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COMMENTARY

Why Only Justice Ginsburg Got Affirmative Action Case Right

By Frank Askin

Once upon a time, the U.S. Supreme Court recognized the difference between laws and regulations that burdened "discrete and insular minorities" and programs intended to help such groups overcome the effects of past discrimination.

But only Justice Ruth Bader Ginsburg who, as a member of the faculty at Rutgers Law School-Newark, helped institute one of the nation's first affirmative action programs in higher education, seems to remember those days.

In its latest rebuff to constitutional history, the high court has cast doubt on the legality of the University of Texas' affirmative action program by calling it a "racial classification" that the university has a heavy burden of justifying under a "strict scrutiny" standard.

In remanding the Texas case back to the lower courts for reconsideration, the majority opinion said that "a benign or legitimate purpose for a racial classification is entitled to little or no weight."

But seven members of the high court got it wrong. It took Ginsburg, the sole dissenter in *Fisher v. University of Texas*, to remind her colleagues that "strict scrutiny" was a standard developed 75 years ago (1938 to be exact) to challenge government programs that burdened racial minority groups lacking the political muscle to protect themselves from majoritarian rule.

Interpreting the former law, she noted: "Actions designed to burden groups long denied full citizenship status are not sensibly ranked with measures taken to hasten the day when discrimination and its aftereffects have been extirpated."

Her dissent was in fact a reference to Footnote 4 of *U.S. v Carolene Products Co.* (1938), which Justice Lewis Powell referred to as "the most famous footnote in constitutional history."

Footnote 4 was intended to explain when courts should give deference to government determinations and when not. The latter instances involved programs "directed at" specific religious, national or racial minorities that were prejudicial to "discrete and insular minorities" because the normal operation of the majoritarian political process could not be relied on to protect them.

Such situations, Powell wrote, "may call for a more searching judicial inquiry" — that which became later known as "strict scrutiny."

Chief Justice Harlan Fiske Stone said in *Carolene* that such a "searching inquiry" was also necessary as to laws that came within a specific prohibition of the Bill of Rights, since such rights could not be subjected to revision or dilution by a political majority.

On the other hand, laws and regulations that involved routine economic activity need only be rationally related to some public health or safety objective, and courts should assume, until demonstrated otherwise, that such judgments were rationally based on facts that were within the knowledge and experience of legislators and government officials.

If the electorate was dissatisfied with police judgments of elected officials, it could respond at the polls.

Carolene Products was itself an example of the latter. It involved a federal statute that forbade the interstate shipment of "filled milk." It was the opinion that brought to an end the old era of economic due process and ushered in a new era of constitutional law guaranteeing individual rights unlikely to be protected by the political process.

In 1967, then-Professor Ginsburg was a strong supporter of a proposal to establish a Minority Student Program at the then practically all-white, all-male Rutgers Law School. That program, which admitted its first class in September 1968, quickly transformed the student body at Rutgers into a racially and gender diverse community. Through the years, that program has greatly helped to diversify the bar, not only in New Jersey bar but throughout the country.

By an odd quirk of fate, the second-career female students who poured into the law school in the late 1960s needed

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a mentor. They co-opted the formerly staid civil procedure scholar Ginsburg as their leader, and encouraged her to become a feminist legal theorist who spent the next decade leading the fight for gender equality under the law before going on the bench.

It is hard not to believe that her experiences at Rutgers Law School helped to mold the current jurisprudence of Ginsburg and make her the caretaker of Footnote 4. ■