

## *Articles*

### Principles and Persons: Ruth Bader Ginsburg, *Raconteuse*

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*Before she was appointed to the judiciary, Ruth Bader Ginsburg was often identified as the nation's foremost legal advocate for women's claim to equal citizenship. Eventually, some years after she had become Justice Ginsburg, she was assigned to write the opinion for the Supreme Court's most sweeping decision validating that claim. Throughout her career as lawyer and judge, she has had a number of occasions to tell the stories of her former clients and other women. This Article considers several themes in those references, in particular her persistent efforts to give credit to other women for their courage and their fortitude.*

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My thanks to Leslie Karst for reviewing a draft of this Article.

In the recognition of women's constitutional right to equal citizenship, the Supreme Court went from near zero to a point approaching 100% in the quarter century from 1971 to 1996. As every reader knows, in the 1970s the leading women's rights advocate to the Court was Ruth Bader Ginsburg, and in 1996, when that Court set the capstone on this development, it was Justice Ginsburg who wrote the Court's opinion.<sup>1</sup> It is no wonder that, when she is invited to write or speak, she is expected to discuss the Constitution's guarantees of equal rights for women. Obviously, she doesn't own the subject,<sup>2</sup> but surely she is entitled to preside over it in its grand scale. My main point in this comment is that the grand scale is by no means her only subject. She repeatedly invokes the images of individual citizens, both advocates and clients, who have claimed and proclaimed women's rights to equality.

Her stories begin early, with the campaign of Elizabeth Cady Stanton and Susan B. Anthony *opposing* ratification of the Fourteenth Amendment.<sup>3</sup> These suffragists were worried that the amendment's second section, with its repeated references to "male" in tandem with "citizen," would undermine women's efforts to appeal to the amendment's substantive guarantees.<sup>4</sup> As then-Judge Ginsburg wrote in 1986, their skepticism was justified.<sup>5</sup> For the Fourteenth Amendment's first century, the Equal Protection Clause was useless in the quest for women's equality.<sup>6</sup> The individuals whose experiences are recounted by Ginsburg are not limited to major figures like Stanton and Anthony. They include people whose names identify cases that are now familiar—think of Sally Reed or Stephen Wiesenfeld.<sup>7</sup> Behind the delays and the advances in constitutional rights, she identifies the conditions and doings of particular people. When she speaks of principles, she points to persons.

In the discussion that follows, I call attention to Ruth Bader Ginsburg's writings before she was a judge and her later writings other than judicial opinions.<sup>8</sup> These writings compose a considerable body of

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1. See generally *United States v. Virginia*, 518 U.S. 515 (1996).

2. The writing on the constitutional law of women's rights is distinguished. I shall not list authors, for fear of making careless omissions. Anyone who reads this will have her own list—and many of you would be on any list that I might offer. Some of you have disagreed sharply with Justice Ginsburg's views. Most of you are cited—and always treated with respect—in Ruth Bader Ginsburg & Barbara Flagg, *Some Reflections on the Feminist Legal Thought of the 1970s*, 1989 U. CHI. LEGAL F. 9, 17.

3. Ruth Bader Ginsburg, *Interpretations of the Equal Protection Clause*, 9 HARV. J.L. & PUB. POL'Y 41, 41 (1986) [hereinafter Ginsburg, *Interpretations*].

4. *Id.*

5. *Id.*

6. *Id.*

7. The cases involving these people appear in every decent casebook on constitutional law. They are discussed *infra* notes 12–37 and accompanying text.

8. I shall cite some sources beyond Justice Ginsburg's own writing, but at the outset I want to identify one article that is indispensable for anyone who wants to understand her work as an advocate

work, and a big proportion of it recounts the acts and feelings of other individuals. Plainly, she wants to know—and wants us to know—about the law’s interactions with people, one by one. Still, if you pay attention to the stories she tells, you will sense that her own story lies underneath.

At first, she was Professor Ginsburg in the Rutgers (Newark) Law School.<sup>9</sup> At the request of students, she designed and taught a course on women and the law. In 1970, she remarked to a panel of the Association of American Law Schools that such “courses develop two themes: the part law has played in assisting society to ‘protect’ women (and keep them in their place) and the stimulus law might provide in the evolution of society toward equality and independence for the still submissive sex.”<sup>10</sup> Law teachers who use the “case method” in their classrooms—that is, nearly all of us—know the educational value of viewing the law’s effects on individual litigants in real-life situations. However long ago we may have studied law, we all remember the facts of some classroom cases, and even think of some legal rules with those litigants at least dimly in mind. Outside the classroom, Professor Ginsburg was the inspiration and founding director of the Women’s Law Project of the American Civil Liberties Union—a responsibility she carried with her in 1972 when she moved to Columbia Law School. Just as a trial lawyer will present the testimony of particular witnesses as a story that fits her client’s version of the case, an appellate lawyer will seek to educate judges by similar means. So, well before she joined the judiciary in 1980, Justice Ginsburg’s experiences as teacher and lawyer had given her a solid grounding in the art of relating legal principles to the lives of individuals.

Some of her teaching and all of her litigation focused on securing women’s full recognition as equal citizens, and her early writings on the subject were part of a political campaign. From the beginning, Professor Ginsburg understood that her litigation was only one element in a larger social movement that was bringing new opportunities to women. Her job as a litigator was to teach about women’s capacities and the injustice of denying them full participation in public and private institutions. One goal of this educational effort was to call attention to the rapid increase in women’s participation in the ranks of workers, and particularly in positions of great responsibility. To counteract long-standing stereotypes of “the nature of woman”—women in general—she brought into the

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and as a judge: Michael J. Klarman, *Social Reform Litigation and Its Challenges: An Essay in Honor of Justice Ruth Bader Ginsburg*, 32 HARV. J.L. & GENDER 251 (2009). From 1983 to 1984, Professor Klarman clerked for Judge Ginsburg in the D.C. Circuit. *Id.* at 251.

9. Ruth Bader Ginsburg, *Treatment of Women by the Law: Awakening Consciousness in the Law Schools*, 5 VAL. U. L. REV. 480, 480 (1971).

10. *Id.*

courtroom the lives of particular women and men. Her writings in the 1970s brought those litigants' stories to the attention of lawyers, and also to readers of journals aimed primarily at a larger audience of women. Many in this latter group did not need convincing, but they did need information about the movement's progress in one field after another. In short, she was teaching both women and men about the implications of women's equal citizenship. The experiences of her clients could serve as talking points in many contexts.

In Professor Ginsburg's litigation campaign in the 1970s, and in her more general writings, her accounts of individuals' lives have served instrumental purposes. Even today, Justice Ginsburg's writings teach her listeners and readers similar lessons. But these descriptions are not merely instrumental. Whether she is discussing the cases that were the subjects of her own briefs and arguments, or describing earlier cases in which women's claims were defeated, or recounting the work of others who have served the cause of women's equal citizenship, her stories make clear that she cares about their protagonists. Professor Ginsburg saw her forerunner advocates, and the litigants in their cases, as individuals. Her writings in later years show that she has retained that regard—and that concern—for each advocate and each litigant that she discusses. I applaud her for that.<sup>11</sup>

#### THREE 1970S CLIENTS WHOSE CASES CHANGED THE LAW, AND ONE MIGHT-HAVE-BEEN

From the beginning, Professor Ginsburg saw what seemed to be coming. In 1971, in a speech to a group of law women, she mentioned an ACLU case in the current term, *Reed v. Reed*,<sup>12</sup> saying, "the turning point is in view."<sup>13</sup> She went on to give her audience a quick summary of the facts in Sally Reed's case.<sup>14</sup> In later writings, she elaborated.<sup>15</sup> Sally Reed and her husband Cecil were separated.<sup>16</sup> Her only income was her pay for taking elderly people into her home for care. At first, Sally had custody

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11. Here I should note that I have known her since her days at Rutgers and Columbia, and we have stayed in touch for half a century. Today, she is as considerate (and, we shall see, as generous) as she was in the 1960s.

12. 404 U.S. 71 (1971).

13. Ruth Bader Ginsburg, *Sex and Unequal Protection: Men and Women as Victims*, 11 J. FAM. L. 347, 353 (1971).

14. *Id.* at 353-54.

15. See, e.g., Ruth Bader Ginsburg, *Constitutional Adjudication in the United States as a Means of Advancing the Equal Stature of Men and Women Under the Law*, 26 HOFSTRA L. REV. 263, 267 (1997) [hereinafter Ginsburg, *Equal Stature*]; Ruth Bader Ginsburg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1, 10 (1975) [hereinafter Ginsburg, *Gender*]; Ruth Bader Ginsburg, *Remarks on Women's Progress in the Legal Profession in the United States*, 33 TULSA L.J. 13, 17 (1997); Ginsburg & Flagg, *supra* note 2, at 15.

16. Ginsburg, *Equal Stature*, *supra* note 15, at 267.

of their son Richard, but when he was no longer “of tender years” he was placed in the custody of his father.<sup>17</sup> He “fell in with a bad crowd and spent some time in a corrections facility.” Upon release to his father’s custody, he was deeply depressed, and at age twenty, he killed himself with his father’s gun. Sally wanted to deal with Richard’s belongings, and petitioned the Idaho court to be appointed administrator of the boy’s estate; soon afterward, Cecil entered his own petition. The court did not hold a hearing, but appointed Cecil. Under the governing Idaho statute, in a case of conflicting petitions from persons “equally entitled” to administer the estate of a decedent, “males must be preferred to females.”<sup>18</sup> The Supreme Court’s decision striking down the Idaho law was unanimous.<sup>19</sup> Today’s law students see this as a clear-cut case of sex discrimination, and so it is; but when *Reed* was decided, it broke new ground. The Equal Protection Clause, a central feature of the Fourteenth Amendment adopted in 1868, had its very first application to sex discrimination a century later. *Reed* was, indeed, a turning point.

Two years later, the Court took its next step in *Frontiero v. Richardson*.<sup>20</sup> Professor Ginsburg’s client was Sharon Frontiero, a U.S. Air Force Lieutenant. Sharon’s husband, Joseph Frontiero, was a full-time college student, receiving support under the G.I. Bill. Sharon’s pay provided three-fourths of the family’s income. Under the governing regulations, however, she was not entitled to a housing allowance; nor was her husband entitled to medical benefits, for his income provided just over half of his own support. If the sexes were reversed, the regulations provided that a male officer would get those family benefits automatically. As Professor Ginsburg later said, the regulation thus “presumed a wife’s, but not a husband’s, dependent status.”<sup>21</sup> This sort of discrimination was found in many statutes, notably those provided in the system of Social Security. The Frontieros both sued, alleging discrimination against Sharon (denied benefits a male officer would get) and against Joseph (denied benefits a service wife would get).<sup>22</sup> The Supreme Court, in an 8–1 decision, held this discrimination

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17. The “tender years” boundary itself resulted from stereotyping: A mother gives comfort during a boy’s tender years, and a father is a role model as the boy learns to be a man in a man’s world.

18. The Idaho legislature had repealed this statute—but only prospectively—before the case was decided by the Supreme Court. *Reed v. Reed*, 404 U.S. 71, 75 (1971).

19. The vote was 7–0. *Reed*, 404 U.S. at 71. Justices Black and Harlan had retired, and President Nixon had not yet appointed Justices Powell and Rehnquist.

20. 411 U.S. 677 (1973). The “personal” aspects of this case, described below, are set out in Ginsburg, *Gender*, *supra* note 15, at 21.

21. Ginsburg & Flagg, *supra* note 2, at 15.

22. Ginsburg, *Gender*, *supra* note 15, at 21.

unconstitutional.<sup>23</sup> Four of the Justices agreed with Professor Ginsburg's argument that governmental sex discrimination should be evaluated under a "strict scrutiny" standard of review, but three others in the majority suggested that the pendency of the Equal Rights Amendment made such a ruling premature.<sup>24</sup> In a lecture the following year, Professor Ginsburg said, "*Reed* and *Frontiero* had the appearance of well-planned first steps in a sustained litigation campaign."<sup>25</sup> She should know.

The woman in the case named *Weinberger v. Wiesenfeld* was not the plaintiff (Stephen), but his wife, Paula Polatschek Wiesenfeld.<sup>26</sup> She had taught mathematics in a public school in New Jersey.<sup>27</sup> When she died in childbirth, baby Jason survived, and Stephen wanted to care for Jason personally at home.<sup>28</sup> As Justice Ginsburg put it not long ago, "He vowed not to work full-time until his son was in school full-time."<sup>29</sup> The Social Security system would provide what the law called "Mother's insurance benefits" for stay-at-home widow-mothers, but not for stay-at-home widower-fathers.<sup>30</sup> Thus the law discriminated against female workers (reducing the value of their work) and also against the men who were women's surviving spouses—and, of course, their children. Plainly, the law's distinction was founded on the "protective" assumption that women who are widowed need a replacement for the income lost when fathers die, but men—assumed to be breadwinners—need no such aid. Professor Ginsburg won Stephen's case, again from a unanimous Court.<sup>31</sup> In a 1997 lecture—some *twenty-two years* after this decision—Justice Ginsburg remarked that Stephen Wiesenfeld had been "an extraordinarily devoted parent."<sup>32</sup> She went on to note that Jason was then "completing his third year at Columbia Law School."<sup>33</sup> Now, where did he get that idea?

One more set of Ginsburgian recollections, before we move on: In her 1993 Madison Lecture, given just before Judge Ginsburg became Justice Ginsburg, she told the story of another client of hers in the early 1970s.<sup>34</sup> The case might have been a doctrinal game-changer—but the

23. *Frontiero v. Richardson*, 411 U.S. 677, 678–91 (1973).

24. *Id.*

25. Ginsburg, *Gender*, *supra* note 15, at 12.

26. 420 U.S. 636, 639 (1975).

27. Ginsburg & Flagg, *supra* note 2, at 16.

28. Ruth Bader Ginsburg & Elena Kagan, *Remarks Commemorating Celebration 55: The Women's Leadership Summit*, 32 HARV. J.L. & GENDER 233, 247 (2009).

29. *Id.*

30. *Wiesenfeld*, 420 U.S. at 637 n.1.

31. *Id.* at 637.

32. Ginsburg, *Equal Stature*, *supra* note 15, at 268.

33. *Id.*

34. Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1200–02 (1992) [hereinafter Ginsburg, *Judicial Voice*]. The case is *Struck v. Secretary of Defense*, 409 U.S. 1071 (1972)

Supreme Court had not decided it. Like *Frontiero*, this one arose in the military. Captain Susan Struck, a nursing supervisor, had made the Air Force her career. Her commanding colonel called her work “exemplary,” but her career was threatened when she became pregnant while she was in Vietnam. An Air Force regulation made childbirth a ground for mandatory termination of a woman officer’s commission. Another regulation offered Air Force hospital facilities for abortion—indeed, encouraged such a resort to preserve an officer’s career—but Captain Struck’s religion closed that avenue. She used her accumulated leave time for the childbirth and promptly placed the infant for adoption. On her behalf, Professor Ginsburg argued in federal court that the Air Force’s regulation violated Captain Struck’s equal protection rights because it imposed no limitation on male officers who became fathers. A powerful argument, we now understand.

The lower courts didn’t see it that way; they denied relief. The Supreme Court, however, granted certiorari—whereupon the Air Force waived its regulation and allowed Captain Struck to continue her career. The Court then dismissed the case as moot. Two decades later, Judge Ginsburg remarked that, if the Supreme Court had decided *Struck v. Secretary of Defense*, it might have issued a relatively narrow opinion founded on women’s equality-based constitutional right to control their own bodies—thus making way for a gradual recognition of women’s reproductive rights.<sup>35</sup> In her own litigation, Professor Ginsburg had adopted just such a gradual approach to nudge the Court toward a more generalized validation of women’s equal citizenship. She suggested that if the Court had adopted a similar approach in this field, perhaps it might have avoided the shock of *Roe v. Wade*<sup>36</sup> and the massive political mobilization triggered by that decision.<sup>37</sup> We’ll never know.

#### GIVING CREDIT

What we do know—partly because Judge Ginsburg reminded us—is that *Reed*, *Frontiero*, and *Wiesenfeld* were all decisions of the Burger Court, not its “liberal” predecessor.<sup>38</sup> It is characteristic of her to give credit where credit is due, notably including credit to women in earlier

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(mem.). Pages cited here include all references to the *Struck* case that follow.

35. Ginsburg, *Judicial Voice*, *supra* note 34, at 1202.

36. 410 U.S. 113 (1973).

37. Ginsburg, *Judicial Voice*, *supra* note 34, at 1200; Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 381 (1985).

38. Ginsburg, *Interpretations*, *supra* note 3, at 42–43. In a footnote, Judge Ginsburg also cited eight more women’s rights decisions of the Burger Court. *Id.* at 42–43 n.8. In my judgment, the most important of these later decisions was *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982) (O’Connor, J., majority opinion). See *infra* note 40.

times who fought the good fight for women's equality, but without success. The heroines of her stories include judges, litigants, and advocates in court; they also include women whose advocacy found venues outside the courtroom. Every one of them is offered as a role model.

During her Supreme Court years, Justice Ginsburg has identified a number of female judges who have been her own role models. Justice Sandra Day O'Connor, of course, gets high marks for introducing her new colleague to the Court's arcana. But, more generally, Justice Ginsburg gives her sister Justice credit for serving the cause of women's equality. This credit is entirely deserved. When Justice O'Connor joined the Court, the two most recent decisions on women's equality issues had diluted the strong standard of review for sex discrimination recently established in *Craig v. Boren*,<sup>39</sup> but her appointment was crucial in restoring order.<sup>40</sup> It is no accident that, when Justice Ginsburg wants to show Justice O'Connor at her best, she does so by quoting her words spoken to a conference on "Women in Power": "As women achieve power, the barriers will fall. As society sees what women can do, as *women* see what women can do, there will be more women out there doing things, and we'll all be better off for it."<sup>41</sup> If you were taking a Supreme Court quiz and asked to identify the author of those sentences, wouldn't you pause before answering?

In 1995, addressing a conference of female judges, Justice Ginsburg told the stories of three women who were among the earliest to serve as federal judges: Florence Ellinwood Allen, Burnita Shelton Matthews, and Shirley Mount Hufstedler.<sup>42</sup> I offer only brief summaries here—all taken from Justice Ginsburg's talk. Judge Allen was a polymath: concert

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39. 429 U.S. 190 (1976). As the *Craig* opinion had it, a law that limited women but not men would be invalid unless it contributed in a substantial way to achieving an important government interest. *Id.* at 197. In two more recent cases, however, Justice Rehnquist led majorities to uphold such laws when men and women were "not similarly situated." *Michael M. v. Superior Court*, 450 U.S. 464 (1981) (decided 5-4); *Rostker v. Goldberg*, 453 U.S. 57, 78 (1981). If this toothless standard had taken hold, it would have undermined the gains for a constitutionalized right of women's equality achieved during the 1970s.

40. Her opinion for the 5-4 majority in *Mississippi University for Women*, 458 U.S. at 718-33, reclaimed the ground Justice Rehnquist had seized, and the Court has not looked back. See *infra* Part IV (discussing *VMI*). On Justice O'Connor's role in this development, see Kenneth L. Karst, *Through Streets Broad and Narrow: Six "Centrist" Justices on the Paths to Inclusion*, 2010 SUP. CT. REV. 1, 18-20.

41. Ruth Bader Ginsburg, *A Tribute to Justice Sandra Day O'Connor*, 119 HARV. L. REV. 1239, 1240 (2006) (quoting Sandra Day O'Connor, Address to the Sixteenth Annual Olin Conference: Women in Power (Nov. 14, 1990)). Justice Ginsburg does make brief mention of Justice O'Connor's life story, but that need not be repeated here.

42. Ruth Bader Ginsburg & Laura W. Brill, *Women in the Federal Judiciary: Three Way Pavers and the Exhilarating Change President Carter Wrought*, 64 FORDHAM L. REV. 281 (1995). Before reading this speech, I had not known these judges' given names; we can be confident that Justice Ginsburg uses them advisedly.

pianist, music critic, graduate student in political science, highly successful law student, worker in the settlement-house movement, prosecutor, suffragist politician, and elected judge, first at the trial level and then at the Ohio Supreme Court.<sup>43</sup> She was the first woman to serve on a state's highest court, and after eleven years there (and some unsuccessful candidacies for Congress), in 1934 President Roosevelt appointed her to the Sixth Circuit—where she was again a “first woman.” There she served for twenty-five years and in her final year on the court she was its senior member and Chief Judge. In Justice Ginsburg's words, Judge Allen portrayed “a catalogue of firsts,” and she continued her advocacy of women's equality throughout her life. President Truman identified her as a possible appointee to the Supreme Court, but was dissuaded by Chief Justice Vinson, a Truman poker buddy. Such was life in the late 1940s.

In 1949 Truman did, however, appoint Burnita Shelton Matthews as the first woman to serve as a federal district judge in the District of Columbia.<sup>44</sup> While working for the Veterans Administration, Matthews had attended night law classes at National University, the forerunner of today's George Washington University. She was a committed suffragist and had been counsel to the national Woman's Party. The Party sought to repeal laws “protecting” women by excluding them from various kinds of work. Justice Ginsburg quotes a 1926 comment in the *American Bar Association Journal* in which Matthews, after deploring men's inability to see this injustice, says, “But then it is not surprising when one remembers that this defective vision, this regard of discriminations as ‘protection’ is traditional.”<sup>45</sup> Sound familiar? A reader of Justice Ginsburg's article about these “way pavers” will notice her repeated insistence on giving credit to her predecessors in the struggle for equal rights for women. As the 1926 date for this quotation indicates, “struggle” is not too strong a word. Matthews had served as an active federal district judge for nineteen years when failing health made her accept the status of senior judge. In that capacity, she sat on a number of panels of the D.C. Circuit Court of Appeals. When she retired in 1984, President Reagan expressed the nation's gratitude for her service.

The third judge featured in Justice Ginsburg's 1995 article is California's own Shirley Hufstедler, who almost certainly would have been the first woman Justice of the Supreme Court, if only President

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43. *Id.* at 281–83. All the following references to Judge Allen are contained in this passage.

44. *Id.* at 284. All the references to Judge Matthews by Ginsburg and Brill, *supra* note 42, are at pages 284–85.

45. *Id.* at 285 (quoting Burnita Shelton Matthews, *Women Should Have Equal Rights with Men: A Reply*, 12 A.B.A. J. 117, 120 (1926)).

Carter had had a vacancy to fill.<sup>46</sup> Justice Ginsburg knows her well, and expresses the appreciation and affection that Shirley Hufstedler has inspired in all who have known her. Hufstedler finished at the top of her class at Stanford Law School, and after about ten years in practice she had served as a judge in the superior court and then the California Court of Appeal. In 1968 President Johnson appointed her to the Ninth Circuit bench, where she stayed until President Carter tapped her to be the first Secretary for the newly created Department of Education. Justice Ginsburg takes note of a number of Hufstedler's views on public issues, and quotes her on rights of personal privacy and on the harms done to children by myths of group dominance and inferiority. These excerpts remind us that the idea of a Justice Hufstedler had great appeal. I can attest that lawyers in California fully expected Hufstedler to be appointed to the Supreme Court—but in our era there can be only nine Justices at a time, and President Carter was not reelected in 1980. It may be, however, that the buzz about a “first woman Justice” was still audible in 1981, when President Reagan's initial appointment to the Court was Justice Sandra Day O'Connor.

To understand my next example of Justice Ginsburg's pattern of crediting others for their contributions to the movement for women's equality, you should know about the Court's decision in *Hoyt v. Florida*,<sup>47</sup> the modern judicial nadir for the consideration of women's concerns. The story of this case has been related by Professor Ginsburg,<sup>48</sup> by Judge Ginsburg,<sup>49</sup> and by Justice Ginsburg.<sup>50</sup> Gwendolyn Hoyt, a battered woman, testified that she had been wounded, insulted, and humiliated by her philandering husband—on one occasion enraging her to the point that she responded by hitting him with their son's baseball bat.<sup>51</sup> He fell back, hit his head on a hard surface, and quickly died.<sup>52</sup> Gwendolyn was convicted of second degree murder.<sup>53</sup> All of the jurors in her case were men.<sup>54</sup> Under Florida law, women were not obliged to do any jury service; a woman would be placed on the jury roll only if she volunteered and registered.<sup>55</sup> Gwendolyn's ACLU lawyer, Dorothy Kenyon, argued to the Supreme Court that, given the testimony, a jury containing women

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46. Ginsburg & Brill, *supra* note 42, at 286. All references to Judge Hufstedler are at pages 286–87.

47. 368 U.S. 57 (1961).

48. Ruth Bader Ginsburg, *Sex Equality and the Constitution*, 52 TUL. L. REV. 451, 456 (1978) [hereinafter Ginsburg, *Sex Equality*].

49. Ginsburg & Flagg, *supra* note 2, at 13–14.

50. Ginsburg, *Equal Stature*, *supra* note 15, at 266.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Hoyt v. Florida*, 368 U.S. 57, 58 (1961).

might well have convicted Gwendolyn of the lesser crime of manslaughter.<sup>56</sup> The unanimous Warren Court, in an opinion by the second Justice Harlan, rejected this argument.<sup>57</sup> The Justices saw the Florida law as a generous treatment of women, allowing them to keep their place at “the center of home and family life.”<sup>58</sup>

Professor Ginsburg pointed out that, at the time of *Hoyt*, “the majority of adult women . . . either had not entered or had passed the stage when children requiring all-day or after-school care are part of the family unit.”<sup>59</sup> Judge Ginsburg commented that Gwendolyn “suspected that women sitting in judgment on her case would better understand her plight and plea.”<sup>60</sup> This view was shared by Justice Ginsburg, who made the point more specifically: “with some women on the jury, [Gwendolyn’s] state of mind at the time of the fatal blow might have been comprehended more accurately by her triers, and her crime perhaps reduced to manslaughter.”<sup>61</sup> Justice Ginsburg later added that the Supreme Court’s decision in *Hoyt* followed a line of precedent that

reflected the long-prevailing “separate spheres” mentality, the notion that it was man’s lot, because of his nature, to be the breadwinner, the head of household, the representative of the family outside the home; and it was woman’s lot, because of her nature, to bear and alone to raise children and keep the house in order.<sup>62</sup>

In 1971, when Professor Ginsburg submitted the brief in *Reed v. Reed*, on the brief’s cover she added the names of two predecessor advocates, both associated with the ACLU.<sup>63</sup> One was Pauli Murray, a long-time fighter for racial and gender justice, and the other was Dorothy Kenyon, who had argued the *Hoyt* case ten years earlier.<sup>64</sup> The *Hoyt* precedent itself crumbled in 1975<sup>65</sup> as the Supreme Court went about revising its treatment of women’s constitutional claims to equality. Meanwhile, Professor Ginsburg was giving credit to others who had helped pave the way for her successes.

#### BELVA LOCKWOOD’S TALE

Justice Ginsburg continues to give credit. In 2008, in a conversation with Elena Kagan, then Dean of Harvard Law School, she emphasized

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56. Ginsburg, *Equal Stature*, *supra* note 15, at 266.

57. *Hoyt*, 368 U.S. at 62.

58. *Id.*

59. Ginsburg, *Sex Equality*, *supra* note 48, at 456.

60. Ginsburg & Flagg, *supra* note 2, at 13.

61. Ginsburg, *Interpretations*, *supra* note 3, at 42.

62. Ginsburg, *Equal Stature*, *supra* note 15, at 266.

63. *Id.* at 267.

64. *Id.*

65. *Taylor v. Louisiana*, 419 U.S. 522, 533–34 (1975).

that “we should appreciate the women on whose shoulders we stand, women who said the same things we said many years later, but we spoke at a time when society was willing to listen.”<sup>66</sup> This conversation was presented to a group of women who had been graduated by the law school in the fifty-five years since 1953. The graduating class of 1953<sup>67</sup> had been the first in that school’s history to include women. Justice Ginsburg had been a major draw for Celebration 55, and Dean Kagan was delighted to invite her to return.<sup>68</sup> Much of the time was given to a “Q and A” session in which the dean asked questions and the Justice responded. But Justice Ginsburg was assigned time near the beginning for her own statement, and she devoted all of that time to a sketch of the life of Belva Lockwood (1830–1917), an early champion of women’s rights to equality.<sup>69</sup> By 2008, of course, the main doctrinal battles in the Supreme Court had been won. To understand what the Justice had in mind, we must pay attention to what she emphasized in her tour through Lockwood’s life. All of the following story is adapted from the Justice’s talk.

Lockwood grew up on a farm in upstate New York.<sup>70</sup> She married at eighteen, had a child, and was widowed at age twenty-two. She went to college and became a schoolteacher and then a principal. At age thirty-six, she moved to Washington, D.C., and after two years, married again. She was an active suffragist and she advocated equal employment opportunities for women, and equal pay, too. She decided to become a lawyer and applied for admission to law study at the National University. The school rejected her application, so that she would not “distract the attention of the young men.” She persisted, and the school eventually admitted her. She completed her work, but the school officials would not give her a diploma, for fear of reducing the value of men’s diplomas. Lockwood took the bull by the horns, writing to the ex officio president of the University—that is, the President of the United States, the Union’s soldier-hero, Ulysses S. Grant. She did not beg. She said she had completed the work, and “I demand my diploma.” Two weeks later, the Chancellor gave her the degree and the diploma. That was 1873, mind you.

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66. Ginsburg & Kagan, *supra* note 28, at 237.

67. My own class, as it happens. When we started in the fall of 1950, there were twelve women, three for each section.

68. At one point, Justice Ginsburg was discussing changes in the Supreme Court and the appointment of women. She mentioned that Justice Stevens, then eighty-eight, might be the next to retire. Ginsburg & Kagan, *supra* note 28, at 245. When he did retire, as you know, Elena Kagan (then serving as Solicitor General) filled that vacancy.

69. *Id.* at 234–37.

70. *Id.* at 235. All references in this paragraph are at page 235.

Three years of law practice in D.C. entitled Lockwood to apply for admission to the bar of the U.S. Supreme Court—but the Court denied her application.<sup>71</sup> End of story, right? Wrong. She took her case to Congress, which in 1879 adopted a law entitling a woman to be admitted to practice before the Supreme Court if she met the qualifications applied to men.<sup>72</sup> Thus, Belva Lockwood was the first woman to argue a case before the Court.<sup>73</sup> During her years at the Supreme Court bar, she twice ran for President as the candidate of the Equal Rights Party.<sup>74</sup> A woman still could not vote, but nothing in the Constitution said she could not be elected President. Her campaigns brought to the public's notice a number of issues that other candidates ignored—supporting not just women's rights but also the causes of Native Americans and Chinese immigrants and Civil War veterans.<sup>75</sup> Throughout all of these tribulations, she believed her cause would prevail.

Justice Ginsburg went on to tell the assembled women that she had decorated her own chambers with a replica of the vote of the Justices refusing to admit Lockwood to the Court's bar, and with “one of several less than flattering cartoons published during her 1884 presidential run against Cleveland and Blaine.”<sup>76</sup>

All right—so what's going on in this meeting, at this late date in the movement for women's equality? Justice Ginsburg has seen an opportunity to teach, this time to an audience of women, most of whom see themselves as committed advocates for the cause they share with her. Her telling of Belva Lockwood's story personalizes some lessons to be learned—and learned again:

- Belief in equal justice is not enough. You have an obligation to take action to achieve full equality.
- You must be determined to overcome obstacles.
- You must extend your efforts to the limit of your ability.
- Courage is often required; don't be afraid.
- Be optimistic; it can be done.

Just reading such a set of instructions may be intimidating, but it is also affecting. When the teacher has credentials as strong as Justice

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71. *Id.* Justice Ginsburg points out that Chief Justice Waite, when he gave her the bad news, did not mention his own vote in favor of her admission. But only three Justices out of the nine had voted for her. *Id.* at 235–36.

72. Ginsburg & Kagan, *supra* note 28, at 236.

73. Justice Ginsburg tells us that Lockwood, soon after her own admission, moved the admission of Samuel R. Lowery to practice. He thus became the first African American lawyer from the South to join the Court's bar. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 237.

Ginsburg's, the lessons must be heeded. Furthermore, her own performance at the bar and on the bench shows that one can be firm and still be conciliatory. Speaking of her present position, she has said, "We're in the business of persuasion."<sup>77</sup>

#### THE SOCIAL SETTING FOR *VMI*

The Supreme Court's 1996 decision in *United States v. Virginia*<sup>78</sup> has been detailed and analyzed over and over. On the chance that there is one reader who does not know: In that case the Court held that the exclusion of women from Virginia Military Institute violated the Equal Protection Clause.<sup>79</sup> I had my say on the case soon after the decision came down,<sup>80</sup> and I shall not add another analysis to the stack. In the view of Mary Anne Case, *VMI* was "an extremely easy case, the logical culmination of a long line of cases . . . Justice Ruth Bader Ginsburg, author of the majority opinion, stands at both ends of this line, now able to affirm as a Justice what she first argued as an advocate."<sup>81</sup> Even so, it is notable that the Supreme Court reached its decision by a 7-1 vote, with Chief Justice Rehnquist joining in the result.<sup>82</sup>

In this case, Justice Ginsburg had no occasion to dramatize the issue before the Court with a particular woman's story. The plaintiff, after all, was the United States, which had sued after the Justice Department learned, in an official way, of *VMI*'s males-only policy.<sup>83</sup> A high school girl had complained to the Department in 1990,<sup>84</sup> but the district judge had not even mentioned her name in his opinion.<sup>85</sup> *VMI* and its "expert" witnesses made clear that women were being excluded because *VMI* is a military school and war is man's business. That was quite enough for Justice Scalia, whose dissent, predictably, resonated in the higher

77. Ginsburg & Kagan, *supra* note 28, at 240.

78. 518 U.S. 515 (1996).

79. *Id.* at 519.

80. See generally Kenneth L. Karst, "The Way Women Are": Some Notes in the Margin for Ruth Bader Ginsburg, 20 U. HAW. L. REV. 619 (1998).

81. Mary Anne Case, "The Very Stereotype the Law Condemns": Constitutional Sex Discrimination Law as a Quest for Perfect Proxies, 85 CORNELL L. REV. 1447, 1450 (2000).

82. The Chief Justice did not join Justice Ginsburg's opinion for the Court, but still concluded that *VMI*'s exclusion of female applicants violated the Equal Protection Clause. *United States v. Virginia*, 518 U.S. at 558 (Rehnquist, C.J., concurring). If Justice Thomas had not recused himself, my guess is that he would have joined Justice Scalia in dissent. Justice Thomas's son was attending *VMI*.

83. The United States sued under Title IV of the 1964 Civil Rights Act, 42 U.S.C. § 2000c-6 (2010). *United States v. Virginia*, 766 F. Supp. 1407, 1408 (W.D. Va. 1991).

84. *Id.* It is worth noting that the lawsuit was brought by the Department during the administration of the first President Bush.

85. *Id.* at 1407.

registers of voice.<sup>86</sup> Six years later, however, Justice Ginsburg remarked that the case had not been “a close call,” and she added:

Public understanding had advanced so that people could perceive that the *VMI* case was not really about the military. Nor did the Court question the value of single-sex schools. Instead, *VMI* was about a State that invested heavily in a college designed to produce business and civic leaders, that for generations succeeded admirably in the endeavor, and that strictly limited this unparalleled opportunity to men.<sup>87</sup>

The reference to public understanding brings us to another theme that pervades Justice Ginsburg’s writings: the importance of changes in the public’s attitudes in underpinning the Supreme Court’s changes in constitutional interpretation. As she said in 2008, “Courts are reactive institutions . . . [Social change] has to start with the people.”<sup>88</sup>

Looking back to her litigation campaign of the 1970s, Judge Ginsburg said, “I was lucky to be in the right place, at the right time.”<sup>89</sup> Indeed, the times had been changing in a number of ways that were undermining traditional forms of sex discrimination. Just before she became a judge, Professor Ginsburg had called attention to some of these social changes: a decline in the need for women to produce at home; an expansion of the service sector of the economy, offering new jobs to women; increased availability of means to control reproduction; increased life spans.<sup>90</sup> The two-earner family was rapidly becoming the standard.<sup>91</sup> All of these developments increased judges’—including Justices’—awareness of “a sea change in United States society,” an “evolving enlightenment” intensified by “the briefs filed in Court, the women lawyers and jurists they nowadays routinely encounter, and perhaps most deeply by the aspirations of the women, particularly the daughters and granddaughters in their own families and communities.”<sup>92</sup> As Justice Ginsburg told Elena Kagan in discussing the 1970s litigation campaign, “we spoke at a time when society was willing to listen.”<sup>93</sup> Referring to earlier women’s rights litigators, she added immediately, in

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86. *United States v. Virginia*, 518 U.S. at 566–603 (Scalia, J., dissenting).

87. Ruth Bader Ginsburg, *The Supreme Court: A Place for Women*, 32 Sw. U. L. REV. 189, 197 (2003) (2002 speech at Southwestern University School of Law) [hereinafter Ginsburg, *Place for Women*].

88. Ginsburg & Kagan, *supra* note 28, at 243.

89. Ginsburg & Flagg, *supra* note 2, at 11.

90. Ruth Bader Ginsburg, *Sexual Equality Under the Fourteenth and Equal Rights Amendments*, 1979 WASH. U. L.Q. 161, 167.

91. *Id.*; see Ginsburg, *Equal Stature*, *supra* note 15, at 269.

92. Ginsburg, *Place for Women*, *supra* note 87, at 198. Klarman, *supra* note 8, at 291–94, shows how the changing climate for social reform offered complications to Professor Ginsburg’s litigation campaign. (After all, if conditions for women’s participation in society are improving, who needs litigation?) Professor Klarman makes clear that she met the challenge. *Id.* at 297–98.

93. Ginsburg & Kagan, *supra* note 28, at 237.

a way that we now see as typical of her, to give credit to those who had gone before: “[These] women . . . were saying a generation before, the same things we were saying, . . . but society was not yet prepared to listen. So we were standing on their shoulders, and they were models of courage for us because they didn’t take no for an answer.”<sup>94</sup>

The shade of Belva Lockwood smiled.

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94. *Id.* at 238.

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