

HOW THE 10TH CIRCUIT COURT OF APPEALS GOT MY WIFE HER GOOD JOB

Martin D. Ginsburg

[*Editor's note:* Martin D. Ginsburg passed away before he could deliver his speech. Justice Ginsburg delivered the speech on his behalf to the 10th Circuit Judicial Conference on August 27, 2010.]

As you have heard, my field is tax law. When Chief Judge Henry asked me to speak today and hinted it might be on my favorite subject, naturally I prepared a long paper addressing the Supreme Court's performance in tax cases. Sadly, the Chief Judge reacted with surprising hostility and so I am going to speak instead about the only significant thing I have done in my long life with Honorable Ruth. I shall recall for you the one case in which we served as co-counsel. It was also the one occasion either of us was privileged to argue in the 10th Circuit. Nonetheless, fascinating as you will surely find this reminiscence, all in all you are the losers, for I promise you, the Supreme Court's performance in tax cases is an exceedingly funny subject.

In the 1960s I practiced law, mainly tax law, in New York City, and Ruth began her law teaching career at Rutgers Law School in Newark. One of the courses she taught was Constitutional Law and, toward the end of the decade, she started looking into equal protection issues that might be presented by statutes that differentiate on the basis of sex. A dismal academic undertaking because, back then, the United States Supreme Court had never invalidated any legislative classification that differentiated on the basis of sex.

Then as now, at home Ruth and I worked evenings in adjacent rooms. Her room is bigger. In my little room one evening in Fall 1970, I was reading Tax Court advance sheets and came upon a *pro se* litigant, one Charles E. Moritz, who, on a stipulated record, was denied a \$600 dependent care deduction under old § 214 of the Internal Revenue Code,

even though, the Tax Court found, the operative facts—save one—fit the statute perfectly. Mr. Moritz was an editor and traveling salesman for a book company. His 89-year-old dependent mother lived with him. In order to be gainfully employed without neglecting mother or packing her off to an old-age home, Charles paid an unrelated individual at least \$600—in fact, a good deal more than that—to take care of his mother when he was away at work.

There was just one small problem, and in the Tax Court, it served to do him in. The statute awarded its up-to-\$600 deduction to a taxpayer who was a woman of any classification (divorced, widowed, or single), a married couple, a widowed man, or a divorced man. But not to a single man who had never been married. Mr. Moritz was a single man who had never married. “Deductions are a matter of legislative grace,” the Tax Court quoted, and added that if the taxpayer were raising a constitutional objection, forget about it: everyone knows, the Tax Court confidently asserted, that the Internal Revenue Code is immune from constitutional attack.

Let me digress a moment to tell you that in the Tax Court Mr. Moritz, although not a lawyer, had written a brief. It was one page in length and said: “If I were a dutiful daughter instead of a dutiful son, I would have received the deduction. This makes no sense.” It was from that brief the Tax Court gleaned the taxpayer might be raising a constitutional objection. Mr. Moritz’s one-page submission remains in my mind as the most persuasive brief I ever read.

Well, I went to the big room next door, handed the Tax Court advance sheets to my spouse, and said, “Read this.” Ruth replied with a warm and friendly snarl, “I don’t read tax cases.” I said, “Read this one,” and returned to my little room.

No more than 5 minutes later—it was a short opinion—Ruth stepped into my little room and, with the broadest smile you can imagine, said, “Let’s take it!” And we did.

Ruth and I took the *Moritz* appeal pro bono of course, but since the taxpayer was not indigent we needed a pro bono organization. We thought of the American Civil Liberties Union. Mel Wulf, the ACLU’s then legal director, naturally wished to review our proposed 10th Circuit brief, which in truth was 90% Ruth’s 10th Circuit brief. When Mel read the brief, he was greatly persuaded.

A few months later, the ACLU had its first sex discrimination/equal protection case in the United States Supreme Court. As many of you will

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recall, it was titled *Reed v. Reed*. Remembering *Moritz*, Mel asked Ruth if she would take the lead in writing the ACLU's Supreme Court brief on behalf of appellant Sally Reed. Ruth did and, reversing the decision of the Idaho Supreme Court, the U.S. Supreme Court unanimously held for Sally.

Good for Sally Reed and good for Ruth, who decided thereafter to hold down two jobs, one as a tenured professor at Columbia Law School where she had moved from Rutgers, the other as head of the ACLU's newly created Women's Rights Project.

Now back to *Moritz*. The 10th Circuit—Judge Holloway writing for the panel—found Mr. Moritz to have been denied the law's equal protection, reversed the Tax Court, and allowed Mr. Moritz his \$600 deduction.

Amazingly, the Government petitioned for certiorari. The 10th Circuit's decision, the Government asserted, cast a cloud of unconstitutionality over literally hundreds of federal statutes—laws that, like old § 214 of the Tax Code, differentiated solely on the basis of sex.

In those pre-personal computer days, there was no easy way for us to test the Government's assertion. But Solicitor General Erwin Griswold took care of that by attaching to his cert. petition a list—generated by the Department of Defense's mainframe computer—of those hundreds of suspect federal statutes. Cert. was denied in *Moritz*, and the computer list proved a gift beyond price. Over the balance of the decade, in Congress, the Supreme Court, and many other courts, Ruth successfully urged the unconstitutionality of those statutes.

So our trip to the 10th Circuit mattered a lot. First, it fueled Ruth's early 1970s career shift from diligent academic to enormously skilled and successful appellate advocate—which in turn led to her next career on the higher side of the bench. Second, with Dean Griswold's help, Mr. Moritz's case furnished the litigation agenda Ruth actively pursued until she joined the D.C. Circuit in 1980.

All in all, great achievements from a tax case with an amount in controversy that totaled exactly \$296.70.

As you can see, in bringing those Tax Court advance sheets to Ruth's big room 40 years ago, I changed history. For the better. And, I shall claim, thereby rendered a significant service to the Nation. I have decided to believe it is the significant service that led to my being invited to speak to you today. And even if you had in mind a topic a little less cosmically significant and substantially more humorous, such as the

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Supreme Court's performance in tax cases, Ruth and I are truly delighted to be back with you in the 10th Circuit once again.