

Legal Limits

Reviewed by Alexandra Vacroux

EQUAL IS THE STORY OF THE resolute and plucky lawyers (many female, some male) who tackled one obstacle after another to reverse gender-based discrimination in the United States. Fred Strebeigh, a writer who teaches nonfiction at Yale, draws us into his tale by tracing the careers and accomplishments of U.S. Supreme Court justices Ruth Bader Ginsburg and Sandra Day O'Connor, feminist legal scholar Catharine MacKinnon, and many lesser-known but no less-determined women. All the action takes place in the few short decades since American law schools began admitting women in more than token numbers.

Strebeigh begins with the fight against rules that arbitrarily preferred men over women in the allocation of government rights and benefits. As a law professor at Rutgers and then Columbia, Ginsburg worked with a few close allies to advance cases that strategically undermined the Supreme Court's interpretation of the Fourteenth Amendment's equal protection clause. Since the amendment's enactment in 1868, the Court had not subjected the charge of discrimination against women to the same scrutiny as a charge of racial discrimination. Only as a Supreme Court justice herself did Ginsburg finally succeed in nudging the Court to apply "skeptical scrutiny"—though still not the highest standard of "strict scrutiny"—to laws that may violate the U.S. Constitution's promise of "equal protection of the laws" for women. In 1996, in *United States v. Virginia*, she wrote the majority opinion finding that the Fourteenth Amendment required the exclusive Virginia Military Institute to admit women.

Elsewhere, Strebeigh examines the struggles to open law schools and the legal profession to women, to ensure that pregnant women were not discriminated against, and to codify sexual harassment and domestic violence as crimes. The

EQUAL:

Women Reshape American Law.

By Fred Strebeigh.
Norton. 582 pp. \$35

narrative of incremental legal change is enlivened by Strebeigh's gift for fleshing out the human drama underlying key cases. His extensive interviews with those who prepared and argued those cases, as well as the use of Court and personal archives, allow him to piece together some of the personal dynamics on the Supreme Court.

Strebeigh is particularly good at dramatizing how the Supreme Court works, and how it vies with Congress to shape the law. For example, he devotes a chapter to the 1976 case *General Electric Co. v. Gilbert*, which arose because GE (which employed 100,000 women) excluded conditions relating to pregnancy from its disability plan, in part because of the cost. In the words of GE president Gerard Swope, "Women did not recognize the responsibilities of life, for they probably were hoping to get married soon and leave the company." In the Court's majority opinion, William Rehnquist wrote that the 1964 Civil Rights Act did not define the word "discrimination" in a way that made it clearly illegal to discriminate against pregnant women. An outraged Congress quickly passed what became the Pregnancy Discrimination Act, which President Jimmy Carter signed in 1978.

The parallel between the struggle for equality for people of color and efforts to apply civil rights protections to women—which came later—runs through Strebeigh's account. President John F. Kennedy signed the Equal Pay Act of 1963 just before introducing a draft of the legislation that would become the 1964 Civil Rights Act. The draft only prohibited discrimination on the basis of race, color, religion, or national origin. A Virginia congressman proposed adding "sex"—he said later, "as a joke"—as an additional category in Title VII, the section that concerned employment, hoping this would kill the bill. It didn't. But enforcement was another matter: For years, the newly created Equal Employment Opportunity Commission dealt grudgingly with cases of gender discrimination. Susan Deller Ross, a lawyer who joined the EEOC in 1970 to work on women's rights, recalls being greeted by a

female colleague who grumbled bitterly, “I hear you’re one of those feminists.”

Equal is a sobering reminder that these battles were fought within the lifetime of any woman older than 30. In the absence of a ratified constitutional amendment guaranteeing women equal rights, recognition that women are entitled to the same legal protections as men has emerged gradually. This book generates a genuine appreciation for the legal entrepreneurs who fought long and hard to make possible the careers of many a professional woman, including this one.

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SCIENCE & TECHNOLOGY

Evolved Tastes

Reviewed by John Onians

THE TRIUMPHS OF CULTURE ARE the product not of fashion, but of deeply rooted instincts. This is the central argument of Denis Dutton’s tour de force *The Art Instinct*, in which he shows that the most compelling works of art in all societies, from the most urban to the most scattered, have common attributes. These characteristics are so universal that they are best understood not as having been built by a process of “social construction” over millennia, but as forged by the powerful selective pressures to which our ancestors were exposed starting roughly 1.6 million years ago during the Pleistocene Epoch, “the evolutionary theater in which we acquired the tastes, intellectual features, emotional dispositions, and personality traits that distinguish us from our hominid ancestors.” Dutton examines the consequences of this exposure in *The Art Instinct*, leading us to reconsider some of the central problems of aesthetics.

Sometimes Dutton focuses on a particular artistic manifestation, as when he reflects on the preference of people from Kenya to Iceland—as expressed in a 1993 worldwide poll—for bluish

landscapes containing people, animals, and some water. This taste results, Dutton argues, not from contemporary exposure to such images, as the prominent art critic and philosopher Arthur Danto has claimed, but from an inborn taste for a landscape resembling the African savanna in which our ancestors thrived during the Pleistocene.

Sometimes Dutton’s viewpoint is truly Olympian, as when he identifies the “cluster criteria” that define art: “direct pleasure,” “skill and virtuosity,” “style,” “novelty and creativity,” and so on. These qualities, he suggests, are manifest to different degrees in Schubert songs, Shakespearean sonnets, and the Sepik shields of New Guineans. Because his criteria “are not chosen to suit a preconceived theoretical purpose,” they provide a “neutral basis for theoretical speculation.”

Dutton—who founded the popular website *Arts & Letters Daily* and teaches the philosophy of art at the University of Canterbury, New Zealand—cites leading philosophers, biologists, sociologists, and evolutionary psychologists. Some he challenges, others he co-opts. Always he is incisive, as when he robustly disputes the claims of some anthropologists that the artifacts of the communities they study—such as Hindu *yyonti* paintings—share nothing with Western conventions. Usually, in spite of his evident impatience, Dutton is respectful, allowing his opponents to have their say before dispatching them.

He is less convincing when advancing his own core idea, that all the activities he groups together as artistic are the product of a rich but unitary mental inclination shaped by sexual selection—the evolutionary process that pits suitors against one another. Charles Darwin proposed this mechanism to explain excesses, such as the peacock’s tail, that appear incompatible with the economy of “natural selection,” and Dutton invokes it to explain the richness and elaboration of art. In his view, it was the persistence of the selective pressures associated with obtaining a mate that led to the development of a single “art instinct.” Although he strives to defend this suggestion against the notion that the many forms of artistic activity are simply spinoffs from

THE ART INSTINCT:
Beauty, Pleasure,
and Human
Evolution.

By Denis Dutton.
Bloomsbury.
278 pp. \$25