IN MEMORIAM

RUTH BADER GINSBURG

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Ruth Bader Ginsburg is a unique figure in the history of American law. In 1972, she became the founding director of the American Civil Liberties Union Women's Rights Project, where she served until her appointment to the federal bench. Her record as an advocate before the Supreme Court was outstanding; she argued six cases before the Court, winning five. Had she had done nothing else in her life, that alone would have been an extraordinary legacy. She was then confirmed for the United States Court of Appeals for the District of Columbia in 1980 and, from there, as an associate Justice of the United States Supreme Court in 1993.[1]

In her 1974 *Women and the Law* textbook,[2] Justice Ginsburg and her coauthors outlined their broad vision of gender equality.[3] It went beyond simply empowering women to compete for stereotypically

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1. *Ruth Bader Ginsburg,* HISTORY.COM (Mar. 24, 2021), https://www.history.com/topics/womens-history/ruth-bader-ginsburg.

2. KENNETH M. DAVIDSON, RUTH B. GINSBURG & HERMA H. KAY, SEX-BASED DISCRIMINATION: TEST, CASES AND MATERIALS (1974).

3. Herma H. Kay would later write that the quoted comments were signed by all three authors but were in fact written by Justice Ginsburg alone. Herma Hill Kay, *Claiming A Space in the Law School Curriculum: A Casebook on Sex-Based Discrimination*, 25 COLUM. J. GENDER & L. 54, 56 (2013).

"men's" jobs (like lawyer, for example).[4] Their efforts were aimed at enabling "*members of both sexes*" to assume all of society's roles. Of course, stereotypes of women as "mother, wife, girlfriend, nurse, helper, the symbolic identification of authority with maleness, from deep resonant voices to patriarchal gods, the relative absence of working women as competent and successful role models" skewed women's view of what was possible.[5] But these attitudes, they suggested, impeded men as well, who were "no less trapped in their assigned roles."[6]

The theory was radical for the 1970s, but Justice Ginsburg's approach as a litigator was decidedly incremental. She picked her cases carefully, rooting her arguments in careful and extensive factual and legal analysis. She often represented men who were discriminated against by statutes that favored women, demonstrating what she had said in that 1974 text: Discrimination hurts everyone.[7]

In 1973, Ginsburg represented Sharron Frontiero, an Air Force officer whose husband, Joseph, had been denied the housing and medical benefits that female spouses of male Air Force officers automatically received. Ginsburg's brief covered the history of discrimination against women, peppered with references to Alexis de Tocqueville and Alfred Lord Tennyson.[8] And at the oral argument to nine male justices of the Su-

4. *See* Bradwell v. Illinois, 83 U.S. 130 (1873). The Court sustained Illinois' refusal to allow Myra Bradwell to become an attorney. The Court affirmed that decision with Justice Bradley's now iconic concurrence: "Man is, or should be, women's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life . . . . This is the law of the Creator." *Id.* at 141 (Bradley, J., concurring).

5. Davidson, Ginsburg & Kay, *supra* note 2, at XI–XIII.

6. *Id.*

7. Ria Tabacco Mar, *Ruth Bader Ginsburg's Fight for Gender Equality was for All of Us,* ACLU (Sept. 22, 2020), https://www.aclu.org/news/civil-liberties/ruth-bader-ginsburgs-fight-for-gender-equity-was-for-all-of-us/.

8. Brief of American Civil Liberties Union as Amicus Curiae at 32–34, Frontiero v. Richardson, 411 U.S. 677 (1973) (No. 71-1694), 1972 U.S. S. Ct. Briefs LEXIS 15.

preme Court, she quoted Sarah Grimké, a nineteenth-century women's rights advocate: "I ask no favor for my sex. All I ask of our brethren is that they take their feet off our necks."[9] She won the case.

Her judging reflected the same incrementalism. Although animated by a passionate concern for equality—she knew what it was like to be powerless, or to represent the powerless—she was an advocate of judicial moderation, anxious not only to avoid upending precedent but also upending collegiality with her judicial colleagues.[10] At her confirmation, she said a judge should "strive to write opinions that both 'get it right' and 'keep it tight.'"[11] In fact, her work on the bench was far, far more complex and nuanced than the label "liberal," let alone "activist," suggests.

She was, as the *New York Times*'s Linda Greenhouse described at the time of her confirmation, a "judicial-restraint liberal,"[12] who combined a "muscular and broadly inclusive Constitution" with a "pragmatist's sense that the most efficacious way of achieving the Constitution's highest potential as an engine of social progress is not necessarily through the exercise of judicial supremacy."[13] Ginsburg's interpretation of that

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9. Transcript of Oral Argument at 20, Frontiero v. Richardson, 411 U.S. 677 (1973) (No. 71-1694) (argument by Ruth Bader Ginsburg) ("I ask no favor for my sex. All I ask of our brethren is that they take their feet off our necks." (quoting Sarah Grimké)).

10. *See, e.g.*, Rebecca L. Barnhart & Deborah Zalesne, *Twin Pillars of Judicial Philosophy: The Impact of the Ginsburg Collegiality and Gender Discrimination Principles on Her Separate Opinions Involving Gender Discrimination*, 7 N.Y. CITY L. REV. 275, 299 (2004).

11. *Nomination of Ruth Bader Ginsburg, to Be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 103d Cong. 53 (1993) (statement of Ruth Bader Ginsburg).

12. Linda Greenhouse, *The Supreme Court: A Sense of Judicial Limits*, N.Y. TIMES, July 22, 1993, at A1.

13. Sarah E. Valentine, *Ruth Bader Ginsburg: An Annotated Bibliography*, 7 N.Y. CITY L. REV. 391, 395 (2004); *see also Nomination of Ruth Bader Ginsburg, to Be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 103d CONG. 51 (1993) (statement of Judge Ruth Bader Ginsburg) ("Let me try to state in a nutshell how I view the work of judging. My approach, I believe, is neither 'liberal' nor 'conservative.' Rather, it is rooted in the place of the judiciary, of judges, in our democratic society."); Ruth Bader Ginsburg, *Interpretations of the Equal Protection Clause*,

"muscular and broadly inclusive" Constitution emerged from narrowly crafted rulings, from language respectful of her colleagues, and from threading the boundaries of precedent. She would take pains to situate the Court's precedent in their social and historical context, tirelessly recounting the history of gender-based classifications, as she had in *Frontiero*, all the while acknowledging "[t]he realities of the workplace" and the "real-world characteristics" of discrimination.[14]

While to Justice Ginsburg the Constitution should be read "as belonging to a global twenty-first century, not as fixed forever by eighteenth-century understandings,"[15] the range of judicial interpretation enabled by the Constitution's language was not without limits. As she noted in a lecture delivered before her 1993 elevation to the Supreme Court, courts have an important role to play in identifying new understandings of the Constitution, but they should do so by "[m]easured motions."[16] Courts must recognize, then-Judge Ginsburg contended, that "they participate in a dialogue with other organs of government, and with the people as well."[17]

9 HARV. J.L. & PUB. POL'Y 41, 45 (1986) (noting that great judges "have not been born once or reborn later liberals or conservatives" but "have been notably skeptical of all party lines"); Deborah Jones Merritt & David M. Lieberman, *Ruth Bader Ginsburg's Jurisprudence of Opportunity and Equality*, 104 COLUM. L. REV. 39, 48 (2004).

14. Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 649 (2007) (Ginsburg, J., dissenting).

15. Ruth Bader Ginsburg, *"A Decent Respect for the Opinions of [Human]kind": The Value of a Comparative Perspective in Constitutional Adjudication*, 99 AM. SOC'Y INT'L L. PROC. 351, 355 (2005) (publishing Justice Ginsburg's keynote address at the Ninety-Ninth Annual Meeting of the American Society of International Law, April 1, 2005); *see also* Ruth Bader Ginsburg, *Constitutional Adjudication in the United States as a Means of Advancing the Equal Stature of Men and Women Under the Law*, 26 HOFSTRA L. REV. 263, 265 (1997) (noting the Founders' inability, due to contemporary cultural norms, to respect fully the ideals of equality proclaimed in the Declaration of Independence).

16. Ruth Bader Ginsburg, *Speaking in A Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1198 (1992) (publishing the revised text of Justice Ginsburg's 1993 James Madison Lecture on Constitutional Law at New York University School of Law).

17. *Id.* at 1198.

Only three years after she joined the Court, she authored an extraordinarily significant decision, *United States v. Virginia.*[18] The United States government challenged Virginia's practice of admitting only men to its prestigious military college, the Virginia Military Institute (VMI). The senior Justice in the majority initially assigned the opinion to Justice Sandra Day O'Connor, the first woman on the Supreme Court. Justice O'Connor, however, believed that Justice Ginsburg should be the one to speak for the majority.[19] Her impact as a lawyer/scholar/judge—all seemingly playing out in the case before her—could not have been clearer.

Justice Ginsburg catalogued the usual justifications for gender discrimination that would not pass muster—justifications she had challenged throughout her career. The justification must be genuine, not an after-the-fact rationalization or the result of "overbroad generalizations about the different talents, capacities, or preferences of males and females."[20] Nor was it sufficient that the government's motivations be "benign."[21] Ostensibly benign justifications, grounded in stereotypes about men and women, had burdened women's full participation in public life for decades, as litigator Ginsburg had shown over and over again.

Even physical differences between men and women—namely, Virginia's claim that most women lacked the physical ability to participate in VMI's rigorous training regime—would be scrutinized and rejected as a basis for excluding women. While there were surely physical differences between men and women, how the law dealt with them was socially constructed—not innate—and based on old-fashioned stereotypes. A woman's ability to bear children, and the traditional

18. *See* United States v. Virginia, 518 U.S. 515 (1996).

19. RUTH BADER GINSBURG & AMANDA L. TYLER, JUSTICE, JUSTICE THOU SHALT PURSUE: A LIFE'S WORK FIGHTING FOR A MORE PERFECT UNION 6 (2021).

20. *Virginia*, 518 U.S. at 533.

21. *Id.* at 535, 536.

division of labor associated with it, too often contributed to "the legal, social and economic inferiority of women."[22] Justice Ginsburg had said it before as an advocate. This time, and over and over again during her tenure on the Court, she said it as a Justice.

The analysis was classic: a lengthy description of the school, its prestige, its role in preparing men and only men for high-status roles in government and industry, buttressing the conclusion that VMI's exclusion of women violated the Equal Protection clause.[23] It resonated with Justice Ginsburg's early work, even her early *Gender and Law* text: There should be no separate spheres for men and women under the law. Distinctions based on what "most" men or women do, on the choices that "most" of them make, are an impediment to full equality.[24]

While Justice Ginsburg was not always successful in persuading the Court to endorse her view of gender equality, she was dogged. In 1998, Justice Ginsburg dissented in *Miller v. Albright*.[25] Section 1409(a) of the Immigration and Nationality Act governs the grant of citizenship to children born to unmarried parents outside the United States in cases where only one of the parents is a U.S. citizen. The requirements for citizenship for the child were more rigorous if the citizen parent were the father, rather than the mother. In a fractured decision, the Court sustained the requirement. Justice Ginsburg, dissenting, revisited the history of gender-based citizenship laws, considering where they fit in the history of discrimination against women and the extent to which they perpetuated old stereotypes about women (e.g., that the mother would more likely bond with the child; the father would not).[26]

22. *Id.* at 533–34.
23. *Id.* at 520–23.
24. *Id.* at 547–54.
25. Miller v. Albright, 523 U.S. 420, 460 (1998) (Ginsburg, J., dissenting).
26. *Id.* at 461–68.

Using the *Virginia* standard, she urged the rejection of § 1409(a).[27]

She swayed the Court nearly two decades later in *Sessions v. Morales-Santana*,[28] which raised a similar issue. The case turned on a different provision of § 1409(c), which also dealt with citizenship for foreign-born children of unmarried parents, one of whom was a citizen. An unwed mother could transmit her citizenship if she had lived in the U.S. for at least one year, but for unwed fathers the residency requirement was five years. Justice Ginsburg, writing for the six justices, found that the differential treatment of citizen mothers and fathers in the residency requirement violated Equal Protection, a decision with important implications for gender equality (in unmarried relationships), citizenship, and immigration.

The decision, characteristically, cited to the cases she had argued and won, as well as to *Virginia.* She criticized the provision for its overbroad, "stunningly anachronistic"[29] generalizations about men and women. American citizenship law was shaped by the "once entrenched principle of male dominance in marriage, [under which] the husband controlled both wife and child,"[30] and by the understanding that outside of marriage, the "unwed mother [was] the natural and sole guardian of a nonmarital child."[31]

In recent years, as the membership of the Court changed, Justice Ginsburg became more and more a dissenter, albeit a reluctant one.[32] In *Ledbetter v. Goodyear Tire and Rubber Co. Inc.*,[33] the plaintiff challenged the fact that she had not been equally paid compared with similarly situated men. The Court

27. *Id.* at 470–71.

28. *See* Sessions v. Morales-Santana, 137 S. Ct. 1678 (2017).

29. *Id.*

30. *Morales-Santana*, 137 S. Ct. at 1691.

31. *Id.*

32. Nancy Gertner, *Dissenting in General:* Herring v. United States*, in Particular*, 127 HARV. L. REV. 433, 433 (2013).

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

rejected the challenge, finding that it had been filed too late. Each separate paycheck comprised a single violation; the first unequal paychecks may well have been the result of discrimination, but a lawsuit based on it was time barred. Justice Ginsburg dissented, this time using more passionate language than usual, and delivered an oral dissent. She explained:

> Pay disparities often occur, as they did in Ledbetter's case, in small increments; cause to suspect that discrimination is at work develops only over time. Comparative pay information, moreover, is often hidden from the employee's view. Employers may keep under wraps the pay differentials maintained among supervisors, no less the reasons for those differentials. Small initial discrepancies may not be seen as meet for a federal case, particularly when the employee, trying to succeed in a nontraditional environment, is averse to making waves.[34]

Her decision reflects her acute understanding of the relationship between the Court and Congress;[35] Congress heard the message loud and clear. In 2009, it passed the Lily Ledbetter law, amending Title VII to clarify that the statute of limitations for filing an equal pay lawsuit resets with each new paycheck affected by the original discriminatory act.[36]

On the same day as the *Ledbetter* dissent, Ginsburg issued another oral dissent, her tone even sharper. *Gonzales* v. *Carhart*[37] involved a federal statute banning a particular method for ending a pregnancy in the second trimester (the so-called "partial birth abortion"), oft-maligned but rarely used in practice. The majority rejected a constitutional challenge to the statute.[38] The Court concluded that barring this method of ending a pregnancy was not an undue burden on the

34. *Id.* at 645 (Ginsburg, J., dissenting).

35. *See generally* Ruth Bader Ginsburg, *Speaking in A Judicial Voice*, 67 N.Y.U. L. REV. 1185 (1992).

36. Lilly Ledbetter Fair Pay Act of 2009, 42 U.S.C. § 2000e-5(e)(3)(A).

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

38. *Id.* at 133.

right to choose abortion. Rather, it concluded that the ban reflected the state's concern for fetal life and even protected the mother's interest: Since the abortion decision is so difficult and one "which some women come to regret,"[39] doctors should keep specifics about the procedure from them.[40]

Justice Ginsburg dissented, arguing that the Court had violated its own precedents with this decision. It blessed a prohibition with no exception safeguarding a woman's health. And it was a prohibition that would do nothing to preserve fetal life. It simply banned one method of ending a pregnancy. And true to form, Justice Ginsburg then situated her opinion in her own equality jurisprudence. The right to choose abortion, she believed, was part and parcel of an analysis of gender, hierarchy, and caste under the Equal Protection Clause. Abortion implicates "a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature."[41]

But Justice Ginsburg chafed not simply at the outcome, but also about the majority's paternalistic tone. While the Court claimed to care that doctor would not share with women the details about how the abortion would be performed, its solution in her view was worse. By barring the procedure, it took from women their right to make an autonomous choice, a pattern that fit within the paternalism of the Supreme Court's earlier opinions, the ones she had aggressively challenged. And she ended with an ominous warning about the future of *Roe* v. *Wade:*

> The Court's hostility to the right *Roe* . . . . secured is not concealed. Throughout, the opinion refers to obstetrician-gynecologists and surgeons who perform abortions not by the titles of their medical specialties, but by the pejorative label 'abortion doctor' . . . . A fetus is described as an 'unborn child,' and as a 'baby'; second-trimester,

39. *Id.* at 129.
40. *Id.* at 156–60.
41. *Id.* at 172 (Ginsburg, J., dissenting).

> previability abortions are referred to as 'late-term'; and the reasoned medical judgments of highly trained doctors are dismissed as 'preferences' motivated by 'mere convenience' . . . . Instead of the heightened scrutiny we have previously applied, the Court determines that a "rational" ground is enough to uphold the Act . . . . And, most troubling, *Casey's* principles, confirming the continuing vitality of 'the essential holding of *Roe,*' are merely 'assume[d]' for the moment, rather than 'retained' or 'reaffirmed.'[42]

Justice Ginsburg also dissented in cases challenging racial affirmative action programs, like *Gratz v. Bollinger*,[43] in which the majority struck down the University of Michigan's freshman admission programs. Justice Ginsburg disagreed with the majority's "insistence on 'consistency,'" reciting the data that showed the persistence of racial inequity in housing, education, and employment. "We are," she said, "not far distant from an overtly discriminatory past, and the effects of centuries of law-sanctioned inequality remain painfully evidence in our communities and schools."[44] Her work prefigured more recent debates about systemic racial discrimination.

Perhaps one of her most biting dissents was in *Shelby County v. Holder*.[45] At issue was the fate of the Voting Rights Act (VRA), which sits among the most consequential pieces of civil rights legislation in American history. The majority threw out the preclearance mechanism in which states with a history of discrimination had to seek approval for changes in voting laws that impacted African Americans. It was no longer necessary in modern America, they said. Justice Ginsburg's dissent was caustic: "Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away

42. *Id.*
43. *See* Gratz v. Bollinger, 539 U.S. 244 (2003).
44. *Id.* at 299 (Ginsburg, J., dissenting).
45. *See* Shelby Cnty. v. Holder, 570 U.S. 529 (2013).

your umbrella in a rainstorm because you are not getting wet."[46] A lengthy dissent, tirelessly examining the instances of voter disenfranchisement through the present day, was capped off with a simple statement: "In my judgment, the Court errs egregiously by overriding Congress' decision."[47]

On the wall in Ginsburg's office hung the biblical saying "Justice, justice shalt thou pursue."[48] This demand for justice echoed loudly in the cases Ginsburg had argued, the causes she had advocated, and the Court's decisions and dissents she authored.

46. *Id.* at 590 (Ginsburg, J., dissenting).

47. *Id.* at 594.

48. *See* Eduardo M. Peñalver, Opinion, *Justice, Justice Shall You Pursue: Remembering Justice Ruth Bader Ginsburg '54*, CORNELL DAILY SUN (Sept. 20, 2020), https://cornellsun.com/2020/09/20/guest-room-justice-justice-shall-you-pursue-remembering-justice-ruth-bader-ginsburg-54/; Deuteronomy 16, 20