

2007 JAMES P. WHITE LECTURE ON LEGAL EDUCATION

INDIANA UNIVERSITY SCHOOL OF LAW—INDIANAPOLIS JAMES P. WHITE LECTURE ON LEGAL EDUCATION*

RUTH BADER GINSBURG**

I was touched by Professor White's request that I visit this law school as James Patrick White lecturer. No person has done more to advance the well being of legal education in the United States than Professor White. For twenty-six years, he was the American Bar Association's principal consultant on legal education, and he continues to aid the ABA's law school accreditation endeavors in an advisory capacity.

Professor White has shared his knowledge and experience with jurist seeking to promote quality legal education abroad. My husband and I had the pleasure of spending time with Professor White and his wife Anna in Barcelona in the summer of 2003, when all of us were participating in the fine program created in that captivating city by the University of Puerto Rico law faculty. I applaud Professor White's distinguished service to law schools, their faculties, staffs, and students, and anticipate that his sage counsel will continue to assist legal educators in the years ahead.

March is Women's History Month, so I thought it appropriate to speak in these preliminary remarks of two way paving women: Belva Ann Lockwood, first woman admitted to the Bar of the United States Supreme Court and first woman to argue before the Court; and Sandra Day O'Connor, first woman to serve as a Justice of the Court.

In March 1879, the *Evening Star*, a widely read Washington, D.C. newspaper, reported: "For the first time [ever], a woman's name now stands on the roll of [Supreme Court] practitioners." That woman, Belva Lockwood, was not born to social advantage. She grew up on a family farm in Niagara County, New York and, when widowed with a child at age twenty-two, she enrolled in college to gain the training she needed to become a teacher and, eventually, a school principal. She moved to D.C. in 1866, remarried, became a leading suffragist and lobbyist striving to open employment opportunities for women, and began pursuit of her long-held ambition to become a lawyer.

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Once compared to Shakespeare's Portia by her sister suffragist Elizabeth Cady Stanton, Lockwood resembled Shakespeare's character in this respect: Both were individuals of impressive intellect who demonstrated that women can hold their own as advocates for justice. Like Shakespeare's Portia, Lockwood used wit, ingenuity, and sheer force of will to unsettle society's conceptions of her sex. Portia, however, succeeded in her mission by impersonating a man. Lockwood, in contrast, used no disguise in tackling the prevailing notion that women and lawyering, no less politics, do not mix. Not only did she become the first woman admitted to the Bar of the Supreme Court, she ran twice for the office of President of the United States.

Her frontrunner status was achieved by persistent effort. In 1869, then a mother of two approaching her thirty-ninth birthday, Lockwood applied for admission to law school. Initially rejected on the ground that her presence "would be likely to distract the attention of the young men," she persevered until the National University Law School (now George Washington University Law School) allowed her to matriculate. She encountered yet another obstacle when that school refused to issue the diploma she had earned because men in the class resisted graduating with women. Ultimately she wrote to President Ulysses S. Grant, titular head of the University. She wasted no words: "I have passed through the curriculum of study . . . and demand my diploma." Grant did not answer, but two weeks later, in September 1873, the University's Chancellor awarded Lockwood her diploma.

Having practiced in the District of Columbia for three years, Lockwood qualified for admission to the U.S. Supreme Court in 1876, but Chief Justice Morrison R. Waite announced the Court's denial of her application with this explanation:

By the uniform practice of the Court . . . and by the fair construction of its rules, none but men are permitted to appear before it as attorneys and counselors.

Undaunted, Lockwood relentlessly lobbied Congress to grant her plea. She succeeded in February 1879. Congress decreed that "any woman" possessing the necessary qualifications "shall, on motion, . . . be admitted to practice before the Supreme Court of the United States." Once a member herself, Lockwood moved the admission of Samuel R. Lowery, first African-American attorney from the South admitted to the Supreme Court bar.

Twenty-one months later, Lockwood became the first woman to participate in oral argument at the Court. She next and last argued before the Court in 1906. Then age seventy-five, with three decades of experience as a claims attorney, she helped to secure a multi-million dollar award for Cherokees who had suffered removal from their ancestral lands and relocation, without just compensation.

Lockwood was not content to rest on her personal achievements. She sought not only suffrage, but full political and civil rights for women. Though she could not vote for President, she ran for the office herself, pointing out that nothing in the Constitution barred a woman's eligibility. As she wrote in a letter to her future running mate, Marietta Stow: "We shall never have equal rights until we take them, nor respect until we command it." In 1884 and 1888, during her two

campaigns as the presidential nominee of the Equal Rights Party, Lockwood drew attention to a range of issues important to Americans. For example, she urged protection of public lands, called for reform of family law, and advocated use of tariff revenues to fund benefits for Civil War veterans. She used the publicity of the campaign to launch herself onto the paid lecture circuit, and to become an activist in the international peace movement and a leading proponent of international arbitration.

So much has changed for the better since Belva Lockwood's years in law practice. Admissions ceremonies at the Court nowadays include women in numbers. It is no longer unusual for women to represent both sides in the cases we hear. Women today serve as presidents of bar associations, federal judges, state court judges, and elected representatives on the local, state, and federal level. Still, the presence of only one woman on the current High Court bench indicates the need for women of Lockwood's sense and steel to see the changes she helped to inaugurate through to full fruition.

If you would like to learn more about Belva Lockwood, a biography is at last available. Just this year New York University Press has published a fine work by political scientist Jill Norgren, titled *Belva Lockwood: The Woman Who Would be President*.

I turn now to another woman of resilience, wit, and good humor who, like Belva Lockwood, has turned put downs and slights into opportunities, my dear colleague, Sandra Day O'Connor.

Collegiality is key to the effective operation of a multi-member bench. Sandra Day O'Connor, in my view, has done more to promote collegiality among the U.S. Supreme Court's members, and with our counterparts abroad, than any other of the now 110 Justices. Justice Breyer recently wrote of that quality: "Sandra has a special talent, perhaps a gene, for lighting up the room . . . she enters; for [restoring] good humor in the presence of strong disagreement; for [producing constructive] results; and for [reminding] those at odds today . . . that 'tomorrow is another day.'"

Of all the accolades Justice O'Connor has received, one strikes me as describing her best. Growing up on the Lazy B Ranch in Arizona, she could brand cattle, drive a tractor, fire a rifle with accuracy well before she reached her teens. One of the hands on the Ranch recalled his clear memory of Sandra Day: "She wasn't the rough and rugged type," he said, "but she worked well with us in the canyons—she held her own." Justice O'Connor did just that at every stage of her distinguished professional and devoted family life.

Her welcome when I became the junior Justice is revealing. The Court has customs and habits one cannot find in the official Rules. Justice O'Connor knew what it was like to learn the ropes on one's own. She told me what I needed to know when I came on board for the Court's 1993 Term—not in an intimidating dose, just enough to enable me to navigate safely my first days and weeks.

At the end of the October 1993 sitting, I eagerly awaited my first opinion assignment, expecting—in keeping with tradition—that the brand new Justice would be slated for an uncontroversial, unanimous opinion. When the list came round, I was dismayed. The Chief gave me an intricate, not at all easy, ERISA case, on which the Court had divided 6-3. (ERISA is the acronym for the

Employee Retirement Income Security Act, candidate for the most inscrutable legislation Congress ever passed.) I sought Justice O'Connor's advice. It was simple. "Just do it," she said, "and, if you can, circulate your draft opinion before he makes the next set of assignments. Otherwise, you will risk receiving another tedious case." That advice typifies Justice O'Connor's approach to all things. Waste no time on anger, regret, or resentment, just get the job done.

As first woman on the Supreme Court, Justice O'Connor set a pace I could scarcely match. To this day, my mail is filled with requests that run this way: Last year (or some years before) Justice O'Connor visited our campus or country, spoke at our bar or civic association, did this or that; next, words politely phrased, but to this effect—now it's your turn. My secretaries once imagined that Justice O'Connor had a secret twin sister appearing for her here and there. The reality is, she has an extraordinary ability to manage her time. Why does she travel to Des Moines, Belfast, Lithuania, Rwanda, Mongolia, when she might rather fly fish, ski, play tennis or golf? In her own words:

For both men and women the first step in getting power is to become visible to others, and then to put on an impressive show. . . . As women achieve power, the barriers will fall. As society sees what women can do, as *women* see what women can do, there will be more women out there doing things, and we'll all be better off for it.

In the twelve and a half years we served together, Court watchers have seen that women speak in different voices, and hold different views, just as men do. Even so, some advocates, each Term, revealed that they had not fully adjusted to the presence of two women on the High Court bench. During oral argument, distinguished counsel—including a Harvard Law School professor and more than one Solicitor General—began his response to my question: "Well, Justice O'Connor" Sometimes when that happened, Sandra would smile and crisply remind counsel: "She's Justice Ginsburg. I'm Justice O'Connor." Anticipating just such confusion, in 1993, my first term as a member of the Court, the National Association of Women Judges had T-shirts made for us. Justice O'Connor's read, "I'm Sandra, not Ruth," mine, "I'm Ruth, not Sandra." (To my sorrow, I am now what Sandra was for her first 12 years of service on the Supreme Court, the lone woman.)

But Sandra remains close by. She has moved to chambers next to mine and maintains a tightly packed schedule. Among her current undertakings, Sandra is endeavoring to encourage all concerned with the health and welfare of our federal system to join forces to preserve the independence of the Judiciary from the political branches of Government, and the independence of judges from the partisan expectations of some who supported their appointment.

Finally, I will recall the surprise appearance Justice O'Connor made one night, some seasons ago, in the Shakespeare Theatre's production of *Henry V*. Playing the role that evening of Isabel, Queen of France, she spoke the famous line from the Treaty scene: "Hap'ly a woman's voice may do some good." Indeed it may, as Justice O'Connor has constantly demonstrated, and will no doubt continue to demonstrate, in all her endeavors.

QUESTION AND ANSWER SESSION WITH JUSTICE GINSBURG

Q. The Justice Department just released eight attorneys, federal attorneys, and all of them were under Bush's Justice Department. Can you comment on that

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A. I have no better information about that than you do. U.S. Attorneys are presidential appointees; all the people let go were appointed by President Bush. Like you, as a concerned citizen, I'll follow explanations for the Department's actions in the news.

Q. Judge, it's nice to have you here, of course. Thank you for coming. I read recently that the number of women law clerks at the Supreme Court has begun to wane. I don't know if anybody is looking at the overall numbers when they choose law clerks, but maybe in retrospect you will look and see that there needs to be something corrective done. Is that an area you have noticed, an area in which you have taken special interest?

A. One could not help but notice. This year there are only seven women clerking for justices. Two of them are in my chambers. The year before there were seventeen. Even though the total number of law clerks at the Court is small (some 36), that's quite a drop. My colleagues, when the news came out, recognized that they had not thought about it. They will think about it now. I expect that the numbers next year will return to what they had been, somewhere in the fifteen to twenty range—not good enough, but a lot better than it once was.

No woman ever served as a law clerk at the Court until 1944, when Justice Douglas engaged the first. What prompted him to do so? World War II was underway, and men left universities for military service. The West Coast deans who chose Douglas' clerks, reported, "Sorry, we haven't any students who meet your standards." He wrote back, "When you say that, have you considered women? If there's one who is absolutely first rate, I might consider her." So, he hired Lucille Loman, who proved to be an excellent clerk. But then the war ended and the men came back. No second woman gained a clerkship at the Supreme Court until 1966. That year, Justice Black employed Margaret Corcoran. She had a significant boost in getting the job. Her father was a prominent Democrat, Thomas Corcoran, known around town as "Tommy the Cork." That filial relationship likely influenced Justice Black's decision to take her on board. Women didn't show up as law clerks at the Court in numbers until the 1970s, about the same time women's enrollment in law school began to spiral.

Q. In the case Rapanos v. United States, Chief Justice Roberts expressed his desire to unify the court and do away with concurring and dissenting opinions. Do you think that is a good idea and if so, can it ever be achieved?

A. Well, first, may I suggest that the Chief's expression was more modest. None of us would ever say the Court is doing away with separate opinions when we know that, in the next opinion to come out, the Court divided 5-4.

Our current Chief certainly has a good role model, the great Chief Justice John Marshall. He was either the third or fourth Chief Justice, depending on whether you count Rutledge who had a recess appointment, but was not confirmed by the Senate. Marshall's idea was that there should be one opinion

for the Court, and he promoted that idea in dealing with his colleagues. In those days, the Justices lived together in one boarding house or another when convening in D.C. They would have dinner, then Marshall would bring out his Madeira, serving it as they discussed the cases. He would say something like, "Well, we all agree, isn't that so," or "let me try to write an opinion that all of you can join." In the early days of his Court, remarkably, almost all the decisions were written by the Chief Justice. That's how he achieved unanimity. But then one of the Justices, Johnson, decided, all things considered, he didn't care much for boarding house fare. He preferred to live in his own quarters rather than with the brethren when they held Court in the Capital City. Another contributor to the break up of boarding house living was Joseph Story's wife, Sarah. She accompanied her husband at one Court session. Marshall worried about her presence. "It might be nice to have a woman at our dining table to add a note of grace," he said, but he hoped Sarah wouldn't occupy too much of her husband's time—the Court had serious work to do. One Justice after another left the boarding house to live alone or with his family. And as the boarding house life broke down, so did the Court's unanimity. Even Marshall, at the end of his long tenure as Chief, wrote a dissent or two. Marshall made a valiant effort.

As to the current Court—you will be better positioned to make a judgment at the end of the term now underway. Our Chief is making a point too often overlooked by the press. Last year, we were unanimous in forty-five percent of the decisions, fifty-five percent if you count only the bottom line judgment and not the separate writings. People tend to focus on the divisions, not on the unanimous decisions. We do try, when possible, to come together on a ground that all of us can accept. It may be a procedural ground, or interpretation of a statute in a way that avoids a divisive constitutional question. Candidly, I do not expect to see the day when our unanimity rate, routinely, is higher than forty percent. The forty-five percent we achieved last year was exceptional. Normally, the unanimity rate hovers around thirty-five percent.

Q. You spoke today about women who advanced civil rights in this nation. First, would you give the students here advice on how they can advance the civil rights of the citizens of this nation? And second, are there particular hot topics or problem issues you would like to see our students work on? Thank you.

A. I hope that every student who graduates from law school comes away from school with an appreciation that law is a learned profession, and that means that you don't simply do a day's work for a day's pay. It means you have a responsibility to use your skill and the monopoly you have in the law business to help make life a little better for the less fortunate people in your community. I think your esteem, your self-esteem, your sense of satisfaction will be bolstered if you know that you're not just turning over a buck, but giving back to the community.

I was an early proponent of clinical legal education. Every semester at Columbia, I taught one course and headed a clinic in which students worked with me on whatever cases I happened to be handling at the time. Nowadays, there are so many causes where the aid of lawyers would be useful. Among the cases that come to mind: death penalty cases; immigration cases, including, asylum cases; and many, many more. And still, unfortunately, cases involving

discrimination on the basis of race, national origin, and gender.

Q. Justice Ginsburg, this past November the State of Michigan's citizens voted to dismantle Affirmative Action in the selection program in the colleges. And looking at Grutter v. Bollinger, and the new challenges growing across the nation in other states—looking at these types of issues on the election ballot, in addition to the new dialogue of the opponents challenging diversity, I'm curious as to how you see where we will end back in the courts on Affirmative Action programs, given the new challenges to using the term diversity?

A. Affirmative Action was launched in a major way by President Nixon. People tend to forget that Affirmative Action became a big thing during his Administration. There was a start during Kennedy's Presidency, but it was Nixon's Department of Labor that devised the Philadelphia Plan. The notion was that unions were so strong in the construction trades, and there was rampant nepotism. It was thought that the only way to break the mold would be to set goals and timetables for the hiring and training of members of minority groups. Nixon approved. He believed it was better to have people at work than on welfare. His Administration inaugurated Affirmative Action programs, first in the construction trades.

The Office of Civil Rights at the then Department of Health, Education and Welfare played a large part. That Office spread Affirmative Action to most colleges and universities in the country. Affirmative Action clauses were contained in every government contract. The Civil Rights Office said to college and universities, "You have government contracts. If you want to keep them, you must set goals and timetables for the hiring of women and members of minority groups." Hardly anyone in those days questioned that that was a right and proper thing to do. It seems to me there is much misunderstanding today about Affirmative Action. I am not at all reticent about saying that I am the beneficiary of Affirmative Action. Justice O'Connor will tell you the same thing.

When I was appointed to the Columbia Law School Faculty in 1972, the president of the university was asked, "Well, how's Columbia doing with Affirmative Action?" The president responded, "It's no coincidence that the most recent appointees to the law school are a woman and a black man." I was asked what I thought of that comment. I replied, "It's no mistake that there has never been a woman teaching law in this two centuries old university, and never an African American man on the law faculty. Columbia is just making up for the talent and diversity lacking all these many years."

It is particularly hard to understand, after the Court's decision in *Grutter*, why people voted the way they did. Perhaps it's because they didn't understand what Affirmative Action truly means. I am comforted by this thought. A very wise man, my spouse, once said, "Instead of the bald eagle," which is printed on my speech box, "the symbol of the United States should be the pendulum." It takes caring people to do the right thing. You can't just sit back and say, "Oh, there's nothing we can do, the other side has geared up and is promoting anti-Affirmative Action referenda all over the country." It takes the will to fight back instead of wringing one's hands and complaining, "How sad all this is."

Q. In the case of Roper v. Simmons, the Honorable Supreme Court had the occasion to refer to the Convention on the Rights of the Child, although it hasn't

been ratified by the United States. My question is: If the occasion would present itself where the United States Supreme Court would have to decide on a certain women's issue, do you think the Supreme Court would look to the Convention on the Elimination of Discrimination Against Women ("CEDAW"), although it hasn't been ratified by the United States, doing so under the Roper v. Simmons precedent.

A. I wouldn't say it would be based on the *Roper* case. It would be based on more than 200 years of Supreme Court history. If you look back to the Supreme Court's early decision under the great Chief Justice Marshall, for example, it was not at all unusual to cite what they then called the Law of Nations, which today we call international law. Marshall said that international law is part of our law. And indeed it is. Even if we haven't signed onto CEDAW or some other U.N. Rights Conventions, we were instrumental in the very beginning in framing the U.N. Charter, and the U.N. Convention on Civil and Political Rights. Eleanor Roosevelt was a great proponent of international accords on matters of fundamental human rights.

I was surprised at all the attention the *Roper* decision got, because it cited a number of decisions of the European Court of Human Rights in Strasbourg. One reason, perhaps, why you don't see references to what other tribunals concerned with human rights are doing, is that U.S. lawyers, in their briefs, are not calling those developments to the attention of our Court. There is a large misunderstanding about referring to a decision from another country. That's comparative law as distinguished from international law, which is part of our law. A decision from abroad, of course, is never, never binding authority. But there are bright minds on courts all over the world. And it has just boggled my mind that there is no criticism at all about looking at any law review, referring even to a student note, but great consternation about citing a decision of the European Court of Human Rights.

The concern is a rather recent phenomenon. As a lawyer, I referred in briefs to U.N. Conventions and to decisions of other constitutional courts. In fact, I did so in the turning point gender discrimination case, decided by the Supreme Court in 1971, *Reed v. Reed*. That case involved an Idaho statute that provided: "As between persons equally entitled to administer a decedent's estate, males must be preferred to females." Just that simple. The plaintiff was a woman, Sally Reed, whose teenage son died under tragic circumstances, probably it was a suicide. Sally had custody of her son when he was "of tender years." But when the boy was into his teens, and the father applied for custody, the judge said, "He needs to be prepared for a man's world." So he allowed the father to share custody, which Sally always regarded as a great mistake. The boy died from a shot fired from one of his father's rifles. Sally wanted to be appointed administrator of his estate, which consisted of nothing but a few books, recordings, a guitar, some clothes, and a very small bank account. Her wish to serve as administrator certainly was not for economic reasons. Her former husband, perhaps out of spite, applied ten days later, and the Probate Court judge said, "I have no choice. The law says males must be preferred to females."

The Supreme Court, as of 1971, had never seen a gender classification it didn't like, or at least thought constitutional. I referred to two foreign decisions

in a rather long brief. Both were from the then West German Constitutional Court. One involved a provision of the German Civil Code that provided: When the parents disagree about the education of the child, father decides. The West German Constitutional Court held that provision incompatible with their new, their post-World War II Constitution, which recognized the equal citizenship stature of men and woman. The second case involved kind of a primogeniture for large farms. The rule was that the farm would not be broken up. The eldest son would inherit the whole. Never mind that the eldest son had three or more older sisters. That too was held unconstitutional under the new post-World War II Constitution. I put those decisions in the brief, never expecting that the Supreme Court would cite them, but in part for psychological effect. The message I tried to convey: If this is where the West German Constitutional Court is today, how far behind can the U.S. Supreme Court be?

We have much to teach based on our long experience with judicial review for constitutionality, but also much to learn from other democratic societies, from other good minds wrestling with problems similar to those we confront. For example, other countries are wrestling with the problem of how to maintain liberty in a time of threats to national security, a time of terror. Some have had the problem much longer than we have. We might look at the decisions of some of those countries. Israel is a prime example. Again, there is much misunderstanding of the utility and propriety of looking beyond our borders. Some say, if the Supreme Court refers to foreign decisions, it must think we ought to be governed by foreign powers. Far from it.

Another point I try to make on this subject. We were once about the only player in the judicial review for constitutionality league. In most of Europe, until World War II, the notion of parliamentary supremacy was so firm that it was unthinkable to let judges have the last word in interpreting the Constitution. But then the world witnessed what happened in Germany, what popularly elected legislators tolerated, even applauded. The Holocaust sparked the idea that perhaps a fundamental instrumental government—a constitution—ought to state rights that are inalienable, above the political fray, rights that can't easily be undone by a powerful leader or a compliant legislature. So, constitutions were framed and constitutional courts were created. Even our neighbor to the north, Canada, never had anything like judicial review for constitutionality until 1982 when that country adopted a Charter of Freedom and Rights. Today, the Canadian Supreme Court's jurisprudence on human rights is well regarded and cited by other courts. If we continue to have what some have called an "island mentality," if we think we have nothing to learn from others, we will stop being listened to. One question I'm regularly asked when I go abroad is: We have been so aided, inspired by the decisions of your Court, and we consult them often, but you never seem to be interested in what we do. I remain a proponent of looking beyond our borders. And several of my colleagues share the same view.

Q. Thank you very much for being here. It is really an honor. Oftentimes, you hear people commenting on the judicial system in this country and saying that the judiciary's role is not to be activists, and courts are taking too strong a position. What might you say to someone who complained of that issue to you?

A. Perhaps the most activist Court in the last century was the Court sitting in the early part of the Twentieth Century, up through the presidency of Franklin Delano Roosevelt. The members of that Court were sometimes called “The Nine Old Men.” It was a Court known for striking down social and economic legislation right and left—mostly right. Roosevelt was beside himself when his efforts to help get us out of the Depression, to help people who were suffering mightily, were slapped down because the implementing legislation was inconsistent with freedom of contract. Laborers were required by their bosses to work ten, even twelve hours a day. What right did the government have to say that they could work only eight hours a day? That Court struck down state and federal laws with abandon if they violated the prevailing justices’ notions of freedom of contract. But now the label “activist” has shifted to the other side. And when I reflect on this I can’t help but conclude, what is a judicial activist? What is an activist court? It seems to depend on whose ox is being gored.

The truth is, that we all are tremendously attached to our craft. We know the difference between being a judge and being a legislator. But we also work with a fundamental instrument of government that has some grandly general clauses, like cruel and unusual punishment, like the equal protection of the laws or due process of law. The founding fathers included those clauses because they meant the grand principles embodied in them to govern through the ages, to serve society as it evolves over time.

Consider the Fourteenth Amendment, one of my favorites. The first time the equality principle is placed in the Constitution is in that post-Civil War amendment. It’s not in the original Constitution. Nor shall any state “deny to any person the equal protection of the laws.” Does that speak to the situation of women? The Fourteenth Amendment was adopted in 1868, long before women even had the right to vote, a time when they didn’t sit on juries, and were restricted by the law in many other ways. So, am I an activist because I think the equal protection clause today encompasses people who were left out originally? One can take that idea, equal protection, and recognize its growth potential. Of course we recognize today that men and women are citizens of equal stature, they deserve equal rights and should bear equal responsibilities. The Constitution’s grandly general clauses properly have been accorded a dynamic interpretation, to remain vibrant from generation to generation.

MODERATOR: I think maybe one more.

Q. Justice Ginsburg, the last response you had about the Lochner case, it sort of raised a question that I always confronted in teaching constitutional law, which is basically, if it was wrong for the Lochner Court to reach the conclusion that it did, that libertarian interpretation of the Due Process Clause isn’t constitutionally justified, how do you distinguish Griswold? What makes Griswold any different as a matter of constitutional law? I mean, Lochner was due process on the right; Griswold is due process on the center left, but how was Griswold and Roe v. Wade any different as a matter of the constitutional law that’s been made?

A. There may be a problem with the way those decisions were rationalized by the

opinion writers. The *Griswold* decision has roots in the Fourth Amendment. The fundamental idea is that government shouldn't be intruding into people's bedrooms. Government shouldn't be snooping into our private lives. That was the idea animating *Griswold*. It's a very old idea: My home is my castle. Motivating the Fourth Amendment was the notion that the government ought to let people alone. If I were a teacher I think I might not assign *Griswold*. I might assign, instead, Harlan's dissent in *Poe v. Ullman*. It should have been a majority opinion. It should have been the model for *Griswold*.

As for *Roe v. Wade*, I have written two articles observing that the decision was vulnerable from the day it was written, because it moved too far too fast, and it tied the decision to the wrong liberty guarantee. If you look at the Court's most recent decision, the *Casey* decision, you get much more of a sense that centrally involved is a woman's ability to determine her own life's course. There was much more of an equality dimension to *Casey* than one finds in *Roe v. Wade*. *Roe* was concerned as much about the freedom of doctors to practice their profession without government interference as about a woman's choice. The way I saw it, and the way I wrote about *Roe*, was this: The Court had before it the most extreme law in the nation, the Texas law that allowed no ground for abortion other than necessity to save the woman's life. No rape, incest, or health exceptions. The Court could have simply said: That most extreme law is unconstitutional. By doing so, the Court would have put its imprimatur on the side of change, which was already occurring all over the United States. The law was in flux. My home state, New York, and three others, made abortion accessible in the first trimester with no need to give any reasons. A number of states had adopted the ALI Model Penal Code grounds for permitting abortions. So the issue was very much in the political hopper. It was my view that if the Court had been more modest, there would have been continuing activity in the political arena to reform restrictive laws, and we might not be in the situation we are in today.

THE MODERATOR: Thank you very much.

Standing applause

