

NOVEMBER 2017 | TAH.OAH.ORG

# The American Historian

ORGANIZATION OF AMERICAN HISTORIANS



## Law and the Courts

ALSO INSIDE:

Teaching about  
Ruth Bader Ginsburg

Felon Disenfranchisement and  
Prison Gerrymandering

## Teaching About the Feminist Rights Revolution: Ruth Bader Ginsburg as “The Thurgood Marshall of Women’s Rights”

Most U.S. history textbooks mention Ruth Bader Ginsburg only in her current role as a U.S. Supreme Court Justice. Of course, Ginsburg has made history writing Supreme Court decisions, as in *United States v. Virginia* (1996), which struck down the exclusion of women students from the Virginia Military Institute. More recently Ginsburg has written powerful dissents, including *Burwell v. Hobby Lobby* (2014), a decision that eroded the separation of church and state, and *Shelby County v. Holder* (2013), a ruling that undermined the Voting Rights Act. Justice Ginsburg’s fiery dissents have been so memorable and frequent as the Court has moved to the right that she has become an internet heroine, idolized on-line in hip-hop lingo as “Notorious RBG,” and renowned for her eloquence and tough-minded intellectualism as the Court’s Great Dissenter in the service of equal rights and justice.

But what textbooks miss is that long before becoming a justice, Ginsburg led a historic women’s rights offensive in the courts. In this article and our interview with Justice Ginsburg, we hope to encourage educators to teach about the RBG the textbooks neglect, the women’s rights legal champion, as a way to understand both Ginsburg and the courtroom front in the feminist movement’s struggle for gender equity. We suggest that a comparison of Ginsburg with the great civil rights courtroom crusader, Thurgood Marshall, would help students link Ginsburg, and the overlooked history of her work for women’s rights, to history already taught in most schools: Marshall and his most famous court victory, *Brown v. Board of Education* (1954).

In justifying Ginsburg’s nomination to the Supreme Court in 1993, President Bill Clinton invoked Marshall as he praised the landmark cases Ginsburg argued before the high court as founder and leader of the American Civil

Liberties Union’s (ACLU) Women’s Rights Project. Clinton explained, “many admirers of her work say that she is to the women’s movement what former Supreme Court Justice Thurgood Marshall was to the movement for the rights of African-Americans. I can think of no greater compliment to bestow on an American lawyer.”<sup>1</sup> This comparison has considerable historical veracity since Ginsburg, in important respects, followed in Marshall’s footsteps. Ginsburg, like Marshall, led a key legal advocacy group whose court victories helped fuel the twentieth-century rights revolution (Marshall in the 1930s to 1950s for the NAACP and Ginsburg in the 1970s for the ACLU). Both became such iconic figures among progressive legal advocates that they would be chosen for the Supreme Court by liberal presidents. Marshall, the great-grandson of slaves, barred from attending the segregated law school at University of Maryland close to his home, had firsthand experience with the racism he fought so bravely to end. As a lawyer, Marshall “brandished the United States Constitution the way Moses brandished the Ten Commandments.”<sup>2</sup> Like Marshall, Ginsburg felt the sting of discrimination, particularly as a woman lawyer, and used the Constitution to steadily erode longstanding gender inequities.

### Biography illuminates history

Even as they witnessed the historic presidential candidacy of Hillary Clinton, young people are often unaware of how many barriers women faced in the mid-twentieth century. Ginsburg’s biography illuminates the rampant sexist discrimination that contributed to her desire to use the courts to end such discrimination. When Ginsburg entered Harvard Law School in 1956, it had only recently begun to admit women. Harvard’s dean made clear his beliefs about women students, asking Ginsburg and

other female students how they could justify occupying a man's space in law school. In fact, mid-twentieth-century America was so pervaded by sexism that two of its best legal talents, later the first and second women on the U.S. Supreme Court, came out of top law schools unable to find employment at law firms. After Ginsburg graduated, no law firm would offer her employment as an attorney despite her brilliant academic record. Sandra Day O'Connor, a talented graduate of Stanford University, was also denied work as an attorney—one firm even advised her to seek work as a legal secretary.<sup>3</sup>

This gender history complicates our understanding of the early and mid-1960s as an era of liberal ascendance exemplified in the Warren Court's decisions on race, church-state separation, free speech, and rights of the accused. The Warren Court's record on gender points not to liberalism but conservatism, as the *Hoyt v. Florida* (1961) decision demonstrates, a decision which was a setback for the right of the accused to have women serve on juries. The Warren Court's justices, Ginsburg recalls, did not regard "discrimination against women as discrimination at all...They didn't understand barriers that women faced as discriminatory. They really bought into the protective notion that if there are [gender] distinctions—[eg] women don't have to serve on juries—then it was for their benefit, for their protection."<sup>4</sup> This conservatism on the

part of an otherwise liberal Warren Court persisted, in Ginsburg's view, because "society was not yet prepared to listen" to the gender equality advocated by second wave feminism in the early and mid-1960s [see interview]. It was not the Warren Court but the rightward-drifting Burger Court in the 1970s that gave Ginsburg and the women's rights movement their first great legal victories. This change came because the women's movement had succeeded in raising Americans' consciousness about sexism, enabling the court to begin ruling in favor of women's rights in Ginsburg's groundbreaking cases and *Roe v. Wade* (1973).

### Ruth Bader Ginsburg and Thurgood Marshall

A comparison of Ruth Bader Ginsburg with Thurgood Marshall enables students to see that social change comes not just via elections and demonstrations but also from battles waged in court. The road to *Brown* was paved by decades of civil rights cases argued by Thurgood Marshall of the NAACP Legal Defense Fund. As Marshall had done for civil rights as an NAACP attorney, Ginsburg used her legal talent to lead the ACLU's Women's Rights Project to win historic court victories for gender equity from 1972–1980.

Being called the Thurgood Marshall of the women's movement resonated with Ginsburg since she admired and emulated his work as a legal strategist.

She also reminds us that Marshall heroically endured threats she never faced: "He was my model as a lawyer ... I took a step-by-step, incremental approach, well, that's what Marshall did. He didn't come to the Court on day one and say, 'End apartheid in America.' He started with law schools and universities, and until he had those building blocks, he didn't ask the Court to end separate-but-equal. Of course, there was a huge difference between the litigation for gender equality in the '70s and the civil rights struggles in the '50s and '60s. The difference between Thurgood Marshall and me, most notably, is that my life was never in danger. His was. He would go to a Southern town to defend people and he literally didn't know whether he would be alive at the end of the day."<sup>5</sup>

Because "there wasn't a great understanding of gender discrimination," Ginsburg's work also involved a different approach than Marshall's: "People knew that race discrimination was an odious thing, but there were many who thought that all the gender-based differentials in the law operated benignly in women's favor. So my objective was to take the Court step by step to the realization, in Justice Brennan's words, that the pedestal on which some thought women were standing all too often turned out to be a cage."<sup>6</sup>

Sandra Day O'Connor was not appointed as the first female Supreme Court Justice until 1981. So in arguing women's right cases for the

---

What textbooks miss is that long before becoming a justice, Ginsburg led a historic women's rights offensive in the courts.

---

---

## A comparison of Ruth Bader Ginsburg with Thurgood Marshall enables students to see that social change comes not just via elections and demonstrations but also from battles waged in court.

---

ACLU, Ginsburg had to convince nine male justices to transcend longstanding gender stereotypes that “men earned the family’s bread and women tend to the home and children.”<sup>7</sup> In deploying her incremental approach, Ginsburg drew upon Marshall’s strategy of using the equal protection clause of the Fourteenth Amendment to confront discrimination. Her victory as an ACLU lawyer in *Reed v. Reed* (1971) was the first time that the Supreme Court agreed that the Fourteenth Amendment applied to women, and the justices struck down an Idaho law favoring male over female parents in assigning administrators of estates. Ginsburg explained that the *Reed* case “was tremendously significant in that it represented the first time ever in the history of the country that the Supreme Court had said yes to a woman; the first time the Court recognized women as victims of discrimination.”<sup>8</sup>

Ginsburg and the ACLU strategically chose to argue men’s cases just as much as women’s to demonstrate how sex discrimination hurts everyone, not just women. For example, in *Frontiero v. Richardson* (1973), Ginsburg convinced the court to overturn a law requiring the military policy to provide housing allowances for married male officers, but not married female officers. Also,

wives of male officers had access to medical and dental care at military posts. Husbands of female officers did not. Similarly, in *Weinberger v. Wiesenfeld* (1975), the Court agreed to Ginsburg’s arguments that social security survivors’ benefits should be extended to widowers. By the time *Hibbs v. Winn* was argued in 2004 and Ginsburg was on the Supreme Court, even conservative Chief Justice William Rehnquist recognized that men just as much as women could play the care-giving role.

Asking students to decide for themselves whether Ginsburg should be considered the Thurgood Marshall of women’s rights provides a way for them to dig into each justice’s cases and strategies to make their arguments. Other questions related to the two great jurists have the potential to yield exciting historical discussions:

- Do the courts tend to be out in front on social change? Or do they lag behind, as Ginsburg implies in her interview?
- Why did Marshall’s historic court victories for racial equality come decades before Ginsburg’s victories for gender equality?
- Was Marshall’s work for the NAACP, and Ginsburg’s work for the ACLU, more revolutionary than anything they did as Supreme Court justices?

### Conclusion

How do we explain Ginsburg’s iconic status as internet sensation and liberal folk hero? This would be a lively subject to discuss with students since it is the young who have given us Notorious RBG, the first justice with rock star appeal—complete with laudatory music videos and RBG costumes. This is likely connected to the bold way Ginsburg, despite her advanced age and diminutive stature, has stood up to the Court’s right-wing members, reading tough-minded dissents that are inspirational to her admirers, especially the young who have few public figures speaking so forcefully for their values.

To have a woman who, in the sexist past, would be stereotyped as a little old lady defying powerful male jurists in the nation is dazzling. In fact, as the senior woman on the U.S. Supreme Court, Ginsburg is the opposite of “little”; she is one of the most powerful women in the United States. RBG on the Court and Notorious RBG on the web today are smashing stereotypes of gender and age as surely as Ginsburg smashed sexist stereotyping to win her historic court victories in the 1970s.

When women’s rights cases are taught in schools, teachers tend to focus on the still-controversial case *Roe v. Wade*. But for Linda K. Kerber, author of *No Constitutional Right to*

*be Ladies: Women and the Obligations of Citizenship* (1998), this is not enough. Like Marshall and his civil rights cases, RBG and her key court victories need to be taught, as they force “us to engage in some of the largest ethical and constitutional issues, and set the relationship of women and the law squarely in the core of American political choices. The cries of the playground—“That’s fair!” “That’s not fair!”—echo throughout our adult lives. Perhaps if we studied *Frontiero* with as much attention as we study *Brown*, we would be better equipped to address the inequalities which challenge us, now and always.”<sup>9</sup>



## ENDNOTES

We would like to thank Maeva Marcus, Director of the Institute for Constitutional History, for making possible the teach-in (for NYC teachers) on women’s rights and the Constitution with Justice Ruth Bader Ginsburg that led to this article. We are also grateful to Justice Ginsburg for taking the time to lead that event and do an interview on teaching about this crucial chapter in American history.

1. William J. Clinton, “Remarks Announcing the Nomination of Ruth Bader Ginsburg to be a Supreme Court Associate Justice, June 14, 1993” *American Presidency Project*, <http://www.presidency.ucsb.edu/ws/?pid=46684>.
2. Neil A. Lewis, “A Slave’s Great-Grandson Who used Law to Lead the Rights Revolution,” *New York Times*, June 28, 1991, para. 9, <http://www.nytimes.com/1991/06/28/us/a-slave-s-great-grandson-who-used-law-to-lead-the-rights-revolution.html>.
3. Linda Hirshman, *Sisters in Law: How Sandra Day O’Connor and Ruth Bader Ginsburg Went to the Supreme Court and Changed the World* (2015), 19.
4. Jeffrey Toobin, “Heavyweight: How Ruth Bader Ginsburg has moved the Supreme Court,” *New Yorker*, March 11, 2013, para. 13, <http://www.newyorker.com/magazine/2013/03/11/heavyweight-ruth-bader-ginsburg>.
5. Jeffrey Rosen, “Ruth Bader Ginsburg is an American Hero,” *New Republic*, Sept. 28, 2014, para. 61, <https://newrepublic.com/article/119578/ruth-bader-ginsburg-interview-retirement-feminists-jazzercise>.
6. *Ibid.*, para. 67.
7. *Ibid.*, para. 63.
8. Association of Women in Science, “Women and the Law: A Dialogue with Ruth Bader Ginsburg,” *Women’s Studies Newsletter*, 5 (Fall 1977), 25. For fuller summaries of the cases discussed here, see online.
9. Correspondence between Robert Cohen and Linda K. Kerber, e-mail, Sept. 21, 2017 (in Robert Cohen’s possession).

**DISTINGUISHED  
LECTURESHIP  
PROGRAM**  
Since 1981

ORGANIZATION OF  
AmericanHistorians®

**Advance the work of the OAH by planning your next guest lecture or conference with help from the OAH Distinguished Lectureship Program.** This well-respected program connects hosts with outstanding U.S. historians who generously contribute their speaking honoraria to the OAH, underwriting the organization’s mission to promote excellence in the scholarship, teaching, and presentation of American history.

The OAH Lectureship Program is an **invaluable resource for making preeminent scholars available** to smaller institutions and academic communities. It’s a pleasure to work with the OAH staff, and the **quality of the speakers is incredible.**”

— MEREDITH CLARK-WILTZ  
FRANKLIN COLLEGE

## Host a Great Speaker and Support the OAH

“The OAH Distinguished Lectureship Program offers an **unbelievable service to the field and the public.** The booking process was a breeze”

— PATRICK LEWIS  
KENTUCKY HISTORICAL SOCIETY



for more information or to schedule a lecture, visit <http://lectures.oah.org>

## ADVICE FOR HISTORY AND SOCIAL STUDIES TEACHERS

Excerpts from interview with Justice Ginsburg by Robert Cohen, Dec. 17, 2015

*Ed. Note: Be sure to check out [tah.oah.org](http://tah.oah.org) for the complete transcript of the RBG interview and for more thorough write-ups of some of RBG's more famous cases.*

- ▶ **ROBERT COHEN** What should teachers emphasize about the ACLU Women's Rights Project? Which court cases would be most important and interesting for secondary students?
- ▶ **JUSTICE RUTH BADER GINSBURG** I recommend a book published by the Supreme Court Historical Society, *Supreme Court Decisions and Women's Rights* (Cushman, 2010). It covers all the leading cases from the 1970s and is very readable for high school students.

As for cases, I would choose *Reed v. Reed*, a case brought by Sally Reed from Boise, Idaho. Sally's son died under tragic circumstances. She wanted to be appointed administrator of his estate but was told by the probate judge "We're sorry, the law says that between persons equally entitled to administer a decedent's estate, males must be preferred to females." So her ex-husband got the appointment. Sally Reed's case is typical of the disadvantages women encountered under the then prevailing separate spheres mentality: Breadwinning and representing the family outside the home was man's domain; care of home and childrearing was women's province.

Another case I'd pick is *Weinberger v. Wiesenfeld*. Paula Wiesenfeld was a teacher who had a healthy pregnancy. But when she went to the hospital to give birth, the doctor came out and told her husband Stephen, "you have a healthy baby boy but your wife died of an embolism." Stephen vowed that he would take care of the child and work only part time until the child was in school. He went to the Social Security office to ask for what he thought were child care benefits and was told that those benefits are for mothers only, not for fathers.

In his case, we argued that the discrimination he experienced started with the woman as wage earner. Social Security taxes she paid didn't gain for her family the same benefits that men's taxes yielded. An argument that prevailed for Justice Rehnquist: Why should the baby have the opportunity for the care of a sole surviving female parent, but not a sole surviving male parent? *Weinberger* illustrated how rigid gender lines in the law hurt everyone – woman, man, and child.

- ▶ **RC** What should teachers highlight about of your role in these cases and the struggle for gender equity?
- ▶ **JUSTICE RBG** I was *fantastically* lucky to be born when I was and to have legal training. Women for generations had been saying the same things that we said in the 1970s, but society was not yet prepared to listen. In the late '60s things began to change and that change accelerated throughout the '70s. On the brief in *Reed v. Reed*, we put the names of feminist attorneys Dorothy Kenyon and Pauli Murray who had been saying what we were saying, but too soon to be heard. Courts are seldom out in front of social change. In the '70s, courts were catching up to a social change that had already occurred.