

Speaker 1:

Mr. Chief Justice, may it please the Court, it's an old joke, but when a man argues against two beautiful ladies like this, they're going to have the last word.

Speaker 2:

She spoke, not elegantly, but with unmistakable clarity. She said, "I ask no favor for my sex. All I ask of our brethren is that they take their feet off our necks."

Leah Litman:

This is a special episode of Strict Scrutiny commemorating the life and brilliant career of Justice Ruth Bader Ginsburg, who passed away at the age of 87 on Friday, September 18th, 2020. I'm Leah Litman.

Melissa Murray:

I'm Melissa Murray.

Kate Shaw:

And I'm Kate Shaw.

Leah Litman:

So on Friday night, the evening before Rosh Hashanah, the Jewish New Year, began, we learned that Justice Ruth Bader Ginsburg had passed away from complications from metastatic pancreatic cancer. We knew, of course, that during the Court's most recent sitting in May, she had participated in arguments from her hospital bed, and in July, we learned that during that hospital stay, they had discovered the cancer had spread to her liver, and that initial treatments were unsuccessful. But still, I think most people were unprepared for her passing. It was like a day we knew on some level might happen, but couldn't bring ourselves to actually think that it would. Maybe because she had defied impossibly long odds at so many points during her career.

Melissa Murray:

With that in mind, we are joined today by Anne Joseph O'Connell, who is the Adelbert H. Sweet Law Professor at Stanford Law School, and a former clerk to Justice Ginsburg from the October 2003 term. So Anne, welcome to the show and many condolences on this loss.

Anne Joseph O'Connell:

Thank you. Thank you for having me.

Kate Shaw:

So when the news broke of Justice Ginsburg's death, conversation turned immediately to questions about the impact on the election, when the President might nominate someone to replace her, who that nominee might be, and we of course understand that instinct, but we also want to spend a little bit of time talking first about Justice Ginsburg's extraordinary life and legacy, and then I think at the end of the conversation we'll turn to some thoughts on what might happen next. But for the first part of the conversation, Anne, we're so happy to have you with us.

Kate Shaw:

So you clerked for the Justice in 2003 term, as Melissa just said, what was it like to work for her?

Anne Joseph O'Connell:

It was an amazing opportunity. Every day when I walked into the court I would pause as soon as I entered the building to think that, just a whole combination of factors, and a lot of luck, had led me there. And to have the experience of working for one of my idols was an incredible one. Some things that immediately come to mind is her physical size. I know this sounds like an odd thing to say, but I'm somewhat small, but the Justice was even smaller, and both in height and in weight, and could look quite frail, but beyond the physical appearance, she had this strength. And the strength didn't come in loud words or in brash movements, it was sort of a very quiet strength.

Anne Joseph O'Connell:

So that's something that struck me. What also struck me was just how hard she worked and the hours in which she worked. It was actually a match for me. I spent many summers in high school and college working for the US Army where the work day started before 7:00. If you turned up to work at 7:30, you were late. But the Justice was a night owl and so she was often seen driving, this was at a time where she drove herself to the court for oral arguments, driving down Constitution Avenue just moments before 10 AM just to sneak in right before oral argument, and she did most of her work between midnight and 4:00am. Because I like those hours too, and I was often in chambers in those hours, she would call and we would have these wonderfully long conversations in the wee hours of the night.

Leah Litman:

So what was her relationship like with the law clerks? What were those wonderfully long conversations about in the wee hours of the night?

Anne Joseph O'Connell:

Mostly about the work. She was in the details. Every word, she cared about, both in terms of preparing for oral argument, and then of course with regard to opinion drafting. So a lot of it was just on the work and getting the work right. She was a very demanding boss. I think she had gone through so much to get where she was, and she wanted to make sure that the work that came out of chambers was of the highest possible quality.

Anne Joseph O'Connell:

Now sometimes those conversations were not about work, and they were about theater or opera, and so sometimes she would speak about that as well.

Kate Shaw:

I always got the sense, and I remember, she had a reputation for being very exacting when it came to her interactions with her law clerks. Her standards were unbelievably high. But it always seemed to me that that must have been because there was never any room for error on her own ascent. She was required to hold herself to these just unbelievably high standards in order to do and achieve the things that she had done. So she sort of held everyone around her to the same kinds of standards.

Anne Joseph O'Connell:

That's right. And not just her clerks. I remember a story, I also clerked for Judge Williams who sadly passed in August, from COVID-19, and Judge Williams had been then Judge Ginsburg's colleague on the DC Circuit, and he remarked that she, when he circulated opinions, would line edit his opinions and send them back to him. So she kept everyone to account.

Kate Shaw:

Yeah.

Melissa Murray:

So much has been made of her very warm relationship with Justice Scalia, who as we know, was sort of her ideological opposite on the court. But in the wake of her passing there have been some really lovely statements from her other colleagues. So Justice Breyer noted that he was reciting the mourner's kaddish at Rosh Hashanah service, and when he heard of her passing he thought, "A great Justice, a woman of valor, a rock of righteousness, and my good, good friend. The world is a better place for her having lived in it."

Melissa Murray:

And Justice Sotomayor, who in this last term, was often alone with Justice Ginsburg in dissenting from some of the decisions of the court, noted that her "dear friend and colleague was an American hero, a path breaking champion of women's rights, who served our country and court with consummate dedication, tirelessness, and passion for justice."

Melissa Murray:

Can you say a little bit about her work with her colleagues? We all know about her friendship with Justice Scalia, but what about the rest of her time on the court and the rest of her colleagues?

Anne Joseph O'Connell:

Yeah. If I could just share one quick story about Justice Scalia and the friendship with Justice Ginsburg, on her birthday, I remember sitting in chambers and I had the desk closest to the front door of chambers among the four clerks, and I heard this booming voice coming down the hall, "Ruth, Ruth, my dear Ruth." And the floor was sort of pounding, like the person was semi running, and in came Justice Scalia with this huge bouquet of roses for the Justice, and so she and Marty, who was still alive at the time I was clerking, were very close with Justice Scalia and his wife. But she seemed to have warm friendships with her other colleagues on the court. And she was very respectful of all of them, and encouraged the clerks, there were opportunities for the clerks to take each Justice out for lunch or to have some interaction with the other Justices.

Anne Joseph O'Connell:

And I do remember once, my co-clerks and I went to lunch with Justice Thomas, and we got in this several hour conversation, I think in part I grew up in a devout Catholic family and Justice Thomas almost became a priest, anyways, we spent hours in conversation with Justice Thomas, and Justice Ginsburg actually had to telephone and get us back to chambers we were gone for so long. But I think she was hesitant to do that, but it had just gone on for so long.

Melissa Murray:

It's funny, in the last couple of years, she had become increasingly frail and I always thought it was interesting when she would step down from the bench in oral arguments, it was Justice Thomas who often offered her his arm to assist her down, which I thought was very sweet as well.

Leah Litman:

You mention her kind of small stature and one of my favorite visuals from my year at the court was seeing Justice Ginsburg kind of waddle down the hallway carrying the cookie tray after the Justices' conferences, back to her chamber. So it was this huge tray that was honestly probably her size, and it was all the leftover sweets from the Justices' conference, and she had a really big sweet tooth. So she would take all the leftover cookies and bring them back to her chambers.

Kate Shaw:

I wonder if did Marty bake those cookies, because he of course was the baker in the family-

Leah Litman:

So this was after Marty had passed away.

Kate Shaw:

Oh, when you were there. I see. I ask because when I was there, it was when Marty was still alive, and it was the time that my co-clerks and I got to sit and have a meal with Justice Ginsburg, instead of a lunch out it was a high tea in her chambers with this unbelievable almond cake that Marty had baked. So I still remember the flavor of it, it's amazing.

Leah Litman:

So Anne, was your clerkship the first time you had interacted with Justice Ginsburg, or seen the Justice?

Anne Joseph O'Connell:

No, so a wonderful combination of factors. Even though I had grown up outside of Washington DC, I had never stepped foot in the Supreme Court until after my first summer of law school. That summer I was working for the General Counsel of the Department of Defense, and they suggested you should just go hear decisions come down from the Court. So one day I went and I stood in the public line, I got a seat, and that day, Justice Ginsburg announced her opinion about women having to be let in to the Virginia Military Institute, and so it was the first time I saw her in person, heard her in person, and I had had a rather difficult first year of law school, which had followed a first year of graduate school where I did the economics graduate sequence. And the crazy gender dynamics in both of those first years was really something that was striking to me. And so to hear her read that decision, I just had tears streaming down my face.

Anne Joseph O'Connell:

So when I got to meet her in person was when she called me for an interview, and she called me for an interview, she said, because at the bottom of my resume I had written that I enjoyed swimming, attending the theater, and spending time with my grandparents, who they were the reason that got me through both graduate school and law school, I would spend one to two weekends a month with my grandparents. Justice Ginsburg said she had never seen anyone mention their grandparents before. So

that was one of the major topics of our interview, and then I was lucky enough to have this year experience clerking for her.

Kate Shaw:

Did you tell her about hearing her announce the decision in VMI when you interviewed with her?

Anne Joseph O'Connell:

No, I didn't.

Melissa Murray:

Were there any notable cases from the term in which you clerked for her that you want to share with us?

Anne Joseph O'Connell:

Sure. So it was an unusual term in that it started before October. There were campaign finance cases that were argued in advance of the traditional first Monday in October start. So it meant that all the clerks got there and the work load was really high from the start, and those oral arguments were long, they were several days of oral argument. Then, this is in 2003, 2004, so there were also key war on terror cases that term. Just one, Hamdi v. Rumsfeld, whether you could hold a US citizen as an enemy combatant just on the basis of the declaration by a Department of Defense official. So there were the kind of campaign finance and war on terror were the bookends in a sense of critical cases that term. The ones she wrote in, there were kind of a slew of statutory interpretation cases about bankruptcy statutes, two cases she wrote on on ERISA, other statutory interpretation cases, and you can see her kind of careful parsing of statutes in those opinions. Some were majorities, some were dissents, some were concurrences on the statutory interpretation side.

Anne Joseph O'Connell:

And then, as someone who teaches, or at least taught civil procedure when I was at Berkeley for 14 years, there were some civil procedure cases that term as well. One on diversity jurisdiction, the group DataFlux case was that term. This is where the parties weren't completely diverse at the start of litigation, but were diverse by the time it got to trial, and Justice Ginsburg dissented from the Court. The court said no, you had to be completely diverse at the time of filing, and she said whoa that's going to have exorbitant costs to have it redone. And there were other, there was a foreign discovery case that she wrote in where she said that district courts were allowed but not required to provide assistance to foreign tribunals.

Anne Joseph O'Connell:

There was sort of a range of the detailed and the broad. It was sort of a phenomenal breadth of cases, as it is I'm sure most years.

Kate Shaw:

You ended that discussion talking about procedure, and of course, she was very associated with procedure cases. She had sort of begun her academic career doing a kind of comparative study of civil procedure in Sweden. She was a procedure scholar among other things during her time as a law professor, and she always seemed to get the really meaty procedural cases. And they're kind of dry if

you like procedure, I think we actually all do probably in this conversation, but they're not ... I think to her it wasn't just the intellectual puzzle in it, right? There were substantive justice implications to the kind of choices that we make about it and the way that we understand access to courts and procedure in courts and things like that. Do you want to talk about that connection for a minute maybe?

Anne Joseph O'Connell:

Yeah sure. Maybe I could talk about it as I interacted with her years later, basically almost a decade later. So in the fall of 2013, Justice Ginsburg came to Berkeley Law and she came to several classes. This was arranged by amazing people at Berkeley, including Amanda Tyler, and Justice Ginsburg came to my civil procedure class and co-taught it, and we had just covered, as maybe some of the listeners to the podcast are thinking about what do you need to state a claim so it's not dismissed under 12(b)(6), and this had followed decisions in Twombly and in Iqbal where Justice Ginsburg was in dissent in both of those cases where the Court kind of raised the burden on those filing claims. And as part of the class, I had given students proposed legislation that would have reinstated the lower pleading standard, the Conley v. Gibson standard for pleading a claim.

Anne Joseph O'Connell:

We were calling on students, the Justice and I, and many of the students favored this legislation, and then it was really interesting, Justice Ginsburg said, "You really want Congress to be making the rules of civil procedure and not the courts?" And it was just this moment, because even though she had dissented, even though she preferred the Conley v. Gibson standard, she had such faith in how the federal rules of civil procedure are normally constructed. Of course Congress can create a rule of civil procedure, but normally the rules of civil procedure come through this sort of agency type process within the courts that the Supreme Court eventually signs off on. And that was a process she preferred, and it was a really interesting moment.

Anne Joseph O'Connell:

And then another moment kind of post my clerkship is she had dissented in a case called Shady Grove, which was about Erie, and I don't exactly remember where we were, but she grabbed my arm and she said, "Anne, you must teach my dissent in Shady Grove. You must teach my dissent in Shady Grove." Because these were issues that really mattered to her.

Leah Litman:

I really like-

Kate Shaw:

That was a great story.

Leah Litman:

Yeah, I like the first story because it so well reflects her inner institutionalist and how she just has such faith in if we adhere to institutional safeguards, here being the courts are the ones who have the role in establishing the rules of civil procedure, then that will lead us to better, more just, substantive outcomes, and it's good to have some people with that faith.

Melissa Murray:

Now more than ever. So Anne, I can't help but notice, it must have been incredibly nerveracking to teach in front of your mentor and Judge, so what's going through your mind as you were cold calling with the Notorious RBG?

Anne Joseph O'Connell:

I don't know who was the most nervous, was it the student who I had sort of picked in advance because she was a Cornell undergraduate, and so I thought since Justice Ginsburg had gone to Cornell, was Madison the most terrified? Was I the most terrified? I'm not really sure. Madison did a great job. But the Justice did at one point in the class say, "Oh, Anne, you know that case from the 1950s." And my brain is going, "What case from the 1950s? What case?" So luckily I didn't have to spit out an answer, because I would have had to say, "I have no idea what you're talking about."

Melissa Murray:

It sounds, I remember that day at Berkeley, and I remember being very glad that I did not teach in the civil procedure rotation and could merely be a spectator as opposed to an active participant in that. I will say, from the spectator's position it was a very active and engaged session between the Justices, the students, and Anne.

Melissa Murray:

All right. This is a show that perhaps we should have anticipated having to do, and yet we find ourselves somewhat on the back foot talking about this. How to capture a life and a career that meant so much to so many and had such a profound impact on the law and the way we understand it. We use her words to open this podcast. I can't even imagine what we're going to say to conclude this. So Anne, I'm going to give you the last word, as her clerk, before we shift to sort of thinking about her jurisprudential legacy more broadly and what comes after, do you want to just say something to kind of capture this person who obviously had such importance in your life, but in so many other people's lives as well?

Anne Joseph O'Connell:

That's a hard one, to sum up the notorious RBG. I guess I would just say on a personal level that her life, both professionally and personally, has been so inspirational to me. To have a career, to have kids, to have a spouse, to know that it's really hard if not impossible to have them all in the air going really well at one time, and there's this sort of give and take over time, and that one's career in particular doesn't follow a linear path. Her career is from the start not destined to end up at the Supreme Court, and kind of taking advantage of the many different opportunities because they're there and because you're passionate about them and not because they're instrumental in some linear story, I think has been really inspirational to me, and I hope to so many others.

Melissa Murray:

Thank you, Anne. To just provide a little perspective on what Anne has said, and what we will continue to talk about, Justice Ginsburg was not just a giant of the court, she was actually a giant of women's rights long before she came to the court. She was a law student at Harvard Law School. She was elected to the Harvard Law Review, she transferred to Columbia Law School in her third year because her husband, Martin Ginsberg, had gotten a job at a law firm in New York and Harvard wouldn't allow her to continue as a student at Harvard when she was no longer a resident, so she transferred to Columbia where she was also admitted to the Columbia Law Review.

Melissa Murray:

She was denied a diploma from Harvard, which subsequent Deans offered to rectify, as she held out for an honorary degree, and she received it. At that honorary degree ceremony she was honored by Placido Domingo, a noted opera singer and of course opera was one of her great passions. Her career in the law began somewhat inauspiciously. Although she was at the top of her class, she was disadvantaged by both being a woman and a mother and also by being Jewish, and so she was turned down for employment at many of the law firms that might have welcomed a man with similar credentials.

Melissa Murray:

She narrowly missed being a clerk for the Supreme Court. Felix Frankfurter considered her application, but ultimately declined to hire her, and it wasn't until her law professor, Jerry Gunther, stepped in, that Edward Palmieri of the Southern District of New York agreed to take her on as a clerk. It was noted that Professor Gunther promised that he would never send another clerk to Judge Palmieri if he did not give Justice Ginsburg a chance.

Melissa Murray:

When she left her clerkship again, she had a difficult time finding employment. This was when she went off to Sweden to do the project in comparative civil procedure that Kate mentioned. Upon her return, she joined the faculty of Rutgers Law School, where she taught civil procedure, but also pioneered the field of women's rights and sex equality law, writing the first casebook in the field with her very good friend, Herma Hill Kay, who was the first female Dean of the University of California Berkeley.

Melissa Murray:

While she was there she also helped co-found the first law review on women's issues, the Women's Rights Law Reporter, and from there she began work with the ACLU's women's rights project and from that position, she litigated such notable cases as *Reed v. Reed*, where she wrote what she called the grandmother brief for sex equality, and she also listed Dorothy Kenyon, an earlier feminist thinker, and Polly Murray, one of the most undersung feminist thinkers of our age as co-authors.

Melissa Murray:

Again, this is all before reaching the Court in 1993. She had been a part of some of the most important sex equality cases of the age, and this is really amazing.

Melissa Murray:

So Kate, I'm going to drop off a little bit and let you talk about one of the cases that we covered in our book on reproductive rights and justice, *Struck v. Secretary of Defense*. Could you say a little about this case and how important it was to Justice Ginsburg?

Kate Shaw:

Sure, and actually let me just say one more thing if I could. Hearing you talk through her early career just brings something to mind which is that these early kind of rejections were so generative in that they set her on a different path. It was outrageous and unjust that she was denied access to these halls of power that she was more than qualified to enter, and yet sometimes those kinds of what feel like failures or rejections can give rise to things that are so much better. So obviously she made an incredible career as a law professor, and was able, I think, from her purge in the academy to do the work with the ACLU



women's rights project, this kind of litigation campaign that I don't know how she would have managed from a purge in a law firm if she had been successful in the first instance of getting one of those jobs. Maybe it all would have ended up in the same way but I'm not sure.

Kate Shaw:

So Melissa mentioned a couple of cases, so *Fronterio*, *Reed v. Reed*, the grandmother brief, she files but doesn't actually argue the case. But in *Frontiero v. Richardson* that's the argument, she's there arguing as amicus and that's the argument in which she says the words, "I ask no favor for my sex." That begins this podcast. And the argument in its entirety as well is worth listening to, actually as are all of the arguments that she did before the court.

Kate Shaw:

*Struck v. Secretary of Defense* is not one of them, because it was never argued before the Supreme Court, but it's a case that she very dearly wished could be brought before the Court. This was all, so it was playing out in the lower courts in the year or two before *Roe vs Wade* was decided by the Supreme Court, and it was a case that involved abortion, but in a very different way. So the plaintiff, who was a plaintiff in *Struck* was a nurse in the Air Force, who became pregnant, and wished to continue in her position, and under military policy at the time could not, was either required to leave her job or to obtain an abortion actually subsidized by the federal government, by the military, which was consistent with military policy at the time, and she was a devout Catholic and didn't want to get an abortion, and so she gave birth, gave the child up for adoption, and returned to her position, and from that position challenged the military policy.

Kate Shaw:

The case ended up being mooted when I think the Solicitor General in conjunction with military leadership intervened and implemented a policy change that prevented the case from actually getting before the Supreme Court, but it was a case that would have allowed the Justices to confront this kind of constellation of issues involving sex equality, both abortion and in this case coerced abortion as opposed to restrictions on abortion, but also pregnancy discrimination, sex equality at work more broadly, but the person with whom she was in a relationship was not facing any kind of professional sanctions for his participation as Justice Ginsburg described it in the conception of the child. So there were a number of kind of substantive avenues that she thought that the case kind of opened up, and she I think always really regretted that that was not the sort of first of the abortion cases, and one of the women's rights cases that she had the chance to take to the Justices.

Kate Shaw:

I think that Neil Siegel, who wrote the chapter in the book that Melissa and I along with Rita Siegel co-edited, I think believed in conjunction with kind of conversations that he had with Justice Ginsburg, that the path of the law might well have been different had that case made it before the Supreme Court because that was the path not taken.

Melissa Murray:

And there's some great trivia, the Solicitor General who was on the other side of that case was none other than Irving Griswold who had been the Dean of Harvard Law School at the time that Justice Ginsburg was a student, and apparently was the Dean according to the movie, *On The Basis of Sex*, where he's played by Sam Waterston, asks her why is she in law school, why are any of these women in

law school, and Justice Ginsburg replies that she's there so she can learn to be a more patient wife and understand her husband's career and some have suggested that she's being a little bit cheeky in that response, trolling them, as it were, in the 1950s.

Leah Litman:

And the litigation strategy in *Struck* kind of mirrors the path that she took in sex equality, which is in the sex equality cases she tried to find cases where men were discriminated against and use that to advance the broader principal of sex equality, and in *Struck* she was trying to advance the broader principal that women should be able to have reproductive autonomy and choose whether to have a child, and there the federal government, the government was trying to tell the woman she could not have a child, that she was again using that to advance a broader principal of choice. So she was a brilliant litigator and strategist and attorney who really moved the law in this significant respect that has paved the way for so many women after her.

Leah Litman:

After the news of her passing reached I think Hillary Clinton tweeted out, "Ruth Bader Ginsburg paved the way for so many, including me." Justice Kagan in her statement on the Justice's passing, she said that, "Ruth reached out to encourage and assist me in my career, as she did for so many others long before I came to the Supreme Court and she guided and inspired me on matters large and small." So she was just, again, opening doors for so many women.

Melissa Murray:

There's also a really, sort of funny, off color aside, I guess after she was nominated, she received a note explaining that she had been known as a "bitch" according to some of the men in her class at Harvard Law School. Her reply is truly one for the ages and really needs to be on a tote bag, a shirt, a mug, all of the things really. Her reply was "Better bitch than mouse." I mean, that's the tweet. There it is.

Kate Shaw:

Amen.

Melissa Murray:

Better bitch than mouse. I love that.

Kate Shaw:

Tote bag is coming. We have to get that done. Maybe we can shift gears for a minute and do a quick kind of round robin, which Anne you should feel to jump in on if you'd like to. Just to highlight--we've talked about her as a litigator and as a boss and as a trailblazer, but as a Justice, if we want to highlight opinions that are worth noting of hers from her nearly 30 years on the Supreme Court, whether those are majorities, dissents, concurrences. Anyone want to start?

Leah Litman:

I can start. So I would say her dissent in *Herring v. United States* which is part of the series of cases limiting the exclusionary rule. In that case the Court said the exclusionary rule wasn't available when evidence was wrongfully obtained as a result of negligence in maintaining a police database, and the Court's majority said it wasn't available because the application of the exclusionary rule would not deter

violations, and Justice Ginsburg said that was inconsistent with the entire premise of tort law which is of course you can deter negligence through sanctions.

Leah Litman:

And a majority opinion I would probably say Sessions v. Morales-Santana, which is a sex equality case in immigration, and really I think brought the Court's immigration cases in line with the sex equality cases, and specifically the Justice's opinion in United States v. Virginia, when the Court had kind of veered away from that subsequently.

Melissa Murray:

So my two are her dissent in Shelby County v. Holder, which is the famous one in which she is responding to Chief Justice John Roberts who has argued that there's no longer a need for preclearance requirements for voting because African American voting in the south has been increasing, and increasing consistently over time, and it's a kind of racial progress narrative that he documents and her response to that is the whole line of argument is a little bit like throwing out your umbrella during a rainstorm because you're not getting wet. The whole idea again is that this works, preclearance works, and that's why you've seen this improvement over time, now is not the time to get rid of it. That is the dissent that sort of kicks off this Notorious RBG meme that really came to dominate the later part of her life, and I think she was really tickled to find herself being compared to the Notorious BIG, and she sort of reveled in it.

Melissa Murray:

The other case that I wanted to highlight is not one in which she litigated or argued or heard as a jurist, but in which she as a member of the Women's Rights Project was an amicus, and this is a Georgia death penalty case called Coker v. Georgia, and it was about the use of the death penalty as a penalty for rape, and she argued that this use of the death penalty or capital punishment more generally as a punishment for rape was not a service to women. In fact, this was sort of more evidence of the kind of benign paternalism that characterized sex based classifications, and what I really thought was interesting about it, it's not just solely an argument about women's rights and feminism and the limits of paternalism, but there is an intersectional lens to this because she talks quite movingly in the brief about the way in which the penalty for rape, including the death penalty, are also meant to sort of sequester white women's purity and chastity from the ongoing threat of black sexuality.

Melissa Murray:

So she really understands the way in which the legal system in the south, but not exclusively in the south, has sort of all kind of cohered to create this scenario in which women's chastity and purity is being protected because it is both men's property and perhaps subject to a threat from an external, racialized entity. So I think it's a really important amicus brief and one that I think did not get a lot of play when it was first announced, but it's really I think remarkable in its breadth.

Anne Joseph O'Connell:

So I would agree with Melissa, my favorite dissent is Justice Ginsburg's dissent in Shelby County, just maybe because it was my first experience with the Justice, but also just because of its import in terms of sex discrimination. My favorite majority, 7-1 majority, in United States v. Virginia, striking down the male only admissions policy at VMI.

Kate Shaw:

And a couple more that I would highlight, although I agree with everything that you all have mentioned, her dissent in *Gonzales v. Carhart*, the 2007 opinion in which the Court upheld the federal partial birth abortion ban act, and she just took real issue with the substance and the kind of tenor of the Kennedy opinion in particular it's sort of paternalistic notions of protecting women from the regrets that they might experience based on their own choices. She writes that the Court shields women by denying them any choice in the matter, this was of protecting women recalls ancient notions about women's place in society and under the Constitution, ideas that have long since been discredited. I always wondered whether ... the language was sharp, and she sort of conspicuously didn't write, didn't get to write the opinions in the two most recent abortion cases out of Texas and Louisiana, and I wonder, it always felt like a little bit of a loss that Breyer and not Ginsburg wrote those opinions and I wondered whether lingering bad blood about the Gonzalez opinion, because that dissent is a harsh one, and I think fairly so.

Kate Shaw:

And then actually on majority opinions, she didn't have a ton, she sat on the left of the Rehnquist court and the Robert's court, and so she was not the median Justice who is assigned a lot of the big opinions, she had huge procedure opinions for sure, but in other kinds of areas, but her opinion in the Arizona Independent Redistricting Commission case in 2015 I think is actually a really important one. It sort of vindicates principles of democratic legitimacy and upholds by a 5-4 vote the decision by the voters of Arizona just to take the process of drawing legislative districts away from self-interested legislators and instead to put it in an independent commission, which in light of the Supreme Court sort of shutting the door to federal constitutional challenges to gerrymandering is one of the few ways that remain for voters in states to try and make sort of democracy and legitimacy meaningful, but it's a great sort of deep dive in constitutional language, constitutional logic, constitutional history, and it's well worth the read.

Leah Litman:

So I know that to some extent it might seem ghoulish or crass to start discussing the politics of this all, the implications for the Court, what a new Justice will mean for our country, and the implications for the presidency and the Senate, but I also think that not to discuss it would be a disservice to the country and dishonor Justice Ginsburg and Justice Ginsburg's dying wish and kind of amount to unilateral disarmament since Republicans are already out there talking about the importance of filling this seat, including the President himself and Senate majority leader Mitch McConnell.

Leah Litman:

So the time is now, whether we want it to be or not, and the fight is here. There will also be fights after November, as guest Elie Mystal wrote in *The Nation*, and I'm just quoting from him here, "I would like to mourn her, but even Ginsburg herself realized there would be no time for that. Her deathbed dictation should not be read as the fleeting hope bubbles of a dying old lady, but as a dying dissent about what we must do." And he was referring of course to the statement that she dictated to her granddaughter as her strength was waning, and that statement was, "My most fervent wish is that I will not be replaced until a new President is installed."

Leah Litman:

So this is where we wanted to take the conversation, the stakes for the Court and the country with her passing and possible replacement by President Trump.

Kate Shaw:

I think we have to talk about it in the context of the 2016 decision by Mitch McConnell and the Republican Senate to deny hearing to Barack Obama's nominee Merrick Garland, who was a nominee to replace Justice Scalia who died in February of 2016, and though that was 10 months out from the November election, the position taken by Republican leadership in the Senate was that it was necessary to wait until the people spoke in November before the seat was filled. So that was the position that was taken then, so that's an important I think piece of the backdrop against which everything is right now unfolding.

Melissa Murray:

So I thought the framing and the way she dictated this sort of dying declaration to her granddaughter was really interesting. It wasn't that she wanted to ... it was her fervent wish that her replacement be named after the election, she specifically said a new President. Is that a kind of clarion call, a rallying call to the Democrats to get out the vote, to be more systematic about turning out the base than they were in 2016? It's a very specific call as opposed to just waiting until the election.

Leah Litman:

I think it is a statement about what another nominee by this President would do to the Court on issues that she cares about. She is trying to open people's eyes to the practical consequences and the reality about what that appointment would do. So we've talked a lot about how the Chief Justice this past term was the median Justice on the Supreme Court, if however President Trump replaces Justice Ginsburg, he will no longer be the median Justice. The median Justice will shift to being Neil Gorsuch, Brett Kavanaugh, or Amy Coney Barrett or Barbara Lagoa on the 11th Circuit, or whoever the new nominee is.

Leah Litman:

So that is in the abstract what this world looks like, but to make it concrete, you can think about the consequences for some of the decisions from this past term. If one of those Justices had been on the Court instead of Justice Ginsburg, the DACA rescission would have been upheld as lawful. The President could be deporting Dreamers. The Louisiana abortion law that would have closed two of the three clinics in the state would have been upheld as constitutional. These are just realities about how those decisions would have come out, and I think the more difficult question that is harder to pin down is what other decisions might have been affected as well, because of course the median justice can effect the negotiations and the direction of the Court in ways that are happening behind the scenes that we can't see simply by the vote breakdown.

Leah Litman:

So we discussed for example, Joan Biskupic's end of term reporting in which she said that the initial vote breakdown in the Presidential tax case out of New York was 5-4 with the Chief Justice joining the four more liberal justices to allow the subpoena and the four other conservatives saying the subpoena could not proceed. So if Justice Ginsburg hadn't been there, then that vote would have gone the other way quite possibly. We don't know if the Chief would have pulled over one of the five conservative Justices in that hypothetical world to join him in allowing the subpoena to proceed. We don't know if the Title VII cases would have come out the same way. We don't know if Ramos would have come out the same way. Changing the median Justice can affect things behind the scene in ways that affect the ultimate outcomes.

Melissa Murray:

It may also change, I think, the Chief Justice's behavior himself. I think part of being the swing Justice is the position in which he is best situated to play out his sort of institutionalist leanings and if he's not in that position, maybe he does feel more free to kind of join the conservative wing of the court in a more full throated fashion. We don't even get the kinds of nods that we saw in this particular term.

Kate Shaw:

And he could even do that and frame it in institutionalist terms, at least in his own mind, by sort of saying better to join and control assignments in the majority, that is a strong conservative six member majority, then to defect and potentially see the law change even more rapidly.

Leah Litman:

And you can also think about this looking ahead to the next term and the cases that this could effect not only the outcome but also the rationale. So we have this major case involving the Affordable Care Act in which thus far every Republican appointed judge has said the amended individual mandate is now unconstitutional and as a result, some other provisions in the Affordable Care Act, like the protections for people with preexisting conditions, might also fall. So I think that as this case was making it's way up to the Supreme Court, we were greeted with repeated statements along the lines of, "There's just no way this case is ever going to go anywhere, the arguments are so ludicrous." And it's true, the arguments are ludicrous, but once you move the median Justice away from the Chief Justice and towards someone like Neil Gorsuch or Clarence Thomas or Samuel Alito, the world looks very difficult, and again, it's hard to overstate how this case, it's entire outcome, effecting this major law, as a country is dealing with a pandemic, could be changed just by this one appointment.

Leah Litman:

I know there are other significant cases that the Court is hearing including a bunch of criminal justice cases like the retroactivity of Ramos and whether individuals who are convicted using non unanimous juries could have their convictions overturned. I think people thought it was possible that the court would say that rule is retroactive, in a world in which the Chief Justice was a median Justice, now it seems like a pipe dream. Or this Jones v. Mississippi about when states can sentence juveniles to life without parole, again the possibility of the Court adhering to it's prior decisions in Miller and Montgomery now also seems like a long shot, or you have cases like Torres v. Madrid where the question is have the police stop someone when they physically shoot them, but the person is able to continue moving. And these are just some of the issues that could be changed by a new nominee, and we're not even talking about other areas of law that aren't currently on the Court's docket.

Kate Shaw:

Can I ask what we think about ... we have talked about institutional legitimacy, what sometimes felt like this kind of oversimplification or misapprehension of what that idea might mean in the sort of end of the last term, but what we think, we do in a deep way care about the Court and it's institutional legitimacy, what rushing a nominee before the Senate and potentially the confirmation before the election could do to the sort of perception and reality of the Court's legitimacy.

Melissa Murray:

Obviously it would be damaging certainly. The question is do they want to risk damaging the Court's legitimacy, do they even care about the Court's legitimacy? The one scenario that Leah did not mention that is likely next term is the fact that if this is a contested election, it will wind up in the Court itself and that is something also to take into consideration in the sort of strategy on the Republican side about what to do about this now vacant seat, is it to nominate someone and rush them through now in the event that this is a contested election that will go to the Court? Do you not because you care about the Court's legitimacy and then this is thrown to the courts because it's a contested election and we only have an eight member court and maybe we're not able to get a decision because they fracture? Not sure how that looks, but maybe that's a possibility. Or they do decide and they decide in favor of the President, who knows? But I think a lot of the scenarios about what they do all kind of depend on the possibility of the election not being obvious on election night, the outcome not being obvious, the composition of the Senate certainly, and just sort of what the political will around whatever they're doing is.

Melissa Murray:

We turned out so many women for the Women's March, are we going to be this exercised to go stand in front of the court or stand in front of the capital and insist that the people be heard on this question? I don't know.

Leah Litman:

There's no question that this will affect the legitimacy of the Court, and I think that's how we should understand the statements that are coming up as people are pointing out that Lindsay Graham, McConnell, and others said we won't confirm someone in the election year because it's for the people to choose. Pointing out their hypocrisy is not because they can be shamed into being consistent, they have shown that they are simply not capable of shame. It is instead to highlight what it is they are doing. It is a transparent power grab. They are just slashing and burning institutions, norms, procedures left and right all in the name of preserving their own power and pushing through policies for which they lack democratic consensus and a democratic warrant.

Leah Litman:

Melissa mentioned the possibility of a contested election, that's something that we are seeing with the President's campaign attempting to limit voting and discredit absentee voting, and Republican legislatures refusing to loosen up restrictions on absentee voting even in the midst of the pandemic. We're seeing the President destroy norms of institutional independence and deference to expertise in the response to the pandemic. We're seeing them try to destroy the Affordable Care Act with they couldn't do through the democratic process, now in the courts. This is what they do, and they are putting the Court in the continued cross hairs this time just like they have before.

Leah Litman:

Mitch McConnell has now, if they confirm this nominee, stolen two seats on a Court through conveniently naked, obvious, transparent changes to old bipartisan rules of nomination. Not holding a hearing for Merrick Garland, and now insisting that that rule applies only when the Presidency and the Senate are in different hands. No it doesn't, you framed that entire rule as the people need a say in determining who the next Supreme Court Justice is. That principal applies no matter whether the President and the Senate are in different parties. It means the people get a say in determining the next Supreme Court Justice. It is just appalling to see the absurd things that people like Ted Cruz and others

are saying, like we need a nine member court in an election year because an eight member court might not be able to resolve election issues. That was true in the 2016 election, of course, when you were totally okay with an eight member court. So all of these arguments are just transparently ludicrous, and pointing out their transparency and hypocrisy again is not because I think Ted Cruz has a shred of principle or integrity to him, it is instead to expose what is happening, which is again, they are totally content just burning everything to the ground if they can hold onto power for another day.

Kate Shaw:

The unfairness as opposed to the hypocrisy somehow seems to me to be something that people could mobilize around, and the other thing that I think, I think that you're completely right. This idea that you could write this revisionist history in which the salient feature of 2016 and the refusal to consider Garland was the split party control of the Presidency and the Senate is sort of facially absurd, but it is also the case that it is not as though there is an election looming. Obviously we're closer to an election than we were in February of 2016. The election is already happening-

Kate Shaw:

So states have started voting. In four states this week people started voting in person. There are hundreds of thousands of absentee ballots, we may actually be in the millions now, that have already been mailed and over the course of the next week I think something like 20 states are going to start having early, in person voting. So even if their arguments held some water in ordinary times, and I don't know, I don't think they do, it can't possibly be the case that if democratic legitimacy means anything, you can ram through a nominee while we are actually in the midst of an election in which the people will have some voice.

Melissa Murray:

That's the question, do they even care about democratic legitimacy? Yesterday at a rally in Minnesota, he not only talked about the seat, and he's been anticipating filling this seat for over a year now, and nakedly talking about her demise well in advance of yesterday, and yesterday in his rally he talked about being able to fill not one seat, not two seats, not three seats, but actually four. So he is thinking of a complete takeover of the Court and this is just the first domino that will set off a chain reaction in his view that leads to a gold plated Court that looks like Trump Tower.

Leah Litman:

Yeah. This is what they have wanted to do. They have wanted to pack the courts and they are packing the courts. Every one of the current seats on the Supreme Court has become vacant in the last 30 years when Republicans won one of the popular electoral votes of seven, yet they might fill six of the nine seats, and again, it will be with two stolen seats that were stolen on the basis of just ludicrous changes in procedural rules. Mitch McConnell trotted out this made up Biden rule which now I'm remembering, what was referring to statements by Joe Biden about a hypothetical future nomination by a Bush administration after the contentious nomination and confirmation of Clarence Thomas. So it wasn't about an actual vacancy or an actual nomination, that rule never existed and it defied historical practice and yet Mitch McConnell was keen to invent it and now he's yanking it away. It is truly absurd how brazen they are and they have been and how successful they have been at being so brazen and at packing the courts so that they can do what they want to get done.

Kate Shaw:



To kind of tie this conversation to both the Notorious RBG more broadly and to the statement that she dictated in her final days to her granddaughter, is there a way to somehow channel the energy that RBG emanated out into the world to actually try to implement her desire that her seat not be filled, at least not right now, at least not in advance of the election? I think maybe the question gets different between the election and the inauguration but at least between now and November 3rd, in that you have the Notorious RBG meme originates in a Tumblr and sort of spreads like wildfire through the culture.

Kate Shaw:

We've now all gone shopping I presume at the kind of RBG spin out section of our local independent book stores because the amount of inspiring children's stories that have been spawned by the Notorious RBG, and sticker books, and temporary tattoos, and the list goes on, but so far, apart from moving product, and inspiring people, the energy hasn't been sort of challenged and put to political purposes, and A, is there a way to do that, to get a younger generation mobilized in ways that they might not have been because they were not as excited about Joe Biden as other potential democratic nominees? So that's question one and I think question two, middle aged white women who actually voted, the majority of them, for Donald Trump in 2016, could somehow they be mobilized to go get their people and in a way by this and by Justice Ginsburg's dying words in a way that could on the margins in a close election make a real difference?

Melissa Murray:

From your mouth to God's ears.

Leah Litman:

I think the best people can do is talk to other people about it, devote an increased focus to Senate races to try and take back the Senate, and to again do what they can in the lead up to the election and to be as loud and as vocal as they can about what Republicans are doing to the Supreme Court, the stakes of this nomination and it is easy to despair given how unprincipled and power-grabby the Republicans have been, but if you just resign yourself to that fate, then we will definitely have lost.

Melissa Murray:

Better bitch than mouse.

Leah Litman:

Exactly. Just the thought of this feminist icon being replaced by this rank misogynist who brags about sexually assaulting women is just very difficult for some of us.

Melissa Murray:

The same week that she dies, yet another woman comes forward to say that the President has sexually harassed her. How many of these women-

Kate Shaw:

Sexually assaulted her, Melissa, right?

Melissa Murray:

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I can't even keep up. How many of these? And it's of no moment, we're so anesthetized to it, you're exactly right, Leah, the idea of her being replaced by this person is just vomitous and gross.

Melissa Murray:

All right, let's end on a high note.

Leah Litman:

So, thank you, Anne, for joining us.

Melissa Murray:

Yes, Anne, we wanted to have you for a long time. We're sorry that this is the occasion, but thank you so much for joining us.

Anne Joseph O'Connell:

Thank you for having me.

Leah Litman:

And thank you to all of our listeners with a special shout out to our Glow subscribers who make this show possible. If you'd like to go the extra mile to support the podcast, you can do that at [glow.fm/strictscrutiny](https://glow.fm/strictscrutiny), and as always we are grateful to our wonderful producer, Melody Rowell, and Eddie Cooper who does our music including putting Justice Ginsburg's words to sound.