

LESSONS LEARNED FROM JUSTICE RUTH BADER GINSBURG

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INTRODUCTION

Serving as a law clerk for Justice Ruth Bader Ginsburg in the Supreme Court’s October Term 1999 was one of the single greatest privileges and honors of my life. As a trailblazer who opened up opportunities for women, she was a personal hero. How many people get to say that they worked for their hero?

Justice Ginsburg was defined by her brilliance, her dedication to public service, her resilience, and her unwavering devotion to taking up the Founders’ calling, set out in the Preamble to our Constitution, to make ours a “more perfect Union.”¹ She was a profoundly dedicated public servant in no small measure because she appreciated just how important her role was in ensuring that our Constitution belongs to everyone. Whether as an advocate or a Justice, she tirelessly fought to dismantle discrimination and more generally to open opportunities for every person to live up to their full human potential. Without question, she left this world a better place than she found it, and we are all the beneficiaries.

As an advocate, Ruth Bader Ginsburg challenged our society to liberate all persons from the gender-based stereotypes that held them back. As a federal judge for forty years—twenty-seven of them on the Supreme Court—she continued and expanded upon that work, even when it meant in dissent calling out her colleagues for improperly walking back earlier gains or halting future progress.² In total, she wrote over 700 opinions on the D.C. Circuit and some 480 opinions on the Supreme Court. The latter group included 153 dissents, which, Justice Ginsburg once said, “speak to a future age.”³ Dissents are “not simply to say my colleagues are wrong and

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1. U.S. Const. pmbl.

2. For an overview of her career and legacy as a Supreme Court Justice, see Ruth Bader Ginsburg & Amanda L. Tyler, *Justice, Justice Thou Shalt Pursue: A Life’s Work Fighting for a More Perfect Union* 1–18 (2021).

3. The NPR Politics Podcast, *Ruth Bader Ginsburg, Progressive Icon, Dead at 87*, NPR (Sept. 18, 2020), <https://www.npr.org/transcripts/914652984> (recording and transcript on file with the *Columbia Law Review*) [hereinafter *RBG, Progressive Icon*] (capturing a soundbite of an archived NPR interview of Justice Ginsburg by legal affairs correspondent Nina Totenberg). Interestingly, given the elevation of her notoriety as a dissenter once she became “the Notorious RBG,” one might think that she wrote more dissents later in her tenure on the Court. But that is not the case. By my rough calculation, she averaged 5.7

I would do it this way, but the greatest dissents,” she observed, “do become court opinions.”⁴ The Justice was ever hopeful about her dissents, and I expect someday she will be viewed in the company of Justice John Marshall Harlan as one of the Court’s great dissenters whose opinions, with the benefit of time, eventually become the law of the land.

Justice Ginsburg’s final opinion was, fittingly but also frustratingly, a dissent in a gender rights case. In *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, the Court upheld the expansion of an exemption to employers claiming religious objections from providing mandated contraceptive coverage to female employees under The Patient Protection and Affordable Care Act of 2010.⁵ Building on her earlier dissent in *Burwell v. Hobby Lobby Stores, Inc.*,⁶ Justice Ginsburg chided the majority for “leav[ing] women workers to fend for themselves, to seek contraceptive coverage from sources other than their employer’s insurer, and, absent another available source of funding, to pay for contraceptive services out of their own pockets.”⁷ The majority’s holding failed to appreciate, she wrote, that “[r]eady access to contraceptives and other preventive measures for which Congress . . . [provided] both safeguards women’s health and enables women to chart their own life’s course.”⁸ Right up until the end, Justice Ginsburg was fighting for gender equality and the ability for individuals to control their own destinies.

As her law clerk and in the many years that followed, I had the privilege of learning from Justice Ginsburg, being mentored by her, and creating many cherished memories of time spent together. I also had the special honor of working with her over the last year of her life on a book that sets out how she hoped to be remembered. Throughout these experiences, “the Justice”—as her law clerks called her—inspired and taught me lessons about the law, and even more about life. What follows are many of those lessons, including three I single out for separate discussion at the end.

LESSONS ON LAW AND LIFE

1. *Try to leave the world a little better than you found it.*

Justice Ginsburg used her law degree as a force for good. In 2013, she told my Berkeley Law students, “If you survive three years of law school,

dissents per Term before Justice John Paul Stevens retired and she became the most senior “liberal” Justice, and 5.6 dissents per Term after Stevens’s retirement. (Statistics calculated using the *Harvard Law Review* annual Supreme Court statistics tables.) Also of note, Justice Ginsburg penned her highest number of total opinions of any Term during her first Term on the Court, the 1993 Term.

4. RBG, *Progressive Icon*, supra note 3.

5. 140 S. Ct. 2367, 2372–79 (2020).

6. 573 U.S. 682, 739 (2014) (Ginsburg, J., dissenting).

7. *Little Sisters of the Poor*, 140 S. Ct. at 2400 (Ginsburg, J., dissenting).

8. *Id.* at 2402.

you have a talent and skill that is precious, but if you use it for only personal gain—you won't get long-term satisfaction. Do something outside of yourself that will help make things better for others not as fortunate as you."⁹ Hers is a model career of what someone armed with a law degree can do to advance the interests of others and make ours a more just society. I hope that her example continues to inspire lawyers to do the same for generations to come.

2. *The law is about real people.*

When then-Judge Ginsburg sat before the Senate Judiciary Committee in July 1993, she quoted extensively from Judge Learned Hand, an important influence on her approach to judging. "The spirit [of liberty]" that Judge Hand described, she testified, "strives for a community where the least shall be heard and considered side by side with the greatest."¹⁰ She took this message to heart, never losing sight of the fact that the cases that come before the Supreme Court are about real people from all walks of life, and she made every effort to understand how the Court's work affected the lived experiences of those whose interests were at stake.

There are countless examples one could cite in illustrating this point, not the least of which are some of her most prominent dissents. Take, for example, her dissent in Lily Ledbetter's case, in which she observes how hard it is for someone in Ledbetter's position to uncover the fact that she is the victim of ongoing long-term gender-based wage discrimination and explains to the reader why, even if employees discover a pay discrepancy, they might hesitate to complain.¹¹ (As Justice Ginsburg explained the latter point to me in a conversation we had in 2019, "The first woman in a field that has been dominated by men doesn't want to be seen as a troublemaker. She doesn't want to rock the boat."¹²) Her dissent in *Hobby Lobby Stores* provides another example.¹³ There, she points out to the all-male majority how expensive it is for women to obtain contraceptive coverage. This, she argued, underscores why the government's interest in making that coverage more accessible is so substantial.¹⁴ Then there is her

9. Susan Gluss, US Supreme Court Justice Ginsburg Captivates Berkeley Law, Berkeley L. (Sept. 19, 2013), <https://www.law.berkeley.edu/article/us-supreme-court-justice-ginsburg-captivates-berkeley-law> [<https://perma.cc/HCF3-PV52>].

10. Justice Ginsburg's testimony is recorded in *Nomination of Ruth Bader Ginsburg, to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary, 103d Cong. 50–51 (1993)* [hereinafter *Ginsburg Testimony*]. Her testimony is reprinted in *Ruth Bader Ginsburg, with Mary Hartnett & Wendy W. Williams, My Own Words 173 (2016)*, as is her Rose Garden acceptance speech, see *id.* at 174.

11. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 659–61 (2007) (Ginsburg, J., dissenting), superseded by statute, *Lilly Ledbetter Fair Pay Act of 2009*, Pub. L. No. 111-2, 123 Stat. 5 (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.).

12. Ginsburg & Tyler, *supra* note 2, at 46 (replicating our conversation).

13. 573 U.S. 682, 739 (2014) (Ginsburg, J., dissenting).

14. See *id.* at 739, 741.

dissent in *Shelby County v. Holder*—the opinion that earned her the nickname “the Notorious RBG.”¹⁵ While making a powerful case for the continuing importance of the Voting Rights Act, Justice Ginsburg walks the reader through the reality on the ground—namely, the ongoing systematic discrimination and second-generation barriers that continue to be erected to prevent minority voters from full participation in the electoral process.¹⁶

The law was not some abstract notion to Justice Ginsburg; in her hands, it was a vehicle for making people’s lives better.

3. *Engage with those with whom you disagree.*

Justice Ginsburg’s long friendship with Justice Scalia was the real deal. They disagreed on just about everything when it came to interpreting the Constitution, but they bonded over much common ground. As Justice Scalia once told his former law clerk, Judge Jeffrey S. Sutton, of their friendship, “[S]ome things are more important than votes.”¹⁷

But it was not just their friendship that stood out. It was also that they modeled the importance of taking seriously the views of those with whom you disagree. Take Justice Ginsburg’s crown jewel of an opinion for the Court in *United States v. Virginia (VMI)*, holding that the Virginia Military Institute must open its doors to female cadets.¹⁸ Justice Scalia was the lone dissenter.¹⁹ (Chief Justice William H. Rehnquist, whom Justice Ginsburg always referred to affectionately as “My Chief,” joined the Court’s holding, though not her opinion.²⁰)

As she told the story at Justice Scalia’s memorial service, he delivered her an early draft of his dissent before circulating it to the other Justices so as to give her more time to work through her responses. (It was, she recounted, “a zinger.”²¹) As a result, she recalled, “My final draft was much improved, thanks to Justice Scalia’s searing criticism.”²² Justice Scalia,

15. 570 U.S. 529, 559 (2013) (Ginsburg, J., dissenting).

16. See *id.* at 590.

17. Jeffrey S. Sutton, Introduction to Antonin Scalia, *The Essential Scalia: On the Constitution, the Courts, and the Rule of Law*, at xix, xx (Jeffrey S. Sutton & Edward Whelan eds., 2020).

18. 518 U.S. 515, 519 (1996).

19. *Id.* at 567 (Scalia, J., dissenting).

20. *Id.* at 558 (Rehnquist, C.J., concurring in the judgment).

21. Justice Ruth Bader Ginsburg, Eulogy at the Memorial for Justice Antonin Scalia (Mar. 1, 2016), https://www.youtube.com/watch?v=jb_2GgE564A&index=6&list=PLDLQjUqKam14fzEvHET4qIGSeFqrpw01t (on file with the *Columbia Law Review*) [hereinafter Ginsburg, Eulogy for Justice Scalia].

22. *Id.* On another occasion, Justice Ginsburg elaborated, “The final draft, released to the public, was ever so much better than my first, second, and at least a dozen drafts more, thanks to Justice Scalia’s attention-grabbing dissent, which he adjusted to meet each of my responsive circulations.” Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, in *My Own Words*, supra note 10, at 276, 281.

moreover, was one of the many voices who recommended that President Clinton appoint her to the high Court.²³

Justice Ginsburg approached every case with strong convictions, but also an openness to hearing from the other perspective. As she said at her confirmation hearings, again referencing Judge Hand, “[T]he spirit of liberty . . . is not too sure that it is right, and so seeks to understand the minds of other men and women and to weigh the interests of others alongside its own without bias.”²⁴ Wise counsel not just for a jurist, but for all of us.

4. *Be precise.*

Justice Ginsburg was precise in everything she did, especially her writing. It was imperative that her opinions be succinct and accessible to all readers, whether trained lawyers or not. Further, her law clerks will tell you that she taught us to go over *every single word* to ensure that it was accomplishing something in an opinion. Having had the great privilege of working with her during the last year of her life on a book about her life and career, I can attest that right up until the end, she was still teaching me about the craft of writing—never to use four words when three will do, and to take care with each word you put on paper. Indeed, in the last months of her life as we corresponded extensively about the book project, she even edited my letters to her!

5. *Show up every day and do the work.*

Justice Ginsburg was the most dedicated public servant I have ever known. Never one to waste time, she used to bring a flashlight to the movies so she could work during the previews. In my year as her law clerk, she had her first bout with cancer, but she never missed a single day on the bench. That same commitment carried her through her subsequent bouts with cancer. Indeed, in May 2020, she even participated from her hospital bed in one of the Court’s oral argument days, held as a teleconference because of the COVID-19 pandemic. To borrow a phrase from the sports world, the Justice left it all on the field.

6. *Bring others along with you and raise them up.*

Through her exacting standards and legendary work ethic, the Justice brought out the very best in her clerks. Working with her on opinions often meant that you would exchange as many as twenty or more drafts, each time with her returning triple-spaced pages covered in edits. But we plugged away, ever hopeful of finally achieving what we all sought—the return of a draft with two words in the upper left corner: “Just Right.” I

23. See Ginsburg, Eulogy for Justice Scalia, *supra* note 21.

24. Ginsburg Testimony, *supra* note 10, at 54.

often analogize working for her as akin to playing on a team with someone like Michael Jordan. She made everyone around her rise to their very best.

7. *Keep your cool.*

The Justice was a model of cool. As she once said, “Reacting in anger or annoyance will not advance one’s ability to persuade.”²⁵ Her law clerks had an up-close window into how she lived out this creed. As she said on another occasion, “Fight for the things that you care about, but do it in a way that will lead others to join you.”²⁶ She never attacked people, but rather ideas, and she did so in a measured, careful way designed to bring others along. This was a huge factor in the many and great successes she achieved both as an advocate and as a jurist.

8. *Representation matters.*

The Justice was very unhappy to be the only woman on the Supreme Court for several years following the retirement of her good friend Justice Sandra Day O’Connor. Imagine being the only woman in the room and having to explain to your male colleagues what it is like, for example, to be a thirteen-year-old girl strip-searched by a school official.²⁷ Or imagine being the only woman on the Court deciding an important abortion case.²⁸ She was elated when President Obama appointed Justices Sotomayor and Kagan to the Court. More generally, Justice Ginsburg appreciated that “to cultivate . . . leaders with legitimacy in the eyes of the citizenry,” it is imperative that “the path to leadership be visibly open” to a diverse pool of individuals.²⁹

25. Ruth Bader Ginsburg, Opinion, Ruth Bader Ginsburg’s Advice for Living, N.Y. Times (Oct. 1, 2016), <https://www.nytimes.com/2016/10/02/opinion/sunday/ruth-bader-ginsburgs-advice-for-living.html> (on file with the *Columbia Law Review*) [hereinafter Ginsburg, Advice].

26. Andrew M. Duehren, To Applause and Admiration, Ginsburg Receives Radcliffe Medal, Harv. Crimson (May 31, 2015), <https://www.thecrimson.com/article/2015/5/31/ginsburg-radcliffe-medal-2015> [<https://perma.cc/9E2Q-3Z9H>] (quoting Ginsburg’s remarks).

27. See *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 381 (2009) (Ginsburg, J., concurring in part and dissenting in part) (disagreeing with the Court’s holding that school officials enjoyed immunity from suit for violating a thirteen-year-old girl’s Fourth Amendment rights when they subjected her to a strip search).

28. See *Gonzales v. Carhart*, 550 U.S. 124, 169, 183 (2007) (Ginsburg, J., dissenting) (criticizing the majority for disregarding medical testimony in upholding a ban on a particular abortion procedure along with its untested assertion that “[w]omen who have abortions come to regret their choices”).

29. Ruth Bader Ginsburg, Assoc. Just., Sup. Ct. of the U.S., Keynote Speech at the L’Institut d’Etudes Politiques de Paris (Sciences Po) Graduation Ceremony: The Value of Diversity (July 17, 2009), <https://www.sciencespo.fr/en/news/news/the-value-of-diversity-ruth8239bader-ginsburgs-2009-keynote-speech/5051> [<https://perma.cc/UL6L-4Q2H>] [hereinafter Ginsburg, Sciences Po Keynote] (quoting *Grutter v. Bollinger*, 539 U.S. 308, 332 (2003) (O’Connor, J.)).

Many are aware of her famous quote: “People ask me sometimes, when . . . will there be enough women on the Court? And my answer is when there are nine.”³⁰ In truth, I think she hoped much more so for the day when the Supreme Court would actually reflect the society that it serves, rather than necessarily a Court composed entirely of women. Thus, she smiled when I told her a couple of years ago about how, when I was teaching my daughter’s fourth grade class about the Court, the students reacted negatively to the “when there are nine” quote, one hand after another rising to say that the high Court should look like the diverse America they knew.

9. *Pay it forward.*

For those of us fortunate enough to work for her, Justice Ginsburg was a mentor without equal. There was never a career decision that I made without consulting her, and she was always in my corner. On several occasions, she picked up the phone at a crucial time to support my career and help me land a job. She knew from her own life how important the support of mentors could be. In her case, Professor Gerald Gunther would not rest until he secured her a federal clerkship when no one else would hire her out of law school, despite the fact that she graduated tied for first in her class at Columbia.³¹

Justice Ginsburg also acutely appreciated how others had paved the way for her work and successes. In 1971, she included pioneering women’s rights attorneys Dorothy Kenyon and Pauli Murray on the first brief she filed in the Supreme Court in *Reed v. Reed*, even though they had not formally worked on the case.³² Later, in her remarks to the Senate Judiciary Committee during her confirmation proceedings, she recognized the work of Susan B. Anthony, Elizabeth Cady Stanton, and Harriet Tubman, observing, “I stand on the shoulders of those brave people.”³³ Through the Justice’s example, her law clerks learned the importance of appreciating the work of those who came before us and how it is now on us to pay it forward and support the next generation.

30. When Will There Be Enough Women on the Supreme Court? Justice Ginsburg Answers That Question, PBS NewsHour (Feb. 5, 2015), <https://www.pbs.org/newshour/show/justice-ginsburg-enough-women-supreme-court> [<https://perma.cc/RKN3-CPG5>].

31. The Justice told this story in our 2019 conversation that is at the heart of the book we compiled together. See Ginsburg & Tyler, *supra* note 2, at 35–36.

32. Of the decision to include Kenyon and Murray’s names on the brief for *Reed v. Reed*, 404 U.S. 71 (1971), Justice Ginsburg said: “Both were then too old to be part of the fray, but people of my generation owed them a great debt, for they bravely pressed arguments for equal justice in days when few would give ear to what they were saying.” 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, *Constitutional Adjudication*]. The *Reed* brief is often called “the grandmother brief.”

33. Ginsburg Testimony, *supra* note 10, at 50.

10. *Small gestures can have a big impact.*

The Justice made a point of recognizing every major milestone in her clerks' lives. I treasure the t-shirts that she sent to mark the arrival of my children, emblazoned with the words "RBG grandclerk." She also went out of her way to lift others up. Hanging in my office is an autographed copy of a slip opinion she sent me in which she cited my scholarship.

She was also profoundly kind and caring. During an incredibly challenging time a few years after my clerkship, she reached out, having been through a similar experience herself. She told me that although I could not see it at the time, one day I would find many silver linings in the experience. Her words carried me through some very difficult months, and to this day, I carry them close to my heart.

I recall fondly another letter she once sent.

Hours after my interview during which the Justice offered me a position in her chambers, I called my grandparents to tell them that I would clerk for her, expecting an enthusiastic reception. All I heard on the other end of the line was silence. Then, a question. They did not know what it meant to be a law clerk. "Is that a *real* lawyer job?" They were concerned. Then, another question. "Who is Justice Ginsburg?"

My grandmother had asked the latter question. I explained to her what an important figure Justice Ginsburg was in American history and how she had done so much to open up opportunities for women in our country, paving the way for someone like me to go to Harvard Law School and clerk at the Supreme Court. In response, my grandmother said, "Well, then, she sounds like someone very special. I am very proud to know that you will work for her."

The next day, I wrote the Justice a letter thanking her for the opportunity to clerk for her and sharing the above story. She wrote me back a characteristically generous note, and also included a separate letter for my grandmother. It was a small gesture, but what an impact it had. My grandmother had it framed and then displayed her prized correspondence in a prominent place on her living room wall until the day she died.

11. *You can do it.*

After my first child was born, the Justice and I corresponded about my forthcoming return to work. I was nervous about how I would manage the now far more consequential task of balancing my professional and personal lives. Her response was as elegant as it was simple: "Where there's a will, there's a way!"

The Justice knew of what she spoke. Like all the women of her time, she had it far tougher than my generation. Through determination and ingenuity, she had forged ahead, bulldozing countless roadblocks thrown in her path along the way. (While on a year-to-year contract as an untenured professor, for example, she dressed in larger sized clothing to hide

her second pregnancy until the next year's contract was in hand.³⁴) She also talked many times about how she had found balance in her life as a mother. Going to law school with a toddler, she once told me, was actually something of an advantage:

Each part of my life was a respite from the other. After an intense day at the law school, I was glad to have the childcare hours. And then when Jane went to bed, I was ready to go back to the books. I think it was appreciation that there is more to life than law school that accounts for how well I did.³⁵

The lesson: Not only *can* you do it, but having a family can bring both great joy and balance to your life.

12. *Choose a partner who thinks your work is as important as theirs.*

A special perk of clerking for the Justice when her husband Marty was still alive was being able to observe firsthand their deep devotion to each other—seeing all that a marriage and partnership could be. As Marty beautifully described their union, “I have been supportive of my wife since the beginning of time, and she has been supportive of me. It’s not sacrifice. It’s family.”³⁶ Observing their grand love affair was a privilege. They were true partners in all that they did and no one was more proud of the Justice’s accomplishments than Marty. (Indeed, as is well known, Marty played an important role in promoting his wife as a Supreme Court candidate.³⁷) Marty also took great satisfaction in giving the boss a hard time. An example: Marty used to ring chambers and ask for “Her Highness.”

Marty also doted on his wife. The year during which I clerked for her was a challenging one for her as she fought colorectal cancer. As the family chef (and an extraordinary one at that), Marty worked hard to craft meals that she could tolerate to help keep her weight up. He also came regularly to chambers to usher her home when she worked late. On a later occasion, when my husband and I had them to dinner, Marty showed up with homemade baguettes under his arm (no bakery in town could make a decent

34. Ginsburg & Tyler, *supra* note 2, at 37.

35. *Id.* at 33.

36. Stephen Labaton, *The Man Behind the High Court Nominee*, N.Y. Times (June 17, 1993), <https://www.nytimes.com/1993/06/17/us/the-man-behind-the-high-court-nominee.html> (on file with the *Columbia Law Review*) (quoting Martin D. Ginsburg).

37. Ginsburg, *Advice*, *supra* note 25 (“I would say definitely and for the record, though Ruth Bader Ginsburg should have been picked for the Supreme Court anyway, she would not have been picked for the Supreme Court if her husband had not done everything he did to make it happen.” (internal quotation marks omitted) (quoting Ron Klain, then-associate White House counsel)).

baguette, he informed me)³⁸ and a flask of Campari in his jacket pocket so the Justice could have her signature drink, Campari and soda.³⁹

The Justice's affection for Marty in turn was always on display for those of us lucky enough to be around them together, and it remained so right up until the end of her life. This past summer, as we were reviewing edits to the introduction I had written for our book project, she did not think I had included enough discussion of Marty. I very happily added more.

When I interviewed the Justice at UC Berkeley in the fall of 2019, I asked if she had any advice for my students. Her response: "My number one advice is choose a partner in life who thinks that your work is as important as [theirs]. Marty was always my biggest booster. He also wanted to be an equal partner in parenting."⁴⁰ In this respect, her own life had taught her what she observed on another occasion: "[W]omen will have achieved true equality when men share with them the responsibility of bringing up the next generation."⁴¹ I would be hard pressed to put it better than an article in *Vogue* did last fall: "May every woman find her Marty Ginsburg."⁴²

13. *Strive to live a full and happy life, and make the most of every day.*

Beyond family, which was at the center of all that she did, the Justice also modeled for her law clerks the importance of having interests beyond the law. During my clerkship, she took her law clerks to the opera and a Gilbert and Sullivan performance. She also arranged a curated tour for us of a new exhibit at the National Gallery.

I recall fondly when she brought us to see *Tosca* in the middle of the day. Ever the teacher, she had told us the story of the opera the day before, and we watched her become animated in a way none of us had ever witnessed, describing and acting out the final dramatic scene in which

38. The Justice told me this past summer that Marty spent an entire year perfecting the recipe. For those more skilled than me in the art of baking, you can find his five-page, single-spaced recipe for "the perfect baguette" in Chef Supreme: Martin Ginsburg—Created by the Justices' Spouses In Memoriam 10–14 (Sup. Ct. Hist. Soc'y, 2011).

39. Because my tutelage with the Justice had taught me always to be prepared, I had purchased a bottle of Campari for the occasion, much to Marty's delight.

40. Ginsburg & Tyler, *supra* note 2, at 39.

41. A Conversation with Justice Ruth Bader Ginsburg, N.Y.C. Bar Ass'n: The Record, Winter 2001, at 9, 18, <https://www2.nycbar.org/Publications/record/winter01.1.pdf> [<https://perma.cc/4HKG-ZQJG>] [hereinafter Ginsburg, The Record]. This is why, as my fellow Ginsburg law clerk Professor Abbe Gluck once said, Stephen Wiesenfeld's case was so special to her. A father wanting to stay home and parent his son embodied her "vision of an ideal world . . . in which men and women are equal partners." Justice Ginsburg, MSNBC (Sept. 19, 2020), <https://www.msnbc.com/msnbc/watch/justice-ginsburg-92112965925> (on file with the *Columbia Law Review*) (documentary based largely on law clerk interviews and quoting Gluck).

42. Michelle Ruiz, May Every Woman Find Her Marty Ginsburg, *Vogue* (Sept. 21, 2020), <https://www.vogue.com/article/may-every-woman-find-her-marty-ginsburg-rgb> [<http://perma.cc/X8U8-AU52>].

Tosca crawls across the stage. I recall a subsequent outing with her to *The Barber of Seville*, when she invited me to sit in for Marty, who was traveling. She sat just slightly behind me, insisting that I have the front seat because it was my first time seeing this particular opera. During almost *every single song*, she gripped my shoulders like a vise (she was strong both literally and figuratively) and whispered in my ear, “*This is my favorite song!*” Oh, how she loved the opera.

More generally, Justice Ginsburg made the most of each and every day. As she explained to me in our 2019 conversation, she had learned a great deal from Marty’s serious bout with cancer while the two were in law school as well as from her own subsequent bouts with cancer. As she phrased it, “[I]f you have survived cancer, you have a zest for life that you didn’t have before, you count each day as a blessing.”⁴³

LESSONS FOR THIS MOMENT

One of the many things that has made the loss of Justice Ginsburg so devastating is that she is not here to help make sense of the challenging times in which we live. For those who care deeply about the issues that are central to Justice Ginsburg’s legacy, the road ahead seems uncertain. The Justice was ever hopeful about all that our country could be, and she labored tirelessly toward building that “more perfect Union” that the Constitution aspires to achieve. To that end, here are three additional lessons she taught me that are particularly timely at this moment in American history.

1. *The Constitution belongs to all of us.*

Justice Ginsburg’s greatest legacy is how her work helped ensure that everyone has, as she wrote for the Court in *VMI*, an “equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities.”⁴⁴ This ideal animated everything that she did.

The Justice appreciated that to achieve this end would require more than court opinions. “[T]he Justices,” she said at her confirmation hearings, “do not guard constitutional rights alone. Courts share that profound responsibility with Congress, the President, the States, and the people.”⁴⁵ She continued: “Constant realization of a more perfect Union, the Constitution’s aspiration, requires the widest, broadest, deepest participation on matters of government and government policy.”⁴⁶ It is not enough, in other words, for each of us to look to the courts or even other

43. Ginsburg & Tyler, *supra* note 2, at 35.

44. *United States v. Virginia*, 518 U.S. 515, 532 (1996).

45. Ginsburg Testimony, *supra* note 10, at 50.

46. *Id.*

government leaders to “guard constitutional rights.”⁴⁷ Every single one of us has a responsibility to do our part to advance the values at the core of our national compact and work to build “a more perfect Union.”

2. *Courts are not always the answer.*

It follows from the above that the Justice did not believe that looking to the courts was the only way—or even always the best way—to achieve meaningful, progressive change. To be sure, as the Justice once put it, “Litigation pursued by lawyers in the public interest ha[s] helped to make it ever more possible for our daughters, as well as our sons, to aspire and achieve according to their individual talent and capacities.”⁴⁸ But part of the strategy she employed as an advocate involved seeking change in the political arena. In fact, as she told me when I interviewed her in 2019 about her litigating career, legislation was the preferred course for securing change.

Take the first gender discrimination case that she and Marty litigated together before she co-founded the ACLU Women’s Rights Project (WRP), *Moritz v. Commissioner of Internal Revenue*.⁴⁹ The case involved Charles Moritz, a never-married man who cared for his mother and was denied a caregiver tax deduction that a woman in his position would have received. Together, the Ginsburgs won his appeal before the United States Court of Appeals for the Tenth Circuit.⁵⁰ Before the Supreme Court had resolved whether to review the lower court’s decision, Congress amended the relevant law to permit all caregivers to claim the deduction going forward. The government nevertheless urged the Court to review Mr. Moritz’s case, fearing the precedential impact of the Tenth Circuit’s holding. In so doing, the Solicitor General appended to the government’s brief to the Court a list of every provision in the United States Code that differentiated on the basis of sex. As Justice Ginsburg described the list, “[T]here it was, right in front of us, all the laws that needed to be changed or eliminated, *through legislative amendment preferably*, if not, through litigation. It was our road map, a pearl beyond price, that list of federal statutes differentiating on the basis of gender.”⁵¹

47. As Justice Ginsburg said on another occasion, “Effective participation by [diverse participants] in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.” Ginsburg, Sciences Po Keynote, *supra* note 29 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 332 (2003) (O’Connor, J.)) (as modified by Ginsburg). She continued: “We will all profit from a more diverse, inclusive society, understanding, accommodating, even celebrating our differences, while pulling together for the common good.” *Id.*

48. Ginsburg, *Constitutional Adjudication*, *supra* note 32, at 271.

49. 469 F.2d 466 (10th Cir. 1972), cert. denied, 412 U.S. 906 (1973).

50. Their brief in the case is published in Ginsburg & Tyler, *supra* note 2, at 55–75. Justice Ginsburg called this brief “the grandparent brief.”

51. Ginsburg & Tyler, *supra* note 2, at 40–41 (emphasis added).

And so, the WRP set to work. On one trajectory, the WRP launched numerous lawsuits, culminating with several pathmarking victories in the Supreme Court. But that was not all they did. As Justice Ginsburg's colleague from that time, Brenda Feigen, remembers things, they went "on to weaponize that list a few years later when [they] presented to the U.S. Commission on Civil Rights a report on statutes that would need to change to eliminate sex discrimination in our federal code."⁵² Those changes were extensive—far beyond what a single lawsuit could accomplish.

The WRP also turned to the legislative arena at times when the courts were not amenable to the arguments they were advancing. Consider the following example. In 1974, the Supreme Court held in *Geduldig v. Aiello* that California's Unemployment Insurance Code, which denied benefits to pregnancy-related disabilities, did not violate the Equal Protection Clause.⁵³ Two years later, in *General Electric Co. v. Gilbert*, the Court next held that a disability benefit plan's exclusion of disabilities related to pregnancy did not constitute sex discrimination within the meaning of Title VII of the Civil Rights Act.⁵⁴ In response, Justice Ginsburg and the ACLU turned their attention to securing legislative change. In 1977, Ginsburg and WRP attorney Susan Deller Ross co-authored an op-ed in the *New York Times* responding to *Gilbert*, criticizing the decision for "leav[ing] a gaping hole in the protection guaranteed women" and ignoring that "discrimination against the pregnant worker is the essence of sex discrimination."⁵⁵ After all, they asked, "[i]f it is not sex discrimination to exclude pregnant women from standard fringe-benefit programs, is it sex discrimination to fire pregnant women, refuse to hire them, force them to take long, unpaid leaves, or strip them of seniority rights when they return to work?"⁵⁶ Foreshadowing a line that would run three decades later at the end of Justice Ginsburg's *tour de force* dissent in Lilly Ledbetter's Title VII case,⁵⁷ the op-ed concluded with this observation:

52. Brenda Feigen, Tribute to Justice Ruth Bader Ginsburg, 134 Harv. L. Rev. 882, 883 (2021) (citing U.S. Comm'n on C.R., Sex Bias in the U.S. Code (1977)).

53. 417 U.S. 484 (1974), superseded by statute, Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified as amended at 42 U.S.C. § 2000e et seq.), as recognized in *Newport News Shipbuilding & Dry Dock Co. v. Equal Emp. Opportunity Comm'n*, 462 U.S. 669 (1983).

54. 429 U.S. 125 (1976), superseded by statute, Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified as amended at 42 U.S.C. § 2000e et seq.), as recognized in *Newport News Shipbuilding & Dry Dock Co. v. Equal Emp. Opportunity Comm'n*, 462 U.S. 669 (1983).

55. See Ruth Bader Ginsburg & Susan Deller Ross, Pregnancy and Discrimination, N.Y. Times (Jan. 25, 1977), <https://www.nytimes.com/1977/01/25/archives/pregnancy-and-discrimination.html> (on file with the *Columbia Law Review*).

56. Ginsburg & Ross, *supra* note 55.

57. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 661 (2007) (Ginsburg, J., dissenting) ("Once again, the ball is in Congress' court. As [before], the Legislature may act to correct this Court's parsimonious reading of Title VII."). Congress responded by embracing Justice Ginsburg's understanding of pay discrimination and amending Title VII accordingly in the Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5

On the issue of statutory construction involved in the Supreme Court's Dec. 7 decision, the high court is not the final arbiter. Legislative overruling is available when the Court misconceives Congressional purpose. The response of the new Congress and Administration will provide an early measure of the nation's current commitment to achievement of genuinely, equal opportunity for women.⁵⁸

Congress heeded the message and, after hearing testimony from Ross⁵⁹ and reviewing findings from a 1973 WRP report,⁶⁰ it passed the Pregnancy Discrimination Act in 1978 and amended Title VII to make clear that pregnancy-based discrimination constitutes gender discrimination.⁶¹

Another example is the WRP's work in support of the passage of Title IX. The ACLU's involvement in promoting Title IX actually predated that of the WRP. ACLU National Board member Pauli Murray testified in 1970 in favor of ensuring that gender equality be taken into account in higher education funding.⁶² In 1972, Ginsburg and Feigen joined the campaign for Title IX,⁶³ witnessing its passage later that year.⁶⁴ The WRP also actively participated in the process leading up to adoption of Title IX's implementing regulations,⁶⁵ and drafted an influential report on gender discrimination in athletics, among other areas.⁶⁶ Could the same objectives have been achieved through litigation in the 1970s? It is hardly clear. But by pursuing the legislative route, Title IX proponents secured broad and lasting

(codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.), which President Obama signed in one of his first acts upon taking office.

58. See Ginsburg & Ross, *supra* note 55.

59. *Discrimination on the Basis of Pregnancy, 1977: Hearings Before the Subcomm. on Lab. of the S. Comm. on Hum. Res., 95th Cong.* 149–60 (1977) (statement of Susan Deller Ross on behalf of the Campaign to End Discrimination Against Pregnant Workers).

60. See *id.* at 180, 185 (statement of New York State Sen. Carol Bellamy); Trudy Hayden, ACLU Women's Rights Project, *Punishing Pregnancy: Discrimination in Education, Employment and Credit* (1973); *The ACLU and Women's Rights: Proud History, Continuing Struggle*, ACLU, <https://www.aclu.org/other/aclu-and-womens-rights-proud-history-continuing-struggle> [<https://perma.cc/7B3T-REQY>] (last visited Mar. 1, 2021).

61. Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e et seq.).

62. See *Discrimination Against Women: Hearings Before the Spec. Subcomm. on Educ. of the H. Comm. on Educ. & Lab., 91st Cong.* 328, 338–39 (1970) (statement of Dr. Pauli Murray, Professor of American Studies, Brandeis University).

63. See Brenda Feigen, *Not One of the Boys: Living Life as a Feminist* 74–75 (2000).

64. Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 373 (codified as amended at 20 U.S.C. § 1681 et seq.).

65. See Note, *Sex Discrimination and Intercollegiate Athletics: Putting Some Muscle on Title IX*, 88 *Yale L.J.* 1254, 1270 (1979).

66. See *Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Educ. of the H. Comm. on Educ. & Lab., 94th Cong.* 384 (1975) (statement of Dr. Bernice Sandler, Director, Project of the Status and Education of Women, and Executive Associate, Association of American Colleges, Washington, D.C.) (relying on ACLU Women's Rights Project, *Sex Discrimination in Athletics and Physical Education* (1975)).

changes promoting gender equality, changes from which multiple generations have now benefited.

In reflecting back on her time as an advocate, Justice Ginsburg celebrated how the courts “effectively carried on in the gender discrimination cases a dialogue with the political branches of government . . . , forcing legislative and executive branch re-examination of sex-based classifications [and] ensur[ing] that laws and regulations would ‘catch up with a changed world.’”⁶⁷ My guess is she would have preferred that *VMI* had never come before the Court and instead been legislatively mooted years earlier.

All this being said, Justice Ginsburg also recognized that the legislative arena was not always a panacea. In the 1970s, she sometimes complained that “legislative inertia” hobbled the movement for gender equality.⁶⁸ Thus, in addition to pursuing litigation challenging specific discriminatory laws and practices, the WRP also promoted ratification of the Equal Rights Amendment (ERA). As the Justice’s longtime friend and co-author Herma Hill Kay once observed, the Justice’s goal was “to put women into the United States Constitution . . . ‘to help place women’s rights permanently on the human rights agenda.’”⁶⁹ In support of the ERA, Justice Ginsburg published several articles⁷⁰ and testified before Congress.⁷¹ In recent years, she spoke publicly of her continuing support for the ERA.⁷² As she told me not long ago, she longed to open a Constitution to see express recognition of the equality of the genders among its core principles.⁷³

67. Ginsburg, *Constitutional Adjudication*, supra note 32, at 270 (quoting Wendy W. Williams, *Sex Discrimination: Closing the Law’s Gender Gap*, in *The Burger Years: Rights and Wrongs in the Supreme Court 1969–1986*, at 109, 123 (Herman Schwartz ed., 1987)).

68. Ruth Bader Ginsburg, *Gender in the Supreme Court: The 1973 and 1974 Terms*, 1975 *Sup. Ct. Rev.* 1, 23–24.

69. Herma Hill Kay, *Ruth Bader Ginsburg*, Professor of Law, 104 *Colum. L. Rev.* 2, 16 (2004) (quoting Ruth Bader Ginsburg, *Remarks for the Celebration of 75 Years of Women’s Enrollment at Columbia Law School*, 102 *Colum. L. Rev.* 1441, 1441 (2002)).

70. See Ruth Bader Ginsburg, *The Equal Rights Amendment Is the Way*, 1 *Harv. Women’s L.J.* 19, 21 (1978); Ruth Bader Ginsburg, *The Need for the Equal Rights Amendment*, 59 *A.B.A. J.* 1013 (1973); Ruth Bader Ginsburg, *Sex Equality and the Constitution*, 52 *Tul. L. Rev.* 451 (1978).

71. See *Equal Rights Amendment Extension: Hearings Before the Subcomm. on the Const. of the S. Comm. on the Judiciary, 95th Cong.* 262 (1979).

72. Ginsburg & Tyler, supra note 2, at 10.

73. Justice Ginsburg elaborated on this point in a 2001 interview:

[T]o think that the U.S. Constitution doesn’t make that basic statement, when almost every post-Second World War constitution does, says something about our society. U.S. children studying the Constitution in their civics class won’t see that basic statement. Children elsewhere will. It is a basic statement for the century just beginning. It is certainly a fundamental human right that men and women should have the chance to pursue whatever is their God-given talent, and not be held back simply because they’re male or female. The Equal Rights Amendment is an expression of that idea, and I think for that reason it belongs in the Constitution.

Justice Ginsburg's work with the WRP underscores the importance of looking beyond simply the judicial arena to advance a cause. This lesson is always timely, but perhaps never more so than now, given that for those who care about the issues about which Justice Ginsburg was passionate, the judicial landscape is not especially encouraging at present.

3. *Stay the course.*

Justice Ginsburg never gave up fighting for the vision she had for our country, even when she was on the losing end for a time. One story, far too little known, embodies this lesson and reveals how, in time, staying the course can lead to victory.

In a case that came before the Supreme Court in 1977 called *Vorcheimer v. School District of Philadelphia*, the Supreme Court took up a challenge to Philadelphia's separate high schools for high-achieving boys and girls. The suit had been brought by a girl, on behalf of a class, seeking admission to the boys' school and its vastly superior resources and facilities. The parallels to *VMI* are striking, insofar as in the latter case, in order to avoid admitting female cadets, the Commonwealth of Virginia had proposed creation of what was unquestionably going to be an inferior school for female cadets to stave off their admission to the Virginia Military Institute.

In *Vorcheimer*, a divided panel of the Third Circuit had upheld the existence of separate high schools, reversing the district court.⁷⁴ At the Supreme Court, Ginsburg was the main author of the petitioner's opening brief seeking reversal. But when a difference of opinion developed between the ACLU team's approach to the case and that of original local counsel, the latter decided to go it alone and filed a reply without Ginsburg's input. Local counsel then argued the case herself.

The result was a 4-4 tie vote in the Court, which left the lower court decision to stand.⁷⁵ One is left to wonder, what if Justice Ginsburg had taken the lead on drafting the reply brief and then argued the case on the heels of her earlier victories before the Court in gender discrimination cases? There is good reason to think that the outcome may have been otherwise, based on her different approach to the case and what we know of the Court's internal deliberations.⁷⁶ But it was not meant to be.

Nonetheless, although it took some twenty years, the Justice played a principal role in seeing to it that *Vorcheimer* is no longer good law. As she

Ginsburg, *The Record*, supra note 41, at 19.

74. *Vorchheimer v. Sch. Dist. of Phila.*, 532 F.2d 880, 888 (3d Cir. 1975), aff'd by an equally divided Court, 430 U.S. 703 (1977).

75. See *id.* Then-Justice Rehnquist did not participate in the case because of a back injury sustained that year.

76. For a detailed explication of what happened, see Serena Mayeri, *The Strange Career of Jane Crow: Sex Segregation and the Transformation of Anti-Discrimination Discourse*, 18 *Yale J.L. & Humans.* 187, 256-64 (2006).

wrote for the Court in *VMI*, a state may no longer field separate educational opportunities to the genders that are in no way equal. This is because, at long last, Justice Ginsburg could write for the Court that “generalizations about ‘the way women are,’ estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description.”⁷⁷ It did not happen overnight, but because Justice Ginsburg stayed the course, her words now constitute the law of the land.⁷⁸ The lesson for today: Achieving one’s objectives may take a long campaign, but a commitment to see the task through to completion—no matter how long it takes—can eventually yield great and meaningful change.

CONCLUSION

The loss of Justice Ginsburg remains devastating. I loved her, as I know all of her clerks did. It is unfathomable to think of the world without her in it. It is my hope that her legacy will continue to inspire generations to come to take up where she left off in working to make ours a “more perfect Union.”

In that vein, I hope that the optimism that kept her going day after day will also serve as an inspiration. As she said in 2019, reflecting back on all she had witnessed in her own lifetime:

What keeps me optimistic . . . is the changes that I have seen. I mean, even think of race discrimination. World War II we were fighting a war against the most odious race discrimination. And yet, our own troops until the very end of the war were rigidly separated by race. I think World War II is what hastened the decision in *Brown v. Board of Education*. So I have seen enormous changes and that’s what makes me optimistic for the future.⁷⁹

77. *United States v. Virginia*, 518 U.S. 515, 517 (1996).

78. Some years ago, she spoke of how she confronted losses on the Court: I’m dejected, but only momentarily, when I can’t get the fifth vote for something I think is very important. But then you go on to the next challenge and you give it your all. You know that these important issues are not going to go away. They are going to come back again and again. There’ll be another time, another day.

Ginsburg, *The Record*, *supra* note 41, at 20.

79. Big Brains Podcast, Supreme Court Justice Ruth Bader Ginsburg on Polarization, Discrimination and Her Favorite Dissent, Univ. of Chi. News (Sept. 9, 2019), <https://news.uchicago.edu/podcasts/big-brains/supreme-court-justice-ruth-bader-ginsburg-polarization-discrimination> [<https://perma.cc/FJ8D-L9HN>].

