

THE THEATRE OF RUTH BADER GINSBURG

Supreme Court Oral Arguments Adapted for Reenactments and Classroom Use

Created by Jack Reuler and Michael Bigelow Dixon

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ISBN: 978-1-61588-516-9

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Supreme Court Oral Arguments

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SYNOPSIS: 8 Supreme Court cases focusing on bias and ethics, featuring Ruth Bader Ginsburg, either adjudicating as a Justice or arguing as a lawyer on each case. Each edited oral argument lasts 15-20 minutes and can be performed by a cast of 4 or more actors. At the heart of the project is role-playing, which encourages students to invest their personal passions and beliefs in a constitutional debate, and performances are intended to inspire discussion of constitutional issues and decisions.

CAST: Each edited Supreme Court case features Justices, lawyers, and Ruth Bader Ginsburg as either a Justice or a lawyer, depending on the case. Each case can be performed by as few as 4 or 5 actors, because multiple Supreme Court Justices have been combined into one or two characters. It's also possible to assign each student one of the Justices or lawyers, so that the cast can involve as many as 10 actors. Because the purpose of the project is to discuss constitutional issues rather than to portray realistic characters, the casting of each role – even Ruth Bader Ginsburg – is open to anyone.

PRODUCTION NOTES, STAGING AND SETTINGS

These oral argument transcripts have been edited so that they can be performed in 15-20 minutes. That leaves time to begin a discussion and hear the Opinion of the Court in one class period. The transcripts offer casting options in terms of the number of actors involved. The only costumes necessary are black robes (choir robes work well) for the Justices and professional attire for the lawyers. As a Justice, Ruth Bader Ginsburg was known for wearing various lace collars and jewelry necklaces.

The Justices can be seated behind a few desks or tables, with name cards before them so the audience can identify which actor plays which Justice. The lawyers can stand at opposite ends of the tables, facing the Justices. The Justices place their scripts on the table, and the lawyers position their scripts on music stands or lecterns. No other props are needed.

Though they read their scripts verbatim, students are encouraged to become familiar enough with the text so that they can periodically raise their eyes and speak directly to either the Justices or the lawyers. Think of this as a form of reader's theatre, and it helps to see the actors' faces from time to time.

ACTING AND DIRECTION

Each student can research the Justice or lawyer they portray, viewing videos and noting particular vocal characteristics, posture, gestures, and general deportment. Students can rehearse sections of the script aloud, incorporating the Justices' and lawyers' verbal style and mannerisms into their readings.

ADDITIONAL NOTES

This work is in the public domain in the United States because it is a work prepared by an officer or employee of the United States Government as part of that person's official duties under the terms of *Title 17, Chapter 1, Section 105 of the US Code*.

During her tenure, Ruth Bader Ginsburg wore various jabots (collars) with her black robes. In an interview with *The Washington Post*, she explained, "You know, the standard robe is made for a man because it has a place for the shirt to show, and the tie. So Sandra Day O'Connor and I thought it would be appropriate if we included as part of our robe something typical of a woman. So I have many, many collars." The jabot in the photograph on the publisher's website was among the first RBG wore in her time on the Supreme Court.

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Cast: 3-6 Supreme Court Justices,
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PREFACE

Attorneys in every state are required to participate in a certain amount of Continuing Legal Education (CLE) to maintain their licensure. The Mixed Blood Theatre has used theatre to provide those mandated CLE hours since 1991. Mixed Blood also participated in an effort to establish dedicated training in the areas of Ethics and Elimination of Bias, which was established in 1996. Since then, Mixed Blood has provided focused accredited Continuing Legal Education through theatre to lawyers in the public and private sectors.

Professor Michael Bigelow Dixon and Mixed Blood Artistic Director Jack Reuler joined forces to edit oral arguments of bias-focused Supreme Court cases – dealing with race, gender, orientation, and disability – and packaged them as “Bench Bias Lingo.” Professional actors portrayed Justices and arguing attorneys to re-enact condensed versions of these landmark cases.

Ruth Bader Ginsburg argued seven cases in front of the Supreme Court before serving as a Justice for 27 years. Her opinions on gender discrimination, voting rights, affirmative action, mental illness, abortion, international law, and more defined her as a champion of Americans marginalized by discrimination.

Upon her passing in 2020, Reuler and Dixon again collaborated to edit eight cases, half of which featured RBG as an attorney and half as a Justice. It was offered to Minnesota lawyers as accredited CLE via Zoom, because it was during the time of the pandemic. Over five hours, five actors performed these oral arguments, contextualized by two panels of prestigious Minnesota attorneys, hailing from The Great Northern Innocence Project, ACLU, Advocates for Human Rights, Legal Rights Center, and a Federal Magistrate.

Ruth Bader Ginsburg led the liberal wing of the Supreme Court and often authored opinions and dissents. A scholar and workaholic, her complex personality was colored by her gender, her religion, her lived experience, and so much more. It is her body of work – as an attorney, as a Judge, as a Justice, and as an outspoken-but-soft-spoken human being – that endears her to the populace, but also makes for great theatre. Working on these short theatrical offerings has been a labor of love for the editors and should be triggers of conversation about sophisticated societal issues for artists and audiences alike.

—Jack Reuler

INTRODUCTION

Incorporating Supreme Court Oral Arguments into Forensics, Civics and Drama Courses

Reenactments of U. S. Supreme Court oral arguments can make significant contributions to curricula of civics, pre-law, and forensics programs in middle schools and high schools. A reenactment also offers a different kind of challenge for a drama class. These cases feature the fundamental elements of good theatre: costumes (those serious black robes), characters in conflict (lawyers arguing two sides of a case), and suspense (only one side can win, but which will prevail?). The stakes of the legal debate are incredibly high – the decision affects thousands if not millions of people. The dialogue is often feisty, witty, or combative. And while the cases establish the content for discussion and analysis, the form of the event follows a classic dramatic structure. The inciting event is created by the original controversy, rising conflict progresses through lower court rulings, the oral argument at the Supreme Court provides the climax, and the denouement comes when a Justice delivers the Opinion of the Court.

Our first educational reenactment took place at Goucher College, where Associate Professor Nina Kasniunas and I combined courses, Introduction to Political Science and Introduction to Drama. While we worked primarily with first-year students at the college level, the lessons and activities of this project are equally relevant to drama and civics courses in secondary schools. At the heart of the project is role-playing, which encourages students to invest their personal passions and beliefs in a constitutional debate. Students are asked to portray characters with tremendous status and power, and it's a real challenge for actors to express themselves using the idiosyncratic rhythms, pauses, and filler words of another person's thought and speech patterns.

The project also offers an opportunity to explore the subject of Political Theatre. Working in small groups, students can research and report on a range of examples: Greek tragedy, Russian agitprop, Bertolt Brecht's Epic Theatre, the 1960s theatre of protest such as the Living Theatre, Anna Deavere Smith's docudramas, and Augusto Boal's Theatre of the Oppressed. The purpose of political theatre is to bring its audience to a greater consciousness through the transformative power of drama, and methods range from simplistic

propaganda to the more subtle staging of conflicting truths. An interesting question to ask students at the end of the project is whether their reenactment constitutes an effective form of political theatre.

We organized our curriculum into eight steps. First, we reserved a two-week period in the semester to focus exclusively on this project. We launched the project with a trip to the U.S. Supreme Court (a one-stop train ride from Baltimore). For most teachers, of course, a visit to a courtroom won't be possible, so you might consider viewing a documentary on the Supreme Court as your first scheduled activity (there are several currently available on YouTube and C-SPAN).

We then worked with students to choose a case that interested them. We offered several choices and they settled on *Boy Scouts of America v. Dale* (2000), which centers on discrimination in the scouting organization. The constitutional issues in the case include freedoms of speech and assembly, which are guaranteed by the First Amendment in the Bill of Rights. Discrimination, bias, and prejudice are, of course, central to discussions of social justice, and some students were able to bring their personal experiences with those topics to the reenactment and subsequent discussion.

We devoted one class to the facts and questions of the case, drawing on information from the Syllabus of the Supreme Court as well as precedents referred to in the briefs (QR Codes with links to on-line documents are included with each case in this collection.) The next class session focused on character development. Each student researched the Justice or lawyer they would portray, noting comments the Justices may have made in interviews as well as their vocal characteristics, posture, gestures, and general deportment. The last class prior to the reenactment performance allowed students to rehearse sections of the script aloud, incorporating the Justice's and lawyers' traits and mannerisms into their readings.

(NOTE: For casting purposes, we've offered choices in terms of cast size. For groups of 4 or 5 students, we've suggested groupings of the Justices, but we've also identified each Justice in those groupings so that the roles can be divided amongst more students.)

The highlight of the project is the reenactment itself, which informs discussions that follow. These oral argument transcripts have been edited so that they can be performed in 15-20 minutes. That leaves time to begin a discussion and hear the Opinion of the Court in one class period. The transcripts also offer casting options in terms of the number of actors needed. The Justices lined up in chairs behind a few desks, with name cards in front so the audience would know which actor played which Justice. The lawyers stood at music stands at opposite ends of the tables, facing the Justices. The Justices placed their scripts on the table, and the lawyers positioned their scripts on the music stands. Though they read their scripts verbatim, students were encouraged to become familiar enough with the text so that they could periodically raise their eyes and speak directly to either the Justices or the lawyers (it helps to see their faces from time to time).

This is how time was allotted for a 50-minute class.

- Introduction of the title and constitutional question (2 minutes)
- Introduction of the Justices and Lawyers (2 minutes)
- Reenactment reading (20 minutes)
- Small group discussions of issues and predicting the decision (20 minutes)
- Announcement of the decision and reading excerpts from the Opinion of the Court (5 minutes)

A more detailed follow-up discussion completed the project on the final day. Students were asked to analyze specific arguments made by the Justices and lawyers – which points were most convincing, who made the best case, was the decision predictable, did the students agree or disagree with the Opinion of the Court, and why. Then students reflected on the project itself, their involvement, what they learned, and how they might adapt the project for future classes. And finally, does the reenactment of important Supreme Court cases comprise a compelling and effective form of political theatre – can it raise public consciousness through reenactment?

– Michael Bigelow Dixon

For further information about incorporating Supreme Court cases into course curricula, follow this QR code.



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Frontiero v. Richardson
Oral Argument - January 17, 1973

CAST OF CHARACTERS

LAWYER 1 (Joseph J. Levin, Jr.)
LAWYER 2 (Samuel Huffington)
RUTH BADER GINSBURG (Justice)
JUSTICE 1 (Warren E. Burger, William H.
Rehnquist)
JUSTICE 2 (Potter Stewart, Thurgood
Marshall)

FACTS: A year after entering the Armed Forces in 1968, Lieutenant Sharron Frontiero married Joseph Frontiero. Because of the statutes which are at issue here, any male member of the Armed Forces would have automatically become entitled to certain housing allowance benefits and medical benefits. The statutes give males in the Armed Forces the irrebuttable presumption that their spouses are dependent, and grant benefits regardless of the wives' actual financial dependency. A female must prove that her spouse is in fact dependent upon her for more than one-half of his support. Lieutenant Frontiero's request for the additional benefits based upon her husband's dependent status was denied.

ISSUE: This sex discrimination case challenges a federal law that established different qualification criteria for male and female members of the Armed Forces regarding additional household allowance and medical benefits when members of the Armed Forces get married. The constitutional issue involves the Fifth Amendment's Due Process Clause – "No person shall be ... deprived of life, liberty or property without due process of law."

FOR MORE INFORMATION

For more information regarding the constitutional issues of this case, follow this QR code for the case Syllabus.



JUSTICE 1: (*As Warren E. Burger.*) We'll hear arguments next in 71-1694, *Frontiero* against *Laird*. Mr. Levin.

LAWYER 1: (*Joseph J. Levin, Jr.*) Mr. Chief Justice and may it please the Court. This is a sex discrimination case. A year after entering the Armed Forces in 1968, Lieutenant Sharron Frontiero married Joseph Frontiero. Because of the statutes which are at issue here, any male member of the Armed Forces would have automatically become entitled to certain housing allowance benefits and medical benefits. Lieutenant Frontiero did not. The statutes giving males in the Armed Forces the irrebuttable presumption, that their spouses are dependent, and grant benefits regardless of the wives' actual financial dependency. A female must prove that her spouse is in fact dependent upon her for more than one-half of his support. In this case, Lieutenant Frontiero earns more than three times as much as her husband Joseph. Her income is approximately \$8,200. His income is just a little in excess of \$2,800. But because Joseph's individual expenses are low, his small income meets more than half of his personal expenses. Now, Sharron was therefore denied any supplemental benefits in both housing and medical for her spouse. So we have a two-fold discrimination. The first is procedural. Women are forced to the burdens and uncertainties of proving that their spouses are in fact dependent upon them while males are given the benefits automatically and irrefutably. But more importantly, there's a substantive discrimination here. Males whose

wives are not financially dependent upon them, nevertheless receive these housing and medical benefits. Women in the identical position do not and there's no way to cure that. There's no way to cure that in Sharron Frontiero's case.

JUSTICE 2: (*As Potter Stewart.*) I understood that the good part of the Government's argument is based upon administrative simplicity, is it not?

LAWYER 1: (*As Joseph J. Levin, Jr.*) Mr. Justice, their entire argument is based upon administrative convenience. And that is all that they have alleged. To them, that's the only justification and we don't say that this is an illegitimate end because of course it isn't. But it in itself cannot justify the discrimination that exists here.

JUSTICE 1: (*As William H. Rehnquist.*) Well, Mr. Levin, you say that it's a personal right you claim here, following the analysis in Weber. But it's a personal right to more money, isn't it?

LAWYER 1: (*As Joseph J. Levin, Jr.*) It's a personal right, Mr. Justice Rehnquist, to be free from discrimination in employment.

JUSTICE 1: (*As William H. Rehnquist.*) But I would think if you follow the Weber analogy, you've got to see what it is you're claiming, what you would get if your claim were sustained? Which is more money?

LAWYER 1: (*As Joseph J. Levin, Jr.*) Yes, sir. But I think with the right that I'm talking about and I think that the kind of personal right Justice Powell is talking about for the Court in Weber was – the right for women as a group to be free from discrimination.

JUSTICE 2: (*As Potter Stewart.*) There used to be an old-fashioned idea that a statute enacted by the Congress or by the legislature of the state was presumptively constitutional, based upon the hypothesis that the Congress could read the Constitution as well as other people. We don't hear much about that anymore.

LAWYER 1: (*As Joseph J. Levin, Jr.*) Appellants in this case would say that apparently, the Congress did not pay too much attention to the Constitution in enacting these particular provisions. I have used more time than I should have. I'd like Professor Ginsburg to speak the appellant's respective position and feel it's essential in this case that she be given an opportunity to present oral argument to the Court.

JUSTICE 1: (*As Warren E. Burger.*) Very well. Mrs. Ginsburg.

RUTH BADER GINSBURG: (*As Lawyer.*) Mr. Chief Justice and may it please the Court. Amicus views this case as kin to *Reed v. Reed* 404 U.S. The legislative judgment in both derives from the same stereotype. The man is or should be the independent partner in a marital unit. The woman with an occasional exception is dependent, sheltered from bread-winning experience. Appellees stated in answer to interrogatories in this case that they remained totally uninformed on the application of this stereotype. That is, they do not know whether the proportion of wage-earning wives of servicemen is small, large, or middle size. What is known is that by employing the sex criterion, identically situated persons are treated differently. The married serviceman gets benefits for himself, as well as his spouse regardless of her income. The married servicewoman is denied medical care for her spouse and quarter's allowance for herself as well as her spouse even if, as in this case, she supplies over two-thirds the support of the marital unit. For these reasons, amicus urges the Court to recognize in this case what it has in others, that it writes not only for this case and this day alone, but for this type of case. As is apparent from the decisions in lower federal as well as state courts, the standard of review in sex discrimination cases is to say the least confused. A few courts have ranked sex as a suspect criterion. Others, including apparently the court below in this case, seem to regard the *Reed* decision as a direction to apply minimal scrutiny, and there are various shades between. The result is that in many instances, the same or similar issues are decided differently depending upon the court's view of the stringency of review appropriate. To provide the guidance so badly needed and because recognition is long overdue, amicus urges the Court to declare sex a suspect criterion. Sex like race is a visible, immutable characteristic bearing no necessary relationship to ability. Sex like race has been made the basis for unjustified or at least unproved assumptions, concerning an individual's potential to perform or to contribute to society. And sex classifications do stigmatize when, as in *Goesaert against Cleary* 235 U.S., they exclude women from an occupation thought more appropriate to men. The sex criterion stigmatizes when it is used to limit hours of work for women only. The sex criterion stigmatizes when, as in *Hoyt against Florida* 368 U.S., it assumes that all women are preoccupied with home and

children and therefore should be spared the basic civic responsibility of serving on a jury. These distinctions have a common effect. They help keep woman in her place, a place inferior to that occupied by men in our society. In asking the Court to declare sex a suspect criterion, amicus urges a position forcibly stated in 1837 by Sara Grimke, noted abolitionist and advocate of equal rights for men and women. She spoke not elegantly, but with unmistakable clarity. She said, "I ask no favor for my sex. All I ask of our brethren is that they take their feet off our necks." Thank you.

JUSTICE 1: (*As Warren E. Burger.*) Thank you, Mrs. Ginsburg. Mr. Huntington.

LAWYER 2: (*As Samuel Huffington.*) Mr. Chief Justice and may it please the Court. A position of the Government in this case is first that there is a rational basis for the different treatment of male and female members of the Armed Forces in the statute here under review. And second, that the rational basis standard is the proper standard for determining the validity of those statutes. Taking the over one million married military men as a group, a significant majority of their wives are the dependent upon them. Under these circumstances, it is rational to decide to grant all married men dependency benefits for their wives automatically rather than undertaking the heavy administrative burden of determining dependency in fact in each case. On the other hand, taking the one or two thousand military women who are married to civilians as a group, an overwhelming majority of their husbands are not dependent upon them. Under these circumstances, it is rational to examine individually the few instances where a military woman might have a dependent husband.

JUSTICE 2: (*As Thurgood Marshall.*) We base it on the whole general class of women and the whole general class of men.

LAWYER 2: (*As Samuel Huffington.*) Right, but we submit that there is a –

JUSTICE 2: (*As Thurgood Marshall.*) And that's a rational basis.

LAWYER 2: (*As Samuel Huffington.*) We submit it's a rational basis.

JUSTICE 2: (*As Thurgood Marshall.*) That's a rational basis.

LAWYER 2: (*As Samuel Huffington.*) Yes.

JUSTICE 2: (*As Thurgood Marshall.*) It is!

LAWYER 2: (*As Samuel Huffington.*) We submit it is a rational basis because there's statistical differences between the two classes which justify –

JUSTICE 2: (*As Thurgood Marshall.*) Women are women and men are men, and you can draw that difference and that difference only based on money.

LAWYER 2: (*As Samuel Huffington.*) Well, I would submit simply that there are statistical differences here which do justify the different treatment. I would like to turn now to Professor Ginsburg's argument that classifications based on sex are suspect for equal protection and due process purposes. To begin with, as Professor Ginsburg acknowledges, this Court has never treated classifications based on sex as inherently suspect. Unlike classifications based on race, nationality, or alienage, classifications based on sex frequently are not arbitrary, but reflect the actual differences between the sexes which are relevant to the purpose of the statutes containing the classifications. Now, we contend here that the dependency statutes, for example, do not discriminate against women because of their femininity. They treat women differently because women as a class are less likely to have dependents than men. In closing, let me simply state that we have no quarrel with the drive of any women to achieve equality by attacking statutes enacted in a different era that may reflect antiquated notions of the respective roles of the sexes. We submit, however, that the plea for across the board change rather than case by case consideration is better addressed to the legislature rather than to the courts. In conclusion, the judgment of the District Court should be affirmed. Thank you.

JUSTICE 1: (*As Warren E. Burger.*) You have three minutes left, Mr. Levin if you wish to use it.

LAWYER 1: (*As Joseph J. Levin, Jr.*) I think we lose sight of the issue that no matter how many figures are thrown at the court that nevertheless you get right down to rock-bottom, women who are identically situated to men as in the case of Lieutenant Frontiero don't receive either housing benefits or medical benefits and we think that this cannot in any way be justified.

JUSTICE 1: (*As Warren E. Burger.*) Thank you. The case is submitted.



CONCLUSION

8-1 DECISION FOR FRONTIERO EXCERPTS FROM THE PLURALITY OPINION BY WILLIAM J. BRENNAN, JR.

The question before us concerns the right of a female member of the uniformed services to claim her spouse as a "dependent" for the purposes of obtaining increased quarters allowances and medical and dental benefits on an equal footing with male members. Under these statutes, a serviceman may claim his wife as a "dependent" without regard to whether she is in fact dependent upon, him for any part of her support. A servicewoman, on the other hand, may not claim her husband as a "dependent" under these programs unless he is in fact dependent upon her for over one-half of his support. Thus, the question for decision is whether this difference in treatment constitutes an unconstitutional discrimination against servicewomen in violation of the Due Process Clause of the Fifth Amendment. A three-judge District Court for the Middle District of Alabama, one judge dissenting, rejected this contention and sustained the constitutionality, of the provisions of the statutes making this distinction. 341 F. Supp. 201 (1972). ... We reverse. ...

... [This] Court held the statutory preference for male applicants unconstitutional. In reaching this result, the Court implicitly rejected appellee's apparently rational explanation of the statutory scheme, and concluded that, by ignoring the individual qualifications of particular applicants, the challenged statute provided "dissimilar treatment for men and women who are . . . similarly situated." The Court therefore held that, even though the State's interest in achieving administrative efficiency "is not without some legitimacy," "[to] give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the [Constitution] ..."

There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of "romantic paternalism" which, in practical effect, put women not on a pedestal, but in a cage..."

FURTHER INFORMATION

To read the Opinion of the Court and Dissenting Opinions, the full transcript of the case, or to listen to an audio recording of the oral arguments, follow this QR code.



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**James Obergefell, et al., Petitioners v. Richard hodge,
Director, Ohio Department of Health, et al.
Oral Argument - April 28, 2015 (Part 1)**

CAST OF CHARACTERS

LAWYER #1	Mary L. Bonauto & Donald B. Verilli, Jr.
LAWYER #2	John J. Bursch
RUTH BADER GINSBURG	U.S. Supreme Court Justice
JUSTICE #1	Sonia Sotomayer, Elena Kagan, Stephen Breyer
JUSTICE #2	John G. Roberts, Jr., Antonin Scalia, Samuel Alito, Anthony Kennedy (Clarence Thomas doesn't speak)

FACTS: Michigan, Kentucky, Ohio, and Tennessee define marriage as a union between one man and one woman; they also ban same-sex marriages and refuse to recognize the legal status of same-sex couples married in other states. The petitioners, 14 same-sex couples and two men whose same-sex partners are deceased, filed suits in Federal District Courts in their home States, claiming that respondent state officials violate the Fourteenth Amendment (the right to equal protection and due process) by denying them the right to marry or to have marriages lawfully performed in another State given full recognition. Each District Court ruled in petitioners' favor, but the Sixth Circuit consolidated the cases and reversed the District rulings stating that the State's laws banning same-sex marriage and their refusal to recognize marriages performed in other states did not violate the petitioners' constitutional rights under the Fourteenth Amendment.

ISSUES: This case raises two constitutional questions. The first is whether the Fourteenth Amendment requires a State to license a marriage between two people of the same sex. The second is whether the Fourteenth Amendment requires a State to recognize a same-sex marriage licensed and performed in a State which does grant that right.

FOR MORE INFORMATION

For more information regarding the constitutional issues of this case, follow this QR code for the case Syllabus.



JUSTICE #2: (*As John G. Roberts, Jr.*) We'll hear argument this morning in Case No. 14-556, *Obergefell v. Hodges* and the consolidated cases. Ms. Bonauto.

LAWYER #1: (*As Mary L. Bonauto.*) Mr. Chief Justice, and may it please the Court: The intimate and committed relationships of same-sex couples, just like those of heterosexual couples, provide mutual support and are the foundation of family life in our society. If a legal commitment, responsibility and protection that is marriage is off limits to gay people as a class, the stain of unworthiness that follows on individuals and families contravenes the basic constitutional commitment to equal dignity. Indeed, the abiding purpose of the Fourteenth Amendment is to preclude relegating classes of persons to second-tier status.

RUTH BADER GINSBURG: (*As Justice.*) What do you do with the *Windsor* case where the court stressed the Federal government's historic deference to States when it comes to matters of domestic relations?

LAWYER #1: (*As Mary L. Bonauto.*) States do have primacy over domestic relations except that their laws must respect the constitutional rights of persons, and *Windsor* couldn't have been clearer about that. And here we have a whole class of people who are denied the equal right to be able to join in this very extensive government institution that provides protection for families.

JUSTICE #2: (*As John G. Roberts, Jr.*) Well, you say join in the institution. The argument on the other side is that they're seeking to redefine the institution. Every definition that I looked up, prior to about a dozen years ago, defined marriage as unity between a man and a woman as husband and wife. Obviously, if you succeed, that core definition will no longer be operable.

LAWYER #1: (*As Mary L. Bonauto.*) I hope not, Your Honor, because what we're really talking about here is a class of people who are, by State laws, excluded from being able to participate in this institution.

JUSTICE #2: (*As John G. Roberts, Jr.*) My question is you're not seeking to join the institution, you're seeking to change what the institution is. The fundamental core of the institution is the opposite-sex relationship and you want to introduce into it a same-sex relationship.

LAWYER #1: (*As Mary L. Bonauto.*) Two points on that, Your Honor. To the extent that if you're talking about the fundamental right to marry as a core male-female institution, I think when we look at the Fourteenth Amendment, we know that it provides enduring guarantees in that what we once viewed as the role of women, or even the role of gay people, is something that has changed in our society.

JUSTICE #2: (*Samuel A. Alito, Jr.*) You argue in your brief that the primary purpose of the Michigan law limiting marriage to a man and a woman was to demean gay people; is that correct?

LAWYER #1: (*As Mary L. Bonauto.*) I think it has that effect, Your Honor.

JUSTICE #2: (*Samuel A. Alito, Jr.*) Is that true just in Michigan or is that true of every other State that has a similar definition of marriage?

LAWYER #1: (*As Mary L. Bonauto.*) I think the commonality among all of the statutes, whether they were enacted long ago or more recently, is that they encompass moral judgments and stereotypes about gay people.

JUSTICE #2: (*As Samuel A. Alito, Jr.*) Well, how do you account for the fact that, as far as I'm aware, until the end of the 20th century, there never was a nation or a culture that recognized marriage between two people of the same sex? Is it your argument that they

were all operating independently based solely on irrational stereotypes and prejudice?

LAWYER #1: (*As Mary L. Bonauto.*) Your Honor, my position is that times can blind. And if you think about the example of sex discrimination and again, I assume it was protected by the Fourteenth Amendment, but it took over 100 years for this Court to recognize that a sex classification contravened the Constitution.

JUSTICE #2: (*As Samuel A. Alito, Jr.*) I don't really think you answered my question.

LAWYER #1: (*As Mary L. Bonauto.*) I'm sorry.

JUSTICE #2: (*As Samuel A. Alito, Jr.*) Can we infer that these societies all thought there was a rational reason for this and a practical reason for this?

LAWYER #1: (*As Mary L. Bonauto.*) I don't know what other societies assumed, but I do believe that times can blind and it takes time to see stereotypes and to see the common humanity of people who had once been ignored or excluded.

RUTH BADER GINSBURG: (*As Justice.*) But you wouldn't be asking for this relief if the law of marriage was what it was a millennium ago. I mean, it wasn't possible. Same-sex unions would not have opted into the pattern of marriage, which was a relationship, a dominant and a subordinate relationship.

Yes, it was marriage between a man and a woman, but the man decided where the couple would be domiciled; it was her obligation to follow him. There was a change in the institution of marriage to make it egalitarian when it wasn't egalitarian. And same-sex unions wouldn't – wouldn't fit into what marriage was once.

LAWYER #1: (*As Mary L. Bonauto.*) That's correct. I mean, for centuries we had – and Europe had this coverture system where a woman's legal identity was absorbed into that of her husband and men and women had different prescribed legal roles. And again, because of equality and changing social circumstances, all of those gender differences in the rights and responsibilities of the married pair have been eliminated. And that, of course, is a system in which committed, same-sex couples fit quite well.

JUSTICE # 2: (*As Antonin Scalia.*) Miss –Miss Bonauto, I'm – I'm concerned about the wisdom of this Court imposing through the Constitution a – a requirement of action which is unpalatable to many of our citizens for religious reasons. They are not likely to change their view about what marriage consists of. And were the States to adopt it by law, they could make exceptions to what is required for same-sex marriage, who has to honor it and so forth. But once it's – it's made a matter of constitutional law, those exceptions – for example, is it conceivable that a minister who is authorized by the State to conduct marriage can decline to marry two men if indeed this Court holds that they have a constitutional right to marry?

LAWYER #1: (*As Mary L. Bonauto.*) Your Honor, of course the Constitution will continue to apply, and right to this day, no clergy is forced to marry any couple that they don't want to marry. We have those protections.

JUSTICE #1: (*As Sonia Sotomayor.*) Counselor, there have been antidiscrimination laws in various States; correct?

LAWYER #1: (*As Mary L. Bonauto.*) Yes, Your Honor.

JUSTICE #1: (*As Sonia Sotomayor.*) Antidiscrimination laws regarding gay people.

LAWYER #1: (*As Mary L. Bonauto.*) Correct.

JUSTICE #1: (*As Sonia Sotomayor.*) And in any of those States, have ministers been forced to do gay marriages?

LAWYER #1: (*As Mary L. Bonauto.*) Of course not, Your Honor. And –

JUSTICE #2: (*As Antonin Scalia.*) They are laws. They are not constitutional requirements. That was the whole point of my question. If you let the States do it, you can make an exception.

JUSTICE #1: (*As Elena Kagan.*) Ms. Bonauto, maybe I'm just not understanding Justice Scalia's question, but for example, there are many rabbis that will not conduct marriages between Jews and non-Jews, notwithstanding that we have a constitutional prohibition against religious discrimination. And those rabbis get all the powers and privileges of the State, even if they have that rule, most – many, many, many rabbis won't do that.

LAWYER #1: (*As Mary L. Bonauto.*) That's precisely –

JUSTICE #1: (*As Stephen G. Breyer.*) It's called Congress shall make no law respecting the freedom of religion –

LAWYER #1: (*As Donald B. Verrilli, Jr.*) This is about equal participation, participation on equal terms in a State-conferred status, a State institution. And that's why we think of it in equal protection terms. And if I could just in the – in the little time that I have left, I'd like to suggest this, that what the Respondents are ultimately saying to the Court is that with respect to marriage, they are not ready yet. And yes, gay and lesbian couples can live openly in society, and yes, they can raise children. Yes, they can participate fully as members of their community. Marriage, though, not yet. Leave that to be worked out later. But what these gay and lesbian couples are doing is laying claim to the promise of the Fourteenth Amendment now. Gay and lesbian people are equal. They deserve the equal protection of the laws, and they deserve it now. Thank you.

JUSTICE #2: (*As John G. Roberts, Jr.*) Thank you. Mr. Bursch.

LAWYER #2: (*As John J. Bursch.*) The marriage institution did not develop to deny dignity or to give second class status to anyone. It developed to serve purposes that, by their nature, arise from biology. Now, imagine a world today where we had no marriage at all. Men and women would still be getting together and creating children, but they wouldn't be attached to each other in any social institution. Now, the marriage view on the other side here is that marriage is all about love and commitment. And as a society, we can agree that that's important, but the State doesn't have any interest in that.

JUSTICE #1: (*As Elena Kagan.*) Mr. Bursch, that's the principal argument that you make in your briefs, that same-sex marriage doesn't advance this State interest in regulating procreation. Let's just assume for the moment that that's so. Obviously, same-sex partners cannot procreate themselves. But is there – in addition to that, are you saying that recognizing same-sex marriage will impinge upon that State interest, will harm that State interest in regulating procreation through marriage?

LAWYER #2: (*As John J. Bursch.*) We are saying that, Your Honor.

RUTH BADER GINSBURG: (*As Justice.*) How could that be, because all of the incentives, all of the benefits that marriage affords would still be available. So you're not taking away anything from

heterosexual couples. They would have the very same incentive to marry, all the benefits that come with marriage that they do now.

LAWYER #2: (*As John J. Bursch.*) Justice Kagan and Justice Ginsburg, it has to do with the societal understanding of what marriage means. And when you change the definition of marriage to delink the idea that we're binding children with their biological mom and dad, that has consequences.

JUSTICE #2: (*As Antonin Scalia.*) Is it your burden to show that it will harm marriage between a man and woman if you allow two men or two women to marry? I thought your burden was simply to show that the State's reason for this institution is a reason that is inapplicable to same-sex couples.

LAWYER #2: (*As John J. Bursch.*) Justice Scalia, you're exactly right, and that's why we – we prevail.

RUTH BADER GINSBURG: (*As Justice.*) Suppose a couple, a 70-year-old couple comes in and they want to get married. (*Laughter.*) You don't have to ask them any questions. You know they are not going to have any children.

LAWYER #2: (*As John J. Bursch.*) Well, a 70-year-old man, obviously, is still capable of having children and you'd like keep that within the marriage. But leaving that aside, many people get married thinking that they can't have kids or won't have kids, and they end up with children, and that the inclusion of those couples advances the State's interest because of this greater idea.

JUSTICE #2: (*As John G. Roberts, Jr.*) Counsel, I'm – I'm not sure it's necessary to get into sexual orientation to resolve the case. I mean, if Sue loves Joe and Tom loves Joe, Sue can marry him and Tom can't. And the difference is based upon their different sex. Why isn't that a straightforward question of sexual discrimination?

LAWYER #2: (*As John J. Bursch.*) Two reasons. All of this Court's landmark precedents in this area in sexual discrimination law have always involved treating classes of men and women differently. And that's not what we have here. But even more fundamentally than that, this Court has recognized in *Nguyen v. INS* that it's appropriate to draw lines based on sex if it's related to biology. And the *Nguyen* case really is important here. You'll recall that's the case where we had a law that determined citizenship of children born to divorced or unmarried individuals overseas. And the law said if it was the

child of a citizen mother, then they automatically had citizenship, but if it was the father, then the father had to, one, prove paternity and, two, make child support payments up to age 18. And that's an obvious sex discrimination.

RUTH BADER GINSBURG: (*As Justice.*) Well, the Court's rationale for that was we know who the mother is. We're fearful that the father is claiming to be the father for some benefits that he's going to get from that status, but we can't be sure he is the father.

LAWYER #2: (*As John J. Bursch.*) Right.

RUTH BADER GINSBURG: (*As Justice.*) In the Nguyen case, the father could get the status of a parent. He just had to do some things that the mother didn't have to do. It wasn't difficult. Here it's a total exclusion.

LAWYER #2: (*As John J. Bursch.*) But the gist of the Court's opinion, Justice Ginsburg, was that the State had an interest in the biological father-child bond, not only improving it, but also ensuring that it sustained. It advanced the exact same interest that the States have when they try to inextricably bind kids to their biological moms and dads.

RUTH BADER GINSBURG: (*As Justice.*) We have changed our idea about marriage is the point that I made earlier. Marriage today is not what it was under the common law tradition, under the civil law tradition. Marriage was a relationship of a dominant male to a subordinate female. That ended as a result of this Court's decision in 1982 when Louisiana's Head and Master Rule was struck down. And no State was allowed to have such a marriage anymore. Would that be a choice that a State should be allowed to have?

LAWYER #2: (*As John J. Bursch.*) No.

RUTH BADER GINSBURG: (*As Justice.*) To cling to marriage the way it once was?

LAWYER #2: (*As John J. Bursch.*) No. Absolutely not, because there the State didn't have a legitimate interest in making anyone subservient to anyone else. But here the State's entire interest springs out of the fact that we want to forever link children with their biological mom and dad when that's possible. And what they are asking you to do is to take an institution, which was never intended to be dignitary bestowing, and make it dignitary bestowing. That's their whole argument.

JUSTICE #1: (*As Anthony M. Kennedy.*) Just in – just in fairness to you, I don't understand it's not dignity-bestowing. I thought that was the whole purpose of marriage. It bestows dignity on both man and woman in a traditional marriage.

LAWYER #2: (*As John J. Bursch.*) It's supposed to—

JUSTICE #1: (*As Anthony M. Kennedy.*) It's dignity bestowing, and these parties say they want to have that – that same ennoblement.

LAWYER #2: (*As John J. Bursch.*) Sure.

JUSTICE #1: (*As Anthony M. Kennedy.*) Or am I missing your point?

LAWYER #2: (*As John J. Bursch.*) I think you're missing my point. If we go back to that world where marriage doesn't exist and the State is trying to figure out how do we link together these kids with their biological moms and dads when possible, the – the glue are benefits and burdens, but not necessarily dignity. You know, dignity may have grown up around marriage as a cultural thing, but the State has no interest in bestowing or taking away dignity from anyone, and certainly it's not the State's intent to take dignity away from same-sex couples or – or from anyone based on their sexual orientation.

JUSTICE #1: (*As Anthony M. Kennedy.*) Well, I think many States would be surprised, with reference to traditional marriages, they are not enhancing the dignity of both the parties. I'm puzzled by that.

JUSTICE #1: (*As Elena Kagan.*) To me it seems as though you are doing something very different that we've never done before, which is you are defining constitutional rights in terms of the kinds of people that can exercise them. And I don't think we've really ever done that. Once we understood that there was a right, it was a right for everybody.

LAWYER #2: (*As John J. Bursch.*) Absolutely. But that's the State's whole point, is that we're not drawing distinctions based on the identity, the orientation, or the choices of anyone. The State has drawn lines, the way the government has always done, to solve a specific problem. It's not meant to exclude. It's not meant to take away dignity.

JUSTICE #1: (*As Elena Kagan.*) But that's why you're drawing distinctions based on sexual orientation in these laws.

LAWYER #2: (*As John J. Bursch.*) Oh, gosh, no, because the – the State doesn't care about your sexual orientation. What the State cares about is that biological reality.

JUSTICE #1: (*As Elena Kagan.*) I'm not asking about your reasons and whether you have any or not. But whether you have any or not, you are drawing distinctions based on sexual orientation. That's what these laws do.

JUSTICE #2: (*As John G. Roberts, Jr.*) Do you want wrap up, counsel?

LAWYER #2: (*As John J. Bursch.*) I – I do want to wrap up. Your Honors, these are obviously very emotional issues where reasonable people can disagree. This Court has never assumed that people have acted out of animus when they're voting in the democratic process. The – the States generally, Michigan specifically, has – has no animus. It doesn't intend to take away dignity from anyone. We respect all parents, and we hope that they love their children. But this Court taking this important issue away from the people will have dramatic impacts on the democratic process, and we ask that you affirm.

JUSTICE #2: (*As John G. Roberts, Jr.*) Thank you, counsel. Ms. Bonauto, you have time remaining.

LAWYER #1: (*As Mary L. Bonauto.*) If I may, my last point is that the only way I can really understand Michigan's points about procreation and biology and so on is when I look, for example, at page 31 of their brief. And they say that what they care about is people who have children together staying together and providing a long-term, stable situation for their children. That interest applies full force in this context, because by denying marriage to same-sex couples, you are denying not only the protection for the adults, which is independently important, you are denying those protections and that security that would come from having married parents. So with that, thank you.

JUSTICE #2: (*As John G. Roberts, Jr.*) Thank you, counsel. The Court will take a brief break and return to the bench in five minutes for argument on the second question presented.



CONCLUSION

5-4 DECISION FOR OBERGEFELL AND OTHER PETITIONERS EXCERPTS FROM THE OPINION DELIVERED BY ANTHONY KENNEDY

The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest. With that knowledge must come the recognition that laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter. ...

It is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality. Here the marriage laws enforced by the respondents are in essence unequal: same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them. And the Equal Protection Clause, like the Due Process Clause, prohibits this unjustified infringement of the fundamental right to marry.

These considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same sex may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them. *Baker v. Nelson* must be and now is overruled, and the State laws challenged by Petitioners in these cases are now held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.

EXCERPTS FROM THE DISSENTING OPINION FROM JUSTICE ROBERTS

Although the policy arguments for extending marriage to same-sex couples may be compelling, the legal arguments for requiring such an extension are not. The fundamental right to marry does not include a right to make a State change its definition of marriage. And a State's decision to maintain the meaning of marriage that has persisted in every culture throughout human history can hardly be called irrational. In short, our Constitution does not enact any one theory of marriage. The people of a State are free to expand marriage to include same-sex couples, or to retain the historic definition.

FURTHER INFORMATION

To read the Opinion of the Court and Dissenting Opinions, the full transcript of the case, or to listen to an audio recording of the oral arguments, follow this QR code.



Ledbetter v. Goodyear Tire and Rubber Company

Oral Argument - November 27, 2006

CAST OF CHARACTERS

JUSTICE 1	(John G. Roberts, Jr., Antonin Scalia, David H. Souter)
JUSTICE 2	(Anthony M. Kennedy, Samuel A. Alito, Jr., John Paul Stevens)
RUTH BADER GINSBURG	(Supreme Court Justice)
LAWYER 1	(Kevin K. Russell)
LAWYER 2	(Glen D. Nager, Irving L. Gornstein)

FACTS: During most of the time that Petitioner Ledbetter was employed by respondent Goodyear, salaried employees at the plant where she worked were given or denied raises based on performance evaluations. Ledbetter alleged that several supervisors had in the past given her poor evaluations because of her sex; that as a result, her pay had not increased as much as it would have if she had been evaluated fairly; that those past pay decisions affected the amount of her pay throughout her employment; and that by the end of her employment, she was earning significantly less than her male colleagues. Goodyear maintained that the evaluations had been nondiscriminatory, and in their appeal of the lower court's decision in Ledbetter's favor, the discriminatory act had to occur after the 180-day time limit written into the law. But the jury found for Ledbetter, awarding back-pay and damages. The Eleventh Circuit reversed, holding that a Title VII pay discrimination claim cannot be based on allegedly discriminatory events that occurred before the last pay decision that affected the employee's pay during the EEOC charging period, and concluding that there was insufficient evidence to prove that Goodyear had acted with discriminatory intent in making the only two pay decisions during that period.

ISSUE: Can a plaintiff claim that each paycheck an employee receives is negatively affected by prior discriminatory conduct that impacted the paycheck's amount, no matter how long ago the discrimination occurred? Does each paycheck trigger a new EEOC charging period, which would otherwise be limited to 180 days immediately preceding the claim?

FOR MORE INFORMATION

For more information regarding the constitutional issues of this case, follow this QR code for the case Syllabus.



JUSTICE 1: (*As John G. Roberts, Jr.*) We'll hear argument next in Ledbetter versus Goodyear Tire & Rubber Company. Mr. Russell.

LAWYER 1: (*As Kevin K. Russell.*) Mr. Chief Justice, and may it please the Court. A jury found that at the time petitioner filed for charge of discrimination with the EEOC, respondent was paying her less for each week's work than it paid similarly situated male employees and that it did so because of her sex. The question for the Court is whether that present act of disparate treatment because of sex constituted a present violation of Title VII.

JUSTICE 2: (*As Anthony M. Kennedy.*) But are you saying that the rule for paycheck decisions is different than the rule for other sorts of decisions?

LAWYER 1: (*As Kevin K. Russell.*) It is. As a practical matter, while it's always the case or almost always the case that somebody knows they have been subject to disparate treatment in a promotion case... they know that they didn't get the promotion and somebody else did... it is frequently possible for an employee to be subject to disparate pay without ever knowing that she has been treated differently than anybody else.

JUSTICE 1: (*As Antonin Scalia.*) I don't really see a vast difference between a promotion and being elevated to a higher pay grade. I mean, there may be no different responsibilities but it's a single act of discrimination: "No, you're not going to move up to the next pay level." I don't see why that's different from "no, you're not going to move up to the next job."

LAWYER 1: (*As Kevin K. Russell.*) Because, I think the difference is that when somebody is denied a promotion for discriminatory reasons the paychecks themselves are not discriminatory.

RUTH BADER GINSBURG: (*As Justice.*) Mr. Russell, I thought that your argument was that yes, you know that you haven't got the promotion, you know you haven't got the transfer, but the spread in the pay is an incremental thing. You may think the first year you didn't get a raise, "well, so be it". But you have no reason to think that there is going to be this inequality.

LAWYER 1: (*As Kevin K. Russell.*) Yes, it's only if petitioner had all of the information that she would know that that pay raise decision increased the overall disparity between her wages and the average wages of men doing the same job. And even then the amount of that disparity, standing alone wouldn't provide a sufficient reason to go claim intentional discrimination to the EEOC.

RUTH BADER GINSBURG: (*As Justice.*) What happened to the Equal Pay Act claim? You started out with a Title VII claim and an equal pay claim and somewhere along the way the equal pay claim dropped out.

LAWYER 1: (*As Kevin K. Russell.*) It's essentially the same kind of case in each instance. Although the jury has to find intentional discrimination in the Title VII case; under the Equal Pay Act the jury has to determine whether the employer has shown that the present disparity is the result of some factor other than sex. And so in both cases, the jury always has to consider the basis of prior decisions that are the cause of the present disparity.

JUSTICE 2: (*As Samuel A. Alito, Jr.*) Do you have to show that at the time when a particular paycheck in question is issued, there was an intent to discriminate?

LAWYER 1: (*As Kevin K. Russell.*) No. The execution of a prior discriminatory decision constitutes a present violation of Title VII.

JUSTICE 2: (*As Samuel A. Alito, Jr.*) What if the situation is that when the particular paycheck is cut, the company, the employer, whoever it is, has no intent whatsoever to discriminate? They think that they are issuing this pay on a totally nondiscriminatory basis?

LAWYER 1: (*As Kevin K. Russell.*) It still constitutes a violation because they are executing a present disparity that is because of sex within the meaning of the statute.

RUTH BADER GINSBURG: (*As Justice.*) I thought your answer before was that if she's going to bring a case – I got a 2 percent raise, he got a 3 percent raise – her chances are very slim, but if this builds up year by year to the point where she is saying, I'm being denied equal pay, it's a requirement of the anti-discrimination law that I get equal pay, so today I'm not getting equal pay, I thought... I mean, the chance that she could win when she gets a salary review and she gets a little less than the other person are nil.

LAWYER 1: (*As Kevin K. Russell.*) Yes, and it's only after that same kind of decision has been repeated over a number of years that you actually have a case that you can bring to the EEOC. But under respondent's view, by that time it's too late.

JUSTICE 1: (*As David H. Souter.*) It seems to me the problem that we've got is the problem of connecting a past discrimination with what may in fact be an apparently neutral act 15 or 20 years later.

LAWYER 1: (*As Kevin K. Russell.*) Well, I don't think that the proof that the act is discriminatory is any more difficult in concept when it happened several years ago than when it happened 180 days ago. The employee still has to show that the present disparity is because of sex.

JUSTICE 2: (*As Anthony M. Kennedy.*) Does he have to know that the present decision to continue the pay structure is discriminatory?

LAWYER 1: (*As Kevin K. Russell.*) No. It's enough that the employer knows as a matter of basic agency law that the petitioner is being paid less because of her sex, because of prior discriminatory decisions.

RUTH BADER GINSBURG: (*As Justice.*) As I remember the facts of this case, wasn't it in 1995 that she got a substantial raise and the reason, according to her supervisor, was that he noticed that her pay was below the minimum of the appropriate range for her job?

LAWYER 1: *(As Kevin K. Russell.)* That's true. She did get a higher raise that year and that was his testimony. He also testified that he had told her differently, that she had done a very good job that year and that's why she had gotten it, and the jury was entitled to believe that.

JUSTICE 1: *(As David H. Souter.)* Do I understand it that your view is that the only thing you have to prove is that in this case a woman was being paid at a rate which is different from the rate of a man doing a comparable job?

LAWYER 1: *(As Kevin K. Russell.)* No, that's not our position. We have to prove in addition that that disparity is because of sex. If I could reserve the remainder of my time.

JUSTICE 1: *(As John G. Roberts, Jr.)* Thank you, counsel. Mr. Nager, we'll hear now from you.

LAWYER 2: *(As Glen D. Nager.)* Thank you, Mr. Chief Justice, and may it please the Court: This Court has repeatedly said that a claim of intentional discrimination is timely and actionable only if it concerns intentionally discriminatory acts taken during Title VII's charge filing period. And the question presented in this case asks the Court to hold that a disparity in pay states a timely actionable claim for intentional discrimination if it is merely the result of allegedly discriminatory actions taken outside of the charge filing period. The question presented is inconsistent with holding after holding of this Court. When Goodyear issued paychecks during the charge filing period, it did not commit intentionally discriminatory acts. No one at Goodyear took Miss Ledbetter's sex into account during the charge filing period in deciding what to pay her.

JUSTICE 2: *(As John Paul Stevens.)* Mr. Nager, can I test your theory with a hypothetical question? Supposing 20 years ago, there was an actual written policy statement, we pay women 20 percent less than men. And that was written up and everybody knew it. And then nothing changed for the next 20 years, and the person then sued today. And there was no intent to do anything, this is just the way it's always been. Would she have a cause of action?

LAWYER 2: *(As Glen D. Nager.)* The answer to that, I think, is no, if I understand your hypothetical, if the employer was not intending to classify on the basis of gender.

JUSTICE 2: (*As John Paul Stevens.*) If present intent was merely to do what we have always done, you have to go back 20 years to find out that what we have always done is the result of a policy decision made 20 years ago that we can hire women at a less expense than men so we will continue to pay the same rate. Would the per paycheck rule apply to that case?

LAWYER 2: (*As Glen D. Nager.*) I think the answer is it clearly would be untimely insofar as the allegation is that there is discrimination today merely because there was discrimination yesterday. Whether or not there is discrimination going on during the charge filing period, whether or not women are intentionally being treated differently than men, I think the answer, based upon your hypothetical, is no, given what you've said.

JUSTICE 1: (*As Antonin Scalia.*) Mr. Nager, why did it make any sense to treat this area any different from the Equal Pay Act.

LAWYER 2: (*As Glen D. Nager.*) Because they are two different statutes and the elements of the plaintiff's claims are fundamentally different. That's the fundamental flaw in the petitioner's claim in this case. Let me explain, if I may, Justice Scalia. In a Title VII case, in an intentional discrimination case, the question is whether or not there is an act that is motivated by gender during the charge filing period. That is not an element of the plaintiff's cause of action in an Equal Pay Act case. In an Equal Pay Act case, all the plaintiff has to do is allege they are performing equal work to a male, and that they are paid differently. And it's that cause of action that triggers the statute of limitations in an Equal Pay Act case. That's fundamentally different.

RUTH BADER GINSBURG: (*As Justice.*) Why is it different if the one further statement was made. And the employer knew that every woman is being paid less than every man. Why isn't that sufficient under Title VII, and if you want evidence, your own supervisor said, oh, we saw one year that she was outside the range appropriate for this job.

LAWYER 2: (*As Glen D. Nager.*) Well, knowledge is a necessary condition, but it's not a sufficient condition, Justice Ginsburg. Title VII allows proof of dissimilar treatment as evidence of present intentional discrimination, but it's not the elements of the claim. What makes this case untimely and unactionable is that there can be no claim because it's the law of the case that Goodyear did not take Miss Ledbetter's sex into account during the charge filing period. What Goodyear did was it said, we are looking at the pay rate contained in our payroll system, and applying those rates as they are mandated for all of our employees, male or female. And what Goodyear did at the beginning of each evaluation period was say, we are starting this payroll period with the pay rates that were paid in the last period for all of our employees, male or female, no matter what their prior causes.

RUTH BADER GINSBURG: (*As Justice.*) If only the 180 day period counts, and she can complain only about discrimination in that period, then how do you account for her being able to go back two years for her remedy?

LAWYER 2: (*As Glen D. Nager.*) The two-year rule is only a damages rule that applies only in Title VII cases. What the 180 days is for is determining the time period during which the allegedly illegal act must occur. What is going on, of course, in this case, is they are trying to use allegedly discriminatory acts that occurred 10, 15, 20 years ago, both to make neutral acts actionable, and to get compensatory and punitive damages.

RUTH BADER GINSBURG: (*As Justice.*) She's claiming that in 1995 a supervisor recognized that her pay was way out of line. Isn't that what the supervisor testified?

LAWYER 2: (*As Glen D. Nager.*) He did. And he said he raised her pay up the maximum amount he was entitled to that year. And she didn't file a charge of discrimination in 1995.

RUTH BADER GINSBURG: (*As Justice.*) Maybe she thought that, well, they are on the right track. Next year, they are going to raise me up to the equal pay level.

LAWYER 2: (*As Glen D. Nager.*) And what the purpose of the charge filing requirement under Title VII, as this Court has repeatedly said, is to require that employee to come forward promptly within 180 days of the date that the alleged unlawful employment action is communicated to her, and bring that claim or lose it.

JUSTICE 2: (*As Anthony M. Kennedy.*) How is that consistent with the statement in *Bazemore* that the employer has a duty to eradicate past discrimination?

LAWYER 2: (*As Glen D. Nager.*) There is no contemplation in that case that that duty would require an employer to investigate discrete employment decisions made in years gone by that weren't made the subject of a timely charge. What this Court has said repeatedly is when the charge filing period passes and no charge is brought, the employer is entitled to treat that past act as if it was a lawful act.

JUSTICE 1: (*As David H. Souter.*) Is that so even if they know it was in fact originally an unlawful act?

LAWYER 2: (*As Irving L. Gornstein.*) Yes. Title VII gives employees like petitioner 180 days to challenge an individual pay decision such as a denial of a pay raise. If she does not do that, she cannot come back 15 years later and say that a decision that was made 15 years ago and 14 years ago were based on my gender, and they –

RUTH BADER GINSBURG: (*As Justice.*) She is not talking about a decision made 15 or 14 in this case. She starts out even, and it builds up over time.

LAWYER 2: (*As Irving L. Gornstein.*) Well, I think in some pay cases, it will build up over time. In some cases it will happen immediately. But in either case, what Title VII says is that you have 180 days to challenge a discrete pay decision. If you do not do that, you cannot come back years later, or here at the end of her career, and challenge every pay decision that's been made up until then on the grounds that it was intentionally discriminatory and continues to have ongoing effects.

JUSTICE 2: (*As John Paul Stevens.*) But you could if the person making the decision was aware of the discriminatory policy.

LAWYER 2: (*As Irving L. Gornstein.*) Knowledge of prior unlawful acts is relevant evidence in deciding whether it's present-day intentional discrimination.

JUSTICE 1: *(As John G. Roberts, Jr.)* Thank you, counsel. Mr. Russell, you have 3 minutes remaining.

LAWYER 1: *(As Kevin K. Russell.)* I think the fundamental disagreement in this case comes down to what is the unlawful employment practice Congress was referring to when it prohibited discrimination with respect to compensation. If it is, in our view, the payment of an intentionally disparate wage, then there's no question that the violation occurred during the limitations period. The fact that the intent was formed outside the limitations period doesn't make the present payment of a disparate wage because of sex any less intentionally discriminatory. Thank you.

JUSTICE 1: *(As John G. Roberts, Jr.)* Thank you, counsel. The case is submitted.

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