

RUTH BADER GINSBURG AND THE DEVELOPMENT OF GENDER EQUALITY JURISPRUDENCE UNDER THE FOURTEENTH AMENDMENT

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During the 1970s, while state legislators were debating ratification of the Equal Rights Amendment (“ERA”) and the second wave women’s movement was in full swing, constitutional lawyers were engaged in a parallel process to establish equal rights for women under the Fourteenth Amendment through the courts. As the current director of the ACLU Women’s Rights Project—following in the footsteps of Women’s Rights Project founder and first director Ruth Bader Ginsburg—I will discuss some of the major cases Ginsburg litigated to establish this constitutional protection.

The ACLU Women’s Rights Project was started by Ruth Bader Ginsburg in 1972.¹ The prior year, she had written a brief on behalf of the ACLU in *Reed v. Reed*, the first case in which the Supreme Court held that the Fourteenth Amendment prohibits discrimination on the basis of sex, as well as discrimination on the basis of race and other protected categories.² The case challenged an Idaho law that provided that when a father and mother of a deceased person both sought appointment as administrator of the child’s estate, the man had to be selected over the woman.³ Young Richard Reed had died without a will, and both of his divorced parents, Sally and Cecil Reed, sought to be appointed as administrator of their son’s estate.⁴ The Idaho court, relying on the statute, chose Cecil.⁵ The Supreme Court reversed,

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¹ JANE SHERRON DE HART, *RUTH BADER GINSBURG: A LIFE* 133–34, 160–63 (2018).

² *Reed v. Reed*, 404 U.S. 71 (1971); *see also, e.g.*, *United States v. Virginia*, 518 U.S. 515, 531–32 (1996) (Ginsburg, J.) (explaining that *Reed* was “the first time in our Nation’s history” the Supreme Court had “ruled in favor of a woman who complained that her State had denied her the equal protection of its laws”).

³ *Reed*, 404 U.S. at 72–73.

⁴ *Id.* at 71–72.

⁵ *Id.* at 74.

finding that the Idaho law violated the Equal Protection Clause of the Fourteenth Amendment.⁶

Following the Supreme Court's decision in *Reed*, the ACLU Board of Directors identified women's rights as the organization's top priority, created the Women's Rights Project ("WRP") to litigate sex discrimination cases, and hired Ginsburg to direct it.⁷ She did so until 1980, when she was appointed to the D.C. Circuit Court of Appeals.⁸ During her decade leading the ACLU WRP, Ginsburg brought numerous cases to the Supreme Court as direct counsel or *amicus*, argued six times before the Court, and established the foundational law of constitutional equal protection for women under the Fourteenth Amendment.⁹

After *Reed*, the next case Ginsburg brought was *Frontiero v. Richardson*.¹⁰ This case was Ginsburg's first argument before the Supreme Court.¹¹ The Court struck down a federal statute that automatically granted male members of the military housing and benefits for their wives, but required female members to prove their husbands' "actual dependency" to qualify.¹² In this case, Ginsburg asked the Court "to add legislative distinctions based on sex to the category of 'suspect' classifications" subject to strict scrutiny,¹³ the same standard applied to laws differentiating based on race.¹⁴

Frontiero was decided 8-1 in the plaintiff's favor; however, only four Justices agreed with Ginsburg that sex discrimination should be subject to strict scrutiny. Justices Brennan, Marshall, White, and Douglas voted in favor of applying the highest level of scrutiny,¹⁵ while Stewart, Powell, Burger, and Blackmun concurred with Brennan's opinion but refused to apply that standard.¹⁶

This result was due, in large part, to the fact that the ERA had been introduced in Congress and was gaining widespread support by state legislatures across the country. At the time of the decision, 30 of the required 38 states had ratified the ERA,¹⁷ and the Justices were keenly aware of these politics. Justice

⁶ *Id.*

⁷ DE HART, *supra* note 1, at 133–34, 160–61.

⁸ *Id.* at 290–92.

⁹ AMY LEIGH CAMPBELL, RAISING THE BAR: RUTH BADER GINSBURG AND THE ACLU WOMEN'S RIGHTS PROJECT 64 (2003).

¹⁰ *Frontiero v. Richardson*, 411 U.S. 677 (1973).

¹¹ DE HART, *supra* note 1, at 204–09.

¹² *Frontiero*, 411 U.S. at 690–91.

¹³ Brief of American Civil Liberties Union *Amicus Curiae* at 7, *Frontiero v. Richardson*, 411 U.S. 677 (1973) (No. 71-1694), <https://socialchangenyu.com/wp-content/uploads/2019/06/1971-Frontiero-and-Frontiero-v.-Laird-ACLU-Amicus.pdf>. See also CAMPBELL, *supra* note 9, at 122.

¹⁴ Brief of American Civil Liberties Union, *supra* note 13, at 34 n.39.

¹⁵ *Frontiero*, 411 U.S. at 688.

¹⁶ *Id.* at 691 (Stewart, J., concurring).

¹⁷ *History of the Equal Rights Amendment*, EQUAL RIGHTS AMENDMENT (2018), <https://www.equalrightsamendment.org/the-equal-rights-amendment> [<https://perma.cc/87C4-BQ7G>]; *Ratification Info State by State*, EQUAL RIGHTS AMENDMENT (2018), <https://www.equalrightsamendment.org/era-ratification-map> [<https://perma.cc/HV67-NMTS>] (listing thirty states that ratified the ERA before *Frontiero*)

Stewart, certain that the ERA would be ratified and believing that progress should be slow and steady, refused to sign onto the portion of Brennan's opinion treating sex as a suspect class and, instead, simply concurred in the judgment.¹⁸ Justice Powell concurred in the judgment and filed a separate short opinion that was joined by Justices Burger and Blackmun, relying on the fact that the ERA had been approved by Congress and submitted for ratification by the states.¹⁹ He wrote, "It seems to me that this reaching out to pre-empt by judicial action a major political decision which is currently in process of resolution does not reflect appropriate respect for duly prescribed legislative processes."²⁰

Because of the Justices' reluctance to apply strict scrutiny while the ERA appeared close to ratification, Ginsburg avoided the issue in the 1975 case, *Weinberger v. Wiesenfeld*,²¹ and instead called for "heightened scrutiny without further labelling."²² In this case, Ginsburg argued on behalf of Stephen Wiesenfeld, a father whose wife had died in childbirth, who was unable to stay home with his newborn son because Social Security regulations provided survivors' benefits only for mothers.²³ The Court again sided with Ginsburg, striking down the sex-discriminatory regulations under the Fourteenth Amendment.²⁴

Craig v. Boren, a case brought by a private attorney, involved an Oklahoma statute that allowed young women to purchase low-alcohol beer at age eighteen but required young men to wait until they were twenty-one.²⁵ Although Ginsburg would not have chosen to bring this case herself, once the Supreme Court decided to hear it, she agreed to assist the local attorney and write an *amicus* brief.²⁶ She urged the private attorney not to push for strict scrutiny, because she knew there were not five votes among the Justices, and instead to argue for "heightened scrutiny."²⁷ In a 7-2 decision, six members of the Court subscribed to a new, intermediate standard of scrutiny for sex-based equal protection claims.²⁸

v. Richardson was decided on May 14, 1973, including Nebraska which also voted to rescind its ratification in March 1973).

¹⁸ BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS: INSIDE THE SUPREME COURT* 255 (1979); *Frontiero*, 411 U.S. at 691 (Stewart, J., concurring).

¹⁹ *Id.* at 691–92 (Powell, J., concurring).

²⁰ *Id.* at 692.

²¹ *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975).

²² Deborah L. Markowitz, *In Pursuit of Equality: One Woman's Work to Change the Law*, 14 *WOMEN'S RTS. L. REP.* 335, 350 (1992) (quoting letter from Ruth Ginsburg, Director, Women's Rights Project, to Elizabeth Defeis, Professor, Seton Hall (Aug. 18, 1975)). See also Brief for Appellee at 14, *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (No. 73-1892), <https://socialchangenyu.com/wp-content/uploads/2019/06/1974-Weinberger-v.-Weisenfeld-Appellee-Brief.pdf>.

²³ *Weinberger*, 420 U.S. at 638–39.

²⁴ *Id.* at 653.

²⁵ *Craig v. Boren*, 429 U.S. 190 (1976).

²⁶ See CAMPBELL *supra* note 9, at 109–113 (2002).

²⁷ *Id.* at 111 (quoting letter from Ruth Ginsburg, Director, Women's Rights Project, to Fred Gilbert (Jan. 26, 1976)).

²⁸ *Craig*, 429 U.S. 190.

Califano v. Goldfarb marked the culmination of Ginsburg's careful Supreme Court litigation strategy.²⁹ This case challenged social security regulations that favored male workers by automatically granting survivors' benefits to their widows, but granting benefits to widowers of female workers only if the men could prove they had been financially dependent on their wives.³⁰ The Court ruled in favor of the plaintiff, applying the intermediate standard of scrutiny established in *Craig*.³¹

After being appointed to the Supreme Court in 1993, Justice Ginsburg continued her efforts to establish full gender equality under the Fourteenth Amendment. As a Justice, rather than an advocate, she could write the decisions that she had tried to persuade the Court to adopt. Her first opportunity to do so came in 1996, when Ginsburg wrote the decision for the Court in *United States v. Virginia*.³² In this case, the Court struck down the male-only admissions policy at the Virginia Military Institute and established a new standard of review for sex discrimination cases.³³ Under this standard, the government must prove an "exceedingly persuasive justification" for any gender-based classification.³⁴ Many scholars and advocates view this decision as ratcheting up the level of scrutiny, not to "strict scrutiny" but to "heightened scrutiny" somewhere between intermediate and strict.³⁵

Most recently, in 2017, Justice Ginsburg reaffirmed this standard of scrutiny with her decision in *Sessions v. Morales-Santana*.³⁶ This case involved a distinction between children of unwed United States citizen fathers and those of unwed United States citizen mothers in the Immigration and Nationality Act. The statute made it easier for children who were born overseas to an unmarried mother who was a U.S. citizen to acquire citizenship than their counterparts whose unmarried father was a U.S. citizen.³⁷ In this case, Ginsburg applied heightened scrutiny³⁸ and wrote that

²⁹ *Califano v. Goldfarb*, 430 U.S. 199 (1977).

³⁰ *Id.* at 201.

³¹ *Id.* at 210–11, 217–18.

³² *United States v. Virginia*, 518 U.S. 515 (1996).

³³ *Id.* at 531–33, 556.

³⁴ *Id.* at 531–33.

³⁵ See, e.g., Ryan James & Jane Zara, *Equal Protection*, 4 GEO. J. GENDER & L. 1, 26, 28–29 (2002).

³⁶ *Sessions v. Morales-Santana*, 137 S. Ct. 1678 (2017).

³⁷ *Id.* at 1686.

³⁸ *Id.* at 1690. To see the power of the heightened scrutiny standard applied correctly, compare the outcome in *Sessions v. Morales-Santana* with the outcome in *Nguyen v. INS*, 533 U.S. 53 (2001) (finding a gender-based classification in a citizenship statute withstood less careful equal protection scrutiny). As Justice O'Connor, joined by Ginsburg and others, noted in her dissent in *Nguyen*,

In a long line of cases spanning nearly three decades, this Court has applied heightened scrutiny to legislative classifications based on sex. The Court today confronts another statute that classifies individuals on the basis of their sex. While the Court invokes heightened scrutiny, the manner in which it explains and applies this standard is a stranger to our precedents. Because the Immigration and Naturalization Service (INS) has not shown an exceedingly persuasive justification for the sex-based classification embodied in 8 U.S.C. § 1409(a)(4)—*i.e.*, because it

the statutory distinction, which relied on stereotypes about differences in women's roles as mothers and men's roles as fathers, was "stunningly anachronistic."³⁹

With the success of Ginsburg's ACLU litigation strategy, and then her rulings in *VMI* and *Morales-Santana*, we now have "heightened scrutiny" in which an "exceedingly persuasive justification" is required for any distinctions on the basis of sex under the Equal Protection Clause of the Fourteenth Amendment.

Since 1980, the ACLU Women's Rights Project has been building on Ginsburg's work to ensure gender equality in all arenas of life. Ginsburg and her colleagues were successful in striking down most laws that explicitly treat men and women differently on their face. However, as we know, women are still far from equal in our society. At the ACLU today, we are fighting to ensure workplace fairness, including protections against pregnancy discrimination⁴⁰ and sexual harassment.⁴¹ We also seek to end gender-based violence in a range of contexts, including discrimination against survivors in housing, in school, and by the police.⁴² We fight sex discrimination in schools, including sexist dress codes and programming that excludes girls.⁴³ We address problems faced by women in the criminal justice system.⁴⁴ And we are launching new efforts to confront 21st century discrimination such as the use of algorithms and digital platforms to enable employers to target only men in disseminating job advertisements.⁴⁵

has failed to establish at least that the classification substantially relates to the achievement of important governmental objectives—I would reverse the judgment of the Court of Appeals.

Nguyen, 533 U.S. at 74 (O'Connor, J., dissenting).

³⁹ *Sessions*, 137 S. Ct. at 1693.

⁴⁰ E.g., Gillian Thomas, *Employees Who Have Babies Are Still Getting the Axe*, ACLU (Oct. 31, 2018), <https://www.aclu.org/blog/womens-rights/pregnancy-and-parenting-discrimination/employees-who-have-babies-are-still> [https://perma.cc/J4PT-5EP7].

⁴¹ E.g., Lenora Lipidus, *If Sexual Harassment Is Illegal, Why Is It So Rampant?*, ACLU (Jan. 18, 2018), <https://www.aclu.org/blog/womens-rights/womens-rights-workplace/if-sexual-harassment-illegal-why-it-so-rampant> [https://perma.cc/RUR5-8UYL].

⁴² E.g., Sandra Park, *How America Systematically Fails Survivors of Sexual Violence*, ACLU (Oct. 16, 2018), <https://www.aclu.org/blog/womens-rights/violence-against-women/how-america-systematically-fails-survivors-sexual-violence> [https://perma.cc/H9MG-LWRV]; Sandra Park, *Domestic Violence and Sexual Assault Survivors Should Feel Safe Seeking Police Help, Not Shame, Hostility, or Indifference*, ACLU (Oct. 27, 2015), <https://www.aclu.org/blog/womens-rights/violence-against-women/domestic-violence-and-sexual-assault-survivors-should-feel> [https://perma.cc/3AXL-87RP].

⁴³ E.g., Lizzy Martinez, *It's Sex Discrimination, Not My Chest, That's Disrupting Class*, ACLU (Apr. 30, 2018), <https://www.aclu.org/blog/womens-rights/womens-rights-education/its-sex-discrimination-not-my-chest-thats-disrupting> [https://perma.cc/9MB6-NRFZ].

⁴⁴ E.g., Anjana Samant, *The First Step Act Is a Small Step for Incarcerated Women*, ACLU (Dec. 27, 2018), <https://www.aclu.org/blog/prisoners-rights/women-prison/first-step-act-small-step-incarcerated-women> [https://perma.cc/LL8V-NHM7].

⁴⁵ E.g., Galen Sherwin, *How Facebook Is Giving Sex Discrimination in Employment Ads a New Life*, ACLU (Sept. 18, 2018), <https://www.aclu.org/blog/womens-rights/womens->

Some of these issues—particularly those focused on gender stereotypes around parenting and work—continue in a direct line from the cases that Ginsburg and her ACLU colleagues brought in the 1970s. Other priorities, such as our work on gender-based violence, are new; the ACLU led the way in framing gender-based violence as a civil rights issue in the early 2000s. And, of course, challenges to discriminatory uses of new technology take on problems that did not yet exist in the 1970s. All of the work, however, builds on the legal theories that Ginsburg argued to the Supreme Court and the equal rights precedents that she established. We are deeply indebted to her for her work laying the bedrock for gender equality, and we are proud to follow in her footsteps to expand upon this foundation.