



Jeffrey Rosen: [00:00:00] I'm Jeffrey Rosen, President and CEO of the National Constitution Center, and welcome to We The People, a weekly show of constitutional debate. The National Constitution center is a non-partisan nonprofit, chartered by Congress to increase awareness and understanding of the Constitution among the American people. Last night, I was thrilled to launch, at the National Constitution Center, my new book, Conversations with RBG: Ruth Bader Ginsburg on Life, Love, Liberty, and Law. And it was such an honor to launch the book in conversation with the great Dahlia Lithwick, host of the Amicus podcast, veteran Supreme Court reporter and old friend. Together, Dahlia and I discussed the sources of Justice Ginsburg's greatness. Dahlia had an important insight about her shining empathy. I offered my own thoughts and together we discussed a personal and constitutional hero. So please enjoy my conversation with Dahlia and please join us back here next week for another weekly show of constitutional debate.

Please join me in welcoming the great Dahlia Lithwick. And with that, I have the pleasure of turning it over to Dahlia.

Dahlia Lithwick: [00:01:27] All right. Well, thank you all for- for coming out. This is- this, kind of, a- a groupie thing wherein Jeff Rosen and Dahlia Lithwick get to see who's the bigger Ruth Bader Ginsburg groupie-

Audience: [00:01:40] [laughs].

Dahlia Lithwick: [00:01:40] ... and you get to watch.

Audience: [00:01:41] [laughs].

Dahlia Lithwick: [00:01:41] But th- that's essentially... It's just a pleasure to- to be here helping Jeff spread word about this really, really beautiful book. And so we're gonna, sort of, have a conversation, talk about the book and then we take questions from you all about how much you love Ruth Bader Ginsburg. And, Jeff, I think, I wanna start at the very beginning and just ask you to describe how you first go to know Ruth Bader Ginsburg.

Jeffrey Rosen: [00:02:13] So it was 1991 and I was a law clerk on the U.S. Court of Appeals for the D.C. circuit, and I was in an elevator. I think, I was going up and into the elevator steps this austere, very formidable woman in workout clothes-

Audience: [00:02:34] [laughs].

Jeffrey Rosen: [00:02:35] ... coming from a class called jazzercise.

Audience: [00:02:38] [laughs].

Jeffrey Rosen: [00:02:39] And Judge Ginsburg, who I hadn't met, had an ability to be incredibly intimidating, even in her workout clothes-

Audience: [00:02:45] [laughs].

Jeffrey Rosen: [00:02:46] ... and she was completely silent in the elevator. Now those who don't know her can mistake this silence for you know, inaccessibility, but it is, kind of,



daunting to- to have a, kind of, long elevator with the other person saying nothing. So, just in an effort to break the ice and 'cause I couldn't think of anything else to say, I just asked her, "What operas have you seen recently?"

Audience: [00:03:05] [laughs].

Jeffrey Rosen: [00:03:06] I didn't even know she was an opera fan-

Audience: [00:03:08] [laughs].

Jeffrey Rosen: [00:03:09] ... But I am, and I couldn't think of anything else to say.

Audience: [00:03:11] [laughs].

Jeffrey Rosen: [00:03:12] As it happened, that was the right question to ask because she really loves opera, as do I, and we started talking about the operas we'd seen and the operas we were going to see, and that started this magical, serendipitous, blessed friendship that has lasted for 25 years.

Dahlia Lithwick: [00:03:29] So- so this book is essentially, a collection of conversations that Jeff and the Justice have had over the years on a variety of topics, and, trust me when I tell you, any one of these topics is something that you really do want to hear what the Justice had to say.

But I- I thought Jeff, just as a framing question I would just ask you this. Justice Ginsburg always talks about the advice that her mother gave her as a young girl, and, at one level, it sounds, kind of, trite. At another level, I think it's very deep and actually inherently contradictory. She always says her mother told her two things always. One, "Be independent." Two, "Be a lady." Now, bearing in mind that, at that time, "Be a lady," meant, "Don't be independent." it is a life that she has actually crafted in which she has managed to do both, and you and I have had the conversation before about how often the meme of the rapper gangster, you know, killer, crusher RBG that has emerged toward the end of her career, somehow dis-serves the part of her that is a lady, very much a lady.

And I wonder if you could just, as a way of setting the table, Jeff, talk a little bit about... You describe her as a minimalist in the book. You describe her as very small-c conservative. We know that on the D.C. circuit she agreed with Antonin Scalia and Robert Bork as much as she d- agreed with anyone, and through the arc of this book you actually trace that change. So I wonder if you can just take us through the Ruth Bader Ginsburg that was a lady, was very careful, very reserved, still is, to the Ruth Bader Ginsburg of today, who by the way, I have the tote bag.

Jeffrey Rosen: [00:05:29] [laughs].

Audience: [00:05:31] [laughs].

Jeffrey Rosen: [00:05:31] So do I.

Dahlia Lithwick: [00:05:32] Yeah.



Jeffrey Rosen: [00:05:32] [laughs].

Audience: [00:05:33] [laughs].

Jeffrey Rosen: [00:05:33] That's such a great question because it encapsulates both essence of what makes her such a remarkable model and hero personally and constitutionally. And you're right that those two injunctions from her mother, and the fact that she tells it, shows how significant it is to her, might seem to be in tension. How can you both be a lady and be independent? I a- asked her about this during our last interview in July and I say, "Your mother often told you to be a lady, to be independent." "Yes," she said. "Wh- by that, I gather she meant overcome unproductive emotions like anger and jealousy. Is that right?" "Yeah," she said, "That's the advice of the great wisdom traditions." "Yes." "But it's very hard to achieve in practice." "Absolutely." And then I said, "So how do you actually do it?" And she said... Lauren, my wonderful wife has just arrived, so, "Your seat-

Audience: [00:06:34] [laughs].

Jeffrey Rosen: [00:06:34] ... is right there [crosstalk 00:06:49].

Audience: [00:06:35] [laughs].

Dahlia Lithwick: [00:06:35] [laughs].

Jeffrey Rosen: [00:06:35] It's good that [laughs] you've come just at the right moment, Darling, because we're talking about RBG's advice from her mother, always to be a lady and to be independent.

Lauren: [00:06:43] [inaudible 00:06:57].

Jeffrey Rosen: [00:06:44] Not at all. So I said, "How do you actually achieve it?" And she said, "Because I realize if I don't overcome unproductive emotions, I'll use precious time for useful work." And it's that extraordinary self-mastery that is the advice of the great wisdom traditions of the Bible and the Bhagavad Gita and the Buddhist's traditions to set aside your ego so that you can focus on achieving your true path in serving others that she lives more successfully than any human being I've ever encountered. And it was in the course of writing this book that I saw it in action.

She a- agreed to do the project. We began to collect the interviews. I sent her the manuscript last January or so. And then, of course, she was ill, and w- I didn't want to disturb her and didn't know what was gonna happen. Th- in- on June 27, 10 minutes after the Supreme Court term ended, I got an email from her saying, "I've edited your manuscript and will give it to you on Tuesday."

Audience: [00:07:47] [laughs].

Jeffrey Rosen: [00:07:49] And I was completely stunned, both that she would think of such a thing, littler the b- the partisan gerrymandering has just been upheld and, you know, the census is struck down and sh- she's focused on her deadline. And I came in. I w- I said, "I'm



stunned that you did this. How did you find time to do this?" "Well, I did it in the backs of cars.

Audience: [00:08:04] [laughs].

Jeffrey Rosen: [00:08:04] And when I was, you know, at the movies, and stuff like that," and every single page of the manuscript was marked up in her beautiful penciled script with both commas and typos and... Paul Golub, my spectacular editor is here as well and I would like a round of applause for him because I-

Audience: [00:08:19] [laughs].

Jeffrey Rosen: [00:08:19] ... am grateful to him. And- and Paul is a really great copy editor and Lauren read it really carefully, too. But, of course, all of missed typos and stuff that RBG catches 'cause-

Audience: [00:08:30] [laughs].

Jeffrey Rosen: [00:08:30] ... her attention to detail is so much greater than any other human beings. And she would change individual words, and in that beautiful pencil, every page is worked up. And just the image, I have to share with you and all of you, friends, of this great lady with all the burdens of the country on her shoulders and with these terrible health challenges that are afflicting her, setting aside her physical pain so that she can focus on all of her work... Obviously, this was just one small project in the middle of everything that she was doing, and always believing that the work, overcoming your ego, not getting distracted, maintaining the focus because it was so urgently important to continue to spread the light. Her ability to actually achieve that inspires me every single day, and we, Lauren and I, talk about it all the time. You know, you- you wake up and there's the choice, "Am I gonna start surfing you know, or- or- or reading and learning?" And I think WW, RBG [laughs]-

Audience: [00:09:29] [laughs].

Jeffrey Rosen: [00:09:29] ... do and you read and you learn and you write. So it's just a model of how to live. So I think that's what her mother really meant. I- she was not raised as an observant Jew, although she's- embraces her Jewish identity, so I don't know that she tied it to the Talmudic tradition, but, "Be- be independent and be a lady," meant, "Don't lose your temper when people are demeaning you with sexist epithets at a time when the epithets were a- a- appalling. Never get rattled when judges, male chauvinist judges are d- are demeaning you with, you know, d- d- d- d- y- calling you, 'Miss Ginsburg,'" and now we know Harry Blackmun's notes sort of, v- g- in- insulting her as well, "never losing your focus." "Why?" I asked her. "Cause I wanted to win my case, you know?"

So that's- it- and so it applies to men, too. Be a- be a gentleman in the sense of be controlled. Be- achieve self-mastery as Aristotle talked about it, so that you can achieve true well-being by serving others. And that's why I think the two are not intentioned with each other. To be a lady is, by definition, to be independent because you're free of ego based emotions. You're not... When Justice Scalia is saying things like, "Your opinion cannot be



taken seriously," as he did at Justice O'Connor, Justice Ginsburg stressed, "I never responded in kind. You know, I love him but he drives me crazy," she said-

Audience: [00:10:50] [laughs].

Jeffrey Rosen: [00:10:50] ... and she... "and when people are losing their temper all around you, you don't lose yours." So that's what I think it means personally. Now how... We- we- I'll stop and we can take another beat about how to frame... how that played out professionally, but I- I'm very glad you noted that central part of her character.

Dahlia Lithwick: [00:11:06] My- my corollary to Jeff's story is that when her nephew, who was her husband Marty's nephew, who wrote the screenplay for the big bio pic that came out last year, and it took him years to write it, and he called and said I'd love for you to have a look at this," thinking that she'd give it the Hollywood read, you know, that [laughs] she'd just blow through it and a day later send him notes. And she s- she [laughs] apparently said to him, same deal. She received it. He'd worked on it for years, and she said, "Page one, line one..."

Audience: [00:11:45] [laughs].

Dahlia Lithwick: [00:11:45] [laughs]. And she- he said this on my podcast. He said, "It took days to go through her notes because she was absolutely ferocious that he get the story right. And more than anything, she really wanted him to get Marty right, the character of Marty right because, as Jeff notes, that was a love story for the ages, and she would not allow him to- to, sort of, fudge any of that. But it goes to this, you know, underneath this, almost myopic, cartoonish precision, there is such a lofty sense of responsibility to get the story right.

Jeffrey Rosen: [00:12:26] I'll- can I tell one more-

Dahlia Lithwick: [00:12:27] Yeah.

Jeffrey Rosen: [00:12:27] ... D- d- editing story? W- w- w- Lauren and I were married by her in her chambers and she said, "Send me the proposed script that you'd like me to read-

Audience: [00:12:39] [laughs].

Jeffrey Rosen: [00:12:40] ... and here are a couple samples that I've used before." So we had it and, kind of, f- forgot about it. We had our mind on other things. At th- you know, her s- her assistant wrote and said, "The Justice would like your edits by 4:00 p.m. Tomorrow."

Audience: [00:12:53] [laughs].

Jeffrey Rosen: [00:12:53] Once again, we forgot about it. 3:00 p.m., "The- the Justice is waiting for your script."

Audience: [00:12:57] [laughs].



Jeffrey Rosen: [00:12:58] So... and this is in the middle of the Supreme Court term. You know, she's got other stuff to do. So we sent in the proposed vows and used the language that she had used in previous ceremonies, which ended with, "Jeffrey, you may kiss the bride." So we sent it in at 3:30. At about 4:30, the marked up, tracked changes-

Audience: [00:13:17] [laughs].

Jeffrey Rosen: [00:13:17] ... in Word come back and she's crossed out, "Jeffrey, you may kiss the bride," and replaced it with, "Jeffrey and Lauren, you may embrace each other for the first kiss of your marriage."

Audience: [00:13:26] Aw.

Jeffrey Rosen: [00:13:27] Aw, absolutely. [laughs].

Audience: [00:13:28] [laughs].

Dahlia Lithwick: [00:13:29] [laughs].

Jeffrey Rosen: [00:13:29] And not on is it an, "Aw," but think about it 'cause she's give the traditional vow scores of times, maybe hundreds of times, but she's so careful and so thoughtful that it suddenly occurred to her to broaden it and to make it egalitarian and to take the time to do this in the middle of ev- everything els is absolutely extraordinary.

But- but is does raise the question of how this great judge who, on the D.C. circuit and when she started off at the Supreme Court, was viewed as a very particularis judge who would definitely pay close attention to word choices and was a judge's judge and a minimalist and was very keen on narrow opinions that wouldn't dramatically disturb legislative choices, became the most galvanizing and g- crusading advocate of liberalism of our time. And I asked her about it and she insisted, "Oh, Jeff. I- I didn't change. The court changed," she said. "When Justice O'Connor retired in 2006 the cart..." that's right, "the court moved to the right," and then she also stressed that when she became the Senior Associate Justice for the, it wasn't 2006. It was, roberts was a- appointed on... d- a- around when Justice O'Connor retired, the- the court shifted and Justice Ginsburg, when Justice Stevens retired, becomes the Senior Associate Justice.

Now here, Justice Ginsburg stressed, understanding a little bit about the procedure of how the Supreme Court operates is important. When- th- the- the justices hear cases and then they go around the table and they vote, if the Chief Justice is in the majority, if he's one of the five, he can either write the decision himself or assign it to the judge who best reflects his views. If he's in the minority, then the Senior Associate Justice in the majority can be a shadow chief and she or he writes the decision or assigns it to the justice who best reflects her views. When Justice Stevens retired, Justice Ginsburg becomes the Senior Associate Justice. All of a sudden, she thinks her role changes. Far from being the minimalist, always crafting narrowing opinions, she thinks it's important for the liberals to speak in one voice, so she starts writing the main dissents and it was in 2013 that she writes her Shelby County dissent, which inspires the Tumblr blog, the Notorious RBG, which goes viral, and she writes the majority opinions when she has the opportunity to do that.



So that's her explanation, that it was really just a change in role and in the composition of the court, not in her. But, Dahlia, I have to ask you this 'cause you've thought as deeply about this as I have. Do you buy that explanation or do you think that she actually did change?

Dahlia Lithwick: [00:16:07] Okay. First of all, it was 2005-

Jeffrey Rosen: [00:16:08] Thank you very much.

Dahlia Lithwick: [00:16:08] ... page 91, paragraph two.

Jeffrey Rosen: [00:16:10] Not too far off.

Audience: [00:16:11] [laughs].

Jeffrey Rosen: [00:16:12] She would have known that.

Dahlia Lithwick: [00:16:13] In the spirit-

Jeffrey Rosen: [00:16:14] Absolutely.

Dahlia Lithwick: [00:16:14] ... of Ruth Bader Ginsburg, we are-

Jeffrey Rosen: [00:16:15] 2005-

Dahlia Lithwick: [00:16:15] ... going to-

Jeffrey Rosen: [00:16:15] ... 2006. Who's counting?

Dahlia Lithwick: [00:16:17] ... precision.

Jeffrey Rosen: [00:16:18] Yes.

Dahlia Lithwick: [00:16:18] So, you know, it's interesting, Jeff recounts, in the book a case that happens when RBG is on the bench alone. Her whole career she's one of two, and she was actually pretty scrupulous about saying, "You know, gender doesn't matter that much." You know, they- she and Justice O'Connor, Jeff talks about this, too, every single year that the two of them sat together, at some point, an oral advocate would call Justice Ginsburg, "Justice O'Connor," and call Justice O'Connor, "Justice Ginsburg." It happened every single term. So much so that the National Women's Law Center had t-shirts made for them that said, "I'm Sandy. She's Ruth. I'm Ruth-

Jeffrey Rosen: [00:16:56] Mm, [laughs].

Audience: [00:16:56] [laughs].

Dahlia Lithwick: [00:16:56] ... She's Sandy." It was, like, joke, but also, I think, that in that period, which is, sort of, the beginning of my watching them, it seemed that she was much less anxious because she wasn't the only, and she was very aware that she wasn't the only, that this, sort of, trailblazing had been done by Justice O'Connor. And then, when O'Connor left in 2005 to take care of her ailing husband, which is, by the way, a whole other feminist



story because it was really a thing that the male justices would not have done, she felt. So O'Connor steps down to take care of her husband and suddenly Justice Ginsburg is the only which is a long way of saying that, in 2009, when the court argues a case about a little girl in middle school, who's been strip searched for contraband ibuprofen... She's apparently running an ibuprofen ring at her middle school.

Jeffrey Rosen: [00:17:57] [laughs].

Audience: [00:17:57] [laughs].

Dahlia Lithwick: [00:17:58] And she's very, very in- in really personal way searched by school administrators, who do not call her parents and give her no option. And the oral argument in that case, I remember sitting in the room, and the oral argument was this, kind of, "[Whacka 00:18:56] whacka. Who's on first?" Everybody was making jokes. Justice Scalia was joking about whether they searched from outside in or the inside out and Chief Justice Roberts was making jokes, and then poor Justice Breyer, who just... Jeffrey accounts all this in the book... cannot help himself but make a bad situation worse starts saying things about, "When I was in high school, changing for gym, people would stick things in my underwear."

And, of course, everybody, at this point, is doubled o- doubled over laughing, and Justice Ginsburg, who never loses her cool because her mom is playing in her ear saying, "Never lose your cool," actually gets very angry. And she, sort of, tunes up her colleagues o- from the bench and says, "This is nothing like changing for gym class," and she describes how this child was humiliated while the strip search was going on. And then interestingly, by the way, she gives an interview while the case is pending, where she says to Joan Biskupic, "I can't believe that I'm the only woman on the bench who thought that was appalling and if there were more women on the bench it would not have been like that." And then she said, which is fighting words for RBG, "I don't think the men share my sensitivities on this." And, by the way as Jeff also points out, by the time the case comes down, all the judges with two exceptions, mostly have conformed entirely to her vision of this as an inappropriate search.

But it was her wielding a, kind of, soft power, and I had never seen her do it until then. And watching the arc of that story... By the way, as that was happening, suddenly Sotomayor is being, you know, looked as- as a replacement. It felt as though she, kind of, kicked into some kind of gear. She was very much, I think, offended by being the only. She was offended by that, kind of, the way that went down in the Stafford case, and I think she felt as though, just gently, by chiding her colleagues, she had effectuated a constitutional outcome that was not what looked like was going to happen from oral argument. And I think that, to me, is when I carbon date how she started to change. And then, you know, a- a- as you say, Hobby Lobby comes. She certainly went after Justice Kennedy and the so-called partial birth abortion case for what she thought of, you know, was very paternalistic writing.

But I think that it wasn't... i- I- I think that the- the almost the axis is wrong. It's not that she changed or the court changed. I think she realized she had a really singular role she could play and that she was very deft and subtle about playing it initially. And I think as it started to feel comfortable to her, she really, really, you know, by Hobby Lobby and by Gonzales and, you know, the other cases that came along, I think she embraced it.



Jeffrey Rosen: [00:21:18] You know, that's so convincing, and that is really a powerful account and saying that she felt comfortable in the role seems right, too. Remember, of course, she was an advocate and she calls herself... In the book, she said, "You know, back in the days when I was a flaming feminist, I had these goals but I had to win my case," and that's why she was always so strategic. She chose to represent men who had been disadvantaged by paternalistic laws favoring women, and she always moved incrementally like Thurgood Marshall and her briefs were written in this very particular way, constantly citing precedent 'cause she was just so strategic, but always, she's a passion... She's the most important advocate of gender equality of our time and in American history now.

So I think that you're right, that once she both realized that she had a distinctive role to play and was, a- as you just said, outraged by the fact that her male colleagues weren't getting it, she could find her voice, and then the writing changes, too. The early decisions quote other judges all the time, "As Judge Posner said," or, "As the court said in this case," and they're full of citations and every sentence is footnoted. Suddenly, after 2013 or so, she's coming up with these great metaphors, like, "Just because it's not you're not getting wet doesn't mean that you throw away your umbrella," and she writes like a dream and she writes in a really galvanizing way. And then young women and other citizens are galvanized and responding and start quoting her, so she- she's just freed up. She's liberated to say what she thinks and what she thinks is she does not like what's going on constitutionally at the court.

And I asked her, "What are the decisions that you would most like to see overturned?" and she didn't miss a beat. She... You know, it's unusual for a sitting justice to say this, but she said, "The first on the list would be Citizens United. That was an outrage." And I- I'm- I'm just describing. You can clap-

Dahlia Lithwick: [00:23:12] [laughs].

Jeffrey Rosen: [00:23:12] ... on a non-partisan basis-

Audience: [00:23:14] [laughs].

Jeffrey Rosen: [00:23:14] ... but there was nothing non-partisan about her list because then- then the next case was the healthcare case, which, after all, came out for ju- for President Obama, but Justice Ginsburg was outraged by Chief Justice R- Robert's separate opinion which broadly construed the Commerce g-... which narrowly construed the Commerce Clause in ways that she thought would harm government regulation in the future. The next on her list is the Shelby County case, the voting rights case and the final one is Carhart.

And that was so interesting, too. There was... I wrote an article around the time that Carhart came down, saying, "Justice Kennedy votes with the liberal justices in the marriage equality and abortion cases," and she wrote a letter out of the blue saying, "You might be right about upholding Roe and Casey, but what about Carhart and what about Stenberg and what about those paternalistic stereotypes?" And she was- she was offended by the notion that these m- meek women had to be protected from regretting their own choices, and she said so.



So it was j-... I think you're- you're right. I g- th- th- k- finding her voice, feeling comfortable, and then suddenly, the- all the roles come together and you realize what it's like to have the Th- the Thurgood Marshall of the women's movement. Now we can call Thurgood Marshall the Ruth Bader Ginsburg for, you know, African Americans because- 'cause this is just a constitutional hero who found her voice.

Dahlia Lithwick: [00:24:33] So- so- so this leads me to... One of the things that- that you explore in the book is, and- and we forget this because, again, this is a time in her history that we've elided, but when she was first tapped for the U.S. Supreme Court, the truth of the matter is, women's groups did not want her. They were strongly opposed to her. One of the funny s- codas to this story is that it was Marty Ginsburg working the refs, who managed to get... and Jeff Rosen, by the way who writes a piece in the New Republic that bounces her to the top of the list. But the women's movement was really, really suspicious of her, and we've forgotten that piece of history.

And one of the things that's interesting is not just... again, she didn't change. She actually had a fairly consistent criticism of Roe that she had elucidated at the time, that people took very much, I think, amiss and it continues to be, to this day, her criticism of Roe. So I just want to read to you what she said when Jeff asked her in one of the interviews why Roe was wrong, and then just think about the fact that, at one point, that was so inflammatory that women didn't want her confirmed. Now it seems that, "Oh, she might have been on the right track and we [laughs] failed to catch it."

This is what she said. "At the time of Roe v. Wade, this issue was all over the state legislature. Sometimes the choice people won. Sometimes they lost. They were out there organizing and getting political experience. The Supreme Court decision made every law in the country, even the most liberal, unconstitutional in one fell swoop. The people who prevailed said, 'How great. We're done. We've got it all. The Supreme Court gave it to us.' What happened? Opposition mounted and instead of fighting in the trenches, state by state, to retain restrictive abortion laws, there was one clear target to aim at, the unelected justices of the Supreme Court. 'This is a decision that should be made,' so the argument went, 'by the people's elected representatives and not nine,' at the time, 'old men.'"

So, embedded in here, there's few criticisms. I think, many of which have been borne out by history. One is that the move in opposition to Roe becomes the single most powerful and effective movement in the country that attacks on the unelected judiciary, becomes salient and organizing. And then her third critique, which is not in this quote, is that she would have always located th- reproductive rights not in the due process clauses, the privacy clauses, not in the right that she scoffs at in Roe, between a doctor and a woman, but in the equal protection clauses, that women cannot function as economic equals in a society where they can't control their reproductive rights.

In many ways, each of those critiques, pretty prophetic, but it's amazing that she went from being somebody that the feminist movement, at that time, in the early '90s, found way too conservative. And now, here she is she seems to have been ahead of her time.



Jeffrey Rosen: [00:27:43] You summed that up so perfectly, and it's a remarkable example, and prophetic is exactly the right word. In that sense, she's, like, our mutual hero of Justice Ginsburg and mine, and I bet yours, too, Justice Brandeis, who's a judicial prophet. So just to unpack some of the great stuff that Dahlia said, isn't it amazing, at the time, women's groups opposed her? It's impossible to imagine now.

And yes, I had just fallen... After the luck of meeting her in the elevator, my first job out of clerking was to be the young highly overconfident Legal Affairs Editor of The New Republic magazine. And there was this Supreme Court seat and I t- t- took it upon myself to make a list, ranking the candidates, and put her at the top of the list, saying that her criticisms of Roe were prescient and she was as respected by liberals and conservatives and I noted I'd just gone to a lunch with the law clerks of the U.S. Court of Appeals and two weeks earlier, Justice Scalia had been there. And he was asked, "If you had to be trapped on an- a desert island for the rest of your life with m- m- Mario Cuomo or Larry Tribe, who were the front runners-

Audience: [00:28:52] [laughs].

Jeffrey Rosen: [00:28:52] ... for the seat, what would you choose?" And without missing a beat he said, "Ruth Bader Ginsberg."

Audience: [00:28:56] [laughs].

Jeffrey Rosen: [00:28:57] So I- I told that story. I said her a- c- op- you know, nomination would be the most acclaimed since Felix Frankfurter, who turned her down for a clerkship on the grounds that she wasn't... the court wasn't ready for a woman. Now we are. So the role of this piece was that th- th- thanks to Marty Ginsburg, and I didn't know about this campaign at the time. Daniel Patrick Moynihan was championing Justice Ginsburg's nomination at a time when Edward Kennedy was championing Stephen Breyer from Boston. So Moynihan is talking to Clinton on Air Force One and Clinton says, "Who should I appoint?" And Moynihan, as he tells me 'cause, you know, I asked him and he wrote about it, had just read the piece and he said, "Ruth Bader Ginsburg." And Clinton said, "The women are against her." That was Clinton's words. And Moynihan said you've got to appoint her." and then they were able to fax something comparing her to the Thurgood Marshall of the women's movement and that brought her over the edge.

So she's appointed. The women's groups are against her, both 'cause of Roe and 'cause they think she's too minimalist, too conservative, too cautious, not enough of a crusader. But then, think about how prophetic she was as Dahlia said. The claim that Roe inspired a backlash that would energize the pro-life side and make complacent, the pro-choice side, in a way that stayed, what Justice Ginsburg said was a movement in favor of the liberalization of abortion laws seemed right. Roe came, as she predicted, to dominate our Supreme Court confirmation politics in a way that blinded people to other issues like the future of the administrative state, for example, that had proved just as salient.

And then there's the equality rationale, and you have to... If many of you are constitutional junkies, all of you are in spirit 'cause you're here, but it's so remarkable, that, for 20 years,



the brightest, most brilliant legal minds in America tried to come up with an alternative rationale for Roe to Justice Blackmun's privacy metaphor, which was problematic, both 'cause the constitution doesn't explicitly protect reproductive autonomy or privacy in that sense, and also because it was paternalistic, as Justice Ginsburg said, to conceive of abortion as a private choice between women and their mostly male doctors.

And after 20 years of thinking, the best that the most brilliant minds could come up with was Justice Ginsburg's claim that it's a violation, not just of privacy, but one of women's equality to impose burdens on women that are not imposed on men, to prevent women, and not men, from making autonomous decisions about their life courses and careers. And, in that sense, to v- violate the promise of equality enshrined in the constitution. And when the c- court upheld Roe v. Wade, in Casey v. Planned Parenthood, it invoked that equality rationale and now, and when... and Justice Ginsburg gave... she- she- she d- she doesn't miss a trick. I mean, it's j-... she's a masterful chess player who's thinking all this out.

She sent us, at the Constitution Center, a singed copy of her brief in the Struck case, which was a case from the 1970s, where she represented a servicewoman who was seeking an abortion and was not able to get one 'cause of military regulations at the time, where Justice Ginsburg first articulated the claim that restrictions on abortion violated equality. The case become mute because the army decided to s- to- to settle it, rather than risk losing. So therefore, she never had a chance to litigate it, but 20 years later, she's sending us the brief, and if we'd listened to her 25 years ago, the rights of abortion would be on much stronger constitutional grounds.

Whew, [crosstalk 00:33:21].

Dahlia Lithwick: [00:32:22] Yeah, well- what-

Audience: [00:32:24] [laughs].

Jeffrey Rosen: [00:32:24] [laughs].

Dahlia Lithwick: [00:32:24] ... nope, that's-

Jeffrey Rosen: [00:32:24] Absolutely, that's [Raiff 00:33:24] in the front row, my wonderful-

Dahlia Lithwick: [00:32:27] ... yeah.

Jeffrey Rosen: [00:32:27] ... book agent and-

Dahlia Lithwick: [00:32:28] [laughs].

Jeffrey Rosen: [00:32:28] ... he gave a big, "Whew." There we go.

Audience: [00:32:31] [laughs].

Dahlia Lithwick: [00:32:31] Let's- while we're- while we're talking about women's issues, I think it's worth just jumping to the very end of the book. One of the last conversations you've captured in the book, where you ask her about Me Too, and I actually remember



being at an event here where you asked her about Me Too, and she was, as ever, quite extraordinary about explaining it as a movement and not a moment and what what she, sort of, saw it beginning to- to change and to shift. But there is a moment where you just straight up asked her in one of these very recent interviews, "What is your advice to all women about how to sustain the momentum of this movement and make its changes lasting?" And this is what she says, and I just want to quiz you on it- 'cause it's another one of those... she's not hiding the ball at all. She says exactly what she thinks.

This is Ruth Bader Ginsburg. "I've heard from lawyers about women coming forward with reports of things that happened many years ago, even though the statute of limitations is long past. These cases are being settled. One interesting question is whether we will see an end to the confidentiality pledge. Women who complained and brought suit were offered settlements in which they would agree that they would never disclose what they had complained about. I hope those agreements will not be enforced by the courts."

So that's Ruth Bader Ginsburg just blowing up the NDAs and all of the- of the requirements that have really, I think, been used by powerful men to suppress Me Too stories, and I... Were you shocked that she just straight up said it?

Jeffrey Rosen: [00:34:08] It's extraordinarily striking. She's completely ahead of the curve. As usual, she understands the most technical issues far better than any of the rest of us. Since realizing the significance of that statement, I just have begun to look into this and I gather there is an argument that non-disclosure agreements made under duress where both parties don't have equal bargaining power, could be unconscionable and unenforceable. But it's a completely cutting legal issue and she had- she boldly jumped right into it and said how she thinks that it will come out. It was remarkable.

What else did you make of her... There's a lot about Me Too in the book and there's th- this incredible dramatic encounter between her and Margaret Atwood. So when I told Justice Ginsburg that I wanted to collect our conversations as a book, she agreed to support the project and then she invited Lauren and me to spend the weekend with her at the Glimmerglass opera in 2018. You can imagine that this was nirvana for both of us, the combination of RBG and opera, and the opera was great, and well, at least, West Side Story was- was great.

And then we went to see Margaret Atwood, who was giving a lecture on the three phases of feminism and Me Too. And Margaret Atwood said that there had been three phases of feminism. The- f- and that this last one, the Me Too one, she feared would provoke a backlash and that its changes would not be lasting. And Justice Ginsburg says, "I think they will be because there's a critical mass. There's so many women in the workplace that we won't go back to the way we did." And then they both discussed their joint concern for due process concerns for the accused as well as the accuser.

Margaret Atwood had gotten into some controversy for having said that that was important, and in the book, Justice Ginsburg criticizes the college codes that don't have due process for the accused as well as the accuser 'cause she's a civil libertarian at her core, ever since she studied civil liberties during the McCarthy era at Cornell, which really shaped her conception



of the importance of due process. She thinks that fairness, for both sides, is crucial and she actually proposes in the book, impartial arbitration proceedings, where universities would put these cases out to outside arbitrators who would have full due process.

So- so I... It was just remarkably complex and it was so her, tremendous support for the movement, confidence that it would last, belief that there remained work to be done, including rooting out unconscious bias, which would continue to lead to discrimination against women, but g- shared concern for the accused or- a- as well as the accused. What did you make of all that?

Dahlia Lithwick: [00:36:45] Yeah, it's- it's... I- I- I mean, leave it to Margaret Atwood and Ruth Bader Ginsburg to be, sort of, at the absolute zenith of woke feminism and also both to be worried about the rights of the accuser. I mean, it's an astonishing... Neither of them are, sort of, believe all women fundamentalists. They are both so complicated and I think it's such a useful lesson, both of them coming at it from radically different places, to arrive at this moment where they both worry profoundly about the accuser. And I think it's fascinating.

At the same time, every time Justice Ginsburg talks about abortion in- in your various conversations, her solicitude is always for the poor women and for the women who will not be able to pick up a suitcase and fly to Paris and go to a spa and terminate a pregnancy. And it's interesting because I think she has such a deep concern for women who are disempowered in a way that is g- maps on to so much of Atwood's writing and so much of *The Handmaid's Tale*.

So it is really interesting to me that they're both, again, talking on two axes. You know, they are certainly talking about this Me Too moment and the backlash it may or may not produce, but they're also talking about power systems that are self-reinforcing and the ways in which we have to pay attention to that at all costs. I mean, time and time again, she says, "There's never going to be a moment in America where wealthy women will not be able to get abortion."

And, again, when you think back to the critiques of her that feminists were making in the '80s and '90s where they said, you know, "She's functionally just a lady who lunches." You know, "She- she just speaks for rich, privileged lawyers. She has no under..." I mean, that was the critique of her, that she wasn't... They wouldn't have used the word at the time, but they- she wasn't intersectional. They thought she was ridiculously privileged and out of touch. And yet, here she is, at the other end of her career, she seems to be the person who is most, I think, vociferously articulating the proposition that we have two tiers of reproductive justice in this country, and why is she the person who has to keep saying it?

Jeffrey Rosen: [00:39:13] I- I'm learning so much from you on this and I want to ask where that- where you think that came from in her biography.

Dahlia Lithwick: [00:39:22] You know, it's such a good... it- you want to give me these, don't you?

Jeffrey Rosen: [00:39:24] I have-

Audience: [00:39:25] [laughs].

Jeffrey Rosen: [00:39:25] ... too many questions. You guys are not gonna ask- get to ask that many questions 'cause I have a lot of questions-

Dahlia Lithwick: [00:39:29] And I also-

Jeffrey Rosen: [00:39:29] ... for Dahlia.

Dahlia Lithwick: [00:39:29] ... have a question that I wanna ask.

Jeffrey Rosen: [00:39:30] Absolutely.

Dahlia Lithwick: [00:39:30] So let's talk faster.

Jeffrey Rosen: [00:39:32] But- j- and- and- ban- jan- and- d- but just to r- and just to r- to reinforce, whenever I asked her about Roe, she would always say, "It will make a- a- a..." And she... First of all, she says repeatedly, "I'm skeptically hopeful that it will not be overturned as long as the balance of the court remains as it is now, with Chief Justice Roberts in the middle." But she said, "Even if it were, rich women would still be able to get abortions just as they are now. There'd be no..." Remember what happens, everyone, if Roe is overturned, it's not, like, abortion becomes suddenly legal or illegal everywhere. It just goes back to the states, either to restrict it or allow it as they please.

So in blue states r- protections remain unchanged and perhaps even expanded. In red states, there already are almost no abortion clinics and it's extremely hard for poor women to get abortions now, and if Roe were overturned and it were banned in those states, it would be even harder for poor women to g- leave the state and go to a clinic where they could get an abortion. R- r- women of means would still be able to do so. So that's why she's so focused on that. And my question to you is, it's- it's not from her upbringing and it's, obviously, not generational 'cause not all women feel that. Where did that come from?

Dahlia Lithwick: [00:40:36] .. It's a great question and I w-... the last, you know, the big, big biography of Justice Ginsburg doesn't fully answer that question. I mean, this is a child who grows up in tremendous privilege you know, has every opportunity, goes to great schools. Her... You know, in the manner of Jewish mothers everywhere, her mother thinks she walks on water. You know, she really does I think, have every opportunity beyond anyone could have conceived of in her generation, and, you know, doors are- are, essentially flung open, you know, at Harvard and at Columbia. I mean, even though she faced unbelievable discrimination based on gender, in another sense, she had every opportunity. And so Jeff's question, I think, is really the most apt question, which is how does she come to have such an absolutely capacious understanding for and empathy for people who are not privileged? And that cuts through all her jurisprudence. That's Shelby County.

That's... I mean, her awareness of a world that, I think, perfectly, frankly, because she's been on the federal bench for so much of her life. These are not people she's bumping into, like,



at the Wal Mart in El Paso. So, yet, how is that possible? And I think that the root of the q- q- ... For me, Jeff, the book answers it in a way that I hadn't thought about until I read it, which is, listening to her... and I remember when you interviewed her. When she talks about Sharron Frontiero, when she talks about these clients that she had in the '70s and immediately she's telling you the entirety of their biography. She is so absolutely enmeshed in their lives, their jobs, their struggles.

She makes a point of telling Jeff, in the book, "You know, these aren't clients that we cherry picked for the purposes of litigation. These were people who were working people who were struggling with horrific discrimination in whatever context they were." And she remembers this encyclopedia account of their lives and it answers, for me, this question, which is, I think her empathy, which is hard to square with the affect of somebody who seems, at this point, to just be a brain in a vat-

Audience: [00:42:59] [laughs].

Dahlia Lithwick: [00:43:00] ... And who is not, like, deeply emotional and never loses is and, you know, the emotional bandwidth is about this much. And yet, her capacious empathy with people who are not like her, I think, is a signal quality she's carried through her life and it makes her very different. You know, when you want to accuse justices of being elitist and out of touch, I think her capacity to deeply, deeply empathize with lives that are not like hers, to imagine herself into someone else's shoes, and it, in some ways, I think, is book-ended by the entire beginning of her career. She has to talk to panels of all white male judges and try to persuade them that, even though they think she's super lucky to be taken care of and to not have to worry her pretty little head about jury duty or Social Security [laughs] or money. And she has to say to them, "Okay. Start from the proposition that I am the luckiest, most pampered girl in the world, but..." And then she Jiu Jitsu's, largely by bringing appeals on behalf of- of men.

But, I think, that in itself, was such an act of emotional empathy of imaginative connection to people who absolutely couldn't understand, but sh- I think that her entire career has been an arc of translating lives that cannot be understood to a judiciary that is, by definition, not gonna move.

Jeffrey Rosen: [00:44:39] Wow. That is s-

Audience: [00:44:42] [laughs].

Dahlia Lithwick: [00:44:46] I told you-

Jeffrey Rosen: [00:44:46] ... that-

Dahlia Lithwick: [00:44:47] ... I'm a super-

Jeffrey Rosen: [00:44:47] ... I-

Dahlia Lithwick: [00:44:47] ... fan.

Jeffrey Rosen: [00:44:48] ... I know. You're more than a super fan.



Dahlia Lithwick: [00:44:50] [laughs].

Jeffrey Rosen: [00:44:51] That- that's the rosebud. I think you, kind of, b- identified the central quality that s- I hadn't realized was so central to who she is and that's because it's hiding in plain sight. As you say, this is a woman who was g- g- criticized for not having the big heart that... you know, Clinton wanted a big heart and Obama wanted a big heart and she was considered the judge's judge who was always focusing on the law. But behind that particularism was the w- w- warmest and most acutely a- attentive empathy imaginable. So attentive that, when she's reciting all the details of the those cases, she's living those indignities with those people.

She realizes that Stephen Wiesenfeld, who can't get Social Security benefits because the law gives those benefits to widows but not widowers and therefore, he can't be the sole caregiver for his son. She gets to know Stephen Wiesenfeld, and she not only wins the case for him, but she stays in touch with him and she performs his s- second marriage and she marries his son at Columbia. And she's keeping in touch with Sharron Frontiero, who's she's gonna go see at the hundredth anniversary of the 19th amendment.

And so my mom passed in January and Justice Ginsburg was recovering from her cancer surgery, and I saw her for the first time... It was her first outing after the surgery in dec- in- in- at- at- I guess, the end of December. G- d- or- d- d- d- it's- no, it was the end of January, r- right after my mom died, a week after my mom died. She'd just come out of her surgery and the first thing she did was pass along a handwritten note expressing sympathy for my mom, which I used as the dedication. Always thinking of others.

What a... I- I- remember I told you that I think that her ability to master her ego and unproductive emotions so she can serve others is the embodiment of what the wisdom traditions counsels? That's why she's a model of- of how to live. Sh- sh- she's just constantly thinking of others, paying attention to the small details of other's lives and carefully conserving her energy and- and precious time so that she can devote every bit of the- of- of- her time on earth to- to- to serving broader ideals and to thoughtfully engaging with other people. And that's the irony of the- the- the woman who... her... Marty always used to say, "You know, my wife p- people wrongly thinks that she's a cold fish. She's not like that at all." And they could think that because, you know, when you first meet her, she did what she did to me in the elevator. She's just-

Dahlia Lithwick: [00:47:24] [laughs].

Jeffrey Rosen: [00:47:24] She just doesn't say anything. It's, sort of, like, a, like, a martian, you know?

Audience: [00:47:27] [laughs].

Jeffrey Rosen: [00:47:27] And- and- and unless you have the good fortune to stumble into the right topic, the s- the \$64,000.00 question, "What operas do you like?" what happened to be the right question, then you wouldn't get... but behind all that is just constant concern for others. What a remarkable model of how to live. And thank you for solving-



Dahlia Lithwick: [00:47:46] Yeah, well okay. So we have some questions and I'm going to ask them and then you can either answer them or s- s- spike 'em to me. But the question is what is the future of the Supreme Court as it moves to the right, especially if Donald Trump is able to make more nominations?

Jeffrey Rosen: [00:48:03] You know, we- we can do that and Dahlia's great on this and... but let's do another town hall on-

Dahlia Lithwick: [00:48:08] Okay.

Jeffrey Rosen: [00:48:08] ... the future of the... Let's- let's stick to RBG because we have this rare opportunity, really, to illuminate her-

Dahlia Lithwick: [00:48:14] So then-

Jeffrey Rosen: [00:48:14] ... and- and I wanna hear more about you [crosstalk 00:49:44].

Dahlia Lithwick: [00:48:15] I- I- I'll ask you the other RBG related question, which you also may- may want to leave for another day. But it's the question that I think plagues a lot of- of otherwise stalwart fans, which is did she consider stepping down when Obama could have appointed a replacement and why didn't she and why are we in this pickle? The word pickle is not in the question.

Jeffrey Rosen: [00:48:39] [laughs].

Audience: [00:48:40] [laughs].

Jeffrey Rosen: [00:48:40] I- I'm sure that we have a very well-behaved audience, so this- this pretty kettle of fish-

Dahlia Lithwick: [00:48:45] Yes.

Jeffrey Rosen: [00:48:45] ... I'm sure that someone said. I asked her, you know, whenever th- the- it was the time in Obama's second term when people were criticizing her for not retired and I said, "People are criticizing you for not stepping down. Why didn't you step down?" And she said, "What reason is there to believe that anyone better than I could have gotten through the senate?"

Audience: [00:49:02] [laughs].

Jeffrey Rosen: [00:49:05] And [laughs], you know, as it turned out, given what happened a year later, that was not a c- that was not a crazy prediction. So there we go.

Dahlia Lithwick: [00:49:14] I will add my gloss to that. - which is I think she really watched. I- I- I flicked at this initially, but I'll unpack it a little bit. Sandra Day O'Connor essentially got forced off the court. Sandra Day O'Connor goes to Justice Rehnquist, Chief Justice Rehnquist, who has thyroid cancer, and says to him, "I'm gonna go in a year to take care of my husband and- and or I'm gonna go..." Yeah. "He- I- I will go in a year. You go now," and he says, "No, you go now because I'm gonna be fine." She leaves a year before she's ready. By the way, by



the time she has left, within a few months, her husband has to be hospitalized, and within a short time after that, doesn't recognize her anymore. So she gets, kind of, pushed off the court. And then, of course, Rehnquist's answer for why we- we can't both go at the same time is we can't have two vacancies in the same summer. That's unseemly, which is true, and then he dies almost immediately thereafter.

So, I think, th- the story as I have heard it, is that she felt that O'Connor was, sort of, f- falling on her sword to take care of her husband, but being forced off before it was time. Had a year passed, as she had an- anticipated, she would have made a different choice. She could have been on the court for six, seven more years. And I think that that really affronted her. I think that it's- it was, sort of, a feminist rebuke, and I think she took it very, very seriously and I think she also felt that, "Why is it that all these men have been on this court till they're 92 and 93 and 96 and nobody says, 'He should retire'?"

And so, right or wrong, I think she construed it as a gendered attack and I'm not- I'm not 100% sure whether that w- is all legitimate, but I think it was deeply felt.

Jeffrey Rosen: [00:51:17] Wow.

Dahlia Lithwick: [00:51:18] Can I ask you one other question what I- that I really wanted to ask you?

Jeffrey Rosen: [00:51:22] Yes, and then I have one question for you and then we can-

Dahlia Lithwick: [00:51:24] All right.

Jeffrey Rosen: [00:51:25] ... at least one.

[inaudible 00:53:07].

Dahlia Lithwick: [00:51:26] ... there's a gorgeous answer here, where... I'm just gonna read it and I may tear up 'cause it's beautiful, but Jeff asks what it was like for her to perform her first same-sex wedding. This is her answer. "It's one more example of what I see as the genius of our Constitution. If I asked you the question, 'Who counted, among we, the people, when our Constitution was new?' Well, not very many people. Certainly, I wouldn't count. Certainly not people who were held in human bondage. Not even most men because you had to be a property owner. So think of what our nation and our Constitution would have become over now, well, more than two centuries. The idea of, 'We, the people,' has become more and more embracing. People who were once left out, people who were once slaves, women, Native Americans, did not count in the beginning. Inclusiveness has come about as a result of constitutional amendments. In the case of the Civil War, three post Civil War amendments and judicial interpretation.

The idea was there from the beginning, equality. And yet, you can read every page of your pocket Constitution and you will not find, in the original Constitution, the word equal or equality, even though equality was a main theme of the Declaration of Independence. The word equal becomes a part of the constitution in the 14th amendment, so I see, as the



genius of our Constitution and of our society, how much more embrative we have become than we were at the start."

So if you're a common law dork, that just raises all the hairs on your arm. Like, it's such an exquisite articulation of something that is the answer, I think, to the cartoon versions of living constitutionalism. And my question i-... You can answer any question you want about that. There's a bit at the end where you ask her about that word embrative. But I think I wanna ask you the question... She says that makes her an originalist, Jeff. She says this is originalism, and I wondered if you could talk about that for a minute.

Jeffrey Rosen: [00:53:35] W- well, first, I have to say thanks for reading that quote, and yes, it just... it- it does bring goosebumps and it does sum up what a liberal vision of the Constitution would look like that was born at Seneca Falls, where heroes of the women's rights movement wrote a declaration of women's rights, evoking the Declaration of Independence and insisting that natural rights of liberty, of equal liberty inherent in all human beings. And for her, in that beautiful paragraph, where every word is well-chosen, to have talked about how the constitution has s- come to slowly embrace, not only African Americans and women, but then other excluded groups, all fulfilling the promise of the declaration. And then to tie that back to the founding vision and to view it as a form of originalism is incredibly inspiring.

And the word I asked her about is embrative. What a beautiful, distinctive, particular word. And as I said to her, "That's your word. That's not Thomas Jefferson or anyone else. Embrative." I said, "What did you mean by embrative?" She means embracing... She says... Her reply was, "Embracing the left out people, not just grudgingly, but with open arms." Mm.

Dahlia Lithwick: [00:54:57] Mm.

Jeffrey Rosen: [00:54:57] Isn't that beautiful. It's just... and- and- and that's- and that's her vision, and it's distinctive, and that's why she's a hero. That's why... There were very few Supreme Court justices... There are many good ones. Th- you know, there's some great ones, but there are few who transform the meaning of the Constitution or understanding of the Constitution. Thurgood Marshall, through his advocacy. You know, Br- Brandeis through re-envisioning the F- First Amendment. G- Justice, Ginsburg, by envisioning the Constitution as a more embrative document. Wh- was I surprised that she called herself an originalist? I was 'cause I- I- I had said, you know, there's originalism and what's the alternative 'cause you're not an originalist? And she said, "No, I am, but I think the founders anticipated the Constitution becoming evermore embrative."

And it's striking. Justice Kagan in introducing Justice Scalia, said, "We're all originalists now," in the sense that everyone thinks that the text and original understand matters to some degree. The question is how do you translate the Constitution in light of changes in society, and Justice Ginsburg's genius is to see that increasing embrativeness as stemming from the founders own vision, so that the promise of the declaration, which is thwarted in the original Constitution, resurrected by Lincoln at Gettysburg, and in front of Independence Hall.



And you know what we have to do for now, friends, for just a minute? The best part of this building, the reason we're here right now, let us just have the privilege of inspiring ourself by looking over there, the room where it happened, the room where the Declaration of Independence is drafted, promises that all men are created equal. That promise is stored in the Constitution.

Lincoln stands in front of there in 1861 and says, "I've never had a thought politically that didn't stem from the declaration." and then the promise of the declaration is codified in the post Civil War amendments, which you can see downstairs. But women are betrayed and- because the women's hour has not come and the word male is inserted into the 14th Amendment for the first time.

But then comes the promise of women's equality in 1920 and an anniversary we're gonna celebrate all next year, starting in 2020, of women's eq-... Yes, we've seen a lot of as-enthusiasm about that. Women are granted the right to vote and the Constitution becomes more and more embracive. And Justice Ginsburg's great achievement is both enshrining that promise into the Constitution in her Virginia Military Institute opinion and also in challenging us to remember that the embraciveness of equality remains to be worked out, and not all imposed by judges. She rema-... She's not a convention... There's nothing conventional about this genius, this great woman. She doesn't believe that judges should just enforce a quality according to what they think that you know the philosophy requires.

She thinks it's ultimately up to us and that's why she's so inspired by young women, who are fighting state by state in state legislatures and in the political arena, to get a more embracive vision of equality 'cause she says, "Don't rely on judges." You- you- the- th- I dodged the question about the courts 'cause it's such a big question, but her answer would be, "Don't rely on the courts. Social change has never come primarily from the courts. The courts can nudge or put on small brakes or they can codify new understandings of equality after they've been ec- embraced by society, as in the marriage equality decision or even in Brown v. Board of Education. But judges cannot lead.

And that's another remarkable thing about her. This great leader who had this heroic vision of equality as an advocate, is so conscious of her role as a judge, becomes more comfortable because of her n- new found voice and because of her empathy, but still never mistakes it to be primarily the role of the courts to fight for equality. She thinks that's the role of all of us.

Dahlia Lithwick: [00:58:52] Yep.

Jeffrey Rosen: [00:58:57] Mm-hmm [affirmative]. Yes.

Dahlia Lithwick: [00:58:57] Yep.

Jeffrey Rosen: [00:58:57] K- I'm- I'm gonna take the... I- I- I've learned so much from you and I'm gonna ask you the last question, which is a version of the, you know, what do you think her legacy is, but, in particular, and among other things, h- h- how does she fit into the the fights for women's equality? Have- have women and has feminism caught up to her vision of equal treatment or is she, you know, has it moved on to another vision? Is she a p-... Was



she a prophet in insisting on that kind of equal treatment or is she just embraced by young women now 'cause they think that she's such a boss, but don't actually share her vision of equality? And when you put her in the context of the- the v- the greatest advocates for women's equality of time, and there are, you know, a handful of great heroes for every great constitutional movement, how would you sum up her constitutional legacy?

Dahlia Lithwick: [00:59:48] Y- yeah, I think it's- it's a great question, and I think in a complicated way, she's both too early and too late. You know, in- in much the same way when we talked about her vision of reproductive freedom that we are only just catching up to... although for a long time she was ahead of her time. And, I think, in a- in a profound way... She- she has said w- when I've interviewed her, that she worries that young women, you know, the- the- the- the kids don't have any understanding of what life was like, what her life was like, what even life was like pre-Roe, that we've become so, y- Harold Bloom's word for it is, belated, that we can't even imagine a time where there will be no abortion.

And I think she worries about those things, that we have somehow... and she- she talks about it a little bit in that quote about winning Roe, that, you know, we- we spiked the football. We say it's over and no one believes we can ever go back. And I think she's anxious about that.

I also think there's a through line in her thinking. It- it- it emerges so strongly in the book, where she authentically believed that the marriage she and Marty had, where, you know, he did the cooking and she did the writing, and he picked up the kids from school and she did the writing and, you know, he- he went to the meeting when the kids were bad and she did the writing. You know, like, he... I think there's a lovely quote from Jane, her daughter, in the book, where Jane says, "You know, my- my dad cooks and my mother does the thinking," right?

Jeffrey Rosen: [01:01:23] [laughs].

Audience: [01:01:23] [laughs].

Dahlia Lithwick: [01:01:23] And that was... That's how she thought. All- all of our marriages were gonna look like that. You know, by 1979, we were all gonna be in that marriage, and clearly that's not what happens. And, you know, when I've spoken to her about this, I think she still feels that the keystone here is going to be this, kind of, small granular domestic equality that she thought... you know, and she- she posits it in different ways in terms of, you know, f- time it- time off work and maternity leave. I mean, she has programmatic definitions of it. But I think she genuinely believed that we, as a society would be much more equal in that sense that, you know, that lofty constitutional sense, but also in the, "Guys, change the toilet paper roll. It's not hard."

Audience: [01:02:16] [laughs].

Dahlia Lithwick: [01:02:16] And, you know, we're still not there.

Audience: [01:02:19] [laughs].

Jeffrey Rosen: [01:02:19] Listen. [laughs].

Dahlia Lithwick: [01:02:19] And so I think that there's a way-

Audience: [01:02:21] [laughs].

Dahlia Lithwick: [01:02:21] ... in which she's always a bit shocked that that... you know, like, when you watch the Jetson's and you're, like, "Wait-

Jeffrey Rosen: [01:02:27] [laughs].

Dahlia Lithwick: [01:02:27] ... we're not-

Audience: [01:02:28] [laughs].

Dahlia Lithwick: [01:02:28] ... you know, flying around in the-

Jeffrey Rosen: [01:02:29] [laughs].

Dahlia Lithwick: [01:02:29] ... in the air. I think she's shocked that there's still such a massive disparity in just, you know, work organization and domestic organization and- and, you know, she talks about, "How is it possible that there's parity in law schools and yet women are still not, you know, partners at law firms?" So I think that's the part that shocks her and it's funny because it always circles back to I think she just really believed that we would come further than we are at that silly domestic level.

And I remember thanking her profoundly because I- [laughs] I have said, on more than one occasion, "She raised my children because when my kid's preschool teachers would call, every single time they were badly behaved, and I could quote Justice Ginsburg who, when her son was badly behaved and they constantly called her. Never Marty. And at one point, she, sort of, very, very angrily said, "The child has a father."

Jeffrey Rosen: [01:03:34] [laughs].

Audience: [01:03:34] [laughs].

Dahlia Lithwick: [01:03:34] And I actually said that to my son's preschool teacher.

Jeffrey Rosen: [01:03:38] [laughs].

Dahlia Lithwick: [01:03:38] "You know, I don't have to be the only person you call." But I think that even, you know, that- that- that- that happened with such a massive timestamp differential, and yet, still, the world hasn't changed. And even now, I think, more so than even she would have said five years ago. The- the- the- the space in which women are allowed to exist and- and thrive publicly is contracting in front of our noses. And so, I think, in that sense, again, she was both a prophet but also, kind of, a disappointed prophet, that we haven't done the work of organizing ourselves according to this, in her view, just crystalline obvious definition of what equality would look like.

Jeffrey Rosen: [01:04:22] Wow. Well, I guess it's up to me as the host to say, first of all, thank you, Dahlia, for taking the time to-

Dahlia Lithwick: [01:04:28] My pleasure.

Jeffrey Rosen: [01:04:29] ... come here and for teaching... I- I- I- I need- I need to finish the- the thanks, which is f- for teaching me as much about RBG as I- I could possibly hope for and let her shining spirit, which you so beautifully identified, of disciplined empathy, inspire all of us to be better people and better students of the Constitution. Thanks for coming and come buy some books-

Dahlia Lithwick: [01:04:59] [laughs].

Jeffrey Rosen: [01:05:00] ... and I will sign them downstairs.

Dahlia Lithwick: [01:05:02] Buy books.

Jeffrey Rosen: [01:05:03] Thank you so much.

Dahlia Lithwick: [01:05:05] Thank you.

Jeffrey Rosen: [01:05:06] Today's show was engineered by Greg Scheckler 01:07:11 and produced by Jackie McDermott. As homework of the week, if you're up for it, check out the audio book for Conversations with RBG. You can find the link to the Audible page in the show notes for today's episode, along with the Amazon link, and the audio book includes two wonderful actors and, as bonus material, excerpts from the original interviews with Justice Ginsburg, themselves. Please rate, review and subscribe to We The People on Apple Podcasts and recommend the show to friends, colleagues or anyone, everywhere, who is hungry for constitutional debate and education, and always remember that the National Constitution Center is a private nonprofit. We rely on the generosity, passion and engagement of people from across the country, who are inspired by our non-partisan mission of constitutional education and debate. You can support the mission by becoming a member at constitutioncenter.org/membership or give a donation of any amount to support our work, including this podcast at constitutioncenter.org/donate. On behalf of the National Constitution Center, I'm Jeffrey Rosen.