FROM RBG'S BRIEF IN *REED V. REED*

Groups that are deemed "suspect" are those that receive closer scrutiny by courts in equal protection challenges, making it much harder for the government to classify on the basis of such categories.

The sex line drawn by Sec. 15-314, mandating subordination of women to men without regard to individual capacity, creates a **"suspect classification"** requiring close judicial scrutiny. Although the legislature may distinguish between individuals on the basis of their need or ability, it is presumptively impermissible to distinguish on the basis of an unalterable identifying trait over which the individual has no control and for which he or she should not be disadvantaged by the law. Legislative discrimination grounded on sex, for purposes unrelated to any biological difference between the sexes, ranks with legislative discrimination based on race, another congenital, unalterable trait of birth, and merits no greater judicial deference.

RBG is invoking the concept of historically disempowered groups deserving greater protection from the courts.

The distance to equal opportunity for women in the United States remains considerable in face of the pervasive social, cultural and legal roots of sex-based discrimination. **As other groups that have been assisted toward full equality before the law via the "suspect classification" doctrine,** women are sparsely represented in legislative and policy-making chambers and lack political power to remedy the discriminatory treatment they are accorded in the law and in society generally. Absent firm constitutional foundation for equal treatment of men and women by the law, women seeking to be judged on their individual merits will continue to encounter law-sanctioned obstacles.

Women are marching in the streets, demanding equal rights, and can no longer be ignored.

Prior decisions of this Court have contributed to the separate and unequal status of women in the United States. **But the national conscience has been awakened** to the

Thanks to Neil Siegel, professor of law and political science at Duke University, and Reva Siegel, professor of law at Yale Law School, for help with the commentary on this excerpt as well as for commentary on the *Struck v. Secretary of Defense, United States v. Virginia,* and *Gonzales v. Carhart* excerpts.

sometimes subtle assignment of inferior status to women by the dominant male culture. . . .

The time is ripe for this Court to repudiate the premise that, with minimal justification, the legislature may draw **"a sharp line between the sexes,"** just as this Court has repudiated once settled law that differential treatment of the races is constitutionally permissible. . . .

Biological differences between the sexes bear no relationship to the duties performed by an administrator. Idaho's interest in **administrative convenience,** served by excluding women who would compete with men for appointment as an administrator, falls far short of a compelling state interest when appraised in light of the interest of the class against which the statute discriminates—an interest in treatment by the law as full human personalities. If sex is a "suspect classification," a state interest in avoiding a hearing cannot justify rank discrimination against a person solely on the ground that she is a female.

. . . **Laws which disable women from full participation in the political, business and economic arenas** are often characterized as **"protective" and beneficial.** Those same **laws applied to racial or ethnic minorities would readily be recognized as invidious and impermissible.** The pedestal upon which women have been placed has all too often, upon closer inspection, been revealed as a cage.

RBG is quoting Justice Felix Frankfurter, who refused to hire her as a clerk because she was a woman. This is from his opinion upholding the law restricting women from tending bar.

RBG wants to establish how irrational it is to claim that men and women are biologically destined to have rigid roles. What does any of this have to do with your body parts?

Equality was just too inconvenient, according to Idaho. Not a good enough excuse, says RBG.

So-called protective legislation for the work conditions of women and children included safety standards, but also limited wages, working hours, and opportunities.

*benevolentsexism

RBG would later stop making this sort of argument as she, in her own words, became "more sensitive to the distinctions—that all oppressed people are not oppressed in the identical way or to the same degree."

FROM RBG'S BRIEF IN *STRUCK V. SECRETARY OF DEFENSE*

"The Air Force regulation . . . directing immediate discharge of a woman officer upon determination that she is pregnant, reflects arbitrary notions of a woman's place wholly at odds with contemporary legislative and judicial recognition **that individual potential must not be restrained, nor equal opportunity limited, by law-sanctioned stereotypical prejudgments;** operating on the basis of characteristics assumed to typify pregnant women, and . . . in total disregard of individual capacities and qualifications, the regulation violates the due process clause of the fifth amendment to the United States Constitution.

The regulation singles out pregnancy, a physical condition unique to women involving a normally brief period of disability, as cause for immediate involuntary discharge. **No other physical condition occasioning a period of temporary disability, whether affecting a man or a woman, is similarly treated.** . . .

Heading the list of arbitrary barriers that have plagued women seeking equal opportunity is disadvantaged treatment based on their unique childbearing function. **Until very recent years, jurists have regarded any discrimination in the treatment of pregnant women and mothers as "benignly in their favor."** But in fact, restrictive rules, and particularly discharge for pregnancy rules, operate as "built-in headwinds" that drastically curtail women's opportunities. **Decisions of this Court that span a century have contributed to this anomaly: presumably well-meaning exaltation of woman's unique role in bearing children has, in effect, restrained women from developing their**

The policy: "A woman officer will be discharged from the service with the least practicable delay when a determination is made by a medical officer that she is pregnant." In other words, abort your pregnancy or lose your job.

RBG in a nutshell. Here she is connecting her ideas about pregnancy with her ideas about sex discrimination.

The idea was that if pregnancy was treated like other temporary disabilities rather than something singular, women wouldn't be singled out for discrimination. After all, men got injured or sick and had to take time off too. Why was women's time off any different?

"Benign" pregnancy policies included being forced off the job the moment pregnant women started showing. Two years after this was written, the Supreme Court would strike down a policy like that in Cleveland Board of Education v. LaFleur.

From the beginning, RBG viewed women's role in reproduction as a key source of societal discrimination that equal protection should forbid.

individual talents and capacities and has impelled them to accept a dependent, subordinate status in society.

In addition to its reliance on a sex-based stereotype no less invidious than **one racial or religious,** the regulation invoked against petitioner operates as an unconstitutional infringement upon petitioner's right to privacy in the conduct of her personal life and her right to free exercise of her religion. It "encourages" women officers not to bear children by prohibiting them from remaining in the Air Force if they do. **Men in the Air Force, on the other hand, are not "encouraged," on pain of discharge, to avoid the pleasures and responsibilities entailed in fathering children. A man serves in the Air Force with no unwarranted governmental intrusion into the matter of his sexual privacy or his decision whether to beget a child. The woman serves subject to "regulation"; her pursuit of an Air Force career requires that she decide not to bear a child. . . .**

Although petitioner, a Roman Catholic, does not seek privileged treatment based on her religious orientation, it should be stressed that the challenged regulation operates with particularly brutal force against women of her faith. . . . Termination of pregnancy prior to the birth of a living child was not an option petitioner could choose. **Thus, the regulation pitted her Air Force career against her right to privacy and autonomy in sexual matters, as well as her religious conscience.**

. . . The conclusion is inescapable that the regulation directing Captain Struck's discharge reflects blatant prejudice against women for a condition peculiar to their sex. . . . If involuntary discharge of a woman solely on the ground of her pregnancy is not sex discrimination, nothing is!

Both already recognized by SCOTUS at that time.

Very bold to suggest to the court that women deserve not just the same employment opportunities, but also the same sexual freedom as men.

Although today, in cases like Hobby Lobby, the religious right appeals to "conscience" to oppose contraception and abortion, during this time liberals appealed to conscience to explain why women should be free from state control over their childbearing decisions.

Here's where RBG tries to get the court to bring pregnancy under the sex-discrimination doctrine it had already begun to develop in Reed v. Reed.

Pretty unusual to see an exclamation point in any brief, let alone RBG's. But the Supreme Court would say in 1974 that discriminating against pregnant women wasn't necessarily the same as sex discrimination, because not all women are pregnant. To undo the damage of that decision, RBG later helped draft the Pregnancy Discrimination Act of 1978, with language much like this. Although Congress has enacted civil rights laws that provide women some protection against pregnancy discrimination in employment, the court has still not interpreted the Constitution as RBG did in Struck.

FROM RBG'S OPINION IN *UNITED STATES V. VIRGINIA*

In 1971, for the first time in our Nation's history, this Court ruled in favor of a woman who complained that her State had denied her the equal protection of its laws. *Reed v. Reed* (holding unconstitutional Idaho Code prescription that, among "'several persons claiming and equally entitled to administer [a decedent's estate], males must be preferred to females'"). Since *Reed,* the Court has repeatedly recognized that **neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities.**

As RBG has described her understanding of feminism, we must all be "free to be you and me."

Without equating gender classifications, for all purposes, to classifications based on race or national origin, the Court, **in post-*Reed* decisions, has carefully inspected official action that closes a door or denies opportunity to women (or to men).** . . . To summarize the Court's current directions for cases of official classification based on gender: Focusing on the differential treatment or denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is "exceedingly persuasive." The burden of justification is demanding and it rests entirely on the State. The State must show "at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" . . . The justification must be genuine, not hypothesized or invented

RBG is happily citing her own successful legal strategy

RBG is getting to cite her favorite Supreme Court case of widowed father Stephen Wiesenfeld.

This may be a comment on pregnancy, which the Supreme Court has never deemed to be discrimination based on sex.

RBG is always adamant to distinguish laws that target previously discriminated groups in order to remedy that discrimination from those that perpetuate historical inequality.

This is the case that said women were too delicate to tend bar unless their husband or father owned the place.

RBG is getting to set a new standard for laws that classify by sex, basically finishing the job she started in the 1970s.

RBG is laying her view of the Constitution, which she says is also "originalist": It's all there in the text; it's society that has to catch up.

post hoc in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females. **See *Weinberger v. Wiesenfeld* (1975);** *Califano v. Goldfarb* (1977) (Stevens, J., concurring in judgment).

. . . **"Inherent differences" between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity.** Sex classifications may be used to compensate women "for particular economic disabilities [they have] suffered," **to "promot[e] equal employment opportunity, to advance full development of the talent and capacities of our Nation's people.** But such classifications may not be used, as they once were, **see *Goesaert*,** to create or perpetuate the legal, social, and economic inferiority of women.

. . . We conclude that Virginia has shown no **"exceedingly persuasive justification"** for excluding all women from the citizen soldier training afforded by VMI. . . .

A prime part of the history of our Constitution . . . is the story of the extension of constitutional rights and protections to people once ignored or excluded. **VMI's story continued as our comprehension of "We the People" expanded.**

EXCERPT FROM RBG'S DISSENT IN *GONZALES V. CARHART*

As Casey comprehended, at stake in cases challenging abortion restrictions is a woman's "control over her [own] destiny." "There was a time, not so long ago," when women were **"regarded as the center of home and family life, with attendant special responsibilities that precluded full and independent legal status under the Constitution."**

Those views, this Court made clear in Casey, "are no longer consistent with our understanding of the family, the individual, or the Constitution." Women, it is now acknowledged, have the talent, capacity, and right "to participate equally in the economic and social life of the Nation." **Their ability to realize their full potential, the Court recognized, is intimately connected to "their ability to control their reproductive lives."** Thus, legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; **rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature.**

Ultimately, the Court admits that "moral concerns" are at work, concerns that could yield prohibitions on any abortion. Notably, the concerns expressed are untethered to any ground genuinely serving the Government's interest in preserving life. By allowing such concerns to carry the day and case, overriding fundamental rights, the Court dishonors our precedent.

The 1992 decision in *Planned Parenthood v. Casey*, coauthored by Kennedy, O'Connor, and Souter, affirmed a woman's right to end her pregnancy before the fetus was capable of living outside the womb, but said the state could pass restrictions that did not place an "undue burden" on her

RBG is quoting from *Hoyt v. Florida*, the 1961 case about women being exempted from juries that was on her Women's Rights Project hit list.

Here, RBG is pointedly reminding Kennedy of the words he signed onto in *Casey*, from which he was now departing

To RBG, abortion rights are about women's equality, not "privacy," a concept the court had slowly begun to recognize too. This is the most direct and sustained statement of this idea in a Supreme Court opinion.

Revealing in this regard, the Court invokes an antiabortion shibboleth for which it concededly has no reliable evidence: **Women who have abortions come to regret their choices, and consequently suffer from "[s]evere depression and loss of esteem."** Because of women's fragile emotional state and because of the "bond of love the mother has for her child," the Court worries, doctors may withhold information about the nature of the intact D & E procedure. The solution the Court approves, then, is not to require doctors to inform women, accurately and adequately, of the different procedures and their attendant risks. Instead, the Court deprives women of the right to make an autonomous choice, even at the expense of their safety.

Unable to win majority support, over time anti-choice advocates began to justify restrictions on abortion as protecting women and not just the unborn. Kennedy's opinion reflects the influence of this new anti-abortion argument.

This way of thinking reflects ancient notions about women's place in the family and under the Constitution—ideas that have long since been discredited.

RBG is calling out the rationale for prohibiting abortion as "protecting women" She says that this kind of anti-abortion argument reflects and reinforces the very stereotypes about women's decision-making capacity and social roles that the court struck down as unconstitutional in sex discrimination cases—including in ones RBG argued herself Once again, women are being told not to worry their pretty heads about it, this is for their own good

Though today's majority may regard women's feelings on the matter as "self-evident," this Court has repeatedly confirmed that "[t]he destiny of the woman must be shaped . . . on her own conception of her spiritual imperatives and her place in society."

. . . In sum, the notion that the Partial-Birth Abortion Ban Act furthers any legitimate governmental interest is, quite simply, irrational. The Court's defense of the statute provides no saving explanation. **In candor, the Act, and the Court's defense of it, cannot be understood as anything other than an effort to chip away at a right declared again and again by this Court—and with increasing comprehension of its centrality to women's lives.**

There's no fooling RBG. She sees that the point of targeting so-called partial birth abortions is to eventually go after all abortions the court protects.

FROM RBG'S ORAL DISSENT IN *LEDBETTER V. GOODYEAR TIRE AND RUBBER COMPANY*

In our view, **the court does not comprehend or is indifferent to the insidious way in which women can be victims of pay discrimination.**

Today's decision counsels: **sue early on when it is uncertain whether discrimination accounts for the pay disparity you are beginning to experience.** Indeed, initially you may not know that men are receiving more for substantially similar work.

Of course, you are likely to lose such a less-than-fully-baked case.

If you sue only when the pay disparity becomes steady and large enough to enable you to mount a winnable case, you will be cut off at the court's threshold for suing too late. That **situation** cannot be what Congress intended when in Title VII it outlawed discrimination on the basis of race, color, religion, sex, or national origin in our nation's workplaces.

. . . Title VII was meant to govern real world employment practices and that world is what the court ignores today.

Comparative pay information is not routinely communicated to employees. **Instead it is often hidden from the employees' view.**

Thanks to David S. Cohen, associate professor of law, Drexel University Thomas R. Kline School of Law, for help with commentary.

RBG was the only woman on the court at this time and was clearly trying to tell the other male justices that they have no clue what it's like to be a woman in the real world, working in a man's profession—like Lilly Ledbetter at Goodyear Tire and like Ruth Bader Ginsburg throughout her career.

Ironic coming from a court that has steadily made it clear that it wants fewer and fewer civil rights suits in the federal courts.

More real talk about how litigation works. It is almost impossible to successfully sue someone as soon as the first instance of discrimination occurs

This refers to Title VII of the Civil Rights Act of 1964. The catch 22 effectively means no one could successfully sue for employment discrimination.

Pay disparities often occur, as they did in Ledbetter's case, in small increments. Only over time is there strong cause to suspect that discrimination is at work.

This is one of the employer's biggest advantages when it comes to pay equity. Imagine how the world of antidiscrimination law would be different if employee pay were public information, or, at least, open to other employees.

LILLY LEDBETTER: "Justice Ginsburg hit the nail on the head. . . . You can't expect people to go around asking their coworkers how much they are making. Plus, even if you know some people are getting paid a little more than you, that is no reason to suspect discrimination right away. Especially when you work at a place like I did, where you are the only woman in a male-dominated factory, you don't want to make waves unnecessarily. You want to try to fit in and get along."

Sounds a lot like RBG's own early life.

Damned if you do, damned if you don't—if she complains early on, she's labeled a troublemaker and suffers the consequences; if she waits, she loses her claim when she ultimately finds out there's been pay inequity that began a long time ago.

Each paycheck is a discrete act that employers are accountable for. As RBG sees it, if employers want secrecy, they need to be held responsible for what they hide.

Pay secrecy affects everyone, not just women under Title VII and, ultimately, not just with respect to unlawful discrimination.

Small initial discrepancies, even if the employee knows they exist, may not be seen as grounds for a federal case.

An employee like Ledbetter, trying to succeed in a male-dominated workplace, **in a job filled only by men before she was hired, understandably may be anxious to avoid making waves.**

. . . Ledbetter's initial readiness to give her employer the benefit of the doubt should not preclude her from later seeking redress for the continuing payment to her of a salary depressed because of her sex.

Yet, as the court reads Title VII, each and every pay decision Ledbetter did not properly challenge wiped the slate clean. Never mind the cumulative effect of a series of decisions that together set her pay well below that of every male Area Manager.

Knowingly carrying past pay discrimination forward must be treated as lawful.

Ledbetter may not be compensated under Title VII for the lower pay she was in fact receiving when she complained to the EEOC.

Notably, the same denial of relief would occur if Ledbetter encountered pay discrimination based on race, religion, age, national origin, or disability.

This is not the first time this court has ordered a cramped interpretation of Title VII, incompatible with the statute's broad remedial purpose.

In 1991, Congress passed a Civil Rights Act that effectively overruled several of this court's similarly restrictive decisions, including one on which the court relies today.

Today, the ball again lies in Congress's court. . . . The legislature has cause to note and to correct this court's parsimonious reading of Title VII.

This court has a history of getting Title VII wrong by not understanding that this law is supposed to help victims of discrimination, not hinder them.

The Democratic-controlled Congress picked up the ball that time, but by 2015, RBG told me, "The current Congress is not equipped really to do anything. So the kind of result that we got in the Ledbetter case is not easily achieved today. Someday, we will go back to having the kind of legislature that we should, where members, whatever party they belong to, want to make the thing work and cooperate with each other to see that that will happen."



FROM RBG'S DISSENT IN *SHELBY COUNTY V. HOLDER*

RBG has vigorously defended voting rights since joining the court in 1993.

"Voting discrimination still exists; no one doubts that." **But the Court today terminates the remedy that proved to be best suited to block that discrimination. The Voting Rights Act of 1965 (VRA) has worked to combat voting discrimination where other remedies had been tried and failed.** Particularly effective is the VRA's requirement of federal preclearance for all changes to voting laws in the regions of the country with the most aggravated records of rank discrimination against minority voting rights. A century after the Fourteenth and Fifteenth Amendments guaranteed citizens the right to vote free of discrimination on the basis of race, the "blight of racial discrimination in voting" continued to "infect the electoral process in parts of our country." Early attempts to cope with this vile infection resembled battling the Hydra. Whenever one form of voting discrimination was identified and prohibited, others sprang up in its place. **This Court repeatedly encountered the remarkable "variety and persistence" of laws disenfranchising minority citizens.** . . . Answering that need, **the Voting Rights Act became one of the most consequential, efficacious, and amply justified exercises of federal legislative power in our Nation's history.** Requiring federal preclearance of changes in voting laws in the covered jurisdictions—those States and localities where opposition to the Constitution's commands were most virulent—the

RBG is alluding to earlier federal civil rights statutes, local laws, and, most significantly, the fourteenth and fifteenth Amendments, which, even when combined, failed to prevent a century of voter discrimination.

As RBG notes, efforts to stamp out racial discrimination in voting were like a game of Whac-A-Mole, with new and inventive tactics deployed as soon as an existing one was outlawed.

It would be hard for RBG to overstate the importance and impact of the Voting Rights Act in transforming American democracy. Known as the "crown jewel" of the civil rights movement, Section 5 was at the heart of the VRA. As RBG notes later in her dissent, "Thanks to the Voting Rights Act, progress once the subject of a dream has been achieved and continues to be made."

Thanks to Janai S. Nelson, associate director-counsel of the NAACP Legal Defense and Educational Fund for help with commentary.

VRA provided a fit solution for minority voters as well as for States. Under the preclearance regime established by §5 of the VRA, covered jurisdictions must submit proposed changes in voting laws or procedures to the Department of Justice (DOJ), which has 60 days to respond to the changes. **A change will be approved unless DOJ finds it has "the purpose [or] . . . the effect of denying or abridging the right to vote on account of race or color." Ibid. In the alternative, the covered jurisdiction may seek approval by a three-judge District Court in the District of Columbia. . . . Congress approached the 2006 reauthorization of the VRA with great care and seriousness. The same cannot be said of the Court's opinion today.** The Court makes no genuine attempt to engage with the massive legislative record that Congress assembled. Instead, it relies on increases in voter registration and turnout as if that were the whole story. Without even identifying a standard of review, the Court dismissively brushes off arguments based on "data from the record," and declines to enter the "debat[e about] what [the] record shows." One would expect more from an opinion striking at the heart of the Nation's signal piece of civil-rights legislation. . . .

Leaping to resolve Shelby County's facial challenge without considering whether application of the VRA to Shelby County is constitutional, or even addressing the VRA's severability provision, the Court's opinion can hardly be described as an exemplar of restrained and moderate decision making. **Quite the opposite.** Hubris is a fit word for today's demolition of the VRA.

RBG is explaining the process of "preclearance." Effectively, certain jurisdictions, largely but not exclusively in the South, had managed to avoid the constitutional mandate to end racial discrimination in voting by inventing wily schemes to suppress the minority vote. Under preclearance, those jurisdictions were required to present all voting changes to either the U.S. Department of Justice or a federal trial court in D.C., in order to determine whether the proposal would put racial minorities in a worse position, before any change could go into effect.

Burn.

A facial challenge asserts that a law is always unconstitutional and should be struck down entirely, as opposed to a more narrow approach of declaring it unconstitutional as applied in a specific instance. Here, RBG is turning the tables on conservative members of the court and their supporters. They often wield the accusation of judicial activism at liberal judges and courts for allegedly overreaching in their decision making to address issues that are not properly before them. Here, RBG says to the conservative majority, "Slow down, love, please chill, drop the caper, you haven't even checked to see there's actual discrimination here or whether you can rule more narrowly."

. . . Volumes of evidence supported Congress' determination that the prospect of retrogression was real. **Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet. . . .**

The sad irony of today's decision lies in its utter failure to grasp why the VRA has proven effective. **The Court appears to believe that the VRA's success in eliminating the specific devices extant in 1965 means that preclearance is no longer needed. . . . With that belief, and the argument derived from it, history repeats itself.**

Here, RBG echoes the arguments of many civil rights advocates who have long praised the efficacy of the VRA both in stopping discriminatory voting laws that are presented for preclearance but also in deterring jurisdictions from dreaming them up in the first place. Importantly, since *Shelby*, organizations like the NAACP Legal Defense Fund and many of its allies have brought court challenges to stop laws that preclearance otherwise would have prevented. One example is Texas's stringent photo ID law, which allows voters to present a gun carry permit but not a student ID to vote.

"It was [not] all a dream." RBG goes on to discuss the robust congressional record that supported the most recent renewal of Section 5 in 2006, as well as the history of discrimination in voting, as if to say to the majority and any other VRA doubters: "And if you don't know, now you know."

Without the force of Section 5, discrimination in voting continues at breakneck speed in jurisdictions across the South and in many unsuspected pockets of the country. This was not lost on the Notorious RBG. In a more recent dissent involving the Texas photo ID challenge, RBG noted that "racial discrimination in elections in Texas is no mere historical artifact." However, there are now fewer tools to combat it.