Notes

PREFACE · An American Icon

ix **"People will find":** "The Supreme Court: Transcript of President's Announcement and Judge Ginsburg's Remarks," *New York Times,* June 15, 1993, A24.

x **"dual constitutional strategy":** Serena Mayeri, "Constitutional Choices: Legal Feminism and the Historical Dynamics of Change," *California Law Review* 92 (2004): 758.

xiii **"always everywhere and just":** Jeffrey Rosen, "The New Look of Liberalism on the Court," *New York Times Magazine,* Oct. 5, 1997.

xv **"a more capacious vision":** Serena Mayeri, "Reconstructing the Race-Sex Analogy," *William and Mary Law Review* 49 (2008): 1789–817.

xvi **originalism in theory:** Robert Post and Reva Siegel, "Originalism as a Political Practice: The Right's Living Constitution," *Fordham Law Review* 75, no. 2 (2006): 545–74.

xvi **"tiger justice":** The quotation is by Justice Souter as reported in Colleen Walsh, "Honoring Ruth Bader Ginsburg," *Harvard Gazette,* May 29, 2015.

ONE · Celia's Daughter

3 **By the end of summer:** Throughout this chapter, I have relied overwhelmingly on information from the following interviews: RBG, interviews by author, Washington, D.C., July 7, 2000, Sept. 3, 2001, Aug. 28, 2002, July 1, 2001, Sept. 24, 2004, and Sept. 1, 2006. Interviews were supplemented by notes relaying additional information. The justice has also made available two other transcripts of oral interviews: RBG, interviews by Maeva Marcus (Supreme Court historian), Washington, D.C., April 10, 1995, and Aug. 15, 1995; and RBG, interviews by Ronald J. Grele, Columbia University Oral History Project, Washington, D.C., Aug. 17–19, 2004. The fullest press accounts containing biographical information appeared at the time of RBG's nomination to the Court. See, for example, Neil A. Lewis, "Rejected as a Clerk, Chosen as a Justice," *New York Times,* June 15, 1993, A1; David Margolick, "Trial by Adversity Shapes Jurist's Outlook," *New York Times,* June 25, 1993, A1; Guy Gugliotta and Eleanor Randolph, "A Mentor, Role Model, and Heroine of Feminist Lawyers," *Washington Post,* June 15, 1993, A14; David Von Drehle, "Conventional Roles Hid a Revolutionary Intellect," *Washington Post,* July 18, 1993, A1; and David Von Drehle, "Redefining Fair with Simple, Careful Assault," *Washington Post,* July 19, 1993, A1. See also "Ruth Bader Ginsburg," in *Current Biography Yearbook, 1994* (New York: H. W. Wilson, 1994), 213–17. Unless otherwise indicated, all material in subsequent paragraphs is based on author's interviews and notes. Where I have relied on interviews by either Marcus or Grele, or upon RBG, *My Own Words,* I have so indicated.

4 **The name stuck:** Von Drehle, "Conventional Roles."

4 **In the Red Hook:** Leuchtenburg, *Franklin D. Roosevelt and the New Deal,* 1–3.

6 **If not quite the suburbs:** For information about Flatbush in the following paragraphs, see Sutton, *Magic Carpet;* Weld, *Brooklyn Is America;* Miller, *Brooklyn USA;* and Manbeck, *Neighborhoods of Brooklyn*.

7 **"amalgam of Jewish aunts":** Aviva Kempner, writer, producer, director, *Yoo-Hoo, Mrs. Goldberg* (Ciesla Foundation, 2009). Although most of the "golden age" of Yiddish radio is lost, recordings from the examples offered in the text can be found at the Yiddish Radio Project website.

7 **Other children on the street:** RBG, *My Own Words,* 6. RBG, interview by Grele, Aug. 17, 2004. I am grateful to the justice for giving me early access to these interviews conducted for the Columbia University Oral History Project. This particular superstition, RBG recalled, was entertained by two elderly women living on her block.

8 **Weathering the strains:** Kenneth Jackson's list of Brooklyn's notables in the arts alone also includes Joseph Heller, Zero Mostel, Joseph Papp, S. J. Perelman, and, more recently, Spike Lee and Wynton and Branford Marsalis. See Jackson's introduction to Manbeck, *Neighborhoods of Brooklyn,* xvii.

8 **"love learning, care about people":** Quoted in Bayer, *Women of Achievement,* 16.

10 **The sounds intrigued:** RBG, *My Own Words,* 4–5.

10 **Jo's quest for autonomy:** On the resonance of Jo March for girls, see Barbara Sicherman, "Reading *Little Women:* The Many Lives of a Text," in Kerber, Kessler-Harris, and Sklar, *U.S. History as Women's History,* 245–56.

10 **"smarter than her boyfriend":** Bayer, *Women of Achievement,* 19; and Carolyn G. Heilbrun, "Nancy Drew: A Moment in Feminist History," in Dyer and Romalov, *Rediscovering Nancy Drew,* 11–21.

10 **"envisioning of their own destiny":** Simone de Beauvoir quoted in Sicherman, "Reading *Little Women,*" 259.

11 **"One of the many questions":** RBG, *My Own Words,* 87.

12 **These were all women:** RBG, interviews by author. I am indebted to the justice for also giving me a copy of her "Remarks for International Lion of Judah Conference," Washington Hilton Hotel, Oct. 18, 2004, in which she elaborates on the contributions of her list of past Jewish women of achievement. For an introduction to these individuals and their achievements, see Antler, *Journey Home;* and Reinharz and Raider, *American Jewish Women and the Zionist Enterprise*.

13 **"No Dogs or Jews Allowed":** RBG, *My Own Words,* 6. On camps, see Paris, *Children's Nature,* 86–95, 199–210.

13 **Camp Che-Na-Wah:** Paris, *Children's Nature,* 109, 128, 141–42, 147, 160; and Leslie Paris, "A Home Though Away from Home: Brooklyn Jews and Interwar Children's Summer Camps," in Abramovitch and Galvin, *Jews of Brooklyn,* 242–49.

13 **What she did know:** Paris, "A Home Though Away from Home," 242–49. RBG is dubious of Paris's description of Che-Na-Wah as "prestigious"; however, both Paris and Joan Jacobs Brumberg agree that summer camps in the Adirondacks had "significant cache" by virtue of their location. See Bond, Brumberg, and Paris, *"Paradise for Boys and Girls,"* 4. Sol Amster purchased the Lake Balfour property in 1922, and he and his new wife, Cornelia Schwartz Amster, opened Che-Na-Wah in 1923. The camp offered horseback riding and sailing, as well as a high ratio of staff to campers.

14 **Sharing with less fortunate:** Bayer, *Women of Achievement,* 24.

14 **"studiously avoid all war talk":** On camp policy regarding the war in Europe, see Bond, Brumberg, and Paris, *"Paradise for Boys and Girls,"* chap. 3; quoted on 89. On knowledge of the Holocaust, see Wyman, *Abandonment of the Jews*.

15 **"[T]he boy was out there":** Katie Couric, "Ruth Ginsburg on Trump, Kaepernick, and Her Lifelong Love of the Law," *The Katie Couric Interview,* Oct. 10, 2016.

15 **For school assembly:** RBG, *My Own Words,* 4.

16 **Moreover, early training:** On children's opera production and high school piano lessons in Manhattan, see RBG, interview by Grele, Aug. 17, 2004. RBG's old copy of Bach's *Well-Tempered Clavier* is now used by her son-in-law. See George T. Spera Jr. to RBG, March 15, 1983. Spera's letter and many others were written on the occasion of RBG's fiftieth birthday at the instigation of three of her clerks when she was serving as judge on the U.S. Court of Appeals for the D.C. Circuit. Friends and family were instructed to write, "When I think of RBG, I think of . . ." I am indebted to Jane Ginsburg for suggesting the Birthday Book (cited hereafter as RBG Birthday Book) as a source of relevant anecdotes and recollections, to Martin Ginsburg for making me a copy, and to RBG for giving me permission to quote from the letters.

18 **"the whole house went into mourning":** Quoted in Cook, *Alfred Kazin,* 13n21.

19 **War came when Kiki:** "The President's Message," *New York Times,* Dec. 9, 1941.

19 **Like other youngsters:** RBG, *My Own Words,* 7.

20 **"Since the beginning of time":** Ibid., 13.

21 **Endorsing the formation:** Ibid., 9. I am indebted to the late Richard Salzman, a former D.C. Superior Court judge, for providing me with an original copy of the essay and the June 24, 1946, graduation program, which recognizes RBG for outstanding achievement and service to her elementary school. Salzman and RBG were classmates, and his mother's collection of artifacts came into his possession upon her death. See Salzman, interview by author, Washington, D.C., Nov. 13, 2003.

22 **"Americans suddenly seemed":** Leandra Zarnow's work on Bella Abzug alerted me to the ideas and presence of Soshuk at East Midwood Jewish Center. Joan Bruder, who attended the same class as her friend Kiki, recalled their graduation and the award Kiki received. Joan Bruder Danoff, interview by author, July 27, 2004. RBG made no mention in our interviews of the Zionist sentiments that were becoming increasingly prominent among mainstream American Jews in her formative years.

24 **"all the right groups":** Margolick, "Trial by Adversity Shapes Jurist's Outlook"; Von Drehle, "Conventional Roles"; and Salzman, interview by author, Nov. 13, 2003. I have followed Von Drehle's wording regarding classmates' negative reactions to RBG.

26 **"convictions and self-respect":** Heilbrun, "Nancy Drew," 15. For an elaboration of what Celia meant by "be a lady," see RBG, interview by author, Sept. 24, 2004, and RBG's "International Women's Forum Lunch Remarks," Oct. 15, 1999.

26 **Her teachers later delivered:** RBG, *My Own Words,* 19.

26 **Yet no amount:** Davidman, *Motherloss.*

27 **"It is impossible":** The trauma of the minyan incident was called to my attention first by Jane Ginsburg and later confirmed by RBG, who provided me with a recent speech in which she quoted Szold's letter. It is that speech from which I have drawn the passage below. See RBG, "Remarks for International Lion of Judah Conference." On women saying the Kaddish, see Wieseltier, *Kaddish,* chap. 6. The unidentified lawyer and judge whom the author informs about his research on the issue (ibid., 189) I suspected was RBG, which she subsequently confirmed. Wieseltier bears correcting on one point: it was the funeral of her mother, not her father, that was critical. For the full version of the letter, see Henrietta Szold to Haym Peretz, Sept. 16, 1916, in Umansky and Ashton, *Four Centuries of Jewish Women's Spirituality,* 164–65. Seeing this minyan incident as a turning point in her relationship with religious institutions, RBG now believes she might have made a different decision as a young adult had Reform congregations been available and women been permitted to become rabbis.

27 **"She was the strongest":** Von Drehle, "Conventional Roles."

28 **"Kiki asked me to be her roommate":** Joan Bruder Danoff, interview by author, July 27, 2004.

29 **"She would have been proud of me":** Quoted in Edelman, *Motherless Daughters,* 306.

TWO · Cornell and Marty

30 **The prospect of being:** On the history of postwar Cornell, see Kammen, *Cornell,* chap. 7.

30 **Yet the seventeen-year-old:** All information and quotations are based on RBG interviews, cited in chap. 1, n1, as well as subsequent communications with the justice, unless otherwise indicated.

30 **Nearby Balch Hall:** Map of Ithaca from *Cornell Desk Book* for the class of 1954. On possible routes she might have taken, information on sites she would have passed in 1950, and the route she took, see author to RBG, April 21, 2004, facsimile; RBG to author, April 22, 2004, facsimile.

31 **"so that we wouldn't contaminate":** For a brief survey, see Engst, *Jewish Life at Cornell;* Levin, *Diary of David S. Kogan,* 120–220. Jews at Cornell were not a token minority. As RBG noted, there were enough Jewish coeds to fill two sororities plus those who never joined; however, there is no mistaking the "otherness" that Jewish students felt in the 1950s.

31 **The social distance between:** As of 1952, many fraternities and sororities had national restrictions on race, religion, and nationality that governed policies of local chapters. The Tri-Delt story was relayed in RBG, interview by author, Sept. 3, 2001. "Rigid" is RBG's characterization in the interview by Grele, Aug. 17, 2004.

31 **Even at the student union's:** Jon Greenleaf, interview by author, July 5, 2003. The degree of social distancing between Jews and non-Jews at Cornell is a matter on which memories of alumni interviewed diverge markedly. I have tried to take that divergence into account by attributing varying perceptions on a sensitive issue to that of specific individuals by name in the text, based on both initial interviews and subsequent correspondence.

31 **"easy to live with":** Joan Bruder Danoff, interview by author, July 27, 2004; and Irma Hilton, interview by author, July 22, 2004.

32 **Finally, Cornell coeds:** On dress code, see the *Cornell Desk Book* for the class of 1954; also, Von Drehle, "Conventional Roles."

32 **"drawing the line":** Sexual adventurism among unmarried Jewish women was considered *not* "good for the Jews," as is evident in the reception in 1955 of the best-selling Herman Wouk novel *Marjorie Morningstar,* although the Jewish press also faulted Wouk's characters for other offenses. See Barbara Sicherman, "Reading *Marjorie Morningstar,*" in Diner, Kohn, and Kranson, *Jewish Feminine Mystique?,* chap. 11. It took over four hundred pages in the novel before Marjorie loses her virginity. For a much fuller discussion of sexual containment, see Jane Sherron De Hart, "Containment at Home: Gender, Sexuality, and National Identity in Cold War America," in Kuznick and Gilbert, *Rethinking Cold War Culture;* and the classic work of Elaine Tyler May, *Homeward Bound,* chaps. 4–5. Though the rate of premarital pregnancy remained stable between 1920 and the 1960s, the nation's preoccupation with "sex" exploded, as evidenced by mass media coverage of the Kinsey Reports (1948 and 1953), Christine Jorgensen's "sex change" surgery, and congressional investigations of homosexuals in government.

33 **By contrast, Ruth's lack:** Bayer, *Women of Achievement,* 27.

33 **"I knew some pretty obscure libraries":** Within many Jewish families, girls were taught to "be smart enough to appreciate the man's brilliance but not 'too' smart to challenge it ('Why win the argument and lose the man?')." See Cantor, *Jewish Women/Jewish Men,* 223. At Barnard College, as much as 40 percent of the student body confessed to playing "dumb" in mixed company lest they scare off a date from calling again. Friends confirm that bright Bryn Mawr women did the same well into the 1960s, and I certainly did as a Duke undergraduate in the mid-1950s. While in retrospect such behavior may be seen as calculating or hypocritical, we knew that we had to "play the

game," selectively suppressing more intellectual, competitive aspects of our identities. On Barnard, see Chafe, *Unfinished Journey,* 125; and, for fuller treatment, Chafe, *Paradox of Change*. The importance of class, race, and ethnicity with regard to the mystique is explored respectively in Meyerowitz, *Not June Cleaver;* and Sicherman, "Reading *Marjorie Morningstar*."

33 **"A dedicated student?":** Irma Hilton, interview by author, July 22, 2004.

33 **"marvelously amusing":** All quotations in this and the following paragraphs from RBG, interviews by author.

35 **"Scary smart":** Margolick, "Trial by Adversity Shapes Jurist's Outlook"; and Hilton, interview by author, July 22, 2004.

35 **"If you want to win a case":** Quoted in Frost-Knappman and Shrager, *Quotable Lawyer,* 18.

36 **Alan Barth's columns:** Bagley, *Joe McCarthy and the Press,* 148–52.

36 **In doing so:** Cushman was editor of the Cornell University Press series on civil liberty. On research tasks assigned, see Elaine Bucklo, "From Women's Rights Advocate to Supreme Justice: Ruth Bader Ginsburg Speaks," *Litigation* 37 (2011): 8–9.

37 **Expanding the scope:** On Konvitz, see Douglas Martin, "M. Konvitz, Scholar of Law and Idealism, Is Dead at 95," *New York Times,* Sept. 11, 2003, A23. Also, Danelski, *Rights, Liberties, and Ideals*.

37 **Yet he clearly accomplished:** Danelski, *Rights, Liberties, and Ideals,* 2.

38 **"a lawyer could do something":** Quoted in Gilbert and Moore, *Particular Passions,* 156.

38 **"integrity, sense of responsibility and tact":** Carroll Arnold to the Harvard Law School Admissions Office, March 3, 1954, box 17, Arnold Correspondence, 1954–72, RBG Papers.

39 **Yet with the exception:** On the Cornell ethos in the 1950s, see Stephanie B. Goldberg, "The Second Woman Justice: Ruth Bader Ginsburg Talks Candidly About a Changing Society," *ABA Journal* 79 (Oct. 1993): 40–43. The epigraph, written by the anonymous Wellesley student, is quoted by RBG in the speech "Sex and Unequal Protection: Men and Women as Victims," Duke University Law School, Oct. 1971, RBG Papers.

39 **Others in the close-knit:** For gender roles and women's options, see Cantor, *Jewish Women/Jewish Men,* 169–75.

39 **But not Anita Zicht:** On Zicht and Rubenberg, see Irma Hilton to author, email, Nov. 15, 2013.

39 **At the time, neither Ruth:** On gender, sexuality, and policy, see Kessler-Harris, *Woman's Wage;* Kessler-Harris, *In Pursuit of Equity;* Canaday, *Straight State*.

40 **Marrying a young man:** Breines, *Young, White, and Miserable,* 193; Weiss, *To Have and to Hold;* and, of course, Friedan, *Feminine Mystique*.

40 **For those who secured:** There is extensive documentation by historians of discrimination against women, Jews, and other ethnic and racial groups in elite institutions and "male" professions. See, for example, Mary Roth Walsh, *"Doctors Wanted: No Women Need Apply."* For a personal account of prejudice against Jews at Yale, where he attended law school, and Harvard, where he taught, see Dershowitz, *Chutzpah,* chaps. 2–3.

40 **On many occasions:** RBG, interview by author, July 1, 2003. According to Irma Hilton, the girls even engaged in a barhopping episode that ended with RBG summoning male friends to escort them home safely. See Hilton, interview by author, July 22, 2004, and RBG, communication with author. Marty Ginsburg claims he offered to swipe one of the handsome copper mugs in which Moscow Mules were served, but his future wife declined his offer. See "Ruth Bader Ginsburg: A Second Circuit Tribute," a video in honor of RBG's seventieth birthday. (Cited hereafter as RBG Seventieth Birthday Video.) I am grateful to James Ginsburg for lending me a copy. I am also grateful to Elaine Ernst at the Kroch Library for helping document various activities in which RBG was engaged.

42 **"Ruth was a wonderful student":** Von Drehle, "Conventional Roles." For recollections of Marty's pursuit, according to M. Carr Ferguson, a Cornell classmate, see Claudia MacLachlan, "Mr. Ginsburg's Campaign for Nominee," *National Law Journal,* June 1993.

42 **"intellectual luminosity":** For reference to the blue plaid coat, see Martin D. Ginsburg to RBG, March 15, 1983, RBG Birthday Book.

42 **Though he failed:** Martin Ginsburg, interview by author, July 1, 2003; and RBG, interview by Grele, Aug. 17, 2004.

43 **"an intense intellectual":** RBG, interview by author, Aug. 17, 2004.

43 **"with the current communist peace offensive":** U.S. House of Representatives, Committee on Un-American Activities, *Report on the Communist "Peace" Offensive: A Campaign to Disarm and Defeat the United States,* 82nd Cong., 1st sess. (Washington, D.C., 1951), 87–90.

43 **Among the first American:** Glenn Altschuler and Isaac Kramnick, "The Morrison Case," *Cornell Alumni Magazine,* July/Aug. 2010. On Philip Morrison and his work with J. Robert Oppenheimer, see Bird and Sherwin, *American Prometheus,* 171–73, 298, 316, 320–21.

44 **Calls for the physicist's:** On Morrison's problems at Cornell, see Schrecker, *No Ivory Tower,* 150–60; also, Michael Ullmann, "Caught in a Crossfire: Deane Malott and Cornell During the McCarthy Era" (history honors thesis, Cornell University, 1980), chap. 3.

44 **For a university:** Ullmann, "Caught in a Crossfire," chap. 4; and "Marcus Singer of Cornell Appears at Velde Session," *Cornell Daily Sun,* May 27, 1953.

44 **"My loyalties always were":** U.S. House of Representatives, Committee on Un-American Activities, *Hearings on Communist Methods of Infiltration (Education) Part 5,* 83rd Cong., 1st sess., May 27, 1953, 1541, 1544, 1552–53.

44 **Marty and Ruth lamented:** Cornell's president, the business-oriented Deane Waldo Malott, who described himself as "an extremely conservative person politically and socially," publicly defended and probably saved the jobs of Morrison and Singer. However, he had little sympathy for either and kept Singer out of the classroom far longer than was necessary, further alienating Singer's colleagues in the Zoology Department. See Ullmann, "Caught in a Crossfire"; also "Singer Convicted for Contempt of Velde Committee," *Harvard Crimson,* March 17, 1956; "House Charges Singer with Contempt," *Cornell Daily Sun,* May 12, 1954; "University Relieves Prof. Singer After Indictment by Grand Jury," *Cornell Daily Sun,* Nov. 23, 1954, 1–2; "Cornell Relieves Marcus Singer of Teaching Duties," *Harvard Crimson,* Nov. 24, 1954, 1–2. For articles on students in support of Singer's trial, see "Council Urges Support of Singer for Honor, Conscience Ground," *Cornell Daily Sun,* May 5, 1954, 1; "A Moral Issue . . . Council Takes Wise Action," *Cornell Daily Sun,* May 6, 1954, 4; "The Great Awakening Fund for Dr. Singer," *Cornell Daily Sun,* May 21, 1954; "Fund for Singer," *Cornell Daily Sun,* May 26, 1954.

44 **"He was the only guy":** RBG, interviews by author, Aug. 28, 2002, and Aug. 17, 2004; also, Bayer, *Women of Achievement,* 29.

45 **Marty followed her lead:** RBG's reaction to the inequitable resources offered by Harvard Business School and Radcliffe's Management Training Program is particularly significant in light of her later position in the *Vorchheimer v. School District of Philadelphia,* 430 U.S. 703 (1977), and *United States v. Virginia,* 518 U.S. 515 (1996) cases. In none of the three pairs of institutions—Harvard Business School and Radcliffe's Management Training Program, Philadelphia's Central High School and the High School for Girls, Virginia Military Institute and Virginia Women's Institute for Leadership—did separate educational facilities offer equal educational opportunities.

45 **"that serious, blonde woman":** Joan B. Danoff and Stanley J. Landay to RBG, March 15, 1983, RBG Birthday Book.

46 **He was prepared to follow:** RBG, interview by Marcus, Aug. 10, 1995.
47 **She would move out:** On Rubenberg and Zicht, see Irma Hilton to author, email, Nov. 15, 2013.
47 **Marty's father, Ruth soon concluded:** RBG, interview by author, Sept. 1, 2006.
48 **By limiting attendance:** Evelyn Ginsburg to RBG, March 15, 2003. See RBG Birthday Book for the way the senior Ginsburgs found out about the engagement.
48 **"life partner":** "Life's partner" is RBG's term.
48 **Sealing her membership:** On golf clubs, see RBG, interview by Grele, Aug. 17, 2004. The problem, RBG explained, is that she is left-handed and the clubs were intended for right-handed players. I am informed by my husband, also a lefty, that clubs for left-handed players were then extremely difficult to find.
49 **"We had nearly":** Martin Ginsburg, interview by Nina Totenberg, in "Martin Ginsburg's Legacy: Love of Justice (Ginsburg)," *Weekend Edition Saturday,* NPR, July 3, 2010. See transcript at www.npr.org.
49 **"He would look at the target":** RBG, interview by Marcus, Aug. 15, 1995, is especially good on the details of life at Fort Sill and is the source for this and the following paragraph, unless otherwise noted. I have followed the language of the interview closely.
50 **A catch-22:** Unaccustomed to racial segregation, RBG initially misread a sign for a café restricted to whites as Joe White's Café rather than Joe's White Café. RBG, interview by Grele, Aug. 17, 2004.
50 **So she quietly certified:** Ibid. According to Marty, this discriminatory treatment of Indians in the local Social Security office was the only work-related frustration that so upset Ruth that she brought it home with her. Martin Ginsburg, interview by author, July 1, 2003.
50 **What he did know:** For an appreciative comment on Marty's cuisine, see Peter Huber, "Tribute to Justice Ruth Bader Ginsburg: 'Dining Chez Ginsburg,'" *Annual Survey of American Law* (1997): 19–21. Also see Alito and Supreme Court Spouses, *Chef Supreme.*
51 **She had visited Marty's Saturday:** On dinner guests and legal discussions, see Anthony I. Van Wye to RBG, March 15, 1983, RBG Birthday Book.
52 **When Marty got up:** On events relating to Jane's birth, see Evelyn Ginsburg to RBG, March 15, 1983, RBG Birthday Book; Martin Ginsburg, interview by author, July 1, 2003; and RBG, interviews by author.
53 **But could she do it with a child:** RBG related the decision-making process, but it was her son who described the nightmare. James Ginsburg (president of Cedille Records), interview by author, Chicago, July 30, 2003.
53 **Evelyn "was just there":** RBG, interview by author, Sept. 1, 2006.
53 **"If a male student":** RBG to author, Jan. 9, 2007.
54 **"A remarkable man":** RBG, interview by author, Sept. 1, 2006.
54 **"Harvard Law School has no glee club":** Quoted in Hope, *Pinstripes and Pearls,* 84.

THREE · Learning the Law on Male Turf

55 **"the legal equivalent":** Hope, *Pinstripes and Pearls,* 29.
55 **"think like lawyers":** Harry A. Blackmun, "In Memoriam: Erwin Nathaniel Griswold," *Harvard Law Review* 108 (1995): 979–1002. For more on "thinking like a lawyer," see Mertz, *Language of Law School.*
55 **Soia Mentschikoff:** Herma Hill Kay, "Ruth Bader Ginsburg, Professor of Law," *Columbia Law Review* 104 (2004): 1–20. Soia Mentschikoff was also the first woman on the faculty at the University of Chicago Law School, the first female to attain the status of partner in a major Wall Street law firm, and the first woman elected president of the Association of American Law Schools in 1974. See "Twenty-Two Portraits of Women at Columbia Law School," *Columbia Law School Report* (Fall 2002), 24; Bradley, *50 Most Influential Women in American Law,* 177–82; Robert Whitman, Soia Mentschikoff, and

Karl Llewellyn, "Moving Together to the University of Chicago Law School," *Connecticut Law Review* 24 (1992): 1119; Warren E. Burger, "Tribute to Dean Soia Mentschikoff," *University of Miami Law Review* 37 (1983): ix; and Smigel, *Wall Street Lawyer, Professional Organization Man?,* 46.

56 **"Why are you at Harvard Law School":** RBG, interview by author, June 27, 2000. RBG's account of the occasion in this and the following paragraphs varies slightly from that of Judith Richards Hope, *Pinstripes and Pearls: The Women of the Harvard Law Class of '64 Who Forged an Old Girl Network and Paved the Way for Future Generations* (New York: Scribner, 2008), 104–7. RBG's quotation is in the film *Paving the Way,* directed by Emma Joan Morris (CINE Golden Eagle, 1995), DVD.

57 **"lowly first year student":** RBG, "In Memory of Herbert Wechsler," *Columbia Law Review* 100 (Oct. 2000): 1359–61. See in that same issue, Harold Edgar, "In Memoriam—Herbert Wechsler and the Criminal Law: A Brief Tribute," 1347–58. Mitchel Ostrer, "A Profile of Ruth Bader Ginsburg," *Juris Doctor* 7 (1977): 34–38.

57 **"I watched in horror":** RBG, interviews by author.

57 **"that would not be considered":** Griswold, *Ould Fields, New Corne,* 173–74.

57 **"Dean Griswold, there are nine of us":** RBG, "Remarks," March 10, 2005.

58 **In the end, she:** RBG, interviews by author. For this and other recollections of Harvard, see also RBG, interview by Grele, Aug. 17, 2004; and Gilbert and Moore, *Particular Passions,* 157–58.

58 **derogatory nicknames:** Hope, *Pinstripes and Pearls,* 99. The designation "Bitch" was recalled by a male classmate in the context of formal remarks made at a Rotary Club meeting at the time of RBG's nomination to the Supreme Court. See Jorie Roberts, "Ginsburg Talk Highlights Celebration 25 Activities," *Harvard Law Record* 66 (1978): 9; also, Jeffrey Rosen, "The Book of Ruth: Judge Ginsburg's Feminist Challenge," *New Republic,* Aug. 2, 1993, 19.

58 **In an era when sexual:** The charitable explanation for what would now be defined as sexual harassment is put forth by Hope, *Pinstripes and Pearls,* 93.

58 **"tremendously engaging":** RBG, interview by Grele, Aug. 17, 2004.

59 **After frantically running:** The justice now marvels that she and her women classmates never complained about the lack of a bathroom in Langdell or the state of the one in Austin. See RBG, "Remarks," March 10, 2005, 9. Recalling other instances of blatant discrimination, she noted, "When I attended the Harvard Law School, there was no space in the dormitories for women. Women were not admitted to the Harvard Faculty Club dining tables. One could invite one's father but not one's wife or mother to the *Law Review* banquet." Bayer, *Women of Achievement,* 38.

60 **Astute lawyers, Hart proposed:** On the evolution of the course and course materials discussed in this and the following paragraphs, see Hart and Sacks, *Legal Process,* containing an introductory essay by William N. Eskridge Jr. and Philip P. Frickey. The book was published posthumously.

60 **"the most carefully worked-out":** Quoted in William N. Eskridge Jr. and Philip P. Frickey, "Commentary: The Making of the Legal Process," *Harvard Law Review* 107 (1994): 2031–55, 2039.

62 **How, they asked, can law:** On the political leanings of law professors, see Friedman, *American Law in the 20th Century,* 493. On the extent to which Hart, Wechsler, Sacks, and Bickel praised *Brown,* although it did not meet their test, see Kalman, *Strange Career of Legal Liberalism,* 27–32. For Hart's and especially Sacks's strength of commitment to racial integration, see the abridged version of the introduction of Eskridge and Frickey, "Commentary: The Making of the Legal Process," n114.

62 **The words "problem" and "anger":** RBG, interview by Grele, Aug. 17, 2004.

62 **"If that's what they're all like":** RBG, interview by Marcus, Aug. 15, 1995.

63 **"A wonderful New England grandmother":** RBG, interview by Grele, Aug. 17, 2004.

63 **a "wise, witty" wordsmith:** RBG, "In Memoriam: Benjamin Kaplan," *Harvard Law Review* 124 (April 2011): 1349. The editors of the *Harvard Law Review* dedicated this issue to Kaplan.

64 **Weekends provided a break:** RBG, interview by Grele, Aug. 17, 2004.

64 **"long, hypothetical fact-situations":** Ibid. For moot court experiences, see Herb Lobl to RBG, March 9, 1983; and Ronald M. Loeb to RBG, March 15, 1983, both in RBG Birthday Book. For more on Calvert Magruder, see Magruder Papers.

65 **"believed in me more":** Berry et al., "Ruth Bader Ginsburg: Women's Rights Advocate, Professor, Counsel, American Civil Liberties Union," in *Women Lawyers at Work,* 54. See Laura Jones, "Columbia's Leader in Legal Battle Against Sex-Based Discrimination," *Columbia Today* 1 (April 1975): 13–15.

65 **"For centuries":** RBG, introduction to Lowe, *Jewish Justices of the Supreme Court Revisited,* 3–4.

66 **"think like a lawyer":** What I am *not* suggesting is that rationalism is distinctively Jewish. To make such an assertion would be to ignore both the extent to which rationalism is also found in gentile worldviews and the long-standing difficulty of defining "Jewish." Nonetheless, rationalism as a mode of analysis is often highlighted by students of Jewish studies, whose primary enterprise involves teasing out whatever it means to be Jewish. See, for example, Heinze, *Jews and the American Soul*. See also Telushkin, *Jewish Humor,* 18.

66 **"Through the quiet force":** Thomas Ehrlich (counsel to the Carnegie Foundation), interview by author, July 12, 2004.

66 **Then, once the next issue:** RBG, interview by Grele, Aug. 17, 2004.

67 **"all . . . one could want":** Ibid.

67 **"in and out of the library stacks":** On Griswold and the *Harvard Law Review,* see Harry A. Blackmun, "In Memoriam: Erwin Nathaniel Griswold," 979. On RBG's proofreading skills and the pleasure of "reading against" her galley and page proof of the forthcoming *Harvard Law Review,* see respectively Susan Deller Ross to RBG, March 15, 1983, and Wilton S. Sogg to RBG, Jan. 31, 1983, RBG Birthday Book.

68 **"the nature, uses, limits":** Howard Raiffa, "In Memoriam: Albert M. Sacks," *Harvard Law Review* 105 (1991): 16–17; and RBG, interview by Grele, Aug. 17, 2004.

69 **"T'aint Whatcha Do":** Howard Raiffa, "In Memoriam." For the Fats Waller story told by Hart and retold by the Harvard Law alumnus and Yale president Kingman Brewster, see Kalman, *Yale Law School and the Sixties,* 60.

69 **"My emphasis is on process":** Quoted in Kalman, *Legal Realism at Yale,* 51.

70 **Leadership of the free:** Key consensus school scholarship includes Hofstadter, *American Political Tradition,* though Hofstadter also explored the dark side of that tradition. Schlesinger, *Vital Center;* and Boorstin, *Genius of American Politics*. See also Wall, *Inventing the "American Way."*

70 **"the affluent society":** See, for example, John Higham, "Changing Paradigms: The Collapse of Consensus History," *Journal of American History* 76 (1989): 460–66; Lears, *Culture of Consumption;* and Elaine Tyler May, *Homeward Bound*. More recently, see Schrecker, *Many Are the Crimes;* Sugrue, *Origins of the Urban Crisis;* and Corber, *Homosexuality in Cold War America*. The phrase "the affluent society" comes from John Kenneth Galbraith's book *Affluent Society.*

70 **Legal scholars on both:** Critiques on the Right came from the law and economics movement. How, asked Richard Posner and others, could Hart, Sacks, and other process scholars consider the law rational and purposive? Legislators, dependent on the support of special-interest groups, are in no position to act in a fair and impartial manner. Judges, Posner argues, cannot be relied on to supply a corrective. Unable to disrupt the political system through judicial activism, they often have to validate statutes that may be unfair, even unjust. Critiques from the Left came from the critical legal studies movement. Emphasizing injustice itself and noting structural bias, critical legal stud-

ies scholars pointed out that citizens simply do not have equal access to the legal process. For example, the poor and less educated are far less likely to vote and lack access to legislators and expert legal counsel. For a concise, evenhanded account of critiques, which I have oversimplified for purposes of brevity, see Eskridge, "Legislation and Pedagogy in the Post–Legal Process Era," *University of Pittsburgh Law Review* 48 (1987): 691–731.

70 **"how it ought to be":** Duxbury, *Patterns of American Jurisprudence,* 299.

70 **"optimistic view of citizens":** Eskridge and Frickey, "Commentary: The Making of the Legal Process," 2052–55.

71 **The disease that had:** Details of illness in the following paragraphs were from author's interviews and were supplemented in letters, notably RBG to author, Jan. 9, 2007.

71 **"While she was always":** Ronald M. Loeb, interview by author, July 27, 2004; and Loeb to RBG, March 15, 1983, RBG Birthday Book, in this and the following paragraph. Asked whether all students felt so positively toward RBG, Loeb responded that so far as he knew, they did—sentiments voiced by every classmate interviewed at Harvard or Columbia. RBG's helpfulness, friendliness, and modesty—traits universally mentioned—apparently disarmed critics at the very least and, at most, generated among friends powerful feelings of admiration and affection.

72 **"What I do recall vividly":** Ronald M. Loeb, interview by author, July 27, 2004; Loeb to RBG, March 15, 1983; RBG, interview by Grele, Aug. 17, 2004.

72 **Beyond her many admonitions:** For RBG's statement on working because she had a child to support, see RBG, interview by Marcus, Aug. 15, 1995.

73 **"what I had come to expect":** Martin D. Ginsburg, interview by author, July 1, 2003.

73 **"creative, deeply intelligent":** MacLachlan, "Mr. Ginsburg's Campaign for Nominee." Martin Ginsburg played a major role in the 1984 buyout of Ross Perot's EDS Corporation by General Motors. He is credited with creating the special Class E stock issue to buy EDS.

74 **"not made out an adequate":** Griswold's reply is reported in Gerald Gunther, "Ruth Bader Ginsburg: A Personal, Very Fond Tribute," *University of Hawaii Law Review* 20 (1998): 583.

74 **"We heard that the smartest":** Ibid. On Appel's initial reaction, see Margolick, "Trial by Adversity Shapes Jurist's Outlook." For quotation on lunches, see Nina Appel (dean emeritus of Loyola Law School), interview by author, July 14, 2004.

74 **"quiet, serious, conscientious":** Appel, interview by author, July 14, 2004; Von Drehle, "Conventional Roles."

75 **"Then, like a coda":** Von Drehle, "Conventional Roles," for Salzman quotations.

75 **The course she described as "extraordinary":** Richard Salzman, interview by author, Washington, D.C., Nov. 13, 2003. Salzman, who lived a block from RBG during their school years in Flatbush, was much less impressed with Wechsler than was RBG. For lecture, see Herbert Wechsler, "Toward Neutral Principles of Constitutional Law," *Harvard Law Review* 73 (1959): 360–61, esp. n10. For RBG's reaction, her observation that Wechsler's position "disquieted law students of my generation," and her account of the course and textbook, see "In Memory of Herbert Wechsler," 1359; also, Fallon, Meltzer, and Shapiro, *Hart and Wechsler's "The Federal Courts and the Federal System."* RBG attests that she keeps the volume "within arm's reach," available as an "aid or stimulant," as she deals with the Court's heavy workload. See "In Memory," 1359.

75 **"sensitive young student":** Wechsler to RBG, March 15, 1983, and Gunther to RBG, March 15, 1983, both in RBG Birthday Book; and "Professor Gerald Gunther Speaks at Investiture of Judge Ruth Ginsburg in Washington, D.C.," *Columbia Law Alumni Observer* 31 (Dec. 1980): 8–9.

76 **"professional courtesy":** Edmund M. Kaufman, interview by author, July 30, 2004.

76 **Happily situated in Greenhouse:** RBG, interview by author, July 1, 2003; and RBG, interview by Grele, Aug. 17, 2004.

76 **"Jane stood up in the middle":** Claire Stiepleman to RBG, March 15, 1983, RBG Birthday Book. Jane's operatic "debut" appears in Carol Saline and Sharon J. Wohlmuth, "Ruth Bader Ginsburg and Her Daughter, Jane Ginsburg," in *Mothers and Daughters,* 48.

77 **"That's my Mommy":** Berry et al., *Women Lawyers at Work,* 55. RBG's ability to captivate the youngest members of her family spans generations. When I was in Chicago interviewing her son, James Ginsburg, his younger daughter, who must have been around three, wandered in intent on conversing with her father. While James went into the kitchen to ask his former wife to retrieve the talkative little girl, I explained to her that I was asking her daddy questions about her grandmother. Her twinkling eyes widened noticeably. "You know my bubbe?" she asked, her voice filled with obvious delight.

FOUR · Sailing in "Uncharted Waters"

78 **White-shoe firms:** White-shoe refers to those white Anglo-Saxon Protestant firms made up of partners and associates whose summer dress traditionally entailed white shoes. While these firms might have a highly assimilated Jew for tax or real estate matters, they did not hire Jews. "Mixed" or "balanced" firms, which tried to maintain a fifty-fifty ratio, were next in the pecking order, followed by Jewish firms. Irish, Italians, Hispanics, and African Americans were even less desired by elite law schools and by major firms. Not until the 1980s did the Jewish "quota" fall. Data, collected in 1995, indicates that Jewish lawyers, while now earning as much as their Protestant counterparts, still faced greater difficulty making partnership in large non-Jewish firms. See Heinzet et al., *Urban Lawyers;* and Ronit Dinovetzer, "Social Capital and Constraints on Legal Careers," *Law and Society Review* 40 (2006): 445–79.

My explanation for RBG's rejection accords with her own. See RBG, interview by Grele, Aug. 18, 2004. Murray was well aware that at Paul, Weiss, Rifkind, Wharton & Garrison she counted as a "twofer."

79 **How could she:** RBG, interviews by author; RBG, interview by Marcus, Aug. 15, 1995; and RBG, interview by Grele, Aug. 18, 2004. See also Gilbert and Moore, *Particular Passions,* 158. When Myra Bradwell Day was held at Columbia Law School in 1980, other alumnae recounted similar stories, noting that they had viewed themselves as lawyers, not "women lawyers," and were surprised by the discrimination. As Sylvia Law, now a professor of law at New York University, recalled, "I had two alternate explanations. . . . One was that I really wasn't as good as I thought I was, and that depressed me. And the other was that my superiors didn't like me, and that depressed me. But it never occurred to me that the explanation was that I was a woman. In retrospect, this was precisely the reason." Quoted in "Myra Bradwell Day Forum Held at Law School," *Columbia Law Alumni Observer,* May 14, 1980, 8.

79 **"What were women lawyers":** RBG, "The Progression of Women in the Law," *Valparaiso University Law Review* 28 (1994): 1161–82, esp. 1173. Another of RBG's colleagues, she reported, placed women attorneys into two categories: "First, there are the social workers, the ones that devote themselves to the poor and the oppressed, the truly needy. That type was not cause for concern. The social workers do not figure at all in the real world of legal business, the professor said. Second, there are the backstagers, women who would find congenial work in drafting wills and contracts, and research and brief writing." Neither really counted.

79 **"rather diffident, modest and shy":** Quoted in Kay, "Ruth Bader Ginsburg, Professor of Law," 20.

79 **"To be a woman":** Gilbert and Moore, *Particular Passions,* 158. Asked subsequently by a law student at the University of Kansas about "the lowest point" of her career,

RBG responded with two stories, the first involving her job rejection and the second detailing the Drano crisis subsequently related. For press accounts containing this and other biographical information, see Lewis, "Rejected as a Clerk, Chosen as a Justice"; Margolick, "Trial by Adversity Shapes Jurist's Outlook"; Gugliotta and Randolph, "Mentor, Role Model, and Heroine of Feminist Lawyers"; Von Drehle, "Conventional Roles"; and Von Drehle, "Redefining Fair with Simple, Careful Assault."

80 **"awesome responsibility, and complete":** Gunther, "Ruth Bader Ginsburg: A Personal, Very Fond Tribute," 586.

80 **"that small group of very good":** Quotations are respectively from Peppers, *Courtiers of the Marble Palace;* and Gunther, "Ruth Bader Ginsburg: A Personal, Very Fond Tribute," 586. Information in this and the following paragraph is also based on Gunther to RBG, March 15, 1983, RBG Birthday Book.

80 **What would his wife:** RBG, interview by Grele, Aug. 18, 2004.

81 **The job was hers:** Judge Leonard Moore also granted an interview. RBG's immediate predecessor, Alvin Schulman, later professed his doubts about this account, recalling that he had narrowly beaten out a woman from Harvard. Alvin K. Hellerstein, another Palmieri clerk, was equally skeptical. See Schulman to RBG, May 2, 2001; Hellerstein to RBG, June 1, 2001; and RBG to Hellerstein and Schulman, June 22, 2001. RBG contacted Gunther, who stuck by his original account. Copies of these letters were made available to me by the justice. RBG later remarked that she was glad she hadn't known about the Gunther-Palmieri arrangement at the time because of the additional pressure it would have placed on her. RBG, interview by author, July 7, 2001.

82 **She learned just as quickly:** For this and the following paragraph, see RBG, interview by Marcus, Aug. 15, 1995. On deciphering the judge's handwriting, see Palmieri to RBG, March 15, 1983, RBG Birthday Book.

82 **"This is what I want":** RBG, interview by Marcus, Aug. 15, 1995; and Gilbert and Moore, *Particular Passions,* 158.

83 **With over fifty:** RBG, interview by Marcus, Aug. 15, 1995; and Gunther, *Learned Hand,* 653.

83 **"Young lady, here I am":** RBG, interview by Marcus, Aug. 15, 1995.

83 **Gender discrimination aside:** Palmieri to RBG, March 15, 1983, RBG Birthday Book.

84 **"She even show[ed] up":** Ibid. and "Ruth Bader Ginsburg," in *Current Biography Yearbook, 1994,* 214.

84 **The justice, Sacks believed:** Michael E. Parrish, "Justice Frankfurter and the Supreme Court," in Lowe, *Jewish Justices of the Supreme Court Revisited,* 61–80.

85 **The odds, Ginsburg:** On Lucile Lomen, Douglas's clerk in 1944, see Clare Cushman, *Supreme Court Decisions and Women's Rights,* 235–41. For numbers on female clerks subsequently hired and by whom, see Peppers, *Courtiers of the Marble Palace,* chap. 2. As the author notes, minorities continued to fare quite poorly. Overall, graduates of elite law schools, especially Harvard, dominated in the number of Supreme Court clerks produced through the year 2000. Although there was a somewhat greater diversity in the Rehnquist Court, a handful of elite law schools remain the locus for recruitment.

85 **"a person of paradox":** Parrish, "Justice Frankfurter and the Supreme Court," 64. Also see RBG, "The Supreme Court: A Place for Women," Wilson Lecture, Wellesley College, Wellesley, Mass., Nov. 13, 1998. For the quotation, see Parrish, "Frankfurter, Felix," anb.org.

85 **Palmieri swung into action:** On Palmieri's actions, see RBG, interview by Grele, Aug. 18, 2004. Strasser Spiegelberg is known today as the Fried Frank firm.

85 **"How would you like":** RBG, interviews by author.

86 **Intrigued, Ginsburg promised:** Hans Smit (Stanley H. Fuld Professor of Law, Columbia University) to author, email, April 19, 2001.

86 **The opportunity proved "irresistible":** RBG, interview by Grele, Aug. 18, 2004.

86 **Their almost daily lessons:** Ibid.

86 **"Ruth is basically a reserved":** RBG, "Introduction to Hans Smit," in Kay, "Ruth Bader Ginsburg, Professor of Law," n38. Smit, interview by author, March 31, 2008.

87 **By the late spring of 1962:** A mother as well as a member of the bar, Toni Chayes had clinched her argument by telling RBG, "If you have the chance to send your child to the best school in all of Manhattan, the Brearley School, and you send her, instead, to another place, you are doing your child a disservice." RBG, interview by Grele, Aug. 17, 2006. (The alternative was Hunter Elementary School, a public school for gifted children.)

88 **"good minds abroad":** RBG, interview by Grele, Aug. 18, 2004.

88 **Sweden's health-care and child-care policies:** An account of the impression left by the Finkbine incident is related in RBG, "Remarks for Panel Discussion on Current Topics in International Women's Rights," Association of the Bar of the City of New York, Dec. 13, 2001, supplied by RBG to the author. For a fuller discussion of Finkbine and the thalidomide problem, see Reagan, *Dangerous Pregnancies,* chap. 2.

89 **"We ought to stop":** Moberg is quoted in Rita Liljestrom, "Sweden," in Kamerman and Kahn, *Family Policy,* 33. See also Moberg, *Kvinnor och människor*.

89 **Predicting that the day:** Rita Liljestrom, "Sweden."

89 **"every cocktail party":** RBG is quoted in Von Drehle, "Conventional Roles."

89 **Based on a new:** Dahlström, *Changing Roles of Men and Women*.

89 **"the right to be human":** Hilda Scott, *Sweden's "Right to Be Human" Sex-Role Equality,* chap. 1.

90 **Hanks lived in the city:** RBG, interviews by author and supplemental notes of Jan. 19, 2007. Eva Hanks (professor of law, Cardozo School of Law, New York City), interview by author, March 28, 2008. On Gellhorn's admission that Columbia would have hired her much sooner had she been male, see Gellhorn to RBG, March 15, 1983, RBG Birthday Book.

91 **Knowing women held:** Hanks, interview by author, 2008; also, RBG, interview by Grele, March 18, 2004. For a brief account of women law faculty holding tenure or tenure-track positions at the Association of American Law Schools approved by the American Bar Association, see Kay, "Ruth Bader Ginsburg," 1–6.

91 **Offered the position:** RBG, interviews by author; also RBG, interview by Grele, Aug. 18, 2004.

91 **In the meantime, she was grateful:** RBG, interviews by author; also RBG, interview by Grele, Aug. 18, 2004; also, introductory note to RBG, "The Equal Rights Amendment Is the Way," *Harvard Law Journal* 1 (1978): 19.

92 **Ginsburg, seeing merit:** On schedule, see "In Memory of Dean Heckel: Comments of Ruth Bader Ginsburg," *Rutgers Law Review* 41 (1989): 477–78. On reception by male colleagues, see Lesley Oelsner, "Columbia Law Snares a Prize in the Quest for Women Professors," *New York Times,* Jan. 26, 1972. On fissions among faculty, see RBG, interview by Grele, Aug. 18, 2004. RBG likens Hanks's friendship and "tips" to those later received from Sandra Day O'Connor when RBG first joined the Court. See RBG, "Remarks for Rutgers," April 11, 1995 (in possession of the author).

92 **The trip was grueling:** On commuting, see Berry et al., *Women Lawyers at Work,* 64. In her franker moments, RBG would describe the commute with all its stops and changes as the commute from hell. It literally produced nightmares, she told me in our interview of Sept. 1, 2006.

93 **Nonetheless, the memory rankled:** Ibid., 63; "Ruth Bader Ginsburg," in *Current Biography Yearbook,* 214; and Ostrer, "Profile of Ruth Bader Ginsburg," 34.

93 **In just a few months:** Hanks, interview by author, March 28, 2008.

93 **"You were the very essence":** Joan B. Danoff to RBG, March 15, 1983, RBG Birthday Book; Ruth Watson Lubic, interview by author, July 27, 2004; and RBG, notes to author, Jan. 19, 2007, supplementing interviews.

93 **On September 8, 1965:** Von Drehle, "Conventional Roles." RBG's sentiments were based not just on having given birth but on the fact that the birth marked survival and regeneration, which is congruent with what the birth of a son must have meant to Marty. See Nina Totenberg, "A Look at Judge Ruth Bader Ginsburg's Life and Career," National Public Radio, July 6, 1993. I am grateful to Totenberg for making a transcript of the broadcast available to me.

94 **Moreover, it had to be:** The most comprehensive treatment of RBG's career at Rutgers is in Kay, "Ruth Bader Ginsburg," 2–20.

94 **Though fully aware:** RBG, interview by author, Sept. 1, 2006. Account of the months following birth based on my previous RBG interviews in this and following paragraphs.

95 **"Leave them undisturbed":** Patterson, *Grand Expectations*. Among the Court's many decisions generating controversy were *Baker v. Carr,* 369 U.S. 186 (1962); *Reynolds v. Sims,* 377 U.S. 533 (1964) (voting redistricting); *Engel v. Vitale,* 370 U.S. 421 (1962); *Abington School District v. Schempp,* 374 U.S. 203 (1963) (school prayer); *Gideon v. Wainright,* 372 U.S. 335 (1963); *Escobedo v. Illinois,* 378 U.S. 478 (1964) (criminal rights); *Jacobellis v. Ohio,* 378 U.S. 184 (1964) (obscenity and pornography); *Griswold v. Connecticut,* 381 U.S. 479 (1965) (privacy); *New York Times v. Sullivan,* 376 U.S. 254 (1964) (libel); *Garner v. Louisiana,* 368 U.S. 157 (1961); *Edwards v. South Carolina,* 372 U.S. 229 (1963); *Shuttlesworth v. City of Birmingham,* 373 U.S. 262 (1963); *Heart of Atlanta Motel v. United States,* 379 U.S. 241 (1964); and *Griffin v. County Board of Prince Edward County,* 377 U.S. 218 (1964) (racial discrimination). Brennan's quotation is in RBG, "In Memoriam: William J. Brennan," *Harvard Law Review* 111 (1997): 3.

95 **Just thinking about the man:** RBG, "In Memoriam: William J. Brennan." RBG might have been alluding in her remarks to a later period when she felt she had taken on too much, but this period after the birth of James she insists was the most difficult in terms of meeting dual commitments to family and career.

95 **"I schlepped Jane":** RBG to author, Jan. 19, 2007; see also RBG, "Remarks," March 10, 2005.

95 **"overcompensated on weekends":** Stephanie Francis Ward, "Family Ties: The Private and Public Lives of Justice Ruth Bader Ginsburg," *ABA Journal* 96 (2010): 36–43.

96 **Unable to return:** RBG, interview by Grele, Aug. 18, 2004.

96 **"What is his name?":** Jane Ginsburg, interview by author, May 6, 2003. RBG has no memory of the exchange after the dance, but agrees I should rely on Jane's account. What she does remember vividly is that the application for dance class was wait-listed, which she took to mean "no Jews wanted," so after Jane's "adamant" refusal to take part in the class, there was no second application. RBG to author, Jan. 19, 2007.

97 **Ruth responded reassuringly:** Jane Ginsburg, interview by author, May 6, 2003, and RBG to author, Jan. 19, 2007.

97 **"I was a resentful child":** For quotations on Jane's resentful nature, her mother's quiet disappointment, and RBG's searches and seizures of childhood debris, see Saline and Wohlmuth, *Mothers and Daughters,* 50; and for others see Berry et al., *Women Lawyers at Work,* 61–62.

97 **Their daughter's ingenuity:** For the camp letter story, I am indebted to James Ginsburg, interview by author, July 30, 2003. That RBG "giggles" when sufficiently amused is also attested to by her clerks. See Deborah Jones Merritt, "Tribute to Ruth Bader Ginsburg," *Annual Survey of American Law* (1997), xxxiii.

97 **"Mommy Laughed":** "Mommy Laughed" was so much a part of family history that Jane was not even sure at the time of our interview that it had appeared as a booklet; both parents confirmed that it did.

98 **Fortunately, the housekeeper:** RBG, interviews by author.

98 **"Deep burns distorted":** Berry et al., *Women Lawyers at Work,* 58–59.

98 **"She absolutely doesn't forgive":** Ibid. Also, RBG, "Remarks," March 10, 2005, 29. Jane Ginsburg, interview by author, May 6, 2003. Jane's quotation is in Saline and Wohlmuth, *Mothers and Daughters,* 50.

100 **But there were times:** RBG, interviews by author.

100 **"For the good students":** Linda P. Campbell and Linda M. Harrington, "Judge Ruth Bader Ginsburg: Portrait of a 'Steel Butterfly,'" *Chicago Herald Tribune,* June 27, 1993.

100 **"she clung to the lectern":** Hanks, interview by author, March 28, 2008.

100 **Colleagues and students roared:** Ibid. RBG described the incident when asked to identify photographs. She describes Hanks as a "great and good friend." See RBG, "Remarks," March 10, 2005.

100 **"We never sat together":** Hanks, interview by author, March 28, 2008. On playing by male rules that were not clearly disclosed, see Aisenberg and Harrington, *Women of Academe,* esp. chap. 3.

101 **"World Wars, Court calendars":** RBG, interview by author; Martin Ginsburg, interview by author, July 1, 2003; and Jane Ginsburg, interview by author, May 6, 2004. Also see Bernard and Joyce West to RBG, March 15, 1983, RBG Birthday Book.

101 **Another part was not:** RBG, interview by author.

101 **"They spoke another language":** RBG, interviews by author. Jane Ginsburg first alerted me to her summers in France.

102 **For that generation:** Svonkin, *Jews Against Prejudice*. For a history of legal liberalism and its relationship to New Dealers, see Kalman, *Strange Career of Legal Liberalism,* prologue and chap. 1.

103 **Protests were erupting:** Patterson, *Grand Expectations,* 694–97.

FIVE · The Making of a Feminist Advocate

104 **"one of the great turning points":** RBG quotation is from *Paving the Way,* directed by Morris.

104 **Spurred by advocates:** Skrentny, *Minority Rights Revolution,* 7. By the late 1960s, 70 percent of the high court's decisions involved individual rights in contrast with no more than 10 percent in the 1930s, when the property-rights claims of business and the wealthy consumed most of the justices' attention.

105 **Funding, organizational backing:** Epp, *Rights Revolution,* 3. Canada and Great Britain were simultaneously undergoing a rights revolution. See ibid., chaps. 3–4, on the United States.

105 **Though Ginsburg, who:** Daniel Horowitz, "Rethinking Betty Friedan and *The Feminine Mystique:* Labor Union Radicalism and Feminism in Cold War America," *American Quarterly* 48 (1998): 1–42, quotation is on 1. For fuller treatment, see Horowitz, *Betty Friedan and the Making of "The Feminine Mystique."* RBG's disappointment upon reading *The Feminine Mystique* was shared by others who, as Horowitz notes, found little new or exciting in Friedan's revelations and her approach limited.

106 **"full participation of women":** National Organization for Women, 1966 Statement of Purpose, reprinted in Kraditor, *Up from the Pedestal,* 363–64.

107 **An "ice woman":** Riegelman's quotation is in Strebeigh, *Equal,* 20.

107 **But handle it she did:** See, for example, RBG to L. Howard Bennet, July 29, 1970; RBG to Melvin Laird, Stanley Resor, Clark Case, and Major Gloria Olson, Sept. 17, 1970; RBG to Stephen Nagler, Dec. 7, 1970, RBG Papers.

107 **If the implicitly sexist:** On New Jersey ACLU work, see "Justice Ruth Bader Ginsburg Remembers," *Rutgers Tradition* (1995): 10–11; RBG, "Remarks on Women's Progress in the Legal Profession in the United States," *Tulsa Law Journal* 33 (1997): 13–21; RBG, "Introduction to Women and the Law: Facing the Millennium," *Indiana Law Review* 32 (1999): 1161–65. See also, RBG to Stephen Nagler, Sept. 20, 1971, RBG Papers.

107 **For the former Cornell:** RBG to Professor Jameson Doig, April 6, 1971, RBG Papers.

107 **But female employees:** "Justice Ruth Bader Ginsburg Remembers," 10–11; also, RBG comments in "Women on the Bench," *Columbia Journal of Gender and Law* 10 (2000–2001): 25–28.

108 **Such discrimination hurt:** As late as 1970, only 1.6 percent of women were employed as engineers. See www.nap.edu.

108 **Women had their own concerns:** Kalman, *Yale Law School and the Sixties,* esp. 218. See also Edward J. Bloustein, "In Remembrance of Dean Heckel," *Rutgers Law Review* 41 (1989): 475–77.

108 **At Yale, these young feminists:** Kalman, *Yale Law School and the Sixties,* 3.

109 **Ginsburg could not resist:** Strebeigh, *Equal,* 14.

109 **She discovered that she:** "Justice Ruth," Duke University Law School, www.law.duke.edu.

109 **What few exemptions:** There is now extensive literature on the early legal status of women. A good place to start is Dayton, *Women Before the Bar;* Hartog, *Man and Wife in America;* Basch, *In the Eyes of the Law;* Kerber, *No Constitutional Right to Be Ladies;* Edwards, *People and Their Peace;* and Pascoe, *What Comes Naturally*.

110 **"Whatever changes may have taken":** Italics mine. Drew's quotation is in Kerber, *No Constitutional Right to Be Ladies,* 163. According to Kerber, when the case first came to trial in Tampa in 1957, of the more than 46,000 women registered to vote in Hillsborough County, only 218 had registered for jury duty. Of the 218, the jury commissioner placed only 10 names in a pool of 1,000 names.

110 **"Despite the enlightened emancipation":** Kerber, *No Constitutional Right to Be Ladies,* 173–84; *Hoyt v. Florida,* 368 U.S. 57 (1961).

110 **"They can't help being influenced":** Kerber, *No Constitutional Right to Be Ladies,* 173–84; for RBG's quotation, see Jones, "Columbia's Leader in Legal Battle Against Sex-Based Discrimination," 13–15.

111 **It was that simple:** *Ballard v. United States,* 329 U.S. 187 (1946).

111 **"judicial paternalism":** On terms, see Judith Baer, *Chains of Protection;* and Grossberg, *Governing the Hearth*. The classic case involving "protective legislation" that limited working hours for women was *Muller v. Oregon,* 208 U.S. 412 (1908). See also Dalrymple, *Sexual Distinctions in the Law.*

111 **"Differentiated by these matters":** *Muller,* 208 U.S. 412.

112 **"The Constitution does not require":** *Goesaert v. Cleary,* 335 U.S. 464 (1948). Davidson, RBG, and Kay, *Text, Cases, and Materials on Sex-Based Discrimination,* 15–17.

112 **Gender discrimination—differentiation:** For an excellent survey on the variability of American gender definitions from 1500 to the present, see Ryan, *Mysteries of Sex*.

112 **Equality, as a principle:** An excellent introduction to race formation and theory and the historical trajectory of racial politics is Omi and Winant, *Racial Formation in the United States,* chap. 4. On the legal struggle, see Klarman, *From Jim Crow to Civil Rights*.

113 **So deeply ingrained were divisions:** On the interchangeability principle, see Pole, *Pursuit of Equality in American History,* 293–94; and Judith A. Baer, "How Is the Law Male? A Feminist Perspective on Constitutional Interpretation," in Goldstein, *Feminist Jurisprudence,* 147.

113 **In fundamental ways:** On the narrow interpretation of the Nineteenth Amendment and its consequences, see Reva Siegel, "She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family," *Harvard Law Review* 115 (2002): 947–1046.

113 **Nor was the record:** John D. Johnson Jr. and Charles Knapp conclude that the performance of America's judges in this area could be "succinctly described as ranging from poor to abominable" in Johnson and Knapp, "Sex Discrimination by Law: A Study in Judicial Perspective," *New York University Law Review* 46 (1971): 676. See also

Reva Siegel, "The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860–1930," *Georgetown Law Journal* 82 (1994): 2127. For the struggle to change women's legal status, see Van Burkleo, *Belonging to the World*.

113 **"How," she wondered, "have people":** RBG quoted in Gilbert and Moore, *Particular Passions,* 153. RBG, "Sex and Unequal Protection: Men and Women as Victims," *Journal of Family Law* 11 (1971): 347–49 (delivered as a lecture with the same title at Duke University Law School, Oct. 1971, RBG Papers). RBG publicized the results of her reading in numerous speeches and articles. See, for example, remarks for the New Jersey ACLU's Annual Awards Dinner, "Civil Liberties Union Efforts to Combat Sex Discrimination," 1971; also, RBG, "Men, Women, and the Constitution," *Columbia Journal of Law and Social Problems* 10 (1973): 77–112.

114 **Members of the President's:** Harrison, *On Account of Sex,* 110–42, 169.

114 **When Ginsburg proposed:** Strebeigh, *Equal,* 19.

115 **Heckel could be confident:** RBG describes her colleagues as "supportive or at least indulgent" in "Justice Ruth Bader Ginsburg Remembers," 11. Few scholars who tried to introduce courses on women into the university curriculum in those years escaped the objections that they were "too ideological" to be standard offerings. Rather, such highly political courses, they were told, should be offered as a voluntary, noncredit "add-on" in the manner of a "teach-in" on Vietnam.

115 **Women at Berkeley's:** On these pioneers, see Linda K. Kerber, "Writing Our Own Rare Books," *Yale Journal of Law and Feminism* 14 (2002): 429–31.

116 **Questions vastly outnumbered answers:** For RBG's attachment to Mill, see her use of the quotation from *The Subjection of Women* in "Introduction to Women and the Law—a Symposium," *Rutgers Law Review* 25 (1970); on the larger enterprise of course creation, see Kerber, "Writing Our Own Rare Books," 431–34.

116 **Examples were plentiful:** RBG to Barbara Schiller, May 21, 1971, RBG Papers, Miscellany Files, 1969–1972, box 19.

116 **Not only would participants:** Ibid.

117 **Why not add a symposium:** RBG, "Introduction to Women and the Law—a Symposium," 1–11.

117 **In 1971, the *Women's Rights Law Reporter:*** Ibid., 3.

118 **For now, it was exhilarating:** Ibid.; and Kerber, "Writing Our Own Rare Books," 429. On fatigue, see Bernard West to RBG, Feb. 16, 1983; and Gunilla Asp to RBG, March 15, 1983, both in RBG Birthday Book.

118 **"Given Vietnam, there was certainly":** For recollections of women at Boalt in the 1960s, see Rose Bird, "3d Year Girls Lament (Fondly Dedicated to Dean Hill)," *Writ* (1965): 2. Ruth Abrams is quoted in "Celebrating the Women of HLS," *Harvard Law Bulletin* 30 (1999). Alumnae at the University of Pennsylvania Law School whose recollections, though later in time, were just as negative are reported by Lani Guinier, Michelle Fine, and Jane Balin, "Becoming Gentlemen: Women's Experiences at One Ivy League Law School," *University of Pennsylvania Law Review* 143 (1994): 1–110. Quotation in Kalman, *Yale Law School and the Sixties,* 143.

119 **That would have to change:** On women in the profession, see Epstein, *Woman's Place,* and *Women in Law;* Doris L. Sassower, "Women in the Law," in Professional Women's Caucus, *Sixteen Reports on the Status of Women in the Professions* (New York, 1970); also Doris L. Sassower, "Women in the Law: The Second Hundred Years," *American Bar Association Journal* 57 (1971): 329–32. On specific women, see, for example, Biskupic, *Sandra Day O'Connor,* chap. 2.

119 **"overwhelming," just "staggering":** RBG does not recall the precise year in which she read *The Second Sex,* saying that it was "in the 1960s," in my interviews on Aug. 28, 2000, and Sept. 2, 2005. The year 1969 has been specified by Klebanow and Jonas; however, she questions how they would have known. See Diana Klebanow and Franklin L. Jonas, "Ruth Bader Ginsburg," in *People's Lawyers,* 361.

119 **"There was a passion":** Hanks, interview by author, March 28, 2008; and Tracy Schroth, "At Rutgers, Ginsburg Changed," *New Jersey Law Journal* 134 (1993): 32.

119 **"hippy-yippy-campy":** Carol Hanisch, "A Critique of the Miss America Protest," condensed and reprinted in Kerber and De Hart, *Women's America,* 577.

119 **"dangled from her wrist":** Ellen Goodman, "The Transformation of Justice Ginsburg," *Boston Globe,* June 29, 2007.

120 **"full participation in the mainstream":** National Organization for Women, 1966 Statement of Purpose.

121 **"land, like woman":** Quotation in Von Drehle, "Conventional Roles." For more on bias against women lawyers, see Phyllis D. Coontz, "Gender Bias in the Legal Profession: Women 'See' It, Men Don't," *Women and Politics* 15 (1995): 1–22.

121 **In this personal evolution:** Examples provided by RBG, interviews by author, July 27, 2000, Sept. 3, 2001, Aug. 28, 2002, and July 1, 2003.

121 **"I ask no favor for my sex":** Grimké, *Letters on the Equality of the Sexes and the Condition of Woman,* 10. An example of RBG's frequent use of this quotation is in Joint Reply Brief of Appellants and American Civil Liberties Union Amicus Curiae of Ginsburg et al. at 2–14, *Frontiero v. Laird,* 341 F. Supp. 201, 1123 (1972).

122 **In Switzerland, women:** RBG, "The Status of Women," *American Journal of Comparative Law* 20 (1972): 585–91; and RBG, "Introduction to Women and the Law—a Symposium," 1–11. See also Offen, *Globalizing Feminisms*.

six · Seizing the Moment

123 **"it was all a matter":** For RBG's statement "I was in the right place at the right time," see, for example, RBG, "On Taking Equal Rights Lightly," speech delivered upon receipt of the Society of American Law Teachers Award, Dec. 14, 1979, RBG Papers.

123 **"Chance," aptly observed:** Charles Nicolle in Fitzhenry, *Harper Book of Quotations,* 488.

123 **As a sixteen-year-old former:** Melvin Wulf (attorney), interview by author, New York City, Nov. 2, 2000; also, RBG, interview by author, Sept. 2, 2005.

123 **One could almost see:** Melvin Wulf (attorney), interview by author, New York City, Nov. 2, 2000; Sara Fritz, "Without Great Expectations Ginsburg Found Her Way to the Top," *Los Angeles Times,* July 21, 1983, 5.

124 **Even more effectively:** Eva Hanks, interview by author, New York City, March 28, 2008; Joan Bruder Danoff, interview by author, July 27, 2004; Irma Hilton, interview by author, July 22, 2004; and Nina Appel, interview by author, July 14, 2004.

124 **For Neier's plans:** RBG, interview by author, Sept. 2, 2005. Neier's quotation is in Walker, *In Defense of American Liberties,* 299–300; also, Neier, *Taking Liberties,* xxvi–xxvii.

125 **"Let's take it":** Martin D. Ginsburg, interview by author, July 1, 2003.

125 **Sex-discrimination cases:** Hoff, *Law, Gender, and Injustice*.

126 **First, they needed:** *Bolling v. Sharpe,* 347 U.S. 497 (1954).

126 **Because even appearing:** Martin D. Ginsburg, interview by author, July 1, 2003.

126 **"We will take the case":** RBG to Wulf, Nov. 17, 1970, RBG Papers.

127 **It took a series:** Martin D. Ginsburg, interview by author, Sept. 2, 2005.

127 **Moritz declined, holding:** Wulf to RBG, Feb. 2, 1971, quoted in Strebeigh, *Equal,* 26.

127 **Ruth now set:** The two became acquainted at Gannett House at Harvard when Dorsen, also a Harvard Law graduate, would stop by the *Harvard Law Review* office to pick up his date Nancy Boxley, who was also on the staff.

127 **In turning to Dorsen:** Dorsen also had among his credits supervision of the ACLU's amicus brief in the landmark 1963 case *Gideon v. Wainwright,* 372 U.S. 335 (1963).

127 **"one of the very best presentations":** For praise of Dorsen's strategic ability and wise counsel, see Neier, *Taking Liberties,* 14. Dorsen to RBG, April 12, 1971, RBG Papers.

128 **"the constitutional guarantees":** Points drawn from Brief for Petitioner-Appellant, Charles E. Moritz, at 20, *Moritz v. Commissioner of Internal Revenue,* 469 F.2d 466, RBG Papers.

129 **Nor was she personally:** Had Pauli Murray not been denied an appointment at Cornell in 1952 because the people who supplied her references—Eleanor Roosevelt, Thurgood Marshall, and A. Philip Randolph—were considered too radical, the paths of the two women might have crossed earlier. Similarly, when RBG had a summer job at Paul, Weiss, Rifkind, Wharton & Garrison, where Murray was employed, they did not become acquainted. Nor did she get to know Pilpel until the two later attended the same conference in Israel. For homage, see RBG, "Constitutional Adjudication in the United States as Means of Advancing the Equal Status of Men and Women Under the Law," *Hofstra Law Review* 26 (1997): 267; also see RBG quotation in Anne Firor Scott, *Pauli Murray and Caroline Ware,* 138–39.

129 **None had been more:** Kenyon was appointed to the League of Nations Committee on the Status of Women from 1938 to 1940 and served as the first U.S. delegate to the UN Commission on the Status of Women from 1947 to 1950.

130 **"a Cassandra crying out":** On the relative inactivity of the Women's Committee in the 1950s, see Alan Reitman to Pat Malin, Aug. 20, 1951, box 1948, Malin Papers. Archival material indicates that the low priority attached to women's issues was not for any lack of support on the part of the ACLU's president, Patrick Malin, but rather a reflection of national inactivity and the ACLU's—and Kenyon's own—preoccupation with McCarthyism. Women's rights activity revived with the introduction of equal pay bills in 1961 for which Kenyon testified before the House Committee on Education and Labor. See Testimony of Dorothy Kenyon on Equal Pay Bills H.R. 8898 and H.R. 10226 on April 27, 1962, box 210, Kenyon Papers. On abortion rights, see draft of speech, "The Legal Concept of Equality," April 2, 1959, 6–7, folder 227, box 23, Kenyon Papers. On her years as the lone feminist, see Kenyon to Fellow Board Members, Feb. 21, 1967, folder 2042, box 114, Murray Papers. For a superb analysis of Kenyon's contribution, see Samantha Barbas, "Dorothy Kenyon and the Making of Modern Legal Feminism," *Stanford Journal of Civil Rights and Civil Liberties* 5 (Oct. 2009): 423–46.

130 **She and Kenyon led:** See "Twenty-Two Portraits of Women at Columbia Law School," 25.

130 **"Now," she asked her:** Gilmore, *Defying Dixie,* 324–26; Murray, *Pauli Murray,* 311–15. Murray was not only a black woman but also a closeted lesbian. For her concerns about her sexuality, which surfaced during adolescence, see Anne Firor Scott's editorial comments in *Pauli Murray and Caroline Ware,* esp. 38. On her denial of admission to the University of North Carolina at Chapel Hill because of race and to Harvard Law School because of gender, see respectively Glenda Elizabeth Gilmore, "Admitting Pauli Murray," *Journal of Women's History* 14, no. 2 (2002): 62–67; and Rosalind Rosenberg, "The Conjunction of Race and Gender," *Journal of Women's History* 14, no. 2 (2002): 68–73. See Murray's own account of her family and her life in *Proud Shoes* and *Song in a Weary Throat*. *Song in a Weary Throat* was later republished as *Pauli Murray*. For a full biography, see Rosalind Rosenberg, *Jane Crow: The Life of Pauli Murray* (New York: Oxford University Press, 2017).

130 **By the time she:** Murray, *States' Laws on Race and Color*.

131 **In it, she and Mary:** On Kenyon's prior arguments against jury exemptions, see Kerber, *No Constitutional Right to Be Ladies,* chap. 4. Pauli Murray and Mary O. Eastwood, "Jane Crow and the Law: Sex Discrimination and Title VII," *George Washington Law Review* 34 (1965): 232–56.

132 **Similar myths and mechanisms:** Sources included Gunnar Myrdal, the Swedish sociologist, who made the same analogy in his classic 1944 study of U.S. race relations, *An American Dilemma: The Negro Problem and Modern Democracy;* as did Helen Hacker in her influential 1951 article "Women as a Minority Group," *Social Forces* 31

(Oct. 1951): 60–69. Simone de Beauvoir's comparison between women and African Americans in *The Second Sex* provided additional fodder.

132 **The willingness of the Supreme:** For an excellent discussion of sources as well as the power (and limitations) of the race-sex analogy in "Jane Crow," see Serena Mayeri, "'A Common Fate of Discrimination': Race-Gender Analogies in Legal and Historical Perspective," *Yale Law Journal* 110 (2001): 1045–87.

132 **As a member of President:** For Murray's earlier efforts to persuade feminists to use equal protection litigation in areas other than those affected by protective labor legislation, see Harrison, *On Account of Sex,* 126–36; Murray, *Pauli Murray,* chap. 29; and Murray to Mary Eastwood, Jan. 25, 1968, folder 957, box 51, Murray Papers.

132 **The "troika," as Kenyon:** Murray and Kenyon to the ACLU Board of Directors, telegram, Sept. 23, 1970. On delegate demands at the 1970 Biennial Conference, see "Resolution Proposed by the Ad Hoc Committee on Women's Rights," April 1970 draft and June 4, 1970, draft; Murray and Kenyon to Board, memo, Sept. 24, 1970; Harriet F. Pilpel Conference paper, "The Civil Liberties Aspects of Human Reproduction," June 3–7, 1970, all in folders 956–57, box 55, Murray Papers. The term "dual strategy" is Serena Mayeri's.

133 **In September 1970:** For vote count, see Murray's handwritten notation on Murray and Kenyon to the Board of Directors, telegram, Sept. 23, 1970; and Alan Reitman to Murray, Sept. 30, 1970, both in folder 956, box 55, Murray Papers.

133 **"Where there are several persons":** Idaho statute quoted in RBG, "Introduction to Women and the Law—a Symposium," 9; RBG to Wulf, April 6, 1971, RBG Papers.

134 **"*We* will write":** Wulf's reply to RBG's request is quoted in RBG Rutgers remarks. For these remarks, she apparently condensed history, indicating that Wulf agreed in the course of their visit in Newark.

134 **Rather, the justices should:** Wulf, interview by author, Nov. 2, 2000. The West German Constitutional Court had declared unconstitutional provisions in the civil code authorizing fathers to determine the education of a child when the parents disagreed and specifying that agrarian estates be inherited whole by the eldest son even when there were older daughters.

134 **"At the time, Ruth":** Wulf, interview by author, Nov. 2, 2000; Dorsen, interview by author, May 1, 2003; and Neier, *Taking Liberties,* 13. RBG agrees that the initiative came from Neier and Wulf and dates the official offer to an ACLU board meeting to which she was invited to discuss litigation possibilities following the November (1971) *Reed* decision. RBG, interview by Grele, Washington, D.C., Aug. 18, 2004. Unless otherwise indicated, all material in subsequent paragraphs is based on author's interviews and notes. Where I have relied on interviews by either Marcus or Grele, I have so indicated.

134 **"Civil liberties," she explained:** Quoted in Women's Rights Project, *With Liberty and Justice for Women: The ACLU's Contribution to Ten Years of Struggle for Equal Rights* (New York: American Civil Liberties Union, 1982), 5. RBG and Barbara Flagg, "Some Reflections on the Feminist Legal Thought of the 1970s," *University of Chicago Legal Forum* 9 (1989): 8–21, esp. 11.

135 **With access to relevant cases:** As an ACLU board member said of the money, "How much is hand wash and how much is real, I don't know . . . but I'll put up with it." On the Playboy Foundation's support for feminist causes—and the attacks it inspired in some feminist circles, though not on the ACLU's part—see Pitzulo, *Bachelors and Bunnies,* 150–67, esp. 165n100 and 166n110. For the financial resources of the ACLU compared with other women's rights groups involved in litigation, see Karen O'Connor and Lee Epstein, "Beyond Legislative Lobbying: Women's Groups and the Supreme Court," *Judicature* 67 (1983): 133–43; and Ruth B. Cowan, "Women's Rights Through Litigation: An Examination of the American Civil Liberties Union Women's Rights Project, 1971–1976," *Columbia Human Rights Law Review* 8 (1976): 377, 386–89.

135 **Unencumbered by the constraints:** For this and the following paragraphs, see Sarat and Scheingold, *Cause Lawyering;* and Scheingold and Sarat, *Something to Believe In*. See also Teles, *Rise of the Conservative Legal Movement,* esp. chap. 2. On public-interest law, see the entire issue of *The Yale Law Journal* 79 (1970).

135 **As anyone following the Swedish:** RBG's continued awareness of Palme and his efforts is evident both in her inclusion of Palme's speech titled "The Emancipation of Man" in her teaching materials and in her adoption of concepts and language in her briefs. See Olof Palme, "The Emancipation of Man: Address Before the Women's National Democratic Club," June 8, 1970, in Davidson, RBG, and Kay, *Text, Cases, and Materials on Sex-Based Discriminations,* ix. See also *Reed v. Reed,* 404 U.S. 71 (1971).

135 **"speak truth to power":** The quotation, almost a cliché, is Quaker in origin, going back to the eighteenth century.

136 **Though she had spent:** RBG, interviews with author.

136 **With the "old boy":** Graham, *Civil Rights Era*.

137 **Sacks might now:** Keller and Keller, *Making Harvard Modern,* esp. chaps. 14 and 18.

137 **"Crits [CLS] and their enemies":** Ibid., 438.

137 **She had learned her lesson:** Hanks, interview by author, March 28, 2008.

137 **"It really wasn't sexism":** Hans Smit (professor of law, Columbia University), interview by author, March 31, 2008.

137 **Nor did it mean:** "Women at Columbia," Columbia University Archives. Also see McCaughey, *Stand, Columbia,* 518.

137 **According to *The New York:*** "Women's Rights Study Begun at Universities," *New York Times,* April 5, 1970, 43; Phyllis Kaniss, "HEW Cracks Down on Universities for Discrimination Against Women," *Pennsylvanian,* Nov. 9, 1970, 1; Nancy Hicks, "Women on College Faculties Are Pressing for Equal Pay and Better Positions in Academic Hierarchy," *New York Times,* Nov. 21, 1971, 41.

138 **"Don't try to make her":** Hans Smit, interview by author, March 31, 2008. Smit apparently did not attend the meeting, because his colleagues were aware of his longtime support of RBG's appointment.

138 **"We're not going":** RBG, interview by Grele, Aug. 18, 2004.

138 **If she could reach:** Michael Sovern, an extraordinarily talented son of working-class Jews in the Bronx and a full professor at Columbia Law School at the age of twenty-eight, would become president of Columbia in 1980. His delighted predecessor, in introducing Sovern, said, "What can I say [except that] Columbia kvells." McCaughey, *Stand, Columbia,* 518. Sovern's evident pleasure in RBG's appointment and the fact that as Law School dean he was one of "the barons" (the term used to refer to the powerful semiautonomous heads of prestigious professional schools) augured well for her future.

138 **Now he could afford:** RBG, interviews with author.

139 **"This child has two parents":** Nina Totenberg, "No, Ruth Bader Ginsburg Does Not Intend to Retire Anytime Soon," NPR, Oct. 3, 2016.

139 **Also, she felt she no longer:** Brenda Feigen sensed a special protectiveness on RBG's part toward James, which I attribute to the Drano accident in chap. 4. Brenda Feigen (attorney), interview by author, Los Angeles, Aug. 13, 2003. On Dalton School phone calls, see James Ginsburg, interview by author, July 30, 2003; also, RBG and Martin Ginsburg, interviews by author. On observation that she "over compensated tremendously" with Jane and "was much more relaxed" with James, especially in exposing them to music, see RBG, "Remarks," March 10, 2005, 29–30.

139 **"a far richer theory":** Cary Franklin, "The Anti-stereotyping Principle in Constitutional Sex Discrimination Law," *New York University Law Review* 85 (2010): 83–173.

139 **In addition, she had secured:** RBG, *My Own Words,* 115.

139 **"if you want something":** RBG, interviews by author.

139 **a "major coup" for the university:** Oelsner, "Columbia Law Snares a Prize in the Quest for Women Professors," A39.

139 **Congratulatory letters:** Richard S. Salzman to RBG, Jan. 26, 1972; Joyce and Bernard West and Gerry Arnson Lavner to RBG, Jan. 26, 1972; Weinstein to RBG, Jan. 26, 1972; Palmieri to RBG, Jan. 26, 1972; William J. McGill to RBG, Feb. 4 and April 12, 1972; and RBG to McGill, April 21, 1972, all in box 17, RBG Papers.

140 **"A number of lawyers":** McGill to RBG, Feb. 4, 1972, box 17, RBG Papers.

141 **But sensibilities on both:** RBG to McGill, Feb. 10, 1972, RBG Papers.

141 **With no admission of guilt:** The fullest account is Rosenberg, *Changing the Subject,* chap. 6. See also McCaughey, *Stand, Columbia,* chap. 18. The situation was complicated by the fact that record keeping at Columbia was much more haphazard than at Harvard or Chicago, making it difficult to compile the data Pottinger requested. Also, according to one of his associates, McGill "didn't give a damn about affirmative action," though he clearly cared about Columbia's financial situation. Quotation is in Rosenberg, *Changing the Subject,* 250. McCaughey notes that because of severe budgetary restraints only three women had been hired by 1993. Not until the more prosperous later 1990s would the proportion of women grow to 28 percent. Also see RBG, interview by Grele. RBG to McGill, March 1, 1972, box RG 1971–1972, McGill Papers.

141 **Some saw affirmative:** Anderson, *Pursuit of Fairness,* 143.

141 **Even Ruth's old friend:** Rosenberg, *Changing the Subject,* 254. On women as teachers of law, see Walter Gellhorn and Louis Henkin, who noted how effectively RBG had dispelled the myth. Gellhorn to RBG, March 15, 1983; and Henkin to RBG, March 15, 1983, both in RBG Birthday Book.

142 **When asked what:** Sovern, *Improbable Life,* chap. 6.

142 **"accessibility with demanding standards":** Raiffa, "In Memoriam: Albert M. Sacks," 16; and Rabb in Pam Lambert, "Ginsburg and Rabb: Setting Precedents," *Columbia* (Summer 1980): 11. On other professors whom RBG sought to emulate, see RBG, interview by Marcus, July 14, 1997, 13.

143 **Both young lawyers:** Accounts of the maids' firings are contained in undated, unidentified newspaper clippings in Subject Files, Columbia University Archives. See especially clipping with Joel Dreyfuss byline.

143 **Hoping that a resolution:** For more on Janice Goodman as attorney for maids, see Veteran Feminists of America Salutes Feminist Lawyers, 1963–75, www.vfa.us.

143 **"Now, dear":** RBG, interview by Grele.

144 **The university, on the other:** Ibid.; also, RBG, interviews by author.

144 **McGill responded positively:** RBG to McGill, Jan. 17, March 1 and 6, April 4, 1972; and McGill to RBG, March 14, 1972, box RG 1971–1972, McGill Papers.

144 **In the end:** RBG to Elizabeth Langer, April 12, 1972, RBG Papers; also, RBG, interviews by author.

SEVEN · A First Breakthrough

147 **The wound proved fatal:** Unless otherwise noted, this and the following paragraphs are based on Clare Cushman, *Supreme Court Decisions and Women's Rights,* chap. 6; also, Memorandum Decision and Order, *Reed v. Reed* (1968); *Reed v. Reed,* 94 Idaho 542 (1969); and Jurisdictional Statement by Melvin L. Wulf and Allen R. Derr (July 21, 1970), in *Reed v. Reed,* RBG Papers.

147 **"of several persons claiming":** Quoted in Linda K. Kerber, "November 22, 1971: Sally Reed Demands Equal Treatment," in Rubel, *Days of Destiny,* 442. *Reed v. Reed,* 404 U.S. 71 (1971), 92 S. Ct. 251, 30 L.Ed. 2d, 225.

148 **He agreed to appeal:** The Derr quotation is in Kerber, "November 22, 1971," 443. I am grateful to Kerber for sharing with me her telephone interview with Derr, which provided the basis for this information.

148 **"rationally related to a permissible":** *Reed v. Reed,* 404 U.S. 71, 92 S. Ct. 251, 30 L.Ed. 2d 225.

148 **But at the very least:** RBG, interviews by author.

149 **"for want of a substantial federal question":** This term is used when there is no federal law related to the issue of the case.

149 **Working with them:** On the ACLU's initial involvement in *Reed* and the division of labor, see Derr to Wulf, March 24, 1970; Wulf to Derr, April 2, 1970; and Wulf to Margaret [*sic*] W. Griffiths, Sept. 16, 1971, all in box 1645, ACLU Papers. The Jurisdictional Statement and Reply Brief are contained in the *Reed v. Reed* case file, RBG Papers. Wulf was assisted by the NYU Law School student Eve Cary.

150 **Ginsburg had translated:** Strebeigh, *Equal,* 34–35.

150 **"It should be noted":** *Korematsu v. United States,* 323 U.S. 214 (1944), 216.

151 **As a fallback position:** RBG, interview by author.

151 **Having taken over the writing of the brief:** On RBG's use of Murray's race-sex analogy, see Serena Mayeri's carefully calibrated contextualization of Murray's approach in the 1960s versus RBG's approach in the early 1970s, when ERA was viable and offered an opportunity for fine-tuning permissible sex-based classification. Mayeri, "'Common Fate of Discrimination,'" 1045–87.

151 **To clinch the argument:** This and the following paragraphs are based on Brief for the Appellant, Wulf et al., at 5, 51, 59, *Reed v. Reed,* 404 U.S. 71 (1971). RBG also made much of the California Supreme Court's use of the race-sex analogy in *Sail'er Inn Inc. v. Kirby,* 485 P.2d 529 (1971), quoting from the decision.

152 **Assuming that the Court:** Deborah L. Markowitz, "In Pursuit of Equality: One Woman's Work to Change the Law," *Women's Rights Law Reporter* 11 (1989): 79n72.

152 **"must be reasonable":** The 1920 case was *F. S. Royster Guano v. Virginia,* 253 U.S. 412 (1920). Italics mine. See also Strebeigh, *Equal,* 41.

152 **Ginsburg then wove:** On RBG's effort to deal with what would appear counterintuitive, see Linda Greenhouse, "Introduction: Learning to Listen to Ruth Bader Ginsburg," *New York City Law Review* 7 (2004): 213.

152 **"creates a 'suspect classification'":** Brief for the Appellant, Wulf et al., *Reed v. Reed,* 404 U.S. 71 (1971).

153 **"My generation owed them":** Strebeigh, *Equal.*

153 **"I thought it fitting to inform":** Wulf claimed that adding the two women's names was his idea. On the debt owed Kenyon and Murray, see RBG, "Constitutional Adjudication in the United States as a Means of Advancing the Equal Stature of Men and Women Under the Law," 267; and "Justice Ruth Bader Ginsburg Remembers," 11. The three law students who worked on the brief were Janice Goodman, Mary Kelly, and Ann E. Freedman. See Wulf to Goodman, Kelly, and Freedman, June 29, 1971, box 1645, ACLU Papers.

153 **When the four research:** RBG, "Remarks," March 10, 2005, 6; and RBG, Remarks for Panel Discussion on Current Topics in International Women's Rights, Association of the Bar of the City of New York, Dec. 13, 2003, 1, in possession of the author.

154 **"Such favors I don't need":** Birch Bayh to Wulf, Aug. 25, 1971; Wulf to RBG, July 15, 1971; and Wulf to Norman Redlich, July 1, 1971, all in box 1645, ACLU Papers. Redlich had reversed the first and second points of the ACLU brief on standard of scrutiny. See Brief of the City of New York, Amicus Curiae, *Reed v. Reed,* 404 U.S. 71.

154 **"the locker-room humor":** RBG to Wulf, March 2, 1971; and RBG to Leo Kanowitz, April 13, 1971, both in box 1645, ACLU Papers.

154 **"There is . . . the very important":** Wulf to Allen R. Derr, June 4, 1971, box 1645, Wulf Papers.

154 **A successful defense:** On Norton, see Gill, *African American Women in Congress,* 100–13.

154 **Highly regarded as a principled:** Norton's feminist consciousness had been carefully nurtured by Kenyon and Murray following her employment as a member of the ACLU legal staff in 1965, though, as Norton noted, her experience with racial discrimina-

tion made sex-based discrimination readily apparent. Hartmann, *Other Feminists,* esp. 182–85.

155 **"You . . . know that I so sincerely":** Derr to Sally Reed, Oct. 9, 1971, box 1645, ACLU Papers.

155 **Wulf was correct:** Myron H. Bright, "The Power of the Spoken Word: In Defense of Oral Argument," *Iowa Law Review* 72 (1986): 35–46; David C. Savage, "Saying the Right Thing," in Choper, *Supreme Court and Its Justices,* 469–70; Andrea McAtee and Kevin T. McGuire, "Lawyers, Justices, and Issue Salience: When and How Do Legal Arguments Affect the U.S. Supreme Court?," *Law and Society Review* 41 (2007): 259–78; and John Szmer, Susan W. Johnson, and Tammy A. Sarver, "Does *the* Lawyer Matter? Influencing Outcomes on the Supreme Court of Canada," *Law and Society Review* 41 (2007): 279–304. Wulf's views reflect the classic advice offered by Justice Robert H. Jackson in his "Advocacy Before the United States Supreme Court," *Cornell Law Quarterly* 37 (1951): 1–16.

155 **It demonstrated "total ignorance":** Wulf to RBG, July 15, 1971; Wulf to Martha W. Griffith, July 6 and Sept. 16, 1971; and Wulf to Derr, Oct. 21, 1971; all in box 1645, ACLU Papers.

155 **"Study the brief":** Wulf to Derr, Oct. 8, 1971, box 1645, ACLU Papers.

156 **The Idaho lawyer:** For the transcript of the oral arguments that occurred on October 19, 1971, see Records of the Supreme Court of the United States, "Transcripts of Oral Arguments, 1968–1978, 1980–1992," Oct. Term 1971, box 1, entry 17, *Reed v. Reed,* esp. 1–22, Record Group 267, National Archives.

156 **"the worst oral argument":** Goodman to Wulf, Oct. 20, 1971; Wulf to Derr, Oct. 21, 1971; both in box 1645, ACLU Papers. RBG to Gerald Gunther, Dec. 26, 1972, RBG Papers. Blackmun graded the argument a D and added that *Reed* was "the worst argued case I have heard up to here." He was only marginally more favorable to Cecil Reed's attorney, to whom the justice gave a D plus. Interestingly, however, Blackmun's initial reaction to the brief—no doubt influenced by some recent cases involving equal protection and national origin—was that the appellant's argument for strict scrutiny was a "compelling one." See Bench Memo, No. 70-4-ASX, *Reed v. Reed,* Blackmun Papers. See also Greenhouse, "Introduction," 213.

156 **Wulf had remained confident:** Wulf to RBG, July 19, 1971; and Martha W. Griffith to Wulf, both in box 1645, ACLU Papers.

156 **"simply superb pieces":** Aryeh Neier, "Reflections on Ruth Bader Ginsburg's Leadership of the ACLU Women's Rights Project," American Civil Liberties Union, www.aclu.org.

156 **"If Mrs. Reed does not win":** Griffiths to Wulf, July 6, 1971, box 1645, ACLU Papers.

157 **"My first reaction":** RBG to author, Oct. 10, 2000.

157 **A unanimous Court:** In reversing the decision, the Court sent the case back to Idaho to decide on the basis of merit which of the Reeds should serve as administrator. Ultimately, the Reeds agreed to serve as co-administrators.

157 **"To give a mandatory preference":** *Reed v. Reed,* 404 U.S. 71 (1971), 76.

157 **The narrowness of the decision:** Wulf, interview by author, Nov. 2, 2000.

157 **To move faster:** On the cultural, racial, and political cleavage of the 1970s, as well as division over the Vietnam War, there is extensive literature. See, for example, Chafe, *Unfinished Journey;* Matusow, *Unraveling of America;* Rieder, *Canarsie;* Hunter, *Culture Wars;* Edsall and Edsall, *Chain Reaction;* and Himmelstein, *To the Right*. Controversial Supreme Court decisions include *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971); *Swann v. Charlotte-Mecklenburg County Board of Education,* 402 U.S. 1 (1971); and *New York Times v. United States, United States v. Washington Post,* 403 U.S. 713 (1971); *Roe v. Wade,* 410 U.S. 113 (1973), and *Doe v. Bolton,* 410 U.S. 179 (1973), were pending.

158 **No longer would the Court:** *Reed,* 404 U.S. at 76.

158 **The press, quick to report:** Fred P. Graham, "Court, for First Time, Overrules a State Law That Favors Men," *New York Times,* Nov. 23, 1971, A1; Nick Kotz, "High Court Voids State Law as Biased Against Women," *Washington Post,* Nov. 23, 1971, A1; Ronald J. Ostrow, "High Court Extends Rights of Women: Voids Laws Giving Men an Arbitrary Preference," *Los Angeles Times,* Nov. 23, 1971, A1; Associated Press, *Arizona Republic,* Nov. 23, 1971; "Top Court Voids Probate Sex Bias Law," *Chicago Tribune,* Nov. 23, 1971, A6; S. J. Micciche, "High Court Advances Women's Rights," *Boston Globe,* Nov. 23, 1971; "High Court Spurs Women's Rights," *Detroit Free Press,* Nov. 23, 1971; "Women Won with Legal Fight," *Kansas City Times,* Nov. 24, 1971; "Women and the Fourteenth," *New York Times,* Nov. 23, 1971, A40; and "Victory for Women and for Justices," *Los Angeles Times,* Nov. 24, 1971, B6.

158 **"a smidgen of equality":** "A Smidgen of Equality," *Boston Globe,* Nov. 24, 1971.

158 **"a small, guarded step":** For more of RBG's public comments, see manuscript draft of "Comment on *Reed v. Reed,*" *Women's Rights Law Reporter* (1972), RBG Papers; and RBG, "The Burger Court's Grapplings with Sex Discrimination," in Blasi, *Burger Court,* 135.

158 **Legal scholars concurred:** For a sampling of law review coverage, see Laurie Bier, "Constitutional Law—Equal Protection—Sex Based Classification—*Reed v. Reed,* 404 U.S. 71 (1971)," *Wisconsin Law Review* (1972): 626–33; Judith A. De Boisblanc, "Constitutional Law: The Equal Protection Clause and Women's Rights," *Loyola Law Review* 19 (1973): 542–51; John P. Murphy Jr., "The *Reed* Case: The Seed for Equal Protection from Sex-Based Discrimination, or Polite Judicial Hedging?," *Akron Law Review* 5 (1972): 251–63; and "Recent Cases: Constitutional Law—Equal Protection—State Probate Code Discriminating in Favor of Males Violate Equal Protection Clause," *Vanderbilt Law Review* 25 (1972): 412–18. For the most astute assessment of the direction of the Court on equal protection following *Reed,* see Gerald Gunther, "The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection," *Harvard Law Review* 86 (1972): 1–306.

158 **However, to ignore:** RBG to Elizabeth Langer, April 12, 1972, RBG Papers.

159 **Others applied *Reed* narrowly:** Compare *Moritz v. Commissioner of Internal Revenue,* 469 F.2d 466 (10th Cir. 1972), with *Schattman v. Texas Employment Commission,* 459 F.2d 32 (5th Cir. 1972).

159 **"What *Reed* has wrought!":** See Gunther, "Foreword: In Search of Evolving Doctrine on a Changing Court," 17–48. A lower federal court relied on the ruling to invalidate, on constitutional grounds, guidelines issued under a federal job-training program that gave top priority to unemployed men while relegating women with preschool children to the bottom of the list. An Idaho law declaring the husband to be head of the family, with the right to determine where it lives, soon toppled. Several months later, a state court in Washington used the case for an even broader decision. Justice Marshall signaled his interpretation of *Reed* in his dissent in *San Antonio Independent School District et al. v. Rodriguez,* 411 U.S. 1 (1973), esp. 107. In *Reed,* the justices had "resorted to a more stringent standard of equal protection review." The Court, Marshall noted, was "unwilling to consider a theoretical and unsubstantiated basis for distinction—however reasonable it might appear—sufficient to sustain a statute discriminating on the basis of sex." In *Eisenstadt v. Baird,* 405 U.S. 438 (1972), a case involving a Massachusetts law restricting sales of contraceptives, Brennan explained why the Court had used the rational relationship test in *Reed*—not because it rejected sex as a suspect classification, but because the Idaho statute in question was so clearly invalid even under the more lenient standard of review. Other cases cited in RBG, "Comment on *Reed v. Reed,*" *Women's Rights Law Reporter* (1972), RBG Papers. RBG to Wulf, Feb. 7, 1973, RBG Papers.

EIGHT · Setting Up Shop and Strategy

160 **"no files, no staff":** RBG, interviews by author.

160 **"the premier philanthropy":** Neier, *Taking Liberties,* xxviii–xxix. Quotation in Hartmann, *Other Feminists,* 143.

161 **According to foundation policy:** Neier, *Taking Liberties,* xxviii–xxix; and RBG, interviews by author.

161 **Nor did Ginsburg:** Neier, *Taking Liberties,* 84; and RBG, interviews by author. RBG had included reproductive rights as one of six targeted areas in her initial memo outlining the project's objectives. For a classic statement that "the basic element of the rights of women is reproductive freedom of choice," see Pilpel's comments in her keynote speech for Myra Bradwell Day at Columbia Law School, April 8, 1980, at which both Pilpel and RBG spoke. See "Myra Bradwell Day Forum Held at Law School," Columbia University Law School, 1980, clipping in box 46, Biographical Files, RBG Papers.

161 **He was one of the most:** RBG, interviews by author. RBG regarded the criticism directed at the project for having taken money from the Playboy Foundation as the least of her worries. For her response, see RBG, "Equality for Women," *Playboy,* Sept. 1973, 52; and Harriet F. Pilpel, "Contraception and Freedom," *Playboy,* Jan. 1969, 51, and Harriet F. Pilpel, "Abortion Laws Challenged," *Playboy,* April 1970, 60. I thank Leigh Ann Wheeler for calling this correspondence to my attention.

161 **In ideology, style:** Feigen, *Not One of the Boys,* 1–71; and Wulf, interview by author, Nov. 2, 2000.

162 **Young feminist attorneys:** Brenda Feigen, interview by author, Aug. 13, 2003; M. E. Freeman and Lynn Hecht Schafran (attorneys), interviews by author, March 2, 2007; and Kathleen Peratis (attorney), interview by author, Nov. 3, 2003. Peratis, "Address of Kathleen Peratis on the Occasion of a Celebration of Twenty Years on the Bench of Hon. Ruth Bader Ginsburg and Unveiling of Her Portrait, November 3, 2000." (Cited hereafter as Peratis, "Address on RBG Portrait Dedication.") I am grateful to Peratis for giving me a copy of her remarks.

163 **"WOMEN WORKING":** "Tribute: The Legacy of Ruth Bader Ginsburg and WRP Staff," American Civil Liberties Council, March 7, 2006.

163 **What she had not expected:** RBG, interview by author. The children of Peratis and Susan Deller Ross were the first so-called ACLU babies. RBG and Sandra Day O'Connor would later attempt to make the Supreme Court a bit more family friendly for clerks, male and female.

163 **And it did, though:** Peratis, "Address on RBG Portrait Dedication."

163 **female "*sanctum sanctorum*":** "Tribute: The Legacy of Ruth Bader Ginsburg and WRP Staff."

164 **"head is in the law":** Peratis, "Address on RBG Portrait Dedication"; see also Feigen's recollection in David Von Drehle, "Ruth Bader Ginsburg: Her Life and Law," *Washington Post,* July 19, 1993, 1, 3, 4–5. RBG's clerks also noted the extraordinary work environment she created. Indeed, Peratis voices similar sentiments expressed by Susan H. Williams and David Williams, "Sense and Sensibility: Justice Ruth Bader Ginsburg's Mentoring Style as a Blend of Rigor and Compassion," *University of Hawaii Law Review* 20 (Winter 1998): 589–93.

164 **"We whom she mentored":** Peratis, "Address on RBG Portrait Dedication."

164 **"[She] spoke to us":** M. E. Freeman, interview by author, March 2, 2007. For comments in a similar vein from RBG students and co-workers—all attorneys—see author's interviews with Lynn Hecht Schafran, March 2, 2007; Jane Booth, March 1, 2007; Kathleen Peratis, Nov. 3, 2003; Susan Reiger, March 1, 2007; and Brenda Feigen, Aug. 13, 2003. See also "Tribute: The Legacy of Ruth Bader Ginsburg and WRP Staff" for comments by Jill Goodman and Margaret Moses.

164 **"rare, radiant smile":** "Professor Gerald Gunther Speaks at Investiture of Judge Ruth Ginsburg in Washington, D.C.," 8–9.

165 **When Ginsburg put down:** Author interviews with Freeman, March 2, 2007; Schafran, March 2, 2007; Booth, March 1, 2007; Peratis, Nov. 3, 2003; Reiger, March 1, 2007; and Feigen, Aug. 13, 2003.

165 **"I don't know if I fully":** Freeman, interview by author, March 2, 2007.

165 **"I just wanted to do":** Sandra Pullman, "Tribute: The Legacy of Ruth Bader Ginsburg at WRP Staff," ACLU.org.

165 **"We were all in awe":** Feigen, *Not One of the Boys,* 73; Feigen, interview by author; and RBG, interviews by author.

166 **More important, where:** Quotation in Jeffries, *Justice Lewis F. Powell Jr.,* 503. According to Jeffries, Sandra Day O'Connor was the first professional woman Powell came to know as a peer. Their friendship became quite close, although Powell apparently never really understood the extent or impact of the sex-based discrimination she had experienced because things had come so easily to him. See ibid., 502–11.

166 **"has all but recaptured":** Abraham, *Justices, Presidents, and the Supreme Court,* chap. 11.

166 **Specifically, this meant limiting:** William H. Rehnquist (assistant attorney general) to Leonard Garment (special counsel to the president), memo, reprinted in "Rehnquist: ERA Would Threaten Family Unit," *Legal Times,* Sept. 15, 1986. I am indebted to Reva Siegel for calling the memo to my attention. For evidence of Rehnquist's conservative views on *Brown* and other matters, see Tushnet, *Court Divided,* 13–31; also, Perry, *"Supremes,"* chap. 1.

166 **"I cannot help but think":** Abraham, *Justices, Presidents, and Senators,* 15–16.

167 **The ACLU had made:** Ibid., 204–7; and Urofsky, *Continuity of Change,* chap. 1.

167 **And he had been a vote for *Reed:*** "Profiles of the Justices," in Blasi, *Burger Court,* 239–55; Robert Henry, "The Players and the Play," in Schwartz, *Burger Court;* and Urofsky, *Continuity of Change,* chap. 1. Also, Hutchinson, *Man Who Once Was Whizzer White*.

168 **"A constitutional right":** House Committee on Armed Services, *Registration of Women: Hearings on H.R. 6569,* CIS-NO: 81-H201-15, 1980, 131. On traditionalist women's apprehensions about gender equality, see my co-authored book with Mathews, *Sex, Gender, and the Politics of ERA,* chap. 6. On "gendered imagination," see Kessler-Harris, *In Pursuit of Equity,* 5–6.

168 **Teague's certainty:** Quotation in Mathews and De Hart, *Sex, Gender, and the Politics of ERA,* 40.

168 **"Sam did not":** Ibid., chap. 2, on Ervin's testimony. RBG would have been familiar with his views inasmuch as the hearing occurred in 1970.

168 **"The response I got":** On the response that women have it better, see, among others, RBG, "Foreword to the Symposium: Women, Justice, and Authority," *Yale Journal of Law and Feminism* 14 (2002): 214–15. I have followed her wording closely. Jones, "Columbia's Leader in Legal Battle Against Sex-Based Discrimination," 14.

169 **"reconsider attitudes and values":** For excellent discussions of RBG's reliance on race-based constitutional law versus Title VII cases, see Kathleen M. Sullivan, "Constitutionalizing Women's Equality," *University of California Law Review* 90 (2000): 735–65; and Mary Anne Case, " 'The Very Stereotype the Law Condemns': Constitutional Sex Discrimination Law as the Search for Perfect Proxies," *Cornell Law Review* 85 (2000): 1447. RBG was certainly familiar with the Title VII case *Phillips v. Martin Marietta Corp.,* 400 U.S. 542 (1971), because, at the time, she was working on *Reed*. See RBG to Wulf, March 2, 1971, box 1645, ACLU Papers. See also Michael C. Dorf, "The Paths to Legal Equality: A Reply to Dean Sullivan," *University of California Law Review* 90 (May 2002): 791–813.

169 **But with only one EEOC case:** *Phillips,* 400 U.S. 542; and Mary Becker, "The Sixties Shift to Formal Equality and the Courts: An Argument for Pragmatism and Politics," *William and Mary Law Review* 40 (1998): 209–77.

170 **"constant dialogue":** Quoted in Jones, "Columbia's Leader in Legal Battle Against Sex-Based Discrimination," 14; and Stephanie B. Goldberg, "The Second Woman Justice: Ruth Bader Ginsburg," *ABA Journal* (Oct. 1993): 40–43.

170 **Here she would rely:** RBG, "Brown v. Board of Education in International Context," *Columbia Human Rights Law Review* 36 (2005): 500.

170 **Precedents already established:** Ibid.; and RBG, "Burger Court's Grapplings with Sex Discrimination," 135. For other sources that deal with initial decisions on litigation strategy, case selection, and her role as litigator/educator, see RBG, ACLU Women's Rights Project Prospectus, RBG Papers; Jones, "Columbia's Leader in Legal Battle Against Sex-Based Discrimination," 13–15.

171 **"Mr. Civil Rights":** Sandra Day O'Connor, "Thurgood Marshall: The Influence of a Raconteur," *Stanford Law Review* 44 (1992): 1220. Tushnet, *Making Constitutional Law;* Glen M. Darbyshire, "Clerking for Justice Marshall," *ABA Journal* (Sept. 1991): 48–51; and Klebanow and Jonas, *People's Lawyers*.

171 **That could promote the personal:** Neier, "Reflections on Ruth Bader Ginsburg's Leadership of the ACLU Women's Rights Project."

171 **In the absence of "original intent":** Feigen, *Not One of the Boys,* 75.

172 **"Justice," as Justice Benjamin:** Philip Marshall Brown, "The Codification of International Law," *American Journal of International Law* 29 (Jan. 1935): 32.

172 **"nudges" rather than "earthquakes":** In a hastily prepared prospectus for the project, which RBG compiled so that Neier would have something on paper at the time of her appointment, she listed six categories for litigation, although she knew at the time that choices would be informed by what was in the pipeline. See RBG, interview by author.

172 **The only way the solicitor:** On Griswold, see RBG, interview by Marcus, Aug. 8, 1996, 32, 26.

172 **In fact, he had previously:** Griswold to Murray, Jan. 31, 1963, box 49, folder 878, Murray Papers. Murray and Griswold both had strong ties to the NAACP, for which he served as an expert witness in *Brown v. Board of Education*.

172 **Surely he had to know:** RBG, "Remarks for Woodrow Wilson International Center for Scholars," May 21, 2002, RBG Papers. On Griswold's intentions, see RBG, interview by author, July 1, 2003; and Martin D. Ginsburg, interview by author, July 1, 2003.

173 **Either way, the appeals process:** RBG, interview by author; and Neier, "Reflections on Ruth Bader Ginsburg's Leadership of the ACLU Women's Rights Project," 1.

174 **Less than a third:** On changing public opinion, see Klein, *Gender Politics,* 90–93.

174 **the "New Nixon" emerged:** Neither the Equal Pay Act nor the Civil Rights Act was passed because of egalitarian feelings toward women. With respect to the former, male unionists backed legislation providing equal pay for the same work on the assumption that if employers had to pay women the same wages for the same work, the jobs would go to men. For background on the Civil Rights Act, see chap. 5 and Kessler-Harris, *Woman's Wage*. The settlement with AT&T in January 1973 prompted RBG to predict that "most companies will take [EEOC] guidelines a little more seriously now." See "Ma Bell Agrees to Pay Reparations," *Newsweek,* Jan. 20, 1973, 53–54. The term "New Nixon" refers to Nixon policies that echoed the more statesmanlike side of his contradictory personality.

174 **"radicals in robes":** I use "radicals in robes" to refer to the feminist Left, not to the fundamentalist Right, about whom Cass Sunstein writes in his *Radicals in Robes*.

174 **There were now more feminist:** Numbers remained small in all categories. Although Douglas hired his first female clerk in 1944–45, clerkships began to open when Black hired a woman in 1961, with Fortas and Marshall following. White and Rehnquist

hired their first female clerks in 1972. See RBG, "The First Female Law Clerks," in Clare Cushman, *Supreme Court Decisions and Women's Rights,* 236–37.

175 **Five journals devoted:** Fannie J. Klein, "Review Urged of Law Curriculum for Women," *New York Law Journal* 26 (1972): S9; Kerber, "Writing Our Own Rare Books," 429–51; also, RBG's remarks at the AALS, "Treatment of Women by the Law: Awakening Consciousness in the Law Schools," *Valparaiso University Law Review* 5 (1971): 480–88. Cowan, "Women's Rights Through Litigation," 373–412, esp. 377n17.

175 **In December 1970:** The only holdout was Virginia's Washington and Lee University.

175 **For those enrolling in the 1970s:** Sassower, "Women in the Law," 4; Roger M. Williams, "Law Schools: The Big Women Boom," *Saturday Review,* Sept. 21, 1974, 51–54; and RBG, "Introduction to Women and the Law—a Symposium," 1–11, esp. 7.

175 **Yet she was convinced:** RBG, interviews by author.

175 **"clearly planned" litigation:** Neier, "Reflections on Ruth Bader Ginsburg's Leadership of the ACLU Women's Rights Project," 1.

176 **"Ruth rode freely":** Feigen, *Not One of the Boys,* 75.

176 **"was making it up":** Jones, "Columbia's Leader in Legal Battle Against Sex-Based Discrimination," 14.

176 **"began as 'The World's Greatest' ":** Allen Axelrod to RBG, March 15, 1983, RBG Birthday Book.

NINE · "The Case That Got Away"

179 **Air force regulations:** Brief for Petitioner at 4–5, *Susan R. Struck v. Secretary of Defense,* 409 U.S. 1071 (1972).

179 **"The commission of any woman":** Quoted in Clare Cushman, *Supreme Court Decisions and Women's Rights,* 180.

180 **She had only one recourse:** Brief for Petitioner at 1–2, *Struck,* 409 U.S. 1071.

180 **Ginsburg thought "long and hard":** Quotation in *Hearings on Ruth Bader Ginsburg to Be Associate Justice of the Supreme Court of the United States,* Senate Judiciary Committee, 103rd Cong., 1st sess. (1993), 206.

180 ***Struck,* Ginsburg concluded:** Brief for Petitioner at 55, *Struck,* 409 U.S. 1071.

180 **unique physical characteristics:** Murray and Eastwood, "Jane Crow and the Law," 240n49.

180 **Worries that the ERA:** ERA strategists no doubt had in mind the objections of Senator Samuel J. Ervin, who believed that special treatment was a corollary of what he called "physiological and functional" differences between the sexes and who used every tactic at his command to preserve the traditional gender order. See Mathews and De Hart, *Sex, Gender, and the Politics of ERA,* chap. 2, n18. For an excellent treatment of this issue, see Reva B. Siegel, "Constitutional Culture, Social Movement Conflict, and Constitutional Change: The Case of the De Facto ERA," *University of California Law Review* 94 (2006): esp. 1360–65.

181 **Otherwise, the "unique physical characteristics":** Barbara A. Brown et al., "The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women," *Yale Law Journal* 5 (1971): 893–96; RBG, "Status of Women," 585, 589.

182 **Or they may seek:** See Brief for Planned Parenthood Federation of America, Aug. 11, 1971, esp. at 10–11, 30, 32, 34, *Roe v. Wade,* 410 U.S. 113 (1973), and *Doe v. Bolton,* 410 U.S. 179 (1973). Also, Brief Amicus Curiae on Behalf of New Women Lawyers et al., Aug. 2, 1971, at 7, *Roe,* 410 U.S. 113, and *Doe,* 410 U.S. 179.

182 **To do so, Ginsburg maintained:** Brief for Petitioner at 55, *Struck,* 409 U.S. 1071.

182 **In New York City:** Reagan, *When Abortion Was a Crime*. Also, Solinger, *The Abortionist*.

182 **Though motivated differently:** Environmentalists, worried about the effects of "population explosion" and the limitations of birth control, also viewed abortion bans as too

restrictive. Joffe, *Doctors of Conscience;* and Staggenborg, *Pro-choice Movement,* 13–28. On public opinion, see Judith Blake, "Abortion and Public Opinion: The 1960–1970 Decade," *Science,* Feb. 12, 1971, 540–49. Liberalization of abortion laws was occurring simultaneously in Europe. On why European abortion policy has been less divisive than in the United States, see Helene Silverberg, "State Building, Health Policy, and the Persistence of the American Abortion Debate," *Journal of Policy History* 9 (1997): 311–38.

183 **With legislative reform stalled:** Garrow, *Liberty and Sexuality,* 277, 341–42.

183 **"There is only one voice":** Betty Friedan, "Abortion: A Woman's Civil Right," reprinted in Greenhouse and Siegel, *Before Roe v. Wade,* 38–40.

183 **Initial lawsuits focused:** *People v. Belous,* 71 Cal.2d 954 (1969), and *United States v. Vuitch,* 402 U.S. 62 (1971).

183 **Although the New York:** Reva Siegel, "*Roe*'s Roots: The Women's Rights Claims That Engendered *Roe,*" *Boston University Law Review* 90 (2010): 1875–907.

184 **the Supreme Court agreed in 1971:** Garrow, *Liberty and Sexuality,* esp. chap. 8; Weddington, *Question of Choice*.

184 **Margie Hames, a member:** *Doe v. Bolton,* 319 F. Supp. 1048 (1970). On Hames joining *Doe,* see Garrow, *Liberty and Sexuality,* 424–25.

184 **The argument for the right:** RBG to Wulf.

184 **What troubled Ginsburg:** Building on Justice Douglas's privacy rationale in a 1965 Connecticut birth control case (*Griswold v. Connecticut,* 381 U.S. 535 [1965]) and coupling it with Justice Harlan's dissent in a prior birth control case reclaiming substantive due process (*Poe v. Ullman,* 367 U.S. 497 [1961]), Roy Lucas, a young New York University graduate, had developed a model abortion brief supported by the ACLU among others. See Roy Lucas, "Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes," *North Carolina Law Review* 46 (1968): 730–78. On the model brief, see Garrow, *Liberty and Sexuality,* 352–53.

184 **As the controversy over Brown:** That Douglas's privacy rationale in *Griswold* had been combined with revived substantive due process in abortion arguments might also have made the privacy argument seem more vulnerable to RBG. It is hard to imagine that she would not have also known that other young feminist lawyers—among them New York's Nancy Stearns—were already making equality claims in abortion cases, tying them to a range of provisions in the Constitution, including equal protection. See also Greenhouse and Siegel, *Before Roe v. Wade,* esp. 140–47. See Brief of Amici Curiae Human Rights for Women Inc. at 11–12, *United States v. Vuitch,* 402 U.S. 62 (1971); Brief of Amici Curiae Joint Washington Office for Social Concerns et al. at 10–11, *Vuitch* 402 U.S. 62; and Brief of Amici Curiae New Women Lawyers et al. at 24–32, *Roe v. Wade,* 410 U.S. 113 (1973).

185 **When Justice Blackmun's initial draft:** See Yarbrough, *Harry A. Blackmun,* chap. 7.

185 **"Until very recent years":** Brief for Petitioner at 9, *Captain Susan R. Struck v. Secretary of Defense,* 409 U.S. 1071 (1972).

186 **"legitimate and compelling interest":** Opposition to Memorandum for the Respondents Suggesting Mootness at 1, *Struck,* 409 U.S. 1071.

186 **As applied, the regulations:** Brief for Petitioner, *Struck,* 409 U.S. 1071, for arguments in this and the following paragraphs.

186 **"opportunity for training":** Ibid., 35, 36. See also 52. RBG, "Speaking in a Judicial Voice," *New York University Law Review* 67, no. 6 (1992): 1205, 1208.

187 **Regulations that disregarded:** Brief for Petitioner at 11, 36, *Struck,* 409 U.S. 1071.

187 **It dispelled later criticism:** Judith Baer, "Advocate on the Court: Ruth Bader Ginsburg and the Limits of Formal Equality," in Maltz, *Rehnquist Justice,* 216–40.

188 **And it would be another seven:** Owen Fiss, "Groups and the Equal Protection Clause," *Philosophy and Public Affairs* 5 (1976): 107–77. MacKinnon, *Sexual Harassment of Working Women*. On additional merits of the *Struck* brief, see Neil S. Siegel and Reva

B. Siegel, "Struck by Stereotype: Ruth Bader Ginsburg on Pregnancy Discrimination as Sex Discrimination," *Duke Law Journal* 59 (2010): 771–98.

188 **What she did not anticipate:** RBG, interview by author.

189 **Trying to accommodate:** Exchanges went back and forth from the offices of Marshall and Brennan to Blackmun over the point at which state regulation should begin. See box 281, Brennan Papers; and box 150, Powell Papers.

189 **That right is broad enough:** *Roe v. Wade,* 410 U.S. 113 (1973), 162.

189 **Further, abortion could not:** *Doe v. Bolton,* 410 U.S. 179 (1973).

190 **"sweeping invalidation of any restriction":** *Roe,* 410 U.S. esp. at 221 for White and 171 for Rehnquist dissents.

190 **"It scaled the whole mountain":** Quotations in Garrow, *Liberty and Sexuality,* 603. On criticism from the legal academy, the most scathing attack came from John Hart Ely, "The Wages of Crying Wolf: A Comment on *Roe v. Wade,*" *Yale Law Journal* 82 (1973): 920–49.

190 **"abortion should not be a matter":** Quoted in Blake, "Abortion and Public Opinion," 540–49.

190 **But apart from circumstances:** Surveys by National Opinion Research Center, in Ladd and Bowman, *Public Opinion About Abortion,* 25. At the time *Roe* was decided, only fourteen states had adopted "reform" laws, and only four had passed "repeal" statutes, legalizing abortion. See Rachel Benson Gold, "Lessons from Before Roe: Will Past Be Prologue?," *Guttmacher Report on Public Policy* 6 (2003): 9.

190 **Catholic bishops had led:** On the Roman Catholic Church's position, see, for example, John T. Noonan Jr., "Abortion and the Catholic Church," *Natural Law Forum* 12 (1967): 85–131.

191 **Right-wing organizers:** "The family" for social conservatives meant the patriarchal, heterosexual, nuclear family defined by the formal relationship of marriage and a gendered division of labor. There is a huge body of literature, both academic and popular, on the contemporary family "crisis" and substantial scholarship on social conservatives' definition of family. See, for example, Judith Stacey, "The Right Family Values," in Lo and Schwartz, *Social Policy and the Conservative Agenda*. It should be noted, however, that not all "pro-lifers" were "family values" conservatives. The National Right to Life coalition also contained a socially "progressive" contingent that included Feminists for Life.

191 **Anticipating a barrage of cases:** The justice no longer recalls the incident. Considering how passionately she believed in a women's equality approach to reproductive rights, as indeed Aryeh Neier did, the request seems entirely plausible. See his *Taking Liberties,* 81–85. He resolved the problem by creating the Reproductive Freedom Project headed by Janet Benshoof. He notes, however, that subsequently the Ford Foundation would mistakenly claim proudly that both were directed by RBG. See ibid., xxviii, n4.

191 **Given her decidedly mixed:** Ibid., 80–83; and Judith Mears, "Taking Liberties," *Civil Liberties Review* 1 (1974): 136.

191 **"the single most important":** RBG to Pinzler et al., memo, May 21, 1979, 3, RBG-ACLU.

192 **"placed the woman alone":** RBG, "Some Thoughts on Autonomy and Equality in Relation to *Roe v. Wade,*" *North Carolina Law Review* 63 (1985): 373–86, quotation at 382, 383; and RBG, "Speaking in a Judicial Voice," 1185–209.

192 **"her full life's course":** RBG, "Some Thoughts on Autonomy and Equality in Relation to *Roe v. Wade,*" 383.

192 **Ginsburg also questioned Blackmun's:** Ibid., 381–82.

192 **Anchoring the abortion:** Ibid., 375.

192 **As written, she feared:** RBG, "Speaking in a Judicial Voice," 1205, 1208.

193 **"The rhetoric of privacy":** Sylvia Law, "Rethinking Sex and the Constitution," *University of Pennsylvania Law Review* 132 (1984): 1020. See, among others, Rhonda

Copelon, "Beyond the Liberal Idea of Privacy: Toward a Positive Right of Autonomy," in McCann and Houseman, *Judging the Constitution,* 287–314, esp. 304–5; Catharine A. MacKinnon, "Reflections on Sex Equality Under the Law," *Yale Law Journal* 100 (1991): 1281–328, esp. 1292; Catharine A. MacKinnon, "Roe v. Wade: A Study in Male Ideology," in Garfield and Hennessey, *Abortion,* 45–54; Reva Siegel, "Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection," *Stanford Law Review* 44 (1992): 261–381; Kenneth L. Karst, "Equal Citizenship Under the Fourteenth Amendment," *Harvard Law Review* 91 (1977): 1–68, esp. 59; Sunstein, *Partial Constitution,* 258–61, esp. 270–85; and West, *Progressive Constitutionalism,* 199–200, 268–73.

193 **To do so, they feared:** "E.R.A. Means Abortion and Population Shrinkage," *Phyllis Schlafly Report,* Dec. 1974, clipping in carton 4, NARAL Papers.

193 **Beginning with *Maher:*** *Maher v. Roe,* 432 U.S. 464 (1977); *Beal v. Doe,* 432 U.S. 438 (1977); and *Poelker v. Doe,* 432 U.S. 519 (1977). Connecticut, Pennsylvania, and Missouri had stringent antiabortion laws prior to *Roe*. Justices Blackmun, Marshall, and Brennan vigorously dissented, viewing the bans as blatant efforts to undermine *Roe*.

193 **The Court considered the ban:** *Harris v. McRae,* 448 U.S. 297 (1980), and RBG, note to author, Aug. 18, 2008.

194 **She also knew that the concern:** *Maher,* 432 U.S. 464; *Beal,* 432 U.S. 438; and *Poelker,* 432 U.S. 519. .

194 **By 1982, Catholics:** Jacoby, *Souls, Bodies, Spirits;* Blanchard, *Anti-abortion Movement and the Rise of the Religious Right;* Cook, Jelan, and Wilcon, *Between Two Absolutes;* and Hunter, *Before the Shooting Begins,* chaps. 2–3.

194 **Ginsburg's "criticisms of *Roe*":** Kate Michelman quotation on tapes for the *Evening News,* ABC and NBC, June 14, 1993, Vanderbilt University Television News Archives, Nashville. These sentiments were so widely shared in feminist and pro-choice circles that President Clinton decided to read RBG's two law journal articles critiquing *Roe* himself before deciding to nominate her to the Court, rather than relying on staff. Once he read them, it was clear to the president, as to other careful readers, that RBG's criticism was directed at Blackmun's majority decision, not at the right to an abortion. See Toobin, *Nine,* 71.

194 **Ginsburg's alternative scenario:** See, for example, Rosemary Nossiff, "Why Justice Ginsburg Is Wrong About States Expanding Abortion Rights," *P.S.: Political Science and Politics* 27 (1994): 227–31; also, Nossiff, *Before Roe*. The point is also made by Helen Neuborne, executive director of the NOW Legal Defense and Educational Fund, and Marcy Wilder, senior staff lawyer for NARAL, among others. See Linda Greenhouse, "Judge Ginsburg Still Voices Strong Doubts on Rationale Behind Roe v. Wade Ruling," *New York Times,* June 16, 1993, A1; David J. Garrow, "History Lesson for the Judge: What Clinton's Supreme Court Nominee Doesn't Know About Roe," *Washington Post,* June 20, 1993, C3; and David J. Garrow, "Abortion Before and After *Roe v. Wade:* An Historical Perspective," *Albany Law Review* 62 (1999): 833–52. See also Kathleen M. Sullivan, "Law's Labor," *New Republic,* March 23, 1994, 42, 44; and Devins, *Shaping Constitutional Values*.

195 **"Justice Douglas":** Justice Harry A. Blackmun, interviewed by Justice Harry A. Blackmun Oral History Project, July 6, 1994–Dec. 13, 1999, 202, 505, JHBOHP; and Roe v. Wade Miscellany, folder 2, box 152, Blackmun Papers.

195 **"would have been regarded":** Quoted in Balkin, *What Roe v. Wade Should Have Said,* 252, 254.

195 **"virtual absence of judicial protection":** Neier, *Taking Liberties,* 84.

195 **Stearns, in fact, had advanced:** See excerpts from Plaintiffs Brief, *Abramovicz v. Lefkowitz,* in Greenhouse and Siegel, *Before Roe v. Wade,* esp. 140–47.

195 **NOW also provided:** Brief Amicus Curiae for the AAUW et al., Aug. 10, 1971, at 37, *Roe v. Wade* and *Doe v. Bolton*.

195 **Most significantly, Judge:** See Memorandum of Decision, *Abele v. Markle,* in Greenhouse and Siegel, *Before Roe v. Wade,* 177–82.

195 **"There was a disconnect":** Linda Greenhouse, "How the Supreme Court Talks About Abortion: The Implications of a Shifting Discourse," *Suffolk University Law Review* 42 (2008): 42, 45–46.

195 **But it is difficult:** Balkin, *What Roe v. Wade Should Have Said*.

196 **Ginsburg, however, clung:** RBG maintained her belief that had *Struck* been heard, it "would have proved extraordinarily educational for the Court and had large potential for advancing public understanding." See RBG, "Speaking in a Judicial Voice," 1200, 1202.

196 **Wishful thinking was a possibility:** Ibid., 1200.

196 **More apparent, too, might:** *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833 (1992), a rare joint opinion put together by Justices Sandra Day O'Connor, David Souter, and Anthony Kennedy, affirms the right of abortion choice as a right of personhood and self-definition. Yet the opinion also upholds the right of the states to place restrictions on abortion so long as the requirements do not place an "undue burden" on women seeking an abortion before the fetus attains viability. Siegel and Siegel note several cases that would have come out differently in "Struck by Stereotype," 792–94n44.

196 **"*Roe* rage" was about:** The term is drawn from Robert Post and Reva Siegel, "*Roe* Rage: Democratic Constitutionalism and Backlash," *Harvard Civil Rights–Civil Liberties Law Review* (2007): 373–433.

196 **"as though they had been disowned":** Quoted in William N. Eskridge Jr., "Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics," *Yale Law Journal* 14 (2005): 1312.

196 **"I have nightmare visions":** Phyllis Zatlin Boring to RBG, n.d., RBG Papers.

TEN · A "Near Great Leap Forward"

197 **"Our idea," she explained:** For quotation and information on the Frontieros, see Clare Cushman, *Supreme Court Decisions and Women's Rights,* chap. 3.

198 **Described by Dees:** Dees, *Season for Justice,* 129–32.

198 **Specializing in what:** "Joseph Levin, Southern Poverty Law Center," Spoke, www.spoke.com.

198 **It was Johnson and Rives:** See Bass, *Unlikely Heroes;* Bass, *Taming the Story*.

198 **But this time the two men:** Johnson and McFadden were district court judges. Rives, a circuit judge on the U.S. Court of Appeals for the Fifth Circuit, sat on the panel by designation.

199 **This was not the end:** On the deliberations of the panel, see Serena Mayeri, "'When the Trouble Started': The Story of *Frontiero v. Richardson,*" in Schneider and Wildman, *Women and the Law Stories*.

199 **"a fair and substantial relation":** *F. S. Royster Guano v. Virginia,* 253 U.S. 412 (1920), 415.

199 **They would have to make:** RBG, interviews by author. On Morgan, see Walker, *In Defense of American Liberties,* 262–93.

200 **Then, with her usual dispatch:** RBG to Abernathy and Levin, Oct. 16, 1972, RBG Papers.

200 **"Nixonian low profile":** Levin to Wulf, Oct. 17, 1972, RBG Papers.

200 **"It was not a good strategy":** Abernathy to Brenda Feigen Fasteau, Oct. 19, 1972, RBG Papers.

201 **"Some things don't change":** RBG, notes to author, July 18, 2000.

201 **"It's our first opportunity":** Levin to Wulf, Oct. 17, 1971, RBG Papers.

201 **"I am not very good":** RBG to Levin, Oct. 24, 1972, RBG Papers.

201 **"I find myself trying":** Levin to RBG, Oct. 27, 1972, RBG Papers.

201 **If all he wanted were:** RBG to Levin, Oct. 31, 1972, RBG Papers.

201 **"Frustrated":** RBG used "frustrated" to characterize her response in an interview with author.

202 **"a question that need not":** Appellant's Brief at 29n21, 36, *Frontiero v. Richardson,* 411 U.S. 677 (1973).

202 **She began her brief:** For this and the following paragraphs, see Brief Amicus Curiae of American Civil Liberties Union for the Appellants, *Frontiero v. Laird,* 409 U.S. 1123 (1973), in Kurland and Casper, *Landmark Briefs and Arguments of the Supreme Court of the United States,* 76:739–845, esp. 761–64.

202 **Like *Reed* and *Stanley:*** *Stanley v. Illinois,* 405 U.S. 645 (1972), overturned an Illinois statute discriminating against unwed fathers in the custody and care of their children.

202 **But cutting off benefits:** Brief Amicus Curiae of American Civil Liberties Union for the Appellants, in Kurland and Casper, *Landmark Briefs and Arguments of the Supreme Court of the United States,* 76:821–25.

203 **Clear, concise, and tightly:** Levin to RBG, Oct. 27, 1972; and RBG to Levin, Oct. 31, 1972, both in RBG Papers.

203 **"I have never had an experience":** Feigen, *Not One of the Boys,* 82.

203 **"I had written briefs before":** Kathleen Peratis (attorney), interview by author, Oct. 2, 1998. Norman Dorsen, interview by author, May 8, 2003. RBG's insistence that briefs should be of high quality because they matter—as do other variables—was reinforced by the impact of her *Frontiero* brief. Her attention to detail is evident in a later letter to Mark Pulliam in which she wrote, "I attach considerable importance to the way I say things and do not permit editors, student or professional, to tamper with my style." See RBG to Pulliam, April 10, 1979, RBG Papers.

203 **Sending him a copy:** RBG to Levin, Dec. 5, 1972, RBG Papers.

203 **"In sum," Ginsburg concluded:** For this and the following paragraphs, see Joint Reply Brief of Appellants and American Civil Liberties Union Amicus Curiae at 2–14, *Frontiero v. Laird,* 409 U.S. 1123 (1973).

204 **Next came preparation:** The preparation for oral arguments for *Frontiero* became RBG's style in future cases. She wrote out only short outlines, believing that oral arguments should be "a conversation between the Court and the lawyers." See RBG, interview by Marcus, Washington, D.C., Aug. 8, 1996, 36–37.

204 **Despite the evident tension:** RBG, interviews by author.

204 **After finishing her usual exercise:** "Ruth Bader Ginsburg," in Berry et al., *Women Lawyers at Work,* 52, 55–56.

206 **On this particular Wednesday:** The Supreme Court Database, Washington University Law. Available at scdb.wustl.edu. Roland B. Colgrove argued that this Local Rule 13(d)(1) of the Revised Rules of Procedure of the U.S. District Court for the District of Montana, which stipulated the trial of civil cases will proceed with juries of six persons, violated the Seventh Amendment, and he sought a ruling to impanel a twelve-member jury. The Court disagreed, stating that the rule was compliant. *Colgrove v. Battin,* 413 U.S. 149 (1973).

In *Morris v. Weinberger,* 410 U.S. 422 (1973), the petitioner had been denied Social Security benefits for his adopted daughter because her court-approved adoption had not been supervised by a child-placement agency. However, Congress amended the relevant statutory provisions of the Social Security Act in the plaintiff's favor twenty days after the Court granted a writ of certiorari, which was dismissed as "improvidently granted."

The petitioners in *Hurtado v. United States,* 410 U.S. 578 (1973), argued that despite being incarcerated to assure their presence as material witnesses, they were entitled to the same $20 per diem compensation afforded to those who were not held. The

Court ruled for the plaintiffs and remanded the case to the district court for further proceedings based on the ruling that a material witness is entitled to the $20 per diem compensation, regardless of his incarceration status.

206 **He tried to stick:** Transcript of Oral Argument at esp. 848–56, *Frontiero v. Laird,* 409 U.S. 1123 (1973). An audio recording of the arguments is available at www.oyez.org.

206 **"the many butterflies":** Jessica Weisberg, "Supreme Court Justice Ruth Bader Ginsburg: I'm Not Going Anywhere," *Elle,* Sept. 23, 2014 (online excerpt from Oct. print issue).

206 **Her Brooklyn-inflected accent:** Ibid.; *Frontiero v. Laird;* Berry et al., *Women Lawyers at Work,* 52; Hirshman, *Sisters in Law,* 73–74. Nina Totenberg observed this as the moment "when Ruth starts to perform." See "No, Ruth Bader Ginsburg Does Not Intend to Retire Anytime Soon."

206 **"The newcomer to our shores":** Transcript of Oral Argument, *Frontiero v. Laird*, 855.

207 **"notion of what constitutes":** Ibid., 856.

207 **"I ask no favor for my sex":** Joint Reply Brief of Appellants and American Civil Liberties Union Amicus Curiae at 2–14, *Frontiero v. Laird,* 409 U.S. 1123 (1973); RBG, interview by Marcus, Aug. 8, 1996, 36–37; RBG, interview by author; and Norgren, *Belva Lockwood,* ix.

207 **"Ruth spoke eloquently":** Feigen, interview by author, Aug. 13, 2003.

207 **Were the justices politely:** Martin D. Ginsburg, interview by author, July 1, 2003.

207 **Ruth attributed the silence:** RBG, interviews by author.

207 **"very precise" but too "emotional":** H.A.B. Notes on 71-1694: *Frontiero v. Laird,* Jan. 17, 1973, folder 9, box 163, Supreme Court Case Files, Blackmun Papers.

207 **He disliked "emotion":** H.A.B. Notes on 70-4: *Reed v. Reed,* Oct. 18, 1970, folder 10, box 135, Supreme Court Case Files, Blackmun Papers.

208 **"Poor Joshua!":** *DeShaney v. Winnebago County,* 499 U.S. 189 (1989), esp. Blackmun's dissent. For popularization of this quotation, see "Law: Poor Joshua!," *Time,* March 6, 1989.

208 **"wary and a little grumpy":** Greenhouse, *Becoming Justice Blackmun,* 207–12, quotation on 209.

208 **As he had made clear:** H.A.B. Notes on No. 70-4: *Reed v. Reed,* Oct. 18, 1970, folder 10, box 135, Blackmun Papers.

208 **Next to Ginsburg's name:** H.A.B. Notes on 71-1694: *Frontiero v. Laird,* Jan. 17, 1973, folder 9, box 163, Blackmun Papers.

208 **Not only should:** Transcript of Oral Argument, *Frontiero v. Laird,* 409 U.S. 1123 (1973).

209 **And more to the point:** Listening to the audio version of the oral arguments attests to the level of discussion on the bench.

209 **Although she could not recall:** RBG, interview by author, Aug. 28, 2002; and Hope, *Pinstripes and Pearls,* 84.

209 **"a member of the club":** RBG, interview by author.

210 **He also knew that:** Initially, even Martin Ginsburg had no idea that RBG would become so effective in oral arguments. Martin D. Ginsburg, interview by author, July 1, 2003.

210 **"CJ keeps yapping":** Greenhouse, *Becoming Justice Blackmun,* 125.

211 **But with the exception:** Douglas notes, esp. note 18, box 1577, Douglas Papers. Brennan thought Warren was remarkable for his ability at conference to lead a thorough discussion of "every case on the agenda, with a knowledge of each case at his fingertips." Schwartz, *History of the Supreme Court,* 266. On the lack of discussion under Burger, see Rehnquist, *Supreme Court,* 290.

211 **Brennan directed one of his clerks:** On Stone's role, see Stern and Wermiel, *Justice Brennan,* 395. Brennan to the Conference, memo, Feb. 28, 1973, box 1577, William J. Brennan Papers.

212 **"In any event":** "Whether it follows from the existence of a suspect classification that 'compelling interest' is the equal protection standard is another matter. I agree with Thurgood that we actually have a spectrum of standards. Rather than talking of a compelling interest," he continued, "it would be more accurate to say that there will be times—when there is a suspect classification or when the classification impinges on a constitutional right—that we will balance or weigh competing interests. Of course, the more of this we do on the basis of suspect classifications not rooted in the Constitution, the more we approximate the old substantive due process approach." White to Brennan, Feb. 15, 1973, box 1577, Douglas Papers. See also Woodward and Armstrong, *Brethren,* 301–3.

212 **"Perhaps we can avoid":** Powell to Brennan, Feb. 15 and March 2, 1973; and Blackmun to Brennan, and Stewart to Brennan, Feb. 16 and March 5, 1973, both in box 1577, Douglas Papers. See also Douglas to Brennan, March 3, 1973, box 298, Brennan Papers.

212 **But when Powell:** H.A.B. Notes on 70-74: *Reed v. Reed,* Oct. 18, 1970, folder 10, box 135, Blackmun Papers.

212 **He was loath to become:**. Also see Abraham, *Justices, Presidents, and Senators,* 242–43.

213 **"I therefore don't see":** Brennan to Powell, March 6, 1973, box 1577, Douglas Papers.

213 **But Powell, who was being wooed:** Powell's objection to Brennan's language as feminist is noted in Woodward and Armstrong, *Brethren,* 254–55.

213 **"'shuttlecock' memos":** Burger to Brennan, March 7, 1973; and Burger to Powell, March 8, 1973, both in box 1577, Douglas Papers.

214 **Urging his colleague not:** Stewart to Brennan, March 5, 1973, box 1577, Douglas Papers. Douglas had already joined Brennan. See Douglas to Brennan, March 3, 1973, Douglas Papers.

214 **"the right result":** Woodward and Armstrong, *Brethren,* 303. Quotation in Abraham, *Justices, Presidents, and Senators,* 195.

214 **"Statutory distinctions":** *Frontiero v. Richardson,* 411 U.S. 677 (1973), 1770.

215 **"classifications based upon sex":** Ibid. at 1768, 1769, and 1771. The Court later backtracked on alienage.

215 **"The law came in":** Chris Carmody, "Judge Ginsburg's Ex-clients Reflect upon Their Cases," *National Law Journal,* June 1993, 34.

215 **"by judicial action a major":** *Frontiero,* 411 U.S. at 1773.

216 **The press showered him:** S. J. Micciche, "Supreme Court Rules Women in Uniform Equal in Spouses' Dependency Benefits," *Boston Globe,* May 15, 1973. For letters to Brennan, see Fran Harris to Brennan, May 15, 1973; Margaret de Lima Norgaard to Brennan, May 15, 1973; and Marna Becker to Brennan, May 15, 1973, all in box 298, Brennan Papers. Also Warren Weaver Jr., "Air Force Woman Wins Benefit Suit," *New York Times,* May 15, 1973, A10; "Summary of Actions Taken by the Supreme Court," *New York Times,* May 15, 1973, A10; "A 'Flaming Feminist' Lauds Court," *New York Times,* May 22, 1973, A36; John P. MacKenzie, "Military Sex Bias Is Barred," *Washington Post,* May 15, 1973, A1; Linda Mathews, "High Court Takes Major Step Toward Equality of the Sexes," *Los Angeles Times,* May 15, 1973, A1; and Tribune Wire Service, "Woman Air Force Officer Wins Fight for Benefits for Husband," *Chicago Tribune,* May 15, 1973, A6.

216 **Her sentiments were also:** Micciche, "Supreme Court Rules Women."

216 **"the old 'minimal' scrutiny":** Jeffrey R. Sliz, "Constitutional Law—Sex Discrimination—Is It Finally Labeled 'Suspect'?," *Georgia State Bar Journal* 10 (1974): 493–99; Jeffrey R. Sliz, "Constitutional Law—Equal Protection—Fifth Amendment, Due Process—Plurality of Court Decides That Sex-Based Classifications Are 'Suspect.' *Frontiero v. Richardson,* 411 U.S. 677 (1973)," *Rutgers Camden Law Journal* 5 (1974): 348–64; Laurence H. Tribe, "The Supreme Court, 1972 Term," *Harvard Law Review* 87 (1973): 256–62; Kathleen L. Bogas, "Constitutional Law—Fourteenth Amendment—Classification Based on Sex Is Inherently Suspect," *Journal of Urban Law* 51 (1974):

535–45; Joseph M. Sartin Jr. and Kerry P. Camarata, "Constitutional Law—Sex Discrimination—Supreme Court Plurality Declares Sex a Suspect Classification," *Tulane Law Review* 48 (1974): 710–20; Susan Vitullo Walters, "Constitutional Law—*Frontiero v. Richardson,* Uniform Services Fringe Benefit Statute Which Presumes Spouses of Male Members to Be Dependent, but Requires Spouses of Female Members to Be Dependent in Fact, Is Violative of Due Process," *Loyola University Law Journal* 5 (1974): 295–313; and Betsy B. McKenny, "*Frontiero v. Richardson:* Characterization of Sex-Based Classification," *Columbia Human Rights Law Review* 6 (1974): 239–47. See also Gunther, "Supreme Court, 1971 Term—Foreword." More recent scholars, notably Reva Siegel and Serena Mayeri, have shifted their focus to Brennan's use of the race-sex analogy that RBG had presented in her amicus brief. See Reva B. Siegel, "Collective Memory and the Nineteenth Amendment: Reasoning About 'the Woman Question' in the Discourse of Sex Discrimination," in Sarat and Kearns, *History, Memory, and the Law,* 131–66; and Mayeri, "'Common Fate of Discrimination,'" 1045–87. The analogy, Siegel notes, effectively denied women's separate struggle in the American legal system. Mayeri objects to the comparative stance, as though women and blacks were mutually exclusive categories. She also notes that Brennan made the history of women's legal status relevant only insofar as it resembled antebellum racial subordination. In so doing, Brennan passed up the opportunity to provide "a meaningful account of the socio-historical interrelationship between race and sex inequality." Indeed, Brennan's opinion "could be read to imply that sex discrimination violated the equal protection guarantee *if and only if* it resembled discrimination based on race." See Mayeri, "'Common Fate of Discrimination,'" 1075.

216 **"near great leap forward":** RBG, "Burger Court's Grapplings with Sex Discrimination," 135. See also RBG, "Comment on *Frontiero v. Richardson*," *Women's Rights Law Reporter* 1 (1973): 2–4. On efforts to keep the press informed, see RBG to Lesley Oelsner, Oct. 13, 1972, RBG Papers. Oelsner wrote for *The New York Times*.

216 **"Five" was the most important:** See Tushnet, *Court Divided,* 35.

216 **In his assessment:** Gunther, "Supreme Court, 1971 Term—Foreword," 1–306.

217 **The Burger Court, for the most part:** Ibid., 12. On the widespread scrutiny of inexact proxies, see Case, "'Very Stereotype the Law Condemns,'" 1447–91.

217 **"If and when it becomes":** Powell to Brennan, March 2, 1973, Brennan Papers.

217 **She had a new Social:** RBG to Phineas Indritz, Jan. 10, 1973, Indritz Papers.

ELEVEN · Coping with a Setback

218 **"There are no anecdotes":** Lambert, "Ginsburg and Rabb," 11.

218 **"marvelously wise":** RBG, interview by Marcus, Aug. 8, 1996, 24; and Neier, *Taking Liberties,* 13–14.

219 **"every nut from Waukegan":** Rabb, quoted in Lambert, "Ginsburg and Rabb." On Feigen's role on compulsory sterilization, see Wheeler, *How Sex Became a Civil Liberty,* 139–41. RBG to Elizabeth Langer, *Women's Rights Law Reporter,* April 14, 1972, RBG Papers; RBG to Phineas Indritz, Jan. 9 and 10, 1973, Indritz Papers. Indritz, a civil rights lawyer who had worked closely with Thurgood Marshall, was a founding member of NOW and worked with Representative Martha Griffiths on speeches and legislation.

219 **But with a full teaching:** Peratis, "Address on RBG Portrait Dedication"; and quotation from RBG to author, note, Aug. 2008. See also the excellent comparison of Marshall and RBG and their roles outside the courtroom by Michael J. Klarman, "Social Reform Litigation and Its Challenges: An Essay in Honor of Justice Ruth Bader Ginsburg," *Harvard Journal of Law and Gender* 32 (2009): 251.

219 **Ginsburg created the Equal Rights Advocacy Project:** Equal Rights Advocacy Project at Columbia University School of Law-Grant No. 730-0379, Report of Activi-

ties, Sept. 1973–March 1974, 3–4, 6, RBG Papers. The project also engaged in non-litigation efforts.

219 **For students like Lynn:** Jones, "Columbia's Leader in Legal Battle Against Sex-Based Discrimination," 15; Schafran, interview by author, March 2, 2007; and Freeman, interview by author, March 2, 2007. In a note to the author, RBG mentioned that Freeman was one of her "all-time favorite students."

220 **"rare display of good judgment":** Recounted in Neier to RBG, March 15, 1983, RBG Birthday Book.

220 **Reading in *Law Week:*** *Shevin v. Kahn,* 273 So. 2d 72 (1973); Brief for Appellants, *Kahn v. Shevin,* 416 U.S. 351 (1974); and RBG to John H. Fleming, Robert L. Deitz, and Allan B. Taylor, Dec. 18, 1974, RBG Papers. See also Strebeigh, *Equal,* 61–64.

220 ***Kahn v. Shevin* disrupted:** RBG, interview by author, Aug. 28, 2002.

221 ***Kahn* was "big trouble":** RBG, interview by Marcus, Aug. 13, 1996; Brief for Appellees, *Kahn,* 416 U.S. 351; and Reply Brief for Appellants, *Kahn,* 416 U.S. 351.

221 **"I'll give you a gold medal":** RBG to Mary McGowan Davis, Jan. 30, 1974, RBG Papers.

221 **Avoiding the analogy:** RBG to Marc Fasteau, Brenda Feigen Fasteau, and Christine Cassady Curtis, Nov. 13, 1973, RBG Papers.

221 **In 1973, wives earned:** Pew Research Center, *Breadwinner Moms: Mothers Are the Sole or Primary Provider in Four-in-Ten Households with Children—Public Conflicted About the Growing Trend* (Washington, D.C.: Pew Research Center, 2013).

221 **"Although discrimination against women":** Brief for Appellants at 4, *Kahn,* 416 U.S. 351; and Reply Brief for Appellants, *Kahn,* 416 U.S. 351. See also RBG to *Spokeswoman,* June 21, 1974, RBG Papers.

221 **Florida's tax exemption:** RBG to Marc Fasteau et al., memo, Nov. 1973, RBG Papers. See also Brief for Appellants, *Kahn,* 416 U.S. 351.

222 **Only then would she:** RBG to Gerald Gunther, Jan. 21, 1974, RBG Papers.

222 **"a fine job—strong throughout":** RBG to Gunther, Jan. 15, 1974; Gunther to RBG, Jan. 18, 1974, RBG Papers.

222 **"just a little boost":** RBG to William Hoppe, March 8, 1974, RBG Papers.

222 **Oral argument would require:** On *DeFunis,* see Deslippe, *Protesting Affirmative Action,* esp. chap. 4. RBG developed the distinction between race-based and sex-based preferences more fully in RBG, "Women, Equality, and the *Bakke* Case," *Civil Liberties Review* 4 (1977): 8–9; and esp. in RBG, "Realizing the Equality Principle," in Blackstone and Heslep, *Social Justice and Preferential Treatment,* 135–53.

223 **Bombarded by questions:** RBG to Hoppe, March 8, 1974, RBG Papers. RBG seemed to reject any notion that her own interrogation during oral arguments was as vigorous and testy as that of McKenzie when directly questioned, saying simply that *Kahn* was the wrong case at the wrong time, which of course it was. RBG, interview by author, July 1, 2003. With *DeFunis,* challenges to strict scrutiny of race no longer focused on elimination of racial barriers because of past racial subordination, but rather demands that the law itself be color-blind. This effectively rules out many substantive measures in law and policy designed to achieve racial justice, as affirmative-action cases from *Regents of the University of California v. Bakke,* 438 U.S. 265 (1978), to *Adarand Constructors v. Peña,* 515 U.S. 200 (1995), demonstrate. This increasingly conservative interpretation of strict scrutiny with regard to race affected, in turn, RBG's own thinking about strict scrutiny in relation to gender, as I indicate in a subsequent chapter.

223 **Not until the rebuttal:** Transcript of the Oral Arguments, *Kahn.*

224 **Surely she had made:** RBG to Hoppe, March 8, 1974; and RBG to *Kahn v. Shevin* (*Harvard Law Review*), Nov. 27, 1974, both in RBG Papers.

224 **"too smart":** Blackmun notes on 73–78: *Kahn v. Shevin,* Blackmun Papers. Blackmun gave RBG a B plus on her oral argument in all likelihood because of her effective

handling of his question on *Kahn* and *DeFunis*. What makes Blackmun's notes on *Kahn* of interest is his wish that the Court move to a middle-tier standard on sex discrimination.

224 **"women as widows are largely":** Ibid. See also Douglas, Notes on Conference on 73–78, *Kahn v. Shevin,* March 1, 1974, Douglas Papers. On the nearly half a century when government policies were deliberately designed to exclude African Americans from benefits, see Katznelson, *When Affirmative Action Was White;* and Yuill, *Richard Nixon and the Rise of Affirmative Action*.

225 **"He didn't want to endanger":** Ellman quoted at length in Marshall L. Small, "William O. Douglas Remembered: A Collective Memory by WOD's Law Clerks," *Journal of Supreme Court History* 32 (2007): 333–34n21.

225 **The draft "was short":** *Kahn v. Shevin,* 416 U.S. 351 (1974), 356 (Douglas's majority).

225 **Having written an opinion:** Douglas, for all his talents, had grown increasingly more unpredictable in his behavior during the 1970s, his attention wandered for long stretches during oral arguments, and his opinions became shoddy in the view of his fellow justices. Though he had suffered from several strokes, he refused to resign. See Rosen, *Supreme Court,* chap. 3.

225 **"all those widowers":** Ibid.; *Kahn,* 416 U.S. at 357–60 (Brennan and Marshall dissenting) and at 360–62 (White dissenting).

226 **His opinion, she lamented:** RBG to Robert A. Sedler, April 30, 1974; and RBG to Sara-Ann Determan, April 26 and 30, 1974, both in RBG Papers. See also RBG to Norman Dorsen, April 30, 1974; E. Sanford Read to RBG, Sept. 16, 1974; RBG to E. S. Read, May 2, 1975; and RBG to Hoppe, June 16, 1975, all in RBG Papers.

226 **Clearly the experience:** When Douglas announced his retirement, RBG confessed to being "deeply affected" and referred to it as a "dismal" day. See RBG to Shirley Bysiewicz, Nov. 13, 1975, RBG Papers. Allen Murphy in his debunking biography *Wild Bill* finds the justice's autobiographical account of his childhood poverty to be greatly exaggerated. Yet so long as Douglas genuinely believed his widowed mother was impoverished, that "fact" shaped his perception of *Kahn*. See also Douglas, *Go East, Young Man*.

226 **"be left with the blind":** RBG, "Some Thoughts on Benign Classification in the Context of Sex," *Connecticut Law Review* 10 (1978): 817–18.

226 **Nor was she comforted:** *Schlesinger v. Ballard,* 419 U.S. 498 (1975); *Cleveland Board of Education v. La Fleur,* 414 U.S. 632 (1974); and *Geduldig v. Aiello,* 417 U.S. 484 (1974).

227 **a "Panglossian" rationale:** RBG to John H. Fleming, Robert L. Dietz, and Allan B. Taylor, Dec. 16, 1974, RBG Papers; and RBG, "Some Thoughts on Benign Classification in the Context of Sex," 817. RBG noted that the exemption was never extended to a female head of household who never married or whose marriage ended in divorce. See also RBG, "Burger Court's Grapplings with Sex Discrimination," 136–37.

227 **In her forthcoming lecture tour:** The Phi Beta Kappa Visiting Scholar was an honor bestowed on distinguished professors and entailed brief visits to selected campuses to speak to faculty and students.

227 **Women in the first-year law:** Whitney S. Bangall, "A Brief History of Women at CLS: Part 3," Columbia Law School.

227 **"male impersonators":** "Ruth Bader Ginsburg: Women and the Law," Columbia Law School Report, 1994, 16–17; Dianne Zimmerman, professor, New York University School of Law, interview by author, March 1, 2007.

227 **her femininity and family:** "Myra Bradwell Day Forum Held at Law School," Columbia University Law School, 1980, RBG Papers; and "Ruth Bader Ginsburg: Women and the Law," 16–17.

227 **"I think I took every course":** Jane Booth (associate general counsel, Columbia University), interview by author, Feb. 28, 2008.

228 **"someone [who], while being":** Lynch, quoted in "Women Call Ginsburg Mentor, Role Model: A Pioneer, She Inspired 'A Whole Generation,'" *St. Louis Post-Dispatch,* June 16, 1993.

228 **"our hands are tied":** RBG, interview by author, July 1, 2003.

228 **Turning to her female colleagues:** Rosenberg, *Changing the Subject,* 194–95.

228 **"a diminutive woman":** Carol H. Meyer, "The First Activist Feminist I Ever Met," *Affilia* 9, no. 1 (1994): 85.

229 **While some called:** RBG, interview by Grele, Aug. 19, 2004. Both Sovern and George Cooper, a professor at the Law School who, with Harriet Rabb, ran the Employment Discrimination Clinic, strongly supported RBG's efforts.

229 **"could accomplish more":** On RBG's late-night work habits, see "Ruth Bader Ginsburg," in Berry et al., *Women Lawyers at Work,* 64; on James Ginsburg's response, see the documentary film *Paving the Way,* directed by Morris; for RBG's late-night diet, see Jane Ginsburg, interview by author, May 6, 2003; and Liz Porter, "Former Clerks for Justice Ginsburg Reminisce," Columbia Law School.

229 **"Ruth, while never heavy-handedly":** Kathleen Peratis, interview by author, May 7, 2003, and conversation with author, Nov. 3, 2000.

230 **"I could say a word":** RBG to Philip B. Kurland, April 4, 1975, RBG Papers.

230 **"back on track":** Quoted in Chafe, *Unfinished Journey,* 427.

TWELVE · Getting Back on Track

233 **Edna Stubblefield, a nineteen:** Marvin P. Morton Jr., "Statement of Case for Criminal Appellee," *Stubblefield v. Tennessee* (1973); Marvin P. Morton to Women's Rights Project, Jan. 24, 1974; RBG to Morton, Jan. 31, 1974; William R. Neese to RBG, Feb. 1 and 21, 1974; and RBG to Neese, Feb. 27, 1974, all in box 9, RBG Papers. Also see Erika Ballou, "Ruth Bader Ginsburg: A Brief Encounter with Justice," *Dicta: The Voice of Tulane Law School* 17 (April 2003): 2. In Henry County from July 1961 to January 1972, a total of 2,306 jurors had been selected by the jury commissioners and listed for jury duty. Of these, only 21 (0.9 percent) were women, although 1970 census figures indicated that women constituted 53.2 percent of the total adult population. Only 47 blacks had been listed, 2 percent of the total jurors selected in a county where blacks made up 15.3 percent of the population, according to Morton et al., Jurisdictional Statement by Appellant esp. at 10, *Stubblefield v. Tennessee,* 420 U.S. 903 (1974). The decision as to whether to hear *Stubblefield* had not been made at the time RBG argued *Healy*. See RBG to William R. Neese and Marvin P. Morton Jr., April 1 and 12, 1974; and RBG to Neese, Oct. 17, 1974, both in RBG Papers.

233 **"as the center of home":** *Hoyt v. Florida,* 368 U.S. 57 (1961).

234 **Male plaintiffs contended:** *Healy v. Edwards,* 363 F. Supp. 1110 (1973). See also *Edwards v. Healy,* 421 U.S. 772 (1975).

234 **"deprives a jury":** *Healy v. Edwards,* 363 F. Supp. 1110 (1973).

234 **"The thought is that the factors":** *Ballard v. United States,* 329 U.S. 187 (1946), esp. 193.

235 **Hence there were compelling:** Memorandum in Opposition to Defendants' Motion to Dismiss and in Support of Plaintiffs' Cross-motion for Summary Judgment, *Healy v. Edwards,* 363 F. Supp. 1110 (1973).

235 **There was the *Stubblefield:*** See Schneider, *Battered Women and Feminist Lawmaking*.

235 **"would not constitute a disruption":** Brief for Amicus Curiae of Rhonda Copelon et al., *Edwards v. Healy,* 421 U.S. 772 (1974). For a fuller version of these arguments, see Brief for Appellees, ibid. at 14, 16, 20–22.

236 **"appallingly overbroad":** For full argument, see Brief for Appellees, Ginsburg et al., *Edwards v. Healy*. The U.S. District Court for the Eastern District of Louisiana included New Orleans and was in the Fifth Circuit.

236 **"jury service is not only a right":** Ibid.

236 **Yet New Orleans–born jurists:** RBG, "Four Louisiana Giants in the Law," Judge Robert A. Ainsworth Jr. Memorial Lecture, Feb. 4, 2002, *Loyola Law Review* 48 (2002): 253–66.

237 **"Females, as individuals":** *Healy v. Edwards,* 363 F. Supp. 1110 (1973), esp. 1115. Also see RBG's use of this quotation in her speech "Four Louisiana Giants in the Law."

237 **"yesterday's sterile precedent":** *Healy v. Edwards,* 363 F. Supp. 1110 (1973), 1117.

237 **Because the two cases:** For RBG's criticism of the revised jury exemption, see Reply to Memorandum of Appellants Suggesting Mootness, *Healy v. Edwards,* 363 F. Supp. 1110 (1973). Also see *Taylor v. Louisiana,* 419 U.S. 522 (1975).

238 **"equal protection matter":** Transcript of Oral Argument at 3–12, esp. 8, *Edwards v. Healy,* 421 U.S. 772 (1974).

238 **"the new theory was that":** Ibid., 17, 20-32, 37.

238 **"that the two sexes are not fungible":** Ibid.

239 **Fifty-nine percent of Louisiana's:** Ibid.

239 **"The focus on women jurors":** Ibid.

240 **It was a compliment of sorts:** Nixon considered nominating two women—Sylvia Bacon and Mildred Lillie—to the Supreme Court mainly to "make a little political [hay]" and gain "every half a percentage point" he could, according to John Dean. For more on the process of Nixon's nomination of a replacement for Justice John Marshall Harlan II, see Dean, *Rehnquist Choice*.

240 **"We think it is no longer":** *Taylor v. Louisiana,* 419 U.S. 522 (1975), 537 (White majority).

240 **"smacks more of mysticism":** Ibid., 542 (Rehnquist dissenting).

241 **To all but die-hard:** For media coverage, see Warren Weaver Jr., "High Court Backs Women's Jury Rights," *New York Times,* Jan. 22, 1975, A1; Linda Mathews, "Exclusion of Women as Jurors Overruled," *Los Angeles Times,* Jan. 22, 1975, A7; John P. MacKenzie, "Court Upsets Bar to Women on Juries," *Washington Post,* Jan. 22, 1975, A1; UPI, "Jury Ban on Women Illegal," *Detroit Free Press,* Jan. 22, 1975; S. J. Micciche, "Court Rules States Can't Bar Women from Jury Duty," *Boston Globe,* Jan. 22, 1975; and W. Dale Nelson, "Court Backs Right of Women Jurors," *Oregonian,* Jan. 22, 1975. For legal scholars' reactions, see Kathleen M. Butler, "The Representative Cross Section Standard: Another Sixth Amendment Fundamental Right," *Loyola Law Review* 21 (1975): 995–1003; "The Supreme Court, 1974 Term," *Harvard Law Review* 89 (1975): 95–103; Carla A. Neely, "Constitutional Law: Jury Selection—Exclusion of Women from Jury Venire Violates Fundamental Sixth Amendment Right to a Representative Jury," *University of Florida Law Review* 28 (1975): 281–88; Kenneth J. Mulvey Jr., "Constitutional Law—Sixth Amendment—Systematic Exclusion of Women from Jury Service Violates the Sixth and Fourteenth Amendments," *Fordham Urban Law Journal* 3 (1975): 733–48; Martha Craig Daughtrey, "Cross Sectionalism in Jury-Selection Procedures After *Taylor v. Louisiana,*" *Tennessee Law Review* 43 (1975): 1–107; Richard H. Faught, "*Taylor v. Louisiana*: Constitutional Implications for Missouri's Jury Exemption Provisions," *Saint Louis University Law Journal* 20 (1975): 159–80; Kathryn Marie Krause, "Jury Selection—Sixth Amendment Right to a Fair Cross Section of the Community—a Change in Emphasis," *Missouri Law Review* 41 (1976): 446–56; and Elizabeth B. Leete, "*Taylor v. Louisiana*: The Jury Cross Section Crosses the State Line," *Connecticut Law Review* 7 (1975): 508–28.

241 ***Duren v. Missouri* (1979):** *Duren v. Missouri,* 439 U.S. 357 (1979).

241 **"weightier reasons":** *Taylor v. Louisiana,* 419 U.S. at 534 (White majority).

241 **But anticipation turned to grief:** For the cause of Paula's death, see RBG, interview by Marcus, Aug. 13, 1996.

242 **"mothers' benefits":** For case facts, see Brief for Appellee, *Weinberger v. Wiesenfeld,* 420 U.S. 636 (1975), in Kurland and Casper, *Landmark Briefs and Arguments of the Supreme Court of the United States,* 82:353–416.

242 **"TELL THAT TO GLORIA":** RBG to Phyllis Zatlin Boring, Dec. 27, 1972, RBG Papers; and RBG, interview by Marcus, July 14, 1997.

242 **"It's a great case":** RBG to Phyllis Zatlin Boring.

242 **"as soon as I get":** RBG to Jane Lifset, Jan. 9, 1973, RBG Papers.

242 **Because the ACLU would be:** Ibid.; RBG to Wiesenfeld, Jan. 10, 1973, RBG Papers.

243 **"Do you think you can arrange":** RBG to Oelsner, Feb. 8, 1973, RBG Papers.

243 **"very conservative":** RBG to Judith Mears, Aug. 30, 1973, RBG Papers. To refer to the district court as "very conservative" was diplomatic wording.

244 **"Hallelujah!" she exulted:** RBG to Lifset, June 1, 1973; RBG to the *Equal Rights Monitor,* April 28, 1975, both in RBG Papers. On the friendship, see Wiesenfeld to RBG, May 4, 1975, Oct. 20, 1978, and May 23, 1979; RBG to Wiesenfeld, Nov. 8, 1978; and Wiesenfeld to RBG, June 3, 1980, all in RBG Papers.

244 **"small, frail, and absolutely":** Wiesenfeld, telephone interview by author, Nov. 14, 2000.

244 **Because opposing counsel:** RBG to James V. Rowan, Jan. 18, 1974; and RBG to Jack Blumenfeld, Oct. 24, 1974, both in RBG Papers.

244 **Whether such responses:** Wiesenfeld, telephone interview by author, Nov. 14, 2000. Transcript of Oral Argument, *Wiesenfeld v. Secretary of HEW,* 367 F. Supp. 981 (1973). The price of equalization was also much emphasized when the case reached the Supreme Court, the solicitor general arguing that if other very closely analogous provisions were extended, the cost would rise to over $350 million annually.

245 **Though the core issues:** Strebeigh, *Equal,* 68–70.

245 **"A weird opinion":** *Wiesenfeld,* 367 F. Supp. 981. RBG to Judith Mears, Aug. 20, 1973; RBG to Lifset, June 1 and Dec. 17, 1973; Lifset to RBG, Jan. 9, 1974; and RBG to James V. Rowan, Jan. 18, 1974, all in RBG Papers.

245 **Bork could be counted:** Pacelle, *Between Law and Politics,* 124–29.

245 **"Mothers' benefits," like "widows' tax exemptions":** Transcript of Oral Argument at 3–19, *Weinberger v. Wiesenfeld,* 420 U.S. 636 (1975), 1233 (Brennan majority).

245 **To counter the argument:** "The fly in the ointment is *Kahn v. Shevin,*" RBG noted. See RBG to Jack Blumenfeld, Oct. 24, 1974, RBG Papers.

245 **"We will simply have":** RBG to Wiesenfeld, May 3, 1974, RBG Papers.

246 **Working from an eleven-page:** For this and subsequent paragraphs, see Brief for Appellee, *Weinberger v. Wiesenfeld,* 420 U.S. 636 (1975), in *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law,* 353–416. See also Outline of Wiesenfeld brief, *Wiesenfeld* Supreme Court Case, RBG Papers.

246 **"while special deference":** Transcript of Oral Argument, *Wiesenfeld,* 420 U.S. 636.

247 **With a little help from Gerry:** Gunther advised RBG to take a look at a 1970 decision, *Welsh v. United States,* and especially Justice Harlan's concurring opinion. Welsh, she discovered, had claimed conscientious objector status—not because of "religious training and belief," as the military service exemption statute dictated, but because of strong moral and ethical beliefs that he characterized as "nonreligious." The Supreme Court, reversing the lower court decision upholding Welsh's conviction, had interpreted "religious" broadly to include Welsh's beliefs. Justice Harlan disagreed. He recognized that Congress said and meant religious conscientious objectors. But that limitation, Harlan concluded, violated the First Amendment's guarantee of free speech. The choice facing the Court, he suggested, was either enlargement—adding a class (nontheistic objectors)—or abrogation of the exemption altogether. The larger legislative intent behind the original statute was clearly to exempt conscientious objectors; the Court was therefore justified in extending the exemption. Other justices, while ruling in favor of Welsh, had not embraced Harlan's analysis, but RBG had decided to try it nonetheless. *Welsh v. United States,* 398 U.S. 333 (1970), esp. 344–67; and RBG, "Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation," *Cleveland*

State Law Review 28 (1979): 301–24. Gunther's role was revealed in RBG, interview by author, Aug. 28, 2002.

247 **That could cost more:** RBG notes, *Wiesenfeld* case files and correspondence, RBG Papers.

247 **Upon leaving, she passed a woman:** RBG, interview by author, Aug. 28, 2002.

247 **In this "awesome" setting:** Wiesenfeld, telephone interview by author, Nov. 14, 2000.

247 **"As soon as Ruth uttered":** Williams, interview by author, March 4, 2000.

248 **the restriction to "widows only":** Transcript of Oral Argument at 3–19, esp. 7–9, *Wiesenfeld,* 420 U.S. 636.

248 **The question, Ruth assumed:** *Stanton v. Stanton,* 421 U.S. 7 (1975), for which Justice Blackmun wrote the majority opinion striking down the Utah law as a violation of equal protection.

248 **Ginsburg used much of her:** Transcript of Oral Argument at 3–19, esp. 7–9, *Wiesenfeld,* 420 U.S. 636. The cutoff amount for earnings was actually $2,980 and not the older figure of $2,400, which RBG cited on page 15.

249 **Berzon researched the history:** Judge Marsha S. Berzon (U.S. Court of Appeals for the Ninth Circuit), telephone interview by author, Aug. 24, 2010.

249 **"Justices Back Widowers' Equal Rights":** "I cried too!" RBG wrote to Milicent Tryon, March 24, 1975, RBG Papers. See Warren Weaver Jr., "Justices Back Widowers' Equal Rights," *New York Times,* March 20, 1975, A1.

249 **"forbids the gender-based":** *Wiesenfeld,* 420 U.S. at 645 (Brennan majority).

250 **Now, however, the provision:** Ibid. Although the Court was unanimous in its judgment, Brennan, who wrote the opinion, was joined by Justices Stewart, White, Marshall, and Blackman. Justice Powell filed a concurring opinion in which Chief Justice Burger joined. Justice Rehnquist filed an opinion concurring in the result. Douglas was ill and took no part in the decision.

250 **Those cases "made the law":** RBG, "Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation"; RBG to author, Jan. 12, 2000.

250 **"back on track":** RBG, "The Supreme Court Back on Track: *Weinberger v. Wiesenfeld,*" n.d., RBG Papers.

250 **"compelling state interest":** *Stanton v. Stanton,* 421 U.S. 7 (1975), 17 (Blackmun majority).

251 **The Ginsburgs held a victory party:** The reaction of some of the ACLU lawyers, which was noted by Sylvia Law, a New York University Law School professor and feminist legal scholar, was reported in David Von Drehle, "Redefining Fair with a Simple Careful Assault—Step-by-Step Strategy Produced Strides for Equal Protection," *Washington Post,* July 19, 1993, A1. Information on the wedding ceremony and a photograph were provided by RBG, interview by author, Aug. 28, 2002.

THIRTEEN · Moving Forward on Shifting Political Ground

252 **After the turbulent 1960s:** On the bicentennial, see Zaretsky, *No Direction Home*, esp. chap. 4.

252 **Public intellectuals fueled:** Daniel P. Moynihan, "The American Experiment," *Public Interest* 41 (1975): 7; "America Now? A Failure of Nerve," *Commentary,* July 16, 1975; Lasch, *Culture of Narcissism;* Lasch, *Haven in a Heartless World;* Zaretsky, *No Direction Home,* esp. chap. 5; Harris Poll, Jan. 5, 1976.

252 **At the 1976 Republican convention:** "Republican Feminists Prepare to Fight for Convention Delegates, Rights Amendment, and Abortion," *New York Times,* Feb. 19, 1976, A25; Eileen Shanahan, "G.O.P. Feminists Angry at Party," *New York Times,* July 28, 1976, A9; Spencer Rich, "GOP Platform Panel Refuses to Support ERA," *Washington Post,* Aug. 12, 1976, A3; Joseph Lelyveld, "Normally Proper G.O.P. Women

Come Out Fighting over E.R.A.," *New York Times,* Aug. 17, 1976, A40. On the division of the GOP and especially Republican women over feminist issues, see Rymph, *Republican Women,* chap. 8, conclusion. For an excellent discussion of how a Republican convention with a majority of pro-choice delegates and an adamantly pro-choice First Lady came to adopt its abortion platform, see Daniel K. Williams, "The GOP's Abortion Strategy: Why Pro-choice Republicans Became Pro-life in the 1970s," *Journal of Policy History* 23 (2011): 512–39.

252 **"I don't think we will":** RBG to East, March 31, 1975, East Papers.

253 **The Court's attentiveness:** Critchlow, *Conservative Ascendancy*. For a superb recent study linking battles over gender and sexuality to this rightward tilt, see Self, *All in the Family*.

253 **Before the three-judge panel:** For contextualization of Oklahoma City politics in the case, see R. Darcy and Jenny Sanbrano, "Oklahoma in the Development of Equal Rights: The ERA, 3.2% Beer, Juvenile Justice, and *Craig v. Boren,*" *Oklahoma City University Law Review* 22 (1997): 1009–49.

253 **"Fed-up with the whole":** Appellee Brief, *Walker v. Hall,* 399 F. Supp. 1304 (1975). The case, when submitted to the Supreme Court, was renamed because Craig had supplanted Walker and Boren had taken Hall's place as governor. For quotation, see Gilbert to RBG, May 27, 1977, RBG Papers.

254 **"something in between":** *Stanton v. Stanton,* 421 U.S. 7 (1975), 17 (Blackmun majority); Amy Leigh Campbell, "Raising the Bar: Ruth Bader Ginsburg and the ACLU Women's Rights Project," *Texas Journal of Women and the Law* 11 (2002): 237.

254 **"in view of your long":** RBG to Gilbert, Jan. 15, 1976, RBG Papers.

254 **"implore[d]" Ginsburg's presence:** Gilbert to RBG, Jan. 21, 1976, RBG Papers.

254 **"We don't have 5 votes":** *Stanton* was a decision in which the Court held unconstitutional a Utah statute requiring parental support for males until age twenty-one but for females only until age eighteen.

254 **"stay away from conclusive":** *Weinberger v. Salfi,* 422 U.S. 749 (1975).

254 **Further, Ginsburg encouraged:** RBG to Gilbert, Jan. 26 and Feb. 4, 1976, RBG Papers. See *Sail'er Inn Inc. v. Kirby,* 5 Cal. 3d 1, 485 P. 2d 529 (1971).

254 **She also volunteered:** Gilbert to RBG, Feb. 5, 1976; RBG to Gilbert, Feb. 16 and May 27, 1976; RBG to Richard Haitch, May 17, 1976; and Haitch to RBG, May 19, 1976, all in RBG Papers.

254 **"beginning to feel like":** Gilbert to RBG, Feb. 5, 1976, RBG Papers.

254 **"I think I succeeded":** Gilbert to RBG, Feb. 27, 1976, RBG Papers.

254 **"Your brief makes many strong":** RBG to Gilbert, March 4, 1976, RBG Papers.

255 **The amendment did not:** Brief Amicus Curiae of the American Civil Liberties Union esp. at 13, 15, 19–22, 25, 33, *Craig v. Boren,* 429 U.S. 190 (1976), in Kurland and Casper, *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law, 1976 Term Supplement,* vol. 91 (Frederick, Md.: University Publications of America, 1978).

255 **"the concept of 'compensatory' ":** Ibid.

255 **"utterly failed to demonstrate":** Ibid.

255 **"But whatever support":** Ibid.

256 **And do submit:** RBG to Gilbert, June 23 and 7, 1976; Gilbert to RBG, June 29, 1976; RBG to Gilbert, July 2 and Sept. 8, 1976, all in RBG Papers.

256 **Her second case, scheduled:** *Coffin v. Secretary of Health, Education, and Welfare,* 400 F. Supp. 953 (1975); *Jablon v. Secretary of Health, Education, and Welfare,* 399 F. Supp. 118 (Md.1975); *Califano v. Goldfarb,* 396 F. Supp. 308 (1975); *Califano v. Hau,* 430 U.S. 960 (1977).

256 **"sometimes the best laid plans":** *Coffin,* 400 F. Supp. 953. For the quotation, see RBG, "Keynote Address at Hawaii ACLU Conference on Women's Legal Rights," March 16–17, 1978, RBG Papers, as quoted in Campbell, "Raising the Bar," 196.

256 **Three weeks before the judges:** Campbell, "Raising the Bar," 226–27; *Califano v. Goldfarb,* 430 U.S. 199 (1977); and RBG, interview by author, July 1, 2003.

257 **"We earned that money":** Anna Quindlen, "Leon Goldfarb Doubly Happy with Decision," *New York Times,* March 3, 1977, 19. Also see Leslie Maitland, "Indictment Says Lefkowitz Aide Accepted Bribe," *New York Times,* March 3, 1977, A1.

257 **Personalizing the injustice:** *Goldfarb v. Secretary of Health, Education, and Welfare,* 396 F. Supp. 308 (1975).

257 **"on the straight and narrow":** RBG to Jill Hoffman, Aug. 13, 1976 (the note to Hoffman is in the form of a postscript on the carbon of a letter to Gilbert). See RBG to Gilbert, Aug. 13, 1976, RBG Papers.

257 **"Dearest Amica," he later wrote:** Gilbert to RBG, May 27, 1977, RBG Papers.

257 **"Dear [Ranger] Fred," she replied:** RBG to Gilbert, May 27, 1976, RBG Papers. See also July 2, 1976, RBG Papers.

257 **Ginsburg, as well as court reporters:** On the changed tone, see *Washington Star* and *Boston Globe,* Oct. 6, 1976, RBG Papers.

258 **In other words, the rational:** For the next several paragraphs, see Transcripts of Oral Argument at 8–9, *Califano v. Goldfarb*, 430 U.S. 199 (1977). *Mathews v. Goldfarb* (No. 75-699) was redesignated *Califano v. Goldfarb* when Joseph A. Califano Jr. replaced F. David Mathews as the Secretary of Health, Education, and Welfare at the onset of the Jimmy Carter administration, which occurred approximately six weeks prior to the Court's decision.

258 **Unlike the Florida widows':** Brief for Appellee, *Mathews v. Goldfarb* (1976); Transcript of Oral Argument, *Califano v. Goldfarb*. For RBG's opening statement, see 20–22.

259 **If she answered directly:** RBG to Richard Larson, Oct. 14, 1976, RBG Papers; and Nina Totenberg (NPR legal correspondent), interview by author, Nov. 13, 2003. RBG, "Gender and the Constitution," *University of Cincinnati Law Review* 44 (1975): 1–41.

259 **"deeply entrenched discriminatory problems":** RBG, "Gender and the Constitution," 28–29.

259 **"invidious impact against women":** Transcript of Oral Argument, 22–26, *Califano v. Goldfarb*.

259 **"It is impossible to rationalize":** Ibid., 31–35.

260 **"merely a color-blind remedy":** RBG to Larson, Oct. 14, 1976, RBG Papers.

260 **Faced with the prospect:** *Webster v. HEW,* 430 U.S. 313 (1976).

261 **But that did not alleviate:** RBG to Gerard Lynch, March 28, 1977, RBG Papers.

261 **If, however, his colleagues:** Burger to Brennan, Nov. 15, 1976, Blackmun Papers.

261 **"some level of scrutiny":** Blackmun Conference Notes on *Craig v. Boren,* Oct. 8, 1976; and Powell to Burger, Blackmun, and Brennan, Oct. 14, 1976, both in Blackmun Papers. Also see Rehnquist to Brennan, Nov. 2, 1976; and Burger to Brennan, Oct. 18, 1976, both in Powell Papers.

262 **After several drafts:** RBG first introduced the idea of a middle tier in the *Frontiero* amicus brief.

262 **Brennan's discussion of why:** For an analysis of brokered judicial decision making that uses *Craig* as illustrative, see Epstein and Knight, *Choices Justices Make,* esp. 1–13, 57–58.

262 **"classifications by gender":** *Craig v. Boren,* 429 U.S. 190 (1976), 210, 217, 218.

262 **When the conference then turned:** Stewart to Burger, Oct. 18, 1976; Burger Memorandum to Conference, Oct. 20, 1976; and Stevens to Brennan, Oct. 21, 1976, all in Marshall Papers.

263 **"a remarkably fine job":** Stewart to Brennan, Dec. 14, 1976, Blackmun Papers.

263 **"considerable backing and filling":** Powell to Brennan, Dec. 6, 1976; Stewart to Brennan, Dec. 14, 1976; Burger, Memorandum to Conference, Jan. 3, 1977; Burger to Rehnquist, Jan. 4, 1977; Stevens to Rehnquist, Jan. 4, 1977; Stewart to Rehnquist, Jan. 4, 1977; all in Marshall Papers. See also *Califano v. Goldfarb,* 430 U.S. 199 (1977).

263 **"the accidental by-product":** RBG to Gerard Lynch, March 16 and 28, 1977, RBG Papers.

263 **Further, the automatic qualification:** *Califano,* 430 U.S. at 199–242.

264 **The remedial end matched:** Five justices joined in the per curiam decision. See *Califano v. Webster,* 430 U.S. 313 (1977).

264 **"After North Carolina's nay":** RBG to Barrett, March 16, 1977, RBG Papers.

264 **"Save at least a handshake":** Lynch to RBG, March 23, 1977, RBG Papers.

264 **"I was wondering what you'd think":** Ibid. Italics mine.

264 **"The *Webster* opinion":** RBG to Lynch, March 28, 1977, RBG Papers.

265 **Expounding to ACLU:** RBG, "The Supreme Court Clarifies the Distinction Between Invidious Discrimination and Genuine Compensation (*Califano v. Goldfarb* and *Califano v. Webster*)," RBG Papers. This statement was apparently prepared for Lesley Oelsner, the legal reporter for *The New York Times*. See RBG to Oelsner, April 5, 1977, RBG Papers.

265 **"also familiar" with the cases:** RBG to Jeffrey S. Saltz, Aug. 15, 1977, RBG Papers. As it turned out, Jane would make the *Law Review,* of which the future chief justice Roberts was editor.

265 **Yet legal analysts agreed:** Lesley Oelsner, "Sex Discrepancy in Old-Age Funds Is Unanimously Upheld by Justices," *New York Times,* March 22, 1977, 28.

265 **"important government interest":** See R. Broh Landsman, "Fifth Amendment Protection Against Gender-Based Discrimination in the Distribution of Survivors' Benefits: *Califano v. Goldfarb*," *Southwestern Law Journal* 31 (1977): 1156–63; John V. Nordlund, "Constitutional Law: Equal Protection—Gender Discrimination—*Califano v. Goldfarb*," *New York Law School Law Review* 23 (1977): 503–17; David M. Douglas, "Social Security: Sex Discrimination and Equal Protection," *Baylor Law Review* 30 (1978): 199–205; and Gregory Kaapuni, "*Califano v. Goldfarb*: An Equal Protection Standard for Gender-Based Discrimination," *University of West Los Angeles Law Review* 10 (1978): 67–85.

265 **"will remain a mask":** Kenneth L. Karst, "The Supreme Court, 1976 Term," *Harvard Law Review* 91 (1977): 1–301, esp. 188.

265 **Nor was the dramatic:** For RBG's testimony on extension of the ERA ratification deadline, see *Hearings on H.J. Res. 638: Equal Rights Extension, Before the Subcommittee on Civil and Constitution Rights of the House Committee on the Judiciary,* 95th Cong., 1st–2nd sess. (1977 and 1978).

266 **The brethren's "ostrich-like":** RBG, "Some Thoughts on the Benign Classification of Sex," *Connecticut Law Review* 10 (1978): 812–27.

266 ***General Electric v. Gilbert:*** For more on the story behind the *Gilbert* litigation, see Strebeigh, *Equal,* chap. 7.

266 **Only Brennan and Marshall:** *General Electric v. Gilbert,* 429 U.S. 125 (1976).

266 **Dismay did not begin:** RBG to Herma Hill Kay, Dec. 7, 1976, RBG Papers.

266 **"Women's Rights Movement":** Lesley Oelsner, "Supreme Court Rules Employers May Refuse Pregnancy Sick Pay: Women's Rights Movement Is Dealt Major Blow by 6–3 Ruling Rejecting Appeals Courts' View," *New York Times,* Dec. 8, 1976, A1.

266 **an "invented tradition":** Cary Franklin, "Inventing the 'Traditional Concept' of Sex Discrimination," *Harvard Law Review* 125 (2012): 1307. Rehnquist's intention was to use *Gilbert* to limit disparate impact in Title VII. See Mayeri, *Reasoning from Race,* 106–22.

267 **"places no obstacles":** *Maher v. Roe,* 432 U.S. 464 (1977), 464–90, esp. 482; RBG to Isabele Katz Pinzler, Phyllis Segel, Susan Berrensford, Margaret Berger, Jane Picker, and Chuck Guerrier, memo, May 21, 1979, RBG Papers.

267 **Both were expressions:** Mayeri, "'Common Fate of Discrimination,'" 1045–87.

267 **Hence Stewart's clever crafting:** *Geduldig v. Aiello,* 417 U.S. 484 (1974).

268 **"eliminating institutional practices":** RBG, "Gender and the Constitution," 1–41.

268 **With affirmative action her best:** Laura Kalman, "At the Border of Law and Politics: Bakke and Affirmative Action" (paper, the American Historical Association, San Diego, Jan. 10, 2010).

269 **"a more capacious vision":** See Mayeri, "Reconstructing the Race-Sex Analogy," 1789–854. For a more extensive discussion, see Mayeri, *Reasoning from Race;* RBG, "Some Thoughts on Benign Classification in the Context of Sex," 813–27; RBG, letter to the editor, *New Republic,* April 1977, 9.

270 **But Powell, whom Brennan:** On Brennan's efforts to persuade Powell, see Stern and Wermiel, *Justice Brennan,* 447–49.

270 **"[T]he perception of racial":** *Regents of the University of California v. Bakke,* 438 U.S. 265 (1978), 303 (Powell majority).

271 **"robust exchange of ideas":** Ibid., 312–13.

271 **Yet Powell's decision:** See "The Landmark Bakke Ruling," *Newsweek,* July 10, 1978, 19.

271 **Ginsburg was not the only:** Of the numerous articles by legal scholars on the meaning of *Bakke,* see, for example, Vincent Blasi, "*Bakke* as Precedent: Does Mr. Justice Powell Have a Theory?," *University of California Law Review* 67 (1979): 21–68.

271 **"Did Justice Powell mean":** RBG, Constitutional Law Lecture, Feb. 29, 1980, RBG Papers.

271 **Other feminist legal scholars:** RBG to Isabel Pinzler, Phyllis Segel, Susan Berresford, Margaret Berger, Jane Picker, Chuck Gerrier, memo, May 21, 1979, RBG Papers. For extensive critiques from other feminist legal scholars, see, for example, Nancy Gertner, "*Bakke* on Affirmative Action for Women: Pedestal or Cage?," *Harvard Civil Rights–Civil Liberties Law Review* 14 (1979): 209–14.

271 **"alive and well":** Mayeri, "Reconstructing the Race-Sex Analogy," 1831. For a definitive study, see Mayeri, *Reasoning from Race*.

272 **Then, in a 1976 case:** *Washington v. Davis,* 426 U.S. 229 (1976).

272 **For nonveterans like Helen Feeney:** For a fuller discussion of the Feeney case and of veterans' preferences, see Kerber, *No Constitutional Right to Be Ladies,* chap. 5.

272 **The Court's newfound:** RBG's reading of the likely disposition of Feeney proved accurate, as did her initial decision not to challenge veterans' preferences in the waning years of the Vietnam War. Traditional veterans' groups, Kerber notes, lobbied intensely against Feeney's challenge as a way of helping young Vietnam vets who they believed had gotten a raw deal—a response congruent with the larger enterprise of postwar remasculinization explored in Jeffords, *Remasculinization of America*. When the Court handed down its decision on June 5, 1979, *Personnel Administrator of Massachusetts v. Feeney,* 442 U.S. 256 (1979), joined prior civil rights rulings to create a framework that made it much more difficult for plaintiffs to successfully challenge facially neutral policies that have a discriminatory impact on women and minorities.

272 **Furthermore, Justice Brennan:** Brennan, who suffered from a sore throat and depleted energy since 1977, would begin cancer treatments in December 1978, according to his biographers. See Stern and Wermiel, *Justice Brennan,* 449–50.

273 **The dual impact of unfavorable:** See Reva Siegel, "Why Equal Protection No Longer Protects: The Evolving Form of Status-Enforcing State Action," *Stanford Law Review* 49 (1997): 1111–48.

273 **"social and economic pressures":** RBG to Isabelle Pinzler, Phyllis Segal, Susan Beresford, Margaret Berger, Jane Picker, and Chuck Guerrier, memo, May 21, 1979, RBG Papers.

273 **"battle for control of the law":** Teles, *Rise of the Conservative Legal Movement*.

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277 **A little more than a year:** Cover of *Ms.,* Jan. 1978.

277 **Passage of the Omnibus:** On feminist involvement in judicial nominations in the Carter era, see Mary Clark, "Changing the Face of the Law: How Women's Advocacy Groups Put Women on the Federal Judicial Appointments Agenda," *Yale Journal of Law and Feminism* 14 (2002): 243–54.

277 **Most important, the bill:** On Carter's reform of judicial selections, see Goldman, *Picking Federal Judges,* chap. 7.

277 **At the White House signing ceremony:** On presidential leadership in the 1970s, see Kalman, *Right Star Rising,* esp. chaps. 6–10.

277 **"more than token":** President's Signing Statement Accompanying Executive Order No. 12059, Oct. 20, 1978, Carter Papers; "President Establishes Circuit Judge Nominating Commission by Executive Order," *American Bar Association Journal* 63 (April 1977): 554; Phyllis N. Segal, "Choosing Women Judges," *National NOW Times,* Aug. 1979. For more on the Omnibus Judgeship Act of 1978, see Jack J. Coe Jr., "Recruitment and Appointment of Federal Judges," *Loyola Los Angeles Law Review* 12 (1979): 1033–42.

278 **But as she waited:** RBG, interview by Sarah Wilson, July 5, 1995, 69, Federal Judicial Center.

278 **But such firms had never:** Ibid.; Griffin B. Bell, "What Went Wrong," in *Taking Care of the Law,* 40. On Bell's strong preference, see also Carter, *White House Diary,* 350.

278 **Ginsburg had her heart:** See copy of "Questionnaire for Prospective Nominees for United States Circuit Judgeship," Jan. 15, 1979, box 22, RBG Papers. As a result of the Omnibus Judgeship Bill, applying for the federal judgeship was something new. In fact, the idea of applying was odious to some people who believed that this crowning accomplishment of a career should come as an anointment. See Gerhardt, *Federal Appointment Process,* 118–20.

279 **"femocrats":** Kenney, *Gender and Justice,* chap. 4.

280 **"thwarting the ambition":** Babcock, *Fish Raincoats,* 160.

280 ***Roe v. Wade* advocate:** On the location of Weddington's office, which would prove critical, see Sarah Weddington, exit interview by Emily Soapes, Jan. 2, 1981, Carter Papers.

280 **"Insider" strategic knowledge:** Kenney, *Gender and Justice,* chap. 4.

281 **Norman Dorsen, then president:** Dorsen to Don Blinken, Dec. 22, 1978, RBG Papers (Second Circuit Judicial Selection).

281 **But when she arrived:** RBG, interview by Wilson, July 5, 1995.

281 **"You were as close":** Nina Totenberg, "Tribute to Justice Ruth Bader Ginsburg," *New York University Annual Survey of American Law* (April 1997): 33–37.

281 **"there was an unholy":** RBG, interview by Wilson, July 5, 1995.

281 **"Mrs. Ginsburg [has] been":** Carter, *White House Diary,* 397.

281 **described as "a natural":** RBG, interview by Wilson, July 5, 1995.

282 **Fortuitously, her old dean:** Gunther to RBG, March 20, 1979, RBG Papers.

282 **NOW's Legal Defense Fund:** Margaret Moses to Carter, telegram, Dec. 6, 1979.

282 **Columbia's executive vice president:** Sovern to Lawrence E. Walsh, Jan. 9, 1979; Rosenthal to Walsh, Jan. 18, 1979, both in RBG Papers.

282 **Distinguished members:** Smith to Joseph D. Tydings, Jan. 22, 1979, Smith to Benjamin R. Civiletti, Dec. 3, 1979, Spann to Benjamin R. Civiletti, Dec. 7, 1979, box 22 D.C. Circuit, Judiciary Appointment—General (1979), RBG Papers.

282 **So, too, did Abner Mikva:** Mikva, interview by Harry Krisler, April 12, 1999, University of California Television.

283 **"There are going to be":** RBG, interview by Wilson, July 5, 1995, 67.

283 **"I'm elated about *Westcott*":** *Orr v. Orr,* 440 U.S. 268 (1979); *Califano v. Westcott,* 443 U.S. 76 (1979). See RBG to Henry Freedman, Feb. 12 and March 16, 1979;

RBG to Diana Steele, March 1, 1979; RBG to Gunther, June 27, 1979, box 2, RBG Papers.

283 **"Mike Sovern's [letter] notes":** RBG, interview by Barbara Babcock, June 4, 1979, RBG Papers.

284 **Attorney General Griffin Bell:** Bell's preferences were reflected in the merit selection committees as well as by other members of the Justice Department. See Kenney, *Gender and Justice,* chap. 4; Phyllis N. Segal to RBG, March 3, 1980, box 42, RBG Papers; Susan Ness, "A Sexist Selection Process Keeps Qualified Women off the Bench," *Washington Post,* March 26, 1978, C8.

284 **As *The New York Times:*** "The Uppity House and Federal Judges," *New York Times,* Feb. 18, 1978, 22; "Trials of Judicial Selection," *New York Times,* Nov. 26, 1978, E20; "That White Male Federal Bench," *New York Times,* Jan. 29, 1979, A16.

284 **"sanitize[d] my prior liberal":** Patricia M. Wald, "Women of the Courts Symposium: Six Not-So-Easy Pieces: One Woman Judge's Journey to the Bench and Beyond," *University of Toledo Law Review* 36 (2005): 986.

284 **A man who radiated:** Mikva, interview by Harry Krisler, April 12, 1999.

284 **Longing for "some time":** RBG, interview by Gunther, June 27, 1979.

285 **The previous summer Ruth:** RBG, "American Bar Association Visits the People's Republic of China," *American Bar Association Journal* 64 (Oct. 1978): 1516–25.

285 **"Far from being 'a leftist' ":** RBG, "A Study Tour of Taiwan's Legal System," *American Bar Association Journal* 66 (Feb. 1980): 165–70; RBG, interview by Yao Chia-wen, July 20, 1979; RBG, interview by Norman Dorsen, Dec. 17, 1979; RBG to Norman Dorsen, Dec. 17, 1979.

285 **Upon learning of his arrest:** See folder 6, box 21, RBG Papers.

285 **Nine members of the Congressional:** Congress members Elizabeth Holtzman, Margaret M. Heckler, Patricia Schroeder, Mary Rose Oakar, Barbara Mikulski, Gladys Noon Spellman, Millicent Fenwick, Lindy Boggs, and Geraldine Ferraro to President Jimmy Carter, July 10, 1979, Ginsburg WH Name File, Carter Papers.

285 **"She's brilliantly qualified":** Babcock to the Attorney General and Associate Attorney General, March 12, 1979, Ginsburg WH Name File, Carter Papers.

286 **But there was little supporters:** RBG, interview by Wilson, July 5, 1995, 69.

286 **Once Bazelon's decision created:** National Women's Political Caucus with co-signers American Association of University Women, California Women Lawyers, Equal Rights Advocates, Federation of Organizations for Professional Women, NAACP Legal Defense Fund, National Conference of Puerto Rican Woman, Women's Equity Action League, Women's Legal Defense Fund, Women's Rights Project Center for Law and Social Policy, B'nai B'rith Women, Washington Chapter of Women's Division/National Bar Association to President Carter, telegram, Jan. 16, 1980, Ginsburg WH Name File, Carter Papers.

286 **But the numbers on the bench:** Kenney, *Gender and Justice,* chap. 4.

286 **But after a lengthy:** Weddington to author, email, May 9, 2011.

286 **Then she rushed downstairs:** Ibid.

286 **Just as she anticipated:** Laura A. Kiernan, "Feminist Picked for U.S. Court of Appeals Here," *Washington Post,* Dec. 16, 1979, A1.

287 **"Bravo! Bravo! Bravo!":** Pauli Murray to RBG, Dec. 17, 1979, folder 8, box 21, RBG Papers.

287 **"What a splendid Christmas":** Frank to RBG, Dec. 18, 1979, folder 8, box 21, RBG Papers.

287 **"We'll all be the better":** Tribe to RBG, Dec. 17, 1979, folder 8, box 21, RBG Papers.

288 **"Time is of the essence":** Telegram by National Women's Political Caucus, Carter Papers.

288 **"no big thing":** "The Complaints of the Women's Lobby: When NOW Was Too Soon," *New York Times,* Dec. 19, 1979, A30.

288 **Her broadside angered:** See Carter, *White House Diary,* 378. Contrast Smeal's response with that of NOW's legal director, Phyllis Segal, and the NWPC's Susan Ness, both of whom displayed far greater understanding of the difficulties involved while simultaneously calling for more nominations of women to the judiciary. See Segal to RBG, March 3, 1980; Susan Ness and Fredrica Wechsler, "Women Judges—Why So Few?," *Graduate Women* 73 (Nov./Dec. 1979): 10–12; Kenney, *Gender and Justice,* chap. 4.

288 **Alarmed that Ginsburg's nomination:** Weddington to Fran Voorde, memorandum, Jan. 28, 1980, box 15, Ginsburg WH Name File, Carter Papers.

288 **Civiletti, annoyed with:** Ibid.

288 **Then, on February 2:** Lyle Denniston and Allan Frank, "Appellate Court Seat for Feminist Stalled," *Washington Star,* Feb. 2, 1980.

289 **"one-issue woman":** Douglas Lavine, "Court Prospect's Feminism Irks Senate Conservatives," *National Law Journal,* Dec. 1979, 8.

289 **"militant feminist":** "Ashbrook 01/22/80 and Crane 02/6/90," box 42, RBG Papers.

289 **"could bring about a vast revolution":** Ibid.

289 **The National Rifle Association:** Laura Kiernan, "Law Professor in Line for Bazelon's Seat," *Washington Post,* Sept. 25, 1979, B1.

289 **"Pro-family" forces:** Wald, "Women of the Courts Symposium," 986–87.

289 **Letters on Ginsburg's behalf:** See, for example, Chesterfield Smith to Joseph D. Tydings, Jan. 22, 1979, Smith to Civiletti, Dec. 3, 1979, Spann to Civiletti, Dec. 7, 1979, box 22 D.C. Circuit, Judiciary Appointments—General (1979), RBG Papers.

289 **To be described as a "militant feminist":** RBG to Herbert Wechsler, Jan. 28, 1980, box 22, D.C. Circuit Judicial Appointment—Opposition (1980), RBG Papers.

289 **Thinking more letters:** Ibid.; see also Segal to RBG, Feb. 25, 1980, March 3, 1980, box 22, D.C. Circuit Judicial Appointment—Opposition (1980), RBG Papers.

289 **When the ten new women:** RBG to Alice Heyman, June 18, 1973, box 42, RBG Papers; RBG, interview by Marcus, Sept. 3, 1997.

290 **Ted Kennedy, who:** RBG, interview by Wilson, July 5, 1995, 70–71.

290 **Once hearings were finally:** See, for example, Nina Totenberg, "Ginsburg: Will 'She' Sail As Smoothly as 'He' Would?," *Legal Times of Washington,* May 26, 1980, RBG Papers.

291 **When Hatch left the table:** For Millstein's recollection, see Ira M. Millstein, "Testimony Before the Senate Judiciary Committee Hearing on the Confirmation of Ruth Bader Ginsburg to Be an Associate Justice of the Supreme Court," July 23, 1993, folder no. 029738, OA/ID 21853, WHORM: Subject File, General, Clinton Presidential Records, William Clinton Presidential Library.

291 **For Marty, later one:** On Marty's teaching skills, see the numerous tributes on "Remembrances of Professor Ginsburg," *Georgetown Law,* www.law.georgetown.edu. On the rapid expansion of Fried, Frank, Harris, Shriver & Jacobson LLP between 1981 and 1987, see "Fried, Frank, Harris, Shriver & Jacobson LLP," www.top-law-schools.com.

291 **"Appellate judging has much in common":** *Hearings Before the Committee on the Judiciary United States Senate,* 96th Cong., 89/2, Serial No. 96-21, Part 7: 349 (statement of Ruth Bader Ginsburg, Nominee, Judge of Court of Appeals, District of Columbia).

291 **"That style of work and thought":** Ibid., 350.

291 **a more "balanced" candidate:** "United Families of America Testimony on Ginsburg Nomination," June 4, 1980, box 42, RBG Papers.

291 **"After many anxious weeks":** RBG to Alice Heyman, June 18, 1980, box 42, RBG Papers.

292 **the "dazzling smile":** "Professor Gerald Gunther Speaks at Investiture of Judge Ruth Ginsburg in Washington, D.C.," 8–9.

292 **Sonnet for Judge:** James Ginsburg to RBG, March 15, 1983, RBG Birthday Book.

293 **But soon other hallmarks:** Williams and Williams, "Sense and Sensibility," 589.
293 **"A meticulous writer":** Klarman to author, email, Nov. 19, 2013.
293 **Striving to meet Ginsburg's:** Williams and Williams, "Sense and Sensibility," 589.
294 **"He was the funniest person":** Klarman to author, email, Nov. 19, 2013.
294 **"I believe you're supposed":** James Ginsburg, "Thoughts on Dad," in Alito and Supreme Court Spouses, *Chef Supreme.*
295 **"I asked for a day off":** Klarman to author, email, Nov. 19, 2013.
295 **"Her rigorous interrogations":** Morrison, interview by author, April 10, 2010.
295 **"a tiger on the bench":** Williams and Williams, "Sense and Sensibility," 590.
295 **Not surprisingly, she generally:** For the next few paragraphs concerning RBG's time on the D.C. Circuit, I rely on Joel Klein's letter to Bernard Nussbaum, June 11, 1993, folder "Ginsburg, Ruth Bader," OA/Box Number CF 33, Clinton Presidential Records, Counsel's Office, Bernard Nussbaum, Clinton Presidential Library. For cases on civil rights, see *Wright v. Regan,* 656 F.2d 820 (1981), *Loe v. Heckler,* 768 F.2d 409 (1985), *McElvoy v. Turner,* 792 F.2d 194 (1986), *Spann v. Colonial Village,* 899 F.2d 24 (1990), and *O'Donnell Construction v. District of Columbia,* 963 F.2d 420 (1992). For cases on worker safety and labor rights, see *Wilson v. Johns-Manville Sales Corp.,* 684 F.2d 111 (1982), *Amalgamated Transit Union Int'l v. Donovan,* 767 F.2d 939 (1985), *Simpson v. Federal Mine Safety and Health Review Comm'n,* 842 F.2d 453 (1988), *West Coast Sheet Metal Inc. v. NLRB,* 938 F.2d 1356 (1991), and *United States Department of the Air Force v. FLRA,* 949 F.2d 475 (1991).
295 **but "indecent" speech:** See *New York Times v. Sullivan,* 376 U.S. 254 (1964). For RBG's application of the "actual malice" standard, see *Tavoulareas v. Piro,* 817 F.2d 762 (1987), 806–9 (RBG concurring). For the opinion on "indecent" speech, see *Action for Children's Television v. Federal Communications Commission,* 852 F.2d 1332 (1988) (RBG majority).
295 **She dissented in a First:** *Dkt Memorial Fund Ltd. v. Agency for Int'l Dev.,* 887 F.2d 275 (1989).
295 **And she sided with protesters:** *Community for Creative Non-violence v. Watt,* 703 F.2d 586 (1983), 605–8 (RBG concurring); reversed by the Supreme Court, *Clark v. Community for Creative Non-violence,* 468 U.S. 288 (1984).
295 **She also wrote a strong:** *Abourezk v. Reagan,* 785 F.2d 1043 (1986) (RBG majority).
296 **"the genius of our Constitution":** *In re Sealed Case,* 838 F.2d 476 (1988).
296 **Her dissent was later upheld:** *Morrison v. Olson,* 487 U.S. 654 (1988).
296 **The hearing was rejected:** *Goldman v. Secretary of Defense,* 739 F.2d 657 (1984).
296 **Carl E. Olsen argued:** *Olsen v. Drug Enforcement Administration,* 878 F.2d 1458 (1989).
296 **In her opinions on health:** See *Natural Resources Defense Council v. Gorsuch,* 685 F.2d 718 (1982); *NRDC v. Hodel,* 865 F.2d 288 (1988); and *National Coal Association v. Lujan,* 979 F.2d 1548 (1992).
296 **And in her opinions on searches:** Richard L. Lesher to William Clinton, July 21, 1993, "Ruth Bader Ginsburg," Folder no. 029738, OA/ID 21853, WHORM: Subject File, General, Clinton Presidential Records, Clinton Presidential Library.
296 **Overall, she distinguished:** See *United States v. Jackson,* 824 F.2d 21 (1987); *United States v. Gandy,* 868 F.2d 458 (1989); *United States v. Dockery,* 965 F.2d 1112 (1992); and *United States v. Chin,* 981 F.2d 1275 (1992).
297 **Ruth and Marty had, in fact:** Harry T. Edwards, "A Tribute to My Friend, the Honorable Ruth Bader Ginsburg," *New York University Annual Survey of American Law* 54 (1997): xv–xvii.
297 **In the 1984 *Dronenburg:*** Quotation from Jeffrey Rosen, "The Book of Ruth," *New Republic,* Aug. 2, 1993. For the case, see *Dronenburg v. Zech,* 741 F.2d 1388 (1984). Robert Bork, Antonin Scalia, and Stephen F. Williams presided.
297 **Other commentators also:** Nat Hentoff, "One Cheer for Judge Ginsburg," *Washington Post,* July 3, 1993, A23; Shilts, *Conduct Unbecoming,* 452.

298 **"she voted 94 percent":** Klein to Nussbaum, June 11, 1993, Clinton Presidential Library.

298 "**a judicial prophet":** Here, I am paraphrasing Rosen's statement in "Book of Ruth": "But even those who know [RBG] best cannot confidently predict whether the change in role will liberate her to act more as a judicial prophet and less as a priest."

298 **"the sole unifying force":** Klein to Nussbaum, June 11, 1993, Clinton Presidential Library.

298 **Appealing for a temperate:** See RBG, "Speaking in a Judicial Voice," 1185, and "Styles of Collegial Judging: One Judge's Perspective," *Federal Bureau News and Journal* 39 (1992): 199.

298 **a survey of "leading centrists":** Klein to Nussbaum, June 11, 1993, Clinton Presidential Library.

299 **George's flexibility and willingness:** For RBG's appreciative remarks about her son-in-law, see "Forty Years Later: Supreme Court Justice Ginsburg's Reflections, Four Decades After Her First Interview with AWIS National," *AWIS Magazine,* Oct. 3, 2013.

299 **When Paul and Clara:** Jane Ginsburg, "Daddy," in Alito and Supreme Court Spouses, *Chef Supreme,* 124. For the grandchildren's chocolate chip oatmeal cookie recipe, see 106.

299 **Remembering their son's:** Nathan J. Silverman, "Local Label Is a Chicago Classic, North Side's Cedille Records Up for First Grammy Award," *Inside* (Illinois).

299 **"its construction, nuance":** Carr Ferguson, "Marty," in Alito and Supreme Court Spouses, *Chef Supreme,* 109–10.

300 **His work so pleased:** Pamala F. Olson, "ABA Section of Taxation 2006 Distinguished Service Award Recipient, Professor Martin D. Ginsburg," *ABA Section of Taxation News Quarterly* 25 (2006): 6.

300 **Marty and Ruth had deliberated:** Stephen Labaton, "The Man Behind the High Court Nominee," *New York Times,* June 17, 1993, A1.

301 **"ghastly number":** MacLachlan, "Mr. Ginsburg's Campaign for Nominee," 33.

301 **"diligent academic to enormously":** Martin D. Ginsburg, "Distinguished Service Award Presentation—May 5, 2006," *ABA Section of Taxation News Quarterly* 25 (2006): 7–8. MDG's speech, which was given when he accepted the award in 2006.

301 **Now "sanitized" after fourteen years:** Wald, "Women of the Courts Symposium," 986–87.

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302 **Given the opportunity:** Ruth Marcus, "President Asks Wider Court Hunt," *Washington Post,* May 6, 1993, A1.

302 **"one of our nation's best":** "Transcript of President's Announcement and Judge Ginsburg's Remarks."

302 **"Rose Garden Rubbish":** Background Briefing by Senior Administration Officials, Office of the Press Secretary, White House, June 14, 1993, Part II: Box 1946, Daniel P. Moynihan Papers, Manuscript Division, Library of Congress, Washington, D.C.

302 **"You were terrific":** Clinton to RBG, June 14, 1993, OA/ID 21853, FG051, Scan ID 033475, WHORM: Subject File, Clinton Presidential Records, Clinton Presidential Library.

303 **"certain zigzag quality":** "Transcript of President's Announcement and Judge Ginsburg's Remarks."

303 **"Brit just didn't know":** Hume and Clinton quotations in "The Supreme Court," *New York Times,* June 15, 1993, A1; Stephanopoulos, *All Too Human,* 166–75.

303 **"Clinton deserves unstinting":** "Wise Choice: Justice Ruth Bader Ginsburg," *New Republic,* July 5, 1993, 7.

303 **Under the direction of:** Background Briefing by Senior Administration Officials, Office of the Press Secretary, White House, June 14, 1993, Part II: Box 1946, Moynihan Papers.

304 **Knowing that any political:** Thomas L. Friedman, "The Supreme Court: The 11th-Hour Scramble; After Hoping for a 'Home Run' in Choosing a Justice, Clinton May Be Just Home Free," *New York Times,* July 15, 1993; Toobin, *Nine,* chap. 5; Neil A. Lewis, "As Political Terrain Shifts, Breyer Lands on His Feet," *New York Times,* May 15, 1994, 10. For an excellent discussion on how the changing politics of judicial nominations circumscribed Clinton's choices, see Mark Silverstein and William Halton, "You Can't Always Get What You Want: Reflections on the Ginsburg and Breyer Nominations," *Journal of Law and Politics* 12 (1996): 459–79.

304 **Rather, Clinton wanted to get:** Background Briefing by Senior Administration Officials, Office of the Press Secretary, White House, June 14, 1993, Part II: Box 1946, Moynihan Papers.

305 **The White House conveyed:** Ibid.

305 **"not on the same":** See "Breyer and Ginsburg" note; also RBG, interview by Wilson, Sept. 25, 1995, 5.

305 **"remote and bookish":** Hirshman, *Sisters in Law,* 201.

305 **"appears to be an unusual synthesis":** Klein to Bernard Nussbaum, June 1, 1993, folder "Ginsburg, Ruth Bader," OA/Box Number CF 33, Clinton Presidential Records, Counsel's Office, Bernard Nussbaum, Clinton Presidential Library.

305 **"an accomplished advocate":** Ibid.

306 **"needed religious and gender":** Ibid.

306 **"Pat, She's the real thing":** Background Briefing by Senior Administration Officials, Office of the Press Secretary, White House, June 14, 1993, Part II: Box 1946, Moynihan Papers.

306 **"Judge Ginsburg's work":** Quoted in Robert Barnes, "Clinton Library Release of Papers on Ginsburg, Breyer Nominations Offer Insight, Some Fun," *Washington Post,* June 8, 2014, A13.

306 **Returning from Vermont:** Hirshman, *Sisters in Law,* 206, and RBG, *My Own Words,* 169.

307 "**I just wanted to":** Joan Biskupic, "Quick Confirmation of Ginsburg Sought," *Washington Post,* June 16, 1993, A1. Clinton had also done his homework, reading articles written by Ginsburg during her tenure on the D.C. Circuit, which no doubt helped him to reach conclusions about her jurisprudence. See, for example, RBG, "Remarks on Writing Separately," *Washington Law Review* 65 (1990): 133–50; RBG, "Styles of Collegial Judging," 199–201; RBG, "Interpretations of the Equal Protection Clause," *Harvard Journal of Law and Public Policy* 9 (1986): 41–45.

307 **What struck him:** Background Briefing by Senior Administration Officials, Office of the Press Secretary, White House, June 14, 1993, Part II: Box 1946, Moynihan Papers.

307 **"Tremendously impressed":** Clinton, *My Life,* 524. See also Harris, *Survivor,* chap. 5.

307 **In November 1991:** "First-Rate Centrists," *American Lawyer* 13 (Nov. 1991): 76.

307 **Indeed, her record on regulatory:** Marcia Coyle, "In Search of an Identity," *National Law Journal* 16 (1994): C1–C3.

307 **"a paragon of judicial restraint":** Jeffrey Rosen, "Ruth Bader Ginsburg: The New Look of Liberalism on the Court," *New York Times Magazine,* Oct. 5, 1997, SM60.

308 **As a graduate of:** On the conservative legal movement, see Teles, *Rise of the Conservative Legal Movement*.

308 **Ginsburg's reputation as:** Clinton had run as a New Democrat. On the shift of the Democratic Party to the center, see Kenneth S. Baer, *Reinventing Democrats,* esp. chaps. 6–8.

308 **"stand up to them":** See RBG, "Speaking in a Judicial Voice," 1185–209; RBG, "Styles of Collegial Judging," 199–201.

308 **"If I'm going to propose":** Background Briefing by Senior Administration Officials, Office of the Press Secretary, White House, June 14, 1993, Part II: Box 1946, Moynihan Papers.

309 **Downstairs in the living room:** Joan Biskupic, "Judge Ruth Bader Ginsburg Named to High Court; Nominee's Philosophy Seen Strengthening the Center," *Washington Post,* June 15, 1993, A1.

309 **"Marty had everything":** RBG, *My Own Words,* 168.

309 **"surprise selection":** Richard L. Berke, "Clinton Names Ruth Bader Ginsburg, Advocate for Women, to Court," *New York Times,* June 15, 1993, A1.

309 "**Pat Was Key":** "Pat Was Key to Top-Court Pick," *New York Post,* June 15, 1993; Marilyn Rauber, "Prez: Ruth Is 'Clearly Pro-choice,'" *New York Post,* June 16, 1993, 5.

309 **Marty attributed the palpable:** *Women's Equity Action League v. Cavazos,* 906 F.2d 742 (1990). RBG wrote an opinion holding that the courts had no authority to oversee "the procedures that government agencies use to enforce civil rights prescriptions controlling educational institutions that receive federal funds," at 744.

310 **But the problem involved:** *Dronenburg v. Zech,* 741 F.2d 1388 (1984). The judges concluded that they could not create a "constitutional right to engage in homosexual conduct" (1398). RBG's vote to not have the entire circuit rehear *Dronenburg* had been based on *Doe v. Commonwealth's Attorney for Richmond,* 425 U.S. 901 (1976).

310 **"measured motions":** RBG, "Speaking in a Judicial Voice," 1198.

310 **The legal historian David Garrow:** David J. Garrow, "Abortion Before and After *Roe v. Wade*: An Historical Perspective," Albany Law Review 62.3 (1999): 833–52. On pro-choice objection, see Greenhouse, "Judge Ginsburg Still Voices Strong Doubts on Rationale Behind Roe v. Wade Ruling." At the time of RBG's nomination, Kate Michelman of NARAL was quoted on *NBC Nightly News* as saying, "Her criticism of *Roe* raises concerns about whether she believes that the . . . right to choose is a fundamental right or a lesser right." On RBG's objection to the sweep of *Roe* and lack of legislative dialogue, see Garrow, "History Lesson for the Judge."

310 **Moreover, the influx:** For example, southern Baptists, the largest Protestant denomination, did not become firmly in the pro-life camp until eighteen years after *Roe v. Wade*. Laura Foxworth, "Southern Baptists for Life and the Challenge of Delivering the Southern Baptist Convention to the Pro-life Movement" (paper presented at the Annual Meeting of the OAH, Atlanta, April 11, 2014).

310 **Even President Clinton:** See, for example, Rauber, "Prez: Ruth Is 'Clearly Pro-choice.'" Also see Background Briefing by Senior Administration Officials, Office of the Press Secretary, White House, June 14, 1993, Part II: Box 1946, Moynihan Papers.

311 **But by 1987:** *California Federal Savings and Loan Association v. Guerra,* 479 U.S. 272 (1987). On the division over same versus equal treatment, especially as it related to pregnancy, see Wendy W. Williams, "Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate," *New York University Review of Law and Social Change* 13 (1984–85): 325–80. Williams played a prominent role in drafting the bill that became the Pregnancy Discrimination Act. On *California Federal Savings and Loan Association v. Guerra,* see Stephanie M. Wildman, "Pregnant and Working: The Story of *California Federal Savings & Loan Ass'n. v. Guerra,*" in Schneider and Wildman, *Women and the Law Stories,* 253–76.

311 **In the legal academy:** For the mother-daughter analogy, see Chamallas, *Introduction to Feminist Legal Theory,* 17.

311 **They also faulted:** See, for example, David Cole, "Strategies of Difference: Litigating for Women's Rights in a Man's World," *Journal of Law and Inequality* 2 (1984): 33–96; Lucinda M. Finley, "Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate," *Columbia Law Review* 86 (Oct. 1986): 1118–82; Mary Becker, "Prince Charming: Abstract Equality," *Supreme Court Review* (1987): 203, 212–13, 218–24; and Mason, *Equality Trap*.

311 **In her influential study:** Gilligan, *In a Different Voice*.

311 **Accordingly, cultural feminists scrutinized:** On cultural or relational feminism in the legal academy, see, for example, Leslie Bender, "A Lawyer's Primer on Feminist Theory and Tort," *Journal of Legal Education* 1/2 (1988): 33–36; Judith Resnik, "On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges," *Southern California Law Review* 61 (1988): 1878–944; and Carrie Menkel-Meadow, "Exploring a Research Agenda of the Feminization of the Legal Profession: Theories of Gender and Social Change," *Law and Social Inquiry* 14 (Spring 1989): 289–319.

311 "**essentially and irretrievably":** Robin West, "Jurisprudence and Gender," *University of Chicago Law Review* 55 (Winter 1988): 1–72, esp. 2.

311 **But while cultural:** Joan C. Williams, "Deconstructing Gender," *Michigan Law Review* 87 (1989): 797–845.

312 **Rather, it should be:** MacKinnon, *Sexual Harassment of Working Women*.

312 **That is, multiple forms:** See "Beyond Racism and Misogyny: Black Feminism and 2 Live Crew," in Cohen, Jones, and Tronto, *Women Transforming Politics,* 552–53; Kimberlé Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics," *University of Chicago Legal Forum* (1989): 139–67. See also Regina Austin, "Sapphire Bound!," *Wisconsin Law Review* (May/June 1989): 539–78.

312 **None of these developments:** Marcia Greenberger, interview by author, Washington, D.C., Sept. 24, 2001.

312 **Yet collectively these new:** On the influence of poststructuralism, see Marie Ashe, "Mind's Opportunity: Birthing a Poststructuralist Feminist Jurisprudence," *Syracuse University Law Review* 38 (1987–88): 1129–73. On the application of multiple perspectives, see Martha Minow, "Foreword: Justice Engendered," *Harvard Law Review* 101 (1987): 10–95. The only public response from RBG is her co-authored article in which she put her own litigation in historical perspective, applauded the diversity of feminist jurisprudence, and urged against personal attacks as well as the assumption that one's particular feminist legal perspective is the only theoretically correct one. See RBG and Flagg, "Some Reflections on the Feminist Legal Thought of the 1970s," 9–21.

313 **When she read Katha:** Ibid.

313 "**the Constitution remained":** RBG and Flagg, "Some Reflections on the Feminist Legal Thought of the 1970s," esp. 13.

313 "**Such comment seems":** Ibid., 17.

313 "**the [current] tendency to":** Ibid., 21 (italics mine).

313 **Other administration-inspired reverses:** On the GOP and the Right, see Critchlow, *Phyllis Schlafly and Grassroots Conservatism,* esp. chaps. 10–11; and Melich, *Republican War Against Women,* esp. chaps. 9–17. On CEDAW and the continuing importance to the United States of its ratification, see Janet Benshoof, "U.S. Ratification of CEDAW: An Opportunity to Radically Reframe the Right to Equality Accorded Women Under the U.S. Constitution," *New York University Review of Law and Social Change* 35 (2011): 104–30. On other reverses, see Evans, *Tidal Wave,* chap. 6. For the impact on feminist organizations, see Ferree and Martin, *Feminist Organizations*.

314 **The destructive rhetoric:** Faludi, *Backlash,* esp. introduction.

314 "**by 1990 abortion clinics":** Evans, *Tidal Wave,* 182n21 for data.

314 **Or perhaps not:** Jeffrey Toobin, "Heavyweight: How Ruth Bader Ginsburg Has Moved the Supreme Court," *New Yorker,* March 11, 2013, 38–47. In nonunanimous cases, RBG voted with Bork 85 percent of the time and Wald 38 percent of the time. See Neil A. Lewis, "Judge Ginsburg's Opinions: At Center, Yet Hard to Label," *New York Times,* June 16, 1993, A1.

314 "**Nothing is so admirable":** On the continuing identification of RBG with "formal" equality, see Judith Baer, "Advocate on the Court: Ruth Bader Ginsburg and the Limits

of Formal Equality," in Maltz, *Rehnquist Justice,* chap. 8. Galbraith's quotation is in Kumar, *Dictionary of Quotations,* 189.

315 **Josephson, a retired partner:** See Stephanie Strom, "For Expert on Electoral College, Calls Never Stop," *New York Times,* Nov. 2, 2004, B1.

315 **The White House, Eizenstat:** Richard Davis, "The Ginsburg Nomination and the Press," *Journal of International Press and Politics* 1, no. 2 (March 1996): 85.

315 **Wasting no time:** For letters of support in favor of RBG's nomination, see Dorsen to Bernard Nussbaum, April 30, 1993; Sovern to William Clinton, April 16, 1993; Robert W. Meserve to Clinton, April 20, 1993, OA/ID 21853, FG051 WHORM: Subject File, Clinton Presidential Records, Clinton Presidential Library.

315 **Other familiar names:** For letters in support of RBG's nomination, see Berger to Bernard Nussbaum, April 27, 1993; Kay to William Clinton, April 24, 1993; Babcock to Nussbaum, May 20, 1993; Law to Clinton, April 12, 1993; Williams to Clinton, May 11, 1993; Susan Deller Ross to Clinton, May 18, 1993; Taub to Clinton, April 30, 1992; Peratis to Clinton, May 5, 1993; Benshoof to Clinton, May 13, 1993, OA/ID 21853, FG051 WHORM: Subject File, Clinton Presidential Records, Clinton Presidential Library.

315 **"distress that her remarks":** Ann W. Richards to Bruce Lindsey, May 31, 1993, OA/ID 21853, FG051, WHORM: Subject File, Clinton Presidential Records, Clinton Presidential Library; Davis, "Ginsburg Nomination and the Press," 85. The *Legal Times* published the Madison Lecture so that readers in the legal community might read it for themselves. See "Ginsburg Laments *Roe*'s Lack of Restraint," *Legal Times,* April 5, 1993. Also see Background Briefing by Senior Administration Officials, Office of the Press Secretary, White House, June 14, 2014, Part II: Box 1946, Moynihan Papers.

316 **"'The women are against her'":** Moynihan, *Portrait in Letters of an American Visionary,* 606; Martin D. Ginsburg, "Some Reflections on Imperfection," *Arizona State Law Journal* 39 (Fall 2007): 955.

316 **An old acquaintance:** Because of the delay in her nomination following the ill-fated nominations of Baird and Wood, Clinton apparently sought Reno's advice only at the last minute. Toobin, *Nine,* chap. 5.

316 **Nussbaum affirmed that:** Martin D. Ginsburg, "Some Reflections on Imperfection," 956. The letter is not among the Nussbaum Papers in the Clinton Library thus far released to the public.

316 **"a number of superbly qualified":** Davis, "Ginsburg Nomination and the Press," 86.

316 **"Washington is a sieve":** Martin D. Ginsburg, "Some Reflections on Imperfection," 956.

316 **Hess circulated the information:** Davis, "Ginsburg Nomination and the Press," 86–87.

316 **That he found "depressing":** Anthony Lewis, "Abroad at Home: How Not to Choose," *New York Times,* May 10, 1993, A19. Lewis's preferred nominee had been Breyer, according to his widow, Margaret H. Marshall, who retired in 2010 as chief justice of the Massachusetts Supreme Judicial Court.

317 **Next came Jeffrey Rosen's:** Jeffrey Rosen, "The List," *New Republic,* May 10, 1993, 12–15.

317 **"I've heard expressed":** Quoted in Murdoch and Price, *Courting Justice,* 421.

317 **As letters supporting:** Davis, "Ginsburg Nomination and the Press," 86, 97n13. See also MacLachlan, "Mr. Ginsburg's Campaign for Nominee," 33–34.

317 **But in the critical:** Alan Emory, "Sources Say Moynihan Key to Ginsburg's Nomination," *Watertown Daily Times,* June 18, 1993, 3, in Part II: Box 1946, Moynihan Papers.

317 **Among the many articles:** Labaton, "Man Behind the High Court Nominee."

317 **"It's a great love story":** Quoted in Eleanor Randolph, "Husband Triggered Letters Supporting Ginsburg for Court," *Washington Post,* June 17, 1993, A25. RBG read Flagg's letter to Woods according to Murdoch and Price in *Courting Justice,* 421.

318 **With Ginsburg's having the highest:** David Von Drehle, "ABA Panel Calls Ginsburg 'Well-Qualified' for Court," *Washington Post,* July 14, 1993, A12; Joan Biskupic, "With Revamped Panel, Confirmation Hearings May Lack Drama," *Washington Post,* July 20, 1993, A6.

318 **Still more sensational:** Davis, "Ginsburg Nomination and the Press," 78.

318 **"Make sure she is always allowed":** Robert A. Katzmann, "Reflections on the Confirmation Journey of Ruth Bader Ginsburg, Summer 1993," in Dodson, *Legacy of Ruth Bader Ginsburg,* 8.

318 **"Ruth . . . is always the same":** Edwards, "Tribute to My Friend, the Honorable Ruth Bader Ginsburg," xvi.

318 **The nominee made clear:** Katzmann, "Reflections on the Confirmation Journey of Ruth Bader Ginsburg, Summer 1993," 10.

319 **"keen sense of the big picture":** Ibid., 9.

319 **Meanwhile, Klain, Klein, and Katzmann:** Ibid., 9–10.

319 **"Flatbush Strategy":** Neil A. Lewis, "Ginsburg Promises Judicial Restraint If She Joins Court," *New York Times,* July 21, 1993, A1.

319 **"to be judged as a judge":** Statement of RBG, *Nomination of Ruth Bader Ginsburg to Be Associate Justice of the Supreme Court of the United States: Hearings Before the Committee on the Judiciary United States Senate,* 103rd Cong. 52 (1993), esp. 46, 52–53.

320 **central to her "life, to her well-being":** Ibid., 207.

320 **"It is her body":** Ibid.

320 **On gender equality:** Ibid., 243–44.

320 **Anticipating future cases:** Ibid., 140–41, 146, 322–33, 341, 359.

320 **"I am not going":** Ibid., 265, 192.

321 **"preternaturally controlled":** Elena Kagan, "Confirmation Messes, Old and New," *University of Chicago Law Review* 62 (Spring 1995): 919–42, esp. 926, 928.

321 **"There is some suspicion":** Lyle Denniston, "Which Judge Ginsburg Will Show Up Tuesday?," *Baltimore Sun,* Aug. 8, 1993.

321 **Yet for all the grousing:** Joan Biskupic, "Senate Panel Approves Ginsburg for Supreme Court Unanimously," *Washington Post,* July 10, 1993, A4.

321 **"official lovefest":** Kagan, "Confirmation Messes, Old and New," 920. Senators Jesse Helms (R-N.C.), Don Nickles (R-Okla.), and Robert C. Smith (R-N.H.) opposed, Helms objecting to RBG's positions on abortion and homosexuality. See Linda Greenhouse, "Senate, 96–3, Easily Affirms Judge Ginsburg as a Justice," *New York Times,* Aug. 4, 1993, B8. On the real vetting, see Silverstein and Halton, "You Can't Always Get What You Want," 459–79.

321 **It was a tribute:** U.S. Senate, "Nomination of Ruth Bader Ginsburg," "Judge Ruth Bader Ginsburg," and "Nomination of Ruth Bader Ginsburg, of New York, to Be an Associate Justice of the Supreme Court," 103rd Congress, 1st sess., Aug. 2, 1993, S10076–S10079, S10097, and S10109; U.S. Senate, "Statement on the Confirmation of Ruth Bader Ginsburg," "Nomination of Ruth Bader Ginsburg," "Votes on S. 919 and Ginsburg Nomination," 103rd Cong., 1st sess., Aug. 3, 1993, S10225 and S10111.

321 **On August 10:** For Clinton's remarks, see "President William Jefferson Clinton Swearing In of Ruth Bader Ginsburg, 10 Aug. 1993," OA/ID 21853, FG051, WHORM: Subject File, Clinton Presidential Records, Clinton Presidential Library.

321 **A small cohort of colleagues:** Hirshman, *Sisters in Law,* 214.

321 **Of the men before whom:** Greenhouse, *Becoming Justice Blackmun;* Barnhart and Schlickman, *John Paul Stevens,* esp. 206–7; and Stevens, *Five Chiefs,* chap. 5.

322 **Sandra Day O'Connor:** For a perceptive biography of O'Connor, see Biskupic, *Sandra Day O'Connor,* xix. Despite the inflated claim of the title, Linda Hirshman also provides an excellent account of O'Connor's route to the Court, her accomplishments, her "tightfisted votes for equality," and the extent to which she paved the way for RBG in *Sisters in Law,* 168.

323 **To treat the founding:** See Thurgood Marshall, "At the Annual Seminar of the San Francisco Patent and Trademark Association," Maui, Hawaii, May 6, 1987.

323 **"fainthearted originalist":** Scalia quoted in Jeffrey Toobin, "Partners," *New Yorker,* Aug. 29, 2011, 42. On Scalia's originalism, see Biskupic, *American Original;* also, Murphy, *Scalia*.

323 **Thomas, unyielding:** As it turned out, Thomas volunteered his help with certiorari tabulations. See RBG, "Remarks for American Law Institute Annual Dinner, 19 May 1994," *Saint Louis University Law Journal* 38 (1994): 883–84.

323 **"to repudiate . . . common sense":** *Citizens United v. Federal Election Commission,* 130 S. Ct. 876 (2010), 979 (Stevens concurring and dissenting).

324 **She would also discover:** RBG with Linda Greenhouse, "A Conversation with Justice Ginsburg," *Yale Law Journal Online* 122 (2013): 299.

324 **A Republican nominee to Brennan's:** See Biskupic, *Sandra Day O'Connor;* Biskupic, *American Original,* 88–89; Tushnet, *Court Divided;* Colucci, *Justice Kennedy's Jurisprudence*.

324 **"I am a judge born":** RBG, quoted in her "Address to the Annual Meeting of the American Jewish Committee," May 1995, reprinted in "See What Being Jewish Means to Me," Advertisement by the American Jewish Committee, *New York Times,* Jan. 14, 1996, A13. RBG also expressed her Jewish identity through organizational affiliations. Prior to her nomination to the Court, she was a member of the American Jewish Committee and the National Commission on Law and Social Action of the American Jewish Congress and served on the board of the American branch of the International Association of Jewish Lawyers and Jurists. See Malvina Halberstam, "Ruth Bader Ginsburg: The First Jewish Woman on the Supreme Court," *Cardozo Law Review* 19 (1998): 1442. Upon becoming a justice, she felt it appropriate for the first time in her adulthood to observe the holiest day in the Jewish calendar, Yom Kippur, by not coming to work.

325 **Visitors to Ginsburg's:** Author's recollections. For additional impressions, see also Rosen, "Ruth Bader Ginsburg: The New Look of Liberalism on the Court," SM60. See also RBG, interview by Brian Lamb, July 1, 2009.

325 **In addition, some 1,619 appeals:** Greenhouse, "Senate, 96–3, Easily Affirms Judge Ginsburg as a Justice," A1.

326 **But each memo still had:** Justice Stevens did not use the certiorari pool. See Barnhart and Schlickman, *John Paul Stevens,* 200.

326 **The two women bonded:** Ibid., 260–61.

326 **Neither hesitated to confront:** Hirshman, *Sisters in Law,* 210; Kempner, *Yoo-Hoo, Mrs. Goldberg*. RBG's comment on O'Connor appears in the Bonus Features.

326 **"I'm Sandra, Not Ruth":** Anita Blumstein Brody et al., "Women on the Bench," *Columbia Journal of Gender and Law* 12 (2003): 361.

326 **Judge Patricia Wald:** RBG with Greenhouse, "Conversation with Justice Ginsburg," 299.

326 **Despite O'Connor's presence:** RBG, *My Own Words,* 75.

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327 **"Just do it":** O'Connor quotations in RBG, "A Tribute to Justice Sandra Day O'Connor," 119 *Harvard Law Review* (2006): 1240. RBG had been assigned the case *John Hancock Mutual Life Insurance Co. v. Harris Trust & Savings Bank,* 510 U.S. 86 (1993). Moved by O'Connor's gesture, RBG would later send similar notes to Sotomayor and Kagan when they announced their first opinions for the Court. See RBG, *My Own Words,* 90–91.

327 **"the most helpful":** Hirshman, *Sisters in Law,* 222–23.

327 **It was no surprise:** Ibid., 154–55 and 222–23. For more on the clerks, see 175 and 211–12.

327 **Ginsburg would undertake:** Tushnet, *Court Divided,* 67.

328 **Justices O'Connor, Kennedy, and especially Souter:** Colucci, *Justice Kennedy's Jurisprudence;* Maveety, *Justice Sandra Day O'Connor;* Tushnet, *Court Divided,* chap. 2. See also Sunstein, *Radicals in Robes*.

329 **Always willing to give:** *Planned Parenthood v. Casey,* 505 U.S. 833 (1992), 980 (Scalia dissenting); see Greenhouse, *Becoming Justice Blackmun,* chap. 8.

330 **On cases involving gender:** Joyce Ann Baugh et al., "Justice Ruth Bader Ginsburg: A Preliminary Assessment," *University of Toledo Law Review* 26 (1994): 1–34. On civil rights/civil liberties cases, Souter voted with the liberal bloc 60 percent of the time in contrast with RBG's 52 percent. See ibid., table 2, 32. See also Christopher E. Smith et al., "The First-Term Performance of Justice Ruth Bader Ginsburg," *Judicature* 78 (1994): 74–80.

330 **"an exceedingly persuasive justification":** *Kirchberg v. Feenstra,* 450 U.S. 455 (1981), 461, and *Mississippi University for Women v. Hogan,* 458 U.S. 718 (1982), 724 and n9, quoted in *Harris v. Forklift,* 510 U.S. 17 (1993), 26.

331 **In the Reagan-Bush years:** See Howard Winant, "Difference and Inequality: Postmodern Racial Politics in the United States," in Cross and Keith, *Racism, the City, and the State,* 108–28.

331 **Redistricting plans designed:** On voting rights and congressional districting, see *Shaw v. Reno,* 509 U.S. 630 (1993), and *Bush v. Vera,* 517 U.S. 952 (1996).

331 **The pragmatic O'Connor:** *Adarand Constructors v. Peña,* 515 U.S. 200 (1995), esp. 239–40 for Scalia and Thomas dissents.

332 **"strict in theory":** Ibid. at 237.

332 **"Properly," Ginsburg wrote:** *Fullilove v. Klutznick,* 448 U.S. 448 (1980), 519, quoted in *Adarand Constructors,* 515 U.S. at 237, 218, 275.

332 **If all went well:** See Cornelia T. L. Pillard, "*United States v. Virginia:* The Virginia Military Institute, Where the Men Are Men (and So Are the Women)," in Gilles and Goluboff, *Civil Rights Stories,* 265–92; and Katharine T. Bartlett, "Unconstitutionally Male? The Story of *United States v. Virginia,*" in Schneider and Wildman, *Women and the Law Stories,* 133–78. A longer, exemplary account on which I rely is Strum, *Women in the Barracks*.

332 **Most American colleges:** On the rush to coeducation from 1969 to 1974, see Malkiel, *"Keep the Damned Women Out."*

333 **The rather forbidding:** Jackson had been a professor at VMI before the outbreak of the war in which he gained renown as a brilliant military strategist. Accidentally shot by one of his own troops, he was buried in Lexington off the post. Cadets are required to salute his "marbled embodiment" each time they pass.

333 **No ordinary college:** Strum, *Women in the Barracks,* chap. 1.

333 **The purpose of the system:** For a skeptical view of whether the system produces its intended goals as opposed to far less desirable traits, see Mary Anne Case, "Two Cheers for Cheerleading: The Noisy Integration of VMI and the Quiet Success of Virginia Women's Institute for Leadership," *University of Chicago Legal Forum* (1999): 368–79.

334 **"We think the things":** Strum, *Women in the Barracks,* 39; on the "rat" system, see ibid., chap. 3.

334 **In 1972, black cadets:** The significance of the New Market charge is reinforced by a twenty-three-foot arch-shaped painting of the battle that covers part of the ceiling in Jackson Memorial Hall, where Sunday church services are held. Flanking the painting of the charge are two floor-length paintings, one of General Stonewall Jackson and the other of General Robert E. Lee. See Brodie, *Breaking Out,* chap. 1.

334 **By the mid-1970s:** Strum, *Women in the Barracks,* 29–31.

334 **That is, the degrading:** For examples of the seamy underside, see Pillard, "*United States v. Virginia,*" 265–92, esp. 270–71.

335 **A "network of connections":** Ibid., 271. In 1989, VMI alumni in Virginia included two congressmen, two state senators, the former Speaker of the House of Delegates, the managing partners of the two largest law firms, and many very prominent businessmen and industrialists.

335 **That some young women:** On ranking, see Bartlett, "Unconstitutionally Male?," 139n30. On gender integration of the service academies, which had occurred only after litigation and an order of Congress, see Stiehm, *Bring Me Men and Women*. On women and the military, see Francke, *Ground Zero;* also, Katzenstein and Reppy, *Beyond Zero Tolerance*.

335 **Keith had had her eye:** Strum, *Women in the Barracks,* 84–86.

335 **"Better Dead than Coed":** Ibid., chap. 6; Brodie, *Breaking Out,* 11; Neil Henderson and Peter Baker, "For VMI Cadets, It's Still 'Better Dead than Coed,'" *Washington Post,* Feb. 20, 1990, B1.

336 **With the dispute:** Patterson was ably assisted by Anne Marie Whittemore, a graduate (summa cum laude) of Vassar when it was still a women's college and of Yale Law School. Convinced that Vassar's move to coeducation had been a mistake and that its reputation had deteriorated, she considered her position on single-sex education to be at the "cutting edge of feminist theory." Hired over Patterson's objections by his Richmond law firm, she had rapidly become a partner and achieved a distinguished career. Like everyone else on the VMI legal team, she was adamant that the institute not be a victim of coeducation, especially its African American cadets, who had a high graduation rate. See Strum, *Women in the Barracks,* 97–98.

336 **"to prevent federal encroachment":** Quoted in Bartlett, "Unconstitutionally Male?," 145n66; Complaint at 1, *VMI v. Thornburgh,* No. 90-083 (W.D. Va. Filed Feb. 5, 1990); Complaint at 1, *VMI Foundation v. United States,* No. 90-084 (W.D. Va. Filed Feb. 5, 1990).

336 **Presented with VMI's suit:** When the Justice Department sued, it named Virginia in its suit along with VMI. See Motion of the United States for Summary Judgment, May 25, 1990, *United States v. Virginia*. With Wilder and his attorney general having declined to participate and Judge Jackson L. Kiser insisting that the commonwealth required representation, VMI's legal team led by Patterson took on the job at no cost to taxpayers.

336 **"exceedingly persuasive justification":** Strum, *Women in the Barracks,* chap. 7. Joe Hogan challenged his exclusion from the nursing school at the state-funded Mississippi University for Women. In a narrow opinion that applied only to the nursing school, the Court held that the school could not discriminate based on sex in its admissions policies. See *Mississippi University for Women v. Hogan,* 458 U.S. 718 (1982).

336 **They had an ally:** Bartlett, "Unconstitutionally Male?," 145.

337 **"distract male students":** Strum, *Women in the Barracks,* chap. 12; *United States v. Virginia,* 766 F. Supp. (W.D. Va. 1992), 1415.

337 **Judge Niemeyer had offered:** Niemeyer had been nominated to the district court by Reagan and then to the court of appeals by George H. W. Bush. For Niemeyer's opinion, see *United States v. Virginia,* 976 F.2nd 890 (4th Cir., 1992), 891–900.

337 **But that was to be the subject:** Strum, *Women in the Barracks,* chap. 14.

338 **"If VMI marches":** *United States v. Virginia,* 852 F. Supp. 471 (April 29, 1994), aff'd, remanded, 44 F.3d 1229 (4th Cir. 1995), 481, 478, 484.

338 **Solicitor General Drew Days:** Strum, *Women in the Barracks,* 253. See Brief for the United States in Opposition, *United States v. Virginia,* 518 U.S. 515 (1995).

338 **"tantamount to admission":** Strum, *Women in the Barracks,* 254n54.

338 **Women's legal advocacy organizations:** Brief for National Women's Law Center et al., *United States v. Virginia,* 116 S. Ct. 2264 (1995) (No. 94-1941); Amicus Curiae Brief

of 26 Private Women's Colleges, *United States v. Virginia,* 116 S. Ct. 2264 (1996) (No. 94-1941).

339 **Mary Baldwin College:** Amicus Curiae Brief of Mary Baldwin College, *Virginia,* 116 S. Ct. 2264 (No. 94-2107); Amicus Curiae Brief of Wells College, *Virginia,* 116 S. Ct. 2264 (No. 94-2107). See Scott Jaschik, "7 Women's Colleges Back All-Male Institute: They Tell Supreme Court They're Threatened; Others Call Them Dupes," *Chronicle of Higher Education,* April 7, 1993.

339 **A brief by seven:** Amicus Curiae Brief of the American Association of University Professors et al., *Virginia,* 116 S. Ct. 2264 (No. 94-2107).

339 **Resurrecting charges against the ERA:** Amicus Curiae Brief of Independent Women's Forum et al., *Virginia,* 116 S. Ct. 2264 (Nos. 94-1941, 94-2107).

339 **With palpable anger:** Amicus Curiae Brief of Women Active in Our Nation's Defense, Their Advocates and Supporters, *Virginia,* 116 S. Ct. 2264 (No. 94-2107); Strum, *Women in the Barracks,* chap. 18.

339 **Theodore B. Olson:** Jeffrey Toobin, "Money Unlimited," *New Yorker,* May 21, 2012, 39.

339 **"We have to decide":** Linda Greenhouse, "Justices Appear Skeptical of V.M.I.'s Proposal for Women," *New York Times,* Jan. 18, 1996, A18; Strum, *Women in the Barracks,* chaps. 18–19; Transcript of Oral Argument, *United States v. Virginia,* 518 U.S. 515 (1996).

340 **"[W]hat if a State":** Transcript of Oral Argument at 22–24, *Virginia,* 518 U.S. 515.

341 **This should be Ruth's:** Strum, *Women in the Barracks,* 282–83. Linda Hirshman indicates that Rehnquist rather than Stevens originally assigned the opinion to O'Connor. See Hirshman, *Sisters in Law,* 241.

341 **"a strong presumption":** *J.E.B. v. Alabama,* 511 U.S. 127 (1994), 152.

341 **She would call instead for "skeptical":** Strum, *Women in the Barracks,* 283.

341 **In her efforts:** Ibid., 284.

342 **Several "had an ending":** RBG quoted in ibid.

342 **"one of the Court's most important":** Linda Greenhouse, "Military College Can't Bar Women, High Court Rules," *New York Times,* June 27, 1996, A1.

342 **"Generalizations about":** *United States v. Virginia,* 518 U.S. 515 (1996), 550 (RBG majority).

342 **"Women seeking and fit":** Ibid. at 557.

342 **"However 'liberally' this plan":** Ibid. at 540.

342 **"More important than the tangible":** Ibid. at 553–54, citing *Sweatt v. Painter,* 339 U.S. 629 (1950).

343 **"a 'pale shadow' " of VMI:** Ibid. at 553, 555.

343 **"ancient and familiar fear":** Ibid. at 555n20.

343 **"may not be solidly grounded":** Ibid. at 545.

343 **Ginsburg traced the development:** In *J.E.B. v. Alabama,* 511 U.S. 127 (1994), 140n11, Blackmun's majority opinion stated that the equal protection clause does not allow states to discriminate on the basis of sex-based stereotypical generalizations "even when some statistical support can be conjured up for the generalizations." As Linda Hirshman points out, RBG had resented the assignment of the majority opinion in *J.E.B. v. Alabama* to Blackmun, given her earlier ACLU cases on exclusion of women jurors and her consistent argument that arrangements that appeared to benefit women actually harmed them. In her disciplined fashion, she treated Blackmun's drafts much as she had done the Oklahoma lawyer Fred Gilbert's efforts in *Craig v. Boren,* pressing Blackmun to include Alabama's sorry treatment of women jurors and improving the opinion in the process, though not without effort. See Hirshman, *Sisters in Law,* 226–28.

343 **"today's skeptical scrutiny":** *United States v. Virginia,* 518 U.S. 515 (1996), 559, 531, 533, 529 (RBG majority).

343 **"inherent differences":** Ibid. at 533.

344 **"functionally dead":** Ibid. at 558 (Rehnquist concurring); ibid. at 596 (Scalia dissenting).

344 **"Single-sex education":** Ibid. at 535 (RBG majority). At the time, single-sex public high schools were coming to be increasingly favored as a way of enhancing educational opportunities for low-income young women of color in urban areas on a voluntary basis. The Young Women's Leadership School of East Harlem served as a model. For the complex issues surrounding such schools, see Martha Minow's nuanced follow-up of *Vorchheimer,* "Single-Sex Public Schools," in Schneider and Wildman, *Women and the Law Stories,* esp. 122–32.

344 **"Sex classifications," she wrote:** *Virginia,* 518 U.S. at 533–34 (RBG majority).

344 **Hailed by advocates:** Eva M. Rodriguez, "Confusion from the High Court," *Connecticut Law Tribune* 9 (July 1996); Greenhouse, "Military College Can't Bar Women"; Joan Biskupic, "Supreme Court Invalidates Exclusion of Women by VMI," *Washington Post,* June 27, 1996. For additional press coverage, see Strum, *Women in the Barracks,* 295–96n70, 73–80, 83–84.

344 **Legal scholars parsed:** Even a cursory search in legal journals turns up at least fifty articles. Typical of varying views, see Karen Lazarus Kupetz, "Equal Benefits, Equal Burdens: 'Skeptical Scrutiny' for Gender Classification After *United States v. Virginia,*" *Loyola of Los Angeles Law Review* 30 (April 1997): 1333–77, a doctrinal shift to a new, more stringent standard; Mayeri, "Constitutional Choices," 755–830, more muscular standard; Amy Walsh, "Ruth Bader Ginsburg: Extending the Constitution," *John Marshall Law Review* 32 (Fall 1998): 197–225, raises the bar; Scott Smailer, "Justice Ruth Bader Ginsburg and the Virginia Military Institute: A Culmination of Strategic Success," *Cardozo Women's Law Journal* 4 (1998): 541–84, stricter tone to intermediate scrutiny; Elizabeth M. Schneider, "A Postscript on VMI," *American University Journal of Gender and the Law* 6 (Fall 1997): 59–64, important case and a victory for RBG but critical language is elusive and the standard of review ambiguous; regardless of what the opinion says, what the Court will do is another matter. On lower courts, see, for example, *Nabozny v. Podlesny,* 92 F.3d (7th Cir.) (1996), 446–61. Regarding VMI as a heightened standard, see 456n6, "We express no opinion on whether the Court's ruling heightens the level of scrutiny applied to gender discrimination in this circuit."

344 **What changes must:** To the institute's credit, administrators turned their full energies to preparing how to deal with everything from installation of tampon machines to pregnancy without altering the essentials of VMI. As at the service academies where students of the opposite sex exercise considerable power over one another, the transition was not easy. On VMI, see Brodie, *Breaking Out,* chaps. 4–9; also, Barkalow, *In the Men's House.*

344 **Framed, it hung outside:** Tushnet, *Court Divided,* 128.

345 **"marked Justice Ginsburg's apotheosis":** Minow, *In Brown's Wake,* 56.

345 **The Court's ruling:** Strum, *Women in the Barracks,* 287n27.

345 **"To me, it was winning":** Ibid., 285. On the Vorchheimer case, see *Vorchheimer v. School District,* affirmed per curiam, 430 U.S. 703 (1977). For the ACLU's efforts to salvage the case and keep Susan Vorcheimer's original lawyer Sharon K. Willis on board, and for RBG's evident displeasure at Willis's inadequacies, see the case files including RBG's handwritten comment in RBG MSS. Martha Minow puts the *Vorchheimer* case in the much broader perspective in "Single-Sex Public Schools: The Story of *Vorchheimer v. School District of Philadelphia,*" in *Women and the Law Stories,* chap. 3. She also updates Susan's story, adding that she became not a rabbi but an anthropologist and also married an anthropologist. Serena Mayeri argues that *Vorchheimer* was not representative of most sex-segregation litigation of the 1960s and 1970s and showed that drawing the comparison between sex segregation and race segregation could be a "pitfall" as a legal strategy in "The Strange Career of Jane Crow: Sex Segregation and

the Transformation of Anti-discrimination Discourse," *Yale Journal of Law and the Humanities* 18 (2006): 253–72.

345 **"I graduated from VMI":** Quoted in "Remarks by Justice Ruth Bader Ginsburg, Associate Justice, Supreme Court of the United States," *Annual Survey of American Law* (April 1997): xii.

346 **By the end of her third:** Strum, *Women in the Barracks,* 318–19.

346 **Nothing was said:** Bartlett, "Unconstitutionally Male?," 161.

347 **"Kept away from the pressures":** *United States v. Virginia,* 518 U.S. 515 (1996), 549.

347 **"This is still very much":** Strum, *Women in the Barracks,* 326.

347 **Many students and alumni:** Ibid., chap. 21.

347 **Yet they were never fully:** Bartlett, "Unconstitutionally Male?," 160–66.

347 **"the way that the litigation":** Pillard, "*United States v. Virginia,*" 289. Pillard, as assistant to the solicitor general, had drafted the government's brief. See also Bartlett, "Unconstitutionally Male?," and Case, "Two Cheers for Cheerleading."

348 **There is no doubt:** See RBG, "Gender and the Constitution."

SEVENTEEN · "I Cannot Agree"

349 **But the dread disease:** Linda Greenhouse, "Ruth Ginsburg Has Surgery for Cancer," *New York Times,* Sept. 18, 1999, A10; Sheryl Gay Stolberg, "Ginsburg Leaves Hospital, Prognosis on Cancer Is Good," *New York Times,* Sept. 29, 1999; Linda Greenhouse, "National Briefing Washington: Ginsburg Discusses Cancer," *New York Times,* May 9, 2001, A22.

350 **"She's never going to make":** Author's recollection.

350 **And Kathleen Peratis:** Peratis, "Address on RBG Portrait Dedication."

350 **"The result for women":** Catharine A. MacKinnon, "Disputing Male Sovereignty: On *United States v. Morrison,*" *Harvard Law Review* 114 (Nov. 2000): 149–50.

350 **Two new legislative:** The Family and Medical Leave Act of 1993 and the Violence Against Women Act of 1994.

351 **Mustering evidence that these:** This is not to deny that alcohol often played a part—as the nineteenth-century founders of the Woman's Christian Temperance Union knew.

351 **Even in 2014:** The problem of rape and other sexual assaults on college and university campuses has not diminished since 1994. Just under 12 percent of the assaults are currently reported and fewer still prosecuted because of inadequate action on the part of universities and police "biases." See Jackie Calmes, "Obama Seeks to Raise Awareness of Rape on Campus," *New York Times,* Jan. 23, 2014, A18.

351 **Similarly, the murder rate:** Russell, *Sexual Exploitation;* Russell, *Secret Trauma;* Gail Elizabeth Wyatt, "The Sexual Abuse of Afro-American and White-American Women in Childhood," *Child Abuse and Neglect* 9, no. 4 (1985): 507–19; Ronet Bachman and Raymond Paternoster, "A Contemporary Look at the Effects of Rape Law Reform: How Far Have We Really Come?," *Journal of Criminal Law and Criminology* 84 (1993): 554–57; *Women and Violence: Hearings Before the Committee on the Judiciary, U.S. Senate, June 20, August 29, and December 11, 1990,* 101st Cong. (1990); Committee on the Judiciary, *Violence Against Women: A Week in the Life of America,* S.Rep. 102–18, 102nd Cong. (1992).

351 **When he suggested:** Biden, *Promises to Keep,* 243.

351 **"a bunch of feminists":** "14 Women Are Slain by Montreal Gunman," *New York Times,* Dec. 7, 1989, A1.

352 **Thus, "if a woman":** This account follows Fred Strebeigh's account in "Ladies' Man," *New Republic,* Sept. 24, 2008; Lisa Heinzerling, "So Rape Isn't Hatred?," *Los Angeles Times,* May 4, 1990, B7.

352 **"rape charge if a woman":** Strebeigh, "Ladies' Man."

352 **"If Biden wants to do":** Quoted in Strebeigh, *Equal,* 344.

353 **She could target:** Ibid., chap. 22. For the full list of coalition organizations supporting the VAWA, see 346–47.

353 **The study, which had assumed:** Ibid.

354 **"critical to meeting":** Ibid.

354 **He urged the ABA:** "Chief Justice's 1991 Year-End Report," 3.

354 **"You cannot establish a cause":** "Statement of Hon. Joseph Biden, a Senator in Congress from the State of Delaware," in *Hearings, Before the Subcommittee on Crime and Criminal Justice,* 101st Cong., 2nd sess., Feb. 6, 1992, 10.

354 **Looking for a counterweight:** My account in this and the following paragraphs, unless otherwise indicated, follows the much more detailed description of events provided in Strebeigh, *Equal,* chap. 25.

354 **Its members, a moderate lot:** "National Association of Women Judges: History," National Association of Women Judges, www.nawj.org.

354 **Schafran knew just the woman:** Strebeigh, *Equal,* chap. 24.

354 **Brooksley Born:** On Born, see "Legends in the Law: A Conversation with Brooksley Born," *Washington Lawyer,* Oct. 2003.

355 **The ABA must not:** www.dcbar.org.

355 **"gender-based crime of violence":** Strebeigh, *Equal,* 411; *Griffin v. Breckenridge,* 403 U.S. 88 (1971), 102.

355 **Using "animus" (meaning extreme prejudice):** Strebeigh, *Equal,* chap. 24.

356 **Feeling as if "her soul":** Joan Biskupic, "Sex-Assault Law Under Scrutiny," *Washington Post,* Jan. 12, 2000, A11.

356 **"liked to get girls drunk":** Quoted in Strebeigh, *Equal,* 423. I have relied closely in this and the following paragraphs, unless otherwise noted, on Noonan, *Narrowing the Nation's Power,* chap. 6.

357 **She also sued Morrison:** *Brzonkala v. Virginia Polytechnic Institute and State University* and *Brzonkala v. Morrison,* 935 F. Supp. 772 (1996). Because institutions are rarely held accountable for upholding the requirements of Title IX, many colleges and universities have swept violence under the rug. In its entire history, the Department of Education's Office for Civil Rights (OCR) has never sanctioned a school for sexual-assault-related violations. The OCR's present threatened sanction—the full removal of federal funds from noncompliant schools—would penalize universities but also students generally. Senators Claire McCaskill, Kirsten Gillibrand, and Richard Blumenthal planned to introduce legislation in the fall of 2014 to provide the OCR with another tool at its disposal—the authority to levy fines against schools in violation of Title IX. In 2017, Trump's Department of Education announced a rollback of enforcement procedures and policies initiated by the Obama administration, leading advocates for accused students to claim a restoration of due process while advocates for victims warned that the changes would lead to devastating consequences in sexual harassment cases. See Alexandra Brodsky and Dana Bolger, "Want Colleges to Protect Students from Sexual Assault? Take Action to Give Title IX Teeth," *Nation,* July 8, 2014 and Sarah Brown, "What Does the End of Obama's Title IX Guidance Mean for Colleges?" *The Chronicle of Higher Education,* September 22, 2017.

357 **"might become hostile in the future":** *Brzonkala v. Virginia Polytechnic Institute and State University,* 132 F.3d 949, 959 (1997).

357 **He first cited *United States:*** Ibid., 953; *United States v. Lopez,* 514 U.S. 549 (1995).

358 **Her case dismissed:** *Brzonkala v. Virginia Polytechnic Institute and State University,* 169 F.3d 820 (1999).

358 **VAWA supporters submitting briefs:** Brief of Law Professors as Amici Curiae in Support of Petitioners, *United States v. Morrison,* 529 U.S. 598 (2000) (Nos. 99-5, 99-

29); Brief of the States of Arizona et al. in Support of Petitioners, *United States v. Morrison,* 529 U.S. 598 (2000) (Nos. 99-5, 99-29).

358 **But after a strong dissent:** *Brzonkala,* 132 F.3d at 953.

359 **"an attenuated and indirect relationship":** *Brzonkala,* 169 F.3d at 844.

359 **"family relationships":** Ibid.

359 **Despite a strong minority:** *United States v. Lopez,* 514 U.S. 549 (1995), 602.

359 **The Court's more right-leaning:** See, for example, *Seminole Tribe of Florida v. Florida,* 517 U.S. 44 (1996), which held that under the portion of the commerce clause involving Indian tribes, Congress did not have power to allow tribes to sue non-consenting states in federal court for breach of good-faith negotiations over gambling rights; *City of Boerne v. Flores,* 521 U.S. 507 (1997), which put new limits on congressional power to implement the Fourteenth Amendment with its "congruence and proportionality" test; *Printz v. United States,* 521 U.S. 898 (1997), which overturned a part of the Brady Handgun Violence Prevention Act, ordering local sheriffs to do background checks of would-be handgun purchasers; *Alden v. Maine,* 527 U.S. 706 (1999), which overturned parts of federal statutes that allowed individuals to sue a state for violating federal laws in labor disputes.

359 **With both constitutional:** On *Flores* and Section 5, see Robert C. Post and Reva B. Siegel, "Equal Protection by Law: Federal Antidiscrimination Legislation After *Morrison* and *Kimmel,*" *Yale Law Journal* 110 (Dec. 2000): 441–526.

359 **An ally on other:** Tushnet, *Court Divided,* 51.

359 **Meanwhile, members of the bar:** Strebeigh, *Equal,* 413.

360 **"one of the most persistent barriers":** Transcript of Oral Argument, *United States v. Morrison,* 529 U.S. 598 (2000).

360 **"Well, presumably Congress could":** Ibid.

361 **"I'm not sure that Congress":** Ibid.

361 **"When a woman is raped":** Quoted in Strebeigh, *Equal,* 437.

361 **The chief lobbied his longtime friend:** Ibid., 438.

361 **Not once were women mentioned:** *Morrison,* 529 U.S. at 628.

362 **Also ignored was:** Ibid.; *Heart of Atlanta Motel Inc. v. United States,* 379 U.S. 241 (1964).

363 **If state officials were failing:** *United States v. Morrison,* 120 S. Ct. 1740, 601–27 (2000).

363 **Given the Rehnquist majority's:** Much ink has been spilled over whether the Rehnquist Court's new federalism jurisprudence was pernicious or salutary, real or symbolic, ephemeral or lasting. For approaches that have tried to strike a middle ground, see, for example, Kathleen M. Sullivan, "From States' Rights Blues to Blue States' Rights: Federalism After the Rehnquist Court," *Fordham Journal of Law* 75 (2006): 799–813; Keck, *Most Activist Supreme Court in History,* chaps. 6–7. The most recent assessment is Banks and Blakeman, *U.S. Supreme Court and the New Federalism,* chap. 3.

363 **"Why," he asked:** *Morrison,* 529 U.S. at 600, 628, 615–31, 665 (Breyer dissenting).

363 **The white men who in 1886:** Freedman, *Redefining Rape,* esp. chap. 4, p. 76.

363 **However, as white citizens:** *United States v. Harris,* 106 U.S. 629 (1883); *Civil Rights Cases,* 109 U.S. 3 (1883). The Civil Rights Act of 1871 was also known as the Ku Klux Klan Act.

363 **By curtailing Section 5:** MacKinnon, "Disputing Male Sovereignty," 168.

364 **"The court applied":** Quoted in Linda Greenhouse, "Battle on Federalism," *New York Times,* May 17, 2000, A18.

364 **"This decision," Biden added:** Linda Greenhouse, "Women Lose Right to Sue Attackers in Federal Court," *New York Times,* May 16, 2000, A1.

364 **"At stake was nothing":** MacKinnon, "Disputing Male Sovereignty," 177.

364 **"Not one member of the Supreme Court":** Ibid., 176. MacKinnon acknowledges that Justice Breyer came closest, but she argues that RBG and Souter declined to join that part of Breyer's dissent. For a possible explanation, see Post and Siegel, "Equal Protection by Law," 441, who share MacKinnon's concern about the "ominous signals" sent by the Court about the future of federal antidiscrimination law.

365 **"Gush" and "Bore":** Patterson, *Restless Giant,* 409.

366 **Elsewhere ballots had "hanging chads":** In addition to voluminous press coverage of the postelection crisis, studies emerged immediately, among them Posner, *Breaking the Deadlock;* and Dershowitz, *Supreme Injustice*. Unless otherwise noted, I have relied in the following paragraphs on Gillman, *Votes That Counted,* and Toobin, *Too Close to Call*.

368 **That provision would end:** *Bush v. Palm Beach County Canvassing Board,* 531 U.S. 70 (2000), 71–78, esp. 76.

368 **"Only by examining":** *Gore v. Harris,* 772 So. 2d 1243 (2000), 1261.

368 **"the majority today departs from":** Application for Stay at 1–2, *Bush v. Gore,* 531 U.S. 98 (2000), (Stevens dissenting), American Presidency Project.

369 **threatened "irreparable harm" to Bush:** Ibid. (Scalia concurring). See also Biskupic, *American Original,* 238–39. Scalia had two sons working in the Florida campaign and Thomas's wife, Virginia, was deeply involved in the Bush campaign, but apparently neither of the two justices saw a conflict of interest.

370 **"shaken and demoralized":** Linda Greenhouse, "*Bush v. Gore:* A Special Report; Election Case a Test and Trauma for Justices," *New York Times,* Feb. 20, 2001, A1.

370 **"sullen hum":** Toobin, *Too Close to Call,* 256.

370 **"I thought your point":** Transcript of Oral Argument at 109, *Bush v. Gore,* 531 U.S. 98.

370 **"And there are different ballots":** Ibid.

371 **Faced with such polarized:** Toobin, *Too Close to Call,* 263–65.

371 **"Our consideration is limited":** *Bush v. Gore,* 531 U.S. at 109.

371 **The Court had never:** Indeed, Justices Rehnquist, Scalia, and Thomas only voted to uphold equal protection in 4 percent of non-affirmative-action cases over the prior ten-year period. In comparison, over the same period, the other justices voted to uphold equal protection in 74 percent of the cases. As the legal scholar Geoffrey Stone contends, the three justices "cast more votes (three, to be exact) to sustain the Equal Protection Clause claim in *Bush v. Gore* than they previously cast in all of the nonaffirmative action Equal Protection Clause cases that they considered in the previous decade." See Geoffrey R. Stone, "The Roberts Court, Stare Decisis, and the Future of Constitutional Law," *Tulane Law Review* 82 (2008): 1551.

371 **With early press accounts:** See Pamela S. Karlan, "Convictions and Doubts: Representation and the Debate over Felon Disenfranchisement," *Stanford Law Review* 56 (2004): 1157. Sociologists have estimated that if ex-offenders who had completed serving their sentences in Florida had been allowed to vote, and had voted only at the same rate as other people of the same socioeconomic background, age, and the like, Gore would have carried the state by more than thirty-one thousand votes. See Christopher Uggen and Jeff Manza, "Democratic Contraction? The Political Consequences of Felon Disenfranchisement in the United States," *American Sociological Review* (2002): 777, 793 table 4a.

371 **When Scalia saw the draft:** Toobin, *Too Close to Call,* 166–67.

371 **This might have been:** RBG told Scalia's biographer, "I love him. But sometimes I'd like to strangle him." See Biskupic, *American Original,* 277.

371 **But exercising her customary restraint:** RBG was later proven correct that the minority voters in Florida were penalized. While the turnout had been higher than in other elections, Florida was one of the nine states in 2000 that permanently disenfranchised felons, a third of whom were African American men. This prohibition, affecting an estimated 600,000 Florida felons who had done their time, presum-

ably affected Democrats adversely. Later estimates concluded that various state laws prevented approximately 3–9 million felons from voting in 2000, according to *The New York Times,* Oct. 24 and 27 and Nov. 9, 2004. Gore representatives alleged that thousands of Floridians, the majority African American, were inaccurately put on the felons list. Both Latinos and African Americans, according to Democrats, had also been prevented from registering in some areas. See Patterson, *Restless Giant,* 413n57.

371 **"Rarely has this Court":** *Bush v. Gore,* 531 U.S. 98 (2000), 8 (RBG dissenting).

372 **"disagreement with the Florida":** Ibid. at 1–2.

372 **"the recount adopted":** Ibid. at 9.

372 **"[O]rderly judicial review":** Ibid. at 10. For further discussion of RBG's federalism jurisprudence, see Deborah Jones Merritt, "The Once and Future Federalist," in Dodson, *Legacy of Ruth Bader Ginsburg.*

372 **"can only lend credence":** *Bush v. Gore,* 531 U.S. at 128–29 (Stevens dissenting).

373 **"looked like a survivor of Auschwitz":** Toobin, "Heavyweight," 47.

EIGHTEEN · Persevering in Hard Times

377 **Further, the administration's embrace:** Timothy Naftali, "George W. Bush and the 'War on Terror,' " and Fredrik Logevall, "Anatomy of an Unnecessary War: The Iraq Invasion," in Zelizer, *Presidency of George W. Bush,* chaps. 4 and 5.

377 **Conservative policies of deregulation:** Finlay, *George W. Bush and the War on Women;* "The War Against Women," *New York Times,* Jan. 12, 2003, 4; James T. Patterson, "Transformative Economic Policies: Tax Cutting, Stimuli, and Bailouts," Meg Jacobs, "Wreaking Havoc from Within: George W. Bush's Energy Policy in Historical Perspective," and Nelson Lichtenstein, "Ideology and Interest on the Social Policy Home Front," in Zelizer, *Presidency of George W. Bush,* chaps. 6–8; also, Gilens, *Affluence and Influence.*

378 **Yet her dissents:** Mary L. Dudziak, "A Sword and a Shield: The Uses of Law in the Bush Administration," in Zelizer, *Presidency of George W. Bush,* chap. 3.

378 **A foreign-born, nonmarital:** Compare U.S. Constitution, Amendment XIV, with 8 U.S.C., 1409 (2006).

378 **As a result of his conviction:** Nguyen was slated for deportation under the 1996 Illegal Immigration Reform and Immigrant Responsibility Act, passed after Republicans seized control of both the House and the Senate in 1994. Among its many provisions, the statute tightened grounds for deportation.

379 **Section 1409(a), she concluded:** Barnhart and Schlickman, *John Paul Stevens,* 256n5 (citing interview with RBG).

379 **Essentializing the mother-child bond:** *Nguyen v. INS,* 553 U.S. 53 (2001), 56–73; ibid. at 64 (Kennedy majority).

379 **The different rules were there:** Ibid. at 69–70.

379 **"real, everyday ties":** Ibid. at 65.

379 **The majority fostered:** Ibid. at 89.

379 **"depth and vitality":** Ibid. at 97. The ruling had a lasting impact. In *Flores-Villar v. United States* (2010), the Ninth Circuit Court applied the Supreme Court's holding in *Nguyen* that more onerous residency requirements in the Immigration and Nationality Act for fathers but not for mothers did not violate the equal protection clause. The provision at issue imposed a five-year residency requirement on U.S. citizen fathers but only a one-year requirement on mothers.

380 **Eight years in the making:** On the history and limitations of the FMLA, see Emily A. Hayes, "Bridging the Gap Between Work and Family: Accomplishing the Goals of the Family and Medical Leave Act of 1993," *William and Mary Law Review* 42 (2001): 1507–43. For a fuller discussion of RBG's prior actions in response to *Geduldig v. Aiello*

(1974) and *General Electric v. Gilbert* (1976), see chap. 8; also, chaps. 12 and 13 of this manuscript.

380 **In the eight cases:** For example, see *Laro v. New Hampshire,* 259 F.3d 1, 16 (1st Cir. 2001); *Hale v. Mann,* 219 F.3d 61, 68–69 (2nd Cir. 2000); *Chittister v. Department of Community and Economic Development,* 226 F.3d 223, 229 (3rd Cir. 2000); *Kazmier v. Widmann,* 225 F.3d 519, 529 (5th Cir. 2000); *Sims v. University of Cincinnati,* 219 F.3d 559, 566 (6th Cir. 2000); *Townsel v. Missouri,* 233 F.3d 1094, 1096 (8th Cir. 2000).

380 **Only in the Ninth:** *Hibbs v. Department of Human Resources,* 273 F.3rd 844 (9th Cir. 2001), 844–73.

380 **As a result, he faced:** Ibid.

380 **"would be a huge symbolic":** Quoted in Linda Greenhouse, "In Family Leave Case, Supreme Court Steps Back into Federalism Debate," *New York Times,* Jan. 12, 2003, L23.

380 **The solicitor general also:** Ibid. Forty-nine current and former members of Congress, many of whom had played leadership roles in the FMLA's development and passage, filed an amicus brief in support of Hibbs. But fourteen states agreed with Nevada that abrogation of their immunity amounted to a "constitutional insult." See ibid.

381 **Yet when the vote count:** Suzanna Sherry, "The Unmaking of a Precedent," *Supreme Court Review* (2003): 231–67.

381 **"narrowly targeted at the fault-line":** *Nevada Department of Human Resources v. Hibbs,* 538 U.S. 721 (2003), 724–40, 738 (italics mine).

381 **"congruent and proportional":** Ibid. at 724–40 (italics mine).

381 **"real sex differences":** Ibid. at 729–32.

381 **"Ruth, did you ghostwrite":** As Greenhouse observed of the RBG-Rehnquist relationship, "Obviously, you didn't see lots of things the same way, but you nurtured him and brought him along, for instance, in the Virginia Military Institute case. He didn't sign your opinion, but he joined your judgment. And he wrote *Hibbs*." RBG with Greenhouse, "Conversation with Justice Ginsburg," 294. RBG appreciated his humor and fairness. She also discerned the humanity behind the "Nordic cool" of the man she always referred to as "My Chief." She especially appreciated the comfort and encouragement he provided during the months of chemotherapy and weeks of daily radiation during her yearlong bout with colorectal cancer, his suspension of weighty assignments, and his willingness to let her decide when she was strong enough to do more. See, for example, RBG, "In Memoriam: William H. Rehnquist," *Harvard Law Review* 119 (2005): 6–10, esp. 9. For an even more detailed description of his caring, see RBG with Greenhouse, "Conversation with Justice Ginsburg," 295–96. "My Chief" is not a designation she uses in referring to his successor.

382 **The summer of 2005:** Linda Greenhouse, "William H. Rehnquist, Chief Justice of Supreme Court, Is Dead at 80," *New York Times,* Sept. 4, 2005, 38; Richard W. Stevenson, "O'Connor to Retire, Touching Off Battle over Court," *New York Times,* July 1, 2005, A6.

382 **Although she and O'Connor:** For data, see Karen O'Connor and Alexandra B. Yanus, "Judging Alone: Reflections on the Importance of Women on the Court," *Critical Perspectives* 6 (Sept. 2010): 444.

383 **"a wise old man":** O'Connor, *Majesty of the Law,* 193. Other factors as well might have been at work. See, for example, Reva B. Siegel, "You've Come a Long Way, Baby: Rehnquist's New Approach to Pregnancy Discrimination in *Hibbs,*" *Stanford Law Review* 58, no. 6 (2006): 1883, and Adam Liptak, "Another Factor Said to Sway Judges to Rule for Women's Rights: A Daughter," *New York Times,* June 17, 2014, A14. The findings emerged from a study of twenty-five hundred votes by 224 federal appeals court judges.

383 **Four of her male counterparts:** For data, see O'Connor and Yanus, "Judging Alone," 443.

383 **After Ginsburg's arrival:** Barbara Palmer, "Justice Ruth Bader Ginsburg and the Supreme Court's Reaction to the Second Female Member," *Women and Politics* 24 (2008): 8.

384 **On a more personal level:** RBG, "Tribute to Justice Sandra Day O'Connor," 1239–45.

385 **Rehnquist, they agreed, would:** Greenhouse, "William H. Rehnquist, Chief Justice of the Supreme Court, Is Dead at 80," 38; Todd S. Purdum, "Eulogies for Rehnquist Recall a Man of Many Interests," *New York Times,* Sept. 8, 2005, A20; Charles Lane, "Chief Justice William Rehnquist Dies," *Washington Post,* Sept. 4, 2005, A1; Susan Levine and Charles Lane, "For Chief Justice, a Final Session with His Court," *Washington Post,* Sept. 7, 2005, A8.

385 **In his own terminal battle:** RBG, "In Memoriam: William H. Rehnquist," 9.

385 **Frequently referring to her fondness:** RBG, "A Conversation with Four Chief Justices," *Record of the Association of the Bar of the City of New York* 62 (2007): 257, 259.

385 **"the best Supreme Court advocate":** Roger Parloff, "On History's Stage, Chief Justice John Roberts Jr.," *Fortune,* Jan. 17, 2011, 64–75, quotation from 64.

386 **Journalists predicted he could:** Ibid.; see also Todd S. Purdum, Jodi Wilgoren, and Pam Belluck, "Court Nominee's Life Is Rooted in Faith and Respect for Law," *New York Times,* July 21, 2005, A1.

386 **Alito's refusal to consider:** For the full ACLU report, see *Report of the American Civil Liberties Union on the Nomination of Third Circuit Court Judge Samuel A. Alito Jr. to Be Associate Justice on the United States Supreme Court,* Dec. 9, 2005.

386 **Yet Democrats could not:** Carl Hulse and David D. Kirkpatrick, "After Memo, Democrats Are Taking Firmer Stance Against Alito Nomination," *New York Times,* Dec. 2, 2005, A24; "Judge Alito, in His Own Words," *New York Times,* Jan. 12, 2006, A30; Adam Nagourney, "From the Left, Calls to Press Alito Harder," *New York Times,* Jan. 12, 2006, A27; David D. Kirkpatrick, "Wider Fight Seen as Alito Victory Appears Secured," *New York Times,* Jan. 14, 2006, A1; David D. Kirkpatrick, "On Party Lines, Panel Approves Alito for Court," *New York Times,* Jan. 25, 2006, A1.

386 **Though the newest justice:** Her suspicions were later verified in a 2013 study which reported that one would have to go back to 1946 to find two justices as likely to vote in favor of business interests as Roberts and Alito. Lee Epstein, William M. Landes, and Richard A. Posner, "How Business Fares in the Supreme Court," *Minnesota Law Review* 97 (2013): 1449.

386 **Steeling herself for what:** Toobin, *Oath,* 58, 63.

386 **Baptized in a swimming:** Asked to comment about her troubled former client, Sarah Weddington wryly commented that in recent years Ms. McCorvey "thought she was not getting enough attention, and obviously Flip Benham was able to fill that need for her." See "'Jane Roe' Joins Anti-abortion Group," *New York Times,* Aug. 11, 1995, A12; see also Joshua Prager, "The Accidental Activist," *Vanity Fair,* Feb. 2013, 108–67.

386 **In support of McCorvey's suit:** Reva Siegel and Sarah Blustain, "Mommy Dearest?," *American Prospect,* Oct. 2006, 22–27; on McCorvey's suit, see Jason A. Adkins, "Meet Me at the (West Coast) Hotel: The *Lochner* Era and the Demise of *Roe v. Wade,*" *Minnesota Law Review* 9, no. 500 (2005): 500–535. A similar suit was filed on behalf of Sandra Cano, plaintiff in the companion case, *Doe v. Bolton,* though neither McCorvey nor Cano had actually gotten abortions.

386 **McCorvey's suit failed:** See Jill Hasaday, "Protecting Them from Themselves: The Persistence of Mutual Benefits Arguments for Sex and Race Inequality," *New York University Law Review* 84, no. 6 (Dec. 2009), esp. 1478–82n68.

387 **"freedom of choice":** Reardon, *Making Abortions Rare,* ix–x.

387 **"the middle majority":** Ibid., 25–26.

387 **Late-term abortions:** Guttmacher Institute, "Fact Sheet: Induced Abortion in the United States," Feb. 2014.

388 **Antiabortion activists and legislators:** Siegel and Blustain, "Mommy Dearest?," 22. On use of this strategy in South Dakota, the first state to enact the ban, see Reva B. Seigel, "The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions," *University of Illinois Law Review* 991 (2007): 1006–23; Reva B. Siegel, "The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument," *Duke Law Journal* 57 (2008): 1641–92.

388 **In 2003, the Partial-Birth:** Indeed, respected physicians and representatives of medical organizations testified in congressional hearings that D&E had specific advantages. But their expertise had been rejected. See the *Partial-Birth Abortion Ban Act of 2003: Hearings Before the Subcommittee on the Constitution of the Committed on the Judiciary,* 108th Cong. (2003), 187–88.

388 **"the entire fetal head":** Partial-Birth Abortion Ban Act, Public Law 108-105, *United States Statutes at Large* (Nov. 5, 2003): 1201.

388 **The ban included:** *Stenberg v. Carhart,* 530 U.S. 914 (2000).

388 **He still had memories:** Linda Greenhouse, "Doctor Spurns Euphemism in Abortion Rights," *New York Times,* April 8, 2009, A7. As former chair of the surgery department at a Nebraska air force base, Carhart's resolve was no doubt stiffened by the fact that his home, horse farm, and most of his horses and household pets had been burned by antiabortion protesters.

388 **When the plaintiffs won:** Petition for a Writ of Certiorari, *Alberto R. Gonzales, Attorney General v. Leroy Carhart et al.,* No. 05-380 (U.S. July 8, 2005).

388 **"informed consent" regulation:** *Akron v. Akron Center for Reproductive Health,* 462 U.S. 416 (1983).

389 **"We also see no reason":** *Planned Parenthood v. Casey,* 505 U.S. 833 (1992).

389 **Thus the seeds:** Maya Manin, "Irrational Women: Informed Consent and Abortion Regret," in Thomas and Boisseau, *Feminist Legal History,* chap. 6; Reva B. Siegel, "Dignity and the Politics of Protection: Abortion Restriction Under *Casey/Carhart,*" *Yale Law Journal* 117 (2008): 1694–800. On the empirical effects of restrictions sanctioned by *Casey,* see Cahn and Carbone, *Red Families v. Blue Families,* chap. 6. On the changing conception of fetal "life," see also Khiara M. Bridges, "'Life' in the Balance: Judicial Review of Abortion Regulations," *U.C. Davis Law Review* 46 (2013): 1285–338.

389 **The Court had narrowly:** The majority had ruled that the ban was vague. *Stenberg v. Carhart,* 530 U.S. 914 (2000).

389 **Justice Kennedy, who had always:** On Kennedy's struggle with abortion, see Colucci, *Justice Kennedy's Jurisprudence,* chap. 2.

389 **Kennedy, the most reluctant member:** *Carhart,* 530 U.S. at 962 (Kennedy dissenting).

389 **The 5–4 vote in *Gonzales:*** Bridges, "'Life' in the Balance."

389 **Roberts, Alito, Kennedy:** The observation on religious affiliation, made initially by the legal scholar Geoffrey Stone, was picked up by the press. See Mark Sherman/Associated Press, "Kennedy May Be Key to Abortion Limits," *Washington Post,* April 19, 2007; Richard Allen Greene, "Court Abortion Verdict Raises Religion Question," *Politico,* April 18, 2007.

390 **It was a recourse:** *Gonzalez v. Carhart,* 550 U.S. 124 (2007), 1625–26 (Kennedy majority).

390 **"respect for the dignity of human":** Ibid. at 1633–34.

392 **"egregiously" wrong:** RBG quoted in Greg Moran, "No Retirement Plans for Justice Ginsburg," *San Diego Union-Tribune,* Feb. 8. 2013.

392 **"Today's decision is alarming":** *Carhart,* 550 U.S. at 1641 (RBG dissenting).

392 **"Today's opinion supplies":** Ibid. at 1644, 1646–47.

392 **"a *method* of abortion":** Ibid. at 1647.

393 **"Women who have abortions":** Ibid. at 1648–49. RBG compared *Mueller v. Oregon,* 208 U.S. 412 (1908), 422–23, and *Bradwell v. State,* 83 U.S. 130 (1873), with *United States v. Virginia,* 518 U.S. 515 (1996), n12, and *Califano v. Goldfarb,* 430 U.S. 199 (1977), 207.

393 **"jeopardizes women's health":** *Carhart,* 550 U.S. at 1652.

393 **"In sum," she bluntly concluded:** Ibid. at 1653.

393 **Energized by their *Carhart:*** Cahn and Carbone, *Red Families v. Blue Families.*

394 **Parental notification, waiting periods:** "Michigan's Attack on Women's Rights," *New York Times,* June 16, 2012, A22; Laura Bassett, "Virginia Ultrasound Bill Passes in House," *Huffington Post,* Feb. 23, 2012; Luisita Torregrosa, "In U.S., a Rekindled War over Abortion," *New York Times,* June 25, 2013; Ashley Woods, "Michigan's 'Rape Insurance' Abortion Rider Law Goes into Effect Today," *Huffington Post,* March 14, 2014; Grace Wyler, "Battles over Abortion Flare in 2014," *Time,* Feb. 6, 2014; Richard Fausset, "Law on Ultrasounds Reignites the Abortion Debate in a 2016 Battleground," *New York Times,* Jan. 11, 2016, A12.

394 **In the years since:** *Planned Parenthood Southeast Inc. v. Strange,* Civil Action No. 2:13cv405-MHT (2014).

394 **In Texas, a state with 5.4 million:** Manny Fernandez, "Both Sides Cite Urgency in Court Appeal of a Texas Law on Abortion Clinics," *New York Times,* Sept. 13, 2014, A14.

394 **"The closing down of clinics":** Kareem Abdul-Jabbar, "The Coming Race War Won't Be About Race," *Time,* Aug. 17, 2014. Some simply chose to walk to Mexico, despite warnings from staff in closing clinics of the dangers involved.

394 **"hidden demand for self-induced":** See graphs attached to article by Seth Stevens-Davidowitz, "The Return of the D.I.Y. Abortion," *New York Times,* March 6, 2016, SR2; also, Charles M. Blow, "The End of American Idealism," *New York Times,* March 7, 2016, 20.

394 **"profoundly wrong":** Linda Greenhouse, "Oral Dissents Give Ginsburg a New Voice," *New York Times,* May 31, 2007, A1.

394 **Kennedy, whose thinking did not:** For affirmative-action cases of the 2006–7 term, see *Parents Involved in Community Schools v. Seattle School District,* 551 U.S. 701 (2007), and *Meredith v. Jefferson County Board of Education,* 548 U.S. 938 (2006). On the death penalty, see *Uttecht v. Brown,* 551 U.S. 1 (2007). On faith-based programs, see *Hein v. Freedom from Religion Foundation Inc.,* 551 U.S. 587 (2007). On wage equity, see *Ledbetter v. Goodyear Tire & Rubber Co.,* 550 U.S. 618 (2007). On Kennedy, see Heather K. Gerken, "Justice Kennedy and the Domains of Equal Protection," *Harvard Law Review* 121 (2007): 104–29.

395 **In November 1999, she filed:** *Ledbetter,* 550 U.S. 618.

395 **Other women at the Gadsden:** Ibid. at 2187.

395 **The U.S. Court of Appeals:** *Ledbetter v. Goodyear Tire & Rubber Co.,* 421 F.3d 1169 (11th Cir. 2005), 1178.

395 **The question now hinged:** Linda Greenhouse, "Court Explores Complexities in Job Discrimination Case," *New York Times,* Nov. 28, 2006, A20.

396 **Complicating the case further:** Among them were *Nat'l RR Corp v. Morgan,* 536 U.S. 101 (2002); *Lorance v. AT&T Technologies Inc.,* 490 U.S. 900 (1989); *Bazemore v. Friday,* 478 U.S. 385 (1986); *Delaware State College v. Ricks,* 449 U.S. 250 (1980); *United Air Lines v. Evans,* 431 U.S. 533 (1977). See Michael Selmi, "The Supreme Court's 2006–2007 Term Employment Cases: A Quiet but Revealing Term," *Employee Rights and Employment Policy Journal* 11 (2007), n9.

396 **"Mr. Russell, I thought your argument":** Transcript of Oral Argument at 6, *Ledbetter,* 550 U.S. 618.

396 **"I suppose all they'd":** Ibid. at 6, 15, 16.

396 **Then Kennedy raised:** Ibid. at 11. See Robin Olinger Bell, "Justice Anthony M. Kennedy: Will His Appointment to the United States Supreme Court Have an Impact on Employment Discrimination?," *University of Cincinnati Law Review* 57 (1989): esp. 1045–50; also, David S. Cohen, "Justice Kennedy's Gendered World," *South Carolina Law Review* 59 (2008): 673–95.

396 **But what was equally:** Transcript of Oral Argument, *Ledbetter,* 550 U.S. 618.
397 **Such rulings reduce:** Toobin, *Oath,* 72–74.
397 **The "big guys":** Tushnet, *In the Balance,* 204.
397 **But Roberts and his:** *Dukes v. Wal-Mart Inc.,* 509 F.3d 1168 (2007). RBG wrote the dissent. On Walmart's employment culture, see Nelson Lichtenstein, "Why Working at Wal-Mart Is Different," *Connecticut Law Review* 39 (2007): 1649–84, and Featherstone, *Selling Women Short,* chap. 1.
397 **Hailed by business groups:** Nelson Lichtenstein, "Why Working at Wal-Mart Is Different," and Featherstone, *Selling Women Short,* chap. 1.
397 **"We apply the statute":** *Ledbetter,* 550 U.S. at 642, 987 (Alito majority).
397 **Justice Stevens, delighted:** Jeffrey Rosen, "The Dissenter, Justice John Paul Stevens," *New York Times Magazine,* Sept. 23, 2007, 50–57, 72, 76, 78–79, 81.
397 **"Title VII was meant":** Quoted in Robert Barnes, "Over Ginsburg's Dissent, Court Limits Bias Suits," *Washington Post,* May 30, 2007, A1.
398 **"Comparative pay information":** *Ledbetter,* 550 U.S. at 645 (RBG dissenting).
398 **Ginsburg turned next:** *Bazemore v. Friday,* 478 U.S. 385 (1986).
398 **"Congress never intended":** *Ledbetter,* 550 U.S. at 654 (RBG dissenting).
398 **"each paycheck less than":** Ibid. at 655.
398 **"The discrimination of which Ledbetter":** Ibid. at 657–61.
399 **The Labor Department:** For a fuller discussion, see, for example, Lichtenstein, "Ideology and Interest on the Social Policy Home Front"; also, Finlay, *George W. Bush and the War on Women*.
399 **And with the president's new nominees:** Selmi, "Supreme Court's 2006–2007 Term Employment Law Cases," 219.
399 **In less than two years:** Robert Pear, "Justices' Ruling in Discrimination Case May Draw Quick Action by Obama," *New York Times,* Jan. 4, 2009, A13.
399 **"I worked a lot":** Quoted in Barnes, "Over Ginsburg's Dissent, Court Limits Bias Suits."
399 **"setback for women":** Marcia Greenberger quoted in ibid.
399 **Workplace experts agreed:** Linda Greenhouse, "Justices' Ruling Limits Suits on Pay Disparity," *New York Times,* May 30, 2007, A1.
399 **"Rarely in the history":** Toobin, *Oath,* 81.
399 **Within hours of the decision's:** Barnes, "Over Ginsburg's Dissent, Court Limits Bias Suits." Senators Tom Harkin of Iowa, Barbara Mikulski of Maryland, and Barack Obama of Illinois jumped in behind Clinton to co-sponsor the bill. See Jacqueline Palank, "Democrats Will Try to Counter Ruling on Discrimination Suits," *New York Times,* July 13, 2007, A13.
399 **The media picked up:** See, for example, "As a Matter of Justice Congress Should Correct Ruling on Fair Pay," *Dallas Morning News,* June 5, 2007, A14; "Court Bias Deadline Too Tight," *Denver Post,* June 4, 2007, B7; "Injustice 5, Justice 4," *New York Times,* May 31, 2007, A18; "It Is Payback Time for New Court," *Cleveland Plain Dealer,* June 1, 2007, E1; Marcia Greenberger, "Paycheck Fairness Is Not a Burden," *Washington Post,* Aug. 20, 2007, A14; Nicole Gaouette, "House Bill to Lift Limits on Pay Suits," *Los Angeles Times,* July 31, 2007, A12.
400 **"We don't do that":** Ball, *Bush, the Detainees, and the Constitution,* 176. Lawyers in the administration interpreted a federal statute banning torture so as to allow the administration maximum latitude in the use of "enhanced" interrogation practices—a change that a bipartisan 9/11 commission would find not only excessive but in violation of the country's legal obligations to other nations. See Scott Shane, "U.S. Practiced Torture After 9/11, Nonpartisan Review Concludes," *New York Times,* April 16, 2013, A1. For full report, see Open Society Institute, *The Report of the Constitution Project's Task Force on Detainee Treatment,* April 2013.

401 **"the political branches":** *Boumediene v. Bush,* 553 U.S. 723 (2008), 755 (Kennedy majority). Roberts, Scalia, Thomas, and Alito dissented. In the preceding terror trials—*Rasul v. Bush,* 542 U.S. 466 (2004), *Hamdi v. Rumsfeld,* 542 U.S. 507 (2004), and *Hamdan v. Rumsfeld,* 548 U.S. 557 (2006)—the Court ruled in favor of detainees. Scalia and Thomas dissented in all three cases. Rehnquist joined them in *Rasul*. Stevens also dissented in *Hamdi*. In *Hamdan,* Alito dissented and Roberts did not participate. For a detailed discussion of these cases, see Ball, *Bush, the Detainees, and the Constitution;* on Scalia with the decisions of his colleagues in these cases, see Biskupic, *American Original,* chap. 15.

402 **Not least was the squandering:** Fisher, *Constitution and 9/11,* esp. chaps. 7, 9, 6, and 10.

402 **Not least were the defeats:** See *Arizona v. Gant,* 556 U.S. 332 (2009).

402 **"What a joy":** Quoted in Anthony Tommasini, "Justices Greet Diva: It's Ardor in the Court," *New York Times,* Nov. 1, 2008, C1.

402 **"I'm not going to cry":** Quoted in ibid.

402 **"gloriously familiar voice":** Ibid.

403 **A brass band played:** Monica Davey and John M. Broder, "Celebration and Sense of History at Chicago Park," *New York Times,* Nov. 5, 2008, P8.

403 **"Something has changed":** Ibid.

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405 **the symbolism inspired:** See Sugrue, *Not Even Past,* esp. introduction, and David A. Hollinger, "Obama, the Instability of Color Lines, and the Promise of a Postethnic Future," *Callaloo* 31 (2008): 1033–37; Bonilla-Silva, *Racism Without Racists;* Alexander, *New Jim Crow;* Erin Aigner et al., "In a Decisive Victory, Obama Reshapes the Electoral Map," *New York Times,* Nov. 6, 2008, 10.

405 **When the Court subsequently held:** Toobin, "Heavyweight," 47.

405 **As she got to know:** Carmon and Knizhnik, *Notorious RBG,* 157.

405 **Yet others, who during the campaign:** Kenski, Hardy, and Jamieson, *Obama Victory;* Parker and Barreto, *Change They Can't Believe In,* chaps. 2, 5.

406 **Something had to be done:** On Greenspan and Bernanke's concern that the level of economic inequality had gone beyond what was healthy for the economy, see Frank, *Frank,* 350.

406 **A disengaged but combat-weary:** On perpetual war, see Dudziak, *War Time*. On white exhaustion and racial inequality, see Sugrue, *Not Even Past,* chap. 3, and Bonilla-Silva, *Racism Without Racists*.

406 **But Republican opposition:** On the first year of the new administration, see Alter, *Promise*. In a nation that is 40 percent moderate and 60 percent ideologically liberal or conservative, even a five- or ten-percentage-point shift in ideological preference had made a difference.

406 **A few days after:** Alec MacGillis, "Why Is Mitch McConnell Picking This Fight?," *New York Times,* Feb. 19, 2016, SR2.

406 **manipulating the rules of Senate:** Julian E. Zeltzer, "Tea Partied: President Obama's Encounters with the Conservative-Industrial Complex," in Zeltzer, *The Presidency of Barack Obama*.

406 **Grassroots activists on the far right:** Skocpol and Williamson, *Tea Party and the Remaking of Republican Conservatism,* 6; Vanessa Williamson, Theda Skocpol, and John Coggin, "The Tea Party and the Remaking of Republican Conservatism," *Perspectives on Politics* 9 (March 2011): 34.

During the 2010 general election, the GOP gained 64 House seats and 6 Senate seats. Of those backed by a Tea Party group or self-identified as a member of the move-

ment, less than one-third won out of 130 House races, and 5 of 10 successfully gained a seat in the Senate, often in areas already strongly supportive of Republicans. The GOP made significant gains in the next two election cycles, but the Tea Party played a less prominent role, being labeled as "too extreme" by its opponents. By 2015, only 17 percent of Americans polled by Gallup identified themselves as Tea Party supporters, barely half the number from five years earlier. Christopher F. Karpowitz, "Tea Time in America? The Impact of the Tea Party Movement on the 2010 Midterm Elections," *PS: Political Science and Politics* 44 (April 2011): 303–9; Kate Zernike, "Tea Party Set to Win Enough Races for Wide Influence," *New York Times,* Oct. 15, 2010, A1; Alexandra Moe, "Just 32% of Tea Party Candidates Win," MSNBC, Nov. 3, 2010; Ian Gray, "Tea Party Election Results: Conservative Movement of 2010 Takes Pounding in 2012," *Huffington Post,* Nov. 7, 2012; Carl Hulse, "Republicans Face Struggle over Party's Direction," *New York Times,* Nov. 7, 2012, A1; Jim Norman, "In US, Support for Tea Party Drops to New Low," Gallup, Oct. 26, 2015.

406 **they also believed that minorities:** Skocpol and Williamson, *Tea Party and the Remaking of Republican Conservatism,* 10–11, 31, 65–71. See also Hochschild, *Strangers in Their Own Land*. Both books examine the Tea Party movement from the grassroots level, with Skocpol and Williamson focusing their fieldwork in Massachusetts, Virginia, and Arizona, while Hochschild focuses on the bayou region of Louisiana, an area considered a conservative hotbed.

406 **"take their country back":** The classic introduction to such movements is Richard Hofstadter, *Paranoid Style in American Politics*. On the Tea Party, see Skocpol and Williamson, *Tea Party and the Remaking of Republican Conservatism,* esp. 65–71.

407 **"change Tea Partiers could believe in":** Here I have slightly altered the title of Parker and Barreto's superb study of the Tea Party, *Change They Can't Believe In*. For a gendered perspective of the Tea Party, see Deckman, *Tea Party Women,* esp. 242–43.

407 **Aided by complicit right-wing media:** Skocpol and Williamson, *Tea Party and the Remaking of Republican Conservatism,* 9–13. For an excellent analysis of the Tea Party's rise and its ties to the Koch brothers, see Kevin Baker, "The Incredible True Story of the Tea Party's Rise to Power," *TakePart,* Oct. 30, 2015. See also Mayer, *Dark Money*. For the Koch brothers and their billionaire allies, the impetus is primarily economic. On the role of the media, see Hammer, *Messengers of the Right*.

407 **The election of 2008 produced:** See Tesler, *Post-Racial or Most-Racial?*

407 **It is to say that after 2008:** On racism in the Tea Party, see Parker and Barreto, *Change They Can't Believe In,* and Williamson, Skocpol, and Coggin, "Tea Party and the Remaking of Republican Conservatism," 34–35.

408 **Despite her friendships:** Hirshman, *Sisters in Law,* 267–70.

408 ***Mad Men:*** *Mad Men* was a television series on the AMC channel set in the 1960s. Acclaimed for its historical accuracy, the program retained all the sexism of the era.

408 **During oral arguments:** Transcript of Oral Argument at 22, 44–45, *Safford Unified School District v. Redding,* 557 U.S. 364 (2009).

409 **"shake [her] bra out":** Ibid. at 45–46.

409 **"not beyond human experience":** Ibid. at 58.

409 **"the Court's only female":** Nina Totenberg, "Court Hears School Strip Search Case," NPR, April 21, 2009; Joan Biskupic, "Ginsburg: Court Needs Another Woman," *USA Today,* May 5, 2009.

409 **Thanks to the press:** *Redding,* 557 U.S. at 2 (RBG concurring in part and dissenting in part).

409 **"eight rather well-fed men":** Adam Liptak, "Let Me Finish, Please: Conservative Men Dominate the Debate," *New York Times,* April 18, 2017, A13. Quotation in Charlie Rose, "Justice Ruth Bader Ginsburg Interview, Part 2," charlierose.com, Oct. 11, 2016. See also Jane Pauley, "Ruth Bader Ginsburg: Her View from the Bench," CBS News, Oct. 9, 2016; Joan Biskupic, *Breaking In,* 153.

410 **Even standing to cook:** On Marty's difficulty standing, see Jane Ginsburg's tribute to her father in Alito and Supreme Court Spouses, *Chef Supreme,* 123–26.

410 **"its disrespect for precedent":** The quotation is Jeffrey Toobin's description of Souter's perception of the Roberts Court. See Toobin, *Oath,* 168. See also Toobin, "Money Unlimited," 36–47.

410 **The chief justice's maneuvering:** Toobin, "Money Unlimited,"

410 **undermined the fundamental principle of democracy:** *Citizens United v. Federal Election Commission,* 558 U.S. 310 (2010), esp. Stevens's dissent on 393–96. Also see *McCutcheon v. Federal Election Commission,* 134 S. Ct. 1434 (2014), esp. Breyer's dissent, 1465. On the overruling, see Jeffrey Rosen, "RBG Presides," *New Republic,* Oct. 13, 2014, 18. Also see Ronald Dworkin, "The Decision That Threatens Democracy," *New York Review of Books,* May 13, 2010.

410 **She had joined Breyer's:** *Parents Involved v. Seattle School District, No. 1,* 551 U.S. 701 (2007), 803–7 (Breyer dissenting). The case dealt with a Seattle School District policy that allowed students to apply to any high school in the district. The district utilized a tiebreaker system to decide which students would be admitted to the most popular schools. Race was considered the second-most-important factor in the system. The Court found the district's racial tiebreaker plan unconstitutional. Breyer cited the precedent established by *Brown v. Board of Education,* 347 U.S. 483 (1954), and *Swann v. Charlotte-Mecklenburg County Board of Education,* 402 U.S. 1 (1971), 16. For the Louisville case, see *Meredith v. Jefferson County Board of Education,* 548 U.S. 938 (2006). Jefferson County Public Schools (JCPS) were integrated by a court order until 2000. After its release from the order, JCPS, with the idea of maintaining racial integration, implemented an enrollment plan that determined a student's placement based on place of residence and school capacity, as well as race. The Court found Jefferson County's enrollment plan unconstitutional.

410 **And then there was the *Heller:*** *District of Columbia v. Heller,* 554 U.S. 570 (2008). Legal precedent prior to *Heller* held that the Second Amendment protected only a state's right to maintain a militia and not an individual right to bear arms independent of the state's need for a militia. *Heller* was followed by *McDonald v. Chicago,* 557 U.S. 965 (2009), which furthered the majority's crusade against gun control. For a historian's perspective, see Winkler, *Gunfight,* Charles, *Armed in America,* Dunbar-Ortiz, *Loaded,* Pogue, *Chosen Country,* and Belew, *Bring the War Home.*

410 **Fortunately, the malignancy:** Radha Chitale, Joanna Schaffhausen, and Dan Child, "Ginsburg's Cancer May Have Been Caught Early Enough," ABC News, Feb. 5, 2009.

411 **Scheduling the surgery:** Adam Liptak, "Justice Ginsburg Undergoes Surgery for Pancreatic Cancer, Court Says," *New York Times,* Feb. 6, 2009, A12.

411 **Still, her delight at Jane's:** Jane Ginsburg had been elected a corresponding fellow of the British Academy for her contribution to the global community of intellectual property law. She had also been selected for the Phi Beta Kappa Society's Visiting Scholar Program, giving her the opportunity to deliver presentations in her area of expertise at U.S. universities. See Sara-Jane Adams and Jeff Wild, "The Cream of the Crop," *Intellectual Asset Management* (Jan/Feb. 2009): 57–58, and "Ginsburg Garners Honors in Britain, U.S.," *Columbia Law School Magazine* (Fall 2011): 7.

411 **"*I will live*":** RBG, interview by author.

412 **A copy of the bill:** Toobin, "Heavyweight," 38–47.

412 **"how the world works":** Transcript of Obama-Sotomayor Announcement, May 26, 2009.

412 **After working as an assistant:** Sotomayor, *My Beloved World,* 39; Keith B. Richburg, "Federal Judge Sonia Sotomayor Likely to Be on Obama's Supreme Court Shortlist; Backers Say She Meets Obama Requisites," *Washington Post,* May 7, 2009, A3; Sheryl Gay Stolberg, "Sotomayor, a Trailblazer and a Dreamer," *New York Times,* May 26, 2009.

412 **"a wise Latina woman":** For text of the lecture, see "Lecture: 'A Latina Judge's Voice,'" *New York Times,* May 15, 2009.

412 **Ultimately, Sotomayor's record:** Adam Liptak, "A Careful Pen with No Broad Strokes," *Washington Post,* May 27, 2009, A1; Jerry Markon, "Judge's Votes Show No Single Ideology," *Washington Post,* June 7, 2009, A4.

412 **"hold her own":** RBG quotations in this and previous sentence in Emily Bazelon, "The Place of Women on the Court," *New York Times,* July 7, 2009, MM22.

413 **Her mother, an elementary:** Lisa W. Foderaro and Christine Haughney, "Meet the Kagans," *New York Times,* June 20, 2010, MB1; Sheryl Gay Stolberg, Katharine Q. Seelye, and Lisa W. Foderaro, "Pragmatic New Yorker Chose a Careful Path to Washington," *New York Times,* May 11, 2010, A1.

413 **When Republicans blocked:** On Kagan's effective leadership, see Tushnet, *In the Balance,* 85–89.

413 **Obama had lured the first:** Peter Baker and Jeff Zeleny, "Obama Said to Pick Solicitor General for Court," *New York Times,* May 10, 2010, A1. See also Tushnet, *In the Balance,* 82–92.

414 **Nevertheless, in August:** Baker and Zeleny, "Obama Said to Pick Solicitor General for Court"; Stolberg, Seelye, and Foderaro, "Pragmatic New Yorker Chose a Careful Path to Washington"; Sheryl Gay Stolberg, "Confirmation Is Likely, but Not G.O.P. Support," *New York Times,* July 2, 2010, A16. The problem, however, was less Kagan's than Obama's lower approval rating at the time of her nomination and the opposition campaigns waged through social media as well as more traditional venues. See Nancy Maveety, "A Transformative Politics of Judicial Selection? President Obama and the Federal Judiciary," in Schier, *Transforming America,* chap. 8.

414 **Ginsburg found the two:** Mark Sherman, "Ruth Bader Ginsburg Considers Elena Kagan's Confirmation an 'Exhilarating' Development," *Huffington Post,* Aug. 4, 2010.

414 **"shrinking violet":** Adam Liptak, "A Most Inquisitive Court? No Argument There," *New York Times,* Oct. 8, 2013, A14; Robert Barnes, "Justices Crank Up the Volume," *Washington Post,* March 2, 2011, A3.

414 **Kagan's brilliance:** Tribe and Matz, *Uncertain Justice;* also "The Supreme Court: Draw Back the Curtain?," *Economist,* Jan. 10, 2015, 29.

414 **Someone who could:** Tushnet, *In the Balance,* ix–xi, vii, 94, 285.

414 **Asked by Obama:** Sotomayor related RBG's response to Obama. See Ian Frazier, "Sonia from the Bronx," *New Yorker,* Feb. 8, 2016.

415 **The five justices:** David Cole, "The Anti-Court Court," *New York Review of Books,* Aug. 14, 2014, 10–14.

415 **When he wrote for the minority:** On Stevens, I rely on Rosen, "Dissenter," 50–57, 72, 76, 78–79, 81, and Jeffrey Toobin, "After Stevens: What Will the Supreme Court Be Like Without Its Liberal Leader?," *New Yorker,* March 22, 2010, 38–47.

415 **reputation as a loner:** Jeffrey Toobin, "Without a Paddle: Can Stephen Breyer Save the Obama Agenda in the Supreme Court?," *New Yorker,* Sept. 27, 2010, 34–41.

415 **"flowery, discursive rhetorical":** Toobin, "Heavyweight."

415 **As her recent dissent:** See Lani Guinier, "Courting the People: Demosprudence and the Law/Politics Divide," *Harvard Law Review* 127 (2013): 437–44.

415 **"speak to a future age":** Maveety, "Transformative Politics of Judicial Selection?" See also Ruth Bader Ginsburg, "The Role of Dissenting Opinions," *Minnesota Law Review* 95.1 (2010): 1-8.

416 **She also resolved:** Toobin, "Heavyweight."

416 **When Ruth arrived:** RBG provided information on Marty's illness and a copy of his note to her to Jeffrey Toobin. See ibid., esp. 46.

417 **The next morning, the final:** *Christian Legal Society Chapter v. Martinez,* 561 U.S. 661 (2010); the quotation is in Totenberg, "Martin Ginsburg's Legacy."

417 **Marty, she believed:** Toobin, "Heavyweight," 46.

417 **"and each of your spouses":** Adam Liptak, "Justices Bid Farewells on Last Day," *New York Times,* June 29, 2010, A18.

417 **"In their gestures":** Hirshman, *Sisters in Law,* 278.

417 **Otherwise, she feared that Ruth:** Toobin, "Heavyweight."

418 **After graduating with honors:** RBG, interview by author, Aug. 31, 2014.

418 **"unbelievably wonderful":** Ibid.

418 **Ruth would perform the wedding:** RBG to author, Aug. 16, 2010.

419 **With the house also available:** RBG, interview by author, Aug. 31, 2014. It is not clear whether the justice pays rent for the adobe or whether she and her family are houseguests.

419 **"discerning, intelligent operagoer":** Anne Constable, "Santa Fe a Favorite Summer Getaway for Justice Ginsburg," *Santa Fe New Mexican,* Aug. 23, 2014.

419 **"fireside chat":** Carlyn Rae Mitchell, "Supreme Court Justice Discusses Advances for Women," *Colorado Springs Gazette,* Aug. 28, 2010. The "fireside chat" was moderated by NPR's Nina Totenberg. Video of RBG's speech and the chat are available at www.c-span.org.

420 **"Happy Birthday":** Ariane de Vogue, "Ruth Bader Ginsburg, Sonia Sotomayor Dish Out Supreme Court Lunchroom Secrets," CNN.com, June 2, 2016.

421 **Nina Totenberg, legal reporter:** Toobin, "Heavyweight."

421 **Ginsburg's genuine affection:** "Remarks by the President at Hanukkah Reception," White House, Dec. 8, 2011.

421 **One month later, during:** "Supreme Court Justice Ginsburg Expresses Admiration for Egyptian Revolution and Democratic Transition," press release, U.S. Embassy Cairo, Feb. 1, 2012.

421 **After Thompson was stripped:** *The New York Times* claimed that her argument was "more persuasive [than the ruling]." See *Connick v. Thompson,* 563 U.S. ___ (2011); "Failure of Empathy and Justice: The Court Refuses to See a Pattern of Abuse by Prosecutors Determined to Win at All Costs," *New York Times,* April 1, 2011, A26.

421 **That five of her colleagues:** Laurence Tribe and Joshua Matz argue that the Roberts Court displayed a "clear arc . . . conferring near-total immunity on prosecutors and police." See *Uncertain Justice,* 301–4, esp. 304. RBG's majority opinion in *Bullcoming v. New Mexico,* 564 U.S. ___ (2011), argued that a criminal defendant had the right "to be confronted with the witnesses against him," specifically, the person who had conducted the lab analysis of evidence rather than a surrogate. In *Leal Garcia v. Texas,* 564 U.S. ___ (2011), RBG, Sotomayor, and Kagan joined Breyer's dissent when the Court denied an application for a stay of execution of Humberto Leal Garcia Jr., a Mexican national convicted of kidnapping, rape, and murder who insisted that the police failed to inform him of his right to contact the Mexican consulate.

421 **Milestones earlier in her tenure:** "Symposium: The Jurisprudence of Justice Ruth Bader Ginsburg," *University of Hawaii Law Review* 20 (1998): 581–795; "Symposium: Celebration of the Tenth Anniversary of Justice Ruth Bader Ginsburg's Appointment to the Supreme Court of the United States," *Columbia Law Review* 104 (2004): 1–252; "Symposium: The Jurisprudence of Justice Ruth Bader Ginsburg: A Discussion of Fifteen Years on the U.S. Supreme Court," *Ohio State Law Journal* 70 (2009): 797–1126.

421 **Those familiar with:** Laura Krugman Ray, "Justice Ginsburg and the Middle Way," *Brooklyn Law Review* 68 (2003): 629–83, esp. 680. Ray characterizes RBG's middle way as "a remarkably precise reflection of her theories of appellate judging" in which she follows the path of moderation, judging each case on its merits, exercising judicial restraint, seeking resolutions that protect the institutional well-being of the court and its pronouncements, and writing in detached, impersonal language that suppresses individuality.

422 "**justice is not to be taken":** Lecture at Yale Law School (1923) as quoted in Brown, "Codification of International Law," 32.

422 **"Measured motions":** RBG, "Speaking in a Judicial Voice," 1185–209.

423 **When approaching cases:** Ray, "Justice Ginsburg and the Middle Way," 629–82.

423 **Her dissents, like her opinions:** Ibid.

423 **Any hope of influencing:** *Parents Involved in Community Schools v. Seattle School District No. 1,* 551 U.S. 701 (2007). The Seattle case had been united with *Meredith, Custodial Parent and Next Friend of McDonald v. Jefferson County Bd. of Ed et al.,* No. 05–915, from Louisville, Kentucky. The respective cities sought to maintain diversity at their schools by using race as a means of limiting transfers or as a tiebreaker for admission to particular schools. Linda Greenhouse, "Justices, Voting 5–4, Limit the Use of Race in Integration Plans," *New York Times,* June 29, 2007, A1.

423 **"strained fury":** Tribe and Matz, *Uncertain Justice,* 20.

423 **The class-action suits:** *Wal-Mart v. Dukes,* 564 U.S. ___ (2011).

424 **Lacking the resources:** Tribe and Matz, *Uncertain Justice,* chap. 8.

424 **"[J]udges must defer":** Ibid., 131.

424 **Breyer, Ginsburg, and Sotomayor:** *Holder v. Humanitarian Law Project,* 561 U.S. 1 (2010) (Breyer dissenting).

424 **In subsequent decisions:** See, respectively, *Beard v. Banks,* 548 U.S. 521 (2006); *Garcetti v. Ceballos,* 547 U.S. 410 (2006); and *Morse v. Frederick,* 551 U.S. 393 (2007).

424 **She was no longer willing:** The same observation is made by Hirshman in *Sisters in Law,* 292.

424 **"supplement[s] the dry reason":** Adam Liptak, "When Words on Paper Don't Convey Enough Ire," *New York Times,* March 9, 2010, A12.

424 **"nuclear option":** William D. Blake and Hans J. Hacker, " 'The Brooding Spirit of the Law': Supreme Court Justices Reading Dissents from the Bench," *Justice System Journal* 31, no. 1 (2010): 1–25; the term "nuclear option" appears on page 3. This study covers dissents read from the bench between the 1969 and the 2007 terms. Supplemental data through the 2013 term was graciously provided by Dr. Hacker through email correspondence. In *Miller v. Johnson,* RBG countered the majority opinion that attempted to eliminate any racial considerations, arguing, "Statutory mandates and political realities may require States to consider race when drawing district lines." *Miller v. Johnson,* 515 U.S. 900 (1995), 949 (RBG dissenting). Four years later, she maintained that when modern technology permits the near-instantaneous transfer of assets, the district courts should be permitted to preliminarily freeze those assets despite the lack of legal tradition. See *Grupo Mexicano de Desarrollo, S. A. v. Alliance Bond Fund Inc.,* 527 U.S. 308 (1999). In 2001, the Court was divided on the issue of "catalyst theory," with RBG insisting that the Buckhannon care facility, whose litigation caused a change in law, be considered the prevailing party, even though the case was dropped without conclusion after that change. See *Buckhannon Board & Care Home Inc. v. West Virginia Department of Health and Human Resources,* 532 U.S. 598 (2001). The First Amendment rights of Minnesota judicial candidates formed the basis of *Republican Party of Minnesota v. White,* 536 U.S. 765 (2002), with the 5–4 majority insisting that the state's "announce clause" that prohibited candidates from announcing their views on legal and political issues was unconstitutional. RBG maintained that the clause acted as a safeguard to judicial impartiality. The 2003 decision in *American Insurance Assn. v. Garamendi,* 539 U.S. 396 (2003), nullified a California law that required insurance companies to disclose information regarding policies held by people in Europe from 1920 to 1945 in an attempt to help Holocaust victims. RBG argued that the law only required the disclosure of information, but did not authorize litigation of Holocaust claims. Finally, the 7–2 majority sent *Cheney v. United States District Court for D.C.,* 542 U.S. 367 (2004), back to the district court, stating that it should have considered separation-of-powers claims and that in order to stop discovery, proceedings should be considered because of the potential interference with presidential activity. RBG disagreed, stating that the district court would keep discovery within appropriate limits.

425 **"black and grim":** Blake and Hacker, " 'Brooding Spirit of the Law' "; Hacker email. Quotation is in Pauley, "Ruth Bader Ginsburg: Her View from the Bench."

425 **At the end of the 2012:** On June 24, 2013, RBG read her dissent for *University of Texas Southwestern Medical Center v. Nassar,* 570 U.S. ___ (2013), *Comcast Corp. v. Behrend,* 569 U.S. ___ (2013), and *Vance v. Ball State University,* 570 U.S. ___ (2013). The following day, she did the same for *Shelby County v. Holder,* 570 U.S. ___ (2013).

425 **Dissents from the bench:** Blake and Hacker, " 'Brooding Spirit of the Law,' " 7–8, and Liptak, "When Words on Paper Don't Convey Enough Ire," A12.

425 **In the process, a dissent:** See Christopher Schmidt's comments on dissents from the bench and the role of legal journalists and commentators, "Justice Sotomayor's First Oral Dissent," *ISCOTUS* (blog), April 25, 2014.

425 **Her image became that:** Alisha Parlapiano, "When the Eight-Member Supreme Court Avoids Deadlocks, It Leans Left," *New York Times,* June 27, 2016; Adam Liptak, "Chief Justice John Roberts Amasses a Conservative Record, and Wrath from the Right," *New York Times,* Sept. 28, 2015, A16: Adam Liptak, "Right Divided, Disciplined Left Steered Justices," *New York Times,* July 1, 2015, A1. As of the 2015 term, Sotomayor is ranked as slightly more liberal than RBG. The charts that *The New York Times* uses to demonstrate the individual ideological drift of the Supreme Court justices are based on Martin-Quinn scores, which quantify the interests of each justice relative to his or her legal decisions. See Andrew D. Martin and Kevin M. Quinn, "Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999," *Political Analysis* 10 (2002): 134–53.

425 **That he now wore:** Toobin, "After Stevens," 38–47.

425 **"I regard her as the founding":** Kenji Yoshino, "Sex Equality's Inner Frontier: The Case of Same-Sex Marriage," *Yale Law Journal* 122 (2013): 275–81, quotation on 280.

426 **Ginsburg responded with:** Ibid. In April 2016, Yale announced that its two new residential colleges would be named after Pauli Murray and Benjamin Franklin. Despite decades of alumni and student protest, the university also announced that the residential college named after the pro-slavery vice president John C. Calhoun would retain its name. See Glenda Elizabeth Gilmore, "At Yale, a Right That Doesn't Outweigh a Wrong," *New York Times,* April 29, 2016.

426 **On May 26, 2011:** See listing for the 2011 honorary degrees at www.harvard.edu. The video of the birthday celebration is in the possession of James Ginsburg.

427 **"Being so close":** Charlie Rose interview, "Justice Ruth Bader Ginsburg, Part 1," Oct. 10, 2016. Available at charlierose.com.

TWENTY · Race Matters

428 **They also raised the ire:** Perry, *Michigan Affirmative Action Cases,* 56, 59–60.

428 ***Grutter v. Bollinger* challenged:** On the intervening years, see Anthony S. Chen and Lisa M. Stulberg, "Racial Inequality and Race-Conscious Affirmative Action in College Admissions: A Historical Perspective on Contemporary Prospects and Future Possibilities," in Harris and Lieberman, *Beyond Discrimination,* 105–34. For a fuller account of the cases, see Perry, *Michigan Affirmative Action Cases*.

428 **The kind of forward-looking:** Brief for Amici Curiae 65 Leading American Businesses in Support of Respondents, on Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit, *Grutter v. Bollinger,* 539 U.S. 306 (2003) (Nos. 02-241 and 02-516); Consolidated Brief of Lt. Gen. Julius W. Becton Jr. et al. as Amici Curiae in Support of Respondents, on Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit, *Grutter v. Bollinger,* 539 U.S. 306 (2003), and *Gratz v. Bollinger,* 539 U.S. 244 (2003); *Grutter v. Bollinger,* 539 U.S. 306 (2003), 311–44, esp. 316 (O'Connor majority).

429 **"a compelling state interest":** *Grutter v. Bollinger,* 539 U.S. 306 (2003), 311–44, esp. 316 (O'Connor majority).

429 **Two students with identical:** Perry, *Michigan Affirmative Action Cases,* 56.

429 **Her application rejected:** Ibid., 64.

429 **In order to create:** Ibid., 56, 59–60.

429 **While the percentage:** Ibid.

429 **A nonminority candidate:** *Gratz v. Bollinger,* 539 U.S. 244 (2003), 303 (RBG dissenting).

430 **"a disguised quota":** Transcript of Oral Argument at 22, ibid.

430 **"the factor of race":** Ibid. at 270, 272 (Rehnquist majority).

430 **"This insistence on 'consistency' ":** Ibid. at 298–301 (RBG dissenting). On 301, RBG is quoting Stephen L. Carter, "When Victims Happen to Be Black," *Yale Law Journal* 97 (1987–88): 434.

430 **"Actions designed to burden":** *Gratz,* 539 U.S. at 301 (RBG dissenting).

430 **"the mere assertion of a laudable":** Ibid. at 301–4 (RBG dissenting).

431 **Former "foot soldiers":** Coyle, *Roberts Court,* 88. On the GOP's conservative egalitarianism, see Chen, *Fifth Freedom,* esp. chap. 6. In *League of United Latin American Citizens v. Perry,* 548 U.S. 399 (2006), Kennedy, joined by Stevens, Souter, RBG, and Breyer, ruled that one Texas voting district, 23, violated the Voting Rights Act and needed to be redrawn. The Court did not throw out the entire Texas districting plan, however. Scalia, Roberts, and Alito dissented to the redrawing of District 23. Roberts cited a previous decision upholding the constitutionality of a Latino district. But Kennedy did not dissent. Kennedy stated that District 23 had been redrawn in a way that clearly prevented Latino voters from electing a candidate of their choosing. For the Louisville case, see *Meredith v. Jefferson County Board of Education,* 548 U.S. 938 (2006). For the Seattle case, see *Parents Involved v. Seattle School District No. 1,* 551 U.S. 701 (2007).

431 "**The whole point":** Transcript of Oral Argument at 35, *Schuette v. Coalition to Defend Affirmative Action,* 572 U.S. ___ (2014).

431 **Rigorous scrutiny, he insisted:** *Grutter v. Bollinger,* 539 U.S. 306 (2003), 387–90 (Kennedy dissenting). On Kennedy's evolving views on race-equality cases, especially affirmative action, see Gerken, "Justice Kennedy and the Domains of Equal Protection," 104–30; also, Reva B. Siegel, "From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases," *Yale Law Journal* 120 (2011): 1278–366.

431 **With possibly five justices:** Opposition to affirmative action at the state level had been building since the 1990s. A *Washington Post*–ABC poll conducted in 2013 found that 76 percent of the U.S. population believed it should be terminated. Although Democrats were more supportive than Republicans, nearly eight in ten whites and African Americans and almost seven in eleven Hispanics objected to race-based admissions. See Scott Clement, "Most in U.S. Oppose Race-Based Admissions," *Washington Post,* June 12, 2013, A3. There was some speculation in the press that the increased resentment of race-based admissions was related to Obama's reelection.

431 **None proved more:** On Blum and his one-man Project on Fair Representation, see Joan Biskupic, "Special Report: Behind U.S. Race Cases, a Little-Known Recruiter," Reuters, Dec. 4, 2012; Morgan Smith, "One Man Standing Against Race-Based Laws," *New York Times,* Feb. 23, 2012, A21; Krissah Thompson, "A Supreme Courter," *Washington Post,* Feb. 26, 2013, C1; Liz Halloran, "Force Behind Race-Law Rollback Efforts Talks Voting Rights Case," NPR, Feb. 26, 2013. On his use of websites to recruit possible plaintiffs for affirmative-action cases, see Adam Liptak, "Unofficial Enforcer of Ruling on Race in College Admissions," *New York Times,* April 7, 2014, A16.

431 **UT, like other universities:** *Sweatt v. Painter,* 339 U.S. 629 (1950).

431 **In response, the state:** For a more detailed history, see *Fisher v. Texas,* 556 F. Supp. 2d 603 (U.S. Dist. 2008).

432 **The underlying objective:** For an argument on behalf of UT by the U.S. solicitor general, Donald B. Verrilli, see Transcript of Oral Argument at 59–72, *Fisher v. Texas,* 570 U.S. 279 (2013); also see comments of UT's director of admission, Kedra Ishop, in Adam Liptak, "Race and College Admissions, Facing a New Test by the Justices," *New York Times,* Oct. 8, 2012, A1.

432 **"special circumstances":** These included socioeconomic status, race, whether English is spoken at home, and whether the student came from a single-parent family.

432 **The university also committed:** *Fisher,* 556 F. Supp. 2d 603.

432 **"[T]he only other difference":** Quoted in Nicole Hannah-Jones, "A Colorblind Constitution: What Abigail Fisher's Affirmative Action Case Is Really About," *ProPublica,* March 18, 2003.

433 **She was also offered:** Ibid.

433 **When Fisher lost:** *Fisher,* 556 F. Supp. 2d 603, and *Fisher v. Texas,* 169 F.3d 295 (5th Cir. 2012).

433 **To show such solicitude:** Julie Dressner and Edwin Martinez, "The Scars of Stop-and-Frisk," *New York Times,* June 12, 2012; Reva B. Siegel, "The Supreme Court 2012 Term, Foreword: Equality Divided," *Harvard Law Review* 127, no. 1 (2013): 1–94, n310.

433 **The importance of the case:** Robert Barnes, "Court Keeps Alive Affirmative Action," *Washington Post,* June 25, 2013, A1.

433 **"independent add on":** Transcript of Oral Argument at 23, *Fisher v. University of Texas,* 570 U.S. 279 (2013).

433 **"Should someone who is one-quarter":** Ibid. at 35.

434 **As drafts circulated:** Biskupic, *Breaking In,* chap. 11.

434 **Thomas, like Sotomayor:** Sotomayor was a proud beneficiary of affirmative action, while Thomas felt that his degrees from Yale were cheapened as a result. See Sotomayor, *My Beloved World;* and Thomas, *My Grandfather's Son*.

434 **Sidestepping the decisive:** Biskupic, *Breaking In,* chap. 11. In the wake of *Grutter,* opponents of affirmative action in Michigan had successfully passed a ballot measure amending the state's constitution to ban race-conscious considerations in any state institution. *Schuette v. Coalition to Defend Affirmative Action,* a test of the ban's constitutionality, would come before the Court in October 2013.

434 **"available, workable race-neutral":** Italics mine. *Fisher,* 570 U.S. at 10 (Kennedy majority).

434 **"Janus-faced logic":** Quoted in Tribe and Matz, *Uncertain Justice*.

435 **She also took a swipe:** *Fisher,* 570 U.S. at (RBG dissenting).

435 **"I have said before":** Ibid.

435 **The conservative justices put *Fisher:*** Adam Liptak, "With Subtle Signals, Justices Request the Cases They Want to Hear," *New York Times,* July 7, 2015, A14.

436 **They also turned a blind eye:** In *United States v. Cruickshank,* 92 U.S. 542 (1875), the Supreme Court prevented the prosecution of whites who murdered freed people in Louisiana in order to prevent them from holding a public meeting, thereby limiting freedmen's right to bear arms and freely assemble. In *Hall v. DeCuir,* 95 U.S. 485 (1877), the Court struck down a Louisiana law that required racial integration in public transportation. In 1883, the Supreme Court refused to apply the Fourteenth Amendment to protect blacks and whites who married each other, and not long after that the Court declared that federal prosecutors could not charge twenty whites who had broken into a jail, beaten three black prisoners, and murdered a fourth. See *Pace v. Alabama,* 106 U.S. 583 (1883), and *United States v. Harris,* 106 U.S. 629 (1883). In the same year, the Court struck down the Civil Rights Act of 1875, declaring that the federal government did not have the power to regulate private actors who chose to discriminate. See *Civil Rights Cases,* 109 U.S. 3 (1883); *Pope v. William,* 193 U.S. 621 (1904).

436 **By World War II:** Keyssar, *Right to Vote,* chaps. 4–5.

436 **Their methods included intimidation:** For more extensive accounts, see Foner and Mahoney, *America's Reconstruction;* Litwack, *Trouble in Mind;* and Keyssar, *Right to Vote*.

436 **In 1965, only 335:** On Selma and voting rights, see Gary May, *Bending Toward Justice,* 53–170.

437 **Once national television:** Keyssar, *Right to Vote,* chap. 4.

437 **To expand the vote:** Thurber, *Republicans and Race,* 226.

437 **"It is wrong":** Lyndon Baines Johnson, "Address to a Joint Session of Congress on Voting Legislation," March 15, 1965, Washington, D.C.

437 **Facing a powerful:** Gary May, *Bending Toward Justice*. Though most southern Democrats voted negatively, forty southern congressmen voted for the VRA. Keyssar, *Right to Vote,* 211.

437 **"active participants":** Quotation in Pamela S. Karlan, "Loss and Redemption: Voting Rights at the Turn of a Century," *Vanderbilt University Law Review* 50 (1997), 316n84.

437 **The right to vote:** The question of what precisely constitutes a fair chance for minorities to have their policy interests represented and what procedures might achieve that result has become a matter of much debate. For ideas on this complex question, see esp. Guinier, *Tyranny of the Majority*.

437 **The Voting Rights Act of 1965:** Voting Rights Act of 1965, Public Law 89–110, Jan. 4, 1965, 79 Stat. 437. The original act was amended in 1975 to include other minorities, including Hispanic, Asian, and Native American citizens, who congressional hearings had established suffered discrimination. See Voting Rights Act Amendments of 1975, Public Law 94–73, Aug. 6, 1975, 89 Stat. 400.

438 **Eager to build the GOP:** Berman, *Give Us the Ballot,* 68–95, 123–44.

438 **Republican-nominated justices:** *City of Mobile v. Bolden,* 446 U.S. 55 (1980), 66 (Stewart majority).

438 **Von Spakovsky, in turn:** Berman, *Give Us the Ballot,* 213–35 and esp. chaps. 5–8. See also Pamela S. Karlan, "Lessons Learned: Voting Rights and the Bush Administration," *Duke Journal of Constitutional Law and Public Policy* 4 (2009): 17–20. According to an exhaustive study done by Loyola University Law School, voter fraud—the impersonation of someone in order to vote more than once or at all—was found in only thirty-one of one billion vote samples. Election fraud—ballot stuffing, vote buying, and machine rigging—is less rare. See Jim Rutenberg, "Overcome," *New York Times Magazine,* Aug. 2, 2015, 36. George Derek Musgrove refers to voter-restricting efforts as "harassment ideology," a movement that arose as a white backlash to the large number of African American officials being elected to office following the passage of the VRA. See *Rumor, Repression, and Racial Politics*. His research builds off the pioneering work of Mary R. Sawyer that examined the harassment of black elected officials, first in *The Dilemma of Black Politics* and then in *The Harassment of Black Elected Officials*.

439 **Most states with a significant:** Richard H. Pildes, "Political Avoidance, Constitutional Theory, and the VRA," *Yale Law Journal* Pocket Part 117 (2007): 148–54.

439 **GOP ascendency in what had:** On concerns as to how the "congruence and proportionality" requirement introduced in *City of Boerne v. Flores,* 521 U.S. 507 (1997), and its progeny might impact any changes in a new reauthorization bill, see Nathaniel Persily, "The Promise and Pitfalls of the New Voting Rights Act," *Yale Law Journal* 117 (2007): 192–95.

439 **Most important, any attempt:** Expansion of the coverage formula to include recent bad actors such as Florida and Ohio would also "heap a new and costly administrative scheme" onto jurisdictions unaccustomed to needing federal permission for voting law changes. See Persily, "Promise and Pitfalls of the New Voting Rights Act," 210.

439 **Since 1982, the Court:** *Flores,* 521 U.S. at 519 (Kennedy majority).

439 **Adherence to federalism:** Persily, "Promise and Pitfalls of the New Voting Rights Act," 180.

439 **The House and Senate Judiciary:** U.S. House, Subcommittee on the Constitution of the Committee on the Judiciary, *To Examine the Impact and Effectiveness of the Voting Rights Act,* Hearing, Oct. 18, 2005 (Serial No. 109–70) (Washington, D.C.: Government Printing Office, 2006).

439 **What emerged was evidence:** Ibid. Supporters of renewal were also aware that the Court's conservatives had been complaining about the cost to federalism imposed by Section 5. See *Miller v. Johnson,* 515 U.S. 900 (1995), 926.

440 **Nevertheless, "second generation":** Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Public Law 109-246, Section 2(b)(2)-(3), 120 Stat. 580, July 27, 2006.

440 **In what appeared:** Raymond Hernandez, "After Challenges, House Approves Renewal of Voting Rights Act," *New York Times,* July 14, 2006, A13.

440 **The Senate followed:** Carl Hulse, "By a Vote of 98–0, Senate Approves 25-Year Extension of Voting Rights Act," *New York Times,* July 21, 2006, A16; caption to photograph by Erik Jacobs, "Bush Signs Extension of Voting Rights Act," *New York Times,* July 28, 2006, A22. GOP congressmen from Georgia and Texas had been particularly active in stalling the House bill initially.

440 **"political avoidance":** I am indebted to Persily for many of these points.

440 **Constitutional scholars pointed:** Persily, "Promise and Pitfalls of the New Voting Rights Act," 191–92.

440 **New fiats from the Court:** See, for example, *Shaw v. Reno,* 509 U.S. 630 (1993); *Shaw v. Hunt,* 517 U.S. 899 (1996); *Miller v. Johnson,* 515 U.S. 900 (1995); *Bush v. Vera,* 517 U.S. 952 (1996); *United States v. Hayes,* 555 U.S. 415 (2009), 129 S. Ct. 1079; *Reno v. Bossier Parish School Board,* 528 U.S. 320 (2000). For contrasting views of *Shaw* and its progeny, see Kousser, *Colorblind Injustice,* and Thernstrom, *Voting Rights—and Wrongs*. For a superb analytical justification for race-based redistricting as a remedy, see Pamela S. Karlan and Daryl J. Levinson, "The Importance of Political Deliberation and Race-Conscious Redistricting: Why Voting Is Different," *University of California Law Review* 84 (1996): 1201–32.

440 **"If it weren't for the Voting":** Quoted in Adam Liptak, "Review of Voting Rights Presents Test of History v. Progress," *New York Times,* April 28, 2009, A16.

441 **His equally wary Latino:** Nina Perales, "*Shelby County v. Holder:* Latino Voters Need Section 5 Today More than Ever," *SCOTUSblog,* Feb. 12, 2013.

441 **politically "open market":** Blum, *Unintended Consequence of Section 5 of the Voting Rights Act,* 7.

441 **"perhaps the most important":** RBG, "Remarks for Second Circuit Judicial Conference," Bolton Landing, N.Y., June 12, 2009, www.supremecourt.gov.

441 **His aggressive questioning:** Berman, *Give Us the Ballot,* 149–52. For an example, see Transcript of Oral Argument at 27–29, 31–32, *Northwest Austin Municipal Utility District No. 1 v. Holder,* 557 U.S. 193 (2009).

441 **"insufficient and that conditions":** *Northwest Austin v. Holder,* 557 U.S. 193 (2009), 8 (Roberts majority).

441 **"The Act imposes":** Ibid., italics mine. The only dissent was that of Thomas, who would have declared Section 5 unconstitutional. Roberts, supporting his concerns about the impact of Section 5 on federalism, referred to a "tradition" of equal sovereignty and to *South Carolina v. Katzenbach* (1996), neither of which supports his dicta. See Zachary S. Price, "NAMUDNO's Non-existent Principle of State Equality," *New York University Law Review* 88 (2013): 24–40.

442 **"a departure from the fundamental":** *Northwest Austin,* 557 U.S. 193 (2009), 8 (Roberts majority).

442 **"the evil that Section 5":** Ibid.

442 **"a canny strategist":** Adam Liptak, "Roberts Court Shifts Right, Tipped by Kennedy," *New York Times,* July 1, 2009, A1.

442 **"anticipatory overruling":** Richard L. Hasen, "Anticipatory Overrulings, Invitations, Time Bombs, and Inadvertence: How Supreme Court Justices Move the Law," *Emory University Law Journal* 61 (2012): 782–84.

442 **"Remember that line":** Quoted in "The Battle, Not the War, on Voting Rights," *Room for Debate* (blog), *New York Times,* June 22, 2009.

442 **When Congress failed:** Blum had discovered the Calera conflict while surfing the Justice Department's website and cold-called a county official offering to finance a suit if the Court ruled narrowly in *Northwest Austin*. See Biskupic, "Special Report: Behind U.S. Race Cases, a Little-Known Recruiter."

442 **The Civil Rights Division had rejected:** Transcript of Oral Argument at 54, *Shelby County v. Holder,* 570 U.S. 2 (2013).

442 **Turned down in district court:** *Shelby County v. Holder,* 811 F. Supp. 2d 424 (U.S. Dist. 2011). The much-publicized case elicited the predictable lineup of amici briefs. Allied on the color-blind side were conservative advocacy groups such as the Cato Institute and the Pacific Legal Foundation along with the attorneys general of Texas, Arizona, and Alaska. Color-conscious policy adherents supporting Section 5 included minority legal defense groups, constitutional scholars and academics, the congressional leaders Senator Harry Reid and Representative John Lewis, who had been severely beaten on "Bloody Sunday" in Selma, and the attorneys general of four states covered by Section 5. See Briefs for *Shelby County v. Holder,* 679 F.3d 848 (D.C. Cir. 2012) (No. 12-96),

442 **Losing again in a split decision:** *Shelby County,* 679 F.3d 848.

442 **The question on which:** Grant of Certiorari at 12, *Shelby County,* 570 U.S. 2.

443 **At the Capitol, a ceremonial:** Nia-Malika Henderson, "Rosa Parks Honored with Capitol Statue," *Washington Post,* Feb. 27, 2013; Laura W. Murphy, "The State of Equality and Justice in America: The Pendulum Swings Between Joy and Despair," *Washington Post,* March 4, 2013.

443 **"Just think about this state":** Transcript of Oral Argument at 5, *Shelby County,* 570 U.S. 2.

444 **the "equal footing" doctrine:** Ibid. at 21–26. RBG's reference was to *South Carolina v. Katzenbach,* 383 U.S. 301 (1966).

444 **"a bigger problem in Virginia":** Transcript of Oral Argument at 40, *Shelby County,* 570 U.S. 2.

444 **"Is it the government's contention":** Ibid. at 29–31, 41.

444 **"perpetuation of a racial":** Ibid. at 47.

444 **Sotomayor and Kagan zeroed in:** Ibid. at 66.

444 **The sharp ideological:** Robert Barnes, "Justices Weigh Voting Rights," *Washington Post,* Feb. 28, 2013, A1.

445 **"Why the [White] South":** William F. Buckley Jr., "Why the South Must Prevail," *National Review,* Aug. 24, 1957, 149.

445 **The civil rights movement advanced:** Nancy MacLean, "Neo-Confederacy Versus the New Deal: The Regional Utopia of the Modern American Right," in Lassiter and Crespino, *Myth of Southern Exceptionalism,* 311.

445 **Reagan, who had opposed:** Bob Herbert, "Righting Reagan's Wrongs," *New York Times,* Nov. 13, 2007, A29.

445 **"state sovereignty":** *Northwest Austin* had stimulated legal scholarship on the majority's "reinvention" of state sovereignty or, as Franita Tolson would demonstrate, its confusion of state autonomy and congressional sovereignty. See Franita Tolson, "Reinventing Sovereignty? Federalism as Constraint on the Voting Rights Act," *Vanderbilt Law Review* 65 (2012): 1195–259. The constitutional law professor Joseph Fishkin called

"state sovereignty" a concept that "seems poised to rise, zombie-like, in clothes just new enough to avoid any obvious shades of the 'senatorial toga of [John C.] Calhoun.'" See "The Dignity of the South," *Yale Law Journal Online* 175 (2013), Forum, June 8, 2013.

The concept would receive more attention from legal scholars following its reemergence in *Shelby v. Holder*. Judge Richard A. Posner bluntly stated, "This is a principle of constitutional law of which I have never heard—for the excellent reason that . . . there is no such principle." See Richard A. Posner, "The Voting Rights Act Ruling Is About the Conservative Imagination," *Slate: Supreme Court 2013: The Year in Review,* June 26, 2013. After a lengthy investigation of the historical record, Abigail Molitor concluded that while the concept had not emerged out of the blue, it was not the fundamental principle that the majority claimed it to be in *Shelby*. See Abigail B. Molitor, "Understanding Equal Sovereignty," *University of Chicago Law Review* 81 (2014): 1839–82, see esp. 1877.

For the latest in a long line of books critiquing the turn taken in the Court's federalism jurisprudence under Rehnquist, see Barber, *Fallacies of States' Rights*.

446 **It was the most significant:** Samuel Issacharoff, "Beyond the Discrimination Model on Voting," *Harvard Law Review* 127 (2013): 102.

446 **"the Act imposes current burdens":** *Shelby County v. Holder,* 570 U.S. 2 (2013), 2, 9, 15–16 (Roberts majority).

446 **"Our decision in no way":** Ibid. at 28.

446 **Consistent with the post–Civil War amendments:** Ibid., 1 (RBG dissenting).

446 **"the grand aim of the act":** Ibid. at 35.

447 **Evident as well:** Ibid. at 7, 9–20.

447 **"whether Congress has rationally":** Ibid. at 10, 23, 30.

447 **"unprecedented extension of the equal":** Ibid. at 31, 36. For a devastatingly authoritative indictment of Roberts's decision, see Ackerman, *Civil Rights Revolution,* chap. 14.

448 **"That commitment has been disserved":** MLK and RBG quotations in Mark Walsh, "A 'View' from the Court," *SCOTUSblog,* June 25, 2013.

448 **This was the second time:** John Paul Stevens, "The Court and the Right to Vote: A Dissent," *New York Review of Books,* Aug. 15, 2013. For an equally critical and far more detailed analysis, see Reva B. Siegel, "Supreme Court 2012 Term, Foreword," esp. 9–74.

448 **Texas promptly announced:** On states other than Alabama, especially Texas with its growing Latino population, see Jim Rutenberg, "Block the Vote," *New York Times Magazine,* Dec. 20, 2015, 32–37, 57.

448 **In North Carolina, where Republicans:** Adam Liptak, "Justices Void Oversight of States, Issue at Heart of Voting Rights Act," *New York Times,* June 26, 2013, A1. See also Richard Fausset, "North Carolina Is a Battlefield for Voter Laws," *New York Times,* March 11, 2016, A1. For an authoritative account of how racial lines are being redrawn by the negative portrayal of the rapidly growing Latino population and the impact on politics, see Abrajano and Hajnal, *White Backlash*.

448 **"Disgusting," declared Rosanell Eaton:** Both quotations in Rutenberg, "Overcome," 30. Obama had carried the state in 2008.

448 **"The past is never dead":** Faulkner, *Requiem for a Nun,* act 1, scene 3. Legislatures in Georgia, Florida, South Carolina, Tennessee, West Virginia, Arkansas, North Carolina, and Virginia created new restrictions in the South. West Virginia was the only state that had a Democrat-controlled legislature and governor. Mississippi's changes were passed by a voter referendum. See "New Voting Restrictions in Place for 2016 Presidential Election," Brennan Center for Justice at NYU School of Law, Nov. 2, 2016.

449 **Spurred by specious claims:** Elizabeth Drew, "Big Dangers for the Next Election," *New York Review of Books,* May 21, 2015. By 2016, Democrats had total control of only seven states.

449 **By 2016, a total:** Those fourteen states are Alabama, Arizona, Indiana, Kansas, Mississippi, Nebraska, New Hampshire, Ohio, Rhode Island, South Carolina, Tennessee,

Texas, Virginia, and Wisconsin. Georgia, North Carolina, and North Dakota were removed following successful legal challenges. See "New Voting Restrictions in Place for 2016 Presidential Election."

TWENTY-ONE · The Right Thing to Do

450 **At a time when:** Robert Barnes, "Supreme Court Justice to Conduct Gay Nuptials," *Washington Post,* Aug. 31, 2013, A1.

450 **"apartheid of the closet":** William N. Eskridge Jr., "Privacy Jurisprudence and the Apartheid of the Closet, 1846–1961," *Florida State University Law Review* 24 (1997): 703–840.

450 **Years of slow, painful:** For a definitive new history of the struggle for same-sex marriage, see Nathaniel Frank, *Awakening: How Gays and Lesbians Brought Marriage Equality to America* (Cambridge: Harvard University Press, 2017).

450 **Leading the drumbeat:** By the 1970s, when open expressions of anti-Semitism and racism were no longer socially acceptable and anticommunism was subsiding, homosexuals and feminists became the new bête noire of the religious Right. The organizations within that coalition differ somewhat in the ways they challenge the LGBT movement but are united in the passion with which they fight. See Galligher and Bull, *Perfect Enemies*.

450 **For those convinced that:** Nussbaum, *From Disgust to Humanity,* esp. chap. 5.

451 **"perfectly capable of filling":** *Perry v. Schwarzenegger,* 704 F. Supp.2d 921 at 940 (N.D. Cal. 2010), 244 (Cott testimony).

451 **Political radicals found challenge:** See, for example, Johnston, *Lesbian Nation;* Martin Duberman writes of the emergence of a gay male "machismo" style in the wake of Stonewall, the national shift toward greater political conservatism in the 1970s, and Anita Bryant's antigay campaign in Florida, as well as other forms of backlash—none of which would have whetted the appetite for gay marriage. See Duberman, *Martin Duberman Reader*.

451 **Resistance would soften:** Shilts, *And the Band Played On*.

451 **Understandably, some in the gay community:** Klarman, *From the Closet to the Altar,* chap. 3.

452 **Parental responsibilities, in turn:** Mamo, *Queering Reproduction;* Rivers, *Radical Relations,* chap. 7. Same-sex couples were able to target sympathetic judges, making the institutional context in which they had to operate less vulnerable to opposition than has been the case with other items on the gay agenda. See Mucciaroni, *Same Sex, Different Politics*.

452 **These developments, characteristic:** For an excellent, brief account of the structural and cultural developments occurring from the mid-1960s onward that contributed to the change in the model and meaning of marriage, see Nancy F. Cott's groundbreaking, *Public Vows,* chap. 9, esp. 202–4. Pushback came from the family values movement, which was part of the social and religious Right.

452 **Yet in a social revolution:** Opposition was in part generational and in part political. For concerns that moving same-sex marriage to the top of the gay agenda represented mainstreaming the movement and diversion of focus from structural inequalities of greater importance to the lives of working-class LGBT people, see Cathy J. Cohen, "What Is This Movement Doing to My Politics?," *Social Text* 61 (Winter 1999): 111–18; Martin B. Duberman, "Class Is a Queer Issue," in *Martin Duberman Reader,* 354–61; and John D'Emilio, "The Campaign for Marriage Equality: A Dissenting View," in *In a New Century,* chap. 26.

452 **The justices had waited:** Such statutes still existed in only thirteen states and were rarely enforced. See Eskridge, *Dishonorable Passions,* chap. 9.

452 **"Liberty presumes an autonomy":** *Lawrence v. Texas,* 539 U.S. 558 (2003), 562 (Kennedy majority). See Richards, *Sodomy Cases*.

452 **Friends and foes alike:** In the dissent, Scalia wrote that state laws against same-sex marriage would not be sustained. See *Lawrence,* 539 U.S. at 590 (Scalia dissenting). For press on same-sex marriage after *Lawrence,* see Rick Santorum, "Gay Unions: A Matter of Rights or a Threat to Traditional Marriage?," *USA Today,* July 10, 2003, A13.

452 **But when a judge in Hawaii:** On May 5, 1993—and in a subsequent clarification on May 27—the Supreme Court of Hawaii remanded the case to trial court to determine whether the state could meet the standard of strict scrutiny in demonstrating that the denial of marriage licenses to same-sex couples compelled state interests and did not unnecessarily curb constitutional rights. In December 1996, Judge Kevin S. C. Chang ruled in favor of the plaintiffs, instructing the state to issue marriage licenses to qualified same-sex couples. *Baehr v. Lewin,* 74 Haw. 530, 852 P.2d 44 (1993), reconsideration and clarification granted in part, 74 Haw. 645, 852 P.2d 74 (1993); *Baehr v. Miike,* Circuit Court for the First Circuit, Hawaii No. 91-1394.

453 **"A dream issue":** Klarman, *From the Closet to the Altar,* 59.

453 **DOMA further stipulated:** Defense of Marriage Act, H.R. 3396, 104th Cong., 1st sess. (1996), sec. 7.

453 **"bedrock of civilization":** Klarman, *From the Closet to the Altar,* chap. 4. Senator Robert Byrd of West Virginia speaking for DOMA to the Senate floor, H.R. 3396, *Congressional Record,* 104th Cong., 2nd sess., 1996, 142, S10109. Representative Gerry Studds objected to such inflammatory and offensive language being used. Senator Phil Gramm from Texas stated, "I stand with the traditional family. I do not believe 5,000 years of recorded history have been in error. I believe the traditional family—the union of a man and a woman, upon which our entire civilization is based—is unique, and I believe it is the foundation of our prosperity, our freedom, and our happiness. I want to defend this and I am confident that we will do so on this very day" (S10105).

453 **Having vetoed the Partial-Birth:** Note the socially conservative language also in the Personal Responsibility and Work Opportunity Act of 1996, Pub. L. No. 104-193.

453 **"politically clobbered":** Becker, *Forcing the Spring,* 10. On actions of the Clinton administration with respect to the LGBT community, see Craig A. Zimmerman, "A 'Friend' in the White House? Reflections on the Clinton Presidency," in D'Emilio, Turner, and Vaid, *Creating Change,* chap. 5; also, Juliet Eilperin, "Raw Politics Explains Why DOMA Got Wide Support in 1996," *Washington Post,* March 28, 2013.

453 **On November 18:** *Goodridge v. Department of Public Health,* 798 N.E.2d 941 (Mass. 2003).

453 **Their aim was to put:** Only six states had defined marriage as the union of a man and a woman prior to 2004, although thirty-one states had statutes reflecting that definition. In the wake of *Lawrence* and *Goodridge,* Mississippi, Missouri, and Oregon passed ballot measures adhering to the traditional definition, while Arkansas, Georgia, Kentucky, Louisiana, Michigan, North Dakota, Ohio, Oklahoma, and Utah approved measures prohibiting recognition of same-sex civil unions. See Sue Connell, "The Money Behind the 2004 Marriage Amendments," Institute on Money in State Politics, Jan. 27, 2006, followthemoney.org. President George W. Bush backed a federal marriage amendment to the Constitution, which Democrats blocked.

453 **"Our journey is not complete":** Barack Obama, Inaugural Address, Jan. 21, 2013.

454 **As a state senator:** Jo Becker, "'Mr. President, How Can We Help You Evolve More Quickly?,'" *New York Times Sunday Magazine,* April 20, 2014, MM20.

454 **"equal citizenship stature":** Neil S. Siegel, "Equal Citizenship Stature: Justice Ginsburg's Constitutional Vision," *New England Law Review* 43 (2009): 799–855. Suggesting the similarities in the basic constitutional outlooks of the justice and the president,

Siegel uses to great effect Senator Obama's 2008 speech on race relations, "Address at the National Constitution Center: A More Perfect Union," National Constitution Center, March 18, 2008.

454 **Fortuitously, the president's hand:** Amid the homophobic backlash surrounding DOMA, activists in what had become the LGBT movement used the media to full advantage. Forty-two million viewers watched as Ellen DeGeneres "came out" in a 1997 episode of the ABC sitcom *Ellen* that landed the lesbian comedian on the cover of *Time* magazine. Revealing her sexual orientation also earned her an attack from the Reverend Jerry Falwell, who labeled her Ellen "Degenerate." The sitcom *Will & Grace* brought gay characters and a gay milieu into homes across the country, becoming the most watched television program for young adults in the eighteen to forty-nine age bracket. See Bruce Handy, "He Called Me Ellen Degenerate?," *Time,* April 14, 1997, 86, and Jack Myers, "Will & Grace: The TV Series That Changed America," *HuffPost Gay Voices,* Aug. 30, 2014.

454 **By 2012, Log Cabin:** Nick Wing, "Laura Bush: Gay Marriage Should Be Legal, Abortion Should Remain Legal," *Huffington Post,* May 5, 2010; Dan Eggen, "Cheney Comes Out for Gay Marriage, State-by-State," *44: The Obama Presidency* (blog), *Washington Post,* June 1, 2009.

454 **Thirty states now had:** "Same-Sex Marriage Laws," National Council on State Legislatures, June 6, 2015, ncsl.org; Ross Toro, "States Where Gay Marriage Is Legal (Infographic)," *Live Science,* www.livescience.com, April 26, 2013.

454 **National polls consistently:** Klarman, *From the Closet to the Altar,* 218.

454 **Other nations led the way:** These nations included Canada, the Scandinavian countries, Belgium, the Netherlands, Portugal, Spain, and South Africa. Pierceson, *Same-Sex Marriage in the United States,* chap. 3.

454 **Five months before:** Becker, *Forcing the Spring,* chap. 30.

454 **Their bold move alarmed:** On prior strategy, see Yoshino, *Speak Now,* 43–48.

455 **"neither the time":** Ibid., 24. Though an unlikely champion of progressive causes, Olson was no stranger to gay rights. When serving in the Reagan Justice Department, he had insisted that a prosecutor could not be denied a promotion because of his sexual preference. And as solicitor general under George W. Bush, he had objected to the Federal Marriage Amendment, telling Bush that it was bad policy and had no place in the Constitution. Religious belief could not justify government restrictions on civil marriage either legally or morally. See Becker, *Forcing the Spring,* 13; Yoshino, *Speak Now,* 22–24.

455 **Because neither Governor:** See Becker, *Forcing the Spring,* and Yoshino, *Speak Now.*

455 **But Governor Schwarzenegger objected:** Ibid., 16–21. On California's prior history of conflict over marriage equality, see Yoshino, *Speak Now.*

455 **Then, in May 2008:** Jean-Paul Renaud, "Rush Expected for Marriage Licenses," *Los Angeles Times,* June 20, 2008, B5.

455 ***Perry v. Schwarzenegger:*** *Perry v. Schwarzenegger* was renamed *Perry v. Brown* when Jerry Brown became governor in 2011. When both governors refused to defend it, Dennis Hollingsworth—the official sponsor of Prop 8—stepped in, causing the case to be renamed *Hollingsworth v. Perry.*

455 **Quashing the injunction:** *Perry v. Schwarzenegger,* 704 F. Supp.2d 921 at 940 (N.D. Cal. 2010) (Motion for Preliminary Injunction).

456 **In addition, he asked both sides:** Ibid. (Summary Judgment Hearing).

456 **"Our decisions have declined":** *Christian Legal Society Chapter v. Martinez,* 561 U.S. 661 (2010), 23 (RBG majority).

456 **As Adam Liptak had pointed out:** Adam Liptak, "Looking for Time Bombs and Tea Leaves on Gay Marriage," *New York Times,* July 19, 2010, A11.

456 **"conjecture, speculation, or fears":** *Perry v. Schwarzenegger,* 704 F. Supp.2d at 940, 24–26 (Walker opinion).

457 **After two more years:** *Perry v. Brown,* 671 F.3d 1052 (9th Cir. 2012).

457 **It also skirted the question:** Kennedy had written the opinion not only in *Lawrence v. Texas* but also in *Romer v. Evans,* striking down a Colorado amendment barring local gay rights ordinances. Even during his earlier tenure on the Ninth Circuit, Kennedy, who was from Northern California, had authored an opinion in 1980 that was quite gay-friendly. See *Romer v. Evans,* 517 U.S. 620 (1996), 623–24; *Beller v. Middendor,* 632 F.2d 788 (9th Cir. 1980).

457 **One of the two:** The district court issued its decision on *Perry* in August 2010, with the circuit court ruling following in February 2012. Windsor won a summary judgment in June 2012, a decision that was upheld by the Second Circuit Court of Appeals four months later. *Perry v. Schwarzenegger,* 704 F. Supp.2d at 940; *Perry v. Brown,* 671 F.3d 1052; *Windsor v. United States,* 833 F. Supp.2d 394 (SDNY 2012); *Windsor v. United States,* F.3d 169 (2d Cir. 2012).

457 **In February 2009:** Unless otherwise indicated, this, and the following paragraphs, draw from Ariel Levy, "The Perfect Wife," *New Yorker,* Sept. 30, 2013, 54.

457 **"powerhouse corporate litigator":** See Kaplan's web page at Kaplan & Company, LLP, www.kaplanandcompany.com.

458 **Kaplan would also ask:** Brief for the Respondent at 15, *United States v. Windsor,* 570 U.S. ___ (2013).

458 **With DOMA challenges:** The criteria for a classification deserving intermediate scrutiny include illegitimacy, gender, race, national ancestry, and ethnic origin. The classification must be "substantially related to a legitimate state interest" to survive constitutional attack. See *Mills v. Habluetzel,* 456 U.S. 91 (1982). My account closely follows Becker, *Forcing the Spring,* 255–59.

459 **"the right thing to do":** Becker, *Forcing the Spring,* 248–49, with Holder's quotation on 249.

459 **Kaplan got a call:** Ibid., 259.

459 **If Kaplan and her client:** *Windsor v. United States,* 833 F. Supp.2d 394 (S.D.N.Y. 2012). The district court judge Barbara S. Jones based her ruling on rational scrutiny.

459 **Applying intermediate scrutiny:** Ibid.

459 **Only eight states:** Massachusetts, Maine, New Hampshire, Vermont, Connecticut, New York, Iowa, and Washington.

460 **Thomas, Alito, and either Roberts:** Adam Liptak, "Who Wanted to Take the Case on Gay Marriage? Ask Scalia," *New York Times,* March 3, 2015, A1.

460 **Both cases could conceivably:** Adam Liptak, "Justices to Hear Two Challenges on Gay Marriage," *New York Times,* Dec. 8, 2012, A1.

460 **No one doubted:** Adam Liptak, "Questions and Answers About a Potentially Decisive Moment for Gay Americans," *New York Times,* March 26, 2013, A14.

460 **Willing to brave the cold:** Jeremy W. Peters, "Cold, Wet Wait for Tickets to Supreme Court's Same-Sex Marriage Cases," *New York Times,* March 25, 2013, A14.

460 **"some 40,000 children":** Transcript of Oral Argument at 21, *Hollingsworth v. Perry,* 570 U.S. ___ (2013).

461 **"It is impossible":** Ibid. at 14–18. Quotations appear on 14 and 18.

461 **"You can force the child":** Ibid. at 44–45.

462 **But neither the solicitor:** Ibid. at 49–63. Quotation appears on 59.

462 **"You are at a real risk":** Transcript of Oral Argument at 59–70, *United States v. Windsor,* 570 U.S. ___ (2013). Quotations appear on 59 and 70.

462 **"It's not as though":** Ibid. at 70.

462 **"Congress decided to reflect":** Ibid. at 74.

462 **"Look, we are not going":** Ibid. at 74–80. Quotation appears on 74–75.

463 **"[P]olitical figures are falling":** Ibid. at 106–8.

463 **"I'm Edie Windsor":** Jeremy W. Peters, "Plaintiff, 83, Is Calm Center in a Legal and Political Storm," *New York Times,* March 28, 2013, A1. The quotations are from Wind-

sor except for "intangible but unmistakable changed," which is Peters's paraphrase of her words.

464 **"skim milk marriage":** Adam Liptak and Peter Baker, "Justices Cast Doubt on U.S. Law Defining Marriage," *New York Times,* March 28, 2013, A1.

464 **The Los Angeles reporter:** Three more states—Rhode Island, Delaware, and Minnesota—were about to legalize same-sex marriage. Jennifer Medina, "Anticipation Turns to Acceptance as California Awaits Marriage Ruling," *New York Times,* June 24, 2013, A15.

464 **"The federal statute is invalid":** *Windsor,* 570 U.S. at 23–26 (Kennedy majority).

464 **"By formally declaring":** While rationales and predictions differed, Scalia, Roberts, Alito, and Thomas issued three separate dissents, with Thomas joining Alito's dissent on Parts II and III. Scalia's quotation is ibid. at 24 (Scalia dissenting).

464 **With Judge Walker's decision:** Kate Mather, "Kamala Harris Calls for Same-Sex Marriage to Resume 'Immediately,'" *Los Angeles Times,* June 26, 2013.

465 **Yet by defining as unconstitutional:** Yoshino, *Speak Now,* 262.

465 **Over the next year:** Adam Liptak, "Supreme Court Delivers Tacit Win to Gay Marriage," *New York Times,* Oct. 7, 2014, A1.

465 **As Ginsburg explained:** Robert Barnes, "Justices Agree to Hear Case on Gay Marriage," *Washington Post,* Jan. 17, 2015, A1.

465 **Leaving the decisions:** Linda Greenhouse, "Something Happening Here," *New York Times,* Oct. 15, 2014.

465 **Adam Liptak suggested:** Adam Liptak, "In Same-Sex Marriage Calculation, Justices May See Golden Ratio," *New York Times,* Nov. 24, 2014, A16. Liptak notes that neither Scalia nor Thomas appears to have been part of the decision.

466 **When the case reached:** *Obergefell v. Wymyslo,* No. 1:13-cv-501 (S.D. Ohio 2013); *Tanco v. Haslam,* No. 3:13-cv-01159 (M.D. Tenn. 2014); *DeBoer v. Snyder,* No. 12-CV-10285 (E.D. Mich. 2014); *Bourke v. Beshear,* No. 3:13-CV-750-H (W.D. Ky. 2014).

466 **Ruling against the plaintiffs:** *DeBoer v. Snyder,* 772 F.3d 388 (6th Cir. 2014).

466 **Does the Fourteenth Amendment:** David Savage, "High Court to Rule on Gay Unions," *Los Angeles Times,* Jan. 17, 2015, A1. In *DeBoer v. Snyder,* Michigan officials had requested an initial en banc hearing—a request for all Sixth Circuit judges to hear the appeal rather than just the three-judge panel—due to the importance of the case and increasing the likelihood of an expeditious consideration. DeBoer's attorneys countered that a panel hearing, rather than an en banc hearing, would most likely "expedite the court's consideration of the case." In addition, similar appeals in other circuits had been heard by three-judge panels, including *Hollingsworth v. Perry*. The request was denied. Neither party in *Hollingsworth* requested an initial en banc review at the district level. After the Sixth Circuit upheld the ban, all four plaintiffs opted to appeal directly to the Supreme Court, bypassing the option for an en banc hearing. See Plaintiffs' Appellees' Response to State Defendants-Appellants' Petition for Initial Hearing En Banc at 2–4, *DeBoer v. Snyder*.

466 **Indicative of the rapidly:** Not surprisingly, 148 amici briefs poured into the Court—double the number addressing both procedural issues and the merits of the cases. Brief of 167 Members of the U.S. House of Representatives and 44 U.S. Senators as Amici Curiae in Support of Petitioners and Brief of 57 Members of U.S. Congress as Amici Curiae in Support of Respondents, *Obergefell v. Hodges,* 576 U.S. ___ (2015).

466 **Also, his three prior decisions:** Adam Liptak, "Surprising Friend of Gay Rights Movement in the Highest of Places," *New York Times,* Sept. 2, 2013, A10.

467 **When the Court struck:** Transcript of Oral Argument on Question 1, *Obergefell v. Hodges,* 576 U.S. ___. RBG's comments regarding Louisiana appear on 70–72.

467 **Kagan also pointed:** Ibid. at 23–26.

467 **"[I]f you prevail here":** Ibid. at 22.

467 **Many gay couples:** Ibid. at 28–41, esp. 28–29.

468 **"If you prevent people":** Ibid. at 82. Arguments the following day proved anticlimactic inasmuch as a nationwide ruling on marriage equality would render moot the question of states' recognition of same-sex marriages performed elsewhere in the United States. See Transcript of Oral Argument on Question 2, ibid.

468 **But that did not stop:** See Mello, *Courts, the Ballot Box, and Gay Rights,* 1–2. Mello, a political scientist, argues that the Supreme Court had yet to determine a consistent answer as to whether citizens can use ballot measures or referendums to vote directly on issues related to fundamental rights. *Obergefell* held the fate of twenty-eight separate ballot measures defining marriage as between one man and one woman. In addition to *Obergefell,* the Court issued a 6–2 plurality decision defending Michigan's right to determine affirmative-action policy through the ballot measure process (RBG concurred with Sotomayor's dissent; Kagan did not participate in the case). See *Schuette v. Coalition to Defend Affirmative Action,* 572 U.S. ___ (2014) (Kennedy majority). Shortly after the *Obergefell* decision, RBG delivered the 5–4 majority opinion in *Arizona State Legislature v. Arizona Independent Redistricting Commission,* 576 U.S. ___ (2015), upholding Arizona voters' right to alter their redistricting policy through popular referendum.

468 **"People looked around":** Adam Liptak, "Justices' Words Are Combed for Clues as Major Decisions Loom at Court," *New York Times,* June 16, 2015, A16.

468 **"The right to marry":** *Obergefell,* 576 U.S. at 3 (Kennedy majority).

469 **"new insights and societal":** Ibid. at 4; RBG, Breyer, Sotomayor, and Kagan joined in the ruling.

469 **Kennedy's words elicited:** Mark Sherman, "Court Declares Nationwide Right to Same-Sex Marriage," *Washington Post,* June 26, 2015.

469 **Roberts was so upset:** *Obergefell,* 576 U.S. ___ (Roberts dissenting).

469 **"as pretentious as its content":** Ibid. at 1, 6–8 (Scalia dissenting).

469 **Alito and Thomas:** Ibid. (Alito and Thomas dissenting). Legal scholars welcoming the ruling acknowledge that in landmark cases like *Brown, Griswold,* and *Obergefell* doctrine provides a set of arguments and justifications for positions and decisions that shape the surrounding legal, political, and cultural context in which the Court intervenes. Yet the justices who write them do not always produce models of legal reasoning as was the case in *Brown* and *Griswold*. See, for example, Michael Klarman, "Marriage Equality and Racial Equality," *Harvard Law Review* 127 (Nov. 2013): 127–60, and Douglas NeJaime's response, "Doctrine in Context," *Harvard Law Review Forum* 127 (Nov. 2013): 10–18.

469 **"affirms what millions":** Robert Barnes, "Supreme Court Rules in Favor of Gay Marriage," *Washington Post,* June 27, 2015, A1.

469 **"America has taken one":** Jim Obergefell, "My Husband," whitehouse.com, June 26, 2015.

469 **Meanwhile, jubilant crowds:** Barnes, "Supreme Court Rules in Favor of Gay Marriage"; "Crowds Celebrate Same-Sex Marriage Ruling at Historic Stonewall Inn," newyork.cbslocal.com, June 26, 2015; Janet O and Elissa Harrington, "Crowd Gathers in San Francisco to Celebrate Historic Same-Sex Marriage Ruling," abc7news.com, June 26, 2015; "A Rainbow Revolution," lgbtweekly.com, June 27, 2015.

469 **"conscience clause":** Erik Eckholm, "Conservative Lawmakers and Religious Groups Seek Exemptions After Ruling," *New York Times,* June 27, 2015, A14; Sarah Pulliam Bailey and Michelle Borenstein, "Faith-Based Groups Fear Losing Their Tax-Exempt Status and Federal Funding," *Washington Post,* June 27, 2015, A10; Campbell Robertson and Richard Pérez-Peña, "Bills on 'Religious Freedom' Upset Capitols in Two States," *New York Times,* April 1, 2015, A1. According to the National Conference of State Legislatures, twenty-one separate states already have some form of religious freedom acts. An additional fifteen states debated religious freedom bills during 2015, including Mississippi, Georgia, and North Carolina. See www.ncsl.org. Public and corporate backlash forced the governors to either veto or consider modifying the bills. Efforts failed in

Montana, South Dakota, Utah, West Virginia, and Wyoming. In North Carolina, the debate has spilled over onto the issue of transgendered individuals being allowed to use the bathroom for whichever gender they identify with rather than the one designated for their birth sex.

469 **"The Fortune 500":** Jonathan Martin, "Parties Trade Places in Culture Wars in Skirmish over Religious Rights," *New York Times,* April 3, 2015; Jacob Bogage, "Marking Cultural Shift, Corporations Express Support for Landmark Decision," *New York Times,* June 26, 2015, A11.

470 **"taking discriminatory action":** H.R. 2802, 14th Cong. (2015).

470 **Infused with the rationale:** On this concept, see Kenji Yoshino, "A New Birth of Freedom? *Obergefell v. Hodges,*" *Harvard Law Review* 129 (Nov. 2015): 147–79, and Laurence H. Tribe, "Equal Dignity: Speaking Its Name," *Harvard Law Review Forum Online* 129 (Nov. 2015). For concerns that equal dignity has elicited among legal scholars who applaud the outcome of *Obergefell,* see, among others, Jack Balkin, "Obergefell and Equality," *Balkinization,* balkin.blogspot.com, June 28, 2015, and Jeffrey Rosen, "The Dangers of a Constitutional 'Right to Dignity,'" *Atlantic Online,* April 29, 2015. Somewhat different objections were raised by Yuvraj Joshi in "The Respectable Dignity of *Obergefell v. Hodges,*" *University of California Law Review Circuit* 6 (Nov. 2015): 117–25.

470 **She toyed briefly:** "Justice Ginsburg Discusses Historic Rulings and Groundbreaking Advocacy," *Duke Law Magazine* (2015): 6.

470 **"a judge at the height":** Mark Tushnet, "The Dissent in *National Federation of Independent Business v. Sebelius,*" *Harvard Law Review* 127 (Nov. 2013), 485.

471 **"harks back to the era":** *National Federation of Independent Business v. Sebelius,* 132 S. Ct. 2566 (2012), 2609, 2621 (RBG concurring in part, dissenting in part).

471 **She could not afford:** *M.L.B. v. S.L.J.,* 519 U.S. 102 (1996).

471 **"cut-and-pasted quotations":** Martha Minow, "*M.L.B. v. S.L.J.,* 519 U.S. 102 (1996)," *Harvard Law Review* 127 (Nov. 2013): 464.

472 **"Each of these shifts":** Ibid. Thomas dissented, claiming that precedents either did not support the conclusion or should be rejected and that the ruling would open the gates to a flood of demands for free assistance by civil appellants in other kinds of cases. Thomas was joined by Scalia, with Chief Justice Rehnquist also joining in all but Part II. Kennedy concurred, complimenting RBG's opinion for "its most careful and comprehensive recitation of precedents" but implying that the ruling should be limited to family matters. See *M.L.B.,* 519 U.S. at 128–44. Quotation appears on 128. On remand, the Mississippi Court of Appeals restored M.L.B.'s visitation rights.

472 **In an era when the Roberts:** See Judith Resnik, "Fairness in Numbers: A Comment on *AT&T v. Concepcion, Wal-Mart v. Dukes,* and *Turner v. Rogers,*" *Harvard Law Review* 125 (2011): 78–170.

It is worth noting that the effect of *Ashcroft v. Iqbal* (2009), which changed the requirements for bringing a lawsuit in federal courts from a lenient standard that presumed a claim to be true unless proven not to be beyond a doubt to a standard requiring that judicial discretion find a claim to be "plausible on its face," had been especially hard on African American complainants. Blacks had much greater difficulty convincing white judges than black judges that their claims of racial discrimination should be heard. See Jonathan Shaw, "The Roberts Court," *Harvard Magazine Online,* Sept. 29, 2015.

472 **"difficult to corroborate":** Laurence H. Tribe, "Respecting Dissent: Justice Ginsburg's Critique of the Troubling Invocation of Appearance," *Harvard Law Review* 127 (Nov. 2013): 479.

472 **"gripping and precise":** Ibid., 480. See *Baze v. Rees,* 553 U.S. 35 (2008), and *Gonzales v. Carhart,* 550 U.S. 124 (2007).

473 **Her dissent had also clarified:** Lani Guinier, "Courting the People," 437–44, esp. 440.

473 **In addition, the wiretap quotation:** I continue her tribute by combining it with another she wrote focusing on *Shelby* (2013). See Lani Guinier, "Justice Ginsburg: Demosprudence Through Dissent," in Dodson, *Legacy of Ruth Bader Ginsburg,* chap. 14. "Demosprudence," as Guinier explains, is a term that she and Professor Gerald Torres coined to describe the process of making and interpreting law from an external ("people driven"), not just an internal, perspective.

473 **"Throwing out preclearance":** *Shelby County v. Holder,* 570 U.S. ___ (2013), 33 (RBG dissenting).

473 **The metaphor, noted Guinier:** Guinier, "Justice Ginsburg: Demosprudence Through Dissent."

474 **Rather, "We, the People":** Ibid.

475 **"The Ruth Will Set You Free":** See notoriousrbg.tumblr.com.

475 **Exploring the blog:** Zeke J. Miller, "Ruth Bader Ginsburg Says She Has Quite a Large Supply of Notorious RBG Shirts," *Time,* time.com, Oct. 19, 2004; Katie Couric, "Exclusive: Ruth Bader Ginsburg on Hobby Lobby, Roe v. Wade, Retirement, and Notorious R.B.G.," Yahoo, www.yahoo.com, July 31, 2014.

475 **Clearly enjoying evidence:** Stephanie Garlock, "Ginsburg Discusses Justice and Advocacy at Radcliffe Day Celebration," *Harvard Magazine,* May 29, 2015.

TWENTY-TWO · A Hobbled Court

476 **In 2014, Erwin Chemerinsky:** Erwin Chemerinsky, "Much Depends on Ginsburg," *Los Angeles Times,* March 15, 2014.

476 **Other liberal law professors:** Randall Kennedy, "The Case for Early Retirement," *New Republic,* April 27, 2011.

476 **She was keenly aware:** Doctors had not predicted the extraordinary rapidity with which Alzheimer's would take over John O'Connor's mind, rendering his wife unrecognizable.

476 **Indeed, as it turned out:** Adam Liptak, "Justice Ginsburg Is Recovering After Heart Surgery to Place a Stent," *New York Times,* Nov. 27, 2014, A21.

476 **The apprehensive Scalia had admired:** Ariane de Vogue, "Scalia-Ginsburg Friendship Bridged Opposite Ideologies," www.cnn.com, Feb. 14, 2016.

478 **"full steam":** Richard Wolf, "Ginsburg's Dedication Undimmed After 20 Years on Court," *USA Today,* Aug. 1, 2013, 1A; Garrett Epps, "Don't Tell Ruth Ginsburg to Retire," *Atlantic,* March 18, 2014; quotation in Adam Liptak, "Court Is 'One of Most Activist,' Ginsburg Says, Vowing to Stay," *New York Times,* Aug. 25, 2013, A1.

478 **Fought by antiabortion forces:** Robert Barnes, "Health Law's Contraceptive Decree Spurs Court Battles," *Washington Post,* May 23, 2013, A1.

478 **This was also the position:** *Hobby Lobby v. Sebelius,* 723 F.3d 1114 (10th Cir. 2013) (Gorsuch, joined by Kelly and Tymkovich, Circuit Judges, concurring); Ephrat Livni, "What We Really Know About US Supreme Court Nominee Neil Gorsuch Based on His Controversial Hobby Lobby Decision," *Quartz,* Feb. 2, 2017. Eugene Volokh and Steve Vladeck state that Gorsuch's judicial history confirms strong commitment to religious freedom as both a constitutional and a statutory right. But he also depends on the text of the law as well as precedent when rendering a decision. Mark K. Matthews and John Frank, "Neil Gorsuch on Religion: Hobby Lobby, Euthanasia, and Other Cases," *Denver Post,* Feb. 13, 2017; Steve Vladeck, "Hobby Lobby and Executive Power: Neil Gorsuch's Key Rulings," *CNNPolitics,* Feb. 1, 2017.

478 **"a corporation is simply":** *Burwell v. Hobby Lobby,* 573 U.S. ___ (2014), 18 (Alito majority). *Burwell v. Hobby Lobby* and *Conestoga Wood Specialties v. Sebelius* had been consolidated in November 2013, when the Court agreed to hear the case. *Sebelius*

v. Hobby Lobby had been redesignated *Burwell v. Hobby Lobby* after Sylvia Burwell replaced the recently resigned Kathleen Sebelius as the secretary of health and human services. The Hobby Lobby chain of stores was owned by the evangelical Christians David Green, Barbara Green, and other relatives, while Mennonites owned Conestoga Wood Specialties.

479 **"including the choice among":** *Burwell v. Hobby Lobby,* 573 U.S. at 3–4, 6 (RBG dissenting).

479 **"just what one would expect":** Ibid. at 14.

479 **"into a minefield":** Ibid. at 34–35.

480 **"I have never seen":** Couric, "Exclusive: Ruth Bader Ginsburg on Hobby Lobby, Roe v. Wade, Retirement, and Notorious R.B.G."

480 **Reminding her audience:** Juhie Bhatia, "Ruth Bader Ginsburg Scrutinizes Court's Gender Rulings," womensenews.org, Sept. 12, 2014.

480 **This "sorry situation":** Samantha Lachman, "Ruth Bader Ginsburg Calls 'Choice' an Empty Concept for Poor Women," *Huffington Post,* July 30, 2015.

480 **"war on caterpillars":** Gail Collins, "Godfathers, Caterpillars, and Golf," *New York Times,* April 6, 2012, A17.

480 **"that most everyday people":** Kathleen Parker, "What the *#@% Is Wrong with Republicans?!," *Newsweek,* Aug. 27, 2012.

480 **If Ginsburg seemed focused:** Eric Eckholm, "Access to Abortion Falling as States Pass Restrictions," *New York Times,* Jan. 4, 2014, A1.

481 **"transformative impact on society":** Colleen Walsh, "Supreme Court Associate Justice Receives Radcliffe Medal for Her Career Battling for Individual Rights," *Harvard Gazette Online,* May 29, 2015; Adam Liptak, "Justices' Calendars Full, and Hard to Check," *New York Times,* June 2, 2015, A10.

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482 **Tongue in cheek, he professed:** Ibid.

482 **Ginsburg, who was portrayed:** Jess Bravin, "Justice Ginsburg's Spin on a Supreme Opera, 'Scalia/Ginsburg,' " *Wall Street Journal,* July 13, 2015. Scalia was in Rome and unable to attend.

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482 **On February 13, 2016:** David G. Savage, "Supreme Court Justice Antonin Scalia Dies at 79," *Los Angeles Times,* Feb. 13, 2016.

482 **The immediate impact:** For a sampling, see Adam Liptak, "Justice Scalia, Who Led Court's Conservative Renaissance, Dies at 79," *New York Times,* Feb. 14, 2016, A1; "Antonin Scalia's Remarkable Legacy," *Washington Post,* Feb. 14, 2016; David B. Rifkin Jr. and Lee A. Casey, "Justice Scalia Kept Constitutional Originalism in the Conversation—No Small Legacy," *Los Angeles Times,* Feb. 15, 2016. For scholarly assessments, see Laurence H. Tribe, "The Scalia Myth," *NYR Daily,* March 10, 2016, and Robert Post, "Justice for Scalia," *New York Review of Books,* June 11, 1998. A distinctly more critical journalistic point of view comes from Linda Greenhouse, "Resetting the Post-Scalia Supreme Court," *New York Times,* Feb. 18, 2016.

482 **A member of the Court:** "Justice Ruth Bader Ginsburg Eulogy at Justice Scalia Memorial Service," C-SPAN, March 1, 2016.

482 **"We're all textualists now":** The quotation appears at 8:25 of the video "The Scalia Lecture | A Dialogue with Justice Elena Kagan on the Reading of Statutes," available at YouTube. See also *District of Columbia v. Heller,* 554 U.S. 570 (2008) (Stevens dissenting).

483 **"Wouldn't this be a better word":** Pauley, "Ruth Bader Ginsburg: Her View from the Bench."

483 **He had ruined:** "The Scalia Lecture | A Dialogue with Justice Elena Kagan on the Reading of Statutes."

484 **"uncanny ability to make":** Couric, "Exclusive: Ruth Bader Ginsburg on Hobby Lobby, Roe v. Wade, Retirement, and Notorious R.B.G."

484 **He had also become a consummate:** "Justice Ruth Bader Ginsburg Eulogy at Justice Scalia Memorial Service."

484 **"a paler place":** Rose, "Justice Ruth Bader Ginsburg Interview, Part 2."

485 **Mitch McConnell, the Republican:** MacGillis, "Why Is Mitch McConnell Picking This Fight?"

485 **The framers of the Constitution:** Garry Wills, "The Next Justice? It's Not Up to Us," *New York Review of Books,* Feb. 15, 2016.

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487 **"she'll have two insurance cards":** Transcript of Oral Argument at 51, *Zubik,* 578 U.S. ___.

487 **Sotomayor objected, insisting:** Ibid. at 32.

488 **"but in a way that does not":** "Zubik v. Burwell," *SCOTUSblog;* Adam Liptak, "Supreme Court Hints at Way to Avert Time on Birth Control Mandate," *New York Times,* March 29, 2016, A10.

488 **When all the parties agreed:** *Zubik,* 578 U.S. ___ (per curiam).

488 **Sotomayor and Ginsburg issued:** Ibid. (Sotomayor concurring).

488 **"it is totally dependent upon":** Transcript of Oral Argument at 9–10, *Fisher v. University of Texas,* 579 U.S. ___ (2016).

489 **"It's as if nothing":** Ibid. at 20, 64; "Race and College Admissions at the Supreme Court," *New York Times,* Dec. 9, 2015, A38; Ilya Somin, "On Today's Fisher II Supreme Court Oral Argument on Affirmative Action," *Washington Post,* Dec. 9, 2015.

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489 **Further, Justice Kennedy:** Adam Liptak, "Court Skeptical of Weighing Race in College Entry," *New York Times,* Dec. 9, 2015, A1; Robert Barnes, "Court Divided over University of Texas Race-Conscious Admissions," *Washington Post,* Dec. 9, 2015.

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490 **"with any degree of specificity":** Ibid. at 1–2, 32, 51 (Alito dissenting).

490 **"ambulatory surgical centers":** Act of July 12, 2013, 83rd Leg., 2nd C.S., chap. 1, §§1-12, 2013 Tex. Sess. Law Serv. 4795–802.

490 **A federal district court:** *Whole Woman's Health v. Lakey,* 46 F. Supp. 3d 673, 676 (W.D. Tex. 2014).

490 **But the decision was overturned:** *Whole Woman's Health v. Cole,* 790 F.3d 563, 576 (5th Cir. 2015).

490 **"Justices continue to think":** Couric, "Exclusive: Ruth Bader Ginsburg on Hobby Lobby, Roe v. Wade, Retirement, and Notorious R.B.G."

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491 **"If that's all right":** Ibid. at 37; Mark Joseph Stern, "The Most Important Exchange of Wednesday's SCOTUS Abortion Arguments," *Slate,* March 2, 2016.

491 **"fundamental right to make":** Transcript of Oral Argument at 41–43, 53–54, 72, *Whole Woman's Health* (15–274). The full context of the exchange between Keller and the bench can be found on pages 36–73.

491 **"neither of these provisions":** *Whole Woman's Health,* 579 U.S. at 2, 4 (Breyer majority).

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492 **"victory lap":** "Ruth Ginsburg's Victory Lap," *Wall Street Journal,* July 11, 2016.

493 **"a disaster for the country":** Adam Liptak, "Ginsburg Has a Few Words About Trump," *New York Times,* July 11, 2016, A1; Helena Andrews-Dyer, "Add Ruth Bader Ginsburg to the List of Celebrities Threatening to Ditch the U.S. if Trump Becomes President," *Washington Post,* July 11, 2016; Joan Biskupic, "Justice Ruth Bader Ginsburg Intensifies Criticism of Trump: 'He Is a Faker,'" CNN.com, July 13, 2016; Mark Joseph Stern, "RBG Just Risked Her Legacy to Insult Trump," *Slate,* July 12, 2016.

493 **"Her mind is shot—resign!":** Mark Sherman, "AP Interview: Ginsburg Doesn't Want to Envision a Trump Win," AP, July 8, 2016; Liptak, "Ginsburg Has a Few

Words About Trump"; Joan Biskupic, "Justice Ruth Bader Ginsburg Calls Trump a 'Faker,' He Says She Should Resign," CNN, July 13, 2016; Michael D. Shear and Maggie Haberman, "Trump Calls Ginsburg 'a Disgrace to the Court,'" *New York Times,* July 13, 2016, A9; Brent Kendall, "Donald Trump's Response to Ruth Bader Ginsburg's Barbs: 'Resign!,'" *Wall Street Journal,* July 23, 2016; twitter.com/realdonaldtrump.

493 **Although there is no specific:** Canon 5 of the Code of Conduct for United States Judges provides that judges refrain from political activity, including endorsing or opposing candidates for public office. Although Supreme Court justices "consult the Code of Conduct," they are not considered strictly bound by that code like the lower court jurists. Instead, the justices are viewed as the sole judges of their own conduct, leaving the Court as the only part of our federal government without an enforceable ethics code. See *Guide to Judiciary Policy, Volume 2: Ethics in Judicial Conduct,* Part A: Codes of Conduct, Chapter 2: Code of Conduct for United States Judges. The quotation above is from Chief Justice John Roberts in a 2011 year-end report, cited in Stephen Gillers, "Can a Supreme Court Justice Denounce a Candidate? It's Clearly Not Right for Justices to Say Which Candidate They Support," *New York Times,* July 12, 2016. See also Jonathan Turley, "With Ginsburg Apology, Congress Should Look at the Real Problem," *Chicago Tribune,* July 15, 2016; Daniel W. Drezner, "Justice Ruth Bader Ginsburg Has Crossed Way, Way over the Line," *Washington Post,* July 12, 2016; "Mr. Trump Is Right About Justice Ginsburg," *New York Times,* July 13, 2016, A18; "Justice Ginsburg's Inappropriate Comments on Donald Trump," *Washington Post,* July 12, 2016.

493 **Her remarks injected further:** For a sampling of criticism and support for RBG's comments, see Erwin Chemerinsky, "Can a Supreme Court Justice Denounce a Candidate? Justices Have Free Speech Rights Too," *New York Times,* July 12, 2016; Aaron Blake and Robert Barnes, "In Her Remarks on the Presumptive GOP Nominee, Ruth Bader Ginsburg May Have Trumped Her Usual Outspokenness," *Washington Post,* July 11, 2016; Aaron Blake, "In Bashing Donald Trump, Some Say Ruth Bader Ginsburg Just Crossed a Very Important Line," *Washington Post,* July 11, 2016; Stern, "RBG Just Risked Her Legacy to Insult Trump"; Burgess Everett and Seung Min Kim, "Democrats Chide Ginsburg over Trump Barbs," *Politico,* July 12, 2016; Noah Feldman, "It's Fine for Supreme Court Justices to Speak Their Minds," *Bloomberg View,* July 12, 2016; Mark Tushnet, "The Flap over Justice Ginsburg's Interviews," *Balkinization,* July 12, 2016; Aaron Blake, "Here's How Unprecedented Ruth Bader Ginsburg's Anti-Trump Comments Were," *Washington Post,* July 13, 2016; Brent Kendall and Jacob Gershon, "Ginsburg's Trump Comments Draw Criticism," *Wall Street Journal,* July 13, 2016; William G. Ross, "Ginsburg's Remarks About Trump Are Part of a Trend Toward Inappropriate Extra-judicial Speech," *Jurist,* July 13, 2016; Jeffrey Toobin, "Ruth Bader Ginsburg's Slam of Trump," CNN, July 13, 2016.

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493 **Ginsburg would head the panel:** "The Venetian Ghetto: Hidden Secrets," *Economist,* June 18, 2016.

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493 **But never before had she heard:** Rachel Donadio, "Ginsburg Weighs Fate of Shylock," *New York Times,* July 28, 2016, C1.

494 **Shylock's wicked and rebellious:** Ibid.

494 **After two hours of argument:** The seriousness of the arguments owed much to RBG, who had asked the lawyers to provide briefs. RBG, interview by author, Sept. 2, 2016.

494 **"impostor" and "trickster":** Donadio, "Ginsburg Weighs Fate of Shylock."

494 **Paul Spera noted that his ever-alert:** Ibid.

494 **Adding to the celebration:** RBG, interview by author, Sept. 2, 2016.

495 **"The cantor," she recalled:** RBG, interview by author, 2014.

496 **She had also agreed to explore:** Michael Cooper, "Terence Blanchard's Opera, 'Champion,' Is Among Kennedy Center's Season Highlights," *ArtsBeat* (blog), *New York Times,* March 8, 2016.

496 **"The best of the house":** I have relied heavily on the Associated Press account, "Standing Ovation Greets Justice Ruth Bader Ginsburg Cameo in DC Opera," *Los Angeles Times,* Nov. 13, 2016.

497 **None of this, of course:** Adam Liptak "Justices Returning to Bench to Face Volatile, Even if Not Blockbuster, Docket," *New York Times,* Oct. 2, 2016, A16. *Ziglar v. Abbasi,* No. 15-1358, is a consolidation of three cases asking whether noncitizens detained after 9/11 have the right to sue for damages against individual government officials. *Sessions v. Dimaya,* No. 15-1498 (originally *Lynch v. Dimaya*), examines whether immigration law is unconstitutionally vague in defining aggravated or violent felonies in deportation cases. Breyer dissented in *Sireci v. Florida,* 580 U.S. ___ (2016), when the Court declined to hear the case that argued prolonged delays in carrying out executions caused additional suffering.

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498 **On the Democratic side:** "Bernie Sanders Confirms Presidential Run and Damns America's Inequities," *Guardian,* April 30, 2015; "Sen. Bernie Sanders on Taxes, Trade Agreements, and Islamic State," *PBS NewsHour,* May 18, 2015; Bernie Sanders, "The TPP Must Be Defeated," *Huffington Post,* May 21, 2015; Bernie Sanders, "Prepared Remarks—Portsmouth Organizing Event with Bernie Sanders and Hillary Clinton," BernieSanders.com, July 12, 2016.

498 **But Trump, with his:** Michael Tomasky, "Can He Be Stopped?," *New York Review of Books,* April 21, 2016; Mark Danner, "The Magic of Donald Trump," *New York Review of Books,* May 26, 2016; Emily Nussbaum, "Guilty Pleasures," *New Yorker,* July 31, 2017, 22–26.

499 **Displaced in a globalized:** Susan Chira, "The Myth of Female Solidarity," *New York Times,* Nov. 13, 2016, SR7; Hochschild, *Strangers in Their Own Land,* 15–16, 227.

499 **Middle-aged white men:** Anne Case and Angus Deaton, "Rising Morbidity and Mortality in Midlife Among White Non-Hispanic Americans in the 21st Century," *Proceedings of the National Academy of Sciences* 112, no. 49 (2015): 15078–83; Carina Storrs, "Death Rate on the Rise for Middle-Aged White Americans," CNN, Nov. 4, 2015; Andrew J. Cherlin, "Why Are White Death Rates Rising?," *New York Times,* Feb. 22, 2016, A19.

499 **But it remained to be seen:** Danner, "Magic of Donald Trump"; Vance, *Hillbilly Elegy*.

499 **The highly qualified Clinton:** See Mark Leibovich, "Her Way," *New York Times Magazine,* Oct. 16, 2016, 4–45, 67, esp. 43.

499 **Equally damaging:** Elizabeth Drew, "How It Happened," *NYR Daily,* Nov. 12, 2016, Clinton initially denied any wrongdoing, insisting that the accusation was a partisan attack before later claiming that while it was a "mistake" to use the server, no classified material had been at risk.

500 **Her obsession with her personal:** For more on Whitewater and Clinton's quest to protect her image, see Chafe, *Bill and Hillary,* esp. 140–49 and 339–43.

500 **An FBI investigation:** For a very extensive behind-the-scenes account, see Matt Apuzzo et al., "In Trying to Avoid Politics, Comey Shaped an Election," *New York Times,* April 23, 2017, A1. See also Jeffrey Toobin, "James Comey's Letter and the

Problem of Leaks," *New Yorker,* Oct. 29, 2016; Jeffrey Toobin, "Clinton Investigation Mania, Part 2," *New Yorker,* Nov. 16, 2016; and Tim Weiner, "What Was James Comey Thinking? Inside the FBI's Story About Hillary Clinton's Emails," *Esquire,* Dec. 13, 2016.

500 **Conservative talk-radio hosts:** Drew, "How It Happened." The Whitewater scandal developed out of a 1978 real estate development—the Whitewater Development Corporation—that the Clintons took part in with James B. and Susan McDougal, who purchased a small savings and loan named Madison Guaranty. An investigation into its demise by the federal Resolution Trust Corporation named the Clintons as "potential beneficiaries" of illegal activities at the bank. After a highly politicized federal investigation during Bill Clinton's presidency, the couple was exonerated. See "Whitewater Timeline" at www.cnn.com.

After a September 11, 2012, attack on the U.S. consulate in Benghazi, Libya, killed Ambassador Chris Stevens and three other Americans, Republicans charged that Secretary of State Hillary Clinton turned down requests for additional security, then attempted to blame the attacks on a spontaneous uprising in response to an anti-Muslim video when she knew they were planned terrorist operations. See Josh Voorhees, "Benghazi, Explained," *Slate,* Oct. 21, 2015. For a summary of other Clinton controversies, see David A. Graham, "From Whitewater to Benghazi: A Clinton-Scandal Primer," *Atlantic,* Nov. 6, 2016.

501 **"Lock her up!":** David A. Fahrenthold, Mary Jordan, and Louisa Loveluck, "The GOP's New Convention Theme: 'Lock Her Up!,'" *Washington Post,* July 20, 2016; Kristen East, "Clinton: I Was Saddened by 'Lock Her Up' Chants," *Politico,* July 24, 2016; Frank Bruni, "I'm O.K.—You're Pure Evil," *New York Times,* June 18, 2017, SR3. For evidence of how anti-Clinton attacks had been arranged well in advance of the campaign by Bannon and his allies, see Green, *Devil's Bargain*.

501 **the level of misogyny:** Thomas B. Edsall, "Democracy Can Plant the Seeds of Its Own Destruction," *New York Times,* Oct. 19, 2017. Edsall's concerns are not limited to the United States. See also Sasha Polokow-Suransky, *Go Back Where You Came From* and Levitsky and Ziblatt, *How Democracies Die*.

501 **Commentators emphasizing the negative:** Amy Chozick, "Clinton's Campaign of Hope and Missteps," *New York Times,* Nov. 10, 2016, P1.

501 **To the dismay of those:** Nicholas Kristof, "Lies in the Guise of News in the Trump Era," *New York Times,* Nov. 13, 2016, SR11; Sean McElwee and Jason McDaniel, "Economic Anxiety Didn't Make People Vote Trump, Racism Did," *Nation,* May 8, 2017. In 2017 elections, the anti-immigration and anti-euro Alternative for Germany party won seats in parliament for the first time, and the center-right People's Party and the far-right Freedom Party in Austria collected 58 percent of the vote. As a result, left and centrist politicians, including Austria's Sebastian Kurz and Germany's Angela Merkel had shifted their immigration positions closer to the populist stances in order to retain voters. Associated Press, "Populism Again Casts Shadow over Booming Eurozone Economy," *New York Times,* June 16, 2017; Associated Press, "Populist Parties Gain More Victories in European Politics," *New York Times,* Oct. 16, 2017; Matthew Goodwin, "European Populism Is Here to Stay," *New York Times,* Oct. 20, 2017.

501 **"a return to the mother's":** "This Land Is Trump's America," *New York Times Magazine,* Nov. 20, 2016, 37–45.

501 **Nor could sexism:** Nina McLozano-Reich, "Sexism, Alive and Well in 2016 Presidential Campaign," *HuffPost*, February 8, 2016.

501 **Three years in the planning:** See Evan Osnos, David Remnick, and Joshua Yaffa, "Active Measures: What Lay Behind Russia's Interference in the 2016 Election—and What Lies Ahead?," *New Yorker,* March 6, 2017, 40–55. Following the election, intelligence officials insisted that there was no indication that Russian hackers had altered the bottom-line vote count. But they gave no such assurances about the back-end vot-

ing systems, where the disruption could prevent voters from even casting ballots. In the twenty-one states that reported such problems, including the key swing states of Virginia, North Carolina, and Florida, there has been no official determination as to whether the problems were accidents, random incidents associated with computer systems, or the results of Russian hacking. See Nicole Perlroth, Michael Wines, and Matthew Rosenberg, "Little Effort to Investigate in States Targeted by Election Hacking," *New York Times,* Sept. 2, 2017, A1.

502 **Clinton still managed:** Clinton received 65,853,516 votes compared with 62,984,825 for Trump. Federal Election Commission, Official 2016 Presidential General Election Results, Jan. 30, 2017. Available at www.fec.gov.

502 **However, she lost the Electoral College:** Nate Cohn, "Turnout Was Not Driver of Clinton's Defeat," *New York Times,* March 29, 2017, A17. In the 1990s, white working-class voters split evenly between the two parties in presidential elections. By 2012, they favored Mitt Romney over Obama in every state but Iowa. In 2016, exit polls showed that 43 percent of union households voted for Trump. See Reid J. Epstein and Janet Hook, "In Their Coastal Citadels, Democrats Argue over What Went Wrong," *Wall Street Journal,* Nov. 18, 2016. See also Nate Cohn, "Why Trump Won: Working-Class Whites," *New York Times,* Nov. 9, 2017; Aaron Blake, "Who Likes President Obama and Voted for Donald Trump? Lots of People," *Washington Post,* Nov. 16, 2017.

502 **"the biggest under-covered":** Ari Berman, "The GOP's Attack on Voting Rights Was the Most Under-covered Story of 2016," *Nation,* Nov. 9, 2016.

502 **In 2012, one year prior:** Leadership Conference on Civil and Human Rights, *Warning Signs: The Potential Impact of Shelby County v. Holder on the 2016 General Election* (June 2016), 13. Available at www.civilrights.org.

502 **But by the time voters:** "New Voting Restrictions in Place for 2016 Presidential Election," Brennan Center for Justice at NYU School of Law, updated Nov. 2, 2016. Those fourteen states are Alabama, Arizona, Indiana, Kansas, Mississippi, Nebraska, New Hampshire, Ohio, Rhode Island, South Carolina, Tennessee, Texas, Virginia, and Wisconsin.

503 **Removal of Section 5:** Arizona, Georgia, and Virginia also were no longer under federal oversight. Combined, the five states represented eighty-four electoral votes in the presidential election. In addition, each was expecting tight races for the Senate and governorships. Leadership Conference on Civil and Human Rights, *Warning Signs,* 2.

503 **The number of polling places:** Leadership Conference on Civil and Human Rights, *The Great Poll Closure* (Nov. 2016). Available at www.civilrights.org. In addition to North Carolina, the other five states were Texas, Arizona, Louisiana, Mississippi, and Alabama. While Texas was Trump country, Republicans' use of gerrymandering and voter-ID laws to discriminate against minority voters effectively denied Democrats two Latino-majority congressional seats. See Ari Berman, "Texas's Redistricting Maps and Voter-ID Laws Intentionally Discriminated Against Minority Voters," *Nation,* March 13, 2017; *Perez v. Abbott,* SA-11-CV-360 (W.D. Tex. 2017).

503 **Reductions in early voting:** Berman, "GOP's Attack"; Jeremy W. Peters, Richard Fausset, and Michael Wines, "Black Turnout Drops, Boding Ill for Clinton," *New York Times,* Nov. 2, 2016, A1; Joan Walsh, "Will North Carolina Lead the Way to a New South," *Nation,* Nov. 9, 2016. For a more detailed analysis of the change in black voting from 2008 through 2016, see Ari Berman, "North Carolina's Voter ID Law Could Block 218,000 Registered Voters from the Polls," *Nation,* March 14, 2016.

503 **In Florida, a state Clinton:** Alice Miranda Ollstein, "Republicans Were Wildly Successful at Suppressing Voters in 2016," *ThinkProgress,* Nov. 15, 2016; "New Voting Restrictions in Place for 2016 Presidential Election."

503 **In Wisconsin, which along with:** "New Voting Restrictions in Place for 2016 Presidential Election," Michael Finnegan, "Final Wisconsin Recount Tally Strengthens Trump's Victory," *Los Angeles Times,* Dec. 12, 2016. The Dane County Clerk's office

and the University of Wisconsin Political Science Department are conducting a joint study of the November election to provide quantifiable data on the factors that may inhibit voting, including the Wisconsin voter-ID requirement. See Amos Mayberry, "UW Study Hopes to Find Effect of Wisconsin Voter ID Laws," *Badger Herald,* Oct. 4, 2017.

503 **By contrast, states:** Guy Cecil, "Voter Suppression Memo," *Priorities USA,* May 3, 2017; Ari Berman, "Wisconsin's Voter-ID Law Suppressed 200,000 Votes in 2016 (Trump Won by 22,748)," *Nation,* May 8, 2017. Alabama, New Hampshire, and Rhode Island changed to non-strict voter-ID laws and experienced an increased turnout, albeit by only 0.7 percent. A subsequent study by two University of Wisconsin political scientists estimated that nearly 17,000 registered Wisconsin voters were kept from the polls in November as a result of the state's strict voter-ID law. Professor Kenneth R. Mayer and the doctoral student Michael G. DeCrescenzo concluded that the law prevented voters with Democratic tendencies from going to the polls, either because they did not have an acceptable ID or because they believed that the one they did possess would not be accepted. See Michael Wines, "Wisconsin Law Deterred Voters, Study Finds," *New York Times,* Sept. 25, 2017, A15.

503 **"He's not my President":** Shira Tarlo, " 'Not My President's Day': Thousands Protest at Anti-Trump Rallies Across U.S.," NBC News, Feb. 20, 2017. Other cities in the NBC report include Boston, Dallas, Chicago, Kansas City, Denver, Milwaukee, Salt Lake City, and Atlanta.

503 **Topping them all:** Tim Wallace, Karen Yourish, and Troy Griggs, "Trump's Inauguration vs. Obama's: Comparing the Crowds," *New York Times,* Jan. 20, 2017; Tim Wallace and Alicia Parlapiano, "Crowd Scientists Say Women's March in Washington Had 3 Times as Many People as Trump's Inauguration," *New York Times,* Jan. 20, 2017. This contrasted with an estimated 160,000 on the National Mall who attended the swearing in of the new president.

503 **Replicated in hundreds:** Kiersten Schmidt and Sarah Almukhtar, "Where Women's Marches Are Happening Around the World," *New York Times,* Jan. 20, 2017.

503 **Thanks to Trump's xenophobic:** The latest surge in potential members for the extreme Right has come largely from teenagers and individuals in their twenties—mostly men—who have been influenced by videos, blogs, and tweets from far-right internet personalities promoting extreme racial beliefs. The "alt-light" movement has successfully drawn young people by framing their efforts as defending Western culture rather than making explicit racist appeals. They also provide easy scapegoats to blame for what they perceive to be the nation's problems—liberals, feminists, migrants, and globalists. Collectively, the number of alt-right and alt-light online followers runs into the millions. Once adherents become involved, they have used social media as their primary means of further increasing their numbers and fighting back against the perceived oppressions of the Left. See Jesse Singal, "Undercover with the Alt-Right," *New York Times,* Sept. 20, 2017, A23.

504 **Nationwide, hate crimes:** Julia Preston, Katharine Q. Seelye, and Farah Stockman, "Donald Trump Win Has Blacks, Hispanics, and Muslims Bracing for a Long 4 Years," *New York Times,* Nov. 10, 2016, P8; Liam Stack, "Trump Win Seen as 'Devastating Loss' for Gay and Transgender People," *New York Times,* Nov. 11, 2016, P9; Yamiche Alcindor, "Minorities Worry What a 'Law and Order' Donald Trump Presidency Will Mean," *New York Times,* Nov. 12, 2016, A16; Eric Lichtblau, "Attacks Against Muslim Americans Fueled Rise in Hate Crime, F.B.I. Says," *New York Times,* Nov. 14, 2016, A14; Adeel Hassan, "Refugees Discover 2 Americas: One That Hates, One That Heals," *New York Times,* Nov. 15, 2016, A1; Julia Preston and Jennifer Medina, "Young Immigrants Fear Deportation by Trump," *New York Times,* Nov. 20, 2016, A18.

504 **Desecration of Jewish cemeteries:** Spurred by his daughter Ivanka, a convert to Judaism, and a tour of the National Museum of African American History and Cul-

ture, Trump finally denounced the bomb threats and anti-Semitism. Julie Hirschfeld Davis, "After Weeks of Silence, Trump Condemns a Rise in Anti-Semitic Threats," *New York Times,* Feb. 22, 2017, A13.

504 **Hangman's nooses, long a symbol:** Sheryl Gay Stolberg and Caitlin Dickerson, "Nooses, Potent Symbols of Hate, Crop Up in Rash of Cases," *New York Times,* July 6, 2017, A11.

504 **Lower-school teachers:** Examples drawn from quotations of more than twenty-five thousand educators surveyed after the election. See "Teaching Tolerance Responds to Election's Negative Impact," *Southern Poverty Law Center Report* (Spring 2017): 4.

504 **"Trump put away the dog":** Clare Foran, "How the President, the Police, and the Media Embolden the Far-Right," *Atlantic,* Aug. 17, 2017. On August 12, 2017, a rally of neo-Nazis and white nationalists in support of a Confederate statue in Charlottesville, Virginia, turned violent when they were confronted by counterdemonstrators. German sees Trump's response to the deadly events as one of a long series of actions the president has taken to side with and endorse the viewpoint of far-right ideological movements and reinforce their sense of victimization. For a more detailed account of the events and the president's response, see Sheryl Gay Stolberg and Brian M. Rosenthal, "White Nationalist Protest Leads to Deadly Violence," *New York Times,* Aug. 13, 2017, A1; "The Hate He Dares Not Speak Of," *New York Times,* Aug. 14, 2017, A18; Glenn Thrush and Rebecca R. Ruiz, "A White House Statement on Virginia Is Also Found Wanting," *New York Times,* Aug. 14, 2017, A1; Michael D. Shear and Maggie Haberman, "Trump Again Says Two Sides at Fault in Rally Violence," *New York Times,* Aug. 16, 2017, A1.

504 **A flurry of executive orders:** Donald J. Trump, "Presidential Memorandum Regarding the Mexico City Policy," Jan. 23, 2016; Donald J. Trump, "Presidential Memorandum Streamlining Permitting and Reducing Regulatory Burdens for Domestic Manufacturing," Jan. 24, 2016; Donald J. Trump, "Presidential Memorandum Regarding Construction of the Dakota Access Pipeline," Jan. 24, 2016; Donald J. Trump, "Presidential Memorandum Regarding Construction of the Keystone XL Pipeline," Jan. 24, 2016; Donald J. Trump, "Presidential Executive Order on Promoting Energy Independence and Economic Growth," March 28, 2016; Donald J. Trump, "Executive Order: Enhancing Public Safety in the Interior of the United States," Jan. 25, 2016; Donald J. Trump, "Executive Order: Border Security and Immigration Enforcement Improvements," Jan. 25, 2016. See also Clifford Krauss and Diane Cardwell, "Policy's Promise for Coal Power Has Its Limits," *New York Times,* March 29, 2017, A1.

505 **Most disruptive was the president's:** Donald J. Trump, "Executive Order: Protecting the Nation from Foreign Terrorist Entry into the United States," Jan. 27, 2016.

505 **Ostensibly an effort:** Ibid. Federal officials disputed the necessity of the order. See Maria Sacchetti and Matt Zapotosky, "Trump's New Entry Ban to Be Challenged in Courts Hours Before It Takes Effect," *Washington Post,* March 14, 2016.

505 **A three-judge panel:** *Minnesota v. Trump,* No. 17-35105, D.C. No. 2:17-cv-00141 (9th Cir., Feb. 7, 2017). Revisions in the new ban include removing Iraq from the list, exempting legal permanent residents and green card holders, and lifting the indefinite ban on Syrians. See Donald J. Trump, "Executive Order: Protecting the Nation from Foreign Terrorist Entry into the United States," March 6, 2016.

505 **"a total and complete shutdown":** Adam Liptak, "Campaign Pledge of Muslim Ban Haunts the President in Court," *New York Times,* March 17, 2017, A1.

505 **On March 15, 2017, district courts:** *Hawaii and Ismail Elshikh v. Trump,* 1:17-00050 DKW-KSC (9th Cir. Ct., March 15, 2017) (Order Granting Motion for Temporary Restraining Order); *International Refugee Assistance Project v. Trump,* 8:17 CV-00361-TDC (4th Cir. Ct., March 15, 2017) (Memorandum Opinion). See also Elise Foley, Cristian Farias, and Willa Frej, "Donald Trump's New Travel Ban Challenged in

Courts Across the Country," *Huffington Post,* March 15, 2017; Josh Gerstein, "9th Circuit Will Hear Revised Trump Travel Ban in May," *Politico,* April 3, 2017. The Hawaii case moved up to the Ninth Circuit Court of Appeals, while the Maryland case would be heard in the Fourth Circuit.

505 **"drips with religious intolerance":** *International Refugee Assistance Project v. Trump,* No. 17-1351 (4th Cir. 2017), 12; *Hawaii v. Trump,* No. 17-15589 (9th Cir. June 12, 2017); Josh Gerstein, "Ninth Circuit Upholds Block on Trump's Travel Ban," *Politico,* June 12, 2017.

505 **On June 1, the Trump:** Ann E. Marimow and Robert Barnes, "Federal Appeals Court Maintains Freeze of Trump's Travel Ban. Attorney General Vows Supreme Court Appeal," *Washington Post,* May 25, 2017.

505 **Then before the cases:** *Trump v. International Refugee Assistance Project,* 582 U.S. ___ (2017), 12 (per curiam). It would not apply to those "who have a credible claim of a bona fide relationship"—for example, a family member of someone living in the country, a student admitted to a university, or an individual with an employment offer in hand. Excluded were refugees who had no prior connection to the United States and were dependent on refugee assistance projects willing to sponsor them. The September 24 order indefinitely banned almost all travel to the United States from seven countries: Iran, Libya, Syria, Yemen, Somalia, Chad, and North Korea. Citizens of Iraq and select individuals in Venezuela would face additional restrictions or heightened scrutiny. The ban, however, would not apply to legal permanent residents, current visitors with valid visas, or refugees. See Donald J. Trump, "Presidential Proclamation Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats," whitehouse.gov, Sept. 24, 2017; Michael D. Shear, "Trump Imposes New Travel Ban on 7 Countries," *New York Times,* Sept. 25, 2017, A1; Amy Howe, "Justices End 4th Circuit Travel-Ban Challenge," *SCOTUSblog,* Oct. 10, 2017; Amy Davidson Sorkin, "What Does Trump's New Travel Ban Mean for the Supreme Court," *New Yorker,* Sept. 26, 2017.

505 **In December:** Miriam Jordon, "Ninth Circuit Judges Rule Against Latest Ban," *New York Times,* Dec. 23, 2017, A17; Adam Liptak, "President's Travel Ban, Already Headed to Supreme Court, Is Rejected Again," *New York Times,* Feb. 16, 2018, A14.

506 **Oral arguments in April:** Robert Barnes, Ann E. Marimow, and Matt Zapotosky, "Supreme Court's Conservative Justices Appear to Back Trump's Authority for Travel Ban," *Washington Post,* April 25, 2018; Adam Liptak and Michael D. Shear, "Supreme Court Signal Support for a Travel Ban," *New York Times,* April 26, 2018, A1.

506 **Appalled by the president's:** Michael M. Grynbaum, "Trump Calls the News Media the 'Enemy of the American People,'" *New York Times,* Feb. 17, 2017; Nolan D. McCaskill, "Trump Tweets: Press 'Is the Enemy of the American People,'" *Politico,* Feb. 17, 2017. Historically, the phrase "an enemy of the people" has referred to political dissenters, dating to Roman times and the emperor Nero. It gained prominence during the French Revolution, then in Nazi Germany when Propaganda Minister Joseph Goebbels referred to Jews as "a sworn enemy of the German people." Its widest use arose when Vladimir Lenin and Joseph Stalin used the term *vrag naroda* (enemy of the nation/people), a reference to those who disagreed with Bolshevik ideologies in the newly formed Soviet Union. Most recently, Venezuela's Hugo Chávez called political dissenters "enemies of the homeland." See Veronika Bondarenko, "Trump Keeps Saying 'Enemy of the People'—but the Phrase Has a Very Ugly History," *Business Insider,* Feb. 27, 2017; and Amanda Erickson, "Trump Called the News Media an 'Enemy of the American People.' Here's a History of the Term," *Washington Post,* Feb. 18, 2017.

506 **"be banished to the wilderness":** Adam Liptak, "Court Is Set to Tilt Right, but It May Play a Surprising Role: Impeding Trump," *New York Times,* Nov. 10, 2016, P7;

David G. Savage, "Trump's Victory Ensures a Conservative Majority on the Supreme Court," *Los Angeles Times,* Nov. 9, 2016.

506 **"most important person":** Ben Schreckinger, "I Did Ruth Bader Ginsburg's Workout," *Politico,* Feb. 27, 2017.

506 **That Kennedy, now the longest-serving:** Liptak, "Court Is Set to Tilt Right."

506 **Trump's freedom to get:** "Trumping the Law," *Economist,* Nov. 25, 2017, 30.

507 **But McConnell had prepared:** Ibid.

507 **On January 31:** "A Coloradan on the Highest Court in the Land," *Denver Post,* Feb. 1, 2017; Robert Barnes, "Trump Picks Colo. Appeals Court Judge Neil Gorsuch for Supreme Court," *Washington Post,* Jan. 31, 2017; Adam Liptak, "A Nominee Who Echoes Scalia's Style," *New York Times,* Feb. 1, 2017, A26.

507 **As a fourth-generation Coloradoan:** Matt Ford, "Trump Nominates Neil Gorsuch for the U.S. Supreme Court," *Atlantic,* Jan. 31, 2017; Sara Clarke, "10 Things You Didn't Know About Neil Gorsuch," *U.S. News & World Report,* Jan. 31, 2017; Josh Gerstein, "Neil Gorsuch: Who Is He? Bio, Facts, Background, and Political Views," *Politico,* Jan. 31, 2017; Charlie Savage, "Justice Dept. Job Put Gorsuch at the Center of Controversy on Bush Terror Policies," *New York Times,* March 16, 2017, A13. See also Tony Mauro, "Trump Chooses Neil Gorsuch, Ivy League Conservative, for Supreme Court," *National Law Journal,* Jan. 31, 2017; Tony Mauro, "Neil Gorsuch: In His Own Words," *National Law Journal,* Jan. 31, 2017.

507 **In 2006, George W. Bush:** Adam Liptak, "A Nominee Who Echoes Scalia's Style," *New York Times,* Feb. 1, 2017, A1; Robert Barnes, "Trump Picks Colorado Appeals Court Judge Neal Gorsuch for Supreme Court," *Washington Post,* Jan. 29, 2017. Now that he's been confirmed, it marks the first time a sitting justice sat on the bench with a former clerk.

508 **"to apply the law":** Mauro, "Neil Gorsuch: In His Own Words."

508 **Relying on a style:** Barnes, "Trump Picks Colo. Appeals Court Judge"; Liptak, "Nominee Who Echoes Scalia's Style"; Eugene Volokh, "Supreme Court Nominee Neil Gorsuch on Religious Freedom," *Washington Post,* Jan. 31, 2017; Mark Sherman, "High Court Nominee Praised for Breezy, Witty Writing Style," AP, March 8, 2017.

508 **"very easy to get along with":** Max Greenwood, "Ginsburg: Trump Supreme Court Nominee Neil Gorsuch Is 'Very Easy to Get Along With,'" *Hill,* Feb. 6, 2017.

509 **In separate published letters:** Harvard Law Classmates of Neil Gorsuch, "Why We Support Neil Gorsuch for the Supreme Court," *RealClearPolitics,* March 9, 2017; Larson Holt, "Over 150 Alumni Call for Gorsuch's Confirmation to Supreme Court," *Columbia Spectator,* March 8, 2017; 150 Columbia and Barnard Alumni to Senate Judiciary Committee Chairman Charles Grassley and Ranking Member Dianne Feinstein, Senate Majority Leader Mitch McConnell, and Senate Minority Leader Chuck Schumer, March 7, 2017. Available at www.confirmgorsuch.com.

509 **Conservative and business:** Callum Borchers, "Trump's Nomination of Neil Gorsuch Is a Promise Kept to Conservative Media," *Washington Post,* Jan. 31, 2017; Volokh, "Supreme Court Nominee Neil Gorsuch on Religious Freedom"; Julie Hirschfeld Davis and Mark Landler, "Trump's Court Pick Sets Up Political Clash," *New York Times,* Feb. 1, 2017, A1; Amy Davidson Sorkin, "Neil Gorsuch and Justices Past," *New Yorker,* Feb. 1, 2017; Kyle Peterson, "Trump's Supreme Court Whisperer," *Wall Street Journal,* Feb. 3, 2017. On the nominee's hostility to same-sex marriage, see Neil Gorsuch, "Liberals 'n' Lawsuits," *National Review Online,* Feb. 7, 2005.

509 **Far less sanguine, liberals:** Alliance for Justice, *The Gorsuch Record,* 1–2, 51. Available at www.afj.org. See also "Neil Gorsuch and the Supreme Court," *New York Times,* Feb. 1, 2017, A26; Christina Cauterucci, "What Neil Gorsuch, Trump's SCOTUS Pick, Means for American Women," *Slate,* Feb. 1, 2017; Dahlia Lithwick, "The Case Against Neil Gorsuch," *Slate,* March 20, 2017; Richard L. Hasen, "Why Gorsuch Could Lead Court in Wrong Direction," CNN, March 1, 2017.

509 **Those familiar with his ruling:** *Hobby Lobby v. Sebelius,* 723 F.3d 1114 (10th Cir. 2013). For the similarly themed *Little Sisters v. Burwell,* he was not part of the three-judge panel, but he joined a dissent when the case was denied an en banc review. See *Little Sisters v. Burwell* (10th Cir., July 14, 2015).

509 **Gorsuch stuck to the letter:** After being instructed to either remain with his vehicle until a repair team arrived or drive the truck while pulling the trailer with its failed brakes, Alphonse Maddin waited over three hours in freezing temperatures in an unheated truck for assistance. He then drove away without the trailer, claiming his feet and legs were going numb, and was subsequently fired for abandoning his trailer. When the Tenth Circuit Court of Appeals affirmed the lower court's ruling that the company violated whistle-blower protections of the Surface Transportation Assistance Act, Gorsuch dissented, arguing, "The trucker in this case wasn't fired for *refusing* to operate his vehicle." Instead, Maddin was fired "only after he declined the statutorily protected option (refuse to operate) and chose instead to *operate* his vehicle in a manner he thought wise but his employer did not." See Marcia Coyle, "Lawyers in Gorsuch 'Frozen Trucker' Case Surprised at Attention," *National Law Journal,* March 22, 2017, and *Transam Trucking Inc. v. Administrative Review Board,* No. 15-9504 (10th Cir. 2016), 19–20.

509 **"evade the chopping block":** *Gutierrez-Brizuela v. Lynch,* 834 F.3d 1142, 1143 (10th Cir. 2016), 14–15. According to *Chevron,* judges must defer to an agency's interpretation of ambiguous laws issued by Congress. Thomas, along with Gorsuch and others, has expressed concern that this predisposes judges to the government's position rather than allowing for independent judgment. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.,* 467 U.S. 837 (1984). Conservative legal scholars raised the constitutional objection that Congress's power to make rules cannot be delegated to federal agencies. See, for example, Hamburger, *Is Administrative Law Unconstitutional?,* as well as his abbreviated version for the general reader *Administrative Threat*.

509 **Democratic members of the judiciary:** Neither Samuel A. Alito Jr. nor Clarence Thomas, two current Supreme Court justices, received sixty confirmation votes. See Linda Qiu, "Lessons and Interpretations on the Court Nomination Process," *New York Times,* April 4, 2017, A13.

510 **"no hints, no forecasts":** Adam Liptak, "Avert, Sidestep, Rethink: Justices' Advice on Hearings," *New York Times,* March 20, 2017, A16; Jeffrey Toobin, "Behind Neil Gorsuch's Non-answers," *New Yorker,* April 3, 2017.

510 **When the hearing began:** Matt Flegenheimer, "At Senate Hearing, Gorsuch Tries to Position Himself Above Politics," *New York Times,* March 21, 2017, A20.

510 **"the big guy":** Benjamin Wallace-Wells, "Neil Gorsuch Makes the Case for His Own Independence," *New Yorker,* March 22, 2017.

510 **The *Chicago Tribune:*** "Neil Gorsuch Earns His Supreme Court Seat," *Chicago Tribune,* March 23, 2017.

510 **The nominee quickly demonstrated:** Adam Liptak et al., "Highlights from Judge Gorsuch's Confirmation Hearing," *New York Times,* March 22, 2017.

510 **"As a general matter":** Ibid.

510 **Never departing from script:** Matt Flegenheimer, "Of Horse v. Duck, Mutton Busting, and Other Diversions," *New York Times,* March 23, 2017, A16.

511 **"should not be overturned lightly":** Adam Liptak and Matt Flegenheimer, "Gorsuch Asserts He Would Be Able to Buck Trump," *New York Times,* March 22, 2017, A1.

511 **In fact, Gorsuch's calm:** Liam Donovan, "Schumer's Folly," *Politico,* March 30, 2017.

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A Note on Sources

The archival materials needed to complete this project were obtained from a wide variety of sources, beginning with the ACLU File, 1967–80, the Speeches and Writings File, which documents Ginsburg's endeavors to promote women's rights. The Miscellany File constitutes Part I of the Ruth Bader Ginsburg Papers located in the Manuscript Division of the Library of Congress, from which the case files especially proved indispensable. Ginsburg's personal papers have subsequently been added to the collection, though they are not yet open to the public. Neither is material pertaining to the years 1979–92, when she served as judge on the U.S. Court of Appeals for the D.C. Circuit. Papers from her tenure as associate justice of the Supreme Court (1993–) will not be available to researchers until a hundred years after the last justice with whom she has served is no longer alive.

Justice Ginsburg graciously provided me with access to transcripts of three extensive interviews not yet accessible to the public. The first, conducted by Maeva Marcus (Supreme Court historian), was recorded for the Court in 1995; the second, done by Ronald J. Grele for the Columbia University Oral History Project, was completed in 2004; the third, conducted for Sarah Wilson in 1995, resides at the Federal Judicial Center. Although there is some overlap, these three interviews cover different aspects of Ginsburg's life and work prior to her move to the Supreme Court. Wilson's interview for the Federal Judicial Center concentrates primarily on Ginsburg's nomination to and early service on the U.S. Court of Appeals for the D.C. Circuit.

These interviews, plus my own with the justice, as well as members of her immediate family, her law school classmates, her former colleagues at Rutgers Law School in Newark, her ACLU associates, her former law students at Columbia, and her clerks at the U.S. Court of Appeals for the D.C. Circuit helped provide key material for the earlier sections of this book, along with the ACLU case files and related material. So, too, did "The Birthday Book," a collection of letters solicited by her clerks from friends for her fiftieth birthday celebration. Each letter begins, "When I think of Ruth Bader Ginsburg . . ." Collectively, they provided choice bits of information that I would not otherwise have obtained.

The late judge Richard Salzman offered recollections of his schoolmate Kiki Bader, including her early writing in their elementary school newspaper that his mother had saved. My account of Ginsburg's college experience was enriched by interviews and correspondence with friends from her freshman year at Cornell and by material at the Cornell University Library. Her intense interest in the impact of McCarthyism on civil liberties was fostered by research she undertook for one of her professors and also by the experience of two faculty members who were targeted by anti-Communists. The ordeal of those two scientists was closely followed in *The Cornell Daily Sun,* the student newspaper. An undergraduate thesis written under the direction of the late historian Michael Kammen

by Michael Ullmann—titled "Caught in a Crossfire: Deane Malott and Cornell During the McCarthy Era"—provided superb insight into the pressures brought to bear on Cornell's president Malott. It also highlighted how Malott's own conservative leanings affected his handling of the crisis. Ellen Schrecker's finely researched history of the age of McCarthyism *Many Are the Crimes* superbly contextualizes events at Cornell.

In writing about Ginsburg's legal education, I found the work of Neil Duxbury, William N. Eskridge Jr., Philip Frickey, and Laura Kalman especially helpful. Collectively, the work of these legal scholars substantially informed my understanding of jurisprudence, especially legal realism and, more important, process theory, which reigned during Ginsburg's years in law school.

Interviews with the late Hans Smit of Columbia Law School provided a wonderful portrait of the justice as a young lawyer at work on the Columbia Law School's Project on International Procedure. Eva Hanks offered a highly perceptive account of their experience together as faculty members at Rutgers Law School in Newark, New Jersey. The William J. McGill Papers at Columbia University's Presidential Archive reveals interesting correspondence between McGill and Ginsburg as she offered McGill astute but unsought advice on how to respond to the gender wars then raging on the Columbia campus.

That Ginsburg had already become part of legal feminists' efforts to reshape federal statutes and constitutional jurisprudence, and the legal profession itself, is evident from the papers of Dorothy Kenyon at Smith College as well as the papers of Catherine East, Mary Eastwood, and most especially Pauli Murray at the Schlesinger Library at Harvard University. Studies fleshing out this effort include Fred Strebeigh's compelling account *Equal*. Serena Mayeri's prizewinning *Reasoning from Race,* Linda Greenhouse and Reva B. Siegel's *Before Roe v. Wade,* and David Garrow's voluminously detailed *Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade* all proved essential. Rosalind Rosenberg's newly published biography of Pauli Murray, *Jane Crow,* belongs on this list.

In writing about the ACLU years, I found useful Austin Sarat and Stuart Scheingold's articulation of "cause lawyering as a protean and heterogeneous enterprise that continues to reinvent itself in confrontation with a vast array of challenges." Steven M. Teles and Ann Southworth also enhanced my familiarity with the conservative legal movement's counterthrust.

Of varying usefulness are the papers of justices before whom Ginsburg argued her cases. Justices William Brennan, William O. Douglas, Thurgood Marshall, and Harry A. Blackmun deposited their papers in the Manuscript Division of the Library of Congress. Those of Justice Lewis F. Powell reside at the Law School of Washington and Lee University. Biographies of each of the justices help understand how they responded to Ginsburg's litigation, most notably Linda Greenhouse's *Becoming Justice Blackmun*.

Ginsburg's transition from advocate to judge and justice draws on interviews with Barbara Babcock, Sarah Weddington, and Patricia Wald, all of whom served in the Carter administration. Babcock and Weddington helped illuminate resistance within the Justice Department to Ginsburg's eventual nomination to the U.S. Court of Appeals for the D.C. Circuit. Judge Wald, Professors Michael Klarman and Deborah Jones Merritt (both former clerks), and the Washington attorney Alan B. Morrison provided useful perspectives on Ginsburg's years as a federal judge.

The Clinton Papers at the president's library in Little Rock proved invaluable for understanding the vetting of top candidates for Justice Byron White's seat on the Court as well as the advice that Clinton received. Included in the Clinton Papers are letters supporting and a few opposing Ginsburg's candidacy. The Daniel P. Moynihan Papers in the Library of Congress's Manuscript Division attest to the powerful New York senator's role in securing the nomination for Ginsburg. Both press accounts and my own interviews

with the justice reveal the considerable efforts of Martin D. Ginsburg on his wife's behalf. So, too, does Robert Katzmann's essay "Reflections on the Confirmation Journey of Ruth Bader Ginsburg, Summer, 1993," in Scott Dodson's *Legacy of Ruth Bader Ginsburg*.

My understanding of the rights revolution, selection of federal judges, the Supreme Court nomination process, the influence of oral argument, the evolving role of clerks, judicial behavior, strategy and constraints, the interplay of social movements, politics, and constitutional change, and popular constitutionalism has been shaped by political scientists and legal scholars. Among the political scientists are Charles R. Epp, Lee Epstein, Lawrence Baum, Michael A. Bailey, Forrest Maltzman, James F. Spriggs II, Paul J. Wahlbeck, Sheldon Goldman, Saul Brenner, Sally Kenney, Nancy Maveety, Jeffrey A. Segal, Howard Gillman, and Richard Davis. A number of distinguished legal scholars whose work has furthered my education include Lucas Powe, Laurence Tribe, Mark Tushnet, Robert Post, Kenneth Karst, Cass Sunstein, Richard Posner, Jack Balkin, Barry Friedman, Michael Klarman, and Kenji Yoshino.

The work of feminist legal scholars has been absolutely indispensable, especially that of Reva Siegel. It was Siegel who first alerted me to how rights, seemingly achieved, have been repeatedly undercut and transformed. Herma Hill Kay, Catharine A. MacKinnon, Sylvia Law, Elizabeth M. Schneider, the late Rhonda Copelon, Kimberlé Crenshaw, Katharine Bartlett, Mary Anne Case, Lani Guinier, Martha Minow, Nina Pillard (now judge Cornelia T. L. Pillard), Neil S. Siegel, Joan C. Williams, Martha Chamallas, Deborah L. Rhode, Cynthia Grant Bowman, Serena Mayeri, Kristin Collins, Cary Franklin, and Linda Kerber all contributed to my understanding of aspects of Ginsburg's work as law professor, advocate, judge, and justice.

I have also benefited greatly from the work of legal journalists, specifically the books, columns, and reports of Linda Greenhouse, Jeffrey Toobin, Adam Liptak, David Cole, Jeffrey Rosen, Joan Biskupic, Marcia Coyle, Jan Crawford Greenburg, Robert Barnes, David Savage, Nina Totenberg, Dahlia Lithwick, Tony Mauro, and Lyle Denniston. Among the many journalists upon whose work I relied are David Von Drehle, Lesley Oelsner, David Margolick, Jim Rutenberg, Michael Tomasky, Emily Bazelon, Ari Berman, Amy Davidson, Elizabeth Drew, and Matt Flegenheimer.

Ginsburg has written extensively about her ACLU cases, the ERA, affirmative action for women, and related matters in legal journals, especially during the 1970s. Her recently published collection of writings, *My Own Words,* ably introduced by the editors Mary Hartnett and Wendy Williams, includes selections that vary from school newspaper editorials to bench remarks on recent cases.

Other books with helpful portions on Ginsburg's early career include Janis M. Berry et al., *Women Lawyers at Work,* Lynn Gilbert and Gaylen Moore, *Particular Passions,* and Rosalind Rosenberg, *Changing the Subject*. Amy Leigh Campbell's *Raising the Bar* chronicles the ACLU years. Irin Carmon and Shana Knizhnik's *Notorious RBG: The Life and Times of Ruth Bader Ginsburg* is a lighthearted, wonderfully illustrated account of the justice and her emergence as a celebrity among millennials. Linda Hirshman's *Sisters in Law,* a dual biography of Sandra Day O'Connor and Ginsburg, offers a compelling account of how these very different women complemented each other in advancing gender equality on the Court. Scott Dodson's *Legacy of Ruth Bader Ginsburg* offers valuable and diverse perspectives from scholars and court watchers on various periods in Ginsburg's life and the array of doctrinal areas on which she exerted influence over the course of her long career.

In writing about cases in which Ginsburg participated as lawyer, advocate, judge, or justice, I have relied on the abundant literature produced by historians and social scientists for background material. Nowhere was this literature more valuable than in my chapters on race and on sexuality, as endnotes indicate. Cases figuring prominently in the book are listed below.

Case Summaries

Hoyt v. Florida, 368 U.S. 57 (1961). Florida automatically registered men for jury service, but women were excluded unless they volunteered. Gwendolyn Hoyt, believing that women should be obliged to serve on juries if she was to be fairly judged by a jury of her peers, appealed her conviction by an all-male jury and lost in the lower courts. The Supreme Court unanimously upheld the Florida law on the grounds that there was no evidence that the state had arbitrarily acted to exclude women from the jury pool. Ginsburg, also believing that women no less than men should be obliged to serve on juries, considered *Hoyt* a precedent in need of overturning, which occurred in 1975 in *Taylor v. Louisiana* (see below), when the Court held that a defendant has the right to a jury that is representative of the community.

Reed v. Reed, 404 U.S. 71 (1971). The Idaho Code specified a preference for male appointees to act as estate administrators. Sally Reed challenged the law, and the Supreme Court, for the first time in its history, struck down the statute as unconstitutional sex-based discrimination. Ginsburg wrote the appellant brief for Sally Reed in the summer of 1971, building on the brief for *Moritz* written just a few months earlier.

Moritz v. Commissioner of Internal Revenue, 469 F.2d 466 (10th Cir. 1972). The IRS granted a tax deduction to never-married, employed daughters for nursing expenses related to care of an elderly parent, but the agency rejected Charles E. Moritz's claim to a deduction for the care of his mother. When Moritz lost his challenge to the Tax Court's ruling, Ginsburg and her husband, Martin D. Ginsburg, took the case in order to test whether the federal court would consider discrimination based on sex as a violation of the Fourteenth Amendment's equal protection clause. The U.S. Court of Appeals for the Tenth Circuit ruled that Moritz was entitled to the deduction, endorsing the Ginsburgs' argument.

Struck v. Secretary of Defense, 409 U.S. 1071 (1972). A U.S. Air Force regulation mandated the dismissal of a pregnant woman unless she opted for an abortion, while her male partner could remain in the military and receive bonuses for reenlisting. Captain Susan Struck, an unmarried Roman Catholic, chose to carry her pregnancy to term and to surrender the baby for adoption while on leave. Having had the baby, she ran afoul of another regulation that denied readmission to the air force to a female service member who had given birth. Appealing the regulations to the Court with a powerful brief written by Ginsburg, Struck was granted a waiver allowing her to resume her career before the case was heard but assuring its dismissal and a change in air force regulations.

Roe v. Wade, 410 U.S. 113 (1973); *Doe v. Bolton,* 410 U.S. 179 (1973). A Texas ban on abortions except for the purpose of saving the woman's life and Georgia's unduly burdensome qualifications for obtaining an abortion were both challenged. In a landmark decision, the Court struck down the Texas and Georgia statutes as improperly interfering with the right of a woman to choose to terminate her pregnancy, violating her right to privacy and her personal liberty as guaranteed by the due process clause of the Fourteenth Amendment (the right to be left alone); however, it placed limits on the exercise of that right, particularly balancing the state's interest in protecting the health of pregnant women along with "the potentiality of human life."

Frontiero v. Richardson, 411 U.S. 677 (1973). A federal statute stipulated that male officers in the U.S. Air Force automatically received spousal benefits for their wives but that a female officer must demonstrate that she was contributing more than half of her husband's living expenses. Sharron Frontiero challenged the statute as a violation of the due process clause of the Fifth Amendment and the equal protection clause of the Fourteenth Amendment. The Court voided sex differentiation in the distribution of spousal benefits but differed as to whether sex ought to be treated as a suspect category as Ginsburg urged in her brief and oral argument.

DeFunis v. Odegaard, 416 U.S. 312 (1974). Admissions procedures for the University of Washington Law School provided that minority applicants be considered without regard

to their individual grades or scores. Marco DeFunis sued, claiming that the school's affirmative-action policy gave preference to minority applicants over white candidates who were better qualified. It was a reverse discrimination case, which the Court determined to be moot because DeFunis had been provisionally admitted to the university as the case moved through the courts and he was scheduled to graduate within months of the time the decision was rendered.

Kahn v. Shevin, 416 U.S. 351 (1974). Florida law provided a property tax exemption of up to $500 for widows irrespective of need—but not for widowers. Mel Kahn challenged the law as an unfair sex-based distinction, but the Supreme Court upheld the distinction as valid because women were more likely to suffer economically after the loss of a spouse than men. Ginsburg, knowing that the justices were not yet ready to hear a reverse discrimination case, reluctantly agreed to represent Kahn, suffering her only loss as litigator for the ACLU Women's Rights Project.

Weinberger v. Wiesenfeld, 420 U.S. 636 (1975). The Social Security Administration (SSA) paid survivors' benefits only to widowed mothers entrusted with the care of a child but not to widowers. Stephen Wiesenfeld was denied Social Security survivors' benefits after his wife, Paula, died during childbirth and he assumed full care of his son. Wiesenfeld then challenged the SSA provision as a violation of equal protection. The Court ruled in his favor, requiring the survivors' benefits for the care of dependent children be sex neutral. Ginsburg argued the case for Wiesenfeld both in the lower courts and in the Supreme Court.

Taylor v. Louisiana, 419 U.S. 522 (1975); *Edwards v. Healy,* 421 U.S. 772 (1975). Both cases challenged the composition of all-male juries in Louisiana. While an amendment to the state's constitution rendered *Healy* moot (Ginsburg's case, which she had won in the lower court), the Court decided that Billy Taylor had been denied his right to a jury consistent with a cross section of his peers. The decision had taken Ginsburg's arguments in *Healy* into account, specifically that men and women experienced life differently. The presence of both sexes on the juries, therefore, was required in order to more accurately reflect these varying perceptions.

Craig v. Boren, 429 U.S. 190 (1976). An Oklahoma statute permitting women to drink "near beer" at the age of eighteen while men were required to wait until age twenty-one was challenged as discriminatory by the Oklahoma State student Curtis Craig and by Carolyn Whitener, co-owner of a convenience store. The Court ruled that Oklahoma's use of sex-based classifications for administrative purposes violated the equal protection clause in the Fourteenth Amendment. What made the case significant was the Court's creation of an intermediate standard of scrutiny that required supporters of the challenged statute to demonstrate that sex-based differentiation is *substantially* related to an important government objective. Ginsburg wrote an amicus brief and provided extensive aid and oversight to the plaintiff's lawyer in the writing of his brief.

Califano v. Goldfarb, 430 U.S. 199 (1977). The SSA required that widowers prove that a deceased wife had supplied three-fourths of the family income, while widows received benefits automatically. Seventy-year-old Leon Goldfarb challenged the requirement after the death of his wife, Hannah, who had been fully employed. The Court ruled that different treatment of widows and widowers constituted invidious discrimination against women who had earned more than their surviving male partners. Ginsburg represented Goldfarb on his appeal to the Court, emphasizing the significance of Hannah's earnings.

Califano v. Webster, 430 U.S. 313 (1977). When calculating retiree benefits, the Social Security Act allowed different formulas for calculating a retired male wage earner's average monthly wage compared with a similarly situated female wage earner as a means of rectifying women's unequal pay. William Webster challenged the provision upon his own retirement. The Court in a per curiam decision ruled that Social Security benefit calculations that were more favorable toward retired female workers constituted constitutionally permissible differential treatment in the interests of gender equality.

University of California Board of Regents v. Bakke, 438 U.S. 265 (1978). The University of California, Davis Medical School set aside 16 percent of its admissions slots for underrepresented minority applicants. Allan Bakke, his application twice rejected, sued the university claiming reverse discrimination after outscoring all of the "disadvantaged" applicants. Nine justices issued six separate opinions for a deeply fractured Court, ruling that while universities may continue to use race as a criterion in admissions, they could not constitutionally use numerical quotas.

United States v. Virginia, 518 U.S. 515 (1996). Since its inception in 1839, the Virginia Military Institute had had an all-male student body. After a female high school graduate filed a complaint with the Office of Civil Rights at the Justice Department, the college filed suit to prevent the federally imposed admission of women. Upon appeal from the lower courts, the Court found the exclusion of women at a publicly funded institution to be unconstitutional. Ginsburg's opinion for the 7–1 majority stated that institutions seeking to continue differential treatment or denial of opportunity must provide "exceedingly persuasive" justification that would survive "skeptical scrutiny."

United States v. Morrison, 529 U.S. 598 (2000). The Violence Against Women Act of 1994 (VAWA) provided federal funds for investigating and prosecuting violent crimes against women and instituted mandatory restitution from those convicted of a crime of violence motivated by an "animus based on the victim's gender." It also allowed civil suits on the part of victims in cases that were left unprosecuted. Christy Brzonkala filed a civil suit against her assailants Antonio Morrison and James Crawford under the provisions of VAWA, having failed in the lower court to obtain a conviction. Upon appeal, the Court majority, ignoring data showing the adverse effects of sexual violence on interstate commerce, struck down Section 13981 of the VAWA, claiming that Congress had overstepped its powers under the commerce clause by creating a federal remedy for a problem that had traditionally been viewed as a state issue. Justice Souter was joined in his dissent by Stevens, Ginsburg, and Breyer.

Bush v. Gore, 531 U.S. 98 (2000). Poorly constructed ballots were the focal point of an exchange of lawsuits involving the presidential candidates George W. Bush and Al Gore in which the Florida vote would prove decisive. Gore asked for a manual recount in four counties instead of throughout Florida, while Bush wanted the current tallies certified. After the Florida Supreme Court authorized the recount and extended the state-mandated deadline, attorneys for Bush appealed to the Supreme Court. They argued, first, that the Florida Supreme Court had violated the federal Constitution by usurping the state legislature's role in the selection of electors. Second, the Bush coalition maintained that the manual recount violated the due process and equal protection clauses because it was an "arbitrary and disparate treatment" of a ballot already cast. The record suggested that inconsistent standards of counting ballots in the various precincts and counties violated Bush's right to equal protection, as well as the rights of the voters. The Court focused on the latter topic, issuing a per curiam decision stating that the decision of the Florida Supreme Court did "not satisfy the minimum requirements for nonarbitrary treatment of voters." Breyer, Ginsburg, Souter, and Stevens wrote separate dissents.

Stenberg v. Carhart, 530 U.S. 914 (2000). A partial-birth abortion is a surgical procedure that removes an intact fetus from the uterus in a late-term abortion because it is considered less likely to damage a woman's cervix than a dismembering of the fetus. A Nebraska law banned partial-birth abortions with no consideration for the health of the pregnant woman and subjected state physicians performing the procedure to revocation of their licenses. Dr. LeRoy Carhart challenged the ban's constitutionality, claiming that the law was vague and placed an undue burden on women seeking abortions as well as physicians such as himself. The Court struck down the ban because it placed an undue burden on a woman's right to make a decision to abort and did not allow an exception for her health.

Nguyen v. INS, 533 U.S. 53 (2001). U.S. immigration law automatically granted citizenship to a child born abroad out of wedlock to an American mother and an alien father, while a

child born to an American father and an alien mother had to meet more complex requirements. The additional prerequisites were based on the premise that the birth mother is more likely than the father to establish the required relationship with the child needed to grant citizenship. The Immigration and Naturalization Service had begun deportation proceedings against Tuan Anh Nguyen after he pleaded guilty to two counts of sexual assault on a child. Nguyen, having been abandoned after birth by his Vietnamese mother and reared by his American father, had failed to apply for U.S. citizenship by age eighteen as required, but challenged the sex-based classifications as an equal protection violation nonetheless. The Court upheld the differentiation, stating that the discriminatory means employed aided the achievement of an important governmental objective—assuring the biological connection between the child and the citizen parent. Ginsburg, Breyer, and Souter joined O'Connor's dissent, which argued that the government had not shown "exceedingly persuasive justification" for the different classifications nor had it established how those classifications related to the achievement of important governmental objectives of parental bonding with the citizen parent.

Gratz v. Bollinger, 539 U.S. 244 (2003). For undergraduate admission to the College of Literature, Science, and the Arts, the University of Michigan used a set of scores based on a variety of measures with certain points assigned for underrepresented minority students. Jennifer Gratz and Patrick Hamacher filed suit, claiming reverse discrimination. Rehnquist's opinion for the 6–3 majority held that the admissions policy was not sufficiently narrowly tailored to meet the strict scrutiny standard. In her dissent, Ginsburg countered that equal protection required permitting government decision makers to distinguish between exclusionary and inclusionary policies—actions intended to deny participation and measures to counter the effects of past discrimination.

Grutter v. Bollinger, 539 U.S. 306 (2003). The University of Michigan Law School sought to ensure a "critical mass" of underrepresented minority students to contribute to a "diverse and academically outstanding" student body. Although it did not define diversity solely in terms of racial and ethnic status, the university did make specific reference to the inclusion of African American, Hispanic, and Native American students. Barbara Grutter filed suit, claiming that the Law School discriminated against her by using race as a "predominant" factor. In a 5–4 ruling, Ginsburg joined O'Connor's majority opinion, which stated that the university's Law School could maintain its narrowly tailored race-conscious policy because minority status was just one of several factors used in its individual review of each applicant for admission and that a diverse student body promoted "a compelling state interest."

Nevada Department of Human Resources v. Hibbs, 538 U.S. 721 (2003). The Family and Medical Leave Act of 1993 (FMLA) granted job protection and unpaid leave for covered family and medical issues. William Hibbs was fired from the Nevada Department of Human Resources after he refused to return to work on the date indicated, believing he still had time remaining on his FMLA leave to take care of his wife. He subsequently filed suit, claiming his dismissal was a violation of the FMLA. Upon appeal, Nevada—and fourteen other states—argued that the Eleventh Amendment prevented a state from being sued by its own citizens in federal court. Ginsburg sided with the 6–3 majority, ruling that Congress was acting within its power in rescinding immunity given to states against suits, thereby allowing state employees to recover monetary damages for violations of the FMLA.

Hamdi v. Rumsfeld, 542 U.S. 507 (2004). The writ of habeas corpus requires the person or entity detaining another individual to bring that person before a judge to determine whether the incarceration is legally justified. The father of the American-born Yaser Hamdi, who was held at Guantánamo after being accused of fighting with the Taliban, appealed to the Supreme Court for the right of habeas corpus. A four-justice plurality, written by O'Connor, recognized that Congress had expressly authorized the detention of enemy combatants when it had passed the Authorization for Use of Military Force (AUMF)

shortly after the terror attacks on September 11, 2001. American citizens, however, still retain the rights of due process. Ginsburg joined Souter's dissent on the first point, insisting that the AUMF did not authorize the detention of Hamdi.

Gonzales v. Carhart, 550 U.S. 124 (2007). The Partial-Birth Abortion Ban Act of 2003 subjected any doctor who performed the procedure to a fine and imprisonment. Dr. LeRoy Carhart and other physicians who performed late-term abortions sued to stop the act from going into effect. By a 5–4 vote, the Court upheld the act, even though it lacked an exemption related to the mother's health, stating that it did not impose an undue burden on the rights of women to obtain an abortion. Ginsburg read her dissent aloud from the bench, calling the decision "alarming" in that it accepts federal attempts to ban an accepted medical procedure and "blesses a prohibition" that lacks an exception for a woman's health.

Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007). The policy of the Equal Employment Opportunity Commission is that each pay period of uncorrected discrimination is seen as a new incident of discrimination. In 1998, Lilly Ledbetter filed suit against her employer, Goodyear Tire, for sex discrimination related to pay. The majority used a procedural issue—she had not demonstrated Goodyear's discriminatory intent within 180 days of its occurrence—to rule that employers could not be sued for pay discrimination under Title VII of the Civil Rights Act of 1964. Ginsburg in a strong dissent from the bench suggested that legislative action might be necessary because the Court's interpretation had strayed from the act's core purpose. In 2009, Congress passed the Lilly Ledbetter Fair Pay Act allowing prior acts of discrimination to be part of a claim.

Northwest Austin Municipal Utility District No. 1 v. Holder, 557 U.S. 193 (2009). Section 5 of the Voting Rights Act of 1965 (VRA) provided a "preclearance requirement" under which targeted areas with historic patterns of voting discrimination were required to submit any alteration of voting practices to the U.S. attorney general for approval. The district sought an exemption from Section 5 while also arguing that the section was unconstitutional. The Court ruled that the district could apply for an exemption, but it made no ruling on the constitutionality of Section 5. However, Roberts warned in his majority opinion that "the Act imposes current burdens and must be justified under current needs," setting the stage for *Shelby County v. Holder*. All of the other justices, including Ginsburg, joined in the opinion. Clarence Thomas joined in part and dissented in part.

Citizens United v. Federal Election Commission, 558 U.S. 310 (2010). The Bipartisan Campaign Reform Act (BCRA) of 2002 expanded the scope of the Federal Election Campaign Act of 1971, limiting "electioneering communications"—a broadcast, cable, or satellite communication that is distributed for a fee and mentions a specific federal candidate—within thirty days of a primary election. Citizens United sought an injunction against the Federal Election Commission, claiming that the application of the BCRA to its film *Hillary: The Movie* violated the First Amendment. The Court held that corporations and unions have First Amendment rights as do individuals and that the government could not restrict their political expenditures on both electioneering communications and advocacy for or against a particular candidate. They may not, however, contribute directly to any candidate or political party. Ginsburg, Breyer, and Sotomayor joined Stevens in dissent.

Fisher v. University of Texas, 570 U.S. 279 (2013); *Fisher v. University of Texas,* 579 U.S. ___ (2016).* After the Court's 2003 ruling in *Grutter* allowed race to be a factor in admissions to the University of Michigan, the University of Texas modified its admissions process to include admitting African Americans from more privileged socioeconomic backgrounds

* Page numbers and Supreme Court citations are assigned only after U.S. Reports has created a printed bound volume. At the time that this manuscript was submitted for publication in May 2018, the most recent release by the Government Printing Office was volume 567, which included cases for the 2011 term. Cases from subsequent volumes typically use three underscores until an official page number has been assigned. Any case citations from these later volumes that include a page number are based upon unofficial reporting and are subject to change with the official volume publication.

to create a greater variety in experience among its black students. Abigail Fisher filed suit after she was denied admission, claiming that the use of race in admissions decisions violated the equal protection clause of the Fourteenth Amendment. Fisher appealed to the Supreme Court, which sent the case back to the lower courts to reconsider. Writing for the seven-member majority, Kennedy stipulated that colleges and universities must conduct "a careful judicial inquiry into whether a university could achieve sufficient diversity *without* using racial classifications." Ginsburg dissented, taking issue with the majority's claim to allow colleges and universities to value racial diversity while also tightening even further the requirements for taking race into account. The case made its way back to the Supreme Court in 2016. In *Fisher II,* a 4–3 majority ruled that while race consciousness played a role in a small number of admissions decisions, the university's policy was narrowly tailored and therefore constitutional.

Shelby County v. Holder, 570 U.S. 2 (2013). Shelby County, Alabama, sought a declaratory judgment that the 2006 renewal of Section 5 and Section 4(b) of the VRA was unconstitutional. It argued that by only applying to a limited number of states, Section 5 violated the equal sovereignty of the states. Section 4, which included a formula devised in 1972 to identify problem areas, imposed an undue burden on the covered states because it did not take "current needs" into consideration. After being denied in the lower courts, Shelby County appealed to the Supreme Court, where a 5–4 majority let Section 5 stand but ruled that Section 4, based on old data, was not constitutional. Ginsburg's powerful dissent took the majority to task for failing to engage with congressional findings on current forms of voting discrimination, for failing to defer to congressional authority in assessing the need for the VRA, and for equating the paucity of enforcement actions under Section 5 with evidence that the act was no longer needed in the designated areas where there was repeated evidence of voter discrimination.

Hollingsworth v. Perry, 570 U.S. ___ (2013). A California ballot initiative, Proposition 8, amended the state constitution to stipulate that "only marriage between a man and a woman is valid or recognized in California." Two same-sex couples filed suit, claiming the amendment violated their right to equal protection and due process based on sexual preference. When the State of California chose not to defend the Proposition 8 change, proponents of the ballot initiative stepped in as defendant-interveners. Losing in the lower courts, they appealed. The Supreme Court in a 5–4 vote ruled that supporters of Proposition 8 did not, in fact, have standing to appeal, effectively allowing same-sex marriages to continue in California.

United States v. Windsor, 570 U.S. ___ (2013). The Defense of Marriage Act (DOMA) defined marriage as a legal union between one man and one woman. Edie Windsor filed suit when the Internal Revenue Service denied her claim to the federal estate tax exemption for surviving spouses following the death of her partner, Thea Spyer. When the case reached the Supreme Court, Kennedy's opinion for the 5–4 majority ruled DOMA to be in violation of the Fifth Amendment because the statute prevented same-sex couples from sharing in the protections given by the federal recognition of marriage.

Burwell v. Hobby Lobby Stores, 573 U.S. ___ (2014). The 1993 Religious Freedom Restoration Act stipulated that the government not impose a "substantial burden" on believers, while a provision in the Affordable Care Act (ACA) required employers' insurance coverage to include various means of contraception. The evangelical owners of the Hobby Lobby craft stores filed suit, arguing that they should not be forced to provide emergency contraception (popularly known as the morning-after pill) or an intrauterine device, which they claimed violated their religious beliefs. The Court ruled that religious freedom protections should be extended to owners of "closely held" corporations. Ginsburg's dissent that for-profit corporations cannot be considered religious entities was joined by Breyer, Kagan, and Sotomayor.

Obergefell v. Hodges, 576 U.S. ___ (2015). Several states, including Ohio, had statutes that banned same-sex marriages and refused to recognize those marriages performed in other

states. James Obergefell filed suit after Ohio failed to recognize his marriage to John Arthur, which had taken place in Maryland. Consolidating six cases on appeal, the Court, in a majority opinion written by Kennedy, ruled that the right to marry "is a fundamental right inherent in the liberty of the person. . . . Couples of the same sex may not be deprived of that right and liberty." The Kennedy opinion laid the groundwork for a shift in legal doctrine, rejecting past subordination in favor of "equal dignity" where all individuals share an equal measure of personal autonomy and freedom in defining themselves rather than having that identity defined by the state.

Zubik v. Burwell, 578 U.S. ___ (2016). Similar to *Hobby Lobby, Zubik,* a consolidation of six cases, including that of the Little Sisters of the Poor, pitted religious beliefs against federally mandated health-care requirements. Several religious organizations challenged lower court decisions that upheld the ACA mandate. The groups argued that although an exemption allowed their institutions to opt out, they would still be morally complicit in facilitating a health-care system that provided contraceptive coverage. The Court issued a per curiam decision vacating the lower courts' decisions when the opposing parties agreed to examine alternative solutions, but also stipulated that it had reached no decision on the merits of the case.

United States v. Texas, 579 U.S. ___ (2016). Obama announced an executive action, the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) initiative, to delay deportation of unauthorized immigrants who have children who were born in the United States. Several states, including Texas, obtained a temporary injunction, arguing that DAPA violated the Constitution because it was arbitrary and capricious and had not gone through the notice-and-comment process of the Administrative Procedure Act. Also, they argued that the president had exceeded his powers, violating the take-care clause of the Constitution ("The President . . . shall take care that the laws be faithfully executed"). The Obama Justice Department appealed, but the Court issued an unsigned per curiam decision stating "the judgment is affirmed by an equally divided court," allowing the lower court injunction against DAPA to stand.

Whole Woman's Health v. Hellerstedt, 579 U.S. ___ (2016). Texas Law H.B. 2 required physicians performing abortions to have admitting privileges at nearby hospitals and for abortion clinics to meet the standards set for ambulatory surgical centers in the state. The Whole Woman's Health clinic and other abortion providers challenged the law as unnecessary because it did little to advance women's health and, by forcing clinic closings, created substantial obstacles to women seeking abortions. A 5–3 majority determined that the law represented an "undue burden" to women seeking an abortion with Ginsburg writing a concurrence to Breyer's opinion in which she noted the relative safety of abortions compared with other medical procedures. Laws that limited access to abortions in the name of safety "cannot survive judicial inspection."

Sessions v. Morales-Santana, 582 U.S. ___ (2017). In a case similar to *Nguyen v. INS* (2001), *Sessions v. Morales-Santana* focused on gender-based differentials in the transmission of U.S. citizenship to a child born abroad to unwed parents. Luis Ramón Morales-Santana challenged Section 1409(c) of the Immigration and Nationality Act—the government's requirement that unwed fathers have a minimum of ten years of U.S. residency in order to pass American citizenship to their children in contrast with the one year stipulated for unwed mothers. Ginsburg's opinion, written for the 7–1 majority, held that the prerequisite was "incompatible" with "the equal protection of the laws."

Trinity Lutheran Church v. Comer, 582 U.S. ___ (2017). Trinity Lutheran Church in Columbia, Missouri, wanted to resurface the playground used by its preschoolers but claimed its First Amendment rights had been violated when its application to a state program using recycled tires for that purpose was denied. The State of Missouri maintained that its constitution barred any aid to religious groups, direct or indirect. The Court's majority held that the exclusion of churches from state programs open to other charitable groups

violates the Constitution's protection of religious freedom. Roberts's opinion maintained that the exclusion of a religious organization from a public benefit for which it is qualified solely on the basis of it being a church is "odious to our Constitution." Sotomayor's dissent, which Ginsburg joined, argued that the ruling would lead the nation "to a place where separation of church and state is a constitutional slogan, not a constitutional commitment."

Ziglar v. Abbasi, 582 U.S. ___ (2017). *Ziglar v. Abbasi* consolidated three cases asking whether noncitizens detained after 9/11 have the right to sue for damages against individual government officials. The case focused on 762 men, primarily Muslims from Arab and South Asian countries, arrested for violations of immigration regulations, who claimed that they had been held as persons "of interest" in detention centers under unreasonably harsh conditions solely because of their race, religion, and ethnicity. Writing for the 4–2 majority (Justices Sotomayor and Kagan had recused themselves, and Gorsuch had not been on the Court to hear oral arguments), Justice Kennedy held that while they did not condone the alleged treatment, lawsuits seeking financial compensation were not the proper way to address misconduct related to a national security crisis, because they could lead officials to "second-guess difficult but necessary decisions." Qualified immunity was valid in instances where reasonable officials in a given situation could not have foreseen the potential illegalities of their policy decisions. Ginsburg joined Breyer's dissent, maintaining that lawsuits for damages were a valid means of checking executive misconduct.

Author's Interviews

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Marcia Greenberger
Jon Greenleaf
Eva Hanks
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Edmund Kaufman
Sylvia Law
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Ruth Watson Lubic
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Kathleen Peratis
Susan Rieger
Richard Salzman
Lynn Hecht Schafran
Elizabeth Schneider
Hans Smit

Nina Totenberg
Laurence Tribe
Sarah Weddington
Stephen Wiesenfeld
Wendy Webster Williams
Melvin Wulf
Diane Zimmerman

Paper Collections/Archival Research

Columbia University Rare Book & Manuscript Library, New York
William J. McGill Papers, 1929–79

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