A CONVERSATION WITH ASSOCIATE JUSTICE RUTH BADER GINSBURG

JUSTICE RUTH BADER GINSBURG*

Annual Stevens Lecture
University of Colorado Law School
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Melissa Hart: Thank you all so much for being with us tonight. My name is Melissa Hart, and I am the director of the Byron R. White Center for the Study of American Constitutional Law at Colorado Law School. We started the Stevens Lecture last year as an opportunity to bring a distinguished member of the judiciary to Colorado to give a public talk about judging and the state of the judiciary. We're honored this year to have Justice Ruth Bader Ginsburg as our second speaker in the series. Before I turn things over to Justice Ginsburg and to Dean Phil Weiser, I have a couple of things I want to say about the White Center.

One of the big focuses of the White Center in the past couple of years has been to really move the conversation about the Constitution outside of the academy and more into the public. We've been doing that through a series of programs, and on the back of your programs here today, you'll see a list of some of the events we have coming up this fall. I'd love to see you at those events. I also want to specifically mention that this week is the week of Constitution Day. Constitution Day is September 17th. We started it last year as a project that sends law students into high schools to teach a constitutional lesson plan during the week of Constitution Day. This year it expanded to include not only law students, but also local attorneys, both alumni and others who volunteer through the Colorado Bar Association, and several faculty members, who chose to volunteer this year. We have eighty students, about thirty lawyers, and several faculty members. And we have been

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* Associate Justice, United States Supreme Court. Justice Ginsburg gave this address for the Annual John Paul Stevens Lecture, which brings an outstanding jurist to address the University of Colorado Law School on important judicial issues. Justice Ginsburg gave this address on September 19, 2012.

in—or will be in by the end of this week—112 classrooms around the state of Colorado. We're really trying very hard to make this an outreach for the whole state of Colorado—not just the metro area. I was actually in Glenwood Springs this morning teaching a group of classes there.

And that's similar also to this lecture—the Stevens lecture. And I want to note that not only is the group of people in this room participating in this conversation—we also have overflow seating at the Wolf Law building, where this lecture is being live-streamed. And we have live-streaming at Colorado College in Colorado Springs, at Colorado Mesa University in Grand Junction, and at Fort Lewis College in Durango. And at all three of those other venues, we're live streaming and giving them the chance to ask questions. They're emailing them to us and they're being included on the list of questions that will be asked of Justice Ginsburg. So we're really trying to bring these conversations around the state of Colorado. So with that, I'm turning things over to Phil Weiser and again, thank you so much for being here.

Dean Phil Weiser (DW): So there's a great Yiddish expression which is, "Let me say a few words before I speak." And in this case, those few words are to thank so many people. I want to start with the Chancellor of our Boulder campus—Phil DiStefano—who has been incredibly supportive of the law school. And we're so grateful to have you here Phil. Thank you for all your support.

We have several Regents here—our members of the Board of Regents, two of whom are grads of our fine law school—Michael Carrigan and Joe Neguse. And Irene Griego is here too I believe. And if any of the other Regents are here, we thank you for all your support and your spirit. We do very much believe in engaging with the community, and we want to continue to do so in many ways. So I would echo what Melissa Hart said and very importantly acknowledge her leadership. In terms of the energy she's brought to the White Center, this Stevens Lecture was her brainchild, the Constitution Day activities were her brainchild. And recognizing that—I know the Board of Regents has recognized this—the Chase Award, given from the President's Office, was given to Melissa Hart for her leading work in community service. So I want to acknowledge Melissa Hart.

And finally, all of you make such a difference to us. When I

think about what makes us successful as a law school, having a diverse, inclusive, and collaborative community of outstanding students, faculty, staff, alums, and friends gives us a fabulous advantage. The members of the judiciary today—and there are several—very supportive alums, professors, this community can come together and really make a difference. And you all matter in so many ways. So I want to thank all of you.

Now when Justice Ginsburg agreed to come, she said, "I don't want to give a lecture, but I would like a fireside chat." And I said, "That would be lovely." And then I gave myself the challenging assignment of coming up with a plan for our conversation. It was easy to know where to start, which is what a pioneer you have been and many people here forget that in the 1950s there were very few women in law school. If you might start by reminding those who remember and helping to enlighten those who don't know what that was like.

Justice Ruth Bader Ginsburg (JG): In those ancient days—I attended law school in 1956 when women were perhaps 3 percent of the lawyers in the country, no more. No woman sat on any federal court of appeals. There had been only one in U.S. history—Franklin Delano Roosevelt appointed Florence Allen from Ohio to the Court of Appeals for the Sixth Circuit in 1934. When she left, there were none until 1968, when President Johnson appointed Shirley Mount Hufstedler to the Court of Appeals for the Ninth Circuit. So in the years I was going to law school, Florence Allen was the only woman ever to have served on any federal court of appeals. Of course, there were none on the Supreme Court. I had no woman as a teacher—that was unheard of. What was law school like in the not so good old days? Well, my entering class numbered over five hundred, and of those, nine were women. How did we feel? We thought all eyes were on us, so we had better be prepared because if we weren't, it would reflect not only on ourselves but on all women. To see the difference, I will tell you what a colleague of mine at Columbia Law School said. Now, it is many years later, it's the mid-70s, and women are in law school in numbers. And this distinguished professor said, "I think it's great that we have so many women students, but I have a certain longing for the way it was. When the class was moving slowly, and you needed a crisp right answer, you called on the woman. She was always prepared. She would give you the right answer, and then you could move on. Well, nowadays there's no

difference; the women are as unprepared as the men." One final note, the law school I attended in my first and second years had two teaching buildings. Only one of them had a women's bathroom, so if you were in class, and you had to leave, you might miss some of the professor's pearls. But if you were taking an exam—a time-pressured exam—in the building without the bathroom and had to make a mad dash to the other building. What I marvel at now is that we never complained. That's just the way it was.

DW: So when you graduated law school, you faced the challenge of finding a job—something our students here are mindful of. You had what you might call a triple challenge. Firms often didn't hire Jews, firms were certainly skeptical of hiring women, and you were also a mother. So how did that job search proceed, and how did you get your first break?

JG: Those were my three strikes. There was no Title VII. I graduated in 1959. Title VII of the Civil Rights Act of 1964 outlawed discrimination on the basis of race, national origin, religion, and sex. But in the 1950s, law firms and some of the finest judges were upfront in saying they wanted no women. They would feel uncomfortable dealing with a woman, or, as I often heard, "We hired a woman at this firm once and she was dreadful." How many men did they hire who didn't work out? So it wasn't easy to get that first job. The first job was all-important because if you got it and performed well, then the next job was secure. I had a great professor my third year at Columbia Law School. Some of you may know his name—Gerald Gunther. He was a leading constitutional law scholar. And he was in charge of getting judicial clerkships for Columbia Law School students. I was his special cause. He was determined to get me a federal clerkship. So he recommended me to a judge who always hired his law clerks from Columbia. And he said, "My candidate for you this year is Ruth Bader Ginsburg." The judge replied, "Well, I've looked at her resume. She has a four year old daughter. How can I rely on her?" And the great professor responded, "Judge Palmieri, give her a chance. If she doesn't work out, there's a man in her class who will step in and take over for her. That's the carrot. The stick. If you don't give her a chance, I will never recommend another Columbia clerk to you." That's how I got my first job. It was at least a paying job. Justice O'Connor graduated from law school

maybe five or six years before I did, very high in her class at Stanford Law School. No one would hire her. So she volunteered to work for a county attorney free for four months on this condition: "If you think I'm worth it at the end of four months, you can put me on the payroll." That's how she got her first job.

DW: For those who are not aware, Justice O'Connor is coming next year to give the Stevens lecture, and I'll be interested to hear her tell that story with maybe a little more flavor. Speaking of flavor, your husband Marty, of blessed memory, was someone who was extraordinary on many levels. He supported your career and is quoted as saying that his greatest single accomplishment was supporting you. He also, in slightly more Marty-humorous fashion, said, "I learned very early on in our marriage that Ruth was a terrible cook. And for lack of interest was unlikely to improve." So he said, "Out of self-preservation, I decided I had better learn to cook." You've talked about this a lot, but I, and particularly the students in the audience, would like you to mention a few words about what it meant to have Marty as your life partner.

JG: I was blessed for fifty-six years, married to a man who thought my work was as important as his—and who was a great chef. Our arrangement in our early years was that I would do the everyday cooking. And Marty would do the weekend and company cooking. When my daughter was about fourteen or fifteen, in high school, she noticed an enormous difference between Mommy's cooking and Daddy's, so she decided that Mommy should be phased out of the kitchen entirely. Since 1980, when I got my first good job in D.C. on the U.S. Court of Appeals for the D.C. Circuit, I have not cooked a meal. My daughter, because she takes responsibility for keeping me out of the kitchen, comes once a month. She has inherited her father's talent. She's a fine cook. She comes once a month, cooks for me, fills the freezer, and then comes back the next month. This time she outdid herself. She was with me on Labor Day weekend and made forty-eight individual meals for me to enjoy.

There's a tribute to Marty I think he would have liked beyond anything else. It's a book. It's the bestselling book in the Supreme Court gift shop. It's called *Supreme Chef*. And it's a collection of thirty-two of Marty's many, many recipes. It was

put together by the wives of the Justices. The Justices' spouses meet for lunch quarterly, and they rotate catering responsibilities. Marty was always a favorite co-caterer. So Martha Ann Alito, Justice Alito's wife, said, "Let's make a cookbook, we'll call it 'Supreme Chef,' and it will be Marty's recipes," which his secretary had on a disk. I think he wrote the recipes with me in mind because nothing is left out. There is not a mistake you can make if you follow his instructions. Anyway, before each section, before the hors d'oeuvres and the soups, one of the Supreme Court spouses wrote her memories of Marty. They start with Maureen Scalia's. The book is very well illustrated. When it was first supplied to the gift shop, they ordered only one thousand copies. They thought it would be of interest only to in-house people. Nina Totenberg then broadcast an account of the book on NPR. By that afternoon—I think she was on about 9 in the morning—by 3 o'clock, they had three thousand orders. Now a good supply is on hand.

DW: Speaking of Marty and your joint enterprise together, there's a fabulous story about your experience as a mother and your son James's experience at a New York City private school and how that related to you and Marty.

JG: This is in the '70s. My child, I called him "lively." His teachers called him "hyperactive." I could expect a call once a month to tell me about my child's latest escapade, then ask me to come down at once to see the room teacher, or the school psychologist, or the principal. One day, when I was particularly weary—I was in my office at Columbia Law School working on a brief—the monthly call came in. I responded: "This child has two parents. Please alternate calls. And today, it's his father's turn." Well, Marty left his office, went to the school, and faced three stone faces. And what was James's crime? "Your son stole the elevator!" Marty's response: "How far could he take it?" Perhaps it was Marty's sense of humor, but when the school had to alternate calls, calls came barely once a semester. There was no great improvement in my young son's behavior, but I think people were much more reluctant to call a man away from his work than a woman.

DW: So you obviously are conscious of your special role as a woman on the Supreme Court. And three weeks after you had surgery, you went to the State of the Union because you said

you wanted the country to see that there was a woman on the Supreme Court. When you joined the Court, Sandra Day O'Connor had been the only woman for some time, and you became two. After she left, you went back to having only a single woman. And now there are three. Could you reflect some on the dynamics at the Court in terms of what it means to have a woman or more than one woman?

JG: Sandra was alone on the Court for twelve years. And by the way, when I showed up, three weeks after pancreatic cancer surgery, it paled in comparison to Sandra's appearance on the bench nine days after her breast cancer surgery. In any case, we belong to the National Association of Women Judges, and they knew just what would happen when I got there. They had a reception at the Court in our honor and presented us with t-shirts. Sandra's read, "I'm Sandra, Not Ruth." And mine, "I'm Ruth, Not Sandra." Nevertheless, every term the two of us sat together, one lawyer or another would address me as Justice O'Connor. People who know us know we don't look at all alike. We don't speak alike. But it was a woman's voice, and the woman was Justice O'Connor . . . . Then I was there all alone. How did it feel? Lonely. It was the wrong perception for people to see one little woman and eight larger men. But now, if you come to the Court, I mean you really should, we are all over the bench. Because of my seniority, I sit toward the middle. Justice Kagan is on the left end of my side of the bench, and Justice Sotomayor, on the right. No one has called me Justice Kagan, no one has called her Justice Sotomayor. These young—by my standard—women, are not shrinking violets. They are very active in questioning at oral argument. So now the perception is, yes, women are here to stay. I'm sometimes asked, "When will there be enough?" And I answer, "When there are nine women." People are shocked. But there have been nine men for most of the Court's history, and nobody has ever raised a question about that.

DW: You have remarked that when you were a younger lawyer, you would often say something, and it would often be ignored. Then a male colleague might say the same thing, and people would say, "Wow, what a great idea!" Does that ever still happen to you, and can you reflect on why inclusiveness in our society, be it gender or race, is still such a continuing challenge?

JG: It doesn't happen now because of the very good job I have. There are only nine of us, and when I speak, my colleagues listen just as I listen to each of them. But that experience, women of my generation—all of them—have had. When a woman spoke, it was time to tune out. She was not going to say anything very important. But much of that, I think, is gone today.

DW: The challenge of gender discrimination is one that you spent a lot of your career fighting. And it's interesting to look at the arc of Chief Justice Rehnquist's views on this topic. When you argued before the Court, and he was on it, he reportedly said, "You won't settle then for putting Susan B. Anthony on the new dollar, would you?" as victory in the overall effort.[1] He later joined your opinion in *United States v. Virginia* calling for women to enter the Virginia Military Institute,[2] and he also wrote the landmark *Nevada v. Hibbs* case, concluding that the Family Medical Leave Act would apply to state employers.[3] When you think about the overall evolution of this doctrine, and you look at his evolution, how do you explain it?

JG: Let me go back to the case you first mentioned, my last argument before the Court. It was in the fall of 1978. The case was about putting women on juries.[4] It isn't all that long ago that many states didn't put women on juries at all, or allowed them to sign up if they wanted to serve, or had an opt-out system—that is, an exemption for any woman. This case was of the latter kind.[5] It was from the state of Missouri. The clerk in Kansas City would send out notices for jury duty, and the notice would say, "If you are a woman, you are not required to serve. If you don't wish to serve, check off here." If no card was returned, the clerk would assume that the woman didn't want to serve. The result, there were almost no women on Kansas City, Missouri juries.[6] By 1978, most states had

1. Transcript of Oral Argument at 19, Duren v. Missouri, 439 U.S. 357 (1979).

2. 518 U.S. 515, 558 (1996) (Rehnquist, J., concurring). Justice Rehnquist did not join Justice Ginsberg's opinion in *United States v. Virginia*. Rather, he wrote a separate opinion and concurred only in the judgment.

3. Nevada Dep't of Human Res. v. Hibbs, 538 U.S. 721, 724 (2003).

4. *See generally Duren*, 439 U.S. 357.

5. *See id.* at 359–60.

6. *See id.* at 360.

changed, there were just two holdouts—Tennessee and Missouri.[7] I had a precious fifteen minutes to argue. I divided the argument with a public defender from Kansas City. I spoke second. When I was done and about to sit down, satisfied that I got out the major points I wanted to make, then Justice Rehnquist—he was not yet Chief—said, "So, Mrs. Ginsburg, you won't settle for Susan B Anthony's face on the new dollar?"[8]

Later, when I joined the Court, and my commission was going to be presented by Janet Reno—most Attorneys General liked to be called General—Janet said, "I am not a general. I am Ms. Reno." The Chief wasn't accustomed to using "Ms." He knew "Miss," and he knew "Mrs." He wanted to make sure he could say it smoothly, so we had a kind of dress rehearsal. Before going on the bench, he said "Ms. Reno" three times. He cared about getting it right. Then in the VMI case, Phil, he didn't join my opinion, but he did join the judgment.[9] The dispute was about admitting women to the Virginia Military Institute, a facility the Commonwealth of Virginia operated for men only, with nothing comparable for women.[10] It wasn't a case about single-sex schools—the women's colleges, most of them were on our side. The idea was that the state cannot make an educational opportunity available for one sex only. In any event, the Chief joined the judgment and that left Justice Scalia the lone dissenter in the *VMI* case.[11]

The *Hibbs* case was about the Family Medical Leave Act, and the Chief's understanding was that it was vital to women's welfare that leave should be part of a worker's life. When you have a sick child, a sick spouse, a sick parent, you can take time off without putting your job in jeopardy.[12] Well, I'd like to say that I had something to do with the Chief's education, but I don't think that's true. I think the cases that came before the Court influenced him, but most of all, I think he was influenced by his granddaughters. One of his daughters was divorced, and she had two girls. The Old Chief was a loving male presence for those girls. They loved him, and I think he thought about how he would like the world to be for them.

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7. *See id.*
8. Transcript of Oral Argument at 19, *Duren*, 439 U.S. 357.
9. *See* United States v. Virginia, 518 U.S. 515, 558 (1996) (Rehnquist, J., concurring).
10. *See id.*
11. *See id.*; *id.* at 556 (Scalia, J., dissenting).
12. *See* Nevada Dep't of Human Res. v. Hibbs at 538 U.S. at 731.

DW: When you think about this evolution, starting really with *Reed v. Reed* in 1971, which was a case involving Idaho probate law that said males must be preferred to females in appointing state administrators,[13] up to *VMI* twenty-five years later,[14] it's quite a movement in the Court's position. You literally were there at every step of the way. With respect to that first step in *Reed v. Reed*,[15] could you relate how you got involved in that case?

JG: *Reed* is a good example of that series of cases. They were all genuine. They were not test cases in the sense that they were set up or solicited by any organization. Sally Reed was a woman from Boise, Idaho. She and her husband had a son. They separated, and Sally was given custody of the boy when he was of "tender years." Then the boy reached his teens, and the father said, "I should spend time with him." The family court judge responded, "I suppose so. Now he needs to be prepared for a man's world." Sally thought that the father's home was not a good place for their son to be, but the judge made the decision he did. The boy was severely depressed, and, one day, took one of his father's many rifles and killed himself. So Sally wanted to be appointed administrator of the boy's estate, not because it had any value—it didn't—but for sentimental reasons. The Idaho law at the time read, "As between persons, equally entitled to administer a decedent's estate, males must be preferred to females."[16] Sally Reed took that case with her own lawyer from Boise, Idaho through three levels of the Idaho courts. When a colleague of mine read the report of the Idaho Supreme Court's decision in a journal for lawyers—Law Week—he said, "This is going to be the turning point case for gender in the Supreme Court." And he was right. Sally Reed won a unanimous judgment.[17] The Court pretended not to be doing anything new, but if you look back, even to the quote "liberal" Warren Court in 1961, when the Court decided a case called *Hoyt v. Florida*,[18] it was different. Gwendolyn Hoyt was the petitioner. She was what we today would call a battered woman. One day, her philandering husband had

13. 404 U.S. 71 (1971).
14. United States v. Virginia, 518 U.S. 515 (1996).
15. 404 U.S. 71.
16. *See id.* at 73 (quoting IDAHO CODE ANN. § 15-314 (1971)).
17. *Reed*, 404 U.S. at 71.
18. 368 U.S. 57 (1961).

humiliated her to the breaking point. She spied her young son's baseball bat in the corner of the room. With all her might, she brought it down on her husband's head. He fell to the floor, and that was the end of the argument, the end of the husband, and the beginning of the murder prosecution. Gwendolyn Hoyt thought if there were women on the jury, they might better understand her state of mind.[19] And even if they didn't acquit her of the murder charge, they might come in with a verdict for the lesser-included offense of manslaughter.[20] She was convicted of murder by an all-male jury.[21] When the case came to the Supreme Court, the unanimous Warren court said, "We don't understand what this complaint is about. Women have the best of all possible worlds. They're not on the jury rolls, that's true, but if they want to serve, they can for the asking. All they have to do is go to the clerk's office and sign up."[22] Well, think of how many men would sign up if they didn't have to. Gwendolyn Hoyt must have been dumbfounded that they didn't understand her plight. That was in 1961, when the "liberal Warren Court" sat. Ten years later, Sally Reed's case came before the "conservative Berger Court" and received a very different response.[23]

DW: So during your time when you were litigating cases, and this comes really as a question from Colorado Mesa University, did you have any trials where you got involved at the trial level? Or if you only did the appeals, might you, in either case, talk a little about the difference between trial work and appeal work?

JG: I was involved in some cases at the ground floor. Stephen Wiesenfeld's case was one such case.[24] But our cases were not like the dramatic trials you might watch on television. They all presented a constitutional question. Let me illustrate by talking about Stephen Wiesenfeld's case, which we brought in the federal district court in New Jersey. Stephen was a man whose wife was a high school teacher. She had a healthy pregnancy and remained in the classroom until the ninth

19. *Id.* at 59.
20. *See id.*
21. *Id.* at 57.
22. *See id.* at 60–62.
23. *See* Reed v. Reed, 404 U.S. 71 (1971).
24. *See* Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).

month. She went to the hospital to give birth. The doctor reported to Stephen, "Mr. Wiesenfeld, you have a healthy baby boy, but your wife died of an embolism." Stephen was determined he would not work full-time until his child was in school full-time. He would earn the minimum he could make and combined with social security benefits, have enough to support himself and his infant son. When he went to the social security office, he was told, "We're very sorry, but these are mother's benefits. They're not available for you. They're available to widowed mothers but not widowed fathers." I came to know about Stephen's case when he wrote a letter to the editor of his local newspaper. He said, "I've been hearing a lot of talk about women's lib. This is what happened to me. How does that fit in? Tell my story to Gloria Steinem." At the time I was teaching at Rutgers, the state university of New Jersey. A professor in the Spanish department, Phyllis Boring, lived in the same town. She read this letter, called me, and asked, "That's wrong, isn't it?" And I answered, "Why don't you suggest to Stephen Wiesenfeld that he contact the American Civil Liberties Union?" That's how it began. In the trial court, the case didn't require putting on evidence—the facts were all undisputed. Our argument was that the Social Security Act provision in point, which was described as beneficial to women (after all, widows got the benefits, widowers were left out), had a flaw common to all such laws. The root of the discrimination was the treatment of women. Here was Paula Wiesenfeld, who paid social security taxes just as the rest of us do, but they didn't gain for her family the same protection as the family of a male wage earner who had paid social security taxes. So the discrimination begins with the woman, and then extends to the man. In his role as parent, rather than breadwinner, he doesn't get the benefits. The judgment of the Supreme Court was unanimous in that case.[25] And by the way, we took it from the district court—from the court of first instance—to the Supreme Court before Jason Paul Wiesenfeld reached his third birthday. That is record speed for federal litigation. Anyway, the Court reached a unanimous judgment, but divided three ways.[26] The majority thought the law discriminated against the woman as wage earner—the very argument I just presented.[27] Two

25. *Id.*
26. *Id.*
27. *Id.* at 653.

thought it discriminated against the male as parent.[28] And one said, "I see this from the vantage point of the baby. It makes no sense that the child should have the opportunity for the personal care of a sole surviving parent only if that parent is female, not if that parent is male."[29]

Other cases in which I was involved from the ground floor included several presenting what I call the "pregnant problem."[30] Into the early '70s, if a woman taught in a public school, and she began to show (somewhere between four and six months) she was put on what was euphemistically called "maternity leave."[31] It was unpaid leave. She had no right to return. The school district could call her, if and when they wanted her back. One of the reasons for this policy was, "After all, we don't want the children to think that their teacher swallowed a watermelon." Other cases concerning the pregnant problem involved women in military service. If you were a woman in service, pregnancy ranked as a "moral or administrative" ground for immediate discharge.[32] Another typical case involved a woman who had a blue collar job and wanted to get health insurance for her family.[33] Her employer had a better package than her husband's employer. So she said, "I'd like family coverage." Her supervisor responded, "Well, I'm sorry. Family coverage is available only to men. Women can get single coverage, but men are the ones who have to cover the family." So in all these cases, you can see what's at work. The woman is seen as someone who is at most a secondary, pin-money earner. The man is the breadwinner who counts. So when the man steps out of his proper role as breadwinner and

28. *Id.* at 654–55 (Powell, J., concurring).

29. *Id.* at 655 (Rehnquist, J., concurring).

30. *See* Cleveland Bd. of Educ. v. LaFluer, 414 U.S. 632 (1974); Brief for the Petitioner, Struck v. Sec'y of Def., 409 U.S. 1071 (1972), *vacating* 460 F.2d 1372. *See generally* Amy Leigh Campbell, *Raising the Bar: Ruth Bader Ginsburg and the ACLU Women's Rights Project*, 11 TEX. J. WOMEN & L. 157, 209–17 (2002) (discussing the "pregnancy problem" and Justice Ginsburg's role as amicus and counsel in several cases, including *LaFluer* and *Struck*, that addressed issues of pregnancy discrimination).

31. *See LaFluer*, 414 U.S. at 634.

32. *See Struck*, 460 F.2d 1372, 1373–74 (9th Cir. 1971), *vacated*, 409 U.S. 1071 (1972).

33. *Without Precedent: Ruth Bader Ginsburg Honored at Law School*, COLUMBIA MAG. (Spring 2012), http://magazine.columbia.edu/news/spring-2012/without-precedent-ruth-bader-ginsburg-honored-law-school (referencing, but not naming, a case that Ginsburg litigated in which factory workers denied health insurance for their families because a woman could not be considered a breadwinner).

wants to take care of a baby, the law was not there to protect him. And similarly, the woman, who wants essentially to get equal pay, doesn't because she is considered not the real breadwinner in the family.

DW: So like the *Wiesenfeld* case, you brought a number of cases where it was the men who were suffering based on the distinction. Can you talk about what drove that decision and why you chose that strategy?

JG: The first case in that series was *Wiesenfeld*. The social security benefits he sought were child-in-care benefits.[34] There was a similar gender-based differential governing retirement benefits. A woman could get benefits for herself, but not for her spouse. When she died, if her spouse survived, there were no periodic survivor's benefits for him. After the *Wiesenfeld* case succeeded, we mounted a series of cases to end gender lines in the social security law.[35]

Perhaps I should explain why I stopped using the term sex and started using the word gender instead. It was at the time of the *Wiesenfeld* case. My secretary at Columbia Law School who typed my briefs remarked one day, "I'm typing these pages and all over the word 'sex' keeps jutting out. Don't you know that the first association of that word is not what you want those judges to be thinking about? So use gender. It's a nice grammar book term. It will ward off distracting associations."

The message we were trying to get across was simply this: when you pigeonhole people on grounds of race, religion, whatever, you don't allow them to be free to be you and me—to borrow from the title of a wonderful song introduced in the 1970s by Marlo Thomas. People should not be held back by human-made laws from using whatever God-given talent they have. Girls as well as boys should be free to aspire and achieve.

DW: Well, what is interesting to think about this revolution of the gender discrimination doctrine is it begins in 1971 with *Reed v. Reed* over one hundred years after the Equal Protection Clause, which forms the foundation of this doctrine,

34. *Wiesenfeld*, 420 U.S. at 640.

35. *See* Califano v. Coffin, 430 U.S. 924 (1977), *dismissing appeal from* 400 F. Supp. 953 (D.D.C. 1975); Califano v. Silbowitz, 430 U.S. 924 (1977), *aff'g* 397 F. Supp. 862 (S.D. Fla. 1975); Jablon v. Califano, 430 U.S. 924 (1977), *aff'g* 399 F. Supp. 118 (D. Md. 1975); Califano v. Goldfarb, 430 U.S. 199 (1976).

was adopted. It is an instructive case study in constitutional law. What lessons do we get from looking at this doctrine that didn't come around until after one hundred years based on the underlying constitutional text? How does that speak to issues around originalism or constitutional jurisprudence?

JG: Well first, you know that in the original Constitution and the Bill of Rights, the word "equal" never appears.[36] To some people that's startling because after all, in the Declaration of Independence, that was the motivating idea—that all people are created equal. Why wasn't the word "equal" included in the original Constitution? For an obvious reason: it was the odious practice of slavery. That's why we don't get the equality principle written into the Constitution until the Fourteenth Amendment, one of the three post-Civil War amendments. And it says, in grandly general terms, "nor shall any State deny to any person . . . the equal protection of the laws."[37] Well, one reaction to that history was, everyone knows the Equal Protection Clause is about racial segregation, racial discrimination. It had nothing to do with women. If you ask the framers of the Fourteenth Amendment, did they think that the equal protection clause meant women had the right to own property in their own names, contract in their own names, sue and be sued in their own names, they would probably say certainly not. Were they here today, I think they would agree that the idea of equality has growth potential, so that it can keep pace with society as it changes from generation to generation.

One of the earliest arguments was made in the 1870s by a woman who thought—well she's a citizen, she should exercise the most basic right of citizens, she should be able to vote. So she invoked the Fourteenth Amendment, and the Court said, "Of course women are persons. We agree with you. Women are persons. But so too are children. And no one would think children should have the right to vote."[38] That was the attitude in the 1870s.

I think that holding people back because of who they are and not what they can do is not compatible with a society that

36. *See* U.S. CONST. arts. I–VII, amends. I–X.

37. U.S. CONST. amend. XIV, § 1.

38. *See* Minor v. Happersett, 88 U.S. 162, 178 (1874) (holding that the Fourteenth Amendment's Privileges or Immunities Clause does not guarantee women the right to vote).

truly believes in the equality principle. We went into World War II with segregated troops. We were fighting a war against racism and yet our armed forces practiced racial discrimination. It was the awakening in the Second World War first to the problem of apartheid in America, and then to the understanding that all people should have the opportunity to aspire and achieve, to become whatever they have the ability and will to be. So I think the people who wrote the Equal Protection Clause would probably say, "Yes, in the twenty-first century, it certainly includes—we meant it to include, people who were once left out." Many people were left out in the beginning—slaves, women, Native Americans were not considered persons capable of participating in the political community.

DW: So a student, a high school student in the auditorium follows up that by asking about the rights of gays and lesbians under the Equal Protection Clause and how their issues are likely to follow a similar arc. Do you see that similar dynamic playing out in that context?

JG: Phil, that question runs up against the so-called "Ginbsurg Rule." When I was before the Senate Judiciary Committee, my rule was you can ask about anything I've written, about any of the hundreds of decisions I wrote when I was a judge on the Court of Appeals for the D.C. Circuit, but you can't ask me a question about an issue that is likely to come before the Court. I think everyone here knows that not so long ago, Congress passed a law called the Defense of Marriage Act ("DOMA"), which says marriage is between a man and a woman.[39] And if you come from a state that recognizes same sex marriage, Massachusetts or New York, for example, no other state is obliged to recognize that marriage.[40] Under DOMA, marriage won't be recognized for any federal purpose, for example social security benefits.[41] There has been a challenge to the constitutionality of that Act.[42] The Court of Appeals for the First Circuit held it unconstitutional.[43] A

39. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7, 28 U.S.C. § 1738C (2006)).

40. Defense of Marriage Act § 2, 28 U.S.C. §1738B.

41. Defense of Marriage Act § 7, 1 U.S.C. § 7.

42. *See generally* Massachusetts v. U.S. Dep't of Health and Human Servs., 682 F.3d 1 (2012).

43. *Id.* at 15–16.

petition for review has been filed in the Supreme Court.[44] We haven't acted on it yet,* but it wouldn't be extraordinary for the Court to be asked to consider the constitutionality of a law passed by Congress that a lower court had held unconstitutional. So I think it's most likely that we will have that issue before the Court toward the end of the current term. And then the person who asked the question will have the answer.

DW: Another question comes from the CU auditorium. The Lilly Ledbetter case[45] was one where you wrote a very emotionally charged dissent.[46] That one that you, if I recall, you read from the bench, which is a rare act. Can you just reflect on that and also how it felt to have literally your request in the dissent—that it's up to Congress—answered in the Ledbetter Act passed in, I believe, the first law that President Obama signed.[47]

JG: I should perhaps preface my answer by saying that when an opinion is ready to be released, the author of the majority opinion will summarize the decision from the bench, certainly not read every word of the often-long opinions. Then the author of the Court's opinion will say at the end of the bench announcement, "Justice So-and-So has filed a dissenting opinion." Dissents ordinarily are not summarized from the bench. The dissenter will do so only when she thinks that the Court not only got it wrong, but egregiously so. That was what I thought in the Lilly Ledbetter case. I think most of you have heard about this case. Lilly Ledbetter was area manager for a Goodyear tire plant in Gadsden, Alabama. She was the lone woman in such a position at that plant. When she was hired in the 1970s, she got the starting salary for people in that position. But over the years, her pay slipped in relation to her male peers. Did she suspect it? Well, she didn't want to be

44. Petition for Writ of Certiorari, Massachusetts v. U.S. Dep't of Health and Human Servs., No. 12-97 (U.S. Dec. 3, 2012).

* [Editor's Note: Since this lecture took place, the Supreme Court granted certiorari in a different case involving a constitutional challenge of the Defense of Marriage Act. *See* United States v. Windsor, No. 12-307 (U.S. Dec. 7, 2012), *certifying questions to* 699 F.3d 169 (2d Cir. 2012).]

45. Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007).

46. *Id.* at 643–61 (Ginsburg, J., dissenting).

47. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (codified in scattered sections of 29 and 42 U.S.C.).

known as a troublemaker. Then one day, when she was close to retirement age, one of her coworkers put a slip in her box. It showed her salary, then the salary of each of the men doing the same job. She was getting 13 cents on the dollar less than the most junior occupant of the same position.[48] So she brought a complaint under Title VII. She had a jury trial and won a sizable verdict.[49] When her case got to the Supreme Court, the majority said, "Ms. Ledbetter, you sued too late. The law says you have 180 days from the discriminatory incident to file your lawsuit."[50] One hundred and eighty days from the first time her pay slipped? Well, women who are breaking new ground don't want to rock the boat. They also know that if they sue that early on, the defense will be: it had nothing to do with her being a woman, she just didn't perform as well as the men. When year after year, she gets good performance ratings and even an award as one of the top performers, that defense is no longer available. Also, employers—many employers—do not give out salary figures, so how would she even know? Her view, which I fully shared, was that every time she got a paycheck, in which her salary reflected discrimination, every month, the discrimination was renewed. And so she would have 180 days from each paycheck to begin her lawsuit. Lilly Ledbetter's experience is familiar to women of her generation, of my generation. And yet, the Court read the 180 days to run from the very first incident of discrimination. She didn't sue then, and too bad. My dissent said basically, "Congress, you wrote a law that says thou shalt not discriminate on the basis of sex in employment. Surely, you meant Lilly Ledbetter's case to be covered. My colleagues have given a parsimonious reading to this law."[51] My statement ended, "The ball is now in Congress's court to correct what I see as a misperception by my colleagues of the will of Congress."[52] Inside of two years, the Lilly Ledbetter Fair Pay Act passed with overwhelmingly bipartisan support. It was the first law President Obama signed when he took office.[53]

48. *Ledbetter*, 550 U.S. at 649 (Ginsburg, J., dissenting).

49. Ledbetter v. Goodyear Tire & Rubber Co., No. 99-C-3137-E, 2003 WL 25507253, at *1 (N.D. Ala. Sept. 24, 2003) (reporting jury verdict of over $3.8 million).

50. *Ledbetter*, 550 U.S. at 621.

51. *See id.* at 656 (Ginsburg, J., dissenting).

52. *See id.* at 661 (Ginsburg, J., dissenting).

53. Sheryl Gay Stolberg, *Obama Signs Equal-Pay Legislation*, N.Y. TIMES (Jan. 29, 2009), http://www.nytimes.com/2009/01/30/us/politics/30ledbetter-

DW: This question comes from the auditorium—I had a similar one—which is, there are number of 5-4 decisions that became very high profile—*Bush v. Gore*, *Citizens United*, and the Affordable Care Act case—and got a lot of popular attention and often were accompanied by commentary that the Court was looking like more of a political actor. How do you answer that charge?

JG: Inevitably, there will be cases that divide that way. But overall, our agreement rate is much higher than our disagreement rate. So we had fifteen 5-4s last term. We had twenty-five unanimous judgments. But agreement is boring. Nobody writes about that. Disagreement is interesting.

DW: So you're saying agreement is not news. It's boring. It's conflict that gets people's attention.

JG: Yes. In the cases that do not present heady constitutional questions, there are sometimes unusual alliances. But on constitutional questions, my disagreement rate is highest with Justice Thomas and next with Justice Scalia. Yet last term, Justice Thomas and I agreed in 61 percent of the cases, and I agreed with Justice Scalia in 62 percent of the cases. Yes, on important questions, for example, campaign finance or affirmative action, we do hold very different views. But the institution we serve, which I think is like no other in the world, is something all of us prize beyond any of our individual egos. So to make it work, we have to be working colleagues, even friends. The Supreme Court is the most collegial place I've ever worked. As for *Bush v. Gore,* it was the most intense time I experienced at the Court. We granted review of the Florida Supreme Court decision on a Saturday, briefs were filed on Sunday, oral argument was held on Monday, and decisions were out Tuesday night. There were sharp divisions. It was late at night. I told my clerks to go to Justice Kennedy's chambers and watch the news reports with his clerks. He was on the other side. Then I got a call in my chambers; it was Justice Scalia. He asked, "Ruth, why are you still in chambers? Go home and take a hot bath." So as trying as that time was, we had to go on to the January sitting. And

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we did. And things were almost the same.

DW: We have two different questions. One from Colorado College and one from someone here that are very similar. Looking back on all the cases that you've decided, will you pick out the ones that were the most influential and maybe the one that you're most proud of?

JG: I am very proud of my dissent in the health care case.[54] Over time, I think it will be influential. And I'm very pleased about the judgment in the *VMI* case.[55] I suspect many members of the VMI faculty were elated. If the school could accept women applicants, WMI could upgrade its applicant pool and attract better students. People still comment, "Women don't want the rat line." I generally reply, "I wouldn't want it. My daughter and granddaughters wouldn't want it. But there are women who do want that experience and are fully capable of holding their own in the cadet corps. Why shouldn't they have the opportunity?"

You know how it all began. The decision that paved the way for *VMI* was *Mississippi University for Women v. Hogan*.[56] Hogan was a man who wanted to be a nurse, and Mississippi University for Women had the best nursing college in the area, so he wanted to enroll in that school. His case came up Justice O'Connor's very first year on the Court. It was a 5 to 4 decision.[57] She wrote the decision for the majority, holding that the state college for nurses had to admit men who were qualified.[58] When I brought that decision home to my husband, he said, "Ruth, did you write it?" Sandra appreciated that there's nothing better you can do for a field that historically has been dominantly female than to get men to do the job as well. When men get into the field in numbers, pay tends to go up.[59] You asked about male plaintiffs. As it turned out, Hogan's case—a man seeking admission into a nursing program at a women's college—was the principal authority for the women who wanted to attend VMI.[60]

54. Nat'l Fed'n Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2609–42 (2012) (Ginsburg, J., concurring in part).

55. United States v. Virginia, 518 U.S. 515 (1996).

56. Miss. Univ. for Women v. Hogan, 458 U.S. 718 (1982).

57. *Id.*

58. *Id.* at 733.

59. *See id.* at 729 n.15.

60. United States v. Virginia, 458 U.S. 718 (1996) (citing *Hogan*, 458 U.S.

DW: Have you gotten letters from women who have since attended VMI?

JG: Oh yes. And from parents. The one I prize most was from a man who had graduated from VMI about twenty years before the decision. He knew that only 15 percent of the VMI graduates enter the military. Most have careers in business or in politics. Whatever field they chose, there was quite an old boy network to help them on their way. So this man wrote, "In my life, I have met women who are as determined as I am, tougher than I am. Why shouldn't women have the choice?" Then some months later, I heard from the same man. This time the letter enclosed something small wrapped in tissue paper. I opened it up. The enclosure looked like a little tin soldier. The letter explained, "This is the keydet pin that is given to every mother of a VMI graduate. My mother died last week. I think she would want you to have her keydet pin." It's something I cherish to this day.

DW: So this next question comes from someone at Wolf Law. And the question is, what's the greatest threat you can see to our American legal system?

JG: Oh, the threat that we will be so overcome by security concerns that we will sacrifice the freedom, the individual rights that our country has stood for. Maintaining liberty and freedom in a time of terror is powerfully difficult, and we have made some dreadful mistakes. Think of what happened to people of Japanese ancestry on the west coast in World War II. I think we learn from our mistakes. We won't make that mistake again. Of course security is important, but our individual rights must be preserved, otherwise we're no different from the forces we're fighting against.

DW: How do you feel the Supreme Court has fared in the terrorism cases it's seen the last decade?

JG: I think the Court has done pretty well, starting with the government's first position on Guantanamo Bay. Guantanamo Bay is no one's land, the Government argued. It's not part of the United States. After all, we only rent it from

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718, throughout).

Cuba. The Court held that, to the extent law exists in Guantanamo Bay, it is U.S. law.[61] There's no other power. Certainly Castro was not controlling what was happening there. The government had argued that the writ of habeas corpus doesn't extend to Guantanamo Bay. We held, yes it does.[62] For that purpose, Guantanamo Bay was part of the U.S.A. We've had follow-on cases,[63] there are many cases still in the lower courts, so all the returns aren't in.

DW: So the next question is one that I know you never get. What's your view of the nomination process? This comes from Fort Lewis College. And how, if any way, might it be improved to make it less—some would say—frustrating or demeaning?

JG: It wasn't always the way it has been for the last several nominations, and those would include our Chief Justice, Justice Alito, Justice Sotomayor, and Justice Kagan. There were divided votes on all of them. People tended to vote along party lines. Contrast that with the way it was when I was nominated in 1993 and Justice Breyer the following year. My biggest supporter on the Senate Judiciary Committee was Senator Orrin Hatch. And he later confirmed in his autobiography that he had told President Clinton he would not back Bruce Babbit, but Ruth Bader Ginsburg and Stephen Breyer would garner his support.[64] A bipartisan spirit prevailed. Although the hearings on my nomination ran over three days, there were no hardball questions. In the main, the senators were mostly speaking through me to their constituents, showing how caring they were, how well-informed. They spent a lot more time talking than I did. The White House was concerned about my ACLU connection. You know, I had helped to launch the ACLU's women's rights project and had been one of four general counsels to the Union for seven years. There wasn't a single question—not a single question—about my ACLU affiliation. That would not have

61. *See* Boumediene v. Bush, 553 U.S. 723, 754 (2008) ("[W]e take notice of the obvious and uncontested fact that the United States, by virtue of its complete jurisdiction and control over the base, maintains *de facto* sovereignty over this territory."); Rasul v. Bush, 542 U.S. 466, 480 (2004).

62. *Boumediene*, 553 U.S. at 771; *Rasul*, 542 U.S. at 480–81.

63. *See, e.g.*, *Boumediene*, 553 U.S. 723; Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

64. *See* ORRIN HATCH, SQUARE PEG: CONFESSIONS OF A CITIZEN SENATOR 180 (2003).

happened in recent years. I think what it will take is great statesmen on both sides of the aisle. I do not fault one party rather than the other. After all, hostile treatment of nominees started with Bob Bork. The Democrats blocked his confirmation. Most recently, there were over thirty negative votes on a nominee as superbly qualified as Elena Kagan. It will take great people on both sides of the aisle to come together and say, "Enough. This is not the way we should behave. We should approve nominees who possess the necessary qualifications. If a person is devoted to the law and has the strength and will to do the hard work involved, that's what should count. A great man I knew intimately (my partner in life for fifty-six years, Martin D. Ginsburg) said that the true symbol of the United States is not the bald eagle, it is the pendulum. I hope the pendulum swings back to the way it was in '93 and '94.

DW: In one hopeful sign, Dick Durbin, Senator from Illinois, I think the number two person in the Senate, the majority leader, said that he thought Lindsey Graham had it right, which is that there should be some deference to the President.[65] Lindsey Graham was one of the few Republicans who voted for Elena Kagan.[66] After Graham did that, Durbin noted that he regretted voting against Alito on that principle.[67] So your hope may, we'll see, have some traction.

The last question will come from an alum in the audience, which is—although I'll reserve the right to ask a follow-up question to this one—what qualities should Colorado Law School be focusing on as we train the next generation of lawyers?

JG: A law degree gives you a license, in a sense, a kind of monopoly on the practice of law. Law is supposed to be a learned profession. If you are a member of a learned profession, you are not satisfied with merely turning over a buck. You know you have something special, and you owe it to your

65. *See* Sheryl Gay Stolberg, *Committee Approves Kagan's Nomination to Supreme Court*, N.Y. TIMES (July 20, 2010, 12:09 PM), http://thecaucus.blogs.nytimes.com/2010/07/20/judicial-committee-approves-kagans-nomination-to-supreme-court.

66. Dana Milbank, *Lindsey Graham Stands Apart from Other Republican Senators on Kagan Vote*, WASH. POST (July 21, 2010), http://www.washingtonpost.com/wpdyn/content/article/2010/07/20/AR2010072005445.html.

67. *See* Stolberg, *supra* note 65.

community to use your talent to help make things a little better for others. I think a lawyer who commits herself to public service, yes, she must make a living—that's necessary—but she should never lose sight of the people who desperately need representation and will not have it unless the Bar cares. So I do not think Colorado Law School should encourage this attitude: "I'll do my job, collect my fees, and remain aloof from community needs." I do not consider that person a true professional.

DW: We'll do our best. I can't thank you enough. This has been delightful and a treat for everyone here. Let's all thank you for your time.