

BOOK EXCERPT: SISTERS IN LAW: HOW SANDRA DAY O’CONNOR AND RUTH BADER GINSBURG WENT TO THE SUPREME COURT AND CHANGED THE WORLD

LINDA HIRSHMAN[∞]

This is an excerpt from the new book by Linda Hirshman, “Sisters in Law: How Sandra Day O’Connor and Ruth Bader Ginsburg Went to the Supreme Court and Changed the World.”

How did they do it? First, they were lawyers. They did not lead a social movement in the conventional sense, marching and sitting in. O’Connor’s only formal “feminist” affiliation was with the exceedingly mainstream Associations of Women Judges. Ginsburg, the Thurgood Marshall of the women’s movement, was not a conventional movement activist either. She was nowhere to be seen in the legendary Women’s Strike for Equality in 1970 or, indeed, marching for anything. When she spoke or wrote, it was almost always in a professional context—women judges, women lawyers, the bar association, law school events, essays in law reviews. Ironically, toward the end of her life, she became an icon on that most populist of mediums, the Internet.

They chose to become lawyers when there was not even a whisper of a women’s legal movement, but their choice of career placed them perfectly to make a social revolution through the law when the opportunity arose. Social revolution through law is a particularly American phenomenon. As the preeminent commentator on American democracy, Alexis de Tocqueville, put it two centuries ago, “Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.” Since the Civil War, most American social movements have relied on the potent equality-enforcing constitutional amendments passed in the wake of that engagement. In the 1940s and ’50s the lawyer (later Justice) Thurgood Marshall had led the most successful such initiative—using the Civil War amendments to enforce racial equality through the courts. When Congress passed the Civil Rights Act in 1964, the racial legal movement gained another arrow for its quiver. All succeeding legal movements to

[∞] Linda Hirshman is a lawyer and cultural historian, and the author of *Sisters in Law: How Sandra Day O’Connor and Ruth Bader Ginsburg Went to the Supreme Court and Changed the World*, *Victory: The Triumphant Gay Revolution*, and many other books. She received her J.D. from the University of Chicago Law School and her Ph.D. in philosophy from the University of Illinois at Chicago, and she has taught philosophy and women’s studies at Brandeis University. Her writing has appeared in the *New York Times*, *The Washington Post*, *Slate*, *Newsweek*, *The Daily Beast*, and *POLITICO*. Copyright © 2015 by Linda Hirshman. Reprinted with permission from Harper, an imprint of HarperCollins Publishers.

some extent emulated Marshall's strategy of social change through legal revolution.

Both O'Connor and Ginsburg were part of the American elite—they went to Stanford and Harvard and Columbia Law Schools. Unlike mass social movements, legal social change movements are heavily top-down. They invoke the most unrepresentative institutions, the courts, often the life-tenured federal courts, and they are carried out by people, like both the women justices, of a rarefied mind-set and privileged social class.

When O'Connor and Ginsburg emerged from their private worlds of practice and teaching onto the public stage in the early 1970s, the women's movement was actively moving to become the next legal social movement. The Civil Rights Act of 1964, passed in the wake of the racial social movement, also barred discrimination on the basis of sex, and women's movement lawyers were starting to bring cases under it. The resurgent women's movement even revived an old project from the 1920s. Right after women won the vote in 1920, the most radical of the suffrage leaders, Alice Paul, proposed an Equal Rights Amendment for women as the only way to attack the whole web of discriminatory laws at once. Despite Paul's half century of effort, the ERA had gone nowhere. Then, in the heady days of the 1970s, anything seemed possible.

The two rose to be leaders in the movement, at first Ginsburg directly and O'Connor by example. When a moment is ripe for legal social change, there are often many lawyers who would like to lead it. Only some ascend to positions of power, and only some who ascend lead the movement itself to success. These two did ascend and did succeed. Ginsburg was a self-conscious legal movement leader. From 1972 to 1980, she ran the preeminent women's legal group, the Women's Rights Project of the American Civil Liberties Union, and she taught courses in women's rights at Columbia. Even after she became a federal judge in 1980, she continued to speak and write on women's rights. During those years, Justice O'Connor advanced women's equality in politics, although without embracing the women's movement formally as Ginsburg had. After O'Connor was selected for the Supreme Court in 1981, however, she became the most famous symbol of a lived feminist existence on the planet. And she was the owner of a precious vote on every Supreme Court decision on women's rights, starting with the crucial fifth vote in *Hogan v. Mississippi* in 1982. In 1993, Ginsburg joined her at the pinnacle of power. In the years following O'Connor's retirement in 2006, when the conservative Court turned its back on women's rights, Ginsburg, the eighty-something feminist, became the icon of resistance to the backlash.

Neither their ascent nor their leadership was an accident. They succeeded because they had "what it takes." Together, their differences made them stronger by giving them a wider reach. Starting at least as early as the election of Ronald Reagan in 1980, the country was increasingly divided to the core between Republican conservatism and Democratic liberalism. O'Connor, the youthful Republican campaign worker and sociable president of the Phoenix Junior League,

who announced at speaking engagements in the '70s that she had "come with her bra and her wedding ring," covered one part of the political and social spectrum. Ginsburg, the youthful ACLU lawyer and introverted law professor, whose mild manner disguised her laserlike legal mind, brought different strengths and constituencies, including her highly connected and devoted husband, Martin Ginsburg. When the Democrats briefly held the Congress after retaking the White House in 1992, it was the liberals' turn to appoint a woman. It's hard to imagine Ruth Bader Ginsburg having much in common with Ronald Reagan. It's hard to imagine Sandra Day O'Connor swapping life stories with Bill Clinton. Each one was better off for the other being there.

Helpful as their superficial differences were, in their strengths they were actually a lot alike. Each possessed a firm belief that she was naturally and by virtue of her talents entitled to run the show. Expressing her comfort in her success as a legislator, O'Connor always said she never had a moment's trouble on the job once the gatekeepers got past their aversion to women and let her in to govern. The governing class was where she belonged and she calmly set about acting as if she was totally entitled to be there. When one of Ginsburg's female faculty colleagues wound up with a big Washington job shortly after Ginsburg went to the Court in 1993, she asked her pal Ruth if she could believe the two of them were in such high places. Actually, Ruth said, she had no trouble at all believing it.

Where did this extraordinarily rare degree of self-confidence come from? The critical moment of any social movement comes when someone who can think outside the box figures out that other people, rather than, say, nature, or even nature's God, are the source of their oppression. O'Connor and Ginsburg each figured that out. If they had internalized the low opinion of the people around them, Justice O'Connor might have been a legal secretary, and Justice Ginsburg might have learned to cook, instead of being the heroines of the feminist movement. O'Connor's father was an intellectual, trapped on an isolated ranch by family obligations. Domineering and opinionated, Harry Day used to spend hours talking politics with his firstborn child. During her critical early years, there simply was no society to teach her her place. After the tragic early death of an older sister, Ginsburg *was* the only child of a gifted woman, who had seen her brother go off to college while she stayed home. All her first-generation immigrant dreams rested on her bookish, beautiful daughter.

Believing they were entitled to rule, O'Connor and Ginsburg treated their opponents—from conservative Republican legislators who served with O'Connor in the Arizona Senate in the '70s to snarky titans of all-male law school faculties when Ginsburg was teaching—as if they were all members of the same club. Reminiscing about the famed jurist Learned Hand, who had refused to hire her when she graduated in 1957, Ginsburg, years later, was fulsome in her praise. Completely ignoring his blind spot on the subject of women, she wrote only about what a great jurist he was. This is not a matter of the oppressed identifying with their masters. In praising him, she sets herself up as someone whose opinion

matters in the elite circles where they both, she assumes, belong. The lawyer who offered to give O'Connor a hand when she became the first woman at the Arizona attorney general's office later remembered embarrassedly how little she needed his assistance! She had no problem with the task of being an assistant attorney general in Arizona at all.

When pressed to admit they were inferior, they took offense. In 1952, the law firm of Gibson, Dunn & Crutcher interviewed a young Sandra Day fresh out of Stanford Law School and suggested she might find employment with them as a legal secretary. After all, they would never hire a woman lawyer. Three decades later, O'Connor, now Justice O'Connor, gave a wicked get-even Speech at the firm's hundredth-anniversary celebration, a speech she called the most fun talk she'd ever delivered. Ginsburg so often told the story of the law school dean asking her what she was doing taking a seat at Harvard from a deserving man that the dean finally went public asserting it had been a *joke*.

But self-esteem is not enough to change the world. If the two had thought that they were the only women worthy of governing, they would have been useless to the movement. They might even have been harmful, like oppressed people who gain access to power and then pull the ladder up after them. Instead, the two jurists' clarity about their rightful place among the legal elite actually enabled them to see the injustice of women's inequality in general. If Gibson, Dunn had no business relegating O'Connor to the job of secretary because of her sex, why would they be any more justified in turning down another woman?

Where did this combination of self-respect and regard for others come from? In addition to their unique family histories, they sprang from cultures of empowerment. O'Connor came from an open western culture that placed a high value on volunteering. Frontier communities such as the American West had no manpower to waste. This unique culture allowed women a robust public role despite their exclusion from high-level formal employment. In institutions such as the Junior League and museum boards that fell from favor after feminism opened paid jobs to women, the women in O'Connor's world demonstrated their worth to anyone who was noticing. And O'Connor was noticing. She once said that she went back to practicing law after a few years of tending to her family in order to get some respite from the demands of the Junior League! Her reliance on voluntarism was a constant theme in her life, public as well as private.

Ginsburg came of age in the early years of the liberal revival. At college, she was the protégée and research assistant of a legendary liberal, Robert Cushman. Her professors at Cornell, like the men who taught her at Harvard, recognized at once that her talents entitled her to claim the goods of liberalism—equality, self-fulfillment—and they advocated for her tirelessly. By the time Ginsburg got her law degree in 1959, the dam was about to break in American culture. It would be the '60s. When the time came, both O'Connor and Ginsburg were prepared by their upbringing and culture to see the injustice of women's inequality.

Not only did O'Connor and Ginsburg recognize that they and other women were being treated unjustly, they recognized that a lot of the problem and, therefore, the solution, lay with the legal system. The laws of all fifty states (and the federal government) treated women and men differently. Inequality was such a given at the time that it demanded a profound clarity of vision for women to figure out that it was wrong. The two arrived at this similar insight by somewhat different paths. O'Connor had been inspired to study law by a desire to make a difference, any difference. Since she was very capable of recognizing her own value, laws treating women differently from men struck her as unjust immediately. Ginsburg came to law with a clear liberal legal agenda. One of the touchstones of American liberalism is that the Constitution exists to protect people against an unjust state. Liberalism suited her perfectly for her future role as a crusading lawyer. Of course, neither O'Connor nor Ginsburg graduated law school with a visible commitment to the then nonexistent women's movement. Their deep commitments to making a difference and to equality, however, predisposed them to be useful when the movement came.

They also shared a capacity to take their revenge, cold. After her new colleague Justice William Brennan insulted Justice O'Connor in an over-the-top dissent during her first year on the Court in 1981, he found her mysteriously immune to his vaunted political charms, charms he used to get the five votes he needed on the nine-justice court. She never *said* anything. But he called his dissent "the worst mistake I ever made." When, at the beginning of her activism in 1970, Ginsburg was trying to get a piece of the action in the first women's Supreme Court case of the new era, *Reed v. Reed*, her contact at the ACLU, Mel Wulf, did not respond enthusiastically to her offers to help. So she and her husband reached out to other contacts at the ACLU who were more excited about her talents. Ginsburg and Wulf appear together on many briefs in women's rights cases after she came to the ACLU in 1972. But six years later, when he was ousted from his staff job as legal director in an internecine battle, Ginsburg, by then one of four powerful ACLU general counsel, "didn't say a word," he says, to save him.

When they could not get even, they would act as if they were not mad at all. As Ginsburg often told her avid audiences, on the eve of her wedding, her mother-in-law bequeathed her a pair of earplugs and shared the secret of a good marriage: "sometimes you have to be a little deaf." The liberal Justice Ginsburg's decades-long odd-couple friendship with her ultraconservative colleague Justice Antonin Scalia is famous. Less well known is that for years after she became the lead litigator for women's equality she corresponded in the friendliest tones with the legendary antifeminist University of Chicago law professor Philip Kurland. O'Connor was a visible supporter of the women's Equal Rights Amendment, yet she maintained a lifelong friendship with the conservative Barry Goldwater, an early and vocal opponent. Perhaps their firm belief that they were natural members of the formerly all-male elite explains why they could turn a deaf ear to powerful colleagues who were making life so much worse for women. After years of

correspondence, when Ginsburg wanted Professor Kurland to help her daughter, then a student at the University of Chicago, she simply wrote him an adorable note describing her daughter's merit, just as men in power have always done. When anti-abortion activists tried to keep O'Connor off the Court in 1981, Barry Goldwater, still powerful, announced that anyone who opposed her should be spanked. It pays, sometimes, to be a little deaf.

Like all disempowered individuals, women tend to be viewed generically. When Ginsburg was appointed to the Supreme Court in 1993, the National Association of Women Judges had a party. They gave each of the two women on the Supreme Court a T-shirt. Justice O'Connor's said, "I'm Sandra, not Ruth." Ginsburg's said, "I'm Ruth, not Sandra." Sure enough, every term for years after Ruth's appointment, some hapless lawyer called them by the wrong name. But although they were similar, they were not generic. Similar and different, once acquainted (they met shortly after O'Connor was appointed) they formed a productive relationship. From her appointment in 1981 until right after Ginsburg joined her, O'Connor took more law clerks from Ginsburg's D.C. Circuit chambers than any other source. Neither bosom buddies nor mean girl competitors, as the moment of acknowledgment in the VMI decision perfectly reflects, the two justices hit the sweet spot of affectionate alliance. For anyone who aspires to lead a social movement, their relationship alone is an inspiration.

Barriers didn't stop them, mockery didn't faze them. While researching this book in the Arizona state archives, I was approached by one of the librarians. She wanted me to know that she had gone on a field trip with Justice Sandra Day O'Connor years before. A lawyer was writing an article about a historic case that originated in Arizona mining country, and he was leading an expedition to the sites where the dispute arose. By chance Justice O'Connor was in Phoenix, where she maintained a home. When she heard that one of her pals, an Arizona State Supreme Court justice, was going on the trip, she decided to go, too. As the vans rumbled across the high desert en route to lunch at a local ranch, they came to a gully that was running with floodwater too deep to cross. They were marooned for several hours. The situation worsened rapidly when Justice O'Connor revealed that she had to pee. As the organizers sat looking stunned and helpless, the justice clambered out of the van.

"Don't worry about me," she told the assembled barristers. "I'll just find a mesquite bush to go behind." Seeing their reaction, she added, "I grew up on a ranch!" And so she did. "I'll never forget it," said the archivist, "a justice of the Supreme Court of the United States dropping trou behind a mesquite tree."

When Ginsburg was nominated to the Supreme Court in 1993, someone sent her a fax relating that one of her old law school classmates told a meeting of his Rotary Club that the guys in her law school class used to call her by the nickname "Bitch." "Better bitch," Ginsburg responded, looking back on her journey from the derisive Harvard Law School scene to the highest court in the land, "than mouse."