

Transcript of Interview of U.S. Supreme Court Associate Justice Ruth Bader Ginsburg, April 10, 2009

INTERVIEWED BY PROFESSOR DEBORAH JONES MERRITT* &
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Professor Wendy Webster Williams [*to the Audience*]: We're going to converse about Ruth Ginsburg's years as a litigator for women's equality and gender equity. By now you all know certain things about Justice Ginsburg. Did you know she grew up in Brooklyn? You know that, okay. Did you know she went to Cornell on a full scholarship? Graduated sky high, got married, had her first child, and then went to Harvard Law School for two years and then Columbia for her last year. And then she also clerked for a federal judge for two years, then joined Columbia [Law] School's International Procedure Project for another two years.

[*To Justice Ginsburg*]: But where I want to start today is with Rutgers Law School. It was the place where you began your teaching career. From the time you began teaching in 1963 until 1970, you wrote and taught about things procedural: civil procedure,¹ Swedish civil procedure,² recognition of foreign judgments,³ full faith and credit,⁴ juries and the Swedish *nämnd*,⁵ and legal representation in Sweden.⁶ And then in 1970, without any warning, you

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¹ Ruth B. Ginsburg, *The Competent Court in Private International Law: Some Observations on Current Views in the United States*, 20 RUTGERS L. REV. 89 (1965–66).

² See, e.g., Ruth B. Ginsburg, *Civil Procedure—Basic Features of the Swedish System*, 14 AM. J. COMP. L. 336 (1965–66); Ruth Ginsburg, *The Jury and the Nämnd: Some Observations on Judicial Control of Lay Triers in Civil Proceedings in the United States and Sweden*, 48 CORNELL L.Q. 253 (1962–63); Ruth Bader Ginsburg, *Summary Adjudication*, 4 INT'L LAW. 882 (1969–70).

³ Ruth Bader Ginsburg, *Recognition and Enforcement of Foreign Judgments: A Summary View of the Situation in the United States*, 4 INT'L LAW. 720 (1969–70).

⁴ Ruth B. Ginsburg, *Judgments in Search of Full Faith and Credit: The Last-in-Time Rule for Conflicting Judgments*, 82 HARV. L. REV. 798 (1968–69).

⁵ Ruth B. Ginsburg, *Special Findings and Jury Unanimity in the Federal Courts*, 65 COLUM. L. REV. 256 (1965).

⁶ Ruth Ginsburg & Anders Bruzelius, *Professional Legal Assistance in Sweden*, 11

did a 180° turn. You put procedure behind you, at least temporarily, and began to litigate, write, and teach about the law of gender.⁷ What happened?

Justice Ruth Bader Ginsburg: It was the time in which we were living. There was first the civil rights movement, and then the revived women's movement—not just in the United States but all over the world. As a reflection of the change running throughout society, students at Rutgers asked the faculty to offer a course on women and the law. And new kinds of complaints trickled into the office of the American Civil Liberties Union (ACLU) of New Jersey. The head of the ACLU office wondered what to do with them. One group of complaints came from teachers who were forced out of the classroom as soon as their pregnancies began to show. After all, the children must be spared the thought that their teacher had swallowed a watermelon. To answer the students' plea, I repaired to the library. Inside of a month I had read every federal decision ever written relating to women's rights, also some state court decisions. That was no great feat, for there were precious few of them.

My eyes had been opened years earlier when I was in Sweden, first by reading Simone de Beauvoir's awesome book, *The Second Sex*,⁸ and then by listening to the debate going on in Sweden about how families should divide their work. Because inflation was rampant, the idea of a two-earner family was well-accepted. If you wanted to bring up your children comfortably, you needed two incomes. So women working outside the home became accepted, indeed expected. But it was also the woman's responsibility to make sure that the children had new shoes when they needed them and to put dinner on the table at seven. A vocal participant in the debate, a writer named Eva Moberg, wrote a column in a Stockholm newspaper. In it, she asked, "Why should the woman have two jobs and the man only one?" Wherever I went in Sweden people were debating that question. Some women were "queen bee" types. They could handle everything. They didn't even need to ask the men in their lives to take out the garbage. But others reacted, "Why shouldn't he share? I work the same number of hours." That debate was going on in 1962 and 1963. I was listening to it and slowly awakening. So that accounts for the

INT'L & COMP. L.Q. 997 (1962).

⁷ See, e.g., Ruth Bader Ginsburg, *Introduction to Women and the Law—A Symposium*, 25 RUTGERS L. REV. 1 (1970–71); Ruth Bader Ginsburg, *Sex and Unequal Protection: Men and Women as Victims*, 11 J. FAM. L. 347 (1971–72); Ruth Bader Ginsburg, *Treatment of Women by the Law: Awakening Consciousness in the Law Schools*, 5 VAL. U. L. REV. 480 (1970–71).

⁸ SIMONE DE BEAUVOIR, *THE SECOND SEX* (1949).

turn in my concentration. It wasn't a complete turn, Wendy, because procedure was very important in my lawyering endeavors.

Professor Williams: In your litigation?

Justice Ginsburg: Yes.

Professor Williams: I have read all those files, and, let me tell you, brilliant with procedure. Brilliant! So you began. Do you think your life experiences up to that point contributed anything to your openness to pursue this new subject?

Justice Ginsburg: I was hired by Rutgers Law School in 1963, the year the Equal Pay Act⁹ became the law of the land. My good dean—and he was a very good dean, a very gentle man—explained that I would have to take a cut in salary. I had expected that. Rutgers was a state university not flush with funds. When I heard how much, I was startled and asked, “What salary are you paying so and so,” a man about my age and time out of law school. The Dean's response, “You know, Ruth, he has a wife and two children to support and your husband has a well-paid job in New York.”

Professor Williams: And mind you, this is at a law school.

Justice Ginsburg: And then [my son] James was born in 1965, after my second year at Rutgers. I was on a year-to-year contract. Becoming pregnant was both unexpected and a wonderful thing. But I feared that my contract would not be renewed if I disclosed my pregnancy. My child was very cooperative. He was born in early September. The school term ended in the latter part of May. I wore my mother-in-law's clothes—she was one size larger—for the last couple of months of the spring term. Then, with contract in hand, I drove home to New York with some of my colleagues and announced that when I came back in the fall there would be one more member in my family. Far from asking for any benefits, my concern was if I revealed my pregnancy, that would be the end of my job. That was in 1965, the year after Title VII passed.¹⁰ Yes, I have seen big changes in my lifetime.

⁹ Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56. The Act prohibited payment of different wages on the basis of sex for “equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.” *Id.* § 3.

¹⁰ Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, 78 Stat. 241. Title VII prohibits employment discrimination on the basis of sex as well as race, color, religion,

Professor Williams: You litigated most of your cases under the auspices of the ACLU, first with New Jersey ACLU, as you said, but then with the national office. At the national office you were a founder of the Women's Rights Project of the ACLU, which exists to this day. Why the ACLU, Justice Ginsburg? What brought you to the ACLU rather than some other institution?

Justice Ginsburg: Women's status was going to improve only when women's equal citizenship stature was on the human rights agenda. People who wanted to keep women down would like nothing better than for women to go off in a corner and speak only to other women. Nothing would happen. You needed to persuade men that this was right for society, that it was right for their daughters and granddaughters. That was one of the reasons I wanted to be affiliated with an organization deeply concerned with human rights, an association in which men and women were working together. I will admit there was another intensely practical reason: the women's litigating groups in those days did not have much money, and the ACLU—while it wasn't a wealthy organization—was able to put up \$50,000 of its own money (not an inconsequential sum in 1971) to get the project going. Then we could go to foundations and say this organization is strongly supportive of what we're doing, they have faith in this effort, and we need your contribution to advance our efforts.

So the attractions of the ACLU were that there were men and women working together for gender equality and the organization, the leading civil rights organization, was willing to put its own funds on the line. It was not an easy decision for the ACLU. To this day, the Union's first client is the First Amendment. Some ACLU members were concerned about getting into the equality business. But they came to see that, yes, equality should be part of their mission and part of the global human rights agenda.

Professor Williams: I can also see structural advantages to the ACLU—the affiliates out there?

Justice Ginsburg: Oh yes, yes, that was very important in developing cases. The ACLU had an affiliate in almost every state. The affiliates would report on complaints they had received from women and sometimes men. We were also able to litigate the same issue in different regions of the country. The affiliate network was enormously helpful to our endeavors.

and national origin.

Professor Williams: Sitting here in the Moritz College of Law, I can't help asking you to reflect on your own legal experience with a Moritz, a certain taxpayer, who was the first client that you actually carried into the federal court of appeals. Could you tell us about the other Moritz, and what his case meant in terms of its position in your litigation career?

Justice Ginsburg: This is the story of Charles E. Moritz, who took good care of his mother, though she was ninety-three. Charles E. Moritz was a book salesman. He had a mother, with whom he lived, and he needed to arrange for her care while he was away. So he hired a nurse to attend to his mother. When it came time for him to fill out his tax returns, he knew about the babysitter deduction, which also covered disabled dependents of any age. It was very low in those days—a \$600 deduction—and he took it. The IRS challenged the deduction. Moritz appeared pro se in the Tax Court, and filed a brief there remarkable for its brevity and clarity. It went like this: “If I had been a dutiful daughter instead of a dutiful son, I would have gotten the deduction. That makes no sense?” The Tax Court said, essentially, “We glean that Mr. Moritz is making a constitutional argument, but the Internal Revenue Code is chock full of arbitrary distinctions. We can't intrude the Constitution into that statute.”¹¹ We argued the case—Marty and I divided the argument—in the Tenth Circuit.

Professor Williams [to the audience]: “Marty,” just in case you don't know, is Professor Martin Ginsburg, her husband.

Justice Ginsburg: A great tax lawyer.

Professor Williams: A great tax lawyer.

¹¹ *Moritz v. Commissioner*, 55 T.C. 113, 115 (1971), *rev'd* 469 F.2d 466 (10th Cir. 1972). In the words of the Tax Court:

We glean from petitioner's argument a constitutional objection based, it seems, on the due process clause of the fifth amendment. Petitioner claims discrimination in that he, a single male, is not entitled to the same tax treatment under section 214 as other single persons, widowers and single women, are entitled.

The objection is not well taken. As stated previously, deductions are within the grace of Congress. If Congress sees fit to establish classes of persons who shall or shall not benefit from a deduction, there is no offense to the Constitution, if all members of one class are treated alike.

Id.

Justice Ginsburg: We met Charles E. Moritz for the first time in the fall of 1971, the night before the argument. He took us to dinner in Denver. He had to hire a babysitter for his mother. One of the arguments the government made in that case is very interesting. It was that Moritz wouldn't be entitled to the deduction in any event because he hadn't proved that he was able to care personally for his mother, that the nurse was a substitute for himself. You could make the assumption that a daughter would be able to care for an elderly parent, but that wasn't apparent in the case of a son. We urged the government not to make that argument; the reason was that in the Tax Court, the government had drawn the stipulation of facts. And in truth, he was devoted to his mother and knew very well how to take care of her. But that was the thinking in those days.

Professor Williams: Yes.

Justice Ginsburg: Yes, a woman can take care of an elderly parent or a child, but a man would have to prove he had that ability. Anyway, it took eighteen months, I think, from the time we argued the case until the Tenth Circuit decided it.¹² The decision was that the distinction between dutiful daughters and dutiful sons was unconstitutional. It was the first time we dealt with the extension argument. In all of these cases, the last thing in the world we wanted was for the court to declare the law invalid. We wanted the courts to say the law is just fine but some people were left out, so include the category that had been left out, and then the law becomes constitutional.

Professor Williams: So there you were in the early months of 1971. You wrote the *Moritz* brief. You told me once that in your mind that was the grandmother brief because, in the meantime, while you were working on that case, *Reed v. Reed*¹³ was taken for review by the Supreme Court. And by golly, who had written the jurisdictional statement? It was some ACLU lawyers. What happened next?

Justice Ginsburg: Mel Wulf, who was then the legal director of the ACLU, came to see [Professor] Frank Askin at Rutgers. We had gone to the same summer camp.

Professor Williams [to the audience]: She and Mel Wulf.

¹² *Moritz v. Commissioner*, 469 F.2d 466 (10th Cir. 1972). The Ginsburgs filed their brief in early April, 1971. The case was argued that fall on October 28, 1971, and the decision came down on November 22, 1972.

¹³ 404 U.S. 71 (1971).

Justice Ginsburg: During that chance meeting I told Mel I would like to write the brief in *Reed v. Reed*. He responded, “Ruth, we will write the brief.” “We” being Mel and me. Which we did. But you can see a strong resemblance between the *Moritz* brief to the Tenth Circuit and the *Reed* brief in the Supreme Court.

Professor Williams: A stunning resemblance, actually. The importance of those briefs was that the argument was made that sex should be viewed as a suspect classification. *Reed* was the first case that the Supreme Court heard where that argument had been made to it, ever. And what happened in *Reed*? You didn’t get to argue that case.

Justice Ginsburg: No. Sally Reed brought that case on her own dime. Let me tell her story. The case arose out of tragic circumstances. Sally Reed had a teenage son, Richard. She was separated from her husband, then divorced. When the child was small, Sally had custody. When the child reached his teens, the father applied for custody and the court said, “Now he’s growing up and has to be prepared for a man’s world, so we think the father should have at least part-time custody.” Sally fought hard against any shared custody, because she thought the father was not a good influence on Richard. She turned out to be right. One day, Richard took out one of his father’s rifles and killed himself. Sally wanted to be appointed administrator of his estate and put in an application. Cecil Reed, her ex-husband, perhaps out of spite, put in a rival application. The probate judge said, “The law tells me what to do. It says as between persons equally entitled to administer a decedent’s estate, males must be preferred to females.” That was the decision of the probate court. Sally Reed, using her own money, pursued the case in the intermediate appellate court and in the Supreme Court of Idaho. She lost initially, won in the middle, lost in the end.¹⁴ It’s a remarkable thing about the American legal system, that people like Sally Reed think they have access to justice by going to a court and explaining why they have been treated unjustly. Anyway, we got into the case at the Supreme Court level. The ACLU first asked the Court to review the decision of the Idaho Supreme Court and then we wrote the appellant’s brief. But Sally’s attorney from Boise, Idaho, argued the case. So that set the stage for *Reed v. Reed*.¹⁵ Sally

¹⁴ *Reed v. Reed*, 465 P.2d 635 (Idaho 1970), *rev’d* 404 U.S. 71 (1971). The Idaho Supreme Court reasoned that the Idaho legislature’s conclusion that men were more qualified than women to serve as administrators was not “so completely without a basis in fact as to be irrational and arbitrary.” *Id.* at 638. “[N]ature itself has established the distinction,” it said. *Id.*

¹⁵ 404 U.S. 71 (1971).

was not at the argument because she couldn't afford the plane fare, but years later, a few years before she died, she visited the Supreme Court as guest of the Supreme Court Historical Society. She attended their annual dinner. It was a great occasion.

Professor Williams: Her case became the first case in which the United States Supreme Court used the Equal Protection Clause to strike down a statute as discriminatory on the basis of sex.

Justice Ginsburg: Yes, it was the first one ever. Before that the Supreme Court never saw a sex classification it didn't like. They were all considered to operate benignly in women's favor. One that came up in the Warren Court years concerned a Florida law that didn't put women on juries unless they came to the clerk's office and volunteered.¹⁶ The Court couldn't understand why that was discriminatory. The majority thought women had the best of all possible worlds: they could serve if they wanted to; they didn't have to serve if they didn't want to. But the Court overlooked what full citizenship stature means. Citizens have obligations as well as rights. Men couldn't avoid service on juries, but women weren't needed. They were expendable. The defendant in the Florida case was Gwendolyn Hoyt. Her crime, she struck her philandering, abusive husband with a baseball bat. He fell from the blow, which, far from her expectation, resulted in his death. Gwendolyn Hoyt was indicted on a murder charge. Her notion was that if women were on her jury, they might better understand her state of mind, her rage. If any of you have read *Billy Budd*,¹⁷ you know how it happened. Just as Billy strikes out at Claggart—he stutters and he can't speak—so Gwendolyn struck her husband.

Her notion was, "I wouldn't expect necessarily that women would acquit me. But they might convict me of the lesser crime of manslaughter because they would understand my state of mind, and perhaps men would not." When the Supreme Court said women had the best of all possible worlds, you could imagine Gwendolyn Hoyt thinking, "But what about me?" That decision was rendered in 1961, in the days of the "liberal" Warren Court. Then ten years later the Supreme Court turned around. Warren Burger was Chief Justice. He

¹⁶ *Hoyt v. Florida*, 368 U.S. 57 (1961), *overruled by Taylor v. Louisiana*, 419 U.S. 522 (1975).

¹⁷ HERMAN MELVILLE, *Billy Budd*, in *BILLY BUDD AND OTHER STORIES* 287, 350 (Frederick Busch ed., Penguin Books 1986) (1924) ("Contrary to the effect intended, these words were so fatherly in tone, doubtless touching Billy's heart to the quick, prompted yet more violent efforts at utterance—efforts soon ending for the time in confirming the paralysis, and bringing to his face an expression which was as a crucifixion to behold. The next instant, quick as the flame from a discharged cannon at night, his right arm shot out, and Claggart dropped to the deck.").

was known as “conservative.” What accounts for the change? Simply this. The Court switched because society had changed. Something Paul Freund, great constitutional law scholar, said is right on target. “The Supreme Court should never be affected by the weather of the day, but inevitably, it is affected by the climate of the era.” By 1971, people all over the United States were awakening to the injustice of arbitrary gender-based classifications. I’ve often said the Court never leads. Even in *Brown v. Board of Education*¹⁸ the Court was hardly in the vanguard. The Court moved when they did because no one in the political arena was going to act, and because the United States government was pushing. The brief filed by the United States in *Brown v. Board* said, essentially, “We are being tarred by the Soviet Union. They are calling the world’s attention to apartheid in America. So please Court, help us, and our international relationships, by ending forced separation of the races in school.”¹⁹ The Supreme Court didn’t decide to make a giant stride on its own. It had the full encouragement of the United States government for the *Brown* decision.

Recall *U.S. v. Virginia*.²⁰ Who brought the challenge to maintaining VMI as an all-male institution? Not some liberal group agitating for change, but the United States government. The earlier suit against West Point, Annapolis, and the Air Force Academy, was brought by private litigants. Congress picked up the cue and changed the law.²¹ There was a dialogue. The Court isn’t sitting on high declaring the final word without a prompt. There is often a back-and-forth conversation between the legislature and the Court. Sometimes the legislature acts to reinforce what the Court has done. Other times, as in the Lilly Ledbetter case,²² Congress acts to correct what the

¹⁸ 347 U.S. 483 (1954) (public schools segregated by race unconstitutional).

¹⁹ Brief for the United States as Amicus Curiae Supporting Appellants at 7, *Brown v. Board of Education*, 347 U.S. 483 (1954) (Nos. 1, 2, 3, 4, 5) (“The United States is under constant attack in the foreign press, over the foreign radio, and in such international bodies as the United Nations because of various practices of discrimination against minority groups in this country. As might be expected, Soviet spokesmen regularly exploit this situation in propaganda against the United States, both within the United Nations and through radio broadcasts and the press, which reaches all corners of the world.”).

²⁰ *United States v. Virginia*, 518 U.S. 515 (1996) The Supreme Court declared unconstitutional the exclusion of women from the Virginia Military Institute. Justice Ginsburg wrote the opinion for the Court.

²¹ *Waldie v. Schlesinger*, 509 F.2d 508 (D.C. Cir. 1974); Department of Defense Appropriations Authorization Act of 1975, Pub. L. No. 94-106, § 803, 89 Stat. 531, 537-38 (mandating the admission of women to the service academies).

²² *Ledbetter v. Goodyear Tire & Rubber*, 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5. In

Court has done.²³ We are in constant conversation with the other branches of government.

Professor Williams: You litigated several cases challenging Social Security provisions that discriminated against one sex or the other. There turned out to be numerically more men that you represented in the Supreme Court than women.²⁴ And you've sometimes said that your favorite one of those was your first Social Security case, the *Wiesenfeld* case,²⁵ involving Stephen Wiesenfeld, which you wanted to bring first because you thought it was the perfect case. Could you explain why it was the perfect case given your theory of what sex discrimination is?

Justice Ginsburg: Perhaps I should explain first that the Social Security law followed the traditional breadwinner/homemaker view of life—the notion that it is man's obligation to earn a living, and woman's to care for the home and children. Under Social Security law, if you were a woman earning wages you didn't get any protection for your family unless you provided at least half your husband's support. That meant all your own support and half of his. In other words, to gain family coverage, the woman had to contribute more than three-quarters of the family income. A man's wife qualified for spousal or survivor's benefits automatically. It was the typical breadwinner/stay-at-home spouse vision of the world.

Stephen Wiesenfeld's case. Stephen was a young man. His wife was a public school teacher. She had a very healthy pregnancy; she worked into the ninth month. She went to the hospital to give birth. The doctor came out and told Stephen, "You have a healthy baby boy, but your wife died of an embolism." Stephen vowed he would not work full-time until the boy, Jason, was in school full-time. He wanted to get the Social Security benefits—child-in-care benefits—so that he could support himself and his infant, working only part-time. He went to the Social Security office, and was told, "We're

Ledbetter, the Court, contrary to lower courts' decisions and the Equal Employment Opportunity Commission's interpretation of Title VII, adopted a narrow reading of Title VII's timeline for filing a claim of discrimination—a reading so narrow that it rendered Title VII's prohibition of pay discrimination useless for most of its female victims. *Id.* at 642 n.11, 644. Justice Ginsburg, joined by Justices Stevens, Souter and Breyer, filed a vigorous dissent and also issued a dissenting statement from the bench when the decision was announced. In the Lilly Ledbetter Fair Pay Act, Congress sided with the dissenters, "overruling" the Court's decision by statutory amendment.

²³ Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

²⁴ But, Professor Williams notes, women predominate among Ginsburg clients when the tally includes Ginsburg cases not resolved by the Supreme Court.

²⁵ *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975).

sorry, but these are mothers' benefits. Fathers don't qualify." Stephen Wiesenfeld wrote a letter to the editor of his local paper in Edison, New Jersey. In it, he said, "I've been hearing a lot about women's lib. Let me tell you my story." The letter ended, "Tell that to Gloria Steinem." A woman on the faculty of the Spanish department at Rutgers lived in Edison, New Jersey. She read Stephen's letter to the editor, called me, and said, "That isn't right, is it?" I said, "Why don't you call the young man and suggest that he contact the ACLU?" That's how Stephen Wiesenfeld's case began.

All the plaintiffs represented by the ACLU's Women's Rights Project were real people with a story, a life story that was engaging and entirely genuine. So Stephen Wiesenfeld was, I thought, the perfect plaintiff. His case involved three-fold discrimination. Discrimination against the woman as wage earner—her contributions to Social Security did not net for her family the same benefits that a man's contributions did. Discrimination against Stephen as a parent, who wanted to care personally for his child. And discrimination against the baby, who would have the opportunity for the care of the sole surviving parent if the parent were female, but not if the parent were male. The Court's judgment was unanimous in favor of Stephen Wiesenfeld, but the opinions split three ways.²⁶ Most of the Justices thought the law discriminated against the woman as wage earner.²⁷ A minority thought the law discriminated against the male as parent.²⁸ And one, the Justice who later became my Chief, thought it discriminated irrationally against the baby.²⁹

Professor Deborah Jones Merritt: Maybe I can jump in here, because I had the great fortune to be in your constitutional law class just after you argued *Wiesenfeld*, and you told the class about it. This harks back to something you mentioned earlier about how your students asked you to put together a sex discrimination course; I know you also worked together with students on your cases through the Columbia clinics. Can you tell us a little bit about your relationship with students and how you worked with them on the cases?

Justice Ginsburg: The clinic I headed at Columbia assisted in the cases I was working on, and the students were thoroughly engaged. Some of my Columbia colleagues doubted the merit of offering clinical courses. One of them was my dear colleague Lou Henkin. He had a simulated constitutional

²⁶ *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975).

²⁷ *Id.* at 637 (majority opinion by Brennan, J.).

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

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

litigation seminar. We were working at that time on the Louisiana jury case.³⁰ Louisiana had the same law that Florida had in the case I described: women served only if they volunteered. We had a moot court involving his students and mine. The question presented: constitutionality of excluding women from jury service. My students' performance was ever so much better because they were dealing with a live case. So the students worked with me on whatever I was working on. They came to the district court in the *Wiesenfeld* case and sat with me at counsel table. If I had an argument in the Supreme Court, they attended.

We also took on a legislative project. I should say, first, that the Solicitor General at the time of *Moritz* was Erwin Griswold. He had been my law school dean at Harvard. He petitioned for certiorari and said, essentially, "Court take this case. Oh, I know Congress changed the law, so prospectively there's no problem. But this decision of the Tenth Circuit casts a cloud of unconstitutionality on dozens of federal statutes." He included an appendix to the cert. petition listing all the provisions of the United States Code that differentiated on the basis of sex. So there it was, all laid out for us. Our endeavor was to encourage Congress to clean up the laws. Students went through the U.S. Code chapter-by-chapter and reported on the laws that differentiated on the basis of, we say "gender" now, we said "sex" then.

Professor Williams: We say "gender" now because of your secretary.

³⁰ *Edwards v. Healy*, 421 U.S. 772 (1975). *Healy* and another case, *Taylor v. Louisiana*, 419 U.S. 522 (1975), both challenged Louisiana's jury law. *Taylor* was a criminal case; Taylor had challenged his conviction on the ground that women were not represented in his jury, thus violating his Sixth Amendment right to a jury drawn from a representative cross-section of the community. *Taylor*, 419 U.S. at 524. Justice Ginsburg's *Healy* case was a class action on behalf of litigants in civil cases who similarly challenged Louisiana's mostly male juries, but on Equal Protection and Due Process grounds. The three-judge federal court in *Healy* ruled that Louisiana's "opt in" provision, resulting in the absence of women on Louisiana juries, "denies all litigants Due Process of Law and deprives female litigants of their right to Equal Protection by according an exemption from jury service to women on a basis different from that available to men under substantially similar circumstances, and on the basis of a sexual criterion that is wholly unrelated to the objectives of jury service." *Healy v. Edwards*, 363 F. Supp. 1110, 1117 (E.D. La. 1973). *Taylor* and *Healy* were argued "in tandem" in the Supreme Court in October of 1974. Meanwhile, Louisiana amended its Constitution and began changing its laws to require men and women alike to serve on juries, subject to similar rules. *Taylor* was decided on the merits and remanded "for further proceedings not inconsistent with this ruling." 419 U.S. at 702. *Healy*, once Louisiana had completed the legal changes, was remanded for a determination of mootness. *Edwards v. Healy*, 421 U.S. 772, 772 (1975).

Justice Ginsburg: Well, I changed because of her prompt. Other people did for different reasons. But, for me it became altogether clear when my secretary at Columbia said, "I'm typing these briefs for you and jumping out all over the page is 'sex, sex, sex.' Don't you know that for the male audience you are addressing, the first association of the word 'sex' is not what you're talking about? So, why don't you use a grammar book term? Use 'gender.' It has a neutral sound, and it will ward off distracting associations." Milicent Tryon was my astute secretary then, and from that day to this, I've used gender.

Professor Williams: And the Court picked it up.

Professor Merritt: Justice, let's jump ahead to your time at the Supreme Court. When you arrived at the Supreme Court, you knew more than almost any appointee about the Court. You had studied its rulings, you had taught its cases, argued before the Court, viewed it as a lower court judge. But I'm thinking that there still must've been something that surprised you when you actually stepped behind the doors and became a Justice.

Justice Ginsburg: One was how hard the job is. I thought in my days on the D.C. Circuit that Court of Appeals judges worked pretty hard, while the Supreme Court, I supposed, had an easier job, with four law clerks to assist each Justice. I was wrong about the easier load. It is the best and hardest job I've ever had. So that was one surprise. [Justice] Peter [Rubin] talked about sitting en banc.³¹ Every case in the Supreme Court is heard en banc; the Court doesn't do anything in panels. There's togetherness in everything we do. I've sometimes said that the real power holders in the federal system are the district judges. They sit all alone in their courtrooms, and are in command throughout the entire trial. We have a firm final judgment rule, so you can't interrupt the case to seek a ruling on appeal. A court of appeals judge is powerless unless she persuades at least one of her colleagues. In the Supreme Court a Justice must persuade four others if her position is to carry the day.

We are together not only when we're sitting. We sit three days two weeks in a row. We sit Monday-Tuesday-Wednesday, confer Wednesday afternoon on Monday's cases, Friday on Tuesday-Wednesday cases. Every day we sit, and every day we confer, we have lunch together. Then there are extracurricular activities, like the one I'm planning at this very time. We have two musicales every year. The world-class baritone Thomas Hampson will perform at the Court on May 7. He will bring a young singer, Nadine

³¹ Peter J. Rubin, *Keynote Address: Justice Ruth Bader Ginsburg: A Judge's Perspective*, 70 OHIO ST. L.J. 826, 834-35.

Sierra, with him. We hold the spring musicale just after our sittings end for the term, and just before the weeks of intense pressure to get out remaining opinions.

Professor Merritt: Did any of the other Justices offer you useful advice when you first arrived? Or did you draw upon advice from your muses? The tax professor and others?

Justice Ginsburg: Justice O'Connor gave me great advice. First, she told me a little bit about my Chief. Those two knew each other very well. It is rumored that when they were students at Stanford Law School they even dated. Later, the Rehnquists and the O'Connors made Phoenix their home. At the end of the first sitting in which I participated, when the homework assignments came around, I eagerly anticipated getting a unanimous single-issue case. That's the tradition for a new justice. Instead, the Chief chose a dull and difficult ERISA case for me, one on which the Court had divided 6-3.³² Justice O'Connor was one of the three. I sought her advice, asking, "Why is he doing this to me?" She said, in typical Sandra fashion, "Ruth, just do it. And get out your opinion before he makes the next set of assignments, or you will risk assignment to another unpleasant case." That's her attitude to life: just do it, whatever comes your way, just get the job done. She is one of the most courageous people I have ever known.

Professor Merritt: I've been thinking about what a remarkable institution the Supreme Court is. Here we have an institution that's been resolving constitutional conflicts for more than 200 years, often striking down laws in the face of popular desire. Those two centuries of precedent are an invaluable treasure, but they also have a price. Some of those decisions may have outdated prejudices embodied in them; some are decisions that, on reflection, may turn out to be just wrongly decided. So as a Justice working in the Court's third century, with all these precedents behind you, how do you approach the issue of stare decisis? How does one deal with that?

Justice Ginsburg: First, let's distinguish between statutory cases and constitutional cases. In statutory cases, you can feel pretty comfortable following whatever the prior ruling was, for example, a construction of a dense provision of the Internal Revenue Code. In such cases, if we got it wrong, Congress can amend the law to make its meaning plain. I have, as was mentioned, sometimes called Congress's attention to instances in which

³² John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 510 U.S. 86 (1993).

I think the majority misread Congress and suggested that Congress repair the damage. That can't be done when the Court interprets the Constitution. In that domain, if the Court went astray, it may be our obligation to correct the error. Our Constitution is powerfully hard to amend. I suppose with a Constitution more easily amended one might say, "We can let that old precedent stand because if the people disagree, they can amend the Constitution." Our Constitution, as I said, is powerfully hard to amend, so the tug of *stare decisis* is weaker when we're dealing with a decision pinned to the Constitution. On the other hand, there is a real concern about stability in the system. You can't overthrow a decision simply because, if you had been there, you would have voted the other way. So, it depends on how wrong the decision is, how badly it is working to govern the people law exists to serve. I have a few cases in mind that, given the opportunity, I would vote to overrule.

Professor Merritt: That is one of the ways in which our Supreme Court has led the world, in dealing with this problem of judicial review for constitutionality. I want to turn for a minute to the opposite, this question of looking to foreign principles. You've spoken very eloquently about how the Supreme Court has for 200 years cited foreign law, and should continue to do so because we can all learn from people abroad. I'm curious both about any further thoughts you have about the Court's citation of foreign law, and also advice you might have for lawyers and students about what we can learn from other legal cultures. Is there something about lawyering in France or Australia or elsewhere that we should note to become better lawyers?

Justice Ginsburg: My first acquaintance with foreign and comparative law was in the two years I was involved in studying civil procedure in Sweden. Learning about another system opens your eyes to facets of your own system. I appreciated the way our system works ever so much more when I could see it in a comparative light. You also learn to be more flexible because you may think the law has got to be this way or that way, then you see another system with the same goals doing it differently. I frankly don't understand all the brouhaha lately in Congress, and even the reservations voiced by some of my colleagues, about referring to foreign or international law. John Marshall, the fourth and probably greatest Chief Justice of the United States, said in no uncertain terms that international law is part of our law. There is perhaps a misunderstanding that when you refer to, say, a decision of the Law Lords or of the Supreme Court of Israel or the Constitutional Court of South Africa that you are using those decisions as binding precedent. Well, of course, they're not binding precedent; they're not our law. But there are many systems that adhere to fundamental values similar to our own. Similar issues come up. Why shouldn't we look to the

wisdom of a judge from abroad with as much ease as we would look to a law review article written by a professor? One of the examples I give is a case before the Israeli Supreme Court some years ago.³³ It was called the ticking bomb case. Suppose the police think that a suspect they have apprehended knows where and when a bomb is going to go off. Can the police use torture to extract that information? In an eloquent decision, Aharon Barak, the Chief Justice of Israel, said, “Torture, never,” and explained that we could hand our enemy no greater victory than to come to look like that enemy in our disregard for human dignity. Now, why should I not read that opinion and be affected by its tremendously persuasive reasoning?

Our neighbor to the north, Canada, wasn't in the business of judicial review for constitutionality until 1982, when Canada adopted a Charter of Rights and Freedoms. That is a very interesting Supreme Court—probably cited more widely abroad than the U.S. Supreme Court nowadays, I think for one reason: you will not be listened to if you don't listen to others. I've been asked so many times by jurists abroad: “We, in our country, are inspired by the model of the United States Supreme Court and we refer to your decisions, but you never refer to ours. Don't you think we have anything to contribute?” For so many years the United States was the only country engaged in judicial review for constitutionality. Most systems had an idea similar to [Professor] Marc [Spindelman]'s—that is, “The courts shouldn't mess with fundamental values, that's for the parliament, the courts should stay out. As the people's representatives, the legislators should decide those questions.”³⁴ What happened in Europe to alter that view was the Holocaust. People came to see that popularly elected representatives could not always be trusted to preserve the system's most basic values. So many countries installed a constitutional court as one check against return to a dictatorial government. Currently, many courts in the world review ordinary laws for constitutionality, and they are looking to each other, not for binding authority, but to see how other good minds have dealt with hard problems. I think that this is a passing phase, that we will get back to where we were in the early nineteenth century when there was no question that it was necessary to take account of international law and appropriate to refer to decisions of other tribunals.

³³ HCJ 5100/94 Public Committee Against Torture in Israel v. Government of Israel [1999] IsrSC 53(4) 817, available at http://elyon1.court.gov.il/files_eng/94/000/051/a09/94051000.a09.pdf (“We conclude, therefore, that, according to the existing state of the law, neither the government nor the heads of the security services have the authority to establish directives regarding the use of physical means during the interrogation of suspects suspected of hostile terrorist activities, beyond the general rules which can be inferred from the very concept of an interrogation itself.”).

³⁴ See generally Marc Spindelman, *Toward a Progressive Perspective on Justice Ginsburg's Constitution*, 70 OHIO ST. L.J. 1115 (2009).

Professor Merritt: Certainly the larger social climate is moving toward the U.S. participating in the world as a whole. I want to ask you now about the hard work of the Supreme Court. From an outsider's perspective, the Supreme Court is one of the most smoothly functioning organizations in the world. After all, it processes thousands and thousands of cases, many presenting very difficult issues; it maintains utmost confidentiality in these cases; it preserves collegiality; and—what's more—you finish your work on time every year. So, for those of us who don't always get our exams in on time, what's the secret of the Court's success?

Justice Ginsburg: Tradition and peer pressure. I've been there fifteen years, and each year, in mid-May the Chief sends around a notice reminding us that all majority opinions are due June 1, or if June 1 is on a Sunday, then June 2. And all dissents, by June 15. In all the years that I've been a member of the Court, no Justice has ever missed those deadlines no matter how much dillydallying goes on during the term. When it comes to the end of the line, June 1, all majorities are in circulation. It's great that we have that system, otherwise we'd never get away for the summer. The number of petitions goes up and up. They now are over 10,000, but one must bear in mind that the largest portion of those are pro se petitions from prisoners. We have a very large prison population, and the larger it grows, the more petitions we will receive.

Professor Merritt: Over 7,000 now, I think, pro se petitions . . .

Justice Ginsburg: The prisoner petitions keep going up. The civil caseload is more or less constant.

Professor Merritt: What about the fact the court itself grants review in fewer cases now than in the 1980s? Do you see a reason for that?

Justice Ginsburg: Two reasons. One is Congress's ending most instances of mandatory jurisdiction, the once must-decide cases. So now, almost all of our jurisdiction is discretionary. The second reason is the Court's recognition that we can't function as an error-correction institution. We have a fine federal court system. The district courts and the courts of appeals can do the everyday job of administering justice very well without Supreme Court intervention. We are needed when there is a split, when other courts—federal courts of appeals, state high courts—disagree on what the law of the United States is. Whether it's a matter of statutory interpretation or constitutional law, you can't have one law in the Ninth Circuit and a different law in the Fourth Circuit. About seventy percent of our cases involve splits of authority

on what the law is. We sit in the main to resolve splits. Fewer cases, I should note, enable us to avoid repetition of days when opinions were announced this way: Justice So-and-So announces the judgment of the Court, and an opinion in which Justices A, B, and C join part II F and E. There was no opinion of the Court. The Court was terribly splintered. The thought was that with fewer cases we would have more time to achieve accommodations and come together on an opinion that will speak for the Court. Sometimes I've gone into the high teens in the number of drafts I have circulated. No majority opinion I've ever written was untouched by my colleagues' suggestions. The law professors who criticize our work product should be mindful of this reality—when you're on a collegial court, you do not write as though you were Queen. You are writing for the Court, which means first that you take notes on what your colleagues say in conference, and you try to incorporate their views into your draft. If you don't, you will get a "Dear Ruth" letter that will say, "Such-and-such a point is important to me. If you put it in, I will join your opinion."

Professor Merritt: So you're suggesting that perhaps before criticizing a Supreme Court opinion any law professor should write an article first that has to be joined.

Justice Ginsburg: You have the luxury of giving out your article drafts to any number of people, and you get the benefit of their suggestions, but they're only suggestions. You can do with them as you please. I try, even after I have the fifth vote, to accommodate a colleague. As Chief Justice Charles Evans Hughes once said, "I always try to write my opinions logically and clearly, but, if another justice on my side wants me to put something in, well in it goes and let the law schools figure out what it means."

Professor Merritt: We appreciate you keeping us in business here. We're coming close to the end of our time, but I want to ask two final questions. The next-to-last one is because of your work on gender discrimination: when you were appointed both to the lower court and then to the Supreme Court, many people asked whether a women's voice would be different than a man's voice. In response, you and Justice O'Connor have often quoted Justice Jeanne Coyne from Minnesota who said, "At the end of the day, a wise old man and a wise old woman will reach the same decision." Is there any effect of having wise women on the Supreme Court? At least one wise woman now?

Justice Ginsburg: Many effects. Even from the outward perspective, the public that attends Court sessions. In the days when Justice O'Connor and I were together on the Court, it was great. Even though there were only two of

us, people could see that women come in all sizes and shapes: we didn't look alike, we didn't talk alike. Even so, every year while she was there inevitably there would be a lawyer who answered my question, "Justice O'Connor," and she would say, "I'm Justice O'Connor, she's Justice Ginsburg." But now there I am all alone and it doesn't look right. I see the people newly admitted to the bar of the Court, and there are many women among them. Even in the box where the reporters are seated, there's Nina Totenberg and there was Linda Greenhouse. I look to our neighbor to the north, Canada; a woman is the Chief Justice of the Supreme Court of Canada, and three other women serve on a court of nine. It's lonely for me, not that I don't love all my colleagues, I do. Even though a wise old man and a wise old woman would reach the same decision, there's life experience that a woman has—because she's grown up female—experience that the men don't have. And that experience can broaden the Court's perspective and enhance its understanding.

And then there's the atmospherics. For example, Linda Greenhouse once brought a new editor to watch our arguments. The police officer on guard said, "Sorry, lady, you can't sit in the first row. You're wearing a t-shirt and t-shirts are not allowed in the front rows." In fact, the woman was wearing an Anne Klein ensemble. This was a problem. We didn't want our police officers to be arbiters of women's fashions. Another example. Dear Abby received a letter and sent copies to Justice O'Connor and me. The letter writer described a recent annoyance. "I came to the Court with my husband to observe an argument. We got there early and had breakfast. My husband excused himself and went to the restroom. He came back and I said, 'That's a good idea. I'll do the same before we go to the Courtroom.' The police officer on duty said, 'Sorry the women's bathroom doesn't open until nine.'" Sandra called me and said, "Could this be?" And sure enough, it was. There was a time when very few women attended Court sessions, and no one thought about changing the restroom opening time once women showed up in numbers. One of our greatest accomplishments was to change the name of the Ladies' Dining Room. The Court is a tradition-bound institution, and Sandra came up with a brilliant idea. She said, "Let's call it the Natalie Cornell Rehnquist Dining Room." It's appropriate because Natalie Rehnquist had, in fact, taken care of renovating the room and there is a lovely photograph of her near the entrance. The Chief couldn't resist. So we now have the Natalie Rehnquist Dining Room where the spouses of Justices meet periodically and lunch together.

Professor Merritt: Do they talk tax and other legal issues? Your spouse is a particularly good tax lawyer.

Justice Ginsburg: At the lunches, Marty is much in demand as co-caterer because he's an excellent chef.

Professor Merritt: Justice, I'll call our dean back to the stage in a moment to conclude the program, but before we do that I want to give you a chance to offer any final words to the audience, and as part of that we do have a special request. I know that you are a big opera fan, and we might have some people in the audience who've never listened to an opera. So if you have one that you'd like to recommend, that our audience can go home and add to their iPods, we would love to hear your advice. And any other parting comments as well.

Justice Ginsburg: For a first opera I would say pick *Butterfly* or *Boheme*, both by Puccini. They are musically beautiful and tell great, if sad, stories. I attended an opera on March 14, one I had never seen performed before; it's by Dvořák, it's called *Rusalka*. It was simply spellbinding, but the libretto is in Czech, so it's a little inaccessible. The first opera I chose for my daughter Jane—this was still at the old Met—was *Così fan tutte*. It's a Mozart opera, it's a comedy, and we had prepared Jane far in advance. First we played music several times and then we sat down with the libretto. The performance was in English translation, and it was wonderful. That choice proved very successful. James's introduction to opera was less successful. I picked *Aida*—seemingly a good choice, a spectacular show. But James found the princess, who doesn't get the man—the man is Radames—James thought the princess was very beautiful. But the soprano who played Aida, James found her not at all attractive. He could not understand why Radames would want Aida when he could have married the beautiful princess. I must say, there is a challenge for me coming up, Wagner's *Ring Cycle*. I've never seen a performance of *Siegfried*, and the Washington National Opera will stage it this spring—all five hours of it. Wagner is a great, great composer, but he needed a good editor.

Professor Merritt: Is there anything else you wanted to add?

Justice Ginsburg: May I say to the students here: I have found working in the law so tremendously satisfying. And not simply because lawyers can earn a decent income. As lawyers, you will have a skill that enables you to contribute to your community. You can do things with your skill to make life a little better for less privileged people, better than it might be if you were not contributing your time and talent. So, I think that's it. There is no greater satisfaction you can have than to give something to the community, a contribution you are able to make because you have gone to this fine law school and passed the bar.