

Women and the American Idea

April 25, 2023

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[00:00:00] **Tanaya Tauber:** Welcome to Live at the National Constitution Center, the podcast sharing live Constitutional conversations and debates hosted by the center in person and online. I'm Tanaya Tauber, the Senior Director of Town Hall Programs. In this episode, we explore key influential women throughout American history and how these women inspired Constitutional change with Tomiko Brown-Nagin, author of *Civil Rights Queen: Constance Baker Motley and the Struggle for Equality*.

[00:00:32] **Tanaya Tauber:** And Elizabeth Cobbs, author of *Fearless Women: Feminist Patriots from Abigail Adams to Beyoncé*. Jeffrey Rosen, President and CEO of the National Constitution Center moderates. This program will stream live on April 25th, 2023 and is made possible through the generous support of the McNulty Foundation in partnership with the Anne Welsh McNulty Institute for Women's Leadership at Villanova University. Here's Jeff, to get the conversation started.

[00:01:05] **Jeffrey Rosen:** Hello, friends. Welcome to the National Constitution Center and to today's convening of America's Town Hall. Let's inspire ourselves by reciting together the National Constitution Center's mission statement. Here we go. The National Constitution Center is the only institution in America chartered by Congress to increase awareness and understanding of the U.S. Constitution among the American people on a non-partisan basis. I want to, uh, start by thanking the McNulty Foundation, whose generous support has made today's program possible.

[00:01:38] **Jeffrey Rosen:** Their great support has also made possible the launch of our broader Women and the Constitution Initiative including the opening of our 19th Amendment Gallery. And I'd like to thank our partners at the Anne Welsh McNulty Institute for Women's Leadership at Villanova University for their collaboration in this great partnership. And now, it is a great honor to introduce our superb panel.

[00:02:01] **Jeffrey Rosen:** Tomiko Brown-Nagin is dean of the Radcliffe Institute for Advanced Study at Harvard University, the Daniel P.S. Paul Professor of Constitutional Law at Harvard Law School and professor of history at Harvard's faculty of Arts and Sciences. She's an award-winning legal historian and is the author most recently of *Civil Rights Queen: Constance Baker Motley and the Struggle for Equality*, which we are really excited to discuss today.

[00:02:27] **Jeffrey Rosen:** And Elizabeth Cobbs holds the Melbern G. Glasscock Chair in American history at Texas A&M. She is a New York Times best-selling author and her most

recent book, which we're here to discuss as well, is *Fearless Women: Feminist Portraits from Abigail Adams to Beyoncé*. Welcome, uh, Tomiko Brown-Nagin and Elizabeth Cobbs. Uh, Professor Brown-Nagin, let's begin with you. Why did you choose to write about Constance Baker Motley and what would you like to tell us about her as we begin our discussion?

[00:03:04] **Tomiko Brown-Nagin:** Sure. Thank you so much, Jeffrey, for inviting me to be a part of this conversation with Elizabeth today. I'm thrilled to talk about Constance Baker Motley, whom I encountered initially in the context of an earlier book called *Courage to Dissent* about Atlanta and the social and legal history of the Civil Rights movement. Motley argued and won the Atlanta school desegregation case. She argued it all the way to the U.S. Supreme Court and a part of my method in that book was including biographical sketches of all of the lawyers who were featured in the book.

[00:03:44] **Tomiko Brown-Nagin:** And I quickly realized that there actually wasn't a lot that had been written about Constance Baker Motley. And I thought that was a kind of historical malpractice, because she truly was spectacular. It's not a stretch to say that she belongs in the pantheon of great lawyers and activists alongside Thurgood Marshall, her mentor and Martin Luther King Jr., her client. And let me tell you just a few things about her that support that proposition.

[00:04:21] **Tomiko Brown-Nagin:** First of all, she argued a lot of civil rights cases that are landmark cases including *Brown versus Board of Education*, of course, one of the most important Constitutional cases of the 20th century, that's been called one that reconsecrated American ideals. And then she went on, after helping to litigate *Brown*, to implement the case in the Southern states, in places like Atlanta, Little Rock, Mobile, New Orleans. It's because of her that thousands of students were able to enter formally all-white schools.

[00:05:03] **Tomiko Brown-Nagin:** And then she desegregated higher education in the South. In the Atlanta case, Alabama, and Ole Miss, a case that she called the second battle of the Civil War. And then finally she had a life in politics as the first woman Manhattan Borough President and finally, she was appointed the first Black woman to serve on the Federal Bench. So she was extraordinary. I'm sure I'll have the opportunity to say more about her. But on the basis of some of those accomplishments, I thought that I should give biography, a genre that was new to me, a shot. And I'm pleased to have written a book that people seem to be responding to and resonating with about Constance Baker Motley.

[00:05:53] **Jeffrey Rosen:** They do indeed and it's so exciting to learn about her remarkable achievements as you describe them, and you have done such a service in writing the definitive biography of her. Elizabeth Cobbs, you bring to life a series of women throughout history. You pair them, so that we can compare and contrast their achievements in each historical era. Tell us how you chose the women you write about and how they built on each other's work in the fight for gender equality in America?

[00:06:24] **Elizabeth Cobbs:** Yeah. And, Jeffrey, I like to always say that feminism was born in the American Revolution and it has driven American history ever since. Some of the key Constitutional developments were really things that feminists put forward, fought for, and that shaped our country. That really allowed it to live up to its values on an increasing basis.

Yeah, every value is a goal, so how do you get closer to the goal, to make a more perfect union?

[00:06:51] **Elizabeth Cobbs:** And so what I essentially did is I wanted to see, what were the steps? I don't think we really had a work I felt that would allow just an average reader to go, "Well, gosh. How did we get from a point from where our head of state is a king, George III to where we have a vice president who is a woman of color?" Now, the narrative arc between that point and this point is fascinating and each chapter tells one, what one rung in that ladder was to get to where we are now.

[00:07:22] **Elizabeth Cobbs:** And charts things, beginning with the right to learn and the right to speak. Funny things, you would think, didn't we get that before the Revolution? No. The women got that as a result of feminist activism in the American Revolution. How did we get from that all the way up to the point where we are today? And so each chapter not only looks at how each generation pushed forward some signal accomplishment that really explains why we're sitting here, even having this conversation, two women and a man in a public setting.

[00:07:54] **Elizabeth Cobbs:** That would have been completely scandalous in another point. And so how did we get there? And each chapter focuses on two biographies and in that way, I'm using the same kind of technique that Tomiko used in her book. And I love her phrase. Tomiko, I love your phrase, historical malpractice because if we think we can tell American history without understanding these major contributions that women made, and that shaped our country, and its Constitution so profoundly, we're kidding ourselves that we actually know our own history.

[00:08:24] **Elizabeth Cobbs:** So each chapter has two people and one is the one I call the face of feminism, the person who is basically a civic-minded individual, someone like Constance Baker Motley, whose own personal life might have been more or less pretty good. And compared with a woman who I call why we care. A person whose own life shows what happens if you don't have certain rights and what kind of suffering occurs that leads both men and women to say, "You know, that's not what we want to be as a country." And so each chapter has two people that tell that story.

[00:09:00] **Jeffrey Rosen:** That's such a powerful way of avoiding what Professor Brown-Nagin called historical malpractice in both the public face and the human face at the heart of the case, which Justice Ruth Bader Ginsburg was always so attentive to in her own litigation as a really powerful way of telling the story. Well, Professor Brown-Nagin, why don't we take Constance Baker Motley up from her remarkable childhood, her immigrant experience, her unexpected educational opportunities, including at Columbia Law School all the way up to her incredible opportunity to work with Thurgood Marshall and the LDF.

[00:09:43] **Tomiko Brown-Nagin:** Sure. Happy to and I'm so glad you mentioned Ruth Bader Ginsburg because she called Constance Baker Motley her human rights hero.

[00:09:51] **Jeffrey Rosen:** Hmm.

[00:09:52] **Tomiko Brown-Nagin:** And one of the women who taught Ginsburg's generation how to use the law as a tool of social change. They also have Columbia Law School in common. Now, Baker, as she was called, when she was a young girl, grew up in New Haven, Connecticut, in the shadow of Yale University. Her parents were immigrants from Nevis and that meant, for them, that they were culturally conservative. They had traditional views about what a girl, or a woman, could do or should not do.

[00:10:36] **Tomiko Brown-Nagin:** They preached the politics of respectability, so Motley was expected to be a lady and to be well-behaved. And yet, amid that conservatism was a sense of, even I would say, superiority that was born of their immigrant experience. Now, Baker Motley's father in particular evidenced a lot of racial prejudice against American Blacks, whom he thought allowed themselves to be debased by segregation. And so one of the points I make in talking about Baker's early years is that either in spite of, or because of, her father's prejudice, she grew up to be the Civil Rights Queen, whose work of course, benefited those same Black migrant Southern Blacks.

[00:11:38] **Tomiko Brown-Nagin:** She was able and to attend college, which was an aspiration that her parents thought was foolish. Her mom told her that she should do something practical like be a hairdresser. But she, Motley, was very intellectually curious. She was ambitious, and she aspired to go to college, and was able to do so because of a philanthropist in New Haven by the name of Clarence Blakeslee, a Yale graduate who heard her speak at a civic organization one day and said, "You ought to be in college and why aren't you?" He wanted to know.

[00:12:22] **Tomiko Brown-Nagin:** Whereupon he learned that her parents did not have the money to send her to college and didn't even think that she should attend. And so this amazing man paid for her undergraduate studies, as well as, her law school studies at Columbia Law School, where she was one of just a handful of women and Blacks. And I want to note, she developed close relationships with some of that small group, including with Bella Abzug, who was a lifelong friend.

[00:12:58] **Tomiko Brown-Nagin:** And from there, she was introduced to Thurgood Marshall who hired her on the spot, after interviewing her. And she was so excited by this proposition and really thought of it as a dream job. And contrasted her experience with Marshall with other partners in white-shoe law firms who took one look at her and closed the door in her face. Again, another parallel with Ruth Bader Ginsburg and Sandra Day O'Connor, and many other talented women of the era.

[00:13:41] **Tomiko Brown-Nagin:** And so it's because of her association with that civil rights law firm that she had the opportunity to work on all of these amazing cases. She worked there for 20 years. She was, during her time at the Legal Defense Fund, the only woman lawyer and she was working with a group of alpha males. I don't think they would deny it, and she did experience some disadvantages even in her workplace with these public-interest lawyers, but she was able to surmount those challenges and have a brilliant career in the law.

[00:14:23] **Jeffrey Rosen:** That's extraordinary. And the parallels to RBG, which are so striking and as you note, children of immigrants. Both told to be ladies. To kind of exemplify

that sort of self-control. Proud of the immigrant experience, but really path breakers after law school in getting that break coming out of Columbia. Elizabeth, let's begin. Your first chapter is the Right to Learn 1776 to 1800, and your pairing is Abigail Adams and Abigail Bailey. And then you follow that with The Right to Speak, which takes us through 1865 and that pairs Angelina Grimké and Harriet Jacobs. Let's begin with those pairings.

[00:15:05] **Elizabeth Cobbs:** Well, so Abigail Adams, she's the wife in the Adams' household, John Adams. And this is really in many ways the epicenter of the American Revolution. This is ground zero, if you will, the fight for the Declaration of Independence itself, the decision to become an independent country. And so in May of 1776, before that declaration was signed, before that controversy is settled, she writes her husband and she says famously in a quote that many people will know, "Remember the ladies."

[00:15:37] **Elizabeth Cobbs:** And what she meant by that and what she said very explicitly is, "We're not allowed to make laws." And then she echoes this statement that is widespread in the colonies at the time, this idea that all men would be tyrants if they could. Now, this is a double entendre because every woman, the law allows every man to be a tyrant. Now, she says, "We know a lot of men are not, but the law allows men to be tyrants and to exercise full tyranny." In fact, when the Constitution is written it says, "We the people," women aren't really the people yet.

[00:16:07] **Elizabeth Cobbs:** Women are not actually people, so part of the law in Constitutional battle up through Ruth Bader Ginsburg's generation is how to define the Constitution in such a way that women are part of the people. And so a lot of people will remember the famous statement, "Remember the ladies." But they don't know John Adams's reply, which was, "I cannot but laugh." Is this a race of Amazons? Does George Washington need to now fight a petticoat army?

[00:16:39] **Elizabeth Cobbs:** I mean, so it's this real kind of put-down, but the funny thing is that he actually gets another letter and writes a male legislator a month later. Again, a month before the Declaration of Independence and he says, "Depend upon it, sir. If this Revolution goes far, too far, women will demand a vote." Now, he says this 150 years before women get to vote, so it's not like there's not a consciousness that, "Hey, you know, there's actually an argument here."

[00:17:06] **Elizabeth Cobbs:** But he doesn't want that argument to be aired publicly. And the woman she's paired with is another woman named Abigail and that Abigail tells us what it's like if you have the bad luck to be married to someone who has full legal control over you, and who actually owns all of your children, to whom you have no right to custody. He has the primary rights and this Abigail Bailey lives only a couple hundred miles away. And her husband is a sexual predator, who not only preys on women servants in the house, but ultimately on their own children, on their daughter. Sexually preys on their daughter and there's nothing she can do about it.

[00:17:41] **Elizabeth Cobbs:** Now, if she gets a divorce, guess what happens in divorce? Men have complete custody of their children, so her husband will have an even more unmitigated access to these children and hires the boys out, et cetera. I don't want to go too far in the story. It's an amazing story. She gets on a horse. She runs, she goes 200 miles

through the snow and the wind, and the rain. And basically that's just true. I'm just stating in a more dramatic way exactly what does happen as this woman strives heroically to save herself and her children.

[00:18:09] **Elizabeth Cobbs:** So then in the next chapter, it's a pairing of two women who don't have the right to speak because women don't, and in fact, John Adams had written Abigail at one point, admiringly praising the new bride of John Hancock, who he pointed out doesn't speak in company when there are men around. She uses only her eyes to communicate because that's what women are supposed to do if men are present, other than their husbands. They should not speak aloud and so can you imagine if Tomiko and I were trying to carry on this conversation with you, with our eyes only?

[00:18:40] **Elizabeth Cobbs:** It would be a little tough. And so Angelina Grimké, who's an abolitionist defends the right of women to speak out in defense importantly of enslaved Black women who she says, "these are our sisters," meaning we can't talk about this? So it's very controversial and in fact, one of the places in which she gives a speech, it's burned down. A crowd attacks it and burns it to the ground in Philadelphia because, how dare she speak publicly?

[00:19:10] **Elizabeth Cobbs:** And the other woman she's paired with somebody who suffered far more greatly than Angelina Grimké, who was just scared out of her skin, who was Harriet Jacobs. And who was enslaved and who's like America's Anne Frank with a happier ending. Who hides in a garret for seven years to save herself, to save her children, more importantly, and more dramatically. And so these are the stories that just sort of tell us, what happens if you can't go to school? Because in the Colonial Era, girls were not allowed to go to high school. That changes with the American Revolution and it's a part of how we can explain the spread of knowledge and the spread of industrialization. And it goes back to these feminist demands, patriotic demands.

[00:19:49] **Jeffrey Rosen:** Patriotic demands indeed, such a central insight that the hunger for education and free speech, which Abigail Adams so powerfully exemplified, as did the other heroes was then translated into a demand for the legal right to speak. And the removal of disabilities culminating in the famous statement, which you note of course, of Angelina, of Grimké's sister Sarah, which Justice Ginsburg loved to quote, "I ask no favor for my sex. All I ask of our brethren is that they take their feet off our necks."

[00:20:23] **Jeffrey Rosen:** Professor Brown-Nagin, give us a sense of Constance Baker Motley's remarkable career. At LDF she played a central role in writing the briefs in *Brown v. Board of Education*. She also led efforts to get equal pay for teachers and then as you said, was central in the effort to actually implement desegregation in Birmingham and elsewhere. And then you culminate in the fact though that she was passed over in the opportunity to lead LDF, in favor of her mentor Jack Greenberg. So give us a sense of that remarkable phase in her career.

[00:20:58] **Tomiko Brown-Nagin:** Sure. Well, I'm glad the word patriotic was mentioned because it allows me to point out that the lawyers in *Brown*, including Constance Baker Motley were able to prevail in part because the basic thrust of their argument was that we needed to be true to what we were saying on paper, right? And so they were able to file these

cases. There were five cases consolidated in Brown versus Board of Education. Motley did write the original complaint in one of those cases and then she went on to help write the briefs in the set of Brown cases.

[00:21:54] **Tomiko Brown-Nagin:** And it was a very hard-fought battle. I describe in my book how the lawyers were acquired, essentially to live in the office and yet, guess what? Constance Baker Motley became pregnant at the same time that she was litigating Brown v. Board of Education, and so she had an extra layer of challenge as a lawyer. She did take maternity leave. Thurgood Marshall allowed it. She came back to the office and continued to litigate the cases in the South, the cases that implemented Brown.

[00:22:36] **Tomiko Brown-Nagin:** She did work on cases about teacher salary equalization. She litigated one in Jackson, Mississippi, which was a frightening experience for her. Her experience of going from New York City to Jackson, Mississippi where there was no question about racial oppression. The lines of inequality were drawn so tightly that even as Motley was litigating on behalf of clients, she experienced racial segregation herself. So she couldn't eat in a restaurant.

[00:23:18] **Tomiko Brown-Nagin:** She had to rely on food that would be provided by friends of the NAACP. She couldn't stay in hotels. She was subject to demeaning language and yet, she did do something incredible, which was to stand in the federal courthouse in Jackson, Mississippi and question the inequality inherent in the practice of paying Black teachers less than white teachers. And so even though there was so much challenge, so much discrimination, just by being there, standing up in the courtroom, and speaking using her voice, Motley was doing something radical.

[00:24:10] **Tomiko Brown-Nagin:** Now, the thing that's so interesting, ironic is that after Motley finished arguing on behalf of Black teachers in Jackson, Mississippi, she went back to the offices of the Legal Defense Fund and said to Thurgood Marshall, "Well, actually I'm not being paid what I should be paid. I don't have the title that I should have and could you please make this right?" Which was a bold thing to do. He did eventually correct the problem there and yet it just goes to illustrate how much she was up against, but also, how well she could maneuver in this system that was not designed for women. She was not supposed to be there, and yet she was, and achieved so much success.

[00:25:06] **Jeffrey Rosen:** So powerful and of that account of her arguing for equal pay and for herself at the same time as she was arguing it for others is really, really remarkable. Elizabeth Cobb, our, our next chapter, which I think is worth focusing on this pairing is The Right to Lobby, paired with Susan B. Anthony and Elizabeth Packard. Susan B. Anthony, of course, pioneering feminist lobbyists who you tell us led the petition drive behind the 13th Amendment, abolishing slavery as well as laying the groundwork in her Declaration of Sentiments for the right to vote, and then Elizabeth Packard. Tell us about both of them and their contribution to gender equality.

[00:25:45] **Elizabeth Cobbs:** Well, I think many people associate Susan B. Anthony with the right to vote and I actually had some editors say, "Are you sure you want to talk about the right to lobby?" But you have to understand that Susan B. Anthony did not live to see the right to vote accomplished. And it's also important to understand that her involvement in

Constitutional reform far predates the passage of the 19th Amendment. And it was she and Elizabeth Cady Stanton who together, really were the first people to raise the problem of the that the Emancipation Proclamation of Lincoln, of course, only freed people in certain states, the states in rebellion, and not all enslaved people.

[00:26:24] **Elizabeth Cobbs:** But also, it was essentially an executive order. It was not a part of the Constitution. There was no law and therefore, could be reversed and changed. And so they led this petition drive to put a new amendment into the U.S. Constitution, which became the 13th Amendment to the U.S. Constitution and it was Charles Sumner of Massachusetts who said, "If you can get me the petitions, I will walk them into the Senate chamber and put this on the floor of the U.S. Senate."

[00:26:54] **Elizabeth Cobbs:** And so she did. And Susan B. Anthony herself traveled hundreds and hundreds of miles organized biracial teams of speakers to go to all parts of the country raising awareness and getting people to sign these petitions. And then took hundreds of thousands of petitions into the U.S. Senate, which were carried into the Senate chamber by two Black men, and presented to Charles Sumner on his desk. And so that fight for the 13th Amendment just shows the ways in which there has always been from the time of Abigail Adams, and Angelina Grimké, and Harriet Jacobs, a deep intertwining between racial justice and gender justice.

[00:27:34] **Elizabeth Cobbs:** So Susan B. Anthony, I almost didn't include her, my friend, because I thought she was so obvious. But she turned out, not only to be so important in ways I hadn't expected, but also, so funny. I mean, she's just hilarious. She is such a witty individual, and then she's paired with Elizabeth Packard. One of the ways in which woman essentially did not exist under the law, in the ways in which their husbands had complete authority and control over them in almost all respects, is that a husband could commit his wife to an insane asylum if he felt like it.

[00:28:05] **Elizabeth Cobbs:** So, the old song about, "oh, my crazy wife." Well, in that day, it meant you could put your crazy wife into an insane asylum for life, and this happened to a woman named Elizabeth Packard. And she fought it. God, it was a horrible struggle. The stories of what goes on in these asylums at this time and kind of punishment of patients is pretty horrific. And so she becomes involved in passing what are known for her as the Packard Laws.

[00:28:33] **Elizabeth Cobbs:** And the Packard Laws are the first laws to protect the rights of mental patients. Such rights as the right to an attorney or the right to correspondence, to get letters. And by the way, one of the people she helps as a result of this, inadvertently is another woman who's imprisoned, in a sense, incarcerated in an insane asylum in Illinois where Elizabeth Packard was, who was Mary Todd Lincoln. And after Lincoln's death, and the death of their two youngest children, her older son decided, "Oh, my mom's crazy." And had her committed.

[00:29:07] **Elizabeth Cobbs:** And it was only because of the Packard Laws that she was able to correspond with an attorney and able to get out. And able to live her remaining years at home with her sister. So these stories are so poignant and you just don't expect the ways in which the suffering that was caused by the lack of rights in granting women only privileges,

not rights. And privileges which were to be bestowed or withdrawn by the men who were in control of them.

[00:29:34] **Jeffrey Rosen:** So powerful and so important to note, as you do, that the women's rights and movement, and the effort to abolish slavery and the fight for African American civil rights, often portrayed as being at odds, were in these two great figures very much united.

[00:29:53] **Elizabeth Cobbs:** Yes. Very much united in these figures and in many, many others. Really, up through the present and I always think that's one of the myths about feminism. There's a lot of hostility towards people who stand up for women's rights, which include men. And one of those critiques has been that there's racism, and there is racism amongst some women. There's absolutely, but the thrust of the feminist movement has always been highly inclusive.

[00:30:20] **Jeffrey Rosen:** Superb. Professor Brown-Nagin, a question from the account you just gave us about Constance Baker Motley and Brown. As we know in the affirmative action cases before the court today, the question of the original understanding of the framers of the 14th Amendment is central and, and Justice Jackson asked, "I thought that there was race consciousness at the time of the framing." Justice Thomas disagrees. What did Constance Baker Motley find in her brief and what did she argue on this point?

[00:30:49] **Tomiko Brown-Nagin:** Yes. It's so interesting how the racial history, I think, becomes a bit distorted in the current cases at the Supreme Court. The reality that Motley and her team found was really about how the 14th Amendment, provisions of it certainly were meant to bring formerly enslaved people into the political and social community. And so that continues to be a strand of the lawyers' argument that's relevant. Today, although I'm not so sure how much this group of Justices will actually take up that point in those cases, but I want to double back, Jeffrey, for a minute to the notion of Susan B. Anthony having a great humor.

[00:31:44] **Tomiko Brown-Nagin:** Because Motley also was quite humorous. She had a deadpan sense of humor and it was natural to her, but also, a part of a set of characteristics and a way of moving through the world that Thurgood Marshall nurtured in her. He always said to the civil rights lawyers who were treated horribly, "In court, never, never show anger. Always have good humor."

[00:32:30] **Tomiko Brown-Nagin:** And so Motley's own inclinations in that regard, but also, her upbringing, the respectability actually gave her tools to navigate in an environment where, for instance, in the Ole Miss case, the lawyer for the state of Mississippi would not shake her hands. He would not call her by her proper name, Mrs. Motley in court. He once called her Constance, by her first name, which was just not done at that time. And she jumped up and said to the federal judge who was presiding, "I would like that lawyer to call me by my proper name."

[00:33:12] **Tomiko Brown-Nagin:** And I will tell you that even the federal judge, who was himself a segregationist, actually instructed that lawyer to call her something other than her or she, which was his practice. And the resolution there was for him to call her the New York Counsel. So conceding at least that she's a lawyer, that she is supposed to be in the court, but

still not able to accept her personhood. And then I also want to share the story about her representing the student marchers in Birmingham who were a part of the great demonstration against segregation there, of course, led by Martin Luther King Jr.

[00:33:58] **Tomiko Brown-Nagin:** When she arrived in federal court there to represent some of those figures, the judge said, "Well, you're a woman." And using that sort of indirection and humor that she had been taught at the Legal Defense Fund, she said, "Well, I am a woman. I'm also the NAACP lawyer assigned to prosecute this case." And then she went on, not missing a beat and started to argue her case. And then the final thing I want to say, pulling on that thread that was being discussed before about feminism, is that Motley did have a great group of feminist friends, who were part of her support group.

[00:34:48] **Tomiko Brown-Nagin:** People like Pauli Murray, who was the women's rights lawyer. There also was a connection to Ruth Bader Ginsburg there. Bella Abzug, whom I mentioned, who was a New York representative. The one who always wore the hat and was very outspoken, her law school classmate. There was Shirley Chisholm who was also a New York politician, who went on to run for president. And so these figures, they were solitary. They were path breakers, but they did come together to provide support in a context in which they might actually show their anger or express their displeasure at all that they were up against.

[00:35:30] **Jeffrey Rosen:** That's very powerful insight that they were able together to express anger. That they felt less able to individually and I return once again to Justice Ginsburg just because of learning her story, the most important advice she got from her mother was overcome unproductive emotions like anger, jealousy, and fear. And Justice Ginsburg said, "I always did that because I always wanted to win my case and to show anger would not do that."

[00:35:57] **Tomiko Brown-Nagin:** Mm-hmm.

[00:35:57] **Jeffrey Rosen:** But, together, these great women were able, indeed, to demonstrate that. Elizabeth Cobb, our next pairing is really powerful, Mary Church Terrell and Rosa Cavalleri, two pioneers for the right to vote. Mary Church Terrell better known, but Rosa Cavalleri, victimized by the infamous Comstock Laws, which were invoked by the Texas District Court just two weeks ago to question the legality of mailing abortion pills. So tell us about this amazing story of Mary Church Terrell, Rosa Cavalleri, and their encounters with the Comstock Laws.

[00:36:40] **Elizabeth Cobbs:** Well, so much of this it really does have this Constitutional questions like for example, Constance Baker Motley's being confronted, "Well, you're a woman." And that is meant to encompass a world of understanding. And in the period that we're talking about in fact, in 1908, there was a famous case called Muller versus Oregon and the question was, "Are women special?" And in fact, Louis Brandeis who was commenting on this decision basically said, "We have to understand that women are a disabled class. Women are a disabled class of Americans and therefore, can't have the same degree of choice about their own lives as men have."

[00:37:24] **Elizabeth Cobbs:** And so the state treats them as quote wards of the state. So women are disabled class. We're wards of the state. I mean, just think about what that all could mean. So anyway, that's of course, what's fought, and fought, and fought, all the way through Ruth Bader Ginsburg, and is still being fought today. So these two people, one, Mary Church Terrell was a Black suffragist and one of the important, important spokespersons for the right to vote, as well as civil rights.

[00:37:54] **Elizabeth Cobbs:** And again, fighting on two fronts all the time. And she's just this fascinating character to sort of show, not only the heroism, and the guts, and the grit that it took to get the vote passed, which as she said, "By a miracle. By a miracle, the 19th Amendment has been passed." This is something for which John Adams opposed 150 years earlier. Susan B. Anthony and others have been fighting for explicitly for 70 years, 70, before it got passed.

[00:38:24] **Elizabeth Cobbs:** So she's such an interesting character because she does embody the sort of dual problem, what today we call intersectional problem, of being a Black woman, an African American woman, and also trying to fight for women's rights. And so she was getting it from both sides. Her husband was a very famous and important Washington D.C. judge. And his friends including Booker T. Washington were saying, "Hey. This is going to be a problem for you. Your wife is making enemies because she's talking about women's rights."

[00:38:59] **Elizabeth Cobbs:** And there were, of course, women, especially Southern women in the suffrage movement who opposed having Black people vote. And so it was this really tough thing and she later said, she had met with every president. She had been in a room with every president from Garfield to Harry Truman and the only president she never sat in a room with was Woodrow Wilson, who is the president under which that Constitutional change gets passed and ratified.

[00:39:26] **Elizabeth Cobbs:** Without going too much into the weeds, and he's the person who really applies Jim Crow to the federal Capitol. She's paired with Rosa Cavalleri. Because women were just not supposed to know. They just were not even supposed to learn about. It was actually illegal to mail information on birth control or contraception in the United States because of the Comstock Laws initiated by Anthony Comstock.

[00:39:52] **Elizabeth Cobbs:** And so here's a woman who like, by the way, a lot of the women in this book almost loses her life several times because of a pregnancy that she has no control over. And not even information on what is conception? She doesn't even know that at the time and she's an immigrant, so partly it's an Italian American story and that's interesting too because so many Americans know exactly who in their family immigrated. So it's that wonderful story of that period of time. And a legal Constitutional question as to whether the 14th Amendment applies to women or doesn't, whether they are African American, white, Italian American, whatever? Are women a disabled class?

[00:40:33] **Jeffrey Rosen:** Wow. Remarkable questions. The text of that Comstock Law which is so relevant today, was explored on a recent We the People Podcast. So folks who want to hear the arguments about whether or not that applies to the abortion pill on both sides

can hear that. And what an insight about Woodrow Wilson being the only president who never met with this great woman as well.

[00:40:59] **Jeffrey Rosen:** Tomiko Brown-Nagin, we're around the time of Constance Baker Motley's path-breaking work in Birmingham. What a quotation you have from Martin Luther King paying tribute to Constance Baker Motley. They're emerged leaders of great renown. Martin Luther King said citing Clarence Darrow, Wendell Willkie, Thurgood Marshall, Charles Houston, Jack Greenberg, and that Portia, Constance Baker Motley. So take us up from her advocacy in Birmingham to her career in politics where she was one of three African American members of the New York State Senate, first Black Manhattan Borough President and her remarkable achievements leading up to her nomination to the Federal Bench.

[00:41:44] **Tomiko Brown-Nagin:** Sure. They admired each other, Motley and Martin Luther King Jr. And some audience members may be aware of the significance of King lifting up Motley, who was a woman, who was working in a profession that is quite atypical for women. Lifting her up and classing her with those amazing male lawyers is quite the compliment coming from him in particular because the scholarship has focused on how King was not actually accepting of woman leaders.

[00:42:25] **Tomiko Brown-Nagin:** While he did accept Motley, he admired her. He was her client as I mentioned in Birmingham, which was this fight against segregation that involved violence even inflicted on young children. Motley represented both King and some of the children who were not only arrested or confined after protesting segregation, but also, expelled from school. And the expulsions and suspensions from school really were deeply problematic for the parents, many of whom had not wanted their children to participate in these marches anyway.

[00:43:16] **Tomiko Brown-Nagin:** And it turned out that it wasn't just a one-off, right? It wasn't just that they were in trouble around the marches. But they had been thrown out of school, and these are parents who believed deeply in education. They wanted their children to graduate and to be educated. And so the parents were really angry at Martin Luther King Jr., and the movement was experiencing a period of great weakness because of that.

[00:43:50] **Tomiko Brown-Nagin:** And Motley comes in and she really does save the day by arguing that the students had Constitutional rights to protest. That they should not be punished because of those rights. And she prevailed, and it's in that context that Martin Luther King Jr. is so grateful to her, for what she's able to do for the movement. And then, she achieved so much in terms of her litigation career. I should mention that she argued 10 cases in the U.S. Supreme Court, winning nine of them.

[00:44:32] **Tomiko Brown-Nagin:** She's the first Black woman known to have argued in the U.S. Supreme Court. And then she does experience a setback, in that she wants to be the successor to Thurgood Marshall at the Legal Defense Fund after he is appointed to the Federal Bench. He does not choose her and it's very hurtful to her. Thurgood Marshall is her mentor. She asserts that he doesn't choose her because he and other men at the time are not able to appreciate that women and leader can go together, that she could in fact, carry this civil rights organization.

[00:45:11] **Tomiko Brown-Nagin:** But that setback actually opens her up to this career in politics. She had name recognition. She had a sterling reputation and so she was a very attractive candidate for the Democrats in New York. She's elected to the Senate. Then she's elected Manhattan Borough President and she is able, in that context, to pursue equal rights through the processes of the legislature. And she does do things like social supports for women, and has quite a good career in politics.

[00:45:53] **Tomiko Brown-Nagin:** But before she knows it, she is being ushered into the White House with Lyndon Baines Johnson, who appoints her to the Federal Bench. And so she has a very short career in politics, and caps off her career with this seat on the Federal Bench in which yet again, she has the opportunity, and people think that she will express her commitment to equality. The story I tell is a little different in that of course, as a judge, she faces constraints of role that she hadn't had as a lawyer.

[00:46:41] **Tomiko Brown-Nagin:** And so this book does allow me to point out that although many of her friends are just thrilled when she goes on to the bench, she's a judge who calls them like she sees them. And so sometimes, litigants win in her courtroom, the progressive litigant. Sometimes they don't and that is as it should be in her view, and according to her philosophy.

[00:47:10] **Jeffrey Rosen:** Really a powerful emphasis on her sense of role. I return to it only because it's the natural association shared again by Justice Ginsburg who distinguished between what she called her career as a flaming feminist in the '70s and her deep sense of limitations as an appellate judge and also as a Supreme Court Justice. Well, we're now at The Right to Earn, which takes us from 1920 to 1960, and that pairs Frances Perkins, and Ann Marie Riebe, if I'm pronouncing it correctly. Tell us about them.

[00:47:47] **Elizabeth Cobbs:** Yeah. You've got that. So property rights. Do you own your property or not? And of course, we talk about, "you hold these truths to be self-evident, that all men are created equal and they're entitled by their Creator of certain inalienable rights." And one of those as originally phrased by John Locke was, "The right to property," and that Jefferson phrases it differently as, "The pursuit of happiness," but it means essentially the same thing. The right to do stuff and to reap the rewards of your efforts.

[00:48:18] **Elizabeth Cobbs:** Up and through the early 20th century even, state legislatures would sometimes pass more liberal property rights and say, "Yeah. If a woman has a job and she earns money, well, that belongs to her." And then the courts would say, "Well, yeah, of course, it does. As long as her husband agrees. As long as he gives his permission for her to keep her wages." And so in localities, and in states, there's always this contest about what does it actually mean to earn?

[00:48:49] **Elizabeth Cobbs:** And Ann Marie Riebe was a young woman from North Dakota and I love this story. I mean, it's kind of fun because the stars of American history have all these different profiles and one of them has a cowboy hat on because she was a rancher. But she was also trying to make her way through the Great Depression, the worst ecological catastrophe as well, that coincided with the economic collapse, was the Dust Bowl. And so she's in the Dust Bowl and what she earns as a teacher is the only way.

[00:49:17] **Elizabeth Cobbs:** It's her only grip on just making it through this incredibly grim period of time. And she's a pretty young woman, very interesting, and fun. And she gets countless marriage proposals, but she says, "I can't accept these because I lose my right to earn. I will be fired from my job." I mean, she's a teacher. It was there and every schoolhouse had this rule that you could not teach and be married. And so she would have had to have given up all of her personal autonomy.

[00:49:46] **Elizabeth Cobbs:** This question again, are you a disabled class or are you somebody who has the same rights as anybody else meaning men? So that's her story and it's this great story that takes place out in the Great Plains. And then the other person is Frances Perkins who is the first woman to serve in any presidential cabinet, the highest ranking woman in American history up to that point. She serves as labor secretary for Franklin Delano Roosevelt. And what we fail to appreciate, and again, historical malpractice here, is the notion of how much of what we still hold onto today from the New Deal.

[00:50:21] **Elizabeth Cobbs:** How many of the really signature accomplishments of the New Deal that benefits us to this very moment were the product largely of Frances Perkins. And she went to the president. She didn't want this job. She knew she'd be a target constantly under attack. And she had an ill husband who, for whom she was the sole support, and a child. And she said, "Well, I will only take this job if you let me fight for three things," which nobody thought could happen, "Social Security, a minimum wage, and unemployment insurance."

[00:50:52] **Elizabeth Cobbs:** And he said, "Well, Frances, I don't see how in the world you can get that through Constitutionally, but I'm happy to support your effort." So anybody in our audience who's ever collected unemployment insurance, who's ever worked for the minimum wage, who's ever collected any form of Social Security really has many people to thank, but primarily and first above all, would be Frances Perkins. So this is part of this idea of how feminism and she was a suffragist.

[00:51:18] **Elizabeth Cobbs:** She is a part of that movement. How these women who think of their mission as being more than just some narrow petty thing, but think, "This is America. We need to live up to what we say we do for people." And this was the fight that Frances Perkins handled so ably, handed her resignation in three more times. She didn't want the job and every time that FDR was elected she said, "Hey. Would you like my resignation?" He said, "No. I can't do without you, Frances."

[00:51:51] **Jeffrey Rosen:** Wow. Social Security, the minimum wage, passed over doubts about its Constitutionality and at a time when she's the only woman in the cabinet. Remarkable achievements. Professor Brown-Nagin, we're now at the time of Judge Motley's judicial service. Tell us about her judicial philosophy, her leading cases, including the one where she was asked to recuse herself because of her sex, and what her judicial legacy is.

[00:52:21] **Tomiko Brown-Nagin:** Happy to talk about that. As I was saying before, she was acutely aware of role. She was just as likely to rule for defendants. In fact, more likely to rule for defendants than plaintiffs in some of the cases that involved race and sex discrimination, which is to say she was no different from any other judge. Those are hard cases to win, and although, both her friends, and her foes expected her and wanted her to rule for their side.

[00:53:07] **Tomiko Brown-Nagin:** In fact, Pauli Murray, when she was confirmed to the bench sent her a note that said, "Hooray for our side." Because they're happy. One of their own will be on the bench, and they think that's going to mean that the women's interests or the interests of people of color would always prevail. But that's not what happens. As I describe in the book, Motley was more of a judicial pragmatist, certainly than any kind of a radical or even a liberal on the bench, although she was certainly a political liberal, a New Deal liberal, by the way.

[00:53:54] **Tomiko Brown-Nagin:** But in terms of the cases that she handled on the bench, she was more pragmatic. And of course, a part of that is because she was on the district court. She was constrained by precedent. And I should mention that there was a concerted effort to keep her off of the Court of Appeals and the Supreme Court, because it was thought that she couldn't handle the financial cases in New York City. Same thing was said about Ruth Bader Ginsburg and some other public-interest lawyers, by the way, who ended up going in to the bench, that these more complex financial cases were outside of their realm.

[00:54:41] **Tomiko Brown-Nagin:** So Motley, she does have some progressive judicial rulings, I can tell you about a few. But the thing I want readers to take away from that section of the book is really about the constraints on anyone that theoretically should apply in the judicial role. Motley took that seriously and so the cases where women plaintiffs, for instance, did prevail, are ones where the evidence is just overwhelming. The kinds of sex discrimination cases, those early cases where there was little doubt that women were disfavored.

[00:55:31] **Tomiko Brown-Nagin:** One of those cases involved Sullivan & Cromwell, the elite New York law firm, that was subjected to one of the early cases about whether professional types of employment like law would be subject to the same rules of nondiscrimination that the blue-collar jobs were. A set of women, law students, brought this case arguing that Sullivan & Cromwell did not hire them consistent with their credentials, or if they were hired, they weren't promoted.

[00:56:12] **Tomiko Brown-Nagin:** They could never make partner, and Constance Baker Motley by a spin of the wheel, so by random, by lottery, drew the case. And the lawyer representing Sullivan & Cromwell was not happy. He actually wrote her a letter arguing that she should remove herself from the case because as a woman, she likely had experienced discrimination. And therefore, he said, that she had a mindset and she didn't even know it. She wasn't even aware of her mindset that would predispose her to rule on behalf of the women.

[00:56:55] **Tomiko Brown-Nagin:** And in a famous decision, her most famous decision, Motley ends up rejecting what became a formal motion for recusal by turning the argument on its head. Holding that if sex, or race, or practice background alone were grounds for recusal, then no judge could hear the case because of course, men have a gender and whites have a race. And so it's just a brilliant opinion that is cited even today for the proposition that identity alone can't be the basis for recusals of judges from cases.

[00:57:42] **Tomiko Brown-Nagin:** There were other really important decisions in the sex discrimination arena. She opened up, not only doors of elite law firms to women, but also,

locker rooms to female journalists. There's a famous case involving the New York Yankees where a woman sports reporter wanted to cover the Series on the same basis as men, which meant she needed to go into the locker room. The New York Yankees argued, "She can't do this. It violates the privacy interests of men."

[00:58:22] **Tomiko Brown-Nagin:** And Motley said, "No. Let them wear towels." In other words, one can square the privacy rights of men with the need for women to earn a living on the same basis as men. So those are some of her cases that show her philosophy, which is of course she would rule on behalf of women and people of color when the facts showed. And the law showed that they deserved to win, but she did not bend over backwards to rule in favor of anyone.

[00:59:01] **Jeffrey Rosen:** Those were some memorable examples of her pragmatism, common sense, and the deep sense of the judicial role. Well, we have time for one last pairing before closing thoughts. And that takes us squarely into the era of Constance Baker Motley. And that's The Right to Equal Treatment Martha Cotera and Yvonne Swan. Professor Cobbs, tell us about them.

[00:59:24] **Elizabeth Cobbs:** Well, as I said, each chapter gets us to a different place in the story that ultimately gets us to today, so that chapter is on The Right to Equal Treatment, followed by The Right to Compete, and followed lastly by The Right to Physical Safety, which is something that's still very, very tenuous for women today. And that particular pairing, that's the period of the second wave, and I think many readers would suspect that you'd choose Gloria Steinem or something.

[00:59:52] **Elizabeth Cobbs:** And the important thing to understand about American feminism, is its great reach, its great diversity, geographically, in terms of ethnic background, in terms of economic interests, and we can't explain it if we can't understand who were the leaders who took feminism into new areas? And the face of feminism in this chapter is a woman still living named Martha Cotera who is from Austin, Texas and a Chicana. And wrote a book called The Chicana Feminist in the mid 1970s. And was a really important organizer in the International Women's Year meetings in Houston that also happened in the mid '70s.

[01:00:25] **Elizabeth Cobbs:** The nature of second-wave feminism was its extraordinary reach and its development of all kinds of services that helped women with the kind of daily challenges that women faced. So the development of rape crisis centers, or free clinics, or reproductive rights. These are the kinds of things that Martha Cotera is just such a face of and she was a close friend of Ladybird Johnson, the wife of Lyndon Baines Johnson.

[01:01:00] **Elizabeth Cobbs:** She was very close, knew very well Ann Richards and Sarah Weddington, who of course, argued the case Roe v. Wade, and she's just this person who really shows us that it's silly and disrespectful to call feminism a white movement. It utterly ignores the magnificent contributions of a lot of women of color who were doing things from the very, very beginning, including people like Martha Cotera who had such a profound impact.

[01:01:28] **Elizabeth Cobbs:** And then the woman who's the kind of the why care figure is a Native American woman, Indigenous woman named Yvonne Swan who at the time was better known by her married name Yvonne Wanrow. And she was a woman who confronted a predator who broke into their house. She was there at her babysitter's house. Several small children there. She's there. There are no men present. She has a gun and she lifts it as this man who's the unknown predator comes to her and they're screaming at him to get out.

[01:01:56] **Elizabeth Cobbs:** And it's quite a remarkable story and she lifts this gun. And he gets so close that the muzzle of the gun meets his shirt. And then she fires a shot and he's killed instantly. It's right at his chest. He's a foot taller than she is and she's sentenced to 20 years in prison for murder. And so this begins a debate about what does equal treatment really mean, if the size difference between men and women is ruled irrelevant? The court decides it on the basis that if she were a reasonable man, a reasonable man should just raise his fist if another man comes at him unarmed.

[01:02:36] **Elizabeth Cobbs:** And that's what a reasonable man would do, but what a reasonable man would do is very different from what a reasonable woman would confront. And so that's a very important legal case, it's challenged. Ultimately it's the Washington state Supreme Court who says, "No. Given the history of sex discrimination, given that all these various kinds of differences between men and women, that there has to be some consideration of those differences to give a person really, truly equal treatment under the law." And so her case, she also is still living, a remarkable, wonderful, inspiring woman.

[01:03:11] **Jeffrey Rosen:** Superb. Well, it's time for closing thoughts in this wonderful discussion. Lots of enthusiasm from the audience including a comment from Bill Child, "So fascinating to learn about these incredible women." And indeed, it is telling the story of the Constitution and American history through these biographies that is incredibly compelling. Ann Marie Hines poses a question to both of you that I'm going to pose as well for your closing thoughts and that is this: What would you both say is the most important thing to take away from each of your books that we could perhaps apply to each of our own lives? And Professor Brown-Nagin, first to you.

[01:03:48] **Tomiko Brown-Nagin:** Sure. I would say that a really important thing to take away from my work and it sounds like from Elizabeth's work as well, is that the opportunities that can be lost when we do not recognize the talents of women. And I believe that talent exists in every population as opportunity that can be lacking.

[01:04:18] **Tomiko Brown-Nagin:** And so I hope that readers take away from this work on Constance Baker Motley whom, as I said, was born in working-class New Haven. She would not be the first person that one would think of as capable of changing the Constitution and making life better for so many people, but she did. And so, let us be open to opportunity in all populations, I would say, as we move forward.

[01:04:51] **Jeffrey Rosen:** Wonderful. Very well said, indeed. And Professor Elizabeth Cobbs, last word to you, what is it that our great audience members can take away from your book that they can apply to their own lives?

[01:05:05] **Elizabeth Cobbs:** I think the most important thing is that feminism born in the American Revolution that has advanced the American experiment from the first days up to the present. That this is a powerfully uniting value in American history. And I think that when we allow people divisively to say, "Oh, I'm not a feminist." Or, "She's a feminist." It's running down and disparaging an important American value. And it's one reason why it's so important to embrace these values now that have defined us historically is it can really help us especially in times of division, when contrary values tend to get normalized through repetition.

[01:05:44] **Elizabeth Cobbs:** Women are inferior. Women should not have control over things. Women stay out. Men are entitled to things they're entitled to. They're to grab women wherever they want. That can easily be normalized if we don't all say, as 91% of Americans do in Pew Polls, that they support gender equality and that's one of the most highly-held values of the American populace. So I'd like everybody to take away that maybe they're feminist patriots too, and that feminism patriotism is really what has helped us to become a better country.

[01:06:19] **Jeffrey Rosen:** Feminist patriotism has helped us to become a better country. Great final thoughts in this wonderful discussion. I'm so grateful to the McNulty Foundation and the Anne Welsh McNulty Institute for Women's Leadership at Villanova University for their partnership and support. And so grateful to two great scholars, Tomiko Brown-Nagin and Elizabeth Cobbs for enlightening and inspiring us with the story of these great American women. Tomiko Brown-Nagin, Elizabeth Cobbs, thank you so much.

[01:06:52] **Tanaya Tauber:** This episode was produced by John Guerra, Lana Ulrich, Bill Pollock, and me, Tanaya Tauber. It was engineered by the National Constitution Center's EV Team. Research was provided by Sophia Gardell. Check out our full lineup of exciting programs and register to join us virtually at constitutioncenter.org. As always, we'll publish those programs on the podcast, so stay tuned here as well or watch the videos. They're available in our media library at constitutioncenter.org/media-library. Please rate, review, and subscribe to Live at the National Constitution Center on Apple Podcasts or follow us on Spotify. On behalf of the National Constitution Center, I'm Tanaya Tauber.