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## An Open Discussion with Justice Ruth Bader Ginsburg

*On March 12, 2004, the University of Connecticut School of Law welcomed Associate Justice Ruth Bader Ginsburg, of the Supreme Court of the United States, to campus as the Day, Berry & Howard Foundation Visiting Scholar. As part of her visit, Justice Ginsburg gave some brief remarks on "The Lighter Side of Life at the Court" to an assembled gathering and then participated in a question-and-answer session moderated by Professor Paul Schiff Berman, who clerked for Justice Ginsburg during the 1997-98 term. Professor Berman gathered the questions in advance from students and faculty members, but Justice Ginsburg was not given the questions before the session. What follows is the text of Justice Ginsburg's prepared remarks, followed by an edited transcript of the question-and-answer session.*

### *Justice Ginsburg:*

Thank you. I appreciate the most hearty welcome I have received here, and am glad to devote most of this hour to a conversation with you based on the questions Paul has gathered. As a lead into that conversation, I will speak not of the heavy work of the U.S. Supreme Court, but of some things less grave—customs that promote collegiality among the nine Justices, and the lighter side of life in our Marble Palace.

Before each Court day begins and before each of our conference discussions, as we enter the robing room or the conference room, we shake

hands, each Justice with every other. Every day the Court hears arguments and every day we meet to discuss cases, we lunch together in the Justices' Dining Room. The Room is elegant. The lunch is not; it ordinarily comes from the Court's public cafeteria, the same fare available to you if you visit the Court.

We spend lunch time together, not because any rule requires it, but voluntarily, ordinarily six to eight of us, but not uncommonly all nine. At the table, the conversation ranges from the lawyers' performance in the case just argued to the new production just opened at the Washington National Opera or the Shakespeare Theatre or the latest exhibition at the National Gallery. Sometimes, because all of us are well past what the French call "a certain age," we talk about our grandchildren.

From time to time, we invite a guest to vary the lunch table conversation. Twenty-first century guests have included: U.N. Secretary General Kofi Annan; National Security Advisor Condoleezza Rice and a predecessor in that post, Henry Kissinger; biographer David McCullough; soprano Catherine Malfitano; President of the Supreme Court of Israel Aharon Barak. So far, Federal Reserve head Alan Greenspan has been our only repeat invitee, in part because he has the uncanny ability to eat and speak at the same time. Our next scheduled guest is Richard Goldstone, recently retired member of the Constitutional Court of South Africa. Some years ago, Goldstone was the first person to serve as Chief Prosecutor of the International Tribunals charged with trying perpetrators of crimes against humanity in Rwanda and in the former Yugoslavia.

We celebrate Justices' birthdays together with a pre-lunch toast, some wine brought in by the Chief, and a "Happy Birthday" chorus led off by Justice Scalia, the only one of the nine who can carry a tune. Sometimes, as in the case of Justice Scalia's recent birthday, the celebration includes a cake baked by my husband, master chef and also Georgetown University Law Center tax professor, Marty Ginsburg.

We attend joyous occasions together; wedding receptions were held at the Court for two of Justice Scalia's four daughters and for Justice Kennedy's daughter. The third birthday of one of my grandchildren was celebrated at the Court too. The Chief hoped it would be a nice day so that the children could stay mainly outside and not endanger the carpet. It was the first and still only time that the principal item on the buffet table was tidbit-sized peanut butter and jelly sandwiches.

Two historic celebrations took place at the Court in January 2003. First, on January 8th of that year, almost all one hundred Senators dined with us in the Court's Great Hall to welcome the newly elected members and to mark the opening of the 108th Congress. Then, on January 23rd last year, the spouses of the Justices arranged a surprise party for us to celebrate our longevity. We are now over nine and a half years together with no change in the Court's composition. We are the longest sitting bench

since 1823, the longest ever since the Court numbered nine. Only one Court is ahead of us, the six-member Court that sat between 1811 until 1823. The delectable dinner on that occasion included a first course by Mary Kennedy, main course and bread by Marty Ginsburg, salad and cheese and floral arrangements by Joanna Breyer, and dessert by Maureen Scalia. The toastmaster of the evening was Cissy Marshall, widow of Thurgood Marshall.

Another pleasant pause usually in early May, after arguments have ended, and before the intense weeks when all remaining opinions must be completed and released (we don't leave town with any backlog), we hold our annual Musicale. That tradition was inaugurated by Justice Blackmun in 1988. The first Musicale celebrated the arrival at the Court of a Baldwin grand piano, selected for us and inscribed by the great conductor and composer Leonard Bernstein. Above Bernstein's signature on the soundboard are the words, "And Justice for All." Sadly, the instrument's quality is not as impressive as its inscription. We are about to replace it with an American Steinway, which will be played for the first time publicly at our May 5th Musicale. Our pianist is Maestro Leonard Slatkin, conductor of the National Symphony Orchestra. Slatkin will perform as accompanist for his wife, soprano Linda Hohenfeld.

In between sitting weeks, several of us spend a day or two visiting law schools, as I am now, or we attend meetings with lawyers and judges from the U.S. or abroad. Some of us travel to diverse places in summer, both to teach and to learn about legal systems in distant land: Israel, India, China, and Japan, for example. Just last summer three of us, Justice O'Connor, Justice Breyer and I traveled to first Luxembourg, home of the European Court of Justice, next Paris, then Florence, where Justices Kennedy and Thomas joined us for five days of conversation with European judges, officials, and law teachers on the topic of the still-pending draft Constitution for the European Union. After those stimulating exchanges, I left my colleagues to spend the following ten days teaching in Barcelona as part of the faculty of the University of Puerto Rico Law School.

While our work at the Court is very hard, it is ever challenging, enormously time consuming, and tremendously satisfying. We are constantly reading, thinking, and trying to write so that at least lawyers and other judges will understand our rulings.

Most impressive about the Court, I think, is this: Despite our sharp differences on certain issues—*Bush v. Gore*,<sup>1</sup> Affirmative Action, most recently Campaign Finance, to mention only three—we remain good friends, people who respect each other and genuinely enjoy each other's company. We even manage to maintain a unanimity rate, at least as to the Court's bottom-line judgment, that hovers around forty percent. Our mutual re-

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<sup>1</sup> 531 U.S. 98 (2000).

spect is only momentarily touched, in most instances, by our sometimes even passionate disagreement on what the law is.

The institution we serve, all of us know, is ever so much more important than the particular individuals who compose the Court at any given time, and our job—the job of judging in any U.S. federal court—is, in my view, the best work a U.S. lawyer can have. We take no preset side, our commission is to do what is right—what the law requires and what is just. The Founding Fathers had the wisdom to equip us to do just that by according us life tenure (or, as the Constitution says, tenure “during good Behaviour”).

Well Paul, I think that’s quite enough in the way of a preface. Let’s take your questions.

*Paul Berman:*

I’ve collected about ten or twelve questions, and we’ll see how many of them we can get through. Just to begin, when I was clerking for you I remember you once addressed a group of Girl Scouts at the Supreme Court, and one of the girls asked if you had always wanted to be a Supreme Court Justice. In response, you said that given the legal climate when you were growing up, the idea that you, as a woman, could even dream of such a thing was completely unbelievable. So, I wonder if you could comment on your experiences as a woman in law school and in the legal profession when you started out.

*Justice Ginsburg:*

I considered myself tremendously fortunate just to get a job in the law! My experience was the same as Justice O’Connor’s. She was a stellar graduate of Stanford Law School, yet the only job offered to her was as a legal secretary. I had the added liability when I graduated from Columbia Law School of having a four-year-old daughter (who today, incidentally, is a Professor of Law at Columbia).

I had a teacher, Gerald Gunther, a great constitutional law scholar who headed Columbia’s clerkship committee. Something I didn’t know until years later, Gerry related that the way he got me a job with a federal district judge was to assure the judge that if I didn’t work out, a male graduate, engaged by a Wall Street firm, would be ready to step in and take over. Shielded by that guarantee, the judge was willing to take a chance on me.

Did I aspire to become a Supreme Court Justice? When I graduated from law school there had been just one woman in the entire history of the United States, Florence Allen, who had ever served on a federal appellate bench. She was a 1934 Roosevelt appointee to the U.S. Court of Appeals for the Sixth Circuit. There wasn’t another until President Johnson appointed Shirley Hufstедler to the U.S. Court of Appeals for the Ninth Circuit in 1968. The first woman named to a federal district court was Burnita

Shelton Matthews. President Truman appointed her to the U.S. District Court for the District of Columbia in 1949. Women on the federal bench were one-at-a-time curiosities until rather late in the 1970s. If you were realistic, you would hardly aspire to judicial office, or even think you could become a federal judge. We just hoped we could get a job in the law—that was the level of our aspiration.

*Paul Berman:*

You litigated on behalf of the American Civil Liberties Union Women's Rights Project in the 1970s, and you succeeded in helping the Court to establish gender as a basis for heightened constitutional scrutiny. Interestingly, you did this sometimes in cases on behalf of male, as opposed to female, plaintiffs, and I wonder if you could talk about that strategy.

*Justice Ginsburg:*

I don't regard it so much as a strategy as it is an illustration of the fact that gender stereotypes are often irrational and generally hurt everyone: women, men, and I think most of all, children. And so in my ideal case, there was indeed a male plaintiff. The case is titled *Weinberger v. Wiesenfeld*,<sup>2</sup> the plaintiff, a man named Stephen Wiesenfeld, whose wife, Paula Polatschek, died in childbirth. Stephen vowed he would work only part-time until the child was in school full-time. He applied to the Social Security Administration for child-in-care benefits and was turned away. He was told those benefits were available only to widows and not to widowers. He wrote a letter about his plight to his local newspaper in Edison, New Jersey: "I've been hearing a lot about 'Women's Lib,'" he wrote, "let me tell you my story . . ." He ended the letter: "I wonder what Gloria Steinem thinks about that!"

A woman teaching in the Spanish department at Rutgers, where I was then teaching, lived in the same town and read the letter. Her name, Phyllis Boring. Phyllis called me and said, "Isn't this wrong?" I responded that she might suggest to the writer that he call the New Jersey American Civil Liberties Union—which he did. Less than three years later, Stephen's case was decided in his favor by the United States Supreme Court with a unanimous judgment, though three sets of opinions.

The plurality thought the law discriminated against *women* as wage earners, because they paid the same social security taxes as men but did not get the same protection for their family. Other Justices thought the law discriminated against *men* as parents, because they did not have the opportunity that female parents would have to be the principal caretaker of their child. And one Justice, my current Chief, thought it discriminated against

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<sup>2</sup> See *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975).

the *baby*, because it was totally irrational to give this baby the chance to have the personal attention of a parent only if the parent were female and not if the parent were male. So the message of the case is: Government should allow us to be free to be you and to be me, to follow whatever talents God has given us and not be held back simply because we are women or men, just as we should not be held back because we are of a particular race or national origin. The essential notion was that stereotypes are harmful to everyone, and we particularly tried to cast men in the role of being good parents. The theme was that children will grow up happier and better all around if they have the care of two loving parents, rather than just one.

*Paul Berman:*

The issue of recusal is much in the news these days, with many calling for Justice Scalia to recuse himself because of a hunting trip he took with Vice President Cheney just after the Supreme Court granted certiorari in a case in which Cheney is a party.<sup>3</sup> More recently, there was a news article yesterday in the *Los Angeles Times* criticizing you for speaking at an event that was co-sponsored by the National Organization for Women.<sup>4</sup> I wonder if you could talk generally about the metric you use for determining whether to recuse yourself from a case. Also, do you think it's purely an individual decision, or could you conceive of any circumstance in which other Justices might suggest to one of their colleagues that recusal would be appropriate?

*Justice Ginsburg:*

Well, first, it isn't entirely a discretionary decision. One statutory command is entirely clear: If we have a financial interest in a party—the statute instructs “financial interest, however small”<sup>5</sup>—recusal is required, and that financial interest can be held by you, your spouse, or a minor child in your family.<sup>6</sup> If I owned, say, one share of General Motors stock, I could not sit on a case in which GM was a party. I was affected by that law as a new judge on the D.C. Circuit. My son had been given at birth one share of stock in El Paso Natural Gas. Until I located and sold that share, I was disqualified in a number of Federal Energy Regulatory Commission cases . . . to the great relief of my then-law clerks!

The other part of the statute refers to the appearance of impartiality.<sup>7</sup>

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<sup>3</sup> Justice Scalia subsequently rejected the request that he recuse himself. See Memorandum of Justice Scalia, *Cheney v. United States District Court for the District of Columbia*, 124 S. Ct. 1391 (Mar. 18, 2004).

<sup>4</sup> Richard A. Serrano & David G. Savage, *Ginsburg Has Ties to Activist Group*, L.A. TIMES, Mar. 11, 2004, at A1.

<sup>5</sup> See 28 U.S.C. § 455(d)(4) (2000) (defining financial interest).

<sup>6</sup> *Id.* § 455(b)(4).

<sup>7</sup> *Id.* § 455(a).

In interpreting this provision, one should distinguish the situation of a district judge or a court of appeals judge, from that of a Supreme Court Justice. A case such as the one you mentioned would be an easy call for a judge who was replaceable, for example, a court of appeals judge on a three-judge panel. If there were any doubt, that judge could step out and let one of her colleagues replace her. But on the Supreme Court, if one of us is out, that leaves eight, and the attendant risk that we will be unable to decide the case, that it will divide evenly. Some think that a recusal in the Supreme Court is equivalent to a vote against the petitioner. When cases divide evenly, we affirm the decision below automatically. Because there's no substitute for a Supreme Court Justice, it is important that we not lightly recuse ourselves.

Four of us whose spouses or children were affiliated with law firms made an agreement some years ago. There was a risk that one party or another, or a "friend of the court" supporting a party, would engage a law firm with which our spouse or child was associated, aiming to take us out of the case. So we have a written agreement—anyone can read it—saying we will not recuse, despite the firm's engagement, when our spouse or child isn't involved in the litigation and will derive no financial benefit from a decision in the client's favor.

*Paul Berman:*

And would the recusal decision solely be an individual decision by the Justice or is there ever any conversation among the Justices about recusal issues?

*Justice Ginsburg:*

In the end it is a decision the individual Justice makes, but always with consultation among the rest of us. I don't know where all this is going to lead. I think the *Los Angeles Times* was attempting to appear unbiased. Justice Scalia had been criticized recently for speaking to a group alleged to have supported a measure in Pennsylvania to ban civil unions for gay people. (The group denied the allegation.) That criticism came from one side of the political spectrum. The next day or so the article about me appeared. It concerned an annual lecture bearing my name. Four years ago, the Bar Association of the City of New York established a Ruth Bader Ginsburg lectureship, co-sponsored by the NOW Legal Defense Fund. Every year, on the date of the lecture, the Great Hall at the City Bar is filled largely by law students from all over town, a spirit-lifting audience for me and other older folk in attendance. It is not a money-making enterprise. The first speaker was Kathleen Sullivan, the next one, Madeleine Albright. I was called yesterday by the Executive Director of the City Bar. She was distressed about the news account. She said the reporters called the Court, they called the NOW Legal Defense Fund, but "No one asked us

what we thought of this, and we are the prime movers in this lectureship!"

When our public information officer told me of the question the *Los Angeles Times* reporter wanted to put to me, I responded: Here are my remarks—the introductory remarks—I've made at these lectures. They are short, and can be read and digested easily by reporters interested in understanding the nature of my participation. And the City Bar audiotapes the entire proceedings. I was confident the City Bar would make the tapes available to the reporter. But the reporter apparently wasn't interested in those materials, that is, in the substance of the lectures. I believe the recorded lectureship speaks for itself. Would anyone who actually read or listened to the proceedings find them problematic? Probably not, I suspect.

*Paul Berman:*

You have been one of the U.S. Supreme Court Justices most interested in creating more dialogue with other constitutional courts around the world and in thinking about the relationship between international law—and in particular international human rights law—and U.S. law. This has sparked some controversy, because some people argue that it's fundamentally illegitimate or undemocratic for the U.S. Supreme Court to look to either international standards or the decisions of other constitutional courts in deciding U.S. constitutional questions. Can you talk about the role that you think international law and foreign court decisions should play in U.S. constitutional adjudication, and whether you think the critique has any validity?

*Justice Ginsburg:*

The use of comparative side-glances is nothing new in the practices of the U.S. judiciary. In fact, the Framers looked elsewhere in place and time for models of government they might adapt to our circumstances. I do not believe to gain knowledge that looking abroad should have stopped once our Constitution was written. The document does recognize the law of Nations,<sup>8</sup> the expression used in earlier days to mean what we now call international law. The great Chief Justice John Marshall affirmed that international law is part of the law of the United States.<sup>9</sup> His statement has been repeated in cases over the years.<sup>10</sup> International law is indeed part of our law. We have taken great pride in the extent to which our Bill of Rights has influenced human rights charters all over the world, notably, the U.N. documents composed in the wake of World War II—the U.N. Uni-

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<sup>8</sup> See U.S. CONST. art. I, § 8.

<sup>9</sup> See, e.g., *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804).

<sup>10</sup> See, e.g., *The Paquete Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts . . .").



versal Declaration of Human Rights<sup>11</sup> and the International Covenant on Civil and Political Rights<sup>12</sup>—and more recently the European Convention on Human Rights.<sup>13</sup> There was a time when the United States was the only player in the judicial-review-for-constitutionality league, when courts elsewhere simply didn't have the authority to review legislative or executive acts for constitutionality.<sup>14</sup> But, largely based on the U.S. example, countries abroad began after World War II to install courts authorized to engage in constitutional review, and those newer courts are looking to us and to each other for information and enlightenment. A wise parent knows she can learn from her children, Second Circuit Judge Guido Calabresi recently observed on this topic.<sup>14</sup> Other courts are now grappling with problems similar to problems we confront. Right now, most urgently, the balance between liberty and security occupies our attention. Would it not be instructive to look at how the Supreme Court of Israel, for example, has dealt with terrorist cases similar to those now coming before our courts?

As to the charge that it is undemocratic to look abroad, I simply don't understand the point, beyond the fact that the judiciary is an undemocratic institution—at least the federal judiciary is—we're appointed, not elected, and we're there for life. So Paul, perhaps you can explain to me why looking at a decision by Aharon Barak, Chief Justice of the Israeli Supreme Court, is any less democratic than reading a law review piece by a U.S. law professor.

*Paul Berman:*

Well it's not my argument necessarily, but I think the argument is that

<sup>11</sup> For example, the Fifth Amendment states: "[N]o person shall . . . be deprived of life, liberty, or property without due process of law . . ." U.S. CONST. amend V. Similarly, the U.N. Declaration of Human Rights guarantees the "right to life, liberty, and security of person." Art. 3.

<sup>12</sup> For example, the Eighth Amendment prohibits the infliction of "cruel and unusual punishments." U.S. CONST. amend. VIII. Similarly, the International Covenant on Civil and Political Rights states that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Art. 7.

<sup>13</sup> For example, the First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble . . ." U.S. CONST. amend. I. Similarly, the European Convention on Human Rights guarantees the "freedom of thought, conscience and religion," the "freedom of expression," and the "freedom of peaceful assembly." Art. 9, 10, and 11.

<sup>14</sup> See *United States v. Then*, 56 F.3d 464, 469 (2d Cir. 1995):

At one time, America had a virtual monopoly on constitutional judicial review, and if a doctrine or approach was not tried out here, there was no place else to look. That situation no longer holds. Since World War II, many countries have adopted forms of judicial review, which—though different from ours in many particulars—unmistakably draw their origin and inspiration from American constitutional theory and practice. These countries are our "constitutional offspring" and how they have dealt with problems analogous to ours can be very useful to us when we face difficult constitutional issues. Wise parents do not hesitate to learn from their children.

(citations omitted).

if you are referring to U.S. judicial decisions you are at least referring to sources of law that were developed here and that are at least somewhat accountable to the public through the nomination and confirmation process that judges go through. But to the extent that you're relying on opinions that were issued by courts where the personnel has nothing to do with the U.S. political process, that might be seen as less legitimate.

*Justice Ginsburg:*

No one who sees the value of looking abroad suggests that a decision, say, of the Canadian Supreme Court would be *binding* on us; we read it for its persuasive value, for the quality of its reasoning. It doesn't bind us any more than a decision of, say, the New Jersey Supreme Court would bind the Connecticut Supreme Court. Surely it would be wrong to say, for example, that a recent decision of the Law Lords in England is binding in the United States; it isn't. But we have something to learn from the quality of the reasoning in an opinion on a question similar to a question that confronts us.

*Paul Berman:*

Last week, Justice Blackmun's papers were opened to the public on the fifth anniversary of his death, and I have a couple of question about that. First of all, to the degree that you've either looked at them or read news accounts of their contents, has anything surprised you about the papers?

*Justice Ginsburg:*

I knew that he took copious notes and that he was a great saver; he didn't toss out anything. But his recollection was not, in all cases, one hundred percent accurate. Prior to my appointment, I was unaware of his meticulous notetaking at oral argument; we overlapped as colleagues only one year. Concerning one of my arguments as an advocate before the Court in the 1970s, Justice Blackmun recorded in his notes that I wore a red dress and had a red ribbon in my hair. I always told students enrolled in clinical programs I supervised that when you go to court it's black, plain black. You don't want to call attention to yourself; you want the court to concentrate on your arguments. So that image was made up . . . perhaps my argument registered red with him! He described another woman who argued before the Court as wearing a white suit. Linda Greenhouse of *The New York Times* recently double-checked. That advocate, it turned out, did recall her outfit as Justice Blackmun described it. Some of my colleagues have noted other items that aren't quite right. But for the most part, it appears, Justice Blackmun did get it right. His notes record in detail what the Court was doing in the years he served. The papers also tell a poignant story about the disintegration of the close relationship between Chief Justice Burger and Justice Blackmun.

There are some who feel that a Justice's papers should not come out so soon. Justice Marshall's were instantly available, but most of us have provided that our papers won't be generally available until all of the colleagues with whom we served are no longer part of this world. There is, all agree, a treasure trove for scholars in the Blackmun papers.

*Paul Berman:*

So far, much of the news of this archive has focused on the opinion of Justices O'Connor, Kennedy, and Souter in *Planned Parenthood v. Casey*,<sup>15</sup> in which they stated, among other things, that even if they might have reached a different judgment on the right to an abortion as an original matter, *stare decisis* should not be swept aside merely because of a shift in personnel on the Court. On the other hand, in *Lawrence v. Texas*,<sup>16</sup> the Court did overturn a relatively recent precedent, *Bowers v. Hardwick*,<sup>17</sup> and affirmed a right of privacy that extends to homosexual acts in the bedroom. I wonder if you could speak about the force of *stare decisis*. Are there certain issues about which you think the commands of *stare decisis* are (or should be) less exacting, and if so, how do you determine when to vote to conform to precedent and when to seek to overturn that precedent?

*Justice Ginsburg:*

First, when it's a matter of statutory interpretation, and the Court has made its best guess at what some dense statute means, we are likely to adhere to that reading. Even if a lawyer confronts us with, say, a solid argument on why a prior federal income tax decision was not well reasoned—I hear such arguments regularly from my tax teacher husband—we are likely to resist overruling. We've said what we thought the statute meant. After that, the ball is in Congress' court; Congress can change the law, thereby overturning our decision, anytime.

For constitutional adjudication, in contrast, there is no higher court, apart from the amending process, and amending our Constitution is very difficult. One can be glad for that, but it does indicate that if the Court has gotten it really wrong, there is something of an obligation to correct ourselves. Think of *Plessy v. Ferguson*,<sup>18</sup> which introduced the "separate but equal" doctrine. Could a late-20th-century Court tolerably say: "Go away, *stare decisis* is so important, we must adhere to that precedent"?

The Court concluded in the *Lawrence* case that *Bowers v. Hardwick* was a very wrong decision, inconsistent with what we regard as essential to due process and equal protection—the entitlement of all of us to govern-

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<sup>15</sup> 505 U.S. 833 (1992).

<sup>16</sup> 539 U.S. 558 (2003).

<sup>17</sup> 478 U.S. 186 (1986).

<sup>18</sup> 163 U.S. 537 (1896).

mental respect for our human dignity. The Court thought *Bowers v. Hardwick* was so wrong, and that no other decisionmaker was likely to correct us, so the Court overturned the precedent. The *Casey* troika certainly did not regard *Roe v. Wade*<sup>19</sup> that way. Recall that at the time *Roe* was decided in 1973 it was hardly controversial. It was a 7-2 judgment, not 5-4 as *Bowers* was. Indeed, the Blackmun papers show that the big event, the big news the day *Roe* was decided, was not *Roe v. Wade*, but L.B.J.'s death. Over time, *Roe* became an important symbol, and I have some thoughts on why that happened, but that would be another talk.

*Paul Berman:*

There have been a couple of cases in recent years—one that you authored in 2000 addressing constitutional standing in citizen suits, *Friends of the Earth v. Laidlaw Environmental Services*,<sup>20</sup> and the other a 2002 takings opinion by Justice Stevens (which you joined), *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*.<sup>21</sup> In both of those cases there seems to be a preference for rules that articulate the criteria for decisionmaking only in relatively abstract terms, effectively leaving more discretion to the judicial decisionmaker. Such rules perhaps have the disadvantage of not providing quite as clear boundary lines, and I wonder if you could talk generally about your preference on this subject. Do you think a judicial decision that articulates very clear dividing lines—very clear rules for behavior—is the best course, or do you think that providing more “wiggle room” and therefore more room for the exercise of discretion by subsequent actors is preferable in adjudication?

*Justice Ginsburg:*

It depends on what the issue is. Some call for precision, as the Court thought was the case in *Miranda v. Arizona*.<sup>22</sup> The Court said in *Miranda*: Here is a litany, a set of words. If police faithfully deliver those precise words, the confessions they later gain will be admissible. If they deviate from the litany, then they can't be sure. *Miranda* qualifies as a case in which clear boundaries seemed in order. If your audience is people whose job it is to enforce the law, you want to arm them with clear guides. They should not have to guess at, for example, what search would require a warrant. On the other hand, when adjudicating a particular case like *Friends of the Earth*, we can't see around corners much of the time. If we stated highly restrictive standing doctrine in such a case, there might be a later case we could not then foresee. And for that reason, the rule or standard is

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<sup>19</sup> 410 U.S. 113 (1973).

<sup>20</sup> 528 U.S. 167 (2000).

<sup>21</sup> 535 U.S. 302 (2002).

<sup>22</sup> 384 U.S. 436 (1966).

written in more abstract terms, terms that will allow for future qualification and clarification. A court should be reluctant to put forth a definitive decision in the first case that comes out of the box.

*Paul Berman:*

Is there any opinion you've written, either on the Court of Appeals or the Supreme Court, that in retrospect you wish you had either decided differently or at least written differently?

*Justice Ginsburg:*

On things past, I follow very good advice given to me when I was a new judge by my then-colleague Ed Tamm. He said, "Ruth, in the job of judging you do your very best in each case that comes before you, but when it's done—when the opinion is released—don't worry over yesterday, go on to the next case and give it your all." I have embraced that good advice, and try not to dwell on cases no longer on my plate but instead, to train my attention on cases currently before me.

*Paul Berman:*

With regard to the Court's Equal Protection Clause jurisprudence, some commentators have noted that there appear to be two different types of rational basis review; one that is more deferential and one that has more "bite." I wonder whether you agree with that characterization, and if so, why do you think the Court has not explicitly acknowledged two different types of rational basis review?

*Justice Ginsburg:*

Well, individual Justices have. Justice Marshall most notably and Justice Stevens on the current Court have several times said there is but one Equal Protection Clause. It says Government shall govern impartially. Students are sometimes over-enamored of tiers. Every time I see three-prong or four-prong tests, I suspect that—excuse me Paul—the law clerks are at work! These tests give a false sense of security that a judge runs through some mental exercise of this order: "First I must decide if this matter falls under strict scrutiny, or intermediate scrutiny, or calls for 'an exceedingly persuasive justification,' or the old style rational basis—the anything-goes rational basis—or what Gerry Gunther called rational basis with bite?"<sup>23</sup> The decision generally turns on the character of the right involved, the individual interest at stake, and the strength of the government interest tugging the other way. I would not assign heavy weight to the labels. I don't think the Court routinely uses them in reaching its deci-

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<sup>23</sup> See Gerald Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for A Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

sion. The decisions are often reached without resorting to preconceived labels, and then fitted into the tiers.

*Paul Berman:*

Who is your favorite jurist, both in terms of writing style and soundness of reasoning?

*Justice Ginsburg:*

I'd have to put a few together, starting with Chief Justice John Marshall. Some years ago I read a wonderful biography of Chief Justice John Marshall by Jean Edward Smith.<sup>24</sup> As a college student, I had read Beveridge's *Life of Marshall*,<sup>25</sup> which was hard going. But reading Jean Edward Smith's portrayal, I literally fell in love with the man. So, I would start with Marshall. For great writing, Oliver Wendell Holmes; for beautiful thinking, Louis Brandeis; for candor and careful analysis, the second Justice John Marshall Harlan. I would certainly put Benjamin Cardozo on the list, not for what he did on the U.S. Supreme Court—he wasn't there long enough—but for his work on the New York Court of Appeals.

*Paul Berman:*

Judge Richard Posner and others have suggested that law school does not need to be three years long.<sup>26</sup> I wonder if you agree, and more generally do you believe that law schools today are doing a good job preparing lawyers, or are there specific improvements you would like to see made in legal education?

*Justice Ginsburg:*

One advance is clinical legal education, which barely existed when I went to law school: There was a legal aid society and that was about it. Clinical education has come a long way. It was looked down on even when I was teaching in the seventies. To help counter the doubts and suspicions, I offered a clinic annually, enlisting students to work as my aides in pending cases. I think my students would agree that those endeavors provided great learning experiences.

I think the third-year curriculum is rich at today's law schools. I should emphasize that, while I'm keen on clinical education, I also think you should not complete law school without taking a course in jurisprudence. If you don't read the works of legal philosophers when you're in

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<sup>24</sup> JEAN EDWARD SMITH, *JOHN MARSHALL: DEFINER OF A NATION* (1996). More recently, a professor at this law school produced another fine biography of Chief Justice Marshall: R. KENT NEWMYER, *JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT* (2001).

<sup>25</sup> ALBERT J. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* (1916-19).

<sup>26</sup> See, e.g., RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 281-95 (1999) (discussing the merits of condensing the law school program from three to two years).

law school, then in view of the demands of a busy practice, you probably never will! Law school gives you time to think “in the grand manner” about the law (as the expression goes). Armed with an appreciation of legal philosophy and legal history, you will be prepared for work as a member of a learned profession, and not simply as a tradesman, an artisan doing a day’s work for a day’s pay.

*Paul Berman:*

Can you compare the personal satisfaction that you’ve derived from your work as a professor and lawyer, with your work as a judge? Are you more proud of your work in either capacity, or do you feel you’ve accomplished more in either capacity?

*Justice Ginsburg:*

I accomplished what I could as an advocate in the seventies. We had a well-defined mission. We came of age in a legal world riddled with differentiations based on gender. Our objective was to root out explicit gender lines in the law. After accomplishing that, the discrimination that lingered was more subtle, and harder to combat. But almost all the explicit gender lines were gone by the time of my 1980 appointment to the D.C. Circuit. Because society was ready for the change, the job was largely accomplished in little more than a decade.

Great aid in that endeavor was provided by the once-Dean of the Harvard Law School, Erwin Griswold. In about 1972, as Solicitor General, he reviewed a tax case to determine whether to petition for certiorari.<sup>27</sup> The complainant was a man who took great care of his mother though she was ninety-three. On his federal income tax return, he took the then-small deduction allowed for care of a child or a dependent infirm relative of any age. The Internal Revenue Code provision in point made the deduction available to a woman or a widowed or divorced man. Charles E. Moritz, the Tax Court petitioner in that case, was a never-married man. He belonged to the sole category of taxpayers who didn’t qualify. Moritz thought, I’m a dutiful son, why should I be treated disadvantageously in comparison to a dutiful daughter? He appeared *pro se* and lost in the Tax Court. My husband and I represented him on appeal to the U.S. Court of Appeals for the Tenth Circuit, where he prevailed. In the interim, Congress prospectively eliminated the gender-based differential. Nonetheless, Solicitor General Griswold petitioned the U.S. Supreme Court to review the case. Even though the law had been changed prospectively, he urged, the decision of the Tenth Circuit cast a cloud of unconstitutionality over dozens of federal statutes, see Appendix E. What was Appendix E? It

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<sup>27</sup> *Moritz v. Comm’r of Internal Revenue*, 469 F.2d 466 (10th Cir. 1972), *cert. denied*, 412 U.S. 906 (1973).

was—in early days for computerized information—a printout of all the provisions of the United States Code that “differentiated on the basis of sex.” So there we had it, all the federal laws in need of revision neatly compiled for us. A main effort was to get Congress to change them—most of the evening out was non-controversial. What couldn’t be resolved legislatively might be challenged in live cases in court. Participating in that effort was often exhausting but constantly exhilarating.

I do love the job of judging, however, and I hope I conveyed that in my opening remarks. People ask: Do you miss being an advocate? I smile and think, well, I have a very select audience but I still consider myself an advocate. After all, I would rather carry a court than write a stirring dissent!

*Paul Berman:*

Who would you say has been the greatest influence or inspiration in your life?

*Justice Ginsburg:*

I’d have to say my mother, although she died when I was seventeen. At a time when girls were generally told the most important degree you can get is not a Ph. D. but an “Mrs.”—that’s what most of my friends were taught—my mother had a different message. She emphasized two things. “Be a lady,” she counseled, and by that she meant don’t snap back in anger, and don’t waste time on emotions like envy that sap energy and do no good. “Be a lady,” untouched by slights and rude behavior. And, above all, be independent, able to make your own way in the world.

*Paul Berman:*

Finally, I wonder if you have any closing advice you’d like to give (in addition to taking a jurisprudence course) to the students who are here.

*Justice Ginsburg:*

If you think of the law as a learned profession, you will appreciate that your obligation as lawyers is to the society law is intended to serve. You will not be content with doing your work only as a skilled craftsman might do a job. In addition, you will give back to society, you will use your professional skills to make the society in which you live, your local community, your State, your Nation healthier, more secure, more respectful of the human dignity of each person on earth. You will help to repair the wounds that make rifts among us. There is no satisfaction, I think, greater than that—knowing that you have contributed to making things a little better for other people and for the communities in which we live.