



## No Ordinary Times

What Thurgood Marshall did for racial justice, Ruth Bader Ginsburg has done for women's rights. In the 1970s, as a lawyer with the American Civil Liberties Union, she argued six landmark cases on gender equality before the United States Supreme Court. Then, after being nominated by President Bill Clinton, she herself joined the high court as an associate justice in 1993. In September, Justice Ginsburg spoke with Joan C. Williams, a distinguished professor of law at UC Hastings in San Francisco, before a live audience.



▶ For the full interview video, go to [callawyer.com](http://callawyer.com).

Legally Speaking is a series of in-depth interviews with prominent lawyers, judges, and academics, coproduced by *California Lawyer* and UC Hastings College of the Law.

**Q. Williams: I'd like you to talk a little bit about the cases that I've spent my life studying, the key gender cases that began in the 1970s, which you litigated and wrote amici briefs for. The 14th Amendment, which guarantees equal protection under the law, had been settled interpretation for, I think, 104 years. What made you think that you could get the courts to overrule more than a century of precedent?**

The times. The Court is a reactive institution. It's never in the forefront of social change. When you think of *Brown v. Board of Education*, it was not only that Thurgood Marshall was a brilliant lawyer. It was the tenor of the times. We had just fought a war against an odious form of racism, and yet our troops through most of World War II were separated by race. Apartheid in America really had to go. Similarly, by 1970 the women's movement was revived, not just in the United States but all over the world. As a great legal scholar once said, the Court should never react to the weather of the day, but inevitably it will react to the climate of the era, and the climate was right for that change.

**Those cases, which are in the casebooks now, are commonly referred to as the formal equalities cases. For the record, was your only goal formal equality?**

One has to begin at the beginning, and what we faced were statute books, state and federal, that were riddled with classifications based on sex. What we wanted was to open all doors for men and for women so that nobody would be blocked from an opportunity or pursuit of a particular course in life because he was male or she was female. That was the mission. But what we encountered when we approached the courts was that many people thought that gender discrimination operated benignly in women's favor; that when women were told they couldn't work at night or overtime because their hours were limited to eight, that all those protections sheltered women. It was hard for them to see that those so-called protections really operated, as Justice Brennan said in the *Frontiero* case, to put women not on a pedestal but in a cage.

**As I look back on those cases, though, it seems to me that a central theme running through them was to deconstruct the gender system that associates men with work and women with family. I wonder what you think of that.**

I think that's exactly right. In fact, I've said quite often that if I were to invent an affirmative action plan, it would be to give men every incentive to be close to children. We would have a health-

ier world, I think, if men shared women's responsibility for bringing up the next generation.

**You've said that if your confirmation hearing had been held today, you would have never been confirmed to the Supreme Court because of your activism with the ACLU. What do you think has changed? Do you think it's the confirmation process, or the politics more broadly, or something else?**

In 1993 when I was nominated, and again in 1994 when Justice Breyer was nominated, there was a true bipartisan spirit prevailing in the Congress. The ranking Republican member of the Senate Judiciary Committee back then was Orrin Hatch, and you can read Orrin Hatch's autobiography where he describes with great pride how before the president nominated me and before he nominated Justice Breyer he called Senator Hatch and said, "Orrin, I am thinking of nominating Ginsburg or Breyer. Would that be OK with you?" That doesn't happen anymore. I should say, by the way, that the White House people were quite worried about my ACLU affiliation. But at the hearing not a single question was asked by any senator, Republican or Democrat, about the work I had done with the ACLU.

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That would not happen today.

**If you could accomplish one thing before leaving the bench—and assuming that all of your colleagues would magically agree—what would it be?**

Well, I'd probably go back to the day when the Supreme Court had said that the death penalty cannot be administered with an even hand. But that's not likely to be an opportunity for me. It is the hardest part of the job I do. Even today, I don't know how many calls I got because there was an execution scheduled for seven o'clock tonight. That's a dreadful part of the business. But I had to make a hard decision. I could have said, as Justice Brennan and Justice Marshall did: "I'm going to take myself out of this. I'm going to say the death penalty is in all cases unconstitutional, period." But if I did that, I would have no voice in what's going on. I would not be able to make things perhaps a little better. So I've stayed in that business.

**Has being on the Supreme Court been more or less what you thought it would be like?**

The most surprising thing for me was the high level of collegiality on the Court. You might not get that idea if you read, for example, Justice Scalia's *VMI* [Virginia Military Institute] dissent. But that's his style. His opinions are always attention grabbing, and with mine I'm rather, people say, bland. Maybe boring. So it's a different style.

**But how after deciding a very bitterly divided case, are you folks able to come to work the next day and see each other at the coffee machine? How does it work?**

It's because we don't merely respect one another, we really genuinely like each other. I mean, Scalia is my biggest buddy at the opera. And in India, Justice Scalia and I once took a ride together on an elephant. It was quite a magnificent, very elegant elephant. But when my feminist friends saw a photograph of us on this elephant, they said to me, "Ruth, why are you sitting in the back?"

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