

# In Memoriam: Justice Ruth Bader Ginsburg, The Last Civil Rights Lawyer on the Supreme Court

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*Tomiko Brown-Nagin*<sup>1</sup>

There are many ways to describe Justice Ginsburg's historic achievements. This essay considers one enduring descriptor. When President Bill Clinton nominated her to the Supreme Court, he noted that some called Ginsburg the "Thurgood Marshall" of the women's movement.<sup>2</sup>

Through this essay, I engage with and complicate that comparison. I do so to celebrate Justice Ginsburg's pathbreaking career as a litigator and contextualize claims that her approach was insufficiently progressive. Properly contextualized, Ginsburg's career highlights a fact too often overlooked: the civil rights movement inspired a "movement of movements" that reverberated throughout society to the benefit of women and a range of marginalized groups. The loss of Ginsburg—the last civil rights lawyer on the Court—deprives the institution of that historical legacy and the invaluable perspective on law and society that it cultivated within her.

## I. THE THURGOOD MARSHALL COMPARISON

As Thurgood Marshall—Mr. Civil Rights<sup>3</sup>—led the NAACP Legal Defense and Education Fund's ("LDF") campaign against Jim Crow, the threat of violent retribution loomed.<sup>4</sup> Ginsburg encountered no such physical danger, and for that reason commentators' comparison of her work to Marshall's is inexact.

At the same time, the allusion is evocative and rooted in fact. The ACLU's Ginsburg-led campaign during the 1970s to dismantle laws that classified by sex followed the blueprint of the NAACP's Marshall-led campaign during the 1940s and 50s to dismantle laws that classified by race.<sup>5</sup>

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<sup>1</sup> Dean, Radcliffe Institute for Advanced Study at Harvard; Daniel P.S. Paul Professor of Constitutional Law, Harvard Law School; and Professor of History, Harvard Faculty of Arts and Sciences. Many thanks to Akua Abu for research assistance.

<sup>2</sup> President William J. Clinton, Remarks Announcing the Nomination of Ruth Bader Ginsburg to be a Supreme Court Associate Justice (June 14, 1993), <http://www.presidency.ucsb.edu/ws/index.php?pid=46684>, archived at <https://perma.cc/37DQ-KHRB>.

<sup>3</sup> See HOWARD BALL, *A DEFIANT LIFE: THURGOOD MARSHALL AND THE PERSISTENCE OF RACISM IN AMERICA* 72 (1st ed. 1998).

<sup>4</sup> See *id.* at 62–63.

<sup>5</sup> See Michael J. Klarman, *Social Reform Litigation and Its Challenges: An Essay in Honor of Justice Ruth Bader Ginsburg*, 32 HARV. J. L. & GENDER 251, 275–301 (2009) (comparing strategies pursued by the NAACP Legal Defense and Education Fund and by Ginsburg with the ACLU Women's Rights Project).

Like the Marshall campaign, the Ginsburg campaign unfolded incrementally,<sup>6</sup> involved carefully-chosen plaintiffs,<sup>7</sup> and featured stark examples of differential treatment.<sup>8</sup> Using this approach, Ginsburg and her co-counsel successfully showed that because of stereotypes and animus, the sex-based classifications in question treated differently groups that were, in fact, fundamentally the same.<sup>9</sup> Thus, the classifications violated the Equal Protection Clause's equal treatment principle.<sup>10</sup> Given these similarities, the comparison helpfully draws attention to commonalities in the ways that dominant groups (whites and men) deployed law to naturalize and justify the oppression of African Americans and women.

## II. THE PAULI MURRAY CONNECTION AND ITS RELEVANCE

But there is more to Ginsburg's connection to the civil rights movement; the connection is more substantial than those blueprints and goes beyond Marshall. Ginsburg's collaboration with Pauli Murray is vital to taking a full measure of her career. Murray—a brilliant, queer Black woman civil rights lawyer—shaped both the NAACP's campaign for racial equality and the ACLU's campaign for gender equality. A bridge between the two move-

<sup>6</sup> See Neil S. Siegel, "Equal Citizenship Stature": Justice Ginsburg's Constitutional Vision, 43 NEW ENG. L. REV. 799, 843–53 (2009).

<sup>7</sup> See, e.g., *Califano v. Goldfarb*, 430 U.S. 199, 203 (1977) (Ginsburg represented a male plaintiff in his challenge to a sex-based provision of the Social Security Act, which required that widowers prove they were financially dependent on their wives' earnings before they could receive survivors' benefits upon the death of their wives, but automatically provided such benefits to widows); Motion of American Civil Liberties Union for Leave to File Brief Amicus Curiae and Brief Amicus Curiae at 11, *Craig v. Boren*, 429 U.S. 190 (1976) (No. 75-628) (Ginsburg wrote an influential brief in the case, in which a male plaintiff challenged the disparate legal regime allowing females to purchase beer at an earlier age than males); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638–39 (1975) (Ginsburg represented a male plaintiff in challenging a provision of the Social Security Act that provided parental benefits only to widows but not widowers with minor children); *Kahn v. Shevin*, 416 U.S. 351, 352 (1974) (Ginsburg represented a male plaintiff challenging a state tax law that provided a property tax exemption to widows but not widowers); see also GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 673 (2018) (noting that a high number of the Supreme Court's sex discrimination cases were brought by male plaintiffs); David Cole, *Strategies of Difference: Litigating for Women's Rights in a Man's World*, 2 LAW & INEQ. 33, 54–55 (1984) (explaining that Ginsburg's choice of male plaintiffs "enabled the Court to reach what was primarily a women's issue").

<sup>8</sup> See, e.g., Motion of American Civil Liberties Union for Leave to File Brief Amicus Curiae and Brief Amicus Curiae at 10, *Craig v. Boren*, 429 U.S. 190 (1976) (No. 75-628) (arguing that the benefit afforded to women by the Oklahoma statute derived from sexist beliefs regarding women); Brief for American Civil Liberties Union at 34–35, *Frontiero v. Richardson*, 411 U.S. 677 (1973) (No. 71-1694) (arguing that gender-based discrimination harmed both women and men).

<sup>9</sup> See Brief for the Petitioner at 8–9, *Struck v. Sec'y of Def.*, 409 U.S. 1071 (1972) (No. 72-178) (arguing that discrimination on the basis of pregnancy violates equal protection); see also Ruth Bader Ginsburg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1, 35–36 (1975) (arguing that gender stereotypes reinforce discriminatory stereotypes and harm women).

<sup>10</sup> See, e.g., *Reed v. Reed*, 404 U.S. 71, 77 (1971); *United States v. Virginia*, 518 U.S. 515, 531–32 (1996) (collecting cases in which the Supreme Court has recognized that certain gender classifications violate the Equal Protection Clause).

ments, Murray developed an influential theory of inequality rooted in insights gleaned from her experiences as a Black woman.<sup>11</sup>

Formative experiences at Howard Law School gave rise to her theory and animated her lifelong struggle for equality. During law school, Murray—the school’s only woman—wrote a paper arguing that segregation violated the Thirteenth and Fourteenth Amendments<sup>12</sup> and proposed a litigation strategy under the Amendments to strike down Jim Crow.<sup>13</sup> At first Murray’s classmates, all men, found her contributions amusing; they “laughed at” her arguments.<sup>14</sup> Soon, they came to their senses. Marshall relied on Murray’s paper to inform the litigation in *Brown v. Board of Education*.<sup>15</sup> Murray’s intellectual work product influenced the most celebrated case in 20th-century constitutional law, so often discussed as the handiwork of Thurgood Marshall and other male lawyers. Her contributions to the twentieth-century’s movements for equality had only begun.<sup>16</sup>

Next Murray made an important contribution to the legal struggle for women’s liberation. A co-founder of the National Organization for Women,<sup>17</sup> she argued that sex and race should be understood as analogous forms of discrimination. Murray coined the term “Jane Crow” to support her contention.<sup>18</sup> “Belittled from her first day at Howard [University Law School],” her biographer explained, Murray developed the term “to stand for the double discrimination she faced as a Black female.”<sup>19</sup> And she argued that lawyers could uproot both racial and gender oppression through a litigation strategy premised on the Fourteenth Amendment’s Equal Protection Clause.<sup>20</sup> Murray’s enterprising “Jane Crow” theory proved influential in the struggle

<sup>11</sup> See SERENA MAYERI, REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION 58–63 (2011) (describing the relationship between Ruth Bader Ginsburg and Pauli Murray); RISA L. GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS 109 (2007) (discussing Pauli Murray’s contributions to the development of the NAACP’s strategies for litigating labor and economic issues in the 1940s); PAULI MURRAY, THE AUTOBIOGRAPHY OF A BLACK ACTIVIST, FEMINIST, LAWYER, PRIEST, AND POET 254–55 (1987) (discussing collaboration with Ginsburg); Serena Mayeri, Note, “A Common Fate of Discrimination”: Race-Gender Analogies in Legal and Historical Perspective, 110 YALE L.J. 1045, 1069–79 (2001) (exploring the use of the race-sex analogy by Pauli Murray and Ruth Bader Ginsburg in the 1960s and 1970s).

<sup>12</sup> See ROSALIND ROSENBERG, JANE CROW: THE LIFE OF PAULI MURRAY 4 (2017); Rosalind Rosenberg, *Pauli Murray and the Killing of Jane Crow*, in FORGOTTEN HEROES: INSPIRING AMERICAN PORTRAITS FROM OUR LEADING HISTORIANS 279, 280 (1998).

<sup>13</sup> See Rosenberg, *supra* note 12, at 280.

<sup>14</sup> ROSENBERG, *supra* note 12, at 349.

<sup>15</sup> 347 U.S. 483 (1954); see also ROSENBERG, *supra* note 12, at 4.

<sup>16</sup> See MURRAY, *supra* note 11, at 245–55; Glenda Gilmore, *Before Brown: Pauli Murray and the Desegregation of Higher Education*, 6 RUTGERS RACE & L. REV. 247, 252–53 (2006).

<sup>17</sup> See *NOW Salutes Our Co-Founder Pauli Murray (1910–1985)*, NOW, <https://now.org/update/now-salutes-our-co-founder-pauli-murray-1910-1985/> (last visited Dec. 22, 2020), archived at <https://perma.cc/J4UV-BCJ7>.

<sup>18</sup> ROSENBERG, *supra* note 12, at 4.

<sup>19</sup> *Id.*

<sup>20</sup> See *id.* at 151–52.

for women's liberation:<sup>21</sup> it shaped Ruth Bader Ginsburg's campaign to end sex discrimination in law.<sup>22</sup>

As founding director of the ACLU Women's Rights Project, Ginsburg relied heavily on Murray's thinking as she devised the litigation campaign against sex discrimination that earned her the comparison to Thurgood Marshall. Ginsburg read Murray's work on "Jane Crow" and found it, she said, "an enormous eye opener."<sup>23</sup> In preparation for *Reed v. Reed*,<sup>24</sup> Ginsburg wrote a sixty-eight-page brief that built on Murray's analogy of race to sex; in it Ginsburg detailed the ways in which discrimination against women "mirrored" discrimination against Blacks.<sup>25</sup> The 1971 case that successfully challenged arbitrary sex discrimination in estate administration, *Reed* broke new ground in the law.<sup>26</sup> As the first U.S. Supreme Court decision to strike down a state law containing a sex-based classification under the Fourteenth Amendment's Equal Protection Clause,<sup>27</sup> the case laid the groundwork for more expansive wins in sex discrimination cases. The win was not Ginsburg's alone: the brief in *Reed v. Reed* credited Pauli Murray as co-counsel.<sup>28</sup> Murray's comparison of sex to race discrimination had gained traction and would continue to animate the series of Supreme Court cases that chipped away at laws upholding the archaic notion that women and men belonged in separate spheres.

The little-known collaboration between Ginsburg and Murray is striking and significant. It undermines a critique of Ginsburg's litigation. Some commentators criticize the litigation strategy and resulting cases as minimalist; Ginsburg advanced a narrow theory of equality that oversimplified the nature of race and sex discrimination and prioritized the needs of middle-class white women, it is said.<sup>29</sup>

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<sup>21</sup> See Carol Giardina, *MOW to NOW: Black Feminism Resets the Chronology of the Founding of Modern Feminism*, 44 FEMINIST STUD. 736, 753–56 (2018); Pauli Murray & Mary O. Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232, 238 (1965).

<sup>22</sup> See ROSENBERG, *supra* note 12, at 342, 350; see also DOROTHY SUE COBBLE ET AL., FEMINISM UNFINISHED: A SHORT SURPRISING HISTORY OF AMERICAN WOMEN'S MOVEMENTS 61 (2014); Betty Friedan, "The First Year": President's Report to NOW, *Washington, D.C., 1967*, in "IT CHANGED MY LIFE": WRITINGS ON THE WOMEN'S MOVEMENT 93, 104–08 (1976); *Finding Pauli Murray*, NOW (Oct. 24, 2016), <http://now.org/about/history/finding-pauli-murray/>, archived at <https://perma.cc/V28N-7EG4>.

<sup>23</sup> ROSENBERG, *supra* note 12, at 342.

<sup>24</sup> 404 U.S. 71 (1971).

<sup>25</sup> ROSENBERG, *supra* note 12, at 342.

<sup>26</sup> See *Reed*, 404 U.S. at 77.

<sup>27</sup> See *id.*

<sup>28</sup> See Brief for Appellant at 68, *Reed v. Reed*, 404 U.S. 71 (1971) (No. 70-4).

<sup>29</sup> See Serena Mayeri, *Reconstructing the Race-Sex Analogy*, 49 WM. & MARY L. REV. 1789, 1798–1800 (2008); see also Laura Krugman Ray, *Justice Ginsburg and the Middle Way*, 68 BROOK. L. REV. 629, 647 (2003) ("Even in the area of gender discrimination, where she might be expected to celebrate bolder judicial action, Ginsburg prefers these 'measured motions.'") (quoting Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1198 (1992)).

This oft-repeated criticism is ahistorical, acontextual, and fails to appreciate the significance of Ginsburg’s collaboration with Pauli Murray. Murray constructed the Jane Crow theory that proved so influential to Ginsburg as a result of the “double discrimination” she confronted. She stands as one of the original theorists of intersectionality<sup>30</sup>—the idea that people experience discrimination along multiple axes and the corresponding demand that law remedy such compound discrimination. Ginsburg signaled understanding of the interplay of race and sex through her embrace of Murray’s Jane Crow framework. And she devised a legal strategy meant to be a beginning—not the end—of the struggle for the liberation through law of women and all oppressed people.<sup>31</sup>

### III. THE RACE/SEX ANALOGY AND THE CULMINATION OF GINSBURG’S LITIGATION STRATEGY

The analogy between sex and race discrimination that Murray touted and Ginsburg pursued found expression in *Reed* and several other important United States Supreme Court cases. In this line of precedent, Ginsburg taught male judges to appreciate the harms of sex-based classifications. In each case, she argued that sex and race were each “congenital, unalterable trait[s] of birth” with no necessary relationship to talent or ability to perform.<sup>32</sup>

The tactic gained purchase in a plurality opinion by Justice Brennan, joined by Justice Marshall, in *Frontiero v. Richardson*.<sup>33</sup> The first case that Ginsburg argued before the Court, *Frontiero* challenged discrimination in the military.<sup>34</sup> Justice Brennan, joined by Marshall, justified heightened scrutiny of the underlying sex-based classification using language that wholeheartedly embraced the Jane Crow concept. Brennan compared woman and enslaved people, saying the condition of women, in many ways, was “comparable to that of [B]lacks under pre-Civil War slave codes,” because both were denied equal access to the political process.<sup>35</sup> The justices’ capacious understanding overstretched the analogy; in fact, harms based on race and

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<sup>30</sup> Serena Mayeri, *Intersectionality and Title VII: A Brief (Pre-)history*, 95 B.U. L. REV. 713, 718–19 (2015) (describing the significance of Pauli Murray’s intersectional approach); see generally Serena Mayeri, *After Suffrage: The Unfinished Business of Feminist Legal Advocacy*, 129 YALE L.J. F. 512 (2020) (discussing Murray’s role as an advocate at the intersection of race and gender).

<sup>31</sup> See Mayeri, *supra* note 29, at 1855. To be sure, the Court’s jurisprudence never fully realized the promise of the Jane Crow-based litigation strategy to undermine gender-based discrimination through the Fourteenth Amendment. It never recognized, much less addressed, intersectional forms of discrimination. But the limitations of the Court’s sex discrimination precedents cannot be blamed on Ginsburg any more than the Court’s failure to embrace the anti-subjugation principle in race discrimination cases can be put down to Thurgood Marshall.

<sup>32</sup> Brief for Appellant at 5, *Reed v. Reed*, 404 U.S. 71 (1971) (No. 70-4).

<sup>33</sup> 411 U.S. 677 (1973).

<sup>34</sup> See *id.* at 678.

<sup>35</sup> *Id.* at 685.

sex frequently are qualitatively different, with racial distinctions indicating dehumanization to an extent that sex-based distinctions generally do not.

Nevertheless, the analogy provided leverage. And it led to a landmark: a Supreme Court majority's application of heightened scrutiny to gender classifications in *Craig v. Boren*,<sup>36</sup> a 1976 case. In the span of just a few years, Ginsburg's litigation campaign had resulted in the Court embracing her challenge to sex role stereotyping. She had deployed the law as a tool of change and in the process advanced the cause of women's rights farther than ever before.

#### IV. THE JURISPRUDENCE OF JUSTICE GINSBURG

Then, as an associate justice on the Supreme Court, Ruth Bader Ginsburg pushed law and change for women farther still. She wrote many consequential opinions, but none more important than *United States v. Virginia*<sup>37</sup> for her legacy as an architect of equality under law for women. In the landmark 1996 case, the justice made a by-now familiar move: she deployed the analogical reasoning that she had relied on in cases such as *Frontiero* and *Craig*. Writing for the majority, Ginsburg struck down as a violation of the Constitution's Equal Protection Clause the Virginia Military Institute's ("VMI") practice of excluding qualified women from admission merely because of sex.<sup>38</sup> Virginia justified exclusion of women from VMI on grounds that females had access to a purportedly equivalent educational alternative—the Virginia Women's Institute for Leadership.<sup>39</sup> Ginsburg rejected the separate school for women.<sup>40</sup> In doing so, she cited a landmark 1950 race discrimination case, *Sweatt v. Painter*;<sup>41</sup> in *Sweatt*, the Supreme Court ordered the admission of a Black man to the all-white University of Texas on grounds that the "separate but equal" space to which he had been confined deprived him of the intangibles of an equal education.<sup>42</sup> Ginsburg's decision in VMI represented the culmination of the campaign, begun in *Reed v. Reed* twenty-five years earlier, for equal treatment for women in the law.<sup>43</sup>

But, as important as her role as champion of women's rights was, Justice Ginsburg did so much more than advance equality for women over the course of her career on the Supreme Court. She made an indelible mark, I propose, as the last civil rights lawyer on the Court, of course, following Thurgood Marshall, the first. Ginsburg championed equity for a range of identities and conditions that have led to subjugation—not only gender, but

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<sup>36</sup> 429 U.S. 190 (1976).

<sup>37</sup> 518 U.S. 515 (1996).

<sup>38</sup> See *id.* at 557–58.

<sup>39</sup> See *id.* at 526.

<sup>40</sup> See *id.* at 550.

<sup>41</sup> 339 U.S. 629 (1950).

<sup>42</sup> See *id.* at 634.

<sup>43</sup> See Kenneth L. Karst, *Principles and Persons: Ruth Bader Ginsburg, Raconteuse*, 63 HASTINGS L.J. 1197, 1210 (2012).

also race, disability, and sexual orientation.<sup>44</sup> She stood up for marginalized people everywhere—and for human rights—in cases ranging from voting rights<sup>45</sup> and criminal law<sup>46</sup> to reproductive rights.<sup>47</sup> In other words, as an associate justice, Ginsburg lived up to the ideal of human rights that she, influenced by Pauli Murray’s intersectional theory of equality, had pursued as a litigator.

Not unlike Justice Marshall, Justice Ginsburg demonstrated uncommon insight into the problem of racial inequity. She penned several historically informed opinions that powerfully advocated broad remedies for the enduring scourge of racism. In *Adarand Constructors, Inc. v. Peña*,<sup>48</sup> Ginsburg outlined the essential nature of the problem that government sought to remedy through affirmative action and the racial history that justified such programs.<sup>49</sup>

The statutes and regulations at issue, as the Court indicates, were adopted by the political branches in response to an unfortunate reality: [t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country. The United States suffers from those lingering effects because, for most of our Nation’s history, the idea that we are just one race was not embraced. For generations, our lawmakers and judges were unprepared to say that there is in this land no superior race, no race inferior to any other.<sup>50</sup>

In *Gratz v. Bollinger*,<sup>51</sup> and *Grutter v. Bollinger*,<sup>52</sup> Ginsburg defended race-based affirmative action in higher education, sustained in 1978’s *Regents of the University of California v. Bakke*<sup>53</sup> but never secure from legal

<sup>44</sup> See, e.g., *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719 (2018) (Ginsburg, J., dissenting) (same-sex rights and discrimination in public accommodations); *Burwell v. Hobby Lobby*, 573 U.S. 682 (2014) (Ginsburg, J., dissenting) (contraceptive coverage); Ginsburg’s dissent questioned whether the Court’s reasoning would find that employers had a right to discriminate based on religious objections to homosexuality); *Christian Legal Soc’y v. Martinez*, 561 U.S. 661 (2010) (Ginsburg, J.) (student groups and same-sex rights).

<sup>45</sup> See, e.g., *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787 (2015) (Ginsburg, J.) (redistricting); *Shelby County v. Holder*, 570 U.S. 529 (2013) (Ginsburg, J., dissenting) (preclearance requirement of Voting Rights Act of 1965); *Bush v. Gore*, 531 U.S. 98 (2000) (Ginsburg, J., dissenting) (presidential election recount).

<sup>46</sup> See, e.g., *Bullcoming v. New Mexico*, 564 U.S. 647 (2011) (Ginsburg, J.) (blood-alcohol tests); *Garner v. Jones*, 529 U.S. 244 (2000) (Ginsburg, J., dissenting) (parole considerations); *Florida v. J.L.*, 529 U.S. 266 (2000) (Ginsburg, J.) (*Terry* stops).

<sup>47</sup> See, e.g., *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (Ginsburg, J., concurring) (admitting privileges and other requirements for abortion providers); *Gonzales v. Carhart*, 550 U.S. 124, 169 (2007) (Ginsburg, J., dissenting) (late term abortions); *Stenberg v. Carhart*, 530 U.S. 914 (2000) (Ginsburg, J., concurring) (late term abortions).

<sup>48</sup> 515 U.S. 200 (1995).

<sup>49</sup> See *id.* at 272.

<sup>50</sup> *Id.* (Ginsburg, J., dissenting) (internal citations omitted).

<sup>51</sup> 539 U.S. 244 (2003).

<sup>52</sup> 539 U.S. 306 (2003).

<sup>53</sup> 438 U.S. 265 (1978).

assaults. Going against the grain and conventional wisdom, she defended institutional transparency in the practice of affirmative action. Whereas other proponents of the policy justified consideration of race as one “plus factor”<sup>54</sup> among many in a “holistic”<sup>55</sup> or multifactorial admissions system, Ginsburg embraced an admissions policy in *Gratz* based on a “selection index.”<sup>56</sup> The index weighted a number of factors, including race, in the admissions process. The majority explained that “[e]ach application received points based on high school grade point average, standardized test scores, academic quality of an applicant’s high school, strength or weakness of high school curriculum, in-state residency, alumni relationship, personal essay, and personal achievement or leadership.”<sup>57</sup> In addition, an applicant “was entitled to 20 points based upon his or her membership in an underrepresented racial or ethnic minority group.”<sup>58</sup> The majority decried the *Gratz* index approach as too much like the quotas banned in *Bakke*. “We find that the University’s policy, which automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single ‘underrepresented minority’ applicant solely because of race, is not narrowly tailored,” Justice Rehnquist wrote.<sup>59</sup> The system amounted to “[p]referring members of any one group for no reason other than race or ethnic origin[, which] is discrimination for its own sake,”—something *Bakke* proscribed.<sup>60</sup> But Ginsburg insisted on the relevance of “a system of racial caste only recently ended,” and the persistence of “large” racial disparities in employment and unemployment, housing, and health care, among other variables, to legal analysis of these policies.<sup>61</sup> And she championed transparent policies such as the selection index in pursuit of a laudable and compelling governmental objective.<sup>62</sup> A “fully disclosed College affirmative action program is preferable to achieving similar numbers through winks, nods, and disguises,” she wrote.<sup>63</sup>

The history of slavery and segregation in the United States and the persistent social, economic, and political disadvantages that African Americans endured as a result of this oppression pervaded Ginsburg’s analyses in cases alleging racial discrimination. Her grasp of the deep and persistent harms that slavery and segregation had caused set her apart from some of her colleagues. Other justices, invoking a shallow reading of history, flatly rejected race-based affirmative action. The period of de jure segregation taught a simple lesson, these jurists asserted. The Court must reject any and all race-

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<sup>54</sup> *Id.* at 295 (Souter, J., dissenting).

<sup>55</sup> *Grutter*, 539 U.S. at 337.

<sup>56</sup> *Gratz*, 539 U.S. at 255.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 270.

<sup>60</sup> *Id.* at 244.

<sup>61</sup> *Id.* at 299–301 (Ginsburg, J., dissenting).

<sup>62</sup> *See id.* at 302.

<sup>63</sup> *Id.* at 305.



based classifications, whether intended to harm or help African Americans and other marginalized groups.<sup>64</sup>

Ginsburg rejected that framing. Inverting her usual mode of analysis, she applied reasoning from the gender context to the race context to explain her perspective. The Court had not banned any and *all* gender-based classifications merely because *some* of them had been designed to and had perpetuated harm. To the contrary, the Court had distinguished harmful from helpful gender classifications in law; and with little controversy, the Court had upheld affirmative action policies designed to rectify historical and ongoing marginalization of women. The same logic should apply in racial discrimination cases, Ginsburg argued. She agreed, that is, with Justice Stevens' assertion that the Court should and could recognize the difference between a racial classification used as an "engine of oppression" and one deployed to "foster equality."<sup>65</sup>

Remarkably, Ginsburg did not only embrace affirmative action in contemporary cases; she anticipated and rejected future attempts to banish it. A few lines in Justice O'Connor's opinion for the majority upholding a narrowly tailored affirmative action policy in 2003's *Grutter v. Bollinger* provided the context for Ginsburg's future-oriented support of race-conscious remedies. While O'Connor sustained such policies in 2003, she hedged her support, writing that affirmative action should end within a generation.<sup>66</sup> "Race-conscious admissions policies must be limited in time," she wrote.<sup>67</sup> "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."<sup>68</sup>

Reasoning from the country's racial history and citing statistics and other data documenting enduring racial discrimination, Ginsburg pushed back against *Grutter*'s sunset provision. "[I]t was only 25 years before *Bakke* that this Court declared public school segregation unconstitutional, a declaration that, after prolonged resistance, yielded an end to a law-enforced racial caste system, itself the legacy of centuries of slavery," Ginsburg noted.<sup>69</sup> She then argued that talk of sunseting affirmative action was ex-

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<sup>64</sup> See, e.g., *Schuette v. Coal. to Def. Affirmative Action, Integration & Immigrant Rts. & Fight for Equal. By Any Means Necessary*, 572 U.S. 291, 323–24 (2014) (Scalia, J., concurring) (arguing that judges should not play the role of dividing the country into racial blocs and determining the policies that serve each one's interests); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in judgment) ("In my view, government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction."); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 520 (1989) (Scalia, J., concurring) (disagreeing with the plurality that "state and local governments may in some circumstances discriminate on the basis of race in order . . . to ameliorate the effects of past discrimination") (internal quotation marks omitted).

<sup>65</sup> *Adarand*, 515 U.S. at 243 (Stevens, J., dissenting) (joined by Justice Ginsburg).

<sup>66</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 342–43 (2003).

<sup>67</sup> *Id.* at 342.

<sup>68</sup> *Id.* at 343.

<sup>69</sup> *Id.* at 345 (Ginsburg, J., concurring).

traordinarily premature, given enduring racial discrimination.<sup>70</sup> “It is well documented that conscious and unconscious race bias, even rank discrimination based on race, remain alive in our land, impeding realization of our highest values and ideals.”<sup>71</sup> Enduring inequality in elementary and secondary education, among other stubborn racial realities, should preclude talk about ending affirmative action in higher education. Ginsburg insisted that the vestiges of racial segregation in K-12 education—revealed through “markedly inadequate and unequal educational opportunities”—should inform the outcomes of cases challenging race-based affirmative action in higher education.<sup>72</sup> The country must first fully address the long-lived matter of racial bias and disadvantage before the Court could or should consider an endpoint to the relatively short-lived and scattered efforts voluntarily undertaken by universities to ameliorate inequity in education.<sup>73</sup>

A strong proponent of school desegregation plans because of her awareness of persistent inequality in K-12 education, Justice Ginsburg powerfully defended them in a dissent in *Missouri v. Jenkins*.<sup>74</sup> The majority, in an opinion by Chief Justice Rehnquist, held that many remedies to increase the quality of education in Kansas City, Missouri schools that lower courts had sustained should end.<sup>75</sup> The costly remedies exceeded the scope of the violation and had been in place for eighteen years—far too long and with too little discernable impact on the academic achievement of Black students.<sup>76</sup> Ginsburg took a different view of the record and of the scope of the Court’s power to remedy discrimination. She wrote: “The Court stresses that the present remedial programs have been in place for seven years. But compared to more than two centuries of firmly entrenched official discrimination, the experience with the desegregation remedies ordered by the District Court has been evanescent.”<sup>77</sup> Her opinion recited the long history of slavery and segregation in Missouri, going back to the Black Codes.<sup>78</sup> Using her signature writing style—unembellished and unemotional but going straight to the heart of the matter—Ginsburg concluded, “Given the deep, inglorious history of segregation in Missouri, to curtail desegregation at this time and in this manner is an action at once too swift and too soon.”<sup>79</sup>

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<sup>70</sup> *See id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 346.

<sup>73</sup> *See id.* at 345.

<sup>74</sup> 515 U.S. 70, 175 (1995).

<sup>75</sup> *See id.* at 102–03.

<sup>76</sup> *Id.* at 80–102.

<sup>77</sup> *Id.* at 175 (Ginsburg, J., dissenting) (internal citation omitted).

<sup>78</sup> *See id.* at 175–76.

<sup>79</sup> *Id.* at 176.

## CONCLUSION

These cases and so many others make the overarching point with which I started. Ginsburg's legacy as a lawyer and as a jurist is not narrow and minimalist but broad and deeply informed by history and context. Subjected to discrimination herself, Ginsburg possessed tremendous insight about practices that mark, that exclude, that disadvantage people on the basis of identity. Thus, what society has lost with Ginsburg's passing is a viewpoint shaped by naked discrimination, an advocate dedicated to the eradication of that scourge, and a judicial mind devoted to equal dignity and opportunity for all. A giant in the law has fallen.

