

## Supreme Court Justices Antonin Scalia and Ruth Bader Ginsburg: Communicating the Virtue of Friendliness

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Supreme Court Justices Antonin Scalia (1936-2016) and Ruth Bader Ginsburg (1933-) enjoyed a long friendship, although they seldom agreed on legal matters due to differences in their views on both the Constitution and on the role of the court. Conservative Scalia and liberal Bader Ginsburg regularly and vigorously disagreed with one another on Supreme Court decisions. In an interview with Nina Totenberg, Scalia suggested, “Why don’t you call us the odd couple?”<sup>1</sup> The juxtaposition of their opposing approaches to legal doctrine and their deep friendship strikes most people as a curious anomaly.

This paper examines the relationship of Scalia and Bader Ginsburg in the context of Aristotle’s discussion of social virtues. I begin with a brief overview of the Justices’ lives prior to their appointment to the Supreme Court. Aristotle’s discussion of social virtues offers insight into public friendship and explains, in part, how Scalia and Bader Ginsburg communicatively engaged one another in person and in footnotes. Their friendship as associates on the court is evident in *United States v. Virginia* (1996). The symbolism of their friendship should receive greater attention in our contemporary political culture—as a lesson for what is needed in a time of political upheaval, pointing to the possibilities democracy holds.

### The Justices: Similarities and Differences

A person’s life circumstances and personal choices shape the development of one’s character. Justices Scalia and Bader Ginsburg both grew up in New York City

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during the great depression and subsequent World War. Their lives were parallel in many ways, yet each developed different political and legal opinions as a result of personal life experiences.

### Supreme Court Justice Antonin Scalia

Antonin Gregory Scalia was born March 11, 1936, in Trenton, New Jersey. His grandparents on both sides were Italian immigrants. He was an only child, growing up in the Irish-Italian neighborhood of Elmhurst, Queens, New York City. His mother, an elementary school teacher helped shape his interest in politics and the law; his father was a professor, guiding his interest in scholarship. Scalia attended St. Francis Xavier High School, a Jesuit military academy in Manhattan; he graduated as class valedictorian in 1953. During his high school years he studied ancient languages, played the piano, and came to enjoy opera. Scalia earned his A.B. from Georgetown University in 1957, again as valedictorian. He graduated magna cum laude from Harvard Law School in 1960, having served as an editor for the *Harvard Law Review*. He received the Shelton Fellow of Harvard University from 1960-1961 designated for international travel after graduation.<sup>2</sup>

After graduating from Harvard, Scalia practiced law in Cleveland, Ohio until 1967. He then resigned from the law firm to teach at University of Virginia School of Law from 1967-1970. Scalia worked for the presidential administrations of Richard Nixon and Gerald Ford from 1970-1977. After Ford lost re-election, Scalia accepted a position as law professor at University of Chicago Law School where he taught from 1977-1982. He resigned when President Ronald Reagan appointed him to U.S. Court of Appeals for the District of Columbia, where he served from 1982-1986. Reagan later appointed Scalia to serve as an Associate Justice on the U.S. Supreme Court (1986-2016), a post he held until his death. Conservative in matters of the law, Scalia was sworn in at age 60 to occupy seat 10 of the Supreme Court.<sup>3</sup>

Scalia came of age before the political activism of the civil rights and Vietnam War eras. His education in “elite urban Roman Catholic institutions” separated Scalia from the hostile conflicts that were prevalent between the Roman and Italian-American

Catholics.<sup>4</sup> Interactions with exclusive contacts impacted his life and “contribute[d] in subtle ways to his perception of law and politics”<sup>5</sup> in his positions as an attorney, law professor, and federal judge. He became popularly recognized as the most conservative member of the Supreme Court. Three years before Scalia’s birth and less than 10 miles away, the person who would become a close professional friend was born.

### Supreme Court Justice Ruth Bader Ginsburg

Joan Ruth Bader was born on March 15, 1933 in Flatbush, Brooklyn, New York. Her parents were first generation Russian Jewish immigrants. Bader’s sister Marilyn was born in 1927; she died of meningitis in 1934 at the age of six when Bader was 14 months old. This left her to be reared as an only child. Bader’s mother, a factory worker, was a driving force in her life prompting an interest in various languages and cultures. Her father was “not very successful [as a] furrier-turned-haberdasher.”<sup>6</sup> She attended Public School 238 in Brooklyn and graduated first in her class. Bader then entered James Madison High School in Brooklyn, again graduating as class valedictorian. Bader grew up playing the cello, and had an interest in classical and performing arts. She earned a B.A. in government from Cornell University (1950-1954), during which time her interest in law developed. Ruth Bader married Martin Ginsburg in May 1954. Following Cornell, Bader Ginsburg enrolled at Harvard Law School (1958-1958) where she served on the *Harvard Law Review*—one of nine women in a class of 500. Family circumstances required that Bader Ginsburg transfer to Columbia University for her last year (1958-1959), where she served on the *Columbia Law Review*. Following a brief time in Oklahoma, she clerked for Judge Edmund Palmieri, U.S. District Court for the Southern district of New York from 1959-1961. From 1961-1963 she worked for Columbia Law School’s Project on International Procedure, conducting research at Lund University in Sweden.

Following her work at Columbia University, Bader Ginsburg taught at Rutgers University School of Law (1963-1972). She returned to Columbia University from 1972-1980 working as Director of and counsel to the ACLU Women’s Rights Project. In 1980, she was appointed by Jimmy Carter as Judge to the U.S. Court of Appeals for

the D.C. Circuit (1980-1993), only the second woman to serve as a Federal Appeals Court Judge. President Bill Clinton appointed Bader Ginsburg to serve on the U.S. Supreme Court (1993-). She was the first Jewish woman, and only the second woman on the court, sworn in at age 60 to occupy Seat 7 of the Supreme Court.<sup>7</sup>

Bader Ginsburg grew up during World War II in a middle class Jewish family. She shared,

“I have memories as a child, even before the war, of being in a car with my parents and passing a place in [Pennsylvania], a resort with a sign out in front that read: ‘No dogs or Jews allowed.’ Signs of that kind existed in this country during my childhood. One couldn’t help but be sensitive to discrimination living as a Jew in America at the time of World War II.”<sup>8</sup>

Bader Ginsburg’s early days as a female attorney also shaped her personal understanding of discrimination based on sex. She was not sheltered from the hatred cast at her and the workplace discrimination that accompanied such views.

Scalia and Bader Ginsburg grew up in a similar geographic area, in a similar time, yet in markedly different circumstances. They served together as judges on the U.S. Court of Appeals for the D.C. Circuit from 1982-1986. During that time Scalia became a friend of Bader Ginsburg “but not an ally on the law.”<sup>9</sup> Despite their differences, both justices exhibit rhetorical poise and a facility with language that is undergirded by virtuous behavior.

### Communicating Virtue Habits in Friendship

Contemporary understandings of friendship are dramatically different from the social virtues sought in antiquity. Following the Enlightenment, values rather than virtues became a more common basis for friendship. Diane Jeske notes that friendships in contemporary society are similar in many ways to familial relationships.<sup>10</sup> Marilyn Friedman echoes this thought. She asserts that a friendship exhibits a commitment to another person that “takes as its primary focus the needs, wants, attitudes, judgments, behavior, and overall way of being of a particular person.”<sup>11</sup> A friendship is specific to a particular relationship and is not generalizable to other relationships. Thus, a friendship often begins with a consideration of the values a person holds. Values are understood to mean “the preferences of autonomous individuals” (Cronen 1991, p. 31). A value-

laden approach to friendship is distinctly different from an Aristotelian understanding of the expression of social virtues in a relationship.

In *Nicomachean Ethics*, Aristotle wrote about the importance of virtue habits leading to a good life in the Greek city-state of Athens.<sup>12</sup> In virtue, one stands “in a certain relationship to a good and worthy end.”<sup>13</sup> J. M. Roberts explained that when Greeks used the term *virtue*, the worthy end was citizens who “were able, strong, [and] quick-witted, just as much as [they were] just, principled, or virtuous in a modern sense.”<sup>14</sup> The aim of all deliberate human action was *eudaimonia* (human flourishing).

Aristotle noted that virtue “disposes us to noble deeds.”<sup>15</sup> A virtue “is a quality of character by which individuals habitually recognize and do the right thing.”<sup>16</sup> Noble deeds stem from two forms of virtue, intellectual virtue and moral virtue. Excellences or virtues of the intellect include philosophy, appreciation, and prudence. Intellectual excellences can be taught. Moral virtues or virtues of character include liberality and temperance and cannot be taught but emerge “as a result of habit” developed through self-discipline<sup>17</sup> as one engages in cultural practices.

In *Nicomachean Ethics* Aristotle discussed twelve virtues and their corresponding vices, in each case a vice of excess and a vice of deficiency. The virtues include courage, temperance, liberality, magnificence, magnanimity, proper ambition, patience/good temper, modesty, and righteous indignation, as well as truthfulness, wittiness, and friendliness. To exercise any one of these virtues, a person must possess all the others as well.<sup>18</sup>

In enacting a virtue, one seeks to express the mean in one’s passions and actions.<sup>19</sup> Gavin Ardley uses the metaphor of a hill to describe virtue as rising between two valleys.<sup>20</sup> Achieving virtue is like climbing a hill; maintaining virtue demands correct discernment to avoid sliding into vice. Remaining atop the hill requires finding the mean, which depends upon a number of factors relative to the situation.

Aristotle wrote that achieving virtue “is not for everyone, nor is it easy.”<sup>21</sup> However, since “the means to the end are the objects of deliberation and choice, it follows that actions concerned with means are based on choice and are voluntary actions. And the activities in which the virtues find their expression deal with means.”<sup>22</sup>

Virtue and vice depends on one's chosen acts. "For where it is in our power to act, it is also in our power not to act, and where we can say 'no,' we can also say 'yes.'"<sup>23</sup> If one has the power to act when it is noble to do so, one also has the power not to act when it is base to do so.<sup>24</sup> Although attaining virtue is difficult, Aristotle insisted that all human beings have the potential to do so and must do so to attain a good life. In considering the friendship between Scalia and Bader Ginsburg, Aristotle's virtues of social intercourse are instructive.

While all Aristotelian virtues are interrelated, three spheres of moral action (or virtues) are most relevant to human communication studies. These are the spheres of social intercourse: self-expression, social entertainment, and social conduct. The three intermediate states or virtues pertaining to communication are truthfulness, wittiness, and friendliness.<sup>25</sup> All three concern the social intercourse of speech and action; however, they are different in that one is concerned with truthfulness while the other two concern what is pleasant. Truthfulness is an intellectual virtue related to self-expression, while wittiness in social entertainment and friendliness in social conduct relate to pleasure.

The intermediate virtue in self-expression is called truthfulness. Excessive self-expression may lead to boastfulness; deficient self-expression may underestimate the worth of one's self-expression.<sup>26</sup> The intermediate virtue in social entertainment is called wittiness. Excessiveness desire to entertain may lead to buffoonery, while insufficient attention to social entertainment in self-expression may lead to boorishness.<sup>27</sup> The intermediate virtue in everyday discourse is friendliness. A person who goes too far may become obsequious or a flatterer; a person deficient in using everyday discourse may be cantankerous and ill-tempered.<sup>28</sup>

Aristotle's social virtues (truth, wit, friendliness) join together in a general understanding of friendship. He wrote that for two people to be friends, "they must be mutually recognized as bearing goodwill and wishing well to each other."<sup>29</sup> When a relationship is defined by a commitment to a common pursuit of goods, affection arises within that relationship. Affection is secondary to the pursuit of an identified good. In a postmodern era, affection is often the central issue in friendships, which are developed

with people whose company one enjoys. Alasdair MacIntyre explains that “[f]riendship’ has become for the most part the name of a type of emotional state rather than of a type of social and political relationship.”<sup>30</sup> The social construct of friendship has shifted to refer to a focus on a singular individual rather than on the broader polis. Friendship has become a private form of relationship, rather than a concern of expressing virtue in the public sphere—and “thereby weakened in comparison to what it once was.”<sup>31</sup> Across time we have lost a varied understanding of different forms of friendship.

Aristotle identified three kinds of friendship. One form is derived from mutual utility; parties associate out of mutual benefit. A second form is derived from mutual pleasure and enjoyment. A third form is derived “from a shared concern for goods which are the goods of both and therefore exclusively of neither.”<sup>32</sup> Aristotle referred to the third form as genuine friendship, explaining that a shared concern for good is appropriate for a relationship between “citizen and citizen in the polis.”<sup>33</sup> An interesting connection arises between the work of Aristotle and that of Wayne Brockriede. In his work Brockriede considers three different stances that arguers may take with respect to “their attitudes toward one another, their intentions toward one another, and the consequences of those attitudes and intentions for the act itself.”<sup>34</sup> Emotion and good will, necessary components in Aristotelian friendship, are present in Wayne Brockriede’s characterization of the way genuine friends may argue—as lovers.

Brockriede considers how different forms of argument (rapist, seducer, and lover) each reflect a different attitude, intention, and type of relationship. An arguer as lover takes an attitude of love toward the other, intending cooperation with one another in a relationship of power parity. “He asks for free assent, advancing arguments openly and asking for open criticism. He risks his own self and asks for that same risk from co-arguers. He seeks a bilateral relationship with human beings.”<sup>35</sup> This form of argument is appropriate for genuine friends.

Aristotle sought to encourage people to develop the quality of a virtuous character (standard bearers) so that they would provide a model of ethical character and action.<sup>36</sup> He used the term *phronesis* to suggesting practical wisdom in discourse and

action. Self (1979) provided a succinct description of Aristotle's notion of *phronesis*: "Aristotle writes, 'Practical wisdom, then, must be a reasoned and true state of capacity to act with regard to human goods.'<sup>37</sup> The deliberations of a person exercising *phronesis* command attention and action because they emerge from wisdom. Perhaps we need to rediscover Aristotle's tradition of practical wisdom (*phronesis*), which conveys truth in one's self-expression, pleasantness of wit in social entertainment, and a pleasing friendliness in social interaction. These social virtues are joined with the other moral virtues in genuine friendship, wherein interactants argue with love in an ongoing relationship with one another.

### Enacting Friendship: Scalia and Bader Ginsburg

Scalia and Bader Ginsburg developed a friendship during their service on the U.S. Court of Appeals for the D.C. Circuit. They differ in their disposition, judicial approach, and political beliefs. As Scalia stated about Bader Ginsburg in 2007, "We are two people who are quite different in their core beliefs, but who respect each other's character and ability."<sup>38</sup> This section briefly outlines the philosophical differences these genuine friends had about the Constitution and considers how they navigated their differences in the *United States v. Virginia* (1996) case.

### Differences in Judicial Approach

Scalia and Bader Ginsburg take two opposing views of the Constitution and how decisions are made in the federal judicial system. A staunch conservative, Scalia interpreted the document as static and fixed. A progressive liberal, Bader Ginsburg approaches the Constitution as having flexible meanings responsive to the historical moment. Irin Carmon notes two of the many different topics on which Scalia and Bader Ginsburg have disagreed.

"Scalia bitterly opposed the Supreme Court's gradual recognition of rights for gays and lesbians; Ginsburg was the first justice to preside over a same-sex marriage. Scalia referred to the Voting Rights Act, the law protecting ballot access for the historically disenfranchised, as one of several 'racial entitlements' that Congress would be hard-pressed to end; Ginsburg ferociously dissented when the court gutted it."<sup>39</sup>



Differences in judicial philosophy lead the Justices to take these opposing stances.

Bader Ginsburg's judicial approach centers on considering the systemic issues pointed to by facts present in each case.<sup>40</sup> In short, she approaches the Constitution as a living document that "adapts to the times, taking on different meanings depending on when it is interpreted."<sup>41</sup> Her belief is that as society changes, judges should modify their interpretations of the Constitution, which should reflect changing social mores.<sup>42</sup> Bader Ginsburg believes that the Constitution extends constitutional rights to previously excluded groups.<sup>43</sup> A pioneer for women's rights, Bader Ginsburg advocates a living Constitution.

Scalia advocates textualism in statutory interpretation and originalism in constitutional interpretation. Both textualism and originalism hold that a judge's interpretation of the Constitution with respect to a case must give weight to "the text of the Constitution and what the common meaning of the language was at the time of its adoption."<sup>44</sup> In originalism, Scalia explains, judges "simply strictly apply laws, especially the Constitution, exactly as they are written."<sup>45</sup> His opinions are based primarily on the facts of the case.<sup>46</sup>

Nina Totenberg explored their interpretive differences in a National Public Radio interview. In the interview, Scalia expressed that he defines a *living* Constitution differently than Bader Ginsburg: "To my mind, no Constitution is living unless it is enduring. If it is subject to whimsical change by five out of nine votes on the Supreme Court who decide it ought to mean something different than what it meant when the people voted on when they ratified the provision of the constitution that is not a living Constitution. . . . That is a dead Constitution—one that does not endure. That's what I mean by it."<sup>47</sup> Bader Ginsburg responded:

There is a certain problem with that view. When you said 'the people' think of our Constitution in 1787, we the people, the people who were part of the political community were white property owning men. . . . Well, they didn't put equality in the original constitution because of the shame of slavery. But they did put due process of law. And equality was the motivation for our Declaration of Independence. So my view is that these grand ideas were meant to develop as society developed. . . .

Countering her argument, Scalia responded:

“This may be true, Ruth, but it was not the founders’ notion. Nobody thought that the constitution would morph. And to mean whatever . . . the Supreme Court thought it ought to mean. . . . That provision had been in the constitution. Due process of law shall mean whatever a majority of the Supreme Court from time to time shall deem it to mean. I deny that provision.”

To which Bader Ginsburg countered: “I have to deny that it’s the Supreme Court. Because the Supreme Court is a reactive institution. It’s never out in front. Why did equality . . . why does it mean something different today than it meant in the days when . . . Why? Because the society understood that the equality norm was neglected.” Scalia refuted her assertion, “Ruth, that is not true. The court has made a number of constitutional decisions that fly in the face of what the majority of Americans want and what the majority of states want. Especially in the field of capital punishment. . . .” Their argument continued for several turns until Scalia interjected, “We’re not gonna agree on this, Ruth. You realize that.” At which point the seriousness of argument broke and both people began to laugh.<sup>48</sup>

The two jurists argue intensely, “intelligently, respectfully, and adamantly.”<sup>49</sup> Several attempts by Totenberg to interrupt their discourse went unnoticed by the interlocutors. The text captures their calm, reasoned argument which maintained their friendship as primary. They argue as lovers: in their argument each advances a claim, listens to criticism from the other involving perceived flaws in reasoning and interpretation, issues respect and does not interrupt the other, and risks themselves. Lani Guinier remarked that both Scalia and Bader Ginsburg have language skills that are adept, using ordinary language in ways that garner the attention of the general public.<sup>50</sup> Bader Ginsburg said of Scalia that “[h]e was a jurist of captivating brilliance and wit. . . . The press referred to his ‘energetic fervor,’ ‘astringent intellect,’ ‘peppery prose,’ ‘acumen,’ and ‘affability,’ all apt descriptions. . . . his pungent opinions so clearly stated that his words never slipped from the reader’s grasp.”<sup>51</sup> The audience for Totenberg’s interview clearly appreciated the discourse, quietly listening, applauding, and laughing as if they were part of the conversation working diligently to articulate their own perspective through Scalia and Bader Ginsburg’s voices.

The intensity of their argument was not limited to verbal interactions about the law. They also continued their arguments in Supreme Court decisions, both in text and in footnotes. And at times, even when they agreed, they did not agree on why they agreed (e.g., *Reed v. Farley*, 114 S. Ct. 2291, 1994). One instance that captures their argument as friends is provided in the differences expressed in *United States v. Virginia*.

#### Differences in *United States v. Virginia*

*United States v. Virginia* (518 U.S. 515, 1996) struck down the Virginia Military Institute's (VMI) male-only admission policy. In 1990 the United States sued the Commonwealth of Virginia and VMI, alleging that their exclusively male admission policy violated the Equal Protection Clause of the Fourteenth Amendment.

VMI was established in 1829 with a mission to train male "citizen soldiers" as civilian and military leaders using an "adversative, or doubting, model of education" that is characterized by "physical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values."<sup>52</sup> VMI argued that admitting women would comprise the school's educational method. The District Court ruled in favor of VMI.<sup>53</sup> The Court of Appeals for the Fourth Circuit disagreed and ordered Virginia to identify a remedy for the Constitutional violation providing for equal opportunity. Virginia then proposed a parallel program for women as the Virginia Women's Institute for Leadership (VWIL) at Mary Baldwin College. The district court accepted Virginia's remedial plan and the Fourth Circuit affirmed their decision, determining that a single-sex education was a legitimate objective. Although the VWIL program would share the VMI mission to educate citizen-soldiers, it would differ in the academic coursework, educational method, and financial resources available. The district court found the education at the two schools sufficiently comparable and an appeal was made to the Supreme Court.<sup>54</sup>

Following oral arguments, Chief Justice Rehnquist assigned Justice Sandra Day O'Connor to write the opinion of the court. O'Connor requested that Bader Ginsburg write the case instead of her because of Bader Ginsburg's legal history of working for

women's rights.<sup>55</sup> Bader Ginsburg carefully considered the comments and concerns of all Justices.

Bader Ginsburg's opinion was in keeping with her previous comments.<sup>56</sup> She wrote "even when stereotypes about women's behavior might accurately predict what might be expected from a majority of women, those women who did not fit the stereotype ought not be ignored or unprotected."<sup>57</sup> She argued that the State had not presented "exceedingly persuasive" evidence that an "important governmental objective" was attained by keeping VMI as an exclusively male institution. She asserted that "all gender-based classifications" warrant "heightened scrutiny" to ensure equal opportunity.<sup>58</sup>

After receiving Bader Ginsburg's draft, Justices reviewed the argument to determine whether or not they would sign-on to the decision, write a concurring opinion, or dissent. Scalia often edits the opinions he receives. While most colleagues dislike this habit of unsolicited revision, Bader Ginsburg seemed to appreciate Scalia's counterarguments, returning the favor by also making revisions on Scalia's writings.<sup>59</sup> Scalia believed that dissents "augment rather than diminish the prestige of the Court . . . . When history demonstrates that one of the Court's decisions has been a truly horrendous mistake, it is comforting . . . to look back and realize that at least some of the justices saw the danger clearly and gave voice, often eloquent voice, to their concern."<sup>60</sup> Bader Ginsburg explained, "My experience confirms that there is nothing better than an impressive dissent to lead the author of the majority opinion to refine and clarify her initial circulation."<sup>61</sup> Bader Ginsburg appreciated Scalia's comments, even though the two did not agree. "The greatest thing for me was to have a Scalia dissent. He would point out all the soft spots and that would give me an opportunity to improve and make it more persuasive than it was before I got this stimulating dissent."<sup>62</sup> And Scalia's draft dissent in *United States v. Virginia* was vigorous.

Bader Ginsburg was preparing to leave to attend the Second Circuit Judicial Conference at Lake George, New York. Scalia entered her chambers with a draft of his dissent in hand. "Tossing many pages onto my desk, he said: 'Ruth, this is the penultimate draft of my dissent in the VMI case. It's not yet in shape to circulate to the

Court, but the end of the Term is approaching, and I want to give you as much time as I can to answer it.”<sup>63</sup> Sharing a dissent in advance of a distributed decision is a highly rare occurrence.

Bader Ginsburg reflected, “On the plane to Albany, I read the dissent. It was a zinger, of the ‘this wolf comes as a wolf’ genre. It took me to task on things large and small.”<sup>64</sup> Scalia dissented on nearly all aspects of Bader Ginsburg’s majority opinion. Scalia, who attended a Jesuit military school as a boy and previously taught at the University of Virginia Law School, sought to preserve the tradition of a state-supported all-male military school. In the opening to his dissent he is clear that Bader Ginsburg’s opinion is “contrary to our established practice . . . sweeps aside the precedents of this Court . . . [and] drastically revises our established standards for reviewing sex-based classifications.”<sup>65</sup> Scalia’s primary objection was to the level of scrutiny sex-based classifications are to be given.

Scalia argued that of the three tests the Court had previously applied (“rational basis” scrutiny, intermediate scrutiny, or strict scrutiny), the Court recognized that the statutory classification based on sex was determined to lie “between the extremes of rational basis and strict scrutiny” in determining if discrimination was “substantially related to an important government objective.” He reminded her that the Court reserved strict scrutiny for “classifications based on race or national origin and classifications affecting fundamental rights” and argued that Bader Ginsburg’s application of the tougher test of strict scrutiny was inappropriate. He wrote that the majority opinion in *United States v. Virginia* collapsed the distinction between sex and race, treating sex discrimination and race discrimination the same for purposes of equal protection.<sup>66</sup> He objected to her application of a higher level of scrutiny for sex discrimination cases than had previously been applied. The tradition of male-only military academies had endured historically. People could change the tradition through democratic processes but he would not support that the tradition was unconstitutional.<sup>67</sup> Scalia believed that such decisions should be played out in the democratic process and then written into the Constitution. He argued, “the virtue of a democratic system is that it enables people over time to be persuaded that the things they took for granted are

not so and to change their laws accordingly.”<sup>68</sup> He protested, “This is not the interpretation of a Constitution . . . but the creation of one.”<sup>69</sup> Their differences did not abate.

Bader Ginsburg noted that before the decision of the court was released to the public she had made at least a dozen more drafts. In response to each distribution, Scalia adjusted his comments; she would then write to meet his responses.<sup>70</sup> Halted only by the waning days of the Court term they agreed “it was time to say *Basta!* [Enough!].”<sup>71</sup> Neither was going to persuade the other.

Bader Ginsburg delivered the opinion of the court, joined by Justices John Paul Stevens, Stephen Breyer, Anthony Kennedy, Sandra Day O’Connor, and David Souter. Rehnquist filed a concurring opinion. Thomas recused himself because his son was enrolled at VMI. The lone dissenter was Justice Scalia.<sup>72</sup> Bader Ginsburg described her announcement of the decision “as one of the most personally satisfying she has delivered in all her years on the bench.”<sup>73</sup> In addition to ruling that VMI violated the Fourteenth Amendment’s Equal Protection Clause, Bader Ginsburg’s manner of arguing with Scalia to refine her ideas also played an important role in bolstering the decision.

#### Friendliness in the Court of Disagreement

Scalia chose to share a draft of his dissent in *United States v. Virginia* with Bader Ginsburg, who was charged with writing the decision of the Court in that case. At that time the associate justices had known each other for 14 years. Aristotle wrote, “friendship requires time and familiarity.”<sup>74</sup> This may account for Bader Ginsburg welcoming his dissenting opinion in advance. This would allow her to “better write what is now a landmark majority opinion striking down an all-male admission policy at a public college.”<sup>75</sup> Bader Ginsburg stated, “When I wrote for the Court and received a Scalia dissent, the opinion ultimately released was notably better than my initial circulation. Justice Scalia nailed all the weak spots—the ‘applesauce’ and ‘argle bargle’<sup>76</sup> giving her “just the stimulation I needed to strengthen the Court’s decision.”<sup>77</sup> Bader Ginsburg was appreciative to Scalia for his rigor of disagreement and for the fact that

their disagreements aided her in preparing a stronger response: “He absolutely ruined my weekend, but my opinion is ever so much better because of his stinging dissent,” she reflected. Bader Ginsburg believed that the institution of the court was made stronger through her public friendship with Scalia. Through their interactions of reverential argumentation, the courts could continue to function without becoming bogged down by polarized ideologies of its members.<sup>78</sup>

Scalia and Bader Ginsburg’s expression of their social virtues often took the form of outthinking one another. Bader Ginsburg shared, “Thinking about fitting responses consumed my weekend.”<sup>79</sup> She noted, “He took me to task on everything. I had a footnote where I referred to the Charlottesville campus of the U of VA. He wrote ‘you must excuse the judge who is more familiar with New York—there is no Charlottesville campus, there is only THE U of VA.’”<sup>80</sup> Scalia noted that Bader Ginsburg fixed the mistake “not by changing the name of the school, but by quoting another judge who had referred to the university in the same way. ‘She knew it was wrong, but she was too proud to change it,’ Justice Scalia remembered, crossing his arms in a pantomime of annoyance.”<sup>81</sup> The intellectual barbs were long remembered by them both.

Their difference in judicial approach was also clear in this argument. Scalia “did not see the point of this lengthy foray into the history of sex discrimination . . . invoking a litany of historical examples of discrimination that had little bearing on the constitutionality of VMI’s admissions policy.”<sup>82</sup> Originalism adheres to the facts of the case; a living Constitution approach is present in Bader Ginsburg’s systematic discussion of sexual discrimination in other areas as it informed the VMI case. Conflict is a feature of all relationships and is not inherently good or bad. Scalia and Bader Ginsburg waged their battles in “oral argument and in the footnotes of the *Supreme Court Reporter*, and, having done so, they then leave their differences there and welcome the joy of sharing their common love of music and good company.”<sup>83</sup> Such communication behaviors indicate the virtue of friendliness.

This section located Scalia and Bader Ginsburg’s dialogic relationship by highlighting an example of their contentious rhetoric as seen through their professional

interactions in the courts. Throughout the communication that took place during the 1996 *United States v. Virginia* Supreme Court case, agreement—although a desirable outcome—was not necessary for the continuance of their friendship.

### In Closing

Scalia and Bader Ginsburg illustrate Aristotle's idea of friendship. Aristotle recognized that to facilitate happiness people must act virtuously for the benefit of their community. Ronald C. Arnett and Pat Arneson wrote, "Happiness is not a life of amusement, but one of 'action' and 'virtue,' involving others as well as oneself. . . . The happiness of a person is thus dependent on living a life of virtuous action for the good of the community."<sup>84</sup> Friendship is not based solely on utility or how one person can benefit another; friendship involves reciprocated goodwill. Complete friendship, Aristotle wrote, "is the friendship of good people similar in virtue; for they wish goods in the same way to each other in so far as they are good, and they are good in themselves."<sup>85</sup> Friends seek to give good advice as well as allow friends who give good advice to influence them.

People find it odd that Scalia and Bader Ginsburg frequently disagreed and sometimes engaged in bitter footnote battles. Through the lens of Aristotle and Brockriede, these battles are understandable and were necessary. The rarity of their relationship also marks their behaviors as uncommon. As Aristotle wrote, "it is natural that such friendship should be infrequent; for such men [friendships] are rare."<sup>86</sup> Despite their differences, Scalia and Bader Ginsburg shared a deep belief in democracy. The judges are "different in our interpretation of written texts, [yet] one in our reverence for the Constitution and the institution we serve."<sup>87</sup> Their friendship transcended their political views and offers a view of a relationship worthy of consideration as political parties become increasingly strident in emphasizing points of contention rather than commonality.

Scalia and Bader Ginsburg both grew up in in New York City, born just a few years apart and living only a few miles apart. Their character development was shaped differently; his by the protection of affluence and hers by the experience of



discrimination. Their friendship began when they both served on the D.C. appeals court. Their arguments stemming from Scalia's originalist approach to the Constitution and Bader Ginsburg's living approach to the Constitution are well-documented. On the Court, they energetically advance their interpretations, driving each other to document and argue a position with extreme clarity. *United States v. Virginia* is but one example of how the virtue of friendship appears in context. The dominant narrative of friendship in contemporary society is focused on individualism and familial in nature; Scalia and Bader Ginsburg's friendship, adhering to social virtues and focused on the public good, provides an important counterexample in this time of political unrest.

### Notes

<sup>1</sup> Pamela Brown, "Ginsburg and Scalia's Wild Adventures," *CNN*, February 13, 2015, <http://www.cnn.com/videos/politics/2015/02/13/lead-pkg-brown-scalia-and-ginsburg.cnn/video/playlists/supreme-court-justice-ruth-bader-ginsburg/>.

<sup>2</sup> Richard A. Brisbin, Jr., *Justice Antonin Scalia and the Conservative Revival* (Baltimore: Johns Hopkins University Press, 1997), 11-12. See also Joan Biskupic, *American Original: The Life and Constitution of Supreme Court Justice Antonin Scalia* (New York: Farrar, Straus and Giroux, 2009); Bruce Allen Murphy, *Scalia: A Court of One* (New York: Simon and Schuster, 2014); James Stabb, *The Political Thought of Justice Antonin Scalia: A Hamiltonian on the Supreme Court* (Lanham: Rowman and Littlefield, 2006).

<sup>3</sup> Brisbin, *Justice Antonin Scalia and the Conservative Revival*, 11-12; See also Biskupic, *American Original*; Murphy, *Scalia*; Stabb, *The Political Thought of Justice Antonin Scalia*; Ruth Marcus and Susan Schmidt, "Scalia Tenacious after Staking out a Position," *The Washington Post*, June 22, 1986, <http://www.washingtonpost.com/wp-dyn/content/article/2007/08/22/AR2007082200970.html>; Bruce Fein, "Antonin Scalia: Intellectual Challenger to Accepted Doctrinal Approaches," in *The Supreme Court and Its Justices*, ed. Jesse H. Choper, 2nd ed. (Chicago: American Bar Association, 2001), 282-289.

<sup>4</sup> Brisbin, *Justice Antonin Scalia and the Conservative Revival*, 11.

<sup>5</sup> *Ibid.*, 11.

<sup>6</sup> Nina Totenberg, "Notes on a Life," in *The Legacy of Ruth Bader Ginsburg*, ed. Scott Dodson (Cambridge: Cambridge University Press, 2015), 4.

<sup>7</sup> The Jewish Virtual Library, "Ruth Bader Ginsburg," <http://www.jewishvirtuallibrary.org/ruth-bader-ginsburg>; Chicago-Kent College of Law at Illinois Tech. "Ruth Bader Ginsburg," Oyez, [https://www.oyez.org/justices/ruth\\_bader\\_ginsburg](https://www.oyez.org/justices/ruth_bader_ginsburg). See also David Von Drehle, "Conventional Roles Hid a Revolutionary Intellect," *The Washington Post*, July 18, 1993, [https://www.washingtonpost.com/archive/politics/1993/07/18/conventional-roles-hid-a-revolutionary-intellect/38a8055a-d575-4eee-b59a-44c2d58771f5/?utm\\_term=.20c556aa811f](https://www.washingtonpost.com/archive/politics/1993/07/18/conventional-roles-hid-a-revolutionary-intellect/38a8055a-d575-4eee-b59a-44c2d58771f5/?utm_term=.20c556aa811f); Brisbin, *Justice Antonin Scalia and the Conservative Revival*; Nichola D. Gutgold, *The Rhetoric of Supreme Court Women: From Obstacles to Option* (Lanham: Lexington Books, 2012); Nina Totenberg, "No, Ruth Bader Ginsburg Does Not Intend to Retire Anytime Soon," *National Public Radio*, Oct. 3, 2016, <http://www.npr.org/2016/10/03/495820477/no-ruth-bader-ginsburg-does-not-intend-to-retire-anytime-soon>; Nina Totenberg, "Ruth Bader Ginsburg: Justice For All," *What It Takes: Academy of Achievement Podcasts*, July 13, 2016.

<http://www.achievement.org/achiever/ruth-bader-ginsburg/>; Scott Dodson, "Preface," in *The Legacy of Ruth Bader Ginsburg*, ed. Scott Dodson (New York: Cambridge University Press, 2015), ix-x; Linda K. Kerber, "Before *Frontiero* There was *Reed*: Ruth Bader Ginsburg and the Constitutional Transformation of the Twentieth Century," in *The Legacy of Ruth Bader Ginsburg*, ed. Scott Dodson (New York: Cambridge University Press, 2015), 31-43; Stephen B. Cohen, "'Seg Academies,' Taxes, and *Judge Ginsburg*," in *The Legacy of Ruth Bader Ginsburg*, ed. Scott Dodson (New York: Cambridge University Press, 2015), 73-87; Cary Franklin, Cary, "A More Perfect Union: Sex, Race, and the VMI Case," in *The Legacy of Ruth Bader Ginsburg*, ed. Scott Dodson (New York: Cambridge University Press, 2015), 88-101; Aziz Z. Huq, "A Liberal Justice's Limits: Justice Ruth Bader Ginsburg and the American Criminal Justice System," in *The Legacy of Ruth Bader Ginsburg*, ed. Scott Dodson (New York: Cambridge University Press, 2015), 117-134; Lani Guinier, "Justice Ginsburg: Demosprudence through Dissent," in *The Legacy of Ruth Bader Ginsburg*, ed. Scott Dodson, (New York: Cambridge University Press, 2015), 206-216; Scott Dodson, "Ginsburg, Optimism, and Conflict Management," in *The Legacy of Ruth Bader Ginsburg*, ed. Scott Dodson (New York: Cambridge University Press, 2015), 233-236; Ruth Bader Ginsburg, "Foreword," in *Supreme Court and Appellate Advocacy: Mastering Oral Argument*, ed. David C. Frederick, 2nd ed. (St. Paul: West, 2003), v-vii; Irin Carmon and Shana Knizhnik, *Notorious RBG: The Life and Times of Ruth Bader Ginsburg* (New York: Harper Collins, 2015).

<sup>8</sup> The Jewish Virtual Library, "Ruth Bader Ginsburg."

<sup>9</sup> Biskupic, *American Original*, 216.

<sup>10</sup> Diane Jeske, "Friendship, Virtue, and Impartiality," *Philosophy and Phenomenological Research* 57, no. 1 (1997): 71. <http://www.jstor.org/stable/2953777>.

<sup>11</sup> Marilyn Friedman, "Friendship and Moral Growth," *The Journal of Value Inquiry* 23, no. 1 (1989): 4.

<sup>12</sup> Aristotle, *Nicomachean Ethics*, trans. D. Ross (Oxford, UK: Oxford University Press, 1998), 1099b-1100a.

<sup>13</sup> Aristotle, *Nicomachean Ethics*, trans. R. Williams (New York: Longmans, Green and Co., 1891), 1099b32.

<sup>14</sup> Roberts, J. M. *The Penguin History of the World*, rev. ed. (London: Penguin Books, 1995), 192.

<sup>15</sup> Aristotle, *Nicomachean Ethics*, trans. R. Williams, 25.

<sup>16</sup> Woodward, K. L., "Overview: Virtues and Values," in *Ethics*, ed. C. Wekesser (San Diego, CA: Greenhaven Press), 208.

<sup>17</sup> Aristotle, *Nicomachean Ethics*, trans. D. Ross, 1103a18; Aristotle, *Nicomachean Ethics*, trans. R. Williams, 28.

<sup>18</sup> See *Nicomachean Ethics* 2.8 and 3.6-4.9; Aristotle, *Nicomachean Ethics*, trans. D. Ross, 1109a4.

<sup>19</sup> Aristotle, *Nicomachean Ethics*, trans. D. Ross, 1109a19.

<sup>20</sup> Gavin Ardley, "The Role of Play in the Philosophy of Plato," *Philosophy* 42, no. 161 (1967): 228. <http://www.jstor.org/stable/3749078>.

<sup>21</sup> Aristotle, *Nicomachean Ethics*, trans. D. Ross, 1109a29.

<sup>22</sup> Aristotle, *Nicomachean Ethics*, trans. M. Ostwald (Indianapolis, IN: Bobbs-Merrill, 1962), 1136b3-14.

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*

<sup>25</sup> Aristotle, *Nicomachean Ethics*, trans. J.A.K. Thomson (London: Penguin Books, 2004), 285-286. In *Nicomachean Ethics*, Aristotle discusses friendliness in Book 4, chapter 6; truthfulness in Book 4, chapter 7; and wittiness in Book 4, chapter 8. In his writing, friendliness precedes

truthfulness and wittiness. The friendliness he described in Book 4 is not friendship in the expansive sense of Books 8 and 9.

<sup>26</sup> Aristotle, *Nicomachean Ethics*, trans. J. A. K. Thomson, 1108a20-31.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*

<sup>29</sup> Aristotle, *Nicomachean Ethics*, trans. W. D. Ross, 1156a3-5

<sup>30</sup> Alasdair MacIntyre, *After Virtue*, 3rd ed. (South Bend: Notre Dame University Press, 2007), 156.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*, 158.

<sup>33</sup> *Ibid.*

<sup>34</sup> Wayne Brockriede, "Arguers as Lovers," *Philosophy and Rhetoric* 5, no. 1 (1972), 2.

<sup>35</sup> *Ibid.*, 7

<sup>36</sup> Aristotle, *Nicomachean Ethics*, trans. T. Irwin (Indianapolis: Hackett Publishing Company, 1985), xi-xix.

<sup>37</sup> Lois S. Self, "Rhetoric and *Phronesis*: The Aristotelian Ideal," *Philosophy and Rhetoric* 12, no. 2 (1979), 130-133.

<sup>38</sup> Ruth Bader Ginsburg, *My Own Words* (New York: Simon and Schuster, 2016), 38.

<sup>39</sup> Irin Carmon, "What Made the Friendship between Scalia and Ginsburg Work," *The Washington Post*, February 13, 2016, [https://www.washingtonpost.com/posteverything/wp/2016/02/13/what-made-scalia-and-ginsburgs-friendship-work/?utm\\_term=.d5163a6ca2a9](https://www.washingtonpost.com/posteverything/wp/2016/02/13/what-made-scalia-and-ginsburgs-friendship-work/?utm_term=.d5163a6ca2a9).

<sup>40</sup> Aziz Z. Huq, "A Liberal Justice's Limits: Justice Ruth Bader Ginsburg and the American Criminal Justice System," in *The Legacy of Ruth Bader Ginsburg*, ed. Scott Dodson (New York: Cambridge University Press, 2015), 128.

<sup>41</sup> Karen Ellen Leve, "Justice Ruth Bader Ginsburg: 20 Years of Supreme Court Jurisprudence," Paper 513, Law School Student Scholarship, Seaton Hall University, South Orange, NJ, May 1, 2014, [http://scholarship.shu.edu/student\\_scholarship/513](http://scholarship.shu.edu/student_scholarship/513).

<sup>42</sup> Craig Platt, "Scalia and Ginsburg: Two Kinds of Justice," *The Huffington Post*, February 23, 2016, [http://www.huffingtonpost.com/craig-platt/scalia-and-ginsburg-two-justice\\_b\\_9275564.html](http://www.huffingtonpost.com/craig-platt/scalia-and-ginsburg-two-justice_b_9275564.html).

<sup>43</sup> Ginsburg, *My Own Words*, 195.

<sup>44</sup> Leve, "Justice Ruth Bader Ginsburg."

<sup>45</sup> Platt, "Scalia and Ginsburg: Two Kinds of Justice."

<sup>46</sup> Huq, "A Liberal Justice's Limits," 128.

<sup>47</sup> Totenberg, Nina. "No, Ruth Bader Ginsburg Does Not Intend to Retire Anytime Soon." See also Julyssa Lopez, "Justices Ginsburg and Scalia: An Unlikely Bond: The Two Justices Put Their Friendship on Display at the George Washington's Lisner Auditorium," *GW Today*, February 13, 2015, <https://gwtoday.gwu.edu/justices-ginsburg-and-scalia-unlikely-bond-0>.

<sup>48</sup> Totenberg, "No, Ruth Bader Ginsburg Does Not Intend to Retire Anytime Soon."

<sup>49</sup> *Ibid.*

<sup>50</sup> Guinier, "Justice Ginsburg," 214.

<sup>51</sup> Marina Fang, "Ruth Bader Ginsburg Remembers Antonin Scalia, Dear Friend and Sparring Partner," *The Huffington Post*, February 14, 2016, [http://www.huffingtonpost.com/entry/scalia-ginsburg-friendship\\_us\\_56bfb717e4b0b40245c6f436](http://www.huffingtonpost.com/entry/scalia-ginsburg-friendship_us_56bfb717e4b0b40245c6f436).

<sup>52</sup> *United States v. Virginia*, 518 U.S. 515 (1996), at 577.

<sup>53</sup> *United States v. Virginia*, 976 F.2d 890 (4<sup>th</sup> Cir. 1992). See also Katharine T. Bartlett, "Unconstitutionally Male?: The Story of *United States v. Virginia*," Paper 12, Duke Law Working Papers, Duke University, Durham, NC, 2010. [http://scholarship.law.duke.edu/working\\_papers/12](http://scholarship.law.duke.edu/working_papers/12).

- <sup>54</sup> *United States v. Virginia*, 518 U.S. 515 (1996); See also Philippa Strum, *Women in the Barracks: The VMI Case and Equal Rights* (Lawrence: University of Kansas Press, 2002).
- <sup>55</sup> Totenberg, “No, Ruth Bader Ginsburg Does Not Intend to Retire Anytime Soon.”
- <sup>56</sup> *Reed v. Reed*, 404 U.S. 71 (1971); *Frontiero v. Richardson*, 411 U.S. 677 (1973).
- <sup>57</sup> Kerber, “Before *Frontiero* There was *Reed*,” 39.
- <sup>58</sup> *United States v. Virginia*, 518 U.S. 515 (1996); See also Murphy, *Scalia*, 238.
- <sup>59</sup> Lopez, “Justices Ginsburg and Scalia.”
- <sup>60</sup> Ginsburg, *My Own Words*, 283.
- <sup>61</sup> *Ibid.*, 280-281.
- <sup>62</sup> Totenberg, Nina. “Ruth Bader Ginsburg: Justice for All.” See also Ginsburg, *My Own Words*, 283.
- <sup>63</sup> Ginsburg, *My Own Words*, 39. See also Totenberg, Nina. “Ruth Bader Ginsburg: Justice for All.”
- <sup>64</sup> *Ibid.*, 40. See also Scalia dissent in *Morrison v. Olson*, 487 U.S. 654 (1988), at 699 for “this wolf comes as a wolf.”
- <sup>65</sup> *United States v. Virginia*, 518 U.S. 515 (1996).
- <sup>66</sup> *Ibid.* See also Franklin, “A More Perfect Union,” 94-95.
- <sup>67</sup> Murphy, *A Court of One*, 239.
- <sup>68</sup> *United States v. Virginia*, 518 U.S. 515 (1996)
- <sup>69</sup> Irin Carmon, “What Made the Friendship between Scalia and Ginsburg Work?”
- <sup>70</sup> Ginsburg, *My Own Words*, 281.
- <sup>71</sup> *Ibid.*
- <sup>72</sup> *Ibid.*, 150
- <sup>73</sup> *Ibid.*
- <sup>74</sup> Aristotle, *Nicomachean Ethics*, trans. W. D. Ross (New York: Oxford UP, 2009), 1156b25-27.
- <sup>75</sup> Brown, “Ginsburg and Scalia’s Wild Adventures.”
- <sup>76</sup> Fang, “Ruth Bader Ginsburg Remembers Antonin Scalia.”
- <sup>77</sup> Ginsburg, *My Own Words*, 40.
- <sup>78</sup> Carmon, “What Made the Friendship between Scalia and Ginsburg Work?”
- <sup>79</sup> Ginsburg, *My Own Words*, 40.
- <sup>80</sup> Totenberg, “Ruth Bader Ginsburg.”
- <sup>81</sup> Lopez, “Justice Ginsburg and Scalia.”
- <sup>82</sup> Franklin, “A More Perfect Union,” 93.
- <sup>83</sup> Dodson, “Ginsburg, Optimism, and Conflict Management,” 236.
- <sup>84</sup> Ronald C. Arnett and Pat Arneson, “Interpersonal Ethics: Aristotle’s Critique and Contribution to Contemporary Literature,” *Iowa Journal of Communication* 25, no. 2 (1993): 14.
- <sup>85</sup> Aristotle, *Nicomachean Ethics*, trans. T. Irwin, 212-213.
- <sup>86</sup> *Ibid.*, 1156b24-25.
- <sup>87</sup> Fang, “Ruth Bader Ginsburg Remembers Antonin Scalia.”