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# Opinions in context: An exploration of the rhetoric used by Supreme Court Justices Antonin Scalia and Ruth Bader Ginsburg regarding the separation of church and state

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Opinions in Context: An Exploration of the Rhetoric Used by Supreme Court Justices Antonin  
Scalia and Ruth Bader Ginsburg Regarding the Separation of Church and State

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An Honors College Project Presented to  
the Faculty of the Undergraduate  
College of Arts and Letters  
James Madison University

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by Catherine Otera Evans

May 2018

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Accepted by the faculty of the School of Writing, Rhetoric and Technical Communication, James Madison University, in partial fulfillment of the requirements for the Honors College.

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PUBLIC PRESENTATION

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## Abstract

Supreme Court Justices Antonin Scalia and Ruth Bader Ginsburg represented opposite ends of the political spectrum on the Court, having been appointed by presidents from different parties. Their opinions on cases revolving around the interpretation of separation of church and state do/did not occur within a vacuum, and this paper examines both the context surrounding these opinions and rhetoric of the opinions themselves, closing with a discussion of the former's effect on the latter. Specifically, four cases (two for each) from the beginning and end of the justices' careers will be analyzed: *Capitol Square Review and Advisory Board v. Pinette*, *Burwell v. Hobby Lobby Stores, Inc.*, *Edwards v. Auguillard*, and *McCreary County v. ACLU of Kentucky*. This project serves as an introductory glance into the motivations and rhetorical strategies of two of modern time's most prominent and incisive justices.

## **Opinions in Context: An Exploration of the Rhetoric Used by Supreme Court Justices Antonin Scalia and Ruth Bader Ginsburg Regarding the Separation of Church and State**

Justices Antonin Scalia and Ruth Bader Ginsburg were and are the leading voices of conservatism and liberalism on the United States Supreme Court, respectively. They served on the Court together for 22 years and on the D.C. federal circuit court before that. These incendiary figures, celebrated by some and loathed by others, disagree profoundly on many policy points, and would seem to be unlikely friends. Yet Justices Scalia and Ginsburg found an appreciation for each other's interpretations and rhetorical styles, and they formed a strong friendship over the years, even providing the inspiration for an opera.<sup>1</sup> At the end of the opera, *Scalia/Ginsburg*, the actors for Ginsburg and Scalia sing a song entitled "We Are Different, We Are One"; as Ginsburg explains, they mean "different in [their] interpretation of written texts, one in [their] reverence for the Constitution and the institution [they] serve."<sup>2</sup> Both Justices improved and built upon the other's rhetoric, developing each other into the prominent figures they became.<sup>3</sup>

Though the friendship between the two Justices is not the focus of this paper, a look into their relationship does make their contrasting rhetorical styles and ideologies all the more intriguing. The rhetoric examined in this project cannot be separated from the individuals who produced it. In the foreword to Justice Scalia's autobiography, Ginsburg wrote, "if our friendship encourages others to appreciate that some very good people have ideas with which we disagree, and that, despite differences, people of goodwill can pull together for the well-being of the institutions and our country, institutions and our country, I will be overjoyed, as I am confident

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<sup>1</sup> Derrick Wang, "Scalia/Ginsburg," accessed March 3, 2018, <http://www.derrickwang.com/scalia-ginsburg/>.

<sup>2</sup> "Ginsburg and Scalia: 'Best Buddies,'" *NPR: All Things Considered*, February 15, 2016, <https://www.npr.org/2016/02/15/466848775/scalia-ginsburg-opera-commemorates-sparring-supreme-court-friendship>.

<sup>3</sup> "Ginsburg and Scalia," *NPR*.

Justice Scalia would be.”<sup>4</sup> In an increasingly polarized political sphere, it is worth noting that it is possible to find common ground with those of differing political affiliations. But how strongly does that political affiliation affect their striking rhetoric in their Supreme Court opinions?

An important issue on which Justice Ginsburg and Justice Scalia have taken largely opposing views is the separation of church and state, constitutionally established in the Establishment and Free Exercise Clauses of the First Amendment to the United States Constitution. This section states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” This language seems simple; however, this clause has been a heavily litigated point of friction in the United States over the past 230 years, subjected to the interpretation of Supreme Court justices. Given the politicized nature of this debate, this project will explore how this particular issue is arbitrated by these two outspoken justices to attempt to answer this question: how are the justice’s rhetorical styles on this issue affected by their political and religious views?

The role of the judiciary is meant to be apolitical, but it becomes inherently political given the nature of the justices’ appointments.<sup>5</sup> For example, Justice Neil Gorsuch has recently taken the judicial oath after a mostly conservative Congress refused to confirm any of President Obama’s appointees for the replacement of the late Justice Scalia—they instead waited to confirm Republican President Donald Trump’s appointee. This move was undeniably based on politics, with what appears to be an expectation for a justice who would make decisions that appealed to conservatives. Given Gorsuch’s record of ruling in favor of a blurred division

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<sup>4</sup> Antonin Scalia, *Scalia Speaks: Reflections on Law, Faith, and Life Well Lived*, eds. Christopher J. Scalia and Edward Whelan (New York: Crown Forum, 2017).

<sup>5</sup> James D. Zirin, *Supremely Partisan: How Raw Politics Tips the Scales in the United States Supreme Court* (Lanham: Rowman and Littlefield, 2016).

between the Christian faith and the government,<sup>6</sup> he seems likely to uphold his end of the agreement on this particular issue. There have been instances in which a justice was appointed by a president of one party and ending up ruling opposite that affiliation, such as Justices Warren and Brennan (Eisenhower appointees) and Justice Souter (a George H.W. Bush pick),<sup>7</sup> so this connection is not necessarily inherent. It is, therefore, important to analyze the rhetoric used by current or recent Supreme Court justices on specific issues in order to recognize rhetoric that is meant to appeal to a partisan base rather than to a true interpretation of the Constitution.

This paper will begin with a review of the literature surrounding the context within which legal rhetoric exists, then provide a background of the justices' religious and other relevant views, as well as their past legal decisions and public image. The bulk of the paper will contain a rhetorical analysis of two separation of church and state cases from each justice, spread over the time of their appointment. Finally, the paper will end with a discussion of the changes to the justices' rhetoric throughout their appointments, a comparison of the two justices' rhetorical styles, and an attempt to determine how their political views affect their rhetoric as a whole.

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<sup>6</sup> Rokia Hassanein, "Neil Gorsuch is a Threat to Church-State Separation. That's Why the Senate Should Reject His Nomination to the Supreme Court," *Wall of Separation* (blog), April 6, 2017, [www.au.org/blogs/wall-of-separation/neil-gorsuch-is-a-threat-to-church-state-separation-that-s-why-the-senate](http://www.au.org/blogs/wall-of-separation/neil-gorsuch-is-a-threat-to-church-state-separation-that-s-why-the-senate).

<sup>7</sup> Zirin.

## Literature Review

For the purposes of this project, it is crucial to explore the existing research surrounding the study of legal rhetoric with a specific focus on the analyses that has already been done on how Supreme Court texts might be interpreted—especially as they relate to the context in which opinions are penned. This literature review will, thus, focus on the relationship between legal and critical theoretical rhetoric, how Supreme Court texts should be interpreted given their contexts, the types of rhetoric that can be observed in legal settings, and how the rhetoric of the Supreme Court is affected by the political atmosphere in which it resides. Finally, I will discuss how these ideas have been applied to specific observations of Justices Ginsburg and Scalia.

The scholarly emphasis on the interdisciplinary relationship between critical theoretical and legal traditions, known as the Law and Literature movement, is relatively new; it began, arguably, in 1973 with the publication of James Boyd White's *The Legal Imagination*.<sup>8</sup> White, a law professor, literary critic, scholar, and philosopher, suggests that legal texts make up how we perceive our “textual community” and are instrumental in forming the ways we interact with one another.<sup>9</sup> Along with White, notable scholars such as Ronald Dworkin, Stanley Fish, and E.D. Hirsh view the law as inextricably linked to rhetoric.<sup>10</sup> While White claims that it is impossible to distinguish between intentionally “plain” and “purposeful” language<sup>11</sup> and that no

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<sup>8</sup> John Hursh, “A Historical Reassessment of the Law and Literature Movement in the United States,” *GRAAT* 14 (2013): 4, <http://www.graat.fr/1hursh.pdf>.

<sup>9</sup> Robin West, “Communities, Texts, and Law: Reflections on the Law and Literature Movement,” *Yale Journal of Law and the Humanities* 1, no.1 (1988): 154, <http://digitalcommons.law.yale.edu/yjlh/vol1/iss1/8>.

<sup>10</sup>Robert Danisch, “Aphorisms, Enthymemes, and Oliver Wendell Holmes, Jr. on the First Amendment,” *Rhetoric Review* 27, no. 3 (2008): 220, doi: 10.1080/07350190802126128; James Seaton, “Law and Literature: Works, Criticism, and Theory,” *Yale Journal of Law & the Humanities* 11, no. 2 (1999): 479, <http://digitalcommons.law.yale.edu/yjlh/vol11/iss2/8>.

<sup>11</sup> James Boyd White, *Justice as Translation* (Chicago: University of Chicago Press, 1990), 219.

“translation” of legal texts is perfect,<sup>12</sup> Dworkin, a philosopher and jurist, advocates for the application of critical literary interpretation to legal texts, using the term “aesthetic hypothesis” to suggest that a critique should attempt to reveal the true, artistic meaning behind a text.<sup>13</sup> As literary theorist and legal scholar, Fish disagrees, stating that these texts should, instead, be interpreted as a rhetorical exercise.<sup>14</sup> Hirsch, a professor of education and humanities at the University of Virginia, on the other hand, believes that the author’s intention and the context in which the author wrote the piece should be of foremost importance in interpreting a legal text.<sup>15</sup> Clearly, there are many factors to consider when analyzing legal texts, and, given their complex context and purpose, it is difficult to determine which should be used.

Thus, an explanation of the rhetorical context in which these justices are writing their opinions is necessary if an interpretation is to be made. Erwin Chemerinsky, an American lawyer and Dean of Berkeley Law, provides a helpful analysis of the message, audience, and speaker of these texts; as he explains, while the messages are written to appear value-free, consistent with precedent, and restrained, value choices are inevitable when the Court makes decisions due to the audience and the biases of the speaker themselves.<sup>16</sup> Instead of conveying the idyllic “indeterminant moral commitments,”<sup>17</sup> the opinions are written as if to indicate that there is only one correct answer to the problem at hand. Indeterminacy is rarely, if ever, addressed in the opinions of the Court except within dissenting (and, to a lesser extent, concurrent) opinions,

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<sup>12</sup> White, *Justice as Translation*, 255.

<sup>13</sup> Ronald Dworkin, *A Matter of Principle* (Cambridge: Harvard University Press, 2006), 149.

<sup>14</sup> Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Durham: Duke University Press, 1990).

<sup>15</sup> E.D. Hirsch, “In Defense of the Author,” In *Intention Interpretation*, ed. Gary Iseminger (Philadelphia: Temple University Press, 1992), <http://www.jstor.org/stable/j.ctt14bs87q.5>.

<sup>16</sup> Erwin Chemerinsky, “The Rhetoric of Constitutional Law,” *Michigan Law Review* (2002): 2011. [https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1633&context=faculty\\_scholarship](https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1633&context=faculty_scholarship).

<sup>17</sup> West, 131.

which bemoan the incorrect assessment of the majority opinion.<sup>18</sup> Eric Berger, Associate Professor of Law at the University of Nebraska, makes a similar argument: Supreme Court justices often “imbue their constitutional opinions with a sense of inevitability,” leading to a sense of absolutism where, in reality, this does not exist.<sup>19</sup> Though the text may imply that the justice’s stance is unequivocal, it is crucial to understand that the context in which these texts are written is decisively an argumentative one.

Rhetoricians have noticed this distinction and have offered alternative ways to analyze this rhetoric. Julia M. Allen and Lester Faigley, who respectively teach English at Sonoma State University and rhetoric at the University of Texas at Austin, suggest that the traditional rhetorical triangle should present the “speaker/writer, subject, and audience as independent entities.”<sup>20</sup> In this case, context is secondary. However, if we are to understand the effects texts can have on a larger community, it is important to understand the “histories of writers, subject matters, and audiences” and how each is contained in “multiple relations of power and how discourses are related to practices.”<sup>21</sup> Similarly, Jenny Edbauer, an associate professor of rhetoric at the University of Kentucky, posits a solution these common problems within the typical “send-receiver” or “conglomeration” models: a shift from discussing rhetorical “situations” to rhetorical “ecologies.”<sup>22</sup> This strategy would involve analyzing the “temporal, historical, and lived fluxes” in order to more easily recognize rhetoric as a “public creation.”<sup>23</sup> A traditional

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<sup>18</sup> Chemerinsky, 2012.

<sup>19</sup> Eric Berger, “The Rhetoric of Constitutional Absolutism,” *William and Mary Law Review* 56, no. 3 (2015): 667, [goo.gl/GNRtMH](http://goo.gl/GNRtMH).

<sup>20</sup> Julia M. Allen and Lester Faigley, “Discursive Strategies for Social Change: An Alternative Rhetoric of Argument,” *Rhetoric Review* 14, no. 1 (1995): 143, doi: 10.1080/07350199509389057.

<sup>21</sup> Allen and Faigley, 143.

<sup>22</sup> Jenny Edbauer, “Unframing Models of Public Distribution: From Rhetorical Situation to Rhetorical Ecologies,” *Rhetoric Society Quarterly* 35, no. 4 (2005): 7-9, doi: 10.1080/02773940509391320.

<sup>23</sup> Edbauer, 9.

approach, then, may not be the best way to think about legal rhetoric within larger contexts. Rather, the histories and backgrounds of the rhetor, audience, and subject should be considered.

Other researchers debate whether dominant legal rhetorical theories account for the variation and complexity within the legal system. A professor of political science at Ohio University, Susan R. Burgess, challenges the idea that legal rhetoric is merely a means to obscure the true influence of politics and to hide “overt value choices.”<sup>24</sup> She emphasizes that “institutional arrangements such as judicial supremacy” should be considered, even within a traditional framework, before jumping to common conclusions.<sup>25</sup> Scholars often choose to focus on the “role of the Court” rather than the larger analysis of constitutional meaning.<sup>26</sup> This phenomenon of judicial supremacy in interpreting the Constitution is often overlooked, as it is seen as a given. In reality, this power was self-bestowed, and liberals and conservatives alike allow the Court to serve as the nation’s moral compass.<sup>27</sup> Michael Kleine and Clay Robinson (a rhetorician and a lawyer, respectively) allege that this heavily persuasive power of the Court is largely rhetorical, just as Burgess suggests. The authors link the Court’s success to the use of “interpretive power, ethos, dialogism, and pragmatic philosophy and practice.”<sup>28</sup> They point out that the Court is not necessarily reliant on popular opinion (doxa), nor does it always represent it, as in the notable cases of *Brown v. Board* and *Roe v. Wade*. Thus, their motivations to maintain

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<sup>24</sup> Susan R. Burgess, “Beyond Instrumental Politics: The New Institutionalism, Legal Rhetoric, & Judicial Supremacy,” *Polity* 25, no. 3 (1993):445-446, <http://www.jstor.org/stable/3234973>.

<sup>25</sup> Burgess, 458.

<sup>26</sup> Burgess, 458.

<sup>27</sup> Burgess, 459.

<sup>28</sup> Michael Kleine and Clay Robinson, “The Dialogic Rhetoric of the Supreme Court: An Interdisciplinary Analysis,” *Rhetoric Review* 27, no. 4 (2008): 415, doi: 10.1080/07350190802339283.

power over the citizens of the United States is largely based upon rhetoric and must be considered when analyzing the rhetorical style of the justices themselves.

Various strategies are utilized by the Court to legitimize both the institution and the justices' arguments. Mentioned by Kleine, the idea of consubstantiality used to this end regarding areas of contention such as the Establishment and Free Exercise Clauses. An article entitled "Defending Child Medical Neglect: Christian Science Persuasive Rhetoric" written by Beth Rapp Young, an associate professor of English at the University of Central Florida, explains how this technique is used to create the impression of common ground between people of differing opinions.<sup>29</sup> This technique creates a sense of identification with a group that a person would otherwise not identify with. Young uses the term "Christian Science" to illustrate how a scientific person could identify with the Christian argument due, in part, to the inclusion of the word "science" in the name.<sup>30</sup> Other noteworthy forms of rhetoric include paralipsis ("a rhetorical device by which a speaker draws attention to an idea that he pretends to pass over"),<sup>31</sup> aphorisms (a brief saying, similar to an adage or proverb), and enthymemes (an argument wherein the premise is implied, rather than stated).<sup>32</sup> These strategies, and many others, can be used in a number of different situations to suit a variety of rhetorical situations.

Two models of judicial behavior are explained by Segal and Spaeth (both professors of political science) in their book, *The Supreme Court and the Attitudinal Model Revisited*. The first is the "legal model," in which justices make decisions based fully on pre-existing law and their

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<sup>29</sup> Beth Rapp Young, "Defending Child Medical Neglect: Christian Science Persuasive Rhetoric," *Rhetoric Review* 20, no. 3-4 (2011): 281, doi:10.1080/07350198.2001.9683386.

<sup>30</sup> Young, 282.

<sup>31</sup> Richard Benjamin Crosby, "Mitt Romney's Paralipsis: (Un)Veiling Jesus in 'Faith in America,'" *Rhetoric Review* 32, no. 2 (2013): 121, doi: 10.1080/07350198.2013.766849.

<sup>32</sup> Robert Danisch, "Aphorisms, Enthymemes, and Oliver Wendell Holmes, Jr. on the First Amendment," *Rhetoric Review* 27, no. 3 (2008): 219-235, doi:10.1080/07350190802126128.

institutional environment. This is contrasted with the “attitudinal model,” which posits that justices decide cases based on their personal policy preferences.<sup>33</sup> Supreme Court justices are, according to the authors, particularly subject to the attitudinal model, since they are left with relatively few restrictions on making decisions based on their merits.<sup>34</sup>

Justices Scalia’s and Ginsburg’s behaviors have been studied extensively, and both seem to match with the attitudinal model in the existing literature. Both have been accused of producing rather one-sided, absolutist rhetoric at times, though there certainly are cases when it is used less frequently.<sup>35</sup> Absolutism was an important characteristic of Scalia’s rhetorical style.<sup>36</sup> Scalia was also known for employing metaphor, colloquialisms, and humor to persuade his audience, as well as for seemingly focusing his persuasive techniques on the “general public” section of his audience.<sup>37</sup> Though some researchers seem to appreciate his bottom-up approach, others believe that his rhetoric added to polarization and lessened the legitimacy of the judiciary.<sup>38</sup> Fewer rhetorical analyses seem to have been done with Justice Ginsburg’s work, though her decisions and rationale are often mentioned throughout legal texts. The approach she

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<sup>33</sup> Jeffrey Segal and Harold Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (New York: Cambridge University Press, 2002).

<sup>34</sup> Segal and Spaeth.

<sup>35</sup> Berger, 696.

<sup>36</sup> Berger, 682.

<sup>37</sup> Meghan J. Ryan, “Justice Scalia’s Bottom-Up Approach to Shaping the Law,” *William and Mary Bill of Rights Journal* 25, no. 1 (2016), <http://search.ebscohost.com/login.aspx?direct=true&AuthType=ip,cookie,url,cpid,uid&custid=s8863137&db=poh&AN=120886295&site=eds-live&scope=site&authtype=ip,uid>.

<sup>38</sup> Stephen A. Newman, “Political Advocacy on the Supreme Court: The Damaging Rhetoric of Antonin Scalia,” *New York Law School Law Review*, 51 (2007): 908, <http://search.ebscohost.com/login.aspx?direct=true&AuthType=ip,cookie,url,cpid,uid&custid=s8863137&db=a9h&AN=25292718&site=eds-live&scope=site&authtype=ip,uid>.

takes to penning her opinions is slightly less inflammatory than Scalia's, but the two are frequently seen as sparring partners.

While the scholarship surrounding legal rhetoric is extensive, few attempts have been made to connect the principles discussed to specific contexts, at least in a substantial and focused way. By analyzing how rhetoric is used by outspoken justices to address the separation of church and state, a particularly polarizing issue, this thesis will apply the research that has so far been addressed to a single rhetorical situation. Context has been shown to be a significant factor when analyzing legal texts, so I will attempt to determine the influence of Justices Scalia and Ginsburg's political appointments and backgrounds on the rhetoric that they use—something that has not been fully addressed in the legal rhetoric literature. The research that has already been done will be beneficial to this thesis, as I will be able to use the suggested techniques and terminology to conduct my analysis more effectively. That said, my goal is to provide useful additions to this literature through a focus on that which has not been explored in a rigorous way. I hope this thesis will provide a helpful addition to the existing body of legal rhetoric scholarship by providing a new level of context for Supreme Court opinions about the Free Exercise and Establishment Clauses.

## Background of Justices

In the interest of providing further context for the rhetorical situations I will analyze, I will first present a biographical and legal background of Justices Ginsburg and Scalia. This context is important, as Judge Richard Posner, former Chief Judge of the United States Court of Appeals for the Seventh Circuit, argues that “innate personal characteristics” such as religion, race, and sex, play a large role in the decision-making process for adjudication.<sup>39</sup>

### Ruth Bader Ginsburg

Ruth Bader Ginsburg is the first Jewish woman—and only the second woman—to serve on the Supreme Court. She believes that the Constitution is a living document: as society changes, so must the interpretation of the Constitution.<sup>40</sup> She is perhaps best known for her women’s rights advocacy and feminist ideals; her vocal action against discrimination is strengthened and shaped by her own experiences with both religion and gender throughout her life.

#### *Biographical Information*

Ginsburg’s parents were Russian Jewish immigrants; at the peak of the Great Depression, her father was a furrier and her mother worked in a garment factory. Born Joan Ruth Bader<sup>41</sup> in Brooklyn, New York, on March 15, 1933, Ginsburg learned to appreciate education and hard work early on in life from her mother, who stressed the importance of academics and sacrificed

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<sup>39</sup> Richard A. Posner, *How Judges Think* (Cambridge, MA: Harvard University Press, 2008): 10.

<sup>40</sup> Justice Antonin Scalia and Justice Ruth Bader Ginsburg, interview by Marvin Kalb, *The Kalb Report*, George Washington University, April 17, 2014.

<sup>41</sup> She later went by Ruth to avoid confusion among other girls named Joan in her class as school; Ruth Bader Ginsburg, Mary Harnett, and Wendy W. Williams, *My Own Words* (New York, New York: Simon and Schuster, 2016).

her own education for the sake of her children's.<sup>42</sup> Ginsburg experienced anti-Semitism throughout her upbringing, exemplified by a sign along a country road which read "No Dogs or Jews Allowed" and the fact that the "best" schools had quotas for the number of admitted Jewish students. Even the dorms at Cornell University, where she completed her undergraduate studies, separated Jewish women from their non-Jewish counterparts.<sup>43</sup>

A day before her graduation from James Madison High School, Ginsburg's mother passed away from cancer.<sup>44</sup> She cites this moment as a turning point in her religious views, as she was not permitted to participate in her own mother's funeral: even though there were plenty of women present, Jewish law required that 10 men "convene a *minyan*, or communal prayer" at the service. Though she was raised as an observant Jew, Ginsburg does not identify as such, in part due to gender inequality within her faith. She claims her view of the law is not affected by her Jewish heritage and upbringing (she considers herself to be a Justice "who happens to be a Jew" rather than a "Jewish Justice"), though she stated that "being part of a minority, [she] know[s] what it is like to be an outsider, what it's like to be the victim of prejudice."<sup>45</sup>

Despite her academic excellence, Ginsburg did indeed face significant gender discrimination throughout her career, which put up more obstacles, she said, than being Jewish.<sup>46</sup> She graduated top of her class in 1954 from Cornell University—in the same year, she married Martin Ginsburg, moved to Oklahoma, and was demoted from a job at the Social Security

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<sup>42</sup> "Ruth Bader Ginsburg," Oyez, Accessed February 7, 2018. [https://www.oyez.org/justices/ruth\\_bader\\_ginsburg](https://www.oyez.org/justices/ruth_bader_ginsburg).

<sup>43</sup> Robert Barnes, "Ginsburg Is Latest Justice to Reflect on Faith," Religion and the High Court, *Washington Post*, January 15, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/01/14/AR2008011402290.html>.

<sup>44</sup> "Ruth Bader Ginsburg," Oyez.

<sup>45</sup> Barnes, "Ginsburg Is Latest." All of the quotes from the paragraph are taken from this article.

<sup>46</sup> Barnes, "Ginsburg Is Latest."

Administration upon the birth of their first child.<sup>47</sup> She enrolled in Harvard Law shortly after, where she faced criticism for being one of the nine women (out of a 500-person class) to take a man's spot.<sup>48</sup> While dealing with this blatant sexism and caring for her child and husband, who had been diagnosed with testicular cancer in 1956, Ginsburg became the first female member of the Harvard Law Review. She transferred to Columbia Law for her last year when Martin recovered, where she served on their law review and graduated first in her class in 1959. She had trouble finding a job, however, which Ginsburg attributes to perceptions of both her gender and the fact that she was a mother of a young child—the latter, she claims, was the “real kicker.”<sup>49</sup> With the help of a professor at Columbia, she worked as a clerk under a judge for two years, at which point she was offered some jobs at law firms; she did not take them, however, because they offered a lower salary to her than to her male counterparts.<sup>50</sup>

Instead, Ginsburg moved to Sweden to do research for the Columbia Project on International Civil Procedure, and she returned to the United States in 1963 to work as a professor at Rutgers Law School until 1972.<sup>51</sup> During this time in 1965, Ginsburg hid her pregnancy from coworkers to avoid the possibility of being denied tenure, which she was eventually granted in 1969.<sup>52</sup> In 1972, Ginsburg accepted an offer to teach at Columbia University, where she would become the first female professor at Columbia to gain tenure. After

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<sup>47</sup> David Margolick, “Trial by Adversity Shapes Jurist’s Outlook,” *New York Times*, 1993, <https://www.nytimes.com/1993/06/25/us/trial-by-adversity-shapes-jurist-s-outlook.html?pagewanted=all>.

<sup>48</sup> “Ruth Bader Ginsburg,” Oyez; Nina Totenberg, “Notorious RBG: The Supreme Court Justice Turned Cultural Icon,” *NPR*, October 26, 2015, <https://www.npr.org/sections/itsallpolitics/2015/10/26/450547606/notorious-rbg-the-supreme-court-justice-turned-cultural-icon>.

<sup>49</sup> Barnes, “Ginsburg Is Latest.”

<sup>50</sup> “Ruth Bader Ginsburg,” Oyez.

<sup>51</sup> “Ruth Bader Ginsburg,” Oyez.

<sup>52</sup> Totenberg, “Notorious RBG.”

being appointed by Jimmy Carter in 1980, Ginsburg went on to serve on the US Court of Appeals for 13 years until Bill Clinton appointed her to the Supreme Court in 1993.<sup>53</sup>

### *Legal History*

Justice Ginsburg's history demonstrates her defense of religious liberty in cases where discrimination based on other factors (particularly gender) also come into play. During the 1970s, she argued six landmark cases before the Supreme Court for the Women's Rights Project of the American Civil Liberties Union.<sup>54</sup> In one of these cases, *Struck v. Secretary of Defense*, Ginsburg defended a Roman Catholic woman who was being discharged from the military for becoming pregnant and refusing to abort the fetus.<sup>55</sup> Ginsburg wrote that the regulation pitted the woman's career against her "religious conscience" and that "while the regulation challenged by Captain Struck is not designed to interfere with religious beliefs, if in effect it does so interfere, it must be supported by necessity of the kind totally absent here."<sup>56</sup> Her overarching argument, however, was that because men who are similarly incapacitated for work in the Air Force were given sick leave, refusing to grant leave to a pregnant woman was, at its core, a "reflect[ion] [of] arbitrary notions of woman's place wholly at odds with contemporary legislative and judicial recognition that individual potential must not be restrained, nor equal opportunity limited, by law-sanctioned stereotypical prejudgments."<sup>57</sup> This absolutist rhetoric is expected in an advocate

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<sup>53</sup> "Ruth Bader Ginsburg," Oyez.

<sup>54</sup> "Ruth Bader Ginsburg," Oyez.

<sup>55</sup> John D. Inazu, "Justice Ginsburg and Religious Liberty," *Hastings Law Journal* 63, no. 5 (June 2012): 1216; Neil S. Siegal and Reva B. Siegal, "Struck by Stereotype: Ruth Bader Ginsburg on Pregnancy Discrimination as Sex Discrimination," *Duke Law Journal* 59, no. 4 (2010).

<sup>56</sup> *Struck v. Secretary of Defense*, 1971 U.S. App. LEXIS 7124 (1971); Brief for the Petitioner, *supra* note 13, at 56.

<sup>57</sup> Brief for the Petitioner, *supra* note 2, at 7.

or lawyer, as it is the responsibility of counsel to provide the best possible defense and destroy the clear opponent's arguments.<sup>58</sup>

As a judge on the District of Columbia Court of Appeals for thirteen years, Ginsburg authored three notable opinions about religious liberty: *Goldman v. Secretary of Defense*, *Leahy v. District of Columbia*, and *Olsen v. Drug Enforcement Administration*. These cases all involved defendants who requested individual religious exemption from general rules that could be seen as discriminatory: preventing the wearing of a yarmulke while in military uniform, requiring the showing of a Social Security number to get a driver's license, and forbidding the use of marijuana for religious purposes. In Ginsburg's dissent in *Goldman*, joined by Judge Scalia, in which a Jewish man was prevented from wearing a yarmulke while in military uniform, she expressed that the court had shown a "callous indifference" to the man's beliefs.<sup>59</sup> Three years later, she relied almost entirely on precedent in *Leahy*, delving into the man's beliefs about Social Security numbers and remanding the case to the district court to determine whether or not they were sincerely held.<sup>60</sup> Ginsburg rejected the man's request to use marijuana in *Olsen*, however, because government interest in protecting public safety overruled the belief, though sincerely held.<sup>61</sup>

### *Public Persona*

When she was nominated to the Supreme Court in 1993, then-President Bill Clinton remarked on his reasons for choosing the judge: the fact that she was "progressive in outlook,

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<sup>58</sup> Berger, 673.

<sup>59</sup> Inazu, 1218.

<sup>60</sup> *Leahy v. District of Columbia*, 266 U.S. App. D.C. OpenJurist 142 (1987).

<sup>61</sup> Inazu, 1221.

wise in judgment, [and] balanced and fair in her opinions,” her “pioneering work on behalf of the women of this country,” and her ability to be a “force for consensus-building on the Supreme Court, just as she has been on the Court of Appeals.”<sup>62</sup> In her nomination speech, Ginsburg mentioned her thoughts on the Establishment Clause in her testimony based on recent decisions made by the Court, essentially arguing that the separation of religion from government does not mean there can be no acknowledgement of the former by the latter. She was praised by the Senate Judiciary Committee for her “understanding of the values of religious pluralism and tolerance” and “her approval of the idea that government must accommodate religious practice in the absence of ‘special circumstances.’”<sup>63</sup> For the first seven years of her term, she was known as a “restrained moderate”—however, after *Bush v. Gore* in 2000 and the appointment of more conservative Justices to the bench, she has become more openly liberal in her dissents.<sup>64</sup> She has become a liberal feminist icon, even appearing in tattoos and memes as “Notorious RBG,” a play on rapper “Notorious B.I.G.” The justice was criticized in 2016 for speaking out against then-candidate Donald Trump, stating she was a “faker” among other things. This type of public politicking is highly unusual for a supposedly apolitical justice.<sup>65</sup> Ginsburg’s advice to her cult-like following is to “fight for the things you care about, but do it in a way that will lead others to join you” and to never demonize your opponents.<sup>66</sup>

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<sup>62</sup> William J. Clinton, “Remarks Announcing the Nomination of Ruth Bader Ginsburg To Be a Supreme Court Associate Justice,” *American Presidency Project*, June 14, 1993, <http://www.presidency.ucsb.edu/ws/?pid=46684%20>.

<sup>63</sup> Inazu, 1224.

<sup>64</sup> Charlotte Alter, “Here’s Why Ruth Bader Ginsburg Is ‘Notorious,’” *Time*, last modified November 4, 2015, <http://time.com/4093354/heres-why-ruth-bader-ginsburg-is-notorious/>.

<sup>65</sup> Joan Biskupic, “Justice Ruth Bader Ginsburg calls Trump A ‘Faker,’ He Says She Should Resign,” *CNN*, July 13, 2016, <https://www.cnn.com/2016/07/12/politics/justice-ruth-bader-ginsburg-donald-trump-faker/index.html>.

<sup>66</sup> Alter, “Here’s Why.”

## **Antonin Scalia**

Appointed to the Supreme Court of the United States by Ronald Reagan in 1986, Antonin Scalia was the first Italian American appointed to Court and one of eleven Catholic justices appointed since 1789.<sup>67</sup> He was a strict constructionist and believed that the Constitution should be interpreted as it was originally written. He was extremely prolific, writing more concurring opinions than any other justice and more dissenting opinions than all but two previous justices.<sup>68</sup> His inflammatory rhetoric, fiery dissents, and conservative decisions have survived and will continue to survive long beyond his death in 2016.

### *Biographical Information*

Scalia was born in Trenton, New Jersey, on March 11, 1936. His mother was from an Italian immigrant family and worked as a schoolteacher, and his father was an Italian immigrant who was a professor at Brooklyn College. It quickly became apparent that Scalia shared his parents' love for education. On scholarship for academic achievement, he attended St. Francis Xavier High School in Manhattan and graduated as valedictorian. In 1953, he began his studies in history at Georgetown University, where he excelled in debate and speech. He again graduated valedictorian in 1957. Three years later, he graduated valedictorian for the third time from Harvard Law, where he had served as the Notes Editor for the Harvard Law Review. After graduation, he became a Sheldon Fellow through his alma mater and traveled and conducted research across Europe in the year that followed.<sup>69</sup>

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<sup>67</sup> Zirin, 54.

<sup>68</sup> "Antonin Scalia," Oyez, accessed March 12, 2018, [https://www.oyez.org/justices/antonin\\_scalia](https://www.oyez.org/justices/antonin_scalia).

<sup>69</sup> "Antonin Scalia," Oyez. This source was used for all facts in this paragraph.

After six years of working in commercial law, Scalia went back to his true passion of academics. He taught administrative law at the University of Virginia until 1971, when President Nixon appointed him as general counsel to the Office of Telecommunications Policy. He then worked as the chairman of the US Administrative Conference. In 1974, Nixon nominated him as Assistant Attorney General for the Office of Legal Counsel, where he handled disputes between the executive and legislative branches following Watergate. He then taught at the University of Chicago Law School until 1982 when he was appointed to the US Court of Appeals DC Circuit by Ronald Reagan. In 1986, Reagan nominated him as Associate Justice of the Supreme Court to replace Justice Rehnquist, who was taking over the position of Chief Justice from Chief Justice Burger. The Senate confirmed his nomination 98-0.<sup>70</sup>

### *Religion*

Scalia was raised as a devout Catholic, and remained so throughout his life. He saw his Catholic beliefs as “different” from other Christians, writing that when he was growing up, “there were some places where Catholics, like Jews, were not welcome;” he believed that this “differentness” made his own faith stronger.<sup>71</sup> He cited this sense of “differentness” as the reason he participated in meatless Fridays and fasting before Communion as a child.<sup>72</sup> His religion deeply impacted his family life, down to his and his wife’s decision to have nine children.<sup>73</sup>

Despite the prominence of religion in his personal life, Scalia stated that his faith never overly affected his decision-making as a judge or justice: “I am hard pressed to [speak] of a

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<sup>70</sup> “Antonin Scalia,” Oyez. This source was used for all facts in this paragraph.

<sup>71</sup> Scalia, *Scalia Speaks*, 117-118.

<sup>72</sup> Tom Gjelten, “Scalia Expressed His Faith With The Same Fervor As His Court Opinions,” *NPR*, February 14, 2016, <https://www.npr.org/2016/02/14/466722712/scalia-expressed-his-faith-with-the-same-fervor-as-his-court-opinions>.

<sup>73</sup> Gjelten.

single opinion of mine that would have come out differently if I were not Catholic.”<sup>74</sup> Even his view on abortion, he claims, is consistent with his view of the Constitution as one that cannot be reinterpreted from its original meaning, which says nothing about the procedure. However, there were two principles that Scalia believed to dictate his life both as a person and a judge—“Be thou perfect as thy heavenly Father is perfect” and “Thou shalt not lie.”<sup>75</sup> He reiterated, however, that “there is no such thing as a Catholic judge.”<sup>76</sup> In a speech given in 1992 to celebrate the thirteenth anniversary of the *Long Island Catholic* newspaper, Scalia spoke at length about how religious views play into public service roles, such as judge. He emphasized that all of his decisions go back to his belief in the Constitution as a set document, though it is perfectly acceptable, though not always prudent, for law to follow public morality, or *bonos mores*, which may be based on religious grounds.<sup>77</sup>

### *Judicial History*

On the Court of Appeals, Judge Scalia joined Judge Ginsburg in dissent of *Goldman v. Secretary of Defense*. This case regarded a Jewish man who had not been permitted to wear a yarmulke as part of his military uniform—both judges felt that the man’s beliefs should have warranted an exception to the uniform policy. Scalia’s opinions on the separation of church and state remained fairly consistent, generally falling on the side of religious freedom instead of freedom from religion. Cases such as *Lee v. Weisman*, *Church of Lukumi Babalu Aye v. City of Hialeah*, *Rosenberger v. University of Virginia*, *Agostini v. Felton*, *Santa Fe Independent School District v. Doe*, *Zelman v. Simmons-Harris*, *Van Orden v. Perry*, *Snyder v. Phelps*, *Hosanna-*

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<sup>74</sup> Barnes.

<sup>75</sup> Barnes.

<sup>76</sup> Gjelten.

<sup>77</sup> Scalia, *Scalia Speaks*, 151-152.

*Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, *Town of Greece v. Galloway*, and *Burwell v. Hobby Lobby Stores, Inc.* all fell on the side of religious liberty.<sup>78</sup>

One notable exception, however, was *Employment Division v. Smith* in 1990, which, by some accounts, severely limited the Free Exercise Clause by ruling that any generally applicable law not affected by another right could not violate the Clause. Under this decision, any religious grievance with such a law would have to be taken up with the legislative branch. The ruling in this case and the resulting fallout prompted the petitioning by more than 60 civil liberties and religious groups for a Religious Freedom Restoration Act (RFRA), which was passed in 1993.<sup>79</sup> The case was a huge blow to religious liberty supporters. Subsequent cases by Scalia, however, appear to suggest that his general view of the separation of church and state remained more or less the same.

### *Public Image*

Upon nominating Scalia to the Supreme Court, Ronald Reagan indicated that he had chosen the justice because of his ability to set aside private opinions in favor of the law and implied that he would uphold the Founding Fathers' original intentions.<sup>80</sup> Scalia was known for his outspoken opinions, drawing criticism for stating that Obama's immigration policy "boggles the mind" in 2013 and that American is "at war with radical Islam" in 2012, among many other

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<sup>78</sup> Michael Peabody, "Unaffordable Luxury: A Brief Summary of Justice Scalia's Free Exercise and Establishment Clause Legacy," *ReligiousLibertyTV*, February 14, 2016, <http://religiousliberty.tv/unaffordable-luxury-a-brief-summary-of-justice-scalias-free-exercise-and-establishment-clause-legacy.html>.

<sup>79</sup> Haynes.

<sup>80</sup> Ronald Reagan, "Remarks at the Swearing-in Ceremony for William H. Rehnquist as Chief Justice and Antonin Scalia as Associate Justice of the Supreme Court of the United States," *American Presidency Project*, September 26, 1986, <http://www.presidency.ucsb.edu/ws/index.php?pid=36494>.

political statements.<sup>81</sup> He had a tendency to adopt contrarian opinions, though his son makes clear in *Scalia Speaks* that he did this only to challenge ideas and strengthen arguments, and that he never directed his vehement and sometimes sarcastic and harsh rhetoric at individuals<sup>82</sup>—though this seems to be a difficult stance to believe. He was well-respected for his skills as an orator and rhetor, though many found his style to be overly partisan and reactionary.<sup>83</sup> He is remembered by many as a conservative hero, and his “pointed writing” in his opinions made his legal rhetoric unforgettable.<sup>84</sup>

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<sup>81</sup> Jilian Fama and Meghan Kiesel, “Scalia’s Two Cents: Justice Draws Criticism For Political Views in Decisions,” *ABC News*, March 14, 2013, <http://abcnews.go.com/Politics/OTUS/supreme-court-justice-antonin-scalias-political-outbursts/story?id=16694778>.

<sup>82</sup> Scalia, *Scalia Speaks*, 5.

<sup>83</sup> Jeffrey Shaman, “Justice Scalia and the Art of Rhetoric,” *Constitutional Commentary* 28, no. 2 (2012): 287.

<sup>84</sup> “Reflections Of Conservative Icon Supreme Court Justice Antonin Scalia,” *NPR: All Things Considered*, December 29, 2016, <https://www.npr.org/2016/12/29/507436655/reflections-of-conservative-icon-supreme-court-justice-antonin-scalia>.

## Rhetorical Analysis

Having established the general perception of the justices along with their judicial and personal backgrounds, it is time to take an in-depth look at the rhetoric used by each justice in cases close to the beginning and end of their tenure. This section is organized by justice to make the cases easier to compare.

### *Capitol Square Review v. Pinette*

*Capitol Square Review v. Pinette*<sup>85</sup> was decided in 1995, just two years after Justice Ginsburg was appointed to the court. This case involved the Ku Klux Klan's request to erect a cross on state-owned property, which the Court ruled was permissible (see Appendix A for a brief of the case). Ginsburg's dissent in this case is brief, but it still demonstrates her beliefs on the Establishment Clause and gives a taste of her rhetorical style.

She begins by restating the situation as two justices, O'Connor and Souter, who both concurred in part, had seen it, perhaps to establish at least a small amount of agreement and build credibility. It is worth noting that she did not make efforts to demonstrate agreement with Justice Thomas, who took a vastly different approach to the other justices, or Justice Scalia, who wrote the majority opinion. While agreeing with O'Connor and Souter, she lists three items which are not present: there was no speaker, private display, or visible sign to "disassociate the religious symbol from the State." This list of negatives aligns with the situation as O'Connor and Souter saw it while also emphasizing all of the features that the justice believes might have adequately

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<sup>85</sup> *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753 (1995), <http://www.lexisnexis.com/lxacui2api/api/version1/getDocCui?lni=3S0V-RN10-003B-R25F&csi=6496&hl=t&hv=t&hnsd=f&hns=t&hgn=t&oc=00240&perma=true>; All quotes from this case were found at this web address.

informed the public of the lack of governmental endorsement of the Klan's message, had they been present. By listing these items with "no" repeated before all of them, she also implicitly states that, without these signals, there is no other way for the public to know whether the message is endorsed by the state.

Having established that the display of the cross is lacking an important disclaimer, she continues with another proposition, backed by precedent: "if the aim of the Establishment Clause is genuinely to uncouple government from church, a State may not permit ... a display of this character." Ginsburg clearly believes that "uncoupling" government from religion is the purpose of the Clause, but she needs to establish this widely debated definition before she can move on to her conclusion. She makes it clear that all should agree on these two points—and if they do, then they should also agree that the state should not permit the cross to be displayed. She uses a highly logical argument here to appear less attitudinal.

She goes on to explain why Justice Souter's exception to this rule is "not even arguably present," which does have a ring of personal opinion to it (since, clearly, Souter did argue it, thus making the point arguable) that the rest of her dissent stays away from. Her main argument here is that if the disclaimer was indeed present as Souter believes, she would have a different ruling on the matter. This argument is moot, however, as Ginsburg has established the inadequacy and failure of the disclaimer. She clearly states in her last paragraph that she does not want to deal in hypotheticals such as whether the cross would be acceptable along with a "sturdier" indicator of non-endorsement, as this is not relevant to the case at hand. As it stands, the Establishment Clause has been violated as there is not an obvious effort to "uncouple" religion from state in Ginsburg's view.

## ***Burwell v. Hobby Lobby***

Nineteen years later, Ginsburg’s approach to dissent appears to have changed quite dramatically. *Burwell v. Hobby Lobby*<sup>86</sup> is one of Justice Ginsburg most famous dissents, as she vehemently argues for women’s rights to contraception access—rights that were left to the discretion of for-profit business owners’ religious beliefs by the Court (see Appendix B for a brief of the case).

Within the first six words of her opinion, Ginsburg makes her dismay with the Court’s opinion clear. Throughout the opinion, but particularly at the beginning, she uses strong adjectives such as “startling,” “extreme,” “extraordinary,” and “stark” to indicate how absurd she finds the majority opinion. Right away, Ginsburg makes a slippery slope argument that the Court has now opened the door for any commercial enterprise to “opt out” of any law they think is against their religion. She states that, following the Court’s logic, disadvantages to individuals or government interests because of these exemptions “hold no sway,” so long as the government will pay for it. Here, she equates the government with “the general public” to reiterate the idea that it is truly taxpayers, not the government itself, that will be paying for these theoretically unlimited exemptions. This equivalency is likely made with the public in mind—indeed, this dissent, more than practically any other, was shared by liberals and contributed to making Ginsburg the feminist heroine she is viewed as today. Her audience is a bit unclear as a result—were she writing only for legal scholars, lawyers, lower courts, and her fellow justices, it seems doubtful that such forceful language would be used.

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<sup>86</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), <http://www.lexisnexis.com/lncui2api/api/version1/getDocCui?lni=5CJG-39W1-F04K-F0NP&csi=6496&hl=t&hv=t&hnsd=f&hns=t&hgn=t&oc=00240&perma=true>. All quotes from this case were found at this web address.

Ginsburg follows by using the Court’s own logic against itself, stating that “the Court does not pretend that the First Amendment’s Free Exercise Clause demands religion-based accommodations so extreme, for our decisions leave no doubt on that score.” It is interesting to note that she is referring to “the Court” here as a past version of itself, rather than referring to the Court’s decision in this single case. She also includes herself within “the Court” by writing “our opinions,” building her own credibility to assert that what follows will actually be what the Court of the past intended. With the same use of “Court” in mind, she states that the Court holds that Congress, not the judicial branch, was responsible for creating the Religious Freedom Restoration Act (RFRA),<sup>87</sup> implying that RFRA can never stand in the place of, nor on the same level as, the First Amendment as it seems to be doing in this case.

Without warning, Ginsburg shifts back to referring to “the Court” as the majority opinion in this particular case. She emphasizes that, according to this ruling, the RFRA “demands” that the religious beliefs of for-profit corporations be given accommodation “no matter the impact that accommodation may have on third parties who do not share the corporation owners’ religious faith—in these cases, thousands of women employed by Hobby Lobby and Conestoga or dependents of persons these corporations employ.” Ginsburg packs quite a bit of rhetorical strategy into this one sentence. First, she distinguishes for-profit corporations from their owners as separate entities, rather than assuming, as the majority seems to, that these two are one and the same. Second, she uses the term “demands” rather than a less loaded term such as “requires” or “allows,” implying that the RFRA as the majority defines it is asking too much of the First

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<sup>87</sup> It is worth reiterating that the RFRA was a result of petitioning by more than 60 civil liberties and religious groups in the fallout of *Employment Division v. Smith* (1990), which limited the power of the Free Exercise Clause. See Charles C. Haynes, “Justice Scalia’s Disastrous Decision on Religious Freedom,” February 18, 2016, <http://www.newseuminstitute.org/2016/02/18/justice-scalias-disastrous-decision-on-religious-freedom/> for more information on this subject.

Amendment's Free Exercise Clause. Third, she introduces the idea that it is not just the corporations which will be affected by this ruling, but also the individuals hired by the corporations—and she paints a picture by specifically referring to the “thousands of women” and the employee's children who will be impacted by this decision, even though their religious beliefs may allow them to take birth control. She is clearly arguing that the majority has held that the corporation owners' religious beliefs are more important than those of their employees.

Her next sentence is perhaps the strongest of the entire dissent, as she states her thesis: “Persuaded that Congress enacted RFRA to serve a far less radical purpose, and mindful of the havoc the Court's judgment can introduce, I dissent.” Here, she describes her view of RFRA as “less radical” than that of the majority, which could translate as more rational. By using the word “havoc,” she produces the image of a future where rule of law does not apply and mass confusion reigns. Clearly, she is making a strong stance against the majority's interpretation of this case.

Rather abruptly after making such a stand, Ginsburg begins discussing the issue that likely makes this case more important to her: the equality of women. She quotes a 1992 case that argues that reproductive control is a prerequisite for women's equal participation in the “economic and social life of the Nation.” She also points out that Congress and the Department of Health and Human Services (with the advice of experts), required group health plans to include contraception. Explaining the history (or “genesis,” as she puts it) of this requirement also explains why it should continue to be a rule. If the Court valued it then, she argues, why would they not value it now?

She goes on to expand on the reasoning behind the Women's Health Amendment, which added to the Affordable Care Act's minimum coverage requirements. Ginsburg brings up this Amendment, even though it is not directly related to the case, to demonstrate that Congress has found the importance of women's contraceptive access to be compelling. Backed by experts (thus more credible even than Ginsburg herself on this matter), the Amendment was meant to fix many problems in public health, which Ginsburg lists. She makes sure to point out the "disproportionate burden" on women for health care and the negative effects of "excluding contraception from preventative care available to employees without cost sharing," all noted by experts in the field. She also mentions benefits of contraception besides preventing pregnancy, such as preventing serious medical conditions. Furthermore, women with unintended pregnancies (a result of limited access to birth control) are more likely to experience "depression and anxiety, and their children face 'increased odds of preterm and low birth weight.'" She argues that not only does limiting women's access to contraception put the burden for preventing pregnancy back on women and make it impossible for them to be equal in society, it also increases the risk for other health problems and creates a dangerous situation for children. These facts are meant to appeal to a legal scholar or member of the public who is against the idea of contraception as a means of preventing pregnancy and make them recognize that failing to provide it could cause harm to children, which could impact a reader even if the prospect of causing harm to women does not.

Next, Ginsburg briefly mentions how a countermeasure to the Women's Health Amendment fared. A "conscience amendment," which would essentially do what Hobby Lobby was asking in this case, as she outlines, failed to pass in Congress, leaving "health care decisions ... in the hands of women, with the aid of their health care providers." Ginsburg presents

legislative precedence, a key argument in any case, but is also clear that the choice lies with women, with the aid of health care providers—nowhere does she state that the choice or responsibility lies with the employer or the insurer. If someone would place personal blame on themselves for allowing women to use contraception, Ginsburg implies that it should not, in fact, be on the employers’ conscience at all, as it is ultimately always the woman’s choice.

Ginsburg quickly shuts down the Free Exercise Clause claim by bringing attention to precedent. She argues that *Employment Division v. Smith*<sup>88</sup> established that prohibiting exercise of religion, while never the government’s goal, was sometimes an “incidental effect” of a “generally applicable” rule. She then goes on to explain how, because the ACA’s requirement applies generally, it cannot logically be stated that it is hindering free exercise. This case is particularly useful in discrediting the majority because Justice Scalia, who penned the majority opinion in this case, also wrote for the Court in *Employment Division v. Smith*—emphasizing this case could make Scalia, in particular, appear hypocritical. She also explains what the case was about, including the background and the holding, which seems unnecessary for an audience of legal scholars. Clearly, she is appealing to a less knowledgeable audience.

Ginsburg offers further precedent in case one was not enough, citing three different cases to persuade the reader that her argument is the only one that makes sense. She states that the Court has already clarified that accommodations on the basis of religious beliefs “must not significantly impinge on the interests of third parties,” then illustrates how the accommodations Hobby Lobby and Conestoga are requesting would do this. The conclusion to the syllogism is

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<sup>88</sup> See previous footnote.

assumed, without an explicit statement, to be that the request cannot be granted using precedent as a guide.

From that point on, the dissent continues with the assumption that there is no “tenable claim under the Free Exercise Clause.” Ginsburg acknowledges that the majority’s argument must, then, be based upon the less authoritative RFRA. Here, she reiterates that Congress meant the Act was meant to overturn *Smith* and nothing more, as evidenced by the lack of controversy surrounding it. Therefore, the Court’s interpretation of the Act as completely separate from Court decisions is inaccurate—or, as she puts it in no uncertain terms, “the Court’s reading is not plausible.” She details the majority’s points and then derails them with the precedent she has established as necessary.

Ginsburg utilizes footnotes in this opinion in a more extensive way than the previously analyzed case. These footnotes, though sometimes providing mere citations, often are almost asides that go even further to disprove the Court’s opinion. In footnote 6, for instance, she mentions that “separating moral convictions from religious beliefs would be of questionable legitimacy,” a crucial point to her overall argument, but perhaps a bit too direct for the body of the opinion. In footnotes 15 and 16, she rather inexplicably writes four paragraphs further explaining two sentences written above. Perhaps she did this to avoid boring the audience with a tedious elaboration—the fact that it is in a footnote signals to the casual reader that they can skip it and still understand the overall argument.

Ginsburg points out the difference between a person and a corporation (the latter of which she believes should not be allowed to claim a religious exemption) by quoting a Chief Justice from “nearly two centuries ago,” likely to appeal to the originalists on the opposing side

of this case, though she also offers a more recent account in order to avoid the criticism that her argument was outdated. She points out a lack of precedent for equating individuals and corporations, which, if the reader is to follow the rest of Ginsburg's argument, indicates that the basis for the argument that corporations should be treated as individuals is thin, if there at all.

Again and again, Ginsburg implies (or directly states) that the majority has come to the undeniably incorrect conclusion. She writes that "history is not on the Court's side," "the Court's conclusion is unsound," and that "the Court does not even begin to explain," leaving little doubt in the reader's mind that hers is the only correct opinion. Ginsburg's rhetoric in this case is exceedingly absolutist. Unlike in *Capitol Square Review v. Pinette*, she does not concede any points to the opposition, except to say that the corporation owners' beliefs are sincerely held. She even implicitly questions the majority's motivations—"one can only wonder why the Court shuts this key difference from sight"—making the reader question not only the logic of the opposition, but also their character.

Ginsburg provides numerous statistics and facts about contraception to highlight the true impact the exemption would have on the women employed by Hobby Lobby or Conestoga and their families, using logical appeals to convince her audience that contraception is hugely beneficial for women's equality, and refusing to offer it would undermine women's progress toward equality. She reiterates the slippery slope argument that the broad exemptions given could also impact other important aspects of people's lives—and put the cost on the government, which it cannot support. This argument is largely hypothetical, differing from the bulk of her argument which deals directly with how the decision was derived. This slippery slope rhetoric comes to a head with the sentence "The Court, I fear, has ventured into a minefield." Ginsburg is absolutely convinced, as is the reader, that this decision will have lasting, negative impacts.

The opinion concludes with a series of quandaries that essentially question the Court’s power. Ginsburg wonders why decisions of this magnitude would be left to Congress rather than the Court, suggesting that she believes the Court should have the ultimate decision-making ability. However, she then questions the ability of the Court to decide “which religious beliefs are worthy of accommodation,” bringing the debate over the Establishment Clause into the opinion for the first time. Though she has hinted before as to the Court’s motivations in making this decision, she is a little clearer here (though still very much implicit)—the Court is dangerously close to allowing the establishment of religion in the United States by granting itself this power.

### ***Edwards v. Aguillard***

Justice Scalia’s approach to this subject is quite different from Justice Ginsburg’s, as is evident even in his earlier case, where, unlike Ginsburg’s earlier opinion, his passion for the issue at hand is abundantly clear. *Edwards v. Aguillard*<sup>89</sup> was argued mere months after Justice Scalia was appointed to the Supreme Court, and his dissent was written less than a year into his term. This case, in which the Court ruled that the Louisiana statute requiring equal treatment for creation-science and evolution was in violation of the First Amendment’s Establishment Clause, is an excellent example of Scalia’s strong language and absolutist rhetoric as it applies to the Establishment Clause (see Appendix C for a brief of the case).

Scalia wastes no time in his criticism of the Court, immediately calling their argument “questionable” and without justification. He even accuses the Court of “impugning” evidence

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<sup>89</sup> *Edwards v. Aguillard*, 482 U.S. 578 (1987), <http://www.lexisnexis.com/lncui2api/api/version1/getDocCui?lni=3S4X-H670-003B-44TY&csi=6496&hl=t&hv=t&hnsd=f&hns=t&hgn=t&oc=00240&perma=true>. All quotes from this case were found at this web address.

that would suggest that their opinion is wrong. In an attempt to find common ground, Scalia uses the phrase “even if I agreed” to argue with an agreed-upon premise. He claims that the legislators were clearly motivated by a secular purpose when creating the Balanced Treatment Act, since they would not have “violated their oaths and then lied about it,” thus invalidating the Court’s original claim.

After stating his main argument, Scalia lays out the facts with which he and the other justices have been presented. He uses the word “we” in order to further establish common ground from which to base his argument. Where the facts begin to diverge is in the definition of “creation science.” Scalia describes the consistent and unchanging definition provided by the legislators as the correct definition. Within this definition, Scalia depends heavily upon consubstantiality to consider creation-*science* a scientific principle, rather than a religious doctrine. He is sure to emphasize, however, that this is an assumption, but it is the safest one given all of the information they have been provided.

Scalia uses italics to emphasize words as though he is speaking them. For instance, he emphatically states that the *Lemon* test demands that there be a secular purpose—and only one is needed.<sup>90</sup> He clarifies that one and only purpose by italicizing words of absolute value such as “a” (singular), “no question,” “wholly,” “entirely,” and “no.” Through this increased emphasis, Scalia conveys that the *Lemon* test, as the Court has used it, is only valid if there is absolutely no secular purpose to be found—and, as his previous premise established, this is not the case.

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<sup>90</sup> The *Lemon* test was first used in the 1971 case of *Lemon v. Kurtzman* (403 U.S. 602) to determine whether a law violated the Establishment Clause of the First Amendment. Its requirements for constitutional legitimacy are as follows: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion.”

Even the Court’s interpretation of the Establishment Clause comes into question during Scalia’s dissent—there is nothing in the Clause that “forbids legislators merely to act upon their religious convictions.” Since he has established that there is a secular purpose to be found in the Act, his argument holds that there is nothing forbidding the Louisiana legislators from passing the Act. However, he goes even further to state that religious activism is “part of our heritage,” comparing feeding the hungry to the Act in question. He never states how the Balanced Treatment Act is a demonstration of religious activism—he is, instead, making the point that religion should not be banned from the public sphere. Scalia expands on this point by explaining that there are cases in which the “government *must* act to advance religion” or others in which “it *may* do so.” Here, he brings in precedent to demonstrate circumstances wherein the government acted to advance religion rather than hinder it.

He then returns to another of his initial points: the motivation behind the Act. Though he assumes the legislators are telling the truth, Scalia acknowledges that there is little information regarding motive for either side. He then proceeds, however, to lay out the evidence for the Act not having “fl[own] through the Louisiana Legislature on the wings of fundamentalist religious fervor,” a claim which sounds so ridiculous that no outside reader would believe it to be true. As part of this evidence, he describes the testimony provided in defense of creation-science. However, he first includes an important disclaimer: though he does not endorse the claims made, his views about the Creation are irrelevant. This statement is crucial, since he does not want to come across as in favor of the teaching itself and be accused of violating the Establishment Clause himself—rather, he is attempting to “ascertain what the members of the Louisiana Legislature believed” and, most importantly, the sincerity of that belief.

To build credibility for his argument, he emphasizes that the argument for creation-science is backed by scientists and educators and covered many different fields of study. This evidence is only valid, he claims, because there is none to the contrary. Therefore, the Court in Scalia's view has no choice but to assume that this testimony is correct. Scalia invites the reader to remember the severity of "striking down a law approved by the democratically elected representatives of the people." This visceral imagery served to convince anyone reading that this measure should only be taken as a last resort, and that elected officials should be trusted until proven untrustworthy.

Scalia outlines the parts of the Act that convinced the majority of its religious—not academic—intentions. Despite statements that he is neutral in this area, he seems to support the idea that there are only two explanations for the creation of the world: creation science and evolution. To teach only evolution, the legislators argue, would brainwash children just as much as teaching only creation science. Scalia claims that this evidence is highlighted only to show that the motivations of the legislators were undeniably secular. Because this argument is so clear, Scalia states that he will "not go on to discuss the fact that, even if the Louisiana Legislature's purpose were exclusively to advance religion, some of the well-established exceptions to the impermissibility of that purpose might be applicable." This use of paralipsis gives emphasis to the fact that, even if his argument about motivations was wrong, his overall decision would be in the right, while precluding him from actually discussing the evidence of how that would be true.

This second disclaimer here is necessary, because Scalia then acknowledges that it is almost always impossible to discern someone's true motivation. However, he does explain that there can never be only one sole purpose for anyone's actions, illustrating why every member of the Legislature may have voted for the Act. These types of group decisions, he points out, are

even more difficult to ascertain meaning from, and he posits a series of hypothetical questions to help the reader understand what those implications might be. Despite this, Scalia shows no doubt that the Court’s interpretation was completely incorrect, and he even describes the current jurisprudence surrounding the separation of church and state “embarrassing.” He concludes by prioritizing predictability over flexibility in jurisprudence, a move to depict them as mutually exclusive and claims that his opinions will help steer the Court in the right direction.

### ***McCreary County v. ACLU of Kentucky***

Justice Scalia wrote his dissenting opinion from *McCreary County v. ACLU of Kentucky*<sup>91</sup> in 2005, eighteen years after *Edwards* and nine years prior to his death in 2016. Though he supports much the same ideas as *Edwards*, the rhetorical tack Scalia takes is significantly different. In this case, the Court determined that displaying the Ten Commandments in two Kentucky courthouses violated the Establishment Clause of the First Amendment (see Appendix D for a brief of the case).

The dissent begins with a story. This narrative tactic is one that few other justices take, as they generally prefer to stick to the facts of the case at hand. Scalia, however, appeals to his readers’ emotions: his story is one of forbidden expression in Europe—he even ties in a national tragedy, 9/11, to demonstrate why the United States is more free than (and thus superior to) other countries. For those who support religious liberty, the idea that they would not be able to say “God bless America,” or hear that phrase from the leader of our country during a tragedy, would

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<sup>91</sup> *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005), <http://www.lexisnexis.com/lncui2api/api/version1/getDocCui?lni=4GGW-F6M0-004C-001C&csi=6496&hl=t&hv=t&hnsd=f&hns=t&hgn=t&oc=00240&perma=true>. All quotes from this case were found at this web address.

strike as un-American and profoundly upsetting—a point that he strives to drive home in the next few paragraphs.

Scalia depicts this secular “model of the relationship between church and state” as a distinctly European one that spread across Europe almost as a disease. He highlights France as a “secular Republic” in opposition to the values supported by George Washington, John Adams, the First Congress, James Madison, and Chief Justice John Marshall, important figures in America’s development. Rather than rely mostly on legal precedent, Scalia informs the reader of the history of the evocation of God in the public sphere, painting it as a crucial part of the country’s heritage rather than something he personally believes in. He even brings up the fact that our coins read “IN GOD WE TRUST,” and our Pledge of Allegiance says that we are “one nation under God.” He also highlights a Supreme Court case in 1952 which stated that the nation is a “religious people whose institutions presuppose a Supreme Being.” He pulls from every branch of government to argue that the United States is a religious nation and that it does not make sense to negate that history in this decision by disallowing courthouses to display the Ten Commandments upon which the nation was built.

After establishing that God is a part of the nation’s heritage, he exaggerates his confusion about the Court’s decision, writing, “with all this reality ... staring it in the face, how can the Court *possibly* assert that ‘the First Amendment mandates governmental neutrality between ... religion and nonreligion’...?” This somewhat aggressive language combined with the italics serve to create the impression that the members of the majority are willfully ignorant. He proceeds to use anaphora to emphasize this point, using the repeated word “surely” to accentuate the fact that there is absolutely no evidence for the Court’s claims, even going so far as to say that the Court’s decision is based on “thoroughly discredited say-so.” He further states that the

Court has discredited itself by not having the “courage ... to apply the neutrality principle consistently.” He refers to the basis of their analysis, the *Lemon* test, as “brain-spun,” implying that it was not an inherent quality of the Constitution or approved of by a higher power.

Because of the Court’s inconsistencies, Scalia suggests that the Court is simply reliant on the justices’ personal opinions. He sarcastically describes their hesitation about the Establishment Clause as a “lovely euphemism,” further indicating his belief that the Court is basing its decision on an inconsistent, and therefore baseless, claim. The tone he takes here, however, also conveys what could be considered a personal attack on the justices’ sensibility and intelligence. The inconsistency, he suggests, will also lower the ethos and persuasive ability of the Court over the general public.

Throughout the opinion, Scalia posits rhetorical questions to challenge a belief or decision of the Court. These questions tend to spark a philosophical question rather than a substance-based one, which lends itself well to the self-posed question format (since there is little evidence that needs to follow). Such questions are as follows: “why, one wonders, is not respect for the Ten Commandments a tolerable acknowledgement of beliefs widely held among the people of this country?” and “what, then, could be the genuine ‘good reason’ for occasionally ignoring the neutrality principle?” In both of these cases, Scalia implies that the answer to both is that the justices are defying the religious nature of the country’s heritage and are instead attempting to remove religion from the government entirely (a “demonstrably false principle,” Scalia claims). This answer is ascertained by reading the surrounding text, and the tone of the question itself.

Scalia asserts that religion cannot be nondenominational without destroying the very foundation of it. He lists beliefs that could be offended by the mention of “God,” but, curiously, he does not mention individuals who believe that God does not exist at all, indicating that he does not feel this is a valid belief—however, he does state that the Establishment Clause, as decided in the past, allows the Court to disregard such beliefs, and here he mentions “devout atheists.” Essentially, Scalia believes that the country is not just religious, but also monotheistic, and it is perfectly acceptable to acknowledge this as a majority-held belief without worrying about causing offense to those of different faiths. This acknowledgement, he claims, does not establish a single religion, as the Ten Commandments are also part of other belief systems.

In an attempt to discredit criticism of his dissent, Scalia hones in on Justice Stevens’ objection to his argument. He describes Stevens’ criticism as an “attack on a straw man.” The use of “attack” here suggests that Stevens is aggressively castigating Scalia on a claim that Scalia himself did not make. Scalia defends his viewpoint scrupulously, as if they were also an attack on himself and his own values. He accuses Stevens of making false arguments, writing that “it is no answer for Justice Stevens to say that the understanding that these official and quasi-official actions reflect was not ‘enshrined in the Constitution’s text.’” By attacking Stevens directly instead of just his argument, he attempts to discredit the person behind the criticism as well as the criticism itself—this strategy of eviscerating his opponent’s credibility has the effect of convincing the reader that there is no way in which the objection could hold any amount of truth.

Scalia further accuses the Court of manipulating the words of *Lemon* to fit their views of any given situation. Here, he reiterates many of the points he previously made, providing two examples of how the *Lemon* test is being used in this particular case. He goes on to argue that, even if these false premises were to be taken seriously, he still finds constitutional criticisms of

the decision. He claims that the Ten Commandments represent, among other things, a respect for Judaism. His mention of Judaism and Islam throughout the text seem to be strategically placed to ensure the readers' understanding that he is not arguing for the display of the Ten Commandments based purely on Christian belief. Instead, he states that the Commandments simply represent a document that was significant in the system's creation—he has already provided the premise of his enthymeme: the country and its system of law are founded on the principles of a monotheistic religion. Though he acknowledges that the display is at least partially religious in nature, he also argues that, because it does not represent a single religious faith, it is acceptable to display it in a courthouse.

At the beginning of the dissent, Scalia listed reasons that the Court was wrong, rather than reasons that he was right. In the conclusion, Scalia is more specific with his criticism, summarizing his own claims and juxtaposing them with the Court's. He ends with a concession that the Court could be right "in identifying the third displays as the fruit of a desire to display the Ten Commandments, but," he adds, "neither our cases nor our history support its assertion that such a desire renders the fruit poisonous." This striking metaphor makes particularly memorable Scalia's view that religious acknowledgement or recognition is a good and necessary part of the United States.

## Discussion

Justices Ginsburg and Scalia have, for the most part, ideologically opposite views regarding separation of church and state. Scalia feels<sup>92</sup> that religion is a necessary part of United States society and legal systems, and any attempt to remove it would be both impossible and unconstitutional. Ginsburg, on the other hand, believes that religion should never be something espoused by the government, as it becomes all too easy to establish a religion in the state. At hand, however, is their distinct use of rhetoric: Scalia's reliance on pathos and ethos, and Ginsburg's focus on logos and ethos. I will explore, based on the scope of the rhetorical analysis completed, the political nature of both justice's rhetoric and how their styles changed between the two cases for each.

Immediately apparent when comparing the justice's styles are the ways in which they lay out an argument. In both of her cases, Ginsburg states a claim and then carefully backs it up with precedent, stating numerous premises that lead up to an inevitable conclusion. She relies heavily on other expert opinion, tending not to frame herself as that expert when avoidable.<sup>93</sup> Scalia, on the other hand, did not shy away from including his own opinion, though he tended to rely more on the Framers' writing and opinions than on more modern interpretations. He focuses significantly more on the emotional side of an argument as well, even including a story about 9/11. Scalia's argument becomes much more emotionally based in his second opinion, perhaps because he believed that a story would be an effective way to persuade his audience that the America they love is being threatened. In both cases, he is essentially making the same

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<sup>92</sup> I will use present tense for Scalia in this section when I am referring to his rhetorical work..

<sup>93</sup> For instance, when she called upon scientists and sociologists to prove that contraceptive coverage is essential to women.

argument, just in different ways. Ginsburg, on the other hand, had the opportunity to move the audience with a story about a woman who was denied contraceptive coverage, or paint a more illustrative picture of the emotional impact of unwanted pregnancy, but she instead uses a logic-driven approach similar to her first case, just in a more comprehensive and incredulous way.

Scalia focuses on discrediting his opponents, even questioning the legitimacy of the Court's jurisprudence. Ginsburg, however, relies on the Court's previous work to make her claims, granting further credibility to the Court by using other justices' opinions as evidence. Unlike Scalia, she does not attempt to question the intelligence of her opponents, though she does express her disbelief in the conclusion they have formed. Scalia goes a step further, naming individuals with whom he disagrees and questioning their credibility.

It is possible that the justices' backgrounds may have made their distinctive approaches inevitable. Ginsburg, a woman who faced significant discrimination for her gender, may have learned over the course of her career that it is better not to appear too sensitive or emotional, as this is a common criticism of females in the public sphere. Scalia, on the other hand, was praised for challenging others' opinions, and he revelled in being "different." Their ideological views also certainly impact their approach—since Scalia relies heavily on original intent, he is more likely to focus on the opinions of the Founders and original legislative and judicial branch members, while Ginsburg seems inclined to dwell on ever-evolving public opinion.

The purposes for which they were nominated seem to have held through their terms. Justice Ginsburg was selected for her ability to protect women's rights and build consensus. Even in a dissent in which the Court has decided something that goes against everything she has ever stood for, Ginsburg refrains from blaming the opposition or resorting to personal attacks

that would make finding common ground more difficult. Though she was unable to persuade the Court, her dissent has the potential to sway future decisions. Scalia was chosen because he could separate his personal views from the law; he consistently held throughout both dissents that his personal view was not important, though it is incredibly difficult to determine if he truly was able to separate his own beliefs from these cases.

Both justices seem to direct their opinions toward a lay audience, though Ginsburg certainly is more clear in this goal in *Burwell v. Hobby Lobby*. The popular audience for both justices was evident because they explained cases that other justices and legal scholars would certainly be aware of, emphasized how these cases affect everyday people, and repeated memorable phrases. This bottom-up approach is more reminiscent of Scalia's style, and Ginsburg did not follow this audience in her first case. However, there is little doubt that she uses this approach in *Hobby Lobby*. The idea here could be that colorful and clear dissents may serve to change public feelings on issues, and, though the position of justice is not meant to be swayed by public opinion, at a certain point the judiciary must bend somewhat to the desires of the citizens if it is to maintain its credibility and power.

Scalia and Ginsburg both use absolute language to drive home their points, though Ginsburg used this to a slightly lesser degree, and not in *Pinette*. Both significantly increase this type of language in their later opinions, perhaps as their ethos as justices increases. This type of rhetoric can also be seen as divisive or polarizing, since it concludes that there is only one right answer—it is impossible, given the rhetoric of the absolutist, to believe that both could be partially true. This polarization helps persuade the reader to the justice's opinion, but it also has effects that are more far-reaching. It also becomes more of an attitudinal argument that justices,

by many accounts, are meant to avoid. Attitudinal approaches are more indicative of the justices' individual beliefs than on their objective interpretation of the law.

It is impossible to determine with any degree of certainty whether the justices' opinions are based upon their personal views or a strict interpretation of the legal rhetoric—indeed, it may be impossible for the authors of these opinions to separate themselves totally from their legal interpretation, since interpretation, by definition, is based on personal experience.<sup>94</sup> However, personal views are more obvious in some writing than in others. Scalia's opinions seem heavily based in his own religious beliefs (despite his claims to the contrary), while Ginsburg's approach seems more objective. However, her *Hobby Lobby* opinion also clearly draws from her own experienced discrimination and her outrage at the disregard shown for women's rights.

Throughout their judicial opinions, Ginsburg seems to be attempting to attract more moderate individuals to her side, and Scalia is writing more to reinforce and strengthen the views of conservative and conservative-leaning individuals. This difference is, perhaps, why Scalia is perceived to be a more divisive figure than Ginsburg. Their politics do play a role in their decision-making, though there are certainly times when they stick to a more objective point of view as indicated within the analysis. With the exception of *Pinette*, both Ginsburg and Scalia seem to employ an attitudinal, politics-based model of rhetoric that the presidents who appointed them preferred they stay away from (at least publicly). However, Scalia used this attitudinal, absolutist rhetoric from the beginning of his appointment, while Ginsburg only recently turned to this public-facing type of dissent.

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<sup>94</sup> "Personal experience," as used here, includes anything from religious, cultural, and political background to significant events in one's life.

## **Conclusion**

Justice Ruth Bader Ginsburg and Justice Antonin Scalia represent opposite ends of the political spectrum, and the rhetoric used in their opinions reflects this. They each employ attitudinal rhetoric, though Ginsburg makes more of an effort to appear to use the legal method, and are absolutist when they want to drive their point home in the strongest terms. This rhetoric could be interpreted as divisive, since it attempts to shut down debate. Although their rhetoric is frequently at odds, these justices found commonality and friendship in each other. On the Court, they contributed (and, in the case of Ginsburg, continue to contribute) excellent scholarship and unique perspectives that will inform legal decisions and scholarships for decades to come.

## Appendices

### Appendix A

#### *Capitol Square Review and Advisory Board v. Pinette, 515 U.S. 753 (1995)*

**Issue:** Does refusing to issue a permit to erect a cross on state-owned property violate the Establishment Clause?

**Facts:** On a 10-acre square of land surrounding a Columbus statehouse, groups were permitted to submit applications to an advisory board to use the square, provided their speech content was neutral. The board authorized the state to put up an annual Christmas tree there and allowed the erection of a menorah, but the board refused to issue a permit for a Ku Klux Klan officer's request to erect an unattended cross in this space. The Klan contested this decision. The District Court and the Appeals Court both held that this refusal to issue a permit violated the Establishment Clause.

**Holding:** The Court affirmed that the board's denial of the Klan's request was not justified and violated the Establishment Clause.

**Reasoning:** Justice Scalia indicated that the display was an example of private religious speech that is protected under free speech. The board's denial of the the application was not justifiable on the relevant Establishment Clause grounds; all other grounds would not be considered since this was the topic debated in the lower courts. Because the space was a public forum, displaying the cross in this location would not give the impression that the state endorsed the symbol or a particular religion. The state could not ban private religious displays on the square or require only religious speech to be designated as disclaiming public endorsement.

**Concurrence:** Justice Thomas made a clear distinction between the religious goals of the Klan and the racist political ones. He stated that the issue at hand was not the Establishment

Clause, since the cross represented was not meant to be a religious symbol, though he ultimately agreed with the Court's decision given that it was argued as an Establishment Clause case.

Justice O'Connor agreed that the display would not be mistaken as a state sponsorship, as a reasonable viewer would not interpret the state's tolerance of private religious displays as an endorsement.

Justice Souter maintained that because the Klan could put up a sign indicating a lack of governmental sponsorship, there would not be the appearance of establishment of religion. Furthermore, the board's response was clearly tailored to the Klan's specific request, as they could have made reasonable accommodations or restricted unattended religious displays to a marked area of the square with a clear sign.

**Dissent:** Justice Stevens dissented on the grounds that the Establishment Clause should be interpreted as being against installing religious symbols on public property, and the fact that other groups had been allowed to place symbols on this property did not change this interpretation. The placement of the religious material near the courthouse further suggested that the message might be approved of by the state. It was also reasonable to conclude that some observers would connect the religious message to the state, discrediting the primary argument of the majority.

Justice Ginsburg argued that permitting the Klan to display the cross would violate the Establishment Clause. The symbol did not include a clear enough sign indicating disaffiliation, as it was small and not legible from a distance. Moreover, the proposed order did not mandate such a disclaimer. The cross may, then, have been interpreted as being supported by the state.

## Appendix B

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

**Issue:** Is requiring corporations to violate their sincerely-held religious beliefs by providing health insurance coverage for contraception permitted under the Religious Freedom Restoration Act (RFRA) and the Free Exercise Clause of the First Amendment?

**Facts:** Owners of three for-profit corporations—Hobby Lobby, Conestoga, and Mardel—sued the HHS for requiring that they provide coverage for 20 FDA-approved contraception methods, including four that might prevent an already fertilized egg from attaching to the uterus. Failing to comply with the mandate would result in significant fines. Religious employers were already exempt from this mandate, and the three companies argued that their sincerely-held Christian belief against abortion made them eligible for this exemption as well under RFRA, which dictates that the government cannot “substantially burden a person’s exercise of religion” unless the burden is the “least restrictive means” to further a “compelling governmental interest.” The HHS argued that owners of corporations forfeit their individual rights under RFRA. The Tenth Circuit concluded that the corporations qualified as “persons” and that the HHS had not demonstrated that the mandate was the “least restrictive means” of ensuring women received contraceptive options.

**Holding:** The Court held that the HHS regulations requiring contraception to be covered by corporate health insurance policies violated the Free Exercise Clause of the First Amendment (and, thus, RFRA).

**Reasoning:** In stating that corporations do not, in fact, forfeit their RFRA protections, Justice Scalia maintained that the contraception mandate did “substantially burden” the corporation’s free exercise of religion. The Court argued that this was apparent given the heavy

finds if the owners did not provide a service which they felt violated their Christian opposition to abortion. Though the Court held that the provision of contraception did qualify as a governmental interest, the mandate was not the least restrictive means of providing contraception, given that the HHS already provided this option to religious non-profit organizations. The Court also decided that corporations are qualified as “persons” under the law, using precedent to assert that for-profit entities should maintain the right to free exercise of religion.

**Concurrence:** Justice Kennedy added that RFRA exists to protect religious freedom. He defines religious freedom as having the “right to believe or strive to believe in a divine creator and a divine law” as well as the right to express that belief in all spheres, including economic. It is unfair to say that some have rights under RFRA and some do not, simply because of how they run their business.

**Dissent:** Justice Ginsburg argued that the Court’s decision allows corporations to opt-out of any law they see as in contention with their religious beliefs, so long as the government can “pick up the tab.” The government’s federal funding system for contraception was not meant to foot the bill for people who were already insured, meaning that a “less restrictive alternative” to the contraception mandate does not exist. Furthermore, Ginsburg maintained that the difference between for-profit corporations and religious organizations is that the latter exists for the sake of people who share the same beliefs, while the former does not. Employees at for-profit corporations may hold different beliefs from the owners of said corporations.

Justices Breyer and Kagan agreed with Justice Ginsburg. However, they stated that they did not need to decide whether for-profit corporations or their owners could bring claims under RFRA.

## Appendix C

### *Edwards v. Aguillard*, 482 U.S. 578 (1987)

**Issue:** Is a statute requiring that teachers give equal consideration to evolution-science and creation-science in public schools a violation of the First Amendment's Establishment Clause?

**Facts:** The Louisiana Legislature added a statute known as the "Balanced Treatment Act" which required Louisiana public schools to give creation-science and evolution-science equal treatment in classes where origin was taught. Although no definition for either creation or evolution was provided in the statute, creation-science and evolution-science were defined in the statute as scientific evidence and inferences from this evidence. The statute also prohibited discrimination against teachers who chose to teach scientific data which suggests creationism, while no mention was made of teachers who choose to teach evolution. The appellees argued that the history of the statute proves that religion was not a motivator for its passing. Both a U.S. District Court and the U.S. Court of Appeals held that there was no valid secular valid reason to prohibit the teaching of evolution, and that requiring the teaching of creation-science whenever evolution was taught was inconsistent with the statute's stated purpose of protecting "academic freedom."

**Holding:** Affirming the lower court's decision, the Court ruled that the Louisiana statute requiring equal treatment for creation-science and evolution was in violation of the First Amendment's Establishment Clause.

**Reasoning:** To determine whether the "Balanced Treatment Act" violated the Establishment Clause, the Court used the three-part test applied in *Lemon v. Kurtzman*: the statute must have a secular purpose, neither advocate nor inhibit religion, and not cause

excessive government involvement with religion. The Court held that the teaching of creation-science is inherently religious regardless of the definition of the term “science,” as creation implies a divine creator, which is an inherently religious tenet. Therefore, the Louisiana statute failed to violate the First Amendment because the Act sought the government’s symbolic and financial support to promote certain religious beliefs over others and to encourage an establishment of religion.

Though the stated purpose was to advance “academic freedom,” the Court found that this “sham” was actually intended to minimize the science curriculum; this was made clear through the legislative history. Furthermore, freedom was not advanced as there was no original law preventing the teaching of evolution that would inhibit freedom in the first place. Fairness was also not furthered, as evidenced by the Act’s “discriminatory preference” for creation-science. The purpose of the Act, then, was to discredit evolution and tailor learning to a specific religious sect.

**Concurrence:** Justice Powell noted relevant legislative history and emphasized that the Court’s decision does not lessen school officials’ discretion in regard to public school curriculum. Powell focused more heavily on the specific wording of the Act and the lack of definitions to demonstrate an apparent religious belief. The legislative history further proves this motive.

Justice White emphasized the fact that the Court is upholding the lower court’s ruling because they were not wrong, which is the Court’s duty.

**Dissent:** Justice Scalia argued that the issue most pertinent to the case was the sincerity of the purpose of the Act as stated by the legislature, which he argued was legitimate given that the legislators were familiar with the Constitution and had revised the text of the Act

substantially. He also contended that creation-science is not inherently religious and does not fail the *Lemon* test, though he questioned if this test was even a valid assessment of whether an Act violates the Establishment Clause.

## Appendix D

### *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005)

**Issue:** Does displaying the Ten Commandments in courthouses violate the Establishment Clause of the First Amendment?

**Facts:** Two Kentucky counties displayed the Ten Commandments in their courthouses; one was ordered by the county legislative body to be placed in a “very high traffic area,” and the other was posted in a ceremony presided over by the county judge-executive and a pastor. When the American Civil Liberties Union (ACLU) sued, the counties revised their exhibits to illustrate that the Commandments were part of Kentucky’s “precedent legal code.” The new displays were titled “Foundations of American Law and Government” and claimed to educate viewers about nine documents including the Ten Commandments. The U.S. District Court and the U.S. Court of Appeals held that the displays, given their purpose and historical significance, were unconstitutional.

**Holding:** The Court determined that the displays had no secular purpose and thus violated the Establishment Clause.

**Reasoning:** In a previous case, *Stone v. Graham*, the Court held that the Commandments are “undeniably a sacred text in the Jewish and Christian faiths” and thus convey an unmistakable religious message. Knowing this, the counties were requesting an abandonment of the Lemon test, particularly the inquiry into the purpose of the display. The Court found this to be an unconvincing argument, given the relevance of outward purpose and the success of the test in the past. Purpose was inferred while taking into consideration the context in which the new displays were hung and without overlooking the fact that they had been changed. Government

neutrality should be considered an objective of the Establishment Clause, and this case did not suggest a neutral approach to religion.

The Court also contended that the dissent's idea of original intent is flawed, due to consideration of the historical record that indicates a lack of common understanding about the government's role in the matter. Thus, it is prudent to understand the Establishment Clause as requiring the government to stay neutral on religious belief.

**Concurrence:** Justice O'Connor noted that the founders' original intent does indeed point toward the danger of governmental interference in private religious practices. If the government is allowed to become a mouthpiece for religious ideas, this would easily suppress other beliefs.

**Dissent:** Justice Scalia argued that the government is not barred from favoring religious practice over irreligion. He held that the government's acknowledgement of a sole Creator does not establish a religion, nor does honoring the Ten Commandments honor God, given their wide-ranging impact on various religious sects. Because the founders, in his view, believed that encouraging religion would foster a sense of morality among the citizens, he contended that the display, along with the consistent governmental use of phrases such as "so help me God" and "in God we trust," are justified. He cited examples of other instances of religious preference, such as exempting churches from property tax and allowing students to be absent from public school to participate in religious classes. He also referred to the majority's criticism of the dissent as a "straw man" argument, since the founders' intent was demonstrated in official capacities and is imperative to understanding the meaning of the Establishment Clause.

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