

## GOODBYE, OLD FRIEND: TRIBUTE TO JUSTICE RUTH BADER GINSBURG

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In the early 1970s, the National Board of the ACLU declared women's rights its top legal and legislative priority, creating the national Women's Rights Project in late 1971.<sup>1</sup>

Ruth Bader Ginsburg was then a law professor at Rutgers University<sup>2</sup> and the ACLU's pick for director. In 1970, Martin Ginsburg, her husband and a tax lawyer, spotted a curious case in a tax court advance sheet brought pro se by a single man who was taking care of his elderly mother.<sup>3</sup> Charles Moritz had to hire outside help to assist while he was away from home as a traveling salesman.<sup>4</sup> He wanted a \$600 dependent care deduction, a credit afforded any woman, married couple, widowed or divorced man, but not to a single man who had never married.<sup>5</sup> Ruth and Marty took the case pro bono and appealed to the United States Court of Appeals for the Tenth Circuit where, with the support of the ACLU, they won.<sup>6</sup> Before Mr. Moritz could realize the benefit, the U.S. Government appealed to the Supreme Court, asserting that this case would cast a cloud of unconstitutionality over literally hundreds of federal statutes.<sup>7</sup> In so

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\* J.D. 1969, Harvard Law School. The author co-founded the ACLU Women's Rights Project with Justice Ginsburg. She served as the National Legislative Vice President of NOW and was a co-founder of *Ms. Magazine* and the National Women's Political Caucus. Portions of this tribute first appeared in Brenda Feigen, *The ACLU, Ruth Bader Ginsburg, and Me*, ACLU (May 27, 2020), <https://www.aclu.org/issues/womens-rights/aclu-ruth-bader-ginsburg-and-me> [<https://perma.cc/R4CD-LRBY>].

1. ACLU, *The History of the ACLU Women's Rights Project 1*, <https://www.aclu.org/other/history-aclu-womens-rights-project> (on file with the *Columbia Law Review*).

2. Professor Ginsburg taught at Rutgers University School of Law from 1963 to 1972, where her subjects included Remedies, Civil Procedure, Comparative Procedure, and a seminar on women and the law. Tom Mulvaney, *Rutgers Law Students Honor the Legacy of Former Professor and Preeminent Jurist Ruth Bader Ginsburg*, Rutgers L. Sch., <https://law.rutgers.edu/the-brief/rutgers-law-students-honor-legacy-former-professor-and-preeminent-jurist-ruth-bader> [<https://perma.cc/4WLA-VJJK>] (last visited Feb. 14, 2021).

3. *Moritz v. Comm'r*, 55 T.C. 113, 113 (1970). Marty recounted his experience with the *Moritz* case in a speech he prepared for the Tenth Circuit Judicial Conference titled, "How the 10th Circuit Court of Appeals Got My Wife Her Good Job." Ruth Bader Ginsburg, *In Memory of Judge William J. Holloway, Jr.*, 40 *Okla. City U. L. Rev.* 33, 33 (2015). Justice Ginsburg delivered the speech at the conference on August 27, 2010, on Marty's behalf shortly after his death. *Id.* at 33 n.1.

4. *Moritz*, 55 T.C. at 114.

5. *Id.*

6. *Moritz v. Comm'r*, 469 F.2d 466, 467, 470 (10th Cir. 1972) (finding that Mr. Moritz was entitled to the deduction claimed and reversing the decision of the Tax Court).

7. Ginsburg, *supra* note 3, at 34.

doing, Erwin Griswold, formerly dean of Harvard Law School and now in his role as Solicitor General, attached to his petition for certiorari an exhibit listing all the other federal statutes that discriminated on the basis of sex.<sup>8</sup> The Court denied certiorari.<sup>9</sup>

Meanwhile, an important case had been accepted by the Court.<sup>10</sup> Sally Reed's son had committed suicide, and as his adoptive mother, she wanted to administer his very small estate, consisting of a guitar and a few other items.<sup>11</sup> She was divorced from his father, Cecil Reed, who also wanted to administer the small estate.<sup>12</sup> Idaho, where they lived, had a statute that favored men over women in the administration of estates.<sup>13</sup> The lower court, upholding the statute, ruled against Sally, and now she was on the way to the high Court.<sup>14</sup> At the request of the ACLU's legal director, Mel Wulf, Ruth became involved in writing its brief. While she did not argue the case, Ruth and her co-counsel successfully challenged Idaho's automatic preference for male administrators of decedents' estates over similarly situated females.<sup>15</sup>

I was then National Legislative Vice President for the National Organization for Women (NOW), and alongside my work lobbying for the Equal Rights Amendment (ERA), Gloria Steinem and I, and a few others, were about to announce the launch of *Ms. Magazine*<sup>16</sup> in early January 1972—but my career was soon to change direction.<sup>17</sup> I received a phone call one evening that same month from Mel Wulf asking if I would be interested in directing the newly-establishing Women's Rights Project with Professor Ruth Bader Ginsburg. He had seen me on television in a debate

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8. *Id.*

9. *Comm'r v. Mortiz*, 412 U.S. 906 (1973).

10. *Reed v. Reed*, 93 Idaho 511 (1970), *rev'd*, 404 U.S. 71 (1971).

11. *Id.* at 512.

12. *Id.*

13. Idaho Code § 15-314 (repealed 1972) (designating in order determinative of the relative rights "the persons who are entitled to administer the estate of one who dies intestate").

14. *Reed*, 93 Idaho at 512–13.

15. *Reed*, 404 U.S. at 76 ("By providing dissimilar treatment for men and women who are thus similarly situated, the challenged section violates the Equal Protection Clause." (citing *Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920))).

16. About *Ms.*, *Ms. Magazine*, <https://msmagazine.com/about/> [<https://perma.cc/3DSD-56SB>] (last visited Feb. 11, 2021) ("*Ms.* was the first U.S. magazine to feature prominent American women demanding the repeal of laws that criminalized abortion[] [and] the first to explain and advocate for the [ERA] . . . *Ms.* was the first . . . to make feminist voices audible, feminist journalism tenable and a feminist worldview available to the public.").

17. *Women Who Put Women's Rights on the ACLU Agenda*, ACLU, <https://www.aclu.org/other/women-who-put-womens-rights-aclu-agenda> [<https://perma.cc/NSJ7-LAL6>] [hereinafter, ACLU, *Women of the ACLU*] (last visited Feb. 11, 2021).

with the noxious Phyllis Schlafly.<sup>18</sup> Because of her simultaneous work at Rutgers, Ruth wanted a partner. In later years, Ruth would explain her desire to direct the Women’s Rights Project: “I wanted to be part of a general human rights agenda. Civil liberties are an essential part of the overall human rights concern—the equality of all people and the ability to be free.”<sup>19</sup> Realizing that there were many women who could work on *Ms.*, but few feminist lawyers around to do the job at the ACLU, I accepted the position in February 1972 and moved into their offices on Fifth Avenue and 20th Street.<sup>20</sup> Ruth had insisted that we both have the title of “Director” rather than “Co-Director.”

I met Ruth on my first day at work when she appeared late in the morning. She was a soft-spoken, thoughtful woman, with large, intelligent eyes. She had entered Harvard Law School exactly ten years before I had.<sup>21</sup> The percentage of women in her class was two percent, while that in my 1969 class had been six percent.<sup>22</sup> We were both ready to embark on what we anticipated would be a tough journey. I had read about Ruth’s involvement with the *Reed* case,<sup>23</sup> in which the Supreme Court had finally held that sex discrimination is unconstitutional.

I now made a point of re-reading that opinion. For the first time in history, a majority of the Justices agreed that women were a protected class deserving recognition under the Equal Protection Clause of the Fourteenth Amendment.<sup>24</sup> There had to be, they said, a *substantial relationship* between a classification based on sex and a *legitimate state interest*.<sup>25</sup> A new age was dawning for women that would mark the beginning of feminist jurisprudence in America.<sup>26</sup>

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18. One of my later debates with Phyllis Schlafly was featured in the fifth episode of *Mrs. America*. *Mrs. America: Phyllis & Fred & Brenda & Marc* (FX on Hulu 2020). See *infra* notes 32–35 and accompanying text.

19. The ACLU and Women’s Rights: Proud History, Continuing Struggle, ACLU, <https://www.aclu.org/other/aclu-and-womens-rights-proud-history-continuing-struggle> [<https://perma.cc/GP9F-2GCD>] (last visited Feb. 2, 2021).

20. ACLU, Women of the ACLU, *supra* note 17.

21. Justice Ruth Bader Ginsburg started at Harvard Law School in 1956. ACLU, Women of the ACLU, *supra* note 17.

22. Harvard Law School only began admitting women in 1950. “Among the nine women who enrolled at [Harvard] in 1956 was Ruth Bader Ginsburg . . .” History of Harvard Law School: A Brief Timeline of Our History, Harv. L. Sch., <https://hls.harvard.edu/about/history> [<https://perma.cc/98X9-4GAV>] (last visited Feb. 12, 2021).

23. 404 U.S. 71 (1971).

24. *Id.* at 75 (“In such situations, § 15-314 provides that different treatment be accorded to the applicants on the basis of sex; it thus establishes a classification subject to strict scrutiny under the Equal Protection Clause.”).

25. *Id.* at 76 (“A classification ‘must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.’” (quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920))).

26. Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 *Yale L.J.* 1373, 1374 (1985).

To start, we issued a press release announcing the official formation of the Women's Rights Project, and we alerted ACLU affiliates around the country that we were there to help. We focused on cases that were on their way up to the Supreme Court and encouraged affiliates to tell us about any sex discrimination lawsuits they were contemplating bringing. Ruth was very cautious, wanting to avoid making any bad law.

Every day at about 11:00 AM, Ruth would call me at the office and I would greet her with: "Hi Ruth, how are you?" or "What's new?" My questions would be met with: "Have you read the advance sheets yet?" or "Brenda, there's such an interesting case the Court just accepted!" Ruth, as far as I could tell, talked, thought, and probably even dreamed about the law any time she wasn't spending with her husband or children. She wasted few, if any, moments on little pleasantries.

As the project was getting started, the ACLU's national office moved up to Madison Avenue and 40th Street. Our announcement attracted law students and others who wanted to help. Our suite was across the hall from the rest of the office that was heavily staffed with men. The day we moved in, I posted a bright yellow "WOMEN WORKING" sign on the door leading into our offices. Ruth thought that was terrific.

Not long after we launched into our work, Ruth and I traveled to Boulder, Colorado, for the ACLU National Lawyers Conference. After we gave the Women's Rights Project presentation and explained our strategy, Ruth agreed with my idea of going riding in the desert. I was impressed with her horseback riding skill. This is a woman who knows how to work—and play—hard, I realized happily. The desert was beautiful, and it was a terrific afternoon.

Back in the office, Ruth and I agreed on the importance of the ERA, which by March 1972 had been passed by both houses of Congress and sent to the states for ratification.<sup>27</sup> I had been involved with it since 1970, when I organized the pro-ERA testimony at the request of Senator Birch Bayh (D-Ind.) who was Chair of the Senate Subcommittee on Constitutional Amendments.<sup>28</sup> I had then testified (along with Gloria Steinem, whose

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27. Proposed Amendment to the United States Constitution, H.R.J. Res. 208, 92d Cong., 2d Sess., 86 Stat. 1523 (1972). The amendment passed in the House of Representatives 354-24, and similarly passed 84-4 in the Senate. See 118 Cong. Rec. 9589 (1972); 117 Cong. Rec. 35,815 (1971).

28. See Scott Bomboy, *A Little-Known Senate Subcommittee that Holds Great Constitutional Power*, Nat'l Const. Ctr. (Mar. 10, 2017), <https://constitutioncenter.org/blog/a-little-known-senate-subcommittee-that-holds-great-constitutional-power> [<https://perma.cc/2JMY-LRQL>] ("Senator Birch Bayh served as the subcommittee's chair for nearly two decades and he drove the process that resulted in [two constitutional amendments]. A third effort championed by Senator Bayh, the Equal Rights Amendment, was approved by the House and Senate, but it fell three states short of . . . ratification.").

testimony I had written) on behalf of NOW.<sup>29</sup> In fact, during the congressional hearings, we were implored by Senator Sam Ervin to allow an amendment to the ERA that would have exempted women from military duty.<sup>30</sup> We adamantly refused any special treatment, or any amendments to the ERA.<sup>31</sup>

Congress, siding with the ERA's proponents, had sent it out to the states for ratification. Debating the arch-enemy of women's equality, Phyllis Schlafly,<sup>32</sup> became a routine part of my life, always involving arguments about toilets and jails. I explained that the legislative history, recorded during the ERA hearings, would allow the government to make provisions for separate bathroom and prison facilities for women and men because of constitutional privacy mandates. One of my television debates with Phyllis Schlafly was portrayed quite accurately in Episode Five of Hulu's *Mrs. America*.<sup>33</sup> To make her point, Schlafly had cited a case she said supported her position that, if the ERA were part of the Constitution, "housewives" would no longer receive alimony from their divorcing husbands.<sup>34</sup> I objected immediately. There was no such case—what was the cite?<sup>35</sup> Clearly flustered, she couldn't give one.

"[The ERA] is the bedrock issue," Ruth later told *Newsweek Magazine* in 1979. "Without [it], 'the Supreme Court has no gun at its head.'"<sup>36</sup> As a result, our division of labor included my spending more time on the ERA. I appeared on numerous television shows debating, in addition to Phyllis Schlafly, Naval Admiral Hyman Rickover and Army General William Westmoreland. They adamantly did not want women to be drafted and they didn't want them to enlist—to serve their country alongside men.

Meanwhile, the Women's Rights Project continued to emphasize winning equal rights for women in the courts and in upcoming legislation. The first major bill came in 1972: Title IX of the Education Amendments would prohibit sex discrimination in all education programs and activities

29. Jill M. Weber, Gloria Steinem, "Testimony Before Senate Hearings on the Equal Rights Amendment" (6 May 1970), 3 *Voices Democracy* 162, 261–68 (2008).

30. The Senate Passes the Equal Rights Amendment, U.S. Senate (Mar. 22, 1972), [https://www.senate.gov/artandhistory/history/minute/Senate\\_passes\\_ERA.htm](https://www.senate.gov/artandhistory/history/minute/Senate_passes_ERA.htm) [<https://perma.cc/B5EX-SYX7>].

31. *Id.*

32. Douglas Martin, Phyllis Schlafly, 'First Lady' of a Political March to the Right, Dies at 92, *N.Y. Times* (Sept. 5, 2016), <https://www.nytimes.com/2016/09/06/obituaries/phyllis-schlafly-conservative-leader-and-foe-of-era-dies-at-92.html> (on file with the *Columbia Law Review*) (describing Phyllis Schlafly as "one of the most polarizing figures in American public life, a self-described housewife who displayed a moral ferocity reminiscent of the ax-wielding prohibitionist Carry Nation").

33. *Mrs. America: Phyllis & Fred & Brenda & Marc* (FX on Hulu 2020).

34. *Id.*

35. *Id.*

36. Legal Battle of the Sexes, *Newsweek*, Apr. 30, 1979, at 69, 70; see also Brenda Feigen, Not One of the Boys: Living Life as a Feminist 76 (2000).

that received federal funds.<sup>37</sup> From then on, the money universities spent on athletics would have to be allocated equally to women's and men's programs. Working alongside Olympic Gold Medal winner Donna de Varona,<sup>38</sup> we were successful—the legislation passed. Today some professional women's sports, notably in tennis and soccer, have garnered huge audiences they never had before.

Also in 1972, the Supreme Court agreed to review the three-judge federal district court ruling in *Frontiero v. Richardson*.<sup>39</sup> Sharron Frontiero, a married Air Force officer, was denied the housing and medical benefits for her husband that male officers in the Air Force automatically received for their wives.<sup>40</sup> The federal statute providing such allowances explicitly set forth the different treatment: While all wives of male officers were automatically entitled to those benefits, husbands of female officers, in order to qualify, had to prove that they were more than half dependent on their wives for support.<sup>41</sup> Sharron and her husband thought this was unfair. Of course, the underlying assumption was that women, in this case wives of male officers, were not the family breadwinners.

The government appealed from that ruling directly to the Supreme Court. We agreed we needed to file a brief, *amicus curiae*, on behalf of the Women's Rights Project. Ruth was concerned that bad law would be made if we didn't intervene. It would be a monumental job made all the more important because Sharron's lawyer insisted that he file his own brief, with no input from us. In addition to wanting a ruling on the merits (that this was outright sex discrimination), we were asking the Court to apply the same level of scrutiny that was used to judge race discrimination. We would ask them to rule that there would have to be a *compelling* state interest to maintain the discriminatory distinction. That would be a higher level of scrutiny than had been applied in the *Reed* case.<sup>42</sup> The lower court had ruled that there had to be a *legitimate state interest* in maintaining a sex-based classification.<sup>43</sup>

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37. 20 U.S.C. § 1681 (1972); see also Title IX—Gender Equity in Education, ACLU, <https://www.aclu.org/title-ix-gender-equity-education> [<https://perma.cc/E6LA-KWPZ>] (last visited Feb. 12, 2021) (tracing the origins of Title IX and the ACLU's advocacy for the legislation).

38. Donna de Varona, Team USA, <https://www.teamusa.org/Hall-of-Fame/Hall-of-Fame-Members/Donna-de-Varona> [<https://perma.cc/NDY8-CD2G>] (last visited Feb. 12, 2021) (noting that Donna had broken eighteen world records as a member of the United States swimming team by the age of seventeen and won two gold medals at the 1964 Tokyo Olympic Games).

39. 341 F. Supp. 201 (M.D. Ala. 1972), rev'd, 411 U.S. 677 (1973).

40. *Id.* at 203–04.

41. 37 U.S.C. § 401 (1962) (amended 1994) (definitions); *id.* § 403 (1962) (amended 2019) (basic allowance for housing); 10 U.S.C. § 1072 (1958) (amended 2017) (definitions); *id.* § 1076 (1958) (amended 2001) (medical and dental care for dependents).

42. *Frontiero*, 341 F. Supp. at 206 n.2.

43. See *supra* note 25 and accompanying text.

Here, the government's argument was that the statutes, allowing benefits for "dependents" of male service members, presumed such dependent status of wives solely for "administrative convenience."<sup>44</sup> Our concern was that the Supreme Court might decide that giving benefits only to wives of male officers saved the government money and was, therefore, a legitimate state interest—and that we would lose. We thought there was a compelling interest in applying the highest standard of review to the discrimination propounded in the statute at issue in *Frontiero*.<sup>45</sup> We wanted the higher level of scrutiny not only because we cared about the outcome of the case on the merits, but also because this was our chance to get sex discrimination judged by the Court as a suspect classification—just as reprehensible as race discrimination. The Equal Rights Amendment that would have mandated absolute equality between the sexes had not yet been ratified.<sup>46</sup>

Ruth and I started drafting our *Frontiero* brief after we outlined the arguments. Once the caption of each argument was drafted and I set forth what I could about the reasoning, Ruth would invariably rewrite and edit each section. She elaborated on the reasons that women should be treated as first-class citizens. She didn't confine her observations to old cases and legal precedent. Instead, she inserted language from ancient opinions, revealing exactly how antiquated the government's position was.

By quoting from some of these famous men, we showed their low regard for women in our society:

Thomas Jefferson: "Were our state a pure democracy there would still be excluded from our deliberations women . . . ."<sup>47</sup>

Alexis de Tocqueville: "American women never manage the outward concerns of the family, or conduct a business, or take part in political life . . . ."<sup>48</sup>

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44. *Frontiero*, 341 F. Supp. at 207; id. at 210–11 (Johnson, J., dissenting).

45. *Frontiero v. Richardson*, 411 U.S. 677, 682 (1973) ("At the outset, appellants contend that classifications based upon sex, like classifications based upon race, to the text of the note alienage, to the text of the note and national origin, to the text of the note are inherently suspect and must therefore be subjected to close judicial scrutiny.").

46. The Equal Rights Amendment would not be ratified by Congress until 1972. Proposed Amendment to the United States Constitution, H.R.J. Res. 208, 92d Cong., 2d Sess., 86 Stat. 1523 (1972).

47. Brief of American Civil Liberties Union Amicus Curiae at 11, *Frontiero*, 411 U.S. 677 (No. 71-1694), <https://socialchangenyu.com/wp-content/uploads/2019/06/1971-Frontiero-and-Frontiero-v-Laird-ACLU-Amicus.pdf> [<https://perma.cc/3QBC-4QSS>] (quoting M. Gruber, *Women in American Politics* 4 (1968)).

48. Id. at 12 (quoting 2 Alex de Tocqueville, *Democracy in America* 252 (Henry Reeve trans. 1840)).

Blackstone: “By marriage, the husband and wife are one person in law . . . . [E]ven the disabilities which the wife lies under are for the most part intended for her protection and benefit.”<sup>49</sup>

Grover Cleveland: “[T]he statute books were full of proof of the chivalrous concern of male legislators for the rights of women.”<sup>50</sup>

Henrik Ibsen: “It is an exclusively male society with laws made by men and with prosecutors and judges who assess female conduct from a male standpoint.”<sup>51</sup>

There were more, including Gunnar Myrdal and Alfred Lord Tennyson, as well as an editorial from the *New York Herald*, which described women’s lowly position in society: “[W]omen are] doomed to subjection . . . . [I]t is the law of her nature. The women themselves would not have this law reversed.”<sup>52</sup>

We ended that section of the brief with the “Declaration of Sentiments,” delivered by Elizabeth Cady Stanton in Seneca Falls, New York, in 1848. Modeled after the Declaration of Independence, Stanton wrote and declared at the 1848 Seneca Falls Women’s Rights Convention:

The history of mankind is a history of repeated injuries and usurpations on the part of man toward woman, having in direct object the establishment of an absolute tyranny over her . . . . He has endeavored in every way that he could, to destroy her confidence in her own powers, to lessen her self-respect, and to make her willing to lead a dependent and abject life.<sup>53</sup>

Ruth proceeded to use the Court’s own language in *Bradwell v. Illinois* to show the ignorance of the Justices when they agreed with the state that, because she was a woman, Myra Bradwell had no right to practice law in Illinois.<sup>54</sup> Much to my enormous personal pleasure (and my desire for revenge, still lingering from law school), Ruth cited *Goesaert v. Cleary*, the case challenging the Michigan law that essentially prevented women from

49. *Id.* at 13–15 (quoting 1 William Blackstone, *Commentaries on the Laws of England* 442, 445 (3d ed. 1768)).

50. *Id.* at 15 (citing Grover Cleveland, *Would Woman Suffrage Be Unwise?*, *Ladies’ Home J.*, Oct. 1905, at 7, 7–8, reprinted in *Up from the Pedestal: Selected Writings in the History of American Feminism* 199, 201–02 (Aileen S. Kraditor ed., 1968)).

51. *Id.* at 12 n.8 (quoting Michael Meyer, *Introduction to Henrik Ibsen, A Doll’s House* 9 (Michael Meyer transl. 1965)).

52. *Id.* at 12 (quoting Editorial, *The Woman’s Rights Convention—The Last Act of the Drama*, *N.Y. Herald*, Sept. 12, 1852, reprinted in *Up from the Pedestal: Selected Writings in the History of American Feminism* 189, 190 (Aileen S. Kraditor ed., 1968)).

53. *Id.* at 16 (quoting 1 *History of Woman Suffrage* 70–75 (Elizabeth Cady Stanton, Susan B. Anthony & Matilda Joslyn Gage eds., 1881)).

54. *Id.* at 35–36 (citing *Bradwell v. Illinois*, 83 U.S. 130, 138–39 (1873) (holding that women’s admission to the bar is not protected by the Fourteenth Amendment)).

bartending,<sup>55</sup> stating that “like the classification challenged here, [it] was difficult to construe as a measure intended to assist women ‘in the struggle for subsistence’ or to safeguard women’s competitive position.”<sup>56</sup>

She added that “[i]t was retrogressive in its day and is intolerable a generation later. . . . *Goesaert* was said by the appellant,” wrote Ruth approvingly, “to be ‘an unchivalrous desire of male bartenders to try to monopolize the calling.’”<sup>57</sup>

I had personal experience with the *Goesaert* case. In my constitutional law class during my second year in law school, the eminent professor, Paul Freund,<sup>58</sup> decided to make a joke of the case, approvingly. The Supreme Court had upheld a Michigan law that barred women from working in bars unless their husbands or fathers were present.<sup>59</sup> Not being able to contain myself any longer at the sexism I was experiencing in law school, I stood up and took issue with his approval that women should be so hindered in their attempt to make a living. Freund came right back at me, questioning my support of the women plaintiffs. The entire class began laughing at me, with him. I left that room in tears of rage but also having turned into a radical feminist in that very classroom that day.

In the brief, Ruth then went through a history of the struggle for women’s suffrage, citing not only Elizabeth Cady Stanton, but also Susan B. Anthony and Sojourner Truth, all the way up to the 1963 statement from the President’s Commission on the Status of Women and language from the 1964 Civil Rights Act, as well as the legislative history of the Equal Rights Amendment.<sup>60</sup>

Observing Ruth’s process, I realized that, as with any other kind of writing, the point was to capture the attention of the readers—in this situation, nine relatively old men—and persuade them that our position was the only tenable one, using all the ammunition we had. Writing our amicus brief with Ruth was an extraordinary experience.

After reading the defendant’s reply brief, and presumably after he’d read our amicus brief, we received a call from Joe Levin, one of Sharron

55. *Id.* at 39–41 (citing *Goesaert v. Cleary*, 335 U.S. 464, 465–67 (1948) (upholding the Michigan law on the basis that the classification made by the law was not without a reasonable basis and that, because Michigan did permit women to serve as waitresses where liquor was sold, the law was not unconstitutional)).

56. *Id.* at 39.

57. *Id.* (quoting *Goesaert*, 335 U.S. at 467).

58. Paul Freund taught at Harvard Law School from 1939 to 1976. Eric Pace, Paul A. Freund, Authority on Constitution, Dies at 83, *N.Y. Times* (Feb. 6, 1992), <https://www.nytimes.com/1992/02/06/us/paul-a-freund-authority-on-constitution-dies-at-83.html> (on file with the *Columbia Law Review*).

59. See *supra* note 55 and accompanying text.

60. Brief of American Civil Liberties Union Amicus Curiae, *supra* note 47, at 16–20. For background on the rise of feminism, see generally Lucy Delap, *Feminisms: A Global History* (2020).

Frontiero's lawyers.<sup>61</sup> He wanted to know if the ACLU would be interested in writing a joint reply brief. Ruth jumped at the opportunity. She had wanted the case handled properly all along, so the more control we had the better. But we could not avoid the fact that the main brief for the Frontieros was embarrassingly inferior. Ultimately, their lawyer said he was glad to have our help, but he wanted to argue the case. We knew that he would be unable to argue the case before the court like Ruth could. After some back and forth, I managed to get him to agree that Ruth would have ten of the allotted thirty minutes to present our part of the argument.

As I was collecting cites to various statutes and reporters, all in very big, heavy volumes that I would take with me to the Supreme Court, Ruth was preparing her oral argument, synthesizing both our amicus and reply briefs into a ten-minute argument.

Early on the day of the argument, Ruth, her husband Marty, and I arrived at Court. She and I were escorted to the counsel table, where I stacked up my opened books in the order of the cases Ruth would cite as precedent. Joe Levin, Sharron's lawyer, looked nervous as he seated himself at our table.

The clerk finally called out the familiar "Oyez, oyez, oyez" and then, "the Justices of the Supreme Court."<sup>62</sup> I felt my heart pounding. Here I was, twenty-eight years old, standing before the nine Justices of the Supreme Court as they filed in behind the bench. Once we had settled down, our male colleague went first, unimpressively, but without doing any real damage.

When it was Ruth's turn, she stood and slowly but clearly declared: "May it please the court."<sup>63</sup> She made our arguments brilliantly, pausing for effect, her voice changing to signal a different point or quote. As she spoke, without any fanfare, she gave the cite to each case, adding the year. I felt a bit silly for having put so much time and energy into collecting all the cases with cites available, but I was mesmerized by her performance.

Suddenly, Ruth was concluding her remarks and not a single Justice had asked a question. This was virtually unprecedented. I did not know if we should be worried, but looking at the faces of those nine men, I saw the same fascination in them that I felt. They seemed thrilled to see their craft performed so brilliantly.

The government lawyers tried lamely to defend the federal statute: In their opinion, there was a rational relationship between the difference in the way male and female officers were treated and the rule that had been

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61. Joseph J. Levin, Jr., S. Poverty L. Ctr., <https://www.splcenter.org/about/board-member/joseph-j-levin-jr> [<https://perma.cc/TK9VJAUH>] (last visited Feb. 13, 2021).

62. For a recording of the oral arguments, see *Frontiero v. Richardson*, Oyez, <https://www.oyez.org/cases/1972/71-1694> [<https://perma.cc/B9FU-KBT3>] (last visited Feb 14, 2021).

63. *Id.*

established to define dependency.<sup>64</sup> It was, to them, legitimate. Some of the Justices' questions seemed aimed at getting the government to come up with a better defense of the statute.

Afterwards, Marty, grinning from ear to ear, came up to Ruth and kissed her congratulations. Then he began to explain to her how to take the Shuttle back to New York. He had to stay in Washington, but she and I were more than ready to return home. Ruth looked confused, as though comprehending that task was a bit much after the day's events. Finally, I told him that it was okay; I had flown on the Shuttle many times. He looked relieved. There had been nothing condescending or macho about Marty's concern.

On the way home, I realized that I had been present for what was probably the best oral argument those Justices had ever heard. How could they possibly disagree with a word we'd written, or a sentence Ruth had said. It was then that I became convinced—and, shortly thereafter, told Ruth—that I was sure she'd be the next Democratic appointee to the U.S. Supreme Court. Who knew that it would take twenty years, but my prophecy did become fact.<sup>65</sup>

On May 14, 1973, the Supreme Court issued its decision in the *Frontiero* case.<sup>66</sup> Eight of the nine Justices agreed that the Air Force was wrongly discriminating against female officers by denying benefits to their dependents on the same terms as those offered to the dependent wives of male officers.<sup>67</sup> But only four of the Justices, a plurality led by Justice Brennan, agreed with our argument that sex should be a suspect classification.<sup>68</sup> The extraordinary thing about Brennan's opinion is how liberally he quoted from our brief.<sup>69</sup> Years later, when I met his clerk, the one who had worked on the opinion, I acknowledged our gratitude. Justice Stewart, in an opinion concurring on the merits, simply stated that "sex is an invidious classification."<sup>70</sup> Three Justices, led by Justice Powell, took the approach that because the ERA was out to the states for ratification, the Court should not interfere in what he thought of as a legislative process.<sup>71</sup>

64. *Id.*

65. See Biography of Associate Justice Ruth Bader Ginsburg, Sup. Ct. of the U.S., <https://www.supremecourt.gov/about/biographyGinsburg.aspx> [<https://perma.cc/XAU9-BQ62>] (last visited Feb. 14, 2021).

66. *Frontiero v. Richardson*, 411 U.S. 677 (1973).

67. *Id.* at 690–91.

68. *Id.* at 684–88 (“With these considerations in mind, we can only conclude that classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny.”).

69. *Id.* at 683 nn.10–11.

70. *Id.* at 691.

71. *Id.* at 691–92 (Powell, J., concurring).

And, not surprisingly, Justice Rehnquist took the side of the government.<sup>72</sup> The policy was fine, he thought.<sup>73</sup> Clearly, we would still need the ERA.

In June 1973, Ruth and I received a call from the U.S. Commission on Civil Rights asking if we would be interested in drawing up a list of all the federal statutes that distinguished on the basis of sex. After FBI security checks, we set a date for a meeting in Washington in late July to hammer out the details. What was great about this, in a point missed by many, was the contribution to our new venture: Erwin Griswold's Exhibit E in the tax case three years earlier.<sup>74</sup> He had gone into such detail, listing all the federal laws that would have to be changed if Charles Moritz were to win the right to the \$600 tax deduction.<sup>75</sup> Ruth, now a full professor of law at Columbia Law School,<sup>76</sup> was able to enlist her class in the preparation of our report to the Commission.

When the Supreme Court issued its ruling in *Roe v. Wade*<sup>77</sup> that same year, Ruth had a complicated reaction to it. While she approved of women having choice and control over their bodies, she felt strongly that case should have been decided on equal protection grounds, as she would write years later about the same-sex marriage cases.<sup>78</sup> *Roe v. Wade* was focused on the wrong argument—that restricting access to abortion violated a woman's *privacy*.<sup>79</sup> What she hoped for instead was “a protection of the right to abortion on the basis that restricting it impeded *gender equality*.”<sup>80</sup> The majority opinion in *Roe*, written by Justice Blackmun, instead laid out a careful plan for when during a pregnancy it would be okay to terminate

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72. Id. at 691 (Rehnquist, J., dissenting) (“Mr. Justice Rehnquist dissents for the reasons stated by Judge Rives in his opinion for the District Court, *Frontiero v. Laird*, 341 F. Supp. 201 (1972).”).

73. See *Frontiero*, 341 F. Supp. at 209 (“Having concluded that the statutory scheme on a whole is not one which classifies on the basis of sex[,] . . . we [conclude] that the challenged statutes are not in conflict with the Due Process Clause of the Fifth Amendment and that they are in all respects constitutional.”).

74. Ginsburg, *supra* note 3, at 34.

75. Id.

76. Ruth taught at Columbia Law School from 1972 to 1980, when she was appointed by President Jimmy Carter to the United States Court of Appeals for the District of Columbia Circuit. See In Memoriam: Ruth Bader Ginsburg '59, Colum. L. Sch., <https://www.law.columbia.edu/news/archive/memoriam-ruth-bader-ginsburg-59> [<https://perma.cc/8SXQ-C D49>] (last visited Feb. 14, 2021).

77. 410 U.S. 113 (1973).

78. See *infra* note 140 and accompanying text.

79. *Roe*, 410 U.S. at 152–56 (“We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation.”).

80. Alisha Haridasani Gupta, Why Ruth Bader Ginsburg Wasn't All that Fond of *Roe v. Wade*, N.Y. Times (Sept. 21, 2020), <https://www.nytimes.com/2020/09/21/us/ruth-bader-ginsburg-roe-v-wade.html> (on file with the *Columbia Law Review*) (last updated Oct. 15, 2020).

it.<sup>81</sup> The trimester arrangement the Court laid out<sup>82</sup> smacked too much of legislation to her.

In that same year, 1973, I gained several new clients for our Project whose rights to reproductive control of their own bodies had been infringed. Nial Ruth Cox was a young, Black woman who was living with her mother and eight brothers and sisters in a poor North Carolina neighborhood.<sup>83</sup> Nial Ruth got pregnant and was in the hospital to deliver her baby.<sup>84</sup> When she woke up, she found a bandage on her stomach. Only later, did she find out what had happened. A social worker had come to the house and told Nial Ruth's mother that unless she signed the form being presented to her, the whole family would be thrown off welfare.<sup>85</sup> The mother, who couldn't read or write, put her "X" in the signature space.<sup>86</sup> Nial Ruth was showing me a slip of paper that contained the words "bilateral tubal ligation." Although she wasn't sure what that meant, I confirmed that she had been sterilized.<sup>87</sup> She wanted to sue. We took up her case and involved our affiliate office in the South. The case was filed but when it came onto the calendar, it was thrown out.<sup>88</sup> The statute of limitations had run. Nial Ruth and another client with similar circumstances hadn't filed in time.

Our Supreme Court litigation schedule was taking shape, as well. Ruth was excited about representing Stephen Wiesenfeld.<sup>89</sup> His wife had died in childbirth, leaving him with an infant son.<sup>90</sup> Wiesenfeld was challenging the Social Security Act's grant of survivors' benefits to widows but not to widowers, highlighting the double-edged-sword approach that Ruth was now taking.<sup>91</sup> Not only was the father harmed, but the mother's earnings were also devalued by not generating equal survivors' benefits for her spouse.<sup>92</sup> A unanimous Court agreed, concluding that since the statute's intent was to enable a parent to remain at home to care for a child, "the

81. *Roe*, 410 U.S. at 163–66.

82. *Id.*

83. *Cox v. Stanton*, 381 F. Supp. 349, 351 (E.D.N.C. 1974).

84. *Id.*

85. *Id.*

86. *See id.*

87. *Id.*

88. *Id.* at 352–55. The case was appealed to the United States Court of Appeals for the Fourth Circuit where a three-judge review panel found that the district court incorrectly applied the statute of limitations, yet because the challenged statute had been repealed the claim was moot. *See Cox v. Stanton*, 529 F.2d 47, 48–49 (4th Cir. 1975).

89. *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975).

90. *Id.* at 639.

91. *See id.* at 639–42 ("He sought declaration that § 402(g) is unconstitutional to the extent that men and women are treated differently, an injunction restraining appellant from denying benefits under § 402(g) solely on the basis of sex, and payment of past benefits commencing in June 1972, the month of the original application.").

92. *See id.* at 645.

gender-based distinction of [the Act] was entirely irrational.”<sup>93</sup> Wiesenfeld was Ruth’s second Supreme Court argument.<sup>94</sup>

Several years later, the Court ruled unconstitutional an Oklahoma statute allowing young women to purchase 3.2% beer at age eighteen but required young men to wait until they were twenty-one.<sup>95</sup> In that case a three-judge panel agreed with the state, concluding “that the classification” had a “fair and substantial relation to apparent objectives of the legislation.”<sup>96</sup> Ruth’s amicus brief for the ACLU focused on the kinds of outdated male-female stereotypes this case represented. And Justice Brennan, writing for the Court, determined that the classification at issue was not *substantially related* to an *important state interest*.<sup>97</sup>

So now the Court had established a new, intermediate standard of scrutiny for gender-based equal protection claims,<sup>98</sup> the heightened scrutiny that Ruth had been urging, as a fallback from the highest level we asked for in the *Frontiero* case.<sup>99</sup> That intermediate standard prevailed in sex discrimination cases until Justice Ruth Bader Ginsburg, three years after her appointment to the Court, raised it even more.

Exactly two decades after the *Frontiero* case, Ruth took her seat on the Supreme Court. I spoke with her shortly afterward at the celebration of the fortieth anniversary of the first class of women to graduate from Harvard Law School. She happily told me that her three-year-old granddaughter would be celebrating her birthday the next day in the Supreme Court rotunda. And then she said that Justice O’Connor had already asked her to join in an early morning gym class. She paused and I interrupted, “But Ruth, you can’t do that. You should start your own class at 4:30 in the afternoon.” Ruth, like me, was a night owl. Early morning get-togethers just don’t work. I learned later, in the Emmy-winning, Oscar-nominated documentary, *RBC*, that Ruth had opted for a personal trainer, who encouraged her through weekly workouts for the rest of her life.

Three years later, in 1996, although still a junior Justice but given the assignment by her more senior colleague, Justice O’Connor, Ruth, welcoming the opportunity, wrote the majority opinion in the Virginia

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93. *Id.* at 651.

94. See Ruth Bader Ginsburg, Oyez, [https://www.oyez.org/justices/ruth\\_bader\\_ginsburg](https://www.oyez.org/justices/ruth_bader_ginsburg) [<https://perma.cc/GV2N-4TN5>] (last visited Feb. 12, 2021) (providing the audio recordings of each of the cases for which Ruth argued in front of the Supreme Court). Prior to arguing *Weinberger v. Wiesenfeld*, she argued for the appellee in *Kahn v. Shevin*, 416 U.S. 351 (1974), and made an appearance on behalf of the ACLU, amicus curiae, by special leave of the court in *Frontiero v. Richardson*, 411 U.S. 677 (1973). Ruth Bader Ginsburg, *supra*.

95. *Walker v. Hall*, 399 F. Supp. 1304, 1311–13 (W.D. Okla. 1975).

96. *Id.* at 1306, 1311.

97. *Craig v. Boren*, 429 U.S. 190, 197, 204 (1976).

98. *Id.*

99. See *supra* note 45 and accompanying text.

Military Institute (VMI) case.<sup>100</sup> Now the Court would definitively establish that there would have to be an *exceedingly persuasive justification* for any distinction based on sex to remain on the books.<sup>101</sup> VMI was a military academy that admitted only men.<sup>102</sup> There was another school nearby that had been established for young women who also wanted to join the military, but it was far inferior as an educational institution.<sup>103</sup> Ruth, relying on the theory that separate is not equal, dismissed the argument that women were offered the same opportunity as what was afforded young men.<sup>104</sup> VMI, she wrote, would have to integrate.<sup>105</sup> A few years later, it brought tears to my eyes to watch on television the first class of women to graduate.<sup>106</sup> It brought even more tears to witness years later their applause for Ruth during a speech that was shown in *RBG*.<sup>107</sup> As she has said, she personally would not have wanted to attend a military academy but there are women who very much do, and they must benefit, equally with men, from the same state-sponsored school.<sup>108</sup>

Much of the attention Justice Ginsburg received after the VMI case came from the burning dissents she wrote. About ten years after VMI, the Supreme Court decided *Gonzales v. Carhart*,<sup>109</sup> another 5-4 case, to uphold Congress's Partial-Birth Abortion Ban Act of 2003, which outlawed a late-term abortion procedure.<sup>110</sup> Justice Anthony Kennedy, who would go on to become a hero of liberals for his decisions upholding the rights of gays

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

101. *Id.* at 523–24 (“[A] party seeking to uphold government action based on sex must establish an ‘exceedingly persuasive justification’ for the classification. . . . [T]he defender of the challenged action must show . . . ‘the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.’” (citing *Missing Univ. for Women v. Hogan*, 468 U.S. 718, 724 (1982))).

102. *Id.* at 520.

103. See *id.* at 526–30, 540–58 (comparing the parallel program available at Virginia Women’s Institute for Leadership (VWIL) and finding that “[i]n myriad respects other than military training, VWIL does not qualify as VMI’s equal”).

104. *Id.*

105. *Id.* at 558 (“There is no reason to believe that the admission of women capable of all the activities required of VMI cadets would destroy the Institute rather than enhance its capacity to serve the ‘more perfect Union.’”).

106. Michael Janofsky, *Military College Awaits Its First Female Cadets*, N.Y. Times (Jul. 20, 1997), <https://www.nytimes.com/1997/07/20/us/military-college-awaits-its-first-female-cadets.html> (on file with the *Columbia Law Review*).

107. *RBG* (CNN Films 2018); see also *A Statement on the Passing of Justice Ruth Bader Ginsburg, VMI*, <https://www.vmi.edu/news/headlines/2020-2021/a-statement-on-the-passing-of-justice-ruth-bader-ginsburg.php> [<https://perma.cc/ZAD7-JYRB>] (last visited Feb. 14, 2021).

108. *RBG*, *supra* note 107.

109. 550 U.S. 124 (2007).

110. 18 U.S.C.S. § 1531 (2003).

and lesbians,<sup>111</sup> wrote the majority opinion.<sup>112</sup> In her dissent, Ginsburg wrote that the majority ruling

tolerates, indeed applauds, federal intervention to ban nationwide a procedure found necessary and proper in certain cases by the American College of Obstetricians and Gynecologists . . . . In candor, the Act, and the Court's defense of it, cannot be understood as anything other than an effort to chip away at a right declared again and again by this Court—and with increasing comprehension of its centrality to women's lives.<sup>113</sup>

She added that the Court

deprives women of the right to make an autonomous choice, even at the expense of their safety. This way of thinking reflects ancient notions about women's place in the family and under the Constitution—ideas that have long since been discredited.<sup>114</sup>

I add to this conversation the obvious point that no woman would choose this procedure unless her health were at risk!

Six years later, in 2013, came the voting rights case, *Shelby County v. Holder*.<sup>115</sup> In perhaps Ginsburg's most famous dissent she criticized Chief Justice John Roberts's 5-4 ruling that struck down a key section of the Voting Rights Act, freeing mostly Southern states from having to clear voting changes with the federal government.<sup>116</sup> In finding the Act unconstitutional and ending the preclearance requirement for the covered states and counties, Chief Justice Roberts wrote for the majority that the "blight of racial discrimination in voting" that had "infected the electoral process in parts of our country for nearly a century," and which the Act was designed to address, had been ameliorated by 2013.<sup>117</sup>

Justice Ginsburg disagreed completely: "The sad irony of today's decision lies in [the Court's] utter failure to grasp why the [law] has proven effective."<sup>118</sup> She added, "Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet."<sup>119</sup> It was this dissent in the *Shelby* case that established Justice Ruth

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111. See generally Russell K. Robinson, *Unequal Protection*, 68 *Stan. L. Rev.* 151 (2016) (analyzing Justice Kennedy's treatment of equal protection claims based on sexual orientation).

112. *Gonzales*, 550 U.S. at 132.

113. *Id.* at 170–71, 191.

114. *Id.* at 184–85.

115. 570 U.S. 529 (2013).

116. *Id.* at 559–94 (Ginsburg, J., dissenting).

117. *Id.* at 530 (majority opinion) (citing *South Carolina v. Katzenbach*, 393 U.S. 301, 308 (1996)).

118. *Id.* at 592 (Ginsburg, J., dissenting).

119. *Id.* at 590.

Bader Ginsburg as a world-wide icon,<sup>120</sup> leading to the “Notorious RBG” moniker that turned into a celebration of her legal career and legacy.<sup>121</sup>

The next year, in 2014, the Supreme Court ruled, in *Burwell v. Hobby Lobby Stores, Inc.*, that certain for-profit companies cannot be required by the government to pay for specific types of contraceptives, such as methods of birth control and emergency contraception, for their employees.<sup>122</sup> In her dissent, Justice Ginsburg wrote that the Court had “ventured into a minefield,” adding it would disadvantage those employees “who do not share their employer’s faith . . . . Any decision to use contraceptives made by a woman . . . will be the woman’s autonomous choice, informed by the physician she consults.”<sup>123</sup> Justice Ginsburg also mentioned the cost barrier that many women face in attempting to gain access to different kinds of birth control.<sup>124</sup> “It bears note in this regard that the cost of an IUD is nearly equivalent to a month’s full-time pay for workers earning the minimum wage . . . .”<sup>125</sup> Finally, in this dissent written six years before her death, Justice Ginsburg called the majority opinion in the *Hobby Lobby* case a “minefield,” giving corporations the right to exert their religion on women employees who needed birth control.<sup>126</sup> In a conversation that was published in the *Minnesota Law Review*, she said: “There is a sect that believes women should be subservient to men, in particular, a woman should not work without . . . her husband’s permission. Must there be an exemption from Title VII for an employer who holds that belief?”<sup>127</sup> I wonder if this will become an issue for the present Court.

In a 2020 case in which the Justices struck down the Affordable Care Act’s contraceptive mandate,<sup>128</sup> Ginsburg upbraided the Court for “[leaving] women workers to fend for themselves.”<sup>129</sup> This time, the Court cleared the way for the Trump Administration to expand exemptions for employers

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120. Joyce White Vance, *Ruth Bader Ginsburg Lost Her Battle to Save Voting Rights. Here’s How We Can Take Up the Fight and Honor Her Legacy*, *Time* (Sept. 21, 2020), <https://time.com/5890983/ruth-bader-ginsburg-voting-rights> [<https://perma.cc/X66V-GMSJ>].

121. Lauren Kelly, *How Ruth Bader Ginsburg Became the ‘Notorious RBG’*, *Rolling Stone* (Oct. 27, 2015), <https://www.rollingstone.com/culture/culture-features/how-ruth-bader-ginsburg-became-the-notorious-rbg-50388> [<https://perma.cc/38L6-39WG>].

122. 573 U.S. 682, 730–31, 736 (2014) (finding that “[t]he contraceptive mandate, as applied to closely held corporations, violates the [Religious Freedom Restoration Act]”).

123. *Id.* at 771–72, 760–61, 765 (Ginsburg, J., dissenting).

124. *Id.* at 762.

125. *Id.*

126. *Id.* at 771–72.

127. *A Conversation Between Justice Ruth Bader Ginsburg and Professor Robert A. Stein*, 99 *Minn. L. Rev.* 1, 14 (2014).

128. *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2372–73 (2020).

129. *Id.* at 2400 (Ginsburg, J., dissenting).

who have religious or moral objections to complying with the Affordable Care Act's contraceptive mandate. And Ginsburg said:

Today, for the first time, the Court casts totally aside countervailing rights and interests in its zeal to secure religious rights to the nth degree . . . . [T]his Court leaves women workers to fend for themselves, to seek contraceptive coverage from sources other than their employer's insurer, and, absent another available source of funding, to pay for contraceptive services out of their own pockets.<sup>130</sup>

She added that the government had acknowledged that the rules would cause thousands of women—"between 70,500 and 126,400 women"—to lose coverage.<sup>131</sup>

The precision of her observation about the effect of the Court's ruling on women's access to contraception shows the extraordinary care and detail Ruth used to make her arguments. I have been indelibly influenced by that. My own days were spent further arguing for passage of the ERA and standing up to Phyllis Schlafly and her cohorts, as well as talking with new potential clients. As a result, I have been better prepared for some of the crazy attacks on the truth by the far right today, preparation I also likely gained by watching Ruth in action. While we have made enormous progress in this country, fighting for women's rights and gender equality, we have learned to be on guard for more incursions into our rights. My work in the area of involuntary sterilization, as a director and advocate in the Women's Rights Project, led me to a greater understanding of the nexus between women's rights and racial injustice. For if low-income women and women of color are treated badly, so are the rest of us; the stereotype—and the actuality—of women as victims of the powers that be will continue.

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My experience working as an advocate alongside Justice Ginsburg afforded me an opportunity to watch an appellate litigator at the top of her field. While I soon realized I would not spend my own life as she had hers pouring through Supreme Court opinions (and eventually writing the best of them)—that I wanted a more active life for myself and the battles I saw ahead—it's clear that without Ruth we would not be accorded the level of scrutiny that is applied today in sex discrimination cases. The equality she achieved for women—under the Equal Protection and Due Process Clauses—is the launch pad off which all other demands we make must begin. I fully expect the present Supreme Court to honor the progress we started and continue to realize in all matters related to sex and gender discrimination.

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130. *Id.*

131. *Id.* at 2401.

My personal fight has long been for women in all strata of society to gain power, as well as equality, in relation to men. Ruth was determined that the Court's actions lead to the elimination of sex and gender stereotypes. I believe our demands must include women gaining actual equal power with men—in all professions and industries and in life, in general. One of the areas Ruth and I tackled was women in sports. In fact, I wrote the cover story for *Ms. Magazine* in the July 1973 issue that homed in on how differently women's professional sports were treated, how professional tennis players like Billie Jean King were paid a pittance in comparison to their male counterparts, but then how that changed with their gaining advertising momentum that then led to much larger paychecks.<sup>132</sup> The fact that Billie Jean beat Bobby Riggs in the famous 1973 tennis battle helped.<sup>133</sup> The Women's Rights Project also had a young high school client who insisted on having access to the same athletic benefits as the boys in her school. And of course, the involuntary sterilization cases had alerted me to how much damage the power imbalance has affected the most abused and disadvantaged people in our country.<sup>134</sup>

I am a feminist. I use the word “feminist” to define people of whatever gender who incorporate into their priorities the elimination of discrimination based on sex, race, class, age, and ableism, as well as a desire to protect the environment and ensure the right of every American citizen to vote. These issues may not necessarily be best confronted in litigation, but they are necessary priorities for feminists and those who join the fight for justice. My injunction to anyone who feels or sees injustice: Take it on now; don't wait for the perfect moment or for others to join you. As Representative John Lewis would say: “Get in good trouble!”<sup>135</sup>

Ruth was always cordial even to people with whose views she took issue. But as I announced in a session during my 50th Harvard Law School reunion, there is no moral equivalence between, for example, what Ruth and I were asking from the Court on behalf of petitioners who wanted simple justice and the kind of remarks uttered by some of the most conservative Justices who, as I've noted above, often sneered at our

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132. Brenda Feigen, Giving Women a Sporting Chance, *Ms. Magazine*, July 1973, at 56–58.

133. See Jesse Greenspan, ‘Battle of the Sexes’: When Billie Beat Bobby, *History* (Sept. 20, 2013), <https://www.history.com/news/billie-jean-king-wins-the-battle-of-the-sexes-40-years-ago> [<https://perma.cc/2F6H-F5MZ>] (last updated Feb. 22, 2021).

134. In launching many battles in recent years, I've worked alongside trial lawyers to address inequities and other power imbalances on behalf of pregnant and lactating dockworkers, stuntwomen (whose roles were being impersonated by men), school teachers, and Teamster women.

135. Joshua Bote, ‘Get in Good Trouble, Necessary Trouble’: Rep. John Lewis in His Own Words, *USA Today* (July 18, 2020), <https://www.usatoday.com/story/news/politics/2020/07/18/rep-john-lewis-most-memorable-quotes-get-good-trouble/5464148002> [<https://perma.cc/QC5C-2LGA>] (last updated July 19, 2020).

demand for equal rights. In *Lawrence v. Texas*,<sup>136</sup> for example, Justice Scalia ruled the effect of the Court's ruling in favor of decriminalizing same-sex sex, comparing laws against it to those he approved that outlawed "bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity."<sup>137</sup> His prediction that same-sex marriage prohibitions would fall was on target but, to my knowledge, all the others have remained. His narrow-minded views did not prevent Ruth from maintaining a friendship with him. I doubt I would have been able to do so, just as I would not count as a friend anyone I considered to be a racist.

In the years since we worked together, I visited Ruth a number of times when I was in D.C. and was one of her guests for some very important oral arguments. During the hearing for the Defense of Marriage Act case,<sup>138</sup> I was sitting in the Gallery and could only barely hear when, sotto voce, she murmured that the government wanted to perpetuate the "skim milk marriages" (i.e., domestic partnerships) forced on gays and lesbians who had wanted to commit before then. Justice Kennedy's opinion showed that she prevailed.<sup>139</sup>

On July 9, 2013, in answer to my query about whether she was taking a vacation, she wrote:

"Dear Brenda:

Yes, I have some holidays in store. I will be in Paris when you receive.

DOMA's defeat is cause for celebration, but other last week decisions were unsettling. Enclosing bench announcements of my dissents.

Wishing you tranquil summer days.

Ruth"

In one of my later visits to the Court, Ruth proudly told me that she was delighted she had persuaded Justice "Tony" Kennedy to include an equal protection section in the marriage cases, so same-sex couples would be entitled to get married and be treated exactly the same way opposite sex couples do.<sup>140</sup>

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136. 539 U.S. 558 (2003).

137. *Id.* at 591, 599.

138. *United States v. Windsor*, 570 U.S. 744 (2013).

139. See *id.* at 746 ("This is strong evidence of a law having the purpose and effect of disapproval of a class recognized and protected by state law. . . . [DOMA imposes] a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages . . .").

140. *Obergefell v. Hodges*, 576 U.S. 644, 672–76 (2015) ("[T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.").

After the same-sex marriage decision, Ruth sent me a copy of her words for the marriage ceremony she officiated. In her note, dated January 14, 2014, she said in part:

“Dear Brenda:

Good to hear from you.

I have now performed four same-sex marriage ceremonies. Enclosing script from the first, and a Stanford Magazine. Interviewer Liz Magill is Dean there, and a former law clerk some years back.

Love to you, Ruth”

In addition to the script from the first same-sex marriage she officiated, Ruth gave me books to which she had contributed, as well as some of her favorite opinions, including the above-mentioned from-the-bench dissents that she penned—and also a book of Marty’s favorite recipes. (Marty had become a world-class cook!)

It is amazing to have known this woman with whom I did such important work, and whose intellect I so admired. I miss her. And the people of our country will continue to miss her wisdom and her advocacy for women and equal justice for all.

