

and it isn't easy to listen to all of us expound on judicial matters, particularly when you are an expert on it and we pretend to be. Some are, but I pretend to be.

I do have some questions, however, that have, oh, I wouldn't say troubled me, but which deal with areas that I think are important enough to elicit a response from a nominee, and I have asked them of many nominees before. They deal with an area that you truly are an expert in, and that is the equal protection clause of the 14th amendment, and particularly as it relates to gender.

Judge Ginsburg, throughout the 1980's I have asked Reagan and Bush Supreme Court nominees their views on gender discrimination. It was my belief that because of the integral role that the equal protection clause has performed in advancing women's equality, a Supreme Court nominee must be committed to those principles. I had concerns that the standards of review developed in the 1970's for gender discrimination analysis under the equal protection clause were at risk at times by nominees that were here. However, you, more than anyone else, any other individual I know, guided the Court into the direction of applying greater scrutiny to laws that discriminate on the basis of gender.

Yesterday I was quite moved by your exchange with Senator Kennedy when you shared the details of the cases that you litigated and some of your personal experience. Having, myself, had two daughters and even a mother who was discriminated against a long time ago, almost 70 years—and she raised me reminding of that—it is on my mind. And your discussion demonstrated to me, and I think the public, how abstract principles of constitutional law affect everyday people in the most fundamental way, including the basic rights to sit on the jury, administer the estate of a deceased family member, or to claim survivor's benefits for a deceased spouse.

Now, the heightened scrutiny test has made an enormous difference in combating laws that discriminate against women in our society. Earlier in this effort to change the law, you argued to the Court that gender-discriminatory statutes should receive the highest level of scrutiny. But then you revised your strategy, I believe, and steered the Court toward the middle-level scrutiny. And in a speech you gave in 1987, you praised the intermediate-scrutiny approach as a stable middle ground; that is, "an effective blend between responding to social change and actually driving it."

So my question, Judge, to you is: Will an intermediate level of scrutiny for gender discrimination statutes always be satisfactory, or does the area need to be constantly developed further?

TESTIMONY OF RUTH BADER GINSBURG

Judge GINSBURG. Senator DeConcini, I don't recall the words that you read. It was always my view that distinctions on the basis of gender should be treated most skeptically because, historically, virtually every classification that, in fact, limited women's opportunities was regarded as one cast benignly in her favor.

I tried yesterday to trace the difference between racial classifications, Jim Crow laws—which were not obscure in the message that one race was regarded as inferior to the other—and gender classifications that were always rationalized as favors to women. My

constant position was that these classifications must be rethought. Are they genuinely favorable, or are they indications of stereotypical thinking about the way women or men are. And that—

Senator DECONCINI. Well, Judge, to be a bit more specific, are you saying that you have to look at each case in determining whether or not the strict scrutiny or the intermediate scrutiny is applied? Is it on that basis or—first of all, am I correct that generally you believe that the intermediate scrutiny, as the Court has, I think, clearly established, is the right area for gender discrimination cases? You don't commit yourself to always be there? Is that what I think your position is, or can you expound on what your position is, please?

Judge GINSBURG. Senator DeConcini, as an advocate, I urged the highest level of scrutiny and—

Senator DECONCINI. All the time?

Judge GINSBURG. After it became clear as a strategic matter that there was not a fifth vote soon to declare sex a "suspect" category, I tried to establish a middle tier. In fact, I did that even earlier—the *Frontiero* (1973) Brief was the first time. Briefs I presented gave the Court two choices in *Reed* (1971), three in *Frontiero* and in Capt. Susan Struck's case.

As you know, I was an advocate of the equal rights amendment. I still am.

Senator DECONCINI. So am I.

Judge GINSBURG. So I think that answers your question about the level of scrutiny that—

Senator DECONCINI. But absent that amendment, Judge, then your position is that the strict scrutiny should be the beginning point on any gender issue brought before the Court?

Judge GINSBURG. I will try to answer your question this way. The last time the Supreme Court addressed this question, as I mentioned yesterday, was in the *Mississippi University for Women* (1982) case. The Court struck down a gender-based classification and said in a footnote that the question whether sex should be regarded as a suspect classification was one not necessary to decide that day; we don't have to go that far, the Court explained, to resolve the case at hand. It thus remains an open question before the Supreme Court.

Senator DECONCINI. And before you?

Judge GINSBURG. I can't, sitting where I am now—

Senator DECONCINI. I understand.

Judge GINSBURG [continuing]. Say anything more than what is in my briefs and my articles and my advocacy of the equal rights amendment, which is part of the record before you.

Senator DECONCINI. Well, thank you, Judge, and I will supply you the reference material I used here in your speech of 1987 where you praised the intermediate-scrutiny approach as a stable middle ground. And if you care to or can give any clarification—maybe that is taken out of context, and I have not read the entire remarks that you made, which might be unfair. But if you can give me a little more explanation, I would appreciate that. It doesn't have to be right now.