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The Heightened Standard of Judicial Review in Cases of Governmental Gender-Based Discrimination: Ruth Bader Ginsburg's Influence on the U.S. Supreme Court in *Craig v. Boren*

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The legislation at issue is a manifestation, with a bizarre twist, of the erstwhile propensity of legislatures to prescribe the conditions under which women and alcohol may mix.

—Ruth Bader Ginsburg in Motion of the
A.C.L.U. in *Craig v. Boren* (1976, p. 188)

Ruth Bader Ginsburg founded and directed the American Civil Liberties Union Women's Rights Project during the 1970s, where she participated in cases that dealt with the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution (History of the A.C.L.U. Women's Rights Project, 2003; Markowitz, 1989). From 1972 to 1978, Ginsburg argued six different gender stereotyping cases before the U.S. Supreme Court, prevailing in five of the six cases (Supreme Court Historical Society, 2000).

During the 1970s, Ginsburg played a key role in persuading the U.S. Supreme Court to adopt a heightened, or more demanding, standard of judicial review for laws that discriminated based on gender. With the 1976 case of *Craig v. Boren*, the Supreme Court for the first time ever required that laws which discriminated based on gender must meet a heightened standard of judicial review (Werling & Rieke, 1985). In this case, Ginsburg co-authored the only amicus curiae, or friend of the court, brief submitted (*Craig v. Boren*, 1976). Ginsburg wrote on behalf of the American Civil Liberties Union to argue that an Oklahoma law which allowed women to purchase 3.2 percent beer at age 18 but required men to wait until age 21 to purchase the same beer violated the Equal Protection Clause of the Fourteenth Amendment.

This paper will argue that Ginsburg influenced the U.S. Supreme Court's decision-making in *Craig v. Boren*. *Craig*, which received national news coverage from the *New York Times* ("High Court," 1976), provided women, and men, with greater protection against governmental gender-based discrimination. In making the argument, this paper initially will provide a brief but essential note on heightened scrutiny in equal protection cases. Next, the paper will compare the arguments of Ginsburg and Justice William Brennan, who wrote

the opinion of the Court. Finally, the paper will explain how Ginsburg's appeal to members of the Court who recently had exhibited moderate positions on the issue of equal protection and gender contributed to her success. Essentially, Ginsburg did an excellent job adapting to her audience. Such an insight serves as a reminder that the traditional concept of audience adaptation remains an important consideration for scholars who seek to understand legal rhetoric.

A Note on Heightened Scrutiny in Equal Protection Cases

This section of the paper offers a brief discussion on heightened scrutiny, which is essential to understanding *Craig*. Under the Equal Protection Clause of the Fourteenth Amendment, the government may not treat different groups of people differently without a reason for doing so (*Reed v. Reed*, 1971). In most cases, the government only needs a rational basis for such discrimination in order to prevail against a claim of an equal protection violation (*Reed*, 1971).¹ A rational basis can be any basis that is not "arbitrary and capricious" (Epstein & Walker, 1996, p. 647). Hence, courts give legislatures broad discretion under the rational basis standard of review.

However, in cases of "suspect" classes that have suffered from historical discrimination, the government faces the burden of offering the judiciary a much more substantial justification for discrimination (*Adarand Constructors v. Peña*, 1995, p. 223-224). The government must offer "a compelling governmental interest" where the means used are "narrowly tailored to further that interest" (*Adarand Constructors*, 1995, p. 235). This standard is much higher and more demanding than the rational basis standard. Such a standard applies in cases of discrimination based upon race, for instance.²

Today, gender does not receive suspect class status, but it does receive quasi-suspect class status.³ The result in cases of gender-based discrimination is that although the government does not have to show a compelling interest where the means used are narrowly tailored, the government must offer more than a rational basis for its discrimination. Indeed, the government must demonstrate that a law meets mid-level scrutiny, which requires that the government show "important governmental objectives" where the means used "must be substantially related to achievement of those objectives" (*Craig*, 1976, p. 197). The result of this judicial compromise is that the government has a harder time justifying laws that discriminate based on gender.

Comparison of the Arguments of Ginsburg and Brennan

Ginsburg's three major arguments in the A.C.L.U. brief all play key roles in Brennan's majority opinion. For instance, Ginsburg's first argument, that the Oklahoma statute impermissibly pigeonholes individuals based on gender, is Brennan's conclusion, since the justice finds a gender-based equal protection violation. In support of this position, both Ginsburg and Brennan cite the 1971 case of *Reed v. Reed* as authority for the principle that the Equal Protection Clause protects against gender-based discrimination (Motion of A.C.L.U., 1978; *Craig*, 1976).

Moreover, in the majority opinion Brennan adopts Ginsburg's second argument, that the Twenty-first Amendment does not shield Oklahoma from

liability. Although Ginsburg concedes that states have a right to regulate alcohol, she does not agree that such regulation limits individual rights guaranteed under the Equal Protection Clause (Motion of A.C.L.U., 1978). Citing different authority, Brennan makes the same point (*Craig*, 1976).

Furthermore, in the Court's opinion Brennan accepts Ginsburg's third argument, that the defendants' proffered statistics fail to justify the gender-based discrimination. Both rhetors point out that arrest statistics do not account for the "chivalry factor," as Ginsburg calls it (Motion of A.C.L.U., 1978, p. 197). Ginsburg speaks of the "fatherly warning" that a young woman may receive instead of an arrest (Motion of A.C.L.U., 1978, p. 197), while Brennan speaks of a young woman's being "chivalrously escorted home" (*Craig*, 1976, p. 203). The two rhetors also agree that driving fatalities by themselves do not prove that the drivers were drinking 3.2 percent beer (Motion of A.C.L.U., 1978; *Craig*, 1976). Additionally, the rhetors are in accord that a roadside survey fails to establish a solid connection between young men and 3.2 percent beer (Motion of A.C.L.U., 1978; *Craig*, 1976). Hence, Ginsburg's three major arguments all appear as keys to Brennan's opinion.

An Explanation of Ginsburg's Influence on the Court

Among other questions, the rhetorician who studies legal argument will want to ask the following: Who are the members of the rhetor's audience? What predispositions do the members of the audience have towards the rhetor's topic? How does the rhetor appeal to the members of the audience? (Freeley & Steinberg, 2000). These questions play important roles in an analysis of Ginsburg's influence on the Court.

Ginsburg's Audience and Its Predispositions

In *Craig*, Ginsburg had nine justices as audience members. The justices included William Brennan, Byron White, Thurgood Marshall, Lewis Powell, John Paul Stevens, Harry Blackmun, Potter Stewart, Warren Burger, and William Rehnquist (*Craig*, 1976).

With regard to the predispositions of the members of Ginsburg's audience, the 1973 U.S. Supreme Court case of *Frontiero v. Richardson* can act as a barometer.⁴ In *Frontiero*, which dealt with a gender-based discrimination issue similar to the issue in *Craig*,⁵ the justices split on the voting and reasoning. Brennan, White, and Marshall all supported a heightened standard of scrutiny in cases of governmental gender-based discrimination (*Frontiero v. Richardson*, 1973). Powell, Burger, and Blackmun agreed with the court that there was governmental gender-based discrimination, but these three justices would not use heightened scrutiny in evaluating such discrimination; instead they relied upon the rational basis test (*Frontiero*, 1973). Stewart merely concurred in the judgment (*Frontiero*, 1973). In contrast, Rehnquist dissented from the judgment (*Frontiero*, 1973). Stevens was not yet on the Court in 1973.

Following the Court's split in the *Frontiero* case, a leading but fragmented decision on the issue of gender-based governmental discrimination during the 1970s, Ginsburg had several factions to whom she could argue. First, she had allies in Brennan, White, and Marshall, all of whom favored heightened scrutiny. Second, she had potential allies in Powell, Burger, Blackmun, and

Stewart, all of whom previously had struck down a statute that discriminated based on gender, but none of whom had expressed an acceptance of strict scrutiny in such a case. Third, Ginsburg had Rehnquist, who had dissented in *Frontiero*. Fourth, she had Stevens, who had not been on the Court to express an opinion in *Frontiero*. Essentially, the four factions ranged from friendly, to potentially friendly, to unfriendly, to unknown. To win in *Craig*, Ginsburg needed to get five justices to side with her.

Ginsburg's Appeals to the Moderates on the Court

Given the various factions on the Court, Ginsburg needed to appeal to the four moderates on the issue of equal protection and gender—Powell, Burger, Blackmun, and Stewart—in order to win. The votes of at least two moderates, in addition to the votes of the three justices who accepted heightened scrutiny in the area of equal protection, would give Ginsburg's position a majority of the members of the Court. This portion of the paper will discuss the appeals in Ginsburg's brief, as aimed at the members of the Court who were more moderate on the issue of equal protection and gender.

To begin with, in the A.C.L.U. brief Ginsburg omits one key argument. She does not argue that the Court should adopt a heightened standard of scrutiny in cases of governmental gender-based discrimination. Ginsburg's only reference to a potentially new standard of scrutiny is implicit at best. When referring to the Supreme Court's prior decision in the 1975 case of *Stanton v. Stanton*, Ginsburg notes that a state's sex/age line established for child support purposes could not withstand careful review, whether the standard of review was "compelling state interest, or rational basis, or something in between" (Motion of A.C.L.U., 1978, p. 185). In quoting the Court in *Stanton*, Ginsburg does little more than suggest that gender-based classifications will fail regardless of the standard of review. This strategy is a clever appeal to the moderate members of the Court who previously had declined to use more than rational basis to strike down a law that discriminated based on gender.

In her brief, Ginsburg makes three main arguments. First, Ginsburg argues that Oklahoma's classification impermissibly pigeonholes on the basis of gender (Motion of A.C.L.U., 1978). Citing the 1971 case of *Reed v. Reed* along with other more recent cases, she points out that Supreme Court precedent stands in contrast to the Oklahoma statute because such precedent forbids gender-based classifications that rest on "overbroad generalizations" about gender (Motion of A.C.L.U., 1978, p. 183). Ginsburg suggests that the difference in age at which men and women can purchase alcohol represents such an "overbroad generalization" about gender since the defendants have not offered a sufficient link between Oklahoma's legislative goal of traffic safety and the means used to further that goal (Motion of A.C.L.U., 1978, p. 183). By focusing on what she characterizes as a law which rests on gender stereotypes, Ginsburg urges the four moderate members of the Court to see that the Oklahoma law simply goes too far to withstand judicial scrutiny.

Second, Ginsburg argues that the Twenty-first Amendment to the U.S. Constitution does not shield Oklahoma's law from scrutiny (Motion of A.C.L.U., 1978). For reference, in relevant portion this Amendment states, "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of

the laws thereof, is hereby prohibited" (United States Constitutional Amendment XXI, 1933). This language suggests that the states can decide how to regulate alcohol (Garner, 1999).

Conceding that Oklahoma can regulate the sale and consumption of alcohol, Ginsburg argues that such regulation cannot justify "gross classification by gender" (Motion of A.C.L.U., 1978, p. 193). Ginsburg uses the offensive hypothetical situation of a state's regulating the sale of alcohol based on race to draw a race/gender analogy and thus points out how unacceptable the Oklahoma gender-based distinction is (Motion of A.C.L.U., 1978). By linking gender-based discrimination and race-based discrimination, Ginsburg makes the point that gender-based discrimination in the context of selling alcohol is worse than any potential harm to states' Twenty-first Amendment rights. Hence, by showcasing the infringed rights of human beings, and not states, Ginsburg presents another appeal to the moderate members of the Court.

Third, Ginsburg argues that the defendants' statistics fail to establish "a fair and substantial relationship between the hypothesized legislative end (traffic safety) and the statutory criterion employed (a sex/age 3.2 beer line)" (Motion of A.C.L.U., 1978, p. 196). In making this argument to the four moderates on the Court, who in order to decide the outcome of the case could examine the barrage of statistics very carefully, Ginsburg pays close attention to the facts in the case.

Ginsburg offers several points to support her argument against the statistics. For example, the fact that the Oklahoma State and Oklahoma City male drunk-driving arrests substantially exceeded female arrests does not necessarily establish any connection between D.U.I. arrests and 3.2 percent beer (Motion of A.C.L.U., 1978). Also, the statistics ignore the "chivalry factor," via which the intoxicated male may be subject to arrest while the intoxicated female may receive an escort home, "perhaps with a fatherly warning" (Motion of A.C.L.U., 1978, p. 197). Additionally, the arrest statistics fail to account for multiple arrests, since one man rather than 47 men may have been subject to arrest 47 times (Motion of A.C.L.U., 1978).

Furthermore, an Oklahoma City roadside survey is unhelpful to defendants' case. During the evenings, Oklahoma City had surveyed drivers as to whether the drivers drank in general or had been drinking on the particular evening in question (Motion of A.C.L.U., 1978). If a given driver answered that he or she had been drinking, the authorities performed a blood alcohol test (Motion of A.C.L.U., 1978). As Ginsburg attempts to make clear in her brief, the authorities made no inquiry into possible consumption of 3.2 percent beer, only into whether the drink was "beer, wine, or liquor" (Motion of A.C.L.U., 1978, p. 201).

With a detailed refutation of the defendants' statistics, Ginsburg makes a strong case that the Oklahoma law does not further the alleged legislative objective of protecting young men and the public (Motion of A.C.L.U., 1978). Ginsburg's attention to detail is necessary to make her case to the four moderates on the Court, for whom the defendants' barrage of statistics might be dispositive. By showing weakness after weakness in the conclusion the defendants draw from their statistics, Ginsburg strengthens her own appeal to the four moderates on the Court.

The Court's Vote

In the end, history indicates that Ginsburg won the votes of seven members of the Court, which struck down the Oklahoma statutes. As one may have guessed, Brennan, White, and Marshall voted in Ginsburg's favor (*Craig*, 1976). Powell and Stevens did likewise, as did Blackmun and Stewart (*Craig*, 1976). Rehnquist and Burger dissented. Of the four members of the Court who in *Frontiero* expressed moderate views on the issue of governmental gender-based discrimination, Ginsburg won the votes of three: Powell, Blackmun, and Stewart. These three votes were instrumental in the Court's adopting her perspective in *Craig*.

Despite Ginsburg's not asking for it, six justices, including Brennan, White, Marshall, Powell, Stevens, and Blackmun even voted for a degree of heightened scrutiny, specifically mid-level scrutiny, in cases of gender-based discrimination. In *Frontiero*, Brennan, White, and Marshall had made an argument for a heightened standard of review, and in *Craig*, Powell and Blackmun also agreed to a heightened standard of review, as did Stevens. However, the proposed heightened standard of review in *Frontiero* was strict scrutiny, while the heightened standard of review in *Craig* was mid-level, or less-exacting, scrutiny. Nonetheless, *Craig* still elevated the level of judicial scrutiny in cases of governmental gender-based discrimination.

Closing Thoughts

This paper has traced the influence of Ruth Bader Ginsburg's amicus curiae brief, the only such brief submitted in the case, on the U.S. Supreme Court's reasoning in *Craig v. Boren*. To do so, the paper provided a background note on heightened scrutiny in equal protection cases. Also, the paper compared the arguments of Ginsburg and Brennan, noting the key similarities. Lastly, the paper looked at how Ginsburg successfully made arguments to the members of the Court who in *Frontiero v. Richardson* had adopted a moderate stance on the issue of governmental gender-based discrimination.

The analysis of this paper suggests at least two implications for rhetorical theory and rhetorical practice. Regarding theory, the classical concept of audience adaptation remains important, especially in helping argumentation scholars explain how lawyers successfully persuade appellate judges. Understanding judges' predispositions to current issues in light of prior judicial decisions is key. Regarding practice, the lesson for the rhetor who seeks to win over an audience of fractured perspectives is to appeal to the center in moderate terms. A rhetor might not be able to win both ends of the spectrum of perspectives, but the rhetor may be able to temper the argument so that one end of the spectrum still accepts the rhetor's perspective and the middle of the spectrum comes along. In cases where the rhetor only needs to win a majority of the members of the audience, such an approach is a viable option.

Although some feminists have criticized as "phallogocentric" Ginsburg's approach of working within the existing male-dominated legal system (Markowitz, 1989, p. 76), denying Ginsburg's influence on the heightened standard of judicial scrutiny that protects women, as well as men, from governmental gender-based discrimination would be difficult. Because of *Craig*, legislatures not only reformed discriminatory state laws but also may

have declined to pass additional discriminatory laws (Darcy & Sanbrano, 1997). Given this type of influence, it should not be a complete surprise that twenty years after *Craig*, Justice Ruth Bader Ginsburg wrote the important U.S. Supreme Court majority opinion in *United States v. Virginia* that reaffirmed the ground-breaking equal protection doctrine of *Craig* (1996).⁶

Notes

¹Various classes receive rational basis review. Some examples include classes based on age, disability, wealth, and sexual orientation. See Cohen, W., & Varat, J. D. (1998). *Constitutional law: Cases and materials*. Westbury, New York: Foundation.

²Other suspect classes are based on alienage and national origin. See Cohen & Varat.

³Another quasi-suspect class is based on illegitimacy. See Cohen & Varat.

⁴In *Frontiero* (1973), the government refused to allow a female member of the U.S. Air Force to claim benefits for her spouse that male service members could claim for their spouses. Essentially, the law in question preferred female service spouses to male service spouses.

⁵The issues in the two cases were very closely related but still legally distinguishable. The distinction lay in the Constitutional authority for each decision. In *Craig*, Oklahoma took the discriminatory governmental action, so that case dealt the Equal Protection Clause of the Fourteenth Amendment. In *Frontiero*, the U.S. government took the discriminatory action, so that case concerned the Due Process Clause of the Fifth Amendment.

The Fourteenth Amendment pertains to the states, whereas, at least with regard to the Due Process Clause, the Fifth Amendment pertains to the federal government. Constitutional language and case law so indicate. The Fourteenth Amendment uses the language "No State shall . . ." to list various prohibitions. See United States Constitutional Amendment XIV (1868). Although the Fifth Amendment does not use language that specifically refers to the federal government, the U.S. Supreme Court ruled long ago that the Bill of Rights, including the Fifth Amendment, applies to the federal government. See *Barron v. Mayor and City Council of Baltimore*, 32 U.S. 243 (1833). In the twentieth century, the Court applied most provisions of the Bill of Rights to the states, but a discussion of the incorporation doctrine must wait for another project. See Cohen, W., & Varat, J. D. (1998). *Constitutional law: Cases and materials*. Westbury, New York: Foundation.

Because the Fifth Amendment does not contain an Equal Protection Clause, the above-noted distinction between two Constitutional authorities is necessary in equal protection cases where the federal government is the defendant. Nonetheless, the U.S. Supreme Court has interpreted the Fifth Amendment's Due Process Clause to include the principle of equal protection. In the 1950s, the Court suggested that equal protection and due process "are not mutually exclusive" concepts. See *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). In the 1970s, the Court recognized "the equal protection component of the of the Fifth Amendment's Due Process Clause." See *Vance v. Bradley*, 440 U.S. 93, 94 (1979). In the 1990s, the Court held "that the Constitution imposes upon federal, state, and local governmental actors the same obligation to respect the personal right to equal protection of the laws." See *Adarand Constructors v. Pena*, 515 U.S. 200, 231-232 (1995). Such statements from the High Court indicate that the Due Process Clause of the Fifth Amendment assumes the duty of protecting individuals' equal protection rights against the power of the federal government. Ergo, in equal protection cases where the federal government is the defendant, the Due Process Clause of the Fifth Amendment functions much like the Equal Protection Clause of the Fourteenth Amendment.

⁶The *United States v. Virginia* case involved gender-based discrimination at the Virginia Military Institute (VMI), a public institution, which had a long-standing policy of refusing to admit female cadets (1996). The Supreme Court struck down this policy as a violation of equal protection.

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