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Recommended Citation

David M. Schizer, *RBG: Nonprofit Entrepreneur*, 121(RBG) COLUM. L. REV. 633 (2021).

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RBG: NONPROFIT ENTREPRENEUR

*David M. Schizer**

It is exceedingly rare for one person to change the world almost single-handedly, but Justice Ruth Bader Ginsburg was one of those people. Even before her distinguished judicial career, RBG was a trailblazing advocate for women's rights during the 1970s. She persuaded the Supreme Court that gender discrimination violates the Equal Protection Clause of the U.S. Constitution, winning five of the six cases she argued there. To lead this historic effort, RBG served as general counsel of the ACLU and as co-founder and the first director of its Women's Rights Project from 1972 until she became a judge in 1980.¹

How can we evaluate RBG's performance in this role? If she had led a for-profit business, we could track its profits. But the test of a nonprofit's success is not how much money it makes, but how much good it does in the world. To operationalize this somewhat abstract test, I have urged nonprofits to assess their work with three questions, which this Article applies to RBG's impact litigation:²

First, how important was the problem RBG was trying to solve?

Second, how effective was her response?

Third, what were RBG's comparative advantages in this work?

To begin with the first question, RBG targeted an enormously significant problem. In the 1970s, gender discrimination had deep roots in U.S. law. Constantly encountering discrimination in her own career, RBG was emphatic that people should be judged by their ability, not their gender. Yet to advance this meritocratic vision, she had to change the way male judges thought about these issues.

Second, how effective was RBG in pursuing this goal? She delivered extraordinary results, crafting a litigation strategy with three key strengths. First, instead of striving to accomplish all her goals in one case, RBG proceeded in stages, so that each new case built on the last one. Like a chess grandmaster, she thought several moves ahead. Second, RBG had a gift

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1. Lenora Lapidus, *Ruth Bader Ginsburg and the Development of Gender Equality Jurisprudence Under the Fourteenth Amendment*, 43 *N.Y.U. Rev. L. & Soc. Change* 149, 150 (2019) (“[T]he 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.”).

2. See David M. Schizer, *Enhancing Efficiency at Nonprofits with Analysis and Disclosure*, 11 *Colum. J. Tax'n* 76, 110–18 (2020).

for seeing cases through the eyes of (skeptical) male judges, so she chose cases carefully, hunting for compelling facts. Third, ever mindful of her audience, she framed legal issues in ways that resonated with male judges.

Along with targeting an important problem in an effective way, a nonprofit also should have comparative advantages in doing its work. This brings us to the third question: What were RBG's unique strengths in leading the ACLU Women's Rights Project? She had the courage to take controversial positions and the legal firepower to prevail. As both a successful professional and a devoted spouse and parent, RBG modeled her nonprofit's mission in her own life. Yet although these issues were deeply personal for her, she rarely showed impatience or frustration. By temperament, RBG was unfailingly polite and collegial. She also knew that venting could set back her cause, and her goal was to *do* good, not to *feel* good. By combining this steely self-control with strategic thinking, determination, and eloquence, RBG was stunningly successful.

In analyzing RBG's record as a nonprofit leader, this Article draws not only on the historical record and RBG's writings, but also on my own experiences with her. I served as her law clerk during the October 1994 Term, her second year on the Supreme Court. Over the next twenty-five years, RBG was a generous mentor and a dear friend. We had countless conversations about her impact litigation.

My goal is to offer an insider's perspective, but also an objective one. In that spirit, I should say that although I have the deepest respect and affection for RBG, we often did not agree. I was a member of the Federalist Society when she hired me, and still am today. As her law clerk, one of my assignments was to offer a counterpoint to her views. Conscientious and fair-minded, she was determined to think through every aspect of each case. She also seemed to enjoy this give and take, since she liked to dissect and critique arguments. Indeed, RBG loved legal analysis the way some people love chocolate.

Although RBG was already a judge when I met her, this Article focuses solely on her work as an advocate, not her judicial service. While advocates are supposed to defend their clients' interests, judges must weigh the law and facts dispassionately. Their calling is to follow the law, not to advance a particular agenda. This is a solemn responsibility, which RBG embraced as a judge. By highlighting her talents as an advocate in the 1970s, I do not mean to imply that she took a similar approach as a judge. Rather, this Article analyzes only her work for the ACLU Women's Rights Project.

I. HOW IMPORTANT WAS THE PROBLEM RBG WAS TRYING TO SOLVE?

Nonprofit leaders make their mark by successfully addressing important issues. How significant was the problem RBG was trying to solve? Gender discrimination was one of the burning issues of her time and, indeed, a formidable obstacle in her own career. In response, she wanted to ensure

that ability—not stereotypes—determined professional opportunities. Yet this was a hard “sell” in the 1970s, especially to an all-male judiciary. At the time, gender-based classifications were pervasive in U.S. law, and most judges accepted their logic. Changing their minds would not be easy. To analyze the importance of that challenge, this Part details RBG’s personal motivations, her meritocratic vision, and the forbidding legal landscape when she launched the ACLU Women’s Rights Project.

A. *“Ruth, We Already Hired a Woman”*

The cause was personal for RBG. “I became a lawyer, in days when women were not wanted by most members of the legal profession,” she later recalled.³

When she started Harvard Law School in 1956, there were only nine women in her class.⁴ Every year, the law school’s dean, Erwin Griswold, would invite the women in the entering class to his home. After gathering them in a horseshoe in his living room, he would ask each of them in turn: “Why are you here occupying a seat that could be held by a man?”⁵

“How did you answer that question?” I asked her years later. “People don’t usually ask me that,” she said with a wry smile. “I told him that my husband was studying to be a lawyer, and I wanted to understand his work.”

“He kept up this practice every year,” she joked, “until there were too many women to sit in a horseshoe in his living room.”

RBG’s husband Marty was a year ahead of her at Harvard Law School. When he graduated, he joined a law firm in New York. Marty had just recovered from cancer, and they had a young daughter, Jane. To keep the family together, RBG asked the Harvard administration to let her spend her third year at Columbia, while still earning a Harvard degree. Although others had been allowed to complete their studies elsewhere, the administration turned down her request. Why? “It was your choice to have a child,” she recalled them telling her. As a result, Columbia had the good fortune to award RBG her law degree.

Yet even though she graduated at the top of her class, RBG struggled to find a job. “I was a triple threat,” she later joked with me, “a Jew, a woman, and a mother.”

Like many other law students, she spent the summer before her third year at a law firm. But although she had a good experience, they declined to invite her back. When I asked her whether they gave a reason, she

3. Nomination of Ruth Bader Ginsburg, to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary, 103d Cong. 54 (1993) [hereinafter Confirmation Hearing].

4. Dahlia Lithwick, “It’s Amazing to Me How Distinctly I Remember Each of These Women”, Slate (July 21, 2020), <https://slate.com/news-and-politics/2020/07/ruth-bader-ginsburg-interview-transcript.html> [https://perma.cc/PDR5-PSVL].

5. Id.

smiled. “Yes,” she recalled, “They said, ‘Ruth, we already hired a woman.’” Marty then weighed in. “Ruth, you owe them a lot,” he laughed. “If not for them, you’d be a partner at a law firm today.”

One of RBG’s professors at Harvard, Albert Sacks, urged Justice Felix Frankfurter to hire RBG as his law clerk on the U.S. Supreme Court, but Frankfurter would not even interview her.⁶ Instead, one of RBG’s mentors at Columbia, Gerald Gunther, recommended her for a clerkship with Edmund Palmieri, a federal district court judge in the Southern District of New York.⁷

RBG’s next opportunity came from Hans Smit, a young law professor at Columbia. Knowing of her interest in civil procedure, Hans invited her to join a research initiative he was leading, the Columbia Law School Project on International Law, but with one catch. She had to learn Swedish so she could write a book on civil procedure in Sweden. “The only clear benefit I grasped immediately,” she later quipped, “would be understanding the language spoken in Ingmar Bergman films.”⁸ Even so, she seized the opportunity. “It was an idea that never occurred to me,” she later recalled. “But Hans described the work in his typically enthusiastic, utterly persuasive way.”⁹

From 1963 to 1972, RBG joined the faculty at Rutgers, one of the few law schools in the country at the time that would hire women. Yet even at this forward-looking institution, RBG was paid less than male colleagues. “‘Ruth, he has a wife and two children to support. You have a husband with a well paid job in a New York law firm,’” RBG recalled the dean explaining. “That was the way thinking was among employers in 1963.”¹⁰ In one of her first personal experiences with litigation, she was part of an equal-pay lawsuit against Rutgers. RBG and her colleagues must have felt some measure of vindication when the university settled the case and awarded them raises.¹¹

6. ‘We Have Lost a Giant’: Ruth Bader Ginsburg (1933–2020), *Harv. L. Today* (Sept. 18, 2020), <https://today.law.harvard.edu/in-memoriam-ruth-bader-ginsburg> [<https://perma.cc/SH3A-9W6Z>].

7. In Memoriam: Ruth Bader Ginsburg ’59, *Colum. L. Sch.* (Sept. 18, 2020), <https://www.law.columbia.edu/news/archive/memoriam-ruth-bader-ginsburg-59> [<https://perma.cc/YMK6-A7R4>].

8. Ruth Bader Ginsburg, *My Own Words* 250 (2016) [hereinafter *Ginsburg, My Own Words*].

9. Ruth Bader Ginsburg, *Tribute to Hans Smit*, *Colum. L. Sch.* (Jan. 1, 2012), <https://www.law.columbia.edu/news/archive/tribute-hans-smit-us-supreme-court-justice-ruth-bader-ginsburg> [<https://perma.cc/VV4W-EAGQ>].

10. Ruth Bader Ginsburg & Amanda L. Tyler, *Justice, Justice Though Shalt Pursue: A Life’s Work Fighting for a More Perfect Union* 36–37 (2021).

11. See *id.* at 37.

The legal academy was not especially welcoming in other ways as well. “Law school textbooks in that decade contained such handy advice as ‘land, like woman, was meant to be possessed,’” she recalled.¹²

Pregnancy also posed professional challenges. When RBG was pregnant with James, her second child, she shared: “I didn’t tell my [Rutgers] colleagues that I was pregnant, and for the last two months of the semester, I wore my mother-in-law’s clothes. She was one size larger,” she recalled. “Then, with contract in hand, I told them, ‘When I come back for the fall semester, there’ll be a new member of our family.’”¹³

These experiences helped to catalyze RBG’s interest in advocacy. “[T]he first gender-based discrimination cases” she handled were “claims on behalf of pregnant public school teachers,” she later recalled. “Women were asked to leave the classroom when their pregnancy began to show, because schools didn’t want the little children to think that their teacher had swallowed a watermelon.”¹⁴

Rutgers’s female students also inspired her interest in litigating women’s rights cases. “In 1970, students at Rutgers, where I was then teaching mainly Civil Procedure, asked for a seminar on women and the law,” she recalled. “So I undertook to read anything one could find on the subject in case reports and legal texts.”¹⁵ There wasn’t much in this new field—or, as she put it with characteristic diplomacy: “That proved not to be a burdensome venture.”¹⁶

Drawing on this knowledge, she began working on women’s rights issues for the ACLU. “My post on a law faculty gave me the leeway to accomplish the work,” she recalled, “and the ACLU had the resources to start up, in 1971, a Women’s Rights Project.”¹⁷

RBG then moved from Rutgers to Columbia in 1972, where she served as the first tenured woman on the law faculty. Along with her teaching and research, she devoted her considerable energies to impact litigation with the ACLU.¹⁸

12. Ruth Bader Ginsburg & Barbara Flagg, *Some Reflections on the Feminist Legal Thought of the 1970s*, 1989 *U. Chi. Legal Forum* 9, 9.

13. Ginsburg & Tyler, *supra* note 10, at 37.

14. *Id.*

15. Ginsburg & Flagg, *supra* note 12, at 11.

16. *Id.*

17. *Id.*

18. RBG agreed to serve as co-founder of the ACLU Women’s Rights Project at the same time that she accepted Columbia Law School’s offer. To enable her to take on both roles, ACLU Executive Director, Aryeh Neier, reached out to Dean Michael Sovern of Columbia Law School. “We made an arrangement,” Neier recalled, “that allowed Ruth to accept both posts” Aryeh Neier, *Aryeh Neier Remembers Ruth Bader Ginsburg*, *Open Soc’y Found.: Voices* (Sept. 23, 2020), <https://www.opensocietyfoundations.org/voices/aryeh-neier-remembers-ruth-bader-ginsburg> [<https://perma.cc/853D-ZUTS>].

Because RBG herself encountered gender discrimination, she resolved not just to persevere in her own career, but also to ensure that other women could succeed as well. To open these doors for women, RBG pressed for fundamental changes in the law.

B. *“Take Their Feet off Our Necks”*

The goal of RBG’s impact litigation was clear. She wanted “a society in which members of both sexes are free to develop their full potential as human individuals.”¹⁹ Granting opportunity to all was good not only for women with professional aspirations, but for everyone. “The increasingly full use of the talent of all of this Nation’s people,” she later said, “holds large promise for the future.”²⁰

Meritocratic to the core, RBG was not seeking special treatment for women. She just wanted them to have the same opportunities as men to prove what they could do. To make this point, RBG quoted Sarah Grimke, an abolitionist and feminist, who said in 1837: “I ask no favor for my sex. . . . All I ask of our brethren is that they take their feet off our necks”²¹

As an advocate, RBG emphasized that in seeking equality, women had to overcome misguided efforts to protect them. “Even outright exclusions,” she observed, “have been viewed by chivalrous gentlemen as favors.”²² To “protect” women from barroom brawls, they could not work as bartenders. To shield them from the “filth, obscenity and noxious atmosphere that so often pervades a courtroom,” they could not serve on juries.²³ “No woman shall degrade herself by practicing law in New York,” observed a Columbia Trustee in 1890, “especially if I can save her.”²⁴ These attitudes “put women not on a pedestal,” RBG said, “but in a cage.”²⁵

Under RBG’s leadership, the ACLU Women’s Rights Project urged employers, government officials, and other decisionmakers to rely on

19. Ruth Bader Ginsburg, *Gender and the Constitution*, 44 U. Cincinnati L. Rev. 1, 2 (1975) [hereinafter *Ginsburg, Gender*].

20. Confirmation Hearing, *supra* note 3, at 50.

21. *Ginsburg, Gender*, *supra* note 19, at 27 (quoting Sarah M. Grimke, *Letters on the Equality of the Sexes and the Condition of Woman: Addressed to Mary S. Parker, President of the Boston Female Anti-Slavery Society* 10 (1838)). RBG also favored a limited form of “transition period affirmative action.” See *id.* at 34. It should be “designed not to confer favors but to assure that women with capacity to do the job are set on a par with men of similar capacity who, through a discriminatory system, have been permitted to monopolize the calling.” *Id.* at 28.

22. *Id.* at 15.

23. *Id.* (quoting *State v. Hall*, 187 So. 2d 861, 863 (Miss. 1996), appeal dismissed, 385 U.S. 98 (1966)).

24. *Ginsburg, My Own Words*, *supra* note 8, at 70.

25. Brief for Appellee at 32, *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (No. 73-1892), 1974 WL 186057 [hereinafter *Wiesenfeld* Brief] (quoting *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973)).

facts, not outdated stereotypes. For example, “most jobs do not demand extraordinary physical strength,” so supposed differentials between men and women are irrelevant. “Even for jobs that require above average strength and endurance, classification by sex is a crude measure,” she urged. “[I]t excludes women who could pass a test of actual capacity and fails to screen out men who could not.”²⁶

Likewise, RBG brought cases to establish the principle that resources awarded to support child-rearing should be allocated—not based on gender—but on whether someone is *actually shouldering* this responsibility. Some men are primary caregivers, while some women are not; indeed, “for most of a woman’s adult years, children requiring care are not part of the household.”²⁷ To reflect this reality, attitudes and policies should turn on “precise functional description,” not “gross gender classification.”²⁸ It was wrong to “imped[e] both men and women from pursuit of the opportunities and styles of life that could enable them to break away from familiar stereotypes.”²⁹

As a scholar and an advocate, RBG warned that stereotypes can become self-fulfilling prophecies. “The problem growing up female,” she said, “is that from the nursery on, an attitude is instilled insidiously.”³⁰ She summed up this self-image by quoting graffiti from a women’s college in the 1950s:

“Study hard
Get good grades
Get your degree
Get married
Have three horrid kids
Die, and be buried.”³¹

To give hope to women who felt this way, “the overriding objective must be . . . [to] signal[] that in all fields of endeavor,” RBG said, “females are welcomed as enthusiastically as males are.”³²

Toward that end, RBG’s impact litigation sought to dispel the stereotype that

it was a man’s lot, by nature, to be breadwinner, head of household, representative of the family outside the home; and it was

26. Ginsburg, *Gender*, supra note 19, at 28.

27. Ruth Bader Ginsburg, *Sex Equality and the Constitution*, 52 *Tul. L. Rev.* 451, 458 (1978) [hereinafter *Ginsburg, Equality*].

28. Ginsburg, *Gender*, supra note 19, at 27.

29. Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 *N.Y.U. L. Rev.* 1185, 1204–05 n.124 (1992) (publishing the twenty-fourth James Madison Lecture, which RBG delivered at New York University School of Law on March 9, 1993) [hereinafter *Ginsburg, Madison Lecture*].

30. Ginsburg, *Gender*, supra note 19, at 29.

31. *Id.*

32. *Id.*

woman's lot, by nature, not only to bear, but alone to rear children, to follow the head of household in the place and mode of living he chose, and to keep the home in order.³³

Along with attitudes, the Women's Rights Project also sought to change behavior. "Customary responsibility for household management remains the most stubborn obstacle to equal opportunity for women," she observed. "Solutions to the home-work problem are as easily stated as they are hard to realize: man must join woman at the center of family life, and government must step in to assist both of them during the years when they have small children."³⁴

C. *"But I Treat My Wife and Daughters So Well"*

RBG was pleased that attitudes and behavior were starting to change in the 1960s as millions of women entered the paid workforce in the United States.³⁵ Yet the law still relied on outdated notions, often assuming that men were breadwinners and a woman's "main domain was home and family."³⁶ As an advocate, her goal was to purge the law of these biases. "What we needed to do," she explained, "was to break down that separate spheres mentality."³⁷ She knew it would not be easy.

Quoting a poem from 1842, RBG offered a "capsule description of the common-law heritage: to the man of the house, the woman ranked as 'something better than his dog, a little dearer than his horse.'"³⁸

Likewise, RBG often quoted the nation's founders to show that they shared these biases. "Turning to the original understanding, yes, Thomas Jefferson meant: all *men* are created equal," she wrote. "As to women, he said: 'Were our state a pure democracy, there would still be excluded from our deliberations . . . women, who, to prevent depravation of morals and ambiguity of issues, should not mix promiscuously in gatherings of men.'"³⁹

In framing her litigation strategy, RBG doubted that the original understanding of the Fourteenth Amendment guaranteed gender equality. "Viewed in historical perspective, expectations for national recognition of a sex equality ideal just after the Civil War were unrealistic," she wrote.

33. Ginsburg & Flagg, *supra* note 12, at 14.

34. Ginsburg, *Gender*, *supra* note 19, at 34.

35. See Ginsburg, *My Own Words*, *supra* note 8, at 161 ("In the years from 1961 to 1971, women's employment outside the home had expanded rapidly.").

36. Ginsburg & Tyler, *supra* note 10, at 41.

37. *Id.*

38. Ginsburg, *Gender*, *supra* note 27, at 2 (quoting Alfred Tennyson, *Locksley Hall* 29 (Ticknor and Fields 1869) (1842)).

39. Ginsburg, *Equality*, *supra* note 27, at 451.

“Overcoming slavery’s legacy was the searing issue for Congress. Change in women’s status was not viewed as federal business.”⁴⁰

RBG (and others) arguably were too quick to concede that the Fourteenth Amendment, as originally understood, did not target gender discrimination.⁴¹ In contrast, Steven Calabresi and Julia Rickert draw the opposite conclusion, using originalist interpretive methods.⁴² They emphasize a key difference between the Fourteenth and Fifteenth Amendments. Unlike the Fifteenth Amendment’s voting guarantee, which targets only discrimination “on account of race, color, or previous condition of servitude,” the Fourteenth Amendment’s equal protection commitment is more general, applying to “any person.” According to Calabresi and Rickert, this difference shows that the Fourteenth Amendment’s original meaning was to “bar[] all systems of caste and of class-based laws, not just the Black Codes.”⁴³ Was sex discrimination the kind of caste system prohibited by the Fourteenth Amendment?⁴⁴ The Nineteenth Amendment confirmed that it was, they argue, in granting women the right to vote.⁴⁵

Yet courts were coming to a very different conclusion when RBG and her colleagues launched the ACLU Women’s Rights Project. “Up to the 1960s, the Supreme Court barely vacillated,” she observed. “It consistently

40. *Id.* at 452–53.

41. Other commentators also have doubted that the Framers and ratifiers of the Fourteenth Amendment intended to ban gender discrimination. See Michael C. Dorf, *Equal Protection Incorporation*, 88 *Va. L. Rev.* 951, 975 (2002) (“If historical accuracy connotes fidelity to the narrowly defined subjective intent of the framers and ratifiers of particular provisions, then any morally acceptable account of the Equal Protection Clause will be deeply ahistorical given nineteenth- (and early twentieth-) century views about race and sex.”); Ward Farnsworth, *Women Under Reconstruction: The Congressional Understanding*, 94 *Nw. U. L. Rev.* 1229, 1230 (2000) (“The [Fourteenth] Amendment was understood not to disturb the prevailing regime of state laws imposing very substantial legal disabilities on women, particularly married women.”); Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 *Harv. L. Rev.* 947, 964 (2002) (“[E]ven if the [Fourteenth] Amendment’s framers did contemplate that its provisions would apply to women, they did not discuss the question in terms that would suggest that they expected or intended the Equal Protection Clause to disturb settled forms of gender status regulation.”).

42. See Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 *Tex. L. Rev.* 1, 4 (2011) (“[T]he text of the Fourteenth Amendment was meant, as an original matter, to forbid class-based legislation and any law that creates a system of caste.”).

43. *Id.* at 6.

44. Even though many legislators voting for the Fourteenth Amendment did not consider sex discrimination to be a form of impermissible caste, “we are governed by the constitutional law that the Framers of the Fourteenth Amendment wrote,” Calabresi and Rickert argue, “and not by the unenacted opinions that its members held.” *Id.* at 9.

45. See *id.* at 10 (“The definition of caste had not changed; rather, the capabilities of women and the truth of their status in society had come to be better understood and that new understanding was memorialized in the text of the Constitution.”).

affirmed government authority to classify by sex.⁴⁶ For example, women could be excluded from the practice of law,⁴⁷ voting,⁴⁸ work as bartenders,⁴⁹ and mandatory jury service.⁵⁰ “[E]ven if women counted as citizens, as they did for some purposes,” she wrote, “they were properly regarded (like children) as something less than full citizens.”⁵¹ Aside from guaranteeing women the right to vote in the Nineteenth Amendment, “the Constitution remained an empty cupboard for people seeking to promote the equal stature of women and men as individuals under the law.”⁵²

As a quintessential example of the judiciary’s historic support for gender-based distinctions, RBG quoted Justice Joseph Bradley’s concurrence in *Bradwell v. Illinois*.⁵³ To explain why states could bar women from practicing law, he asserted that “[t]he paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.”⁵⁴ Deploying her sharp wit, RBG countered that “[n]either Justice Bradley, nor lawmen who recapitulate his exposition, provide enlightenment on the method of communication between jurist and Creator.”⁵⁵

Like Justice Bradley, male judges over the years mostly took for granted that the law should treat men and women differently. “From a Justice’s own situation in life and attendant perspective, his immediate reaction to a gender discrimination challenge would likely be: But I treat my wife and daughters so well, with such indulgence,” RBG explained.⁵⁶ They thought that women “had the best of all possible worlds.” They “could work if they wished; they could stay home if they chose.” Women “could avoid jury duty if they were so inclined, or they could serve if they elected to do so. . . . So what was there for them to complain about?”⁵⁷

To sum up, RBG faced a daunting challenge. U.S. law was riddled with gender-based discrimination, and the relevant decisionmakers—male judges—were largely untroubled by this differential treatment, if they thought about it at all. “To turn in a new direction,” RBG explained, “the Court first had to gain an understanding that legislation apparently

46. Ginsburg, Equality, *supra* note 27, at 451.

47. *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 140–41 (1873) (Bradley, J., concurring).

48. *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 178 (1874). Decades later, the Nineteenth Amendment eventually afforded women the right to vote.

49. *Goesaert v. Cleary*, 335 U.S. 464, 466 (1948).

50. *Hoyt v. Florida*, 368 U.S. 57, 61 (1961).

51. Ginsburg & Flagg, *supra* note 12, at 13.

52. *Id.*

53. 83 U.S. (16 Wall.) 130 (1873).

54. Ginsburg, Gender, *supra* note 19, at 4 (quoting *Bradwell*, 83 U.S. at 141 (Bradley, J., concurring)).

55. *Id.* (footnote omitted).

56. Ginsburg & Flagg, *supra* note 12, at 14.

57. Ginsburg, My Own Words, *supra* note 8, at 157.

designed to benefit or protect women could have the opposite effect.”⁵⁸ In other words, someone had to open their eyes. As leader of the ACLU Women’s Rights Project, this is precisely what RBG set out to do.

II. HOW EFFECTIVE WAS RBG’S RESPONSE TO THIS CHALLENGE?

As the last Part showed, RBG took on the critically important problem of gender discrimination. While a socially significant goal is necessary at nonprofits, it is not sufficient. They also have to deliver results.

In this spirit, how successful was RBG in combatting gender discrimination? The short answer is “astonishingly successful.” In less than a decade, she and her colleagues won a series of cases in the U.S. Supreme Court and in lower courts, establishing the proposition that gender discrimination violates the Equal Protection Clause. As Senator Daniel Patrick Moynihan observed in RBG’s Supreme Court confirmation hearings, “Her imprint can be found on virtually every gender case which reached the Supreme Court in the 1970’s.”⁵⁹

Based on this track record, RBG would have been one of the most influential lawyers of her generation even if she had never become a judge. Marty Ginsburg made this point in his characteristically light-hearted way. “[I]f Ruth, in 1980 at age forty-seven, retired to a life of TV and bonbons,” he jested, “she would have enjoyed a significant place in twentieth-century history.”⁶⁰

How did she do it? This Part details her strategy for persuading skeptical male judges. RBG had a rare capacity to see a case through their eyes, and this gift helped her win them over.

A. *Three-Part Strategy*

Specifically, RBG developed a three-part strategy, which she used again and again. First, she proceeded incrementally. “Measured motions seem to me right, in the main, for constitutional as well as common law adjudication,” she later explained.⁶¹ By asking a court to take too large a leap, she risked losing the case, and thus setting an adverse precedent that would make future lawsuits more challenging. Instead, the key was to proceed in stages, with each victory paving the way for the next.

Second, as she proceeded incrementally, RBG was thoroughly mindful of her audience. “Legislators and judges, in those years,” she later

58. Ginsburg & Flagg, *supra* note 12, at 14.

59. Confirmation Hearing, *supra* note 3, at 11 (statement of Sen. Daniel Patrick Moynihan).

60. Martin Ginsburg, *Marty Ginsburg’s Favorite Subject: Remarks Introducing Justice Ginsburg*, in Ruth Bader Ginsburg, *My Own Words* 27, 30 (2016) [hereinafter *Ginsburg, Introduction*].

61. Ginsburg, *Madison Lecture*, *supra* note 29, at 1198.

recalled, “were overwhelmingly white, well-heeled, and male.”⁶² She was a “teacher from outside the club, or the home crowd, seeking to open minds.”⁶³ To reach a potentially unsympathetic audience, she had to pick her cases carefully, so the facts would resonate with the middle-aged and elderly men deciding them.

Third, for the same reason, she knew that advocates had to choose legal arguments with care. “Speaking to that audience as though addressing one’s ‘home crowd,’” she said, “could be counterproductive.”⁶⁴ The goal was not to speak truth to power, whatever the consequences, but to find winning arguments. “My check list for a first-rate brief. Above all, it is selective,” she later explained. “It resists making every possible argument and sticks to the ones the court can reasonably be asked to consider.”⁶⁵ Sometimes, those weren’t the most satisfying arguments to make, but a win was still a win. “Fight for the things that you care about,” she later urged, “but do it in a way that will lead others to join you.”⁶⁶ This was a guiding principle for RBG throughout her career.

B. “*One Step at a Time*”

RBG’s work as an advocate began when her husband handed her a newly decided tax court opinion. “Ruth replied with a warm and friendly snarl, ‘I don’t read tax cases,’” Marty later joked. But “[n]o more than five minutes later—it was a short opinion—Ruth stepped into my little room and, with the broadest smile you can imagine, said, ‘Let’s take it!’ And we did.”⁶⁷

Their client, Charles E. Moritz, was an editor and traveling salesman for a book company.⁶⁸ Since his eighty-nine-year-old mother lived with him, he paid someone to care for her while he was on the road.⁶⁹ Moritz claimed a dependent-care deduction on his tax return.⁷⁰ But although a \$600 deduction was available to women, married couples, and men who were widowed or divorced, it was not available to Mr. Moritz, who had

62. Ginsburg, *My Own Words*, supra note 8, at 157.

63. Ginsburg & Flagg, supra note 12, at 18.

64. Ginsburg, *My Own Words*, supra note 8, at 157–58.

65. Ruth Bader Ginsburg, *Remarks on Appellate Advocacy*, 50 S.C. L. Rev. 567, 568 (1999) [hereinafter *Ginsburg, Appellate Advocacy*].

66. Alanna Vagianos, *Ruth Bader Ginsburg Tells Young Women: ‘Fight for the Things You Care About’*, Harv. Radcliffe Inst. (June 2, 2015), <https://www.radcliffe.harvard.edu/news/in-news/ruth-bader-ginsburg-tells-young-women-fight-things-you-care-about> [<https://perma.cc/6MFC-PYJZ>].

67. Martin D. Ginsburg, *How the Tenth Circuit Court of Appeals Got My Wife Her Good Job*, in *Ruth Bader Ginsburg, My Own Words* 126, 128 (2016) [hereinafter *Ginsburg, Job*].

68. *Moritz v. Comm’r*, 469 F.2d 466, 468 (1972).

69. *Id.*

70. *Id.* at 467.

never married.⁷¹ As a result, the Tax Court denied Mr. Moritz's deduction.⁷²

Representing himself in the Tax Court, Mr. Moritz had written a very short brief, which said, "If I were a dutiful daughter instead of a dutiful son, I would have received the deduction. This makes no sense."⁷³ In Marty's view, "Mr. Moritz's one-page submission remains in my mind as the most persuasive brief I ever read."⁷⁴

In the only case they ever worked on together, RBG and Marty teamed up with the ACLU to represent Mr. Moritz in an appeal to the Tenth Circuit. "Had petitioner been a divorced man or a widower, or had he been a single woman whether or not divorced or widowed, he would have been allowed the dependent care deduction," the Ginsburg brief contended. "Solely because of his status as a never married man, he was denied that deduction by the terms of the statute."⁷⁵ Adopting the theory of the Ginsburg brief, the Tenth Circuit held that the tax rule was unconstitutional and thus granted Mr. Moritz his deduction.⁷⁶

The Solicitor General, Erwin Griswold, urged the Supreme Court to take the case, but they declined to do so.⁷⁷ Griswold, who as dean of Harvard Law School had asked RBG why she had occupied a seat that could have gone to a man, inadvertently gave RBG a precious gift. The Solicitor General argued that *Moritz*, in striking down a gender-based classification, "cast a cloud of unconstitutionality over literally hundreds of federal statutes," Marty recalled.⁷⁸ "In those pre-personal computer days, there was no easy way for us to test the government's assertion." But Griswold "took care of that by attaching to his cert. petition a list—generated by the Department of Defense's mainframe computer," Marty explained.⁷⁹ This "computer list proved a gift beyond price. Over the balance of the decade . . . Ruth successfully urged the unconstitutionality of those statutes."⁸⁰

In other words, the government handed RBG a roadmap for her incremental litigation strategy. "[T]here it was, right in front of us," she

71. *Id.* at 468–69.

72. *Id.* at 467.

73. Ginsburg, Job, *supra* note 67, at 128.

74. *Id.*

75. Brief for Petitioner-Appellant at 6, *Moritz*, 469 F.2d 499 (No. 71-1127), 1973 WL 391987.

76. *Moritz*, 469 F.2d at 470.

77. Griswold petitioned the Court even though Congress had amended the law so that, going forward, both men and women could claim this deduction. Ginsburg & Tyler, *supra* note 10, at 52.

78. *Id.* at 129.

79. *Id.*

80. *Id.*

recalled, “all the laws that needed to be changed or eliminated, through legislative amendment, preferably, if not, through litigation.”⁸¹

So, step by step, RBG persuaded courts to strike down gender discrimination in a range of settings. “Real change, enduring change,” she later observed, “happens one step at a time.”⁸²

She started with a tragic case, *Reed v. Reed*, in which Richard Lynn Reed apparently committed suicide while in his father’s custody. “His parents were long separated, then divorced,” RBG later recalled. “Richard’s mother, Sally Reed, had unsuccessfully tried to keep the boy totally out of his father’s custody. While Richard was staying in his father’s house, he died from a bullet shot from one of his father’s guns.”⁸³ Idaho required the father to be chosen as administrator of the son’s estate, even though the mother also sought this responsibility: “Of several persons claiming and equally entitled . . . to administer,” Idaho law provided, “males must be preferred to females.”⁸⁴ RBG wrote the ACLU’s successful amicus brief, persuading the Court to invalidate this rule.⁸⁵ This was “the first time in our Nation’s history” that the Supreme Court “ruled in favor of a woman who complained that her State had denied her the equal protection of its laws.”⁸⁶

Using this precedent, RBG then targeted statutes differentiating between men and women in offering welfare benefits. She started with a case about military benefits,⁸⁷ knowing that only limited sums were at stake, since few women were then serving in the military. After winning this case, *Frontiero v. Richardson*, she used it as a precedent to challenge gender discrimination in the social-security system, where the financial stakes were much larger.⁸⁸

81. *Id.* at 52.

82. Chengyi Lin, Felicia A. Henderson & Zoe Kinias, Strategy and Leadership Lessons from the ‘Notorious RBG’, Knowledge: INSEAD (Mar. 8, 2021), <https://knowledge.insead.edu/blog/insead-blog/strategy-and-leadership-lessons-from-the-notorious-rbg-16201> [<https://perma.cc/6JNE-VHDK>].

83. Ginsburg, My Own Words, *supra* note 10, at 159.

84. *Reed v. Reed*, 404 U.S. 71, 73 (1971) (quoting Idaho Code § 15-314 (repealed 1972)).

85. *Id.* at 76 (“To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment.”).

86. *United States v. Virginia*, 518 U.S. 515, 531–32 (1996). Justice Ginsburg reviewed this history in her majority opinion, which required the Virginia Military Institute to accept women. *Id.* at 557–58.

87. *Frontiero v. Richardson*, 411 U.S. 677, 678 (1973).

88. Ginsburg, Equality, *supra* note 27, at 463–64 (“Striking the one-way dependency test would cost very little in the military context But, the Solicitor General warned the Court, virtually identical gender lines are found in the Social Security Act’s old-age and survivors’ insurance provisions, and in that domain, upward equalization would run many hundreds of millions.”).

Armed with these precedents,⁸⁹ RBG then took aim at sex discrimination in jury service.⁹⁰ Each win gave her ammunition to challenge another rule, as she made her way through Erwin Griswold's list.

RBG did lose one case at the Court, but only when forced to depart from her carefully crafted incremental strategy. In *Kahn v. Shevin*, she challenged a Florida property-tax exemption, which was available to widows but not widowers.⁹¹ RBG did not want to bring this case, but she had no choice; the Court had already agreed to hear it when she took it on. RBG was wary of this case because she predicted—correctly, as it turned out—that the Justices would sympathize with this statute.⁹² In upholding it, they justified it as a remedy for past discrimination. “There can be no dispute that the financial difficulties confronting the lone woman in Florida or in any other State exceed those facing the man,” Justice Douglas wrote. “Whether from overt discrimination or from the socialization process of a male-dominated culture, the job market is inhospitable to the woman seeking any but the lowest paid jobs.”⁹³ Anticipating this reaction, RBG wanted to save this issue for a later day, after she had won easier cases that would serve as favorable precedents. “*Kahn* . . . should never have come up that year,” she later explained.⁹⁴

C. “Knowing the Audience”: Finding the Right Facts

Each step of the way, RBG knew that her arguments might not initially ring true to male judges. “The Supreme Court needed basic education,” she recalled.⁹⁵ She “kept firmly in mind the importance of knowing the audience—largely men of a certain age.”⁹⁶

She chose cases carefully, looking for facts that would move them. “We sought to spark judges’ and lawmakers’ understanding that their own daughters and granddaughters could be disadvantaged by the way things

89. See generally *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975).

90. See *Duren v. Missouri*, 439 U.S. 357, 360 (1979); *Edwards v. Healy*, 421 U.S. 772, 772 (1975); *Taylor v. Louisiana*, 419 U.S. 522, 524–25 (1975).

91. 416 U.S. 351, 352 (1974).

92. See Amy Leigh Campbell, *Raising the Bar: Ruth Bader Ginsburg and the ACLU Women’s Rights Project*, 11 *Tex. J. Women & L.* 157, 196–97 (2002) (“[S]he signed onto the case reluctantly. . . . *Kahn* did not fit clearly within the confines of Ginsburg’s litigation strategy due to its lack of double-edged discrimination, and she knew that a loss at the Supreme Court level would have been detrimental.”).

93. *Kahn*, 416 U.S. at 353.

94. Malvina Halberstam, *Ruth Bader Ginsburg: The First Jewish Woman on the United States Supreme Court*, 19 *Cardozo L. Rev.* 1441, 1448 n.29 (1998) (quoting Ruth B. Cowan, *Women’s Rights Through Litigation: An Examination of the American Civil Liberties Union Women’s Rights Project, 1971–1976*, 8 *Colum. Hum. Rts. L. Rev.* 373, 391 (1976)).

95. Ginsburg & Flagg, *supra* note 12, at 18.

96. Ginsburg, *My Own Words*, *supra* note 8, at 157.

were,” she recalled. “We saw ourselves as teachers appearing before audiences that, on the realities underlying our cases, had not advanced much beyond the third grade.”⁹⁷

One of her tried-and-true strategies was to find male clients, like Charles Moritz, so male judges could identify more readily with their plight. These cases “helped judges—who, in those days, were almost uniformly male—to understand that overbroad gender classifications were problematic,” she explained. “Men, too, could be disadvantaged by sex-role stereotyping.”⁹⁸

Perhaps the quintessential example was *Weinberger v. Wiesenfeld*,⁹⁹ a case that RBG later described as “dear to my heart”¹⁰⁰ and the “[m]ost spectacular of the Court’s gender discrimination decisions to date.”¹⁰¹ Paula Wiesenfeld was a high school math teacher who died in childbirth. Her husband Stephen, opting to devote himself full-time to raising their son Jason, applied for social-security benefits. Yet the system provided support for raising young children only to widows, not to widowers. “Stephen’s case so moved me,” RBG later recalled. “He was devastated by his wife’s death, and he was really determined to bring up Jason himself.”¹⁰²

With these poignant facts, RBG’s brief emphasized three distinct harms. First, this discriminatory regime wronged Paula. Although she had made the same social-security contributions as male colleagues, her family did not receive the same benefits. “The sole reason for the differential was Paula Wiesenfeld’s sex,” RBG wrote in her brief. “As a breadwinning woman, she was treated equally for Social Security contribution purposes, but unequally for the purpose of determining family benefits due under her account.”¹⁰³

The second was harm to Stephen. “Appellee Stephen Wiesenfeld is a father, not a mother,” she wrote. “42 U.S.C. § 402(g) recognizes the mother, to the exclusion of the father, as the nurturing parent. She may

97. *Id.* at 158.

98. *Id.* at 162.

99. 420 U.S. 636 (1975).

100. Ginsburg, *My Own Words*, *supra* note 8, at 160.

101. Ginsburg, *Gender*, *supra* note 19, at 14. RBG’s long-time friend and authorized biographer, Wendy Williams, has described *Wiesenfeld* as RBG’s favorite case. See Wendy W. Williams, Ruth Bader Ginsburg’s Equal Protection Clause: 1970–80, 25 *Colum. J. Gender & L.* 41, 47 (2013).

102. Robert Barnes, Ginsburg Performs Wedding for Man in 1970s Case She Argued Before the Supreme Court, *Wash. Post* (May 25, 2014), https://www.washingtonpost.com/politics/ginsburg-performs-wedding-for-man-in-1970s-case-she-argued-before-the-supreme-court/2014/05/25/a1add474-e114-11e3-9743-bb9b59cde7b9_story.html (on file with the *Columbia Law Review*). See generally Stephen Wiesenfeld, *My Journey with RBG*, 121 *Colum. L. Rev.* 563 (2021).

103. *Wiesenfeld* Brief, *supra* note 25, at 10.

stay home with her child, he may not stay home with his.”¹⁰⁴ A male judge could easily identify with Stephen, wondering what he would do in these heartbreaking circumstances.

Third—and perhaps most masterfully—RBG condemned this rule’s callousness to an innocent baby. “Jason Paul Wiesenfeld, child of a deceased mother . . . , is the person ultimately disadvantaged by the statutory scheme. A child whose insured father dies may receive the personal care of its surviving parent, but the child whose insured mother dies must get along without the personal care of either parent.”¹⁰⁵ Why should a young child have to “get along” in this way? “Is a social insurance benefit, which is designed to facilitate close parent-child association, constitutionally allocated,” she asked, “when it includes children with dead fathers, but excludes children with dead mothers?”¹⁰⁶

This powerful advocacy secured a unanimous judgment. While Justice Lewis Powell and Chief Justice Warren Burger focused only on the unfairness to female workers,¹⁰⁷ their colleagues also adopted RBG’s arguments about fathers and children. “The fact that a man is working while there is a wife at home does not mean that he would, or should be required to, continue to work if his wife dies,” Justice William Brennan wrote for the Court. “It is no less important for a child to be cared for by its sole surviving parent when that parent is male rather than female.”¹⁰⁸ Even Justice William Rehnquist, a regular dissenter in RBG’s gender discrimination victories, joined the judgment to right the injustice to baby Jason.¹⁰⁹ “The Court was getting the message,” she later recalled.¹¹⁰

RBG wasted no time in making use of this precedent. In *Califano v. Goldfarb*, she brought another challenge to the same regime, but this time the widower was childless.¹¹¹ “*Goldfarb* might be described as . . . *Wiesenfeld* without the baby,” she later recalled.¹¹² By proceeding incrementally, she used exceptionally compelling facts to establish a principle and then

104. *Id.* at 11–12.

105. *Id.* at 12.

106. *Id.*

107. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 654–55 (1975) (Powell, J. concurring) (“The statutory scheme . . . impermissibly discriminates against a female wage earner I attach less significance to the view emphasized by the Court that a purpose of the statute is to enable the surviving parent to remain at home to care for a child.”).

108. *Id.* at 651–52.

109. Justice Rehnquist saw “no necessity for reaching the issue of whether the statute’s purported discrimination against female workers violates the Fifth Amendment.” *Id.* at 655 (Rehnquist, J., concurring in the result). Instead, he “would simply conclude . . . that . . . it is irrational to distinguish between mothers and fathers when the sole question is whether a child of a deceased contributing worker should have the opportunity to receive the full-time attention of the only parent remaining to it.” *Id.*

110. Ginsburg & Tyler, *supra* note 10, at 41.

111. 430 U.S. 199, 202–03 (1977).

112. Ginsburg, *Equality*, *supra* note 27, at 468.

applied this principle to cases with more common facts. She won *Goldfarb* by a five-to-four vote.¹¹³

D. “*Knowing the Audience*”: *Picking the Right Legal Argument*

In formulating the ACLU’s litigation strategy, RBG was masterful in choosing not only the right facts, but also the right legal arguments. She had a rare gift for seeing the world through the eyes of her audience—even when she did not agree with them—so she could make the most persuasive case.

For example, RBG knew that the fate of gender-based classifications largely turned on the standard applied in reviewing them. “In determining whether laws or official actions comport with the equal protection requirement,” she explained in 1975, “the Supreme Court has differentiated two standards of review: a deferential or ‘rational relationship standard,’ and a ‘strict scrutiny standard,’ satisfied only by demonstration of a ‘compelling state interest.’”¹¹⁴ While gender-based classifications were likely to survive if the Court applied the “rational relationship” test, which RBG called the “anything goes” standard,¹¹⁵ they would be struck down if the Court applied “strict scrutiny,” which was the test the Court applied to race-based classifications.

Initially, RBG urged the Court to apply strict scrutiny, but she soon realized that only four Justices supported this approach. In *Frontiero*, Justice Brennan applied strict scrutiny, but only three Justices joined him.¹¹⁶ To secure a majority, she needed one more vote.

Although RBG believed that strict scrutiny was the right test, she knew her audience. Instead of continuing to propose “strict scrutiny,” she started asking for “heightened scrutiny,” inviting the Court to add a third “intermediate scrutiny” test.

This pivot won the day in *Craig v. Boren*. Curtis Craig was a fraternity brother who wanted to buy “weak beer,” and RBG wrote the Supreme Court brief in his case. Under the relevant Oklahoma rule, “[g]irls were permitted to buy 3.2[%] beer at 18; boys (because they will be boys),” she later explained, “were to wait till 21.”¹¹⁷ The Court struck down this rule.¹¹⁸

113. 430 U.S. at 199.

114. Ginsburg, *Gender*, supra note 19, at 16.

115. Williams, supra note 101, at 42 (quoting Brief for American Civil Liberties Union as Amicus Curiae, Supporting Appellants at 13, *Craig v. Boren*, 429 U.S. 190 (1976) (No. 75-628), 1976 WL 181333).

116. See *Frontiero v. Richardson*, 411 U.S. 677, 688–89 (1973). Four other Justices agreed that the statute was unconstitutional, but did not treat gender as a suspect classification. See *id.* at 691 (Stewart, J., concurring in the judgment); *id.* (Powell, J., concurring in the judgment).

117. Ginsburg, *Equality*, supra note 27, at 468.

118. *Craig v. Boren*, 429 U.S. 190, 210 (1976).

Even more importantly, for the first time a majority explicitly applied “intermediate scrutiny” to gender discrimination.¹¹⁹ “One might wish the Court had chosen a less frothy case for announcing the ‘heightened’ review standard,” she later quipped. “Still, it was a key doctrinal advance.”¹²⁰

RBG showed the same flexibility and creativity in advancing another of her litigation priorities: pressing for more women to serve on juries. In *Duren v. Missouri*, she challenged Missouri’s practice of treating jury service as voluntary for women, but mandatory for men.¹²¹ RBG asked the court to overrule *Hoyt v. Florida*,¹²² a precedent set less than two decades earlier. *Hoyt* permitted jury service to be optional for women because, as Justice John Marshall Harlan put it, the “woman is still regarded as the center of home and family life.”¹²³

In response, RBG offered two rationales for overruling *Hoyt*. Notably, she emphasized the one that probably was less persuasive to her, but more palatable to her judicial audience.

Her first objection to Missouri’s system—the one that may well have bothered her the most—was its reliance on gender stereotypes. “[T]he vaunted women’s privilege, viewed against history’s backdrop, simply reflects and perpetuates a certain way of thinking about women,” she said in oral argument. “Women traditionally were deemed lesser citizens—”¹²⁴

As she started making this argument, Chief Justice Burger immediately interrupted her: “That wouldn’t concern Mr. Duren, would it?”¹²⁵ Her client was a male criminal defendant, not a female potential juror who had been told that she—unlike a man—was not required to serve.

In response, RBG pivoted to her second argument: When women were underrepresented on juries, criminal defendants were denied their Sixth Amendment right to a jury of their peers. “Mr. Duren has a right to

119. “Classification by gender fails unless the legislative objective is *important* (a word stronger than *legitimate* [(the Court’s usual standard of review)], but weaker than *compelling* [(the standard for strict scrutiny)]),” RBG explained. “Moreover, the classification must relate *substantially* to the important objective. (Again, *substantial* has a more stringent tone than *rational*, but implies a connection less tight than a *necessary* one.)” Ginsburg, Equality, *supra* note 27, at 468–69.

120. Ginsburg, My Own Words, *supra* note 8, at 161.

121. 439 U.S. 357, 360 (1979).

122. 368 U.S. 57 (1961).

123. *Id.* at 62.

124. Transcript of Oral Argument at 12, *Duren*, 439 U.S. 357 (No. 77-6067) [hereinafter *Duren* Transcript]. See generally Oral Argument at 14:50, *Duren*, 439 U.S. 357 (No. 77-6067), <https://www.oyez.org/cases/1978/77-6067> (on file with the *Columbia Law Review*) [hereinafter Oyez Transcript].

125. *Duren* Transcript, *supra* note 124, at 12; Oyez Transcript, *supra* note 124, at 14:56.

a jury drawn from a panel reasonably representative of the community. And as this—”¹²⁶

Again, Chief Justice Burger interrupted. “Yes, but he wouldn’t be interested in the factor you mentioned,” he said, “whether this is fair or unfair to the women . . . to be called for jury service or not called.”¹²⁷

In response, RBG found a way to finish her point about stereotyping. “But that was the traditional justification given by States, first, for excluding women altogether, and then the second step was providing an exemption for ‘any woman,’” she answered, “the notion being that women are not really needed, not really wanted for participation in the democratic processes of government.”¹²⁸

But she then reverted to her other argument, which was a better fit for her all-male audience: the right of a criminal defendant to a representative jury. This actually was an awkward argument for her to make, since it implied that female and male jurors had inherently different perspectives. Otherwise, why would defendants be harmed when women were excluded from their jury? Was there something systematically different about women as jurors? Wasn’t this idea itself rooted in gender stereotypes?

When Justice John Paul Stevens pressed RBG on this issue, she used humor to deflect it and then quickly moved on:

QUESTION: If we look at [this] from the point of view of the defendant, and you take the view, as I think you do, that men and women are essentially fungible for purposes of jury service, how is the cross-section hurt if women are excluded?

MRS. GINSBURG: Yes, men and women are persons of equal dignity and they should count equally before the law, but they are not the same; there are differences between them that most of us value highly

QUESTION: What is the relevant difference between men and women for purposes of jury service, from the point of view of the defendant?

MRS. GINSBURG: What is the relevant—

QUESTION: Yes,

MRS. GINSBURG: It is that indefinable something—

[Laughter.]

QUESTION: That sounds kind of like a stereotyping.

MRS. GINSBURG: I think that we perhaps all understand it when we see it and when we feel it, but it is not that easy to describe; yes, there is a difference.¹²⁹

126. *Duren* Transcript, *supra* note 124, at 12.

127. *Id.*

128. *Id.* at 13.

129. *Id.* at 15; see also *Oyez* Transcript, *supra* note 124, at 18:15. Notably, in later years, she made a similar point about women serving on the bench:

RBG found a winning argument, prevailing by a vote of eight to one.¹³⁰ In dissent, Justice Rehnquist expressed frustration, arguing that *Duren* was really an equal protection case in disguise. “[T]he majority is in truth concerned with the equal protection rights of women to participate in the judicial process,” he wrote, “rather than with the Sixth Amendment right of a criminal defendant to be tried by an ‘impartial jury.’”¹³¹

He also hammered away at RBG’s answer to Justice Stevens. “If . . . men and women are essentially fungible for purposes of jury duty, the question arises how underrepresentation of either sex . . . infringes on a defendant’s right to have his fate decided by an impartial tribunal,” he wrote. “Counsel for petitioner, when asked at oral argument to explain the difference, from the defendant’s point of view, between men and women jurors, offered: ‘It is that indefinable something’”¹³² He dismissed this answer as “mystical incantations.”¹³³

Ironically, RBG might well have shared Justice Rehnquist’s view of the Court’s reasoning, even as she disagreed with his vote. She surely would have welcomed an equal protection rationale. But as an advocate, her goal was to win the case. If one theory was too hard a “sell” for her audience, she was creative and determined enough to find another.

E. “*Doctrinal Limbs Swiftly Shaped*”: RBG’s Critique of *Roe v. Wade*

RBG drew on her insights about impact litigation not only to win her own cases but also to analyze other high-profile decisions. For example, although she was a supporter of liberal access to abortions, RBG was quite critical of *Roe v. Wade*, a 1973 case striking down restrictions on abortion in Texas and Georgia.¹³⁴ Although RBG played no role in this case, which the Court decided the year after she helped launch the ACLU Women’s Rights Project, her critique sheds further light on her views of appellate advocacy, supporting this Article’s conclusions about her strategy. Specifically, RBG faulted *Roe* for lacking the three qualities, emphasized above,

What does women’s participation in numbers on the bench add to our judicial system? It is true, as Jeanne Coyne of Minnesota’s Supreme Court famously said: at the end of the day, a wise old man and a wise old woman will reach the same decision. But it is also true that women, like persons of different racial groups and ethnic origins, contribute what the late fifth Circuit Judge Alvin Rubin described as “a distinctive medley of views influenced by differences in biology, cultural impact, and life experience.” Our system of justice is surely richer for the diversity of background and experience of its judges.

Ginsburg, *My Own Words*, supra note 8, at 77.

130. See *Duren v. Missouri*, 439 U.S. 357, 357 (1979).

131. *Id.* at 378 (Rehnquist, J., dissenting).

132. *Id.*

133. *Id.*

134. 410 U.S. 113, 116, 166 (1973).

that she prized in impact litigation: incrementalism, compelling facts, and legal arguments tailored to persuade a skeptical audience.

1. “*The Women Are Against Her.*” — Before turning to the details of her critique, it is worth noting that she caused something of a stir. Indeed, a lecture criticizing *Roe*, delivered in March of 1993,¹³⁵ complicated her Supreme Court nomination three months later by triggering opposition from an improbable source: women’s rights groups. When Senator Daniel Patrick Moynihan suggested RBG’s name to President Bill Clinton, Clinton initially balked, noting that “the women are against her.”¹³⁶

Indeed, the leaders of three women’s groups sent a joint statement to the White House, pointedly refusing to endorse RBG: “It has been reported that the women’s movement would oppose the nomination of Judge Ruth Bader Ginsburg to the Supreme Court,” they wrote. “We want to be certain there is no confusion about where our organizations stand: at this stage in the process, we have not taken any position in favor or in opposition to any candidate.”¹³⁷

When Marty Ginsburg read this letter, he “saw it as a pearl beyond price,” as he later recalled.¹³⁸ He realized that when the letter became public, these groups would be forced either to go public with their opposition or to stop opposing RBG privately.¹³⁹ They chose the latter course.

Meanwhile, others were expressing public support for RBG. For example, Justice Antonin Scalia, who had been RBG’s colleague on the D.C. Circuit, was asked about two other front-runners. “If you were stranded on a desert island with your new Court colleague, who would you prefer, Larry Tribe or Mario Cuomo?” His answer was, “Ruth Bader Ginsburg.”¹⁴⁰

RBG got a critical boost from Erwin Griswold, her former law school dean and adversary in litigation. Even though they were on opposite sides in the courtroom, Griswold admired RBG’s talent and commitment. In remarks commemorating the fiftieth anniversary of the U.S. Supreme Court building, Griswold included RBG in exceedingly distinguished company:

I think, for example, of the work done in the early days of the NAACP which was represented here by one of the country’s great lawyers, Charles Hamilton Houston; work which was carried on

135. Ginsburg, Madison Lecture, *supra* note 29, at 1185, 1198.

136. Jill Lepore, Ruth Bader Ginsburg’s Unlikely Path to the Supreme Court, *New Yorker* (Oct. 1, 2018), <https://www.newyorker.com/magazine/2018/10/08/ruth-bader-ginsburgs-unlikely-path-to-the-supreme-court> (on file with the *Columbia Law Review*).

137. *Id.* (quoting Joint Statement from Women’s Legal Def. Fund, Nat’l Women’s L. Ctr., & NOW’s Legal Def. & Educ. Fund to Bernard Nussbaum, Gen. Counsel, White House (May 19, 1993)).

138. *Id.*

139. *Id.*

140. Ginsburg, *My Own Words*, *supra* note 8, at 40.

later with great ability by Thurgood Marshall. And I may mention the work done by lawyers representing groups interested in the rights of women of whom Ruth Bader Ginsburg was an outstanding example.¹⁴¹

Those words helped overcome Bill Clinton's reservations about RBG. When the White House Counsel, Bernard Nussbaum, called Senator Moynihan about her, the Senator replied: "Hmm, well, all I have is this statement, she's a very fine attorney, she developed the theory of gender equality under the equal-protection clause."¹⁴² Just as Nussbaum was ending the call so he could go see the President, Moynihan added one last thought. "Hold it! Hold it! One minute!" he recalled saying. "Erwin Griswold—dean of *Harvard* Law School—said—on the fiftieth anniversary—the Supreme Court—building a new building—that—she—was—to—women's rights—what—Thurgood Marshall—was—to—civil rights!"¹⁴³

Two days later, President Clinton nominated RBG. At the announcement in the Rose Garden, Nussbaum reminded Moynihan of Griswold's assessment and said that "I walked into the Oval Office with that."¹⁴⁴ Reflecting on the importance of those words, Moynihan thought: "Well, if I had not kept Nussbaum for twelve seconds . . ."¹⁴⁵

While RBG's 1993 lecture did not help her to be nominated, did it help her to be confirmed? Did she criticize *Roe v. Wade* as a tactic to position herself as a moderate with Republican senators? I was with RBG once when someone implied this possibility. Ever courteous, she let the moment pass. But when the two of us were alone a few minutes later, she expressed frustration. "I had said those things before," she vented. Indeed, she began criticizing *Roe v. Wade* in the 1970s, long before a Supreme Court nomination was potentially on the horizon.¹⁴⁶ Nor was it her style to say something she did not believe as a way to secure political advantage. She was intellectually honest to the core.

2. *Incrementalism.* — Rather, in criticizing *Roe*, RBG was drawing on her own deeply held views about how to prevail in impact litigation. First, she criticized the Court for doing too much, too quickly. "Doctrinal limbs

141. Confirmation Hearing, *supra* note 3, at 11 (statement of Sen. Daniel Patrick Moynihan) (quoting Erwin Griswold, Solicitor Gen., Remarks at the Proceedings in Commemoration of the 50th Anniversary of the Opening of the Supreme Court Building (Oct. 7, 1985), in 474 Official Reports of the Supreme Court III, IX (1986)).

142. Sidney Blumenthal, A Beautiful Friendship, *New Yorker*, July 5, 1993, at 34, 38, <https://archives.newyorker.com/newyorker/1993-07-05/flipbook/038> (on file with the *Columbia Law Review*).

143. *Id.* (emphasis in original).

144. *Id.*

145. *Id.*

146. For example, in 1977, she contrasted the "ginger[]" approach in her equal protection cases with the Court's 1973 performance in the abortion cases: "[I]t appeared that in no other area of the law had the Burger Court (or perhaps any Court) acted more intrepidly." See Ginsburg, *Equality*, *supra* note 27, at 460.

too swiftly shaped, experience teaches, may prove unstable. The most prominent example in recent decades is *Roe v. Wade*,” she said. “To illustrate my point, I have contrasted that breathtaking 1973 decision”—and, to RBG, “breathtaking” was not a compliment—“with the Court’s more cautious dispositions, contemporaneous with *Roe*, in cases involving explicitly sex-based classifications”—that is, with the ACLU’s impact litigation.¹⁴⁷

RBG faulted the Court for deciding the issue on its own and leaving no role for states and the political process. “*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.”¹⁴⁸

RBG did assert a role for the Court on this issue, but a more modest one than the intervention in *Roe*. Her model was the incremental approach of her own impact litigation. In her cases about welfare benefits and jury service, “[t]he ball, one might say, was tossed by the Justices back into the legislators’ court, where the political forces of the day could operate,” she wrote. “The Supreme Court wrote modestly, it put forward no grand philosophy; but by requiring legislative reexamination of once customary sex-based classifications, the Court helped to ensure that laws and regulations would ‘catch up with a changed world.’”¹⁴⁹

RBG faulted *Roe* for diverging so starkly from this incremental approach. “*Roe v. Wade*, in contrast, invited no dialogue with legislators. Instead, it seemed entirely to remove the ball from the legislators’ court,” she observed. “In 1973, when *Roe* issued, abortion law was in a state of change across the nation. As the Supreme Court itself noted, there was a marked trend in state legislatures ‘toward liberalization of abortion statutes.’”¹⁵⁰

As an alternative, RBG argued that the Court should have struck down only the Texas law at issue in the case, which allowed abortions solely as a life-saving procedure. “Suppose the Court had stopped there,” she suggested, “and had not gone on, as the Court did in *Roe*, to fashion a regime blanketing the subject, a set of rules that displaced virtually every state law then in force. Would there have been the twenty-year controversy we have witnessed . . . ?”¹⁵¹

3. *The Right Facts*. — RBG would have preferred not only a more incremental approach, but also more compelling facts. Specifically, she wanted the Court’s first case on abortion to be about a woman’s decision

147. Ginsburg, Madison Lecture, *supra* note 29, at 1198 (footnotes omitted).

148. *Id.* at 1208.

149. *Id.* at 1204–05 (footnote omitted) (quoting Wendy W. Williams, Sex Discrimination: Closing the Law’s Gender Gap, *in* *The Burger Years: Rights and Wrongs in the Supreme Court 1969–1986* at 109, 123 (Herman Schwartz ed., 1987)).

150. *Id.* at 1205 (footnote omitted) (quoting *Roe v. Wade*, 410 U.S. 113, 140 (1973)).

151. *Id.* at 1199 (footnote omitted).

not to have one. Indeed, she had persuaded the Court to take a case with those facts during the same term when *Roe* was decided:

Captain Susan Struck [was] an Air Force officer serving as a nurse in Vietnam, where, in 1970, she became pregnant. She was offered this choice: have an abortion on base or leave the service Captain Struck, a Roman Catholic, would not have an abortion, but she undertook to use no more than her accumulated leave time for the birth, and she arranged for the baby's adoption immediately after birth. She sued to fend off the discharge Air Force regulations required.¹⁵²

In RBG's view, Captain Struck's situation was "an ideal case to argue the sex equality dimension of laws and regulations regarding pregnancy and childbirth."¹⁵³ Just as she relied on male plaintiffs as a way to champion women's rights, RBG relied on a client who did *not* want an abortion as a way to broaden access to abortions.

Ironically, these facts turned out to be too compelling. "Solicitor General Erwin Griswold saw the loss potential for the government," RBG explained. "He recommended that the Air Force waive Captain Struck's discharge and abandon its policy of automatically discharging women for pregnancy."¹⁵⁴ As a result, the Court dismissed the case.

"Perhaps it is indulgence in wishful thinking," RBG said in her 1993 lecture, "but the *Struck* case, I believe, would have proved extraordinarily educational for the Court and had large potential for advancing public understanding."¹⁵⁵

4. *Fine-Tuning the Legal Argument.* — RBG wanted to litigate these issues not just with more compelling facts, but also with a different legal theory. *Roe* is grounded in the "right of privacy . . . founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action."¹⁵⁶ Although the Court acknowledges that "[t]he Constitution does not explicitly mention any right of privacy,"¹⁵⁷ the Court nevertheless held that this right "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."¹⁵⁸

RBG argued that instead of privacy, the Court should have focused on equality. "The idea of the woman in control of her destiny and her place in society was less prominent in the *Roe* decision itself, which coupled with the rights of the pregnant woman the free exercise of her physician's medical judgment," she wrote. "The *Roe* decision might have been less of a

152. Ginsburg, *My Own Words*, supra note 8, at 163.

153. *Id.*

154. *Id.*

155. Ginsburg, *Madison Lecture*, supra note 29, at 1200.

156. *Roe v. Wade*, 410 U.S. 113, 153 (1973).

157. *Id.* at 152.

158. *Id.* at 153.

storm center had it . . . homed in more precisely on the women's equality dimension of the issue"¹⁵⁹

Indeed, this was precisely the argument she wanted to make for Captain Struck. She summarized this equal protection theory in her 1993 lecture:

[D]isadvantageous treatment of a woman because of her pregnancy and reproductive choice is a paradigm case of discrimination on the basis of sex. What was the assumption underlying the differential treatment to which Captain Struck was exposed? The regulations that mandated her discharge were not even thinly disguised. They declared, effectively, that responsibility for children disabled female parents, but not male parents, for other work—not for biological reasons, but because society had ordered things that way.¹⁶⁰

To sum up, in both RBG's critique of *Roe* and in her litigation strategy for the ACLU, we see the same themes. As an advocate, she was determined to proceed step by step, so each victory could pave the way for the next win. To persuade skeptical judges, she hunted for compelling facts. Once she found the right vehicle, she was meticulous in choosing her legal argument.

This Part has posed the question, "How effective was RBG's response to gender-based discrimination?" The answer, of course, is that she was extraordinarily effective. Her victories as an advocate were powered not only by eloquence and determination, but also by disciplined analysis.

III. WAS RBG THE RIGHT PERSON TO TAKE ON THESE CHALLENGES?

So far, this Article has shown that in leading the ACLU Women's Rights Project, RBG was pursuing a socially significant goal in an effective way. As I have written elsewhere, in making the case for its work, a nonprofit is off to a strong start in showing, first, that it is targeting an important problem and, second, that it is responding effectively. But this is not enough. A nonprofit should also ask a third question: "Are we the right organization to respond?" Does the organization have a comparative advantage in addressing the issue? After all, nonprofits add more value by playing to their strengths. They should prioritize jobs that others cannot do as well.

In this spirit, what were RBG's comparative advantages in leading the ACLU Women's Rights Project? What personal qualities contributed to her success in this effort? This Part focuses on four singular strengths: her courage, her aptitude for lawyering, the example she set in her personal life, and her collegiality.

159. Ginsburg, Madison Lecture, *supra* note 29, at 1199–1200 (footnotes omitted).

160. *Id.* at 1202 (footnote omitted).

A. *“Spend No Time Fretting”*

A key source of RBG’s success as a nonprofit leader—and, of course, in the rest of her career as well—was her fierce determination. She was one of many women in her generation who faced obstacles in her professional life. No doubt, countless others shared her frustration. But RBG was the rare person who was determined—indeed, implacably determined—to do something about it.

She credited her mother for teaching her to be strong. RBG felt fortunate to have a “mother who, by her example, made reading a delight and counseled me constantly to be ‘independent,’ able to fend for myself, whatever fortune might have in store for me.”¹⁶¹

It took courage to press a novel agenda, striving to change the minds of a skeptical audience. She knew there would be low moments along the way, but she pressed on.

Sadly, RBG had to learn to overcome adversity early in life. She lost her mother to cancer two days before her high school graduation. In rebounding from this terrible blow, RBG learned to be resilient. She also was motivated to live up to her mother’s expectations for her. “I pray that I may be all that she would have been, had she lived in an age when women could aspire and achieve,” RBG said when President Clinton nominated her to the Supreme Court.¹⁶²

RBG’s searing experiences early in life steeled her to make a choice that was unusual at the time: going to law school while raising a young child. She later recalled wise advice she received from Marty’s father. “Ruth, if you don’t want to start law school, you have a good reason to resist the undertaking. No one will think the less of you if you make that choice,” he told her. “But if you really want to study law, you will stop worrying and find a way to manage child and school.”¹⁶³

RBG took this advice to heart. “Many times after, when the road was rocky,” she recalled, “I thought back to Father’s wisdom, spent no time fretting, and found a way to do what I thought important to get done.”¹⁶⁴

Unfortunately, law school became even more challenging “[w]hen Marty was diagnosed with a virulent cancer,” she recalled. “[T]here were precious few known survivors.”¹⁶⁵ Showing an impressive ability to function without sleep, she took care of him while also tending to her academic work and child care responsibilities. To make sure Marty did not fall

161. Ginsburg, *My Own Words*, supra note 3, at xiv.

162. *Id.* at 177.

163. *Id.* at xvi.

164. *Id.*

165. Ginsburg & Tyler, supra 10, at 34.

behind in his classes, RBG arranged for friends to share notes with him.¹⁶⁶ Fortunately, Marty made a full recovery.

As awful as this experience must have been, it showed RBG that she could overcome even the most daunting obstacles when she set her mind to it. “We just took every day as it came, we were determined to prevail,” she recalled. “After those hard months, I believed that whatever came my way, I could handle it.”¹⁶⁷

Indeed, I imagine that she drew on this experience later on in her own bouts with cancer. While battling those illnesses, she continued to work at her usual frenetic pace. During her first illness, I called to urge her to slow down until she recovered. This is the only conversation with RBG that I regret. She responded with a touch of anger—the only time in all the years we knew each other—and explained that her work actually was *helping* her to recover. “This is how I deal with it,” she said.

These deep reserves of strength served her well. Indeed, they were a great asset to her clients and to the ACLU, spurring her to persevere even when the courts seemed unreceptive to her cause.

B. “*Get It Right and Keep It Tight*”

Along with her courage and determination, RBG obviously also had exceptional gifts as a lawyer, which were essential to the Women’s Rights Project’s success under her leadership. This Article already has emphasized her talent in formulating strategy and framing issues.

In addition, RBG was a gifted stylist. Her prose was evocative, clear, and spare. In some ways, she was influenced by Vladimir Nabokov, who was her professor at Cornell. “Words could paint pictures, I learned from him,” she later recalled. “Choosing the right word, and the right word order, he illustrated, could make an enormous difference in conveying an image or an idea.”¹⁶⁸ RBG’s writing also was rigorously clear. In her view, if an idea could not be explained clearly, then it was not a sound idea. She was committed to expressing it with as few words as possible. “I will often read a sentence aloud and [ask], ‘Can I say this in fewer words—Can I write it so the meaning will come across with greater clarity?’”¹⁶⁹ In chambers, her mantra for opinions was: “Get it right and keep it tight.”

To “get it right,” RBG was painstakingly honest and meticulously accurate. “Above all, a good brief is trustworthy,” she explained. “It states the facts honestly. It does not distort lines of authority or case holdings. It

166. Lepore, *supra* note 136 (“Ruth not only cared for him, and for the baby, but also covered all of his classes and helped him with his papers.”).

167. Ginsburg & Tyler, *supra* 10, at 34.

168. Ginsburg, *My Own Words*, *supra* note 8, at xv.

169. Halberstam, *supra* note 94, at 1444 (alterations in original) (quoting Eleanor Ayer, Ruth Bader Ginsburg: Fire and Steel on the Supreme Court 21 (1994)).

acknowledges and seeks fairly to account for unfavorable precedent.”¹⁷⁰ To communicate this idea to law clerks, she cautioned them never to “knock chess pieces off the table.” She also was careful not to overstate her position, knowing that she would lose credibility once the other side exposed the overstatement. RBG also was allergic to typos and inaccurate citations. She wanted her work product to be perfect.

To accomplish this, she worked exceedingly hard. Although she had the talent to produce fine work with only a modest effort, this was never her way. On the contrary, she wrote, rewrote, and then rewrote again, thinking carefully about each word. Ever a night owl, she worked late into the night, often finishing her work day at 4:00 AM. Aside from time with her family and occasional evenings at the opera, she invested all of her considerable energies in her professional responsibilities.

In fact, one of the nicest compliments I have ever received was a call from her on a Sunday, saying that a draft I had sent was in good enough shape that she and Marty would go to a movie that afternoon. Always entertaining, Marty said in the background that if the movie wasn’t any good, they would hold me responsible.

C. “A Caring Life Partner”

RBG was the right leader for the ACLU Women’s Rights Project not only because of her courage and legal talent, but also because of the example she set in her personal life. “Women will have achieved true equality,” she observed, “when men share with them the responsibility of bringing up the next generation.”¹⁷¹ In the way they supported each other and divided labor, RBG and Marty exemplified this ideal. Marrying Marty, RBG often said, “was the best decision I ever made.”¹⁷²

As a feminist, RBG did not urge women to put their careers before their children. Rather, she wanted fathers to join mothers in bearing the responsibilities of childrearing. RBG believed this division of labor would be better not only for mothers and children, but also for fathers.

To reinforce this point, RBG always asked about *my* family whenever we spoke. When I served as dean of her alma mater, Columbia Law School, her first question was always about my children. Only then would we talk about the school. I got the message, and my life has been richer for it.

She communicated the message so credibly because of her own choices. RBG was utterly devoted to her husband and children, and later to her grandchildren and great-granddaughter. She adored them, worried

170. Ginsburg, *Appellate Advocacy*, supra note 65, at 568.

171. Alana Esposito, *A Lifetime Spent Fighting for Progress: Ruth Bader Ginsburg’s Unparalleled Legacy*, Redefy (Sept. 20, 2020), <https://www.redefy.org/stories/a-lifetime-spent-fighting-for-progress-ruth-bader-ginsburgs-unparalleled-legacy> [<https://perma.cc/KB6R-9M47>].

172. Ginsburg, *My Own Words*, supra note 8, at 26.

about them, took pride in them, and obviously invested a great deal of time and effort in them. For RBG, her family was not a distraction from her true calling, but a source of strength, support, and inspiration. “Each part of my life provided respite from the other,” she once explained, “and gave me a sense of proportion.”¹⁷³

For example, her “success in law school, [she had] no doubt, was due in large measure to baby Jane.” She explained: “I attended classes and studied diligently until four in the afternoon; the next hours were Jane’s time, spent at the park, playing silly games or singing funny songs, reading picture books and A.A. Milne poems, and bathing and feeding her. After Jane’s bedtime, I returned to the law books with renewed will.”¹⁷⁴

Marty, meanwhile, was RBG’s most enthusiastic booster. “I have had the great fortune to share life with a partner truly extraordinary for his generation,” RBG said of Marty in her confirmation hearings, “a man who believed at age 18 when we met, and who believes today, that a woman’s work, whether at home or on the job, is as important as a man’s.”¹⁷⁵ He was “so secure about himself, he never regarded me as any kind of threat to his ego,” RBG recalled. “On the contrary, he took great pride in being married to someone he considered very able.”¹⁷⁶ Marty “always made me feel I was better than I thought I was, that I could accomplish whatever I sought,” she said. “He had enormous confidence in my ability, more than I had in myself.”¹⁷⁷

Indeed, Marty was a trusted source of professional advice for RBG, just as she was for him in his career as one of the nation’s leading tax experts. “My parents discussed everything,” recalled their daughter, Jane Ginsburg.¹⁷⁸ Indeed, their children also were engaged with their work. “I don’t remember exactly at what point,” Jane recalled, “but I was certainly still in high school when I got involved reading briefs and editing briefs, so it was very much a family enterprise.”¹⁷⁹

Behind the scenes, Marty also played a pivotal role in making the case for RBG’s nomination to the Supreme Court. “And I betray no secret in reporting that, without him, I would not have gained a seat on the U.S. Supreme Court,” RBG later recalled:

173. *Id.* at xvi.

174. *Id.*

175. Confirmation Hearing, *supra* note 3, at 50.

176. Ginsburg, *My Own Words*, *supra* note 8, at 26.

177. *Id.*

178. Fonda Shen, Professor Jane Ginsburg Reflects on Her Family History as “On the Basis of Sex” Screens at Athena Film Festival, *Colum. Spectator* (Mar. 5, 2019), <https://www.columbiaspectator.com/arts-and-entertainment/2019/03/05/professor-jane-ginsburg-reflects-on-her-family-history-as-on-the-basis-of-sex-screens-at-athena-film-festival> [<https://perma.cc/FG86-WAH9>].

179. *Id.*

Then-Associate White House Counsel Ron Klain said of my 1993 nomination: “I would say definitely and for the record, though Ruth Bader Ginsburg should have been picked for the Supreme Court anyway, she would not have been picked for the Supreme Court if her husband had not done everything he did to make it happen.” That “everything” included gaining the unqualified support of my home state senator Daniel Patrick Moynihan and enlisting the aid of many members of the legal academy and practicing bar familiar with work I had done.¹⁸⁰

RBG and Marty supported each other in more prosaic ways as well. For example, each of them often joked about his superior abilities as chef. “Ruth is no longer permitted in the kitchen,” Marty quipped. “This by the demand of our children, who have taste.”¹⁸¹

In the same vein, Marty poked fun at their daughter, saying that Jane had told the press that “she had grown up in a home in which responsibility was equally divided: her father did the cooking, she explained, and her mother did the thinking,” Marty jested. “It was Jane’s press statement that convinced me truth should not be allowed as a defense in defamation actions.”¹⁸²

Marty’s sense of humor—and, indeed, his proficiency in teasing those he loved—could lighten RBG’s mood, even when she felt the weight of the world on her shoulders. In remarks introducing her, which RBG included in a collection of her writings, Marty offered a glimpse of this dynamic between them, recounting a time they went to a play in New York some years after she began her service on the Court:

After the first act intermission, as we walked down the aisle to our seats, what seemed like the entire audience began to applaud, many stood, Ruth beamed. I beamed, too, leaned over, and whispered loudly, “I bet you didn’t know there’s a convention of tax lawyers in town.” Well, without changing her bright smile, Ruth smacked me right in the stomach, but not too hard. And I give you this picture because it fairly captures our nearly fifty-year happy marriage, during which I have offered up an astonishing number of foolish pronouncements with absolute assurance, and Ruth, with only limited rancor, has ignored almost every one.¹⁸³

In his inimitable way, Marty also joked—as only Marty could—about RBG’s contribution to the law. “Thirteen years on the D.C. Circuit where, to take but one example, her efforts on behalf of the ICC’s filed rate doctrine will never be forgotten,” he quipped. “Rather more important . . .”

180. Ginsburg, *My Own Words*, supra note 8, at xvii.

181. Ginsburg, *Introduction*, supra note 60, at 28.

182. *Id.*

183. *Id.* at 27.

he went on, were her “efforts on behalf of everybody, everyone I guess except the ICC.”¹⁸⁴

In her own way, RBG also was quite adept at teasing Marty. When asked in an interview what she thought of a marital sex scene in *On the Basis of Sex*, a movie chronicling the early years of her career and marriage, RBG gave the perfect answer. “What I thought of it,” she laughed, “is that Marty would have loved it.”¹⁸⁵

In short, RBG’s personal life exemplified the very cause she fought to advance. She did not leave her work in the office; she lived it at home as well. RBG showed an unfailing commitment to both her family and her profession. She and her husband divided the labor so they could nurture a family while they both pursued their professional goals, supporting each other along the way. As head of the ACLU Women’s Rights Project, RBG was all the more inspiring because she practiced what she preached.

D. “Disagree Without Being Disagreeable”

She was a successful advocate not only because of her courage, legal talent, and the personal example she set in her family life, but also because of her temperament. Always courteous and calm, RBG mastered the art of disagreeing in a collegial way. “You can disagree,” she liked to say, “without being disagreeable.”¹⁸⁶

RBG understood that “[r]eacting in anger or annoyance will not advance one’s ability to persuade,”¹⁸⁷ and she had the self-control to avoid this mistake. For example, at the end of her oral argument in *Duren v. Missouri*, Justice Rehnquist said, “You won’t settle for putting Susan B. Anthony on the new dollar?”¹⁸⁸ Although RBG was tempted to say, “We won’t settle for tokens,” she held her tongue.¹⁸⁹

In RBG’s view, effective advocacy required this sort of restraint. “A top quality brief . . . scratches put downs and indignant remarks about one’s adversary or the first instance decision maker,” she later advised. “These are sometimes irresistible in first drafts, but attacks on the competency or

184. *Id.* at 30.

185. Rebecca Gibian, ‘Notorious RBG’ Addresses Biopic Sex Scene: ‘Marty Would Have Loved It’, *Wash. Times* (Dec. 16, 2018), <https://www.washingtonpost.com/news/2018/dec/16/ruth-bader-ginsburg-talks-basis-sex-sex-scene-sold> (on file with the *Columbia Law Review*).

186. Jenn Pedde, How Ruth Bader Ginsburg Restored My Faith in America, *Medium* (Sept. 21, 2016), <https://medium.com/@jpedde/how-ruth-bader-ginsburg-restored-my-faith-in-america-a0b840b1e574> [<https://perma.cc/N48M-Q332>] (emphasis added).

187. Ginsburg, *My Own Words*, *supra* note 8, at xv.

188. Transcript of Oral Argument, *supra* note 124, at 19.

189. David Von Drehle, Redefining Fair with a Simple Careful Assault, *Wash. Post* (July 19, 1993), <https://www.washingtonpost.com/archive/politics/1993/07/19/redefining-fair-with-a-simple-careful-assault/3a57e57b-ed36-46e9-a2e1-f10fc8b004be> [<https://perma.cc/D7U7-QCD6>]. Instead, Chief Justice Burger replied: “I think you have no jurisdiction to make that concession, Mrs. Ginsburg. Thank you.” Transcript of Oral Argument, *supra* note 124, at 19.

integrity of a trial court, agency, or adversary, if left in the finished product, will more likely annoy than make points with the bench.”¹⁹⁰ Rather, instead of lashing out, effective advocates developed a thick skin. “A sense of humor is helpful for those who would advance social change,” she observed.¹⁹¹

Yet RBG’s collegiality was not just a tactic; it was who she was. Underneath her somewhat reserved manner was a generous and considerate heart. For example, however busy she was, she always took the time to celebrate the birthdays of her law clerks, to worry about their personal lives, and to be their most ardent booster.

This same impulse led her to keep in touch with clients from the 1970s, even decades later. As a law-school dean, I met with Jason Wiesenfeld—the baby in the *Wiesenfeld* case, whose father was a widower seeking social-security benefits. Jason had graduated from Columbia Law School and become quite successful. A few days later, while sitting with RBG and one of her friends, I asked if she knew that Jason went to Columbia Law School. “Of course I knew!” she said with a bright smile. “Ruth keeps in touch with all her clients,” her friend added. I had not realized this, but I was not at all surprised. In fact, Stephen (Jason’s father) testified at RBG’s Senate confirmation hearing.¹⁹² RBG also officiated at Jason’s wedding in 1998, and then at Stephen’s wedding in 2014, when he remarried almost forty years after *Wiesenfeld* was decided.¹⁹³

RBG’s collegiality stemmed not just from her quiet warmth, but also from her comfort with the notion that reasonable minds could disagree. For example, she knew that my perspective on some issues was different from hers, but this never seemed to trouble her. In RBG’s view, a difference of opinion on some issues—even very significant issues—did not have to drive people apart. What about the other values and interests they still had in common?

Throughout her career, RBG believed that it was better to focus on what unites us than on what divides us—a valuable lesson in these polarizing times. She liked to quote advice “from [her] savvy mother-in-law, advice she gave . . . on [RBG’s] wedding day. ‘In every good marriage,’ she counseled, ‘it helps sometimes to be a little deaf.’” RBG went on to recall: “I have followed that advice assiduously, and not only at home. . . . I have employed it as well in every workplace When a thoughtless or unkind word is spoken, best to tune out.”¹⁹⁴

In this spirit, she urged friends and allies not to fight with each other. For example, when introducing a symposium on feminist legal theory, she

190. Ginsburg, *Appellate Advocacy*, supra note 65, at 568.

191. Ginsburg, *My Own Words*, supra note 8, at 70.

192. See *Confirmation Hearing*, supra note 3, at 561 (statement of Stephen Wiesenfeld).

193. Barnes, supra note 102.

194. Ginsburg, *My Own Words*, supra note 8, at xv.

called for comity. After praising the women's movement's many successes, she concluded by cautioning against "one discordant, jarring note—the tendency to regard one's feminism as the only true feminism, to denigrate rather than to appreciate the contributions of others," she said. "If that fatal tendency can be controlled, feminist legal theory, already an intellectual enterprise of the first dimension, will indeed be something to celebrate."¹⁹⁵

RBG prized collegiality not just within the same camp, but also across the political aisle. In this spirit, she did not want courts to be perceived as political battlegrounds. In countless speeches and interviews, she emphasized that the Supreme Court is unanimous more often than it is sharply divided.¹⁹⁶ "Lawyers are sometimes quick to classify appellate judges into 'liberal' and 'conservative' camps But a careful check . . . would disclose that we are far less easily type-cast than popular but superficial reports suggest," she said. "Yes, there are decisions on which courts divide in a way one might call political. But in most cases, no razor-sharp lines can be drawn separating Republican from Democratic appointees."¹⁹⁷

This was not just talk. One of her closest friends was Justice Antonin Scalia, one of the Court's leading conservative voices. "We are two people who are quite different in their core beliefs," Justice Scalia observed, "but who respect each other's character and ability."¹⁹⁸ In part, their friendship sprang from the admiration each felt for the other's considerable talents, their shared love of opera and travel, and their similar life histories. Both were children of immigrant families in New York who went on to remarkable success. Their friendship had deeper roots as well. They shared common values, including a commitment to meritocracy, family, and the rule of law.¹⁹⁹ Needless to say, they disagreed on important issues—quite heatedly at times—but they never lost sight of what they had in common.

RBG also knew that insightful criticism could clarify and sharpen her own views, enabling her to justify them in a more compelling way. "Indeed, whenever I wrote for the Court and received a Scalia dissent, the majority opinion ultimately released improved on my initial circulation," RBG recalled in a tribute to her friend upon his passing. "Justice Scalia homed

195. Ginsburg & Flagg, *supra* note 12, at 21.

196. For example, she reported that in the October 2015 Term, the Supreme Court was unanimous in twenty-five of sixty-seven cases, but 5-3 or 4-3 only eight times. (Because Justice Scalia had passed away, there were only eight justices.) See Ginsburg, *My Own Words*, *supra* at 8, at 325.

197. Ginsburg, *Appellate Advocacy*, *supra* note 65 at 570.

198. Ginsburg, *My Own Words*, *supra* note 8, at 38 (quoting Justice Scalia).

199. David M. Schizer, *The Conservative Legacy of Ruth Bader Ginsburg*, *Newsweek* (Sept. 23, 2020), <https://www.newsweek.com/conservative-legacy-ruth-bader-ginsburg-opinion-1533831> (on file with the *Columbia Law Review*).

in on the soft spots, and gave me just the stimulation I needed to strengthen the Court's decision."²⁰⁰

In seeking to build bridges, RBG never let her ego get in the way. On the contrary, she was thoroughly unassuming. For example, in speeches and articles about her victories in the 1970s, she took pains not to refer to herself; instead of saying "I argued," she would say, "counsel argued" (without identifying who "counsel" was). Unlike some successful people, who want to talk only about themselves—and, as a result, are easier to admire from a distance—RBG was reluctant to speak about herself. When offered a compliment, her first impulse was to share the credit with others. Of course, RBG knew that she had been extraordinarily successful, but she felt no need to say as much.

Given this impulse, the most surprising thing about RBG, in my view, was not that she became a pioneering advocate or a Supreme Court Justice, but that she became a media celebrity. She did not crave the attention of a crowd, and her knowledge of popular culture did not extend much beyond Verdi and Mozart. On the rare occasions when she went to a movie, she often brought a flashlight and used the time to catch up on paperwork. I doubt "Notorious RBG" ever watched *Saturday Night Live* before it began including affectionate parodies of her.

As I told RBG not long before she passed away, if someone had asked me twenty-five years ago who—among all the people I knew—was *least likely* to become a popular-culture icon, she would have been my choice, hands down. She smiled and said, "I know." Yet I was pleased to see her receive this recognition. In her quiet way, she seemed to enjoy it. She even began giving "Notorious RBG" paraphernalia as gifts.

To sum up, RBG's perennial courtesy, quiet warmth, and unassuming manner were significant assets as a nonprofit leader. She could inspire fierce loyalty from colleagues without sparking animosity from potential adversaries. She could present novel ideas in ways that minimized controversy, enabling her to bring even skeptical audiences along with her.

* * *

So was RBG the right person to lead the ACLU's impact litigation campaign? She had rare gifts as a leader and as a practitioner of impact litigation. RBG possessed the courage to make controversial arguments, knowing that she would face stiff headwinds. A singularly gifted lawyer, she won the day with eloquence, meticulousness, and a tireless work ethic. Outside of the courtroom, she lived the cause in her daily life, modeling with Marty a new way for spouses to support each other and divide labor. In all of this, RBG was unfailingly collegial and unassuming. Even when disagreements were heated, she knew how to find common ground. These

200. Ginsburg, *My Own Words*, supra note 8, at 40.

rare qualities—combined with her peerless gift for mapping litigation strategy and framing issues—helped power the ACLU to victory after victory, reshaping the law of gender discrimination in under a decade. It is hard to imagine how anyone could have done better.

CONCLUSION

Needless to say, few nonprofit leaders—and, indeed, few jurists—become “rock stars” as RBG did late in life. Likewise, few play such a pivotal role in spearheading a transformative social movement. Like Thurgood Marshall and a handful of others, RBG won legal victories that fundamentally changed the nation.

Yet although few of us can hope to achieve what RBG accomplished, we all can learn lessons from her success. As she showed in leading the ACLU Women’s Rights Project, nonprofits make the greatest mark when they target an urgent problem with an effective solution, taking on jobs that others cannot do as well. Indeed, RBG had compelling answers to the three questions posed in this Article: How important was the problem she sought to solve? How effective was her response? Was she the right person to meet this challenge? Almost single-handedly, RBG altered the status of women under U.S. law, an effort that depended on a broad range of skills, including her courage, strategic thinking, eloquence, collegiality, and work ethic.

RBG’s playbook for impact litigation is similarly revealing: First, proceed incrementally, bringing issues in the right sequence so each success paves the way for the next. Second, search for the right facts, which can win over judges who are not in “the home crowd.” Third, be just as disciplined about legal theories, carefully honing them to appeal to a skeptical audience.

Asked about her legacy, RBG once answered that she would like to be remembered as “[s]omeone who used whatever talent she had to do her work to the very best of her ability. And to help repair tears in her society, to make things a little better through the use of whatever ability she has.”²⁰¹ That she certainly did, and much more.

201. Irin Carmon, *Exclusive Justice Ruth Bader Ginsburg Interview: Full Transcript*, MSNBC (Feb. 17, 2015), <https://www.msnbc.com/msnbc/exclusive-justice-ruth-bader-ginsburg-interview-full-transcript-msna531191> [<https://perma.cc/DUH2-KCU8>].