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Judith Resnik
Yale Law School

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OPENING THE DOOR: RUTH BADER GINSBURG, LAW'S BOUNDARIES, AND THE GENDER OF OPPORTUNITIES

JUDITH RESNIK¹

A pervasive assumption is that nation-states have bounded legal regimes. Yet the burdens imposed on women in the name of gender and sexuality have not been circumscribed by jurisdictional lines. Rather, gender hierarchies have traveled—by way of Roman law, civil law, the common law, and religious systems—to impose constraints on women living under autocracies, republican democracies, and other political forms. The many laws supporting gender inequalities make plain that legal rules internal to a nation-state are often not indigenous to a particular polity but, instead, are regularly shaped by cross-border influences.

Similarly, efforts to interrupt inequalities know no jurisdictional bounds. In tension with the classical model of state-to-state international law production, human rights movements of this and of other eras result from diverse exchanges across jurisdictional hierarchies. Illustrative are the equality projects of earlier centuries—emancipation for slaves and equality for women of all colors—that spanned oceans through networks of local religious and secular societies communicating (before the internet) via the post, pamphleteering, and the press to demand legal reforms.² Indeed, one can understand women's groups as the original "NGOs"—organizations that were nongovernmental not by choice but by exclusion and yet remarkably generative.

1 Judith Resnik, All rights reserved, 2013. Judith Resnik is the Arthur Liman Professor of Law at Yale Law School, where she teaches and writes about federalism, adjudication, equality, citizenship, and sovereignty. She is the author (with Dennis Curtis) of *Representing Justice: Invention, Controversy and Rights in City-States and Democratic Courtrooms* (2011), co-editor (with Seyla Benhabib) of *Migration and Mobilities: Citizenship, Borders, and Gender* (2010), and co-editor (with Vicki Jackson) of *Federal Courts Stories* (2010). She is a Managerial Trustee of the International Association of Women Judges, the founding director of the Liman Public Interest Program at Yale Law School, and an occasional litigator. She is a recipient of the ABA's Margaret Brent Award, and is a member of the American Philosophical Society and a fellow of the American Academy of Arts and Sciences. Thanks to Ester Murdukhayeva and to Edwina Clarke for their ever-thoughtful research assistance, to Katherine Franke for convening the Symposium, to Reva Siegel for ongoing discussions about equality's import and frontiers, to the other panelists, and to Justice Ginsburg, who makes reflections on her contributions a special privilege.

2 See generally Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564 (2006); IAN TYRRELL, *WOMAN'S WORLD, WOMAN'S EMPIRE: THE WOMAN'S CHRISTIAN TEMPERANCE UNION IN INTERNATIONAL PERSPECTIVE 1880-1930* (1991).

During the twentieth century, efforts to interrupt gender hierarchies intensified. Major transnational markers include the United Nations' Universal Declaration of Human Rights (UDHR), which in 1948 recognized rights of "[e]veryone and without distinction of any kind such as race, color, sex, . . . or other status."³ A second landmark of that century is the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which came into force in 1981. CEDAW aims to cabin the burdens of gender by insisting that state parties undertake "appropriate measures" ranging across "all fields" (including "the political, social, economic, and cultural") so as "to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men."⁴ Now ratified by 187 countries, CEDAW has proven to be a prompt for legislation and court decisions in various jurisdictions,⁵ as well as for critical commentary, including from members of the United States Senate, which has not ratified the treaty. A third transnational agreement that reflects a new appreciation for women's status is the 1998 Rome Statute, creating the International Criminal Court. This treaty is the first to recognize the impact of crimes against humanity on women and the need to have women participate not only because they are victims of such crimes but also because they should serve in decision making roles as prosecutors and judges.⁶

This stream of activities brings me, of course, to Justice Ginsburg. By border-crossing in law, we are following the route that Justice Ginsburg charted. Long before comparative law and international law were the familiar (and debated) topics that they have now

3 Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 2, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

4 Convention on the Elimination of All Forms of Discrimination Against Women, art. 3, Dec. 18, 1979, 1249 U.N.T.S. 20378 (entered into force Sept. 3, 1981) [hereinafter CEDAW].

5 See Judith Resnik, *Comparative (In)equalities: CEDAW, the jurisdiction of gender, and the heterogeneity of transnational law production*, 10 INT'L J. CONST. L. (I-CON) 531 (2012).

6 Rome Statute of the International Criminal Court (ICC), July 15-17, 1998, UN Doc. A/CONF.183/9* (July 17, 1998), reprinted in 37 ILM 999 (1998) (entered into force July 1, 2002), art. 7(1)(g) (defining persecution on the basis of gender as a crime against humanity); art. 36(8)(a)(iii) (requiring "a fair representation of female and male judges" to be taken into account during selection of judges); art. 42(9) (requiring the ICC's Prosecutor to appoint advisers with legal expertise on issues such as sexual and gender-based violence); art. 68 (requiring the ICC to "take appropriate measures to protect the safety, physical and psychological well-being, dignity, and privacy of victims and witnesses . . . [with] regard to all relevant factors, including age, gender . . . and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence"). As of December 2012, ten of the eighteen judges on the ICC were women. In addition, three of the six ad litem judges (whose terms have expired but who continue to serve to complete proceedings) were women. International Criminal Court, STRUCTURE OF THE COURT: JUDGES, <http://www2.icc-pi.int/Menu/ICC/Structure+of+the+Court/Chambers/The+Judges/> (last visited Dec. 18, 2012).

become, Justice Ginsburg was exposing gender *inequalities* through a comparative and transnational lens. She understood that law was and is a *source* of gendered identities, and not only a result. Hence, she proffered examples of legal regimes whose alternative rules denaturalized the sex-gender classifications that American law had imposed.

As is familiar, in her brief filed in the United States Supreme Court in *Reed v. Reed*,⁷ the 1970 case about the Idaho statutory preference for men over women as administrators of estates, then-lawyer Ginsburg drew on her knowledge of Sweden⁸ (where she had lived and studied comparative procedure). In her brief, she mixed voluminous American sources (federal and state statutes, case law, legislative history, executive orders, and reams of statistics on women's participation in the labor market, household, juries, higher education, and law reviews) with John Stuart Mill, Simone de Beauvoir, Alexis de Tocqueville, Sojourner Truth, Swedish essays on the "Changing Roles of Men and Women," a report to the U.N. on "The Status of Women in Sweden," and the U.N. Charter.⁹

In addition, then-lawyer Ginsburg cited two German judgments. As her brief described, in the first, issued in 1959, the West German Federal Constitutional Court (which she noted was "a high court created with the model of the United States Supreme Court in close view") had invalidated a statute giving fathers a preference over mothers as children's representatives and declaring that when parents disagree, "the father decides."¹⁰ In the other opinion, rendered in 1963 and dealing with a law according sons over daughters a preference in "agrarian inheritance law," the German Constitutional Court "relegat[ed] to the scrap heap of history" the legal distinction that "men were better equipped than women to manage property."¹¹

In other words, when arguing law's obligation to reject such classifications as unconstitutional constraints on equality, Ginsburg's "brief"/essay eloquently crossed the boundaries of law, political theory, and the nation-state to track the practice and impact of sex stereotypes. Moreover, Ginsburg unabashedly identified the very court to whom she appealed for redress as a source of the harms. Ginsburg introduced her call that sex should be a suspect classification with a discussion of how the Supreme

7 Brief for Appellant, *Reed v. Reed*, 404 U.S. 71 (1971) (No. 70-4).

8 *Id.* at 55 n.52.

9 *Id.*, Tables of Authorities and of "Other Authorities Cited," at ii-xiii.

10 *Id.* at 54-55.

11 *Id.* at 55.

Court's decisions "contributed to the separate and unequal status of women."¹² She cited the Court's 1948 ruling upholding the exclusion of women from serving as waitresses in taverns as illustrative of "an antiquarian male attitude toward women,"¹³ just as Idaho's preference for male administrators exemplified the "device of law-mandated subordination of 'equally entitled' women to men, the dominant male society, exercising its political power, has secured women's place as the second sex."¹⁴

As Cary Franklin has detailed,¹⁵ in bringing cases seeking equal opportunities for women and men to have the legal license to administer their children's estates (*Reed v. Reed*), to obtain tax deductions for care for their elderly parents (*Moritz v. Commissioner of the IRS*¹⁶), and to receive benefits once deemed only available for "mothers" (*Weinberger v. Wiesenfeld*¹⁷), Justice Ginsburg did not only aim to bend gendered assumptions about women's roles. Her male plaintiffs were gender-non-conventionalists, and her work sought to undermine the constraints imposed on all persons who were penalized for failing to conform to a social order's expectations.

Ginsburg's intervention was not to tell women and men what *to do* but to prohibit the state from enforcing and entrenching gender-delineated roles. And Ginsburg's interventions were sometimes "Ginsburgs' interventions" because her spouse, the preeminent tax professor Marty Ginsburg, joined in some of this work. He was the first to identify the tax-based discrimination at issue in *Moritz* and litigated the case with her,¹⁸ and he was the nonconventional husband who served as the chief cook of their

12 *Id.* at 6.

13 Brief for Appellant, *Reed v. Reed*, 404 U.S. 71 (1971) (No. 70-4) at 46 (discussing *Goesaert v. Cleary*, 335 U.S. 464 (1948)).

14 *Id.* at 59 (footnotes omitted).

15 Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83 (2010).

16 469 F.2d 466 (10th Cir. 1972), *cert. denied*, 412 U.S. 906 (1973).

17 420 U.S. 636 (1975).

18 Martin D. Ginsburg, *A Uniquely Distinguished Service*, 10 GREEN BAG 2D 173 (2007) (reprinting a speech delivered in 2006). The line drawn by the Tax Code permitted a "woman of any classification (divorced, widowed, or single), a married couple, a widowed man, or a divorced man" a deduction of up to six hundred dollars for dependent care, but "not to a single man who had never been married." *Id.* at 175. As he also explained, the amount in controversy was \$296.70, and the government's effort to obtain Supreme Court review of their success in the Tenth Circuit entailed listing "hundreds of federal statutes that . . . contemplated differential treatment on the basis of sex," and thereby provided a "gift"—an agenda of legal claims that could be attacked. *Id.* at 175–76.

household.¹⁹

Ginsburg's foray abroad in the *Reed* brief demonstrated the utility of inter-jurisdictional analysis, for it helped to underscore that what had been claimed to be natural was not inevitable but was made through a mix of law and practice. Yet the notably short Supreme Court *Reed* decision that resulted gave no hint of the context from which it emerged. The four-page opinion by Chief Justice Warren Burger for a unanimous Court did not venture beyond the Idaho statute and a bit of United States case law. The ruling invoked none of the diverse materials, either from within or beyond the United States.²⁰ But *Reed* is the national landmark for the reconceptualization of the Fourteenth Amendment as prohibiting at least certain forms of sex-based classifications. The Court held that a "mandatory preference 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," because the Constitution did not permit that choice "solely on the basis of sex."²¹

When Justice Ginsburg was a practicing lawyer, the decision to cite materials from outside the United States was not the controversial act that it has become. Illustrative is a discussion in another pivotal case of the twentieth century—*Miranda v. Arizona*.²² Chief Justice Earl Warren wrote the five-person majority decision holding that the Fifth Amendment imposed a constitutional prohibition against compelled self-incrimination and that, given the history of "inquisitorial and manifestly unjust methods of interrogating" detainees,²³ custodial detainees had the right to be told they could remain silent and obtain the assistance of lawyers. To explain its ruling, the *Miranda* majority reported on legal safeguards on interrogation provided in Scotland, India, and Ceylon, as well as by the United States FBI and the Uniform Code of Military Justice.²⁴ The Chief Justice was not chastised by his colleagues for doing so. Rather than objecting to references to foreign practices, Justice Clark, in dissent, disagreed with the majority's evaluation of their rules and used those opinions to argue against the majority's holding: "none of these

19 CHEF SUPREME: MARTIN GINSBURG (Supreme Court Historical Soc'y 2011).

20 404 U.S. 71 (1971).

21 *Id.* at 76–77.

22 384 U.S. 436 (1966).

23 *Id.* at 442. The decision was 5-4 on three of the four consolidated cases; Justice Clark concurred on the fourth, *California v. Stewart*, 384 U.S. 436 (1966), in favor of the defendant. The dissent by Justices Harlan, Stewart, and White applied to all four decisions.

24 *Miranda*, 384 U.S. at 488.

jurisdictions has struck so one-sided a balance as the Court does today.”²⁵

But in the late 1980s, and now repeatedly, some members of the current bench have famously voiced hostility to looking outside the borders of the United States when thinking about the meaning of this country’s constitution.²⁶ Moreover, some of those protests come in decisions about the Eighth Amendment prohibition against “cruel and unusual punishment,” a text that could be read to direct consideration of law beyond that of the United States as part of the inquiry into whether a punishment is “unusual.” Indeed, that approach was adopted by the Supreme Court in the nineteenth century when reasoning about the constitutionality of a particular punishment.²⁷

Strident voices against the use of “foreign” law continue to insist on its impermissibility as a resource. Their success at denaturalizing consideration of other countries’ jurisprudence can be found in many arenas. All of the last four nominees to the Supreme Court were questioned by senators about whether they would turn to sources from outside the United States when interpreting domestic constitutional obligations.²⁸ And, in 2010, seventy percent of Oklahoma’s voters supported a constitutional amendment to instruct the judges of that state not to “look at the legal precepts of other nations or cultures,” and specifically,

25 *Id.* at 521 (Clark, J., dissenting in part and concurring in part).

26 *See, e.g.,* *Stanford v. Kentucky*, 492 U.S. 361, 369 n.1 (1989); *Roper v. Simmons*, 543 U.S. 551, 628 (2005) (Scalia, J., dissenting).

27 *See* *Wilkerson v. Utah*, 99 U.S. 130, 134–35 (1879).

28 Chief Justice Roberts cited “democratic theory” in viewing non-United States law for constitutional interpretation as unwise, albeit not a violation of a judge’s oath of office nor appropriately prohibited by Congress. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 199–201 (2006). Noting the relevance for treaties or private law questions, Justice Alito similarly rejected foreign law for constitutional interpretation. *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 370 (2006) (“We have our own law. We have our own traditions. We have our own precedents. And we should look to that in interpreting our Constitution.”). Justice Sotomayor was asked several times about the issue. Noting that she shared Justice Ginsburg’s view of its educational use, Sotomayor stated, “American law does not permit the use of foreign law or international law to interpret the Constitution.” *Confirmation Hearing on the Nomination of Sonia Sotomayor To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 442 (2009). Justice Kagan likewise registered an insistence on the use of American sources (“Our Constitution is our own. It’s . . . the text that we have been handed down from generation to generation. . . .”). *Confirmation Hearing on the Nomination of Elena Kagan To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 127 (June 29, 2010). She also noted that in “a number of circumstances” (such as to decide “who counts as an ambassador”), international law would be relevant. *Id.*

not to consider either “international or Sharia law.”²⁹

From the 1970s forward, however, Justice Ginsburg has been a steady voice explaining once and again the utility of dialogic exchanges. (She is joined, I should add, by several of her colleagues on the Court.³⁰) The title of a speech Justice Ginsburg gave in 2006 in South Africa, “A decent Respect for the Opinions of [Human]kind”³¹ captures her view that, as a “matter of comity and in a spirit of humility,”³² considering the responses of other courts is an important facet of judicial decision making.

One way to honor Justice Ginsburg’s path-breaking inquiries is to continue the “international human rights dialogue”³³ in which she has long engaged. Yet the purpose of marking the forty years since Justice Ginsburg joined the tenure track faculty at Columbia Law School is not simply to celebrate the decades of achievements. Indeed, when I asked Justice Ginsburg’s advice about this segment of the symposium, she urged us to take up the central issues afresh—to focus on what role law can play in empowering women in all corners of the world, with very different governing legal systems, and to consider what needs yet to be accomplished.

Thus, reflection is in order on the continuities and disjunctures over these past forty years. I have already alluded to one shift—the effort to turn consideration of “foreign” law into an exotic and illicit enterprise. Not only is that approach disloyal to the Court’s history and unwise,³⁴ it also mistakenly assumes that national law is itself a result of domestic manufacture. Just as products “made in the U.S.A.” often include parts from abroad, law in the United States (produced by judges, legislatures, and the executive at

29 State Question No. 755/Legislative Referendum Number 244, Enrolled H.J. Res. 1056, 52d Leg., 2d Reg. Sess., amending Oklahoma Const. art. 7, § 1 (May 25, 2010). The Tenth Circuit held that this provision unconstitutionally violated First Amendment rights. *See Awad v. Ziriax*, 670 F.3d 1111 (10th Cir. 2012).

30 Justice Breyer has defended the practice, as have Justices Ginsburg, Kennedy, and O’Connor. *See, e.g., A Conversation Between U.S. Supreme Court Justices*, 3 INT’L J. CONST. L. (I-CON) 519, 530 (2005).

31 Justice Ruth Bader Ginsburg, Remarks to the International Academy of Comparative Law: “A decent Respect to the Opinions of [Human]kind: The Value of a Comparative Perspective in Constitutional Analysis” (July 30, 2010); Justice Ruth Bader Ginsburg, Remarks to the Constitutional Court of South Africa: “A decent Respect to the Opinions of [Human]kind”: The Value of a Comparative Perspective in Constitutional Adjudication” (Feb. 7, 2006), transcripts available at <http://www.supremecourt.gov/publicinfo/speeches/speeches.aspx>.

32 *See* Ginsburg, Remarks to the International Academy of Comparative Law, *supra* note 31.

33 Ruth Bader Ginsburg & Deborah Merritt, *Affirmative Action: An International Human Rights Dialogue*, 21 CARDOZO L. REV. 253 (1999).

34 *See generally* VICKI C. JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA (2009).

both state and federal levels) regularly draws upon, or is influenced by, and is intertwined with law from abroad.³⁵ Examples range from the text of the “Due Process Clause” to the adoption of the Kyoto Protocols by more than 800 mayors from around the United States,³⁶ as well as Justice Ginsburg’s own invocation that CEDAW’s “temporary measures” is an analogue of American “affirmative action” remedies.³⁷

Second, when Justice Ginsburg was building sex equality law in the United States in the 1970s, the range of precedents, the number of constitutional documents inscribing sex and gender equality, and the international commitments to that proposition were narrower than they are today. The Canadian Charter of Rights and Freedoms was adopted in 1982; the South African Constitution dates from 1994, with its final version effective in 1997. Thus, as the commentaries that follow by former Justices Claire L’Heureux-Dubé from the Canadian Supreme Court, of Yvonne Mokgoro and of Kate O’Regan from South Africa’s Constitutional Court, and of Justice Susanne Baer of Germany’s Federal Constitutional Court underscore, many more jurisdictions are addressing the implications of laws expressly naming discrimination based on sex as wrongful.³⁸

Third, Justice Ginsburg’s concerns about the harms of sex/gender stereotyping are now part of the infrastructure of international human rights law. CEDAW, the transnational convention focused on gender equality that came into force in 1981, instructs its state parties to take measures to “modify the social and cultural patterns of conduct of men and women” so as to eliminate “prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.”³⁹

Yet, and fourth, while I can thus sketch the contours of a substantial transnational body of law insistent on women and men as equal actors and aiming to undermine

35 See Resnik, *Law’s Migration*, *supra* note 2, at 1626–56.

36 See Judith Resnik, Joshua Civin & Joseph Frueh, *Ratifying Kyoto at the Local Level: Sovereignism, Federalism, and Translocal Organizations of Government Actors*, 80 ARIZ. L. REV. 709 (2008).

37 *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring).

38 See Claire L’Heureux-Dubé, *Symposium Honoring Justice Ruth Bader Ginsburg*, 25 COLUM. J. GENDER & L. 101 (2013); Yvonne Mokgoro, *Tribute to Justice Ruth Bader Ginsburg*, 25 COLUM. J. GENDER & L. 116 (2013); Kate O’Regan, *The Right to Equality in the South African Constitution*, 25 COLUM. J. GENDER & L. 110 (2013); Susanne Baer, *The Difference a Justice May Make: Remarks at the Symposium for Justice Ruth Bader Ginsburg*, 25 COLUM. J. GENDER & L. 92 (2013).

39 CEDAW, *supra* note 4, art. 5(a); see also CEDAW Comm., General Recommendation No. 25, Art. 4 of the CEDAW on temporary special services, Jan. 12–30, 2004, para. 8, U.N. Doc. CEDAW/C/2004/1/WP.1/Rev.1, 30th Sess. (Jan. 30, 2004).

subordination, I must also report on the maldistribution of rights and remedies. Impressive victories are matched with depressing examples of widespread gender-based harms. The forty years since Justice Ginsburg began at Columbia mark the resiliency of hierarchies of authority, power, and safety, and law's capacity to cling to gender-based stereotypes.

An example comes from the 2007 decision *Gonzales v. Carhart*, in which a majority on the United States Supreme Court, over the dissent authored by Justice Ginsburg, upheld a federal statute generally prohibiting late-term abortions.⁴⁰ The majority characterized all pregnant women as mothers who, given “the bond of love the mother has for her child,”⁴¹ were inevitably in need of protection about whether to end a pregnancy. The Court's view of a pregnant woman, potentially awash with “regret,” “grief,” and “sorrow,” has become a signature of the decision.⁴² The majority made no claim that fathers likewise felt anguish when prospective parenthood was precluded or that fathers needed law's supervision when making decisions.

This conflation of women with mothers was rejected by Justice Ginsburg, invoking the Court's past jurisprudence of reproduction that had recognized a woman's “personhood,” “autonomy,” and individual “dignity.”⁴³ While “ancient notions” of women had located women inevitably in motherhood and in need of shelter, contemporary laws and constitutional commitments saw women as citizens owning their own “destiny.”⁴⁴

But unshaking other destinies—even with law's support—remains complex. A wealth of materials documents the persistence of a “global gender gap,”⁴⁵ in terms of access to resources and opportunities in education, health, and politics. Violence against women is a practice that respects no jurisdictional boundary nor admits to easy solutions. And new reports document the continued and commonplace phenomenon of “repressive stereotyping of women in all parts of the world.”⁴⁶ Thus, pronouncements of equality—be they from national constitutions and charters, international law, national or local courts,

40 550 U.S. 124 (2007).

41 See *id.* at 159–60 (majority opinion).

42 *Id.*

43 *Id.* at 183–86 (Ginsburg, J., dissenting) (noting the Court's invocation of the “bond of love the mother has for her child” to justify its holding).

44 *Id.* at 171, 185.

45 See, e.g., WORLD ECONOMIC FORUM, THE GLOBAL GENDER GAP REPORT (2011).

46 Louise Arbour, *Foreword*, in REBECCA J. COOK & SIMONE CUSACK, GENDER STEREOTYPING: TRANSNATIONAL LEGAL PERSPECTIVES, at vii (2010).

or legislatures—have not translated across classes and borders into equality and safety.

Furthermore, the very mechanism on which Justice Ginsburg has relied—access to open and public courts—as one of several avenues of redress is itself at risk of becoming unhinged. One of the under-appreciated aspects of Justice Ginsburg's inventions is the degree to which she reshaped expectations of adjudication. As her *Reed* brief made pointedly clear, courts had both tolerated and generated inequalities.⁴⁷ In 1875, when Virginia Minor sought to invoke the relatively new Fourteenth Amendment, she went to the Old St. Louis Courthouse to insist that she could, as a citizen, exercise her right to vote. But the courts—both state and federal—told her that, while a citizen, her status as a woman could be used by the state of Missouri to bar her from voting.⁴⁸ Virginia Minor followed in the footsteps of Dred and Harriet Scott (indeed, she was in the very same courthouse), whose names are iconic for the horrors of slavery and the failures of law.⁴⁹ Although an 1850s Missouri jury had ordered the Scotts free, the state Supreme Court and the United States Supreme Court concluded that the Constitution put slaves (“beings of an inferior order”) outside citizenship and hence, that they lacked juridical voice even to challenge the state court's holding.

The social and political movements of the last century, of which Justice Ginsburg was a leader, upended both the *Dred Scott* and *Minor v. Happersett* rulings and transformed the practices of courts. These venues not only became hospitable to enforcing equality *elsewhere* but also became institutions according dignified and equal treatment for all women and men as litigants, witnesses, staff, lawyers, and judges. That shift in doctrine and practice was the result of intensive collective work, exemplified by more than dozens of projects, officially chartered by the state and federal courts and denominated “task forces” on gender, race, and ethnic bias *in courts*. More than sixty reports documented problems of unequal or unfair treatment and proposed remedies that today make it seem “natural” that courts are receptive to a range of claims and respectful of all claimants.⁵⁰

But the open doors of the courthouses may be closing. Time and again in the last decade, a majority of the United States Supreme Court has limited access for civil rights plaintiffs of various kinds, as well as for consumers, employees, environmentalists, and

47 See Brief for Appellant, *Reed v. Reed*, 404 U.S. 71 (1971) (No. 70-4); see also *supra* notes 7–14.

48 *Minor v. Happersett*, 88 U.S. 162, 178 (1875).

49 See *Scott v. Sandford*, 60 U.S. 393, 407 (1856); LEA VANDERVELDE, *MRS. DRED SCOTT* 232–319 (2009).

50 See Judith Resnik, *Asking About Gender in Courts*, 21 *SIGNS* 952 (1996).

others seeking to be heard.⁵¹ In January of 2012, Justice Ginsburg filed a lone dissent when the Court rejected a claim by a federal prisoner who had been sent to a private prison. Justice Ginsburg was—once again—a singular voice, insistent that the prisoner’s constitutional right not to have his jailors be deliberately indifferent to known medical needs should not be remitted to the “vagaries of state tort law.”⁵²

When thinking about Justice Ginsburg’s ambitions and achievements, what came to mind were a few words from across the Atlantic Ocean—the volume *A Room of One’s Own*, written in the late 1920s by Virginia Woolf, who said:

[I]n a hundred years, I thought, reaching my doorstep, women will have ceased to be a protected sex. . . . Anything may happen when womanhood has ceased to be a protected occupation, I thought, opening the door.⁵³

While many people have the ability to delineate problems, what Justice Ginsburg has done, as lawyer, academic, and justice, has been to specify what was wrong and to imagine how law could and should respond. But doors swing shut as well as open, and the lesson to be drawn from her work is the need both to enlist and to look beyond the structures that exist, locally and globally.

51 See generally Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78 (2011).

52 *Minneci v. Pollard*, 132 S. Ct. 617, 627 (2012) (Ginsburg, J., dissenting).

53 VIRGINIA WOOLF, *A ROOM OF ONE’S OWN* 40 (Harcourt 1957) (1929).