

“JUSTICE RUTH BADER GINSBURG: ASKING NO FAVORS, BUT
INSISTING ON JUSTICE”

*Prof. Loren Jacobson**

During oral argument in *Frontiero v. Richardson*, one of the groundbreaking cases that would eventually lead to the Supreme Court recognizing gender as a protected class under the Equal Protection Clause, Ruth Bader Ginsburg quoted the abolitionist Sarah Grimké to the male justices before her. She said, “I ask no favor for my sex. All I ask of our brethren is that they take their feet off our necks.”¹ The image of the five-foot-one Ruth Bader Ginsburg standing before a panel of nine male justices and repeating this line in a case asking the Court for the first time to recognize gender as a protected class sums up, in my opinion, the inspirational qualities of the late Justice: she was fierce—in Yiddish, we would say she had *chutzpah*—she spoke truth to power, she sought equality for all, and she was what she would call a waypaver.²

Ruth Bader Ginsburg was born to an immigrant father and a mother whose parents were immigrants.³ Neither of her parents had the opportunity to attend college; Ginsburg was the first to do so in her family.⁴ Because she was a woman and a mother, she was denied many professional opportunities.⁵ Although she graduated at the top of her class at Columbia Law School, no New York law firm would hire her, and, although she was recommended for a Supreme Court clerkship,

* Assistant Professor of Law at UNT Dallas College of Law. Professor Jacobson teaches Constitutional Law, Health Care Law, Civil Rights Law, and Reproductive Rights and Genetic Technologies.

¹ Oral Argument at 27:39, *Frontiero v. Richardson*, 411 U.S. 677 (1973) (No. 71-1694), <https://www.oyez.org/cases/1972/71-1694>.

² See RUTH BADER GINSBURG, ET AL., *MY OWN WORDS* 63 (2016). When she lived in Sweden as a young lawyer, Ginsburg came across the word *vägmärken*, which translates as “pathmarker” or “waypaver.” *Id.* Throughout her career, she gave many speeches about various “pathmarkers” or “waypavers,” including women in law, justices’ wives, and Jewish Supreme Court justices. See *id.* at 63–109, for a collection of some of these speeches.

³ *Ruth Bader Ginsburg*, HISTORY.COM (Mar. 24, 2021), <https://www.history.com/topics/womens-history/ruth-bader-ginsburg>.

⁴ *Id.*

⁵ Kerri Lee Alexander, *Ruth Bader Ginsburg*, NAT’L WOMEN’S HIST. MUSEUM, <https://www.womenshistory.org/education-resources/biographies/ruth-bader-ginsburg> (last visited Mar. 20, 2021).

JUSTICE RUTH BADER GINSBURG: ASKING NO FAVORS, BUT
INSISTING ON JUSTICE

UNT DALLAS L. REV. ON THE CUSP, SPRING 2021

she didn't even receive an interview.⁶ She was also a member of a minority group in the United States, as she was Jewish.⁷

On the Supreme Court, Justice Ginsburg never forgot where she came from or what it was like to be an underdog. Describing the legacy of the Jewish justices on the Supreme Court, she said that they, like she, had the conviction that “[l]aw is the protector of the oppressed, the poor, the minority, the loner.”⁸ She also explained her belief in “Tikkun Olam,” which she described as the Jewish obligation to “do one’s part to make our communities, nation, and universe more humane, fairer, more just.”⁹ She hung art on the walls of her chambers with the command from Deuteronomy in Hebrew, “Zedek, Zedek, tardof,” which means “Justice, Justice shalt thou pursue.”¹⁰

Following these precepts and never forgetting her own experiences, Justice Ginsburg used the law, first as an advocate and then as a judge and justice, to protect and empower women and the disabled. She also advocated for interpretations of the law that would protect African-Americans’ voting rights and women’s ability to control their bodies and reproductive health.¹¹ In doing so, she was never afraid to challenge authority, whether that meant standing before nine male justices and telling them to take their feet off women’s necks or sitting among her fellow justices and saying “I dissent” from the bench.

Of course, Justice Ginsburg is best known for her advocacy on behalf of gender equality. She was a co-founder of the ACLU’s Women’s Rights Project, where she crafted the legal strategy that would eventually lead the Supreme Court to recognize gender as a protected class under the Equal Protection Clause of the Fourteenth Amendment. The Equal Protection Clause provides that “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”¹²

⁶ Angela Onwuachi-Willig, *POV: Ruth Bader Ginsburg Fought Tirelessly for What She Believed Was Right*, BU TODAY (Sept. 20, 2020), <http://www.bu.edu/articles/2020/ruth-bader-ginsburg/>.

⁷ Alexander, *supra* note 5.

⁸ GINSBURG ET AL., *supra* note 2, at 83.

⁹ *Id.* at 86.

¹⁰ *Id.* at 85.

¹¹ In addition to the opinions discussed in detail below, Justice Ginsburg penned and announced important dissents from the bench. *See* *Gonzales v. Carhart*, 550 U.S. 124, 169 (2007) (Ginsburg, J., dissenting) (*see also infra* note 41); *Nat’l Fed. of Ind. Bus. v. Sebelius*, 567 U.S. 519, 589 (2012) (Ginsburg, J., concurring in part and dissenting in part); *Burwell v. Hobby Lobby*, 573 U.S. 682, 739–41 (2014) (Ginsburg, J., dissenting). In each case, Justice Ginsburg emphasized the importance of comprehensive health care, not just to women, but to others who do not have access to insurance due to inability to pay or preexisting conditions. For example, in *Burwell*, she asserted that “the ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.” 573 U.S. at 741 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992)). In *National Federation of Independent Business*, her dissent made clear that part of the importance of the Affordable Care Act was that it provided insurance to those who are “not uninsured by choice,” including individuals with preexisting conditions. 567 U.S. at 596.

¹² U.S. CONST. amend. XIV, § 1.

JUSTICE RUTH BADER GINSBURG: ASKING NO FAVORS, BUT
INSISTING ON JUSTICE

UNT DALLAS L. REV. ON THE CUSP, SPRING 2021

The provision was meant to ensure states did not engage in racial discrimination, and race has always been a protected class under the clause. In a famous footnote from a 1938 case, Justice Stone suggested that the Equal Protection Clause may also protect certain “discrete and insular minorities” who had not historically benefitted from the political process.¹³ Based on this principle, Ginsburg carefully chose a series of cases with sympathetic plaintiffs to convince the Court that sex, which is generally an immutable characteristic, should receive heightened protection under the Equal Protection Clause.

In the reply brief filed in *Frontiero*—a case that urged the Court to hold that a federal law making it more difficult for female servicemembers to get benefits for their spouses than for male servicemembers violated the Fifth Amendment¹⁴—Ginsburg argued that sex should be a suspect class because women held little political power and were thus subjected to laws that stereotyped them.¹⁵ Specifically, she argued, “[i]n educational institutions, on the job market and most conspicuously, in the political arena, women continue to occupy second-place status.”¹⁶ Ginsburg also argued that classifications based on gender could never be benign.¹⁷ Speaking from personal experience, she noted that “[w]omen who seek to break out of the traditional pattern [that stereotypes women as homemakers and mothers] face all of the prejudice and hostility encountered by members of a minority group.”¹⁸ Although her arguments failed to convince the *Frontiero* Court to recognize sex as a suspect class, she did prevail in the case,¹⁹ and the arguments Ginsburg made led the Court eventually to recognize sex as a suspect class three years later in *Craig v. Boren*.²⁰

Then, some 23 years later, as a Supreme Court justice, she reiterated these arguments, this time holding that the policy of the Virginia Military Institute that prohibited women from enrolling violated the Equal Protection Clause. In *United States v. Virginia*, Justice Ginsburg made clear that “neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship

¹³ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

¹⁴ The Fourteenth Amendment only applies to state laws, while the Fifth Amendment applies to federal laws. Since the Fifth Amendment does not contain an Equal Protection Clause, the Supreme Court has held that the equal protection aspect of the Fourteenth Amendment is incorporated into the Fifth Amendment’s Due Process Clause. *Bolling v. Sharpe*, 347 U.S. 497, 498–500 (1954).

¹⁵ GINSBURG ET AL., *supra* note 2, at 134.

¹⁶ *Id.*

¹⁷ *Id.* at 135.

¹⁸ *Id.* at 136.

¹⁹ *See Frontiero v. Richardson*, 411 U.S. 677, 691 (1973) (“We . . . conclude that, by according differential treatment to male and female members of the uniformed services for the sole purpose of achieving administrative convenience, the challenged statutes violate the Due Process Clause of the Fifth Amendment insofar as they require a female member to prove the dependency of her husband.”).

²⁰ 429 U.S. 190 (1976).

JUSTICE RUTH BADER GINSBURG: ASKING NO FAVORS, BUT
INSISTING ON JUSTICE

UNT DALLAS L. REV. ON THE CUSP, SPRING 2021

stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities.”²¹

While her advocacy work focused on equality for women, as a Supreme Court justice, Ginsburg also repeatedly showed that she never forgot “the oppressed, the poor, the minority, the loner” and ensured the law protected them.²² In *Olmstead v. L.C.*, for example, Justice Ginsburg wrote an opinion finding that Georgia’s policy that refused placement of mentally disabled individuals in community settings violated the Americans with Disabilities Act.²³ In so holding, she wrote “unjustified isolation” of the mentally disabled “is properly regarded as discrimination based on disability.”²⁴ Her holding was grounded, in part, on the concern that animated her fight for gender equality—a concern that stereotypes prevent people from living their fullest lives. Indeed, in *Olmstead*, she noted that “institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life.”²⁵ Because of her opinion, states are required to treat mentally disabled people as individual persons, providing community-based treatment for people with mental disabilities when such placement is deemed appropriate, the affected person doesn’t oppose such treatment, and the placement can be reasonably accommodated.²⁶

Because of the composition of the Court during most of her tenure, Justice Ginsburg became best known not for her majority opinions, but for her dissents. Justice Ginsburg took pride in her dissents; she had a special “dissent” collar she wore when she read one from the bench. But she did not take dissenting lightly. She thought carefully about when and how to dissent and used her ability to dissent judiciously. Justice Ginsburg believed that dissents had power. She noted that “an impressive dissent [can] lead the author of the majority opinion to refine and clarify her initial circulation.”²⁷ Always the optimist about the arc of the moral universe bending towards justice,²⁸ she also quoted Chief Justice Charles Evans Hughes, who said that a “dissent in a court of last resort is an appeal . . . to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed.”²⁹ Justice Ginsburg declared, “I will continue to speak in dissent when important matters are at stake.”³⁰

²¹ *United States v. Virginia*, 518 U.S. 515, 532 (1996).

²² GINSBURG ET AL., *supra* note 2, at 83.

²³ 527 U.S. 581 (1999).

²⁴ *Id.* at 597.

²⁵ *Id.* at 600.

²⁶ *Id.* at 607.

²⁷ GINSBURG ET AL., *supra* note 2, at 281.

²⁸ *See id.* at 296 (In her dissent from the bench in *Shelby Cty. v. Holder*, Justice Ginsburg, calling Dr. Martin Luther King the “great man who led the march from Selma to Montgomery,” quoted his famous statement that “the arc of the moral universe is long . . . but it bends toward justice.”) 70 U.S. 529, 581 (2013).

²⁹ *Id.* at 282–83.

³⁰ *Id.* at 286.

JUSTICE RUTH BADER GINSBURG: ASKING NO FAVORS, BUT
INSISTING ON JUSTICE

UNT DALLAS L. REV. ON THE CUSP, SPRING 2021

Some of the dissents that she thought most powerful³¹ were the ones she wrote in *Bush v. Gore*,³² *Ledbetter v. Goodyear Tire & Rubber*,³³ and *Shelby County v. Holder*.³⁴

In *Bush v. Gore*, the Court, in a per curiam opinion, held that Florida's recount of ballots for the presidential election could not go forward because the recount could not promptly be conducted in compliance with the requirements of equal protection and due process—essentially handing the election to George W. Bush.³⁵ In a powerful dissent, Justice Ginsburg excoriated the Court's conservative bloc for voting to suspend the counting of disputed ballots in Florida, accusing the Court of failing to credit the state court's decisions, and urging the Court to allow the State to conduct a quick and fair recount.³⁶ She wrote: "The Court's conclusion that a constitutionally adequate recount is impractical is a prophecy the Court's own judgment will not allow to be tested. Such an untested prophecy should not decide the Presidency of the United States. I dissent."³⁷

In *Ledbetter v. Goodyear Tire & Rubber*, the majority held that the statute of limitations for filing an Equal Pay Act claim with the EEOC begins to run when the discriminatory act takes place, meaning when the employer sets the unequal pay.³⁸ Justice Ginsburg filed a dissent that she read from the bench, criticizing the Court for failing to take into consideration the realities of women in the workforce.³⁹ She noted that the majority opinion overlooked "common characteristics of pay discrimination," including the fact that it is often not apparent to the woman who is receiving lower pay that this is the case because most employers do not share salary information with their employees.⁴⁰ Justice Ginsburg further noted that "compensation disparities . . . are often hidden from sight."⁴¹ On the bench, she criticized the majority's blindness to the lived experiences of women, stating, "The Court does not comprehend, or is indifferent to, the insidious way in which women can be victims of pay discrimination."⁴²

³¹ See, e.g., *id.* at 282–86.

³² 531 U.S. 98, 135 (2000).

³³ 550 U.S. 618, 643 (2007).

³⁴ 570 U.S. 529, 559(2013).

³⁵ *Bush*, 531 U.S. at 110.

³⁶ *Id.* at 135 (Ginsburg, J., dissenting).

³⁷ *Id.* at 144 (Ginsburg, J., dissenting).

³⁸ *Ledbetter*, 550 U.S. at 618.

³⁹ *Id.* at 643 (Ginsburg, J., dissenting).

⁴⁰ *Id.* at 649 (Ginsburg, J., dissenting).

⁴¹ *Id.*

⁴² GINSBURG, ET AL., *supra* note 2, at 287. The *Ledbetter* dissent was not the only time Justice Ginsburg criticized her male colleagues on the Court for failing to understand, sympathize with, or take into account, the real lived experiences of women. In *Gonzales v. Carhart*, the Court held that a federal ban on what some call "partial birth abortion," a procedure called an intact D&E, was constitutional. 550 U.S. 124 (2007). In finding that the federal government had a compelling interest in putting a ban in place, Justice Kennedy found that such a ban might be necessary to protect a

JUSTICE RUTH BADER GINSBURG: ASKING NO FAVORS, BUT
INSISTING ON JUSTICE
UNT DALLAS L. REV. ON THE CUSP, SPRING 2021

Finally, in *Shelby County v. Holder*, the majority opinion gutted a major provision of the Voting Rights Act that required certain states and counties to get preclearance from the government before enacting any law that could burden the right to vote.⁴³ The majority found that a current lack of state action to impede voting on the basis of race meant that such preclearance requirements were unnecessary.⁴⁴ Justice Ginsburg, in a vociferous dissent, pointed out that there was a lack of laws burdening the right to vote precisely because of the preclearance requirement. She wrote, “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.”⁴⁵ After *Shelby County* came down, many of the jurisdictions no longer subject to the preclearance requirement immediately passed laws making it harder for minorities to vote, like voter ID laws and laws that purged voter rolls.⁴⁶ Justice Ginsburg’s dissent proved to be prescient.

Even though she was obviously a powerful person as a Supreme Court justice, Justice Ginsburg’s commitment to dissenting and the dissents themselves show her continued dedication to speaking truth to power, to reminding her colleagues to consider people whose experiences differed from theirs, and to describing those experiences so that her fellow justices could not be unaware of who their opinions harmed or left behind. Justice Ginsburg’s dissents also are a testament to her belief that one person, whether as an advocate or as a Supreme Court justice, can change the law for the better, if not immediately, than through perseverance and persistence.

When describing Belva Lockwood, the first woman to gain admission to the Bar of the U.S. Supreme Court, Ruth Bader Ginsburg said, “I speak about a woman of courage who would not be put down.”⁴⁷ These same words must be spoken of her. Justice Ginsburg was a woman of courage and conviction who would not be put down. She persisted through multiple illnesses and losses to ensure a more fair

woman who might “regret her choice to abort” and will “struggle with grief more anguished and sorrow more profound when she learns” how brutal the procedure is. *Id.* at 160. In response to this sentiment, Justice Ginsburg chided Justice Kennedy for stereotyping women and characterizing them as emotionally weak. She wrote in her dissent, “[T]his way of thinking reflects ancient notions about women’s place in the family and under the Constitution—ideas that have long since been discredited. Though the majority may regard women’s feelings on the matter as ‘self-evident,’ this Court has repeatedly confirmed that the destiny of the woman must be shaped on her own conception of her spiritual imperatives and her place in society.” *Id.* at 185 (Ginsburg, J., dissenting).

⁴³ 570 U.S. 529 (2013).

⁴⁴ *See id.* at 554 (“Congress did not use the record it compiled to shape a coverage formula grounded in current conditions.”).

⁴⁵ *Id.* at 590 (Ginsburg, J., dissenting).

⁴⁶ *See, e.g.,* Wendy Weiser and Max Feldman, *The State of Voting 2018*, BRENNAN CTR. FOR JUST., 5-8 (2018), https://www.brennancenter.org/sites/default/files/publications/2018_06_StateOfVoting_v5%20%281%29.pdf.

⁴⁷ GINSBURG, ET AL., *supra* note 2, at 65.

JUSTICE RUTH BADER GINSBURG: ASKING NO FAVORS, BUT
INSISTING ON JUSTICE

UNT DALLAS L. REV. ON THE CUSP, SPRING 2021

and just world, not just for herself and others like her, but also for those who would come after her and those quite different from her. She was also a woman of great warmth and humanity. When Justice Ginsburg discusses her exhortation to have “our brethren” take their “feet off our necks”⁴⁸ in the documentary *RBG*, a little smile appears on her face, her eyes twinkling with mischievousness and mirth.⁴⁹ Indeed, Justice Ginsburg combined her courage and drive with radiating warmth and humor. She famously said, “A sense of humor is helpful for those who would advance social change.”⁵⁰

The loss of Justice Ruth Bader Ginsburg late last year was devastating. Her willingness to stand up for the oppressed and the forgotten and her perseverance in making our communities and our nation fairer, more humane, and more just were inspirational long before COVID and the social injustices of the summer of 2020 befell us. But certainly, even through some of our darkest times, she remains an inspiration in showing us not only that we should have the courage to challenge unjust laws and insist that those in power recognize and understand the lived experiences of all Americans, but also that in the face of obstacles and challenges, hope, humor, and empathy are more powerful than despair.

⁴⁸ Oral Argument at 27:39, *Frontiero v. Richardson*, 411 U.S. 677 (1973) (No. 71-1694), <https://www.oyez.org/cases/1972/71-1694>.

⁴⁹ *RBG* (Magnolia Pictures 2018).

⁵⁰ GINSBURG, ET AL., *supra* note 2, at 71.