

## FOREWORD

### Spring 2022 Symposium: The Legacy of Justice Ruth Bader Ginsburg

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Justice Ruth Bader Ginsburg was a significant figure in the law. She was a brilliant law professor, litigator, judge, and Justice. This symposium in *The George Washington Law Review* examines her legacy. In my role as faculty adviser to the *Law Review*, I proposed this conference and asked my colleague and former Ginsburg clerk, Paul Berman, to help organize it. We recruited an impressive group of judges and scholars—all of whom clerked for Justice Ginsburg—to discuss various aspects of her legacy. Justice Stephen Breyer opened the conference with his recollections of Justice Ginsburg and then answered some questions from Laura A. Dickinson<sup>1</sup> about what it was like to serve with Justice Ginsburg on the Supreme Court.<sup>2</sup> Next, I interviewed California Supreme Court Justice Goodwin Liu<sup>3</sup> and Ninth Circuit Judges John B. Owens<sup>4</sup> and Paul J. Watford<sup>5</sup> to learn

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<sup>2</sup> The Honorable Stephen G. Breyer & Laura A. Dickinson, *A Conversation Regarding the Legacy of Justice Ruth Bader Ginsburg*, 90 Geo. Wash. L. Rev. 1405 (2022).

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how Justice Ginsburg influenced their careers and their work on the bench.<sup>6</sup> Finally, Professors Rachel Bayefsky,<sup>7</sup> Paul Schiff Berman,<sup>8</sup> Abbe R. Gluck,<sup>9</sup> Aziz Z. Huq,<sup>10</sup> Anne Joseph O'Connell,<sup>11</sup> Daphna Renan,<sup>12</sup> and Amanda L. Tyler<sup>13</sup> analyzed various aspects of the Justice's jurisprudence. My colleagues Laura Dickinson and Maeva Marcus<sup>14</sup> moderated the academic panels and shared some of their personal recollections of the Justice.

In this brief Foreword, I want to highlight two aspects of Justice Ginsburg's legacy that should not go unnoticed on this occasion. First, as evidenced by the extraordinary participants in this symposium, an important part of the Justice's legacy is the distinguished group of law clerks she hired and trained during her four decades on the bench. Justice Ginsburg was known for her precision and attention to detail, and she held her law clerks to the same high standards.<sup>15</sup> I have no doubt that she imparted her habits of mind to all those who had the privilege to clerk for her. Many of her law clerks followed in her professional footsteps. As noted, three of the participants in this symposium are appellate judges. At least two more of her clerks have been appointed to the bench: Benjamin Beaton<sup>16</sup> and Toby Heytens.<sup>17</sup> Many of her clerks have served in government, including Elizabeth Prelogar, the current Solicitor General of the United States.<sup>18</sup> In addi-

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6 The Honorable Goodwin H. Liu, The Honorable John B. Owens, The Honorable Paul J. Watford & Bradford R. Clark, *Reflections on the Legacy of Justice Ruth Bader Ginsburg*, 90 Geo. Wash. L. Rev. 1409 (2022).

7 Associate Professor of Law, University of Virginia School of Law.

8 Walter S. Cox Professor of Law, The George Washington University Law School.

9 Alfred M. Rankin Professor of Law and Faculty Director of the Solomon Center for Health Law and Policy, Yale Law School; and Professor of Internal Medicine (General Medicine), Yale Medical School.

10 Frank and Bernice J. Greenberg Professor of Law, University of Chicago Law School.

11 Adelbert H. Sweet Professor of Law, Stanford Law School.

12 Peter B. Munroe and Mary J. Munroe Professor of Law, Harvard Law School.

13 Shannon Cecil Turner Professor of Law, University of California, Berkeley School of Law.

14 Director of the Institute for Constitutional Studies and Research Professor of Law, The George Washington University Law School.

15 Amanda L. Tyler, *Lessons Learned from Justice Ruth Bader Ginsburg*, 121 COLUM. L. REV. 741, 745 (2021).

16 Judge Beaton was appointed by President Trump to the United States District Court for the Western District of Kentucky. See *District Judge Benjamin Beaton*, U.S. COURTS, <https://www.kywd.uscourts.gov/content/district-judge-benjamin-beaton> [<https://perma.cc/Z3K6-XCW7>].

17 Judge Heytens was appointed by President Biden to the United States Court of Appeals for the Fourth Circuit. See *Judge Toby J. Heytens*, U.S. COURTS, <https://www.ca4.uscourts.gov/judges/judges-of-the-court/judge-toby-j-heyten> [<https://perma.cc/5CMC-4VJ8>].

18 See *Meet the Solicitor General*, U.S. DEP'T JUST. (Apr. 13, 2022), <https://www.justice.gov/osg/staff-profile/meet-solicitor-general> [<https://perma.cc/8M9B-BSRJ>].

tion, a significant number of her clerks became law professors, including all seven academic contributors to this symposium. Several others have served as law school deans and university administrators.<sup>19</sup> Many have practiced law of various kinds across the nation. Thus, even before one considers Justice Ginsburg's jurisprudence, it is no exaggeration to say that she had a profound impact on the law solely by virtue of the law clerks she hired, trained, and mentored.

Second, Justice Ginsburg set an important example—through both words and deeds—that people with differing political viewpoints and legal philosophies can listen respectfully to counterarguments, learn from one another, and even form deep and lasting friendships. Of course, this example was nowhere more evident than in her notorious friendship with Justice Antonin Scalia. I clerked for Justice Scalia and witnessed their enduring relationship over many years. They first got to know one another when they were on the D.C. Circuit together, and their friendship only deepened during their time on the Supreme Court. During a joint appearance with Justice Ginsburg in 2015,<sup>20</sup> Justice Scalia quipped when asked why he was so fond of her: “Call us the odd couple[.] . . . She likes opera, and she's a very nice person. What's not to like? Except her views on the law.”<sup>21</sup> Following Justice Scalia's death in 2016, Justice Ginsburg wrote: “From our years together at the D.C. Circuit, we were best buddies. . . . It was my great good fortune to have known him as a working colleague and treasured friend.”<sup>22</sup> Indeed, they liked each other so much that they often traveled and made public appearances together.<sup>23</sup> Less well known to the public was that they and their spouses regularly celebrated New Year's Eve together.<sup>24</sup>

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19 These include Paul Schiff Berman (former Dean of Arizona State University, Sandra Day O'Connor College of Law and The George Washington University Law School), M. Elizabeth Magill (current President of the University of Pennsylvania, former Dean of Stanford Law School, and former Provost of the University of Virginia), Trevor W. Morrison (former Dean of NYU Law School), and David Schizer (former Dean of Columbia Law School).

20 Julyssa Lopez, *Justices Ginsburg and Scalia: An Unlikely Bond*, GW TODAY (Feb. 13, 2015), <https://gwtoday.gwu.edu/justices-ginsburg-and-scalia-unlikely-bond-0> [<https://perma.cc/SM7Y-3JAA>].

21 David G. Savage, *From the Archives: BFFs Ruth Bader Ginsburg and Antonin Scalia Agree to Disagree*, L.A. TIMES (June 22, 2015), <https://www.latimes.com/local/lanow/la-na-court-odd-couple-20150622-story.html> [<https://perma.cc/NCA2-4477>].

22 Statement of Justice Ruth Bader Ginsburg, *Statements from the Supreme Court Regarding the Death of Justice Antonin Scalia*, SUP. CT. U.S. (Feb. 14, 2016), [https://www.supremecourt.gov/publicinfo/press/pr\\_02-14-16.pdf](https://www.supremecourt.gov/publicinfo/press/pr_02-14-16.pdf) [<https://perma.cc/6DY8-CDZQ>].

23 See Savage, *supra* note 21.

24 Debra Cassens Weiss, *Ginsburg and Scalia Celebrate New Year Together, Despite Differences*, ABA JOURNAL (Jan. 2, 2008, 12:36 PM), <https://www.abajournal.com/news/article/ginsburg-and-scalia-celebrate-new-year-together-despite-differences>.

When Justice Ginsburg was appointed to the Supreme Court in 1993, Justice Scalia had already become a leading conservative voice on the Court.<sup>25</sup> Justice Ginsburg, of course, quickly became a leading liberal voice.<sup>26</sup> Thus, in many important cases, they disagreed—even sharply.<sup>27</sup> But the two jurists did not let these disagreements affect their friendship. Indeed, they saw such disagreements as an opportunity to learn from one another. Both recognized that their exchange of ideas would make their opinions stronger. As Justice Ginsburg explained: “We disagreed now and then, but when I wrote for the Court and received a Scalia dissent, the opinion ultimately released was notably better than my initial circulation.”<sup>28</sup> Likewise, Justice Scalia described their working relationship as “a mutual improvement society.”<sup>29</sup> According to Scalia’s son Chris, Justice Ginsburg “wouldn’t just correct his typos or change punctuation—she helped him strengthen his arguments.”<sup>30</sup> Both Justices sought to produce the most persuasive opinions possible and were happy to challenge and assist one another in this endeavor.

I personally witnessed then-Judge Ginsburg’s openness to constructive criticism when I clerked for Judge Robert Bork on the D.C. Circuit.<sup>31</sup> The two judges were good friends and were assigned to hear

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burg\_and\_scalia\_celebrate\_new\_year\_together\_despite\_differences [https://perma.cc/CTN3-ZABS].

<sup>25</sup> Matt Ford, *The Remarkable Life of Antonin Scalia*, ATLANTIC (Feb. 14, 2016), <https://www.theatlantic.com/politics/archive/2016/02/antonin-scalia-death-legacy/462753/> [https://perma.cc/Q8J3-YGCN].

<sup>26</sup> Lawrence Hurley, *U.S. Supreme Court’s Ginsburg, a Liberal Dynamo, Championed Women’s Rights*, REUTERS (Sept. 18, 2020), <https://www.reuters.com/article/us-usa-court-ginsburg-obituary/u-s-supreme-courts-ginsburg-a-liberal-dynamo-championed-womens-rights-idUSKBN26A003> [https://perma.cc/GDN9-R5TL].

<sup>27</sup> See, e.g., *United States v. Virginia*, 518 U.S. 515, 519 (1996) (Justice Ginsburg writing for the Court and ruling that the Virginia Military Institute’s male-only admissions policy violates the Equal Protection Clause); *id.* at 566 (Scalia, J., dissenting) (“To achieve [its] desired result, [the Court] rejects (contrary to our established practice) the factual findings of two courts below, sweeps aside the precedents of this Court, and ignores the history of our people.”).

<sup>28</sup> Statement of Justice Ruth Bader Ginsburg, *supra* note 22.

<sup>29</sup> Christopher J. Scalia, *Christopher J. Scalia: My Father’s Relationship with Justice Ginsburg – ‘Best of Friends,’* FOX NEWS (Sept. 21, 2020, 6:00 AM), <https://www.foxnews.com/opinion/ruth-ginsburg-antonin-scalia-relationship-friends-christopher-scalia> [https://perma.cc/TK5C-UTG3].

<sup>30</sup> *Id.*

<sup>31</sup> Judge Ginsburg’s chambers were right next to Judge Bork’s, so I saw her from time to time. Because she was somewhat reserved, I was surprised when she stopped me in the hallway one day, addressed me by name, and asked about my experiences at Columbia Law School. She shared some recollections about her time there as both a student and a professor and was particularly interested in hearing about my favorite courses and teachers. Being a professor in D.C., I also had the good fortune to interact with her on various occasions over the ensuing years.

an appeal involving alleged police misconduct in the District of Columbia.<sup>32</sup> As the senior judge, Judge Ginsburg assigned the opinion to herself and circulated an initial draft to the panel. Judge Bork agreed with most of her analysis but sent her a substantive memorandum explaining his points of disagreement and suggesting ways to strengthen the opinion. Then-Judge Ginsburg not only incorporated all of his suggestions, but also insisted on issuing the revised version as the joint opinion of “Circuit Judges GINSBURG and BORK.”<sup>33</sup> I believe that this is the only joint majority opinion Justice Ginsburg ever issued during her time on the bench. This episode illustrates an important point about the Justice. She welcomed constructive criticism from her colleagues, even—and perhaps especially—from those who disagreed with her judicial philosophy. She received such criticism with an open mind and was willing to reconsider and revise her opinions when persuaded.

The example set by Justice Ginsburg is more important now than ever. In recent years, our academic institutions, our politicians, and our citizens have become increasingly intolerant of opposing viewpoints. On both the left and the right, those who disagree with others often seek to demonize or silence their opponents rather than engage in reasoned discourse and debate.<sup>34</sup> At many universities, students have attempted to prevent unpopular speakers from even appearing—let alone speaking—on campus.<sup>35</sup> Their tactics range from shouting down speakers during their remarks to disrupting events by yelling, banging on desks, and even pounding on the walls from outside.<sup>36</sup>

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<sup>32</sup> See *Carter v. District of Columbia*, 795 F.2d 116 (D.C. Cir. 1986).

<sup>33</sup> *Id.* at 118.

<sup>34</sup> See Teresa Bejan, *You Don't Have to be Nice to Political Opponents. But You Do Have to Talk to Them.*, WASH. POST (Mar. 8, 2017, 12:27 PM), <https://www.washingtonpost.com/post/everything/wp/2017/03/08/you-dont-have-to-be-nice-to-political-opponents-but-you-do-have-to-talk-to-them/> [<https://perma.cc/9UWH-XJ88>].

<sup>35</sup> See, e.g., Yaron Steinbuch, *Yale Law Students Disrupt Bipartisan Free Speech Panel, Trigger Police Escort*, N.Y. POST (Mar. 17, 2022 8:07 AM) <https://nypost.com/2022/03/17/yale-law-students-disrupt-bipartisan-free-speech-panel/> [<https://perma.cc/4PK9-SJ6J>]; see also Josh Moody, *Law Students Shout Down Controversial Speakers*, INSIDE HIGHER ED (Mar. 23, 2022), <https://www.insidehighered.com/news/2022/03/23/law-student-protests-stifle-speakers-yale-uc-hastings> [<https://perma.cc/65MS-9GR3>] (describing recent incidents at both Yale Law School and UC Hastings College of the Law).

<sup>36</sup> See Moody, *supra* note 35. A few months after these events, Dean Heather Gerken released “A Message to Our Alumni on Free Speech at Yale Law School,” reaffirming the school’s “enduring commitment to the free and unfettered exchange of ideas.” See *A Message to Our Alumni on Free Speech at Yale Law School*, YALE L. SCH. (Oct. 12, 2022), <https://law.yale.edu/yls-today/news/message-our-alumni-free-speech-yale-law-school> [<https://perma.cc/SMK3-3BDE>].

Shutting down free and open debate on controversial topics undermines free speech<sup>37</sup> and is corrosive to democracy.<sup>38</sup>

Student intolerance of opposing viewpoints is especially concerning in the nation's law schools. The United States has an adversary system premised on the idea that the fair and accurate resolution of disputes requires that both parties have a full and fair opportunity to present their best arguments and respond to those of their opponent. The parties do not have the option of simply preventing the other side from speaking—no matter how offensive they find their opponent's position to be. Legal education is meant to prepare students to function effectively within this system. An essential legal skill is the ability to listen carefully to opposing arguments and formulate effective counterarguments. Allowing law students to censor or shout down disfavored speakers leaves students ill prepared to practice law in the real world.

Justice Ginsburg showed us a better way. Throughout her career as a lawyer, law professor, judge, and Justice, she fought tirelessly for her beliefs. At the same time, she always respected—and even welcomed—opposing views. Even when such views did not persuade her, she recognized that they could strengthen her arguments and that all sides are entitled to be heard in a free society. In short, she believed—as Judge Bork and Justice Scalia did—that the power of one's ideas is the best way to change minds and gain adherents. She also demonstrated that if we look past our differences, we often have more in common than we think. As we honor Justice Ginsburg's legacy, we should remember her lifelong commitment to free, open, and civil discourse on matters of public policy and strive to emulate her approach.

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<sup>37</sup> Erwin Chemerinsky & Howard Gillman, Opinion, *Free Speech Doesn't Mean Hecklers Get to Shut Down Campus Debate*, WASH. POST (Mar. 24, 2022, 5:53 PM), <https://www.washingtonpost.com/opinions/2022/03/24/free-speech-doesnt-mean-hecklers-get-shut-down-campus-debate/> [https://perma.cc/T7KJ-GXQQ].

<sup>38</sup> Editorial, *America Has a Free Speech Problem*, N.Y. TIMES (Mar. 18, 2022), <https://www.nytimes.com/2022/03/18/opinion/cancel-culture-free-speech-poll.html> [https://perma.cc/4ZWA-NJNK].