Tribute to Justice Ruth Bader Ginsburg

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TRIBUTE TO
JUSTICE RUTH BADER GINSBURG

When Justice Ginsburg and I graduated from law school in 1959, she from Columbia, I from Chicago, we were among a small handful of women entering the legal profession. Although neither of us may have realized it fully, sex discrimination was perfectly legal at the time. The Equal Pay Act, which prohibits paying women less than men for "equal work on jobs the performance of which requires equal skill, effort, and responsibility and which are performed under similar working conditions," was not enacted until 1963. Title VII of the Civil Rights Act, which prohibits sex discrimination in employment, was not enacted until 1964. And while both statutes became law shortly after each of us began our academic careers, she at Rutgers in 1963, I at Berkeley in 1960, neither initially applied to institutions of higher education. Title VII expressly excepted academic institutions until it was amended in 1972, the same year that the Equal Pay Act was extended to academic and professional employees.

But wait (you might be thinking)—that might have been true of private schools like Harvard or Stanford, but you and Justice Ginsburg began teaching at public law schools: Didn't the Constitution apply? The answer is yes—and no. The Equal Protection Clause, which was added to the Constitution after the Civil War primarily to protect the newly freed slaves against discrimination, does apply to all state action—including actions taken by state universities. But as Justice Ginsburg herself once wrote, "the equal protection guarantee was not framed with a view towards the eradication of gender-based discrimination in the law." In the early 1960s, the Clause prohibited only irrational discrimination, and the Supreme Court had held in a number of cases that legal distinctions between women and men were perfectly rational. It was not until 1971 that

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6. See id. at 4 ("In the nation’s highest tribunal, until 1971, no legislatively drawn sex line, however sharp, failed to survive constitutional challenge.")
the Court broke new ground to hold in *Reed v. Reed*\(^7\) that a state law preferring men over women as administrators of the estates of deceased persons violated the Equal Protection Clause.

Our common interest in improving the legal status of women brought Justice Ginsburg and me together in 1971 to work with each other and our co-author, Professor Kenneth Davidson, on our casebook on sex-based discrimination, first published in 1974. Justice Ginsburg’s commitment to developing laws that established equality between women and men was not limited to writing books and articles on the subject. Through her leadership of the Women’s Rights Project of the ACLU in the early 1970s, she was actively involved in litigation designed to put women in the Constitution. As she herself pointed out, developing a workable strategy was difficult because the constitutional text was “an empty cupboard for people seeking to promote the equal stature of women and men as individuals under the law.”\(^8\)

The strategy she chose was a brilliant accommodation between the inherently unsettling nature of her claim for equal stature and the settled attitudes of the male judiciary that classifications based on sex were entirely reasonable. Wisely, she started from ground familiar to her audience. She selected her cases with care to demonstrate that laws reflecting old notions about sex differences could harm both men and women. Among her clients were a young father left with sole responsibility for infant care when his wife died in childbirth who could not qualify for “maternity” leave, even though the functions he was performing were those normally assigned to mothers;\(^9\) a servicewoman who could not obtain spousal benefits for her husband unless he was dependent on her, even though a similarly situated serviceman could obtain spousal benefits for his wife without a showing of dependency;\(^10\) young men below twenty-one who could not purchase near-beer, although their female companions could do so at eighteen;\(^11\) and a widower who was not eligible for his deceased wife’s social security benefits because he was not dependent on her for support, even though a widow in the same situation could collect.\(^12\) As she put it, “[t]he 1970s cases . . . all rested on the same fundamental premise: that

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the law's different treatment of men and women, typically rationalized as reflecting 'natural' differences between the sexes, historically had tended to contribute to women's subordination—their confined 'place' in man's world—even when conceived as protective of the fairer, but weaker and dependent-prone sex.\(^{13}\)

Then Professor Ginsburg drew criticism in some quarters for what others saw as her modest claims. One commentator questioned how it was possible to champion women's rights while representing male plaintiffs.\(^{14}\) She herself, however, saw matters differently:\(^{15}\)

The Supreme Court needed basic education before it was equipped to turn away from the precedents in place... [T]he Justices received relevant education as the 1970s wore on, publicly from the press and the briefs filed in court; privately, I suspect, from the aspirations of women, particularly the daughters, in their own families and communities. A teacher from outside the club, or the home crowd, seeking to open minds, however, knows she must keep it comprehensible and digestible, not too complex or intimidating, or risk losing her audience.

And, re-examined after two decades, the enduring fact about Ginsburg's strategy is how well it succeeded. She filed briefs in nine of the major sex discrimination cases decided during the 1970s, and she presented oral argument in six. In addition, she filed amicus briefs in fifteen cases. These cases established the intermediate scrutiny standard for equal protection sex discrimination challenges,\(^{16}\) the same standard which today supports a result thought unattainable only a few years ago: a solid holding that the provision of public single-sex military education for men only is a denial of equal protection to women.\(^{17}\)

It is an especially sweet triumph that VMJ came from Justice Ginsburg's pen, for its holding represents the logical conclusion of the proposition put to the Court in Reed twenty-five years ago: a statute that prefers men to women in the distribution of public ben-

\(^{13}\) Ginsburg & Flagg, \textit{supra} note 8, at 11.


\(^{15}\) Ginsburg & Flagg, \textit{supra} note 8, at 18.

\(^{16}\) \textit{See} Craig, 429 U.S. at 197 ("To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.")

efits for no reason other than their sex cannot be justified under the equality principle. A state’s designation of men over women as estate administrators in Reed or as “citizen soldiers” in VMI once reflected widely accepted social attitudes and conventions that had gone unchallenged since the birth of the nation. These attitudes and conventions had, however, been under attack by feminists of both sexes ever since women became involved as activists in the struggle for abolition of slavery that preceded the Civil War. The success of the suffrage movement, the entry of women into the work force following World War II, the role of women in the civil rights movement of the 1960s, and the ongoing struggle for reproductive freedom all contributed to a different culture surrounding interactions between men and women.

Ruth Bader Ginsburg’s litigation strategy took that changed culture and used it to educate a predominantly white, male judiciary to recognize that fundamental social change could become the basis for new patterns in the law. By the time she herself became an appellate court judge in 1980, her cases had already provided the foundation upon which a series of further moves could be launched. Led by Justice Sandra Day O’Connor, the Supreme Court held in 1982 that a state university could not exclude men from nursing school. The heightened scrutiny that had characterized the “intermediate” standard that Ginsburg helped establish took on a new edge with the observation that the state’s justification for using a classification based on sex must be an “exceedingly persuasive” one.

It was not, however, until Justice Ginsburg took her own well-deserved seat on the High Court in 1993 that the issue of whether sex-based classifications should be reviewed according to the highest standard of strict scrutiny was re-opened. In VMI, she rephrased the intermediate standard to give it greater stringency:

Focusing on the differential treatment or denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is “exceedingly persuasive.” The burden of justification is demanding and it rests entirely on the State. (citation omitted) The State must show “at least that the [challenged] classification serves ‘important governmental objectives and that the discriminatory means employed’ are ‘substantially related to the achievement of those

19. See id. at 724.
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objectives.’” (citation omitted) The justification must be genuine, not hypothesized or invented post hoc in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.21

Not only will this revised and strengthened intermediate standard give greater scope to the equality principle, but it is capable of supporting the extension of that principle to other areas—most notably to the abortion cases, a development already under discussion prior to VMI.22 The power of Ruth Bader Ginsburg’s advocacy is not yet exhausted.

Today, nearly four decades after the time we both graduated from law school, sex discrimination is no longer legal. Nor are the attitudes that subordinated women to men under the guise of protecting the weaker sex from exploitation considered reasonable. Much of the credit for this remarkable change in the law belongs to Ruth Bader Ginsburg, who has proved beyond dispute the power of a compelling argument, modestly phrased and asserted with caution, in the hands of a skilled advocate who understands both the limitations and the creative authority of the judiciary in the American legal system. By taking one step at a time, she has moved our society closer to a new legal era of equality between the sexes.

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