RUTH BADER GINSBURG: AN APPRECIATION

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Ruth Bader Ginsburg was a unique figure in American history: as Chief Justice Roberts put it, she was "a jurist of historic stature."[1] She was that, of course, but she was so much more. If she had never served on the Supreme Court, Ruth Bader Ginsburg would still have been a person of historic stature. She was a leading legal scholar who wrote major works about procedure, jurisdiction, comparative law, and constitutional law. And she was the architect of a litigation campaign that resulted in a series of Supreme Court rulings that fundamentally transformed the law of gender discrimination.

Those were the reasons that I applied to be one of her earliest law clerks. I am honored to have had that extraordinary privilege. As a result, I along with my nearly 150 co-clerks over her forty years on the bench became part of her family. We feel a deep sense of personal as well as professional loss. But we are not alone. Our nation has experienced a profound loss.

Let's begin with Professor Ginsburg, the scholar. She made her mark early with significant articles on complex procedural subjects in leading law reviews[2] as well as a highly regarded book and several other articles on Swedish law.[3] But she also published numerous works on

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[1] Press Release, Chief Justice John G. Roberts, Jr., Statements from the Sup. Ct. Regarding the Death of Assoc. Just. Ruth Bader Ginsburg (Sept. 19, 2020), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_09-19-20 [https://perma.cc/2MJP-NWHY].

[2] *See, e.g.*, Ruth Bader Ginsburg, *Judgments in Search of Full Faith and Credit: The Last-in-Time Rule for Conflicting Judgments*, 82 HARV. L. REV. 798 (1969); Ruth Bader Ginsburg, *Special Findings and Jury Unanimity in the Federal Courts*, 65 COLUM. L. REV. 256 (1965).

[3] *See, e.g.*, RUTH BADER GINSBURG & ANDERS BRUZELIUS, CIVIL PROCEDURE IN SWEDEN (1965); Ruth Ginsburg, *The Jury and the Nämnd: Some Observations on Judicial Control of Lay Triers in Civil Proceedings in the United States and Sweden*, 48 CORNELL L.Q. 253 (1963); Ruth

constitutional issues[4] and coauthored the first law school casebook on gender discrimination.[5]

Those latter projects grew out of her work as a lawyer, leading an effort to combat the gender discrimination that was pervasive in our law. When she began her work, the Supreme Court had never in its entire history found a sex-based law to be unconstitutional. But the Court had decided quite a few cases that rejected challenges to such laws. For example, in 1873 the Court upheld the exclusion of women from membership in the bar.[6] One of the opinions in that case, written by a supposedly progressive Justice, said that women were too fragile to be lawyers: "The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator."[7] Sometimes the Court refused to take gender-discrimination claims seriously. In a 1948 case challenging a Michigan ban on women working as bartenders, the Court said that "to state the [legal] question is in effect to answer it."[8] And as late as 1961, the Court upheld the effective exclusion of women from jury service because they were "the center of home and family life."[9]

That changed in the 1971 case *Reed v. Reed*,[10] which struck down an Idaho law that automatically chose men as administrators of estates. Professor Ginsburg did not argue that case, but she wrote the brief. This seemingly small case—and a tragic one, involving the aftermath of a teenager's suicide[11]—was the first time that the Supreme Court found any form of gender discrimination to be unconstitutional. She soon built on that foundation in a series of cases that she argued and others in which she wrote amicus briefs and often advised the lawyers who did

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Bader Ginsburg & Anders Bruzelius, *Professional Legal Assistance in Sweden*, 11 INT'L & COMPAR. L.Q. 997 (1962).

4 *See, e.g.*, Ruth Bader Ginsburg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1 (1975); Ruth Bader Ginsburg, *Sex Equality and the Constitution*, 52 TUL. L. REV. 451 (1978); Ruth Bader Ginsburg, *Sexual Equality Under the Fourteenth and Equal Rights Amendments*, 1979 WASH. U. L.Q. 161; Ruth Bader Ginsburg, *Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation*, 28 CLEV. ST. L. REV. 301 (1979).

5 KENNETH M. DAVIDSON, RUTH BADER GINSBURG & HERMA HILL KAY, SEX-BASED DISCRIMINATION: TEXT, CASES, AND MATERIALS (1974).

6 Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873).

7 *Id.* at 141 (Bradley, J., concurring).

8 Goesaert v. Cleary, 335 U.S. 464, 465 (1948).

9 Hoyt v. Florida, 368 U.S. 57, 62 (1961).

10 404 U.S. 71 (1971).

11 *See* Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 NYU L. REV. 1185, 1203 n.107 (1992).

argue.[12] By the end of the 1970s, the Supreme Court had made clear that gender discrimination was no longer trivial but instead required a substantial legal justification. Her work was essential to these doctrinal breakthroughs.

Ruth Bader Ginsburg became a judge on the U.S. Court of Appeals for the District of Columbia Circuit on June 18, 1980. I remember the date because she hired me after my interview at her home that morning, maybe an hour after her Senate confirmation. She was a superb judge and a great boss. She had few rules other than that the clerks do excellent work and do it on time. There was no dress code (although of course we all dressed appropriately), nor were there formal working hours (except that we had to be in the courtroom when the cases for which we had prepared bench memos were argued). But she was otherwise flexible. Despite her complete indifference to sports, for example, she readily allowed one clerk who was a die-hard Los Angeles Dodgers fan to leave early so that he could attend a Dodgers game in Philadelphia. When he reported the next day that his team had lost, the Flatbush native Ginsburg replied: "They never should have left Brooklyn."

And she kept up with us after we left her chambers. I once quoted her beloved husband, Marty, in a footnote in one of my articles. He had testified at a congressional hearing on a major tax bill, and one of his comments appeared in boldface type on the front page of the *Washington Post* the next day. Hundreds of T-shirts bearing that quote were distributed at the IRS. I alluded to that in the footnote, too.[13] After reading the footnote, she sent one of those T-shirts to me.

She became Justice Ginsburg in August 1993. As I mentioned, she was a brilliant lawyer and a shrewd strategist, as shown by her enthusiasm for using male plaintiffs as part of the campaign for gender equality. And she brought that strategic sense to the Supreme Court, especially when she became the most senior member of the liberal wing in 2010. She helped to keep that group unified in some high-profile cases. And sometimes that meant *not* writing separately even when there was plenty to say. Take, for instance, *Obergefell v. Hodges*,[14] the same-sex marriage case. That was a 5–4 decision in which Justice Kennedy wrote for the Court. His opinion was unconventional in many ways, and almost certainly the other justices in the majority would have written it differently. But none of those justices wrote anything. Justice

12 *See, e.g.*, Califano v. Goldfarb, 430 U.S. 199 (1977) (argued); Craig v. Boren, 429 U.S. 190 (1976) (amicus); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (argued); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (amicus); Frontiero v. Richardson, 411 U.S. 677 (1973) (argued).

13 Jonathan L. Entin, *Privacy, Emotional Distress, and the Limits of Libel Law Reform*, 38 MERCER L. REV. 835, 835 n.1 (1987) (part of a symposium on libel).

14 575 U.S. 947 (2015).

Ginsburg surely had something to do with that. She would have hesitated to write separately so as not to undermine the force of the Court's ruling, and I suspect that one way or another she communicated her view to Justices Breyer, Sotomayor, and Kagan.

Similarly, last term in *Bostock v. Clayton County*,[15] which held that employment discrimination based on sexual orientation and transgender status violates Title VII, Justice Gorsuch wrote for a 6–3 Court relying exclusively on textualism to interpret the statute. There are, of course, other approaches to statutory interpretation, but none of the liberal justices said anything about those alternatives—and I see the strategic hand of Justice Ginsburg there, too.

During her time, most of the Justices were appointed by Republican Presidents. Still, she wrote more than her share of opinions for the Court, including important cases involving redistricting,[16] jurisdiction,[17] environmental law,[18] and copyright.[19] Perhaps most notably, she wrote for the Court in *United States v. Virginia*,[20] which struck down the male-only admissions policy of the Virginia Military Institute.

But she will probably be best remembered for her dissents. One notable example is *Ledbetter v. Goodyear Tire & Rubber Co.*,[21] which rejected a claim of gender-based pay discrimination as untimely. Justice Ginsburg strongly disagreed with the majority's "parsimonious reading of Title VII,"[22] explaining in detail why Lilly Ledbetter had filed her lawsuit on time and examining the workplace dynamics that make wage

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15 140 S. Ct. 1731 (2020).

16 *See, e.g.*, Va. House of Delegates v. Bethune-Hill, 139 S. Ct. 1945 (2019) (holding that one branch of a state legislature lacked standing to appeal in a redistricting case where the state's attorney general declined to appeal); Evenwel v. Abbott, 136 S. Ct. 1120 (2016) (rejecting the argument that the Constitution requires states to draw legislative districts on the basis of citizen voting-age population rather than total population); Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787 (2015) (upholding the constitutionality of the agency that voters approved to draw congressional districts).

17 *See, e.g.*, Daimler AG v. Bauman, 571 U.S. 117 (2014) (limiting the scope of general jurisdiction); Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280 (2005) (taking a narrow view of the *Rooker-Feldman* doctrine).

18 *See, e.g.*, Am. Elec. Power Co. v. Connecticut, 564 U.S. 410 (2011) (holding that the Clean Air Act displaced common law nuisance claims); Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167 (2000) (recognizing the validity of citizen suits to enforce environmental statutes).

19 *See, e.g.*, Eldred v. Ashcroft, 537 U.S. 186 (2003) (upholding the constitutionality of the Copyright Term Extension Act).

20 518 U.S. 515 (1996).

21 550 U.S. 618 (2007).

22 *Id.* at 661 (Ginsburg, J., dissenting).

bias difficult to discover.[23] She concluded by noting that it would be up to Congress to amend the statute to make clear that claims like Ledbetter's were indeed timely.[24] The Lilly Ledbetter Fair Pay Act of 2009 was one of the first pieces of legislation passed by the Congress that convened in January of that year.[25]

Another came in *Shelby County v. Holder*,[26] which invalidated the formula in section 4(b) of the Voting Rights Act.[27] This ruling eviscerated the preclearance provisions contained in section 5.[28] She challenged Chief Justice Roberts's majority opinion in virtually every particular. As she put it: "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."[29]

Let me conclude by returning to my observation about her prominence even before she went onto the bench. Her scholarship put her in the first rank of the legal academy, and her legal advocacy transformed a vital area of the law to our lasting benefit. Either would have made her a figure of lasting significance. But she went on to contribute enormously to the law on the bench. She was not just a *jurist* of historic stature. She was also a scholar of historic stature and a lawyer of historic stature. Someone else will occupy her seat, but she cannot be replaced.

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23 *Id.* at 649–51 (Ginsburg, J., dissenting).

24 *Id.* at 661 (Ginsburg, J., dissenting).

25 Pub. L. No. 111-2, 123 Stat. 5 (codified at 29 U.S.C. § 626(d)(3), 42 U.S.C. § 2000e–5(e)(3) (2018)).

26 570 U.S. 529 (2013).

27 *Id.* at 557; 52 U.S.C. § 10303(b) (2018).

28 *Shelby Ctny.*, 570 U.S. at 559 n.1 (Ginsburg, J., dissenting); 52 U.S.C. § 10304 (2018).

29 *Shelby Ctny.*, 570 U.S. at 590 (Ginsburg, J., dissenting).