

Problem #4

1. Some of you already were quite familiar with RBG and her career (and some of you presumably knew less about her). What (if anything) surprised you in the article?
2. RBG's Feminist Vision
  - a. Marty Ginsburg joked that RBG owed a lot to the law firm that turned her down. Otherwise, she would have spent her career at a law firm, instead of as an academic, advocate, and judge. Do you think he was right? How important were RBG's personal experiences of discrimination in motivating her?
  - b. RBG credited her mother as a key influence in her life. Why?
  - c. In a piece on RBG, Professor Amy Wax at Penn discusses two visions of feminism. An "equity feminist...pushe[s] for formal equality and for greater access to arenas from which women were previously excluded, expecting greater access to yield greater parity." They "envisioned women as a match for men not just in legal formalisms, but in outcomes and roles." In contrast, "difference feminists," acknowledge "women's unique vulnerabilities, traits, and needs, calling upon society to recognize, accommodate, and even cater to the ways in which women are not exactly like men." Which of these perspectives is a better description of RBG's views?
  - d. Professor Lani Guinier of Harvard Law School has criticized legal education, arguing that traditionally "learning to think like a lawyer means learning to think and act like a man." In the paraphrasing of Amy Wax, Lani Guinier criticizes "the Socratic method, with its emphasis on logic, rigor, fine analytic distinctions, and public performance, deeming it personally intimidating and psychologically traumatic for women." Guinier urged law schools "to adopt more 'female-friendly' educational methods," Wax wrote, "that were better suited to women's wants and needs." Do you think RBG shared this view of legal education?
  - e. True or False: RBG believed that women had to choose between having families and having professional ambitions, and she urged them to choose careers.
  - f. Assume that a particular city requires firefighter candidates to be able to lift a specified weight above their heads, to climb ropes, and to satisfy

other strength requirements, and that men are proportionately more likely to satisfy these requirements. Assuming that physical strength is, in fact, an important component of the job, do you think RBG would object?

- g. Assume that a city decided to do away with the strength tests in “d” and simply to say that only men could be firefighters. Would RBG object?
- h. The only case RBG lost involved a property tax exemption for widows; there was no equivalent exemption for widowers. The Court upheld this case partly on the theory that widows often are in a more financially vulnerable position than widowers.
  - i. RBG did not initiate this case. The Court already had granted cert when she got involved. Why do you think she had not pushed this issue?
  - ii. According to RBG’s vision of equal protection, how should the property exemption have been drafted instead?
  - iii. RBG was disappointed but not altogether surprised to lose this case. She later learned something about Justice William O Douglas, who cast a key vote against her, which made her understand his vote better. What do you think that was?

### 3. The Advocacy Challenge

- a. RBG observed a key difference between advocacy for racial equality and for gender equality. She had a somewhat easier job, she said, because women are not a “discrete and insular” minority. What do you think she meant by that? Put another way, what allies could she count on in making a case to male judges?
- b. Even so, why was her task complicated by the reality that the courts were virtually all male in the 1970s? What did she mean in ascribing to judges the idea that “ I treat my wife and daughters so well”?

### 4. Incrementalism

- a. True or false: RBG proceeded step by step because she could not be sure at the outset where she wanted to end up.
- b. “Real change, enduring change,” RBG said, “happens one step at a time.” What did she mean by that?
- c. Why was the *Moritz* case a good first step?
- d. What was “Appendix E” in the Solicitor General’s cert petition? Why was it so helpful to RBG?

### 5. *Weisenfeld*

- a. What were the facts in *Wiesenfeld*? Why did RBG consider it to be a good case to bring?

- b. How many different violations of equal protection did RBG allege in *Wiesenfeld*? Wouldn't one be enough? If so, why allege more than one?
- c. The same legal issue can be presented with different facts. Presumably, a legal principle should dictate the same result in different factual circumstances. If so, then why do the facts matter to an advocate? Who controls the facts of the case?

#### 6. *Craig v. Boren*

- a. What is the difference between rational basis review and strict scrutiny?
- b. RBG started by asking the court to apply strict scrutiny to gender discrimination? Did she succeed in that effort?
- c. What were the facts in *Craig*?
- d. What step did the Court take for the first time in the case?
- e. RBG did not make originalist arguments against gender discrimination. She accepted the idea that the relevant language as originally understood did not support her. Some commentators think she gave up too quickly, though. What textual argument could she have emphasized? (Hint: it involves a comparison of the 13th, 14th, and 15th Amendments.)

#### 7. *Duran*

- a. Who was RBG's client and what complaint was she asserting on his behalf?
- b. Was Equal Protection relevant to this case?
- c. What two arguments was RBG making? Which one did Chief Justice Burger discourage her from making?
- d. What was Justice Stevens' question? Why was it difficult for RBG to answer? How did she answer it?
- e. In *Hoyt*, the Court had held that women could be exempted from juries. This was the precedent that RBG was seeking to change. In that case, a woman was accused of murdering her abusive husband. Do you think the lack of women on the jury might have made a difference in the jury's deliberations?

#### 8. Abortion

- a. RBG was a supporter of abortion rights, but she was quite critical of the Supreme Court's decision in *Roe v. Wade*. "*Roe* . . . halted a political process that was moving in a reform direction," she wrote, "and thereby, I believe, prolonged divisiveness and deferred stable settlement of the issue." What did she mean by that?
- b. RBG contrasted *Roe* with the cases she won, in which "the Supreme Court wrote modestly, it put forward no grand philosophy?" What did she mean? Why were the cases she won different?

- c. RBG also thought that *Roe v. Wade* was decided under the wrong clause of the U.S. constitution? What alternative theory did she find more persuasive?
  - d. RBG had a case on abortion pending before the Supreme Court during the same term as *Roe v. Wade*, involving Captain Susan Struck. What were the facts? Why did RBG think this was a better case for the Court to hear?
  - e. The Court agreed to take the case, but they never had the chance to consider it. Why not?
  - f. Extra credit (this is not in the reading): Why couldn't the court hear the case anyway? (Hint: the U.S. constitution requires there to be a "case or controversy" in order for a federal court to hear a case.)
  - g. Last thought (also not in the reading): RBG asked Captain Struck if there was anything else she wanted the Air Force to do for her. If there was something else, it would be a way to keep the case from being dismissed. Can you guess what Captain Struck said she wanted, which she and RBG both thought was too unrealistic to pursue?
9. Personal Life
- a. Please give examples in which RBG showed resilience in her personal life. Do you think this affected her professional life as well?
  - b. RBG liked to say that marrying Marty was the best decision she ever made. Why?
10. Supreme Court Confirmation
- a. What group nearly blocked RBG from being nominated to the Supreme Court?
  - b. What changed Bill Clinton's mind about her candidacy? What irony do you see in that? Do you think RBG saw the irony as well?
  - c. At about the same time, Bill Clinton had made two failed nominations as Attorney General: Zoe Baird and Kimba Wood. Do you know what scuttled their nominations? Do you think RBG had this issue as well? Did it matter that she was married to a tax lawyer?