. Most notably, in *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976), Justice Marshall, writing for the majority, held that Title VII prohibits racial discrimination in employment against white employees on the same basis that it protects black employees.⁴⁶⁰ This case was never treated as remarkable, at the time, or since.

Likewise, the *SFFA* case did not disturb the decisions in *U.S. Steelworkers v. Weber*, 443 U.S. 193 (1979) or *Johnson v. Transp. Agency, Santa Clara County*, 480 U.S. 616 (1987), which considered whether an

⁴⁵⁴ See *Am. Ass'n of Colleges for Tehr. Educ. v. McMahon*, 770 F. Supp. 3d 822 (D. Md. 2025), reconsideration denied, No. 1:25-CV-00702-JRR, 2025 WL 863319 (D. Md. Mar. 19, 2025).

⁴⁵⁵ See generally *id.* (citing the Court's holding).

⁴⁵⁶ See *President & Fellows of Harvard Coll. v. U.S. Dep't of Health & Hum. Servs.*, 798 F. Supp. 3d 77 (D. Mass. 2025).

⁴⁵⁷ *Id.* at 121, 136.

⁴⁵⁸ *Id.* at 136.

⁴⁵⁹ See generally *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181 (2023) (citing the alignment of the Court's holding with constitutional principles of the workplace).

⁴⁶⁰ *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280 (1976).

employer can implement race or gender-based measures to address discrimination within its own workplace.

In *Steelworkers v. Weber*, the Court contemplated the legality of an affirmative action plan adopted by U.S. Steelworkers, which reserved 50% of the job openings to black candidates, “until the percentage of black skilled craftworkers in the plant approximated the percentage of blacks in the local labor force.”⁴⁶¹ The Court upheld the plan, acknowledging it was “designed to eliminate conspicuous racial imbalance in traditionally segregated job categories.”⁴⁶²

In *Johnson v. Transp. Agency*, the Court permitted gender-based affirmative action in promotion decisions, provided it met narrowly-tailored criteria.⁴⁶³ First, the plan must be based on a “manifest imbalance” of women or workers-of-color in “traditionally segregated job categories.”⁴⁶⁴ Second, any race-based or gender-based preference must be narrowly tailored to address the disparity without unnecessarily infringing upon the interests of non-minorities or males.⁴⁶⁵ According to the Court, these limitations on affirmative action “provide[s] assurance both that sex or race will be taken into account in a manner consistent with Title VII’s purpose of eliminating the effects of employment discrimination, and that the interests of those employees not benefiting from the plan will not be unduly infringed.”⁴⁶⁶

These cases remain good law though some stress from *SFFA* might be imaginable. In short, employers still have the right (if not duty) to examine their practices and self-correct to address discrimination, provided that their plan is remedial and narrowly tailored to this purpose.

Even though the *SFFA* decision did not change workplace antidiscrimination doctrine, the decision sparked a massive fundraising campaign to support litigation on behalf of white individuals and/or men who allegedly face workplace discrimination, with the aim of reshaping the narrative to argue that white individuals and men are the primary victims of discrimination.⁴⁶⁷

⁴⁶¹ *United Steelworkers v. Weber*, 443 U.S. 193, 197 (1979).

⁴⁶² *Id.* at 209.

⁴⁶³ *Johnson v. Transp. Agency*, Santa Clara County, 480 U.S. 616, 641-42 (1987).

⁴⁶⁴ *Id.* at 631-32.

⁴⁶⁵ *Id.* at 637-38.

⁴⁶⁶ *Id.* at 632.

⁴⁶⁷ Mirtha Donastorg, *UPS, Coke and Home Depot Shareholders Try to Force DEI Changes*, THE ATLANTA J.-CONST. (May 19, 2024), <https://www.ajc.com/news/business/ups-coke-and-home-depot-shareholders-try-to-force-dei-changes/YOZYKGO7ZREAJNK3LVFPJAKX54/> [<https://perma.cc/H7L7-EPRU>]; Bruce Crumley, *After DEI Assaults, Conservative Opponents Attack Corporate ESG Policies*, INC. (June 12, 2024), <https://www.inc.com/bruce-crumley/after-dei-assaults-conservative-opponents-attack-corporate-esg-policies.html> [<https://perma.cc/G83T-KGRC>]; see generally Brian Schwartz, *Trump-Allied Dark Money Group Joins Forces with a Think Tank Run by Ex-President’s Former Aides*, CNBC (Nov. 22, 2021, at 13:48 ET), <https://www.cnbc.com/2021/11/22/trump-alumni-think-tank-joins-forces-with-america-first-works->

IV. RUTH BADER GINSBURG AND POST-*SFFA* UNIVERSITY AND WORKPLACE

What does the story of Ruth Bader Ginsburg's journey at RLSN teach us? What can we learn from her numerous civil rights opinions, many of them dissents, that, as I argue, were influenced in part by her years at RLSN? How do Justice Ginsburg's opinions, which highlight our racial history and challenge the concept of formal color-blindness, inform our understanding of the world? How should universities and employers navigate the emergence of formal color-blindness, as manifested in the *SFFA* decision, within the contemporary workplace? How is Justice Ginsburg's journey relevant, if at all, to these questions?

There is no doubt Justice Ginsburg would have joined Justices Sotomayor, Jackson, and Elena Kagan in the *SFFA* dissent and—as the Senior Associate Justice—likely have authored a dissent, given her longstanding commitment to the importance of an inclusive educational environment in affirmative action cases.⁴⁶⁸ Considering her likely dissent, what insights can Justice Ginsburg's path and judicial opinions offer about opportunity and equity in higher education—and, by extension, in the workplace—especially in light of Justice Roberts's assertion that “a dissenting opinion is generally not the best source of legal advice on how to comply with the majority opinion”?⁴⁶⁹

After all, Justice Ginsburg held one of the most expansive views of affirmative action in education during her twenty-seven years on the Court, grounded in her lived encounters with personal discrimination and observing the effects of entrenched structural discrimination during her tenure at

dark-money-group.html. [https://perma.cc/7GKN-UT8J] (“The group [America First Policy Institute] also lists as their priorities ‘election integrity’ and ‘critical race theory’ as areas of concern”).

⁴⁶⁸ See *Gratz v. Bollinger*, 539 U.S. 244, 298 (2003); see also Fisher I, *supra* note 286, at 337 (explaining the case should not have been remanded as the Court of Appeals had already completed the inquiry to “assess whether the University has offered sufficient evidence [to] prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity.”).

⁴⁶⁹ See *Students for Fair Admissions, Inc. v. President and Fellows of Harv. Coll.*, 600 U.S. 181, 230 (2023). Chief Justice Roberts's comment was likely triggered by the dissenters' more granulated, less redemptive view of U.S. racial history and their criticism of his more sanguine story of U.S. race relations. In her dissent, for instance, Justice Sotomayor stated “[Chief Justice Roberts's] interpretation of the Fourteenth Amendment is not only contrary to precedent and the entire teachings of our history . . . but is also grounded in the illusion that racial inequality was a problem of a different generation. . . . What was true in the 1860s, and again in 1954, is true today: Equality requires acknowledgment of inequality.” *Id.* at 334. Justice Sotomayor further noted, “[Chief Justice Roberts's] contention blinks both history and reality in ways too numerous to count. But the response is simple: Our country has never been colorblind. Given the lengthy history of state-sponsored race-based preferences in America, to say that anyone is now victimized if a college considers whether that legacy of discrimination has unequally advantaged its applicants fails to acknowledge the well-documented ‘intergenerational transmission of inequality’ that still plagues our citizenry.” *Id.* at 385. Further, Justice Jackson's also picked up the theme, stating, “With let-them-eat-cake obliviousness, today, the majority pulls the ripcord and announces, ‘colorblindness for all’ by legal fiat.” *Id.* at 407.

RLSN. In these cases, and others, Justice Ginsburg demonstrated a deep understanding of the entrenched and structural history of racism and sexism in the United States, highlighting often how seemingly neutral criteria and formalism can obscure both this historical context and contemporary manifestations of this discrimination.

In the *SFFA* decision, however, Chief Justice Roberts cemented his status as the most influential jurist in generations for shaping the constitutional framework that courts use to address issues of race.⁴⁷⁰ His *SFFA* opinion, with the nearly concurrent weaponization of the decision to not only attack DEI programs outside of the educational context, but to dismiss the achievements of people of color have significant cultural implications at the micro-level. Justice Ginsburg articulated a vision that sharply diverged from Chief Justice Roberts and the other justices in the *SFFA* majority—one, as we have discussed, shaped by her nine years at RLSN. Likely, she would have concurred in several points raised by the dissenters. One also wonders if she would have taken the majority to task for dismissing goals the majority deemed “commendable” simply because of the purported difficulty of measuring these goals. While Chief Justice Roberts provided some wiggle room at the end of the decision to allow universities to “consider an applicant’s discussion of how race affected his or her life,”⁴⁷¹ Justice Ginsburg’s lived experience—both personally and at RLSN—offered more concrete examples about the criticality of diverse voices in an educational institution, even if those voices are not leaned partly into race or sex.⁴⁷²

Justice Ginsburg’s likely alignment with the views of the *SFFA* dissenters does not diminish the relevance of her perspectives on inclusivity programs in employment. After all, as previously discussed, the *SFFA* case specifically addressed whether racial diversity could be considered in college admissions, without disturbing established employment law or Title VII, which prohibits discrimination based on race and gender. When considering

⁴⁷⁰ See, e.g., *Shelby Cnty.*, 570 U.S. at 557 (J. Roberts, writing for the majority, struck down Sec. 4, the preclearance formula provision of the 1965 Voting Rights Act, reasoning, “Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.”); see also *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (C.J. Roberts, speaking for the Court in striking down a desegregation plan that used race as a tiebreaker in determining admission to popular over-enrolled schools, stated “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”); *Trump v. Haw.*, 585 U.S. 667, 706 (2018) (C.J. Roberts, upholding on behalf of the Court an immigration ban originally coined by President Trump as a “Muslim ban,” rejected claims that the ban was based on unconstitutional religious animus, states that the policy is neutral on its face and passes rational basis scrutiny “because there is persuasive evidence that the entry suspension has a legitimate grounding in national security concerns, quite apart from any religious hostility, we must accept that independent justification”).

⁴⁷¹ *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 143 (2023).

⁴⁷² See discussion *supra* Section I.

how *SFFA* has affected the workplace, we must examine how these competing visions manifest, both in the final rulings and in the relationship between *SFFA* and the well-established law under Title VII.

From this tension, Justice Ginsburg's decisions and her lived experiences, both in and outside the workplace, offer us three key lessons. First, it is crucial to recognize that formal colorblindness is just that—formal colorblindness. While the history and language of societal discrimination may not factor into hiring practices, we must not conflate this colorblind approach with the eradication of racism or, through the snap of our fingers, the end of our racial history, resetting all individuals to an equal meritocratic starting line. Second, Justice Ginsburg recognized that discrimination manifests in various forms. Therefore, it is increasingly critical for employers to identify and address discriminatory practices, including disparate impact and unconscious bias. Finally, Justice Ginsburg understood the importance of casting a wide net for overlooked talent, often obscured by ongoing and historical discrimination as well as unexamined notions of merit. After all, Justice Ginsburg herself experienced being overlooked, and during her time as Professor at Rutgers and on the bench, she worked to create opportunities for underrepresented individuals.

Let us look at each of these lessons in turn.

First, Ginsburg always maintained a sober, candid view about the history of race and sex discrimination of this country, as well as its contemporary manifestations—at both the structural and micro levels. Against the backdrop of history, she was much more skeptical than Chief Justice Roberts about the anti-racist underpinnings of “colorblindness.” In several decisions, Justice Ginsburg provided a more comprehensive account of the history of racial and sex discrimination than the majority opinions, highlighting gaps that stemmed from either optimism, cynicism, or both. She was certainly aware of the many moments in our history when jurists and political leaders prematurely declared racism to be a thing of the past or insisted on the need to move on from a focus on race. Ginsburg would proceed from a very different narration of Supreme Court history post-emancipation.⁴⁷³

As a backdrop, recall, Justice Joseph Bradley in the *Civil Rights Cases*, which nearly 150 years ago gutted significant Reconstruction era legislation and eviscerated the Thirteenth Amendment, famously pronounced:

⁴⁷³ See generally *United States v. Stanley*, 109 U.S. 3, 25 (1883) (also known as the “Civil Rights Cases,” the Court struck down public accommodation law as unconstitutional abrogation of freedom to contract, thus prematurely declaring that systemic racism had been remedied, a pattern Ginsburg warned against).

When a man has emerged from slavery, and, by the aid of beneficent legislation, has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen and ceases to be the special favorite of the laws, and when his rights as a citizen or a man are to be protected in the ordinary modes by which other men's rights are protected. There were thousands of free colored people in this country before the abolition of slavery, enjoying all the essential rights of life, liberty and property the same as white citizens, yet no one at that time thought that it was any invasion of his personal status as a freeman because he was not admitted to all the privileges enjoyed by white citizens, or because he was subjected to discriminations in the enjoyment of accommodations in inns, public conveyances and places of amusement.⁴⁷⁴

As Justice Ginsburg understood, this case became one of many Supreme Court cases gutting Reconstruction and unleashing Jim Crow and white racial terrorism in the South.⁴⁷⁵

Again, when *Plessy v. Ferguson* was reversed in *Brown v. Board of Education* in 1954, many viewed this pronouncement of formality equality under the Constitution as the end of racism. Yet, in *Brown II*, the Supreme Court allowed state and local efforts to proceed with “all deliberate speed.”⁴⁷⁶ This led to violent resistance in Little Rock,⁴⁷⁷ Oxford,⁴⁷⁸ among other locations.⁴⁷⁹ This brought us images of U.S. Marshals escorting first-grader Ruby Bridges to her New Orleans elementary school.⁴⁸⁰ And this brought images from more than twenty years later, of a white man stabbing an African American Yale educated lawyer with an American flag in

⁴⁷⁴ *Id.* at 42.

⁴⁷⁵ See generally *Slaughterhouse Cases*, 83 U.S. 36 (1872) (limiting the federal government's ability to enforce racial equality protections); *United States v. Cruikshank*, 92 U.S. 542 (1875) (in context of Colfax massacre of African-Americans, the Court struck down the indictment of several Klan members and portions of the KKK Act for encroaching on states' rights); *Plessy v. Ferguson*, 163 US 537, 551 (1896) (the Court ruled in context of the official segregation of Louisiana street cars that separate is not inherently unequal); *Giles v. Harris*, 189 U.S. 475, 488 (1903) (the Court upheld formally neutral Alabama Constitutional provisions, allowing white voters to be grandfathered in if registered before a date certain and others requiring a civic duties test, both provisions excluding significant numbers of Black voters.).

⁴⁷⁶ *Brown v. Board of Education II*, 349 U.S. 294, 301 (1955).

⁴⁷⁷ *Civil Rights: The Little Rock School Integration Crisis*, EISENHOWER LIBR., <https://www.eisenhowerlibrary.gov/research/online-documents/civil-rights-little-rock-school-integration-crisis> [https://perma.cc/C9CE-3JJP] (last visited Nov. 2, 2024).

⁴⁷⁸ Debbie Elliott, *Integrating Ole Miss: A Transformative, Deadly Riot*, NPR (Oct. 1, 2012, at 03:30 ET), <https://www.npr.org/2012/10/01/161573289/integrating-ole-miss-a-transformative-deadly-riot>. [https://perma.cc/NAP8-VQD2].

⁴⁷⁹ *The Case That Changed America: Brown v. Board of Education*, NAACP LEGAL DEF. FUND, <https://www.naacpldf.org/brown-vs-board/southern-manifesto-massive-resistance-brown/>. [https://perma.cc/Q4JD-MVUL].

⁴⁸⁰ *Ruby Bridges and Integration of New Orleans Schools*, PBS, <https://www.pbs.org/wgbh/americanexperience/features/neworleans-ruby-bridges-and-integration-new-orleans-schools/> [https://perma.cc/YCC6-73XV] (last visited Nov. 2, 2024).

defiance to a federal court desegregation order in Boston.⁴⁸¹ Now with the prevalence of white flight and the rise of private schools, public education remains highly segregated, leaving many Brown and Black students with inadequate educational opportunities.

With the passage of the Civil Rights Act of 1964 and the VRA, more than eighty years after Justice Bradley told Black Americans, in essence, to get over it, many declared that we had finally achieved formal equality in both the public and private spheres, along with meaningful access to the ballot box. This acknowledgment overlooks the fact that both acts were passed in the face of massive violent resistance, which resulted in the murder of NAACP Secretary Medgar Evers,⁴⁸² the brutal murder of James Chaney, Andrew Goodman, and Mickey Schwerner, in Mississippi to register black voters;⁴⁸³ the murder of four African American girls in the 16th Street Baptist Church—their church—on a Sunday morning;⁴⁸⁴ and the murders of Jimmy Jackson, Viola Liuzzo, and Reverend James Reeb.⁴⁸⁵ This era also brought images of the Alabama National Guard mowing down nonviolent marchers on the Edmund Pettus bridge on “Bloody Sunday” in Selma, leaving future Congressman John Lewis badly beaten and inches from death.⁴⁸⁶

Justice Ginsburg understood this history and used it to support many of her dissents. For instance, in *Adarand Constructors, Inc.*,⁴⁸⁷ Justice Ginsburg, in a separate dissent, noted that the original juridical articulation of “colorblindness,” itself rested on a corrosive racial foundation of white superiority, warranting skepticism. She stated:

[F]or generations, our lawmakers and judges were unprepared to say that there is in this land no superior race, no race inferior to any other. In *Plessy v. Ferguson*, 163 U.S. 537 (1896), not only did this Court endorse the oppressive

⁴⁸¹ NPR Staff, *Life After Iconic 1976 Photo: The American Flag's Role in Racial Protest*, NPR (Sep. 18, 2016, at 10:21 ET) <https://www.npr.org/2016/09/18/494442131/life-after-iconic-photo-todays-parallels-of-american-flags-role-in-racial-protes>. [<https://perma.cc/7S4W-QVE4>].

⁴⁸² See generally WILLIE MORRIS, *THE GHOSTS OF MEDGAR EVERS* (Random House 1998) (discussing the events leading up to and following the murder of Medgar Evers); see also *June 12, 1963: Medgar Evers Murdered in Mississippi*, ZINN EDUC. PROJECT, <https://www.zinnproject.org/news/tdih/medgar-evers-murdered/> [<https://perma.cc/S87F-GTWV>] (last visited Dec. 17, 2025).

⁴⁸³ *Murder in Mississippi*, PBS: FREEDOM SUMMER, <https://www.pbs.org/wgbh/americanexperience/features/freedomsummer-murder/> [<https://perma.cc/8GSQ-6KVX>] (last visited Nov. 2, 2024).

⁴⁸⁴ *Four Little Girls*, NAT'L PARK SERV., <https://www.nps.gov/articles/fourlittlegirls.htm> [<https://perma.cc/7328-J65W>] (last visited Oct. 17, 2025).

⁴⁸⁵ Steve Fiffer, *Two Murders That Ignited Passage of the Voting Rights Act*, THE DAILY BEAST (Apr. 23, 2021, at 23:34 ET) <https://www.thedailybeast.com/two-murders-that-ignited-passage-of-the-voting-rights-act/> [<https://perma.cc/T6AA-QZDD>].

⁴⁸⁶ Aniko Bodroghkozy, *How the Images of John Lewis Being Beaten During 'Bloody Sunday' Went Viral*, THE CONVERSATION (July 23, 2020, at 08:19 ET), <https://theconversation.com/how-the-images-of-john-lewis-being-beaten-during-bloody-sunday-went-viral-143080> [<https://perma.cc/8TVK-MLC9>].

⁴⁸⁷ *Adarand Constructors, Inc.*, 515 U.S. at 272.

practice of race segregation, but even Justice Harlan, the advocate of a “color-blind” Constitution, stated: “The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty.”⁴⁸⁸

She uses this as a foundation to argue, as obvious, that racism permeates society in pernicious forms:

The divisions in this difficult case should not obscure the Court’s recognition of the persistence of racial inequality and a majority’s acknowledgment of Congress’ authority to act affirmatively, not only to end discrimination, but also to counteract discrimination’s lingering effects. Those effects, reflective of a system of racial caste only recently ended, are evident in our workplaces, markets, and neighborhoods. Job applicants with identical resumé, qualifications, and interview styles still experience different receptions, depending on their race. White and African American consumers still encounter different deals. People of color looking for housing still face discriminatory treatment by landlords, real estate agents, and mortgage lenders.⁴⁸⁹

Likewise, in *Ricci v. DeStefano*, she reminded us:

The Court’s recitation of the facts leaves out important parts of the story. Firefighting is a profession in which the legacy of racial discrimination casts an especially long shadow.... overt racism was partly to blame, but so too was a failure on the part of municipal employers to apply merit-based employment principles. In making hiring and promotion decisions, public employers often ‘reli[ed] on criteria unrelated to job performance,’ including nepotism or political patronage.⁴⁹⁰

Finally, in *Shelby County v. Holder*, Justice Ginsburg dissented:

There is no question, moreover, that the covered jurisdictions have a unique history of problems with racial discrimination in voting. Consideration of this long history, still in living memory, was altogether appropriate. 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. And those who cannot remember the past are condemned to repeat it.⁴⁹¹

The dissent Justice Ginsburg refuted the majority’s claim that the nation had changed significantly since the Voting Rights Act was first enacted and

⁴⁸⁸ *Id.* (citations omitted) (internal quotations marks omitted).

⁴⁸⁹ *Id.* at 273.

⁴⁹⁰ *Ricci*, 557 U.S. at 609-10 (citations omitted).

⁴⁹¹ *Shelby Cnty.*, 570 U.S. at 576 (citations omitted).

noted that “[v]oting discrimination still exists; no one doubts that...[b]ut the Court today terminates the remedy that proved to be best suited to block that discrimination.”⁴⁹²

Justice Ginsburg would have recognized and condemned the aggressively promoted notion that whites are the primary victims of discrimination, urging a focus on and vigilance in reckoning this history.⁴⁹³ Justice Ginsburg understood that the monumental patriotic struggle to pass the Civil Rights Act—and to confront entrenched racism, often in the face of senseless violence from those opposing equal rights for Black Americans—embodied the true, rather than Orwellian, meaning of “America First”. She understood the danger of backlash even unraveling formal colorblindness itself.

Second, given the emergence of “color blindness” as the dominant juridical framework, Justice Ginsburg likely would have urged redoubled and deep scrutiny of conventional notions of merit for bias. She would have called on employers to vigilantly and diligently scrutinize employment practices and policies, including understanding how unconscious and implicit biases may influence decision-making.

As discussed, Justice Ginsburg, much like Justice Sotomayor in *SFFA*, understood that from its very juridical inception, “color blindness” contained its own contradiction and defect—the concealment of white supremacist ideas.⁴⁹⁴ Justice Roberts ignored Justice Harlan’s prefatory comments in favor of his more dewy-eyed homage to color blindness. Given this intrinsic defect, Justice Ginsburg’s life, opinions, and writings appear to advocate for a more rigorous examination of recruitment, hiring, and promotion policies in the workplace to root out discrimination.

She recognized that successful cases alone, like those discussed above, do not demonstrate the ongoing pervasiveness of discrimination. Much discrimination, especially hiring discrimination is notoriously difficult to prove given that the employer, not the applicant, has most of the relevant information. Cognizant of this barrier, the United States Equal Employment Opportunity Commission has long prioritized hiring discrimination for enforcement. Likewise, it has pursued systemic hiring discrimination cases to address widespread practices and to challenge selection instruments.

⁴⁹² *Id.* at 560.

⁴⁹³ See *Memory of Justice Ruth Bader Ginsburg (1933-2020)*, ACLU (Sep. 18, 2020), <https://www.aclu.org/news/civil-liberties/in-memory-of-justice-ruth-bader-ginsburg-1933-2020> [<https://perma.cc/GH9B-KZP8>]; see also *Remembering Justice Ruth Bader Ginsburg*, GEORGETOWN INST. FOR WOMEN, PEACE & SEC., <https://giwps.georgetown.edu/remembering-justice-ruth-bader-ginsburg/> [<https://perma.cc/RG56-N4XN>] (last visited Oct. 26, 2024) (Her work focused on dismantling entrenched biases rather than promoting the narrative that men or whites were primarily victims of discrimination. This approach demonstrated her belief that laws and policies must address historical and systemic inequities rather than amplify concerns over so-called reverse discrimination).

⁴⁹⁴ See *Adarand Constructors, Inc.*, 515 U.S. at 272-73.

In this context, I believe she would have pushed back on Justice Roberts's discussion of several educational goals asserted to support affirmative action—goals he deemed “commendable” but dismissed as a basis for affirmative because they were “not sufficiently coherent” or measurable, refusing as well to give deference to the expertise of educators as to the components of a strong educational environment.⁴⁹⁵ These goals included two, which Justice Ginsburg herself came to embody—“training future leaders in the public and private sectors” and “producing new knowledge stemming from diverse outlooks.”⁴⁹⁶ The focus on their supposed immeasurability will likely lead to pressure from groups seeking to expand *SFFA* to discard them altogether as potential proxies for “discrimination.” Attacking this argument, Chief Justice Roberts asks: “[h]ow many fewer leaders Harvard would create without racial preferences, or how much poorer the education at Harvard would be, are inquiries no court could resolve?”⁴⁹⁷ I believe Justice Ginsburg would have asked whether this is even the right question, whether measurable criteria don't present their own dangers, and whether some deference should be paid to the expertise of the educators themselves. In the end, any pressure to confine educational goals only to those which can be measured, dilutes the critical importance of the distinctiveness of each voice to educational environment, and the inherent immeasurability of leadership itself, and privileges measurable criteria which may not have any connection to the traditional educational objectives.

In this spirit, Justice Ginsburg understood disparate impact framework was critical to Title VII as a way to remove unfair barriers unrelated to the job. In this context, measurable admissions criteria need to be related to the core mission of the educational institution, which have often been articulated broadly⁴⁹⁸ (or than as a reward for the highest test scores and grade point averages). In *Ricci*, Justice Ginsburg chastised the majority for downplaying its importance; “[o]nly by ignoring *Griggs* could one maintain that intentionally disparate treatment alone was Title VII's ‘original, foundational prohibition,’ and disparate impact a mere afterthought.”⁴⁹⁹

Ginsburg continued: “Neither Congress’ enactments nor this Court’s Title VII precedents (including the now-discredited decision in *Wards Cove*)

⁴⁹⁵ *Students for Fair Admissions*, 600 U.S. at 251.

⁴⁹⁶ *Id.* at 214.

⁴⁹⁷ *Id.* at 215.

⁴⁹⁸ For instance, my current institution's charter states: “ASU is a comprehensive public research university, measured not by whom it excludes, but by whom it includes and how they succeed; advancing research and discovery of public value; and assuming fundamental responsibility for the economic, social, cultural and overall health of the communities it serves.” Arizona State University, *ASU Charter, Mission and Goals*, NEW AMERICAN UNIV., <https://newamericanuniversity.asu.edu/about/asu-charter-mission-and-goals> [<https://perma.cc/7KX7-5CQ7>].

⁴⁹⁹ *Ricci*, 557 U.S. at 620-21.

offer even a hint of “conflict” between an employer’s obligations under the statute’s disparate-treatment and disparate-impact provisions.”⁵⁰⁰ Further, “[s]tanding on an equal footing, these twin pillars of Title VII advance the same objectives: ending workplace discrimination and promoting genuinely equal opportunity.”⁵⁰¹

The disparate impact doctrine is based on the understanding that formally neutral rules, unrelated to an institution’s objective, can result in racial disparities. As Justice Ginsburg discussed in *Ricci*, this is the teaching of *Griggs v. Duke Power*.⁵⁰² *Griggs* involved a challenge to the company’s adoption of a high school diploma requirement and standardized test following the enactment of the Civil Rights Act of 1964—policies that disproportionately excluded African Americans.⁵⁰³ According to the unanimous Court, Title VII prohibits “practices, procedures, or tests neutral on their face” that “operate to ‘freeze’ the status quo of prior discriminatory employment practices.”⁵⁰⁴ Title VII requires “the removal of artificial, arbitrary, and unnecessary barriers to employment [that] operate invidiously to discriminate on the basis of...impermissible classification.”⁵⁰⁵ The Court held “[A]n employment practice which operates to exclude [African Americans that] cannot be shown to be related to job performance . . . is prohibited.”⁵⁰⁶

The Court then made clear that Title VII adopts a broad understanding of “discrimination” detached from discriminatory intent; “[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as ‘built-in headwinds’ for minority groups and are unrelated to measuring job capability.”⁵⁰⁷ *Griggs* was later codified in the Civil Rights Act of 1991.⁵⁰⁸

Justice Ginsburg explained the importance of disparate impact in her *Ricci* dissent:

In codifying the *Griggs* and *Albemarle* instructions, Congress declared unambiguously that selection criteria operating to the disadvantage of minority group members can be retained only if justified by business necessity. In keeping with Congress’ design, employers who reject such criteria due to reasonable

⁵⁰⁰ *Id.* at 624.

⁵⁰¹ *Id.*

⁵⁰² *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).

⁵⁰³ *Id.* at 425-26.

⁵⁰⁴ *Id.* at 430.

⁵⁰⁵ *Id.* at 431.

⁵⁰⁶ *Id.*

⁵⁰⁷ *Id.* at 432.

⁵⁰⁸ Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

doubts about their reliability can hardly be held to have engaged in discrimination “because of” race.⁵⁰⁹

Against the formal colorblind framework, Justice Ginsburg would likely demand for employers and universities to proactively scrutinize whether their selection, evaluation, and promotion criteria result in racial or gender disparities—and, if so, to assess whether these criteria are genuinely job-related. With the rapid rise of AI and other data-driven tools, it is more important than ever for employers to examine whether ostensibly neutral (‘colorblind’) tools might conceal underlying discrimination.⁵¹⁰

Besides scrutinizing neutral employment criteria for non-job-related impact, Justice Ginsburg recognized that discrimination can be subtle, incremental, and concealed. In *Ledbetter*, Justice Ginsburg wrote in her dissent:

Pay disparities often occur, as they did in *Ledbetter*’s case, in small increments; cause to suspect that discrimination is at work develops only over time. Comparative pay information, moreover, is often hidden from the employee’s view. Employers may keep under wraps the pay differentials maintained among supervisors, no less the reasons for those differentials. “Small initial discrepancies may not be seen as meet for a federal case, particularly when the employee, trying to succeed in a nontraditional environment, is averse to making waves.”⁵¹¹

Justice Ginsburg’s decisions and scholarship also recognized that discrimination in its more subtle forms include implicit and unconscious bias.⁵¹²

⁵⁰⁹ *Ricci*, 557 U.S. at 625.

⁵¹⁰ *The Future of Work: Protecting Worker’s Civil Rights in the Digital Age: Hearing Before the C.R. & Hum. Serv. Subcomm., Comm. on Educ. & Lab., U.S. House of Representatives*, 114th Cong. 4, (2020) (statement of Jenny R. Yang, Chair, Urban Inst.), https://edworkforce.house.gov/uploadedfiles/jenny_yang_-_testimony.pdf [<https://perma.cc/DLE6-N588>].

⁵¹¹ *Ledbetter*, 550 U.S. at 645.

⁵¹² Even though several state Critical Race Theory bans, accelerated by the *SFFA* decision, aim to eliminate teaching about implicit bias, the concept has long been recognized in the Supreme Court. Justice Sandra Day O’Connor, writing for the Court, in *Watson v. Fort Worth Bank & Trust*, stated: “[I]n relatively small businesses like respondent’s, it may be customary and quite reasonable simply to delegate employment decisions to those employees who are most familiar with the jobs to be filled and with the candidates for those jobs. It does not follow, however, that the particular supervisors to whom this discretion is delegated always act without discriminatory intent. Furthermore, even if one assumed that any such discrimination can be adequately policed through disparate treatment analysis, the problem of subconscious stereotypes and prejudices would remain. In this case, for example, petitioner was apparently told at one point that the teller position was a big responsibility, with ‘a lot of money . . . for blacks to have to count.’ Such remarks may not prove discriminatory intent, but they do suggest a lingering form of the problem that Title VII was enacted to combat. If an employer’s undisciplined system

For example, in *Adarand Constructors, Inc. v. Peña*, Justice Ginsburg cited a matched pair study showing that Anglo applicants, when sent out by investigators, received 52% more job offers than their matched Hispanic counterparts.⁵¹³ Similarly, in another study, it was found that in one out of five audits, the white applicant advanced further in the hiring process than his Black counterpart. Additionally, in one out of eight audits, the white applicant received a job offer, while his equally qualified Black counterpart did not.⁵¹⁴

Likewise, writing about affirmative action in 1999, Justice Ginsburg again expressed a deep understanding of the dangers of unconscious discrimination. Discussing a decision of the European Court, Justice Ginsburg noted the decision was “perhaps most notable for its sensitivity to sometimes unconscious bias.”⁵¹⁵ She quoted the Court, stating:

[T]hat a male candidate, and a female candidate are equally qualified does not mean that they have the same chances, the Court of Justice observed. Traditional habits of thought may lead to the selection of males in preference to females, because employers fear women will be distracted from their work by household and family duties, the European Court said. In other words, a tie-breaker preference for women may do no more than ensure actual adherence to the nondiscrimination principle. Without such positive action by government, unconscious or half-conscious discrimination might continue unchecked.⁵¹⁶

Consistent with Ginsburg’s perspectives, several studies highlight the ongoing presence of implicit bias in the employment realm.⁵¹⁷ In one famous study conducted by leadership consulting firm Nextion, researchers

of subjective decision-making has precisely the same effects as a system pervaded by impermissible intentional discrimination.” *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 990-91 (1988).

⁵¹³ *Adarand Constructors, Inc.*, 515 U.S. at 274, n.3.

⁵¹⁴ *Id.*

⁵¹⁵ Ginsburg & Merritt, *supra* note 299, at 225 (1999).

⁵¹⁶ *Id.*

⁵¹⁷ See Janice Gassam Asare, *New Research Reveals Resumes With Black Names Experience Bias in the Hiring Process*, FORBES (Apr. 17, 2024), <https://www.forbes.com/sites/janicegassam/2024/04/17/new-research-reveals-resumes-with-black-names-experience-bias-in-the-hiring-process/> [https://perma.cc/M9DP-QV44] (researchers distributed identical resumes to 97 U.S. employers and the findings revealed that resumes with distinctly white and female names received the highest number of callbacks while Black male and female names received the fewest callbacks); see also Roy Maurer, *Researchers Say New Study Method Catches Resume Bias*, SHRM (Feb. 17, 2020), <https://www.shrm.org/topics-tools/news/talent-acquisition/researchers-say-new-study-method-catches-resume-bias> [https://perma.cc/H43W-ZSPF] (study of 72 employers and nearly 800 resumes found that candidates with female and minority names were rated lower than their white male counterparts for STEM roles, despite having similar qualifications); George Cunningham & Harper Cunningham, *Bias Among Managers: Its Prevalence Across a Decade and Comparison Across Occupations*, 3 FRONTIERS IN PSYCH. 1 (2022), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9692076/> (study results showed that hiring managers expressed both explicit and implicit biases based on disability, gender, race, and sexual orientation).

created a legal memo with twenty-two intentional errors—seven were minor spelling or grammar errors, six were substantive technical writing errors, five were errors in fact, and four were errors in the analysis of the facts.⁵¹⁸ Sixty partners from twenty-two law firms who agreed to participate in a “writing analysis study” received copies of the memo. Half were told the memo was written by an African American man named Thomas Meyer, and half were told the writer was a Caucasian man named Thomas Meyer. Fifty-three partners completed the task, with twenty-nine receiving the memo attributed to the white attorney and twenty-four receiving the version attributed to the Black attorney. Results showed that the memo attributed to the white Thomas Meyer received an average rating of 4.1 out of 5, while the one attributed to the Black Thomas Meyer received only 3.2. Reviewers praised the white writer for his analytical skills but deemed the Black writer as “average at best.”

Given the variety and persistence of discriminatory practices, employers should not assume that anti-Black racism and other forms of deeply entrenched discrimination have vanished. In short, post-*SFFA*, identifying and addressing discriminatory practices has become a moral imperative. Indeed, it is critical for employers to take protective measures, including addressing discrimination rooted in implicit bias and disparate impact—two areas that sometimes spark controversy on the political right. Further, EEOC Artificial Intelligence guidance recommends taking proactive steps.⁵¹⁹ In this spirit, employers must not be intimidated from examining their employment practices that perpetuate entrenched forms of discrimination, which are often overlooked by the vocal proponents of racial formalism.

Finally, Ginsburg would have appreciated the importance of tapping into a broad talent pool, leveraging voices based on a range of lived experiences, understanding how easily talent can be overlooked on one hand, and how the right environment can amplify that talent on the other. As we have discussed, Justice Ginsburg’s personal story illustrates how she was once an overlooked talent, passed over by law firms, judges, and law schools—some overtly sexist, while others politely hid behind neutral standards. (Of course, as Justice Ginsburg recognized, she also had many advantages that enabled her to break one glass ceiling after another.)

The recognition of her exceptional talents hinged on many factors, both large and small: the right environment to thrive, supportive friends, a dean and colleagues who championed her voice—even an aggrieved voice. Many

⁵¹⁸ Debra Weiss, *Hypothetical Legal Memo Demonstrates Unconscious Biases*, ABA J. (Apr. 21, 2014), https://www.abajournal.com/news/article/hypothetical_legal_memo_demonstrates_unconscious_biases [<https://perma.cc/5CTD-S7N9>].

⁵¹⁹ EEOC, *SELECT ISSUES: ASSESSING ADVERSE IMPACT IN SOFTWARE, ALGORITHMS, AND ARTIFICIAL INTELLIGENCE USED IN EMPLOYMENT SELECTION PROCEDURES UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964*, (May 18, 2023).

years later, Justice Ginsburg would recall Rutgers Law School as “a place that allowed us space to think and grow in understanding what is needed to make the United States ‘a more perfect union.’”⁵²⁰

In turn, she repaid this support by creating opportunities for others through MSP and by advocating for the demands of the recently admitted African American students to engage with its Newark home, both as a public institution and as a moral imperative. She also collaborated with the growing number of women students to create both a pedagogical and scholarly space.

She honored the request to engage with the community by working with the NJ ACLU on a litigation strategy that, inspired by Pauli Murray and Thurgood Marshall, she largely developed herself. Essentially, she was a self-taught feminist lawyer who opened doors for those who would follow. This story serves as a backdrop for all her educational affirmative action cases, but it is perhaps most vividly illustrated in *United States v. Virginia*⁵²¹—a case she seemed destined to write, drawing on her years as an appellate advocate for the ACLU Women’s Rights Project. Justice Ginsburg challenged the stereotypes regarding women’s capability to succeed at VMI—a form of discrimination she had experienced multiple times throughout her life.⁵²²

Yet, aren’t these the same “pernicious stereotypes” that Chief Justice Roberts criticizes as underpinning the “diversity” rationale advocated by Harvard and North Carolina in *SFFA*?⁵²³ According to Justice Roberts, “Harvard’s admissions process rests on the pernicious stereotype that ‘a black student can usually bring something that a white person cannot offer.’”⁵²⁴ Justice Roberts continued “when a university admits students ‘on the basis of race, it engages in the offensive and demeaning assumption that [students] of a particular race, because of their race, think alike ... (internal quotation marks omitted)—at the very least alike in the sense of being different from nonminority students.’”⁵²⁵

Isn’t Chief Justice Roberts’s critique of the purported claim that Blacks “all think alike” analogous to Justice Ginsburg’s condemnation of an essentialist view of women’s ability to succeed at VMI? I believe, as Justice Ginsburg would have certainly understood, that Chief Justice Roberts flails a straw man by attacking the purported claim that all Blacks “think alike,” — a position that was not advanced in the *SFFA* case. Most people recognize that acknowledging race or gender as influences on experience is fundamentally different from claiming that these influences shape

⁵²⁰ Letter from Ruth Bader Ginsburg, Sup. Ct. J., to Rutgers Law School (50th Reunion Letter).

⁵²¹ *Virginia*, 518 U.S. at 549.

⁵²² See *supra* text accompanying notes 218-23.

⁵²³ See *supra* Section III.A.

⁵²⁴ *Students for Fair Admissions, Inc.*, 600 U.S. at 220.

⁵²⁵ *Id.*

everyone's experience identically or render it meaningless. The *SFFA* decision either skeptically views the relationship of lived experience, running through racial or ethnic lines and voice, or fundamentally questions the importance of voice itself.

Justice Ginsburg, drawing from her own experiences, understood that while women may interpret their lives differently, most men lack the perspective to truly capture the lived experiences of women—and if they do, it is because they have listened to the voices of women. She understood that women did not “think alike.” After all, Hanks expressed bemusement at the lack of gender equality but did not make it her cause. After all, any female students walked by Justice Ginsburg's office to visit renowned civil rights attorney Arthur Kinoy,⁵²⁶ focusing their concerns more on the Vietnam War or the struggle for freedom in the South. Yet, it was their shared experiences as women that led Ginsburg and Hanks to sneak off and meet on their way home.

Justice Ginsburg's unique personal experience with gender discrimination drove her to create entirely new spaces at RLSN, where students could explore the intersection of gender and law—topics largely ignored by male-dominated U.S. law schools until then. Chief Justice Roberts, viewing the issue through a formally gender-neutral lens, might contend that if history replayed 100 times, many men would have pioneered similar advances, juridically and pedagogically, and most women would not have done so. In reality, it required a woman with firsthand experience of gender discrimination to create this space, or for a man to demonstrate the humility to “hear” and channel these experiences. Until then, in the male-dominated legal profession, no men had stepped forward to take on this role.

Justice Ginsburg understood that her experiences as a woman uniquely equipped her to create these spaces at Rutgers and beyond—something her progressive male colleagues, like Kinoy, could not offer. At the time, most male colleagues met the concerns of women students with indifference or even hostility, not necessarily out of stereotypical biases, but as a product of the prevailing historical context.

And so, it has been, and so it continues, in ways both big and small. It was W.E.B. Du Bois, an African American sociologist at Harvard, who challenged and corrected the pervasive “Lost Cause” narrative of Reconstruction that dominated academia—particularly at Harvard. He reframed the story by amplifying Black voices rather than focusing on those

⁵²⁶ See *supra* text accompanying note 88.

of the conquerors.⁵²⁷ This story can be run in an endless loop, yet it will always be the presence of Black “voices” that transformed this truly “pernicious” narrative a more accurate and multidimensional narrative of our shard history. Dubois created an academic space for these voices, flipping the discourse, and providing a platform for scholars of all backgrounds, such as Eric Foner, nearly the premier scholar in Reconstruction history, to be more inclusive in their study of this moment in history.

You can run the story in an endless loop, but it will always be individuals like John Smith or George Floyd who give voice to the experience of being a Black man subjected to policing and surveillance in the United States.⁵²⁸ Non-Black allies may critique the over-policing of Black communities, but all effective allies understand the importance first of listening to the voices of the other. Given the value Justice Ginsburg placed on diverse voices, she would likely not over-interpret Chief Justice Roberts’s concern about stereotyping Black voices as a broader rejection of the necessity for Black or Latino representation—or, indeed, a rich array of perspectives overall. She would emphasize the importance of engaging with this diversity of voices and lived experiences as critical to higher education. Justice Ginsburg’s conception of voice differs from Justice Roberts’s deficit-based view of how race might be relevant, but she would recognize areas of convergence.

In *SFFA*, Justice Roberts stated:

A benefit to a student who overcame racial discrimination, for example, must be tied to that student’s courage and determination. Or a benefit to a student whose heritage or culture motivated him or her to assume a leadership role or attain a particular goal must be tied to *that student’s* unique ability to contribute to the university. In other words, the student must be treated based on his or her experiences as an individual—not on the basis of race.⁵²⁹

So, what would Justice Ginsburg advise regarding this small opening in the Chief Justice’s race-neutral formalism? And what do we do with the fact that Justice Ginsburg, a longstanding advocate of diversity, only had one Black clerk during her entire tenure on the Supreme Court?⁵³⁰

Allegations of hypocrisy are fair game. Justice Ginsburg functioned mostly in a rarefied world, mustering life experiences and heralding the value

⁵²⁷ *Black Reconstruction in America*, ZINN EDUC. PROJECT, <https://www.zinnproject.org/materials/black-reconstruction-america/> [https://perma.cc/BP9H-3G36] (last visited Oct. 26, 2024).

⁵²⁸ See *infra* Section V.

⁵²⁹ See *Students for Fair Admissions Inc.*, 600 U.S. at 231.

⁵³⁰ Moya Lothian McLean, *People Are Pointing Out the Lack of Diversity in a Photo of RBG’s Staff*, INDY100 (Sep. 25, 2020), <https://www.indy100.com/news/ruth-bader-ginsburg-memorial-clerks-black-hiring-supreme-court-9714436> [https://perma.cc/8LPA-36EK].

of diverse voices, but often, following her teaching experience, detached from Black people. Though this may militate against the glorification of Justice Ginsburg, it also provides fresh resolve to imagine new ways to identify hidden talent and leverage the full talent before us.

As employers strive for innovation and navigate global markets, diverse customer bases, and increasingly varied workforces, Ginsburg's decisions would underscore the importance of lived experience—whether as a woman or as a Black individual. Despite their differences, these experiences are real, and the voices that emerge from them are crucial. Justice Ginsburg would recognize the significance of navigating the world as a woman in a nation that still grapples with sexism, as well as the challenges faced by individuals living in Black communities within a nation that remains racist and segregated in many respects.

Here, a person's voice—shaped by their unique lived experiences of race, national origin, or gender—should be both relevant and beneficial to employers and society at large. Recognizing this point means that intentionally expanding talent pools is not just the right thing to do, as many employers have learned, but it also provides broader benefits to their business, and a more inclusive sense of national belonging.

V. EPILOGUES ARE FOREVER BEING WRITTEN

So, what does this story tell us?

Most importantly, it tells us that Ginsburg's rise as a Supreme Court Justice and feminist icon was far from inevitable. It turned on her genius and character for sure, but also what I have termed "contingent spaces"—her post-Rebellion RLSN. Her journey at Rutgers highlights a brilliant, tenacious, and creative individual who, as she later put it, found "the right place at the right time" to launch her path into history.⁵³¹ Ginsburg never forgot this formative space, using it to open doors for others often excluded from opportunity. Throughout her life, she continued to draw on this formative experience as a litigator, scholar, and eventually as a Justice on the U.S. Supreme Court, particularly in decisions related to educational opportunity, affirmative action, employment discrimination, and civil rights.

And what about the polymath and gifted trumpeter John "J.W." Smith?

His fate was sealed the day he was beaten by the Newark Police Department. His jazz dreams died that day and, in a way, he did as well. A different kind of contingent space—the space of racialized policing of the Newark Black community—determined his fate and undercut his immeasurable artistic promise. He continued to face legal problems from the

⁵³¹ RBG Remarks at Rutgers Law School, *supra* note 208.

encounter until the charges were dropped. He faced medical problems for the rest of his life. His parents retrieved him from Salisbury. He would never work again, and dementia slowly set in. He always had a hollow hole where his ribs had been permanently caved in. In contrast to Ginsburg's self-description of her time at Rutgers, this talented man found himself at the wrong place at the wrong time.

Smith died in his hometown of Salisbury, North Carolina on April 6, 2002. On April 10, 2002, Smith's childhood Pastor officiated his funeral service at Mount Zion Baptist Church, and he was interred at the Salisbury National Cemetery—a military veterans cemetery reserved for those with military service in the U.S. armed forces. James Smith, always inspired by his older brother, played a solo rendition of "Around Midnight" on the trumpet.⁵³²

The policing and surveillance of Black communities continue largely unchanged in this country following Smith's 1967 beating, leading to repeated episodes of civil unrest. A direct line can be traced from the assault on Smith to the murder of George Floyd.

The furious backlash against the protests and the brief reckoning of Summer 2020—highlighted by the Supreme Court's *SFFA* decision—illustrates, once again, that moments of hope for racial reckoning and redemption in the United States are often short-lived, with the Supreme Court often dealing mortal blows.

The promise of Reconstruction was dismantled by the Supreme Court, widespread racial terror, and the withdrawal of federal troops following the Hayes-Tilden Compromise.⁵³³ The promise of *Brown v. Board of Education* was followed the next year by *Brown II* demanding desegregation to occur with "all deliberate speed." This judicial "opening" triggered massive resistance, often violent, from Little Rock to Oxford to Boston.⁵³⁴ The landmark Civil Rights Act and Voting Rights Act were secured only after immense grassroots resistance to violent terror, often with the endorsement

⁵³² The prayer card at the funeral fittingly stated: "Each man has something special, God means for him to do. For life designs a pattern, no one weaves but you. . . . Sometimes we can't distinguish, the reason in the way, nor can our minds decipher, the part we must play."

⁵³³ See *infra* at notes 328-29.

⁵³⁴ See generally KAREN ANDERSON, *LITTLE ROCK: RACE AND RESISTANCE AT CENTRAL HIGH SCHOOL* (Princeton University Press, 2010) (discussing refusal by Central High School to follow a court order to admit Black students and ensuing decision to send in U.S. military to enforce a court order); HENRY T. GALLAGHER, *JAMES MEREDITH AND THE OLE MISS RIOT* (University press of Mississippi, 2012) (discussing violent resistance to James Meredith's admission as the first African American student at the University of Mississippi); J. ANTHONY LUKAS, *COMMON GROUND: A TURBULENT DECADE IN THE LIVES OF THREE AMERICAN FAMILIES* (Vintage, 1986) (discussing conflict over order to desegregate Boston Public Schools); *The Case That Changed America: Brown v. Board of Education*, *supra* 479 (discussing resistance to Supreme Court decision in *Brown v. Board of Education*).

of state authorities.⁵³⁵ The U.S. Supreme Court would later roll back these victories.⁵³⁶

A week after the passage of the Voting Rights Act, the Watts riots erupted.⁵³⁷ Two years later it was Newark and Detroit. Then Richard Nixon was elected on a platform of “law and order” in 1968.⁵³⁸ John Ehrlichman, Assistant to the President, later acknowledged,

We knew we couldn’t make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.⁵³⁹

Nixon’s “War on Drugs” marked the beginning of a massive carceral initiative that led to the disproportionate incarceration of Black and Brown men, a trend that persisted well into Chief Justice Roberts’s tenure on the U.S. Supreme Court⁵⁴⁰ and throughout the presidency of Barack Obama, the nation’s first Black president.

One year following the election of President Obama, with many proclaiming a “post-racial” era,⁵⁴¹ the Supreme Court struck down the transformative preclearance formula provisions of the historic Voting Rights Act in *Shelby County v. Holder*.⁵⁴² The Senate had approved the Section five formula with a unanimous 98-0. As we discussed, Justice Ginsburg read her

⁵³⁵ Birmingham Sunday; Birmingham Children’s March, Murder of Jimmy Jackson, Murder of Reverend Reeb, beating of Jon Lewis on Edmund Pettus Bridge.

⁵³⁶ See discussion of *Shelby Cnty.*, *supra* text accompanying note 339; *Wards Cove v. Atonio*, 490 U.S. 642 (1989) (Supreme Court severely restricts standard to prove disparate impact), subsequently superseded by Civil Rights Act of 1991.

⁵³⁷ Brenda Gazzar, *Revisiting the Watts Riots 50 Years Later: ‘The Explosion Was Almost Predictable’*, L.A. DAILY NEWS (Aug. 28, 2017), <https://www.dailynews.com/2015/08/08/revisiting-the-watts-riots-50-years-later-the-explosion-was-almost-predictable/> [<https://perma.cc/S6LM-YPWR>].

⁵³⁸ Republican National Committee, *Nixon 1968 Acceptance Speech Law and Order*, C-SPAN (Aug. 22, 2020).

⁵³⁹ Tom LoBianco, *Report: Aide Says Nixon’s War on Drugs Targeted Blacks, Hippies*, CNN (Mar. 24, 2016, at 15:14 ET), <https://www.cnn.com/2016/03/23/politics/john-ehrllichman-richard-nixon-drug-war-blacks-hippie/index.html> [<https://perma.cc/LQ9Z-DNRY>].

⁵⁴⁰ See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012) (discussing how War on Drugs and ensuing mass incarceration of a disproportionate number of Black men replicated the Jim Crow color-line in many respects).

⁵⁴¹ Jeremy Nesoff, *The Myth of a Post-Racial Society After the Obama Presidency*, *FACING HIST. & OURSELVES* (Feb. 8, 2017), <https://www.facinghistory.org/ideas-week/myth-post-racial-society-after-obama-presidency> [<https://perma.cc/S45U-TEBY>].

⁵⁴² Fisher I, *supra* note 286, at 559.

lacerating dissent from the bench predicting a roll back of voter protections across the country, which turned out to be correct.⁵⁴³

So, life seems so often – too often perhaps – to move in circles. Like Ruth Bader Ginsburg and John Roberts, I attended Harvard Law School. At twenty-one years old, I was a high school dropout and a recent graduate of Arizona State University, where I now teach, having never traveled east of the Mississippi River, eating rice with a spoon, believing Brown University to be in Baltimore but, unlike my classmate to whom I made the faux pas, knowing Pac-12 rival Oregon State was in Corvallis, Oregon.

All three of us arrived with different backgrounds, life experiences, and expectations, yet we studied in the same majestic, if not intimidating, library under the vigilant portraits of, Pound and Langdell. We learned in the same classrooms, no doubt wondering whether a 1L professor would punch our number in front of our high-achieving classmates. We smelled the same smells, and navigated the same tradition, local environment, and rigors of a legal education. (I suspect as an Arizonan, I may have experienced the long Boston winters and longer distance from home a tad differently.) I may have attended Harvard Law, but I knew on day one it was not my destiny to be “of” Harvard Law, that is, the acculturation of the finishing school aspects of “elite” law school (and finishing school) would be wasted on someone who would never quite finish. I suspect Ruth Bader Ginsburg felt the same way.

One of my friends, a Latino from Yale (or maybe Princeton) told me early on, all students-of-color from state schools got admitted based on affirmative action. However, because I lived in the infamous frill free Gropius dorm in my first year, I was never very blown away by the maturity or life experiences of the “masters of the universe” on the hall especially those from the most prestigious schools – all lovely boys to be sure; dorm life was the great equalizer. With the love of small communities, I made it out respectably without any individual love from the institution itself.

The first time I was asked to return and teach a course at Harvard called “Frontiers of Civil Rights,” my opening words to the students were, “I can’t believe Harvard made the same mistake twice.” The students laughed, but I never felt like a mistake—just a little rough around the edges. I still am, not as conversant as some of my classmates in Princeton’s dining halls, Yale’s colleges, quickie ski vacations to Switzerland, or summers on Martha’s Vineyard. The institution seemed to loom lord-like above each student so I felt, not that I did not belong, but I was there to validate that the system worked for all—though I knew even then I had been lucky and blessed (thank

⁵⁴³ *Id.*; BRENNAN CTR. FOR JUST., *Effects of Shelby County v. Holder on the Voting Rights Act*, (June 21, 2023), <https://www.brennancenter.org/our-work/research-reports/effects-shelby-county-v-holder-voting-rights-act> [https://perma.cc/B5KE-FHUT].

you Ernesto and Faith) and the system actually gobbled up many people smarter, braver, and more innovative than me and most of my classmates.

In 2021, amid the challenges of pandemic Zoom school and following the loss of my mother (and my father the year before), I stepped down as dean of RLSN. That last year was spent navigating Zoom classes, grappling with grief, and working on this book project about Justice Ginsburg at Rutgers. After stepping down and as my research assistant graduated, I tucked the manuscript away in my desk and only returned to it in earnest this year, motivated by the ABA paper requirement.

During my sabbatical year, I was asked if I would like to visit Harvard again, to teach any course I wanted. With *Bostock* decided and the Crown Act in motion, and with Ginsburg partly as my inspiration, I created the class in the spirit of her “Women and the Law” seminar—a course I wish I had been offered when I was in law school. I called this course “The Law and Legal System through the Lens of Latina/o Communities.” In this class, we examined issues such as Puerto Rico’s colonial status, the broken immigration system that leaves millions in liminal immigrant statuses, the connection between this liminality and precarious, invisible work, language access in the workplace and in the courts, and the many lessons offered by Latin American feminism. My alma mater had rarely engaged with most of these topics. My inaugural class was racially and geographically mixed, with all the students drawn to the course by a shared sense of disappointment that many of the issues we planned to discuss had been omitted from the standard curriculum. It was designed horizontally so that students could share and learn from each other’s lived experiences and scholarship.

I returned as a visiting professor at Harvard for the fourth time. (For those keeping count at home, Harvard has now made the same mistake five times). I have avoided addressing the *SFFA* decision until now because I suspected it would be at odds with my lived experience as a student, Dean and professor at Rutgers, and my vocation as a lifelong learner. I knew it would be at odds with what I believed RLSN stands for, both then and now—true opportunity. I knew it would feel like Harvard, at its worst, arrogant and unwilling to even try to understand what it does not know.

I have heard that the number of Black and Latine students at Harvard Law has dropped significantly for this entering class, echoing Justice Ginsburg’s plea not to close the umbrella in a rainstorm. I thought of former President Barack Obama, who also shared the halls, and Michelle Obama, known as Michelle Robinson as my classmate, or Associate Justice Ketanji Brown Jackson, one of the dissenters in *SFFA*. I consider how President Obama was incessantly attacked for not releasing his transcript, dog whistling his academic achievements, which even included the rarefied club as Editor-in-Chief of the Harvard Law Review, a barely dressed up racial gaslight. I think of how some commentators have doubled down on this

gaslight, to seemingly challenge the intellectual capabilities of Michelle Obama and Justice Jackson, among other Black women, weaponizing their diversity to challenge diversity.

I love all my students, of course, but I always return to the “People’s Electric Law School” in Newark, with all its imperfections. After all, it was my first academic home, just as it was for Justice Ginsburg; and I found my colleagues inspiring and amazing, just like Professor Ginsburg. Thanks to the hard work done in the late 1960s and 1970s, of which Professor Ginsburg was a critical part, it remains the most unique and special place among the seven schools where I have taught.

With this perspective, along with my many years of practicing anti-discrimination law, I approached the question of how we navigate inclusion in the post-*SFFA* landscape. In response to this question, I have drawn upon the wisdom of Justice Ruth Bader Ginsburg, informed by her personal story, her time at RLSN, and her tenure on the U.S. Supreme Court.

Here is a simple answer. Inspired by Justice Ginsburg, I have always aspired to create these fertile contingent spaces for my students, geeking out on the law but affirming each voice and life experience as the threshold material to understand how abstract legal doctrines shape personal and community experience, and how legal change happens. I have taught my Ginsburg-inspired course, not only at Harvard, but at Yale, NYU, and Arizona State University. Eight students, all women, six self-identified as Latina, have published academic papers stemming from the class—a rare feat for law students, introducing new ideas into the public sphere (e.g. intersection between disability and immigration law, Latin American movements against femicide, sexual harassment of farmworker women, and reparative frameworks for Puerto Rico, etc.), filling gaps in legal scholarship, transcending tradition, and expressing gratitude for the space and their community who inspired their own work.

Each one in her own way carries on Ginsburg’s legacy. Indeed, a course requirement is that when the opportunity arises, the student must create new generative spaces for others. Each one, like Ginsburg, had a space to overcome their hardships to thrive and find their voice—a space Smith, an extraordinary man with an ordinary name, who died suffering dementia with a caved rib cage, the vestiges of the murder of his jazz dreams twenty-five years earlier.