UNIVERSITY OF HAWAI'I LAW REVIEW

VOLUME 20

1998

University of Hawai'i Law Review

Volume 20 / Number 2 / Winter 1998

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Symposium: The Jurisprudence of Justice Ruth Bader Ginsburg

During the spring 1998 semester, the William S. Richardson of Law and its Jurists-In-Residence Program hosted the Honorable Ruth Bader Ginsburg, Associate Justice of the United States Supreme Court, for one memorable week in February. It was an opportunity for Justice Ginsburg to not only take a well-deserved break from the hectic Supreme Court calendar and enjoy the sights of Hawai'i, but also to interact with the students and faculty of the law school. Students and faculty seized this rare opportunity to discuss with a sitting Justice timely legal issues through class discussions and a "question and answer" session. Moreover, social and recreational events with the Justice, such as paddling on the beaches of Hawaii, revealed the more adventurous side of Justice Ginsburg. A hula performance by the students and faculty of the law school culminated the week's festivities and expressed the law school's appreciation to Justice Ginsburg for her participation in the Jurist-in-Residence Program.

Justice Ginsburg's visit to the law school provides the occasion for the University of Hawai'i Law Review's Symposium honoring Justice Ginsburg and her many accomplishments. The richness and sincerity of the symposium's tributes, speeches, articles and comments are direct reflections of the breadth of Justice Ginsburg's impact in enriching the lives of many individuals. As a mentor and teacher, she has educated and shaped the minds of law clerks and students. As a tireless advocate for gender equality, representing ordinary women and men disadvantaged by gender stereotypes, she envisioned and succeeded in creating a society where women and men are afforded equal opportunities to be judged strictly on the basis of merit. As a judge and Justice, she has brought a disciplined and compassionate approach to the procedural aspects of legal process from the bench. She also recognized that an independent judiciary, free from political pressures, is the foundation to our legal system and values. And most importantly, as a friend, colleague, wife, and mother, she is a loyal and caring human being.

As this symposium hopes to demonstrate through a diversity of perspectives from distinguished contributors, Justice Ginsburg's jurisprudence reflects a dynamic, thoughtful, and disciplined personal and professional philosophy. Practitioners, legal scholars, judges, and the general public should pay special attention to this philosophy which successfully balances the tensions of analytical rigor and compassion. Indeed, her accomplishments range far beyond that touched upon in this symposium. One can anticipate the need for another symposium in the not-to-distant future to discuss her further contributions to our legal system and values.

Ruth Bader Ginsburg: A Personal, Very Fond Tribute

Gerald Gunther*

The William S. Richardson School of Law honors itself at least as much as it does The Honorable Ruth Bader Ginsburg in devoting this symposium issue to her life and work. Justice Ginsburg's attainments lie not only in the realms of distinguished judging, scholarship and law practice; she is also to my knowledge a very special human being. My brief comments will speak mainly of that special person who has been my good, truly caring friend for four decades.

I first came to know Ruth Bader Ginsburg when she was my student at Columbia Law School in 1958-59. I was teaching the federal courts course as well as constitutional law; she had just transferred from Harvard Law School to Columbia. The petite, attractive, earnest, and obviously brilliant young woman that was Ruth had decided to complete her legal education at Columbia rather than Harvard in order to be with her family in New York City. Her husband, Martin Ginsburg, had just completed his studies at Harvard in 1958 and, eager to commence what proved to be an outstanding career in tax law, had accepted a position at a New York law firm. Ruth and Marty had a young daughter, Jane, born in 1955. (Jane Ginsburg is now a distinguished professor of intellectual property law at Columbia).

Women were rare phenomena in the law schools of the 1950's. I began at Harvard in 1950, in the Class of '53, the very first to which Harvard admitted women. There were eleven women out of well over five hundred students. I understand that there were even fewer women than that when Ruth Ginsburg was at Harvard, from 1956 to 1958. Many of the Harvard faculty had difficulty adjusting to the unaccustomed presence of women in the classroom, to judge by the experiences of my own female classmates, and Ruth Ginsburg no doubt encountered obstacles at Harvard because of her gender. And she confronted an even greater barrier when, in her second year, she applied pursuant to Harvard's administrative rules for permission to receive a Harvard degree by spending her last year of law school at an institution approved by Harvard. Her application was denied by the Dean: she was told that she had not made out an adequate case of exigent personal circumstances required for such permission. Her understandable desire that she and her young child reside in the same location as her husband proved to be an insufficient ground, even though to my knowledge applications by males for similar permissions were quite frequently granted. Consequently, Ruth Ginsburg was awarded an

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L.L.B. degree by Columbia, with Columbia giving her credit for her first two years at Harvard.

When Ruth Bader Ginsburg arrived at Columbia in 1958, I had just established a program to help place its graduates in judicial clerkship positions. Ruth soon expressed an interest in a position with a federal district judge, even though most students with an academic record as superb as hers tended to prefer appellate judges. Her desire for a clerkship with a trial judge reflected her interest in civil procedure, which became her initial scholarly field. She clerked for Judge Edmund L. Palmieri of the U.S. District Court for the Southern District of New York for two years, and the Judge became one of her most enthusiastic fan. But at the outset, there were obstacles commonplace for women applicants for judicial clerkships in those days. When I roamed the halls of the federal courthouse in New York looking for judges interested in recommendations from Columbia, Judge Palmieri was the only one who asked me to submit just one name to him every year and indicated that he would take my recommendation without further ado. But in Ruth's case, my enthusiastic recommendation of her prompted not an immediate acceptance but instead an immediate phone call asking what had gotten into me: How could I recommend a woman as his clerk? Didn't I know that he sometimes worked late in the office? What would his wife and daughters think? I knew the Judge well enough to argue with him, but at first I could not budge him from his firm resistance. Ultimately, I arranged with a New York law firm and another Columbia senior to assure the graduate's release from his firm if the Judge found it impossible to work with Ruth. With that backstop in hand, I once again called the Judge and advised him that I would seriously consider never recommending another Columbia student to him if he did not at least give Ruth Ginsburg a trial run. With that safety cushion, the Judge agreed to hire her.

During the 1970's, while teaching law at Rutgers and then at Columbia, Ruth Bader Ginsburg first became a major national figure because of her display of extraordinarily effective appellate advocacy. She directed the Women's Rights Project of the American Civil Liberties Union, putting aside her major academic interest in comparative procedure in order to persuade the Supreme Court to reject gender-based stereotypes and apply heightened scrutiny for gender-based classifications disadvantaging men or women. At the beginning of the 1970's, Ruth Ginsburg had criticized law schools, including authors of constitutional law casebooks, for slighting the issue of sex discrimination. The eighth edition of my own book, in 1970, was indeed

one of the proper targets of her criticism that "treatment of women by the law has been overlooked in the law schools."[1]

Ruth Ginsburg could not level that charge against any of my later editions, including the most recent, the thirteenth. In all of my editions since the early 1970's, the treatment of gender discrimination has occupied a prominent part of my equal protection chapter. And the central reason for this sudden increase in attention, in my book as well as others, is the result of Ruth Ginsburg's success in engaging the Supreme Court's attention to equal protection issues bearing on gender-based discrimination. Today, my teaching of gender-based discrimination is largely through a parade of cases in which lawyer Ruth Bader Ginsburg played the leading role. The cases in which she participated during the 1970's, whether through the oral argument, submitting a brief, or both, surely comprises a hit parade of major changes in sex discrimination law: they include *Reed v. Reed*,[2] *Frontiero v. Frontiero*,[3] *Weinberger v. Wiesenfeld*,[4] *Califano v. Goldfarb*,[5] *Craig v. Boren*,[6] and *Wengler v. Druggists Mutual Insurance Co.*.[7] In the most recent edition of my casebook, that parade of Ginsburg successes is now crowned by *United States v. Virginia*,[8] with the majority opinion from the pen of Justice Ruth Bader Ginsburg. No wonder that, for years, students in my introductory constitutional law class have suggested I entitle that section "In Praise of Ruth Bader Ginsburg."

In the wake of these successes before the Supreme Court, President Carter in 1980 named Ruth Bader Ginsburg to a seat on the United States Court of Appeals for the District of Columbia Circuit. She asked me to deliver the address to that court at her investiture ceremony. With characteristic modesty, she asked me to speak about the traits of good judging rather than about her personally, and I did so: I spoke mainly about judging in the Learned Hand manner, for I was then just beginning to write my biography of Hand.[9] In describing the traits of distinguished judging on the federal bench as

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[1] Ruth Bader Ginsburg, *Treatment of Women by the Law: Awakening Consciousness in the Law Schools*, 5 VAL. U. L. REV. 480, 484 (1971).

[2] 404 U.S. 71 (1971).

[3] 411 U.S. 677 (1973).

[4] 420 U.S. 636 (1975).

[5] 430 U.S. 199 (1977).

[6] 429 U.S. 190 (1976).

[7] 446 U.S. 142 (1980).

[8] 518 U.S. 515 (1996). *See* GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 681-720 (13th ed. 1997). These pages encompass the section on gender-based discrimination (Justice Ruth Bader Ginsburg's preferred term, rather than sex discrimination).

[9] *See* GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE (Alfred A. Knopf ed., 1994).

exemplified by Learned Hand in that address,[10] I spoke with admiration of "the modest but creative judge, a judge who is genuinely open-minded and detached, the judge who is heedful of limitations stemming from the judge's own competence and, above all, from the presuppositions of our constitutional scheme." I noted that Hand "preached and practiced 'detachment,'" and I noted that Hand's skepticism "reflected a genuine personal modesty." Although most of my address discussed Hand, I could not resist adding a few words about Ruth Ginsburg herself. I expressed "my belief that her intellect, her temperament, her character, her 'moral' qualities (to use Hand's term) will demonstrate on this bench many of the judicial qualities Learned Hand articulated and exemplified." And I added that in my view Ruth Ginsburg had "the character and temperament, the persistence, the open-mindedness, the sense of responsibility, the modesty as well as the courage and strength reflected in Learned Hand's words and deeds."

In the course of the reception that followed the ceremony, every judge on the bench at one time or another approached me to congratulate me on my remarks. These were judges on both sides of that divided court, from activist liberals to conservatives. In the comments of each judge, there was a notable figurative wink: my suggestions that there were comparable traits in Ruth Bader Ginsburg and Learned Hand apparently left each judge quite skeptical. Their comments to me conveyed the sense that they knew, I suppose from Ruth's role in the women's rights movement, that she would prove to be a liberal activist. I had similar winks from other members of the audience, winks suggesting that I couldn't be serious, that I was simply trying to be gracious rather than accurate. I was rather annoyed by these doubts, and I wagered five dollars on the proposition that within a few years Ruth would widely be seen as the most independent, thoughtful, modest judge on the bench. I take real satisfaction in having won that bet. Indeed, my five dollar bill arrived in an envelope also containing a clipping from the *Washington Post* depicting her as the moderate centrist on the Court of Appeals.

Needless to say, I was also overjoyed by Ruth Bader Ginsburg's deserved ascension to the Supreme Court in 1993. There, she continues to display the traits of judicial greatness. She listens to both sides of the argument, she does not disguise "the difficulties, as lazy judges do, who win a game by sweeping all the chessmen off the table," as Learned Hand put it in 1939, in a tribute to Benjamin Cardozo.[11] She does not rush to decide any more questions than she

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[10] *Professor Gerald Gunther Speaks at Investiture of Judge Ruth Ginsburg in Washington, D.C.*, COLUMBIA LAW ALUMNI OBSERVER, Dec. 31, 1980, at 8-9 (reprinting the transcript of the investiture proceedings of September 5, 1980).

[11] LEARNED HAND, *Mr. Justice Cardozo, in* THE SPIRIT OF LIBERTY-PAPERS AND ADDRESSES OF LEARNED HAND 129-131 (I. Dilliard ed., 1960).

needs to; she is meticulous in her awareness of the technical posture of a case and in her lucid articulation of her reasoning.

As I suggested at the outset, Ruth Bader Ginsburg is not only the model of a great advocate, a great judge, scholar, and lawyer. She is also (and this surely is a major reason for my affection for her) a fine human being—modest and warm, a loyal and caring friend. I can illustrate her sensitive kindness and humaneness with her reaction to two sad periods in my own family in the last few years. Two years ago, my brother died of cancer. I had mentioned to Ruth that he spent his last few weeks in an extraordinary hospital in New York City, one that gives highest priority to assuring that terminal patients receive personal attention and adequate pain relief. Some months after the death, Ruth called me to ask whether that hospital was still my favorite charity, and I told her that it was. She promptly issued a major gift in my brother's memory, in the course of serving as a funds-directing committee member for a foundation. Soon after, my daughter-in-law was diagnosed as having an illness that required a life-threatening bone-marrow-transplant operation. On learning of my anxieties, she wrote that she would join my family in our prayers. The prayers were evidently heard: my daughter-in-law recovered, without an operation. No wonder then that Ruth Bader Ginsburg's achievements as well as her friendship have made it easy indeed to write this affectionate tribute.

Sense and Sensibility: Justice Ruth Bader Ginsburg's Mentoring Style As a Blend of Rigor and Compassion

Susan H. Williams*
David C. Williams**

From the summer of 1985 to the summer of 1986, we clerked for Ruth Bader Ginsburg, then a judge on the United States Court of Appeals for the District of Columbia. Since that time, we've been lucky to have contact with her in a variety of settings, both social and professional: we have gone to clerks' reunion parties; we've had dinner with her and Marty in Washington; and we helped her prepare for her confirmation hearings—although she needed no help. We have seen her, then, in a number of roles, but her first role in our lives remains the most fundamental and enduring: she has been an active and caring mentor, an almost old-fashioned idea these days.

As a mentor, she has exhibited two quite distinct qualities in great degree. First, she demands of herself and those around her adherence to a most exacting standard of analytical rigor. Second, she offers a depth of warmth and kindness grounded in a sensitive emotional awareness. It is her combination of these qualities that, to us, is the most striking aspect of her mentoring. Many consider these qualities to be in some tension, and in many people they are in tension. Some judges, notoriously, seem so enamored of hard-hearted analysis that they become emotionally blind in their work and perhaps in their private lives as well. Others are so sympathetic that they seem unable to subject their emotional lives to analytical inspection. If Justice Ginsburg feels any tension between these two qualities, however, we have never noticed it. She has apparently never felt it necessary to compromise warmth and sensitivity for analytical rigor, or vice-versa, because in her they are not contradictory. Instead, she moves easily and naturally back and forth between them as occasion warrants. Nor has she felt it necessary to compartmentalize these qualities, reserving her emotional life for home and her analytical mind for work. Rather, we have seen her, in her professional role as mentor, deploy them both at the same time. Nor, finally, has she felt it necessary to allocate these qualities according to some closed set of rules or principles—analysis under certain conditions, emotion under others. Instead, she deploys either or both as the particular context demands. In that sense, her mentoring style

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corresponds to her judging style—closely tied to context, focused on particulars, taking each case and each person as they come.

Justice Ginsburg's analytical rigor is by now the subject of legend and needs little emphasis. Among our law school classmates, she was famous as the architect of the legal campaign to get the Supreme Court to give heightened scrutiny to gender classifications. Yet among the clerks on the D.C. Circuit, that part of her history garnered barely a ripple of awareness. Instead, she was widely regarded not as a "women's" judge, much less a "political" judge, but as a judge's judge. That image of her rested on several perceptions. First, she has a comprehensive memory for cases, and she unfailingly ties her analysis of legal rules to the facts of the cases from which they emerge. Second, she approaches each case on its own merits, without prejudgement, not as an opportunity to advance some larger and hidden agenda. Third, despite her generally quiet demeanor in personal communications, she can be a tiger from the bench, because she will not tolerate obfuscation or sloppy thinking from lawyers. Fourth, she is deliberate and careful in all things. Indeed, the degree of her deliberation is so unusual that it can take some getting used to: unlike most people, she carefully ponders each sentence, and so she often pauses at length before responding to a question or comment. For trepidatious new clerks, this conversational style can be initially unsettling, as they might read disapproval into her silence and wonder whether they have said the wrong thing. In reality, her pausing is a sign not of disapproval but of respect, as she carefully considers the words of clerks, just as she carefully considers everything in life.

In law school, students and professors talk endlessly about styles of judging—what it is possible, desirable, or conceivable for a judge to do. It is one thing to talk about such matters, however, and another to see them in practice. One way that Justice Ginsburg mentored was to offer her own rigorously analytical style of judging as one possible way of living in the law. In 1985, faculty at the Harvard Law School were profoundly divided on whether legal language could ever be sufficiently determinate to generate one right outcome or even a range of right outcomes. Among the student body, this division generally took a highly simplified form. Those on the political right took the view that legal language was always and completely determinate, so that judges should be utterly passive. Those on the left took the view that legal language was always and completely indeterminate, so that law was nothing more than politics. It was thus a revelation, as recent graduates, to discover a prominent jurist who managed in practice to reject the polar terms in which this debate was phrased. Justice Ginsburg did believe that judges should pay close heed to legal language, and she was aware that such language could also have multiple meanings. Neither fact, however, seemed utterly central to her style of judging. Instead, we saw in her a judge who felt herself

to be constrained principally by the forms, practices, and culture of the law. In other words, her practice of analytical rigor—her attention to cases and context, her refusal to prejudge, her intolerance for sloppy thinking, her deliberation and care—provided her internal job description, making her neither an automaton nor a loose cannon.

Her analytical rigor also explains the very high regard in which she was held by her fellow judges on the D.C. Circuit, including those with substantially different substantive views and personal styles, such as then-Judges Antonin Scalia and Robert Bork. She, in turn, reciprocated that regard. In her new position, she enjoys the same relationship with the Chief Justice. To some, these relationships seem incomprehensible: after all, these very judges resisted or would have resisted her efforts as an advocate to secure heightened scrutiny for gender classifications. Yet Ginsburg exemplifies analytical rigor so powerfully that she compels respect for her judging abilities, even from those who hold deeply divergent substantive views.

Analytical rigor, however, only partially explains these close relationships in the face of sharp disagreement. Justice Ginsburg's well-known commitment to collegiality also crucially contributes to their possibility, and this commitment to collegiality is only one instance of her broader commitment to sensitive emotional awareness and nurturance of human relationships. This quality of Justice Ginsburg's character, we believe, is much less well known because of her sometimes shy and reserved demeanor. Indeed, we did not see it in its fullness until some time into our clerkship. Because Justice Ginsburg is a private person, she does not wear her warmth on her sleeve, and yet the warmth is there, with a depth that is sometimes startling.

That warmth can be illustrated only through random anecdotes, but of course the telling of anecdotes cannot adequately capture the experience. We were already married when we started our clerkships, and so the chambers became our second home. We were not married, however, when we accepted the job, eighteen months before. Some employers might have been discomfitted by this sudden change, this intrusion of a close personal relationship into a workplace setting. By contrast, Justice Ginsburg was so delighted by this answer to the work/home conflict that she did some research to discover that we were, in her words, "a Federal first"—the first co-clerks married before their employment began. Early in our clerkship, we began to interview for teaching jobs, and Justice Ginsburg willingly and happily allowed us to leave the chambers for several one-week trips. During that year, she often traveled herself, and she commonly brought us back small gifts, in the way that a parent would do; indeed, we have more presents from her travels than our own parents' travels. As is well known, she and Marty often invite her clerks to their house for dinner; what is less well known is that the clerks generally feel feted at these dinners in the way that a visiting dignitary

would. Since our departure from her chambers, she has followed our careers with a close and caring eye. To this day, she routinely sends our children gifts and cards.

One incident, told in more detail, may help to explain this powerful mix of qualities. Because this incident happened to one of us (David), we shift briefly to the first person singular. During the preparation for Justice Ginsburg's confirmation hearings, I arrived early and waited in the hall outside the conference room. Shortly, the other participants—Important People from the executive department and the academy—also arrived. And then Justice Ginsburg arrived, and we waited her pleasure. Ignoring for the moment the others in the hallway, Justice Ginsburg came straight over to me, stood on tiptoe to reach me and kissed my cheek. That moment is frozen in tableau in my mind: this tiny woman, radiating simultaneously enormous warmth and power, filling the hallway with her presence, briefly ignoring Important People so as to make contact with a distinctly unimportant ex-clerk, so justly confident in her judicial stature that she could publicly display the human tenderness that deeply grounds her.

Even more broadly, these two mentoring qualities resonate throughout Justice Ginsburg's life. Her early career as an advocate for women sought to break down barriers, to open opportunities to all those of talent, regardless of gender. In a recent tribute to Justice Harry A. Blackmun, she recalls his words in *Stanton v. Stanton*, a case argued by Justice Ginsburg herself: "No longer is the female destined solely for the home and the caring of the family, and only the male for the marketplace and the world of ideas."[1] In this phase of her work, then, Justice Ginsburg sought to allow women to exercise analytical rigor, to achieve excellence and prominence in "the marketplace and the world of ideas."

More recently, however, Justice Ginsburg has turned her attention to the damage that can be wrought by an exclusive commitment to a life of analytical rigor and competition in the workplace: "An American Bar Association report in the early 1990's expressed concern that lawyers in commercial practice may be losing their sense of perspective and ethics, under pressure from law firms to produce business and billable hours. Substantial numbers of the young lawyers surveyed complain about the attendant pressure to cut back on family involvement."[2] But Justice Ginsburg offers hope and proposals for reform: "There is reason to hope that the increasing participation of women in the profession will have an ameliorating effect. By persistently raising the crucial

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[1] Justice Ruth Bader Ginsburg, *A Tribute to Justice Harry A. Blackmun*, 108 HARV. L. REV. 4, 5 (1994) (quoting Stanton v. Stanton, 421 U.S. 7, 14 (1975)).

[2] Justice Ruth Bader Ginsburg, *Remarks for George Mason University School of Law Graduation*, 2 GEO. MASON IND. L. REV. 1, 2 (1993).

issues of family and work place, of leave time for parents and work place affiliated facilities, women lawyers can take the lead in bringing sanity and balance to the profession. In this regard, sisters need the aid of brothers in law. These issues must become human issues, not just 'women's issues.'"[3]

Read too simply, these passages could suggest that Ginsburg somehow compartmentalizes analytical rigor and emotional awareness: early in her life, she fought for the former in the work place, and later in her life, she fought to make the latter possible at home. In fact, however, we think that Justice Ginsburg is seeking to promote both qualities in both places. *Stanton* did make it more possible for women to succeed in the workplace. The reason, however, that the Justice believes equal opportunity is so important is not just an abstract commitment to equality as a principle; rather, it is because she, like Justice Blackmun, "cherishes daughters fully as much as sons."[4] Correlatively, in calling for "sanity and balance" in the profession, Justice Ginsburg is not seeking to make space for a rigidly compartmentalized emotional life at home. Rather, she is seeking to blur the line between home and work, by insisting the we are human beings with a full emotional pallette even in the workplace, and we are thinking, analyzing people, even at home. She plainly hopes to make it possible for all lawyers to achieve the complex balance that she has achieved—always and everywhere committed simultaneously to analytical excellence and emotional depth—in all the aspects of her life, most evident to us in her mentoring style.

It is sometimes said that youth is wasted on the young; it might equally be said that truly wonderful clerkships are wasted on the young. At the time, we did not really know what we were seeing in then-Judge Ginsburg, because we had no standard of comparison. We did not understand how extraordinarily she combined these two faculties. And we did not understand what an utterly remarkable workplace she created for us—a place where we could bring both our emotional and analytical lives in fullness, a place where our mentor rejoiced in our being a "Federal first," a married couple working together in a chambers where the line between work and home was transparent. It was an introduction to the law that we will never outgrow.

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[3] *Id.*

[4] Ginsburg, *supra* note 1, at 5.

Tribute to Justice Ruth Bader Ginsburg

Edith Lampson Roberts*

That I should have been asked to write a tribute to Justice Ruth Bader Ginsburg is in itself a tribute to this exceptional woman. Justice Ginsburg's work to secure for women treatment under the law equal to that afforded to men is well known. It is largely through her efforts that women are today offered full access to professional and social avenues once off limits to them.

As a former law student, attorney, and law clerk to Justice Ginsburg when she served as a judge on the United States Court of Appeals for the District of Columbia Circuit, I am among the many beneficiaries of Justice Ginsburg's pathfinding achievements. But those achievements have affected more than just my professional life. My decision of several years ago to take a detour from the path of a lawyer to take care of my children was, thanks to Justice Ginsburg's efforts, a truly voluntary, and therefore a much more satisfying one. And the Justice's suggestion that I join the distinguished contributors to this symposium demonstrates her own abiding respect for choices made by women that may not coincide with those she made in her own life.

Working for and with Justice Ginsburg as she performed the daily tasks judging offered instruction not only in the substance of the law, but in approaches to legal analysis and the crafting of judicial opinions. In Justice Ginsburg's case, style and substance are often inextricably intertwined. The hallmarks of her style of judging—meticulous attention to detail, abiding respect for the views of her judicial colleagues, and absolute clarity of expression in the opinions she authors—necessarily affect her view both of the appropriate outcome of each case and of the way in which a judge is obliged to explain that outcome.

Justice Ginsburg's command of detail is legendary. During my clerkship, she read every brief in every case, from criminal cases filed *in forma pauperis* to appeals from the most technical rate-making decisions of the Federal Energy Regulatory Commission. When we met to discuss the cases I had been assigned to work on, she zeroed in immediately on the crucial, often the dispositive, facts and issues in the case. This sharp focus served several purposes. First, it enabled the Justice to ensure that she never shirked her obligation to decide only the case before her, not hypothetical situations that might someday be presented in court or debated in a legislature. Meeting this obligation, Justice Ginsburg believed, was essential in order to respect the limits imposed on the judiciary under the Constitution and to retain the integrity of the judicial role.

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* Law Clerk to then-Judge Ginsburg, 1989-90.

Homing in on the details also kept the Justice in close touch with the real world effects of each decision she made as a judge. Her sensitivity to those effects has led her to accompany her law clerks on periodic tours of Lorton Reformatory, the prison where many appellants to the D.C. Circuit are incarcerated, to observe a side of the criminal justice system that cannot be conveyed through legal briefs or oral arguments.

Another central component of Justice Ginsburg's judging style—one with similar effects on the content of her judicial philosophy—was her respect for and desire to accommodate the views of her colleagues on the bench. She described this approach in her confirmation hearings:

> Willingness to entertain the position of the person, readiness to rethink one's own views, are important attitudes on a collegial court. If your colleagues, who are intelligent people and deserve respect, have a different view, perhaps you should then pause and rethink, Am I right? Is there a way that we can come together? Is this a case where it really doesn't matter so much which way the law goes as long as it is clear?[1]

Opinions written in one voice, Justice Ginsburg believed, can strengthen the institutional role of the judiciary by increasing the certainty of legal rulings.

My clerkship offered me a close-up view of Justice Ginsburg's collegial approach. Her respect for the view of colleagues, in service of the judicial institution as a whole, extended to judges on all levels of the court system. Unlike many appellate court judges, Justice Ginsburg scrupulously avoided referring to the authors of decisions under her review as "the lower court" or the "court below." Speaking of the "trial court" or the "district court" instead, she believed, demonstrated appropriate respect for the critical role played by the judiciary's front line.

A final aspect of Justice Ginsburg's stylistic and substantive approach to the law—and the one that left the most lasting impression on me during my clerkship—was the unparalleled care she took in crafting her written opinions. She weighed and measured every word in every draft to ensure that it accurately expressed its intended meaning. Arguments had to be taut, with no extra flourishes or verbose asides. Justice Ginsburg's perfectionism made her the most exacting of editors. She wielded her editor's pencil or, sometimes, her scissors—freely, dissecting and reorganizing draft opinions to convey more clearly the basis of each ruling.

Surprisingly, though, editing sessions with the Justice were not only instructive, but enjoyable. She walked her clerks through each new draft, pointing out how her amendments clarified the opinion and suggesting how

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[1] *Nomination of Ruth Bader Ginsburg, to be Associate Justice of the Supreme Court: Hearings Before the Senate Committee on the Judiciary*, 103d Cong. 51 (1993) (testimony of Justice Ruth Bader Ginsburg).

we might think about crafting future efforts. She taught us, too, the purpose behind the pains she took: the better to fulfill the judge's obligation to explain her decisions, so that the rule of law will rest on a solid foundation. And she was quick to recognize and praise the fruits of her tutorials. Few compliments have meant more to me than the Justice's words "just right!" penciled in the margin of one of my draft opinions.

Ruth Bader Ginsburg's distinctive style, as a lawyer, teacher, writer, editor, jurist reflects her equally distinctive personal and professional philosophy. She believes that the role of the judiciary is not to spearhead social change, but to ensure fair play, according to clear rules, taking care that no individual's rights are lost in the shuffle. These are precepts not only to judge by, but to live by. In her life, as in her work, Justice Ginsburg continues to get it "just right."

Reflections

Maria Simon*

I am delighted to participate in the University of Hawai'i's Symposium Issue dedicated to Justice Ruth Bader Ginsburg. I am told the occasion for this celebration is Justice Ginsburg's week-long visit to your law school where, among other things, she will teach a few classes. That will be a treat!

I had the great good fortune to serve as one of four law clerks to Justice Ginsburg in the Supreme Court's October Term 1995. Justice Ginsburg, a teacher by nature and training, was in some respects reduced to a class of four. The law clerks received a tremendous education.

Early on, Justice Ginsburg instructed us to "get it right" and "keep it tight"—a goal that she regularly accomplishes in her opinions. She admonished us not to assume that a word used in different legal contexts necessarily bore the same meaning in each context.[1] Justice Ginsburg expected precision not only in our legal reasoning, but also in our use of the English language. Mercifully, past law clerks had noted certain basics for the newcomers, such as to use "because" rather than "since" to indicate causality.

Ground rules in place, Justice Ginsburg invited us to join her in the rich, intense, and challenging work of the Court. She treated her clerks as colleagues, greeting our analysis with respect. The Justice was generous with praise and gentle, but firm, with criticism. In our conversations, the Justice would strip away extraneous issues to train our minds on the core of the legal matter. For me, the thrill of those conversations was second only to the satisfaction of reviewing a written piece with the Justice. I would join her at her conference table and together we would review the writing, which might be a draft opinion, a speech, or an article. Justice Ginsburg explained each change—they were frequently extensive. Invariably, the Justice chose fewer words and focused the language to more accurately state the law. The result would be clear, crisp writing.

Legal writing was only one of the lessons taught at that conference table. The Justice kept firmly in mind the individuals affected by each case; we did

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[1] To make this point, the Justice distributed the following quote to her clerks: "The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them, runs all through legal discussions. It has the tenacity of original sin and must constantly be guarded against." Walter Wheeler Cook, *"Substance" and "Procedure" in the Conflict of Laws*, 42 YALE L.J. 333, 337 (1933). Justice Ginsburg's law clerks were not the only ones to receive this advice. *See, e.g.*, City of Chicago v. International College of Surgeons, 522 U.S. 156, 184 (1997)(Ginsburg, J., dissenting) (recalling Cook's "sage and grave warning").

not deal in disembodied legal principles. She decided only the case at hand, forcing us to leave for another day and proper presentation other, often tantalizing, issues.

Of course, Justice Ginsburg's audience was much larger than the four of us. Ever mindful of the busy practitioner, Justice Ginsburg carefully reviewed the syllabi which accompany all Supreme Court opinions to insure accuracy and brevity. In addition, Justice Ginsburg crafted the first paragraph of an opinion in a press-release style, stating the legal issue and its resolution. Finally, Justice Ginsburg paid close attention to the bench statements. These are statements summarizing the Court's opinion read aloud in the Courtroom by the authoring Justice. Justice Ginsburg wrote these statements in readily understandable terms, recognizing the unique opportunity to communicate the Court's work to the public, those present in the Courtroom and those who would learn of the decision via the press corp seated on the side of the Courtroom.[2]

Expanding her audience wider still, Justice Ginsburg included many public appearances in her already demanding schedule. She gave generously of her time to so many groups, including law school students, women's organizations and legal groups of all types. My favorite of these events was Justice Ginsburg's meeting with the players of the U.S. Olympic women's basketball team. After touring the Courtroom, she and Justice O'Connor brought them upstairs to the other "courtroom"—the basketball court! At the women's urging, Justice Ginsburg took a shot. With a little practice, the players agreed, she could become a point guard!

Justice Ginsburg's extracurricular interests ran to the arts, opera in particular. This too was a world she shared with her law clerks. One afternoon, she spirited us away from the Court to attend an Opera Look-In of *Carmen* at the Kennedy Center.

On those occasions when the Justice's husband, Martin D. Ginsburg, would join us, we glimpsed a very special "life partnership." Marty, a highly acclaimed tax specialist and law professor, was content to be known at the Supreme Court for the scrumptious cakes he baked for the Justice's holiday parties and birthday teas. We delighted in Marty's ever-so-gentle teasing of the Justice. Borrowing a line from Gilbert and Sullivan's *Pirates of Penzance*, he would respond to the Justice's repeated assurances that she was leaving the office, with "Yes, but you *don't* go!"[3]

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[2] *See* Ruth Bader Ginsburg, *Communicating and Commenting on the Court's Work*, 83 GEO. L.J. 2119, 2120, 2124-25 (1995).

[3] GILBERT & SULLIVAN, *The Pirates of Penzance*, *in* 1 THE ANNOTATED GILBERT AND SULLIVAN 131 (Penguin Books 1982). The exchange occurs in Act II; the Police say: "We go, we go! Yes, forward on the foe!" and the General replies "Yes, but you *don't* go!"

Underlying this good humor was a bedrock of respect and support. I well remember observing, during the Justice's Senate confirmation hearings, Marty arranging her notes on the table, as the soon-to-be Justice greeted the Senate Judiciary Committee Members. I also recall Marty's resplendent smile, as Justice Ginsburg frankly and adroitly responded to the Senators' questions. The relationship between the Justice and Marty truly marks the path toward gender equality in our society.

To close, I'd like to share two aspects of the Justice's vision of gender equality that encourage and inspire me. The Justice consistently emphasizes *opportunities*. This emphasis reflects her confidence that equality between the genders will emerge when women and men are afforded equal opportunities to be judged strictly on the basis of merit. According to the Justice, "simply by engaging the most able people" the numbers of women in the workplace will increase.[4] Although equality of opportunities will transform the workplace, the Justice cautions that equally significant changes are necessary to transform the homefront. According to the Justice, men must "accept equal responsibility for the burdens, and take equal pride in the joys, of parenthood."[5] I rejoice in the strength of Justice Ginsburg's vision and the limitless possibilities that it opens for all of us.

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[4] Ruth Bader Ginsburg, *The Washington College of Law Founders Day Tribute*, 5 Am. U. J. Gender & L. 1, *4 (1996).

[5] Ruth Bader Ginsburg, *Foreword*, 84 Geo. L.J. 1651, 1655 (1996).

Remarks on Judicial Independence[1]

The Honorable Ruth Bader Ginsburg*

Of all the words recently spoken and written about judicial independence, our Chief Justice's comments seem to me most directly on target. On the obligation of the good judge, Chief Justice Rehnquist said some years ago: He or she must strive constantly to do what is legally right, all the more so when the result is not the one the Congress, the President, or "the home crowd" wants.[2] And in a 1996 address at American University, the Chief commented:

> The framers of the United States Constitution came up with two quite original ideas—the first[,] . . . a chief executive who [is] not responsible to the legislature, as a Chief Executive is under the parliamentary system. The second[,] . . . the idea of an independent judiciary with the authority to declare laws passed by Congress unconstitutional. The first idea, a President [independent of the legislature], has not been widely copied by other nations . . . . But the second idea, that of an independent judiciary with the final authority to interpret a written constitution, has caught on [abroad], particularly since the end of the Second World War. It is one of the crown jewels of our system of government today.
>
> Change is the law of life, and the judiciary will have to change to meet the challenges which will face it in the future. But the independence of the federal judiciary is essential to its proper functioning and must be retained.[3]

It is a trite but true observation, Henry Fielding wrote, that examples work more forcibly on the mind than precepts,[4] so let me give you a stunning illustration of the message our Chief sought to convey. No doubt you will recall a 1974 unanimous opinion written by Chief Justice Rehnquist's predecessor, Warren E. Burger, in a case titled *United States v. Nixon*.[5] On Chief Justice Burger's death, a *New York Times* obituary called the opinion "the pinnacle of [Burger's] career and one of the [U.S.] judiciary's finest achievements."[6] The case concerned a subpoena issued by a U.S. District

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[1] These remarks were presented at the Hawai'i State Bar Reception in Honolulu, on February 3, 1998. They are published here substantially as delivered. To aid the reader, footnotes have been added.

* Associate Justice, Supreme Court of the United States.

[2] *See* William H. Rehnquist, *Dedicatory Address: Act Well Your Part: Therein All Honor Lies*, 7 PEPPERDINE L. REV. 227, 229-30 (1980).

[3] William H. Rehnquist, *Keynote Address at the Washington College of Law Centennial Celebration (April 6, 1996)*, 46 AM. U. L. REV. 263, 273-74 (1996).

[4] *See* HENRY FIELDING, JOSEPH ANDREWS 39 (R.F. Brissenden ed., Penguin Books 1977) (1742).

[5] 418 U.S. 683 (1974).

[6] *Justice Burger's Contradictions*, N.Y. TIMES, June 27, 1995, at A16.

Judge John Sirica directing the President to produce, for use in a criminal proceeding, tape recordings and documents capturing Oval Office conversations between Nixon and his advisers.

In his campaign for the Presidency, Nixon had repeatedly called for the restoration of "law and order." He pledged to appoint judges equal to the task, people who would not be "soft on crime."[7] A U.S. Supreme Court that included four Nixon appointees—in addition to Chief Justice Burger, now Chief Justice Rehnquist and Justices Powell and Blackmun—that Court declared the law and affirmed Judge Sirica's order, which the President obeyed, then promptly resigned from office.

Another, more recent example, a case still attracting hindsight commentary. In *Clinton v. Jones*,[8] a unanimous Supreme Court, in May 1997, rejected argument made on behalf of the President who appointed Justice Breyer and me. The Court held that the Constitution did not grant the President even temporary immunity from a tort suit based on an episode alleged to have occurred before he took office.

Time and again, and we are now in such a time, some members of Congress and of the press speak, write, or act as though they do not understand how seriously most federal judges—whether appointed by Kennedy, Johnson, Nixon, Ford, Carter, Reagan, Bush or Clinton—take their obligation to construe and develop the law reasonably and sensibly, with due restraint and fidelity to precedent, and to administer justice impartially without regard to what "the home crowd" wants.

To some extent, I think, assaults on judges from the political branches stem from a certain jealousy (federal judges face no periodic election campaigns but hold their offices during "good Behaviour"[9]) or some misperception about activities in which judges engage or should engage. For example, activities of the kind in which I am engaging all this week at the William S. Richardson School of Law not long ago were the subject of a Senate inquiry. Senator Grassley, Chairman of the Senate Judiciary Committee's Subcommittee on Administrative Oversight and the Courts, sent a survey to federal circuit and district court judges inquiring, among other things, about extracurricular activities. Questions included:

> (a) Are you involved in . . . teaching, lecturing, writing law review articles . . .?
> (b) If so, how much time do you spend on these activities, including preparation and travel?

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[7] *See, e.g.*, 2 STEPHEN E. AMBROSE, NIXON: THE TRIUMPH OF A POLITICIAN, 1962-1972, at 376 (1989).

[8] 520 U.S. 681 (1997).

[9] U.S. CONST. art. III, § 1.

(c) [W]hat is the compensation you receive for such activities?[10]

Many judges found the survey disquieting. Some found it, as did Second Circuit Chief Judge Ralph Winter, a good chance to educate, as that former Yale Law School teacher said, "an opportunity to dispel myths."[11]

An overwhelming majority of the court of appeals judges who responded to the survey (and a large majority did respond) reported: Indeed yes, they are involved in extracurricular educational and professional activities—notably teaching, lecturing, and occasionally writing law review articles.[12] Almost all performed such undertakings without personal compensation, accepting only travel expense coverage. The Executive Committee of the U.S. Judicial Conference, in its response to the Senate survey, explained that "[f]ederal judges have a long and distinguished history of service to the legal profession through their writing, speaking, and teaching";[13] the judges' committee emphasized that interaction between law schools, bar associations, and judges should be encouraged, not viewed with suspicion.

In October 1996, Senator Grassley published the results of his survey.[14] I found in the publication not a derogatory word about judges' teaching, lecturing, and writing. The report does propose some cost-saving measures, none of them, as I see it, as worthy of consideration as the proposal made by a panel of scholars, attorneys, and former judges appointed by the University of Virginia: Streamline the nomination process for federal judges, the panel counseled. If vacancies were filled expeditiously, those experts observed, the largest problem—the mounting caseload—could be tackled far more efficiently.[15]

Congress last year, did not follow that advice. As of December 1, 1997, there were 41 nominees pending before the Senate (13 for court of appeals posts, 28 for district court posts). In his 1997 year-end report, the Chief Justice commented on current vacancies. They had mounted to 82 of the 846 Article III judicial offices, he reported—almost one of every 10 Article III judgeships lacked an appointee. Of the 82 vacancies, 26 had persisted for 18 months or longer. Leading the queue, over one-third of the seats on the Court

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[10] STAFF OF SENATE SUBCOMM. ON ADMIN. OVERSIGHT AND THE COURTS OF THE SENATE COMM. ON THE JUDICIARY, 104TH CONG., REPORT ON THE JAN. 1996 JUDICIAL SURVEY, pt. 2, app. A, at 2 (1996) [hereinafter SENATE REPORT].

[11] Deborah Pines & Bill Alden, *District, Circuit Judges Use Senate Survey to Boast, Gripe*, N.Y.L.J., Mar. 25, 1996, at 1.

[12] *See* SENATE REPORT, *supra* note 9, at 49.

[13] RESPONSE OF THE EXEC. COMM. OF THE JUDICIAL CONF. OF THE UNITED STATES TO THE JUDICIAL SURVEY, Feb. 26, 1996, at 19.

[14] *See generally* SENATE REPORT, *supra* note 9.

[15] *See* Jonathan Groner, *Grassley's Poll*, LEGAL TIMES, May 20, 1996, at 6.

of Appeals for the Ninth Circuit remained empty. Vacancies cannot remain at such high levels, the Chief said, without eroding the quality of justice traditionally associated with the federal judiciary.[16]

Some of the reasons vacancies linger unfilled—my former colleague and D.C. Circuit Chief Judge Abner Mikva said in his November 1997 Cardozo Lecture in New York City—"are too trivial to be real."[17] A nominee for a vacancy in Texas was opposed in part because of his conscientious objector status during the Vietnam War. The expressed concern was that he might be biased in cases involving defense contractors.[18] A nominee in California, senior partner in a large law firm, was asked how she voted on over 100 California referenda in recent years.[19] She attracted Senators' suspicion for a speech she delivered while President of the California Bar Association. The speech described difficulties women lawyers encountered trying to meld careers and parenthood, and suggested that law firms, in their own self-interest, take a fresh look at their policies for career advancement.[20]

A brilliant lawyer in D.C. never gained the nomination the President contemplated, because decades ago he wrote an article criticizing the legal treatment of poverty in the United States.[21] A federal district court judge in Virginia, nominated for a court of appeals seat, was attacked because, sitting by designation, he served on an appellate panel that issued a per curiam decision overturning a conviction due to a juror's misconduct.[22]

An often-aired justification or excuse for the ideological screening of federal bench nominees is the asserted "egregious activism" or wrongheaded views of some seated judges.[23] A personal illustration. An *Associated Press* ("*AP*") release misreported a talk I gave at Louisiana State University in October 1996. The report said I called the U.S. Constitution outdated.[24] In fact, I praised the Constitution as it has evolved over the course of U.S.

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[16] *See* Chief Justice of the United States, 1997 YEAR-END REPORT ON THE FEDERAL JUDICIARY 7 [hereinafter 1997 YEAR-END REPORT].

[17] Abner J. Mikva, *The Judges v. the People: Judicial Independence and Democratic Ideals*, 52 THE REC. OF THE ASS'N OF THE BAR OF THE CITY OF N.Y., 791, 794 (1997).

[18] *See* Ron Hutcheson, *Gramm Official Lambastes Nominee*, THE FORT WORTH STAR-TELEGRAM, Nov. 17, 1997, at 1.

[19] *See* Viveca Novack, *Empty-Bench Syndrome: Congressional Republicans are Determined to Put Clinton's Judicial Nominees on Hold*, TIME, May 26, 1997, at 37.

[20] *See* Margaret Morrow, Address at the California State Bar Women in the Law Conference (Apr. 30, 1994); *see also* Monica Bay, *Women Urged to Change Profession's Priorities*, AMERICAN LAWYER, May 9, 1994, at 3.

[21] *See* Mikva, *supra* note 16, at 794.

[22] *See* Bruce D. Brown, *From the Freying Pan . . .*, LEGAL TIMES, Apr. 8, 1996,at 6.

[23] *See, e.g.*, Laurie Asseo, *Judicial Independence Threatened?*, AP ONLINE (Aug. 1, 1997).

[24] *See, e.g.*, Peter Shinkle, *Justice Ginsburg: Constitution "Skimpy,"* THE BATON ROUGE ADVOCATE, Oct. 25, 1996, at 1B-2B.

history.[25] The *AP* printed a correction,[26] but bad news, however incorrectly spun or distorted, is not easily erased. A sampling of letters received in chambers from readers of the incorrect release: "Your extreme views are outrageous. I am calling for your resignation." I deplore your "alien, Anti-American ideology." "I am ashamed that you were ever appointed to your position and especially ashamed that you are a woman."

In April 1997, the *American Legion Magazine*, a journal for armed services veterans, reported in its Washington Watch column: "ACLU views dominated [Ginsburg's] speech at Louisiana State University. 'She's showing her true colors,' [a spokesman for] the Judicial Selection Monitoring Project [commented]."[27] Ominously, the *Legion Magazine* added: "Congressional insiders predict the fallout [from Ginsburg's talk] will be intense Senate scrutiny ... of President Clinton's future nominees to the federal bench."[28]

Some members of Congress are urging eternal vigilance not only in screening nominees, but in bringing up for impeachment judges who decide cases wrongly. The House Majority Whip, Tom Delay, not a lawyer, but, Judge Mikva reports, an exterminator by profession,[29] has placed on his list of judicial pests a district court judge in San Antonio who held up certification of the election of two Republican victors in county races. The judge had issued a stay pending state court resolution of a charge that absentee ballots were counted from persons whose only tie to the election district had been temporary residence on a military base located in the district.[30] Once the state court held the ballots valid, the federal judge promptly vacated the stay order.[31] In justification of his undertaking to collect names of potential impeachment targets, Congressman DeLay commented that judges "need to be intimidated."[32]

Saving for last what I regard as the worst, a constitutional amendment has been proposed authorizing Congress, by a majority vote of each House, to overrule any federal or state court decision resolving a constitutional question.[33]

At a January 5, 1998 meeting of the ABA Litigation Section on Maui, Australia High Court Justice Michael Kirby gave a talk in which he com-

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[25] *See generally* Ruth Bader Ginsburg, *An Overview of Court Review for Constitutionality in the United States*, 57 LA. L. REV. 1019 (1997).

[26] The AP correction circulated on November 4, 1996.

[27] Cliff Kincaid, *Judge Not, Lest Ye ...*, AM. LEGION MAG., Apr. 1997, at 16.

[28] *Id.*

[29] *See* Mikva, *supra* note 16, at 793.

[30] *See* Casarez v. Val Verde County, 957 F. Supp. 847 (W.D. Tex. 1997).

[31] *See* Casarez v. Val Verde County, 967 F. Supp. 917 (W.D. Tex. 1997).

[32] *As quoted in* Herman Schwartz, *One Man's Activist: What Republicans Really Mean When They Condemn Judicial Activism*, WASHINGTON MONTHLY, Nov. 1997, at 10.

[33] *See* ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH 117 (1996).

mented on judge bashing as a worldwide phenomenon. Justice Kirby mentioned the 1996 remarks of the U.K.'s current Lord Chancellor condemning "judicial invasion of the legislature's turf." Judges in New Zealand, Kirby noted, have been castigated for bail decisions that went awry; and a former Prime Minister of Australia accused his country's High Court bench of "undermin[ing] democracy." Australia's current Deputy Prime Minister promised that when High Court Justices now sitting reach the mandatory retirement age of 70, the Government will appoint in their stead "Capital C conservatives."[34]

The conservation work needed in the United States, as I see it, is of a different kind. It is to conserve the historic role of courts under our constitutional system, in Justice Hugo Black's words, the authority and responsibility of the Third Branch to "stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement."[35] The United States, time and again, has been a model for the world in this regard. May it not surrender, but instead sustain, that great example.

I am not merely indulging in wishful thinking, for there is good news too. Bar associations, state, local, and national, have helped the public to understand that both restraint and courage are qualities the good jurist must have, and that independence is essential to the preservation of courage. The public, it seems, is receptive to the message. In a 1996 poll, 84 percent of responders agreed it was unreasonable for a President or member of Congress to try to influence a federal judge's decision in a pending case. And 83 percent thought it inappropriate to use judicial decisions as targets in political campaigns.[36]

Will our Chief Justice's year-end plea to fill vacancies be heard? Senator Hatch, who heads the Senate Judiciary Committee, offered some cause of hope. His immediate response: "If I were Chief Justice, I would be keeping the pressure on too."[37] And he noted that he had intervened to block "tit for tat" moves against Clinton appointees by what he termed "a handful" of Republicans.[38] Senator Grassley, who heads the subcommittee that monitors the judiciary, said: "Delays in filling vacancies are partly the blame of the

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[34] Michael Kirby, Attacks on Judges—A Universal Phenomenon, Address at the Winter Leadership Meeting of the American Bar Ass'n Section on Litigation (Jan. 5, 1998).

[35] Chambers v. Florida, 309 U.S. 227, 241 (1940).

[36] *See* John Gibeaut, *Taking AIM*, 82 A.B.A. J. 50, 52 (1996).

[37] *As quoted in* David S. Broder, *Partisan Sniping on Judicial Vacancies Gets Louder*, WASH. POST, Jan. 3, 1998, at A7.

[38] *Id.*

President and partly ours."[39] Hatch added: "If [the President] will give us good nominees, they will move quickly."[40] We shall see.

I confess that, in my views on the prime place of independence for federal judges, I am an "originalist." I am mindful of one of the grievances against George III enumerated in our Declaration of Independence: "He has made judges dependent on his Will alone, for the Tenure of their Offices, and the Amount and Payment of their Salaries."[41] I side with James Madison, and will recall his words when he introduced in Congress the amendments that became our Bill of Rights:

> [I]ndependent tribunals of justice will consider themselves in a peculiar manner the guardians of th[e]se rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.[42]

May Madison's vision remains our guide. And may I close as the Chief Justice did in his 1997 year-end report:

> The [U.S.] public continues to hold the judiciary in high regard. The [U.S.] judiciary continues to command respect abroad. Representatives of other judicial systems frequently visit our courts, and from my conversations with them it is clear that there is international recognition of an able, independent federal judiciary in this country. Let us strive to uphold this splendid tradition as we go forward toward the millennium.[43]

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[39] *Id.*

[40] *Id.*

[41] THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776).

[42] James Madison, Address to the House of Representatives (June 8, 1789), *reprinted in* THE MIND OF THE FOUNDER 224 (Marvin Meyers ed., 1973).

[43] 1997 YEAR-END REPORT, *supra* note 15, at 19.

Judicial Independence[1]

Judge Myron Bright*

I. THE PAST

Justice Ginsburg and I have a mutual friend, retired Justice Harry Blackmun, who has turned movie actor in a recent Spielberg-directed movie, *Amistad*. The movie *Amistad* has been reviewed as a true story of Africans kidnapped into slavery who overcome and kill their captors and become freed in these United States. But it is a story of more than slavery to redemption and freedom. It is a story of the independence of the judiciary.

To those who have not seen the film, I give a short review. The kidnapped Africans are taken from the slave fortress in Africa to Havana, given false identifications, sold as slaves in Havana and placed on a ship to be exported as slaves. Enroute, they overcome their captors except for two of the Spanish leaders. The Africans want to go back home to Africa but are fooled into sailing to this country and land in Connecticut. There, they are imprisoned, and the competition ensues for their lives and bodies. Isabella, the Queen of Spain, seeks their return as Spanish property. Two Spaniards, Ruiz and Montez, claim the *Amistad* slaves as their property. The American warship which discovered and placed the Africans in custody sought an interest in the slaves and cargo as a prize in admiralty.

Into this litigation, President Martin Van Buren, who is up for re-election intervenes. He is under pressure from the southern states and from the Secretary of State on behalf of Spain to intervene and make sure the slaves do not become free.

Martin Van Buren first dismisses the federal judge hearing the case when it appears that the judge may have reacted favorably to the evidence presented in favor of freedom. That judge is transferred and a friend of the Administration is placed in charge of the case to serve without a jury. That judge may be a friend of Martin Van Buren and the Administration but most of all he shows himself to be a true judge, independent of the Administration and he decides for freedom.

The Administration then seeks an appeal which ends up in the United States Supreme Court which numbers among its members seven slave-holding judges. The Supreme Court exhibits judicial independence too and decides for freedom. Justice Blackmun in a memorable role renders the Supreme Court decision. The queen of Spain is shown as rejecting the decision. In her

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[1] These remarks were presented at the Hawai'i State Bar Reception in Honolulu, on February 3, 1998. They are published here substantially as delivered.

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queendom, the courts do precisely what the queen desires. The independent Supreme Court rejected the demands of the Van Buren Administration and decided the case for freedom for the Africans.

For this lecture I went into the United States Reports and read the case, 40 U.S. 518 (1840) (*"Amistad"*). Roger Baldwin, who argued the case for Cinque and his fellow Africans made this statement to the Court:

> In preparing to address this honorable court, on the questions arising upon this record, in behalf of the humble Africans whom I represent–contending, as they are, for freedom and for life, with two powerful governments arrayed against them–it has been to me a source of high gratification, in this unequal contest, that those questions will be heard and decided by a tribunal, not only elevated far above the influence of executive power and popular prejudice, but, from its very constitution, exempt from liability to those imputations to which a Court, less happily constituted, or composed only of members from one section of the Union, might, however unjustly, be exposed.
>
> This case is not only one of deep interest in itself, as affecting the destiny of the unfortunate Africans whom I represent, but it involves considerations deeply affecting our national character in the eyes of the whole civilized world, as well as questions of power on the part of the government of the United States, which are regarded with anxiety and alarm by a large portion of our citizens.[2]

Now, 150 years later, as then in the early years of our country's history, freedoms rest on the foundations of an independent judiciary.

Let me put judicial independence in a global perspective. Judicial independence, as we know it in these United States, however, is a goal sought to be obtained in many countries of the world and, particularly, in the Asian countries, including China, and in almost all the newly established nations in Africa and in the changed face of Russia.

Judge Clifford Wallace, former Chief Judge of the Ninth Circuit, and I serve together on a judicial conference committee called the International Judicial Relations Committee. Our work includes among other things sharing our "know-how" with foreign judges to assist those foreign courts. A measure of independence is a goal of every foreign judiciary. Judge Wallace who has spoken to us of the problem indicates that independence of a judiciary in foreign lands requires these attributes—credibility, fairness and efficiency. Those attributes of an independent judiciary are necessary in this country too. Let us briefly examine a little more in depth what is going on in these areas in our society.

As Justice Ginsburg reminds us, while independence of the judiciary remains an absolute necessity for our constitutional government to function, that independence is under attack. As I look back over my long career in the

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[2] 40 U.S. at 549.

law, I can easily say, "Again." The recent news tells us that judges, including both federal and state judges, are under attack.

As a student back in 1937, I remember President Roosevelt's criticism of the United States Supreme Court in his failed attempt to increase the number of judges on the Court from 9 to 15 in the hope that the Court would stop declaring unconstitutional the New Deal legislation.

In the 50's when I practiced law in the State of North Dakota, it was not uncommon to travel through the country-side and see emblazoned on large signs on big grain storage buildings the following legend: "IMPEACH EARL WARREN." Earl Warren, in my opinion, was one of the great Justices in the history of the United States Supreme Court, who did so much to make the clause "equal protection of the laws under the Constitution" a meaningful phrase.

Then later came a movement in the Congress to impeach Justice Douglas for reasons that frankly escape me now and really were not very solid at any time. Then later we had the spectacle of Justice Fortas resigning his seat on the United States Supreme Court under fire. In those days the ire of the people and the politicians was focused on our highest Court and not much was said about the federal judges who labored in trying cases on the United States district courts and in examining appeals on the United States courts of appeal.

The one exception is one I remember very well, because in the mid-70's I went to a seminar critiquing the federal judiciary and all I heard was criticism of the so-called activist judges. Indeed, two of the federal judges who attended this session declared openly that they would no longer be activist judges. I never thought I was an activist judge, so I made no such declaration.

II. THE PRESENT

The federal courts came through this period in relatively good shape. No federal judge has been impeached for his or her decisions. The integrity of the judiciary with very minor exceptions has been upheld and is considered exemplary. But somehow the mood of the country has changed. We are a far more angry society now than we were 25 years ago. Now the judges catching the brunt of criticism about their activities are not only the members of the United States Supreme Court, but those of us who toil in the litigation field as district judges or as appellate judges. For the most part in the federal system, the United States district judges have been catching the flack of public dissatisfaction with individual decisions. In the state system, supreme court justices have been dismissed under mostly unfair and often scurrilous, untruthful attacks.

I mention four recent instances of what is going on in some quarters. Probably the most prominent recent case is that of Judge Harold Baer, United

States District Judge for the Southern District of New York, who in March 1960 decided that the police had committed an unconstitutional search and seizure of a defendant drug runner's car and suppressed the seized drugs. The prosecution filed a motion for reconsideration and pending that motion, Senate Majority Leader Robert Dole and Speaker of the House Newt Gingrich both threatened to initiate impeachment proceedings against Judge Baer if he did not change his ruling. The President, I assume in consideration of the forthcoming election, spoke through one of his representatives that if Judge Baer did not change his ruling, he would consider asking for his resignation. This was a serious and direct attack on the independence of a federal judge by members of the Executive and Legislative branches. This is the first time I have heard threats of impeachment because of a single decision made by a lower court judge. Fortunately, or perhaps unfortunately, depending on how you look at it, Judge Baer reconsidered and changed his ruling. That took the heat off for awhile.

Justice Ginsburg has mentioned a number of other examples in the federal courts. But judge bashing has become a serious problem in state judiciaries. Judges are dismissed or rejected not for the legal correctness of their decisions, but due to the political opposition to those decisions. Justice Penny White of the Tennessee Supreme Court was voted off the court in a retention election because of her vote on a death penalty case. She was the subject of false, scurrilous and misleading advertisements.

In the last election, David Lanphier, a justice on the Nebraska Supreme Court, lost his retention election because, among other things, he voted with the majority to declare term limits for legislators unconstitutional. An editorial in a Lincoln, Nebraska newspaper, the *Lincoln Journal Star*, stated, "This is a dangerous direction. A judge is being forced to defend himself against the spin of detractors–nameless detractors at that." The editorial went on to state:

> The trouble is, Lanphier's character and work habits should be the issue. A handful of decisions should not be the issue . . . . This is a dangerous direction turning a judge's job into another political office. This politically motivated campaign could easily spawn imitators. Folks who want to oust a judge because of a narrow personal agenda, could make a mockery of the merit system. If that occurs, Nebraska will be on its way to trashing a system where judges can make decisions based on the merits of the law, the arguments of the case and their own sense of fairness.

State judges do not have quite the independence of federal judges who hold office "during good behavior" and can only be threatened but not dismissed except by impeachment. Yet the election and retention procedures exert pressures that can affect the independence of state judges.

I focus briefly on a federal case mentioned without a name by Justice Ginsburg. This was Judge Beaty, a district judge, sitting by designation on the Fourth Circuit. This circuit is not known for any softness toward criminals. But in an egregious case of juror misconduct, the panel on which Judge Beaty sat overturned a murder conviction. At the time, Judge Beaty's nomination for a fourth circuit judicial vacancy was pending. Here's what the chairman of that committee had to say:

> President Clinton is rewarding Judge Beaty by promoting him. While the President cannot force activist, soft on crime judges to resign, he can choose to keep them where they are instead of promoting them to the appellate courts where they can do even more damage to the law and to our communities. Maybe he ought to withdraw the nomination.

Look at the Fourth Circuit judges. There hasn't been a new judge appointed since 1994.

At this point, I ask you this rhetorical question. If you were a United States district judge sitting in the District of Hawai'i and your name had been mentioned for one of the vacancies on the Ninth Circuit, would the experience of Judge Beaty weigh heavily upon you when you were examining a petition for writ of habeas corpus of a "cause-celeb" criminal who maintained that his constitutional rights had been violated both in his arrest and during the trial? You answer that question and answer whether or not that kind of conduct on the part of our elected representatives has as its goal influencing or pressuring federal judges. Fortunately, I hope few, if any, will be influenced.

Let's talk a bit about what independence of the judiciary means. I give you this definition.

> Judicial independence refers to the existence of judges who are not manipulated for political gain, who are impartial toward the parties of a dispute, and who form a judicial branch which has the power as an institution to regulate the legality of government behavior, enact "neutral" justice, and determine significant constitutional and legal issues.[3]

I ask, are the actions of Congress, the public and the press in fact eroding the concept of judicial independence?

I also want to underscore another aspect of judicial independence referred to by Justice Ginsburg; that is the failure of Congress to fill current vacancies on the federal courts. In this regard, I reiterate a matter previously mentioned. An independent judiciary requires efficiency. The failure to fill vacancies is crippling the efficiency of the federal courts. In some jurisdictions it takes years to get a trial on a civil case.

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[3] Christopher M. Larkins, *Judicial Independence and Democratization: A Theoretical and Conceptual Analysis*, 44 AM. J. COMP. L. 605, 611 (1996)(citations omitted).

Let me emphasize only two circuits. Two immensely important circuits–your circuit, the Ninth, and the eminent Second Circuit based in New York. The Second Circuit with thirteen appellate judges is limping along with four (30%) vacancies. The Ninth Circuit with twenty-eight authorized judges has ten vacancies (almost 37%). Six nominations have been made. Three of them, Bill Fletcher, Richard Paez and Margaret McKeown, have been pending since January 1997. The Judge Norris vacancy has been open since mid-1994. Add to that twenty-two district judge vacancies, including one here in Hawai'i. Susan Oki Mollway's nomination has been pending since January 1997, and the vacancy resulted from the death of Harold Fong more than two and a half years ago.

Now, I recognize that the failure to nominate judges for the federal bench does not directly impinge on judicial independence, but it is part of the problem of the judiciary and its relation to the public and to the Congress. But, indirectly it affects the quality of justice. My colleague on the Eighth Circuit Court of Appeals, Judge Lay, wrote in a case that had been litigated for ten years:

> The executive and legislative branches of our government bear some responsibility for this delay. During much of the intervening time, the District of Minnesota was short-handed because of the delayed appointments of two district judges. The problem is a continuing one, from the far past to the present. Much of the responsibility for judicial vacancies is attributable to the political process and the refusal to expedite judicial appointments. This delay only serves to aggravate the litigation crunch Article III judges confront on a daily basis. The ultimate victims of this delayed process are the American people.[4]

I don't have to tell this group of lawyers about the importance of judicial independence. That independence guarantees our freedom and also guarantees the neutrality of the judge who sits and decides your cases.

For a moment, let me return to remarks of my old friend Justice Ginsburg. She reported on former Judge Abner Mikva's Cardoza's lecture. I add a quote from Judge Mikva's presentation:

> The bar has a most important role to play here. Only the lawyers know enough and have enough self-interest to defend the judges in their unpopular decisions. Lawyers not only have to restrain their own judge bashing, which they want to do; they have to be the voice of the judges. If [they don't], who will defend the notion of an independent judiciary?
>
> There is a bad climate out there. It is not the first time the judges have been under attack. As people become more estranged from their government in general, it is easier to attack those appointed busybodies who turn criminals

[4] Jensen v. Eveleth Taconite Co., 130 F.3d 1287, 1304 (8th Cir. 1997).

> loose, who keep kids from praying, who keep the police from doing their jobs, who never seem to come up with the common sense solutions that Judge Wapner, or now Judge Koch, comes up with on "People's Court."

Let me look you, the bar here in Hawai'i, straight in the eye. I say to you, we judges need you to speak for us, and by us I mean the judges who serve you in the great state of Hawai'i, as well as those who serve in the federal judiciary.

You have a responsibility. What are you going to do about it?

"The Way Women Are": Some Notes in the Margin for Ruth Bader Ginsburg

Kenneth L. Karst*

In the first decade of the modern women's movement, Professor Ruth Bader Ginsburg led the Women's Rights Project of the American Civil Liberties Union. In this capacity she was the nation's leading litigator on behalf of women's claims to equal justice under law. Think of any Supreme Court decision on women's rights in the 1970s, and you can be sure that Ruth Bader Ginsburg was there.[1] Beginning with *Reed v. Reed*,[2] she sought to persuade the Supreme Court (1) that official sex discrimination, like racial discrimination, should be subjected to exacting judicial scrutiny of its asserted justifications, and (2) that a state's asserted justification for treating women and men differently would not pass that scrutiny if it were based on generalized assumptions about "the way women are."[3]

In what came to be called the "equal treatment/special treatment debate,"[4] Professor Ginsburg was identified as a protagonist of equal treatment. She argued for invalidation of a number of laws giving "benign" special treatment to women[5] because those laws reinforced stereotypical assumptions that women were inherently weak, domestic, or dependent—the very assumptions

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[1] In nine cases decided by the Supreme Court in the 1970s, Professor Ginsburg participated in writing the main brief; in six of those she presented an oral argument to the Court. In another fifteen cases she participated in writing briefs amici curiae to the Court. She also participated in writing petitions for certiorari or other memoranda in eleven cases that the Court did not decide.

For a comprehensive review of Professor Ginsburg's work as director and principal litigator of the Women's Rights Project, see Deborah L. Markowitz, *In Pursuit of Equality: One Woman's Work to Change the Law*, 11 WOMEN'S RTS. L. REP. 73 (1989).

[2] 404 U.S. 71 (1971).

[3] Markowitz, *supra* note 1, at 81 (quoting Ruth Bader Ginsburg as recorded in an oral history project).

[4] For a persuasive explanation that this "debate" was a difference in emphasis rather than a sharp disagreement over the content of women's rights to equality, see Wendy W. Williams, *Notes from a First Generation*, 1989 U. CHI. LEGAL F. 99, 105 and *passim*; *see also* Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 351-80 (1984-85).

[5] *See, e.g., Kahn v. Shevin*, 416 U.S. 351 (1974), in which the Women's Rights Project represented a widower who challenged the validity of a state property tax exemption for widows and not for widowers. The Court rejected this challenge, but virtually overruled *Kahn* six years later. *See* Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142 (1980).

that had rationalized the exclusion of women from participation as equal citizens in the public life of communities both local and national. After her accession to the bench, Judge Ginsburg sounded the same theme in her occasional nonjudicial writings. She rejected the idea that a law treating women and men differently could be justified by

> the thesis that women and men speak in or respond to different voices or have fundamentally dissimilar psyches and moral systems. Accepting the truth of the thesis generally, or "on the average," how should I act on it? . . . I am fearful, or suspicious, of generalizations about the way women or men are. . . . [T]hey cannot guide me reliably in making decisions about particular individuals.[6]

Judge Ginsburg wrote those words in 1986. Ten years later, as Justice Ginsburg, she confronted the case of *United States v. Virginia*,[7] a constitutional challenge to the exclusion of women from Virginia Military Institute ("VMI").

When the VMI case was in the lower federal courts, it provided a textbook example of the way in which "generalizations about the way women or men are" can be translated into "decisions about particular individuals." To train its cadets to be leaders, VMI had long employed a punishing "adversative method which pits male against male,"[8] emphasizing rigid discipline, deprivation of privacy, and the imposition of mental stress on cadets. All these techniques, designed to produce a "leveling process,"[9] were brought to bear with special force on the "rat line," as first-year VMI cadets are called. As all parties conceded, a central feature of the adversative method is the incessant tormenting and humiliation of the rat line by upperclassmen. The district court found that such a program was suited to men, because men "tend to need an atmosphere of adversativeness."[10] Women, in contrast, "tend to thrive in a cooperative atmosphere"; because most women would not thrive at VMI, the exclusion of women was justified.[11] A divided court of appeals

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[6] Ruth Bader Ginsburg, *Some Thoughts on the 1980s Debate over Special Versus Equal Treatment for Women*, 4 LAW & INEQ. J. 143, 148 (1986).

[7] 518 U.S. 515 (1996).

[8] United States v. Virginia (VMI II), 44 F.3d 1229, 1233 (4th Cir. 1995).

[9] *Id.*

[10] United States v. Virginia (VMI I), 766 F. Supp. 1407, 1434 (W.D. Va. 1991)

[11] *See id.* The district court concluded that some women would be suited to the VMI adversative method, but that this method would, in the words of the court of appeals, "not produce the same results when a male is set against a female." *VMI II*, 44 F.3d at 1233. Thus, admitting women to VMI would "deny those women the very opportunity they sought because the unique characteristics of VMI's program would be destroyed by coeducation." United States v. Virginia (VMI I), 976 F.2d 890 (4th Cir. 1992), *reaffirmed (in VMI II) at* 44 F.3d at 1233.

By the time the case reached the Supreme Court for decision on the merits, the lower courts had approved the proposal of the Commonwealth of Virginia to establish a parallel program at Mary Baldwin College, a private women's liberal arts college. The new program

affirmed, on the basis of these findings about tendencies of men in general and women in general.[12]

The Supreme Court reversed, in a 7-1 vote.[13] In an opinion by Justice Ginsburg, the Court soundly rejected this version of "the tyranny of averages"[14] as a justification for excluding women from the "unique" educational opportunity offered by VMI.[15] Furthermore, the Court said—with repetition for emphasis—that governmental sex discrimination will be held unconstitutional unless it can be supported by "an exceedingly persuasive justification."[16] Justice Scalia protested that this formula, for most practical purposes, amounted to strict judicial scrutiny, and he was right.[17] A quarter century after *Reed v. Reed*,[18] the VMI decision has brought to fruition both of the early doctrinal goals of the Women's Rights Project. When Justice Ginsburg recently mentioned the failed Equal Rights Amendment in remarks to a student audience, she said, "There is no practical difference between what has evolved and the E.R.A."[19]

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would be called the Virginia Women's Institute for Leadership (VWIL). It would include some military training but would not use the "adversative method," because, as educational experts had concluded, that method "would not be effective for women as a group." *VMI II*, 44 F.3d at 1233.

For a critical analysis of the lower court proceedings, see Dianne Avery, *Institutional Myths, Historical Narratives and Social Science Evidence: Reading the "Record" in the Virginia Military Institute Case*, 5 S. CAL. REV. L. & WOMEN'S STUD. 189 (1996).

[12] *VMI II*, 44 F.3d 1229.

[13] *See* United States v. Virginia (VMI II), 518 U.S. 515 (1996). Justice Thomas had recused himself; his son was attending VMI.

[14] Perry Treadwell, *Biologic Influences on Masculinity*, *in* THE MAKING OF MASCULINITIES 259, 278-81 (Harry Brod ed. 1987).

[15] *See VMI II*, 518 U.S. at 546. The Supreme Court concluded that VWIL's instruction would not be comparable to VMI's program, and that VWIL's graduates would not hold a degree comparable in prestige to a VMI degree. Thus Virginia was denying all women admission to VMI's "unique" benefits. *See id.* at 546-56. The term "unique" was applied to VMI by both parties; all the judges in the case, at all levels, used the same label.

[16] *Id.* at 556. The expression is most commonly associated with Justice Sandra Day O'Connor's opinion in *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982), but it originated in *Personnel Administrator v. Feeney*, 442 U.S. 256, 273 (1979).

[17] *See VMI II*, 518 U.S. at 565, 571 (Scalia, J., dissenting). Commentary on the decision inclines toward Justice Scalia's characterization. *See, e.g.*, Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 75, 77 (1996); Candace Saari Kovacic-Fleischer, *United States v. Virginia's New Gender Equal Protection Analysis with Ramifications for Pregnancy, Parenting, and Title VII*, 50 VAND. L. REV. 845, 880-83 (1997).

[18] 404 U.S. 71 (1971).

[19] Quoted in Jeffrey Rosen, *The New Look of Liberalism on the Court*, N.Y. TIMES, Oct. 5, 1997, § 6 (Magazine), at 60, 65 (internal quotation marks omitted).

I. OF RATS AND MEN

Dissenting in the VMI case, Justice Scalia proclaimed—with the animation of a football player celebrating a touchdown—that "anti-feminism" was not part of Virginia's purpose in excluding women from VMI.[20] The evidence, he said, "utterly refuted the claim that VMI has elected to maintain its all-male student-body composition for some misogynistic reason."[21] Justice Ginsburg did not bother to respond. The majority had made no such claim, and modern doctrine governing sex discrimination has never required proof of misogyny to support a claim of constitutional violation.[22] Another reason for ignoring Justice Scalia's provocation to a spat may have been a reluctance to indulge in name-calling with an old friend. This possibility is more interesting, but it requires elaboration.

A subtext runs throughout the VMI case, both in the majority opinion and in the dissent.[23] The subtext is that VMI, up to the time of the Supreme Court's decision, offered young men what they perceived as an opportunity to validate their manhood. The anxiety of manhood occupies the space between the abstract (and thus unattainable) ideal of masculinity and the efforts of the individual boy or man to perform the masculine role. The pursuit of manhood, above all, consists in expressions of power, on repeated occasions.[24] The principal stages for enacting these dramas are situations

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[20] *See VMI II*, 518 U.S. at 580 (Scalia, J., dissenting).

[21] *Id.*

[22] In a concurring opinion, Chief Justice Rehnquist did respond to Justice Scalia's comment about misogyny. *See id.* at 562 n.* (Rehnquist, C.J., concurring). The context was a disagreement over the merits of Virginia's assertion that VMI's males-only policy served an interest in diversity of educational opportunity in the Commonwealth. The Chief Justice said, "We may find that diversity was not the Commonwealth's real reason without suggesting, or having to show, that the real reason was 'antifeminism.'" *Id.*

The Chief Justice's concurrence is remarkable in another way. In rejecting the majority's use of the "exceedingly persuasive justification" standard for judicial review in sex discrimination cases, he stands foursquare for the standard of intermediate scrutiny announced in *Craig v. Boren*, 429 U.S. 190 (1976). After setting out that standard, he says, "We have adhered to that standard of scrutiny ever since," *VMI II*, 518 U.S. at 558, and follows with citations to thirteen cases. In *Craig* and in most of the other cases cited, the Chief Justice was in dissent from the Court's heightened scrutiny. One of the opinions cited is his own plurality opinion in *Michael M. v. Superior Court*, 450 U.S. 464 (1981), where he cut the heart out of the *Craig* formula by relaxing the means scrutiny previously required. *See* text accompanying *infra* notes 49-52. As his opinion in the VMI case shows, the Chief Justice has steered a more centrist path since he came to occupy his present post.

[23] Chief Justice Rehnquist's concurring opinion does not fit this "subtext" characterization.

[24] Some years ago I sketched some of the main images of manhood that bombard Americans every day:

> [A] man is supposed to be: active, assertive, confident; decisive; ready to lead; strong; courageous; morally capable of violence; independent; competitive; practical; successful

characterized by male rivalry. The basic anxiety of manhood is "the fear of being dominated by other men, humiliated for not living up to the manly ideal."[25]

A young man need not enter VMI to experience a process that "pits male against male."[26] But the process at VMI has been unusually focused and intense. When Justice Scalia refers to VMI's "military, adversative, all-male environment,"[27] and when he embraces the district court's conclusion that VMI's all-male composition "is essential to that institution's character,"[28] he is evoking the atmosphere of an institution in which the achievement of manhood is a central pursuit. In the VMI that preceded the Supreme Court's decision, a boy in his late teens entered as a "rat," and spent a year in submission to the domination of the upperclassmen. Then he had three more years of male-against-male encounters that handed him, on a platter, endless opportunities to dominate the rat lines that succeeded his own.[29] Three years is a good run for any dramatic performance, even *Tom Brown's School Days*.[30] Up to now, the prestige of a VMI degree has included its function as a certificate of masculinity.

Justice Scalia's complaint that the majority "shuts down" VMI[31] cannot be taken literally; VMI is still operating, even though women are now enrolled.[32] But Justice Scalia is right to this extent: the VMI decision did shut down an institution that had given young men an opportunity to prove their manhood in a particular way. When those lower court judges said that admission of

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in achieving goals; emotionally detached; cool in the face of danger or crisis; blunt in expression; sexually aggressive and yet protective toward women. "Proving yourself" as a man can take many forms, but all of them are expressive, and all are variations on the theme of power.

Kenneth L. Karst, *The Pursuit of Manhood and the Integration of the Armed Forces*, 38 UCLA L. REV. 499, 504 (1991).

[25] *Id.* at 505.

[26] These are the words of the court of appeals. *See VMI II*, 44 F.3d at 1233.

[27] *VMI II*, 518 U.S. at 587. The context leaves little doubt that Justice Scalia regards the three adjectives as roughly synonymous in the VMI context.

[28] *Id.* at 566.

[29] In her essay on The Citadel, Susan Faludi suggests that the "knobs" (The Citadel's first-year cadets, subjected to severe hazing similar to VMI's hazing of the "rat line") are cast in feminine roles in a "domestic male paradise." The result, she says, is "a ruthless intimacy, in which physical abuse stands in for physical affection, and every display of affection must be counterbalanced by a display of sadism." Susan Faludi, *The Naked Citadel*, NEW YORKER, Sept. 5, 1994, at 62, 80. On reading Faludi's piece for a second time, after the VMI decision, I was reminded that a number of the most powerful rituals of manhood—especially those used in the military training of the recent past—do, indeed, feature misogyny.

[30] *See* THOMAS HUGHES, TOM BROWN'S SCHOOL DAYS (Harper & Bros. 1911)(1857).

[31] *See VMI II*, 518 U.S. at 566 (Scalia, J., dissenting).

[32] *See infra* note 39.

women would mean the "destruction" of VMI,[33] they had the same point in mind: Part of what made VMI "unique"[34] was its function as an arena for proving manly status by performing masculine roles, and the exclusion of women had been seen as central to that function.

The nation's armed forces have historically satisfied similar psychic needs by similar means, socializing males in their late teens through manipulation of the anxieties of manhood.[35] Even when women came to be admitted to the forces in large numbers, the proof-of-manhood function remained unchanged so long as women were excluded from the services' main functions—that is, excluded from jobs designated as "combat" positions.[36] Today women fly combat aircraft, serve on combat ships, and occupy many jobs that used to carry the "combat" label. They remain excluded from combat positions in the infantry, armor, and artillery branches of the Army, and in the Marines. Back when women were entirely barred from combat positions, General Robert H. Barrow, then Commandant of the Marine Corps, made clear the psychological function of the exclusion. Allowing women in combat, he said, "tramples the male ego. When you come right down to it, you have to protect the manliness of war."[37]

It wasn't misogyny that General Barrow was expressing; it wasn't antifeminism, either. Rather it was the assumption that a warrior, to be

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[33] *See VMI II*, 44 F.3d at 1233.

[34] *See supra* note 15 and accompanying text.

[35] *See* William Arkin & Lynne R. Dobrofsky, *Military Socialization and Masculinity*, 34 J. SOC. ISSUES 151 (1978); R. W. Eisenhart, *You Can't Hack It Little Girl: A Discussion of the Covert Psychological Agenda of Modern Combat Training*, 31 J. SOC. ISSUES 13 (1975)(on Vietnam era).

Over the last two decades, drill sergeants have deployed fewer and fewer insults such as "bitch" and "faggot" to motivate their charges. Such terms are now forbidden by service regulations, and they surface relatively rarely. Basic training and boot camp today remain rigorous, but have become far less demeaning. This change reflects the conviction of the top leaders of the services that leadership is most effective when subordinates are treated with dignity. *See, e.g.*, Paul Richter, *Boot Camp Softens Its Image*, L.A. TIMES, Oct. 26, 1997, at A1; James Kitfield, *Basic Training Gets Nice*, NAT'L J., Sept. 27, 1997, at 1914.

[36] For fuller discussion of the ways in which the combat exclusion was historically expanded and contracted for purposes unrelated to the competence of women, see Karst, *supra* note 24, at 523-45.

In 1991, Congress repealed the old statutory ban on women as combat pilots in the Navy and Air Force. In 1993 the Secretary of Defense ordered the services to open combat aircraft jobs to women, proposed congressional action to lift the ban on women in most combat vessels, and ordered the exploration of opportunities for women in a number of ground combat jobs, including the field artillery and combat intelligence. *See* Melissa Healy, *Aspin Orders Wider Military Role for Women*, L.A. TIMES, Apr. 29, 1993, at A1. For the current posture of the services, see *infra* notes 67-74 and accompanying text.

[37] Michael Wright, *The Marine Corps Faces the Future*, N.Y. TIMES, June 20, 1982, § 6 (Magazine), at 16, 74 (quoting General Robert H. Barrow).

effective, must see war as a performance of his manhood and must cast himself in a role that is uncompromisingly masculine. Justice Scalia might have been making a similar assumption when he referred, in one breath, to VMI's "military, adversative, all-male environment." Justice Ginsburg might not have wanted to suggest to her friend and colleague that his denial of misogyny and antifeminism on the part of VMI said less about the majority opinion than it said about his own views on masculinity and its validation.

II. THE INFLUENCE OF A "CRITICAL MASS"

The all-male Virginia Military Institute was the *alma pater* for two of the best-known generals of the Second World War: the charismatic, hell-for-leather George S. Patton, Jr., whose tanks spearheaded the Allies' drive in Northern France in 1944, and the sober, trenchant George C. Marshall, the Army Chief of Staff who became the main architect of the Allies' global strategy. Patton achieved notoriety when he publicly slapped a soldier who was suffering from battle fatigue. Marshall went on after the war to serve with distinction as Secretary of State and Secretary of Defense. Both Patton and Marshall are celebrated at VMI as models of leadership, but the "adversative method" is a salute to Patton.[38]

All thirty women who entered VMI in the fall of 1997 were, no doubt, seeking leadership training.[39] Some of them probably were seeking to demonstrate their abilities to compete in a traditionally male environment. But not a single one of them needed to prove that she is a real man. This would seem to be a qualitative difference of some importance, a difference that will be more evident when members of that year's rat line are seniors, and the number of women cadets has increased sharply. Whatever other results may ensue, the presence of all those women tarnishes the image of pure masculinity that VMI once projected. It will be a tribute to VMI's leaders if the Institute can escape a backlash among male cadets similar to the backlash that hounded Shannon Faulkner out of The Citadel in her first week in 1994,[40]

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[38] This salute is figurative; the literal salutes go to the statue of Confederate General Stonewall Jackson, which each member of the rat line must salute upon passing.

[39] The fall 1997 "rat line" began with 430 men and 30 women. *See* Peter Finn, *The General and the Women*, NEWSDAY, Aug. 25, 1997, part II, at B4. A month into the fall term, 32 of the men and 4 of the women had left the class. This attrition rate matches that of earlier years. One of the four women had been suspended for two semesters, for striking at an upperclassman. *See* Peter Finn, *VMI Suspends Woman*, WASH. POST, Sept. 10, 1997, at B1. None of the other three identified hazing or sexual harassment as the cause for their leaving. *See* Andy Dworkin, *Student Teachers*, DALLAS MORNING NEWS, Oct. 13, 1997, at 1A.

[40] On the harassment of Shannon Faulkner and her family around the time she first attended The Citadel, see Faludi, *supra* note 29, at 72-75. Faludi also reports that, when the admission of women loomed at The Citadel, some cadets worried about a new and different kind of

and produced serious harassment of token women two years later.[41] VMI has learned from its sister institution's experience: the female presence most likely to produce incidents of harassment would be just a few women. When the VMI case was first in the district court, the judge implicitly recognized this concern; if women were to be admitted, he said, VMI had the ability to recruit "a critical mass" of women.[42]

Justice Ginsburg recently used the same metaphor. In writing of the increase in women in the District of Columbia bar, she noted, "Progress is evident."[43] Immediately, though, she added a caution: "Has the progress yet yielded a 'critical mass'? Not quite yet."[44] What might be the impact of a critical mass of women in the legal profession? She said once more, "Generalizations about the way women and men are . . . seem to me unhelpful in making decisions about particular individuals."[45] Still, she said, women as a group do contribute a "distinctive medley of views influenced by differences in biology, cultural impact and life experience."[46] She went on to recognize

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humiliation: "If a girl was here, I'd be concerned not to look foolish." "See, you don't have to impress [women] here. You're free." *Id.* at 68.

[41] One woman "knob" (first year cadet) withdrew from The Citadel in mid-year after (she alleges) several incidents of sexual harassment and protracted severe hazing—including two occasions when her shirt was set on fire with lighter fluid. *See* John Heilprin, *Mentavlos Files Suit Against Citadel*, CHARLESTON POST & COURIER, Sept. 9, 1997, at A1. In the same year four women withdrew, alleging harassment. *See Chief Vows No Hazing at Citadel*, CHARLESTON DAILY MAIL, Aug. 25, 1997, at 7A. The one major incident of sexual harassment at VMI resulted in the swift expulsion of the commandant-elect of the corps of cadets. *See* Josh White, *Top Cadet Expelled from VMI, Sexual Harassment Alleged by 2 Women*, WASH. POST, June 27, 1999, at C1; *Expulsion Not Symptom of Larger Problem, Bunting Says*, RICHMOND TIMES DISPATCH, June 28, 1999, at B1.

[42] *VMI I*, 766 F. Supp. at 1437-38.

[43] Ruth Bader Ginsburg, *Foreword [to the Report of the Special Committee on Gender, by the D.C. Circuit Task Force on Gender, Race, and Ethnic Bias]*, 84 GEO. L.J. 1651, 1653 (1996).

[44] *Id.*

[45] *Id.* at 1654.

[46] *Id.* (quoting U.S. Circuit Judge Alvin Rubin in *Healy v. Edwards*, 363 F. Supp. 1110, 1115 (E.D. La. 1973)).

For further development of this view, see Carrie Menkel-Meadow, *Culture Clash in the Quality of Life in the Law: Changes in the Economics, Diversification and Organization of Lawyering*, 44 CASE W. RES. L. REV. 621, 638-41 (1994); Carrie Menkel-Meadow, Feminization of the Legal Profession, *in* [3 Comparative Theories] LAWYERS IN SOCIETY 196 (Richard L. Abel & Philip S. C. Lewis, eds., 1988); Rosabeth Moss Kanter, *Reflections on Women and the Legal Profession: A Sociological Perspective*, 1 HARV. WOMEN'S L.J. 1, 10-17 (1978)(on token women). Kanter's comments were written when women were "tokens" in most law firms. Since she wrote, the number of women lawyers in the United States has risen rapidly, and women constitute about 20% of the legal profession. Menkel-Meadow, *Culture Clash*, *supra*, at 627. In recent years women have constituted about 50% of the UCLA Law School's student body.

"the value of those perspectives in judicial assessments of what is at stake and [what] the likely impact of a court's judgments are."[47]

The idea of a critical mass[48] is usually contraposed to the idea of tokenism. Yet, in a small group that carries high authority, even a lone woman can cast a long shadow. Consider Justice Sandra Day O'Connor's crucial role in preserving the equal protection doctrine that subjected sex discrimination to heightened judicial scrutiny. The gains of the Women's Rights Project were in jeopardy when Justice O'Connor was appointed to the Supreme Court. In two cases in 1981,[49] a majority of the Court had sapped the vitality of the pathbreaking mid-1970s precedents of *Weinberger v. Weisenfeld*[50] and *Craig v. Boren*.[51] The principal opinions in the 1981 cases de-emphasized heightened scrutiny, upholding sex discrimination on the ground that women and men were "not similarly situated."[52] (Any judge who wants to identify a way in which men and women are different will be able to find one.) Shortly after her appointment, Justice O'Connor wrote the opinion of the Court in *Mississippi University for Women v. Hogan*,[53] breathing new life into the 1970s precedents, and adding for emphasis that official sex discrimination, to be upheld, required an "exceedingly persuasive justification"—the phrase that Justice Ginsburg put to such effective use in the VMI case.

Social science confirms what common sense suggests: In a large institution with a long history as a male preserve, the entry of a few token women is a

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Most readers of this comment, members of the legal profession, will know that American law firms came to establish day care facilities and to adopt parental leave policies (for mothers and fathers alike) only after women began to appear in significant numbers among the firms' partners. Of course many of the lawyers responsible for those decisions were men, and the women partners were only part of the socialization contributing to the changes.

[47] Ginsburg, *supra* note 43, at 1654.

[48] The term originates in the physics of nuclear fission, which results only when a mass of fissionable matter reaches a critical level. When the process of fission begins, it becomes self-sustaining so long as the material lasts.

Once "critical mass" entered the general vocabulary as a metaphor, the term itself became self-sustaining; it is now something of a cliché in fields far removed from science. Its popular uses in settings of human institutions—for example, in this comment—are anything but scientific. The predictions I make in the text below do have some basis in experience in the armed forces and in other work environments, but they are not scientific, not even social-scientific.

[49] The cases were *Michael M. v. Superior Court*, 450 U.S. 464 (1981)(upholding a statutory rape statute that punished only men), and *Rostker v. Goldberg*, 453 U.S. 57 (1981)(upholding a males-only requirement of registration for a military draft). For an unusually illuminating analysis of these two decisions, see Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175 (1982).

[50] 420 U.S. 636 (1975).

[51] 429 U.S. 190 (1976).

[52] *See Michael M.*, 450 U.S. at 469-74; *Goldberg*, 453 U.S. at 78-83.

[53] 458 U.S. 718 (1982).

recipe for trouble.[54] The district judge in the VMI case suggested that a critical mass of women cadets would be ten percent of the entering class.[55] The proportion of women in the first class admitted to VMI under the new regime is about two-thirds of that estimate, but the early returns are encouraging.

Although VMI's board of visitors had agreed to admit women only by a 9-8 vote[56]—the daunting alternative being to convert VMI into a self-supporting private college—the leaders of VMI, including cadet leaders, have responded to the presence of women cadets with a professionalism that lives up to the school's ideals. Their measures of accommodation deserve to be stated in some detail:[57]

> *Planning and preparation.* Hundreds of faculty, staff, and cadets spent fourteen months of planning, including close examination of the experience (positive and negative) in other military colleges that had integrated women into their student bodies. Specifically, the VMI leadership concluded, on the basis of The Citadel's unhappy results with tokenism, that a critical mass of women would be needed from the beginning; accordingly, they conducted a national recruiting campaign under the direction of a full-time woman recruiter.[58] Even before the entry of women cadets, the VMI faculty of 128 members included twenty women; in preparation for women cadets, women administrators were appointed to key positions. In the spring of 1997, meetings were held with all faculty, all

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[54] *See generally* ROSABETH MOSS KANTER, MEN AND WOMEN OF THE CORPORATION 206-42 (1993 [1977]); Rosabeth Moss Kanter, *Some Effects of Proportions on Group Live: Skewed Sex Ratios and Responses to Token Women*, 82 AM. J. SOC. 965 (1977). In an Afterword to the 1993 reprinting of her book, Kanter remarks that "the next step up from tokenism" can produce "backlash, resistance, complaints of 'reverse discrimination.' Research shows that dissatisfaction and tension are greatest in groups in which there are several women or minorities, but not enough to fully balance the numbers or create a routine expectation of diversity." *See* KANTER, *supra*, at 315-16.

In a leading modern case on workplace sexual harassment, two expert witnesses explained the mechanisms by which small numbers of women in a workplace become the object of special attention, are subjected to stereotyping, and attract extreme responses from male co-workers, including both disapproval of their work performance and sexual teasing. *See* Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1503, 1506 (M.D. Fla. 1991).

[55] *See VMI I*, 766 F. Supp. at 1437-38.

[56] Wes Allison, *VMI Rats Get Equal Abuse; Women Getting Their Fair Share, Board Told*, RICHMOND TIMES DISPATCH, Aug. 30, 1997, at B1.

[57] The account that follows comes from Arnold Abrams, *It Ain't Easy*, NEWSDAY, Aug. 24, 1997, at A5; Allison, *supra* note 49; Wes Allison, *VMI Gives Federal Judge Coeducation Progress Report*, RICHMOND TIMES DISPATCH, Sept. 16, 1997, at B4; Dworkin, *supra* note 34; Finn, *supra* note 34; Dan Eggen, *VMI Says More Women Interested in Attending*, WASH. POST, Sept. 16, 1997, at B1; Eric Schmitt, *Line of Fire; A Mean Season at Military Colleges*, N.Y. TIMES, Apr. 6, 1997, at 4A, p. 25.

[58] The "critical mass" conclusion was expressly endorsed by VMI's superintendent, General Josiah Bunting III. *See* Schmitt, *supra* note 57.

staff members, and all cadets to discuss ways in which the next fall's integration of women could be accomplished efficiently and fairly. Although these meetings highlighted accommodations that would be made, they also made clear the leadership's intention to preserve VMI's traditions, including the "rat line." Workshops were held on hazing and sexual harassment. In the fall, shortly before classes began, "refresher" meetings were held with the sophomore, junior, and senior classes.

Physical plant. Barracks were modified to establish women's showers and bathrooms, both with individual stalls. (Men's barracks remain as they were, with no such privacy.) Mirrors were lowered in women's bathrooms. Window shades were installed in student rooms. Classroom desks were resurfaced to remove graffiti likely to offend women cadets—and, we can hope, most men cadets. Exterior security lighting was increased on the post (campus), and new emergency phones were added.

Operations. Women rats are to be treated the same as men, and required to meet the same physical fitness standards, but the "buzz" haircut allows women one-half inch more of hair length. Yogurt and milk are now available to cadets at all meals, to assure an adequate supply of calcium in women's diets. The student bookstore stocks pantyhose, and VMI sweatshirts in pastel colors. Most important of all, VMI has enrolled nine women exchange students from Texas A and M University and Norwich University (Vermont), military colleges that have recently integrated women into their cadet ranks. Every two weeks during the school year, a committee of cadets, staff members, and consultants will discuss the progress of coeducation at VMI and consider whether further changes may be needed.

One bitter critic of the integration of women insists that, although the first year of integration has attracted women who are "groundbreakers," in years to come "VMI will wither away and become a third-rate choice [for college entrants]."[59] This view is distinctly a minority view in the VMI community. On the whole, the Institute's hard work to make integration a success seems to be paying off.

Part of the payoff is that the women cadets have academic credentials that raise VMI's average. The Institute's formerly strong academic standing has declined to some degree over the past generation, and the superintendent who is leading VMI through this era of change has high hopes of reestablishing the former academic glories.[60] Other changes are less quantifiable but equally gratifying. For example, cadets have traditionally named their rifles; in past

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[59] Thomas M. Moncure, Jr., VMI 1973, who resigned from the Institute's board of visitors after it voted to admit women, quoted by Finn, *supra* note 39.

[60] The Superintendent himself, General Josiah Bunting III of the Class of 1963, was the last Rhodes Scholar to be selected from VMI. He intends to produce others to follow him to Oxford. *See* Finn, *supra* note 39.

years, nearly all were given women's names. Among the women rats, one named her rifle Sergio, and another named hers Cookie Monster.[61] Old-timers from VMI who are angered by this news are hereby invited to go soak their heads.

"VMI has not changed," said the Commandant of Cadets in August 1997,[62] and that continuity seems to be the strong preference of the first cohort of women rats: A VMI spokesman said, at the start of the school year, "They [the women] all made the same point. They want precisely the same experience as everyone else."[63] Indeed, they say they would resent any relaxation of the Institute's rigors.[64] VMI's superintendent explains this attitude by saying that the young women who have been attracted to VMI resemble the young men who have always been so attracted: they are practical, conservative, military-minded, interested in the school's tradition, aware of its challenges and ready to face them.[65] The number of women who have asked for information about enrolling in VMI in the fall of 1998 is almost double the number of those for the previous year.[66] It would be surprising if VMI did not increase its proportion of women rats as the years go on, well beyond the ten percent figure suggested by the district judge. In the class that entered West Point in the fall of 1997, sixteen percent are women.[67]

More than two decades have passed since the United States Military Academy admitted its first women, and the officers who run West Point have learned a thing or two. The first-year women do not have their heads shaved any more. Said Lieutenant General Dave Palmer, West Point's superintendent from 1986 to 1991, "We had the same attitude [as VMI's] when women started at West Point, that she needed to act and look like a man. . . . Twenty

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[61] *See* Wes Allison, *"The Job's Not Done, It's Just Starting"; Cadet Trainers, Leaders Note Good Beginning for the Rats*, RICHMOND TIMES DISPATCH, Aug. 24, 1997, at C1.

[62] Allison, *supra* note 56.

[63] Abrams, *supra* note 57.

[64] *See* Finn, *supra* note 39.

[65] *See id.* The first year of integration confirms these expectations. *See* Peter Finn, *Women Find No Difference on the Rat Line; VMI Freshman Say Months of Terror Bonded Male and Female*, RICHMOND TIMES DISPATCH, May 17, 1998, at A1.

[66] *See* Eggen, *supra* note 57. The number is 3,219, up from 1,688 who asked for information about enrolling in the fall of 1997. The current estimate is that 120 women will be in the corps of cadets by the 2000-01 school year. *See* Superintendent's Report to the Board of Visitors (on file with author).

[67] Michael Winerip, *The Beauty of Beast Barracks*, N.Y. TIMES, Oct. 12, 1997, § 6 (Magazine), at 46. In 1997, women constituted about 15% of the forces in the U.S. Army, 13% in the Navy, 5% in the Marines, and 17% in the Army—for an all-service average of about 14%. Department of Defense, Female Military Personnel by Rank/Grade; Active Duty Military Personnel by Rank/Grade, (last visited Feb. 14, 2000) <http://web1.whs.osd.mil/mmid/military/history/tab9397.htm> and <http://web1.whs.osd.mil/mmid/military/history/tab10397.htm>.

years of training women . . . taught us you can be a good cadet and be feminine."[68] Today's West Point is not a platform for staging manhood dramas; those who run the Academy (U.S. Army officers, not officers of the Virginia Militia[69]) know that manhood games have nothing to do with the success of their graduates, all of whom will serve as military officers.[70] Part of that awareness surely comes from their experience with women in the Army and with the numerous women who have been West Point cadets.

What does the idea of a critical mass of women mean in the context of VMI? The district judge who used this term surely had in mind that admitting a tiny number of women to a college imbued with hypermasculinity would leave the women vulnerable to harassment—not just the traditional torment of the rat line, but uglier forms of harassment designed to force the women to withdraw from VMI. The fate of Shannon Faulkner at the Citadel supports just such a prediction. A greater number of women would provide each woman lateral support from all the others. It would also teach male cadets that women cadets were not oddities, but classmates who were their equals and comrades who could be counted on. A critical mass of women would not only make clear that women were at VMI to stay; it would also help to reduce "backlash" harassment.[71] Only by maintaining a critical mass of women can

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[68] *See* Winerip, *supra* note 46, at 46.

[69] The latter officers are appointed by the Governor of Virginia.

[70] Thirty-five percent of VMI's graduates do so. *See* Finn, *supra* note 39.

[71] A number of observers, across a spectrum of views, have suggested that the prevalence of sexual harassment in the armed forces decreases as the proportion of women in a unit increases. It is not surprising to hear this view from Nancy Duff Campbell, of the National Women's Law Center. As Campbell points out, the incidence of sexual harassment is highest in the Marines, where women are present in the lowest proportions (about 5%). *See* Alexandra Marks, *Women in Combat Draw Unfriendly Fire*, CHRISTIAN SCIENCE MONITOR, Apr. 18, 1997, at 1. The incidence of sexual harassment is lowest in the Air Force, which has the highest proportion of women (about 17%). "Critical mass is important" to the Air Force's success, says retired Navy Captain Carolyn Prevette, who heads a Department of Defense advisory committee on women's issues. Sheryl Stolberg, *Forget the Scandals*, L.A. TIMES, Nov. 29, 1996, at E1. The importance of sizable numbers of women is underscored by Navy Captain Paul Ryan in his article, *Much Ado About Nothing*, PROCEEDINGS (U.S. Naval Institute), June 1997, at 66. Ryan reports that this "critical mass" idea has been adopted for staffing women ion ships by the Navy's Bureau of Naval Personnel. *See also* Keren Mahoney, *Aboard The Sullivans*, ALBANY TIMES UNION, Oct. 13, 1997, at C1. The USS The Sullivans is a new destroyer named for the Sullivan brothers, who died in World War II. The ship is the first destroyer specifically designed to accommodate women sailors. Its crew consists of 267 men and 44 women. *See id.* A recent RAND Corporation study concluded that one successful device for integrating women into service units is the Navy's policy of maintaining substantial numbers of women on a ship, including a number of senior women officers, to reduce the sense of isolation and vulnerability among women sailors. *See* Dana Priest, *Women Fill Few Jobs Tied To Combat*, WASH. POST, Oct. 21, 1997, at A1.

The effort to prevent sexual harassment surely is less taxing at VMI than it is at most

VMI create the conditions in which women cadets are treated as full members of the VMI community—and, in time, leaders in the corps of cadets.

The idea of the critical mass means more than these variations on the theme of fostering success for women cadets. Surely the "distinctive medley of views" that Justice Ginsburg mentioned[72] will, in time, affect the atmosphere of VMI and even the instructional program in ways the participants in the current transition cannot imagine. In the VMI case, Chief Justice Rehnquist concurred in the Court's judgment largely because VMI had simply asserted the educational value of the "adversative method" without offering any evidence that this method has positive educational or character-building benefits.[73] To put the matter charitably, there is considerable doubt whether any such evidence could be persuasive.

Imagine that, in the next decade or so, women cadets perform at the top of VMI's classes in matters both academic and military, and that the distinctive views of women as a group percolate into the consciousness of VMI decision-makers from the superintendent down to sophomore cadets. In short, imagine that VMI's leadership comes to understand in a decade what West Point's leadership now understands after two decades of experience with women cadets. Would it be surprising if VMI's treatment of the rat line should be modified, directing some of the energies formerly spent on hazing into other forms of rigor and discipline that, in the course of a four-year college career, would build character and professionalism more effectively—and, in the bargain, would produce some Rhodes Scholars?[74]

Every integration implies a disintegration. When the University of Mississippi finally admitted black applicants, undoubtedly "the essential character" of Ole Miss was changed. The observers who have said that the admission of women to VMI will change the institution forever are probably right, if we consider the matter in a perspective longer than the current school year. In the long run, the presence of a critical mass of women probably will

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military and naval bases. VMI is a small, stable, relatively closed community, where cadets are not free to leave the post. The typical service base is large, has a population that shifts with transfers in and out, and allows its personnel considerable time away from the base. Navy vessels and small, isolated outposts are exceptions to this pattern, but at any given moment the vast majority of service personnel are not serving in such locations.

[72] *See* text accompanying *supra* note 46.

[73] *See* United States v. Virginia (VMI II), 518 U.S. 515, 564 (1996).

[74] Even at The Citadel the emphasis has already changed from harassment of "knobs" to professionalism. Its new president, retired General John Grinalds, says, "What's gone is the meanness—the personal invective. . . . The standard by which all cadets are measured is now achievement—not by how much humiliation you can endure by an upperclassman." Cynthia Barnett, *The Citadel is Still Hell to Pay*, RALEIGH NEWS & OBSERVER, Sept. 2, 1997, at A1. For one telling example, an upperclassman who orders a knob to do pushups must now do the same number alongside the knob. *See id.*

produce a greater proportion of graduates whose careers resemble the model of George Marshall more than they resemble the model of George Patton. For VMI graduates—and especially for those who pursue a military career in the 21st Century—that result seems more than acceptable.

Hearing the Voices of Individual Women and Men: Justice Ruth Bader Ginsburg

Deborah Jones Merritt*

A prime part of the history of our Constitution...is the story of the extension of constitutional rights and protection to people once ignored or excluded.[1]

I. INTRODUCTION

As a Supreme Court advocate during the 1970s, Ruth Bader Ginsburg represented ordinary women disadvantaged by gender stereotypes: a bereaved mother denied the chance to administer her son's estate because of a statutory preference for male administrators,[2] a married Air Force lieutenant deprived of housing and medical benefits routinely granted her wedded male colleagues,[3] and a pregnant woman refused unemployment benefits after losing her job for reasons unrelated to the pregnancy.[4] Ginsburg also represented men hindered by the same presumptions: a young father seeking social security benefits based on the earnings of a wife who died in childbirth,[5] a

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[1] United States v. Virginia, 518 U.S. 515, 557 (1996) (Ginsburg, J., for the Court) (citing historian RICHARD MORRIS, THE FORGING OF THE UNION, 1781-89 (1987)).

[2] *See* Reed v. Reed, 404 U.S. 71 (1971). The Supreme Court unanimously adopted the position urged by Ginsburg and her colleagues, striking down the automatic preference for male administrators.

[3] *See* Frontiero v. Richardson, 411 U.S. 677 (1973). The Court ruled eight to one, with only Justice Rehnquist dissenting, that the discrimination against servicewomen violated the Constitution. During the same Term, Ginsburg represented another Air Force officer, Susan Struck, who challenged an Air Force regulation automatically discharging officers who became pregnant. After granting Struck's petition for certiorari, the Court vacated the lower court's decision and remanded for consideration of mootness "in light of the position presently asserted by the Government." Struck v. Secretary of Defense, 409 U.S. 1071, 1071 (1972).

[4] *See* Turner v. Department of Employment Sec., 423 U.S. 44 (1975). Utah's unemployment compensation scheme barred all pregnant women from obtaining unemployment benefits for twelve weeks before and six weeks after childbirth, regardless of the woman's ability to work. The Court concluded that the statute's irrebuttable assumption of incapacity violated the fourteenth amendment.

[5] *See* Weinberger v. Wiesenfeld, 420 U.S. 636 (1975). Ginsburg persuaded all eight Justices who participated in the decision that the statutory distinction between mothers and fathers was unconstitutional. Two years later, Ginsburg also won *Califano v. Goldfarb*, 430

criminal defendant challenging the automatic exclusion of female jurors,[6] and a widower requesting the property tax exemption granted widows.[7] Through these lawsuits, Ginsburg overturned more than a century of judicial endorsement of gender distinctions and established sexual equality as a constitutional principle.[8]

U.S. 199 (1977), in which a widower sought social security benefits automatically granted widows, but requiring proof of dependency for widowers.

[6] *See* Duren v. Missouri, 439 U.S. 357 (1979). The Court ruled eight to one that the automatic exemption of women jurors was unconstitutional. Ginsburg previously represented a class of female civil litigants challenging an even more exclusionary system (under which women were not called as jurors unless they filed notice of a desire to serve), but the Supreme Court held that system unconstitutional in a challenge brought by a criminal defendant, *see* Taylor v. Louisiana, 419 U.S. 522 (1975), and then remanded Ginsburg's case to the lower court to consider whether changes in the state's law had rendered the controversy moot. *See* Edwards v. Healy, 421 U.S. 772 (1975).

[7] *See* Kahn v. Shevin, 416 U.S. 351 (1974). *Kahn* was the only case out of six Ginsburg argued personally before the Court in which the Court failed to follow Ginsburg's analysis. The Court voted six to three to uphold the tax exemption for widowers while allowing the state to continue denying the exemption to widowers.

As I discuss further below, Ginsburg represented the interests of both men and women in all of these lawsuits, whether the named plaintiff was male or female. The plaintiffs in the social security act cases, for example, were men, but their deceased wives (and other women like them) had an interest in assuring support for their survivors.

[8] In addition to the cases mentioned in the text and previous footnotes, Ginsburg co-authored amici briefs in a stunning array of cases challenging sex-based distinctions. Some of these challenges rested on constitutional grounds; others invoked statutory protections. The cases in which Ginsburg participated include: Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142 (1980) (challenge to statute requiring widowers, but not widows, to prove incapacity or financial dependence before collecting workers' compensation benefits for spouse's death); Califano v. Wescott, 443 U.S. 76 (1979) (challenge to Aid to Families with Dependent Children rules distinguishing between mothers and fathers as principal wage earners); Orr v. Orr, 440 U.S. 268 (1979) (challenge to statute imposing alimony on husbands but not wives); Los Angeles v. Manhart, 435 U.S. 702 (1978) (challenge to differential pension plan contributions for men and women); Nashville Gas Co. v. Satty, 434 U.S. 136 (1977) (challenge to policy requiring pregnant employees to take a leave of absence without sick pay and to forfeit all accumulated seniority); Dothard v. Rawlinson, 433 U.S. 321 (1977) (challenge to height, weight, and gender criteria for correctional counselors at maximum security prison for men); Craig v. Boren, 429 U.S. 190 (1976) (challenge to statute permitting sale of 3.2% beer to women, but not men, between ages of 18 and 21); General Elec. Co. v. Gilbert, 429 U.S. 125 (1976) (challenge to disability plan that excluded pregnancy-related disabilities); Drew Municipal Separate Sch. Dist. v. Andrews, 425 U.S. 559 (1976) (challenge to public school rule against employing parents of illegitimate children; in practice, rule affected mothers but not fathers); Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737 (1976) (Title VII challenge to insurance benefits and maternity leave regulations); Geduldig v. Aiello, 417 U.S. 484 (1974) (challenge to exclusion of pregnancy from California disability scheme); Corning Glass Works v. Brennan, 417 U.S. 188 (1974) (challenge to differential pay for men on night shift and women on day shift at factory; bias perpetuated through later seniority and pay provisions); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (challenge to mandatory maternity leave for school

Ginsburg's constitutional claims succeeded, in part, because she convinced a majority of the Supreme Court's Justices to hear the individual litigants before them rather than to adhere reflexively to stereotypes. It was true in 1973 that more men than women served in the military and that more wives than husbands depended on their spouses for support. Ginsburg, however, introduced the Justices to individuals who differed from these norms: Sharon Frontiero had achieved the rank of Air Force lieutenant, while Stephen Wiesenfeld earned less money than his wife Paula. Ginsburg's triumph lay in persuading the Supreme Court that the equal protection clause sheltered individuals rather than stereotypes.

I was fortunate to learn about the equal protection clause from Justice Ginsburg—then Professor Ginsburg—as she advocated her vision of equality before the Supreme Court. In class, Ginsburg taught us to follow the same principles she employed to win Supreme Court arguments: focus on the facts of each individual case, challenge assumptions, pursue equality, and analyze legal precedents carefully.

As a Supreme Court Justice, Ginsburg applies the same precepts. She searches for the individual voices of litigants who appear before her. The facts of their cases, shorn of stereotypes, form the basis of her decisions. She remains committed to equality for all "people once ignored or excluded."[9] And she treats precedents with care, preserving what has gone before but allowing the law to evolve to meet the claims of those new litigants.

In this essay, I briefly discuss five Ginsburg opinions that embody the characteristics described above. These cases happen to involve female plaintiffs, issues of particular concern to women, or challenges to gender stereotypes. As a professor of "women and Law," a field Ginsburg helped to invent,[10] I regularly discuss these opinions with my students. As I suggest in

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teachers); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973) (challenge to help-wanted advertisements separated by sex). Together, these cases exemplify both the extent of gender distinctions that persisted through the 1970's and Ginsburg's contribution in overturning those stereotypes.

Ginsburg also co-authored an ACLU amicus brief, defending affirmative action in the well-known case of *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). And she helped author another ACLU amicus brief, *Coker v. Georgia*, 433 U.S. 584 (1977), challenging the imposition of the death penalty in rape cases. There, Ginsburg argued both that the rule perpetuated patriarchal visions of women as property and contributed to racial discrimination in death sentencing.

[9] United States v. Virginia, 518 U.S. 515, 557 (1996) (citing historian RICHARD MORRIS, THE FORGING OF THE UNION, 1781-89 (1987)).

[10] Ginsburg created a seminar on "Women and the Law" in response to student demand at Rutgers Law School in the early 1970's. After moving to Columbia in 1972, she regularly taught courses on women's rights and gender-based discrimination. She co-authored the first casebook on sex-based discrimination with Herma Hill Kay and Kenneth M. Davidson in 1974.

closing, however, Ginsburg's position in all five of these cases would assist men as well as women. More generally, her focus on individual claims, rejection of stereotypes, and commitment to equality benefit all litigants. Ginsburg's jurisprudence is one that listens and speaks to all claimants with care.

II. THE SIMPLICITY OF JUSTICE GINSBURG'S APPROACH

During her first months as a Supreme Court Justice, Ginsburg contributed a short concurrence to the Court's decision in *Harris v. Forklift Systems*.[11] The Court held in *Harris* that Title VII does not require serious psychological harm before an employee recovers for sexual harassment, and Ginsburg readily concurred in that result. While the majority and lower courts struggled over the precise line at which harassment becomes actionable, however, Ginsburg found the boundary plain. Title VII, she explained, asks simply "whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."[12] If a "reasonable person subjected to the discriminatory conduct would find . . . that the harassment so altered working conditions as to 'make it more difficult to do the job,'" and if the plaintiff experienced that increase in job difficulty, then Title VII supports a claim.[13]

Ginsburg's approach to sexual harassment is breathtaking in its simplicity and might eliminate much of the doctrinal clutter surrounding harassment claims.[14] Ginsburg is able to achieve that elegant result because she so completely discards the stereotypes that still surround working women. For Ginsburg, working women are not unusual, provocative, sexually tantalizing, or unduly sensitive. Working women, like working men, are in the workplace primarily to get a job done. If bosses or co-workers make that task more difficult for women than men, then the difference in working conditions violates Title VII. Ginsburg's brief *Harris* concurrence shows the depth of her commitment to workplace equality for women, as well as the difference her equality analysis would make if fully accepted by the Court.

Six months later, Ginsburg again wrote on behalf of working women—this time in dissent. In *National Labor Relations Board v. Health Care & Retirement Corporation*,[15] five members of the Court ruled that nurses

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[11] 510 U.S. 17 (1993).

[12] *Id.* at 25 (Ginsburg, J., concurring).

[13] *Id.*

[14] For a recent discussion of some of the doctrines restricting sexual harassment claims, *see* L. Camille Hebert, *Analogizing Race and Sex in Workplace Harassment Claims*, 58 OHIO ST. L.J. 819 (1997).

[15] 511 U.S. 571 (1994).

working at the Heartland Nursing Home were supervisory employees barred from unionizing under the National Labor Relations Act ("NLRA").[16] Ginsburg, writing for herself and three other Justices, dissented from that conclusion.

Ginsburg's dissent judiciously explained how the majority's interpretation of the NLRA's supervisor category would undercut the statute's clear protection of professional employees. She also chided the majority for failing to defer to the expertise of the agency charged with enforcing the NLRA. In these portions of the dissent, Ginsburg demonstrated her careful attention to statutory language, congressional intent, and precedents commanding judicial deference.

Ginsburg's most powerful argument on behalf of the nurses, however, lay in her description of their daily toil. The nurses, Ginsburg noted, "'spent only a small fraction of their time'" giving orders to aides.[17] Instead, they devoted most of their day to the mundane tasks of nursing: the nurses "'checked for changes in the health of the residents, administered medicine, . . . received status reports from the nurses they relieved,' . . . pinch-hit for aides in 'bathing, feeding or dressing residents,' and 'handled incoming telephone calls from physicians and from relatives of residents who wanted information about a resident's condition.'"[18] The home's administrator and director of nursing "were 'always on call'" to make any important decisions, and the nurses "called [those managers] at their homes 'when non-routine matters ar[o]se.'"[19] The administrative law judge, moreover, specifically found that the home's administrator disdained the nurses' opinions on management matters: the administrator "'believed that the nurses' views about anything other than hands-on care of the residents were not worth considering.'"[20]

Ginsburg's ability to see the tasks really performed by the nurses thus girded her argument for statutory coverage. How could anyone reading Ginsburg's description, based firmly on the administrative record, think that the duty nurses were managers rather than "'hired hands'"?[21] In *National Labor Relations Board*, Ginsburg's attention to facts, combined with her interpretation of the statutory and administrative record, should have persuaded a majority of the Court to place the Heartland nurses on the supervisory side of the NLRA line. The majority's decision represents a

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[16] 29 U.S.C. § 151 *et seq.*

[17] *National Labor Relations Board*, 511 U.S. at 593 (Ginsburg, J., dissenting) (quoting the opinion of the administrative law judge).

[18] *Id.*

[19] *Id.* at 594.

[20] *Id.*

[21] *Id.*

serious setback for both male and female professionals who seek unionization to remedy workplace ills.[22]

Two Terms later, however, Ginsburg led a nearly unanimous Court in opening a different avenue to women with professional aspirations. In *United States v. Virginia* ("*VMI*"),[23] Ginsburg authored an opinion for the Court, holding that the state of Virginia could no longer exclude women from its famed Virginia Military Institute ("V.M.I.").[24] Even Chief Justice Rehnquist, who had resisted Ginsburg's arguments for sexual equality in the 1970s, concurred in the judgment.

Ginsburg's opinion in *VMI* shows the importance of transcending stereotypes and focusing on individual claimants. In announcing the Court's decision, Ginsburg was willing to assume "that most women would not choose V.M.I.'s adversative method" or other curriculum features.[25] Some women, however, prospered under the V.M.I. approach and wanted to attend V.M.I. "It is on behalf of *these* women," Ginsburg stressed, "that the United States has instituted this suit, and it is for them that a remedy must be crafted."[26]

Having concentrated attention on the small, but nonetheless deserving, group of women who wanted V.M.I.'s challenging and highly prestigious education, Ginsburg concluded that the state could not defend its exclusion of women on the ground that most other women would not choose that education. Nor could the state establish a milder brand of leadership education tailored to the needs of "'women as a group.'"[27] The latter education simply did not respond to the desires of the women seeking admission to V.M.I. Having failed to produce an "'exceedingly persuasive justification'" for denying those women the benefits of a V.M.I. education, the state's barrier had to fall.[28]

Ginsburg's *VMI* opinion eloquently expresses her rejection of stereotypes and her willingness to recognize a wide range of tastes and skills among both men and women. It is also a testament to her previous work as a litigator and scholar, which laid the groundwork for the V.M.I. challenge, that six of the seven other Justices participating in the case joined her opinion for the Court. "[G]eneralizations about the 'the way women are,'" Ginsburg concluded on

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[22] *See, e.g.*, James J. Brudney, *Reflections on Group Action and the Law of the Workplace*, 74 TEX. L. REV. 1563, 1578-80 (1996); David M. Rabban, *Can American Labor Law Accommodate Collective Bargaining by Professional Employees?*, 99 YALE L.J. 689 (1990).

[23] 518 U.S. 515 (1996).

[24] Justice Thomas recused himself from the case. The remaining Justices voted seven to one to invalidate V.M.I.'s single-sex policy.

[25] 518 U.S. at 542.

[26] *Id.* at 550 (emphasis added).

[27] *Id.* at 549 (quoting the Task Force charged with designing an alternative education for women).

[28] *Id.* at 534 (quoting Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)).

behalf of her colleagues, "estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description."[29]

The *VMI*, nurses, and *Harris* cases all involved women seeking educational or employment opportunities. In *M.L.B. v. S.L.J.*,[30] Ginsburg showed that she is equally capable of hearing the voices of women as mothers—and then of amplifying those voices to achieve legal redress. A Mississippi Chancery Court had terminated M.L.B.'s parental rights, allowing her former husband's new wife to adopt the children instead. The Chancellor's opinion was brief and formulaic, prompting M.L.B. to appeal the decision. The state, however, required all civil litigants to pre-pay the costs of appeal, and M.L.B. could not afford the required $2,352.36. Unless relieved of that burden, M.L.B. would lose her parental rights forever.

Writing for a five-Justice majority, Ginsburg held that if a state allows paying litigants to appeal from a proceeding terminating parental rights, it cannot deprive indigents of the same relief. *M.L.B.* thus granted an indigent woman (a member of an especially powerless class) a voice in the judicial process. Ginsburg's opinion for the Court, however, was particularly effective precisely because she did *not* treat M.L.B. principally as a woman or as a mother. Instead, the strength of Ginsburg's *M.L.B.* opinion lies in her ability first to hear the power of M.L.B.'s claim and then to analogize that complaint to claims asserted by other indigents outside the parental rights setting.

Ironically, if Ginsburg had begun her *M.L.B.* opinion with the Court's parental rights precedents, she might have found it more difficult to articulate a persuasive justification for allowing M.L.B.'s *in forma pauperis* appeal. In *Santosky v. Kramer*,[31] the Court had required "clear and convincing" evidence before terminating parental rights. Yet in *Lassiter v. Department of Social Services*,[32] the Court had refused to require state-appointed counsel in all cases in which indigents faced termination of their parental rights. Used as a

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[29] *Id.* at 550 (emphasis in original). At the same time that she responded to the desires of women who might seek admission to V.M.I., Ginsburg was careful to recognize the possible needs of a different group of women. The parties to the *VMI* case, she emphasized, did not contest the fact that "[s]ingle-sex education [might] afford[] pedagogical benefits to at least some students." *Id.* at 535. Nor did they dispute the proposition "that diversity among public educational institutions can serve the public good." *Id.* Ginsburg thus carefully left open the question whether, if a state created single-sex educational institutions with those laudable goals genuinely in mind, the system could survive constitutional attack. Similar justifications could not support V.M.I. because they were merely post hoc "rationalizations for actions in fact differently grounded." *Id.* at 535-36.

[30] 519 U.S. 102 (1996).

[31] 455 U.S. 745 (1982).

[32] 452 U.S. 18 (1981).

starting point, *Lassiter* might have suggested that parental rights were not sufficiently weighty interests to elicit special protection for indigents.

Ginsburg, however, began her analysis with a line of criminal cases establishing the right of indigents to appeal convictions and obtain state-funded transcripts for those appeals. Carefully tracing the law's evolution, Ginsburg showed that the Court had required state-funded transcripts even for appeals from convictions for petty offenses involving no jail time. M.L.B.'s interest in maintaining ties to her children, Ginsburg argued, was at least as strong as a defendant's interest in avoiding payment of a small fine linked to a petty offense.

Only then did Ginsburg turn to *Lassiter* and *Santosky*. Having set the stage with the line of cases involving appeals from criminal convictions, she was able to use both *Lassiter* and *Santosky* to establish the strength of a parent's interest in avoiding termination of all parental rights. She was also able to show that *Lassiter* is *more* generous than some criminal cases in providing counsel for indigents. In criminal cases, the Court requires state-appointed counsel only when the trial results in jail time. Defendants facing only fines enjoy no right to counsel at state expense. Yet *Lassiter* recognizes that the state must provide counsel to an indigent parent facing termination of parental rights whenever representation is "warranted by the character and difficulty of the case."[33] "It would be anomalous," Ginsburg concluded, "to recognize a right to a transcript needed to appeal a misdemeanor conviction—though trial counsel may be flatly denied—but hold, at the same time, that a transcript need not be prepared for M.L.B.—though were her defense sufficiently complex, state-paid counsel, as *Lassiter* instructs, would be designated for her."[34]

Once the cases were lined up in this manner, it was apparent that *Lassiter* supported a right to appeal in M.L.B.'s case. Ginsburg, however, reached that result only because she was able to combine sensitivity to M.L.B.'s complaint with a careful reading of the Court's precedents in two very different fields. If Ginsburg had seen M.L.B. in only one dimension—as an indigent parent—*Lassiter* would have loomed larger as a precedent and might have appeared unduly negative. Ginsburg's discerning treatment of both *Lassiter* and the criminal law precedents provided relief for M.L.B.[35]

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[33] *M.L.B.*, 519 U.S. at 117 (citation omitted).

[34] *Id.* at 123 (citation omitted).

[35] Ginsburg's reliance upon both strands of precedent also demonstrated her willingness to draw upon both equal protection and due process analyses. As Ginsburg wrote for the majority, "the Court's decision concerning access to judicial processes . . . reflect both equal protection and due process concerns." *Id.* at 120 (citation omitted). Ginsburg's opinion is highly effective in showing the interdependence of these two doctrines and in demonstrating how each works in different ways to protect individuals in the judicial system.

As these four cases show, Justice Ginsburg displays a special sensitivity to the needs of women. She is able, moreover, to recognize the voices of very different women: from teenaged women seeking to attend a rigorous military academy to an indigent mother defending her parental rights. Ginsburg's greatest talent, however, lies in both recognizing the claims of these women and finding the legal principles that address their needs. She repeatedly shows that, although our society may suffer still from gender stereotypes and other forms of inequality, the law itself need not embody those flaws. Instead, law remains a powerful tool for overcoming prejudice and other forms of oppression.

III. SHATTERING STEREOTYPES

Shattering sex-based stereotypes, Ginsburg has always maintained, benefits men as well as women. Indeed, each of the Ginsburg opinions discussed above advantages both sexes. *M.L.B.* allows indigent fathers as well as mothers to appeal the termination of their parental rights. Ginsburg's reading of the National Labor Relations Act in the Heartland nursing case would have assisted both men and women holding professional jobs. The elimination of sexual harassment, encouraged by Ginsburg's *Harris* concurrence, would increase productivity and reduce workplace tension—ultimately aiding male employers, workers, and consumers as well as women in the same roles. And challenges to institutions like V.M.I. open analogous avenues of relief for men seeking education or advancement in traditionally female fields.[36]

Another Ginsburg opinion offers an even more direct example of how her ability to perceive individual claims, free of stereotype, can benefit male plaintiffs. In *Consolidated Rail Corporation v. Gottshall*,[37] Ginsburg dissented from a decision restricting recovery for emotional distress claims under the Federal Employers' Liability Act ("FELA").[38] James Gottshall and Alan Carlisle were both Conrail employees who suffered severe distress from work-related incidents. Gottshall witnessed a good friend and co-worker die from a heart attack while repairing the track on an oppressively hot day. A supervisor then ordered Gottshall and his mates back to work "within sight of [their co-worker's] covered body."[39] In a different incident, Carlisle suffered

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[36] *Cf.* Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) (upholding judgment in favor of male applicant who sought admission to state nursing school previously reserved for women).

[37] 512 U.S. 532 (1994).

[38] 45 U.S.C. §§ 51-60.

[39] *Gottshall*, 512 U.S. at 536. Gottshall suffered "nausea, insomnia, cold sweats, and repetitive nightmares" after this incident. *Id.* He spent three weeks in a psychiatric institution, "where he was diagnosed as suffering from major depression and post-traumatic stress

a nervous breakdown after Conrail's cutbacks forced him "to work twelve to fifteen-hour shifts for weeks at a time," and to insure safety despite the company's "[a]ging railstock and outdated equipment."[40]

A majority of the Court responded to these claims by holding that a FELA worker may recover for negligently inflicted emotional distress only if he stands "within the zone of danger of physical impact" and "fear[s] . . . physical injury to himself."[41] The Court remanded Gottshall's claim for consideration under this standard, but ordered the lower court to enter judgment against Carlisle because his stress resulted from overwork rather than any dangerous physical condition. The "core of Carlisle's complaint," the majority concluded, "was that he 'had been given too much—not too dangerous—work to do. That is not our idea of a FELA claim.'"[42]

Ginsburg, joined by Justices Blackmun and Stevens, displayed a deeper understanding of the employees' claims. Ginsburg detailed the severe distress suffered by each employee, as well as the physical manifestations of that distress. She also noted the grim conditions under which Conrail forced the employees to work and the callousness of the company's supervisors.[43] Recalling the Court's charge to interpret FELA liberally, she rebuked the

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disorder." *Id.* He continued to receive psychological treatment even after his release from the institution. *See id.* at 537.

[40] *Id.* at 539.

[41] *Id.* at 556. The test thus would compensate workers injured "by the negligent conduct of their employers that threatens them imminently with physical impact." *Id.*

[42] *Id.* at 558 (quoting Lancaster v. Norfolk & Western Ry. Co., 773 F.2d 807, 813 (7th Cir. 1985)).

[43] Gottshall's injury, Ginsburg stressed, stemmed from "Conrail's decision to send a crew of men, most of them 50-60 years old and many of them overweight, out into 97-degree heat at high noon, in a remote, sun-baked location, requiring them to replace heavy steel rails at an extraordinarily fast pace without breaks, and without maintaining radio contact or taking any other precautions to protect the men's safety." *Id.* at 565 (Ginsburg, J., dissenting). When these conditions killed one worker, the supervisor "required the crew to return to work immediately after [the] corpse was laid by the side of the road covered, but still in view." *Id.* The next day, moreover, the supervisor reprimanded Gottshall for attempting to aid his dying co-worker and "then pushed the crew even harder under the same conditions, requiring a full day, plus three or four hours of overtime." *Id.* at 565-66.

Carlisle, the Philadelphia train dispatcher "chiefly responsible for ensuring the safety of 'trains carrying passengers, freight and hazardous materials,' . . . became 'increasingly anxious' over [Conrail's] sharp reduction in staff, together with outdated equipment and 'Conrail's repeated poor maintenance.'" *Id.* at 566 (quoting the court of appeals opinion). Carlisle also worked "12 to 15-hour shifts for 15 consecutive days" and suffered under "'an abusive, alcoholic supervisor.'" *Id.* Other co-workers at the Philadelphia office testified that Conrail's insensitivity had "'caused them to suffer cardiac arrests, nervous breakdowns, and a variety of emotional problems, such as depression, paranoia, and insomnia.'" *Id.* at 567. A report of the Federal Railway Administration, moreover, "'criticized the outdated equipment and hazardous working conditions at Conrail's Philadelphia dispatching office.'" *Id.*

majority for "leav[ing] severely harmed workers remediless, however negligent their employers," rather than tying recovery to the "genuineness and gravity of the worker's injury."[44]

Ginsburg also paid closer attention to the common law and the FELA context than the majority did. She pointed that only a minority of states endorsed the zone-of-danger test adopted by the majority, while a much larger group embraced more liberal standards that might have supported claims by both Gottshall and Carlisle. In citing fears of open-ended liability, the majority also overlooked FELA's limited scope. The statute applies only to "railroad workers who sustain injuries on the job;"[45] it could hardly support an avalanche of emotional distress claims.

Ginsburg's diligent reading of both the common law and congressional statute effectively undermined the majority's position. In addition, her openness to the workers' emotional distress claim reflected her willingness to break gender stereotypes. Our society links emotional distress more to women than to men; we do not expect husky mail railroad workers to suffer depression or nervous breakdowns. Ginsburg, unaffected by these stereotypes, easily read FELA's reference to on-the-job "injury" to encompass both physical and emotional damage. She also had no difficulty accepting emotional distress claims from the male plaintiffs before her.[46] Ginsburg's dissent in *Gottshall* emphatically underscores how the rejection of gender stereotypes can benefit both male and female claimants.

IV. CONCLUSION

Like a skilled orchestra leader, Ginsburg can hear the individual notes in the largest symphony. She understands that each tone is unique and that we must fight deeply rooted assumptions that all strings sound alike or that bass players never carry the melody. Ginsburg's ear for the individual has enriched both the Court's constitutional theory and its statutory jurisprudence.

Although I have focused here on decisions challenging gender stereotypes, Ginsburg displays the same sensitivity in cases involving other types of discrimination. She has drawn upon both historical and social science materials to remind the Court of the omnipresent racial prejudice in our

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[44] *Id.* at 572.

[45] *Id.* at 560.

[46] Ginsburg, of course, would not remedy every allegation of emotional distress. She stressed in *Gottshall* that both plaintiffs had suffered severe physical manifestations of their distress. In a subsequent case, she rejected an emotional distress claim by a worker who presented no "objective evidence of severe emotional distress." Metro-North Commuter R.R. v. Buckley, 521 U.S. 424, 445 (1997) (Ginsburg, J., dissenting in part). She did, however, press for more concrete guidelines governing the latter worker's claim on another matter.

society. In this way, she attempts to tie the Court's decisions on racial discrimination to the everyday experience of individuals who suffer from that bias.[47] Similarly, when evaluating claims of religious establishment, Ginsburg focuses on the challenged conduct as it would be viewed by a member of a minority religion. She perceives the practice as it would be felt by the religious outsider, and attempts to convey that sensitivity to the Court.[48]

Ginsburg's focus on individual experience, moreover, is part of a larger tendency to concentrate carefully on the facts of each case. She allows the law to mature slowly, an approach that leads to thoughtful decision-making. Just as she repudiated stereotypes as an advocate, Ginsburg rebuffs sweeping pronouncements as a Justice. Her jurisprudence challenges the law to accommodate those who have been "ignored or excluded," but to achieve those ends by moving cautiously from case to case.

In light of this jurisprudence of individuals, it is fitting that Ginsburg's impact on people has been as significant as her lasting contribution to law. Men still outnumber women in the armed forces, and most husbands still earn more than their wives, but there are many more Sharon Frontieros and Stephen Wiesenfelds today than there were in 1970. Women have swept into the workforce in unprecedented numbers, overturning barriers to find employment as lawyers, doctors, air force pilots, prison guards, and nuclear engineers. At the same time, men have begun to share the responsibility for cleaning their homes and nurturing their children. As much as any other individual, Ginsburg has helped to create this new world. It is a world that has improved the lives of countless women and men, as well as the lives of the children they raise together.

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[47] *See, e.g.*, Miller v. Johnson, 515 U.S. 900, 934 (1995) (Ginsburg, J., dissenting); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 271 (1995) (Ginsburg, J., dissenting); Missouri v. Jenkins, 515 U.S. 70, 184 (1995) (Ginsburg, J., dissenting). A majority of the Court, unfortunately, has not followed Ginsburg's lead in these cases. *See also supra* note 8 (noting Ginsburg's co-authorship of an amicus brief supporting the affirmative action program challenged in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978)).

[48] *See, e.g.*, Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 817 (1995) (Ginsburg, J., dissenting) ("We confront here . . . a large Latin cross that stood alone and unattended in close proximity to Ohio's Statehouse. . . . Near the stationary cross were the government's flags and the government's statutes. No human speaker was present to disassociate the religious symbol from the State. No other private display was in sight. No plainly visible sign informed the public that the cross belonged to the Klan and that Ohio's government did not endorse the display's message.").

Justice Ruth Bader Ginsburg's Jurisprudence of Process and Procedure

Elijah Yip*
Eric K. Yamamoto**

I. INTRODUCTION

The Senate confirmation hearing of a nominee to the United States Supreme Court is typically an occasion to ascertain his or her political predilections.[1] Aware of this, Ruth Bader Ginsburg sought to center her confirmation hearing on a deeper discussion of the complex dynamics of judging. "Let me try," she said, "to state in a nutshell how I view the work of judging. My approach, I believe, is neither liberal nor conservative."[2]

Despite her efforts, the media persisted in assigning a label to then-Judge Ginsburg and, pointing to her performance as a former law school professor and a federal appellate judge, portrayed her as "moderate."[3] In agreement, Republican senators who applauded her nomination joined in labeling her as "moderate."[4] After Justice Ginsburg joined the Supreme Court and served for a term, a law review article concluded, on the basis of her first-term voting behavior, that she "was indeed a moderate."[5]

What does "moderate" mean? Politically? Judicially? Does "neither liberal nor conservative" necessarily equate with moderate? Or for that matter, do the labels liberal, conservative, and moderate meaningfully portray Justice Ginsburg's writing and decisionmaking? Conventional political labels suffer from a number of shortcomings. They carry interpretative baggage that may badly mischaracterize the person being labeled; they tend to reflect the perceptions and beliefs of the person assigning the label; they are shorthand

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[1] *See generally* Henry Paul Monaghan, *The Confirmation Process: Law or Politics?*, 101 HARV. L. REV. 1202 (1988)(commenting on the political significance of the Supreme Court appointment process); William G. Ross, *The Supreme Court Appointment Process: A Search for Synthesis*, 57 ALB. L. REV. 993 (1994)(surveying the problems associated with the Supreme Court appointment process and proposing reform measures).

[2] *Nomination of Ruth Bader Ginsburg, to be Associate Justice of the Supreme Court of the United States: Hearings Before the Comm. on the Judiciary, U.S. Senate*, 103d Cong. 51 (1993) [hereinafter *Hearings*] (testimony of Justice Ruth Bader Ginsburg).

[3] *See* David A. Kaplan & Bob Cohn, *A Frankfurter, Not a Hot Dog*, NEWSWEEK, June 8, 1993, at 29.

[4] *See, e.g.*, 139 CONG. REC. S10085 (daily ed. August 2, 1993)(statement of Sen. Grassley ("Judge Ginsburg showed us that, while she is a political liberal, she is a judicial moderate.")).

[5] Joyce Anne Baugh et al., *Justice Ruth Bader Ginsburg: A Preliminary Assessment*, 26 U. TOL. L. REV. 1, 11 (1994).

descriptions that foreclose careful and continued scrutiny of actual behavior.[6] For these reasons, overused labels such as liberal, conservative, or moderate obscure rather than illuminate.[7] And, in our opinion, they are inadequate to describe Justice Ginsburg's dynamic approach to the complex issues of legal process.[8]

This article sets aside the familiar political labels and engages in a deeper analysis of what Justice Ginsburg has done and said. What prompted Justice Ginsburg's reputation as a moderate may be, as a survey of her judicial opinions suggests, her willingness to accommodate a number of differing, sometimes contrasting concerns when crafting a judicial opinion. For

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[6] See MARTHA MINOW, MAKING ALL THE DIFFERENCE 173-77 (1990), for a general survey of labeling theory and its criticisms.

[7] Justice Ginsburg similarly questions the utility of conventional political labels in describing the tenor of judicial action. *See* Ruth Bader Ginsburg, *Interpretations of the Equal Protection Clause*, 9 HARV. J.L. & PUB. POL'Y 41, 44 (1986) [hereinafter Ginsburg, *Interpretations*]; *see also* Ruth Bader Ginsburg, *Inviting Judicial Activism: A "Liberal" or "Conservative" Technique?*, 15 GA. L. REV. 539, 546 (1981) [hereinafter Ginsburg, *Activism*]. In addressing criticisms that the Supreme Court has been swayed by both right-wing and left-wing litigants, Ginsburg wrote:

> I asked then, and I ask again now, whether it is fair to conclude from the business that litigants of various political persuasions bring to court that, in the United States legal system, calls for judicial intervention, for intrusive review of legislative and executive decisions, depend less upon the challenger's "liberal" or "conservative" ideology, and more upon the practical question of whose ox is being gored.

Ginsburg, *Interpretations*, *supra* this note, at 44. To express her point that labels of liberal and conservative are inadequate to explain the dynamics of decision-making, Ginsburg quotes a passage from Gilbert & Sullivan's *Iolanthe*:

> When in that House M.P.'s divide
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> . . . .
>
> They've got to leave [their] brains outside
> And vote just as their leaders tell 'em to
> They can do this thanks to the providence:
> That Nature always does contrive
> That ev'ry boy and ev'ry gal
> That's born into the world alive
> Is either a little Liberal
> Or else a little Conservative.

Ginsburg, *Activism*, *supra*, at 557 (alterations in original).

[8] Peter Huber, a former law clerk for Judge Ginsburg, commented: "The beauty of Ruth Ginsburg is that she doesn't readily admit to categorization. The labels don't fit." Tony Mauro, *Judicial Journey Helped to Shape Court Nominee*, USA TODAY, June 18, 1993, at 10A. Similar commentary is offered by Richard Taranto, a former law clerk to Judge Robert Bork: "What makes her extraordinary is that in area after area, she comes to cases with a single-minded dedication to follow the legal standards as they exist . . . It's much harder to pin a substantive label on her." Barbara Franklin, *Business is Upbeat: Ginsburg's Record Shows Fairness, Lack of Bias*, N.Y. L.J., June 17, 1993, at 5.

instance, Justice Ginsburg's procedural decisions evince a strong belief in the ideal of a person's "day in court."[9] Justice Ginsburg has allowed litigants to proceed with their cases despite their apparent difficulty in overcoming procedural barriers such as timeliness[10] and mootness.[11] Yet, she has also on occasion dismissed cases involving important substantive issues on narrow procedural grounds, such as lack of standing.[12]

Analysis of these cases on their own terms and in light of a larger framework of process values reveals the complexity of Justice Ginsburg's philosophy of process and procedure[13]—a philosophy often masked by political labels. This article engages in a detailed analysis of Justice Ginsburg's approach to the procedural aspects of legal process.[14] To aid in this endeavor, the article pays particular attention to her decisions in the context of the most complicated, and therefore revealing, procedural device: the class action.[15] Justice Ginsburg's majority opinion in the asbestos class action, *Amchem Products v. Windsor*,[16] discussed later, lays open a complex array of competing concerns undergirding procedural decisionmaking. *Amchem* and her other judicial opinions in class action cases offer beginning insight into her jurisprudence of process and procedure.[17]

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[9] *See* J. Stratton Shartel, *Ginsburg's Opinions Reveal Willingness to Grant Access to Litigants*, INSIDE LITIG., Aug. 1993, at 1; *see also, e.g.*, Doe v. Sullivan, 938 F.2d 1370 (D.C. Cir. 1991)(deciding that a military service person's challenge of an FDA regulation permitting use of unauthorized drugs on military personnel without their consent was not moot, notwithstanding the termination of the military situation creating the need to invoke the regulation).

[10] *See, e.g.*, Spann v. Colonial Village, Inc., 899 F.2d 24 (D.C. Cir. 1990)(holding that plaintiffs were entitled to an immediate right of appeal even though the district court did not technically enter final judgment in a separate document pursuant to FRCP 58). *See also infra* notes 19-74 and accompanying text.

[11] *See, e.g.*, Doe v. Sullivan, 938 F.2d 1370 (D.C. Cir. 1991). *See also infra* notes 63-74 and accompanying text.

[12] *See, e.g.*, Arizonans for Official English v. Arizona, 520 U.S. 43 (1997)(requiring a showing of actual or imminent invasion of a legally protected interest that is concrete rather than an interest shared generally by the public at large in order to confer standing to sue). *See also infra* notes 160-175 and accompanying text.

[13] By "process" we mean "legal method"—that is, the manner in which judges reach decisions in cases and articulate reasons for those decisions. By "procedure" we mean specific litigation procedures (such as summary judgment motions) and procedural requirements (such as subject matter jurisdiction and standing).

[14] One caveat is in order. Our assessment of Justice Ginsburg's procedural jurisprudence is based on a relatively limited universe of information. Our views are therefore preliminary and serve as a base for further inquiry.

[15] The class action device is governed by Federal Rule of Civil Procedure 23.

[16] 521 U.S. 591 (1997).

[17] *Amchem* involved the class settlement of asbestos litigation, a legal phenomenon that has posed a formidable challenge to the institutional values of the judicial system. *See* Georgine v.

Part II of this article sketches major procedural themes in Justice Ginsburg's work as a scholar and as a jurist. Part III constructs a conceptual framework of process values to better ground our later assessment of those themes. Part IV revisits, in depth, the themes in Justice Ginsburg's work, employing the process values framework in the context of class action procedure. Finally, Part V offers a description of Justice Ginsburg's jurisprudence of process and procedure that is not laden with the baggage of common political labels. We describe a "values proceduralism."

II. THEMES IN JUSTICE GINSBURG'S JURISPRUDENCE OF LEGAL PROCESS

Justice Ginsburg's views of process and procedure, as reflected in her writings, do not lend themselves to neat political labels. They reflect diverse themes that defy easy characterization. As Justice Ginsburg remarked at her Senate confirmation hearing, her prior judicial opinions and academic writings are "the most tangible, reliable indicator of [her] attitude, outlook, approach and style."[18] This Part follows her lead. It casts aside conventional labels and explores her judicial and scholarly writings to ascertain general themes concerning process and procedure. The major themes of her writings include litigant access, court efficiency, and judicial integrity.

A. Litigant Access

A theme that percolates through Justice Ginsburg's judicial opinions is open court access for aggrieved individuals.[19] As a Circuit Judge of the District of Columbia Circuit Court of Appeals, Judge Ginsburg sometimes disfavored the perfunctory application of threshold procedural requirements, such as the timeliness of appeal,[20] standing[21] and mootness,[22] to bar full development of the merits of a case.

For example, in *Center for Nuclear Responsibility, Inc. v. United States Nuclear Regulatory Commission*,[23] Judge Ginsburg argued that the mechanical

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Amchem Prods., Inc., 83 F.3d 610, 617 (3d Cir. 1996). The Third Circuit Court of Appeals remarked that "[e]very decade presents a few great cases that force the judicial system to choose between forging a solution to a major social problem on the one hand, and preserving its institutional values on the other. This is such a case." *Id.*

[18] *Hearings*, *supra* note 2, at 52.

[19] *See* Shartel, *supra* note 9, at 1.

[20] *See, e.g.*, Center for Nuclear Responsibility, Inc. v. United States Nuclear Regulatory Comm'n, 781 F.2d 935, 943 (D.C. Cir. 1986)(Ginsburg, J., dissenting); Spann v. Colonial Village, Inc., 899 F.2d 24 (D.C. Cir. 1990).

[21] *See, e.g.*, Doe v. Sullivan, 938 F.2d 1370 (D.C. Cir. 1991).

[22] *See id.*

[23] 781 F.2d 935 (D.C. Cir. 1986). At the outset, we note that our assessment of cases does

construction of the appeal period should not preclude an appeal of an unfavorable, but substantively important, decision of the lower court.[24] The Center for Nuclear Responsibility, Inc. ("CNR"), an organization that promotes nuclear safety, sought to enjoin a final decision of the Nuclear Regulatory Commission ("NRC") allowing amendments to a nuclear power plant's operating license.[25] The district court dismissed the lawsuit for lack of subject matter jurisdiction, holding that it lacked jurisdiction to review the final orders of the NRC.[26] Nevertheless, in the same opinion, the court also reached the merits of CNR's National Environmental Policy Act ("NEPA") claim.[27] On defendants' subsequent motion for clarification, the court amended its opinion to reflect a lack of jurisdiction over the NEPA claim as well.[28] CNR then filed its notice of appeal within sixty days after the amendment of the opinion, but after the sixty-day appeal period following the issuance of the original order.[29]

The defendants argued that the appeal was untimely pursuant to Rule 4 of the Federal Rules of Appellate Procedure ("FRAP").[30] CNR contended that the defendants' motion for clarification tolled the sixty-day period because it was a "motion to alter or amend the judgment" made under Federal Rule of Civil Procedure ("FRCP") 59(e).[31] Defendants responded that the motion was

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not reveal a definitive trend or approach. Rather, our survey of Justice Ginsburg's writings indicates her tendencies or leanings.

[24] *See id.* at 946 (Ginsburg, J., dissenting).

[25] *See id.* at 937.

[26] *See id.* (finding no subject matter jurisdiction under the Atomic Energy Act of 1954 and 28 U.S.C. § 2342(4)).

[27] *See id.* at 938.

[28] *See id.*

[29] *See id.*

[30] *See id.* at 939. A notice of appeal must be filed within 60 days after entry of the "judgment" of the district court. FED. R. APP. P. 4(a). A judgment is entered within the meaning of FRAP 4(a) "when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure." FED. R. APP. P. 4(a)(7). FRCP 58 requires that the "judgment" be set forth in a separate document. *See* FED. R. CIV. P. 58. Federal Rule of Civil Procedure 79(a) requires that the clerk of the court enter the judgment on the civil docket. FED. R. CIV. P. 79(a).

[31] *See Center for Nuclear Responsibility*, 781 F.2d at 939. FRAP 4(a)(4) provides, in part:

> If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party . . . (iii) under Rule 59 to alter or amend the judgment[.] . . . [T]he time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect.

FED. R. APP. P. 4(a)(4) (1979)(amended 1993). FRCP 59(e) provides: "A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment." FED. R. CIV. P. 59(e).

made pursuant to FRCP 60(b)(1), and accordingly, did not toll the appeal period.[32]

The Court of Appeals agreed with the defendants.[33] The majority noted an absence of definitive authority as to whether a court may correct errors in legal reasoning through a Rule 60(b)(1) motion.[34] "The tension between Rule 59(e) and Rule 60(b)," the court said, "is generated by the competing goals of finality of judgments and rendering justice to particular litigants."[35] Faced with this divide, the court held that Rule 58 is to be "applied mechanically."[36] Since the original order complied with the "separate document" requirement of FRCP 58 and the filing requirement of FRCP 79(a), it was a "final judgment" within the meaning of FRAP 4.[37] Therefore, according to the majority, the defendants' motion to clarify was not a FRCP 59(e) motion and CNR's notice of appeal was untimely.[38]

In a rare dissent,[39] Judge Ginsburg argued that CNR should not have been denied its appeal.[40] CNR was uncertain of the proper court in which to bring its claim.[41] Judge Ginsburg observed that Congress had provided a statutory remedy for litigants in CNR's situation,[42] but the provision had apparently escaped the district court's attention because it was enacted shortly before the court dismissed the case.[43] Nonetheless, she was opposed to a remand of the case:

> [I]t would be a curious procedure indeed to remand this aging matter to the district court so that a district judge could decide whether or not to ticket as a "transfer" the parties' return trip here. Nor is such a convoluted procedure

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[32] *See Center for Nuclear Responsibility*, 781 F.2d at 939. FRCP 60(b) states, in part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect[.] . . . A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation.

FED. R. CIV. P. 60(b).

[33] *See Center for Nuclear Responsibility*, 781 F.2d at 937.

[34] *See id.* at 939.

[35] *Id.*

[36] *Id.*

[37] *See id.*

[38] *See id.* at 940.

[39] As discussed below, Justice Ginsburg rarely writes dissenting opinions. *See infra* notes 133-140 and accompanying text.

[40] *See Center for Nuclear Responsibility*, 781 F.2d at 946 (Ginsburg, J., dissenting).

[41] *See id.* at 945 (Ginsburg, J., dissenting).

[42] *See id.* at 943 (Ginsburg, J., dissenting).

[43] *See id.* at 944 (Ginsburg, J., dissenting).

> necessary to a fair decision: all the considerations relevant to "the interest of justice" appear from the record to be within our plain view.[44]

Judge Ginsburg also criticized the majority's rigid application of FRCP 59.[45] "The mechanical analysis offered by the court does not persuade me that we lack power to hear this case. On the contrary, the case belongs in this forum, . . . and we should accord these litigants their long-sought day in court."[46] In Justice Ginsburg's estimation, the Court of Appeals should have heard the merits of CNR's appeal.[47]

Timeliness was also an issue in *Spann v. Colonial Village, Inc.*,[48] in which a black resident of the District of Columbia and two non-profit organizations dedicated to the interest of housing equality challenged real estate advertisements featuring exclusively white models.[49] After a complex series of procedural steps,[50] the lower court dismissed the claims.[51] The defendants argued that the plaintiff's subsequent appeal was premature because the district court did not set forth its final judgment in a separate document pursuant to FRCP 58.[52]

Writing for the majority, Judge Ginsburg observed that FRCP 58 "must be applied in such a way as to favor the right to appeal."[53] She disfavored the "mindless" application of FRCP 58.[54] Rather,

> so long as "it is clear that the district court has intended a final, appealable judgment, mechanical application of the separate-judgment rule should not be used to require the pointless formality of returning to the district court for ministerial entry of judgment; instead, the right to immediate appeal is favored."[55]

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[44] *Id.* at 945 (Ginsburg, J., dissenting).

[45] *See id.* at 946 (Ginsburg, J., dissenting).

[46] *Id.*

[47] *See id.*

[48] 899 F.2d 24 (D.C. Cir. 1990).

[49] *See id.* at 25-26.

[50] *See id.* at 26. The case before the Court of Appeals was a consolidation of actions against two unrelated sets of defendants. *See id.* In the first action, the defendants consisted of an owner and manager of a residential condominium in Virginia and a development corporation. *See id.* In the second action, the defendants were an advertising agency and its owner. *See id.* The case was consolidated in district court. *See id.* The district court made a ruling in favor of the defendants, which plaintiffs appealed. *See id.* The appeal was cut short when the defendants moved successfully in the Court of Appeals to dismiss for want of finality. *See id.* The district court then issued a final judgment in favor of the defendants. *See id.*

[51] *See id.*

[52] *See id.* at 31.

[53] *Id.* at 32 (quoting Matter of Seiscom Delta, Inc., 857 F.2d 279, 283 (5th Cir. 1988)).

[54] *See id.* at 32 n.4 (citing United States v. Perez, 736 F.2d 236, 237-38 (5th Cir. 1984)).

[55] *Id.* at 32 (quoting *Seiscom*, 857 F.2d at 283).

Accordingly, Judge Ginsburg found the lower court's decision final for the purpose of appellate review.[56]

Spann also presented a standing issue.[57] Although the defendants alleged harm that affected only their noneconomic interests, Judge Ginsburg found that the defendants had standing.[58] The defendants' ads, she said, had a destructive effect on the plaintiffs' efforts to educate the public about anti-discriminatory housing practices.[59] The plaintiffs incurred "concrete drains on their time and resources" in redoubling their efforts to educate the community.[60] Judge Ginsburg described the suit as "traditional grist for the judicial mill."[61] Thus, she determined the plaintiffs had suffered an injury sufficient to confer them standing.

Judge Ginsburg also interpreted narrowly another threshold procedural doctrine, mootness,[62] to afford relatively open court access to individuals raising substantial questions of federal law. In *Doe v. Sullivan*,[63] a military serviceman and his wife challenged Food and Drug Administration ("FDA") regulations[64] authorizing the Department of Defense ("DOD") to use unapproved drugs in certain military situations without obtaining military personnels' informed consent.[65] The FDA, pursuant to the regulation, issued consent waivers allowing the DOD to administer certain drugs during the Gulf War.[66] The district court dismissed the suit and Doe appealed.[67] While the appeal was pending, the Gulf War ended, and the DOD notified the FDA that the need for the waiver had ceased.[68] The government then moved to dismiss the appeal as moot.[69]

Judge Ginsburg broadly applied the test of "capable of repetition, yet evading review" to find an exception to the mootness doctrine in Doe's case.[70]

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[56] *See id.* at 32.

[57] *See id.* at 27. The standing doctrine requires a party to have suffered a sufficient injury so as to present a justiciable controversy to the court. *See* Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982)(articulating a three-part test for standing).

[58] *See Spann*, 899 F.2d at 27-31.

[59] *See id.* at 28.

[60] *Id.* at 29.

[61] *Id.* at 30.

[62] The mootness doctrine renders a claim non-justiciable if the action complained of by the claimant is no longer causing injury. *See* Honig v. Doe, 484 U.S. 305 (1988).

[63] 938 F.2d 1370 (D.C. Cir. 1991).

[64] *See, e.g.*, 21 C.F.R. §§ 312.34, 312.35.

[65] *See Sullivan*, 938 F.2d at 1371-75.

[66] *See id.* at 1374.

[67] *See id.* at 1375.

[68] *See id.*

[69] *See id.*

[70] *Id.* at 1376 (quoting Weinstein v. Bradford, 423 U.S. 147, 149 (1975)(per curiam)).

Doe's appeal satisfied the evading review standard, Ginsburg wrote, because the consent waiver granted by the FDA was withdrawn after only three months, which was not enough time for Doe to secure judicial review.[71] Moreover, Judge Ginsburg noted that the threat of chemical warfare was ongoing.[72] Since the regulation was still in place, the controversy was capable of repetition.[73] The plaintiffs had not lost a "personal stake" in the case nor had the public or the military service personnel lost an interest in the issue.[74]

Judge Ginsburg's judicial opinions in *Center for Nuclear Responsibility*, *Spann*, and *Sullivan* highlight her receptivity to arguments favoring litigant access to the courts. At a minimum, her writings in these opinions demonstrate her aversion to applying procedural requirements rigidly to preclude aggrieved litigants from presenting their claims before a court.

B. Court Efficiency

Justice Ginsburg's opinions also evince concerns for court efficiency. As a federal judge, Justice Ginsburg expressed worry about the pressures of overloaded federal court dockets:

> [The federal courts] have too much business. Some of it must be trimmed if the quality of federal justice is to remain high, retaining as its hallmark the individual effort of each judge to make each decision on the justiciability or merits of a controversy the product of his or her own careful deliberation.[75]

As a Supreme Court justice, Justice Ginsburg expressed similar concerns, as reflected in her opinion in *Caterpillar Inc. v. Lewis*.[76] In *Caterpillar*, a Kentucky resident, Lewis, brought a products liability action in state court against a nonresident manufacturer, Caterpillar, and an in-state service company.[77] The service company's insurer, also a Kentucky corporation, intervened as a plaintiff asserting subrogation claims against Caterpillar and the servicer.[78] After learning that Lewis had settled his claims against the servicer, Caterpillar removed the remaining claims to federal court on the basis of diversity jurisdiction.[79] Lewis unsuccessfully moved to remand on the ground that the servicer's continued presence in the suit as a party to the

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[71] *See id.*

[72] *See id.* at 1378-79.

[73] *See id.* at 1376-79.

[74] *See id.* at 1378.

[75] Ruth Bader Ginsburg, *Reflections on the Independence, Good Behavior, and Workload of Federal Judges*, 55 U. COLO. L. REV. 1, 7 (1983).

[76] 519 U.S. 61 (1996).

[77] *See id.* at 64-65.

[78] *See id.* at 65.

[79] *See id.*

subrogation claim rendered diversity incomplete.[80] Before trial, the servicer was dismissed from the suit, leaving Caterpillar the sole defendant.[81]

After a trial resulting in a verdict for Caterpillar,[82] Lewis appealed.[83] The Sixth Circuit accepted Lewis' argument that the parties were not completely diverse at the time of removal.[84] Since the district court lacked subject matter jurisdiction at the time of removal, the Sixth Circuit vacated the district court's judgment.[85]

The Supreme Court agreed that the nondiverse service company destroyed diversity jurisdiction at the time of removal. The Court nevertheless held that the district court had jurisdiction at the time of judgment and that this was sufficient to sustain the judgment.[86] Writing for a unanimous Court,[87] Justice Ginsburg implicitly rejected the general rule that subject matter jurisdiction is assessed at the time of case filing[88] and joinder of parties and claims.[89] "Once a diversity case has been tried in federal court," she wrote, "considerations of finality, efficiency, and economy become overwhelming."[90] No jurisdictional defect existed when the district court rendered its judgment.[91] Dismissing the case after it had been litigated for years "would impose unnecessary and wasteful burdens on the parties, judges, and other litigants waiting for judicial attention."[92] Since vacating the district court's judgment "would impose an exorbitant cost on [the] dual court system, a cost incompatible with the fair and unprotracted administration of justice," the Court reversed the Sixth Circuit's decision reinstating the verdict.[93]

Similar concerns for court efficiency resonated in Justice Ginsburg's decision in *In re Korean Airlines Disaster of September 1, 1983*.[94] A number of federal court cases arising from the crash of an airliner were consolidated

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[80] *See id.* at 65-66.

[81] *See id.* at 66.

[82] *See id.* at 67.

[83] *See id.*

[84] *See id.*

[85] *See id.*

[86] *See id.* at 73.

[87] *See id.* at 63.

[88] *See, e.g.*, Navarro Sav. Ass'n v. Lee, 446 U.S. 458, 459 n.1 (1980)(citation omitted) (observing that jurisdiction turns on the facts existing at the commencement of the suit).

[89] *See, e.g.*, Lewis v. Lewis, 358 F.2d 495, 502 (9th Cir. 1966)(holding that diversity is determined at the time the complaint is filed, and in the case of an amended complaint joining new parties, diversity must exist at the time of amendment).

[90] *Caterpillar*, 519 U.S. at 75 (citation omitted).

[91] *See id.* at 77.

[92] *Id.* at 76 (internal quotation marks omitted)(quoting Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 836 (1989)).

[93] *Id.* at 77.

[94] 829 F.2d 1171 (D.C. Cir. 1987).

and transferred into a single court for pretrial proceedings. The plaintiffs in these cases argued that the law of the transferor forum applied to their claims.[95] Judge Ginsburg, then a Circuit Judge on the Court of Appeals for the District of Columbia, rejected their argument.[96] She noted that efficiency was the dominant concern of the consolidation device, and that "[a]pplying divergent interpretations of the governing federal law to plaintiffs, depending solely upon where they initially filed suit, would surely reduce the efficiencies achievable through consolidated preparatory proceedings."[97]

C. Judicial Integrity

Justice Ginsburg's writings, both as a scholar and as a jurist, provide insight into her views on the relationships between different actors in the judicial system, between the judiciary and other political branches, and between substance and procedure.[98] Maintaining the integrity of judicial institutions appears to be a theme that pervades her thoughts on the interaction among judges, the judiciary, lawyers, and litigants. Justice Ginsburg's commentary on four qualities that describe good judges and judging—deference to precedent, collegiality, judicial interdependence, and procedural accountability—point to the notion that the judiciary's legitimacy depends upon developing careful, balanced relationships between the numerous actors and institutions in the judicial system.

1. Stare decisis

As an advocate and a jurist, Justice Ginsburg recognized the significance of precedent. Her experiences in gender discrimination litigation illustrate her approach to stare decisis. As the director of the American Civil Liberties Union Women's Rights Project, Ginsburg followed the legal stratagem of litigating cases that were "clear winners."[99] In a political environment not yet

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[95] *See id.* at 1172.

[96] *See id.* at 1175.

[97] *Id.*

[98] A non-exhaustive list of writings in which Ginsburg expresses her thoughts on relationships between judicial actors include Ruth Bader Ginsburg, *On Muteness, Confidence, and Collegiality: A Response to Professor Nagel*, 61 U. COLO. L. REV. 715 (1990); Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133 (1990)[hereinafter Ginsburg, *Remarks*]; Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185 (1992)[hereinafter Ginsburg, *Judicial Voice*]; Ruth Bader Ginsburg, *Styles of Collegial Judging*, 39 FED. BAR NEWS & J. 199 (1992).

[99] *See* Deborah L. Markowitz, *In Pursuit of Equality: One Woman's Work to Change the Law*, 14 WOMEN'S RTS. L. REP. 335, 337 (1992).

hospitable to gender claims, her aim was to validate gender discrimination law, and to establish precedent for more complex cases.

That strategy included advocacy of gender discrimination claims brought by men.[100] The Supreme Court, many thought, would be more receptive to striking down laws that unfairly disadvantaged men. The strategy succeeded in constructing a doctrinal edifice for gender discrimination that later benefited women.[101] The framing of this incremental litigation strategy lay in the building of "precedents one upon the other."[102] Doctrinal change favorable to women claimants was made easier by a line of gender discrimination precedents.[103]

Justice Ginsburg carried her views on stare decisis to the bench. When questioned in her Senate confirmation hearing on how she would vote on controversial issues, she replied that she would be "scrupulous in applying the law on the basis of the Constitution, legislation, and precedent."[104] Explaining her awareness of the reliance interests connected to statutory interpretation, she said:

> The soundness of the reasoning is certainly a consideration. But we shouldn't abandon a precedent just because we think a different solution more rational. Justice Brandeis said some things are better settled than settled right, especially when the legislature sits. So if a precedent settles the construction of a statute, stare decisis means more than attachment to the soundness of the reasoning. *Reliance interests* are important; the *stability, certainty, predictability* of the law is important.[105]

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[100] *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677 (1973)(rejecting a federal statute requiring the husband of a military servicewoman to prove "dependent" status in order to obtain benefits); Kahn v. Shevin, 416 U.S. 351 (1974)(upholding a state statute allowing widows but not widowers an exemption from small property taxes); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975)(holding unconstitutional a provision of the Social Security Act giving benefits to surviving women of a deceased wage earner but not to surviving men); Craig v. Boren, 429 U.S. 190 (1976)(striking down a state statute prohibiting the sale of beer to males under 21 and to females under 18); Califano v. Webster, 430 U.S. 313 (1977)(upholding a state statute allowing women to exclude more low-earning years than men in calculating Social Security retirement benefits).

[101] The Supreme Court finally applied the intermediate level scrutiny standard to gender-based classifications in *Craig v. Boren*, 429 U.S. 190 (1976), an argument Ginsburg made in her brief to the Court in that case. The Court would not likely have established the intermediate scrutiny test in *Boren* were it not for Ginsburg's litigation efforts in prior cases. *See* Markowitz, *supra* note 99, at 356.

[102] Markowitz, *supra* note 99, at 345.

[103] *Id.*

[104] *Hearings*, *supra* note 2, at 192.

[105] *Id.* at 197 (emphasis added).

Justice Ginsburg's statement reveals her belief that maintenance of stability, certainty, and predictability in the legal system justifies close adherence to the dictates of stare decisis.

Justice Ginsburg's judicial record is consistent with her stated respect for stare decisis. She is reluctant to deviate from prior case holdings,[106] even when she believes the established rule is not entirely correct.[107] Her concurrence in *United States Department of Defense v. Federal Labor Relations Authority*[108] exemplifies her willingness to support a decision dictated by precedent even though it is inconsistent with her sense of an appropriate outcome. In *Federal Labor Relations Authority*, two local unions filed unfair labor practice charges with the Federal Labor Relations Authority ("FLRA") after federal agencies refused to comply with the unions' request for the home addresses of the agency employees in the bargaining units.[109] The agencies argued that the Privacy Act of 1974[110] prohibited disclosure.[111] Rejecting that contention, the FLRA concluded that the Federal Service Labor-Management Relations Statute[112] required the agencies to disclose the addresses.[113]

The Fifth Circuit ordered enforcement of the FLRA's orders, finding that the requests for disclosure fell within an exception to the Privacy Act—the Act does not preclude disclosure of personal information that must be divulged under section 552 of the Freedom of Information Act ("FOIA").[114] In reaching this conclusion, the Fifth Circuit balanced the public interest in effective collective bargaining against the employees' interest in keeping their home addresses private.[115]

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[106] *See, e.g.*, Critical Mass Energy Project v. Nuclear Regulatory Comm'n, 975 F.2d 871 (D.C. Cir. 1992)(Ginsburg, J., dissenting)(arguing against the redefinition of the test of "confidentiality" under the Freedom of Information Act established in *National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), because "stare decisis is a wise policy").

[107] *See, e.g.*, Save Our Cumberland Mountains, Inc. v. Hodel, 826 F.2d 43 (D.C. Cir. 1987)(Ginsburg, J., concurring)(questioning the lodestar rule established in a prior case decided in the Circuit but refusing to circumvent the rule because it was precedent).

[108] 510 U.S. 487 (1994).

[109] *See id.* at 490.

[110] 5 U.S.C. § 552a (1988 & Supp. IV).

[111] *See Federal Labor Relations Auth.*, 510 U.S. at 490 [hereinafter *FLRA*].

[112] 5 U.S.C. § 7101-7135 (1988 & Supp. IV) [hereinafter labor statute].

[113] *See FLRA*, 510 U.S. at 490.

[114] 5 U.S.C. § 552a(b)(2) (1988 & Supp. IV) [hereinafter FOIA]; *see FLRA*, 510 U.S. at 491. The only exception to FOIA disclosure that potentially applied, the provision exempting personnel files "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," 5 U.S.C. § 552(b)(6) (1988 & Supp. IV), did not bar disclosure in this case. *See FLRA*, 510 U.S. at 491.

[115] *See FLRA*, 510 U.S. at 491. Application of this test appeared to run contrary to the Supreme Court's holding in *Department of Justice v. Reporters Committee for Freedom Press*, 489 U.S. 749 (1989).

The Supreme Court reversed, finding that disclosure of the addresses would contravene the Privacy Act.[116] In *Department of Justice v. Reporters Committee for Freedom Press*, the Court specified that the only public interest to be considered under FOIA is "the extent to which disclosure would serve the 'core purpose of the FOIA,' which is 'contribut[ing] significantly to public understanding of the operations or activities of the government.'"[117] The fact that FOIA's provisions were implicated indirectly under the Labor Statute did not mean that the FOIA analysis should incorporate the policies underlying the Labor Statute.[118] Guided by *Reporter's Committee*, the majority found the public interest in disclosure of the addresses negligible, as disclosure "would not appreciably further 'the citizens' right to be informed about what their government is up to.'"[119]

Justice Ginsburg disagreed with the majority's analysis.[120] She noted that Congress intended to bolster the position of federal unions by enacting the labor statute.[121] Thus, Congress did not intend to deny federal unions information that private-sector unions routinely received.[122] Moreover, Congress could not have aimed to elevate the privacy interest above the interest in promoting the collective bargaining endeavors of federal unions.[123] Based on this, Justice Ginsburg argued that *Reporter's Committee* did not necessitate the majority's interpretation of FOIA.[124]

Notwithstanding her disagreement with the majority, Justice Ginsburg concurred with the judgment of the Court. She wrote, "I am mindful, however, that the preservation of *Reporter's Committee*, unmodified, is the position solidly approved by my colleagues, and I am also mindful that the pull of precedent is strongest in statutory cases."[125] She therefore concluded that the anomaly resulting from the Court's decision—that federal unions are denied information accessible to private-sector unions—should be rectified not by the Court but by Congress.[126]

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[116] *See FLRA*, 510 U.S. at 489.
[117] *Id.* at 495 (quoting *Reporter's Committee*, 489 U.S. at 775 (alteration in original)).
[118] *See id.* at 498-99.
[119] *Id.* at 497 (quoting *Reporter's Committee*, 489 U.S. at 773).
[120] *See id.* at 504 (Ginsburg, J., concurring).
[121] *See id.* at 506 (Ginsburg, J., concurring).
[122] *See id.*
[123] *See id.*
[124] *See id.*
[125] *Id.* at 509 (Ginsburg, J., concurring).
[126] *See id.*

2. *Collegiality*

Described as a "judge's judge,"[127] Justice Ginsburg has emphasized collegiality in judges' relationships with each other.[128] In their writings, judges should adopt a "judicial voice," one that pays heed to the impact of their expressions on the public's respect for the court.[129] As administrators of "the least dangerous" branch of government,[130] judges "hold neither the sword nor the purse of the community," and must give effect to their judgments through persuasion.[131] Judges should therefore write in a "moderate and restrained voice" that reflects temperance in judgment.[132]

In keeping with a collegial judging style, judges should exercise restraint in writing separately.[133] "[O]verindulgence in separate opinion writing," Ginsburg has warned, "may undermine both the reputation of the judiciary for judgment and the respect accorded court dispositions."[134] When judges endeavor to write separately, they should "engag[e] in a dialogue with, not a diatribe against, co-equal departments of government, state authorities, and even [their] own colleagues."[135] Separate opinions should not "generate more heat than light" [136] by way of "intemperate denunciation of [the writer's] colleagues, violent invective, attributi[on]s of bad motives to the majority of the court, and insinuations of incompetence, negligence, prejudice, or obtuseness of [other judges]."[137] Rather, an appropriate separate opinion articulates independent legal reasons for the author's decision and points out differences with the opinions of other members of the court without undermining public confidence in the judiciary.[138]

Restraint in writing separately is conducive to respectful relationships among judges. Ginsburg's writings express her belief that adherence to a

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[127] Peter W. Huber & Richard Taranto, *Ruth Bader Ginsburg, A Judge's Judge*, WALL ST. J., June 15, 1993, at A18; Sheila M. Smith, Comment, *Justice Ruth Bader Ginsburg and Sexual Harassment Law: Will the Second Female Supreme Court Justice Become the Court's Women's Rights Champion?*, 63 U. CIN. L. REV. 1893, 1897 (1995).

[128] *See generally Remarks*, *supra* note 98; *see also Judicial Voice*, *supra* note 98, at 1190-91.

[129] *Judicial Voice*, *supra* note 98, at 1190-91.

[130] THE FEDERALIST NO. 78 (Alexander Hamilton).

[131] *Judicial Voice*, *supra* note 98, at 1186.

[132] *Id.* (quoting Brainerd Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754, 757 (1963)).

[133] *See id.* at 1194-96.

[134] *Id.*

[135] *Id.* at 1186.

[136] *Id.* at 1194.

[137] *Id.* (quoting Roscoe Pound, *Cacoethes Dissentiendi: The Heated Judicial Dissent*, 39 A.B.A. J. 794, 795 (1953))(alterations in original).

[138] *See id.* at 1196.

collegial style enables the "steady, upright, and impartial administration of the laws."[139] The operation of the courts is helped by collegial relationships because it fosters good-will among members of a court, and in turn, validates the judiciary in the public's estimation.[140]

3. *Measured movement*

Justice Ginsburg's academic writings offer commentary on how the judiciary should coordinate with other political branches. Justice Ginsburg regards the judicial system as "an interdependent part" of America's democratic system.[141] The office of the judiciary is to formulate legal doctrine—but in doing so, courts should engage in dialogue with other branches of government and also with the populace.[142] Judges can legislate, but "'only interstitially; they are confined from molar to molecular motions.'"[143] In her words, courts will do well to make "measured movement" in crafting legal doctrine.[144] At her Senate confirmation hearing, Justice Ginsburg quoted Justice Benjamin Cardozo to clarify what it means to make measured movement in adjudication: "Justice is not to be taken by storm. She is to be wooed by slow advances."[145] Judges should render decisions with deliberateness, making sure that their rulings are well-reasoned, supported by precedent, and limited in their stride.[146] "Doctrinal limbs too swiftly shaped," she admonishes, "may prove unstable."[147]

Justice Ginsburg cited *Roe v. Wade*[148] as an example of improvident judicial decisionmaking. She criticized the *Roe* Court for not engaging in a dialogue with legislators in formulating its holding.[149] At the time *Roe* was decided, state legislatures across the nation were prepared to liberalize abortion

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[139] *Id.* at 1188 (quoting Alexander Hamilton, THE FEDERALIST NO. 78, at 465 (Clinton Rossiter ed., 1961)).

[140] *See id.* at 1191.

[141] *Id.* at 1198.

[142] *See id.*

[143] *Id.* (quoting Southern Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917)(Holmes, J., dissenting)). Justice Ginsburg's view of the proper role of the courts is echoed by Legal Process theorists. Legal Process scholars argue that courts should fashion legal rules according to a legitimate set of procedures, but they should defer to the legislature as the primary lawmaking branch. *See* Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 505 (1988) (reviewing LAURA KALMAN, LEGAL REALISM AT YALE: 1927-1960 (1986)).

[144] *See Judicial Voice*, *supra* note 98, at 1198.

[145] *Hearings*, *supra* note 2, at 51.

[146] *See Judicial Voice*, *supra* note 98, at 1208.

[147] *Id.* at 1198.

[148] 410 U.S. 113 (1973).

[149] *See Judicial Voice*, *supra* note 98, at 1205.

statutes.[150] In her view, the Court took the abortion issue away from legislators and instituted its own system of regulation.[151] *Roe* left virtually no state abortion laws standing.[152] *Roe* was, in short, not a measured movement—it was a quantum leap.[153]

Decisions such as *Roe*, Justice Ginsburg argued, threaten to undermine the legitimacy of the court as the "final arbiter of constitutional questions[.]"[154] The Court's adoption of "[t]wo extreme modes of court intervention in social change processes . . . place[s] stress on the institution."[155] At times, the Court is the vanguard of social change; at other times, the Court is a resistor of change.[156] In adopting either stance, Ginsburg observed, the Court has earned the labels "activist" or "imperial," and has weakened its credibility.[157] Courts can, and should, "reinforce or signal a green light for a social change," but "without taking giant strides and thereby risking a backlash too forceful to contain."[158] Justice Ginsburg thus concluded that a temperate approach to judicial decisionmaking is true to the role of the judiciary within the American scheme of governmental power.

4. Procedural accountability

A former law clerk to Justice Ginsburg described her penchant for methods and procedures as "almost [a] Talmudic reverence and respect for the process of law . . . ."[159] Although perhaps overstated, this assessment points to Justice Ginsburg's careful use of procedure to assure appropriate airing of legal controversies. Justice Ginsburg's opinion in *Arizonans for Official English v. Arizona*[160] is illustrative.

The plaintiff in *Arizonans*, Maria-Kelly F. Yniguez, was an Arizona state employee at the time she sued the State challenging the constitutionality of a

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[150] *See id.* at 1205.

[151] *See id.*

[152] *See id.*

[153] *See id.*

[154] *Id.* at 1206.

[155] *Id.* at 1205-06.

[156] *See id.* at 1206.

[157] *See id.*

[158] *Id.* at 1208.

[159] Jeffrey Rosen, *The New Look of Liberalism on the Court*, N.Y. TIMES, Oct. 5, 1997, § 6 (Magazine), at 90. Peter Huber, the law clerk who made the comment, also noted, "[I]t is an extremely revealing fact about Ruth Ginsburg that she taught civil procedure for 17 years[.] . . . She has this terribly old-fashioned notion that rules can get written down or can evolve through a common-law process and can build upon each other to create a decisional fabric." *Id.* at 86, 90 (internal quotation marks omitted).

[160] 520 U.S. 43 (1997).

provision of the Arizona State Constitution.[161] Yniguez alleged that Article XXVIII of the Arizona State Constitution, which declared English as "the official language of the State" and required the State to "act in English and in no other language,"[162] violated the First Amendment.[163] Yniguez feared she would lose her job or face other sanctions if she spoke in Spanish in the course of her employment.[164] The district court found Article XXVIII fatally overbroad.[165]

Following judgment, the Attorney General, the Arizonans for Official English Committee ("AOE") and its chairman, Robert D. Park, moved to intervene as defendants to appeal the court's invalidation of Article XXVIII.[166] The court denied the motions to intervene,[167] and the Attorney General, AOE and Park appealed to the Ninth Circuit.[168] Meanwhile, Yniguez resigned from her state employment, whereupon the Attorney General informed the Ninth Circuit that the case may have become moot.[169] The Ninth Circuit rejected the suggestion of mootness, pointing out that Yniguez may be entitled to nominal damages.[170] Later, the Ninth Circuit, sitting en banc, reaffirmed its panel's conclusion that the provision was overbroad.[171]

The Supreme Court held that the case was moot. Justice Ginsburg, writing for a unanimous Court, posed the question: "Is this conflict really necessary?"[172] She found the actual controversy extinguished when Yniguez resigned her job.[173] The litigation, however important, was being pursued by groups on behalf of a nonexistent plaintiff. According to Justice Ginsburg, the federal courts should have stopped its adjudication of the state constitutional provision when Yniguez left her job.[174] The Court's vacation of the Ninth

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[161] See *id.* at 48.

[162] ARIZ. CONST. art. XXVIII (1988).

[163] U.S. CONST. amend. I, cl. 2; *see Arizonans*, 520 U.S. at 50.

[164] *See Arizonans*, 520 U.S. at 50.

[165] *See id.* at 54; *see also* Yniguez v. Mofford, 730 F. Supp. 309 (D. Ariz. 1990).

[166] *See Arizonans*, 520 U.S. at 55-56. Governor Mofford, a defendant in the action, announced that she would not appeal the district court's order. *See id.* at 56.

[167] *See id.* The district court found that the Attorney General, as an organ of the state, was already a party to the action. *See id.* at 56-67. Therefore, it could not intervene. *See id.* Further, the Attorney General was estopped from appealing because of Governor Mofford's decision to forego an appeal. *See id.* at 57.

[168] *See id.* at 57.

[169] *See id.* at 59-60.

[170] *See id.* at 60.

[171] *See id.* at 63; *see* Yniguez v. Arizonans for Official English, 69 F.3d 920, 931-48 (9th Cir. 1995)(en banc).

[172] *Arizonans*, 520 U.S. at 75.

[173] *See id.* at 67.

[174] *See id.* at 68. Additionally, the Court held that the Ninth Circuit erred in declaring that she was entitled to nominal damages because 42 U.S.C. § 1983 created no remedy against a

Circuit decision, she noted, did not preclude legal challenges to Article XXVII. At the time of the *Yniguez* decision, a constitutional challenge to the amendment was percolating through the Arizona state courts.[175]

Justice Ginsburg's dissent in *Agostini v. Felton*[176] similarly evidences her insistence on procedural propriety—or more specifically, her objection to the twisting of procedural rules to accomplish substantive ends. *Agostini* revisited *Aguilar v. Felton*,[177] in which the Court had held that the Establishment Clause[178] barred the New York City Board of Education from maintaining a program that sent public school teachers into parochial schools to teach disadvantaged children.[179] The district court permanently enjoined the Board's program on remand.[180] Ten years after *Aguilar*, the Board sought relief from the injunction pursuant to FRCP 60(b),[181] arguing that the "decisional law [had] changed to make legal what the [injunction] was designed to prevent."[182] Determining that its more recent Establishment Clause cases undermined the assumptions upon which *Aguilar* relied,[183] the Court reopened the judgment under FRCP 60(b)(5) and dissolved the injunction.[184]

In her dissent, Justice Ginsburg disagreed with the majority's use of FRCP 60(b) and Supreme Court Rule 44[185] to overturn the original *Aguilar* decision.

State. *See id.* at 69.

[175] *See* Susan Kiyomi Serrano, Comment, *Rethinking Race for Strict Scrutiny Purposes: Yniguez and the Racialization of English Only*, 19 U. HAW. L. REV. 221, 222 (1997).

[176] 521 U.S. 203 (1997).

[177] 473 U.S. 402 (1985).

[178] U.S. CONST. amend. I, cl. 1.

[179] *See Aguilar*, 473 U.S. at 402.

[180] *See Agostini*, 521 U.S. at 212.

[181] FRCP 60(b) provides, in part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

FED. R. CIV. P. 60(b).

[182] *Agostini*, 521 U.S. at 214 (quoting Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 388 (1992)).

[183] *See id.* at 222.

[184] *See id.* at 240.

[185] Supreme Court Rule 44 states in pertinent part:

> 1. Any petition for the rehearing of any judgment or decision of the Court on the merits

If the Court applied the Court's Rules and FRCP 60(b) properly, she reasoned, it would have deferred reconsideration of *Aguilar* until it was presented with the issue in another case.[186] The Board's petition for reconsideration in *Agostini* did not comport with Supreme Court Rule 44, which provides that such petitions be filed within 25 days of the entry of the judgment in question.[187]

According to Justice Ginsburg, the Court saw no "better [procedural] vehicle"[188] to reconsider *Aguilar* directly, so it tortuously employed FRCP 60(b)(5) as a "substitute."[189] However, she opined, "[t]here are such [procedural] vehicles in motion, and the Court does not say otherwise."[190] Rule 60(b)(5) does not permit relitigation of legal or factual claims underlying the original judgment.[191] It allows modification of the injunction only if the facts or the law had changed so much as to warrant such relief,[192] and this case did not satisfy those requirements.[193] In her estimation, the Court had "just cause" to wait for another case that appropriately invited review of *Aguilar*.[194] "That cause," she explained, "lies in the maintenance of integrity in the interpretation of procedural rules, [and] preservation of the responsive, non-agenda-setting character of this Court[.]"[195]

This survey of Justice Ginsburg's writings on legal process and procedure suggests that her judging style endeavors to accommodate numerous considerations. These considerations include affording litigants the opportunity to resolve their grievances in the courts; ensuring the efficient operation of the courts; and maintaining working relationships among participants within the legal system as well as between the judiciary and the other political branches and the public.

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shall be filed within 25 days after entry of the judgment or decision, unless the Court or a Justice shortens or extends the time.

SUP. CT. R. 44.

[186] *See Agostini*, 521 U.S. at 255 (Ginsburg, J., dissenting).

[187] *See id.*

[188] *Id.* at 259 (Ginsburg, J., dissenting)(internal quotation marks omitted)(quoting majority opinion, 521 U.S. at 239).

[189] *Id.* at 255 (Ginsburg, J., dissenting).

[190] *Id.* at 259 (Ginsburg, J., dissenting).

[191] *See id.* at 257 (Ginsburg, J., dissenting).

[192] *See id.*

[193] *See id.* at 257-58. Justice Ginsburg focused on whether the district court abused its discretion when it concluded that the facts and the law had not changed to such an extent as to warrant relief from the injunction. *See id.* at 257. Since *Aguilar* had not been overruled, and the factual situation had not changed, she concluded that the district court was correct in denying the petition for relief under FRCP 60(b). *See id.* at 257-58.

[194] *Id.* at 260 (Ginsburg, J., dissenting).

[195] *Id.*

Identifying general themes in Justice Ginsburg's legal thought is one task. A much more difficult one is ascertaining their complex interplay in Justice Ginsburg's decisionmaking. To aid in our assessment of that interplay, we describe here, and employ later, a broad framework of process values.

III. PROCESS VALUES FRAMEWORK

This Part outlines a framework for assessing Justice Ginsburg's process and procedural jurisprudence. Process values are "the goals and positive contributions of good procedure[.]"[196] The framework we construct consists of three process values—efficiency, fairness and institutional legitimacy. Briefly stated, efficiency in the context of judicial process refers to the minimization of costs to courts and litigants.[197] Fairness may be equated with the opportunity to participate meaningfully in proceedings that affect one's legal interests.[198] Finally, institutional legitimacy denotes the public's acceptance of the judiciary as the public institution for adjudicating legal disputes.[199]

As described earlier, these values are comprised of several more discrete concepts. Additionally, efficiency, fairness, and institutional legitimacy are not neatly separable. They are often in tension, sometimes overlapping or colliding. It is this tension, as procedures are construed and applied in particular situations, that creates a process dynamic helpful to our understanding of Justice Ginsburg's approach to judging.

A. Efficiency

The term "efficiency" in law generally refers to the value of minimizing the costs of fair and accurate judicial administration.[200] Legal efficiency is

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[196] John R. Allison, *Ideology, Prejudgment, and Process Values*, 28 NEW ENG. L. REV. 657, 659 (1994).

[197] *See* Stephen G. Bullock & Linda Rose Gallagher, *Surveying the State of the Mediative Art: A Guide to Institutionalizing Mediation in Louisiana*, 57 LA. L. REV. 885, 917-18 (1997).

[198] *See* Kremer v. Chemical Constr. Corp., 456 U.S. 461, 483 n.24 (1982)("What a full and fair opportunity to litigate entails is the procedural requirements of due process.").

[199] *See* Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 DUKE L.J. 703, 714 (1994). There are differing views on the source of institutional legitimacy. *See* Mark C. Suchman, *On Beyond Interest: Rational, Normative, and Cognitive Perspectives in the Social Scientific Study of Law*, 1997 WIS. L. REV. 475, 493 (1997)(examining different theories of the source of legal legitimacy).

[200] Edward Brunet, *The Triumph of Efficiency and Discretion Over Competing Complex Litigation Policies*, 10 REV. LITIG. 273, 277 (1991). The distinction should be made between efficiency for individual litigants and systemic efficiency. *See id.* at 277-78. Securing the "just,

achieved by streamlining the judicial system through the reduction of overall cost and delay.[201] Two theories of systemic efficiency have gained acceptance in legal discourse. The first is utilitarianism, a long-established conception of the aggregate good developed by social philosophers Jeremy Bentham[202] and John Stuart Mill.[203] The principle tenet of utilitarianism is the achievement of the greatest good for the greatest number.[204] Maximization of social welfare is the central aim of utility theory. The utilitarian measures the relationship between every cost and every benefit in order obtain the maximum benefits at the minimum cost possible.[205]

In the context of judicial procedure, utilitarianism holds that litigation is efficient when it maximizes outcome accuracy.[206] The Supreme Court adopted such a view of procedural due process in *Mathews v. Eldridge*.[207] The purpose of procedure, the Court explained, is the accurate application of substantive

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speedy, and inexpensive" adjudication of a claim for an individual litigant is the focus of individual efficiency. *See id.* at 278. By contrast, systemic efficiency perspective is preoccupied with benefits to the judicial system as a whole. *See id.* That which makes the administration of courts efficient, however, does not necessarily inure to the benefit of an individual litigant. *See id.* For instance, a court's decision to consolidate several pending trials that arise from the same transaction conserves the court's resources and time. *See id.* At the same time, consolidation could prolong or complicate the process by which an individual litigant secures compensation. *See id.*

[201] *See id.*

[202] *See* JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 1-7 (Clarendon Press 1907)(1823).

[203] *See generally* JOHN STUART MILL, UTILITARIANISM (Oskar Priest ed., Bobbs-Merrill Co., Inc. 1957)(1863).

[204] *See* Bentham, *supra* note 202, at 1-7.

[205] *See* Brunet, *supra* note 200, at 279. Utility theory is predominantly concerned with the aggregate benefits to society as a whole, rather than benefits to individuals. *See* R. MALLOY, LAW AND ECONOMICS: A COMPARATIVE APPROACH TO THEORY AND PRACTICE 40 (1990).

[206] *See* Brunet, *supra* note 200, at 280.

[207] 424 U.S. 319 (1976). The plaintiff in *Mathews*, who was allegedly disabled, challenged the administrative procedure of the Social Security Administration, arguing that his Social Security disability benefits could be terminated only after his disability status was determined at an evidentiary hearing before a hearing examiner. *See id.* at 324-25. The Supreme Court ruled that an evidentiary hearing was not required prior to the termination of his benefits. *See id.* at 349. The Court set out the following analytical framework for determining whether process is due:

> [f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that additional or substitute procedural requisites would entail.

Id. at 335.

law at reasonable costs,[208] which in turn benefits society at large.[209] A procedure that does not enhance accuracy is inefficient by definition, even if it is cheap or serves some other purpose such as affording a litigant the opportunity to be heard.[210]

A second theory of efficiency emerges from law and economics, a school of legal thought introduced in the 1960s.[211] Efficiency is its central norm.[212] Law and economics conceives of efficiency as value-maximization.[213] It translates utility theory's goal of promoting general social welfare into quantitative terms.[214]

Under a law and economics view of the judicial system, the goal of judicial procedure is to minimize "error costs" and "direct costs."[215] Error costs accrue when the judicial system makes an inaccurate determination, such as when it mistakenly imposes legal liability on a party.[216] Direct costs are incurred in connection with the administration of the judicial system.[217] Ideally, parties to a dispute avoid these costs by agreeing to settle their differences outside of the court system in a manner that serves their best economic interests.[218] Law economics, then, measures the efficiency of legal

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[208] *See id.* at 334.

[209] *See* Eric K. Yamamoto, *Efficiency's Threat to the Value of Accessible Courts for Minorities*, 25 HARV. C.R.-C.L. L. REV. 341, 354 (1990). *See also* Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976).

[210] *See* Yamamoto, *supra* note 209, at 354.

[211] *See, e.g.*, Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961); Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

[212] *See* Russell Hardin, *Magic on the Frontier: The Norm of Efficiency*, U. PA. L. REV. 1987, 1987 (1996). Law and economics scholars, however, recognize multiple definitions of "efficiency." *See* Gregory S. Crespi, *The Mid-Life Crisis of the Law and Economics Movement: Confronting the Problems of Nonfalsifiability and Normative Bias*, 67 NOTRE DAME L. REV. 231, 234 (1991). One conception of efficiency is "Pareto" efficiency, which holds that a system is efficient "if it operates to benefit at least one person and harms no one, with the persons affected being the judges of whether benefits or harms have resulted." *Id.* at 234-35. Law and economics also recognizes "Kaldor-Hicks" efficiency. *See id.* Under this definition, a rule is said to enhance efficiency if its total benefits exceed its total costs. *See id.* at 236.

[213] *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW, 10 (1977) [hereinafter Posner, *Economic Analysis*] ("'Efficiency' means exploiting economic resources in such a way that 'value'—human satisfaction as measured by aggregate consumer willingness to pay for goods and services—is maximized.").

[214] *See* RICHARD POSNER, THE ECONOMICS OF JUSTICE 49 (1981).

[215] *See* Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 400-01 (1973)[hereinafter Posner, *Economic Approach*]; Posner, *Economic Analysis*, *supra* note 213, at 430.

[216] *See* Posner, *Economic Approach*, *supra* note 215, at 400-01.

[217] *See id.* at 401.

[218] *See* Bryant G. Garth, *Privatization and New Formalism: Making the Courts Safe for*

rules by their ability to replicate this process, incurring the "least expense necessary to achieve accurate determinations."[219]

B. *Fairness*

Procedural fairness is prominent in the process values framework for two reasons. First, concerns of adjudicatory fairness often counterbalance considerations of efficiency.[220] Second, procedural fairness, which is easier to achieve than substantive fairness,[221] tends to serve as the marker for the overall fairness of adjudication.[222] No single concept encompasses the many values comprising adjudicatory fairness.[223] In the context of litigation, procedural fairness may be viewed in three component parts: litigant autonomy, dignity, and participation.

Litigant autonomy reflects the notion that a party is entitled to exercise control over her own litigation.[224] The party is presumed to retain authority to make all relevant decisions with respect to the prosecution of her claim or

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Bureaucracy, 1988 LAW & SOC. INQ. 157, 161.

[219] *See* Michael D. Bayles, *Principles for Legal Procedure*, 5 LAW & PHIL. 37, 45 (1986)(explaining that the principle of economic costs is to minimize the economic costs of legal procedures).

[220] *See* Brunet, *supra* note 200, at 276 (noting that a "tension between efficiency and fairness clearly exists," but that the tension cannot be defined in simple terms). Pursuit of efficiency conflicts with fairness at times, which is why the fairness-efficiency tension often surfaces in matters of judicial procedure. *See* Frank H. Easterbrook & Thomas E. Baker, *A Self Study of Federal Judicial Rulemaking—A Report from the Subcommittee on Long Range Planning to the Committee on the Rules of Practice and Procedure of the Judicial Conference of the United States*, 168 F.R.D. 679, 692-93 (1996)(observing that the command of FRCP 1 that the Rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action" points to the "inevitable tension" between fairness and efficiency). It is thus important to consider the concerns of fairness alongside our discussion of efficiency.

[221] *See* Allison, *supra* note 196, at 678.

[222] *See* E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 209 (1988); *see also* Allison, *supra* note 196, at 678. Procedural justice is a dimension of John Rawl's theory of distributive justice. *See* JOHN RAWLS, A THEORY OF JUSTICE 83-90 (1971). The fairness of an outcome depends not just on whether it is objectively fair, but also on whether it is subjectively perceived as fair. *See* Laurens Walter et al., *The Relation Between Procedural and Distributive Justice*, 65 VA. L. REV. 1401, 1402-03 (1979). Rawls argues that "pure procedural justice" may serve as a "surrogate for distributive justice" when the substantive fairness of an outcome cannot be easily ascertained. Allison, *supra* note 196, at 678; Rawls, *supra*, at 83-90.

[223] Brunet, *supra* note 200, at 283.

[224] *See* Roger C. Cramton, *Individualized Justice, Mass Torts, and "Settlement Class Actions": An Introduction*, 80 CORNELL L. REV. 811, 814 (1995).

defense,[225] including the type of lawsuit filed;[226] the forum in which to litigate the case;[227] the claims and defenses that are raised;[228] the resources to be expended;[229] and the decision to settle or go to trial.[230] The American judicial system has long recognized three reasons for the parties' control over the litigation.[231] First, litigant autonomy is rooted in the philosophical tradition that recognizes the dignity of the individual.[232] Second, individual autonomy rests upon the economic assumption that the possessor of a legal interest is best positioned to make decisions about that interest.[233] Finally, placing in the injured party the authority to prosecute claims affects the fairness of the outcome.[234]

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[225] *See id.*

[226] *See id.*

[227] *See id.*

[228] *See id.*

[229] *See id.*

[230] *See id.*; Brunet, *supra* note 200, at 284 ("Litigant autonomy includes various strategy choices that we have occasionally labeled 'rights,' including the plaintiff's ability to select a forum for reasons ranging from geographic preference to choice of law[,] . . . the ability to determine the scope of a case, whether to select a potentially manageable and speedy two-party suit or to file a potentially complicated class action.").

[231] *See* Roger H. Transgrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. ILL. L. REV. 69, 75 (1989).

[232] Immanuel Kant, for instance, posited that the individual is of intrinsic worth, that being dignity. *See* IMMANUEL KANT, CRITIQUE OF PURE REASON AND OTHER WORKS ON THE THEORY OF ETHICS 46-54 (Thomas Kingsmill Abbott ed. & trans., Longmans, Green, and Co. Ltd. 6th ed. 1927)(1785). Kant reasoned that the basis of human dignity is autonomy. *See id.* at 54. It follows that an injured individual is entitled to retain control over the process by which he or she seeks redress, for injury to the person as well as to personal dignity, from the alleged tortfeasor. *See* Transgrud, *supra* note 231, at 74.

[233] *See* Transgrud, *supra* note 231, at 74. Decisions involving the disposition of a personal injury claim, for example, should be left to the litigant. *See id.* Professor Transgrud explains:

> Control and disposition of a valuable piece of property, such as a substantial tort claim, ought to rest with its owner, the injured party or his family, and not with some stranger such as a class representative or lead counsel in a mass tort case consolidated in a common venue.

Id. The litigant is more likely to control the claim in a way that maximizes personal satisfaction, be it by trial, settlement, or alternative means of resolution. *See id.*

[234] *See id.* at 83. A person who is permitted to litigate a tort claim on behalf of the injured party without that party's substantial input may engage in harassment, deception, and other misconduct to win the claim. *See id.* The Agent Orange litigation provides an example of plaintiffs' lawyers engaging in questionable tactics to retain or secure control of the litigation. *See id.* A classic example is that of an attorney who solicits clients in mass tort cases for a class action suit without first explaining to them the implications of maintaining the suit as a class action. *See* Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 CORNELL L. REV. 1045, 1137-42 (1995)(describing the account of a couple who was led by attorneys to think that their only way to secure compensation for the husband's mesothelioma was to agree to be named representatives in a class action). In such instances of

The second component, dignity, is associated with the concern for the humiliation or loss of self-respect a person experiences when she is precluded from litigating.[235] Dignity includes "the right to receive a careful, measured, and respectful consideration of a litigant's participation."[236] Closely related to the concept of dignity is the value of participation, or the appreciation of litigation as a way to express one's will in societal decisions of concern to oneself.[237] In tandem, dignity and participation values reflect the norm that "[p]rocedures should be designed to make affected parties feel that they matter."[238] Empirical studies confirm that judicial processes that respect the parties' dignity and participation interests enhance perceptions of adjudicatory fairness.[239]

Respect for individual dignity is important additionally because it is conducive to a functional society.[240] The legitimacy of the judicial system rests on more than substantive outcomes.[241] Procedures that allow those

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overzealous representation, the substantial attorney's fees at stake are more the driving force behind the litigation than the aim of securing corrective justice and compensation for the injured party. *See* Transgrud, *supra* note 231, at 75.

[235] *See* Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights*, 1973 DUKE L.J. 1153, 1172 (1973).

[236] Brunet, *supra* note 200, at 283. *See generally* Mashaw, *supra* note 209, at 49-52 (discussing the dignitary theory of procedural due process); Jerry L. Mashaw, *Administrative Due Process: The Quest For a Dignitary Theory*, 61 B.U. L. REV. 885 (1981)(pointing out the merits of a dignitary theory of administrative due process). A Rand Institute study found that litigants rated dignity as the highest of procedural values. *See* E. ALLAN LIND ET AL., THE PERCEPTION OF JUSTICE: TORT LITIGANTS' VIEWS OF TRIAL, COURT-ANNEXED ARBITRATION AND JUDICIAL SETTLEMENT CONFERENCES 70 (1989).

[237] *See* Michelman, *supra* note 235, at 1172.

[238] Allison, *supra* note 196, at 681.

[239] *See* Lind & Tyler, *supra* note 222, at 230-40. Lind and Tyler's studies demonstrate that litigants perceive procedures that afford them an opportunity to present their evidence and arguments as fairer than procedures that preclude them from being heard in the process. *See id.* at 215. Fair judicial procedures may enhance the value of dignity independent of the substantive outcome. *See id.* at 207. Richard Safire describes this sense of well-being derived from fair procedural treatment as "inherent dignity." Richard Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. Rev. 111, 121 (1978).

Furthermore, procedures that allow litigants to participate foster perceptions of fairness even when the litigant does not have an opportunity to influence the outcome, *see* Tom R. Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings*, 56 SMU L. REV. 433, 439-40 (1992), or when the substantive outcome is unfavorable to the litigant. *See* Lind & Tyler, *supra* note 222, at 215. By contrast, a litigant who is deprived of the freedom to make critical decisions about the litigation is likely to perceive the litigation experience as procedurally unfair and arbitrary. *See* Brunet, *supra* note 200, at 284; *see also* Yamamoto, *supra* note 209, at 388.

[240] *See* Yamamoto, *supra* note 209, at 388.

[241] *See id.* at 389.

affected to participate in decisions pertaining to their interests bolster the legitimacy of the government.[242] However, government processes which are apathetic or repugnant to dignity concerns cultivate the belief that government power is nothing but arbitrary and naked coercion.[243]

The last component of fairness, due process,[244] refers to process "which, following the forms of law, is appropriate to the case, and just to the parties to be affected."[245] Justice Frankfurter wrote that due process "[r]epresent[s] a profound attitude of fairness between man and man, and more particularly between the individual and government . . . ."[246] The foundation of due process is the notion that a person should have her rights and liabilities affected by the state only through a fair process. Paramount to fair process in American jurisprudence are notice,[247] adequate representation,[248] and the opportunity to be heard.[249]

C. Institutional Legitimacy

Fairness and efficiency concerns sometimes intersect with the judiciary's interest in maintaining its legitimacy. Called the "least dangerous branch"[250] because of its lack of coercive power and control over the purse-strings of the

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[242] *See* Mashaw, *supra* note 209, at 49-50.

[243] *See id.*; Yamamoto, *supra* note 209, at 389.

[244] "Due process" in this article refers to procedural due process rather than substantive due process.

[245] Hagar v. Reclamation Dist., No. 108, 111 U.S. 701, 708 (1884).

[246] Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 162 (1951)(Frankfurter, J., concurring).

[247] *See, e.g.*, Pennoyer v. Neff, 95 U.S. 714 (1877). In a landmark case which constitutionalized the requirement of personal jurisdiction, the Supreme Court held that a court cannot exert personal jurisdiction over an individual without first having given notice to that person. *See id.*

[248] *See, e.g.*, Hansberry v. Lee, 311 U.S. 32 (1940). The plaintiffs in *Hansberry* sought to enjoin the defendants from breaching a racially-restrictive covenant. *See id.* at 37-38. Defendants argued that the agreement was ineffective because the requisite 95% of landowners had not signed it. *See id.* at 38. Plaintiffs responded that the issue was res judicata by way of stipulation to the requisite number of signatories in an earlier suit. *See id.* The lower courts found in favor of plaintiffs, *see id.* at 38-39, but on certiorari, the Supreme Court held that defendants were not adequately represented by the litigants in the previous suit, whose interests were antagonistic to that of defendants. *See id.* at 42-46.

[249] *See, e.g.*, Fuentes v. Shevin, 407 U.S. 67 (1972). Challenges were made to state statutes authorizing the issuance of writs of replevin without the requirement of notice to the defendant or a hearing. *See id.* at 69-70. The Supreme Court struck down the statutes as violative of the due process requirement of the Fourteenth Amendment, holding that parties whose rights are to be affected are entitled under procedural due process to be heard at a meaningful time. *See id.* at 96-97.

[250] Hamilton, *supra* note 130.

community,[251] the judiciary draws its authority from public acceptance of it as the institution fit to interpret and apply the law.[252] When public perception of the judiciary's legitimacy decreases, acceptance by the public of institutional decisions similarly decreases.[253]

Fair judicial process enhances public perceptions of legitimacy[254] when it assures that courts do not assume "functions that exceed the appropriate judicial role."[255] When courts appear to exceed their powers, to transgress

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[251] *See* Planned Parenthood v. Casey, 505 U.S. 833, 865 (1992)(highlighting the importance of the legitimacy of the United States Supreme Court in light of its lack of coercive power or ability to provide financial incentives); *see also* Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 635 (1992)(observing that the judiciary lacks the "standard political levers over people and institutions").

[252] *See* Hamilton, *supra* note 130; *see also* Tyler & Mitchell, *supra* note 199, at 707. The Supreme Court spoke emphatically about the judiciary's dependence on public perceptions of its legitimacy in *Casey*, a case in which the Court upheld *Roe v. Wade*, 410 U.S. 113 (1973). The Court said:

> Our analysis would not be complete, however, without explaining why overruling *Roe*'s central holding would not only reach an unjustifiable result under principles of stare decisis, but would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law. To understand why this would be so it is necessary to understand the source of this Court's authority, the conditions necessary for its preservation, and its relationship to the country's understanding of itself as a constitutional Republic.
>
> The root of American governmental power is revealed most clearly in the instance of the power conferred by the Constitution upon the Judiciary of the United States and specifically upon this Court. As Americans of each succeeding generation are rightly told, the Court cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees. The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands.

Casey, 505 U.S. at 864-65. The Court attributes its legitimacy to principled decisionmaking. *See id.* at 866. Unless adjudicative outcomes are viewed as principled, the decisions of the court will be viewed with skepticism by the public. *See* Tyler & Mitchell, *supra* note 199, at 707.

[253] *See* JANE W. ADLER ET AL., SIMPLE JUSTICE: HOW LITIGANTS FARE IN THE PITTSBURGH COURT ARBITRATION PROGRAM 90-91 (1983)(detecting a strong link between perceptions of procedural justice and satisfaction levels, and between satisfaction and acceptance of decisions in court-annexed arbitration programs).

[254] *See* Allison, *supra* note 196, at 682; *see also* Tom R. Tyler & Kenneth R. Rasinski, *Procedural Justice, Institutional Legitimacy, and the Acceptance of Unpopular U.S. Supreme Court Decisions: A Reply to Gibson*, 25 LAW & SOC'Y REV. 621, 626 (1991). Procedural justice refers to the belief that the procedures by which authorities make decisions are fair. *See id.* (surveying the procedural justice literature).

[255] Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 78 GEO. L.J. 1355, 1403 (1991). The notion that there is a proper allocation of governmental power is reflected in considerations of federalism and the limits of equity power. *See id.* For instance, appellate

procedural restraints, public perceptions of judicial illegitimacy arise.[256] The public commonly understands that the judiciary's role is to decide cases by employing legal principles and reasoning.[257] When courts deviate from this role,[258] the public fears that the courts are usurping the authority of other branches of government without the constraints of political accountability.[259]

A court's effort to influence substantive outcomes may also affect its legitimacy.[260] When called upon to decide a case that will have significant political or social ramifications, a court may apply procedural rules to dispose of the case without resolving the underlying substantive issues.[261] Alterna

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courts may disapprove of district courts intruding on the discretion of state and local executive branches. *See, e.g.*, Inmates of Occoquan v. Barry, 844 F.2d 828, 844 (D.C. Cir. 1988)("In this setting of institutional conditions litigation . . . courts work in an arena that represents a crossroads where the local political branches of government meet the Article III branch and the higher commands of the Constitution."); Ruiz v. Estelle, 679 F.2d 1115, 1145 (5th Cir.)(per curiam)("As a matter of respect for the state's role and for the allocation of functions in our federal system . . . the relief ordered by federal courts must be 'consistent with the policy of minimum intrusion into the affairs of state prison administration that the Supreme Court has articulated for the federal courts.'" (quoting Ruiz v. Estelle, 650 F.2d 555, 571 (5th Cir.), *vacated in part, amended in part*, 688 F.2d 266 (5th Cir. 1982))).

[256] *See* Sturm, *supra* note 255, at 1403.

[257] *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 143-44 (William N. Eskridge, Jr. & Philip P. Frickey eds. 1994) (arguing that courts have an obligation to justify their decisions by "reasoned elaboration").

[258] Hart and Sacks explain that each governmental institution is "institutionally competent" to address certain types of legal questions. The legislative branch is suited to handle questions that can be answered by political compromise or majority rule. *See id.* at 112, 696-97. The executive branch is most competent to deal with questions that require discretionary decisions to be made. *See id.* at 143-44. The judiciary, however, is charged with the responsibility of formulating general rules that are consistent with precedent and that can be applied to future cases. *See id.*

[259] *See* Sturm, *supra* note 255, at 1406. Criticism of the court for overstepping its bounds may center on the incapacity of the judicial process, a mechanism tailored to address narrow factual situations, to remedy broad social problems. *See id.* at 1406-08. Additionally, the public may perceive the court as compromising the fairness of the process. *See id.* at 1409.

[260] *See* Michael E. Levine & Charles R. Plott, *Agenda Influence and Its Implications*, 63 VA. L. REV. 561, 563 (1977).

[261] Robert Cover cites the example of *Robinson v. Smyth*, 126 Eng. Rep. 1007 (C.P. 1799), *reprinted in* Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 723 (1975), a case in which the defendant moved to postpone a trial on an action for wages allegedly due to the plaintiff, a seaman. Defendant's justification was the absence of one of its witnesses, who was prepared to testify that plaintiff was defendant's slave. *See id.* If that fact were to be established, defendant would owe plaintiff no wages. *See id.* The court denied the procedural motion, thereby assuring victory for the plaintiff. *See id.* It remarked that the substantive defense was "odious" and that although recognized by law, a court "should not give [it] a day's time." *Id.* Cover submits that the case is troubling, not because the court disfavored the slavery defense, but because it manipulated the process to

tively, procedure is a means by which the court can recast substantive issues in a different, and less controversial, light.[262] In either event, the public may detect that the court has not addressed the issue candidly, and that may diminish the court's legitimacy.[263]

The process values of efficiency, fairness, and institutional legitimacy illuminate our discussion of Justice Ginsburg's procedural philosophy. These often colliding values aid our understanding of a process dynamic that characterizes her judging style.

IV. A GLIMPSE OF JUSTICE GINSBURG'S CLASS ACTION JURISPRUDENCE

The framework of process values just discussed provides a basis for assessing the procedural themes identified in Part II. This Part discusses those themes as parts of Justice Ginsburg's jurisprudence of process and procedure. It does so by focusing on her approach to class actions. Class action litigation is particularly fertile ground because class action procedure implicates the often colliding process values of efficiency, fairness, and institutional legitimacy. This Part begins with a summary of the class action device and the value tensions it embodies. It then analyzes Justice Ginsburg's opinions in three major class action cases.

A. Value Conflicts in Class Action Litigation

The class action device allows a few people to represent many—a class—in the litigation of a matter of interest to the class.[264] Absent procedural defects,[265] the judgment in a class action binds all class members.[266] The class

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effect an admirable substantive end. *See id.* at 723-24. The court denied the defendant an opportunity to present its legally recognized albeit dislikable defense. *See id.*

[262] *See, e.g.*, Arizonans for Official English v. Arizona, 520 U.S. 43 (1997).

[263] *See* David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 737 (1987)(explaining that the public reacts cynically when it discovers that the court is disingenuous in its reasoning).

[264] Cramton, *supra* note 224, at 819. Class action suits are governed by FRCP 23.

[265] As will be discussed below, class representatives must demonstrate that they meet certain requirements before the court will certify a class. *See infra* notes 277-280 and accompanying discussion. If a court improvidently determines that the requirements are met, the ensuing judgment is subject to collateral attack.

[266] However, certain types of class action suits give class members the option to "opt-out" of the class, thereby preserving their right to prosecute their claim in a separate suit. FRCP 23(c)(2) provides in part: "In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances[.] . . . The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date. . . ." FED. R. CIV. P. 23(c)(2).

action device, codified in FRCP 23, was designed to empower individual litigants with small claims.[267] Rule 23(b)(3) allows atomized claimants, such as individual consumers, to exert collective power.[268] Rule 23(b)(3) thus creates litigative power by aggregating numerous "negligible claim[s] into a very large one."[269] For plaintiffs and their counsel, the aggregation of claims under the class action device makes litigation economically feasible and gives them settlement leverage, particularly with corporate defendants.[270]

Although the class action was designed to promote justice for individual claimants who might otherwise find the courts inaccessible, the device now also serves the judicial system's interest in efficiency. Class actions reduce the transaction and direct costs of class members.[271] In addition, class actions, at least in concept, ease court congestion by reducing the number of case filings.[272]

Fairness and efficiency values often collide in class actions.[273] By design, class actions treat class members as a group rather than as individuals.[274] Thus, class action litigation tends to overlook individual claimants' concerns about substantive outcomes and procedural fairness. Class member autonomy, participation, and dignity are exchanged for negotiating leverage and overall

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[267] *See* STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 248 (1987).

[268] *See id.*

[269] *Id.* Due to the power of aggregation, extraordinary power derives from the certification of a class. *See* George L. Priest, *Procedural Versus Substantive Controls of Mass Tort Class Actions*, 26 J. LEGAL STUD. 521, 621 (1997). Particularly indicative of the power of certification is that the certification of virtually every mass tort class action leads to settlement rather than trial. *See id.* at 522.

[270] *See* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1350 (1995).

[271] *See* Mace v. Van Ru Credit Corp., 109 F.3d 338 (7th Cir. 1997). The Seventh Circuit observed:

> The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.

Id. at 344

[272] *See* Cramton, *supra* note 224, at 818 ("Collective justice appeals to all parties to some degree and to courts and judges almost without exception.").

[273] *See* FED. R. CIV. P. 23 advisory committee's note. The Advisory Committee sought to "achieve *economies of time, effort, and expense*, and promote uniformity of decision as to persons similarly situated, without sacrificing *procedural fairness* or bringing about other undesirable results." *Id.* (emphasis added)(citing ZECHARIAH CHAFEE, SOME PROBLEMS OF EQUITY 201 (1950)).

[274] *See* Cramton, *supra* note 224, at 811 (recognizing the tension between individual justice and collective justice in settlement class actions).

efficiency. That class action judgments are binding on class members who had no control over the litigation underscores the efficiency-fairness tension.[275]

Rule 23 therefore establishes procedural checks against the misuse of the class action device.[276] Under FRCP 23(a), class representatives must meet certain prerequisites before the court will certify a class.[277] The most important criterion is that class representatives, who are parties to the suit, adequately represent class members, who are not.[278] After meeting Rule 23(a) prerequisites, class representatives must demonstrate that their suit is maintainable as one of three types of class actions under Rule 23(b).[279] If the

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[275] *See id.* at 825. Professor Cramton observes that there is usually no process for modifying the amounts awarded in distributing a damage award to individual class members. Often, the disposition of a class action irreversibly compromises an individual class member's right to damages. *See id.*

[276] The Advisory Committee Notes to the 1966 Amendments to Rule 23 state:

> The amended rule describes in more practical terms the occasions for maintaining class actions; provides that all class actions maintained to the end as such will result in judgments including those whom the court finds to be members of the class, whether or not the judgment is favorable to the class; and refers to the measures which can be taken to assure the *fair conduct* of these actions. . . .

FED. R. CIV. P. 23 advisory committee's note (emphasis added)(ellipses in original)

[277] Rule 23(a) of the Federal Rules of Civil Procedure provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claim or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

FED. R. CIV. P. 23(a).

[278] *See* FED. R. CIV. P. 23(a)(4).

[279] Rule 23(b) of the Federal Rules of Civil Procedure provides:

> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
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> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
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> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
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> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interest; or
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> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B)

suit is maintained under Rule 23(b)(3), the class representatives must provide notice to individual members of the class and inform them of their right to exclude themselves from the class.[280] Finally, the district court must approve a class action settlement to protect the interests of class members.[281]

B. Justice Ginsburg and Class Actions

Justice Ginsburg's opinions suggest acute awareness of the process value tensions inherent in class action litigation. *Telecommunications Research & Action Center v. Allnet Communication Services, Inc.*,[282] an associational standing case, illustrates her disapproval of efficiency efforts to circumvent FRCP 23's fairness protections for class members. The plaintiff in *Allnet* was the Telecommunications Research and Action Center ("TRAC"), a non-profit membership organization created to promote fair, reasonable, and nondiscriminatory rates for communications services.[283] TRAC sued Allnet Communications for maintaining discriminatory rates and for changing rates without public notice.[284] Although the membership of TRAC numbered 12,000 when it initiated the non-class action suit,[285] counsel for TRAC identified only five or six members as Allnet subscribers.[286]

The district court dismissed the action because TRAC lacked standing to claim damages on behalf of its members.[287] The Court of Appeals of the District of Columbia affirmed.[288] Writing for the court, then Judge Ginsburg

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the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

FED. R. CIV. P. 23(b).

[280] Rule 23(c)(2) of the Federal Rules of Civil Procedure provides:

In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date, (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

FED. R. CIV. P. 23(c)(2).

[281] FED. R. CIV. P. 23(e).

[282] 806 F.2d 1093 (D.C. Cir. 1986).

[283] *See id.*

[284] *See id.* at 1093-94.

[285] *See id.* at 1094.

[286] *See id.*

[287] *See id.* Lack of standing was one of several grounds for dismissal.

[288] *See id.*

first reiterated that an association had standing to sue on behalf of its members when

> a) [the association's] members would otherwise have standing to sue in their own right; (b) the interests [the association] seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.[289]

TRAC met the first two parts of the test,[290] but failed the third prong because money damages ordinarily required individual participation.[291]

Judge Ginsburg then observed that the suit should have been brought as a class action under FRCP 23(b)(3) subject to the procedural safeguards built into the rule.[292] A class action requires that class representatives fairly and adequately represent the class,[293] and a FRCP 23(b)(3) class action requires the "best notice practicable" of the suit to class members.[294] The non-class action suit brought by TRAC had none of these safeguards.[295]

Judge Ginsburg recognized that "[the] court, in matters such as this, writes for a genre of cases, not for one day and case alone."[296] If the court determined that TRAC had standing it would establish precedent that an association could sue on behalf of its members even if those members had differing interests in the outcome of the litigation. Such a rule would enable an association's leaders to file an aggregated suit to gain litigation leverage and then sacrifice the interests of individual association members. Despite the prospect of increasing transactional costs to the plaintiff association, Judge Ginsburg decided that the procedural safeguards of FRCP 23 were necessary to ensure fairness to the individuals otherwise inadequately represented in the litigation.

Justice Ginsburg expressed a similar concern for individual litigant fairness in *Matsushita Electronic Industrial v. Epstein*.[297] *Matsushita* involved two class action shareholder suits filed against MCA after it was acquired by Matsushita Electrical Industrial Co ("Matsushita").[298] The first suit was filed in state court against MCA and its directors for breach of fiduciary duty.[299]

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[289] *Id.* (alterations in original).

[290] *See id.*

[291] *See id.* at 1095.

[292] *See id.* at 1096.

[293] *See* FED. R. CIV. P. 23(a)(4).

[294] FED R. CIV. P. 23(c)(2).

[295] *See Allnet*, 806 F.2d at 1096. By not filing a class action, TRAC avoided the exacting scrutiny of Rule 23 certification criteria, which, in turn, left the interests of the individual association members unconsidered. *See id.*

[296] *Id.* at 1095. Judge Ginsburg's remark reflects her consideration of stare decisis.

[297] 516 U.S. 367 (1996).

[298] *See id.* at 370.

[299] *See id.*

The second suit, filed against Matsushita in federal court, alleged violations of the Securities Exchange Commission's regulatory rules,[300] over which the federal courts have exclusive jurisdiction.[301] The district court refused to certify the class and dismissed the case.[302]

The shareholders appealed the federal court's decision in the second suit to the Ninth Circuit Court of Appeals.[303] Thereafter, the parties to the first state court suit agreed to a settlement establishing a two million dollar fund in return for a global release of all claims based on the Matsushita-MCA acquisition, including all federal claims.[304] The state court certified the class, approved the settlement, and dismissed all the claims with prejudice.[305]

Matsushita then argued to the Ninth Circuit that the court-approved settlement in the first suit barred the appeal of the federal action under the Full Faith and Credit Act.[306] The Ninth Circuit rejected Matsushita's argument, holding that the settlement in the state action was not entitled to full faith and credit.[307] The Supreme Court reversed. The Court determined that the Full Faith and Credit Act afforded the settlement of the state court suit preclusive effect over the federal action even though the federal courts have exclusive jurisdiction over securities claims.[308]

In contrast to the majority's focus on the full faith and credit doctrine, Justice Ginsburg's separate concurring opinion emphasized that a state court judgment was not entitled to full faith and credit unless it satisfied the requirements of the Fourteenth Amendment's Due Process Clause.[309] In support of her argument, Justice Ginsburg cited *Phillips Petroleum Co. v. Shutts*,[310] which held that minimal due process requirements—including notice, an opportunity to be heard, a right to opt out, and adequate representation—had to be satisfied in order for a class action judgment to bind absentee class members.[311] She regarded adequate representation as the "sine qua non for approval of a class action settlement[.]"[312]

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[300] *See id.*

[301] 15 U.S.C. § 78aa.

[302] *See Matsushita*, 516 U.S. at 370.

[303] *See id.*

[304] *See id.* at 370-72.

[305] *See id.* at 371-72.

[306] 28 U.S.C. § 1738; *see Matsushita*, 516 U.S. at 372.

[307] *See Matsushita*, 516 U.S. at 372.

[308] *See id.* at 369.

[309] *See id.* at 388 (Ginsburg, J., concurring in part, dissenting in part).

[310] 472 U.S. 797 (1985).

[311] *See Matsushita*, 516 U.S. at 395 (Ginsburg, J., concurring in part, dissenting in part) (citing *Phillips Petroleum*, 472 U.S. at 812).

[312] *Id.* at 397 (Ginsburg, J., concurring in part, dissenting in part)(citing Prezant v. Angelis, 636 A.2d 915, 926 (1994)).

Justice Ginsburg observed a troublesome conflict of interest in the case. Before approving the second settlement agreement, the Delaware court had rejected an earlier agreement that provided no monetary benefit to class members, released substantial federal claims, and awarded generous attorney's fees.[313] The court had approved the second agreement, but observed that the release of the federal claims was procured in return for meager compensation for class members and a large fee for the class attorneys.[314] Suspicion of collusion ran high.[315] Justice Ginsburg expressed wariness about the defendants' use of the settlement class action device.[316] Use of the temporary settlement class device requires "telescoping the inquiry of adequate representation into the examination of the fairness of the settlement," she wrote.[317] Justice Ginsburg concurred with the majority's decision to remand the case,[318] but stressed "the centrality of the procedural due process protection of adequate representation in class action lawsuits, emphatically including those resolved by settlement."[319]

Allnet and *Matsushita* highlight salient points in Justice Ginsburg's approach to class action litigation. In each case, the courts were faced with competing concerns of fairness and efficiency. In both cases, Justice Ginsburg argued forcefully that efficiency concerns did not subvert procedural fairness for individual claimants. The Court's most recent pronouncement on class action procedure, *Amchem Products, Inc. v. Windsor*,[320] replayed this value tension in the context of mass tort litigation and the stresses it places upon the judiciary.

C. *Amchem Products, Inc. v. Windsor*

Amchem is the first case in which the Supreme Court addressed the recent phenomenon of the employment of the class action device for the sole purpose

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[313] *See id.* at 391 (Ginsburg, J., concurring in part, dissenting in part).

[314] *See id.* at 392. The establishment of the two million settlement fund awarded shareholders two to three cents per share before payment of fees and costs. *See id.* at 392. However, the state court determined that the class would be best served by settlement of the litigation, and that the terms of the settlement were fair and reasonable. *See id.* at 392.

[315] *See id.* at 393.

[316] *See id.* at 396-97; *see also infra* note 321 for a general discussion of the settlement class action device.

[317] *Matsushita*, 516 U.S. at 397 n.6 (Ginsburg, J., concurring in part, dissenting in part).

[318] *See id.* at 388 (Ginsburg, J., concurring in part, dissenting in part).

[319] *Id.* at 399.

[320] 521 U.S. 591 (1997).

of settling mass tort cases.[321] The facts of *Amchem* are complex. We therefore summarize *Amchem*'s background.

1. The background of Amchem

The parties in *Amchem* handled the asbestos claims as a mass tort. Mass torts litigation generally refers to the aggregation of large numbers of claims that arise from similar events or transactions.[322] Mass tort litigation inundated federal courts in 1980s and 1990s[323] as claimants sought compensation under

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[321] *Amchem* was a settlement class action. *See id.* at 597. FRCP 23 makes no reference to the settlement class action device. Rather, the device is a judicially created procedure. *See In re* General Motors Corp. Pick-up Truck Fuel Tank Litig., 55 F.3d 768, 777-78 (3d Cir.), *cert. denied sub nom.* General Motors v. French, 516 U.S. 824 (1995)(observing that the first Manual for Complex Litigation strongly disapproved of settlement classes, but because courts increasingly used the device, later manuals endorsed usage of the device under carefully controlled circumstances). A settlement class action is never intended to be litigated. Settlement class actions are filed for the sole purpose of binding class members to a settlement agreement reached by the class representatives and defendants. Typically, the complaint, answer and settlement agreement are all filed at the same time or one closely following the other. The court is left to approve the settlement pursuant to FRCP 23(e). The controversy engendered by settlement class actions, as exemplified in *Amchem*, stems from the issue of whether the court should engage in analysis of the class certification criteria of FRCP 23(a) and (b) in approving the settlement. *See generally General Motors*, 55 F.3d 768 (3d Cir. 1995). *See infra* note 330 for mass tort cases that have invoked the class action device for settlement purposes.

[322] The American Law Institute proposes the following definition of a "mass tort":

> From the process perspective, the salient defining characteristics of a mass tort include:
> (1) numerous victims who have filed or might file damage claims against the same defendant(s);
> (2) claims arising from a single event or transaction, or from a series of similar events or transactions spread over time;
> (3) questions of law and fact that are complex and expensive to litigate and adjudicate—frequently questions that are scientific and technological in nature;
> (4) important issues of law and fact which are identical or common to all or substantial subgroups of the claims;
> (5) injuries that are widely dispersed over time, territory, and jurisdiction;
> (6) causal indeterminancy—especially in cases involving toxic substance exposure—that precludes use of conventional procedures to determine and standards to measure any causal connection between the plaintiff's injury and the defendant's tortious conduct;
> (7) disease and other injuries from long delayed latent risks, especially in cases involving toxic substance exposure.

2 AMERICAN LAW INSTITUTE, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY, REPORTER'S STUDY 389 (1991).

[323] *See* Coffee, *supra* note 270, at 1356. Professor Coffee observed, "Hundreds of thousands of people sued scores of corporations for losses due to injuries or diseases that they attributed to catastrophic events, pharmaceutical products, medical devices or toxic substances." *Id.* (quoting Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961, 961 (1993)).

state law from manufacturers of asbestos products,[324] breast implants,[325] intrauterine devices[326] and automobiles.[327] As court congestion increased, some courts and attorneys turned to class actions as an aggregation device.[328]

Defendants in mass tort cases quickly recognized the strategic utility of FRCP 23 in obtaining cheap global settlements.[329] Defendants could entice plaintiffs' counsel into aggregating claimants into classes using Rule 23 and then negotiating a global settlement that benefited plaintiffs, their attorneys, a small number of class members, and, most of all, the defendants.[330] Initially,

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[324] *See, e.g.*, Georgine v. Amchem Prods., Inc., 83 F.3d 610 (3d Cir. 1996)(asbestos litigation).

[325] *See, e.g., In re* Silicone Gel Breast Implants Prods. Liab. Litig., No. CV-92-P-10000 - S, 1994 U.S. Dist. LEXIS 12521 (N.D. Ala. Sept. 1, 1994)(breast implants litigation).

[326] *See, e.g., In re* N. Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig., 521 F. Supp. 1188 (N.D. Cal.), *modified*, 526 F. Supp. 887 (N.D. Cal. 1981), *vacated*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983)(intrauterine devices litigation).

[327] *See, e.g., In re* General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768 (3d Cir.), *cert. denied sub nom.* General Motors v. French, 516 U.S. 824 (1995)(automobiles products liability litigation).

[328] *See* Judith Resnik, *From "Cases" to "Litigation"*, 54 LAW & CONTEMP. PROBS. 5, 43 (1991).

[329] *See* Coffee, *supra* note 270, at 1349. See also *infra* note 330 and the accompanying discussion for a more thorough treatment of defendants' use of FRCP 23 to their own advantage. The class action device can be said to have been transformed from the plaintiff's "sword" into the defendant's "shield." *See* Coffee, *supra* note 270, at 1350.

[330] Collusion in mass torts litigation usually entails an agreement between the defendants and plaintiffs' counsel to settle the case below value in return for attorneys' fees that are above market value. *See* Coffee, *supra* note 270, at 1367-84. Defendants have invented a number of devices of collusion. Examples of such devices include the "scrip settlement," which is a nonpecuniary settlement in the form of discount coupons redeemable by members of the injured class to purchase defendant's product at a discount. *See id.* at 1367-68; *see also General Motors*, 55 F.3d 768 (3d Cir. 1995)(scrutinizing auto-manufacturer's proposed settlement in the form of a scrip certificate to class members in the amount of $1,000 which they could redeem for the purchase of manufacturer's brand of trucks). The "cy press settlement" involves an agreement by the defendant to make a payment of goods or services, not directly to the class members, but to a third party for the indirect benefit of the plaintiff class. *See* Coffee, *supra* note 270, at 1368; *see also In re* Matzo Food Prods. Litig., 159 F.R.D. 600 (D.N.J. 1994)(refusing to approve defendant's proposal to settle an antitrust class action by creating a fund that would distribute defendant's food products to charities and paying plaintiffs' attorneys fees). The "reverse auction" is a competition among plaintiffs' attorneys initiated by the defendants to determine which team of attorneys will settle with the defendants first. Since each team of lawyers is prosecuting the same allegations, the first team to settle essentially precludes the others from litigating their cases. *See* Coffee, *supra* note 270, at 1370; *see also* Grimes v. Vitalink Communications Corp., 17 F.3d 1553 (3d Cir.), *cert. denied*, 513 U.S. 986 (1994)(holding that a release contained in a state court judgment precludes subsequent federal securities action arising from the same facts, even though the state court has no jurisdiction to hear exclusive federal securities claims).

"Inventory settlements" are the subject of *Amchem*. A mass tort plaintiff's attorney

such collusion met little resistance.[331]

Amchem is a particularized version of this mass tort phenomenon. The claimants were workers exposed to asbestos in the 1940s and 1950s who manifested injuries beginning in the 1960s.[332] The claimants filed a stream of individual asbestos cases in federal courts.[333] Realizing the strain of asbestos litigation on federal courts, eight federal judges urged the Judicial Panel on Multidistrict Litigation ("MDL Panel") to consolidate all asbestos cases in a single district.[334] The MDL Panel agreed and in 1991 transferred all pending federal court asbestos cases to the Eastern District of Pennsylvania.[335]

Following the transfer, the plaintiffs and defendants formed separate steering committees.[336] Court-appointed plaintiffs' counsel[337] and counsel for the Center for Claims Resolution ("CCR"), a consortium of 20 former asbestos manufacturers, began negotiations with an eye toward creating a settlement that would resolve both present and future claims.[338] Plaintiffs' counsel and defendants eventually agreed to settle existing and future claims

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typically serves as counsel to an "inventory" of cases which he or she wishes to settle as expeditiously as possible. *See* Coffee, *supra* note 270, at 1373. Defendants, on the other hand, are more concerned about the class of future claimants, which is indeterminable in size and may be much larger than the class of present claimants. *See id.* It is to the advantage of both defendants and plaintiffs' counsel to trade favors—defendants agree to settle the plaintiff's attorney's inventory of cases in return for a global settlement of future claims against defendants on terms favorable to them. *See id.* The global settlement is usually made binding on future claimants by way of a settlement class action (i.e., one created only for settlement purposes). *See id.* at 1373-74. Future claimants, who may be unaware or apathetic about their potential to bring a claim, have no incentive to decide carefully whether to opt out of such class actions. *See* Cramton, *supra* note 224, at 828.

[331] *See* Coffee, *supra* note 270, at 1350-52. Professor Coffee points out that the mass tort class action is uniquely vulnerable to the danger of collusion between defendants and plaintiffs' counsel for three reasons: 1) courts, faced with massive dockets, may be more willing to approve of suspicious settlements that they ordinarily would reject; 2) the court's primary method of regulating plaintiffs' counsel's actions in class actions—control over attorneys' fees—loses potency in the mass torts context because defendants can entice the attorneys with out-of-court compensation over which the court has no control; 3) future claimants (those who have yet to experience any symptoms or illnesses) are often apathetic about mass tort actions brought on their behalf, and therefore, usually fail to object to under-valued settlements of their claims. *See id.*

[332] *See* Georgine v. Amchem Prods., 83 F.3d 610, 618 (3d Cir. 1996).

[333] *See In re* Asbestos Prods. Liab. Litig. (No. VI), 771 F. Supp. 415, 418-19 (J.P.M.L. 1991)(reporting the findings of the Judicial Conference Ad Hoc Committee on Asbestos).

[334] *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 599 (1997).

[335] *See id.*; *see also Asbestos Prods.*, 771 F. Supp. at 424.

[336] *See Amchem*, 521 U.S. at 599.

[337] *See id.* Judge Weiner, who presided over the pretrial proceedings of the consolidated case, appointed Ronald Motley, Gene Locks, and later Joseph F. Rice, as plaintiffs' class counsel in the action. *See id.*

[338] *See id.* at 600.

in two separate agreements, one binding on all future claimants, and the other settling the existing claims for $200 million.[339]

On behalf of future claimants, on January 5, 1993, the settling parties filed a complaint; an answer; a joint motion seeking conditional class certification for purposes of settlement; and a stipulation of settlement proposing to settle all present and future claims of class members against CCR companies for asbestos-related personal injury or death that were not filed before January 15, 1993.[340] The proposed settlement established an administrative procedure for determining individual compensation of class members.[341] In 1993, Judge Reed approved the stipulation of settlement and certified the settlement class.[342]

Objectors, consisting of members of the plaintiff class,[343] challenged the settlement on various grounds, including the adequacy of representation, justiciability, subject matter jurisdiction, personal jurisdiction and the adequacy of class notice.[344] The objectors expressed concern about the inadequacy of the compensation for certain claimants, especially those who did not presently manifest asbestos-related health problems.[345] The Third

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[339] *See id.* at 601.

[340] *See id.* at 601-02. The class consisted of

> (1) all persons exposed occupationally or through the occupational exposure of a spouse or household member to asbestos-containing products or asbestos supplied by any CCR defendant, and (2) spouses and family members of such persons, who had not filed an asbestos-related lawsuit against a CCR defendant as of the date the class action was commenced.

Georgine v. Amchem Prods., 83 F.3d at 610, 619 (3d Cir. 1996).

[341] *See Amchem*, 521 U.S. at 603. As the first step of the administrative procedure, a claimant would have to meet specific medical and exposure criteria. *See id.* If the criteria are met, compensation is provided for four categories of diseases. *See id.* The stipulation fixed a range of damages that CCR would award for each disease for eligible claimants. *See id.* at 603-04.

There are caps on the amount of damages a particular claimant may recover and on the number of qualifying claimants who may be paid in any given year. *See id.* at 604. Recovery exceeding the cap is allowed for "extraordinary" claims, but only a limited number of claims can be found to be "extraordinary." *See id.* There is also a cap on the total amount of compensation available to claimants. *See id.*

Some claimants who qualify for compensation under the settlement are allowed to file a claim in court. *See id.* at 605. However, the settlement limits the number of such exceptions. *See id.* Additionally, claimants who have "pleural" conditions—an accumulation of plaque on the lungs due to asbestos that does not cause physical impairment—are not eligible for compensation. *See id.* at 604. Pleural claimants regularly received substantial money damages in individual tort suits. *See Georgine*, 83 F.3d at 620. The stipulation allowed each defendant to withdraw from the settlement after ten years, but plaintiffs were bound by the settlement in perpetuity. *See Amchem*, at 604-05.

[342] *See id.* at 606.

[343] *See* Georgine v. Amchem Prods., 157 F.R.D. 246, 258 (E.D. Pa. 1994).

[344] *See Georgine*, 83 F.3d at 622.

[345] *See Amchem*, 521 U.S. at 607-08.

Circuit ruled that a settlement class action must satisfy the requirements of FRCP 23(a) and (b)(3).[346]

The court found that under 23(b)(3) common questions of fact and law did not predominate.[347] The court also observed serious intra-class conflicts that precluded satisfaction of the adequacy of representation requirement. It was unfair, the court opined, to bind exposure-only class members who may be insufficiently informed to make a reasoned decision of whether to opt out of the class.[348] The court decertified the class.[349]

2. *Justice Ginsburg's opinion*

Justice Ginsburg wrote the majority opinion affirming the Third Circuit's decision.[350] She first recognized the division among courts over the issue of whether the certification of settlement classes required fulfillment of FRCP 23's certification criteria.[351] She confirmed that the certification requirements *did* apply in the settlement class context.[352] Rule 23 procedural safeguards protecting absentee class members "demand undiluted, even heightened, attention in the settlement context."[353] Certification of a settlement class requires added scrutiny of FRCP 23 requirements because unlike a class action certified for trial, the court has no future opportunity to adjust the class.[354]

Turning to the specific class-certification criteria, Justice Ginsburg emphasized the vital purposes served. The requirements of FRCP 23(a) and (b), she wrote, are not mere procedural technicalities to which courts pay lip-service; rather, they compel careful inquiry into the appropriateness of

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[346] *See Georgine*, 83 F.3d at 624-25.

[347] *See id.* at 626-30.

[348] *See id.* at 633.

[349] *See id.* at 618.

[350] *See Amchem*, 521 U.S. at 597.

[351] *See id.* at 618. The Court cited to the following cases to illustrate the divide among federal courts: *In re* Asbestos Litig., 90 F.3d 963, 975 (5th Cir. 1996)("in settlement class context, common issues arise from the settlement itself")(citation omitted), *cert. pending*, Nos. 96-1379, 96-1394; White v. National Football League, 41 F.3d 402 408 (8th Cir. 1994) ("adequacy of class representation . . . is ultimately determined by the settlement itself"), *cert. denied*, 515 U.S. 1137 (1995); *In re* A.H. Robins Co., 80 F.2d 709, 740 (4th Cir.)("[i]f not a ground for certification per se, certainly settlement should be a factor, and an important factor, to be considered when determining certification"), *cert. denied sub nom.* Anderson v. Aetna Casualty & Surety Co., 493 U.S. 959 (1989); Malchman v. Davis, 761 F.2d 893, 900 (2d Cir. 1985) (certification was appropriate, in part, because "the interests of the members of the broadened class in the settlement agreement were commonly held"), *cert. denied*, 475 U.S. 1143 (1986).

[352] *See Amchem*, 521 U.S. at 620.

[353] *Id.*

[354] *See id.*; *see also* FED. R. CIV. P. 23(c) and (d)(conferring power to the court to make orders pertaining to the class after certification).

invoking the class action device:

> The safeguards provided by the Rule 23(a) and (b) class-qualifying criteria, we emphasize, are not impractical impediments—checks shorn of utility—in the settlement class context. First, the standards set for the protection of absent class members serve to inhibit appraisals of the chancellor's foot kind—class certifications dependent upon the court's gestalt judgment or overarching impression of the settlement's fairness. [355]

It is not enough to submit a proposed settlement class action to scrutiny under FRCP 23(e).[356] Under FRCP 23(e), any settlement of a class action must be approved by the court. The inquiry in approving a settlement under FRCP 23(e) is whether the settlement is "fundamentally fair, adequate, and reasonable."[357]

That standard of analysis, Justice Ginsburg said, is inadequate to ascertain whether the interests of class members are served by the settlement:

> [I]f a fairness inquiry under Rule 23(e) controlled certification, eclipsing Rule 23(a) and (b), and permitting class designation despite the impossibility of litigation, both class counsel and court would be disarmed.[358]

Federal courts, therefore, lack authority to certify a settlement class on the ground of overall fairness. Certification under those circumstances would vitiate most of the procedural protections of FRCP 23.[359]

The facts of *Amchem*, Justice Ginsburg observed, reveal the danger of abandoning those protections. The interests of the class members and class representatives were not aligned.[360] A significant disparity existed between the value of recovery for class members who were currently injured and for those who were only exposed to asbestos.[361] Further, Justice Ginsburg perceived a lack of "structural assurance of fair and adequate representation

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[355] *See Amchem*, 521 U.S. at 621.

[356] FRCP 23(e) provides: "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." FED. R. CIV. P. 23(e).

[357] 5 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 23.85 (3d ed. 1997); *see also In re* Pacific Enter. Secur. Litig., 47 F.3d 373, 377 (9th Cir. 1995)(affirming the district court's determination that the proposed settlement was "fundamentally fair, adequate, and reasonable" under Rule 23(e)); Class Plaintiffs v. City of Seattle, 955 F.2d 1268, 1276 (9th Cir. 1992) (stating that the "fundamentally fair, adequate and reasonable" standard is "universal"); County of Suffolk v. Long Island Lighting Co., Inc., 726 F.2d 1295, 1323 (2d Cir. 1990)(noting that a court must scrutinize a settlement proposal to ensure that it is fair, adequate and reasonable).

[358] *Amchem*, 521 U.S. at 621.

[359] *See id.* at 621-22.

[360] *See id.* at 626.

[361] *See id.*

for the diverse groups and individuals affected."[362] Since the class representatives in this case did not represent the various interests of the class, and since the class was not divided into subclasses, some class members were likely to have been left without an advocate.[363]

Justice Ginsburg also observed that the class was deficient in the sense that common questions of law or fact among members of the class did not predominate over individual questions.[364] The "class members' shared experience of asbestos exposure and their common 'interest in receiving prompt and fair compensation for their claims'" did not supply the requisite commonality in law or fact.[365]

D. Justice Ginsburg's Process Jurisprudence

What do Justice Ginsburg's class action opinions reveal about her process jurisprudence? We observe initially that class action litigation involves an interplay among the three, sometimes conflicting, process values—efficiency, fairness and institutional legitimacy—and Justice Ginsburg's writing evinces careful effort to accommodate all three, but with differing emphases under differing circumstances. She does not pay fealty to a particular process value. Instead, the policies underlying the procedure in question and the specific facts of a case animate her procedural decisionmaking. Consistent with this approach, Justice Ginsburg's opinions emphasize the importance of fairness at certain times and court efficiency at others.[366]

Her opinions in *Allnet*, *Matsushita* and *Amchem*, in particular, wrestle with the tension between efficiency and fairness. The risk of shortchanging the interests of absentee class members runs high in class action litigation, and the procedural safeguards built into FRCP 23 are designed to mitigate that possibility. For that reason, concerns of efficiency, both in the systemic and the individual sense, although important to Justice Ginsburg, do not compel her to approve of an otherwise unfair process for class members.

In *Allnet*, for example, the prospect of burdening the plaintiffs with added transaction costs did not persuade her that the court should have granted them standing to litigate against Allnet on behalf of all organization members.[367]

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[362] *Id.* at 627.

[363] *See id.*

[364] *See id.* at 622; *see also* FED. R. CIV. P. 23(b)(3)(requiring predominance of questions of law or fact).

[365] *Amchem*, 521 U.S. at 622 (quoting Georgine v. Amchem Prods., 157 F.R.D. 246, 316 (E.D. Pa. 1994)).

[366] *See supra* Part II.

[367] *See* Telecommunications Research & Action Ctr. v. Allnet Commun. Servs., Inc., 806 F.2d 1093, 1096 (D.C. Cir. 1986). Judge Ginsburg recounted the following exchange during oral argument:

The efficiency achieved by TRAC's associational form of action did not justify the circumvention of safeguards assuring the adequacy of representation of the association's members. In Justice Ginsburg's view, the suit should have been brought as a class action.

In *Matsushita*, Justice Ginsburg perceived the majority's holding to be skewed in favor of court efficiency—it lightened federal court dockets by barring the adjudication of claims already settled and approved by a state court. Hints of collusion in the state court settlement—the release of all claims against the defendant, including federal claims over which federal courts had exclusive jurisdiction, in exchange for undervalued compensation for the shareholders and a handsome fee for the class attorneys[368]—suggested a process failure. For this reason, Justice Ginsburg declined to join the majority. Despite the costly and time-consuming prospect of allowing certain class claimants "more than one day in court,"[369] as the majority put it, Justice Ginsburg maintained that fairness commanded a more searching examination of whether the state court judgment respected the class members' rights to fair participation or representation in the litigation.

Amchem perhaps most clearly reveals Justice Ginsburg's thoughtful handling of the fairness-efficiency dynamic. As a mass tort case, *Amchem* threatened to inundate the federal judiciary with massive, repetitious litigation involving state law issues and large numbers of parties.[370] Faced with an ostensible assault on the functioning capacity of the federal courts, Justice Ginsburg first considered the efficiency-enhancing aspects of FRCP 23:

> The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.[371]

More tellingly, TRAC's counsel stated at oral argument that the form of action the organization selected was influenced by this consideration: "[I]t didn't involve the kind of notice requirements and expense that a class action might." This colloquy took place:

Court: Is it the notice—the cost of giving notice—that led you away from the class action?

Counsel: That's correct in that there were virtually no up-front costs to the association in utilizing this remedy. . . .

Id. (ellipses in original).

[368] *See* Matsushita Elec. Indus. v. Epstein, 519 U.S. 367, 388 (1996)(Ginsburg, J., concurring in part, dissenting in part).

[369] *Allnet*, 806 F.2d at 881.

[370] *See Amchem*, 521 U.S. at 597-98 (citing REPORT OF THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON ASBESTOS LITIGATION 2-3 (Mar. 1991)).

[371] *Id.* at 617 (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997)).

Justice Ginsburg then examined how the class action device constrained the autonomy and participation rights of individual class members:

> Sensitive to the competing tugs of individual autonomy for those who might prefer to go it alone or in a smaller unit, on the one hand, and systemic efficiency on the other, the Reporter for the 1966 amendments cautioned: 'The new provision invites a close look at the case before it is accepted as a class action . . . .'[372]

Personal injuries inflicted on an individual's body are specific and personal.[373] Accordingly, Justice Ginsburg observed that "[e]ach plaintiff [in an action involving claims for personal injury and death] has a significant interest in individually controlling the prosecution of [his case]; each ha[s] a substantial stake in making individual decisions on whether and when to settle."[374]

Justice Ginsburg's initial observations in *Amchem* highlight the efficiency-fairness dialectic in class actions. The object of FRCP 23 is to "'achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.'"[375] Rule 23 encroaches on individual autonomy while it promotes efficiency.[376]

For Justice Ginsburg, the *Amchem* class action was a prime example of the untoward results of sacrificing procedural fairness. Plaintiff's counsel selected class representatives whose interests did not align with those of future claimants.[377] As claimants with matured claims, the named plaintiffs sought immediate compensation.[378] Future claimants, on the other hand, were interested in "ensuring an ample, inflation-protected fund for the future."[379] Under the proposed settlement, present claimants benefited substantially while future claimants received undervalued returns for their sacrifice of control over participation in the litigation.

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[372] *Id.* at 615 (quoting Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 390 (1967)).

[373] *See* Resnik, *supra* note 328, at 23.

[374] *Amchem*, 521 U.S. at 616 (alterations in original)(internal quotation marks omitted) (quoting *Georgine*, 83 F.3d at 633).

[375] *Id.* at 615 (alteration in original)(quoting FED. R. CIV. P. 23(b)(3) advisory committee's note).

[376] *See* Resnik, *supra* note 328, at 23. Class actions operate in the manner of a sacrifice—class members surrender their right of control and participation in the litigation of their claims in return for increased effectiveness in securing corrective justice and individual compensation. *See id.* Rule 23's certification requirements, particularly "adequacy of representation," "predominance," and "superiority," ensure that the equation balances in favor of absent class members. *See* FED. R. CIV. P. 23 advisory committee's note; *see also supra* notes 273 and 276.

[377] *See Amchem*, 521 U.S. at 626.

[378] *See id.*

[379] *Id.*

The structure of the proposed settlement thus emitted strong signals of collusion between plaintiff's counsel and defendants. To Justice Ginsburg, that was a *de facto* violation of the adequacy of representation requirement.[380] When the representatives or counsel bargain away the interests of the class members in return for personal gain, the class members are left bereft of not only representation, but also a fair outcome.

Allnet, *Matsushita* and *Amchem* suggest that the enormous systemic stress of asbestos litigation is insufficient, in itself, to convince Justice Ginsburg to certify a procedurally faulty class action. It would be a misreading of Justice Ginsburg's opinions in *Allnet*, *Matsushita*, and *Amchem*, however, to conclude that she is insensitive to efficiency-oriented arguments. She is aware that procedure can be instrumental in conserving the limited resources available to courts.[381] When judicial economy can be promoted by stretching a procedural rule without sacrificing substantially fairness to litigants, Justice Ginsburg is at times willing to stretch the rule to promote efficiency. In *Caterpillar*, for example, she implicitly modified the traditional timeframe for establishing subject matter jurisdiction because considerations of "finality,

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[380] The interests of the class representatives must not be antagonistic toward those of the class members. *See, e.g.*, Crawford v. Honig, 37 F.3d 485, 487 (9th Cir. 1994)(noting that adequate representation "depends on the qualifications of counsel for the representatives, an absence of antagonism, a sharing of interests between representatives and absentees, and the unlikelihood that the suit is collusive."); Retired Chicago Police Ass'n v. Chicago, 7 F.3d 584, 598 (7th Cir. 1993)(stating that the two parts of the adequacy of representation requirement are the adequacy of class counsel and the adequacy of representation of the "different, separate, and distinct interest[s]" of class members); *In re* the Drexel Burnham Lambert Group, 960 F.2d 285, 291 (2d Cir. 1992)(holding that adequacy of representation is measured by the dual standards of class counsel being qualified, experienced and able to conduct the litigation, and of the class members not holding interests that are antagonistic to one another).

Additionally, the class representatives must have interests in the litigation that operate as an incentive for them to represent the class claims vigorously through class counsel. *See, e.g.*, *In re* American Med. Sys., Inc., 75 F.3d 1069, 1083 (6th Cir. 1996)(requiring class representative to share common interests with absent class members and to vigorously represent the interests of the class through qualified counsel); Andrews v. American Tel. & Tel. Co., 95 F.3d 1014, 1023 (11th Cir. 1996)(defining adequacy of representation to mean that the class representative shares common interests with class members and will vigorously protect class interests through qualified counsel); Hassine v. Jeffes, 846 F.2d 169, 179 (3d Cir. 1988)(stating that a court's inquiry into adequacy of representation should include whether the putative class representative has the ability and incentive to represent the class claims vigorously).

[381] *See, e.g.*, BMW of North Am., Inc. v. Gore, 517 U.S. 559 (1996). In *Gore*, Justice Ginsburg wrote a dissent criticizing the majority for constitutionalizing the law of punitive damages. *See id.* at 1614-20 (Ginsburg, J., dissenting). The majority position permitted the Supreme Court to review the constitutionality of state high court decisions regarding punitive damage awards. *See id.* at 1595-98. Justice Ginsburg voiced concern that "the Court will work at this business alone. It will not be aided by the federal district courts and courts of appeals. It will be the only federal court policing the area." *Id.* at 1617 (Ginsburg, J., dissenting).

efficiency, and economy . . . [were] overwhelming,"[382] and because the removal scheme devised by Congress allowed for "expeditious superintendence by district courts."[383] Justice Ginsburg's ruling precluded the plaintiffs from relitigating their state claims in their court of choice—state court.

The safest description of Justice Ginsburg's approach to the efficiency-fairness tension in complex cases is that it defies simplistic description.[384] Whether her procedural decision in a particular case tips in favor of fairness or efficiency depends on the specific facts before the Court and the value concerns underlying the rule, both in the particular case and the genre of similar cases, a dynamic discussed further in the next Part.

At bottom, Justice Ginsburg's class action opinions evince an overarching concern for institutional legitimacy, which grows out of her respect for the "[r]ule of law virtues of consistency, predictability, clarity, and stability."[385] Her application of FRCP 23 reinforced the legitimacy of the judiciary in two ways: by preserving the integrity of FRCP 23 and by approving only careful, restrained exercises of federal court authority. Her insistence on "heightened attention"[386] to FRCP 23's requirements contributes to public perception of the federal judiciary as a procedurally fair institution. If the Court had validated the *Amchem* settlement class while bypassing the class certification criteria, it would probably have engendered two negative results. First, the public would likely perceive the federal judiciary as an arbitrary, result-oriented institution that abides by its own rules only when compelled to do so. Second, the Court would likely have undermined FRCP 23, relegating it to a "check[] shorn of utility."[387] Neither result is conducive to litigant, lawyer, or public faith in the judicial system, and certainly not to the integrity of federal class actions.

Amchem also tempted the Court to wield federal judicial power broadly. Plaintiff's counsel and defendants invited the Court to approve a use of FRCP 23 that approximated a legislative solution to the asbestos litigation crisis. As a subscriber of the "measured movement" approach to judicial decision-making, Justice Ginsburg was unwilling to condone such an expansive

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[382] Caterpillar v. Lewis, 519 U.S. 61, 75 (1996).

[383] *Id.* at 76.

[384] That Justice Ginsburg's emphasis shifts from fairness to efficiency and vice-versa underscores the inappropriateness of assigning her a conventional label. One may be tempted to portray her as liberal because she sometimes favors an individual litigant's "day in court" over efficiency, but that is an invalid assumption. Part V posits a more sophisticated explanation of her procedural decisions in the form of values proceduralism.

[385] Ginsburg, *Judicial Voice*, *supra* note 98, at 1191. Consistency, predictability, clarity, and stability also seem to be value concerns that permeate her thoughts on stare decisis. *See supra* note 105 and accompanying text.

[386] *Amchem*, 521 U.S. at 620.

[387] *Id.* at 621.

application of Rule 23. Approval of the proposed settlement in *Amchem* would be akin to establishing a court-ordained, "nationwide administrative claims processing regime[.]"[388] Justice Ginsburg acknowledged that such an approach may "provide the most secure, fair, and efficient means of compensating victims of asbestos exposure," but "Congress . . . has not adopted such a solution."[389] In restraining the Court from acting beyond its prescribed authority, Justice Ginsburg appeared to preempt public criticism of a legislating Court.

At the root of Justice Ginsburg's concern for institutional legitimacy is her belief that the rule of law is viable only when the court's directives are clear and reasonable and the judiciary works incessantly to accommodate competing process values. Her argument in *Arizonans* and *Agostini* resurfaces in *Amchem*: the legitimacy of the Court depends in part on adherence to procedural rules designed to assure dignity and participation, even when straying from the rules might yield a substantively satisfying or efficient result.[390] Succumbing to the temptation to stray undermines the potency of the procedural device and portrays the Court as vulnerable to social and political pressures.[391] In her view, the Court should confine its authority to the power prescribed in formal procedural rules that by design reflect a balance of competing values. In keeping with this exercise of restraint, the Court must refrain from interpretive leaps such as that suggested by the class counsel and the defendants in *Amchem*. At the same time, when the Court's determinations are not constrained by formally prescribed rules—e.g., in determining whether subject matter jurisdiction at the moment of judgment is sufficient, as in *Caterpillar*—then the Court should formulate its own procedural rules in a manner that best accommodates the full range of competing process values for the "genre of cases."

Although *Allnet*, *Matsushita*, *Amchem*, and *Caterpillar* do not comprise a definitive blueprint of Justice Ginsburg's approach of legal process and

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[388] *Id.* at 628.

[389] *Id.* at 628-29. Justice Ginsburg's concern that the proposed settlement *Amchem* would overstep the authority of the judiciary seems similar to Lon Fuller's argument that courts should not decide substantive legal questions involving "polycentric" tasks. *See* Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394-404 (1978). A polycentric task is one that requires consideration of the interests of a multiplicity of parties. *See id.* at 395. Since disputes that are polycentric in nature can be resolved in more than one way, Fuller argues that the court should avoid them, as it is not equipped to make such complex policy decisions. *See id.* at 395-98. In *Amchem*, there was no singular method of settling the asbestos litigation that would have served the conflicting interests of all class members. The solution pressed upon the Court arguably involved policymaking to a degree that it could not competently, nor prudently, handle.

[390] *See supra* notes 254-263 and accompanying discussion.

[391] *See* Planned Parenthood v. Casey, 505 U.S. 833, 865 (1992).

procedure, they do provide preliminary insight. Her judicial opinions address the efficiency-fairness tension, along with the Court's broader objective of preserving its legitimacy. None of those values, taken alone, dictate her decisions. Nonetheless, the interplay among those values animates her procedural decisionmaking. The final Part of this article endeavors to more fully describe that dynamic.

IV. VALUES PROCEDURALISM

Justice Ginsburg's writings confirm that her views on judicial process are integral to her decisionmaking. Her opinions in class action cases provide insight into her approach to the procedural aspects of legal process, and on a more general level, her jurisprudence. We draw two inferences from these cases. First, the value choices she makes in rendering a procedural decision are usually deliberate and calculated. As she expressed in *Allnet*, her judicial opinions are written for a "genre of cases, not for one day and case alone."[392] Aware of the precedential impact of her opinions, she is careful not to articulate a view that may be used in a future case to disrupt the balance among process values. *Allnet* was such a case, in which she declined standing to the plaintiff association because a contrary ruling would have opened the door to potentially unfair and abusive associational litigation.

The second inference, a correlative of the first, is that Justice Ginsburg is averse to applying procedural rules in a "mechanical" or "mindless" fashion.[393] Her dynamic rather than dogmatic approach finds guidance not only from the terms of a rule,[394] but also from contextual considerations of fact, policy, and value. By dynamism we mean that her jurisprudence of process and procedure is not fixed on any particular value. Her procedural decisions reflect her sensitivity to the commonality and antagonism that exists among process values.

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[392] Telecommunications Research & Action Ctr. v. Allnet, 806 F.2d 1093, 1095 (D.C. Cir. 1986).

[393] *See* Center for Nuclear Responsibility v. United States Nuclear Regulatory Comm'n, 781 F.2d 935, 946 (D.C. Cir. 1986)(Ginsburg, J., dissenting)(rejecting the majority's "mindless" application of Rule 58); Spann v. Colonial Village, Inc., 899 F.2d 24, 32 n.4 (D.C. Cir. 1990)(citing United States v. Perez, 736 F.2d 236, 237-38 (5th Cir. 1984))(disfavoring the "mindless" application of Rule 58).

[394] That Justice Ginsburg does not necessarily confine herself to the text of a rule in determining the correct procedural result in a case does not mean that she believes judges are free to abrogate the procedural requirements of a rule. To the contrary, as previously discussed in Part II.C., she insists on the accurate application of procedure. *See* Agostini v. Felton, 521 U.S. 203, 212 (1997), 521 U.S. at 212; *see also supra* notes 176-95 and accompanying discussion. We merely suggest that what is "accurate" in her view depends upon the contextual and value considerations attendant to a given case.

Dispelling the notion that Justice Ginsburg's approach to process and procedure is one-dimensional is but one step in doing justice for the Justice. The class action cases permit the next step: a description of the dynamic. The remainder of this Part takes up this task. Before proceeding, however, we bear in mind that our conclusions are based on a limited universe of ever-expanding information.

We know from her judicial opinions that Justice Ginsburg strives to be a principled decisionmaker; the question that remains is by what principles she abides. In hopes of illuminating the interplay of those principles, we suggest a descriptive term: values proceduralism.[395] Values proceduralism refers to the interpretation or application of open-ended or ambiguous procedural rules in a manner that reflects a context-dependent accommodation of process values. In following this mode of procedural decisionmaking, a jurist is not captivated by concerns emanating from a particular process value. She does not even arrive at a decision by weighing value concerns anew in every case, as a utilitarian or law and economics theorist engages in cost-benefits analysis. Rather, the jurist looks at the technical requirements and larger aims of the procedural rule in question and examines the differing balances of process values served by one construction of the rule rather than another. She then selects the construction that best reflects the accommodation of values that she perceives to be embodied in the rule.[396] Justice Ginsburg's writings tend to embrace this values proceduralism approach.

Integral to the values proceduralism approach is careful attention to the process value concerns embodied in specific procedures. Only analysis of the formation of a procedural rule reveals its purposes and its accommodation of competing process values. Once a judge identifies those aspects of a rule, she can better determine how they should play out with the facts presented in a given case.

Values proceduralism describes Justice Ginsburg's practice of looking closely at the value concerns underlying a rule for guidance in construing and applying the rule. Justice Ginsburg's opinions in *Amchem* and *Agostini* illustrate this approach. In *Amchem*, Justice Ginsburg refused to approve a settlement class that bypasses the safeguards in FRCP 23, for that would facilitate the convenient, yet unfair, settlement of future claims, a result

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[395] We hope that "values proceduralism," as a newly-minted term, will avoid the problems associated with conventional labels. *See supra* note 6 and accompanying discussion.

[396] Values proceduralism runs parallel, in some respects, to Legal Process theory. Members of the Legal Process movement argue that judges should develop the common law in light of the purposes and policies behind the legal rules they are obligated to interpret and apply. *See* Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 467, 505-08 (1988)(book review) (summarizing the Legal Process movement). In taking a values proceduralism approach, as we suggest she does, Justice Ginsburg's judging style appears to bear the influence of Legal Process theory.

inconsistent with the balance between efficiency and fair representation that is structured into FRCP 23. Similarly, Justice Ginsburg disagreed with the majority's employment of FRCP 60(b) in *Agostini* to revisit the Court's holding in *Aguilar*. In her view, Rule 60(b) is not a tool for reopening the litigation of legal or factual claims that form the basis of a judgment. Construing the rule as the majority did would undermine the integrity of the Court, a process value firmly embedded in the rule.[397]

Conceptualizing Justice Ginsburg's procedural approach as one of values proceduralism offers a broad framework for understanding how the diverse themes in Justice Ginsburg's writings comprise her judicial philosophy. The numerous concerns that surface in her writings are taken by some as inconsistencies in her procedural jurisprudence, or as indications of her "moderate" style of judging. Both of these interpretations misconstrue her approach to procedural aspects of legal process.[398] Justice Ginsburg's opinions disclose no predilection toward any one value concern; they instead highlight her aim of construing and applying procedural rules in ways that best reflect the accommodation of the value concerns embedded in the rules.

Implicit in the values proceduralism approach is faith in the capacity of

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[397] That the integrity of the courts is a concern embodied in Rule 60(b)(5) is evinced by the conditions the rule establishes for setting aside a final judgment or order. *See* FED. R. CIV. P. 60(b)(5). Rule 60(b)(5) dictates that courts cannot nullify a prior judicial pronouncement arbitrarily. Relief from a judgment or order is proper only in circumstances where denial of such relief would be unjust.

[398] For instance, Justice Ginsburg has rendered decisions that favor efficiency in some instances and fairness in others. Her pattern of judicial behavior makes sense in light of the differing value concerns served by the procedural rules implicated in those cases. Where efficiency is a primary concern of the procedural rule at issue, Justice Ginsburg's decisions tend to reflect a concomitant emphasis on enhancing court efficiency. *See* Caterpillar, Inc. v. Lewis, 519 U.S. 61 (1996); *In re* Korean Airlines, 829 F.2d 1171 (D.C. Cir. 1987); *see also supra* notes 77-93 and 95-97 and accompanying text. In contrast, when Justice Ginsburg detects that a procedural rule is especially concerned with ensuring fairness to litigants (e.g., FRCP 23), she endeavors to construe and apply the rule so as to give effect to its accommodation of fairness. As another example, Justice Ginsburg's different approaches to the mootness doctrine in *Doe v. Sullivan*, 938 F.2d 1370 (D.C. Cir. 1991), and *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997), are also reconcilable under the rubric of values proceduralism. Justice Ginsburg found that *Arizonans* presented a moot claim, whereas *Sullivan* did not. The difference turned on the question of how, in her view, the mootness doctrine accommodates competing value concerns. The mootness doctrine prevents the waste of judicial resources on extinguished disputes, but it does not bar adjudication of controversies that are not truly resolved—i.e., those that are "capable of repetition, yet evading review." *Sullivan*, 938 F.2d at 1376. In *Sullivan*, the plaintiff had no opportunity to litigate his claim before the court, as the consent waivers were withdrawn within three months. Justice Ginsburg perceived that the dispute at issue in that case could foreseeably arise again in the future. *Arizonans* presented a different factual circumstance. There, the plaintiff had been afforded her day in court, and the challenge to the English Only law was kept alive in the Arizona state courts, assuring some form of judicial review. *See* Serrano, *supra* note 175, at 222.

procedures particularly, and process rules generally, to serve two important functions. The first is to foster the perception that procedural rules make for fair adjudication of disputes. Procedural fairness is integral to an individual's assessment of the overall fairness of the judicial system, and sometimes, may even alleviate misgivings about the fairness of the substantive result. The second is to maintain the legitimacy of the judiciary. Procedural rules, as components of legal process, bear heavily on the public's sense of the integrity of the courts. Although no guarantor of appropriate judicial behavior, procedure cultivates confidence among the public that the courts will exercise their authority within a settled, pre-established framework. In that sense, procedural rules instill a sensé of stability to the judicial system, as they are constants, to some degree, around which individuals may make decisions regarding how to deal with their legal interests, rights, and claims.[399]

V. CONCLUSION

Portrayed as the consummate moderate, Justice Ginsburg's judicial philosophy has often been described in terms loaded with political baggage. Such descriptions fail to illuminate the complex value considerations informing her judicial decisionmaking. Our examination of Justice Ginsburg's writings reveals that the sometimes seemingly inconsistent themes in her process jurisprudence—a flexible approach to procedural rules in one situation and strict adherence in others—is instead what we have described as a values proceduralism. As scholars and commentators of her judicial philosophy, we should avoid misshapen political labels and instead, do justice for the Justice.

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[399] *See* Hardin, *supra* note 212, at 1988. The doctrine of stare decisis shares in the conception of rules as an instrument of stability. Stare decisis indicates how a court may rule on an issue that has been previously decided by precedent. *See id.* Posner, commenting on stare decisis from a law and economics perspective, describes the body of precedents in an area of law as a "stock of capital goods" that yields productive services over time. Posner, *Economic Analysis*, *supra* note 213, at 419-21. Like settled rules of substantive law, rules of process and procedure can form the basis of reliance interests.

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I. INTRODUCTION

Associate Justice Ruth Bader Ginsburg ("Ginsburg") began arguing that the "strict scrutiny" standard should be applied to gender discrimination cases when she was a law professor at Columbia University. Women's rights groups from all camps hoped she would continue to argue for strict scrutiny in gender discrimination cases once she was appointed as an Associate Justice to the United States Supreme Court.[1] In the case concerning Virginia Military Institute's ("V.M.I.") exclusion of women, Ginsburg, writing for the majority, stopped short of applying strict scrutiny.[2] Instead, she applied a standard of review which, although based on language from prior cases, arguably could be considered a higher level of scrutiny.[3] Following the Court's decision in *United States v. Virginia* ("*VMI*"), a state must have an "exceedingly persuasive justification" to establish classifications that are based on sex.[4]

Justice Scalia said that the standard used in *VMI* is, in fact, strict scrutiny;[5] other commentators say Ginsburg "is keeping her powder dry for battles yet to come, but it is not clear how much powder is left."[6] Some argue that Ginsburg compromised her long-held ideals in the *VMI* opinion.[7] Compromise does not seem likely for a woman who faced gender discrimination as a mother, law student, law clerk, and college professor.

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[1] *See generally* Tony Mauro, *Quick Sketch on Justice Ruth Bader Ginsburg*, *in* ALMANAC OF THE FEDERAL JUDICIARY, May 19, 1994, *available in* WESTLAW, Ginsburg File [hereinafter Mauro]("Twenty years ago, she was arguing that gender discrimination be judged by the same 'strict scrutiny' standard used in race bias cases."). Ruth Bader Ginsburg was appointed by President Clinton to fill Justice White's vacancy. *See id. See also* Shelia M. Smith, Comment, *Justice Ruth Bader Ginsburg and Sexual Harassment Law: Will the Second Female Supreme Court Justice Become the Court's Women's Rights Champion?*, 63 U. CIN. L. REV. 1893 (1995). Commentators speculate that Ginsburg's perspectives on women's issues would result in her supporting women's rights more often and perhaps more passionately than Justice O'Connor. *See id.* (citing Harriet Chiang, *Nominee is Longtime Crusader against Sex Discrimination*, S.F. CHRON., June 15, 1993 at A1; Eleanor Smeal, *Ruth Bader Ginsburg's Nomination Discussed* (CNN television broadcast, June 15, 1993)).

[2] *See* United States v. Virginia, 518 U.S. 515, 534 (1996)(articulating the standard from the lower court opinion as requiring "exceedingly persuasive justification" for gender classifications).

[3] *See id.* at 573 (Scalia, J., dissenting).

[4] For an example, *see id.* at 534 ("Virginia has shown no 'exceedingly persuasive justification' for excluding all women[.]").

[5] *See id.* at 571 (Scalia, J., dissenting).

[6] Mauro, *supra* note 1. The government had argued that "strict scrutiny" should be applied in the *VMI* case. *See VMI*, 518 U.S. at 571 (Scalia, J., dissenting).

[7] *See* Mauro, *supra* note 1. ("She is modest in her jurisprudence as well, to the occasional chagrin of liberals who expected dramatic decisions from this former feminist lawyer.").

Although numerous articles have documented her gender discrimination work and judicial standards of review,[8] this article analyzes Ginsburg's impact on gender discrimination law as an attorney, judge, and Supreme Court justice. It is limited to that vantage point and is not a review of gender discrimination law as a whole. This article also traces the evolution of the gender classification standard as it appears in Ginsburg's writings, from her days as a law professor and advocate for the American Civil Liberties Union ("ACLU") to 1996 as a Supreme Court Justice when she wrote the *VMI* opinion.

Prior to *VMI*, the accepted standard of review for gender classifications was "intermediate scrutiny."[9] Following *VMI*, speculation continues as to what is the appropriate standard of review.[10] Some commentators have said that the *VMI* standard is really strict scrutiny, the highest standard of review the Court can apply.[11] For purposes of this article, the *VMI* standard of review is referred to as the "exceedingly persuasive justification" standard.

Part II begins with an examination of Ginsburg's background and the origins of her judicial and feminist philosophies by looking at her personal experiences with discrimination. Part III analyzes the development of the standard of review in Ginsburg's pre-Supreme Court opinions and writings on gender discrimination. Four phases are examined: the standard of review prior to 1971, the history of women and the United States Constitution, the gender discrimination cases Ginsburg tried as a lawyer for the ACLU, and Ginsburg's opinions and writings as an appellate judge for the District of

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[8] *See, e.g.*, Deborah L. Brake, *Sex as a Suspect Class: An Argument for Applying Strict Scrutiny to Gender Discrimination*, 6 SETON HALL CONST. L.J. 953 (1996)(arguing that the Supreme Court should adopt "strict scrutiny" in the *VMI* case); Trlica Cosby, Note, *Strictly Speaking: Viewing J.E.B. v. Alabama ex rel. T.B. as Sub Silentio Application of Strict Scrutiny to Gender-based Classifications*, 32 HOUS. L. REV. 869 (1995)(arguing that the Supreme Court could only reconcile *J.E.B.* with *Taylor v. Louisiana* by using "strict scrutiny").

[9] *See* Craig v. Boren, 429 U.S. 190 (1976). The "intermediate level" of scrutiny for sex-based classifications, as first applied in *Craig v. Boren*, provided that a law must be "substantially related to achievement of [important governmental] objectives[]" to pass constitutional muster. *Id.* at 197.

[10] *See VMI*, 518 U.S. at 559-60 (Rehnquist, C.J., concurring)(concluding that the repetition of the phrase "exceedingly persuasive justification" obfuscated intermediate scrutiny); *see also id.* at 571-73 (Scalia, J., dissenting)(arguing that the Court effectively accepted the government's arguments to apply "strict scrutiny"). The *VMI* standard has been called "rationality with extra bites," "skeptical scrutiny," and "the sliding scale of scrutiny." *See* Christopher H. Pyle, *Women's Colleges: Is Segregation by Sex Still Justifiable After United States v. Virginia?*, 77 B.U. L. REV. 209, 219, 231-32 (1997).

[11] *See VMI*, 518 U.S. at 571 (Scalia, J., dissenting). *See also* Shayne R. Kohler, Note, *Dismantling a Relic of the Nineteenth Century: An End to Discrimination at the Virginia Military Institute*, 1996 UTAH L. REV. 717 (arguing that "strict scrutiny" should have been adopted by the Court in *VMI*).

Columbia Circuit Court.[12] Part IV presents Supreme Court opinions that lead to the *VMI* opinion, in particular, the footnote references in *Harris v. Forklift Systems, Inc.*,[13] and *J.E.B. v. Alabama*.[14] Part IV next examines the *VMI* opinions, including the lower court opinions and arguments presented, and also evaluates why the Court stopped short of strict scrutiny in the *VMI* case. Part V projects future battlegrounds for gender discrimination and applies the *VMI* exceedingly persuasive justification standard to other fact situations. Among the remaining bastions of male exclusivity and dominance that could be challenged are college athletic programs and military programs such as special forces and combat-intensive units. Part V also examines *VMI*'s potential impact on future cases involving discrimination based on sexual orientation. The article concludes that for whatever reason, the Court chose to refrain from applying strict scrutiny to the gender discrimination in *VMI*, leaving courts with a new standard which falls in between intermediate and strict scrutiny.

II. BACKGROUND

The artificial barriers[15] that Ginsburg encountered throughout her early

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[12] *See, e.g.*, Walker v. Jones, 733 F.2d 923 (D.C. Cir. 1984); Valentino v. USPS, 674 F.2d 56 (D.C. Cir. 1982).

[13] 510 U.S. 17 (1993).

[14] 511 U.S. 127 (1994).

[15] *See infra* Part II.A. and notes 329, 330. Ginsburg wrote about equal rights or sex equality advocates whose goal was "to remove artificial barriers to women's aspiration and achievement; . . . to help make . . . the rules fit for all humankind." Ruth Bader Ginsburg, Madison Lecture, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1204 n.124 (1992) [hereinafter Ginsburg, *Judicial Voice*]. By "promoting woman's 'natural' role as selfless homemaker, and . . . emphasizing the man's role as provider," the state impeded men and women from pursuing opportunities that could enable them to break away from familiar stereotypes. *Id. See also* Ruth Bader Ginsburg & Barbara Flagg, *Some Reflections on the Feminist Legal Thought of the 1970s*, 1989 U. CHI. LEGAL F. 9, 17-18; *see generally*, Ruth Bader Ginsburg, *Treatment of Women By the Law: Awakening Consciousness in the Law Schools*, 5 VAL. U. L. REV. 480 (1971)[hereinafter Ginsburg, *Treatment of Women*]; Ruth Bader Ginsburg, *Some Thoughts on Benign Classification in the Context of Sex*, 10 CONN. L. REV. 813 (1978) [hereinafter Ginsburg, *Benign Classification*]; Ruth Bader Ginsburg, *Remarks on Women Becoming Part of the Constitution*, 6 LAW & INEQ. J. 17 (1988)[hereinafter Ginsburg, *Remarks on Women*]. An 1876 Minnesota case in which the court denied Martha Dorsett's admission to the Minnesota State bar even though she previously had been admitted to the Bar in another state is one example of this "artificial barrier." The court stated that the primary job of women is to take care of children which requires a full-time commitment, day and night, like that required of those who serve the bar. *See* Ruth Bader Ginsburg, *The Washington College of Law Founders Day Tribute*, 5 AM. U. J. GENDER & L. 1, 5 (1996)[hereinafter Ginsburg, *Founders Day Tribute*] (citing *In re Application of Martha Angle Dorsett to Be Admitted to Practice as Attorney and Counselor at Law* (Minn. C. P. Hennepin Cty., 1876) in THE SYLLABI, Oct. 21, 1876, pp. 5, 6).

years shaped her philosophy, advocacy, and strategy.[16] These experiences instilled within her a perspective that would impel her to become a skilled, dedicated, and inspiring leader in the fight against sexual discrimination. This section highlights some of the challenges she faced along her path to becoming the second woman in history to be appointed to the United States Supreme Court.

A. The Shaping of an Advocate

Growing up at a time when federal and state laws reflected and reinforced "traditional" sex roles,[17] Ruth Bader Ginsburg was denied job opportunities

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The court reasoned that women train and educate the young which

> forbids that they shall bestow that time (early and late) and labor, so essential in attaining to the eminence to which the true lawyer should ever aspire. It cannot therefore be said that the opposition of courts to the admission of females to practice . . . is to any extent the outgrowth of . . . 'old fogyism[.]' . . . it arises rather from a comprehension of the magnitude of the responsibilities connected with the successful practice of law, and a desire to grade up the profession.

Id. at 7 n.13.

[16] *See* Joyce Ann Baugh et al., *Justice Ruth Bader Ginsburg: A Preliminary Assessment*, 26 U. TOL. L. REV. 1, 3-6 (1994)[hereinafter Baugh]; *see also* Deborah L. Markowitz, *Ruth Ginsburg: Women's Rights Advocate—Supreme Court Justice*, 20 VT. B.J. & L. DIG. at 9 (Oct. 1994)[hereinafter Markowitz, *Women's Rights Advocate*]; Henry J. Reske, *Two Paths for Ginsburg: The Trailblazing Women's Rights Litigator Became a Moderate Judge*, 79 A.B.A. J. at 16-19 (Aug. 1993)[hereinafter Reske]; Margaret Carlson, *The Law According to Ruth*, TIME, June 28, 1993, at 38, *available in* 1993 WL 2930539[hereinafter Carlson].

[17] *See* Deborah L. Markowitz, *In Pursuit of Equality: One Woman's Work to Change the Law*, 14 WOMEN'S RTS. L. REP. 335, 335-38 (1992)[hereinafter Markowitz, *In Pursuit of Equality*]; *see generally*, John D. Johnston, Jr. & Charles L. Knapp, *Sex Discrimination By Law: A Study in Judicial Perspective*, 46 N.Y.U. L. REV. 675 (1971); Ginsburg, *Remarks on Women*, *supra* note 15.

In a speech following President Bill Clinton's announcement of Ruth Ginsburg's nomination as the next United States Supreme Court Justice, Ginsburg thanked her mother, Celia Amster Bader. *See Clinton Nominates Ginsburg to Supreme Court*, 51 CONG. Q. WKLY. REP. 25, June 19, 1993, at 1599, *available in* 1993 WL 7766297. Celia Amster Bader "was a woman of great intellect and drive, thwarted by a culture in which it was a husband's shame to have a working wife." David Margolick, *Trial by Adversity Shapes Jurist's Outlook*, N.Y. TIMES, June 25, 1993, at A1, *available in* LEXIS, News Library, Papers File [hereinafter Margolick]. Celia earned top grades and graduated from high school at age fifteen, *see id.*, and "may have had dreams of University education for herself." Ruth Bader Ginsburg, *Remarks on Women's Progress in the Legal Profession in the United States*, 33 TULSA L.J. 13 (1997)[hereinafter Ginsburg, *Women's Progress*]. Instead, she worked at a garment factory to help put her oldest brother through Cornell. *See* Margolick, *supra* at A1. Denied a college education, she stressed the importance of achievement and independence and instilled her love for reading in Ruth—called Kiki. *See id.*; David Von Drehle, *Conventional Roles Hid a Revolutionary Intellect Discrimination Helped Spawn a Crusade*, WASH. POST, July 18, 1993,

because of an immutable characteristic—her gender.[18] These personal adversities influenced her selection of cases and the legal strategy she effectively employed as a litigator. Her research and teaching experiences as a law professor also shaped her advocacy for women's rights.[19]

When Ruth Bader attended Cornell as an undergraduate, most females focused on finding a mate rather than earning a degree.[20] She related that she was both the party girl, Kiki Bader, and the somber Phi Beta Kappa student who knew "some pretty obscure libraries" on campus.[21] In being both, she quietly challenged the norm and simultaneously worked within the norms.[22] Ginsburg graduated at the top of her class[23] and found her lifelong friend and mate, whom she married soon after graduation.[24]

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at A1, *available in* LEXIS, News Library, Papers File [hereinafter Von Drehle, *Conventional Roles*]. Celia became ill with cancer during Ruth's freshman year in high school and died a day before her daughter's graduation. *See* Margolick, *supra* at A1. Celia Bader managed to save $8,000 from her "pin money" for her daughter's education, but Ruth gave most of it to her father because she had obtained scholarships. *See* Von Drehle, *Conventional Roles*, *supra* at A1. Ruth Ginsburg acknowledged that her mother's "intellectual gifts were not allowed to flourish in a male-dominated society." Sara Fritz, *Without Great Expectations, Ginsburg Found Her Way to Top: The Ability of Clinton's Supreme Court Nominee to Overcome Traditional Barriers Could Shape Her Judicial Role*, L.A. TIMES, July 21, 1993, at A5, *available in* LEXIS, News Library, Papers File [hereinafter Fritz].

[18] *See* Margolick, *supra* note 17, at A1; *see also* Ginsburg, *Women's Progress*, *supra* note 17, at 14-16; *infra* notes 26, 41, 43, & 46 and accompanying text. In Ginsburg's pathbreaking cases, she incorporates this theme of discrimination based on an immutable characteristic in her arguments. *See, e.g.*, Reply Brief for Appellant at 15-16, Reed v. Reed, 404 U.S. 71 (1971)(No. 70-4)[hereinafter Brief *Reed*]; Brief for American Civil Liberties Union as *Amicus Curiae* in Support of Appellants at 28-30, Frontiero v. Richardson, 411 U.S. 677 (1973)(No. 71-1694)[hereinafter Amicus ACLU].

[19] *See* Jennifer S. Thomas, *Ruth Ginsburg: Carving a Career Path Through Male-Dominated Legal World*, 51 CONG. Q. WKLY. REP. 29, July 17, 1993, at 1876, *available in* 1993 WL 7766497 [hereinafter Thomas]; *see also* Markowitz, *In Pursuit of Equality*, *supra* note 17 at 337 n.22; Ginsburg, *Women's Progress*, *supra* note 17, at 15-18; *infra* notes 49-80 and accompanying text.

[20] *See* Stephanie B. Goldberg, Development, *The Second Woman Justice Ruth Bader Ginsburg Talks Candidly about a Changing Society*, A.B.A. J. Oct. 1993 at 42 [hereinafter Goldberg]. Ginsburg related, "[t]here was a problem with Cornell in the '50's . . . . The most important degree for you to get was Mrs., and it didn't do to be seen reading and studying." *Id.* It was a great sin for women at Cornell to look serious. *See* Von Drehle, *Conventional Roles*, *supra* note 17, at A1. Ginsburg's dedication to her studies can be attributed to her mother. *See id.*

[21] *See* Goldberg, *supra* note 20, at 42.

[22] *See id.*

[23] *See* Von Drehle, *supra* note 17, at A1.

[24] *See* Jay Mathews, *The Spouse of Ruth: Marty Ginsburg, the Pre-Feminism Feminist*, WASH. POST, June 19, 1993, at B1, *available in* LEXIS, News Library, Papers File [hereinafter Mathews]; *see also* Carlson, *supra* note 16, at 38; Baugh, *supra* note 16, at 3; *Clinton*

Ruth Ginsburg accompanied her husband to Oklahoma where she faced one of her earliest encounters with discrimination in the workplace.[25] Although she qualified for a higher position with the Social Security Administration, she was given a typist job when she mentioned that she was pregnant.[26] Her employers assumed that her role as mother would "interfere" with her job performance.[27] The administration gave the better post to another woman who concealed her pregnancy.[28] Several trailblazing cases[29] dealt with social security because they "brought those stereotypes to the front of her thinking."[30]

Entering Harvard Law School[31] in 1956 as one of nine females in a class of hundreds,[32] Ginsburg faced discrimination again.[33] The Dean of the law school asked her to justify taking up one of the limited spaces in the class that could

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Nominates Ginsburg to Supreme Court, *supra* note 17, at 1599.

[25] *See* Von Drehle, *Conventional Roles*, *supra* note 17, at A1.

[26] *See id.* Neither Martin or Ruth Ginsburg were overt feminists at the time. *See* Mathews, *supra* note 24, at B1. Martin Ginsburg stated that "[i]t was an educational process where we were all back at zero because everybody knew that this was the natural order of things." *Id.*

[27] *See* Thomas, *supra* note 19, at 1876.

[28] *See* Von Drehle, *supra* note 17, at A1. Although Ruth Ginsburg qualified for a GS-5 job, she was told that she could not travel for training and would have to accept a GS-2 position. *See id.*

[29] *See, e.g.*, *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975)(distinguishing between men and women regarding the right to survivors' benefits of a surviving parent who is left with minor children); *Califano v. Goldfarb*, 430 U.S. 199 (1977)(automatically awarding social security survivor benefits to women but not men).

[30] Reske, *supra* note 16, at 18 (citing Kathleen Peratis, staff director of the ACLU Women's Rights Project under Ginsburg). Ginsburg gained a "lasting impression of bureaucratic callousness" and prejudice by watching workers mistreat Indian applicants. *See* Mathews, *supra* note 24, at B1; Von Drehle, *Conventional Roles*, *supra* note 17, at A1.

[31] *See* Von Drehle, *Conventional Roles*, *supra* note 17, at A1. Martin Ginsburg stated that they selected law because they wanted to share the same career so "there would be something [to] talk about, bounce ideas off of, [and] know what each other was doing." Mathews, *supra* note 24, at B1; *see also*, Von Drehle, *Conventional Roles*, *supra* note17, at A1.

After the birth of their daughter, Ginsburg's father-in-law advised her that it was fine if she decided against attending law school, but if she really wanted to be a lawyer, a baby would not stand in her way. *See* Margolick, *supra* note 17, at A1. She agreed and with Martin's help, found a way: an elderly woman babysat while they attended class; they shared childcare responsibilities; and Martin cooked. *See id.*

[32] *See Clinton Nominates Ginsburg to Supreme Court*, *supra* note 17, at 1599; Guy Gugliotta & Eleanor Randolph, *A Mentor, Role Model and Heroine of Feminist Lawyers*, WASH. POST, June 15, 1993, at A14, *available in* 1993 WL 2186599 [hereinafter Gugliotta & Randolph, *Mentor*].

[33] *See* Von Drehle, *Conventional Roles*, *supra* note 17, at A1. Ginsburg related that all the professors knew the nine women in the class and the women were much more conscious of their special place. *See* Ruth Bader Ginsburg, *The Equal Rights Amendment Is the Way*, 1 HARV. WOMEN'S L.J. 19, 20 (1978)[hereinafter Ginsburg, *ERA Is the Way*].

have been filled by a male.[34] When she attempted to check a cite for the law review, she was barred from entering the periodical room at a Harvard library because she was a woman.[35] She left and sent a male colleague to check the reference—"working around the problem rather than sparking a confrontation."[36] Ginsburg transferred to Columbia University[37] to be with her husband who had accepted a job as a tax attorney in New York.[38] Although she completed the requisite two years at Harvard[39] and earned grades high enough to qualify for and become the first woman editor of the Harvard Law Review,[40] she was denied a Harvard diploma when she graduated at the top of her class from Columbia Law School.[41]

Despite a brilliant academic record, including the distinction of being the first woman to serve on the law reviews of two Ivy League schools,[42] Ruth Bader Ginsburg failed to receive a single offer from any law firm[43] in the

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[34] *See* Von Drehle, *Conventional Roles*, *supra* note 17, at A1; Markowitz, *Women's Rights Advocate*, *supra* note 16, at 9. Ginsburg's response was that studying law would help her understand her husband's work and possibly lead to part-time employment for herself. *See* Margolick, *supra* note 17, at A1.

[35] *See* Thomas, *supra* note 19, at 1876.

[36] *Id.*

[37] *See* Gugliotta & Randolph, *Mentor*, *supra* note 32, at A14.

[38] *See id.* During Ruth Ginsburg's second year at Harvard, her husband developed cancer which had spread to several lymph nodes; he was told that no one had ever survived such a diagnosis. *See* Von Drehle, *Conventional Roles*, *supra* note 17, at A1. Ruth Ginsburg cared for her preschool daughter and her husband through his illness. *See id.* She took notes in Martin's classes, typed his papers while he dictated, *see id.*, and enabled him to graduate on time. *See* Margolick, *supra* note 17, at A1; Thomas, *supra* note 19, at 1876. Martin recovered and obtained a good job with a New York firm. *See* Von Drehle, *Conventional Roles*, *supra* note 17, at A1. Because Ginsburg wanted to "remain together as a family unit," she enrolled at Columbia Law School. *See id.*

[39] *See* Markowitz, *Women's Rights Advocate*, *supra* note 16, at 9. Harvard's practice was to grant a diploma to transfer students who had completed two years at Harvard. *See id.* After Ginsburg was appointed to the United States Court of Appeals for the District of Columbia in 1980, Harvard offered her a diploma but she rejected the offer as being twenty years too late. *See id.*; *see also* Carlson, *supra* note 16, at 38.

[40] *See* Mathews, *supra* note 24, at B1; *Clinton's Choice of Ginsburg Signals Moderation*, 51 CONG. Q. WKLY. REP. 25, June 19, 1993, at 1599, *available in* 1993 WL 7766327.

[41] *See* Margolick, *supra* note 17, at A1; Thomas, *supra* note 19, at 1876.

[42] *See Clinton Nominates Ginsburg to Supreme Court*, *supra* note 17, at 1599; Thomas, *supra* note 19, at 1876.

[43] *See* Gugliotta & Randolph, *Mentor*, *supra* note 32, at A14 (quoting Ginsburg in a 1981 essay: "I signed up for all the law firm interviews I could get .... No one offered me a job."); Reske, *supra* note 16, at 16.

Justice Sandra Day O'Connor encountered a similar experience. *See* Ginsburg, *Women's Progress*, *supra* note 17, at 14. In 1952, she graduated from Stanford Law School in the top of her class, but no private firm would hire her. *See id.* She had interviewed with law firms in Los Angeles and San Francisco, but none were prepared to hire a woman. *See* PETER W. HUBER,

entire city of New York.[44] She attributed this phenomenon to the fact that she was "a woman, a Jew, and a mother," but the biggest "impediment" was that she was the mother of a young child.[45] Although recommended for a judicial clerk position by one of her professors, Justice Felix Frankfurter "said no" after being told of her family situation.[46] She eventually accepted a position as a law secretary for United States District Court Judge Edmund L. Palmieri,[47] one of the only clerkships open to women.[48]

Although offered a job with a firm after her clerkship,[49] Ginsburg accepted an offer from a Columbia professor to work on an international civil procedures project[50] and wrote about the legal system in Sweden.[51] While in

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SANDRA DAY O'CONNOR: SUPREME COURT JUSTICE 33 (1990); *see also* Ginsburg, *Women's Progress*, *supra* note 17, at 14.

[44] *See Clinton Nominates Ginsburg to Supreme Court*, *supra* note 17, at 1599; Markowitz, *Women's Rights Advocate*, *supra* note 16, at 9; *Excerpts from Nomination*, NEWSDAY, NASSAU & SUFFOLK ED., June 15, 1993, at 19.

[45] *See* Gugliotta & Randolph, *Mentor*, *supra* note 32, at A14. Ginsburg explained in an interview that "[t]he fear was I would not be able to devote my full mind and time to a law job." *Id.*; *see also* Ginsburg, *Founders Day Tribute*, *supra* note 15; Fritz, *supra* note 17, at A5.

[46] *See* Ginsburg, *Founders Day Tribute*, *supra* note 15, at 3. Albert Sacks, a dean at the Harvard law School, suggested Ginsburg, one of his star students, as a law clerk to Justice Frankfurter who responded that he "just wasn't ready to hire a woman." Neil Lewis, *The Supreme Court: Woman in the News; Rejected as a Clerk, Chosen as a Justice: Ruth Joan Bader Ginsburg*, N.Y. TIMES, June 15, 1993, at A1, *available in* LEXIS, News Library, Papers File. *See also*, Margolick, *supra* note 17, at A1.

Justice William O. Douglas hired the first female law clerk at the United States Supreme Court for the 1944 Term. *See* Ginsburg, *Founders Day Tribute*, *supra* note 15, at 2. It was wartime and the deans who recommended law clerks to Justice Douglas could not find a student worthy of his consideration. *See id.* Douglas inquired if any women were included in the selection process and stated that he might hire one if he could "find one who [was] absolutely first-rate." *Id.* Despite finding Lucille Lomen "very able and very conscientious," he did not think about hiring another woman until 1950 when he decided to hire two law clerks, specifying that one be a woman because he wanted an "accomplished typist" who could assist his secretary for half or three-quarters of the time. *Id.* at 2-3. He did not hire another woman until 1966, sixteen years later. *See id.* at 3.

[47] *See* Daniel Wise, *Lawyers Hail Ginsburg Nomination: Called Founding Mother of Women's Rights Movement*, N.Y. L.J., June 15, 1993, at 2. Ginsburg worked for Judge Palmieri from 1959-61. *See id.*; Mauro, *supra* note 1, at 1. She was given the clerkship after a teacher convinced Judge Palmieri that Ginsburg could handle motherhood and a law career. *See* Thomas, *supra* note 19, at 1876.

[48] *See* Markowitz, *Women's Rights Advocate*, *supra* note 16, at 9.

[49] *See* Von Drehle, *Conventional Roles*, *supra* note 17, at A1. Ginsburg was offered a job after Judge Palmieri "assured one firm's partners that 'she even shows up on weekends.'" *Id.*

[50] *See id.*; Margolick, *supra* note 17, at A1.

[51] *See* Von Drehle, *Conventional Roles*, *supra* note 17, at A1. A Columbia professor asked Ginsburg to study and write a volume on Sweden's legal system under a Carnegie Foundation grant which also included an examinatin of the legal systems of France and Italy. *See id.* The opportunity to write a book appealed to Ginsburg. *See id.* Ginsburg learned Swedish, co-wrote

Sweden, Ginsburg's feelings regarding the role of women were "rustled"[52] and began to change.[53] During her stay, an American woman, who had taken thalidomide and was concerned about severe birth defects, had to travel to Sweden to have an abortion.[54] About the same time, she read an essay, written by a Stockholm columnist, asking why career women should have two jobs, "work and family," and men only one.[55] She observed that "[w]omen were all over the legal profession there .... Women judges were common."[56] In stark contrast, the criminal division of the United States Attorney's Office did not welcome women because the office thought that women should not be exposed to hardened criminals.[57] Ginsburg "tucked all that away"[58] and began teaching at Rutgers in 1963.[59]

When Ginsburg taught at Rutgers University Law School in the 1960's, her students stimulated her interest in sex discrimination issues.[60] Sex discrimination cases grew during the late 1960's[61] as an increasing number of women and men had "the courage to complain about sex discrimination."[62] Because of her position as a law professor of civil procedure, the New Jersey ACLU asked her to assist with cases, sometimes involving issues that she, herself, had experienced.[63] While teaching at Rutgers, she was "moved" to go to court and accepted a case in which schoolteachers were being threatened with the

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two books on Swedish law, and received an honorary degree from Lund University. *See id.*

[52] *See* Von Drehle, *Conventional Roles*, *supra* note 17, at A1; Margolick, *supra* note 17, at A1. Ginsburg stated that the first stirrings of feminist feelings occurred during her visits to Sweden, where women had made inroads into the paid work force by the early 1960's. *See* Margolick, *supra* note 17, at A1.

[53] *See* Ginsburg, *ERA Is the Way*, *supra* note 33, at 20. Ginsburg noted that her "awakening to activism in the sex-discrimination field came gradually." *Id. See also*, Thomas, *supra* note 19, at 1876.

[54] *See* Von Drehle, *Conventional Roles*, *supra* note 17, at A1.

[55] *See id.*; *see also* Ginsburg, *Women's Progress*, *supra* note 17, at 20.

[56] Ginsburg, *ERA Is the Way*, *supra* note 33, at 20.

[57] *See id.*; *see also* Goldberg, *supra* note 20, at 41.

[58] Ginsburg, *ERA Is the Way*, *supra* note 33, at 20. Ginsburg noted that before law school and after graduating, she absorbed all the problems she faced as a woman because she expected them then—they seemed natural. *See id.* Her attitude began to change after visiting Sweden. *See id.*; *see also supra* notes 52-57 and accompanying text.

[59] *See* Ginsburg, *ERA Is the Way*, *supra* note 33, at 20.

[60] *See* Ruth B. Cowan, *Women's Rights Through Litigation: An Examination of the American Civil Liberties Union Women's Rights Project, 1971-1976*, 8 COL. HUM. RTS. L. REV. 373, 378 (1976)[hereinafter Cowan].

[61] *See* Ginsburg, *ERA Is the Way*, *supra* note 33, at 20; Thomas, *supra* note 19, at 1876.

[62] *See* Ruth Bader Ginsburg, *Remarks at the Rededication Ceremony, University of Illinois College of Law, September 8, 1994*, U. ILL. L. REV. 11, 14 (1995)[hereinafter Ginsburg, *Rededication Ceremony*].

[63] *See* Ginsburg, *Women's Progress*, *supra* note 17, at 16.

loss of their jobs if they became pregnant.[64] In litigating ACLU cases, she used the resources of the national network[65] to gather specific information and to assist with the development of strategies.[66] With the assistance of law faculty colleagues, dedicated students, and her ACLU work,[67] she began to formulate the ideas that she used in the Supreme Court litigation that followed.[68] While gathering materials for a seminar on Women and the Law, a course requested by her women law students at Rutgers,[69] she studied, thought, and wrote about the stature of women under the United States Constitution.[70]

Ginsburg taught "Women in the Law" at Harvard, but she was not offered a full-time position.[71] Instead, she became the first female faculty member to be tenured at Columbia Law School in 1972.[72] She was also hired as the first Director of the Women's Rights Project of the ACLU[73] and served as general

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[64] *See* David Von Drehle, *Redefining Fair with a Simple Careful Assault: Step-by-Step Strategy Produced Strides for Equal Protection*, WASH. POST, July 19, 1993, at A1 [hereinafter Von Drehle, *Redefining Fair*]. With no tenure at Rutgers, Ginsburg hid her second pregnancy by wearing her mother-in-law's large, shapeless dresses for camouflage. *See* Ruth Bader Ginsburg, *Remarks of the Honorable Ruth Bader Ginsburg, Conference on Civil Rights Developments*, 37 RUTGERS L. REV. 1107, 1109 (1985)[hereinafter Ginsburg, *Civil Rights Developments*]; Ginsburg, *Women's Progress*, *supra* note 17, at 16; Thomas, *supra* note 19, at 1876.

Ginsburg supported cases in the 1970's that involved "forced maternity leaves, and no health or disability insurance coverage for pregnancy." Ginsburg, *Civil Rights Developments*, *supra* at 1109. *See also*, Ginsburg, *Women's Progress*, *supra* note 17.

[65] *See* Ginsburg, *ERA Is the Way*, *supra* note 33, at 20; Cowan, *supra* note 60, at 386. The ACLU had local affiliates throughout the nation. *See id.*

[66] *See* Ginsburg, *Women's Progress*, *supra* note 17, at 20.

[67] *See* Thomas, *supra* note 19, at 1876. Ginsburg admitted that she was a "latecomer" to the women's rights movement. *See id.* She began to specialize in that area in the late 1960's with prodding from her students and the ACLU. *See id.*

[68] *See* Ginsburg, *Rededication Ceremony*, *supra* note 62, at 14.

[69] *See id.*; Ginsburg, *Women's Progress*, *supra* note 17, at 16.

[70] *See* Ginsburg, *Rededication Ceremony*, *supra* note 62, at 14. She stated that her advocacy for women's rights began gradually, and as she became involved, she found the work fascinating and had hopes for significant change. *See* Thomas, *supra* note 19, at 1876.

[71] *See* Carlson, *supra* note 16, at 38. When Ginsburg left Harvard, The Boston Globe newspaper quoted the Law School Dean as saying that "we would like to have more women on the faculty," but it was "very difficult to find people who are qualified." Gugliotta & Randolph, *Mentor*, *supra* note 32, at A14. He further stated that "we thought we needed more time and more information" when he declined to hire Ginsburg. *See id.*

[72] *See Clinton's Choice of Ginsburg Signals Moderation*, *supra* note 40, at 1599. Jane C. Ginsburg, a Columbia Law School faculty member, and Justice Ginsburg "are the first mother/daughter to have served on any law faculty in the United States." *See* Ginsburg, *Women's Progress*, *supra* note 17, at 14.

[73] *See* Cowan, *supra* note 60, at 384. The Women's Rights Project, the ACLU national staff, and the ACLU affiliates developed a valuable network of communication and established

counsel from 1973 until 1980. While teaching at Columbia Law School and managing sex equality cases headed toward the Supreme Court in the mid-1970's, Ginsburg was frustrated when the school called regarding an incident in which her son "commandeered" the school's elevator.[74]

> In my son's early school years, there were calls from the principal almost monthly, requesting a meeting with me to discuss my lively child's most recent adventure. One afternoon, when I felt particularly weary, I responded: "This child has two parents. Please alternate calls for conferences." After that, although I observed no quick change in my son's behavior, the telephone calls came barely once a semester. There was more reluctance to take a father away from his work. There still is.[75]

Ginsburg's private challenges to the old ways of thinking fueled her professional efforts to strip men and women of the rose-colored glasses through which they viewed the division of labor between the sexes.[76] She recognized that law schools nurtured several movements for social change in the late twentieth-century.[77] To contribute to the "awakening process essential to shorten the distance between women and equal opportunity,"[78] she advocated for reforms in law school curriculum offerings and materials.[79] With increasing female enrollment and academic attention to gender-based

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linkages with many women's rights groups and community-centered organizations concerned with civil rights groups. *See id.* at 386.

[74] *See* Ruth Bader Ginsburg, *Address, Remarks for George Mason University School of Law Graduation, May 22, 1993*, 2 GEO. MASON INDEPENDENT L. REV. 1, 2-3 (1993).

[75] *Id.*

[76] *See* Ginsburg, *Women's Progress*, *supra* note 17, at 19-20.

[77] *See* Ginsburg, *Rededication Ceremony*, *supra* note 62, at 14.

[78] *See* Ginsburg, *Treatment of Women*, *supra* note 15, at 487. Ginsburg explained that the good will and effort of teachers of standard law school curricular offerings were required to raise the consciousness of the law school community in general since enrollment in elective "Women and the Law" courses would account for a relatively small percent of the student body. *See id.* at 481. Law schools had an academic responsibility to "develop in law students sensitivity to the important social movement for the reexamination of traditional sex roles" by eliminating from law school texts and "classroom presentations of attempts at comic relief via stereotyped characterizations of women" and infusing material on sex-based discrimination into standard curricular offerings. *See id.* She emphasized the need for courses "devoted to a fresh and concentrated examination of sex-based discrimination." *Id.* at 480. The two themes envisioned for these courses were: "the part law has played in assisting society to 'protect' women (and kept them in their place) and the stimulus law might provide in the evolution of society toward equality and independence for the still submissive sex." *Id.* The eventual goal which law should serve was "aptly described as 'the emancipation of man.'" *Id.* at 480 n.3 (referring to an Address by Swedish Prime Minister Olof Palme, Women's National Democratic Club, June 8, 1970, *in* KENNETH M. DAVIDSON ET AL., TEXT, CASES AND MATERIALS ON SEX-BASED DISCRIMINATION 938-46 (1974)).

[79] *See* Ginsburg, *Treatment of Women*, *supra* note 15, at 480.

discrimination, she anticipated that "[l]awyers and judges whose sensitivity ha[d] been developed in the law schools should be incapable of the kind of reaction still prevalent in some judicial arenas."[80]

These early beginnings sensitized Ginsburg to the invidious nature of stereotyping individuals on the basis of congenital and immutable biological traits of birth.[81] Her experiences motivated her to argue both men and women's rights causes before the Supreme Court in the 1970's.[82] The disparate treatment of individuals on the basis of gender, race, or alienage set the framework for her future work in gender discrimination litigation.

B. The Philosophy of the Feminist Advocate

Although denied opportunities because of her gender, Ginsburg is not bitter about past incidences of discrimination.[83] She states that being angry or hostile is very unproductive and recommends that "you . . . accept for yourself the role of teacher . . . [engage in] constant dialogue, constant persuasion, and not in shouting matches" to effect real change.[84] This section discusses Ginsburg's philosophy and approach when she litigated cases for the ACLU and persuaded the Court to raise the level of scrutiny for gender classifications.

Fundamental to Ginsburg's philosophy is that all individuals have the constitutional right to be able to use their talents, unencumbered by labels such as race or gender,[85] or by stereotypical or "divine"[86] gender roles.[87] Her definition of feminism is about removing barriers: "It means freeing people, men as well as women, to be you and me, allowing people to pursue their talents, their qualities, whatever they have without artificial constraints."[88]

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[80] *See id.* at 487.

[81] *See generally* Von Drehle, *Conventional Roles*, *supra* note 17, at A1; *Ginsburg Marches Past Hearings on Near-Certain Path to Court*, 51 CONG. Q. WKLY. REP. 30, July 24, 1993, at 1956, *available in* 1993 WL 7766550. *See also supra* notes 18, 34.

[82] *See* Reske, *supra* note 16, at 18.

[83] *See* Goldberg, *supra* note 20, at 41.

[84] *Id.*

[85] *See* Ruth Bader Ginsburg, *Foreword*, 84 GEO. L.J. 1651 (1996). "Gender equality is an important goal for a Nation concerned with full utilization of the talent of all of its people." *Id.*

[86] *See infra* text accompanying note 148.

[87] *See Clinton Nominates Ginsburg to Supreme Court*, *supra* note 17, at 1599. Ginsburg recognized her mother as the bravest and strongest person she had known. *See id.* Ginsburg also stated, "I pray that I may be all that she would have been, had she lived in an age when women could aspire and achieve, and daughters are cherished as much as sons." *Id. See also*, *supra* note 17.

[88] Matt McKinney, *Ginsburg Offers Wheaton a Feminist View*, PROVIDENCE SUNDAY J., May 18, 1997 at B11, *available in* 1997 WL 10832642 (quoting from Ginsburg's graduation speech at Wheaton College, May, 1997).

Ginsburg advocates similar treatment for similarly situated individuals.[89] She challenges the concept of benign preference to women as she reasons that such preferences, when based on stereotypical gender roles, are detrimental to both men and women.[90]

Essential to a woman's equality with man is her right to choose whether to have a baby or not—"it's her body, her life, and men—to that extent—are not similarly situated."[91] Any imposition of restraints that disadvantages the woman is a denial of her full autonomy and full equality with men.[92] For this reason, her constitutional analysis of reproductive autonomy is premised under an equal protection/sex discrimination rubric rather than the substantive due

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[89] *See generally* David Cole, *Strategies of Difference: Litigating for Women's Rights in a Man's World*, 2 LAW & INEQUALITY 33, 54-55 (1984).

Ginsburg's feminism is generally characterized as following an equal treatment model or a "sameness" model. In this model, laws and policies treat men and women equally in all respects. *See generally* Joan C. Williams, *Deconstructing Gender*, *in* FEMINIST JURISPRUDENCE: THE DIFFERENCE DEBATE 41-74 (Leslie Friedman Goldstein ed., 1992); Mary Becker, *Prince Charming: Abstract Equality*, *in* FEMINIST JURISPRUDENCE: THE DIFFERENCE DEBATE 99-132 (Leslie Friedman Goldstein ed., 1992); Anne Marie Leath Storey, *Note, An Analysis of the Doctrines and Goals of Feminist Legal Theory and Their Constitutional Implications*, 19 VT. L. REV. 137, 151-186 (1994).

Differential treatment (sometimes referred to as benign preference) is perceived to be harmful to women because it is often used to restrict women's opportunities in the workplace. *See* Ginsburg, *Benign Classification*, *supra* note 15, at 814-22. Critics of the "sameness" doctrine state that courts extend "legal assistance to women only when they are able to demonstrate that they are like men. Although neutral in form, the equality guarantee is functionally male-biased." Mary Joe Frug, *Progressive Feminist Legal Scholarship: Can We Claim "a Different Voice"?*, 16 HARV. WOMEN'S L.J. 37, 42 (1992). *See also* Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1302 (1987)[hereinafter Littleton].

Other feminists pursue equality utilizing a "difference" or special treatment model which recognizes that there are differences between the sexes. *See* Littleton, *supra* at 1295. Society, therefore, must recognize and accommodate the differences between sexes. *See id.* Some proponents state that women perceive rape, sexual harassment, pornography and reproductive events in a unique and different way from men, and laws must reflect the biological, social, and cultural differences between the sexes as equality can only be achieved by recognizing these differences. *See* Martha Albertson Fineman, *Feminist Theory in Law: The Difference It Makes*, 2 COLUM. J. GENDER & L. 1, 15-16 (1992).

[90] *See, e.g.*, Ginsburg, *Benign Classification*, *supra* note 15, at 817. Ginsburg cited cases in which statutes restricted the working hours and conditions of women and not of men, and thereby, reinforced and pigeon-holed the roles of men and women. *See id.*; *infra* note 106. *See also infra* Part II.B. Special treatment also provided judges with the opportunity to protect the weaker sex—"the sex that must bear, and . . . therefore should care for, children (leaving men free for other pursuits)." Ginsburg, *Civil Rights Development*, *supra* note 64, at 1110. *See* generally Ginsburg, *ERA Is the Way*, *supra* note 33, at 21.

[91] *Nomination Hearings: Ginsburg Adroit, Amiable But Avoids Specifics*, 51 CONG. Q. WKLY. REP. 30, July 24, 1993, at 1956, *available in* 1993 WL 7766528.

[92] *See id.*

process/personal autonomy analysis in *Roe v. Wade*,[93] which is "not expressly linked to discrimination against women."[94] She anticipates that the responses to questions in these areas will shape the law and "influence[] the opportunity women will have to participate as men's full partners in the nation's social, political, and economic life."[95] Abortion prohibitions discriminate against women because they concern "women's position in society in relation to men."[96] "Society . . . places a greater stigma on unmarried women who become pregnant than on the men who father [those] children."[97] Society expects women to provide the predominant care and support for the child when fathers deny paternity and responsibility.[98] Although these expectations are in part man-made and not totally a function of a woman's anatomy, they prevent women from having "autonomous charge of [their] full life's course . . . [their] ability to stand in relation to man, society, and the state as . . . independent, self sustaining, equal citizen[s]."[99] Ginsburg's dream of the way the world should be is "[w]hen fathers take equal responsibility for the care of their children [because] that's when women will truly be liberated."[100]

Ginsburg espouses a society that values the worth of the individual and enables both sexes to develop their full potential as human individuals.[101] She recognizes that

> in order that women shall be emancipated . . . men must also be emancipated. . . . [T]he aim must be that men and women should be given the same rights, obligations and work assignments in society. . . . The greatest gain of increased equality between the sexes would be, of course, that nobody should be forced into a predetermined role on account of sex, but each person should be given better possibilities to develop his or her personal talents.[102]

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[93] 410 U.S. 113 (1973).

[94] Ruth Bader Ginsburg, *Essay, Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 375-76 (1985)[hereinafter Ginsburg, *Autonomy and Equality*]. In 1978, Congress overruled the Court prospectively with respect to Title VII. *See id.* at 379. The amended statute states explicitly that classification on the basis of pregnancy is included in the classification on the basis of sex. *See id.* However, this definition is not controlling in constitutional adjudication. *See id.*

[95] *See id.* at 375.

[96] *Id.* at 382 (citing Professor Karst's analysis of the abortion issue).

[97] *Id.* (internal quotations omitted).

[98] *See id.* at 382.

[99] *See id.* at 383.

[100] Jeffrey Rosen, *The New Look of Liberalism on the Court*, N.Y. TIMES MAGAZINE, Oct. 5, 1997, at 60, 63.

[101] *See* Ruth Bader Ginsburg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1, 2 (1975) [hereinafter Gender and the Constitution].

[102] Address by Swedish Prime Minister Olof Palme, Women's National Democratic Club, June 8, 1970, *in* K. DAVIDSON, R. GINSBURG & H. KAY, TEXT, CASES AND MATERIALS ON SEX-BASED DISCRIMINATION 938-46 (1974). *See also* Ginsburg, *Treatment of Women*, *supra* note

To this end, she lectured and wrote on gender classification issues and litigated cases which would incrementally[103] set new precedents and pathmarkers that would ultimately subject gender classifications to a higher standard of review.[104]

III. DEVELOPING THE STANDARD OF REVIEW FOR GENDER DISCRIMINATION

When Ruth Bader Ginsburg began to litigate gender-based discrimination cases before the Supreme Court in the early 1970's,[105] the challenges were formidable, especially in light of the existing case law in this area.[106] Cases were determined by using a two-tiered standard of review. Every gender-based classification survived the Court's review.[107] Women and the United States Constitution had an ominous historical relationship until 1971.[108]

A. Standard of Review Up to 1971

The Supreme Court developed two standards of review to determine the constitutionality of a federal or state statute under the Equal Protection Clause of the Fourteenth Amendment: "a test of reasonable classification"[109] and a "more stringent" test.[110] The "reasonable classification," or "deferential 'old' equal protection,"[111] test applied in "the generality of cases"[112] and meant "minimal scrutiny in theory and virtually none in fact."[113] The "more

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15, at 480 n.3.

[103] *See* Von Drehle, *Redefining Fair*, *supra* note 64, at A1. Ginsburg wanted the Court to provide a "green light" to change. *See id.*

[104] *See* Cowan, *supra* note 60, at 389.

[105] *See* Markowitz, *In Pursuit of Equality*, *supra* note 17, at 337.

[106] *See, e.g.*, Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872)(barring women from the practice of law); Muller v. Oregon; 208 U.S. 412 (1908)(prohibiting employment of women in any mechanical establishment, factory, or laundry for more than 10 hours a day); Goesaert v. Cleary, 335 U.S. 464 (1948)(barring women from employment as bartenders); Hoyt v. Florida, 368 U.S. 57 (1961)(limiting jury service to women who registered with the court). *See* Ginsburg, *Autonomy and Equality*, *supra* note 94, at 377.

[107] *See supra* note 106.

[108] *See infra* Part III.B.

[109] Brief *Reed*, *supra* note 18, at 8.

[110] *Id.* at 9.

[111] Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972)[hereinafter Gunther].

[112] *See* Brief *Reed*, *supra* note 18, at 8-9.

[113] Gunther, *supra* note 111, at 8. During the Warren court years, the rational basis test was applied in this manner. *See id.*

stringent" or "strict scrutiny"[114] test applied when the classification affected a fundamental right or a "suspect" class and was "'strict' in theory and fatal in fact."[115]

Equal protection decisions recognize that legislatures frequently classify citizens for various purposes and treatment.[116] Within any major legislative program, hundreds of statutory classifications are necessary to implement the program.[117] A classification is generally valid if it includes all and only those persons similarly situated with respect to the purpose of the law.[118]

1. Rational review: the test of reasonable classification

In equal protection cases, a court's concern is with the assessment of the "constitutional validity of a statute whose coverage is usually not at issue."[119] Courts are expected to maintain proper respect for the legislature while safeguarding constitutional values at the same time.[120] To assess the constitutional validity of a statute, a court ordinarily determines which legislative purpose is the most probable one and ascribes a purpose to each statutory classification.[121] Under a rational review standard, any statutory classification which is rationally related to a legitimate legislative objective survives judicial review.[122] A classification is likely to be upheld unless it is "palpably arbitrary."[123]

Until 1971, every gender-based classification withstood constitutional review[124] based on the deferential or "rational relationship" standard of review.[125] Chief Justice Warren's statement exemplified the traditional deferential review: "[t]he constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the

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[114] *Id.*

[115] *Id.*; *but see* Adarand Constructors Inc. v. Pena, 515 U.S. 200, 237 (1995).

[116] *See Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1076 (1969)[hereinafter *Developments*].

[117] *See id.*

[118] *See* Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 344-46 (1949)[hereinafter Tussman & tenBroek]. *See also Developments*, *supra* note 116, at 1076.

[119] *Id.* at 1077.

[120] *See id.* at 1078.

[121] *See id.* at 1077.

[122] *See generally* Gunther, *supra* note 111, at 19-20 (discussing levels of judicial scrutiny in equal protection cases up to 1972); *see also* Markowitz, *In Pursuit of Equality*, *supra* note 17, at 338-39 (summarizing levels of judicial scrutiny under the equal protection clause).

[123] *Developments*, *supra* note 116, at 1083.

[124] *See* Ruth Bader Ginsburg, *From No Rights, to Half Rights, to Confusing Rights*, 7 HUMAN RIGHTS No. 1 at 12, 13 (1978)[hereinafter Ginsburg, *From No Rights*].

[125] *See id.*

State's objective . . . . A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."[126] In summary, the Court gave virtually complete deference to governmental interest unless the case involved a "fundamental" interest protected by the United States Constitution or a "suspect" classification.

2. Strict scrutiny review: the more stringent test

When government action impinges upon a "fundamental right" protected by the United States Constitution or invokes a "suspect criterion,"[127] a more stringent strict scrutiny test is applied.[128] Fundamental rights are those that are explicitly or implicitly guaranteed[129] by the Constitution and include voting,[130] reproductive freedom,[131] and interstate travel.[132] Suspect criteria include race, national origin, and, in some cases, alienage.[133] A suspect classification is upheld if it is narrowly drawn and is necessary to achieve a compelling state goal, and the state demonstrates that its objective cannot be attained without this classification.[134] The means is acceptable only if no alternative is available to achieve the same end.[135] Under this analysis, the classification is rarely upheld.

During Chief Justice Burger's tenure, 1969-1986, some justices sought formulations to narrow the gap between the existing two tiers.[136] Justices dissatisfied with old doctrine began to examine old rationales and to intervene

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[126] Gunther, *supra* note 111, at 19-20 (quoting McGowan v. Maryland, 366 U.S. 420, 425-26 (1961)).

[127] *See id.*

[128] *See* Gunther, *supra* note 111, at 8-10.

[129] *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 17 (1973); *see also* Ginsburg, *From No Rights*, *supra* note 124, at 13.

[130] *See* Harper v. Virginia Bd. of Elections, 383 U.S. 663, 667, 670 (1966); *see also* Ginsburg, *From No Rights*, *supra* note 124, at 13.

[131] *See* Roe v. Wade, 410 U.S. 113 (1973); *see also* Ginsburg, *From No Rights*, *supra* note 124, at 13-14.

[132] *See* Memorial Hosp. v. Maricopa County, 415 U.S. 250, 254 (1973); Shapiro v. Thompson, 394 U.S. 618, 630 (1964).

[133] *See* Ginsburg, *Gender and the Constitution*, *supra* note 101, at 17.

[134] *See* Gunther, *supra* note 111, at 21-23.

[135] *See id.* at 21.

[136] *See* Gunther, *supra* note 111, at 17. *See, e.g.*, Justice Powell's majority opinion in *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 173 (1972)(blurring distinctions between strict and minimal scrutiny precedents by developing a dual inquiry applicable to "all" equal protection cases); Justice Marshall in *Chicago Police Department v. Mosley*, 408 U.S. 92, 95 (1972)(questioning whether the differential treatment suitably furthers an appropriate governmental interest); Justice Marshall's dissent in *Dandridge v. Williams*, 397 U.S. 471, 519-30 (1970)(suggesting a multifactor, sliding scale analysis).

on the basis of the deferential standard.[137] While ostensibly using the "toothless minimal scrutiny standard,"[138] a majority of the Justices began to find "bite in the equal protection clause."[139] The trend reflected that, in equal protection cases, the judges were beginning to move towards a "means-focused, relatively narrow, preferred ground of decision in a broad range of cases."[140] The two-tiered standard was becoming less rigid at a time when the number of gender discrimination cases was increasing.

B. Women and the Constitution

In studying and researching women and the United States Constitution,[141] Ginsburg recognized that sex discrimination was well "entrenched in social and cultural institutions 'shaped by centuries of law-sanctioned bias[.]'"[142] She incorporated the history of women's "second-class citizenship" as an essential element of her strategy to dispel old beliefs.[143] She cited key cases[144] as examples and revealed the archaic assumptions that reflected "social conditions and constitutional theory peculiar to an earlier era."[145]

An 1872 decision, *Bradwell v. Illinois*,[146] that denied women the right to practice law,[147] summarized women's heavy legacy. In *Bradwell*, Justice Bradley looked to the "law of the Creator" and wrote:

> Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.[148]

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[137] *See* Gunther, *supra* note 111, at 18-19.

[138] *See id.* at 19. Deborah Markowitz noted that the ACLU recognized that the Court "appeared ready to reconsider previous interpretations of equal protection . . . and it acted quickly to take advantage of the favorable judicial climate." Markowitz, *In Pursuit of Equality*, *supra* note 17, at 337 n.22.

[139] *See Gunther*, *supra* note 111, at 18.

[140] *See id.* at 20.

[141] *See supra* Part II.A.

[142] Markowitz, *In Pursuit of Equality*, *supra* note 17, at 341 (citing Brief *Reed*, *supra* note 18, at 12).

[143] *See generally* Brief *Reed*, *supra* note 18, at 10-59.

[144] *See* cases cited *supra* note 106.

[145] Brief *Reed*, *supra* note 18, at 45.

[146] 83 U.S. (16 Wall.) 130 (1872).

[147] *See Bradwell*, 83 U.S. at 141 (Bradley, J., concurring).

[148] *Id.*

These words corresponded with "our" founding fathers' original understanding.[149] Thomas Jefferson, "author of the declaration that 'all men are created equal,'" believed that "women should be neither seen nor heard in society's decision-making councils."[150] Jefferson further declared, "to prevent depravation of morals and ambiguity of issues, [women] should not mix promiscuously in gatherings of men."[151] These attitudes were similarly reflected outside of government. An 1852 editorial in the *New York Herald* stated:

> How did woman first become subject to man as she now is all over the world? By her nature, her sex, just as the negro, is and always will be, to the end of time, inferior to the white race, and therefore doomed to subjection; but happier than she would be in any other condition, just because it is the law of her nature. The women themselves would not have this law reversed.[152]

Men not only controlled the behavior of their wives and slaves but also "had legally enforceable rights to their services without compensation."[153] The text of the Fourteenth Amendment limited the right to vote specifically to male citizens.[154] This was the first time that the United States Constitution specified "male," thereby generating apprehension that the guarantees of "due process of law" and "the equal protection of the laws" would have only qualified application to women.[155] The suggestion was that "even if women counted as citizens, . . . they were . . . something less than full citizens."[156]

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[149] *See* Ruth Bader Ginsburg, *Sex and Unequal Protection: Men and Women as Victims*, 11 J. FAM. LAW 347, 348 (1971)[hereinafter Ginsburg, *Sex and Unequal Protection*].

[150] Brief *Reed*, *supra* note 18, at 25-26.

[151] Ginsburg, *Sex and Unequal Protection*, *supra* note 149, at 348 (*quoted in* MARTIN GRUBERG, WOMEN IN AMERICAN POLITICS 4 (1968)).

[152] *Id.* at 348. In Ginsburg's brief in *Reed*, she noted that the legal status of women before the Civil War was comparable to that of blacks under slave codes. *See* Brief *Reed*, *supra* note 18, at 28.

[153] *See* Brief *Reed*, *supra* note 18, at 28-29.

[154] *See* U.S. CONST. amend. XIV, § 2. "But when the right to vote at any election . . . is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, . . . the basis of representation therein shall be reduced in the proportion which the number . . . of male citizens twenty-one years of age in such State." *Id.*

[155] *See* ELEANOR FLEXNER, CENTURY OF STRUGGLE 143 (1959); Ginsburg, *Gender and the Constitution*, *supra* note 101, at 3. Ginsburg stated that the gender equality advocates of the 1860's were understandably apprehensive because the coupling of "male" with "citizens" suggested that the Due Process and Equal Protection clauses of the Fourteenth Amendment would have "muted application to women." Ruth Bader Ginsburg, *Interpretations of the Equal Protection Clause*, 9 HARV. J.L. & PUB. POL'Y 41, 41 (1986). Ginsburg observed that this was an accurate forecast because "every woman who came before the Supreme Court with a gender equality plea in the next one hundred years lost her case." *Id.*

[156] *See* Ginsburg, *Remarks on Women*, *supra* note 15, at 18. *See also* Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1874)(stating that women qualify as persons and citizens within the

Women did not secure the right to vote until the Nineteenth Amendment was passed on August 18, 1920.[157]

The following two themes dominated Anglo-American literature and case reports: "[W]omen's place in a world controlled by men is divinely ordained," and "the law's differential treatment of the sexes operates benignly in women's favor."[158] Discrimination as "benign preference" was largely intended for women's protection and benefits.[159] This preference was manifested in a concern for the health of women who were "weaker in physical structure but assigned the role of bearing the future generation."[160] This resulted in a limitation on work hours applicable to "women only"[161] and a denial of access to better-paying positions and promotions.[162] A statute denying women the right to be bartenders[163] was upheld on the basis that man was provider, protector and guardian of female morality.[164] A statute limiting jury service to only those women who registered for service resulted in a woman being convicted by an all-male jury.[165] The United States Supreme Court consistently deferred to the sex classifications established by the state legislatures since the adoption of the Fourteenth Amendment.[166] Believing that women should be protected by the Fifth and Fourteenth Amendments of the United States Constitution and treated equally under the law,[167] Ruth Ginsburg embarked on her quest to lay the pathmarkers for change.

Fourteenth Amendment's compass, as do children, but that status as a person and citizen does not include the right to vote).

[157] *See* Ginsburg, *Remarks on Women*, *supra* note 15, at 18.

[158] *See* Ginsburg, *Gender and the Constitution*, *supra* note 101, at 2.

[159] *Id.* at 3.

[160] *Id.* at 6. *See* Muller v. Oregon, 208 U.S. 412, 421 (1908).

[161] *See Muller*, 208 U.S. at 421-22.

[162] *See* Ginsburg, *Gender and the Constitution*, *supra* note 101, at 6. *See* Goesaert v. Cleary, 335 U.S. 464 (1948).

[163] *See Goesart*, 335 U.S. at 465 (citing Pub. Acts Mich. 1945, No. 133, § 19a). The statute allowed women to work as waitresses in taverns, but not as bartenders which was a more lucrative position. *See* Brief *Reed*, *supra* note note 18, at 45.

[164] *See Goesaert*, 335 U.S. at 465.

[165] *See* Hoyt v. Florida, 368 U.S. 57 (1961). Hoyt killed her husband with a baseball bat after he had been unfaithful and refused to reconciliate. *See id.* at 58-59. A Florida jury statute accorded women absolute exemption from jury service unless they expressly waived this privilege by indicating their desire to be placed on a jury list. *See id.* at 58 n.1. Hoyt felt that the outcome would have been different had women been included in the jury because of the nature of her crime. *See id.* at 59. *See also* Ginsburg, *Gender and the Constitution*, *supra* note 101, at 7.

[166] *See* Ginsburg, *Gender and the Constitution*, *supra* note 101, at 3-4.

[167] *See* Markowitz, *Women's Rights Advocate*, *supra* note 16, at 9.

C. The ACLU Strategist Advocates a New Standard

A firm believer in precedent, Ginsburg recognized the need for a well-developed, long-range strategy to chip away at precedent, to establish new principles incrementally,[168] and to pave the way for changing the law on gender discrimination.[169] While women made significant gains through legislation—The Equal Pay Act of 1963,[170] Title VII of the Civil Rights Act of 1964,[171] and Executive Orders[172]—the laws were not rigorously enforced.[173] Through her volunteer work with the local ACLU, she was aware of the ACLU national network and its efforts to effect social change.[174] Recognizing the importance of the interplay among people, the political branches, and the courts,[175] she sought to challenge gender classification principles by educating the Court and the legal community of the changing roles of women.[176]

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[168] *See* Reske, *supra* note 16, at 19.

[169] *See generally* Ginsburg, *From No Rights*, *supra* note 124; *see also* Shelia M. Smith, *Justice Ruth Bader Ginsburg and Sexual Harassment Law: Will the Second Female Supreme Court Justice Become the Court's Women's Rights Champion?*, 63 U. CIN. L. REV. 1893 (1995). She developed the strategy "to remove legal impediments to women's equality." Reske, *supra* note 16, at 18.

[170] 29 U.S.C. § 206(d)(1978). *See* Ginsburg, *Gender and the Constitution*, *supra* note 101, at 9; Cowan, *supra* note 60, at 376.

[171] 42 U.S.C. § 2000(e)(1978), *amended by* Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000(e) (1974). *See* Ginsburg, *Gender and the Constitution*, *supra* note 101, at 9-10; Cowan, *supra* note 60, at 376.

[172] *See* Exec. Order No. 11,246, *amended by* Exec. Order No. 11375, 3 C.F.R. 320 (Supp. 1967). *See* Ginsburg, *Gender and the Constitution*, *supra* note 101, at 10; Cowan, *supra* note 60, at 376; Brief *Reed*, *supra* note 18, at 11-12.

[173] *See* Cowan, *supra* note 60, at 378-89. The Equal Pay Act was the first federal law addressing women's inequality since the Nineteenth Amendment. *See id.* at 376. Title VII of the Civil Rights Act of 1964 was the most far reaching of the sex equality statutes passed by Congress. *See id.* Executive Order 11375, issued by the President in 1967, prohibited sex discrimination by all holders of federal contracts and by the government itself. *See id.*

[174] *See* Cowan, *supra* note 60, at 379. Cowan noted that the ACLU recognized a need to manage women's rights litigation because gender discrimination issues were "raised in a manner inconsistent with women's rights" and set bad precedents. *Id.* at 383. The ACLU established the Women's Rights Project as a separate organizational unit to specialize in sex discrimination issues shortly after the Idaho Supreme Court decided *Reed v. Reed*. *See id.*

[175] *See* Ginsburg, *Remarks on Women*, *supra* note 15, at 25.

[176] *See id.* at 20-21. Part of the ACLU Women's Rights Project strategy was to have Professor Ginsburg speak at gatherings of law students, professors and practitioners. *See* Cowan, *supra* note 60, at 389. She also wrote scholarly articles to build a body of legal opinion supportive of arguments to be used in the courts later and co-authored a major text on sex discrimination. *See id.* The following are some of the articles that she wrote for this purpose: *The Need for the Equal Rights Amendment*, 59 A.B.A. J. 1013 (1973); *Sex and Unequal Protection*, *supra* note 149; *Status of Women: Introduction*, 20 AM. J. COMP. L. 585 (1972); *Treatment of Women*, *supra* note 15; *Women and the Law—A Symposium: Introduction*, 25

Ginsburg's initial step was "to 'awaken' the Supreme Court and begin to persuade the court to take seriously the argument that sex-based classifications [were] inherently suspect."[177] Because the Supreme Court had uncritically accepted dated assumptions and stereotypical ideas about women's place in society, Ginsburg asserted that "exposing false stereotypes was fundamental to eliminating sexism."[178] She started with "easy" cases and "clear winners,"[179] oftentimes picking cases in which males were the victims.[180] These cases appeared to benefit females,[181] but she deftly demonstrated how "sexism hurt men, sometimes in the pocketbook."[182] She selected cases with employment-related issues, especially those involving the principle of equal pay for equal work and those challenging the traditional assumptions about family roles, for litigation.[183] By winning easy cases, she planned to lay a

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RUTGERS L. REV. 1 (1970); S. Elsen & P. Coogan, *Men, Women and the Constitution and the Equal Rights Amendment*, 10 COLUM. J.L. & SOC. PROBS. 77 (1973).

[177] Markowitz, *Women's Rights Advocate*, *supra* note 16, at 9. Reinforcing the Court's predilection for approving sex discrimination was the nature of the judicial institution. The Court was exclusively male so interactions within courts occurred among men: judges, attorneys, and professors that trained them. *See generally* Doris L. Sassower, *The Legal Profession and Women's Rights*, 25 RUTGERS L. REV. 54, 57-61 (1970); *see also* Cowan, *supra* note 60, at 380. In addition, the Court relied heavily on precedent, was reluctant to overrule recently stated positions, was reluctant to grant *certiorari*, and preferred to uphold lower federal court decisions. *See id.* These characteristics generally sustained sex biases and were based on sexist assumptions. *See id.*

[178] Markowitz, *In Pursuit of Equality*, *supra* note 17, at 341. *See also* Ginsburg, *Remarks on Women*, *supra* note 15, at 20-21.

[179] Until the Court's ruling in *Reed*, the Court differentiated between two standards of review in determining whether laws or official action comported with the equal protection requirement: a deferential or "rational relationship standard" and a more stringent "strict scrutiny standard." *See supra* Part II.A. *See also*, Tussman & tenBroek, *supra* note 118; G. Sidney Buchanan, *A Very Rational Court*, 30 HOUS. L. REV. 1509 (1993). Ginsburg strategically selected cases that were "clearly discriminatory," were easily defeated by the "rational basis" test, and had compelling facts "cry[ing] out for justice." *See* Markowitz, *Women's Rights Advocate*, *supra* note 16, at 10.

[180] *See* Frontiero v. Richardson, 411 U.S. 677 (1973); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Craig v. Boren, 429 U.S. 190 (1976).

[181] *See* Reske, *supra* note 16, at 18. Ginsburg chose cases that seemed "obvious" and systematically challenged gender classification principles which she described as "pathbreaking." *Id.* (quoting Herma Hill Kay who co-authored one of the first casebooks on sex discrimination).

[182] Goldberg, *supra* note 20, at 20. *See infra* notes 263, 285 and accompanying text.

[183] *See* Cowan, *supra* note 60, at 392.

favorable foundation of sex equality law[184] that properly reflected a changed society and dispelled false stereotypes of women as homemakers.[185]

Using the equal protection framework,[186] she skillfully crafted the pattern for structuring her argument: focus on the strict scrutiny standard; identify the government objective; challenge the assumption and/or overbroad generalization about women; compare the status of "similarly situated" males and females;[187] and demonstrate the irrationality of the relationship between classification and government interest.[188] Her goal was to create a body of good precedents that clearly established that "each individual ha[d] a right to equally advantageous treatment by the government regardless of sex."[189] By attacking the stereotype of men as breadwinners and women as homemakers and using cases benefiting men, she showed "that the real issue was not a narrow women's rights question, but a question about people's freedom to organize their lives on the basis of their own judgment."[190] Her ultimate goal was to get rid of "gender labels in the law."[191] The following cases trace her strategy in establishing these initial precedents.

1. Reed v. Reed

Reed v. Reed[192] was the first of the gender cases in which Ginsburg argued for a higher standard of review.[193] She found a case with compelling facts:[194]

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[184] *See* Markowitz, *In Pursuit of Equality*, *supra* note 17, at 337. She rejected cases involving comparable worth and Vietnam veterans because she felt that those cases would lose in court and possibly create poor precedents for future cases. *See* Markowitz, *Women's Rights Advocate*, *supra* note 16, at 9.

[185] *See* Markowitz, *In Pursuit of Equality*, *supra* note 17, at 341.

[186] *See supra* Part II.A.

[187] *See generally* Patricia A. Cain, *Feminism and the Limits of Equality*, 24 GA. L. REV. 803 (1990)(the "equal treatment" concept is also referred to as "formal equality" and stresses the similarities between men and women) [hereinafter Cain]. *See supra* note 89.

[188] *See, e.g.*, Reed v. Reed, 404 U.S. 71 (1971).

[189] Markowitz, *In Pursuit of Equality*, *supra* note 17, at 337.

[190] Cowan, *supra* note 60, at 394.

[191] *Id.*

[192] 404 U.S. 71 (1971).

[193] *See* Ruth Bader Ginsburg, *Sex Equality and the Constitution: The State of the Art*, 14 WOMEN'S RTS. L. REP. 361, 362 (1992)[hereinafter Ginsburg, *Sex Equality*].

[194] *See* Reed v. Reed, 404 U.S. 71 (1971). After the Idaho Supreme Court rejected Sally Reed's claim, General Counsel for ACLU convinced Sally Reed's attorney to allow the ACLU to appeal the case to the U.S. Supreme Court. *See* Markowitz, *In Pursuit of Equality*, *supra* note 17, at 340. After ACLU Legal Director, Melvin Wulf, and a New York University law student filed the jurisdictional statement and the U.S. Supreme Court noted probable jurisdiction, Ruth Ginsburg offered to assist Wulf as co-counsel. *See id.* They also enlisted a team of women law students who assisted them with the development of the introductory material on the history of women's suppression and the appendix. *See id.*

a sympathetic plaintiff,[195] a statute that was repealed[196] before oral argument; and a prayer for relief that was cost-free.[197] *Reed* was a classic case of discrimination. The law in question differentiated solely on gender lines, because the Idaho statute provided that males must be preferred to females when there were two equally entitled persons available to administer an estate.[198] The law assumed that men had more business experience and were better qualified as administrators.[199] The United States Supreme Court had not yet determined "whether the basic law of our land establishe[d] the principle of equality before the law without regard to sex."[200] The law was unclear as to whether women would "continue to encounter law-sanctioned obstacles."[201] Ginsburg argued that continuing gender distinctions should be subject to a heavier burden of proof[202] because the legislature frequently based judgments on "inaccurate stereotypes of the capacities and sensibilities of women."[203]

The historical framework was a critical element of Ginsburg's strategy. First, it exposed "rules and customs [that] often discriminate[d] against women in ways that have long been taken for granted or have gone unnoticed"[204] and that served as "generators of a separate and unequal place for women in the labor force."[205] Second, it provided a rationale for "moving into new directions."[206] The national statistics confirmed that the number of

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[195] Sally and Cecil Reed had separated when their adopted son was a young child. *See id.*, note 17, at 339. While Sally had custody during the "tender years," Cecil obtained custody when their son reached adolescence, a customary practice at that time in Idaho. *See id.* Their son spent some time in a juvenile home; became depressed after being released into his father's custody; and ultimately committed suicide. *See id.* Sally blamed Cecil for their son's death and did not want Cecil to administer his small estate. *See id.*

[196] *See Reed*, 404 U.S. at 74 n.4. Idaho Code, section 15-314 stated that "[o]f several persons claiming and equally entitled (under § 15-312) to administer, males must be preferred to females and relatives of the whole to those of the half blood." *Id.* at 73. On March 12, 1971, the Idaho Legislature adopted the Uniform Probate Code which effectively repealed this statute. *See id.* at 74 n.4.

[197] *See* Markowitz, *In Pursuit of Equality*, *supra* note 17, at 339.

[198] *See Reed*, 404 U.S. at 72.

[199] Brief *Reed*, *supra* note 18, at 61-62. See note 158 and accompanying text for the themes underlying case reports. The themes endorsed male definitions of "woman" as "less rational (not fit for public life), as beautiful and weak (in need of male protection) and as fit only for roles in the private sphere of home and family." Cain, *supra* note 187, at 816-17.

[200] Brief *Reed*, supra note 18, at 10; *see also Reed*, 404 U.S. at 74.

[201] Brief *Reed*, *supra* note 18, at 10.

[202] *See id.* at 17.

[203] *Id.*

[204] Brief for Appellee at 32, Weinberger v. Wiesenfeld, 420 U.S. 636 (1975)(No. 73-1892)[hereinafter Brief *Wiesenfeld*](quoting Green v. Waterford Board of Education, 473 F.2d 629, 634 (2d Cir. 1973)).

[205] *Id.*

[206] *See supra* note 177 and accompanying text.

women in the work force increased. The "archaic notions" and traditional stereotypes of woman's role were no longer congruent with reality. *Reed* provided the initial precedent for the Court to move in a new direction without jeopardizing the rule of law "virtues" of consistency, predictability, clarity, and stability.[207]

In the argument, Ginsburg set the stage by initially reviewing the existing two-tiered standard of review.[208] After describing the "rigid scrutiny" framework, she introduced the proposition that gender, like race and ancestry, was a suspect classification.[209] She hoped to "make an opening by which women could challenge the unfair treatment of women by the law"[210] and to introduce the higher standard of review at the start so that her ultimate position was clear.[211] By using strict scrutiny as her primary argument, she also envisioned that some of her ideas might be reflected in the language and analysis of the decision and would establish an initial precedent for future cases.[212] She then focused on the similarities between race and sex discrimination.[213]

Ginsburg pointed out that the Court's refusal to declare racial discrimination unconstitutional in *Plessy v. Ferguson*[214] "reinforced the institutional and political foundations of racism."[215] In *Goesaert v. Cleary*,[216] the Court "came close to repeating the mistake of *Plessy*." In *Reed*, the Court could "inaugurate judicial recognition of . . . women for the equal rights before the law guaranteed to all persons."[217] Ginsburg presented the federal question as "the constitutional right of a person, who is a woman, to be judged on the basis of her individual qualifications, rather than pre-judged by a male legislature's assignment of second rank status to all members of the female sex."[218] By

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[207] *See Judicial Voice*, *supra* note 15. Ginsburg views the Constitution as an evolving document with commitments to equality and individual liberty. *See id.* at 1186-88. Although the founding fathers did not envision women holding public office, the founders' commitment to equality had growth potential. *See id.* at 1188. Once-excluded groups received constitutional rights and protections through amendment, judicial interpretation, and practice. *See id.*

[208] *See* Brief *Reed*, *supra* note 18, at 8-9.

[209] *See supra* note 177 and accompanying text.

[210] Markowitz, *In Pursuit of Equality*, *supra* note 17, at 340.

[211] *See id.* at 341.

[212] *See* Markowitz, *Women's Rights Advocate*, *supra* note 16, at 9. Ginsburg expected to present the "strict scrutiny" test over a period of time because she did not expect the Court to enunciate a "strict scrutiny" test for sex classifications immediately. *See* Markowitz, *In Pursuit of Equality*, *supra* note 17, at 341.

[213] *See* Brief *Reed*, *supra* note 18, at 9-24.

[214] 163 U.S. 537 (1896).

[215] *See* Brief *Reed*, *supra* note 18, at 12-13.

[216] 335 U.S. 464 (1948).

[217] Brief *Reed*, *supra* note 18, at 13.

[218] *Id.* at 2.

referring to a "male" legislature and "second rank status," Ginsburg subtly suggested a nexus between gender and race as suspect classes.[219]

In arguing that sex was a suspect classification, Ginsburg articulated the similarities between race and sex discrimination. Gender, like race, was "an unalterable identifying trait over which the individual ha[d] no control."[220] In distinguishing sex from non-suspect statuses and aligning it with recognized suspect classifications, she reasoned that the characteristic frequently had no relation to the individual's ability to perform or contribute to society and relegated the whole class to an inferior legal status.[221] Like race and other "suspect" groups, women also lacked political power and significant representation in legislative and policy-making bodies to remedy their discriminatory treatment generally.[222]

Although recognizing that specific characteristics of a "suspect" class had not been explicitly identified,[223] she referred to a series of cases[224] which suggested that the principal characteristic of a suspect class was an unalterable identifying trait.[225] The dominant culture, viewing the trait as a "badge of inferiority,[226] justif[ied] disadvantaged treatment in the social, legal, economic and political contexts."[227] The "protective" and beneficial laws that prevented women from full participation in the political, business, and economic arenas were immediately recognizable as "invidious and impermissible" when applied to racial or ethnic minorities.[228] By analogy, Ginsburg argued that sex should be subject to the higher scrutiny afforded race.[229] In support of the proposition that times had changed, she included comparative data, much like *Brown v. Board of Education*,[230] on the number of working women, including those with families, to dispel "the myth that women [were] secondary

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[219] *See infra* notes 222-25 and accompanying text (discussing suspect characteristics).

[220] Brief Reed, *supra* note 18, at 5. Ginsburg argued that the legislature could distinguish between individuals based on their need or ability, but that discrimination based on sex, "for purposes unrelated to any biological difference between the sexes," merited judicial deference, like that given race, another congenital trait of birth. *Id.*

[221] *See id.* at 20.

[222] *See id.* at 6.

[223] *See id.* at 24.

[224] *See, e.g.*, Sail'er Inn v. Kirby, 485 P.2d 529 (1971); Karczewski v. Baltimore & Ohio R.R. Co., 274 F. Supp. 169 (N.D. Ill. 1967).

[225] *See* Brief *Reed, supra* note 18, at 24.

[226] In *Brown v. Board of Education*, 347 U.S. 483 (1954), the Court used the results of social studies to reject *Plessy v. Ferguson*, 163 U.S. 537 (1896). *See Brown*, 347 U.S. at 494. The Court wrote, "[w]hatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority." *Id.*

[227] Brief *Reed, supra* note 18, at 24-25.

[228] *See id.* at 21.

[229] *See id.* at 18-25.

[230] *Brown*, 347 U.S. at 495 n.11; *see supra* note 226.

workers."[231] She also cited recent legislation designed to eliminate gender discrimination.[232] Ginsburg argued that the status of working women was "separate and unequal,"[233] resulting in severe consequences, most notably the fact that almost two-thirds of the adult poor were women.[234]

Ginsburg then urged the application of the strict scrutiny test and demonstrated that discrimination was not justified by any compelling government interest.[235] The brief closed with the secondary argument that the statute was unconstitutional even under a rational basis test.[236] The sex-based classification was arbitrary and capricious and bore no rational relationship to any legitimate government interest.[237]

In this landmark decision, the United States Supreme Court issued its first affirmative response to a woman's gender discrimination complaint.[238] In an opinion authored by Chief Justice Burger, the Court unanimously agreed that a statute could not establish an arbitrary preference in favor of one sex "in the face of the Fourteenth Amendment's command that no State deny the equal protection of the laws to any person within its jurisdiction."[239] By providing different treatment to applicants on the basis of sex, the statute established a classification "subject to scrutiny" under the Equal Protection Clause.[240] The classification had to be "reasonable, not arbitrary" and rest on some ground of difference, "having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced are treated alike."[241] By

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[231] Brief *Reed*, *supra* note 18, at 39. Ginsburg pointed out that the Court relied on "'sociological insight' and contemporary 'social standards'" to declare racial segregation unconstitutional in *Brown*. *Id.* *See also supra* note 226.

[232] *See* Brief *Reed*, *supra* note 18, at 17. The Equal Pay Act of 1963, Title VII of the Civil Rights Act of 1964, and Executive Orders designed to eliminate discrimination against women in federal jobs were cited as evidence of the measures offering relief from discriminatory employment practices. *See id.* at 11. Congress, prompted by an awakened consciousness that preferential treatment was "outmoded and discriminatory," also eliminated a similar statute that gave preference to males in the District of Columbia. *See id.* at 2.

[233] *See id.* at 40.

[234] *See id.*

[235] *See id.* at 53-59. Acknowledging that the expeditious administration of estates was a bona fide state interest, Ginsburg stated, however, that expeditious administration could not be done by unconstitutional means. *See id.* at 56.

[236] *See id.* at 60. Ginsburg had rejected the customary method of appellate advocacy by advocating the more controversial method of achieving the desired outcome, "strict scrutiny," first. *See* Markowitz, *In Pursuit of Equality*, *supra* note 17, at 341.

[237] *See* Brief *Reed*, supra note 18, at 61-62.

[238] *See* Ginsburg, *Gender and the Constitution*, *supra* note 101, at 10.

[239] *Reed*, 404 U.S. at 74.

[240] *See id.* at 75.

[241] *See id.* at 76 (citations omitted).

stating that the classification had to have a "fair and substantial relation"[242] to the governmental objective, the Court applied a slightly higher standard than mere rational scrutiny.[243] The Court held that the statute did not advance an objective in a manner consistent with the Equal Protection Clause and explained that a mandatory preference of one sex, merely to accomplish the elimination of hearings on the merits, was an "arbitrary legislative choice forbidden by the Equal Protection Clause."[244]

Ginsburg convinced the Court of the arbitrariness of legislation "based on overgeneralized and stereotypical notions of women."[245] The Court adopted Ginsburg's formulation of the equal protection principle that a challenged statutory provision violated the Equal Protection Clause "by providing dissimilar treatment for men and women who [we]re similarly situated."[246] *Reed* was the "first Court expression of women's right to equality under the Constitution."[247] In recognizing such a right, *Reed* established a precedent for the Court and paved the way for a new standard for reviewing sex-based classifications.[248] Ginsburg referred to the *Reed* brief as the "grandmother brief" because the basic argument in all subsequent briefs came from *Reed*.[249]

2. *Frontiero v. Richardson*

One and a half years after *Reed*, Ginsburg argued that a federal statute violated the equal protection guarantee because eligibility for specified benefits was based solely on gender.[250] Ginsburg challenged the law that discriminated between the spouse of a serviceman and servicewoman. While a serviceman's spouse was automatically recognized as a dependent, a "similarly situated" servicewoman had to prove that her spouse was actually

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[242] Royster Guano Co. v. Virginia, 253 U.S. 412 (1920). Ginsburg quoted this case, an old equal protection case, in her brief to the United States Supreme Court. *See* Brief *Reed*, *supra* note 18, at 8.

[243] *See* Gunther, *supra* note 111, at 12. Gunther refers to this as the "equal protection bite without 'strict scrutiny'." *Id.*

[244] *Reed*, 404 U.S. at 76. Ginsburg argued that the sex line drawn by the statute created a "suspect classification" requiring close judicial scrutiny. *See* Brief *Reed*, *supra* note 18, at 5. Discrimination grounded on sex ranked "with legislative discrimination based on race, another congenital unalterable trait of birth, and merits no greater judicial deference." *Id.*

[245] Markowitz, *In Pursuit of Equality*, *supra* note 17, at 341. Ginsburg's strategy was to "expos[e] false stereotypes" in order to eliminate sexism. *See* Brief *Reed*, supra note 18, at 24-40.

[246] *Reed*, 404 U.S. at 77.

[247] *See* Cowan, *supra* note 60, at 393.

[248] *See* Markowitz, *In Pursuit of Equality*, *supra* note 17, at 342.

[249] *See* Cowan, *supra* note 60, at 392.

[250] *See id.* at 394.

dependent on her for more than one half of his support.[251] The regulation also stipulated that a "servicewoman who assume[d] support of a husband attending college d[id] not have a dependent spouse."[252]

Sharron Frontiero, a lieutenant in the Air Force, was denied housing, subsistence allowance, and medical benefits for her husband as her dependent.[253] For administrative convenience, Congress established a conclusive presumption that automatically qualified women as dependents for benefits.[254] Men, however, were not considered homemakers and were not automatically classified as dependents.[255]

Ginsburg challenged this traditional model of male breadwinner and female homemaker by repeating the history of the subordination of women used in *Reed*,[256] delineating the equal protection standards of review, announcing an intermediate review standard,[257] and citing national statistics that showed that women were no longer secondary and inconsequential breadwinners.[258] She reinforced the fact that *Reed* was "a major precedent marking a new direction in judicial review of sex-based classifications."[259] The "question of the stringency of review was left open" and required clarification because several courts gave *Reed* minimal precedential value.[260]

Ginsburg discussed the need for a re-evaluation of the prior rulings based on "benign" classifications and explicated how each "protectionist" ruling worked to the detriment of women.[261] This argument was strategically

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[251] *See* Frontiero v. Richardson, 411 U.S. 677 (1973)(plurality opinion).

[252] Amicus ACLU, *supra* note 18, at 10.

[253] *See Frontiero*, 411 U.S. at 678-79.

[254] *See* Amicus ACLU, *supra* note 18, at 5, 44. Regardless of their potential or actual income, the wife and children of military personnel were entitled to comprehensive medical benefits by statute. *See id.* at 5.

[255] *See id.* at 5. To be entitled to any medical benefits, the husband of military personnel had to demonstrate that he was "in fact dependent upon" the female member for more than half his support. *See id.*

[256] *See id.* at 20-23. Unlike the *Reed* brief, Ginsburg deleted the extensive comparison with race discrimination because she became "more sensitive to the distinctions—that all oppressed people are not oppressed in the identical way or to the same degree." *See* Markowitz, *In Pursuit of Equality*, *supra* note 17, at 344-45.

[257] *See* Amicus ACLU, *supra* note 18, at 23. Ginsburg proposed an intermediate level of review, "the classification at issue, closely scrutinized, is not reasonably necessary to the accomplishment of any legitimate legislative objective." *Id.*

[258] *See id.* at 24-27.

[259] *Id.* at 32.

[260] *Id.* at 33.

[261] *See id.* at 34-44. *See generally supra* Part II.B., notes 158-65 and accompanying text. In *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 132 (1872), the Court stated "[t]hat God designed the sexes to occupy different spheres of action, and that it belonged to men to make, apply, and execute the laws, was regarded as an almost axiomatic truth." The laws delineating a "sharp line between the sexes" were sanctioned on assumptions impossible to disprove since

significant, "[e]specially for men[,] accustomed to a paternalistic mode of thinking about women," who found it difficult to perceive how a special benefit to women actually harmed them.[262] Ginsburg introduced the Court to the concept that special benefits given to women actually harmed women who sought to be the breadwinners in their own right.[263]

Citing *Reed* as case precedent, Ginsburg further argued that administrative convenience had already been rejected as a justification for sex-based classifications under the rational relationship test.[264] The dominant purpose of the statute was to attract and retain competent men and women in the armed forces. Requiring "similarly situated" male spouses to demonstrate dependency to qualify for the same benefits was not reasonably related to the legislative objective.[265]

The plurality opinion[266] stated that classifications based on sex, like

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their "inspiration was an article of faith." *See* Amicus ACLU, *supra* note 18, at 36. In *Minor v. Happersett*, 88 U.S. 162 (1874), the states were allowed to limit voting to men alone since the right to vote was not one of the "privileges and immunities of U.S. citizenship." *See* Amicus ACLU, *supra* note 18, at 36. In *Muller v. Oregon*, 208 U.S. 412 (1908), women were "protected" from better-paying jobs and opportunities based on the broad proposition that "sex is a valid basis for legislative classifications." *See* Amicus ACLU, *supra* note 18, at 38-39. In *Goesaert v. Cleary*, 335 U.S. 464, 467 (1948), men were allowed to "monopolize the calling" as bartenders. *See* Amicus ACLU, *supra* note 18, at 39. In *Hoyt v. Florida*, 368 U.S. 57 (1961), women had the right, but not obligation to serve on a jury. *See* Amicus ACLU, *supra* note 18, at 41. This resulted in an all-male jury that convicted Hoyt of murdering the husband who insulted and humiliated her to the breaking point. *See id.*

[262] Markowitz, *In Pursuit of Equality*, *supra* note 17, at 345. The argument was obviously effective as illustrated by the plurality opinion which stated: "Traditionally, . . . discrimination [on the basis of sex] was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage." Frontiero v. Richardson, 411 U.S. 677, 684 (1973). *See also* Ginsburg, *Benign Classification*, *supra* note 15, at 816.

[263] *See* Markowitz, *In Pursuit of Equality*, *supra* note 17, at 345; *see also* Ginsburg, *Benign Classification*, *supra* note 15, at 816.

[264] *See* Amicus ACLU, *supra* note 18, at 9. Ginsburg refuted the argument that administrative convenience justified differential treatment by identifying Congressional actions that equalized benefits paid to or for "dependents" and that prohibited discrimination on the basis of sex. *See id.* at 48-57.

[265] *See id.* at 57-62.

[266] *See Frontiero*, 411 U.S. at 691-92. Four Justices supported Ginsburg's "strict scrutiny" argument. *See id.* at 678 (Douglas, J., Brennan, J., White, J., Marshall, J., concurring). Three Justices concurred in the judgment but refused to hold that all classifications based on sex are "inherently suspect" and subject to "close judicial scrutiny." *See id.* at 691 (Powell, J., Burger, C.J., Blackmun, J., concurring). They argued that it was premature and unnecessary given that state legislatures were debating the Equal Rights Amendment and would "resolve the substance of this precise question." *See id.* at 692.

The Equal Rights Amendment, passed in 1972, required ratification by three-fourths of the States within seven years to be effective. H.R.J. Res. 208, 92nd Cong., 2d Sess. (1972). *See*

classifications based on race, alienage, or national origin, were inherently suspect and subject to strict judicial scrutiny.[267] The government was required to demonstrate that the differential treatment actually saved the government money to satisfy the demands of strict judicial scrutiny.[268] The plurality reaffirmed *Reed* and adopted the reasoning and language set forth in the *amicus curiae* brief.[269] The plurality agreed that sex discrimination was rationalized by a paternalism that put women "not on a pedestal, but in a cage."[270] Statutory distinctions between the sexes oftentimes relegated females to inferior status.[271] The plurality referred to the history of subordination of women in the opinion itself.[272] In *Frontiero*, Ginsburg succeeded in having her ideas reflected and incorporated in the language and analysis of the decision.[273]

Having identified the type of cases she thought would be beneficial in furthering her position, Ginsburg called upon the ACLU affiliates to look for cases with the fact scenario she sought. Specifically, she looked for Social Security and jury cases that challenged traditional assumptions about appropriate family gender roles.[274] For example, she took on cases in which women earned fewer benefits than men,[275] and jury cases which challenged statutes

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Ruth Bader Ginsburg, *Ratification of the Equal Rights Amendment: A Question of Time*, 57 TEX. L. REV. 863 n.1 (1979).

[267] *See Frontiero*, 411 U.S. at 688. Ginsburg stated that she had not expected Brennan's opinion because she thought that he might wait until four to five cases existed before declaring sex a suspect classification. *See* Markowitz, *In Pursuit of Equality*, *supra* note 17, at 345. For decisions involving race, alienage, and national origin, see *Loving v. Virginia*, 388 U.S. 1 (1967); *Graham v. Richardson*, 403 U.S. 365 (1971); and *Oyama v. California*, 332 U.S. 633 (1948), respectively.

[268] *See Frontiero*, 411 U.S. at 689. Three of the concurring judges decided the *Frontiero* case based on the authority and standard of *Reed*. *See id.* at 691-92.

[269] *See id.* at 683-84 (citing *Reed*, 404 U.S. at 77). The *Frontiero* Court, in its plurality opinion, cited the equal protection argument in *Reed*. *See id.* at 683.

[270] *Id.* at 684. This reference was originally taken from *Sail'er Inn v. Kirby*, 485 P.2d 529, 541 (1971): "The pedestal upon which women have been placed has all too often, upon closer inspection, been revealed as a cage." *See* Ginsburg, *Benign Classification*, *supra* note 15, at 816 n.19. It refers to the argument that administratively convenient schemes legitimately benefit a class of women by presuming them dependent on men. *See id.* at 816.

[271] *See Frontiero*, 411 U.S. at 685. The plurality stated that statute books were "laden with gross, stereotyped distinctions between the sexes" because of archaic notions. *Id.* *See also Reed*, 404 U.S. at 75.

[272] *Frontiero*, 411 U.S. at 684-88. The Court cited *Bradwell v. State of Illinois* and referred to many of the sources used in Ginsburg's brief. *See id.* *See also* Amicus ACLU, *supra* note 18, at 11-20.

[273] *See supra* notes 211-12 and accompanying text.

[274] *See* Markowitz, *In Pursuit of Equality*, *supra* note 17, at 346.

[275] *See* Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Califano v. Goldfarb, 430 U.S. 199 (1977).

that made jury service voluntary for women.[276] She thought that she could dislodge stereotyped notions about women's roles in society in these areas because the issues were easily comprehended.[277]

3. *Weinberger v. Wiesenfeld*

As part of her overall strategy, Ginsburg spoke at gatherings of law students, professors, and practitioners to educate them as to the nature and importance of sex discrimination.[278] She also wrote articles to help "build a body of legal opinion supportive of arguments later raised in court."[279] *Weinberger v. Wiesenfeld*[280] was another case based on the legal stereotype of man as breadwinner and woman as homemaker.

Wiesenfeld was the first of a series of social security cases intended for judicial review,[281] directed at eliminating all gender lines in the Social Security Act.[282] A case with sympathetic and compelling facts, it involved Paula Wiesenfeld, a teacher who died in childbirth and left the care of their infant son to her husband.[283] Stephen Wiesenfeld became unemployed, however, as a result of difficulties in securing childcare.[284] Although he obtained social security benefits for his son, he was told that other "mother's insurance benefits" were specifically authorized for women only.[285] A father

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[276] *See* Duren v. Missouri, 439 U.S. 357, 367 (1979)(holding that a Missouri statute denied the defendant's right to a jury comprised of a fair cross section of the community because it granted women an automatic exemption which resulted in an unconstitutional underrepresentation of women on juries); Healy v. Edwards, 363 F. Supp. 1110, 1117 (E.D. La. 1973)(holding that a Louisiana statute denied all litigants due process and denied all female litigants equal protection because all women were exempted from jury service unless they filed a written request to serve).

[277] *See* Markowitz, *In Pursuit of Equality*, *supra* note 17, at 346.

[278] *See* Cowan, *supra* note 60, at 389.

[279] *Id.*

[280] 420 U.S. 636 (1975).

[281] *See* Cowan, *supra* note 60, at 395.

[282] *See id.*

[283] *See Wiesenfeld*, 420 U.S. at 639.

[284] *See id.* at 641 n.7.

[285] *See* Brief *Wiesenfeld*, *supra* note 204, at 4-5. The section titled "Mother's insurance benefits," 42 U.S.C. § 402, provides:

> (1) The widow and every surviving divorced mother . . . of an individual who died a fully or currently insured individual, if such widow or surviving divorced mother—
> (A) is not married,
> (B) is not entitled to a widow's insurance benefit,
> (C) is not entitled to old-age insurance benefits, or is entitled to old-age insurance benefits each of which is less than three-fourths of the primary insurance amount of such individual;
> (D) has filed application for mother's insurance benefits, or was entitled to wife's

who wanted to care for his baby did not qualify for the same support.

In challenging the statute, Ginsburg posed the pivotal question: "Is a social insurance benefit, which is designed to facilitate close parent-child association, constitutionally allocated when it includes children with dead fathers, but excludes children with dead mothers?"[286] She argued that the double-edged discrimination failed constitutional review and denigrated a woman's effort in the economic sector.[287] The discrimination did not foster any legitimate government interest, and the sharp line drawn between the sexes did not represent a "fair, rational and functional approach to the allocation of family benefits."[288] When invidious discrimination results, a gender label such as "widowed mother" could not serve for the functional classification, "sole surviving parent."[289] Although the classification was designed to compensate women beneficiaries for economic difficulties, the Court stated that the "mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme."[290]

As in the prior two cases, Ginsburg used national statistics to highlight women's participation in the paid labor force to counter the notion of "husband at work" and "woman at home."[291] She also cited federal laws prohibiting family fringe benefit differentials based on sex to reflect the "overriding concern of Congress to eliminate gender-based discrimination in

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insurance benefits on the basis of the wages and self-employment income of such individual for the month preceding the month in which he died,

(E) at the time of filing such application has in her care a child of such individual entitled to a child's insurance benefit . . . shall . . . be entitled to a mother's insurance benefit for each month . . . .

[286] Brief *Wiesenfeld, supra* note 204, at 12. Section 402(g) of Title 42 of the United States Code provides benefits "payable on the basis of the earnings of a deceased wife and mother covered by the Act, however, only to the minor children and not to the widower." *Wiesenfeld*, 420 U.S. at 637-38.

[287] *See* Brief *Wiesenfeld, supra* note 204, at 10. The brief asserts that 42 U.S.C. § 402(g) constitutes a denial of the equal protection of the laws guaranteed by the due process clause of the Fifth Amendment because it discriminates against surviving spouses of female workers insured under Social Security. *See id.* at 11.

[288] *Id.* at 16.

[289] *See id.* Section 402(g) of Title 42 of the United States Code "impermissibly distinguishes between men and women without regard to individual or family need, ability, preference or life situation." *Id.* The barrier is insurmountable because "under no circumstances are 'child in care' benefits paid to the surviving spouse of a female insured individual." *Id.* at 31.

[290] *Wiesenfeld*, 420 U.S. at 648.

[291] *See* Brief *Wiesenfeld, supra* note 204, at 19-20. *See also* Markowitz, *In Pursuit of Equality, supra* note 17, at 350 (citing O'Connor & Epstein, *Beyond Legislative Lobbying: Women's Rights Groups and the Supreme Court*, 67 JUDICATURE 134, 135 (1983)).

the economic sphere."[292] Although Congress assumed a division of parental responsibility along gender lines in providing a "mother's benefit," but no father's benefit,[293] Ginsburg surmised that the omission of widowers with children was "not the product of deliberation"[294] but rather the result of the "stereotype of woman at home, man at work" which was pervasive in family benefit amendments at the time.[295]

Ginsburg noted that the statute discriminated invidiously against gainfully employed women insured under social security and their surviving spouses and children.[296] The benefit was inextricably bound to parental care for minor children. The child supplied the *raison d'etre* for the benefit.[297] A statute operating to deny a child the opportunity to receive the personal care of his sole surviving parent was manifestly irrational, inequitable, and unjust.[298] The Railroad Retirement Commission had already identified the fundamental unfairness of excluding motherless families from the "child in care" benefit and had reported that the "economic and functional capability of the surviving breadwinner to care for children" should determine benefits.[299] As precedent, she cited the 1973 *Frontiero v. Richardson* decision that equalized fringe benefits for male and female members of the uniformed services.[300]

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[292] Brief *Wiesenfeld, supra* note 204, at 38. The Wage and Hour Division of the Department of Labor ruled that employers who pay family coverage insurance premiums for married male employees but who require women to be heads of their families to qualify for family coverage premiums are in violation of the Equal Pay Act. *See id.* at 39. Congress passed Pub. L. 92-187, 85 Stat. 644, to provide the same benefits to all federal employees. *See id.* at 40. *See also infra* note 293.

[293] *See* Brief *Wiesenfeld, supra* note 204, at 16. The Equal Employment Opportunity Commission's Sex Discrimination guidelines issued in 1972 explicitly proscribed the differential treatment of men and women. *See* Brief *Wiesenfeld, supra* note 204, at 38 (referring to 19 C.F.R. § 1604.9(d)).

[294] *See id.* at 17. When disparate treatment is rooted in traditional role-typing and not specifically aimed at redressing past injustice, it is unconstitutional. *See* Ginsburg, *Benign Classification, supra* note 15, at 823.

[295] *See* Brief *Wiesenfeld, supra* note 204, at 18.

[296] *See id.* at 10-13. This case was the prototype of the kind of discrimination and stereotype that Ginsburg and the Women's Rights Project sought to abolish. *See* Cowan, *supra* note 60, at 395-96.

[297] *See* Brief *Wiesenfeld, supra* note 204, at 12.

[298] *See id.* at 13.

[299] *Id.* at 15. The Railroad Retirement Commission analysis stated that "if the society's aim is to further a socially-desirable purpose, e.g., better care for growing children, it should tailor any subsidy directly to the end desired, not indirectly and unequally by helping widows with dependent children and ignoring widowers in the same plight." *Id.* (citing H.R. Doc. No. 92-350, 92d Cong., 2d Sess. 378, RAILROAD RETIREMENT COMMISSION REPORT (1972)).

[300] *See id.* at 41.

The statute was alleged to "ameliorate the inferior economic status of women,"[301] but Ginsburg demonstrated the inescapable inconsistency and illogic[302] of the double-edged sword. A unanimous Court concluded that the classification in *Wiesenfeld* was indistinguishable from that held invalid in *Frontiero*;[303] the challenged section was a Constitutional violation.[304] All parties were victims of invidious sex-discrimination.[305] Ginsburg explained:

> The majority thought it was discrimination against the woman as wage earner . . . . A few thought it was discrimination against the man, because he didn't have the same opportunity to give personal care to the baby . . . . And one, [Chief Justice Rehnquist], thought it was discrimination against the baby.[306]

By the time the *Wiesenfeld* issues were resolved, the Court had substituted the functional designation of parent's benefits in place of "mother's benefits."[307] In Ginsburg's view, this case epitomized "all that [she was] doing in the 70's."[308]

4. *Craig v. Boren*

Craig v. Boren[309] was a landmark case.[310] Challenged was Oklahoma's legislation which classified eighteen to twenty-year old males and females into two categories in conformity with preconceived notions about men and women. At eighteen years of age, females could purchase beer while males

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[301] *Id.* at 44. Ginsburg pointed out that a similar guideline issued by the United States Department of Health, Education and Welfare, Higher Education Guidelines instructed the employer to not presume that a married man is head of household. *See id.* at 43-44.

[302] *See id.* at 44.

[303] *See Wiesenfeld*, 420 U.S. at 642-43.

[304] *See id.* at 648.

[305] *See Wiesenfeld*, 420 U.S. at 636. *Wiesenfeld* dealt with parental benefits. *See id.* at 637-38. *See also* Cowan, *supra* note 60, at 395. Future cases were to focus on husbands and widowers, as *Wiesenfeld* was to be the first of a series of Social Security cases. *See id.* Also factored in the selection of cases was the cost to the government. *See id.* As the litigation sequence progressed, the cost to the government would increase. *See id.*

[306] Rosen, *supra* note 100, at 64 (quoting Justice Ginsburg).

[307] *See* Cowan, *supra* note 60, at 404.

[308] Rosen, *supra* note 100, at 64. The next case would center on benefits for aged husbands and widowers. *See* Cowan, *supra* note 60, at 395. The first ACLU case to reach the court was *Coffin v. Secretary of Health, Welfare and Education*, 400 F. Supp. 953 (D.D.C. 1975). Coffin was a retired police officer who was denied Social Security survivor benefits under her account. *See id.* at 953. *See also* Markowitz, *In Pursuit of Equality*, *supra* note 17, at 353.

[309] 429 U.S. 190 (1976).

[310] *See* Markowitz, *In Pursuit of Equality*, *supra* note 17, at 356.

under twenty-one years old could not.[311] It was the "only law of its kind left in the nation."[312]

Ginsburg argued for "heightened scrutiny" and "played down" strict scrutiny in recognition that five votes were necessary for suspect classification and would not be forthcoming.[313] She carefully selected her issues and cases to insure that she would lose no ground.[314] In shifting her focus from strict scrutiny, she argued that sex classification could not be justified on any basis.[315] In *Boren*, she influenced the Court to enunciate an intermediate level of scrutiny for sex-based classification in the law.[316]

Ginsburg cited the Court's findings in *Reed*, *Frontiero*, and *Wiesenfeld* to support her case.[317] This is illustrative of her strategy of "building up, case-by-case, to the declaration of a heightened level of scrutiny for sex-based classification[.]"[318] She also demonstrated the lack of relationship between the facts presented and the prohibition that the statistics purported to support.[319] A firm majority of the Court agreed that the law denied young men equal protection, because the law was not shown to be "substantially related to [the] achievement of the statutory objective."[320]

5. *Califano v. Goldfarb*

In another social security case, *Califano v. Goldfarb*,[321] Ginsburg success-

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[311] *See* Brief for American Civil Liberties Union as *Amicus Curiae* in Support of Appellant at 10, Craig v. Boren, 429 U.S. 190 (1976)(No. 75-628)[hereinafter Amicus *Craig*].

[312] *See id.* at 10.

[313] *See* Markowitz, *In Pursuit of Equality*, *supra* note 17, at 355.

[314] *See* Ginsburg, *Judicial Voice*, *supra* note 15, at 1191.

[315] *See* Markowitz, *In Pursuit of Equality*, *supra* note 17, at 355.

[316] *See* Craig, 429 U.S. at 204; *see also* Markowitz, *Women's Rights Advocate*, *supra* note 16, at 10.

[317] *See* Amicus *Craig*, *supra* note 311, at 13-14.

[318] Markowitz, *Women's Rights Advocate*, *supra* note 16, at 10.

[319] *See* Amicus *Craig*, *supra* note 311, at 25-33.

[320] *Craig*, 429 U.S. at 204.

[321] 430 U.S. 199 (1977). Ginsburg stated that this case was the second step in a litigation campaign aimed at advancing the *Frontiero* decision and containing the *Kahn v. Shevin*, 416 U.S. 351 (1974), decision. *See* Ginsburg, *Benign Classification*, *supra* note 15, at 819. In *Kahn*, a Florida statute granting a property tax exemption to all Florida widows, but not to widowers, was upheld. *See Kahn*, 416 U.S. at 352. The majority ruled that the exemption helped some women while harming none and was a fair means of reducing "the disparity between the economic capabilities of a man and a woman." *Id.* A female head of household who never married or was divorced, however, did not receive this benefit. *See id.* Ginsburg noted that the Court seemed "wedded" to the notion that laws operate benignly in women's favor, ranking women as men's dependents and oblivious to the image of women projected by this "benign dispensation." *See* Ginsburg, *From No Rights*, *supra* note 124, at 13.

fully argued that a statute that allowed widows to automatically qualify for survivor benefits but required widowers to prove dependency violated due process.[322] By not invoking a need or income test as a criterion for benefits and simply treating the terms "widow" and "dependent" as equivalents,[323] the law afforded female workers, who were required to pay social security taxes, less protection for their spouses than that obtained by men.[324] Ginsburg argued that the statutory scheme for social security, "just as the schemes in *Frontiero*[325] and *Wiesenfeld*,[326] favor[ed] one type of marital unit over another."[327]

The Court stated that the gender-based differentiation was forbidden by the Constitution when supported by no more substantial justification than "archaic and overbroad" generalizations.[328] The statute devalued the woman's efforts by marking her as an individual whose participation in the paid labor force was subordinate to that of the family's man[329] and served to "impede removal of artificial barriers to recognition of women's full, human potential, and to retard society's progress toward equal opportunity, free from gender-based discrimination."[330] The Court rejected the government's justification that the statute was a reasonable means of redressing economic discrimination against women.[331] Excluding the spouse from benefits did not remedy the effects of past economic discrimination against women.[332] Ginsburg demonstrated that a one-way dependency test could not be justified for a "functional, sex-neutral classification"[333] and that a benign classification again resulted in double-edged discrimination. The benefit provided to wives and mothers operated to the detriment of female breadwinners and their families.[334]

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[322] *Goldfarb*, 430 U.S. at 204.

[323] *See* Ginsburg, *Benign Classification*, *supra* note 15, at 819-20.

[324] *See* Brief for Appellee at 12, Califano v. Goldfarb, 430 U.S. 199 (1977)(No. 75-699)(quoting *Wiesenfeld*, 420 U.S. at 645) [hereinafter Brief *Goldfarb*].

[325] *See id.* at 23. To qualify for benefits on the basis of a woman's wage record, the wife must have paid at least three-fourths of the total family expenses. *See id.* at 27. This was virtually identical to the dependency test invalidated in *Frontiero*. *See id.* at 12-13.

[326] *See id.* at 23; *see also supra* note 325.

[327] Brief *Goldfarb*, *supra* note 324, at 23.

[328] *See Goldfarb*, 430 U.S. at 206-07.

[329] *See* Brief *Goldfarb*, *supra* note 324, at 17.

[330] *Id.* at 24.

[331] *See Goldfarb*, 430 U.S. at 209 n.8; Ginsburg, *Benign Classification*, *supra* note 15, at 820.

[332] *See* Brief *Goldfarb*, *supra* note 324, at 34. The legislative history indicated that Congress had acted on the premise that men were breadwinners and women were wives and mothers. *See id.* at 25.

[333] *Id.* at 9.

[334] *See* Ginsburg, *Gender and the Constitution*, *supra* note 101, at 22.

Ginsburg's strategy for litigating cases was to "articulate the policy being sought as a series of narrow issues."[335] Each case was identified, packaged, and presented in the proper sequence.[336] She established one principle at a time by narrowly defining the problem.[337] In so doing, Ginsburg shaped gender discrimination law judicially, a task that could not or would not be done legislatively.

As a litigator, Ginsburg challenged governmental and judicial institutions to re-evaluate their fundamental beliefs by systematically litigating these issues in the cases examined in this section. By framing the legal analysis to encompass parties who were "similarly situated," she was able to demonstrate the obviously discriminatory effect of various statutes. By using equal protection jurisprudence, she convinced the Court to adopt an intermediate level of scrutiny for gender-based classifications.

D. As a Judge on the D.C. Circuit

President Jimmy Carter appointed Ginsburg to the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") in 1980. In the thirteen years that Ginsburg served on the D.C. Circuit, few cases on gender discrimination came to her court.[338] During this time period, however, several important gender equality developments occurred. First, the Supreme Court continued to find state and federal laws which classified by gender unconstitutional.[339] Second, in 1973, the Supreme Court had decided *Roe v. Wade*,[340] a decision which Ginsburg considered an intrepid action and which continued to create litigation in state courts.[341] Third, the Equal Rights Amendment ("ERA") was drafted and was in the process of ratification by the states.[342]

Ginsburg took the opportunities offered her as a judge to write or speak about those important developments in women's rights. As she explained in a 1992 article, "[n]ot only the sex discrimination cases, but the cases on contraception, abortion, and illegitimacy as well, present various faces of a

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[335] *See* Cowan, *supra* note 60, at 402.

[336] *See id.*

[337] *See id.* at 404.

[338] The nature of the D.C. Circuit includes a high volume of regulatory cases not conducive to broad constitutional thinking. *See* 51 CONG. Q. WKLY. REP. 25, June 19, 1993.

[339] *See, e.g.*, Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142 (1980)(deleting the sex-based classification in workers' compensation schemes); Kirchberg v. Feenstra, 450 U.S. 455 (1981)(striking down a law designating the husband as head of the household).

[340] 410 U.S. 113 (1973).

[341] *See* Ginsburg, *Sex Equality and the Constitution*, 52 TULANE L. REV. 451, 460 (1978). *See also* Ginsburg, *Judicial Voice*, *supra* note 15, at 1205.

[342] *See infra* notes 397-99 and accompanying text.

single issue: the roles women are to play in society."[343] These issues all related to the question of whether women were to have the opportunity to enjoy full partnerships with men.[344] The Supreme Court did not see all these cases as part and parcel of a single issue.[345] For Ginsburg, equality, employment, contraception, abortion, and illegitimacy were all part of the "full dimension of current controversy surrounding gender-based discrimination."[346] This section examines chronologically Ginsburg's thirteen years on the D.C. Circuit, focusing on her evolving gender equality philosophy, as evidenced in her speeches, writings, and opinions.

Ginsburg maintained a conservative record on the D.C. Circuit and continued to advocate equal protection while adhering to precedent.[347] After her tenure ended with a Supreme Court appointment, commentators said, Ginsburg "earned a reputation as a non-ideological moderate who eschew[ed] judicial activism."[348] In 1979, Ginsburg wrote that the Court was sending the message that lawmakers and states should rethink ancient positions on the questions of equal protection for women.[349] Ginsburg found that the Court had left room for lawmakers to determine that special treatment for women was warranted because of the biases or disadvantages women had encountered.[350] Ginsburg defended the Court's ruling on various statutes which discriminated against men unconstitutional.[351]

Ginsburg's first opportunity as a judge to hear a case on gender discrimination came in 1982, in *Valentino v. United States Postal Service*.[352] The case involved a employment discrimination claim for failure to promote a female

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[343] Ginsburg, *Sex Equality*, *supra* note 193, at 361 (1992)(quoting Professor Kenneth Karst, *Book Review*, 89 HARV. L. REV. 1028, 1036 (1976)). Professor Karst argued that the question of whether women were going to have the opportunity to participate equally with men in a social, political, and economic sense was "one of the most important" constitutional issues of the twentieth century. *See id.* (citations omitted).

[344] *See id.*

[345] *See id.* at 361-62.

[346] *Id.* at 361.

[347] *See* Joan Biskupic, *Clinton's Choice Would Probably Strengthen the Court's Center*, WASH. POST, June 21, 1993, at 7. Biskupic commented that on the D.C. Court of Appeals, Ginsburg lacked dynamism and the innovation she had possessed as an attorney for the ACLU. *See id.* It is more likely that Ginsburg was adhering to her strategy of incremental change and her support of a Court that moves in "[m]easured motions." *See* Ginsburg, *Judicial Voice*, *supra* note 15, at 1198.

[348] 51 CONG. Q. WKLY. REP. 25, June 19, 1993.

[349] *See* Ginsburg, *Some Thoughts supra* note 193, at 310-14. "'Legislation that rests on such presumptions, without more' . . . cannot survive equal protection scrutiny." *Id.* at 314 (quoting Califano v. Westcott, 443 U.S. 76, 89 (1979)).

[350] *See* Ginsburg, *Some Thoughts*, *supra* note 193, at 317.

[351] *See id.* at 314.

[352] 674 F.2d 56 (D.C. Cir. 1982).

to an upper level position at the United States Postal Service ("USPS") Headquarters.[353] The plaintiff, Mary Valentino, argued that she was discriminatorily denied advancement because of her sex, and that others of her class had also been denied promotions.[354] The D.C. Circuit Court, with Ginsburg writing the majority opinion, found that the USPS had produced adequate evidence of a legitimate, nondiscriminatory reason for its action and held that Valentino had failed to carry the burden of persuasion to demonstrate that USPS was actually discriminating.[355] This ruling demonstrated Ginsburg's capacity for independent judging despite her personal views of women's equality.

In 1984, Ginsburg heard *Walker v. Jones*,[356] a case which involved an employee's claim that she was discharged from her job as general manager of the House of Representatives' restaurant because she was a woman.[357] Anne Walker had held the manager's job for about ten years.[358] Jones, her supervisor, allegedly made statements that Walker's $45,000 salary was "ridiculous for a woman," and after her termination, Jones hired a man as general manager.[359] The lower court had dismissed Walker's claim on the basis of Jones' legislative immunity, but Ginsburg, writing for the majority, reversed, finding that gender discrimination in employment was not subject to immunity and that Walker had a legitimate claim.[360]

During her tenure on the D.C. Circuit, Ginsburg lectured on the role of women and the Constitution at the 1984 Eighth Circuit Judicial Conference in Colorado Springs, Colorado, where she stated that the Supreme Court in the 1970's:

> accelerat[ed] the pace of change, change toward shared participation by members of both sexes in our nation's economic and social life. I do not want to leave you with the impression that the judiciary has proceeded automaton-like—securely on course without missteps, detours, inconsistencies, and the like. Occasional fog is inevitable in this domain.

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[353] *See id.*

[354] *See id.*

[355] *See id.* at 61. In order to establish a prima facie case of discriminatory refusal to promote, a plaintiff needs to show that: 1) she belongs to a protected group; 2) she was qualified for and applied for a promotion; 3) she was considered for and denied the promotion; and 4) other employees of similar qualifications who were not members of the protected group were promoted. *See id.* at 63.

[356] 733 F.2d 923 (D.C. Cir. 1984).

[357] *See id.* at 926.

[358] *See id.* at 925.

[359] *See id.* at 926-27.

[360] *See id.* at 934. The court remanded the case for further proceedings to determine if the termination occurred because of sex. *See id.*

> Registration for military draft and the statutory rape, to take two 1980's examples, proved perplexing for the Justices.[361]

In 1989, the D.C. Circuit heard one gender-related case. *Women's Equity Action League v. Cavazos*[362] involved federal aid to organizations that engaged in discrimination, and Ginsburg granted standing to students, employees, and organizations to litigate the case.[363] The complaint was for violations of Title VI of the Civil Rights Act.[364] Department of Health, Education and Welfare officers were the alleged violators in the complaint.[365] Other complainants, including the Women's Action Equity League, intervened in the case, seeking enforcement of Title IX of the Education Amendment of 1972,[366] which prohibited discrimination on the basis of sex.[367] The National Federation of the Blind also intervened for discrimination under the Rehabilitation Act of 1973.[368] Ginsburg, writing the opinion, found that the plaintiffs had a possible cause of action for statutory violations and allowed them access to the court for their complaints.[369]

In 1990, Ginsburg spoke of the development of the Supreme Court's standard of review for gender classifications, noting that from 1971 to 1982,

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[361] Mauro, *supra* note 1, at 2 (quoting Ruth Bader Ginsburg). The "fog" still remains today, as registration for the military draft is still required for only men, and some states still have statutory rape laws covering females only. *See, e.g.*, MISS. CODE ANN. § 43-17-50 (1997) (defining statutory rape as applicable only to females).

[362] 879 F.2d 880 (D.C. Cir. 1989).

[363] *See id.* at 880-81. In 1989, the court also heard *Trout v. Garrett*, 891 F.2d 332 (D.C. Cir. 1989), which involved an award of attorney's fees in the sex discrimination case of a female computer service technician in the Navy. In *Whitacre v. Davey*, also decided in 1989, Ginsburg was part of a panel that denied a female employee's age discrimination claim which involved her removal from her management position. 890 F.2d 1168 (D.C. Cir. 1989).

[364] 42 U.S.C. § 2000d (1982).

[365] *See Cavazos*, 879 F.2d at 881. The alleged violations included racial segregation of blacks in public schools, discrimination against women in educational institutions receiving federal funding, and discrimination against Mexican-Americans in government contracting. *See id.* at 881-82.

[366] 20 U.S.C. §§ 1681-1686 (1972).

[367] *See Cavazos*, 879 F.2d at 882.

[368] *See id.* at 883 (referring to 29 U.S.C. § 794 (1982 & Supp. IV 1986))-05 (quoting WENDY WILLIAMS, SEX DISCRIMINATION: CLOSING THE LAW'S GENDER GAP, IN THE BURGER YEARS: RIGHTS AND WRONGS IN THE SUPREME COURT 1969-1986, at 123 (Herman Schwartz ed., 1987)).

[369] *See Cavazos*, 879 F.2d at 881. This case demonstrated Ginsburg's sensitivity to any type of discrimination, as exemplified by her remarks that "[r]ank discrimination is not a part of our Nation's culture. Tolerance is." 139 CONG. REC. S10159-02, *S10160 (Aug. 3, 1993)(statement of Sen. Moseley-Braun).

the Court held unconstitutional a series of state and federal laws that differentiated on the basis of sex.[370]

> The backdrop for these rulings was a phenomenal expansion, in the years from 1961 to 1971, of women's employment outside the home, the civil rights movement of the 1960's and the precedents set in that struggle and a revived feminist movement, fueled abroad and in the United States by Simone de Beauvoir's remarkable 1949 publication, The Second Sex.[371]

During this period, the Court invalidated state laws that had become obsolete, not by condemning the legislature but by "open[ing] a dialogue with the political branches of government."[372]

In 1990, Ginsburg noted that the Supreme Court had "said nevermore to a state law designating the husband 'head and master of the household'" in *Kirschberg v. Feenstra*.[373] Ginsburg described the Supreme Court as writing "modestly, [putting] forward no grand philosophy; but by requiring legislative reexamination of once customary sex-based classifications, the Court helped to ensure that laws and regulations would catch up with a changed world."[374]

As a judge, Ginsburg continued to advocate for women's equality, while adhering to precedent and moving in "[m]easured [m]otions in [t]hird [b]ranch [d]ecision [m]aking."[375] The Court's failure to move in measured motions led Ginsburg to be critical of the *Roe v. Wade*[376] decision in her 1990 remarks.[377] "Doctrinal limbs too swiftly shaped, experience teaches, may prove unstable."[378] Had the Court stopped short of fashioning a broad regime on abortion in *Roe v. Wade* and simply declared the Texas criminal abortion statute unconstitutional, a twenty-year controversy might have been avoided.[379] *Roe v. Wade* displaced virtually every state abortion law then in force.[380] The *Roe v. Wade* decision "might have been less of a storm center had it both homed in more precisely on the women's equality dimension of the issue and, correspondingly, attempted nothing more bold at that time than the mode of decisionmaking the Court employed in the 1970's gender classification cases."[381] In fact, Ginsburg noted that the Supreme Court had on its

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[370] *See* Ginsburg, *Judicial Voice*, *supra* note 15, at 1203-05.
[371] *Id.* at 1203-04.
[372] *Id.* at 1204.
[373] 450 U.S. 455 (1981).
[374] Ginsburg, *Judicial Voice*, *supra* note 15, at 1204.
[375] *Id.* at 1198.
[376] 410 U.S. 113 (1973).
[377] *See* Ginsburg, *Judicial Voice*, *supra* note 15, at 1198.
[378] *Id.*
[379] *See id.* at 1199 (citations omitted).
[380] *See id.*
[381] *Id.* at 1200.

calendar a case that could have served "as a bridge, linking reproductive choice to disadvantageous treatment of women on the basis of their sex."[382]

Struck v. Secretary of Defense[383] involved a female Air Force captain who became pregnant while in Vietnam. She was forced out of the Air Force because of her pregnancy.[384] Air Force hospitals provided that pregnancies could be terminated before twenty weeks' gestation, but it was an option that Struck did not take because she did not believe in abortion.[385] When Struck sued, the Air Force quickly granted her a waiver to the discharge rule, and the Solicitor General found that the case had become moot.[386] Ginsburg noted that if the Supreme Court had taken more time to reflect on Struck's case, they might have recognized, among other things, that "disadvantageous treatment of a woman because of her pregnancy and reproductive choice is a paradigm case of discrimination on the basis of sex[.]"[387]

When the Court decided *Roe v. Wade*, abortion law was in a state of change nationwide, and even the military provided facilities for abortion, as seen in *Struck v. Secretary of Defense*.[388] A decision of *Roe v. Wade*'s muscularity was not necessary, and *Roe* left virtually no state with laws conforming to the Court's definition of permissible abortion regulations.[389] In 1985, Ginsburg wrote:

> If Roe had left off at that point and not adopted what Professor [Paul] Freund called a 'medical approach,' physicians might have been less pleased with the decision, but the legislative trend might have continued in the direction in which it was headed in the early 1970's. '[S]ome of the bitter debate on the issue might have been averted,' Professor Freund believed; '[t]he animus against the Court might at least have been diverted to the legislative halls.'[390]

Ginsburg continued to support sex discrimination causes when she joined the dissent in *King v. Palmer*.[391] The *King v. Palmer* decision involved the awarding of attorney's fees in a sex discrimination case.[392] Mabel King

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[382] *Id.* (referring to *Struck v. Secretary of Defense*).

[383] 460 F.2d 1372 (9th Cir. 1971), *cert. granted*, 409 U.S. 947 (1972).

[384] *See Struck*, 460 F.2d at 1373.

[385] *See* Ginsburg, *Judicial Voice*, *supra* note 15, at 1200.

[386] *See Struck*, 409 U.S. at 1071 (remanding for consideration of mootness). Ginsburg later said of the case that "[a]t that point the Air Force decided it would rather switch than fight." Ginsburg, *Judicial Voice*, *supra* note 207, at 1201.

[387] Ginsburg, *Judicial Voice*, *supra* note 15, at 1202.

[388] *See id.* at 1201-02 (noting that the military was an institution not particularly known for avant-garde policy).

[389] *See id.* at 1205.

[390] Ginsburg, *Autonomy and Equality*, *supra* note 94, at 382 (internal citations omitted) (alterations in original).

[391] 950 F.2d 771, 785 (D.C. Cir. 1991).

[392] *See id.* at 773.

brought a gender discrimination claim against her employer, the District of Columbia, and ultimately received an award of back pay and retroactive promotion.[393] King had experienced no difficulty getting an attorney, who took the case expecting a contingency award.[394] The majority determined, however, that a contingency fee could never be allowed under Title VII.[395] Ginsburg joined the dissent.[396]

In the 1970's, Ginsburg anticipated a positive response to the Court's "dialogue with the legislature" in the adoption and ratification of the ERA.[397] Ginsburg's view was that the ERA would have clarified the meaning of the Fourteenth Amendment's extension of equal rights to women.[398] Twelve years later, in 1992, Ginsburg wrote that the ERA was in a mid-passage state. Ratification of the ERA would have given the Supreme Court "a clear signal—a more secure handle for its rulings than the fifth and fourteenth amendments."[399] One of Ginsburg's great disappointments was that the states failed to ratify the ERA.[400] At her confirmation testimony before the Senate Judiciary Committee, Ginsburg said that she remained an advocate of the ERA, because[401]

> I have a daughter and a granddaughter, and I would like the legislature of this country and of all the states to stand up and say we know what that history was in the 19th century and we want to make a clarion call that women and men are equal before the law just as every modern human rights document in the world does.[402]

In addition to advocating passage of the ERA, in 1992 and 1993, Ginsburg heard two more cases that, while not gender discrimination cases, allowed her to consider related issues and standards of review. *Federal Election*

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[393] *See id.* The plaintiff alleged that she was not promoted because another woman who was promoted instead of her had a sexual relationship with the person who made promotion decisions. *See* King v. Palmer, 778 F.2d 878, 879 (D.C. Cir. 1986) (Previous opinion prior to en banc ruling in 950 F.2d 771).

[394] *See King*, 950 F.2d at 773.

[395] *See id.* at 785 (Edwards, J., dissenting).

[396] *See id.* (Edwards, J., dissenting). Edwards' dissent argued that contingency fees were needed to induce attorneys to represent plaintiffs in Title VII actions. *See id.* at 790 (Edwards, J., dissenting).

[397] *See, e.g.*, Ginsburg, *ERA is the Way*, *supra* note 33 at 19; *see also* Ginsburg, *Judicial Voice*, *supra* note 15, at 1204.

[398] *See* Transcript, Confirmation Hearings, July 21 at 65, 72-76; *see also* Ruth Bader Ginsburg, *Men, Women, and the Constitution: The Equal Rights Amendment*, 10 COLUM. J.L. & SOC. PROBS. 77, 91-105 (1973).

[399] Ginsburg, *Sex Equality*, *supra* note 193, at 366.

[400] *See* 51 CONG. Q. WKLY. REP. 30, July 24, 1993, at 1956, *available in* 1993 WL 7766550.

[401] *See* 51 CONG. Q. WKLY. REP. 30, July 24, 1993.

[402] *Id.*

Commission v. International Funding Institute,[403] heard en banc, involved an action against political committees for use of publicly disclosed contributor lists in soliciting contributions.[404] Ginsburg and Judge Randolph, in separate concurrences, referred to a three-level system of scrutiny.[405] "The trichotomy of strict, intermediate, and rational-basis scrutiny with its judicial ranking of 'compelling,' 'important,' and 'legitimate' governmental interests, a trichotomy devised in equal protection cases, seems to me out of place when it comes to analyzing issues concerning the freedom of speech."[406]

In 1993, Ginsburg was on a panel for *Harding v. Gray*,[407] a reverse discrimination case involving a white male who lost a promotion to a black female.[408] The court found that, to make a prima facie case of reverse discrimination, the plaintiff must allege that he possessed superior qualifications and support the allegation with sufficient background facts.[409]

On March 19, 1993, when Justice Byron White announced that he would retire from the Supreme Court at the end of the term in June, President Clinton nominated Ginsburg to become the second female Associate Justice.[410] Members of both parties praised her nomination, and she was confirmed swiftly and easily.[411] Upon her appointment to the Court, commentators had difficulty predicting how Ginsburg would rule in certain cases because of her performance on the D.C. Circuit Court.[412] Ginsburg herself said in her confirmation testimony: "Were I to rehearse here what I would say and how I would reason on such questions, I would act injudiciously."[413] President Clinton said, "Ruth Bader Ginsburg cannot be called a liberal or a conservative. She has proved herself too thoughtful for such labels."[414]

The fact that she received bipartisan support suggested that she was viewed as a "centrist without an ideological agenda."[415] Liberals praised her advocacy

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[403] 969 F.2d 1110 (D.C. Cir. 1992).

[404] *See id.* at 1112.

[405] *See id.* at 1118 (Ginsburg, J., concurring).

[406] *See id.* at 1120 (Randolph, J., concurring).

[407] 9 F.3d 150 (D.C. Cir. 1993).

[408] *See id.* at 151. For further discussion of reverse discrimination, see *Adarand*, *infra* Part IV.E.

[409] *See id.*

[410] *Confirmation Hearings*, 139 Cong. Rec. S10083-01, *S10085 (daily ed. Aug. 2, 1993).

[411] *See id.*

[412] *See* 139 CONG. REC. S10083-01, *S10085 (daily ed. Aug. 2, 1993). Senator Hatch said of Ginsburg that "Judge Ginsburg has been anything but a lockstep liberal." *Id.* "Judge Ginsburg voted more consistently with her Republican-appointed colleagues than with her fellow Democratic-appointed colleagues." *Id.*

[413] 51 CONG. Q. WKLY. REP. 30, July 24, 1993.

[414] 51 CONG. Q. WKLY. REP. 25, June 19, 1993.

[415] *Id.* *See* Rosen, *supra* note 100, at 62. "[T]he same qualities that make it very unlikely that Ginsburg will ever be a visionary leader as an Associate Justice—her minimalism, her

prior to becoming a judge on the D.C. Circuit in 1980, while some feminists expressed concern over her *Roe v. Wade* criticism.[416] Conservatives may have been relieved by her conduct on the federal bench just as liberal allies may have been disappointed.[417] Most apparent, however, was the fact that Ginsburg would exercise restraint, using a methodical approach to cases, while searching for just the right case to advance the cause of women's equality.[418] The following section examines Supreme Court decisions on equal protection for women leading up to and including Ginsburg's *VMI* opinion. *VMI* perhaps was "just the right case" to allow Ginsburg to advance the standard of review for gender classifications to a new, higher level.

IV. JUSTICE GINSBURG, THE SUPREME COURT, AND GENDER DISCRIMINATION

Any review of gender discrimination and classifications must begin with an examination of the necessary judicial standard of review.[419] This section provides an overview of Ginsburg's work on the Supreme Court and the facts and proceedings of the most recent gender discrimination case.[420] A detailed analysis of the case opinion and a sampling of how the standard has been applied by the lower courts is then presented.[421] A recent racial classification case[422] is also examined to ascertain its possible impact on Ginsburg's *VMI* opinion.

A. Setting the Stage for VMI

Until 1976, no United States Supreme Court majority could agree on the appropriate standard of review for gender classifications.[423] After *Craig*,[424]

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jurisprudential as well as personal restraint and her emphasis on avoiding constitutional conflicts rather than engaging them—might make her an effective Chief Justice for a divided Court." *Id.*

[416] *See id. See also* Rosen, *supra* note 100, at 62. "[S]ome of Ginsburg's feminist colleagues were lukewarm about her Supreme Court candidacy on the grounds that her jurisprudence was too conservative and her vision of equal-treatment feminism not radical enough." *Id.*

[417] *See* 51 CONG. Q. WKLY. REP. 30, July 24, 1993.

[418] *See* Rosen, *supra* note 100, at 64.

[419] *See supra* Part III.C.

[420] *See infra* Part IV.A-C.

[421] *See infra* Part IV.C.

[422] Adarand Constructions, Inc. v. Pena, 515 U.S. 200 (1995) (holding that federal classifications based on race were subject to "strict scrutiny").

[423] *See supra* Part III.C.4.

[424] *See supra* Part III.

the Court applied the intermediate standard of review in gender classification cases. This intermediate test was amorphous,[425] and perhaps complicated by the unique history of women's rights and their status as a disadvantaged majority.[426]

Ginsburg's role in the development of the test for gender discrimination has been instrumental.[427] As a Justice, she has shaped the equal protection jurisprudence through a methodical and calculated approach. Following her appointment to the Supreme Court in 1993, Ginsburg heard two gender-related cases which allowed her to lay the foundation for the *VMI* case.[428]

In *Harris v. Forklift Systems, Inc.*,[429] the Supreme Court decided a Title VII action which arose out of a hostile work environment complaint.[430] In a concurring opinion, Ginsburg generally discussed discriminatory conduct in light of case law and statutory law, but planted a "building block" in a footnote.[431] Ginsburg revisited the requirement of an exceedingly persuasive justification[432] for a gender-based classification, then noted that "it remain[ed] an open question whether classifications based upon gender are inherently suspect."[433]

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[425] *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 743 (4th ed. 1991). As these commentators noted, this test is one "which neither prohibits the use of all gender classifications nor one which requires the justices to defer to legislative decisions." *Id.* The Court's decisions "appear to be *ad hoc* judgments based upon justices' perceptions of the gender classification at issue in each case." *Id.*

[426] *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST 164-70 (1980). Ely notes that prejudice against women is rare, but stereotyping is rampant. *See id.* at 164. It is this stereotyping which disadvantages women. Ely contends that the difficulty of this constitutional area is the assumption that some women have accepted the stereotypes and have done nothing to correct them. *See id.* at 165. However, Ely contends that constitutional suspicion turns on "blocked access" and not on electoral dynamics. *See id.* at 166. Ely concludes by stating that since women have gained power, official discrimination is unlikely and if women don't protect themselves, it will not be because they lack power, but because they choose not to exercise it. *See id.* at 169. Ginsburg would likely disagree, and her litigation strategy as an advocate suggests that stereotypes create harmful discrimination. *See supra* Part III.

[427] *See supra* Part II, III.

[428] *See infra* Part IV.C.

[429] 510 U.S. 17 (1993).

[430] *See id.* at 23 (holding that for the purposes of Title VII, conduct need not seriously affect the plaintiff's psychological well-being to be actionable as an abusive work environment).

[431] *See id.* at 26 n.* (Ginsburg, J., concurring).

[432] *See* Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982). The Court held that a party seeking to uphold a classification must carry the burden of demonstrating an exceedingly persuasive justification. *See id.* at 724 (citing *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981) and *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 273 (1979)). Interestingly, Justice O'Connor also noted that the question of whether gender classifications are inherently suspect remained open. *See Hogan*, 458 U.S. at 724 n.9.

[433] *Harris*, 510 U.S. at 26 n.* (Ginsburg, J., concurring).

Shortly after *Harris*, the Supreme Court decided an equal protection case involving the use of gender-based peremptory challenges to remove male jurors.[434] In *J.E.B. v. Alabama*,[435] the Supreme Court held that the equal protection clause forbade discrimination on the basis of gender and held that "gender, like race, is an unconstitutional proxy for juror competence and impartiality."[436] Justice Blackmun reviewed the discriminatory conduct under the exceedingly persuasive justification test and concluded that, because the peremptory challenges failed under that test, the Court did not need to address "whether classifications based on gender [were] inherently suspect."[437] To support this statement, Justice Blackmun cited three different cases,[438] including Ginsburg's footnote in her concurring opinion in *Harris*.[439] Thus, the "building blocks" and the votes for change continued to grow.[440] Although some have commented that *J.E.B. sub silentio* elevated gender to a suspect class,[441] *VMI* demonstrates that the standard of review is not quite strict scrutiny.

B. Facts of VMI and the Proceedings Below

In *VMI*, the United States sued the Commonwealth of Virginia alleging that the V.M.I.'s exclusively male admission policy violated the Equal Protection Clause of the Fourteenth Amendment.[442] V.M.I. is a state military college,

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[434] *See* J.E.B. v. Alabama, 511 U.S. 127 (1994).

[435] 511 U.S. 127 (1994).

[436] *Id.* at 129.

[437] *Id.* at 137 n.6.

[438] The three cases were *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993); *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982); and *Stanton v. Stanton*, 421 U.S. 7 (1975).

[439] *See J.E.B.*, 511 U.S. at 137 n.6 (quoting *Harris*, 510 U.S. at 26 n.*). Justice Blackmun's opinion cited the *Hogan* opinion in which Justice O'Connor wrote that because a gender-based classification failed the intermediate test, "we need not decide whether classifications based on gender are inherently suspect." *Id.* (quoting *Hogan*, 458 U.S. at 724 n.9). It remains to be seen whether these Justices are merely clarifying the issues before the court, or are characterizing their individual views.

[440] *See, e.g., J.E.B.*, 511 U.S. at 152 (Kennedy, J., concurring). Justice Kennedy, in his concurrence to *J.E.B.*, wrote that although the intermediate standard is not a very clear standard, the Supreme Court case law "does reveal a strong presumption that gender classifications are invalid." *Id.*

[441] *See* Trlica Cosby, Note, *Strictly Speaking: Viewing J.E.B. v. Alabama ex rel. T.B. as Sub Silentio Application of Strict Scrutiny to Gender-based Classifications*, 32 HOUS. L. REV. 869, 888 (1995)(arguing that the Supreme Court could only reconcile *J.E.B.* with *Taylor v. Louisiana* by using "strict scrutiny").

[442] *See VMI*, 518 U.S. at 523. In 1990, a female high school student filed a complaint with the Attorney General's office alleging that V.M.I.'s admission policy violated the Equal Protection Clause of the Fourteenth Amendment. *See id.* The Justice Department subsequently

funded by Virginia and subject to the authority of the Virginia General Assembly.[443] The mission of V.M.I. was:

> to produce educated and honorable men, prepared for the varied work of civil life, imbued with love of learning, confident in the functions and attitudes of leadership, possessing a high sense of public service, advocates of the American democracy and free enterprise system, and ready as citizen-soldiers to defend their country in time of national peril.[444]

V.M.I. accomplishes its mission through an "adversative" model of education "which features physical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values."[445] Entering students are subjected to a "boot camp" environment replete with uniforms, spartan barracks, and military drills.[446] V.M.I. attracts applicants because of its reputation as an extraordinarily challenging military school and because its alumni are exceptionally loyal to the school.[447]

At the trial level, the District Court for the Western District of Virginia ruled in favor of the Commonwealth of Virginia.[448] The District Court found that despite several reasons for allowing women into V.M.I.,[449] Virginia's rationale that admitting women would effectively end the present adversative method satisfied the constitutional test of *Hogan*.[450]

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filed this suit. *See id.*

[443] *See id.* at 520-21. V.M.I. was established as one of the first state military colleges. *See* 1839 Va. Acts ch. 20. The state of Virginia financially supports V.M.I. *See* VA. CODE ANN. § 23-92 (Michie 1993)(cited in *VMI*, 518 U.S. at 520-21).

[444] *See VMI*, 518 U.S. at 521-22 (quoting Mission Study Committee of the V.M.I. Board of Visitors, Report, May 16, 1986)(cited in *United States v. Virginia*, 766 F. Supp. 1407, 1425 (W.D. Va. 1991)).

[445] *See id.* (quoting *Virginia*, 766 F. Supp. at 1421). This adversative method "'dissects the young student,' and makes him aware of his 'limits and capabilities' . . ." *See VMI*, 518 U.S. at 522 (quoting a former Commandant of Cadets, Colonel N. Bissell)(cited in *Virginia*, 766 F. Supp. at 1421-22).

[446] *See VMI*, 518 U.S. at 522 (citing *Virginia*, 766 F. Supp. at 1422-32). V.M.I.'s adversative method is a hierarchical class system. *See id.* Entering freshmen, or "rats," are assigned a senior mentor as part of the "dyke" system. *See id.*

[447] *See id.* at 523 (quoting *Virginia*, 766 F. Supp. at 1421).

[448] *Virginia*, 766 F. Supp. at 1407.

[449] These reasons included the fact that some women would want the opportunity to attend V.M.I., the school could recruit sufficient numbers of women, some women are capable of all of the individual activities at V.M.I., and the training experience for all cadets would be better because of the mixed gender environment of the Armed Forces. *See id.* at 1412, 1414, 1437-38, 1441.

[450] *See id.* at 1415. The court used the traditional intermediate scrutiny formulation of the important governmental objective and substantial relationship between the objective and the means used to accomplish it. *See id.* The important objective was single gender education for

The Court of Appeals for the Fourth Circuit vacated the judgment of the District Court, holding that Virginia had not advanced any state policy by which it could justify a unique program for men and not for women.[451] The court suggested options to remedy the constitutional violation: admit women to V.M.I.; establish parallel institutions/programs; or abandon state support.[452] The Supreme Court denied *certiorari*.[453]

In response to the Fourth Circuit's holding, Virginia developed a plan calling for a separate "parallel" program for women titled the Virginia Women's Institute for Leadership ("VWIL").[454] The program would provide an all-female academic education with ROTC programs.[455] Virginia's task force proposed a cooperative method for VWIL, which would reinforce self-esteem, unlike the adversative method at V.M.I.[456] The financial endowments at both institutions were markedly different, as were the degree offerings, faculty qualifications, salaries, and post-graduation networks.[457] Virginia sought approval of its plan from the District Court, which decided that the VWIL program, despite the differences, met the requirements of the Equal Protection Clause.[458] The District Court found that "controlling legal principles" did not require Virginia to provide a mirror image of V.M.I. for women, despite the fact that some women may have desired the V.M.I. adversative model.[459] The District Court anticipated that V.M.I. and VWIL would "achieve substantially similar outcomes,"[460] and on that basis held that the requirements of the Equal Protection Clause were met.[461]

On appeal, the Fourth Circuit Court of Appeals affirmed the judgment.[462] The court reviewed the VWIL proposal deferentially, finding legitimacy in

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males and the means of establishing that objective was an all male institution. *See id.*

[451] *See* United States v. Virginia, 976 F.2d 890, 892 (4th Cir. 1992).

[452] *See id.* at 900.

[453] *See* United States v. Virginia, 508 U.S. 946 (1993).

[454] *See VMI*, 518 U.S. at 526.

[455] *See id.* at 527.

[456] *See id.* at 526-27. The VWIL task force even concluded that the military model of V.M.I. would be "wholly inappropriate" for most women. *See id.* (quoting *Virginia*, 852 F. Supp. at 476).

[457] *See id.* Indeed, perhaps the greatest post-graduation benefit of a V.M.I. degree is the prestige with which that degree is held in the South. V.M.I. alumni include business leaders, politicians and military generals. *See id.* at 520.

[458] *See Virginia*, 852 F. Supp. at 473.

[459] *See id.* at 481. This "separate and unequal" statement seems to fly in the face of gender discrimination jurisprudence. *See supra* Part III.

[460] *Virginia*, 852 F. Supp. at 481.

[461] *See id.* Based on the glaring deficiencies in the VWIL program, it is unclear how this conclusion was made. *See VMI*, 518 U.S. at 551-54.

[462] *See* United States v. Virginia, 44 F.3d 1229, 1232 (4th Cir. 1995).

Virginia's objective of providing single-gender education.[463] The court found that the benefits of an education at either V.M.I. or VWIL were substantively comparable and if certain conditions were met, the programs would be constitutionally sound.[464]

The Court of Appeals' dissent, however, criticized Virginia for not meeting the exceedingly persuasive justification standard set out in *Hogan*.[465] Virginia's purpose was "to exclude women [to allow V.M.I.] to preserve its historic character and mission."[466] The dissent further surmised that the VWIL program fell short of providing substantially equal benefits to men and women.[467] The court, however, denied rehearing *en banc*.[468] The dissenting opinion,[469] by four judges, stated that "[w]omen need not be guaranteed equal 'results' . . ., but the Equal Protection Clause does require equal opportunity to obtain these results; that opportunity is being denied here."[470] On appeal, the Supreme Court granted *certiorari*.[471]

C. The VMI Opinion

Ginsburg, writing for the majority,[472] crafted her opinion to answer two issues: first, whether Virginia's exclusion of women denied equal protection of the laws guaranteed by the Fourteenth Amendment; and second, whether V.M.I.'s maintenance of a single-sex public institution of higher learning

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[463] *See id.* at 1239.

[464] *See id.* at 1241. The court found that VWIL did lack the historical pedigree of V.M.I., but the educational opportunities were sufficiently comparable. *See id.* The conditions were if the VWIL program were undertaken with a high level of commitment and that men and women would not be denied the opportunity for an education with discipline and special training in leadership. *See id.*

[465] *See id.* at 1247 (Phillips, J., dissenting).

[466] *Id.* (Phillips, J., dissenting).

[467] *See id.* at 1250 (Phillips, J., dissenting). Both Judge Phillips and Justice Ginsburg compared the shortcomings of the VWIL program with the shortcomings of the University of Texas Law School's remedy struck down in *Sweatt v. Painter*, 339 U.S. 629 (1950). *See VMI*, 518 U.S. at 553.

[468] United States v. Virginia, 52 F.3d 90 (4th Cir. 1995).

[469] *See id.* Fourth Circuit rules permit rehearing *en banc* only by a vote of the majority of Circuit judges without regard to recusals. *See id.* at 91 n.1 (citing 4th Cir. Local Rule 35(b)). Therefore, seven votes were required to rehear. *See id.* Six judges voted to rehear the case *en banc*, four voted against rehearing, and three were disqualified or recused themselves. *See id.*

[470] *Id.* at 93 (Motz, J., dissenting).

[471] *See* United States v. Virginia, 516 U.S. 910 (1995). Perhaps the Court granted certiorari to quell the continuing litigation surrounding V.M.I. and the Citadel. For the most recent phase of the Citadel litigation, see *Faulkner v. Jones*, 136 F.3d 342 (4th Cir. 1998).

[472] *See VMI*, 518 U.S. at 519. Justice Ginsburg authored the majority opinion and was joined by five other justices. *See id.* Chief Justice Rehnquist wrote a concurring opinion, Justice Scalia dissented, and Justice Thomas recused himself. *See id.*

offended the Constitution, and, if so, what the appropriate remedy would be.[473] Ginsburg began the Court's opinion by revisiting *J.E.B.* and *Hogan*, and described the "core instruction" of these cases: "[p]arties who seek to defend gender-based government action must demonstrate an exceedingly persuasive justification for that action."[474] Ginsburg then revisited the hallmark cases in gender discrimination jurisprudence[475] and noted that "[t]oday's skeptical scrutiny[476] of official action denying rights or opportunities based on sex responds to volumes of history."[477]

Ginsburg then summarized the current legal standard for gender classifications: "[f]ocusing on the differential treatment or denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is exceedingly persuasive. The burden of justification is demanding and rests entirely on the State."[478] To meet this burden, Virginia had to show that the classification served "important governmental objectives and that the discriminatory means employed [we]re substantially related to the achievement of those objectives."[479] This justification had to be genuine and not invented *post hoc*.[480] The justification also may not rely on generalizations of gender differences.[481] While inherent physical differences remained between men and women, these differences were a "cause for celebration, but

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[473] *See id.* at 530-31 (citations omitted).

[474] *Id.* (citations and internal quotations omitted).

[475] *See id.* at 531-34. *See also* Frontiero v. Richardson, 411 U.S. 677 (1973) and Reed v. Reed, 404 U.S. 71 (1971). *See supra* Part III.

[476] Justice Ginsburg prefers the "exceedingly persuasive justification" phraseology. *See* Justice Ruth Bader Ginsburg, Address at the William S. Richardson School of Law (Feb. 3, 1998)(tape on file with the University of Hawaii Law Review). "Skeptical scrutiny" and other phrases have been used by commentators to capture the *VMI* standard. *See* Peter S. Smith, Recent Development, 23 J. CONTEMP. L. 279 (1997); *see also* Kupetz, Note, *Equal Benefits, Equal Burdens: "Skeptical Scrutiny" For Gender Classifications After United States v. Virginia*, 30 LOY. L.A. L. REV. 1333, 1335 (1997); Kathryn A. Lee, Note, *Intermediate Review 'With Teeth' in Gender Discrimination Cases: The New Standard in United States v. Virginia*, 7 TEMP. POL. & CIV. RTS. L. REV. 221 (1997)

[477] *VMI*, 518 U.S. at 531.

[478] *Id.* at 532-33 (internal quotations omitted). This is a new formulation of the *Hogan* test. Chief Justice Rehnquist noted in his concurrence that exceedingly persuasive justification was an "observation on the difficulty of meeting the applicable test, not as a formulation of the test itself." *Id.* at 559 (Rehnquist, C.J., concurring). Indeed, Justice Ginsburg herself termed this formulation "exceedingly persuasive justification" rather than use the traditional intermediate scrutiny language. *See id.* at 531.

[479] *Id.* at 533 (citations and internal quotations omitted). This is the *Hogan* "test" for gender classifications. *See* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982).

[480] *See VMI*, 518 U.S. at 533.

[481] *See id.* Perhaps this addresses the concern raised by Ely, *supra* note 426, about ridding the government of legislation and policies that foster stereotypes.

not for denigration of the members of either sex or for artificial constraints on an individual's opportunity."[482]

Ginsburg then concluded that Virginia had failed to meet its burden of showing an exceedingly persuasive justification for its policy excluding women from V.M.I.[483] The Court also found that VWIL did not cure the constitutional violation because it did not provide equal opportunity.[484] Accordingly, the first Fourth Circuit opinion was affirmed, and the second Fourth Circuit opinion was reversed.[485]

Because the lower courts had been persuaded by V.M.I.'s justifications, the Court's opinion separately addressed these arguments.[486] Ginsburg analyzed Virginia's proffered justifications of the benefits of single-sex education and the impact on V.M.I.'s "adversative" method that would result from the admission of women.[487] Both the District Court and Fourth Circuit agreed that single-sex education afforded benefits to both male and female students and that diversity in public educational institutions served the public good.[488] The Court, however, held that V.M.I. was not established to provide for diversity of educational opportunities, nor had it maintained its categorical exclusion of women to diversify the educational system in Virginia.[489] Ginsburg considered as a tenable justification, one which described actual state purposes, not "rationalizations for actions in fact differently grounded."[490]

Ginsburg found *Hogan* on point.[491] The *Hogan* Court undertook a "searching analysis [and] found no close resemblance between the alleged objective and the actual purpose underlying the discriminatory classification."[492] Ginsburg revisited some of the history of educational opportunities for women at institutions of higher education in Virginia and dismissed

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[482] *Id.* at 533.

[483] *See id.* at 534.

[484] *See id.*

[485] *See id.* The initial judgment of the Court of Appeals, 976 F.2d 890 (4th Cir. 1992), was affirmed; the final judgment of the Court of Appeals, 44 F.3d 1229 (4th Cir. 1995), was reversed, and the case was remanded. *VMI*, 518 U.S. at 558.

[486] *See id.*

[487] *See id.* at 534-35.

[488] *See VMI*, 518 U.S. at 524-30. *See also Virginia*, 766 F. Supp. 1407 (W.D. Va. 1991).

[489] *VMI*, 518 U.S. at 536-37.

[490] *Id.* at 535-36.

[491] *See id.* at 536. In *Hogan*, the state tried to justify a gender exclusion by asserting that it was engaged in educational affirmative action. *See Hogan*, 458 U.S. at 727. Justice Ginsburg found that Virginia's alleged pursuit of diverse educational opportunities was not supported by history. *See VMI*, 518 U.S. at 536.

[492] *Id.* (citations and internal quotations omitted).

Virginia's argument regarding its stated objective of diverse opportunities in higher education.[493]

The Supreme Court's decision in *Hogan* prompted V.M.I. to form a committee to examine its female exclusion policy.[494] V.M.I.'s "mission study" committee counseled against changing the exclusionary policy but primarily focused on the anticipated difficulties in recruiting women.[495] Nonetheless, the Court found "no persuasive evidence in th[e] record that V.M.I.'s male-only admission policy [was] in furtherance of a state policy of diversity."[496]

Virginia's second argument was that V.M.I.'s adversative method of education could not be made available, unmodified, to women.[497] At trial, expert witnesses testified that while some women could meet the physical standards V.M.I. imposed on men, educational experiences had to be designed around the rule and not the exception.[498] The Court found these generalizations of women by both Virginia and the District Court to be problematic.[499] The Court was unmoved by Virginia's prophecy of the destruction of the historic tradition of the adversative system.[500] Citing similar prophecies of difficulty surrounding the integration of women into law schools, medical schools, and the federal service academies,[501] Ginsburg dismissed this argument.[502] Accordingly, she concluded that Virginia had failed to provide

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[493] *See id.* at 536-39. "Neither recent nor distant history bears out Virginia's alleged pursuit of diversity through single-sex educational options." *Id.* at 536. A three judge Federal District court required Virginia to integrate the University of Virginia in 1970 stating: "Virginia may not now deny to women, on the basis of sex, educational opportunities at the Charlottesville campus that are not afforded in other institutions operated by the [S]tate." *Id.* at 538 (citing Kirstein v. Rector and Visitors of University of Virginia, 309 F. Supp. 184, 186 (E.D. Va. 1970)(internal quotations omitted)).

[494] *See VMI*, 518 U.S. at 539.

[495] *See id.*

[496] *Id.* (internal quotations omitted).

[497] *See id.* at 540.

[498] *See id.* at 540-41.

[499] *See id.* at 540-42. "State actors controlling gates to opportunity, we have instructed, may not exclude qualified individuals based on fixed notions concerning the roles and abilities of males and females." *Id.* at 541 (internal quotations omitted)(quoting *Hogan*, 458 U.S. at 725).

[500] *See id.* at 542-43.

[501] *See id.* at 543-45.

[502] *VMI*, 518 U.S. at 544. Justice Ginsburg found noteworthy and footnoted the fact that women cadets have graduated at the top of their class at every federal military academy. *See id.* at 545 n.13. V.M.I.'s goal of producing citizen-soldiers is a goal that "is great enough to accommodate women, who today count as citizens in our American democracy equal in stature to men." *Id.* at 545.

an exceedingly persuasive justification for its policy of men-only students at V.M.I.[503]

Having found a constitutional violation, Ginsburg next addressed Virginia's proposed remedy to the male-only admission policy, the VWIL program.[504] Ginsburg began by stating that "[a] remedial decree . . . must closely fit the constitutional violation; it must be shaped to place persons unconstitutionally denied an opportunity or advantage in the position they would have occupied in the absence of discrimination."[505] The remedy must eliminate the discriminatory effects of the past and bar the discrimination in the future.[506]

Virginia proposed VWIL in response to this litigation and held it out as a parallel program; however, VWIL failed to eliminate the effects of V.M.I.'s exclusionary policy.[507] In comparing V.M.I. and VWIL, the Court reminded Virginia that the violation was not in failing to provide programs for women, but in denying the opportunity for the women who wanted a V.M.I.-type education.[508] "It is on behalf of these women that the United States has instituted this suit, and it is for them that a remedy must be crafted, a remedy that will end their exclusion from a state-supplied educational opportunity for which they are fit. . . ."[509] The classification had to fail because no exceedingly persuasive justification for discriminatory classification existed, and the remedy did not alleviate that violation.[510]

D. Application of the VMI decision

The *VMI* opinion and its exceedingly persuasive justification standard has been followed by few courts.[511] Other courts, however, have chosen to follow the old standard of intermediate scrutiny.[512] Still others have explicitly stated

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[503] *See id.* at 546.

[504] *See id.*

[505] *Id.* at 547 (internal brackets and quotations omitted).

[506] *See id.*

[507] *See id.* at 548-49.

[508] *See VMI*, 518 U.S. at 549-50.

[509] *Id.* at 550-51. Beyond the military training, VWIL is substantially deficient in comparison to V.M.I.'s academic opportunities, financial backing, and post-graduation networks. *See id.* at 551-53.

[510] *See id.* at 555-56. Women entered V.M.I. for the first time in the fall of 1997. *See* Peter Flynn, *Second Female Cadet Quits VMI's Rat Line*, WASH. POST, Aug. 26, 1997, at B3.

[511] *See* Coalition for Economic Equity v. Wilson, 122 F.3d 692 (1997)(using the exceedingly persuasive justification standard as evidence justifying California's Proposition 209). *See also* Monterey Mechanical Co. v. Wilson, 1997 WL 538757 (9th Cir. 1997).

[512] *See* Keevan v. Smith, 100 F.3d 644 (8th Cir. 1996)(outlining the test for gender classification without the exceedingly persuasive justification part of the *VMI* test). *See also* Cohen v. Brown University, 101 F.3d 155, 183 n.22 (1st Cir. 1996), where the majority concluded that *VMI* did not add anything to the "analysis of equal protection challenges to

that *VMI* did not overrule *Hogan*, and that therefore, *Hogan* is still precedent.[513] This tension in application suggests that perhaps *VMI* is another building block which Ginsburg may use to take the final step to strict scrutiny.

E. Why Not Strict Scrutiny?

In *VMI*, Ginsburg had the opportunity to advance her lifelong position regarding judicial review of gender classifications.[514] She argued for strict scrutiny in the past;[515] the United States sought strict scrutiny at oral argument;[516] and she may have been able to win a majority of the court.[517] Perhaps though, as Justice Scalia pointed out in his dissent in *Edmonson v. Leesville Concrete*

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gender-based classifications that has not been part of that analysis since 1979 . . . . While the *VMI* court made liberal use of the phrase 'exceedingly persuasive justification,' and sparse use of [the old standard], the Court nevertheless [applied] *intermediate* scrutiny." *Id.* at 183 n.22 (emphasis added). The *Cohen* dissent cited the dissent in *VMI* for the proposition that *VMI* changed the level of scrutiny. *See id.* at 190-91 (Torruella, J., dissenting). The dissent did not consider the change a "matter of semantics" and urged re-examination of the issue under the appropriate standard of review. *See id.* at 191 (Torruella, J., dissenting). *See also* Engineering Contractors Ass'n of S. Fla. Inc. v. Metropolitan Dade County, 943 F. Supp. 1546, 1556 (S.D. Fla. 1996)(stating that the court "cannot say for certain whether the Supreme Court intended that the [*VMI*] decision signal a heightening in scrutiny of gender-based classifications.")

[513] *See* Engineering Contractors Ass'n of S. Fla. Inc. v. Metropolitan Dade County, 122 F.3d 895 (11th Cir. 1997). On appeal from a district court's ruling using the old intermediate standard, the Eleventh Circuit concluded that *VMI* did not change the scrutiny for gender-based classifications. *See id.* The opinion stated that the phrase exceedingly persuasive justification "connotes more intense scrutiny than do customary descriptions of intermediate scrutiny." *Id.* at 907. The Eleventh Circuit noted the increased scrutiny called for in *VMI*, but quoted *VMI* disclaiming an equation of gender classifications and racial ones, which would thereby invoke "strict scrutiny." *See id.* Finally, the court held that because *VMI* did not explicitly overrule prior precedent establishing the intermediate scrutiny standard, *VMI* cannot be read to establish a new standard. *See id.* at 908.

[514] *See supra* Parts II and III.

[515] *See supra* Part II.

[516] *See Transcript of Oral Argument before the Supreme Court*, in United States v. Virginia, 518 U.S. 515, *available in* WESTLAW. The Solicitor General apparently thought that *VMI* was the case to elevate the standard. Justice O'Connor questioned the Deputy Solicitor General about what aspect of the case demanded the Court to raise the scrutiny level. *See id.* at 12. The Deputy Solicitor General replied that the Court had stated that the question of the appropriate standard was an open one. *See id.* The Court (speaker unknown) replied that it wasn't an open question, because *Hogan* and *Craig* set up the appropriate standard. *See id.* at 13.

[517] Justice Ginsburg stated that while she argued for "strict scrutiny" as a lawyer, she wrote the *VMI* opinion for the Court, not herself. *See* Justice Ruth Bader Ginsburg, Address at the William S. Richardson School of Law (Feb. 3, 1998)(tape on file with the University of Hawaii Law Review).

Co.,[518] strict scrutiny would work against minorities.[519] Or perhaps, a recent racial classification case, *Adarand Constructors, Inc. v. Pena*,[520] had proven to be too dangerous to affirmative action.[521]

Adarand outlined the current justices' perception on governmental remedies to past racial discrimination.[522] A divided Court, with multiple concurring and dissenting opinions, held that race-based classifications, even those adopted by Congress, must satisfy strict scrutiny.[523] Ginsburg joined in the dissenting opinions by Justice Stevens and Justice Souter, and then wrote her own dissent. She attempted to harmonize the different opinions of the Court after first agreeing with Justice Stevens that the Judiciary owes "large deference" to Congress' competence and authority to "overcome historic racial subjuga-

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[518] 500 U.S. 614 (1991).

[519] *See id.* at 644-45 (Scalia, J., dissenting). While commenting on racially based peremptory challenges of jurors in civil trials, Justice Scalia noted that strictly racially based peremptory challenges can be used to "assure rather than to prevent a racially diverse jury." *Id.* at 644 (Scalia, J., dissenting). He predicted that striking down the race based peremptory challenges on Equal Protection grounds would have a high cost, "much of it will be paid by the minority litigants who use our courts." *Id.* at 645 (Scalia, J., dissenting).

[520] 515 U.S. 200 (1995).

[521] *See* Frank S. Ravitch, *Creating Chaos in the Name of Consistency: Affirmative Action and the Odd Legacy of Adarand Constructors, Inc. v. Pena*, 101 DICK. L. REV. 281 (1997)(concluding that *Adarand* has created anomalies in Equal Protection jurisprudence which will cause confusion for the lower courts and legislatures attempting to remedy past discrimination).

[522] *See generally id.*

[523] *See Adarand*, 515 U.S. at 227. The Court's holding in *Adarand* overruled the Court's holding in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990)(holding that "benign" federal racial classifications need only satisfy intermediate scrutiny). *See Adarand*, 515 U.S. at 227. Commentators have found it noteworthy that Justices Scalia and Thomas voted to strike down the statute, despite the fact that they most often rely on textualist and originalist arguments. *See* DANIEL A. FARBER ET AL., CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY 58 (Supp. 1997). In *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 520-24 (1989), Justice Scalia observed that "it is one thing to permit racially based conduct by the Federal Government—whose legislative powers concerning matters of race were explicitly enhanced by the Fourteenth Amendment, . . . and quite another to permit it by the precise entities against whose conduct in matters of race that Amendment was specifically directed [namely, the state]." *Id.* at 521-22 (Scalia, J., concurring). Justice Scalia has seemingly turned from his prior position that federal and state actors are treated differently under the Fourteenth Amendment. *See id.* Justices Scalia and Thomas favor a "color-blind" approach to equal protection jurisprudence. *See* John Marquez Lundin, *The Call for a Color-Blind Law*, 30 COLUM. J. L. & SOC. PROBS. 407 (1997)(arguing that the Scalia/Thomas interpretation is the truest to the history and text of the Fourteenth Amendment). *But see* Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245 (1997)(concluding that the original intent of the Fourteenth Amendment was not to preclude consideration of race, but merely the discrimination based on it).

tion."[524] Ginsburg wrote separately to "underscore[,] not the differences the several opinions in this case display, but the considerable field of agreement—the common understandings and concerns—revealed in opinions that together speak for a majority of the Court."[525]

Ginsburg summarized the conflicting opinions and reaffirmed that strict scrutiny was appropriate to differentiate between legitimate and illegitimate uses of race.[526] She read the majority opinion to use strict scrutiny to search out malign classifications which appeared benign.[527] "The Court's once lax review of sex-based classifications demonstrates the need for such suspicion."[528]

Finally, Ginsburg wrote that the majority's elaboration suggested that strict scrutiny was "fatal in fact" despite words in the majority opinion to the contrary.[529] Apparently envisioning a lowered strict scrutiny standard, Ginsburg wrote that "[c]ourt review can ensure that preferences are not so large as to trammel unduly upon the opportunities of others or interfere too

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[524] *Adarand*, 515 U.S. at 271 (Ginsburg, J., dissenting). Justice Stevens distinguished state from federal actors and chided the majority for failing to do so. *See id.* at 252-53 (Stevens, J., dissenting). Justice Stevens stated that while the equal protections of the Fifth and Fourteenth Amendments may encompass similar guarantees, it is an entirely different matter to not defer to Congress' constitutional authority. *See id.* at 253 (Stevens, J., dissenting).

[525] *Id.* at 271 (Ginsburg, J., dissenting).

[526] *See id.* at 275-76 (Ginsburg, J., dissenting). Justice Ginsburg wrote that "strict scrutiny" is useful to "distinguish" between a "No Trespassing" sign and a "welcome mat." *Id.* at 276 (Ginsburg, J., dissenting)(internal quotations and citations omitted). Perhaps the three-tiered standard of review has become outmoded. When asked about the impact of the three-tiered standard of review in the wake of *Adarand* and *VMI*, Justice Ginsburg noted that in *Plyler v. Doe*, 457 U.S. 202 (1982), the Court applied a different scrutiny to the statute in question. *See* Justice Ruth Bader Ginsburg, Address at the William S. Richardson School of Law (Feb. 3, 1998)(tape on file with the University of Hawai'i Law Review). She seemed to suggest that the Court has never strictly followed a three-tiered system. *See* Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985). It seems that Justice Ginsburg does not favor the three-tiered approach, yet is bound by precedent.

[527] *See Adarand*, 515 U.S. at 275-76 (Ginsburg, J., dissenting). Arguably, Ginsburg tried to preserve benign classifications which would benefit minorities who were shown to be disadvantaged. *See id.* (Ginsburg, J., dissenting).

[528] *Adarand*, 515 U.S. at 275 (Ginsburg, J., dissenting). Justice Ginsburg placed another building block into her foundation for *VMI*, reminding the court of its duty to be suspicious of these classifications. *See id.*

[529] *Id.* (Ginsburg, J., dissenting). The majority wrote that it wished to "dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" *Id.* at 237. The opinion continued that "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." *Id.* Justice O'Connor concluded by stating that "[w]hen race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the 'narrow tailoring' test . . . ." *Id.*

harshly with legitimate expectations of persons in once-preferred groups."[530] The impact of *Adarand* on equal protection jurisprudence is potentially broad;[531] thus *Adarand* was undoubtedly on Ginsburg's mind when she drafted the *VMI* opinion.[532]

F. *Scalia's Dissent and the Future of Single-Sex Schools*

In his dissenting opinion, Justice Scalia argued that the *VMI* exceedingly persuasive justification standard of review is certain to impact other single-sex institutions,[533] which are regulated under Title IX.[534] Title IX, which prohibits the use of federal resources to support gender discrimination, was amended in 1972 to exempt private undergraduate institutions.[535]

One of V.M.I.'s main arguments was the value of single-sex education.[536] The district court recognized that a substantial body of exceedingly persuasive evidence supported V.M.I.'s argument that some students benefit from attending a single-sex college.[537]

To establish a compelling educational interest to have a single-sex school, women's colleges, for example, would have to prove that either women learn

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[530] *Id.* at 276 (Ginsburg, J., dissenting).

[531] *See* Derrick A. Bell, Jr., *California's Proposition 209: A Temporary Diversion on the Road to Racial Disaster*, 30 LOY. L.A. L. REV. 1447, 1458 (1997)(emphasizing how *Adarand* turned "strict scrutiny" protection for minorities "on its head").

[532] *See supra* note 526.

[533] *See VMI*, 518 U.S. at 597-98 (Scalia, J., dissenting).

[534] 20 U.S.C. § 1681(a)(1988). Title IX provides that

> no person in the United States shall, on the basis of sex, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance, except that in regard to admissions . . . this section shall apply *only* to *public institutions* of undergraduate higher education.

Id. (emphasis added).

[535] 20 U.S.C. § 1681(a)(1)(1994).

[536] *See VMI*, 518 U.S. at 533, 535. *See also* William Henry Hurd, *Gone with the Wind? VMI's Loss and the Future of Single-Sex Public Education*, 4 DUKE J. GENDER L. & POL'Y 27, 36-37 (1997).

[537] *See* United States v. Virginia, 766 F. Supp. 1407, 1412 (W.D. Va. 1991). The court wrote:

> Students of both sexes become more academically involved, interact with faculty frequently, show larger increases in intellectual self-esteem and are more satisfied with practically all aspects of college experience (the sole exception is social life) compared with their counterparts in coeducational institutions. Attendance at an all-male college substantially increases the likelihood that a student will carry out career plans in law, business and college teaching, and also has a substantial positive effect on starting salaries in business. Women's colleges increase the chances that those who attend will obtain positions of leadership, complete the baccalaureate degree, and aspire to higher degrees.

Id.

so differently from men that segregated instruction is demonstrably better, or that women require a different kind of education than men.[538] Women's colleges would also have to prove that they had actually chosen a gender-specific means for educating women that they could not use if they had to accept men.[539] Some commentators have argued that "[t]his burden may prove impossible to meet."[540] Furthermore, Scalia argued that because government support, in the form of chartitable status under tax laws, is immensely important to private educational institutions, the *VMI* opinion threatened all single-sex private schools by potentially making this tax support unconstitutional.[541]

Ginsburg interpreted that the Court's holding in *VMI* has narrow precedential implications, because V.M.I. provides a unique educational opportunity that cannot be duplicated.[542] Ginsburg characterized V.M.I.'s gender-conscious policy as part of a larger historical problem of discrimination,[543] allowing for the interpretation that the benign intent of women's colleges might save them from similar charges.[544]

For women's colleges like Mount Holyoke, Smith, and Wellesley, the struggle following the *VMI* decision will be justifying sufficient grounds for excluding men from their undergraduate programs.[545] Like the Citadel prior to *Faulkner v. Jones*,[546] most women's colleges allowed members of the other sex to take classes but barred them from receiving undergraduate degrees.[547] While private women's colleges may be free from equal protection challenges because they are not state actors, these colleges may be in danger of losing

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[538] *See* Pyle, *supra* note 10, at 226.

[539] *See id.*

[540] *Id.*

[541] *See VMI*, 518 U.S. at 598-99 (Scalia, J., dissenting).

[542] *See id.* at 523. "We address specifically and only an educational opportunity recognized as . . . 'unique'." *Id.* at 534 n.7. The district court argued the uniqueness of the *VMI* experience. *See id.* at 534.

[543] *See id.* at 537. "[N]o struggle for the admission of women to a state university . . . was longer drawn out, or developed more bitterness, than that at the University of Virginia." *Id.* Historically, Virginia had opposed the admission of women to V.M.I. because of the belief that their presence might encroach on the rights of the men. *See id.* at 538. Virginia argued that including females would result in new problems of government, the need to change the old honor system, lowering of standards, and the loss of the glorious reputation of the university as an all-male school. *See id.* (citations omitted).

[544] *See* Pyle, *supra* note 10, at 217.

[545] *See id.* at 209.

[546] 51 F.3d 440 (4th Cir. 1995). Shannon Faulkner was a female who had been admitted to the Citadel, but whose admission was withdrawn when it was discovered that "he" was a "she." *See* Falkner v. Jones, 10 F.3d 226, 228 (4th Cir. 1993).

[547] *See* Pyle, *supra* note 10, at 209 n.1. "The Citadel did admit women to night classes, but barred them from its four-year, degree-granting program." *Id.*

government subsidies.[548] Private colleges such as Wellesley derive nearly 20% of their budgets from state, federal, and local government funds, not counting tax exemptions and financial aid to students.[549]

In spite of Ginsburg's insistence that the Court's holding in *VMI* is narrow and is due to the uniqueness of V.M.I.'s education, it is possible that the Court moved closer to the *Brown v. Board of Education*[550] conclusion that "[s]eparate educational facilities are inherently unequal."[551] Many women's colleges employ generalizations to justify excluding men which are based on gender stereotypes that might not survive an equal protection challenge under the exceedingly persuasive justification standard. In *Norwood v. Harrison*[552] in 1973, the Court found that the Constitution prohibited states from providing an all-white private school with textbooks.[553] In light of this ruling, it is difficult to see how any state can lawfully subsidize a single-sex private college. Additionally, women's colleges can no longer claim that they exclude men in order to provide women with scarce educational opportunities, because over 97% of all college women attend coeducational institutions, and with the integration of V.M.I. and the Citadel, only two all-male institutions remain.[554]

Only two justifications remain for all-women's colleges: 1) the exclusion is still needed to combat societal discrimination against women (the affirmative action defense); and 2) women have special educational needs that cannot be met by any coeducational institution (the special needs, special environment defense).[555] In light of *Adarand*, however, it seems unlikely that an affirmative action defense will not withstand scrutiny.[556] Moveover, it is a fact that more girls than boys go on to attain higher education, and most

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[548] *See VMI*, 518 U.S. at 569-70 (Scalia, J., dissenting). "[I]t is certainly not beyond the Court that rendered today's decision to hold that a donation to a single-sex college should be deemed contrary to public policy and therefore not deductible if the college discriminates on the basis of sex." *Id.* at 598.

[549] *See* Brief of Mary Baldwin College as *Amicus Curiae* in Support of Respondents at 22 n.13, 25, United States v. Virginia, 518 U.S. 515 (1996)[Nos. 94-1941, 94-2107]. Mary Baldwin College, a private women's school, argued that a ruling against V.M.I. would ultimately cost private women's colleges their government support, and few could survive without it. *See id.* at 22.

[550] 347 U.S. 483 (1954).

[551] 347 U.S. at 495.

[552] 413 U.S. 455 (1973).

[553] *See id.* at 464-65.

[554] *See* Pyle, *supra* note 10, at 233-35. The two all-male institutions are Wabash College in Crawfordsville, Indiana, and Hampton-Sydney College in Hampton-Sydney, Virginia. *See id.* at 235 n.99.

[555] *See id.* at 235-36.

[556] *See supra* note 521 and accompanying text.

continue to get better grades than boys.[557] The arguments that boys dominate classroom discussions and that female approaches are not recognized in coeducational classrooms bear little significance in light of today's reality that boys, not girls, are the underachievers.[558]

Despite the Constitutional challenges to single-sex educational institutions, a movement toward single-sex schools has taken root among educators desperate to find solutions to the problems facing their schools, especially in the nation's inner-city school districts.[559] The Young Women's Leadership School ("YWLS") in East Harlem, New York, is being investigated by the United States Department of Education because of complaints from the American Association of University Women, the National Organization of Women, and the ACLU that it discriminates against boys and segregates girls.[560] In Detroit, the school district proposed three schools exclusively for African-American males, but the proposal failed under an equal protection challenge.[561] Faced with the high cost of litigating its proposal, Detroit abandoned the program.[562] Two other single-sex public schools, Girls High in Philadelphia and Western in Baltimore, have survived by maintaining low profiles and by technically being open to both girls and boys, though few boys have expressed interest in applying.[563] The city of Ventura, California,

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[557] *See* Jean Stockard & J. Walter Wood, *The Myth of Female Underachievement: A Re-examination of Sex Differences in Academic Underachievement*, 21 AM. EDUC. RES. J. 825, 826 (1984).

[558] *See id.* at 826-36. However, researchers generally have found that while girls start out equal or even ahead of boys in math and science, they drop back in adolescence and are less likely to pursue these subjects in higher education. *See* Richard Lee Colvin, *California Tries Public Schooling Segregated By Sex*, HONOLULU ADVERTISER, Aug. 29, 1997, at A16.

[559] *See* Walteen Grady Truely & Martha F. Davis, *Public Education Programs for African-American Males: A Gender Equity Perspective*, 21 N.Y.U. REV. L. & SOC. CHANGE 725, 728-29 (1994).

[560] *See* Colvin, *supra* note 558, at A16. YWLS focuses on unconditional love, and students share classical music in the cafeteria with their mid-morning muffins. *See also* Tamara Henry, *A New Push for Girls-Only Public Schools*, USA TODAY, Sept. 18, 1996, at 1D, 2D.

[561] *See* Garrett v. Board of Educ., 775 F. Supp. 1004 (E.D. Mich. 1991). The academies planned to serve approximately 250 boys from preschool through fifth grade. *See id.* at 1006. *See also* Kristin Caplice, *The Case for Public Single Sex Education*, HARV. L.J. & PUB. POL'Y 227, 274 (1994). Of the 24,000 males enrolled in the Detroit public high schools, fewer than 39% became graduates,and boys were suspended three times more often than girls. *See id.* at 275-76. Detroit made 560 seats available for its all-male academy and 1200 boys applied. *See id.* at 277.

[562] *See Garrett*, 775 F. Supp. at 1014 (granting preliminary injunction after finding that great disruption would result if female students won suit and all-male schools were then aborted). Other all-male programs in Philadelphia and Miami have similarly been canceled by the threat of lawsuits. *See* Hurd, *supra* note 536, at 40.

[563] *See* Mary B. Tabor, *Planner of a New Public School for Girls Look to Two Other Cities*, N.Y. TIMES, July 22, 1996, at B1.

attempted to balance male dominance in math and science with all-female high school math classes, but had to resort to calling them classes for the "mathematically challenged" to offset a Department of Education challenge.[564]

One possibility for future single-sex schools, argued by Judge Phillips in his dissent from the Fourth Circuit's approval of VWIL in the *VMI* lower court action,[565] is the symmetrical model.[566] This year, a Stockton, California, public school adopted a "separate, but equal" program, becoming the first California public school where boys attend class only with boys, and girls only with girls.[567] Each academy was given $500,000 to be divided equally between the boys and girls, down to the penny, with the funds being spent in exactly the same way for each sex.[568] This fact "makes them unique in the country and, it is hoped, will help them withstand the sort of legal challenges that have been directed at experiments in one-sex education elsewhere."[569] Only strictly parallel programs, like the California Brookside Middle School academies, could hope to survive Ginsburg's exceedingly persuasive justification standard for equal protection gender claims under the Fourteenth Amendment.[570] Schools such as Girls High in Philadelphia and Western in Baltimore would probably meet the exceedingly persuasive justification standard, because technically, they do admit males. However, single-sex schools with no component school for the other sex, such as the Detroit boys' school, or YWLS for girls, would not survive the standard.

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[564] *See* Catherine Saillant, *West Ventura City Focus: Ventura, New Math Class Recruiting Method*, LOS ANGELES TIMES, Feb. 4, 1995, at B2. Although girls start equal with boys in math, research shows that by adolescence, boys are ahead. *See* Colvin, *supra* note 558, at A16. Ginsburg would argue that this approach reinforces inappropriate stereotypes of women, as did the exclusion of women from V.M.I. *See VMI*, 518 U.S. at 540.

[565] *See* United States v. Virginia, 44 F.3d 1229, 1242 (4th Cir. 1995)(Phillips, J., dissenting).

[566] *See id.* at 1250 (Phillips, J., dissenting). "If we looked for the arrangement most likely to survive scrutiny, it presumably would involve simultaneously opened single-gender undergraduate institutions having substantially comparable curricular and extra-curricular programs, funding, physical plant, administration and support services, and faculty and library resources." *Id.* (Phillips, J., dissenting).

[567] *See* Colvin, *supra* note 558, at A16. The academies at Brookside Middle School were the first of seven pairs of such academies expected to open in the State of California in 1997. *See id.*

[568] *See id.*

[569] *Id.*

[570] *See* Pyle, *supra* note 10, at 209 n.5. Scalia would likely disagree, however, as he says in his dissent: "By going through the motions of applying a balancing test—asking whether the State has adduced an 'exceedingly persuasive justification' for its sex-based classification—the Court creates the illusion that government officials in some future case will have a clear shot at justifying some sort of single-sex public education." *VMI*, 518 U.S. at 596 (Scalia, J., dissenting).

V. POTENTIAL BATTLEGROUNDS FOR THE VMI STANDARD

Ginsburg's opinions, through the years, demonstrate her belief that a good judge must be able to put aside her individual viewpoint and be able to examine each argument presented to her court equally.[571] This is the essence of an independent, unbiased judge,[572] and such a judge cannot be cast into any particular mold; her judicial performance is not readily predictable by "refer[ring] to her pre-bench activism."[573] Although Ginsburg would say that it is not easy to predict future performance of the Court by referring to past decisions with different facts,[574] the following discussion will use the exceedingly persuasive justification standard articulated in *VMI* to hypothesize about future gender discrimination cases.

A. VMI and the Impact on Women in the Military

Some commentators have speculated that the *VMI* opinion will end the combat exclusion of women in the United States Armed Forces.[575] This view casts broadly the effect of *VMI* without realizing the conflicting tensions inevitably caught in that net. This section illuminates the history of women in the military and the Supreme Court's historical involvement in military affairs. It closes with a discussion of how *VMI* might apply to women in the military.

1. Women and the military

Although women have participated in American military operations since the Revolutionary War,[576] until the 1970's no women were officially admitted

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[571] *See* Ruth Bader Ginsburg, *Inviting Judicial Activism: A "Liberal" or "Conservative" Technique?*, 15 GA. L. REV. 539, 555 (1981) [hereinafter Ginsburg, *Judicial Activism*].

[572] *See id.* at 555, 558.

[573] Smith, *supra* note 169, at 1907.

[574] *See* Ginsburg, *Judicial Activism supra* note 571, at 555.

[575] *See* Karen L. Kupetz, Note, *Equal Benefits, Equal Burdens: "Skeptical Scrutiny" For Gender Classifications After United States v. Virginia*, 30 LOY. L.A. L. REV. 1333, 1335 (1997). The author concludes that the current combat and draft exclusions in the military could not withstand the *VMI* test. *See id.* at 1376-77.

[576] *See* MAJOR GENERAL JEANNE HOLM, USAF (RET.), WOMEN IN THE MILITARY: AN UNFINISHED REVOLUTION 3 (1992). General Holm's work traces the involvement of women in military operations since the Revolutionary War. Some women surreptitiously posed as men in combat forces, while most became involved as nurses, cooks, and later as clerical staff. *See id.* at 3-6.

into a wholly integrated military.[577] When women entered the enlisted ranks, public pressure demanded women's admittance into the federal military academies.[578] The academies were reluctant, until Congress legislatively directed all such academies to admit women in the fall of 1976,[579] an important milestone in the history of women in the military.[580] This action merely laid the foundation for the true paradigm shift in the role of women in the military.[581] The hallmark event, which changed the landscape of women in the military, however, was the Persian Gulf War.[582]

In 1948, Congress passed the Women's Armed Services Act of 1948[583] which established limited peacetime opportunities for women in the Army, Navy, Air Force, and Marines.[584] Women were historically relied upon to fill critical needs in wartime, yet had few opportunities in the peacetime military.[585] This new legislation provided that the Air Force and Navy/Marine Corps could not assign women to combat aircraft or vessels, but that the Secretary of the Army could prescribe appropriate regulations governing the

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[577] *See id.* at 21-55, 246-59. Historically, women served in uniform in the Auxiliaries. *See id.* at 21-36. Later, women were allowed in certain support corps (Nursing, Judge Advocate General). *See id.*

[578] *See id.* at 305-12. The federal academies are the United States Military Academy, United States Naval Academy, United States Air Force Academy, United States Coast Guard Academy and the United States Merchant Marine Academy. *See id.* The Merchant Marine Academy and Coast Guard Academy acted prior to Congressional mandate to integrate. *See id.* at 309. *See also* 10 U.S.C. § 4342, *amended by* Pub. L. No. 94-106, 89 Stat. 537-38(1975).

[579] *See* HOLM, *supra* note 576, at 309-10. The Army, Navy, and Air Force totally opposed the admission of women to their respective Academies. *See id.* at 305-12.

[580] *See* HOLM, *supra* note 576, at 305. Members of the Defense Advisory Committee on Women in the Services ("DACOWITS") and women graduates of the service academies recently celebrated the 20th anniversary of women's admission into the service academies. *See* Melita Marie Garza, *Citadels of Sexism Pioneer Officers Recall Their Ordeals*, CHI. TRIB., Feb. 3, 1997, *available in* 1997 WL 3516729. Given the successes of women at the federal service academies, *see id.*, it seems unusual that the Citadel and V.M.I. took twenty years to integrate.

[581] *See generally*, Michael J. Frevola, *Damn the Torpedoes, Full Speed Ahead: The Argument for Total Sex Integration in the Armed Services*, 28 CONN. L. REV. 621 (1996)(encouraging military leaders to take one more step to allow women to fight alongside their male counterparts).

[582] *See* HOLM, *supra* note 576, at xiii.

[583] 34 U.S.C. § 105(j)(1948). This act provided for a permanent integrated, albeit combat-excluded, place in the regular and reserve military forces. *See id.* This integration act authorized integration, promotion rates, and authorized service Secretaries to assign women as they saw fit, with the exception of statutorily prohibiting women on combatant vessels and combatant aircraft. *See id.*

[584] *See* HOLM, *supra* note 576, at 113. The Coast Guard was not part of the new (in 1948) Department of Defense, and was thus not mandated to be integrated with the other Armed Forces. *See id.* at 129 n.1. The Coast Guard was only integrated upon legislation in 1974. *See id.*

[585] *See* HOLM, *supra* note 576, at xiv.

assignment of women.[586] The statute limited the numbers of women who could enlist in the military and placed a cap on the highest rank a woman officer could attain.[587] The statute also restricted the entitlements that women could receive for their dependents, where no restriction existed for men.[588]

The next critical juncture for women in the military came during the throes of the Vietnam War, when the United States faced mounting criticism over the continued draft of men to fulfill the needs of the military.[589] President Nixon formed a commission to develop a plan to move toward an all-volunteer force.[590] The trend towards a volunteer force prompted many debates about what role women would play in the volunteer military.[591] The proposed Equal Rights Amendment's impact on the military personnel policies provided a potent battleground for ERA foes.[592] Although an increasing number of women entered the military, they were faced with very limited job opportunities because of the exclusionary statutes.[593] Litigation to resolve these inequities was inevitable.[594] The exclusionary policies proved unworkable, especially in joint service operations.[595]

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[586] *See* HOLM, *supra* note 576, at 119-20. This distinction is crucial because that statute was the *only* combat exclusionary law. *See id.* When Congress repealed the statute after the Gulf War, the only hindrance to the assignment of women to all combat specialties were internal military regulations. *See id.* at 337-45.

[587] *See* HOLM, *supra* note 576, at 120. *See also* Pub. L. No. 80-625, 62 Stat. 356-75(1948). These restrictions were repealed in 1967 by Pub. L. No. 90-130, 81 Stat. 374-84(1967). *See* HOLM, *supra* note 576, at 120-21.

[588] *See* HOLM, *supra* note 576, at 120-21. This portion of the statute remained valid until *Frontiero v. Richardson*, 411 U.S. 677 (1973), overruled it as a violation of the Due Process Clause of the Fifth Amendment. *See id.* at 690-91. The statute in question was a military pay provision which had little to do with actual military operations. *See supra* Part III.C.

[589] *See* HOLM, *supra* note 576, at 246-59.

[590] *See id.* at 246-47.

[591] *See id.* at 262-64. Perhaps the most contentious was the applicability of the Equal Rights Amendment ("ERA") on the draft. *See id.* at 262. Opponents of the ERA argued passionately to "prevent sending the daughters of America into combat to be slaughtered or maimed by the bayonets, the bombs, the bullets, the grenades, the mines, the napalm, the poison gas, and the shells of the enemy." *Id.* at 264.

[592] *See id.* at 263. Indeed, then Assistant Attorney General William Rehnquist stated that the passage of the ERA would require Congress to draft both men and women or draft none and that Congress could not exclude women from combat duty. *See id.* He added that the ERA would not "require or permit women any more than men to undertake duties for which they are physically unqualified under some generally applied standard." *See id.* (quoting 118 CONG. REC. S. 4403 (daily ed. Mar. 21, 1972)).

[593] *See* 10 U.S.C. §§ 6015, 8549 (1991).

[594] *See* Rostker v. Goldberg, 453 U.S. 57 (1981). *See also* discussion *infra* Part VI.A.2.

[595] *See* HOLM, *supra* note 576 at 421-24. The Coast Guard has never been subject to the combat exclusion statute, and integrated its ships far sooner than the Navy. *See id.* at 421-22. The Coast Guard integrated two high endurance cutters in 1977. *See id.* at 333. Soon thereafter, two women were selected to command ninety-five foot patrol boats. *See id.* at 334.

On August 2, 1990, the future of women in the military shifted from the halls of Congress and the Pentagon to the Middle East, when Iraq invaded Kuwait.[596] Operation Desert Shield constituted the largest deployment of military women in United States history.[597] Unfortunately, the combat exclusionary statute and regulations caused confusion down to the unit level regarding women's role in the operation.[598] Military women were shot down, killed in SCUD missile attacks and taken prisoner by the Iraqis.[599] Women's contributions to the Gulf War were highly praised by everyone from field commanders to the Secretary of Defense.[600]

In the wake of the Gulf War, Congress repealed the statutory combat exclusion law.[601] Women are now allowed into virtually all specialty areas and face few statutory obstacles to their increased roles.[602] These integration

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Twenty years later, integration of Coast Guard vessels continues. *See* John Fritz, *Pulling their Weight, Men, Women Work Together on Cutter*, THE FLORIDA TIMES-UNION, June 30, 1997 at A1. The Coast Guard Cutter Pea Island, presently commanded by Lieutenant Andrea Marcille (a 1989 graduate of the United States Coast Guard Academy), is crewed by 50% women and 50% men. *See id.* Perhaps this ideal should be the standard and not the exception.

[596] *See* HOLM, *supra* note 576, at 438-71.

[597] *See id.* at 440. Over 40,000 women served in the combat theater. *See id.* at 469.

[598] *See id.* at 444-50.

[599] *See id.* at 455-61. Two women, one an Army truck driver and the other an Army surgeon, were captured by the Iraqis. *See id.* at 456-57. One reported to Congress that she had been sexually assaulted by an Iraqi after her capture. *See Combat Ready: Sexually Assaulted by One of her Iraqi Captors, Major Rhonda Cornum Still Thinks Women Should Go to War*, 138 CONG. REC. E2383-03 (daily ed. Aug. 5, 1992)(statement of Rep. Schroeder), *available in* 1992 WL 186428. Thirteen women died with their male counterparts. *See* HOLM, *supra* note 576, at 459.

[600] *See id.* at 470.

[601] Pub. L. No. 103-160, 107 Stat. 1659-60 (1993)(repealing 10 U.S.C. § 6015). The statute only governs assignment of women on combat vessels and combat aircraft. *See id.* Absent affirmative legislation, the Secretary of the Army still has the authority to assign women as the Secretary sees fit. *See id.*

[602] *See id.* The combat preclusion policies are discussed herein. Women are precluded by Navy policy from combat assignment in the Marine Corps and Seals. *See* Vice Admiral Patricia Tracey, *Gender Integrated Training, Testimony before Senate Armed Services Committee*, June 5, 1997, *available in* 1997 WL 11233329. Women are also precluded from service aboard submarines. *See* Comments of Admiral Jay Johnson, USN, U.S. NAVAL INSTITUTE PROCEEDINGS, June 1997, at 9. It has been noted that there "is no practicable method to integrate the submarine force." *See* Frevola, *supra* note 581, at 657. But, because only three percent of active duty personnel are assigned to submarines, the exclusion of women from this specialty is not likely to impose a "serious impediment to their becoming full-fledged members of our nation's combat force." *Id.* at 658. In the Air Force, over 99% of positions are open to women, the exception being Pararescue, Combat Controllers and any other position involved in direct ground combat. *See* Madeline Morris, *By Force of Arms: Rape, War and Military Culture*, 45 DUKE L.J. 651, 736 (1996). The Army has only 67% of its positions open to women. *See id.* The closed specialties include "all combat units below the brigade level; Special Operations Forces; all armor and infantry; cannon, artillery, and short-range air defense

efforts have not been without criticism or trauma,[603] but these efforts represent growing pains and not fatal flaws.[604] This article deals with the legal impediments to combat inclusion and not the physical ones.[605] However, tailoring assignment policies to a job's physical requirements will preclude a constitutional challenge.[606] If combat exclusion policies are challenged under

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artillery; and units that co-locate . . . with direct ground combat units." *Id.* at 736-37. The United States is not alone in its integration efforts, as Israel has decided to allow female medics to serve in enemy territory. *See Israeli Army to Let Women Cross Enemy Lines: Report*, AGENCE FRANCE-PRESSE, Feb. 11, 1998, *available in* 1998 WL 2219652. Australia too is considering a greater combat role for women. *See Australian Women May Be Given Combat Roles*, SINGAPORE STRAITS TIMES, Feb. 11, 1998, *available in* 1998 WL 7582570.

[603] *See* Mike Rosen, *No Foxes in Foxholes*, DENV. POST, July 26, 1996 at B7 (noting that 70 female soldiers serving in Bosnia were declared medically unfit for service due to pregnancy). *Cf.* Frevola, *supra* note 581, at 646-50. While noting that pregnancy can detract from a unit's combat readiness, Frevola finds the pregnancy argument incomplete. *See id.* at 647-49. In the Persian Gulf War, more men were unable to carry out their assignments than their female counterparts. *See id.* at 648. The most common male injuries were sports-related. *See id.* Recent experiences onboard a naval combatant demonstrates the fact that pregnancy is not a statistically significant staffing problem. *See* Commander Gerard D. Roncolato, USN & Lieutenant Commander Stephen F. Davis, Jr., USN, *A View From the Gender Fault Line*, U.S. NAVAL INSTITUTE PROCEEDINGS, Mar. 1998, at 102-04. Documenting their experiences as Captain and Executive Officer of the U.S.S. The Sullivans, Roncolato and Davis provide evidence that while pregnancy does impact a ship, it does not impact more than injuries incurred during basketball or flag football games. *See id.* at 102. Of the forty-three women assigned to the ship's commissioning crew, five were transferred ashore due to pregnancy. *See id.* This constitutes two percent of the crew. *See id.* Those vacancies in female berthing areas are quickly filled. *See id.* Roncolato and Davis voice the opinion that while it is challenging to integrate a naval combatant, it is the "right thing to do." *See id.*

[604] Some argue that sexual harassment and perhaps even rape stem from the masculine culture of the military and that changes to the combat exclusion rules will ensure the equal rights of women. *See generally supra* note 602; *see also* Kristin K Heimark, *Sexual Harassment in the United States Navy: A New Pair of Glasses*, 44 NAVAL L. REV. 223, 224 (1997). The integration efforts have been different among the services. While the Navy and the Air Force adopted more aggressive strategies, the Army chose a more "natural evolution." Dana Priest, *Army Changes Slowly, Women Find*, HONOLULU ADVERTISER, Jan. 12, 1998, at A1-A2. This policy has produced "meager gains" and has led to discrimination. *Id.* at A1.

[605] *See* Frevola, *supra* note 581, at 636-42. There seems to be confusion over requiring physical testing for fitness and using physical testing as a job criteria. Indeed, it is unclear for what purpose the services are testing. Either way, it is undisputed that men and women are not similarly situated anatomically. Men have less fat, higher cardiac output and greater upper body strength. *See* Yana Ginburg, *All Things Being Equal: Should Men and Women Meet the Same Physical Standards?*, NAVY TIMES, Sept. 22, 1997, at 14-15. While some argue that modern warfare makes this discussion irrelevant, *see* Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499, 532 (1991), the controversy remains. Frevola argues that because some men who fill combat billets are physically weaker than some women, the combat exclusion is overbroad and would fail judicial scrutiny. *See* Frevola, *supra* note 581, at 639-41.

[606] *See supra* note 592.

the Equal Protection Clause, the Supreme Court will have to balance the competing tensions between gender classifications and the appropriate standard of review.

2. *Standard of review, Justice Ginsburg and VMI*

The Supreme Court has, in the past, addressed constitutional violations within the military context.[607] However, as Justice Jackson noted, "judges are not given the task of running the Army . . . . The military constitutes a specialized community governed by a separate discipline from that of the civilians."[608] The appropriate standard of review for constitutional challenges to military policies is debatable.[609] Some consider the deference the Court pays to the military and political branches to be a "judicial abdication."[610] Others consider it appropriately extreme deference, "bordering on non-justiciability."[611]

Constitutionally-speaking, the War Powers of the government rest with Congress and the President, and not the judiciary.[612] Despite this Constitutional pedigree, the Court has never held that:

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[607] *See supra* Part III.

[608] Orloff v. Willoughby, 345 U.S. 83, 93-94 (1953)(holding that the judiciary could not compel the Army to commission a medical doctor who had filed a writ of *habeas corpus*).

[609] *See* Gilligan v. Morgan, 413 U.S. 1, 8 (1973)(holding that the judiciary was not suited to handle political questions involving the military). *See generally,* Barney F. Bilello, *Judicial Review and Soldier's Rights: Is the Principle of Deference a Standard of Review?*, 17 HOFSTRA L. REV. 465 (1989). The Court has decided cases involving judicial review of military decisions using different doctrines. *See, e.g.*, John N. Ohlweiler, *The Principle of Deference: Facial Constitutional Challenges to Military Regulations*, 10 J.L. & POL. 147 (1993)(outlining the Supreme Court's deference to Congress for matters governing the military); *see also* James M. Hirschhorn, *The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights*, 62 N.C. L. REV. 177 (1984)(outlining the Supreme Court's acknowledgment of the special relationships in the military which separate it from civil governance). Recently, the Court used the separation of powers doctrine in affirming a General Court Martial death penalty conviction, which was challenged on Eighth Amendment grounds. *See, e.g.*, Loving v. United States, 517 U.S. 748 (1996). Thus, once again the Court deferred to Congress and the President.

[610] *See* Pamela Jones, Note, *Women in the Crossfire: Should the Court Allow It?*, 78 CORNELL L. REV. 252, 276 (1993).

[611] *See* C. Thomas Dienes, *When the First Amendment is Not Preferred: The Military and Other 'Special Contexts'*, 56 U. CIN. L. REV. 779, 808 (1988). This deference is at its ultimate during wartime. *See infra* note 618.

[612] *See* U.S. Const. art. I, § 8 ("The Congress shall have Power . . . To declare War; . . . To raise and support Armies; . . . To provide and maintain a Navy; . . . [and] To make Rules for the Government and Regulation of the land and naval Forces.") *Id.* "The President shall be Commander in Chief of the Army and Navy of the United States . . . ." U.S. Const. art. II, § 2.

> military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service. But the special relationships that define military life have supported the military establishment's power to deal with its own personnel. The most obvious reason is that courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have.[613]

As the discussed case law suggests, the relationship between the civil courts and the military is quite unique because the Supreme Court generally defers to the judgments of the political branches.

Perhaps the clearest articulation of this deference is illustrated in *Rostker v. Goldberg*.[614] In *Rostker*, several men challenged the Military Selective Service Act ("MSSA")[615] on the grounds that it violated the Due Process Clause of the Fifth Amendment, because it required male registration but not female registration.[616] Justice Rehnquist noted the deference normally afforded Congressional decisions, but went further in his analysis.[617] Rehnquist wrote that this case "arises in the context of Congress' authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference."[618] Rehnquist wrote that the Constitution required deference to Congress.[619]

The Solicitor General argued that the Act should be rationally reviewed, rather than reviewed under the heightened scrutiny of gender-based discrimination.[620] Rehnquist, writing for the Court, rejected that position stating:

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[613] Chappell v. Wallace, 462 U.S. 296, 304-05 (1983)(Burger, C.J., for a unanimous court)(internal citations and quotations omitted).

[614] 453 U.S. 57 (1981).

[615] 50 U.S.C. § 451 *et seq.* (1976).

[616] *See Rostker*, 453 U.S. at 61.

[617] *See id.* at 64.

[618] *See id.* at 64-65. A vivid illustration of how this deference was carried to an extreme appears in *Korematsu v. United States*, 323 U.S. 214 (1944). For a discussion of *Korematsu* and the need for higher judicial review of civil liberty restrictions in the name of national security, *see* Eric K. Yamamoto, *Korematsu Revisited-Correcting the Injustice of Extraordinary Government Excess and Lax Judicial Review: Time for a Better Accommodation of National Security Concerns and Civil Liberties*, 26 SANTA CLARA L. REV. 1 (1986).

[619] *See Rostker*, 453 U.S. at 67-68. Commentators have stated that the deference doctrine should not "produce a knee-jerk reaction to the presence of an issue involving the military. Rather the strength of the claim to judicial deference is greater in some constitutional contexts and less persuasive in others." Karst, *supra* note 605, at 571. Karst draws parallels to the racially segregated military and argues to suggest that judges are "incompetent to understand that discrimination betrays a fundamental conception of judicial review that has prevailed for half a century." *Id.* at 580.

[620] *See Rostker*, 453 U.S. at 69.

> we do not think that the substantive guarantee of due process or certainty in the law will be advanced by any further refinement in the applicable tests as suggested by the Government. Announced degrees of deference to legislative judgments, just as levels of scrutiny which this Court announces that it applies to particular classifications made by a legislative body, may all too readily become facile abstractions used to justify a result.[621]

Justice Rehnquist reviewed the legislative debate governing both the draft and women's involvement in the Armed Forces and held that the MSSA was constitutional.[622]

While *Rostker* has not been overruled, the combat exclusion statutes have been repealed,[623] thus leaving the military service combat exclusion policies further exposed to constitutional challenge.[624] The direct application of *VMI* to the United States military has not occurred. However, there are clues as to how Ginsburg would rule on such a challenge.

In a recent concurring opinion, Ginsburg stated that "men and women in the Armed Forces do not leave constitutional safeguards and judicial protection behind when they enter military service."[625] She quoted Justice Douglas who stated that:

> it is the function of the courts to make sure . . . that the men and women constituting our Armed Forces are treated as honored members of society whose rights do not turn on the charity of a military commander . . . . A member of the

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[621] *Id.* at 69-70 (internal emphasis omitted).

[622] *See id.* at 83.

[623] *See supra* note 601.

[624] Some broad clues about potential litigation can be drawn from litigation involving the exclusion of homosexuals from military service. *See generally* MELISSA WELLS-PETRY, EXCLUSION: HOMOSEXUALS AND THE RIGHT TO SERVE (1993). Typically, the courts have appropriately deferred to the military determinations about who or who is not qualified for military duty. *See id.* at 6. The courts have allowed the military to distinguish (Wells-Petry uses the term "discriminate," but the authors prefer a more neutral term) between persons based on parental status, criminal background, disability, height, weight, language, age, etc. *See id.* at 5. A Seventh Circuit case involving a soldier barred from re-enlistment based on homosexual status lends insight. In *Ben-Shalom v. Marsh*, the court rejected an equal protection challenge by a homosexual discharged from the military. *See* 881 F.2d 454 (7th Cir. 1989). The court used rational basis scrutiny to uphold the Army's exclusion regulation. *See id.* at 465. Deferring to the Army, the court stated that "[t]he complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches." *Id.* at 466 (quoting *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973)). These cases suggest that it is unlikely that any court would interfere with a military determination that gender integration is incompatible with the military's primary function, combat.

[625] Weiss v. United States, 510 U.S. 163, 194 (1994)(Ginsburg, J., concurring). It is noteworthy that many of the early gender discrimination cases arose from issues surrounding women in the military. *See supra* note 588 (discussing *Frontiero*).

> Armed Forces is entitled to equal justice under the law not conceived by the generosity of a commander but as written in the Constitution . . . .[626]

Ginsburg's words remind the Court that, despite deference, the Constitution still governs the policies of the military, and the Court can and will hold accordingly.

3. *The impact of VMI on the military*

Some have written that under *VMI*'s standard of review, all gender exclusion will fail a constitutional challenge.[627] However, the Court deferred to Congress the last Equal Protection challenge regarding exclusions of women.[628] While the statutory authority for gender exclusion has been repealed,[629] the military is still on solid ground because of the Court's unwillingness to "run the Army."[630] As far as a direct application of the *VMI* holding to military policies, the Court's consistent standard of deference will likely preclude any application of the exceedingly persuasive justification standard to combat exclusion policies.[631]

Given the enormous successes of women in the military, and the military's effectiveness in the Persian Gulf War, military leaders should encourage the sensible integration of women into *all* areas of military operation. *VMI* did not change any judicial standard of review for the military,[632] and it seems that there is no willingness on the part of the Court to change the deferential review.[633] In a different opinion, Ginsburg articulated that the courts should

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[626] *Weiss*, 510 U.S. at 195 (quoting *Winters v. United States*, 89 S. Ct. 57, 59-60 (1968)(Douglas, J., in chambers).

[627] *See* Kupetz, *supra* note 575, at 1374-76.

[628] *See Rostker*, 453 U.S. at 83.

[629] *See* Pub. L. No. 103-160, 107 Stat. 1659-60 (1993).

[630] *See supra* note 613.

[631] *Cf.* Kupetz, *supra* note 575; *see also supra* note 576. Commentators have noted that with the arguable higher standard of review for gender classifications from *VMI* and with the lack of statutory support for combat exclusion, the Court would be unable to defer to the military. *See* Steven A. Delchin, Comment, *United States v. Virginia and Our Evolving "Constitution": Playing Peek-A-Boo with the Standard of Scrutiny for Sex-Based Classifications*, 47 CASE W. RES. L. REV. 1121 (1997).

[632] *See VMI*, 518 U.S. at 515. While some may contend that V.M.I. was a state *military* institution, the transcript of oral arguments before the Supreme Court demonstrates that the discussion was about V.M.I. as an *educational* institution and not a military one. *See* 1996 WL 16020, Transcript of Oral Argument before the Supreme Court. Justice Ginsburg herself is quick to state that *VMI* was not about the military, nor was it about single gender education. *See* Justice Ruth Bader Ginsburg, Address at the William S. Richardson School of Law (Feb. 3, 1998)(tape on file with the University of Hawai'i Law Review). She limits the holding to a unique educational opportunity denied to women based on sex. *See id.*

[633] *See, e.g.*, Rostker v. Goldberg, 453 U.S. 57 (1981).

protect the constitutional interests of the members of the Armed Forces.[634] Despite a more enlightened view of women in combat, in both society and Congress, it would be erroneous to predict that the Supreme Court today is ready to abandon the traditional deference to the war fighting branches of government. While military leaders *should* take immediate steps to fully integrate all branches of service, it is unlikely that a legal challenge to these exclusionary policies of the United States military would trigger the exceedingly persuasive justification standard of *VMI*.

B. Title IX and College Athletics

In addition to education and the military, the *VMI* exceedingly persuasive justification standard is likely to have an impact in intercollegiate athletics. In this area, physical differences between men and women have been allowed as justification for unequal treatment. The following section examines potential gender inequalities in collegiate athletic programs under the *VMI* standard.

One of the remaining areas of established male dominance is college athletics, where football is still king and scholarship values for women fall below those for men. Women are physically different than men, and it is in college athletic programs and the military where physical strength is a factor, and differences in the sexes become apparent.[635] The Title IX provision that no person in the United States shall, on the basis of sex, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance, also covers intercollegiate athletic programs at public institutions.[636] One way that institutions can comply with Title IX in intercollegiate athletic programs is to provide opportunities for men and women that are "substantially proportionate to the enrollment numbers."[637] Thus, if the female enrollment is fifty-one percent of the college or university, then fifty-one percent of the athletic

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[634] *See Weiss*, 510 U.S. at 194-95.

[635] *See generally* Sherry Broder & Beverly Wee, *Hawaii's Equal Rights Amendment: Its Impact on Athletic Opportunities and Competition for Women*, 2 U. HAW. L. REV. 97 (1979)(criticizing the use of inherent physical differences between men and women, such as the presence of breasts, as a reason for discriminating against women).

[636] 44 Fed. Reg. at 71, 413-23 (1979).

[637] *Id.* For example, if the enrollment is 50 percent male and 50 percent female, an athletic program should have an equal number of programs and equal funding for both sexes. *See* Steve Marcus, *Title IX Needs NCAA's Push*, NEWSDAY, June 22, 1996, at A34. Yet most colleges have about 70% male athletes. *See* Brian L. Porto, *The More Things Change, The More They Stay the Same: Title IX and the Battle for Gender Equity in College Sports*, 41 NOV. RES GESTAE 26, 27 (1997)(exploring options which would enable colleges to fully comply with Title IX).

opportunities must be for women. The second method of compliance is that if members of one sex are underrepresented, schools must show a "history and continuing practice of program expansion."[638] A school can comply under this method by continuing to add women's sports—a practice many schools currently follow. The third way of complying provides that where members of one sex are underrepresented and the institution cannot show a continuing practice of program expansion, it can demonstrate that the present program fully and effectively accommodates the interests and abilities of the members of the underrepresented sex.[639] In the past, colleges have tended to interpret this third criteria to mean that "if no one complains, the [women's athletics] program is up to speed."[640]

World record-holding track and field star Jackie Joyner-Kersee has said that instead of becoming a member of the track team, she almost became a pom-pom girl, because girls' track practices were scheduled so late in the day that her mom was ready to pull her out.[641] Joyner-Kersee was ten when Title IX was passed. Years later, she received an athletic scholarship to UCLA.[642] Because of Title IX, women's programs must be substantially equal to men's, not only in numbers or percentages of participants, but also in facilities and resources. Joyner-Kersee is only one of Title IX's success stories.[643] Statistics show that since Title IX was passed in 1972, the number of women participating in National Collegiate Athletic Association ("NCAA") sports has increased from 31,852 to 123,207 in 1995-96,[644] and to more than 135,000 in 1997.[645] Grave disparities still exist, however. In 1995-96, men at NCAA Division 1-A[646] schools received $165 million in scholarships, while women at those schools received $88 million.[647] And in 1997, seventy-nine percent

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[638] 44 Fed. Reg. at 71, 418. However, that expansion could be "as little as hiring a female assistant coach." Marcus, *supra* note 637, at A34.

[639] 44 Fed. Reg. at 71, 418.

[640] Marcus, *supra* note 637, at A34.

[641] *See Title IX at 25: Limited Progress*, DES MOINES REGISTER, June 23, 1997, at 1.

[642] *See id.*

[643] Female athletes also experienced great success at the 1996 Summer Olympic Games, winning 19 of the 44 gold medals for the United States. *See* Porto, *supra* note 637, at 26.

[644] *See Sports Spending: National Federation of State High School Associations, NCAA and Women's Sports Federation*, SAN FRANCISCO EXAMINER, July 6, 1997, at C8.

[645] Note, *Cheering on Women and Girls In Sports: Using Title IX to Fight Gender Role Oppression*, 110 HARV. L. REV. 1627, 1627 (1997). "Close to 2.4 million girls play organized high school sports, up from 300,000 in 1971." *Id.* (citations omitted).

[646] The NCAA offers four levels of competition in football and three levels in other sports. In football, Division 1A is the most expensive and competitive. *See* Porto, *supra* note 637, at 27 n.22. Schools can choose to compete at a lower level. *See id.*

[647] *Sports Spending*, *supra* note 644, at C8.

of the athletic department operating expenses at Division 1-A schools was spent on men, with twenty-one percent on women.[648]

Title IX's twenty-fifth birthday stirred a variety of reactions and responses, from a Presidential proclamation by Clinton that its reach be expanded,[649] to demands from the Women's Sports Foundation and other women's sports groups that the main offender, college football, be downsized.[650] Interestingly, the NCAA found that although women's sports opportunities had increased, the dollar gap between spending on men's and women's sports had actually widened.[651] "So far, gender-equity progress has been piecemeal and slow—mainly reacting to court decisions."[652] As a result, women's advocates have called for a reduction in the eighty-five scholarship limit for Division 1-A football, a number that creates an almost immediate imbalance in spending between male and female sports.[653]

Many interpreted the Supreme Court's non-action on Title IX in *Cohen v. Brown*[654] as a clear message that universities must not only take Title IX considerations for gender equality seriously, but that they must take appropriate, rapid action.[655] In *Cohen v. Brown*, a much publicized case, Brown University was sued for its plans to drop women's volleyball and

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[648] *See id.*

[649] *See Title IX at 25: Limited Progress*, *supra* note 641, at 1. President Clinton declared Title IX a success that needs expanding, noting that the number of high school girls playing competitive sports leaped from 300,000 in 1972 to more than 2.3 million in 1996. *See id.* He also said: "Too many schools still drag their feet and lag behind in their responsibility to our young women and girls," and announced plans for federal agencies to crack down on those who lag behind. *Id.* Clinton also announced plans to eliminate the Title IX exemption for military service academies and other federal facilities. *See id.*

[650] *See id.* A study by the Women's Sports Foundation showed that schools still spend less on women's sports, pay less to coaches of women's teams and involve a far smaller percentage of their women in sports than they do men. *See id.*

[651] *See id.*

[652] *Id.* (quoting Deborah Brake of the National Women's Law Center).

[653] *See id.*

[654] 101 F.3d 155 (1st Cir. 1996).

[655] *See* Patrick McManamon, *Football and Gender Equity No Easy Mix*, HOUSTON CHRON., Apr. 27, 1997, at 1 (quoting Myles Brand, President, Indiana University). In fact, in the 1990's, women have routinely won cases under Title IX against colleges for failing to accommodate their athletic interests. *See, e.g.*, Favia v. Indiana Univ. of Penn., 7 F.3d 332 (3rd Cir. 1993)(challenging the college's decision to disband women's field hockey and gymnastics teams); Pederson v. Louisiana State Univ., 912 F. Supp. 892 (M.D. La. 1996)(holding that a 20-point disparity between the percentages of women in the student body and on athletic teams indicated failure to meet Title IX standards of substantial proportionality); Roberts v. Colorado State Bd. of Agric., 998 F.2d 824 (10th Cir. 1993)(finding that the college violated Title IX when it disbanded the women's softball team); Cook v. Colgate Univ., 992 F.2d 17 (2d Cir. 1993)(ordering the college to upgrade its women's ice hockey club to varsity level).

gymnastics.[656] The school had sixteen men's and sixteen women's sports in 1991 when budget cuts forced the elimination of two sports each for men and women.[657] Female athletes sued, and the court found that Brown University's intercollegiate athletics program was not in compliance with Title IX.[658]

In April, 1997, the United States Supreme Court rejected Brown's appeal of the lower court ruling.[659] Brown University lawyers maintain that the ruling will require colleges nationwide to offer varsity opportunities on a stark numerical quota.[660] Coupled with President Clinton's proclamation that every federal agency had ninety days (from approximately June 23, 1997) to submit a "new and vigorous enforcement plan" to strengthen the law's "anti-discrimination punch,"[661] major college athletic programs are expressing concern. Many see college football as the "900 pound gorilla" in Title IX compliance.[662]

According to athletic directors, football is the primary reason most schools are not in compliance with Title IX.[663] Even though football scholarships have been reduced from 105 to 85 for NCAA Division 1-A schools in the past two decades, the sport continues to create an imbalance in intercollegiate participation.[664] "There's just not a female sport to offset football in numbers of players needed . . . . Until there is a sport like that for women, the ratio is going to stay out of balance in spite of all the considerable efforts being made to get things even."[665]

Cutting the number of football scholarships, many contend, would hurt football programs and funding for all athletics.[666] One athletic director said:

> It's already reached the point that most programs don't have spring scrimmage games. Most coaches say there aren't enough numbers because with the freshmen having not arrived yet and the seniors from the previous season gone, there's not enough depth to field two teams. Plus, they're afraid of injuries.

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[656] *See Cohen*, 101 F.3d at 161, 163.

[657] *See id.*

[658] *See id.* at 162.

[659] *See* Brown Univ. v. Cohen, 520 U.S. 1186 (1997) (denying certiorari).

[660] *See Cohen*, 101 F.3d at 155.

[661] Ted Lewis, *Law on Their Side: Title IX Has Slowly But Surely Enabled Women to Realize Equality in Sports*, NEW ORLEANS TIMES-PICAYUNE, June 23, 1997, at D1.

[662] *See* Caulton Tudor, *Football Stymies Title IX*, NEWS AND OBSERVER, Raleigh, N.C., Apr. 27, 1997, at C1.

[663] *See id.*

[664] *See supra* note 653 and accompanying text.

[665] Tudor, supra note 662, at C2 (quoting Florida State Athletic Director Dave Hart).

[666] *See id.* "I can tell a difference between now and the days when 95 was the scholarship limit," North Carolina State football coach Mike O'Cain said. *Id.* "The game being played now is not as good as it was then . . . . The smaller number of scholarship players you have, the fewer top-line players you have." *Id.*

> The scholarship numbers for football are never going to go up again, that's for sure. And you've got two forces—Title IX and finances—working in the opposite direction, so you never say something's impossible. A lot of people probably never thought the limit would be down to 85. But to go lower would be something I wouldn't want to see done.[667]

Many schools argue that funding for women's sports is necessarily reliant on college football revenues. At Syracuse University, for example, ninety-eight percent of the revenues come from men's football and basketball.[668] San Diego State University's athletic director said, "football is [the] only revenue-producing sport."[669] At the University of Nebraska, the very successful Cornhusker football program provides money for additional women's scholarships in other sports.[670]

Title IX critics argue that Title IX has resulted in reverse discrimination, where men's programs are cut to even the balance, and significantly more scholarships are given to women than men in a number of sports.[671] Schools have responded to inequity by creating more women's teams[672] and cutting men's scholarships across the board.[673] Some non-revenue producing men's sports have even been summarily eliminated.[674] NCAA Division 1-A men's gymnastics has decreased from fifty-nine teams in 1982 to twenty-seven in 1997; wrestling has lost forty-eight programs in that time period.[675] "These

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[667] *Id.* (quoting Clemson Athletic Director Bobby Robinson). However, professional football teams manage to play with just 47 players on their rosters, and ordinarily only 40 to 45 players on a college team will play in any game. *See* Susan M. Shook, Note, *The Title IX Tug-of-War and Intercollegiate Athletics in the 1990's: Non-Revenue Men's Teams Join Women's Athletes in the Scramble for Survival*, 71 IND. L.J. 773, 811 (1996).

[668] *See* McManamon, *supra* note 655, at 1.

[669] Ed Graney, *Women In College Sports: Revenue Holds Key to Gender Equity*, SAN DIEGO UNION-TRIBUNE, Apr. 22, 1997, at A1.

[670] *See* Harold W. Anderson, *Gender Equity Has Downside, Too*, OMAHA WORLD-HERALD, Nov. 24, 1996, at 1.

[671] *See id.* For example, the University of Nebraska gymnastics team has 12 scholarships for women, while the men's team has 6.3, and the women's track and cross-country team has 18 compared to the men's 12.6 at Nebraska. *See id.* Brooklyn College chose to disband all of its teams and cease intercollegiate competition in 1992, as a result of a review that found it was not in compliance with Title IX. *See* T. Jesse Wilde, *Gender Equity in Athletics: Coming of Age in the '90s*, 4 MARQ. SPORTS L.J. 217, 244-45 (1994).

[672] Women's Division 1-A soccer teams have increased from 91 to 186 in the past five years. *See* Lewis, *supra* note 661, at D1.

[673] *See id.*

[674] *See id.* It is possible that the Title IX remedial measures for women's athletics which sometimes encourage schools to eliminate or curtail sports for men could face an equal protection challenge in the future. *See infra* notes 679-81 and accompanying text.

[675] *See* Lewis, *supra* note 661, at D1.

are the kind of things that give Title IX a bad name," said one Olympic wrestler, whose wrestling program at Syracuse was eliminated.[676]

The *Cohen v. Brown* decision has "colleges looking to add sports such as crew and ice hockey to build participation numbers even though the talent pool might be questionable and interest level low."[677] At Nebraska, the women's bowling club was raised to the status of a scholarship-awarding intercollegiate sport in an effort to increase the number of female athletes.[678] At the University of Texas at Arlington, which ranks thirteenth among 305 Division 1-A schools in proportion of female athletes (forty-seven percent) to female students (fifty percent), the baseball coach said, "I love seeing women's sports get ahead, but it's being done at the expense of men's programs."[679] Recently, in *Lichten v. State University of New York at Albany*,[680] student athletes brought a lawsuit challenging the state university's determination to cancel four varsity intercollegiate sports teams.[681] The sports eliminated were wrestling, men's tennis, and men and women's swimming.[682] At the same time, women's field hockey and golf were added to achieve "a more gender equitable [intercollegiate athletic] program."[683] The court found there was no improper determination to eliminate the sports.[684] Applying the *VMI* standard to intercollegiate sports programs may increase this trend in order to bring women's participation levels up to men's.

Legal challenges, in light of *Cohen v. Brown* and President Clinton's proclamation, are on the way. On June 2, 1997, twenty-five colleges and universities were accused of discriminating against women in awarding athletic scholarships.[685] The National Women's Law Center filed complaints with the Education Department's Office for Civil Rights.[686] Among the

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[676] *Id.*

[677] *Id.*

[678] *See* Anderson, *supra* note 670, at 1. According to the NCAA, women's sports account for 4% of intercollegiate athletics revenue. *See* Lewis, *supra* note 661, at D1.

[679] *See* Andy Friedlander, *Level Playing Fields: UTA Masters Gender Equality Compliance Under Title IX*, THE FORT WORTH STAR-TELEGRAM, July 6, 1997, at 3.

[680] 646 N.Y.S.2d 402 (1996).

[681] *See id.* at 403.

[682] *See id.* Women's sports with low numbers of participants, such as swimming, are sometimes replaced with sports with more participants, in order to satisfy Title IX's quotas. *See* Anderson, *supra* note 670, at 1.

[683] *Lichten*, 646 N.Y.S.2d at 403.

[684] *See id.* at 404.

[685] *See Sports Court Docket*, COLORADO SPRINGS GAZETTE TELEGRAPH, June 3, 1997, at SP2.

[686] *See id.*

schools listed were Colorado University, Colorado State University, and Vanderbilt.[687]

The National Women's Law Center alleged that female athletes received only about one-third of all scholarship money nationwide.[688] The average value of a scholarship for a woman is significantly lower than the value of a man's scholarship.[689] Although the complainants did not offer an explanation for the disparity, a spokesperson for the National Women's Law Center, attorney Judy Applebaum, said that "[t]he reasons don't matter as much as the fact that women have been playing and practicing just as hard for their sports as their male counterparts and not getting their fair share of scholarships . . . . That's a violation of Title IX, and it transfers into real harm for the athletes."[690] Interestingly, immediately after the *Cohen v. Brown* decision and the Supreme Court's denial of certiorari, college administrators said that the threat of action, "seems far away, out of sight."[691] Now, just a year later, litigation is here.

In *Beasley v. Alabama State University*,[692] a federal court in Alabama determined that the university's refusal to pay for medical treatment of a female athlete's foot injury incurred during athletic competition was, *inter alia*, a claim for denial of equivalent treatment.[693] Beasley, a scholarship volleyball player, suffered a foot injury in 1991 which was serious enough to require surgery, but the university denied financial coverage until 1995.[694] Male athletes, Beasley claimed, received prompt treatment and support.[695] The court granted Beasley standing to continue to seek class certification and relief.[696]

1. Applying the VMI standard

The question for cases to come is: how will the new standard outlined in Ginsburg's *VMI* opinion affect Title IX actions, if at all? Although impossible to predict, many commentators argue that things are changing.[697] In the past,

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[687] *See id.*

[688] *See id.*

[689] *See id.* The difference at Vanderbilt was the highest at $6,765. *See id.*

[690] Lewis, *supra* note 661, at D1.

[691] Marcus, *supra* note 637, at A34 (quoting Richard Laskowski, Dean of Physical Education, Stony Brook). "Stony Brook gets $10 million a year in federal funds, so Laskowski is concerned about compliance." *Id.*

[692] 966 F. Supp. 1117 (M.D. Ala. 1997).

[693] *See id.* at 1123.

[694] *See id.* at 1121.

[695] *See id.*

[696] *See id.* at 1131.

[697] *See generally* Porto, *supra* note 637, at 26-27.

Title IX challenges have also raised constitutional equal protection claims, and thus the *VMI* standard may eventually be applied to college athletics programs.[698] As a result of the *VMI* opinion, college athletic programs with differing, unequal programs for women would have to show that an exceedingly persuasive justification for such disparities existed, and that there were important objectives, with means substantially related to those objectives.[699]

College football powerhouse schools, such as the University of Nebraska, might argue that football supports other athletic programs, and that without football revenues, all other men's and women's sports programs would be in jeopardy.[700] Others will argue that football programs are allotted more scholarships than needed to run a program[701] or that expenditures could be cut to provide more scholarship money for women.[702] "The problem of course is that unless the NCAA does something like that nationally, no school is going to be the first one to do it because it'll lose its competitive edge."[703]

Another exceedingly persuasive justification argument for maintaining the status quo in men's revenue-producing sports programs would be a financial justification. The financial success of a college football program is in game-winning, because a winning program can produce more ticket sales,[704] donor

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[698] *See, e.g.*, Adams v. Baker, 919 F. Supp. 1496 (D. Kan. 1996)(holding that a school district policy which prohibited a female high school student from competing on a boys' wrestling team violated her rights under the Equal Protection Clause); Leffel v. Wisconsin Interscholastic Athletic Ass'n, 444 F. Supp. 1117 (E.D. Wis. 1978)(finding that the exclusion of females from participation in a varsity program where males were allowed to participate was an equal protection violation).

[699] *See* discussion of *VMI* standard of review, *supra* Part IV.D.

[700] *See* Anderson, *supra* note 670, at 1. However, this may be a myth; one commentator argues that most college football teams lose money. *See* Porto, *supra* note 637, at 33 (citations omitted).

[701] *See* McManamon, *supra* note 655, at 1.

[702] *See Title IX at 25: Limited Progress*, *supra* note 641 (suggesting, for example, the baseball team could give up its spring training in Florida or eliminate its farthest, most expensive trip); *see also* Andy Friedlander, *Level Playing Fields: UTA Masters Gender Equality Compliance Under Title IX*, THE FORT WORTH STAR-TELEGRAM, July 6, 1997 (quoting Pete Carlon, Athletic Director at University of Texas at Arlington, a non-football school, who questioned why a football team has to spend the night before a game at the Hilton Hotel).

[703] *Title IX at 25: Limited Progress*, *supra* note 641 (quoting Brake, National Women's Law Center). If this arrangement to cut scholarships were to apply equally to all Division I-A schools, however, it would not hurt recruiting. *See* Porto, *supra* note 637, at 33 n.116.

[704] For example, at the University of Hawaii, where the football program had a losing record in 1996-97, ticket sales for the 1997-98 season are at an all time low. *See* Stephen Tsai, *UH Football Ticket Sales Keep Dropping*, HONOLULU ADVERTISER, Aug. 23, 1997, at D8. Ticket sales have dropped each year since 1991-92, which was the Rainbows' last winning season. *See* Ferd Lewis, *'Bows Must Show They're Worth Seeing*, HONOLULU ADVERTISER, Aug. 24, 1997, at C1, C4.

program revenue,[705] and radio and television proceeds.[706] Football programs could not survive a further decrease in financial support or in scholarship numbers without risking failure. Football coaches and athletic directors cite the cut in scholarships is directly responsible for the decline in football programs.[707]

One approach might be to mimic V.M.I., which implemented a gender-blind policy when faced with the Court's decision and the choice between losing state funding or complying by admitting women.[708] While Ginsburg has argued for gender-blind policies and programs, using a gender-blind approach for college athletics might needlessly eliminate opportunities for women in sports.[709] Some schools might argue that women's sports, like men's, must produce adequate revenue to survive.[710] Others might argue for coed teams for sports such as swimming, track or golf, or argue for the allowance of women in intercollegiate football to equalize the opportunities.[711] Cases involving women's participation on men's teams have primarily been predicated on constitutional grounds and not through Title IX entitlement.[712] "None of the

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[705] *See* KEN FARRIS, GOING PUBLIC 94 (1994). When the Donor Program at the University of Oklahoma began in 1975, it covered the cost of the scholarship program. Scholarship costs in 1975-76 for all sports were $688,079. *See id.* at 41.

[706] For example, in 1949-50, the University of Oklahoma football team's television rights netted $1,491,168.92. *See* FARRIS, *supra* note 705, at 98. Television rights fees are split between the two football teams participating. *See id.* A school's share is then forwarded to its conference, to be divided equally between all schools in that conference. *See id.* Postseason bowl games have become monstrous moneymakers, with schools participating in the Gator Bowl taking home $1 million; those participating in the Cotton Bowl, $2.5 million; those in the Sugar or Orange Bowl, $2.75 million; and those in the Rose Bowl, $6 million each. *See* Diane Heckman, *Women & Athletics: A Twenty Year Retrospective on Title IX*, 9 U. MIAMI ENT. & SPORTS L. REV. 1, 44 n.197 (1992).

[707] *See* Tudor, *supra* note 662, at C1.

[708] *See* Donald P. Baker, *By One Vote, VMI Decides to Go Coed; Nation's Last All-Male Military School to Enroll Women Starting in '97*, WASH. POST, Sept. 22, 1996, at A1. On September 21, 1996, the Board of Visitors of V.M.I. voted nine to eight to admit women rather than lose funding. *See id.*

[709] *See* Ginsburg, *Benign Classification*, *supra* note 15, at 827.

[710] *See* Heckman, *supra* note 706, at 11 n.37.

[711] For court rulings permitting females to participate on male sports teams, *see generally* Fortin v. Darlington Little League, 514 F.2d 344 (1st Cir. 1975)(Little League baseball); Brenden v. Independent Sch. Dist., 477 F.2d 1292 (8th Cir. 1973)(high school tennis, cross-country skiing, and cross-country running); Morris v. Michigan State Bd. of Educ., 472 F.2d 1207 (6th Cir. 1973)(high school tennis); Saint v. Nebraska Sch. Activities Ass'n, 684 F. Supp. 626 (D. Neb. 1988)(high school wrestling); Lantz v. Amback, 620 F. Supp. 663 (S.D.N.Y. 1985)(high school football); Darrin v. Gould, 540 P.2d 882 (Wash. 1975)(all high school sports, including football and wrestling).

[712] Claims have sometimes been raised as equal protection arguments. *See supra* note 698 and accompanying text.

cases involved female participation on a collegiate men's sports team."[713] Another possibility is adding women's football, which might generate significant revenue and interest and would help establish proportionality.[714]

It has been suggested that women's athletic opportunities cannot achieve equality without affirmative action programs, such as special teams for women, to remedy past discrimination in women's athletics.[715] In athletic competition, physical strength can provide an advantage, and because of this, men and women are not similarly situated. As in *VMI*, this idea, however, may be based on unacceptable stereotypes as to what women are like.[716] For feminists who accept the jurisprudence of equal treatment, sex-based generalizations are impermissible, even if they are derived from physical differences such as size and strength.[717] The impact of the *VMI* standard on intercollegiate athletics is uncertain, but it is clear that intercollegiate athletics is an area where women still face inequality and discriminatory practices.

C. Questions of Sex and Sexual Orientation

The previous section examined the newly emerging disputes regarding inequalities in spending between the sexes in intercollegiate athletics. Another relatively new area of dispute which may arise under the exceedingly persuasive justification standard is in the area of gay and lesbian rights. Gays and lesbians face discrimination in many areas because of the unpopularity of their lifestyle. An emerging argument for their cause is that discriminating against gays and lesbians is discrimination on the basis of sex. This section postulates the application of VMI's exceedingly persuasive justification standard to the argument over same-sex marriage.

The ability of gay and lesbian couples to marry, and to receive the rights and benefits that accrue from marriage, is another area that may be affected by the advance in gender discrimination jurisprudence represented by the *VMI* opinion. Before the 1990's, courts rejected arguments in support of the proposition that persons of the same sex should be able to marry each other.[718]

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[713] *See* Heckman, *supra* note 706, at 61.

[714] *See* Rodney K. Smith, *Solving the Title IX Conundrum with Women's Football*, 38 S. TEX. L. REV. 1057, 1058 (1997)(arguing that women's football would be profitable and would increase the numbers of women who participate in sports).

[715] *See* Broder & Wee, *supra* note 635, at 140 (arguing that some affirmative action is essential to realize the goal of equality).

[716] *See* discussion *supra* note 185 and accompanying text.

[717] Wendy Webster Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/ Special Treatment Debate*, 13 N.Y.U. L. REV. & SOC. CHANGE 325, 329-31 (1984-85).

[718] Courts have described marriage as a "fundamental" right because of its link to procreation. *See* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)("Marriage and procreation are fundamental to the very existence and survival of the race.") Because of this

Recent cases signal that future courts may reevaluate the issue, however, and grant heightened scrutiny to laws which prohibit same-sex marriage, based on the argument that such laws discriminate on the basis of sex.[719]

1. Current status of same-sex marriage

At the forefront of issues in gay rights litigation is the right for same-sex couples to marry.[720] Committed gay and lesbian couples currently are not

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characterization, same-sex marriage claims based on due process arguments have failed. *See, e.g.*, Baker v. Nelson, 191 N.W.2d 185, 187 (Minn. 1971)(citing *Skinner* in justifying its holding that there is no due process protection for same-sex marriage); Baehr v. Lewin, 74 Haw. 530, 550-57, 852 P.2d 44, 55-56 (1993)(noting that same-sex marriage is not a fundamental right); Dean v. District of Columbia, 653 A.2d 307, 333 (D.C. 1995)(citing *Baehr* for the proposition that "in recognizing a fundamental right to marry, the Court has only contemplated marriages between persons of the opposite sexes—persons who had the possibility of having children with each other").

Courts have rejected summarily same-sex marriage claims based on the reasoning that the marriage relationship by definition can only exist between a woman and a man. *See, e.g.*, Jones v. Hallahan, 501 S.W.2d 588, 589 (Ky. 1973)(refusing to authorize the issuance of a marriage license to a lesbian couple because two women were simply "incapable" of entering into a marriage contract); Anonymous v. Anonymous, 325 N.Y.S.2d 499, 501 (N.Y. 1971)(holding that a marriage that took place between a pre-operative transsexual and an unaware man was void from its inception); Slayton v. State, 633 S.W.2d 934, 937 (Tex. Crim. App. 1982)(observing that marriage in Texas cannot exist between persons of the same sex). Until recently, courts have also rejected same-sex marriage claims brought under the Equal Protection Clause. *See* Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App. 1974). In *Singer*, the court held that the state's denial of marriage licenses to same-sex couples did not offend the Washington equal rights amendment prohibiting sex discrimination, because both sexes were treated equally. *See id.* at 1196. The *Singer* court rejected an analogous counterargument based on *Loving v. Virginia*, 388 U.S. 1, 9 (1967), in which the Supreme Court had held that the fact that an antimiscegenation statute affected all races equally did not conceal the racist motives underlying the statute, thus requiring submission of the statute to "strict scrutiny" review. *See Singer*, 522 P.2d at 1191.

[719] *See* Baehr v. Lewin, 74 Haw. 530, 852 P.2d 44 (1993). In *Baehr*, the Supreme Court of Hawai'i held that a statute restricting marriages to male-female couples discriminated on the basis of sex. *See id. See also* Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743, at *6 (Alaska Super. Feb. 27, 1998)(memorandum and order) discussed *infra* section D1. *See generally* WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT (1996)[hereinafter ESKRIDGE, THE CASE FOR SAME-SEX MARRIAGE](offering historical, social, and legal arguments in support of the legalization of same-sex marriage, including the argument that the prohibition of same-sex marriage discriminates on the basis of sex).

[720] *See generally* ESKRIDGE, THE CASE FOR SAME-SEX MARRIAGE, *supra* note 719. *See also* H.R. REP. NO. 664, at 2 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2906. Eskridge describes the political movement that began in the late 1960's and experienced a revival in the late 1980's:

Many . . . newly-liberated couples formed openly committed relationships functionally

afforded the same legal and financial benefits given automatically to married heterosexual couples.[721] Non-citizens may face deportation because the law does not view them as "married" to their American partners.[722] Same-sex couples are ineligible for many of the economic incentives granted to married heterosexual couples: social security and pension benefits under their partners' plans, health-insurance benefits, tax advantages, and inheritance rights, and bereavement leave when a partner dies.[723] Gay couples are also routinely denied the right to share in health decisions,[724] or to visit partners in

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similar to different-sex marriages. As part of [a] demand for acknowledgment or acceptance, many activists sought legal recognition of same-sex marriages on the same terms as different-sex marriages, as part of a general movement to end all forms of state discrimination against lesbians, gay men, and bisexuals.

William N. Eskridge, *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1424 (1993).

[721] *See* David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447, 447 (1996); *see also* Joan Beck, *'Domestic Partnership' for Committed Gay Pairs*, THE BALTIMORE SUN, Mar. 20, 1996, at 21A (listing benefits that are denied to gay couples that heterosexual couples may take for granted). While no jurisdiction currently allows same-sex marriages, some municipalities and corporations have recognized domestic partnerships and give benefits rights to same-sex partners. *See, e.g.*, *Domestic Partnership Listings* (visited January 30, 1998) <http://www.lambdalegal.org/cgi-bin/pages/documents/record?record-21//Registry>; Lewis Becker, *Recognition of Domestic Partnerships by Governmental Entities and Private Employers* (last modified 1995) <http://www.cs.cmu.edu/afs/cs/user/scotts/bulgarians/njsol/dp_recog.txt> (copies of all pages on file with authors). Recognition by a municipality usually comes in the form of procedures for registering as a domestic partnership. *See* Becker, at 1. As of 1998, registration provisions are in effect in 25 municipalities: Berkeley, CA (Oct. 1991); Laguna Beach, CA (June 1990); Long Beach, CA (Mar. 1997); Oakland, CA (Jun. 1996); Palo Alto, CA (Dec. 1995); Sacramento, CA (Oct. 1992); San Francisco, CA (Nov. 1990); West Hollywood, CA (Feb. 1985); Hartford, CT (Jun. 1993); Atlanta, GA (June 1993); Oak Park, IL (Oct. 1997); Boston, MA (Dec. 1993); Brookline, MA (June 1993); Cambridge, MA (Sept. 1992); Provincetown, MA (1993); Ann Arbor, MI (Nov. 1991); East Lansing, MI (Mar. 1991); St. Louis, MO (1997); Ithaca, NY (Aug. 1990); New York, NY (Jan. 1993); Rochester, NY (Apr. 1994); Carrboro, NC (Oct. 1994); Chapel Hill, NC (Apr. 1995); Seattle, WA (Sep. 1994); and Madison, WI (Aug. 1988). *See Domestic Partnership Listings*, at 2. Registration grants same-sex unions some of the recognition and status given to licensed marriages. *See* Becker, at 3. Domestic partnerships do not seem to be limited to same-sex couples. Actual provisions vary according to municipality, but seem to have similar requirements. It is required that the couple be "committed" to one another (Madison); or that the couple be in a "relationship of mutual support, caring, and commitment" (Ann Arbor and Ithaca); or that the "partners declare that they have an intimate and committed relationship of mutual caring" (San Francisco and New Orleans). *See id.*

[722] *See* Adams v. Howerton, 486 F. Supp. 1119, 1123 (C.D. Cal. 1980). The court in *Adams* held that the denial of "immediate relative" status by Immigration and Naturalization Services to a male Australian citizen who had entered into a "marriage" with male American citizen was not a constitutional violation. *See id.* at 1124.

[723] *See* Chambers, *supra* note 721, at 472-85.

[724] *See id.* at 455-56.

hospitals and jails.[725] When a partner dies, a survivor who is not legally recognized as a "surviving spouse" or "family member" may be threatened with eviction.[726]

Because same-sex couples have been denied the right to marry, they also lack clear parental rights, including the award of child custody and visitation,[727] and support payments in divorce proceedings, and the opportunity to adopt children through equivalent processes, if at all.[728] They also lack the legal protection afforded by marriage, such as the right to enter into premarital agreements, or to file for non-support actions, spousal privileges and confidential marital communications, or the right to bring wrongful death actions.[729] William Eskridge writes, "[a]s gay and lesbian couples have come to form more lasting relationships, many of them viewing their unions as not materially different from heterosexual marriages, gaylaw has insisted that the

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[725] *See* Beck, *supra* note 721, at 21A.

[726] *See* Braschi v. Stahl Assoc., 543 N.E.2d 49, 51 (N.Y. 1989). Plaintiff Braschi brought suit against his landlord when the landlord tried to evict him from his rent-controlled apartment upon the death of Braschi's partner of ten years. *See id.* The Court of Appeals of New York held that Braschi fell within the definition of "family member" so as to be protected by the state anti-eviction statute. *See id.* at 55.

[727] *See* Nancy S. v. Michele G., 228 Cal.App.3d 831 (1991). In this case, the court denied a woman visitation rights to the two young children who had been conceived through sperm donation and carried to term by her former partner during the course of their long-term lesbian relationship. *See id.* at 834. The court acknowledged that appellant had developed a "parental" relationship with the children. *See id.* at 841. Nonetheless, it declined to grant appellant visitation, because it did not want to expand the definition of "parent" and thereby increase the standing of individuals to litigate for parental rights. *See id.* The court noted that it was "not telling the parties that the issues they raise are unworthy of legal recognition. To the contrary, we intend only to illustrate the limitations of the courts in fashioning a comprehensive solution to such a complex and socially significant issue." *Id.*

[728] Florida and New Hampshire statutes prohibit otherwise qualified persons who are "homosexual" from adopting children. *See* FLA. STAT. ANN. § 63.042 (West 1998); N.H. REV. STAT. ANN. § 170-B:4 (1997). Colorado and Wisconsin courts have read their adoption statutes to permit a child to have only one parent of each sex, thus the adoption of a child by an unmarried same-sex partner would not be possible without first terminating the other partner's own parental rights. *See, e.g., In re Adoption of T.K.J. & K.A.K.*, 931 P.2d 488, 493 (Colo. 1983); *In re Angel Lace M. v. Terry M.*, 516 N.W.2d 678, 686 (Wis. 1994). Currently, some states allow same-sex couples to adopt through a longer and costlier dual adoption process. *See* Judith Havemann, *N.J. Allows Gays to Adopt Jointly; Activists Say Settlement Puts Unmarried Couples on Equal Footing*, WASH. POST, Dec. 18, 1997, at A1, *available in* 1997 WL 16224581. Earlier this year, however, the New Jersey Supreme Court settled a class action suit which had challenged the requirement that gay and lesbian couples go through the tedious dual-adoption process as violative of the state's equal protection clause. *See id.* Accordingly, New Jersey became the first state to grant equal preference to both gay couples and heterosexual couples in adoption, clearing the way for all unmarried couples to adopt children. *See id.*

[729] *See, e.g.*, Baehr v. Lewin, 74 Haw. 530, 561, 852 P.2d 44, 59 (1993).

state not only tolerate same-sex unions, but recognize them as marriages, or at least as something marriage-like through domestic partnership laws."[730]

The development of a legal approbation or recognition of a right to same-sex marriage has been slowly progressing.[731] Legal scholars have advanced the theory that discrimination against gays and homosexual practices has its roots in patriarchal assumptions about society, family, and gender roles that are no longer justifiable.[732] Women can no longer be assumed to be "passive" or inherently domestic, and unfit for roles traditionally held by men, whether as executors of estates,[733] or as students in military academies.[734] Laws that result in differential treatment of women on the basis of sex are unconstitutional. Similarly, marriage laws which prohibit same-sex couples from marrying, because marrying a woman is something only someone of the opposite sex can do, discriminate on the basis of sex.

The decision of the Supreme Court of Hawai'i in *Baehr v. Lewin*[735] ("*Baehr*") provides a test case for the argument that discrimination against gays is sex discrimination, and as such is deserving of a heightened standard

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[730] Eskridge, *A History of Same-Sex Marriage*, *supra* note 720, at 1484. *See also* discussion *supra* note 721 (regarding pros and cons of domestic partnerships). *But see* Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage"*, 79 VA. L. REV. 1535 (1993). Polikoff argues against legalizing same-sex marriages: "[a]dvocating lesbian and gay marriage will detract from, even contradict, efforts to unhook economic benefits from marriage and make basic health care and other necessities available to all." *Id.* at 1549.

[731] Besides *Baehr* and *Brause*, a Vermont court decision to uphold the state's refusal to license same-sex marriages is currently on appeal to the state supreme court. *See* Baker v. Vermont, Superior Court No. S1009-90Cnc (Dec. 19, 1997).

[732] *See generally* Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 195 (1988); Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994); Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1 (1995). Law's article discusses the history and social function of condemning attitudes toward gays. *See* Law, *supra* this note at 197-215. For instance, the American Colonial tradition of marriage was deeply patriarchal. *See id.* at 199. The system encouraged the formation of family units for the purpose of assuring stable economic production and social status in rural communities, with the husband as the leader of the family and the wife's role and legal identity completely subordinated. *See id.* at 199-200. Homosexuality was a threat to a social order in which most forms of sexual expression, outside of procreation between married heterosexuals, were illegal. *See id.* at 199. Thus both adultery and the use of contraceptives were considered crimes. *See id.* Additionally, the meaning of "sodomy" at that time encompassed all forms of non-procreative sex, and not just homosexual activities. *See id.* at 200.

[733] *See* Reed v. Reed, 404 U.S. 71, 75 (1971).

[734] *See VMI*, 518 U.S. at 550.

[735] Baehr v. Lewin, 74 Haw. 530, 852 P.2d 44 (1993).

of scrutiny.[736] In December 1990, two lesbian couples and one gay couple filed applications for marriage licenses with the State Department of Health, the agency responsible for issuing marriage licenses and regulating marriages in Hawai'i .[737] The State denied the issuance of licenses on the grounds that the co-applicants were of the same sex, and state marriage laws did not permit same-sex couples to marry.[738] The plaintiffs filed a complaint seeking: 1) a declaration that the construction and application of the state's marriage law denying marriage licenses to an applicant couple solely because they were the same sex was unconstitutional; and 2) an injunction against future withholding of marriage licenses on that sole basis.[739] The plaintiffs made no reference to their sexual orientation in their complaint.[740] The trial court granted defendant's motion for judgment on the pleadings,[741] and the plaintiffs appealed to the Supreme Court of Hawai'i .[742] The supreme court found that plaintiffs had been discriminated against on the basis of sex.[743] Because Hawai'i had adopted the Equal Rights Amendment prohibiting sex discrimination, the court stated that strict scrutiny would be the standard applied on remand.[744]

The court based its decision on the face of the statute,[745] and the State Department of Health's interpretation of the statute in issuing marriage licenses.[746] The Supreme Court of Hawai'i rejected the plaintiffs' claim that they had a fundamental right to same-sex marriage under the Due Process Clause,[747] but upheld their Equal Protection claims under the Hawai'i

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[736] *See id.* at 561-571, 852 P.2d at 59-63.

[737] *See* Baehr v. Miike, No. 91-1394 (Haw. Cir. Ct. Dec. 3, 1996) available in 1996 WL 694235, at *1 (recounting the procedural history of the case).

[738] *See id.*

[739] *See Baehr*, 74 Haw. at 536-37, 852 P.2d at 48-49.

[740] *See Baehr*, 74 Haw. at 544, 852 P.2d at 52. The supreme court later noted that the state had purposefully attempted to make homosexuality an issue before the trial court, as the plaintiffs had not asserted their sexual orientation in their complaint. *See id.*

[741] *See Baehr*, 74 Haw. at 545, 852 P.2d at 52 n.12 (recounting the procedural history of the case). The lower court granted the state's motion for judgment on the pleadings because it framed the issue in terms of discrimination based on "homosexuality" rather than "sex." *See id.* at 543-44, 852 P.2d at 51-52. It thus refused to give the statute heightened scrutiny because "[t]he issue of whether homosexuality constitutes an immutable trait" was unsettled in the "scientific community." *Baehr*, 74 Haw. at 547, 852 P.2d at 53 (quoting the circuit court's order granting the State's motion for judgment on the pleadings)(internal quotations omitted).

[742] *See id.* at 545, 852 P.2d at 52.

[743] *See id.* at 580-81, 852 P.2d at 67.

[744] *See id.* at 580, 852 P.2d at 67.

[745] *See Baehr*, 74 Haw. at 561-65, 852 P.2d at 59-61.

[746] *See id.*

[747] *See id.* at 550, 852 P.2d at 54 (holding that there is no fundamental right to marriage for same-sex couples under due process clause of the Hawai'i Constitution). Historically, cases advocating for gay rights under the Due Process Clause have been unsuccessful. *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186 (1986)(Supreme Court enforcing Georgia's sodomy statute

Constitution.[748] The court described the state's regulation of marriage as a sort of business partnership, with corresponding benefits and tax breaks.[749] By describing marriage as a state-created right and casting it in economic terms, the court was able to sidestep moral and historical arguments limiting marriage to different-sex couples only.[750]

The court noted that in theory, a same-sex marriage could be comprised of either homosexuals or heterosexuals.[751] Such a couple, regardless of their sexual orientation, would be denied a marriage license because they were of the same sex.[752] The court concluded that the marriage statute, facially and as applied, was presumed unconstitutional, because it denied licenses to same-sex applicants who would otherwise be eligible for a marriage license with a different-sex partner.[753]

The court did not directly address the issue of the plaintiffs' homosexuality.[754] In fact, it emphasized that the plaintiffs' sexual orientation was not at issue[755] and expressly discounted the need for any discussion of homosexuality as a suspect classification.[756] In doing so, the court avoided

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as applied only to homosexual conduct). For a discussion regarding the non-efficacy of advocating for gay rights under the Due Process Clause, see Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L. J. 1 (1994), in which the author states that the substantive due process argument for gay privacy rights has "all but been foreclosed" by *Hardwick*. *See id.* at 2. *See also*, Eskridge, *A History of Same-Sex Marriage*, supra note 720, at 1432; Patricia A. Cain, *Litigating For Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551, 1614-41 (1993). Cain notes that the refusal of the court in *Hardwick* to grant substantive protection to homosexual conduct is a major obstacle to due process claims, and advises techniques to litigate around the precedent. *See id.*

[748] HAW. CONST. art. I, § 5 (1978) provides: "No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, *sex* or ancestry." *Id.* (emphasis added).

[749] *See Baehr*, 74 Haw. at 558-59, 852 P.2d at 58.

[750] *See id.* at 564-65, 852 P.2d at 61. The state relied on reasoning of the courts in *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky. 1973) and *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974), which had held that same-sex marriage is an innate impossibility because it was the "custom" of the state not to recognize such marriages. *See Baehr* at 569-70, 852 P.2d at 62-63. The supreme court rejected this argument as "circular," and compared the status of the same-sex applicants to the situation of interracial couples prior to *Loving v. Virginia*, 388 U.S. 1 (1967). *See Baehr* at 565-69, 852 P.2d at 61-62.

[751] *See id.* at 544, 852 P.2d at 52 n.11.

[752] *See id.* at 564-65, 852 P.2d at 60-61.

[753] *See id.* at 565-571, 852 P.2d at 61-63.

[754] *See id.* at 558, 852 P.2d at 58 n.17.

[755] *See id.*

[756] *See id.* at 548, 852 P.2d at 54 n.14. The court stated that it need not reach the question of whether homosexuality was "biologically fated" or an immutable characteristic because:

> it is immaterial whether the plaintiffs, or any of them, are homosexuals. Specifically, the issue is not material to the equal protection analysis set forth in . . . this opinion . . . . Its

negative precedent for classifications based on homosexuality, for which equal protection analysis has only afforded rational basis review.[757] By eschewing any argument that homosexuality should be a suspect classification, the court also avoided the difficult question of whether homosexuality is an immutable characteristic deserving of any government protection.[758] Rather, the supreme court vacated the lower court decision on the ground that the plaintiffs had made a viable case for review under a theory of sex discrimination.[759]

On remand to circuit court, the state had the burden of showing a compelling government interest in restricting marriage licenses to heterosexual couples.[760] The state relied on the argument that the basis of the institution of marriage was to raise a family, and that heterosexual couples were better suited to raise children than gay couples.[761] This argument was effectively countered by the plaintiffs' witnesses,[762] and the circuit court held that the state had failed to meet its burden.[763] Two days after the decision, the circuit court judge granted a stay on same-sex marriage licenses pending a second appeal by the state.[764]

Public sentiment toward marriage rights for gay couples on both the national and local levels has lagged behind the opinions passed down by the Hawai'i

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> resolution is unnecessary to our ruling that HRS § 572-1, both on its face [and] as applied, denies same-sex couples access to the marital status and its concomitant rights and benefits. Its resolution is also unnecessary to our conclusion that it is the state's regulation of access to the marital status, on the basis of the applicants' sex, that gives rise to the question whether the applicant couples have been denied the equal protection of the laws in violation of article I, section 5 of the Hawaii Constitution.

Id.

[757] *See, e.g.*, Romer v. Evans, 517 U.S. 620, 631 (1996). The Supreme Court applied rational basis analysis to strike down an amendment to the Colorado Constitution that would have prohibited all affirmative action based on sexual orientation. *See id.*; *see also* Sunstein, *supra* note 745, at 3-7 (discussing courts' general application of rational basis review to classifications discriminating on the basis of sexual orientation).

[758] *See* Steffan v. Cheney, 780 F. Supp. 1, 6-7 (D.D.C. 1991)(finding that "homosexual orientation is neither conclusively mutable nor immutable"), *rev'd sub nom.* Steffan v. Aspin, 8 F.3d 57 (D.C. Cir. 1993). *See also* High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 573-74 (9th Cir. 1990)(finding that "[h]omosexuality is not an immutable characteristic").

[759] *See Baehr*, 74 Haw. at 562, 852 P.2d at 60.

[760] *See* Baehr v. Miike, No. 91-1394 (Haw. Cir. Ct. Dec. 3, 1996) *available in* 1996 WL 694235, at *1.

[761] *See id.* at *4-10.

[762] *See id.* at *10-16. Both sides relied on psychologists and social scientists who testified as to what constitutes a good family environment, children's adjustment and development, and the ability of gays and lesbians to be fit parents. *See id.* at *4-16. There was a consensus that the most reliable indicator of a child's adjustment is the "quality of parenting." *See id.* at *17.

[763] *See id.* at *21.

[764] *See* Miike v. Baehr, *appeal docketed*, No. 91-1394-05 (Haw. Dec. 11, 1996).

courts. A February 1994 poll conducted by a task force formed in response to the *Baehr* decision found that only 18% of those surveyed believed that the state should license same-sex marriages, while 71% believed marriage should be reserved to only male-female couples.[765] A more recent poll conducted nationally also found that a majority of people still oppose the sanctioning of same-sex marriages within their own states.[766] Many of those polled expressed their position by stating the belief that by its very definition, "marriage . . . means a man and a woman."[767]

In anticipation of the then-pending *Baehr* decision on remand to the circuit court, legislatures of thirty-seven states, including Hawai'i, considered proposals to enact laws prohibiting same-sex marriages.[768] By 1996, sixteen states had passed acts prohibiting same-sex marriage, refusing to recognize same-sex couples who obtain licenses out-of-state, or defining marriage as existing only between a man and a woman.[769] Responding to the states' actions, the 1996 Congress passed the Defense of Marriage Act ("DOMA").[770]

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[765] *See* H.R. REP. NO. 104-664, at 2 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2909 (citing Prepared Statement of Terrence Tom, Member and Chairman of Judiciary Committee, Hawai'i House of Representatives ("Tom Prepared Statement") at Hearing on H.R. 3396, the Defense of Marriage Act).

[766] *See* Jennifer Loven, *Poll Finds Most Americans Opposed to Same-Sex Marriages*, ASSOC. PRESS POL. SERV., Apr. 19, 1996, *available in* 1996 WL 5378186. The poll found that only 33% responded favorably to the legalization of same-sex marriages within their own state, while 57% did not. *See id.*

[767] *See* Beck, supra note 721 (citing a poll in which 63% of respondents believed the definition of marriage precluded same-sex unions).

[768] *See* H.R. REP. NO. 104-664, at 2 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2909.

[769] Statutes prohibiting same-sex marriage which were passed before the Defense of Marriage Act are as follows: ALASK. STAT. § 25.05.013; ARIZ. REV. STAT. ANN. § 25-101 (West 1998); DEL. CODE ANN. tit. 13 § 101 (1997); GA. CODE ANN. § 19-3-3.1 (1998); IDAHO CODE § 32-209 (Michie 1997); 750 ILL. COMP. STAT. ANN. 5/213.1 (West 1998); KAN. STAT. ANN. § 23-101 (1997); MICH. COMP. LAWS ANN. § 551.1 (West 1998); MO. ANN. STAT. § 451.022 (West 1997); N.C. GEN. STAT. § 51-1.2 (Michie 1997); OKLA. STAT. ANN. tit. 43, § 3.1 (West 1998); 23 PA. CONS. STAT. ANN. § 1704 (West 1997); S.C. CODE ANN. § 20-1-15 (Law. Co-op. 1997); S.D. CODIFIED LAWS § 25-1-1 (1998); TENN. CODE ANN. § 36-3-113 (1997); UTAH CODE ANN. § 30-1-2 (1997).

[770] 1 U.S.C. § 7 and 28 U.S.C. § 1738(c)(1996). The Defense of Marriage Act ("DOMA") was intended to have two primary purposes. The first one was to "defend the institution of traditional heterosexual marriage." *See* H.R. Rep. No. 104-664, at 2 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2909. The second purpose was to "protect the right of the States to formulate their own public policy regarding the legal recognition of same-sex unions, free from any federal constitutional implications that might attend the recognition by one State of the right for homosexual couples to acquire marriage licenses." *Id.* One criticism of DOMA is that is may be unconstitutional under the Tenth Amendment. *See, e.g.*, H.R. REP. NO. 104-664 at 27, *reprinted in* 1996 U.S.C.C.A.N. at 2931; 142 CONG. REC. S5931-01 (daily ed. Jun. 6, 1996)(statement of Sen. Ted Kennedy). In a letter to Senator Kennedy, Professor Lawrence Tribe stated that "Congress possesses no power under any provision of the Constitution to

Currently, twenty-six states have either ratified the DOMA or enacted similar laws banning same-sex marriages.[771]

On the other hand, some reactions to the *Baehr* decision have supported the rights of same-sex couples. During its 1997 session, the Hawai'i legislature enacted a law to provide a large package of benefits to registered "reciprocal beneficiaries."[772] In its findings, the legislature stated that Hawai'i sought "to preserve the tradition of marriage as a unique social institution based upon the committed union of one man and one woman," and had thus imposed restrictions on the ability to marry.[773] The legislature recognized, however, that "there are many individuals who have significant personal, emotional, and economic relationships with another individual yet are prohibited by such legal restrictions from marrying."[774] Such individuals can become registered reciprocal beneficiaries and become eligible for some of the benefits derived from marriage,[775] such as insurance coverage[776] and survivorship.[777]

In February of this year, an Alaskan superior court declared that choosing a partner is a fundamental right that could result in a "nontraditional" choice, and that Alaska's ban on same-sex marriages should thus be subjected to strict

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legislate any such categorical exemption from the Full Faith and Credit Clause." *See id.* at S5932.

[771] States that have passed anti same-sex marriage legislation since 1996 are as follows: ARK. CODE ANN. § 9-11-208 (1997); FLA. STAT. ANN. § 741.212 (West 1997); IND. CODE ANN. § 31-11-1-1 (West 1998); ME REV. STAT. ANN. tit. 19-A, § 701 (West 1998); MINN. STAT. ANN. § 517.03 (West 1998); MISS. CODE ANN. § 93-1-1 (1994 & Supp. 1998); MONT. CODE ANN. § 40-1-401 (1997); N.D. CENT. CODE § 14-03-01 (1997); VA. CODE ANN. § 20-45.2 (Michie 1998). Most recently, Washington has responded to DOMA by enacting a statute which defines marriage as a contract which can only be entered into by a man and a woman. *See* 1998 Wash. Legis. Serv. ch. 1 (S.H.B. 1130)(West 1998). For updates on legislation concerning same-sex marriage issues, see Partners Task Force for Gay & Lesbian Couples, *Legislative Reactions to Hawaii Same-Sex Marriage* (visited Mar. 3, 1998)<http://www.buddybuddy.com>. In Hawai'i, the legislature passed out a proposed amendment to the constitution which would allow the legislature to define marriage as a "union between a man and a woman." *See id.* The proposed amendment was submitted to Hawai'i voters for ratification in the November 1998 general election. *See id.*

[772] *See* HAW. REV. STAT. § 572C (1997). For a couple to qualify as "reciprocal beneficiaries" they must be: 1) consenting adults of at least eighteen years of age; 2) neither married nor in another reciprocal beneficiary relationship; 3) legally prohibited from marrying each by state law; and 4) registered as reciprocal beneficiaries. *See* HAW. REV. STAT. § 572C-4 (1997).

[773] HAW. REV. STAT. § 572C-2 (1997).

[774] HAW. REV. STAT. § 572C-2 (1997). The legislature intended reciprocal beneficiary coverage to extend to relatives, such as a "widowed mother and her unmarried son," as well as to committed same-sex couples. *See id.*

[775] *See* HAW. REV. STAT. § 572C-6 (1997).

[776] *See* HAW. REV. STAT. § 431:10-234 (1997).

[777] *See* HAW. REV. STAT. § 560:2-206 (1997).

scrutiny.[778] The court decided the case on due process grounds and thus did not reach the plaintiffs' equal protection claims.[779] The judge remarked, however, that "[w]ere this issue not moot, the court would find that the specific prohibition of same-sex marriage does implicate the [c]onstitution's prohibition of classifications based on sex or gender, and the state would then be required to meet the intermediate level of scrutiny generally applied to such classifications."[780]

2. *Application of the VMI standard to same-sex marriage cases*

Given the recent increase in litigation, it is likely that the issue of same-sex marriage will eventually reach the highest court. It is difficult to predict the outcome of such cases. Given the conflicting case law among the different jurisdictions and the rash of legislation still being enacted, the Supreme Court might hesitate to intervene at this early stage to decide what has been regarded as a matter for state legislatures.[781] The Supreme Court will grant certiorari on the issue of same-sex marriage only when there is sufficient percolation of the issues at the state level,[782] or if the Commerce Clause or the Full Faith and Credit Clause is implicated.

Future challenges to laws that forbid same-sex marriages may take place in states which have Equal Rights Amendments similar to the Hawai'i provision. Seventeen states have constitutions which prohibit discrimination on the basis of sex.[783] Challenges to marriage statutes in these states may receive review

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[778] *See* Brause v. Bureau of Vital Statistics, No. 3AN-95-6562CI (Alaska Super. Ct. Feb. 27, 1998) *available in* 1998 WL 88743, at *6 (memorandum and order). *See generally Judge Rules Against Same-Sex Marriage Ban*, CHARLESTON DAILY MAIL, Feb. 28, 1998, at P3a, *available in* 1998 WL 5936602.

[779] *See Brause*, 1998 WL 88743 at *6.

[780] *Id.* The court stated that the fact that the state marriage code was a sex-based classification could "readily be demonstrated." *Id.* The court proposed a hypothetical in which twins, one male and one female, both desired to marry the same woman. *See id.* The male would meet the Code's requirements and be allowed to marry the woman, while his female twin would be barred solely because of her sex. *See id.* The court concluded: "Sex-based classification can hardly be more obvious." *Id.*

[781] *See* Ginsburg, *Judicial Voice*, *supra* note 15, at 1199 (observing that the judiciary participates in a dialogue with state legislatures, and criticizing the *Roe* court's "sweeping" opinion as having reversed the trend among state legislatures toward liberalizing abortion statutes). *See id.* at 1200. *See also*, *Autonomy & Equality*, *supra* note 94, at 381 (stating that the *Roe* court "ventured too far in the change it ordered." *Id.*

[782] *See* Ginsburg, *Judicial Voice*, *supra* note 15, at 1207-8.

[783] States which either contained provisions forbidding discrimination based on gender in their original constitutions, or which adopted similar provisions after the 1972 Congress had presented the Equal Rights Amendment to the states for ratification, are as follows: ALASKA CONST. art. 1, § 3; CO. CONST. art. 2, § 29; CONN. CONST. art. 1, § 20; HAW. CONST. art. 1, §

under either strict scrutiny or the intermediate scrutiny standard afforded to gender cases in the wake of the *VMI* opinion if no explicit standard has been established in that jurisdiction.[784] Same-sex marriage applicants in states that lack an equal rights amendment may try to bring suit in federal courts in order to have the *VMI* standard for sex discrimination applied to their cases.[785]

Assuming that such a challenge arises on a federal level, and the court accepts the theory that marriage laws prohibiting same-sex unions discriminate on the basis of sex, the burden will shift to the state to demonstrate that an exceedingly persuasive justification for the prohibition exists, and that forbidding same-sex couples to marry serves "important governmental objectives."[786] The state will most likely rely on the argument which is the basis for DOMA, that is, that marriage is historically and fundamentally a heterosexual institution; by definition it exists only between a man and a woman. The inquiry will likely focus on the purpose and tradition of marriage.[787] Because advocates for same-sex marriage have analogized the current situation of gay partners to that of interracial couples before *Loving v. Virginia*,[788] the state will probably attempt to distinguish the case by saying that *Loving* applies only to race and not sex or sexual orientation.[789] Mildred

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5; ILL. CONST. art. 1, § 18; LA. CONST. art. 1, § 3; MD. CONST. art. 46; MASS. CONST. Pt.1 art. 1; MONT. CONST art. 2 § 4; N.H. CONST. pt. 1, art. 2; N.M. CONST. art. 2 § 18; PA. CONST. art. 1 § 28; TEX. CONST. art. 1 § 3a; UTAH CONST. art. IV § 1; VA. CONST. art. 1 § 11; WASH. CONST. art. 31, § 1; and WYO. CONST. art. 1 § 3.

[784] Several states besides Hawai'i employ "strict scrutiny" when reviewing claims of sex discrimination under their state equal rights amendments. *See, e.g.* Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005 (Colo. 1982); Estate of Hicks, 675 N.E.2d 89 (Ill. 1996); Opinion of the Justices to the Senate, 366 N.E.2d 733 (Mass. 1977). *But see* Dydyn v. Department of Liquor Control, 531 A.2d 170 (1987)(applying intermediate scrutiny to sex discrimination cases arising under the Connecticut equal protection amendment, despite that such a standard of review would have been guaranteed under the federal equal protection clause). States which have not yet adopted a standard of review must comply with federal standards at a minimum. *See, e.g.*, Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982); *Reed*, 404 U.S. at 76.

[785] In discussing potential constitutional restraints on the Defense of Marriage Act and state legislation enacted in reaction to the *Baehr* decision, the House noted that "[i]f an argument can be persuasive that the anti-same sex marriage statute is discrimination based on gender, it may well receive intermediate scrutiny." H.R. REP. NO. 104-664, at 37, *reprinted in* 1996 U.S.C.C.A.N. 2905, 2943 (1996).

[786] *See VMI*, 518 U.S. at 531.

[787] *See generally* David Orgon Coolidge, *Same-Sex Marriage? Baehr v. Miike and the Meaning of Marriage*, 38 S. TEX. L. REV. 1 (1997).

[788] 388 U.S. 1 (1967).

[789] *See* Coolidge, *supra* note 787, at 75 nn.257-59. The author distinguishes *Loving* by stating that the decision is solely about:

> (1) . . . racism, and not about other categories such as sex or sexual orientation; (2) those other categories are not analogous to race, so *Loving* does not apply to the same-sex

Jeters and Richard Loving were of different races, but they were a woman and a man.[790] The state thus would argue that the prohibition against their marriage was unconstitutional precisely because it excluded two otherwise eligible participants from participating in the exclusively heterosexual institution of marriage based on their race.[791]

Gay rights advocates will look beneath the surface of the argument that marriage is a heterosexual tradition.[792] They would argue that the prohibition of same-sex marriages reinforces "'archaic and overbroad' generalizations" about the proper roles of the sexes.[793] Insofar as laws which limit marriage to heterosexuals rest on impermissible sex stereotypes or outdated assumptions about same-sex couples as partners and parents, they should be presumed unconstitutional.[794]

In order to justify the discriminatory denial of marriage licenses to same-sex couples on the basis of sex, the state would then be required to meet the exceedingly persuasive justification standard. States and municipalities with domestic partnership laws might assert that such partnerships have been enacted precisely to make same-sex couples equal to married couples—that such laws have been "shaped to place persons unconstitutionally denied an opportunity or advantage 'in the position they would have occupied in the

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marriage issue; (3) existing definitions of marriage are not based on sexist or heterosexist ideologies—they are based on the intrinsically heterosexual nature of marriage; (4) therefore . . . the Fourteenth Amendment offers no reason to redefine marriage.

Id.

[790] *Loving*, 388 U.S. at 2.

[791] *See id.*

[792] The Brief of Appellees, in the appeal of *Baehr* currently before the Supreme Court of Hawai'i, states that Hawai'i's denial of marriage licenses to same-sex couples rests on "an assumption that whatever marriage in fact means to individuals, gay men and lesbians as a class cannot participate and must not be allowed equal inclusion. These kinds of stereotypes are precisely the impermissible and illegitimate state purposes that equal protection scrutiny means to protect against." Brief for Appellees at 29, Miike v. Baehr, *appeal docketed*, No. 91-1394-05 (Haw. Dec. 11, 1996), *available in* <http://qrd.org>(visited Mar. 3, 1998)(copy on file with author). Appellees object to the notion that gay couples cannot be equally loving or committed spouses, parents, neighbors, etc.—whatever the institution of marriage purports to value and protect. *See id.* at 28-30.

[793] *Craig*, 429 U.S. at 198-99 (quoting Schlesinger v. Ballard, 419 U.S. 498, 508 (1975)).

[794] In her nomination hearings before the Senate, Justice Ginsburg was asked by Senator Ted Kennedy if she still held the view she had expressed in a 1979 colloquium on women's rights, where she had stated that discrimination based on sexual orientation should be deplored. *See* 51 CONG. Q. WKLY. REP. 1956, *available in* 1993 WL 7766528. Justice Ginsburg stated that rank [meaning intentional] discrimination against anyone should be deplored, and that the great tradition of the United States was a "generous respect for differences." *See id.*

absence of [discrimination].'"[795] If the states can demonstrate that the partnerships are the equivalent of marriage, then the burden will be met.[796]

At present, no state or municipality could meet the exceedingly persuasive justification burden. Even Hawai'i, which has been described as having the most comprehensive package of benefits for domestic partnerships to date, falls short of providing all the rights derived from marriage.[797] Domestic partnerships provide fewer benefits than those obtained through marriage, and some jurisdictions offer domestic partnerships in name only without providing benefits.[798] Another substantial disparity between marriages and domestic partnerships is that domestic partnership rights do not transfer out of the jurisdiction in which they were enacted.[799] Furthermore, the rights afforded to couples are unstable because domestic partnership laws are often subject to repeal.[800]

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[795] *See VMI*, 518 U.S. at 547 (quoting Milliken v. Bradley, 433 U.S. 267, 280 (1977)(alteration in original).

[796] *See id.* The proper remedy envisioned by the *VMI* Court would "eliminate so far as possible the discriminatory effects of the past" and "bar like discrimination in the future." *Id.* (quoting Louisiana v. United States, 380 U.S. 145, 154 (1965))(alteration in original).

[797] *See* Coolidge, *supra* note 787, at 17. For example, the Hawai'i statute does not obligate private employers to recognize or provide benefits for reciprocal beneficiaries. *See* HAW. REV. STAT. § 572C-6 (1997).

[798] *See* discussion on domestic partnerships *supra* note 721.

[799] *See id.* Just as domestic partnership falls short of offering the rights that accompany legal marriage, the benefits derived from VMIL were a "pale shadow" compared to those gained at V.M.I. in almost every respect: endowment; teaching methodology; course offerings; facilities; and faculty. *See VMI*, 518 U.S. at 553.

[800] *See* Lilly v. City of Minneapolis, No. MC93-21375, 1994 WL 315620, at *11 (Minn. Dist. Ct. 1994), *review denied*, 527 N.W.2d 107 (1995). *Lilly* held that a municipality's refusal to extend domestic partnership benefits for registered *domestic partners* of its employees did not violate the equal protection clause of the Minnesota Constitution. *See id.* The court's holding essentially invalidated the Minneapolis domestic partnership ordinance. *See id.* The court reasoned that because applicant-intervenors were lesbians and thus could never marry each other, they would always be "single" and ineligible for benefits extended only to married couples. *See id.* at *6. In that respect, they were not being treated differently from any other member of the class of single employees. *See id.* The court reasoned that there was a difference between married and unmarried persons, in that "married employees have legal and financial obligations to their dependents that unmarried employees do not have." *See id.* at *12. The court's finding was in direct opposition to Minnesota's Domestic Partnerships Ordinance of 1991 which envisioned that unmarried domestic partners be "jointly responsible to each other for the necessities of life" and "committed to one another to the same extent as married persons are to each other, except for the traditional marital status and solemnities." *See id.* at *1. Similarly, each year since the D.C. Council has passed its domestic partnerships ordinance, Congress has attached funding restrictions to bar the city from implementing it. *See Domestic Partnership Listings*, *supra* note 721, at 2. In Northhampton, Massachusetts, a domestic partnership ordinance passed by the city council in 1995 was repealed by a voter referendum in the same year. *See id.*

Besides the economic and legal differences, there are intangible benefits[801] associated with marriage that do not accrue to domestic partnerships. William Eskridge notes that marriage has been a way for states to recognize a couple's citizenship, and does not necessarily imply a "seal of approval for their lifestyle."[802] He adds, however, that the legalization of same-sex marriage might contribute to the "civilizing" of gays and lesbians: it would increase so-called traditional family values, and, as time passes, legitimize same-sex couples in the eyes of society.[803]

VI. CONCLUSION

Ruth Bader Ginsburg has been crucial to gender discrimination law as an advocate, judge, and Supreme Court Justice. Her early work in this field of law repeatedly thrust the law's disparate treatment of the sexes onto the Supreme Court's docket. Her time on the Court of Appeals demonstrated a thoughtful shift from tenacious advocate to restrained arbiter. Since appointment to the Supreme Court, Ginsburg awaited the case to accomplish her earlier objective of strict scrutiny. *United States v. Virginia* was that case.

Following the Supreme Court's opinion in the *VMI* case, V.M.I.'s regents refused to make more than minimal changes to accommodate the women, adding that Ginsburg had said that "some women would have the will and the capacity to succeed in the training and attendant opportunities that *VMI* uniquely affords."[804] V.M.I., which refused to lower its standards for the women, defended its equal treatment policy by using Ginsburg's specific words in arguing that V.M.I.'s harsh physical and mental treatment of cadets was not "inherently unsuitable to women."[805] Board Chairman William W. Berry said, "We are going to take Ginsburg at her word."[806] V.M.I. Superintendent Josiah Bunting, III said the fully qualified women would be demeaned by relaxation of the standards and, therefore, the same physical requirements

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[801] This situation can be compared to the *VMI* Court's recognition that VWIL graduates were deprived of the "benefits associated with V.M.I'.s 157-year history, the school's prestige, and its influential alumni network." *VMI*, 518 U.S. at 551.

[802] *See* ESKRIDGE, THE CASE FOR SAME-SEX MARRIAGE, *supra* note 719, at 11. For instance, convicted felons cannot be deprived of the right to marry. *See id.* at 12.

[803] *See* ESKRIDGE, THE CASE FOR SAME SEX MARRIAGE, *supra* note 719, at 13.

[804] Donald P. Baker, *By One Vote, VMI Decides to Go Coed; Nation's Last All-Male Military School to Enroll Women Starting in '97*, WASH. POST, Sept. 22, 1996, at A1 (citations omitted).

[805] *See* David Reed, *30 Women Sign In, Then Get Heads Shaved at VMI*, COMM. APPEAL (MEMPHIS, TENN.), Aug. 19, 1997, at A4. By declaring women unsuitable to attend V.M.I., the state of Virginia was validating stereotypical generalizations about women. *See VMI*, 518 U.S. at 532.

[806] Baker, *By One Vote*, *supra* note 804 at A01.

would be imposed on female cadets.[807] On Monday, August 18, 1997, Beth Ann Hogan broke a 158-year tradition when she became the first woman to sign her name as an incoming freshman at V.M.I.[808] Hogan was among thirty women who registered for the fall 1997 semester and willingly shaved their heads in the V.M.I. tradition.[809]

In light of *Adarand*'s change of strict scrutiny, the exceedingly persuasive justification standard was a legal necessity to preserve benign classifications. The *VMI* standard of review changes the landscape of future gender battles. Gender policies in the military, college athletics, and in same-sex marriage involve issues beyond Equal Protection, but Ginsburg's exceedingly persuasive justification standard may well impact all of them.

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Jayna K. Kim,
Mark M. Murakami[810]

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[807] *See id.*

[808] *See* David Reed, *With a Pen and Buzz Cut, Oregon Girl Ends VMI's 158-Year All-Male Policy*, THE ASSOCIATED PRESS, Aug. 18, 1997.

[809] *See id.*

[810] Class of 1999, William S. Richardson School of Law.

Ruth Bader Ginsburg and John Marshall Harlan: A Justice and Her Hero

I. INTRODUCTION

"Society is founded on Hero-worship."[1]

In her confirmation hearings, Associate Justice Ruth Bader Ginsburg ("Ginsburg") spoke of former Associate Justice John Marshall Harlan ("Harlan"), who served on the Supreme Court from 1955 to 1971:[2] "He is one of my heroes as a great Justice . . . ."[3] It is significant for Ginsburg to label a person as her "hero," [4] particularly because of her reputation as a jurist who chooses her words with precision.[5] This comment will compare Ginsburg's philosophy on the role of the Court and her style of adjudicating to those of her self-pronounced hero, Harlan.

On the surface, Harlan is not an obvious choice as one of Ginsburg's "heroes." A leading dissenter during a time of great civil liberties activism in

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[1] THOMAS CARLYLE, ON HEROES, HERO-WORSHIP AND THE HEROIC IN HISTORY 12 (1904). "All dignities of rank on which human association rests, are what we call *Hero*archy (Government of Heroes),—or a Hierarchy." *Id.* (emphasis in original).

[2] *See* TINSLEY E. YARBROUGH, JOHN MARSHALL HARLAN: GREAT DISSENTER OF THE WARREN COURT viii (1992). President Eisenhower nominated Harlan in November, 1954, to succeed Justice Robert Jackson. *See* PERCIVAL E. JACKSON, DISSENT IN THE SUPREME COURT 500 (1991). Harlan's grandfather by the same name, the first Justice John Marshall Harlan, is famous for his dissent in *Plessy v. Ferguson*, 163 U.S. 537 (1896), where he wrote boldly that "our Constitution is color-blind." JACKSON, *supra* this note, at 17-18.

[3] *Hearings Before the Committee on the Judiciary: Nomination of Ruth Bader Ginsburg to be Associate Justice of the Supreme Court*, 103rd Cong. 172 (1993)[hereinafter *Judiciary Hearings*].

[4] Webster's defines "hero" as: "a man admired for his achievements and noble qualities;" "an illustrious warrior;" or "the central figure in an event, period, or movement." WEBSTER'S NEW COLLEGIATE DICTIONARY 566 (9th ed. 1984). Longfellow wrote of heroes: "Lives of great men all remind us/ We can make our lives sublime,/ And, departing, leave behind us/footprints on the sands of time." Henry Wadsworth Longfellow, *A Psalm of Life, reprinted in* A POCKET BOOK OF QUOTATIONS 82 (Henry Davidoff, ed., 1952). The hero was an important character in mythology. The Homeric hero "must have a worthy opponent: a gigantic warrior, a Goliath of Gath . . . . In the *Iliad*, [for Achilleus] this is Hektor." THE ILLIAD OF HOMER 33 (Richard Lattimore, trans. 1961).

[5] *See* Jeffrey Rosen, *The New Look of Liberalism on the Court*, N.Y. TIMES, Oct. 5, 1997, § 6 (magazine), at 86. Commentators have said of Ginsburg: "I've seen her agonize over individual words many times. Not terms of art, but adjectives." *Id.* (quoting David Post). "She's not deliberative as a matter of principle but as a matter of temperament. A conversation with her is a special pleasure because there are no words that are not preceded by thoughts." *Id.* (quoting Leon Wieseltier). Law clerks have commented on her desire for precision of language, and her emphasis on "getting it right and keeping it tight." *Id.* at 96.

the Supreme Court,[6] Harlan was largely deemed a conservative.[7] Ginsburg, on the other hand, was considered an activist as an advocate.[8] Women's rights groups heralded Ginsburg's 1993 appointment to the Supreme Court as a victory, and feminists placed great hope for the future of women's equality on her presence on the Court.[9] President Clinton, announcing Ginsburg's nomination to the Supreme Court, called her "the Thurgood Marshall of gender equality law,"[10] a comparison made by some commentators because of similarities between her work to advance the constitutional rights of women and Thurgood Marshall's work to advance the rights of African-Americans in

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[6] *See* YARBROUGH, *supra* note 2, at viii. The Court under Chief Justice Earl Warren became known as a defender of equal protection and civil liberties. *See* JACKSON, *supra* note 2, at 520 ("That the Warren Court consisted of a libertarian majority is open to little question.").

[7] *See* Martha A. Field, *Justice Harlan's Legal Process*, 36 N.Y. L. SCH. L. REV. 155 (1991). Harlan "served as a model of procedural regularity on the Warren Court, acting as the Court's conservative conscience." *Id.* (internal quotations omitted). "Conservative," however, is a term that can mean different things to different commentators. *Compare* Charles Fried, *The Conservatism of Justice Harlan*, 36 N.Y.L. SCH. L. REV. 33 (1991) *with* Bruce Ackerman, *The Common Law Constitution of John Marshall Harlan*, 36 N.Y.L. SCH. L. REV. 5 (1991). *See also* Gerald Gunther, *Another View of Justice Harlan—A Comment on Fried and Ackerman*, 36 N.Y.L. SCH. L. REV. 67 (1991)(commenting that both Fried and Ackerman depict Harlan as "conservative," but that Fried intends the label as praise, whereas Ackerman uses "conservative" as a criticism). The articles by Fried, Ackerman, and Gunther were all included in a special centennial issue of the Law Review of Harlan's alma mater, the New York Law School. *See id.* Justice Brennan said the following of Harlan:

> I think Professor [Robert] Weisberg is correct to detect in my dear friend John Harlan's jurisprudence a certain lofty conservatism—Burke may well be an apt model—premised on both a faith in man's intuitive moral rationality and a conviction that there are limits to what heights we should reasonably expect people and society to ascend if we simply order things 'properly.'

William J. Brennan, Jr., *Constitutional Adjudication and the Death Penalty: A View from the Court*, 100 HARV. L. REV. 313, 319 (1986).

[8] *See Rosen*, *supra* note 5, at 61-62.

[9] *See generally* Shelia M. Smith, *Justice Ruth Bader Ginsburg and Sexual Harassment Law: Will the Second Female Supreme Court Justice Become the Court's Women's Rights Champion?*, 63 U. CIN. L. REV. 1893 (1995)(examining Ginsburg's feminist jurisprudence and sexual harassment law). Some of Ginsburg's feminist colleagues were lukewarm about her candidacy, stating that her jurisprudence was too conservative and her vision of feminism not radical enough. *See* Rosen, *supra* note 5, at 62.

[10] *See* Michael James Confusione, *Ruth Bader Ginsburg and Justice Thurgood Marshall: A Misleading Comparison*, 26 RUTGERS L.J. 887 (1995). President Clinton acknowledged this connection in his presidential announcement of Ginsburg's nomination to the Supreme Court, quoting Janet Benshoof, President, The Center for Reproductive Law and Policy. *See id.* at 887 n.1. Marshall was known for his use of the court system to secure the constitutional rights of African-Americans. *See id.* at 895. *See, e.g.*, Brown v. Board of Education, 347 U.S. 483 (1954)(arguing as plaintiff's counsel that schools which separated students according to race were inherently unequal).

landmark cases before the Supreme Court. Ginsburg's judicial philosophy and approach, however, are closer to Harlan's.

Despite Harlan's conservatism, jurists everywhere praised Harlan for his fairness and respect for the values of federalism and the judicial process following his death in 1971.[11] Harlan strove to prevent his conservative ideologies from influencing his independence as a judge. Similarly, Ginsburg's work has exemplified her philosophy that a good judge must be able to suppress her individual viewpoint in order to examine all arguments objectively.[12] "No judge is appointed to apply his or her personal values,"[13] and Ginsburg defines a good judge as one who eludes simple categorization, and whose performance does not merely track her pre-bench activism.[14]

This comment suggests that in spite of their ideological differences, Ginsburg is markedly similar to her "hero" in her style of judging. Individuals often choose their heroes because of qualities that they wish to emulate, and

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[11] *See* Fried, *supra* note 7, at 33. It is remarkable how often Harlan's name has been invoked as a model for other leaders. *See id.* Governor Dukakis spoke of Harlan during the 1988 presidential campaign. *See id.* Justice Souter also named Harlan as his model. *See* Liang Kan, *A Theory of Justice Souter*, 45 EMORY L.J. 1373, 1383 (1996). Yet, most likely, neither looked to Harlan because of the substantive content of his opinions, but rather for his fairness and his intense respect for the judicial process. *See* Fried, *supra* note 7, at 33, 38. "Harlan has given the nation a shining example of moral rectitude, of penetrating analysis, of unstinting labor . . . . He has set a tone and standard for all judges and lawyers to endeavor to emulate for years to come." Henry J. Friendly, *Mr. Justice Harlan, as Seen by a Friend and Judge of an Inferior Court*, 85 HARV. L. REV. 382, 389 (1971). "I repeat: candor, care, being true to the facts, the record, and the precedents, and a modest respect for the other institutions that surround the Supreme Court–these are the hallmarks of Mr. Justice Harlan's conservative ethic and the characteristics that have led many to invoke his name as a role model." Fried, *supra* note 7, at 51.

[12] *See* Ruth Bader Ginsburg, *Inviting Judicial Activism: A "Liberal" or "Conservative" Technique?*, 15 GA. L. REV. 539 (1981). "Ginsburg often conceals or sublimates her personal views of the merits of a case by focusing on legal process." Rosen, *supra* note 5, at 86.

[13] *See* 139 Cong. Rec. S10083-001, S10085 (daily ed. Aug. 2, 1993)(testimony of Sen. Hatch).

[14] *See* Smith, *supra* note 9, at 1907. Ginsburg said to the Senate Judiciary Committee that a judge's performance should not be previewed or predicted. *See* 51 CONG. Q. WKLY. REP. 30, July 24, 1993, *available in* 1993 WL 7766528, at 4. "I come to this proceeding to be judged as a judge, not as an advocate. Because I am and hope to continue to be a judge, it would be wrong for me to say or to preview in this legislative chamber how I would cast my vote on questions the Supreme Court may be called upon to decide." *Id.* In her confirmation hearings, one senator commented on Judge Ginsburg's decision in *Women's Action Equity League v. Cavazos*, 906 F.2d 742 (D.C. Cir. 1990), where she ruled that Congress gave no cause of action to civil rights groups to sue federal officials for enforcement, and that therefore the courts had no authority to create such a cause of action. *See* 139 CONG. REC. S10083-001, S10084 (daily ed. Aug. 2, 1993)(testimony of Sen. Hatch). "Judge Ginsburg declined an opportunity to legislate from the bench, even though from her background as a women's rights lawyer, she might have been thought to be sympathetic to the plaintiffs." *Id.*

because of qualities that they recognize in themselves, albeit in differing degrees.[15] "Any list [of heroes] chosen is peculiar to its maker and reveals as much about [the chooser] as about his choices."[16] Although Ginsburg would not agree with many of Harlan's opinions, as discussed briefly in Part II, Harlan's work has demonstrated that he was indeed an independent judge, with qualities of fairness and respect for the judicial process which many commentators have acknowledged.[17] "[S]incerity, a deep genuine sincerity, is the first characteristic of all men in any way heroic."[18] Harlan's work on the Supreme Court demonstrates that he was a sincere, thoughtful Justice, a quality which Ginsburg and others have characterized as heroic.[19]

Commentators have commended Harlan's balanced, reasoned jurisprudence and his determination to follow precedent and allow the legislature to effect social change.[20] Harlan wrote many dissents in response to the activism of the Warren Court,[21] an activism which he maintained was inappropriate for the judiciary.[22] He strongly emphasized that the role of the Court was not to make

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[15] *See* PHILIP JASON & ALLAN B. LEFCOWITZ, CREATIVE WRITER'S HANDBOOK 362 (1994)(defining "hero").

[16] Carl Niemeyer, *Introduction* to CARLYLE, ON HEROES, *supra* note 1, at viii. Carlyle wrote of categories of heroes: the hero as divinity, prophet, poet, priest, man of letters or king. *See id.*

[17] *See supra* note 11 and accompanying text.

[18] CARLYLE, *supra* note 1, at 45 (emphasis in original). Although Carlyle's reputation has declined for his failure to be more discriminating in his choice of heroes, he recognized the force of the great man in history. *See* Carl Niemeyer, *Introduction* to CARLYLE, ON HEROES, *supra* note 1, at viii. For example, Carlyle categorized Napoleon as a hero because of his humble beginnings. *See id.*

[19] *See* Fried, *supra* note 7, at 33; *see also* Judiciary Hearings, *supra* note 3; James F. Simon, *Foreword: The New York Law School Centennial Conference in Honor of Justice John Marshall Harlan*, 36 N.Y.L. SCH. L. REV. 1 (1991); Gunther, *Another View of Justice Harlan*, *supra* note 7, at 67; Field, *supra* note 7, at 155.

[20] *See, e.g.*, Fried, *supra* note 7, at 43; Kan, *supra* note 11, at 1425.

[21] *See* JACKSON, *supra* note 2, at 500-01. Serving on the Warren Court in 1955 were Justices Warren, Black, Frankfurter, Douglas, Harlan, Reed, Burton, Clark, and Minton. *See id.* at 501. In 1957, Justices Brennan and Whittaker replaced Reed and Minton. *See id.* at 502. In 1958, Justice Burton was replaced by Justice Potter Stewart. *See id.* at 504. Justice Whittaker resigned in 1961, to be replaced by Byron White, and Justice Frankfurter retired before the 1962 term, being replaced by Arthur Goldberg. *See id.* at 507. Justice Fortas replaced Goldberg in 1965. *See id.* at 510. In 1966, Thurgood Marshall replaced Clark. *See id.* at 511. Chief Justice Warren resigned at the end of the 1967 term. *See id.* at 512. Key decisions of the Warren Court included *Brown v. the Board of Education*, 347 U.S. 483 (1954)(prior to Harlan's appointment to the Court), and *Griswold v. Connecticut*, 381 U.S. 479 (1965). *See also* discussion *infra* notes 68-72 and accompanying text.

[22] *See* Lori G. Wentworth, *Justice Harlan, Justice Rehnquist, and the Values of Federalism*, 36 N.Y.L. SCH. L. REV. 255, 257 (1991).

new law arbitrarily. Ginsburg also supported this view on the role of the Court, as discussed in Part III of this comment.

Harlan and Ginsburg are also similar in their careful, strategic use of dissenting and concurring opinions as "pathmarking models"[23] for future change in the law. Since his death, commentators have called Harlan the "great dissenter," both for the quality and quantity of his dissents.[24] Similarly, in Ginsburg's short career on the Supreme Court she has penned some powerful dissents and concurrences.[25] Part IV compares the writings of Harlan and Ginsburg by examining their use of both dissenting and concurring opinions.

The Court, according to Harlan and Ginsburg, should ideally move in measured motions, carefully relying on precedent to develop change in the patterns of the law and allowing the legislature to respond.[26] Both Harlan and Ginsburg helped the Court make permanent changes in the law by using precedent and laying pathmarkers in just such a measured, precise manner. Part V of this comment compares two specific examples of significant changes in the law that evolved from each respective Justice's work: the individual right to privacy, which Harlan first developed in a dissenting opinion,[27] and the heightened standard of review in gender discrimination cases, which Ginsburg advocated early in her career.[28] These examples demonstrate both

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[23] Ginsburg used this word to describe separate opinions deliberately written to use in building precedents for future cases. *See* Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. Rev. 1185, 1196 (1992) [hereinafter Ginsburg, *Judicial Voice*].

[24] *See* YARBROUGH, *supra* note 2, at viii. The quantity of Harlan's dissents ranged from four in 1954, his first term on the Supreme Court, to a high of 67 in 1967. *See* PERCIVAL E. JACKSON, *supra* note 2, at 500-513. The quality and eloquence of Harlan's dissents is exemplified in *Poe v. Ullman*, 367 U.S. 497, 549 (1967)(Harlan, J., dissenting)(discussion *infra* Part V.A.). For other particularly eloquent examples of Harlan's dissenting, *see also Flast v. Cohen*, 392 U.S. 83, 116 (1968)(Harlan, J., dissenting) and *Fay v. Noia*, 372 U.S. 391, 448 (1963)(Harlan, J., dissenting).

[25] *See, e.g.*, Adarand v. Pena, 515 U.S. 200, 271 (1995) (Ginsburg, J. dissenting)(discussion *infra* note 214 and accompanying text); Consolidated Rail Corp. v. Gottshall, 512 U.S. 532, 559 (1994)(Ginsburg, J. dissenting)(discussion *infra* notes 105-10 and accompanying text); Harris v. Forklift Systems, Inc., 510 U.S. 17, 25 (1993)(Ginsburg, J., concurring)(discussion *infra* notes 257-63 and accompanying text).

[26] *See generally* Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133 (1990)[hereinafter Ginsburg, *Remarks*]; John M. Harlan, *Thoughts on a Dedication: Keeping the Judicial Function in Balance*, 49 A.B.A. J. 943 (1963)[hereinafter Harlan, *Thoughts at a Dedication*].

[27] *See* discussion *infra* Part V.A.

[28] *See* discussion *infra* at Part V.B.

Harlan's and Ginsburg's thoughtful judicial strategies to change the law by linking pathmarkers in separate opinions.[29]

Harlan will continue to be a hero for jurists, because he stood for fairness and reason on the Court and was a model of procedural regularity. It is undoubtedly for these qualities, and not for his conservative ideas, that Ginsburg has chosen him as one of her "heroes."[30] This comment argues that, although Ginsburg has only begun her career on the Supreme Court, her style parallels Harlan's in its balanced, deliberate approach and respect for the legal process.

II. HARLAN AND GINSBURG: CONTRASTING VIEWS

"Amongst [Harlan's] prolific output of opinions are dissents in which he came to results that many would find unacceptable today."[31] Harlan was known for his conservative civil rights stance.[32] *Hoyt v. State of Florida*[33] is an example of one of Harlan's majority opinions with which Ginsburg disagreed specifically. The case involved a woman, Hoyt, convicted by an all-male jury of the second degree murder of her husband.[34] Hoyt claimed that the statute that excused women from jury service unless they expressly requested to serve was discriminatory, because only a few women had registered for jury duty since the enactment of the statute.[35]

Harlan, writing for the majority, found that the right to an impartial jury did not "entitle one accused of crime to a jury tailored to the circumstances of the

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[29] The Supreme Court defined the right to privacy in *Griswold v. Connecticut*, 381 U.S. 479 (1965), based on Harlan's dissent in *Poe v. Ullman*, 367 U.S. 497, 549 (1961). Ginsburg recently articulated a new level of review for gender classifications in *United States v. Virginia*, 515 U.S. 518 (1996). The standard of review therein specifies that states must have an "exceedingly persuasive justification" to classify on the basis of sex. *Virginia*, 515 U.S. at 533.

[30] *See* discussion *infra* Part II.

[31] Fried, *supra* note 7, at 33. *See, e.g.*, Avery v. Midland County, 390 U.S. 474, 486 (1968)(Harlan, J., dissenting). Harlan objected to states being prevented from reapportioning electoral districts to minimize minority voting. *See id. See also* Reynolds v. Sims, 377 U.S. 533, 589 (1964) (Harlan, J., dissenting); Wesberry v. Sanders, 376 U.S. 1, 20 (1964)(Harlan, J., dissenting). In *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), Harlan challenged the Court's approval of Fourteenth Amendment action for discrimination in places of public accommodation. *See id.* at 680 (Harlan, J., dissenting). And in *Shapiro v. Thompson*, 394 U.S. 618, 655 (1969), Harlan argued that one-year residency requirements should be allowed for voters. *See id.* at 655 (Harlan, J., dissenting).

[32] *See, e.g.*, Griffin v. Illinois, 351 U.S. 12, 29 (1956)(Harlan, J., dissenting)(arguing that imposing a fee for a transcript of a trial did not deny an indigent defendant of his constitutional rights).

[33] 368 U.S. 57 (1961).

[34] *See id.* at 58.

[35] *See id.*

particular case[.]"[36] Harlan defended the Florida statute as reasonable, asserting that despite woman's "enlightened emancipation" and "entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life."[37] The Court upheld the Florida statute, even though women comprised only five percent of the jury registry.[38]

It is not a surprise that in her writing, Ginsburg singled out the *Hoyt* case for criticism.[39] She described *Hoyt* as follows:

> Complainant Hoyt had been convicted of second degree murder. Her trouble began with an alleged bruising altercation in which, she claimed, her philandering husband had wounded, insulted, and humiliated her to the breaking point. Spying a nearby baseball bat, she seized it and administered the blow that ended both fight and husband, and precipitated the murder prosecution. Hoyt believed that female peers on the jury roll might have produced a panel more competent to assess her plea of temporary insanity.[40]

Ginsburg criticized Harlan's opinion and the Florida statute that purported to spare women the obligation to serve on juries in recognition of their place in the home.[41] "A check of the current Population Reports," Ginsburg wrote, "would have revealed the infirmity in that generalization."[42]

Another Harlan opinion with which Ginsburg would not have likely agreed is *Reynolds v. Sims*,[43] where Harlan dissented against the Court's finding that Alabama's legislative apportionment plan violated the Equal Protection Clause of the Fourteenth Amendment.[44] The plaintiffs in *Reynolds* argued that Alabama's reapportionment diluted their votes by entitling them to vote for fewer legislators than other voters.[45] Harlan would have allowed the Alabama legislature to apportion districts as it chose, so long as it had no intent to disadvantage a racial group.[46] Ginsburg would not likely have supported such

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[36] *See id.* at 59.

[37] *Id.* at 61-62.

[38] *See id.* at 59, 65.

[39] *See* Ruth Bader Ginsburg, *Sex Equality Under the Fourteenth Amendment and the Equal Rights Amendments*, 1 WASH. U. L.Q. 161, 163 (1979); *see also* Ruth Bader Ginsburg, *Sex Equality and the Constitution*, 52 TUL. L. REV. 451, 456 (1978).

[40] Ginsburg, *Sex Equality and the Constitution*, *supra* note 39, at 456.

[41] *See id.*

[42] *Id.* In other words, women were also out in the workplace in large numbers, rather than primarily "in the home." *See id.*

[43] 377 U.S. 533 (1964).

[44] *See id.* at 590 (Harlan, J., dissenting). Plaintiffs were minority voters who argued that their voting power was diluted by the districting plan. *See id.* at 563.

[45] *See id.* (Harlan, J., dissenting).

[46] *See id.* at 624 (Harlan, J., dissenting).

a literal interpretation of the Fourteenth Amendment, as evidenced by her arguments in early gender discrimination cases.[47]

Although Harlan's *Poe v. Ullman*[48] dissent, which gave rise to the individual right of privacy is highly praised, Harlan did not support privacy interests outside the marriage.[49] Harlan wrote: "Adultery, homosexuality and the like are sexual intimacies which the State forbids altogether, but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage[.]"[50] In contrast, as an advocate for the American Civil Liberties Union ("ACLU"), Ginsburg argued that an unmarried pregnant woman's right to decide whether to have an abortion implicated the right to privacy.[51] While Harlan would not have extended the right of privacy to an unmarried woman, Ginsburg considered this to be an important blend of women's equality and the right to privacy.

"Conservative" is a loaded term, and Harlan's complexity "makes him far less readily reducible than most Justices to simple characterizations drawn from the liberal-conservative spectrum."[52] Harlan's opinions were not always conservative. For example, in *NAACP v. Alabama*,[53] Harlan established for the first time, and in broad terms, the freedom of association as an aspect of liberty assured by the Due Process Clause.[54] In *Cohen v. California*,[55] Harlan, writing for the majority, reversed the conviction of a defendant who wore a jacket bearing the words "Fuck the Draft" into a Los Angeles County Municipal Court.[56] Harlan wrote that the First Amendment protected the

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[47] *See infra* notes 251-52 and accompanying text. In her Confirmation Hearings, one senator said that although often in recent years the Supreme Court had adopted "excessively narrow interpretations" of civil rights laws, placing "obstacles in the path of victims of discrimination," Justice Ginsburg "will reject that destructive trend in the Court's jurisprudence . . . ." 139 CONG. REC. S10083-001, S10090 (daily ed. Aug. 2, 1993)(quoting Senator Edward Kennedy).

[48] 367 U.S. 497 (1961).

[49] *See id.* at 553 (Harlan, J., dissenting).

[50] *See id.* (Harlan, J., dissenting).

[51] *See* Struck v. Secretary of Defense, 460 F.2d 1372, 1374 (9th Cir. 1971). The Air Force had a mandatory discharge rule for females who became pregnant and refused to get an abortion. *See id.* After the case was presented, the Air Force granted Struck a waiver, and the Court declared the case moot. *See* Ginsburg, *Judicial Voice*, *supra* note 23, at 1200 n.90.

[52] Gunther, *Another View of Justice Harlan*, *supra* note 7, at 67.

[53] 357 U.S. 449 (1958).

[54] *See id.* The Court held that requiring the NAACP to produce records of the names and addresses of all members restrained their freedom of association. *See id.* at 460.

[55] 403 U.S. 15 (1971).

[56] *See id.* at 16, 26.

emotive force of words, or a person's "freedom to speak foolishly and without moderation."[57]

Marked exceptions to Harlan's restrained stance in civil liberties cases[58] reveal Harlan as an independent jurist who carefully reviewed the facts of each individual case.[59] Although Harlan wrote many opinions that Ginsburg would not have supported, she has expressed admiration for Harlan's respect for the judicial process, and in many instances, she has adopted his methods. Mere moral differences cannot render Harlan and Ginsburg dissimilar. While each Justice might support different cases or make different arguments, these differences do not diminish their many similarities in approach and jurisprudential style.

III. HARLAN AND GINSBURG: AFFECTING LEGISLATIVE CHANGE SIMILARLY

Both Harlan and Ginsburg wrote of their belief that the Court must follow established precedent and leave elaborate changes to the legislature.[60] In 1921, Benjamin Cardozo wrote on the role of the judiciary, expressing ideas that Harlan and Ginsburg later adopted. Cardozo expressed the idea that judicial power should never be exercised "for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or in other words, to the will of the law."[61]

Cardozo saw the task of the judge as that of a translator, reading signs and symbols given from within the law.[62] He acknowledged that legislatures sometimes disregarded this responsibility and passed it on to the courts.[63]

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[57] *See id.* at 26. Ginsburg called *Cohen v. California* her "favorite Harlan case." *See* Ruth Bader Ginsburg, Roundtable Discussion at William S. Richardson School of Law (Feb. 3, 1998)(tape on file with U. HAW. L. REV.).

[58] *See, e.g.*, Garner v. Louisiana, 368 U.S. 157, 192 (1961)(Harlan, J., concurring) (expressing his conviction that a black man sitting in protest at a "whites only" lunch counter was protected under the First Amendment). *But cf.* Harper v. Virginia Bd. of Elections, 383 U.S. 663, 680 (1966)(Harlan, J., dissenting)(arguing for the constitutionality of state poll taxes which had the effect of denying the poor, especially blacks, the right to vote).

[59] *See* Gunther, *Another View of Justice Harlan*, *supra* note 7, at 67.

[60] *See* Harlan, *Thoughts at a Dedication*, *supra* note 26, at 943-44; *see also* Ginsburg, *Judicial Voice*, *supra* note 23, at 1204-206.

[61] BENJAMIN N. CARDOZO, LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES 11 (1931).

[62] *See* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 174 (1921). Cardozo rightfully feared that the power put in the hands of the Court was subject to potential abuse. *See id.* at 16.

[63] *Id.* at 93. Cardozo wrote that the Court's usefulness should not be measured by counting the number of times it uses its power to restrain legislative judgment. *See id.* at 92. Cardozo

Cardozo called the judge "the interpreter for the community of its sense of law and order," especially in cases where there was a "fragmentary, ill-considered, and unjust statute," and stated that judges "must supply omissions, correct uncertainties, and harmonize results with justice through a method of free decision[.]"[64] "It is when the colors do not match, when the references in the index fail, when there is no decisive precedent, that the serious business of the judge begins."[65]

Harlan and Ginsburg have both demonstrated similar attitudes about the role of the judiciary in relationship to the role of the legislature. This section will compare their attitudes by first examining specific cases where each Justice found that the Court had shown inappropriate judicial activism, and then by examining cases where Harlan and Ginsburg each determined it was necessary for the Court to recast legislation.

A. Harlan and Ginsburg: Leaving It to the Legislature

Although Harlan served on an activist Supreme Court, he advanced the philosophy that the Court should move slowly, allowing the legislature to make major social changes.[66] Harlan outlined his faith in the legislature's ability to correct the country's problems in a 1963 speech:

> [Some] doubt whether the federal system is any longer adequate to meet the needs of modern American society; impatiece with the slowness of political solutions generally; and an urge for quick and uncompromising panaceas for things that call for reform. I venture to say at the outset that this cosmic view of the place of the judiciary is not only inconsistent with the principles of American democratic society but ultimately threatens the integrity of the judicial system itself.[67]

By contrast, Justice William Brennan, who served on the Court with Harlan beginning in 1957, became the "liberal lion of the Warren Court of the 1960's."[68] Brennan, along with Chief Justice Earl Warren, often adopted an

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argued that the restraining power of the Court in the background could serve as a stabilizer for the legislature. *See id.* at 93.

[64] *Id.* at 16.

[65] *Id.* at 21.

[66] For Harlan's comments on deference to the legislature, *see* Harlan, *Thoughts at a Dedication*, *supra* note 26, at 943.

[67] *Id.*

[68] Rosen, *supra* note 5, at 62. When Brennan was appointed to the Court in 1956, he joined with the liberal group, comprised of Chief Justice Warren, Justice Black, and Justice Douglas. *See* JACKSON, *supra* note 2, at 502. The conservative group included Justices Harlan, Frankfurter, and Burton, with Justice Clark sometimes showing conservative tendencies. *See id.* "One consequence of the division during this and the subsequent three terms was the

activist, liberal stance, especially on civil liberties issues.[69] Harlan spoke out at every possible opportunity on the impropriety of the Court's activism.[70] For example, in *Berger v. New York*,[71] Harlan wrote: "Newly contrived constitutional rights have been established without any apparent concern for the empirical process that goes with legislative reform."[72] This sentence embodies Harlan's standing criticism of the Court's activism at the time.

Harlan's strict philosophy on stare decisis and federalism was apparent.[73] Those who knew Harlan said he was so impartial in his approach that, in some instances, both defense attorneys and prosecutors wanted Harlan to be the judge.[74] Harlan commented extensively in his opinions on the issues of federalism and the separation of powers.[75] One commentator even called Harlan's commitment to federalism "the central theme of his judicial

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increased number of five-to-four decisions." *Id.*

[69] *See* DANIEL A. FARBER ET AL., CONSTITUTIONAL LAW 23 (1993)("[Warren] did bring an abiding mission—equal justice—and a tremendous political ability to lead the Court in new, and sometimes radical and controversial, directions.") An example of this was the Warren Court decision in *Brown v. Board of Education*, 347 U.S. 483 (1954). *See* FARBER, *supra* this note, at 25 (noting that the case embodies "the virtues Chief Justice Warren sought judicial review to foster: equality of opportunity as the goal, fairness as the guidepost, and public morality as the basis of evaluation."). Also, the Warren Court began to develop the role of the First Amendment in cases such as *Cox v. Louisiana*, 379 U.S. 536 (1965)(protecting the right of peaceful demonstration), *Brandenburg v. Ohio*, 395 U.S. 444 (1969)(preventing state prosecution of unpopular ideas), and *New York Times v. Sullivan*, 376 U.S. 254 (1964)(protecting the freedom of the press).

[70] *See* YARBROUGH, *supra* note 2, at viii.

[71] 388 U.S. 41 (1967).

[72] *Id.* at 89 (Harlan, J., dissenting). The claim involved a Fourth Amendment violation for using an eavesdropping device without exigent circumstances. *See id.* Harlan wrote in his dissent: "Despite the fact that the use of electronic eavesdropping devices as instruments of criminal law enforcement is currently being comprehensively addressed by the Congress and various other bodies in the country, the Court has chosen, quite unnecessarily, to decide this case in a manner which will seriously restrict, if not entirely thwart, such efforts, and will freeze further progress in the field . . . ." *Id.*

[73] *See* Field, *supra* note 7, at 155. "One focus of Harlan's opinions was explaining and defending the values behind those doctrines [of federalism and the separation of powers], and his opinions helped build a literature concerning the demands and contributions of the federal system that is still much used by the Court today." *Id.*

[74] *See* Simon, *supra* note 19, at 2.

[75] *See* Griffin v. Illinois, 351 U.S. 12, 29 (1956)(Harlan, J., dissenting)(arguing that the choice of proper rules for criminal procedure should be left to the states); Spencer v. Texas, 385 U.S. 554, 568-69 (1967)(writing that it would be "a wholly unjustifiable encroachment" for the Court to establish rules of evidence for the states). *See also* David L. Shapiro, *Justice Harlan and Justiciability: Notes on Two Dissents*, 36 N.Y.L. SCH. L. REV. 199, 201 (1991); Harvie Wilkinson, III, *Justice John M. Harlan and the Values of Federalism*, 57 VA. L. REV. 1185, 1187 (1971); Field, *supra* note 7, at 155.

universe[.]"[76] Another wrote that: "Harlan was unusual, because he genuinely seemed to care more about how a case was decided than about the result reached. Even today—twenty years after his retirement—he serves as the model for these judicial virtues."[77]

Much as Harlan gained a reputation for being a non-activist and placing faith in the judicial process, Ginsburg earned a reputation as a moderate, non-activist judge on the United States Court of Appeals for the District of Columbia ("D.C. Circuit") which eased her confirmation in the Senate.[78] One senator said that Ginsburg's record demonstrated "that she [was] willing and able to issue rulings called for by the Constitution and the Federal statutes, even though Judge Ginsburg, were she a legislator, might personally have preferred different results[.]"[79] Another senator said that Ginsburg "speaks and practices judicial restraint, understanding that a judge must work within our constitutional system, respecting history, precedent, and the respective roles of the other two branches of Government[.]"[80] In fact, following her first term on the Supreme Court, liberals were disappointed that Ginsburg failed to follow in the traditions of the "Warren Court justices who consistently advanced broad interpretations of constitutional rights."[81]

Ginsburg's cautious, reasoned approach on the Supreme Court should come as no surprise, however, since she herself has written extensively about how the judicial branch should take incremental steps, allowing legislature and society to respond to court-ordered changes.[82] Her philosophy is that judges should "generally lay markers along the road to doctrinal change, rather than making abrupt changes that lack secure foundations."[83] Even as an advocate, she insisted that the ACLU attempt to develop the law on women's equality one step at a time.[84] Ginsburg's colleagues on the ACLU remembered her cautioning them many times by saying: "It's not time for that case."[85]

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[76] Wentworth, *supra* note 22, at 255 (citations omitted). *See also* Wilkinson, *supra* note 75, at 1187 (calling Harlan's commitment to federalism an "obsession").

[77] Field, *supra* note 7, at 155.

[78] *See* 139 CONG. REC. S10083-001, S10085 (daily ed. Aug. 2, 1993). Senator Grassley of Iowa said: "Judge Ginsburg showed us that, while she is a political liberal, she is a judicial moderate." *Id.*

[79] *Id.* at S10084 (quoting Senator Hatch, Utah).

[80] *Id.* at S10083-001.

[81] Christopher Smith et al., *The First Term Performance of Justice Ruth Bader Ginsburg*, 78 JUDICATURE 74, 78 (1994). Legal scholars expected Ginsburg to encourage the Supreme Court to re-energize the liberal Warren Court approach. *See id.* at 75. However, she neglected to advance any broad women's rights agenda in her first term. *See id.* at 80.

[82] 139 CONG. REC. S10083-001, S10084 (daily ed. Aug. 2, 1993).

[83] *Id.*

[84] *See* Rosen, *supra* note 5, at 64.

[85] *Id.* (internal quotations omitted).

Perhaps because of her reputation as a moderate judge, the Senate Judiciary Committee unanimously voted to recommend confirmation at the end of Ginsburg's hearings.[86] The Committee concluded that Ginsburg was a careful adherent to a "case-by-case method of gradual evolution in the law, . . . [believing that] the Court should move in 'measured motions.'"[87] The Committee also observed that Justice Harlan's approach was one of "measured change and rooted evolution," which comported with both the intent and draftsmanship of the Constitution.[88] "In adopting Justice Harlan's approach . . . Judge Ginsburg has selected a method for identifying unenumerated rights in keeping with the Constitution's majestic and capricious language."[89] In these traits, the Committee found that Harlan appeared to be Ginsburg's model, and found that "Judge Ginsburg's embrace of this approach provide[d] excellent reason to support her."[90]

B. Harlan and Ginsburg: Critiquing Examples of Inappropriate Judicial Activism

Both Harlan and Ginsburg have voiced disapproval of specific instances of inappropriate Supreme Court activism, where the Court ruled contrary to precedent. An example of what Harlan perceived as the Court's over-reaching was the well-known *Miranda v. Arizona*[91] decision.[92] Harlan objected to *Miranda* for the "nakedly legislative character of the Court's opinion, which did not even pretend to address the case before it but rather took the occasion to lay down an elaborate code of police procedure."[93] Harlan attacked the *Miranda* holding because it violated his convictions of the outer limits of

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[86] *See* Judiciary Hearings, *supra* note 3, at 40.

[87] *See id.* at 8. When Ginsburg was appointed to the D.C. Circuit, Gerald Gunther spoke of the modesty and open-mindedness of Learned Hand, expressing the belief that Ginsburg also held these qualities and would demonstrate them on the bench, although most thought of her as a liberal advocate. *See* Gerald Gunther, *Ruth Bader Ginsburg: A Personal, Very Fond Tribute*, *supra* this edition.

[88] Judiciary Hearings, *supra* note 3, at 15.

[89] *Id.*

[90] *Id.*

[91] 384 U.S. 436 (1966).

[92] *See id.* at 525-26 (Harlan, J., dissenting). *But cf.* Welsh v. United States, 398 U.S. 333, 355-56 (1970)(Harlan, J., concurring)(discussed *infra* Part III.C).

[93] Fried, *supra* note 7, at 47. The case involved the admissibility of statements obtained from a defendant questioned while in custody and deprived of his freedom of action by police. *See Miranda*, 384 U.S. at 440. The *Miranda* case created individual rights against self-incrimination upon arrest, including the right to remain silent, the right to have an attorney provided at no cost, and to have the attorney present at questioning. *See id.* at 440. *See also* Fried, *supra* note 7, at 47.

judicial power.[94] Specifically, Harlan criticized the majority's position, stating that: "The Court's opinion in my view reveals no adequate basis for extending the Fifth Amendment's privilege against self-incrimination to the police station. Far more important, it fails to show that the Court's new rules are well supported, let alone compelled, by Fifth Amendment precedents."[95]

Modern commentators have recognized Harlan's objections to the *Miranda* opinion as valid, even though *Miranda* is still good law today.[96] One commentator has said that *Miranda* was "perhaps the most unabashed example to date of the Court's imposition of its general policy views on a whole area, without regard to what the case before it required for decision."[97] In this respect, *Miranda* was the forerunner of the Court's opinion seven years later in *Roe v. Wade*.[98]

The *Roe v. Wade* decision dealt with a Texas statute that made it illegal for a woman to get an abortion.[99] Besides declaring the statute unconstitutional, the opinion created an unprecedented trimester system for states to follow in regulating abortion.[100] The system detailed by the Supreme Court fashioned an abortion regime that displaced virtually every state law then in force.[101]

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[94] *See* Fried, *supra* note 7, at 47.

[95] *Miranda*, 384 U.S. at 510. Harlan argued that the decision of the Court "represent[ed] poor constitutional law and entail[ed] harmful consequences for the country at large. How serious these consequences may prove to be only time can tell." *Id.* at 504 (Harlan, J., dissenting).

[96] *See* Fried, *supra* note 7, at 47.

[97] *Id.*

[98] *See id. See also* Roe v. Wade, 410 U.S. 113 (1973).

[99] *See Roe*, 410 U.S. at 114.

[100] *See id.* at 164. The trimester system provided that during the first trimester, "the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician." *Id.* During the next three-month period, the state could require other measures protective of the woman's health. *See id.* In the stage subsequent to viability, which is the point where a fetus could survive outside the womb, the state could also concern itself "with an emerging interest, the potentiality of human life, and [could] regulate [or] even proscribe abortion except [to preserve] the life or health of the mother." *Id.* at 164-65. Ginsburg argued that the detail of the opinion made virtually all state abortion laws unconstitutional. *See* Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 381 (1985)[hereinafter Ginsburg, Autonomy].

[101] *See* Ginsburg, *Judicial Voice*, *supra* note 23, at 1198. The holding in *Roe v. Wade* not only declared the Texas criminal abortion statute unconstitutional, but it established for the first time a trimester measure of legality for state abortion regulations. *See Roe*, 410 U.S. at 164. Twenty years of controversy surrounding the constitutionality of state abortion laws resulted. *See* Ginsburg, *Judicial Voice*, *supra* note 23, at 1199. *See also* Planned Parenthood v. Casey, 505 U.S. 833 (1992)(noting the controversy resulting from the *Roe v. Wade* decision); *Litmus Test?*, WALL ST. J., Jan. 22, 1998, at A18. "In the 25 years since *Roe v. Wade*, the abortion controversy has not faded away but steadily intensified." *Litmus Test?*, *supra* this note, at A18. Having lost a key battle in Roe, opponents of abortion began a series of court and legislative

Like Harlan in *Miranda*, Ginsburg found the Court's action in *Roe* without precedent. She wrote and spoke extensively of her objections to the opinion,[102] even though basic reproductive freedom for women was an idea she supported.[103] "Doctrinal limbs too swiftly shaped, experience teaches, may prove unstable."[104] Ginsburg criticized the Court's creation of an abortion regime in the opinion which rendered every existing state law unconstitutional.

Ginsburg's desire to leave major changes in the law to the state legislatures is especially evident in her writings on affirmative action cases.[105] *Adarand v. Pena*[106] involved a Colorado affirmative action program which governed the awarding of federal highway subcontracts by giving preferences to racial or economic minorities.[107] The Supreme Court issued a split decision which overruled standards it had set in *Metro Broadcasting, Inc. v. FCC*.[108] In

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skirmishes that now have lasted a quarter-century." *Roe, 25 Years After*, NATL. L. J., Jan. 26, 1998, at A20.

[102] *See, e.g.*, Ginsburg, *Judicial Voice*, *supra* note 23, at 1185; Ginsburg, *Autonomy*, *supra* note 100, at 375. Ginsburg supported allowing the states to make changes in the abortion laws at their own pace. *See* Ginsburg, *Judicial Voice*, *supra* note 23, at 1205; *see also* Ruth Bader Ginsburg, *On Muteness, Confidence, and Collegiality: A Response to Prof. Nagel*, 61 U. COLO. L. REV. 715, 719 (1990)[hereinafter Ginsburg, *Collegiality*]; Confirmation Hearings, *supra* note 3, at 18-19.

[103] *See* Ginsburg, *Sex Equality and the Constitution*, *supra* note 39, at 460. "The 1973 abortion decisions have been typed aberrational—highly activist decisions from a bench normally deferential to legislative judgments. But significantly, the opinions in *Roe v. Wade* and *Doe v. Bolton* barely mention women's rights. They are not tied to any equal protection or equal rights theory." *Id.*

[104] Ginsburg, *Judicial Voice*, *supra* note 23, at 1198.

[105] *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 271 (1995)(Ginsburg, J., dissenting); *see also* Hopwood v. State of Texas, 78 F.2d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1031 (1996). For other cases dealing with deference to the state court on issues of state law, *see also Arizonans for English v. Arizona*, 520 U.S. 43, 75 (1997); *Arizona v. Evans*, 514 U.S. 1, 23 (1995)(Ginsburg, J., dissenting).

[106] 515 U.S. 200 (1995).

[107] *See Adarand*, 515 U.S. at 205. In *Adarand*, Adarand Constructors, Inc., a non-minority controlled business, submitted the low bid on a highway construction guardrail contract. *See id.* Adarand claimed that the federal government's practice of giving general contractors on government projects a financial incentive to hire subcontractors controlled by "socially and economically disadvantaged individuals," and the government's use of race-based presumptions violated the equal protection component of the Fifth Amendment's Due Process Clause. *See id.* at 205-06. The Court held that a strict scrutiny review applied, and such racial classifications would pass constitutional muster only if narrowly tailored to further compelling governmental interests. *See id.* at 227.

[108] *See Adarand*, 515 U.S. at 227 (overruling *Metro Broadcsting*). "To the extent that *Metro Broadcasting* is inconsistent with that holding [that strict scrutiny would apply], it is overruled." *Id.* In *Metro Broadcasting*, the Court had held that "*intermediate scrutiny*" applied to a racial classification intended to benefit racial minorities in radio and television licensing, i.e.,

Adarand, the Court found that strict scrutiny must apply to any racial classification, because it was not always possible to tell when a classification was benign.[109] Ginsburg dissented, arguing that she saw no reason for the Court to intervene where the statutes and regulations at issue were adopted by the political branches in response to an "unfortunate reality: the unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in the country."[110]

In addition to arguing for deference to the legislature in *Adarand*, Ginsburg expressed Harlan-like ideas on federalism in later cases,[111] where she supported the idea that state courts should be allowed to enforce new legislation before subjecting the legislation to a constitutional challenge. In *Hopwood v. Texas*,[112] in denying a petition for *certiorari*, Ginsburg wrote a short statement explaining that the Court "must await a final judgment on a program genuinely in controversy."[113] Ginsburg also articulated the Court's reluctance to overturn state laws based on a facial review in *Arizonans for Official English v. Arizona*.[114] As a general rule, she said, federal courts "ought not to consider the Constitutionality of a state statute in the absence of a controlling interpretation of its meaning and effect by the state courts."[115]

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affirmative action. *See id.* at 600. The intermediate scrutiny standard established that a benign federal racial classification must be substantially related to the achievement of important government objective to survive review. *See id.* at 564-65. *See also* Craig v. Boren, 429 U.S. 190 (1979)(establishing the "intermediate" standard). While Ginsburg has said that she does not consider labels, i.e. "intermediate review," or "Warren Court," to be completely accurate, this comment uses the standards of review used by the Supreme Court as a convention for discussion. *See* Ruth Bader Ginsburg, Roundtable Discussion at William S. Richardson School of Law (Feb. 3, 1998)(tape on file with U. HAW. L. REV.).

[109] *See Adarand*, 515 U.S. at 225.

[110] *Id.* at 272 (Ginsburg, J., dissenting)(citing lead opinion).

[111] *See, e.g.*, Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996); Arizonans for Official English v. Arizona, 520 U.S. 43 (1997). *See also* discussion *infra* note 195.

[112] 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1031 (1996). The petition for *certiorari* involved a law school admissions case, where preferences to African-American and Mexican-American applicants were held to be unconstitutional. *See Hopwood*, 78 F.3d at 955.

[113] Hopwood v. Texas, 518 U.S. 1031, 1031 (1996)(Mem.). This is a significant example of Ginsburg's fair approach and consistent support of the principles of federalism, because Ginsburg had previously written in support of affirmative action programs in her *Adarand* dissent. *See* discussion of *Adarand infra* note 209. In addition, the Supreme Court refused to block the enforcement of California Proposition 209, which prohibits granting preferences on the basis of race or gender in state or local government, and denied the request for review without making comment. *See High Court Won't Block Affirmative Action Ban*, LOS ANGELES TIMES, Aug. 30, 1997, at A19.

[114] 520 U.S. 43 (1997).

[115] *Id.* at 75. *See also* Arizona v. Evans, 514 U.S. 1, 23 (1995)(Ginsburg, J., dissenting). Ginsburg argued that where it is unclear whether a state court decision is based on state or

Ginsburg warned against a federal court endeavoring to interpret a law which was unique to a state before the state court had a chance to review the law, because in doing so, the federal court risked generating error in its interpretation.[116]

Interestingly, in this opinion, Ginsburg quoted Harlan's dissent in *Poe v. Ullman* to support the Court's position, saying that "[w]hen anticipatory relief is sought in federal court against a state statute, respect for the place of the states in our federal system calls for close consideration . . . ."[117] Ginsburg's opinions in these cases demonstrated a respect for federalism which is strongly reminiscent of Harlan's.[118] These examples indicate that Ginsburg too is inclined to leave interpretations of state law to the states until the Court has a reason to intervene.

C. Harlan and Ginsburg: The Judiciary's Role in Recasting Legislation

The "leave it to the legislature" philosophy was not an absolute for Harlan and Ginsburg. Both acknowledged that, at times, and in certain situations, the judiciary must make new constitutional law.[119] Harlan conceded that the judiciary should provide constitutional guidelines and remand unconstitutional legislation at times.[120] For example, Harlan argued to extend a statute in *Welsh v. United States*:[121]

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federal law, the presumption should be for state law. *See Evans*, 514 U.S. at 24 (Ginsburg, J., dissenting).

[116] *See Arizonans for English*, 520 U.S. at 76.

[117] *See id.* at 75 (quoting Poe v. Ullman, 376 U.S. 497, 526 (1961)(Harlan, J., dissenting)).

[118] *See, e.g.*, Chapman v. California, 386 U.S. 18, 45 (1967)(Harlan, J., dissenting). Harlan wrote that "among the constitutional values which contribute to the preservation of our free society none ranks higher than the principles of federalism . . . ." *Id.* at 57 (Harlan, J., dissenting). Another argument Harlan advanced in support of federalism was that the states were more in touch with the practical affairs of the "real world," while the Supreme Court had an "ivory tower" perspective which was too far removed. *See* Stephen M. Dane, *"Ordered Liberty" and Self-Restraint: The Judicial Philosophy of the Second Justice Harlan*, 51 U. CIN. L. REV. 545, 550-51 (1982).

[119] *See* Judiciary Hearings, *supra* note 3, at 11. "Judge Ginsburg then did acknowledge that there are some cases in which the Court appropriately may lead society in bold new directions—even where there are no 'pathmarkers' to show the way, and no 'dialogue' with the political branches." *Id.* Specifically, she cited as an example *Dred Scott v. Sanford*, 60 U.S. 393 (1857), where the Court ruled for the first time on the status of a slave who had been taken to a non-slavery state. *See* Judiciary Hearings, *supra* note 3, at 11. See also Harlan's concurring opinion in *Welsh v. United States*, 398 U.S. 333, 344 (1970), a case involving a person who claimed conscientious objector status on moral grounds and refused to submit to induction into the U.S. armed forces.

[120] *See, e.g.*, Welsh v. United States, 398 U.S. 333, 355 (1970)(Harlan, J. concurring).

[121] 398 U.S. 333 (1970).

> If an important congressional policy is to be perpetuated by recasting unconstitutional legislation . . . the analytically sound approach is to accept responsibility for [the] decision.[122]
>
> Where a statute is defective because of underinclusion there exist two remedial alternatives: a court may either declare it a nullity and order that its benefits not extend to the class that the legislature intended to benefit or it may extend the coverage of the statute to include those who are aggrieved by exclusion.[123]

Ginsburg too has recognized the need for the judiciary to recast legislation in certain circumstances, and her philosophy on when and how a Court should recast legislation was influenced directly by Harlan's approach in *Welsh v. United States*.[124] For example, she once wrote that although Congress can mend disagreements in the law more efficiently than courts can, when courts identify deficiencies, "too often, no receiver in Congress picks up the message."[125] In those circumstances, the Court should repair or recast the law. Ginsburg specifically followed Harlan's approach for judicial repair of legislation as an ACLU advocate in 1975, in her argument in *Weinberger v. Weisenfeld*.[126]

Weinberger v. Weisenfeld[127] involved a Social Security law which provided for payment of "mother's benefits" if her spouse should die. The plaintiff in the case, however, was a father who had lost his wife.[128] Ginsburg argued for extension of the "mother's benefit" to a "parent's benefit."[129] Ginsburg studied Harlan's concurrence in *Welsh* as a standard for when and how a court should attempt to recast a statute, citing it as support in her briefs

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[122] *Id.* at 355-56 (Harlan, J., concurring). Harlan argued that the statute involved was underinclusive because it did not include exemption from military service unless based on a belief in God. *See id.* at 345. Exemptions were not granted for simple moral or ethical objections to war. *See id.* at 336. The Court found that views which were purely ethical or moral could entitle a person to conscientious objector status. *See id.* at 337.

[123] *Id.* at 361 (Harlan, J., concurring).

[124] *See infra* notes 127-32 and accompanying text.

[125] Ruth Bader Ginsburg, *A Plea for Legislative Review*, 60 S. CAL. L. REV. 995, 1013 (1987).

[126] *See* Ruth Bader Ginsburg, *Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation*, 28 CLEV. ST. L. REV. 301-05 (1979)[hereinafter Ginsburg, *Judicial Authority*]. *See also* Brief for American Civil Liberties Union as *Amicus Curiae* at 20-23, Frontiero v. Richardson, 411 U.S. 677 (1973)(No. 71-1694).

[127] 420 U.S. 636 (1975).

[128] *See id.* at 641.

[129] *See id.* at 636. The statute favored women by granting widows' benefits automatically, but requiring widowers to prove that their deceased wage-earning wife supplied at least three-fourths of the couple's support. *See id.* at 641.

for the ACLU.[130] She applied Harlan's strategy in arguing to expand the Social Security statutes to cover women as well as men.[131] In this way, Harlan's previous writings allowed Ginsburg to justify her position on the Court's right to extend the law.[132]

Both Harlan and Ginsburg recognized, however, that major changes in the law should ideally be made by the legislature.[133] They each articulated the position that the Court should intervene only when the statute is unconstitutional,[134] or when "no receiver in Congress picks up the message" that change in the law is needed.[135] The value of legislative enactment over Court-made legislation is that:

> Ordinary legislation, not disguised as constitutional interpretation, is flexible and subject to ready change in response to public opinion without the tug-of-war which rules of stare decisis generate. Nor need it overcome the obduracy of men with life tenure who, like most men, are not given to confess error. On the other hand, the Court's legislation, until a shift of ideological membership occurs, must undergo the tortuous paths laid down for its amendment by the Constitution, paths the Court deliberately bypasses by its pretense of constitutional interpretation . . . .[136]

This passage expresses the attitude that Harlan demonstrated in his work; Harlan recognized the value of allowing major changes in the law to be accomplished by the legislature. Ginsburg also demonstrates deference to the legislature in her work, drawing support from specific Harlan writings.[137] Even the Senate in her Confirmation Hearings noted similarities between Harlan and Ginsburg in their attitudes on the role of the judiciary, calling Harlan Ginsburg's "model."[138] Although identification with a conservative Justice like Harlan no doubt helped her confirmation process in a Republican

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[130] *See* Ginsburg, *Judicial Authority*, *supra* note 126, at 303.

[131] *See, e.g.*, Brief for Appellee at 13, Weinberger v. Weisenfeld, 420 U.S. 636 (1975)(No. 73-1892).

[132] *See* Ginsburg, *Judicial Authority*, *supra* note 126, at 306 n.27.

[133] *See* Welsh v. United States, 398 U.S. 333, 355-56 (1970)(Harlan, J., concurring) (expressing agreement that a statute is inadequate and must be enlarged); Ruth Bader Ginsburg, *A Plea for Legislative Review*, 60 S. CAL. L. REV. 995, 1013 (1987)[hereinafter Ginsburg, *Plea*](acknowledging that sometimes the courts must intervene).

[134] *See Welsh*, 398 U.S. at 355-56 (Harlan, J., concurring). *See also supra* note 126 and accompanying text.

[135] Ginsburg, *Plea*, *supra* note 133, at 1013. Ginsburg wrote that Congress occasionally does attend to "petty tinkering" needed to maintain the legal system "in running order." *See id.* An example of appropriate "tinkering," Ginsburg wrote, would be clarifying the times when attorney's fee applications could be filed. *See id.*

[136] JACKSON, *supra* note 2, at 521.

[137] *See supra* notes 124-132 and accompanying text.

[138] *See supra* notes 88-90 and accompanying text.

Senate, Ginsburg adopted Harlan's techniques as a model early in her career, as an ACLU advocate.[139] Ginsburg spoke out against inappropriate court activism in *Roe v. Wade* and other times when doing so went against her feminist motivations, echoing Harlan's response to many cases in the Warren Court years, especially *Miranda v. Arizona*.[140] This examination of Harlan's and Ginsburg's judicial philosophies on the role of the Court illustrates specific instances where Ginsburg has emulated her hero, Harlan, adopting his reasoned, conservative methods, and gaining praise for doing so.[141] Like Harlan, Ginsburg thus emerges as a wise, cautious adjudicator, willing to open a dialogue with the legislature and prod it into acting, rather than promote her own substantive ideologies from the bench.

IV. HARLAN AND GINSBURG: WRITING SEPARATELY ON THE SUPREME COURT

The history and practice of having one opinion for the Court began with Chief Justice John Marshall, and remains standard for the Supreme Court and the Federal Courts of Appeals.[142] Dissents are filed in over one half of all Supreme Court cases.[143] The Supreme Court is bound by prior case law only to the extent that it values stare decisis.[144]

Both Harlan and Ginsburg have expressed strong convictions that the Court should value stare decisis and collegiality.[145] Yet both Harlan and Ginsburg were frequently compelled to write separately on the Court. Although this practice seems inconsistent with Harlan's and Ginsburg's philosophies, a closer examination of their dissents and concurrences indicates that both Justices chose to write separately for strategic reasons.

Historically, Justices have expressed varying opinions on the value of dissenting.[146] For example, Justice William O. Douglas once wrote that "[t]he

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[139] *See supra* note 130 and accompanying text.

[140] *See supra* notes 92-95 and accompanying text.

[141] *See supra* notes 88-90 and accompanying text.

[142] *See* Karl M. ZoBell, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, 44 CORNELL L. Q. 186, 193 (1959). *See also* Ginsburg, *Remarks*, *supra* note 26.

[143] *See* JACKSON, *supra* note 2, at 19. During Harlan's years on the Court, the incidence of his dissents varied from four in 1954 to 67 in 1967. *See id.* at 500-13.

[144] *See* Frank X. Altimari, Comment, *The Practice of Dissenting in the Second Circuit*, 59 BROOK L. REV. 275, 278 (1993).

[145] *See* Harlan, *Thoughts at a Dedication*, *supra* note 26, at 944-45; *see generally* Ginsburg, *Collegiality*, *supra* note 102, at 715.

[146] *See* ALAN BARTH, PROPHETS WITH HONOR 1-7 (1974). Although dissenting has varying meanings to Justices on the Supreme Court, the word "dissenter" in England originally denoted a member of a religious body who had separated from the established church. *See* JACKSON,

right to dissent is the only thing that makes life tolerable for a judge of an appellate court."[147] Frequently, Harlan found himself dissenting to express his strong objections to the Supreme Court's activism.[148] Harlan's philosophy about dissenting echoed that of Justice Hughes, who said:

> A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed.[149]

Often Harlan's dissents reflected his opinions that the Court had erred. Although Justice Brennan said that "some contend that the dissent is an exercise in futility, or, worse still, a 'cloud' on the majority decision that detracts from the legitimacy that the law requires and from the prestige of the institution that issues the law,"[150] many of Harlan's dissents have endured and have in some cases become part of majority decisions.[151]

Similarly, Ginsburg has dissented or written separately in an average of one out of every four cases she has heard on the Supreme Court.[152] Justice Jackson expressed reasons for using separate opinions discriminately when he wrote:

> [Dissents] . . . are the lesser of evils. A court opinion which puts out a misleading impression of unanimity by avoiding, or confusing an underlying difference is a false beacon to the profession. [It is] . . . far better that the division be forthrightly exposed so that the profession will know on what narrow grounds the case rests[.][153]

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supra note 2, at 3. In the United States, "dissenter" bears legal connotations and is primarily used to characterize a nonconformist. *See id.*

[147] WILLIAM O. DOUGLAS, AMERICA CHALLENGED 4 (1900). Franklin Delano Roosevelt appointed Douglas during the New Deal Reconstruction period (1932-1938). *See* FARBER ET AL., *supra* note 69, at 20. The Court during this time was known for eliminating the practice of giving judicial review to economic legislation. *See id.*

[148] *See supra* notes 68-72 and accompanying text.

[149] Ginsburg, *Remarks*, *supra* note 26, at 144 (quoting Charles Evans Hughes). Justice Hughes, served on the Court during the New Deal years from 1937 to 1942. *See* FARBER ET AL., *supra* note 69, at 19-20.

[150] William J. Brennan, Jr., Lecture, *In Defense of Dissents*, 37 HASTINGS L. J. 427, 429 (1984). *See* discussion of Brennan, *supra* notes 68-69 and accompanying text.

[151] For a discussion of later majority opinions adopting these dissents, *see infra* note 181-89 and accompanying text. *See, e.g.*, Poe v. Ullman, 367 U.S. 497 (1967); Desist v. United States, 394 U.S. 244 (1969).

[152] *See* Appendix A, Table 2, *infra* (statistics compiled from Supreme Court Reports, West Publications, Volumes 114-118 and Supreme Court Term Volumes 108-111 HARV. L. REV.).

[153] Stanley H. Fuld, *The Voices of Dissent*, 62 COLUM. L. REV. 923, 927 (1962)(quoting Justice Jackson). Franklin Delano Roosevelt appointed Justice Jackson during the New Deal years. *See* FARBER ET AL., *supra* note 69, at 20. "On the whole, the New Deal Justices were young, talented, and loyal to the President who appointed them. They transformed

Another commentator has argued that every difference of opinion "should not be translated into dissent; self-restraint should be the guide. [Dissents should], like homicides, fall into three categories, excusable, justifiable, and reprehensible."[154]

On the topic of dissenting, Ginsburg has acknowledged that in the hands of a skilled Justice, a deliberately-written dissent can provide the basis for the Court to move in measured motions toward change.[155] Ginsburg's work demonstrates that she, like her hero Harlan, crafts her opinions strategically, with a mind to creating precedent for the future.[156]

Like Harlan, Ginsburg has written dissenting or concurring opinions that later majority opinions have adopted.[157] Harlan wrote separately in over half of the cases he heard on the Supreme Court.[158] Since her appointment to the Supreme Court in 1993, Ginsburg has written or joined in fifty-six dissents and has written twenty-seven concurring opinions.[159] This section will compare Harlan's and Ginsburg's philosophies on writing separately and examine some of each Justice's more powerful dissents and concurrences.

A. Harlan as a Great Dissenter

In the tradition of Justice Holmes, who was known as "broadly intellectual" because of his dissents,[160] Harlan too is "deserving of the appellation great dissenter."[161] In his sixteen years on the Supreme Court, Harlan wrote 613 opinions; of those, 168 were opinions he authored for the Court, while 149 were concurrences.[162] More significantly, however, almost half of the opinions Harlan wrote—some 296—were dissents.[163] Harlan used the dissent to strike at what he considered to be the inconsistencies and contradictions of

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constitutional law." *Id. See, e.g.*, United States v. Carolene Prods. Co., 304 U.S. 144 (1938)(holding for the first time that express constitutional prohibitions applied to the states through the Fourteenth Amendment).

[154] Theodore Hirt, *In the Matter of Dissents Inter Judices de Jure*, 31 PA. B.A.Q. 256, 258 n.1 (1960)(citations omitted).

[155] *See generally* Ginsburg, *Remarks*, *supra* note 26.

[156] *See infra* Part V.B.

[157] *See infra* at notes 219-20.

[158] *See* YARBROUGH, *supra* note 2, at viii.

[159] *See* Appendix A, *infra* (covering 1993-1996 terms).

[160] *See* FARBER ET AL., *supra* note 69, at 18; YARBROUGH, *supra* note 2, at viii. Holmes, who served on the Supreme Court from 1902 to 1932, dissented on behalf of unpopular individuals and groups in support of their right to speak out without prosecution. *See* FARBER ET AL., *supra* note 69, at 18. Of Brandeis' and Holmes' dissents, it has been said that "[t]heirs was ultimately the voice of the future." *Id.*

[161] YARBROUGH, *supra* note 2, at viii (internal citations omitted).

[162] *See id.*

[163] *See id.*

the Supreme Court's constitutional law revolution.[164] Harlan did not agree with the Court's activism, and he expressed his philosophy by saying:

> Very weighty considerations underlie the principle that courts should not lightly overrule past decisions. Among these are . . . the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments.[165]

As the Court continued to overrule past decisions and broaden the application of the Bill of Rights, Harlan sharply criticized the Court's actions as ultimately limiting individual liberties.[166] Harlan saw the Court transferring substantial legislative power to itself, which he argued would serve to reduce the scope of protected individual liberties.[167] To Harlan, "continuing national respect for the Court's authority depends in large measure upon its wise exercise of self-restraint and discipline in constitutional adjudication[.]"[168]

Often a dissent constitutes a statement by the judge as an individual or a personal statement.[169] Harlan wrote some of his dissents to make an individual statement, or to express what commentators called a sense of "wrath at what the majority of the Court was doing."[170] *O'Callahan v.*

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[164] *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 504 (1966)(Harlan, J., dissenting); *see also* Liang Kan, Comment, *A Theory of Justice Souter*, 45 EMORY L. J. 1373, 1384 (1996)(citations omitted).

[165] Moragne v. State Marine Lines, 398 U.S. 375, 403 (1970).

[166] *See* Mapp v. Ohio, 367 U.S. 643, 686 (1961)(Harlan, J., dissenting)(arguing that the Court can increase respect for the Constitution only if it rigidly respects the limitations the Constitution places on the Court). *See also* Wentworth, *supra* note 22, at 257.

[167] *See* Malloy v. Hogan, 378 U.S. 1, 16-17 (1964)(Harlan, J., dissenting). Ordinary legislation can be flexible, while court-made legislation is doomed to endure until the membership of the Court changes. *See* JACKSON, *supra* note 2, at 521-22. In *Malloy*, for example, the Court found that the state could not abridge a prisoner's right to refuse to answer questions. *See Malloy*, 378 U.S. at 1. Harlan argued in his dissent that:

> [T]he logical gap between the Court's premises and its novel constitutional conclusion can, I submit, be bridged only by the additional premise that the Due Process Clause of the Fourteenth Amendment is a shorthand directive to this Court to pick and choose among the provisions of the first eight amendments and apply those chosen to the states.

Id. at 15 (Harlan, J., dissenting). "[T]he reasoning behind the Court's decision," Harlan wrote, "carries extremely mischievous, if not dangerous, consequences . . . ." *Id.* (Harlan, J., dissenting).

[168] Baker v. Carr, 369 U.S. 186, 340 (1962)(Harlan, J., dissenting).

[169] *See* Brennan, *In Defense of Dissents*, *supra* note 150, at 437.

[170] *See* Fried, *supra* note 7, at 44. This is similar to Justice Brennan, who spoke of his repeated dissents in death penalty cases as the place where he needed to distance himself from the majority opinion. *See* Brennan, *In Defense of Dissents*, *supra* note 150, at 437 ("[T]his type of dissent constitutes a statement by the judge as an individual: 'Here I draw the line.'")

Parker[171] is an example of Harlan dissenting to distance himself from the Court's action.[172]

The issue in *O'Callahan* was whether the military court had jurisdiction to try a member of the Armed Forces for a civilian crime which occurred off post.[173] The majority opinion called the military's court-martial proceeding "an institution . . . singularly inept in dealing with the nice subtleties of constitutional law."[174] The majority continued: "A civilian trial, in other words, is held in an atmosphere conducive to the protection of individual rights, while a military trial is marked by the age-old manifest destiny of retributive justice."[175]

Harlan wrote a lengthy rebuttal to the Court's opinion,[176] criticizing particularly its references to historical facts dating back to the colonial era.[177] He wrote in his dissent that: "The Court's largely one-sided discussion of the competing individual and governmental interests at stake, and its reliance upon what are at best wholly inconclusive historical data, fall far short of supporting the contrary conclusion which the majority has reached."[178] His dissent concluded that "[a]bsolutely nothing in the language, history, or logic of the Constitution justifies this uneasy state of affairs which the Court has today created."[179] The *O'Callahan* opinion was just one of the many times Harlan disagreed with the Court. In fact, as the Court became more liberal, Harlan increasingly found himself in the minority.[180]

Even though he was in the minority with some of his views, Harlan's dissents and concurrences advanced sound legal precepts, leading the way to

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[171] 395 U.S. 258 (1969).

[172] *See id.* at 274 (Harlan, J., dissenting).

[173] *See O'Callahan*, 395 U.S. at 259-60. The case involved an active duty soldier who, while on a pass, assaulted and attempted to rape a guest at a Honolulu hotel. *See id.* at 263. The military elected to try him by court martial, a proceeding that notably differs from civilian court in its lack of a jury. *See id.*

[174] *Id.* at 265.

[175] *Id.* at 266.

[176] *See id.* at 274 (Harlan, J., dissenting).

[177] For the majority's references, see *O'Callahan*, 395 U.S. at 268-70. The Court cited military mutiny and legislative acts in force in 1776 at the time of British rule as support for this idea. *See id.* These references troubled Harlan. *See id.* at 278-79 (Harlan, J., dissenting).

[178] *Id.* at 274 (Harlan, J., dissenting).

[179] *Id.* at 284 (Harlan, J., dissenting). Harlan argued that the language of Article I § 8, cl. 14 of the Constitution empowered Congress to make rules for the government and regulate the land and naval forces. *See id.* at 275 (Harlan, J., dissenting).

[180] *See* JACKSON, *supra* note 2, at 501-13. *See also Miranda*, 384 U.S. at 504 (Harlan, J., dissenting, joined by Justice Stewart and Justice White); *see* discussion *supra* notes 171-78 and accompanying text.

changes in the law and becoming majority opinions in time.[181] For example, in *Desist v. United States*,[182] Harlan dissented against the Court's retroactive application of Fourth Amendment protection to electronic surveillance, and emphasized that applying new constitutional principles on *habeus corpus* would upset finality of judgments.[183] After Harlan's death, in *Teague v. Lane*,[184] the Court explicitly adopted Harlan's position "set out" in the *Desist* dissent: "[W]e now adopt Justice Harlan's view of retroactivity for cases on collateral review."[185] The Court wrote Harlan's dissent into law with only minor modifications.[186]

Similarly, Harlan's dissent in *Poe v. Ullman*[187] evolved into the modern right of privacy, and Supreme Court opinions still cite to it today.[188] "This in itself attests to Harlan's abiding influence. It is most unusual for a Justice to have his opinions written into law in this fashion after he has retired."[189]

B. Ginsburg's Philosophy on Writing Separately

Ginsburg's writings similarly indicate that she values the power of the separate opinion, and, as examined below, Ginsburg makes use of the dissent and concurrence with a precision and purpose that parallels Harlan.[190] For a Justice, a dissenting opinion can signal the dissenter's individuality and the need to distance herself from a particular majority opinion. One of Ginsburg's early dissents on the Court was in *Consolidated Rail v. Gottshall*,[191] where she disagreed with the majority's standard for finding negligent infliction of emotional distress actionable under the Federal Employer's Liability Act ("FELA").[192]

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[181] *See infra* Part V; *see, e.g.*, Poe v. Ullman, 367 U.S. 497, 521 (1961)(Harlan, J., dissenting); Griswold v. Connecticut, 381 U.S. 479 (1965).

[182] 394 U.S. 244 (1969).

[183] *See id.* at 257-58 (Harlan, J., dissenting). In *Desist* the government used electronic surveillance tape recordings to convict the defendants of conspiracy to import heroin. *See id.* at 245. The original concept of retroactivity was established in *Linkletter v. Walker*, 381 U.S. 618, 629 (1965).

[184] 489 U.S. 288 (1989).

[185] *Id.* at 310.

[186] *See id.* at 306 (citing *Desist*, 394 U.S. at 262-63). *Teague* involved a black defendant's use of peremptory challenges. *See id.* at 292-93.

[187] 367 U.S. 497, 522 (1961)(Harlan, J., dissenting).

[188] *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 848-49 (1992); *Arizonans for English*, 520 U.S. at 75.

[189] Field, *supra* note 7, at 162.

[190] *See* Ginsburg, *Remarks*, *supra* note 26, at 134.

[191] 512 U.S. 532 (1994).

[192] *See id.* at 559 (Ginsburg, J., dissenting). *Consolidated Rail* involved two claims for negligent infliction of emotional distress: the first by an employee who watched his friend die

In *Consolidated Rail*, Ginsburg wrote an extensive thirteen-page dissent, in which she denounced the majority opinion as not being "faithful to the legislation and our case law."[193] The Court's test, Ginsburg said, was not firmly rooted in the common law, and was never adopted in a majority of the states.[194] Ginsburg found that the majority opinion did not follow legislative intent for the FELA statute, which was to fashion a liberal remedy for workers' injuries.[195]

Ginsburg has also written that a separate opinion can be useful as a means of clarifying the Court's majority ruling.[196] Although Ginsburg has written of the importance of the Court speaking with one voice, she has acknowledged the reality of frequent separate opinions in Supreme Court decisions.[197] Ginsburg attributed this to the increasing complexity of Supreme Court cases.[198] "Hard cases do not inevitably make bad law, but too often they produce multiple opinions."[199] A Court runs the risk of misleading the public by reporting a unanimous opinion when underlying differences exist.[200] In recent Supreme Court rulings on complex cases, it is common for no single opinion to express a clear majority.[201]

The complexity of modern Supreme Court cases is well illustrated by the multiple separate opinions written in *Adarand v. Pena*,[202] a 1995 case addressing affirmative action programs in government contracting.[203] In all, the *Adarand* case generated six separate opinions (including the lead opinion written by Justice O'Connor, in which Justice Kennedy joined).[204] Two

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at a job site; the second involving an employee who suffered a nervous breakdown because of poor working conditions and long shifts. *See id.* at 536, 539. The court adopted a "zone of danger" test to define which plaintiffs could recover. *See id.* at 547-48. Under a zone of danger test, plaintiffs could recover if they sustained a physical impact as a result of a defendant's negligent conduct, or if they were placed in an immediate risk of physical harm. *See id.*

[193] *See id.* at 560 (Ginsburg, J., dissenting).

[194] *See id.* at 569-70 (Ginsburg, J., dissenting).

[195] *See id.* at 572 (Ginsburg, J., dissenting)(citing Kernan v. American Dredging Co., 355 U.S. 426, 432 (1958)).

[196] *See* Ginsburg, *Remarks*, *supra* note 26, at 143.

[197] *See id.* at 148.

[198] *See id.*

[199] *Id.*

[200] *See* Brennan, *In Defense of Dissents*, *supra* note 150, at 434. *See also supra* note 153 and accompanying text.

[201] *See Adarand*, 515 U.S. at 204. *See also* Boos v. Barry, 485 U.S. 312, 314 (1989). Ginsburg wrote: "As in civilian systems, we have but one judgment, and we mark it the Court's. But in tune with the British tradition, we place no formal constraints on the prerogative of each judge to speak out separately." Ruth Bader Ginsburg, *Remarks*, *supra* note 26, at 138.

[202] 515 U.S. 200 (1995).

[203] *See id.* at 205.

[204] *See id.* at 200.

justices, Scalia and Thomas, wrote separate concurrences,[205] whereas Justices Stevens, Souter and Ginsburg dissented (with Justice Breyer joining in the dissents, but not writing separately).[206] Ginsburg joined in the other two dissenting opinions, Justice Stevens wrote a dissent but did not join in any others, and Justice Souter filed a dissent in which Ginsburg and Breyer joined.[207] Justice Souter, however, did not join in the other concurrences or dissents.[208]

Adarand offers a prime example of the confusion that can result from separate writings. Particularly confusing is the cross-referencing and quoting that occurred between the Justices in their separate opinions.[209] The separate opinions in *Adarand* may exemplify the Court's response to complex legal issues in a system which "place[s] no formal limit on the prerogative of each judge to speak out separately."[210]

Ginsburg wrote that separate dissenting or concurring opinions are valuable in moderation, but emphasized that concern for the well-being and authority of a court and respect for its pronouncements may militate against writing separately.[211] Separate opinions, Ginsburg wrote, may provoke clarifications, refinements, or modifications in the Court's opinion, and they may provide some assurance that the opinion is not perfunctory.[212] Brennan called this type of dissenting opinion "a sort of damage control mechanism," used to emphasize the limits of an unnecessarily broad majority decision, or to

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[205] *See id.* at 239 (Scalia, J., concurring); *see also* 515 U.S. at 240 (Thomas, J., concurring).

[206] *See id.* at 242 (Stevens, J., dissenting); *see also* 515 U.S. at 264 (Souter, J., dissenting); 515 U.S. at 271 (Ginsburg, J., dissenting).

[207] *See id.* at 242, 264, 271.

[208] *See id.* at 264.

[209] *See id.* at 264 (Souter, J. dissenting). Justice Souter wrote a dissent which Ginsburg joined, and he also quotes Ginsburg's dissent. *See id.*

> Indeed, a majority of the Court today reiterates that there are circumstances in which the government may, consistently with the Constitution, adopt programs aimed at remedying the effects of past invidious discrimination. *See, e.g., ante* at 228-229, 237 (opinion of O'CONNOR, J.); *Id.* at 243 (STEVENS, J., with whom GINSBURG, J., joins, dissenting); *post* at 273, 275-76 (GINSBURG, J., with whom BREYER, J., joins, dissenting).

Adarand, 515 U.S. at 270 (Souter, J., dissenting)(citations in original to United States Reporter).

[210] Ruth Bader Ginsburg, *Styles of Collegial Judging: One Judge's Perspective*, 39 FED. BAR NEWS & J. 199 (1992). Ginsburg points out a similar example occurring in the opening paragraph of *Boos v. Barry*, 485 U.S. 312, 314 (1988). *See* Ginsburg, *Remarks*, *supra* note 26, at 148. Ginsburg wrote that "[m]ore unsettling than the high incidence of dissent is the proliferation of separate opinions with no single opinion commanding a clear majority .... The opening paragraph of the Court's 1988 decision in *Boos v. Barry* is illustrative." *Id.* (citations omitted).

[211] *See* Ginsburg, *Remarks*, *supra* note 26, at 142.

[212] *See id.* at 143.

provide lower courts and litigants with practical guidance.[213] In her dissent in *Adarand*, Ginsburg sought to limit the seemingly absolute tenor of the Court's ruling, writing "separately to underscore not the differences the several opinions in this case display, but the considerable field of agreement—the common understandings and concerns—revealed in opinions that together speak for a majority of the Court."[214] In future affirmative action cases, the Court may recall Ginsburg's dissent in support of affirmative action programs. While it remains to be seen whether Ginsburg's dissent, like Harlan's in *Teague* or *Poe*, will in fact lay the path for renewed support of affirmative action, her care and precision in drafting the dissent is certainly reminiscent of Harlan's jurisprudential method.[215]

The ultimate endorsement of a dissenting or concurring opinion is whether it ultimately gains the support of the majority.[216] Jurists have said that "[d]issenters are, in a sense, men who speak before their time, that is to say, men who foresee the future before events make it manifest to their contemporaries. Perhaps, then, one may fairly call them prophets."[217] Accordingly, a Court majority eventually endorsed some of Harlan's dissents, making his previous dissenting words seem prophetic.[218] Ginsburg too had dissent become law, when the Supreme Court, in *Morrison v. Olson*,[219] upheld a view she expressed in an earlier dissent on the D.C. Circuit.[220] Although both Harlan and Ginsburg have demonstrated a profound respect for *stare decisis* and deference to the legislature, they are similar in that when they do dissent from the majority, their dissents are guided by those constitutional principles which outline the separation of powers and the power of the judiciary basic to the United States democracy. Although not all dissents or concurrences are

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[213] *See* Brennan, *In Defense of Dissents*, *supra* note 150, at 430.

[214] *Adarand*, 515 U.S. at 271 (Ginsburg, J., dissenting). Ginsburg saw from the separate opinions in the case that a majority of the Justices held to the belief that at times, remedial racial classifications could still exist without violating equal protection. *See id.* (Ginsburg, J., dissenting).

[215] *See* discussion *supra* notes 184-87 and accompanying text.

[216] *See* ALAN BARTH, PROPHETS WITH HONOR 8 (1974)(referring to dissents which eventually lead the Court "to correct the error into which the dissenting judge believes the court to have been betrayed.").

[217] *Id.*

[218] *See supra* notes 184-87; *see also infra* Part V.A.

[219] 487 U.S. 654 (1988).

[220] *See In re* Sealed Case, 838 F.2d 476, 518 (D.C. Cir. 1989)(Ginsburg, J., dissenting). The Court reversed the circuit court's decision involving the separation of powers and the Ethics in Government Act of 1978. *See Morrison*, 487 U.S. at 696-97. Ginsburg had dissented in the circuit court opinion. *See In re* Sealed Case, 838 F.2d at 518 (Ginsburg, J., dissenting). The Supreme Court's reversal was based on a similar argument to the one Ginsburg presented in her dissent. *See Morrison*, 487 U.S. at 696.

"prophetic"[221] or "the voice of the future,"[222] commentators place Harlan in a class of great dissenters.[223] In Ginsburg's short time on the Supreme Court, some of her separate writings have proven to be prophetic, like those of her hero Harlan.[224]

V. THE PATHS MARKED BY HARLAN AND GINSBURG: MOVING IN MEASURED MOTIONS

In her confirmation testimony, Ginsburg spoke of her belief that the Court "should move in measured motions . . . without reaching out to cover cases not yet seen."[225] Ginsburg echoed Justice Holmes, who wrote that "I recognize without hesitation that judges do and must legislate, but they do so only interstitially; they are confined from molar to molecular motions."[226] Ginsburg has said that "measured motions seem to me right, in the main, for constitutional as well as common law adjudication."[227]

Prior to coming to the Supreme Court, Ginsburg noted that she tried to write a few separate opinions as pathmarkers each year.[228] "Among the pathmarking models, one can look to . . . separate opinions by the second Justice John Marshall Harlan."[229] This is significant in that Ginsburg expressly identified Harlan as a "model," even before she was under consideration to become part of the institution to which her hero belonged.

The most notable example of Harlan's pathmarking is his writing on the individual right to privacy.[230] This section will examine Harlan's work in developing the right to privacy and compare it with Ginsburg's efforts to raise the standard of review in gender discrimination cases. Both Justices accomplished major changes in the law by working within the process, following precedent, and laying stepping stones for the Court to follow in later rulings.

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[221] BARTH, *supra* note 216, at 20.

[222] *Id.* at 4.

[223] *See generally* YARBROUGH, *supra* note 2.

[224] *See infra* Part V.B. (tracing the impact of Ginsburg's footnote in a concurrence in *Harris v. Forklift Systems, Inc.*).

[225] *Judiciary Hearings*, *supra* note 3, at 92.

[226] Southern Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917)(Holmes, J., dissenting). A similar concept of the legislative power of a judge is the theory that a judge's work is to fill in the gaps in the law. *See generally* CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, *supra* note 62, at 69-70.

[227] Ginsburg, *Judicial Voice*, *supra* note 23, at 1198.

[228] *See id.* at 1196.

[229] *Id.*

[230] *See infra* Part V.A.

A. HARLAN'S PATH TO THE RIGHT OF PRIVACY

Commentators have called Harlan the author of the constitutional right to privacy, a right that evolved from his dissent in *Poe v. Ullman*,[231] which spoke of the individual's liberty from state action.[232] Harlan's language in the *Poe* dissent came from the writings of Cardozo, who defined fundamental rights in the 1937 decision, *Palko v. Connecticut*.[233] Cardozo described fundamental rights as only those guarantees that are "implicit in the concept of ordered liberty, and . . . to abolish them is . . . to violate a principle of justice so rooted in traditions and conscience of our people as to be ranked fundamental."[234] At that time, the Court had begun to define certain rights which were fundamental, such as the right of parents to determine how their children might be educated.[235]

The issue in the *Poe* court was the right of Connecticut married couples to purchase contraceptives.[236] The Court found the case not ripe for adjudication because there was no indication that states would actually enforce the statute against the couples.[237] Harlan disagreed, however, and wrote his now-famous dissent:

> [T]he most substantial claim which these married persons press is their right to enjoy the privacy of their marital relations free of the inquiry of the criminal law, whether it be in a prosecution of them or of a doctor whom they have consulted. And I cannot agree that their enjoyment of this privacy is not substantially impinged upon, when they are told that if they use contraceptives, indeed whether they do so or not, the only thing which stands between them and being forced to render criminal account of their marital privacy is the whim of the prosecutor. [238]

In a phrase adopted from Cardozo, Harlan wrote: "[T]his Court has held in the strongest terms, and today again confirms, that the concept of privacy

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[231] 367 U.S. 497 (1961).

[232] *See id.* at 543-44 (1961)(Harlan, J., dissenting).

[233] 302 U.S. 319, 325 (1937)(Cardozo writing for the majority).

[234] *Id.* at 325

[235] *See* Meyer v. Nebraska, 262 U.S. 390, 399 (1923)(striking down law prohibiting teaching foreign language to children as violation of an individual's liberty); *see also* Pierce v. Society of Sisters, 268 U.S. 510 (1925)(finding that parents had the liberty right to determine where their children went to school); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)(finding procreation to be a fundamental liberty).

[236] *See Poe*, 367 U.S. at 498. One woman seeking to obtain contraceptives had experienced three pregnancies and each time delivered infants who had congenital abnormalities and died soon after birth. *See id.* Another woman sought to purchase contraceptives because she had experienced life-threatening complications from a previous pregnancy. *See id.* at 500.

[237] *See id.* at 508-09.

[238] *Id.* at 536 (Harlan, J., dissenting).

embodied in the Fourth Amendment is part of the ordered liberty assured against state action by the Fourteenth Amendment."[239] This pathmarker which Harlan laid in *Poe v. Ullman* shaped the Court's recognition of an individual right of privacy four years later in *Griswold v. Connecticut*.[240] In *Griswold*, Harlan referred to his dissent in *Poe*, and said that the Connecticut statute violated the basic values "implicit in the concept of ordered liberty."[241] In 1972, the Court extended the right of privacy to unmarried persons wishing to purchase contraceptives.[242] Thirty-one years after *Poe*, in *Planned Parenthood v. Casey*,[243] the Court referred to Harlan's *Poe* dissent, and to the pathmarking phrase Harlan had used by writing: "Justice Harlan wrote these words in addressing an issue the full Court did not reach in *Poe v. Ullman*, but the Court adopted his position four Terms later[.]" [244]

The impact of Harlan's work on the right of privacy has been far-reaching. Supreme Court and lower court decisions have continued to cite it for over thirty years.[245] Although the conservative Harlan would not likely have supported some of the modern implications of the right to privacy,[246] his pathmarker in the *Poe v. Ullman* dissent, carefully crafted from earlier opinions, enabled substantial changes in the law.

B. Ginsburg's Path To a Higher Standard of Review in Gender Classifications

As an advocate for the ACLU and a judge on the D.C. Circuit, Ginsburg began laying the stepping stones for a heightened standard of review for

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[239] *Id.* at 549 (Harlan, J., dissenting)(internal quotations omitted).

[240] 381 U.S. 479 (1965). Harlan concurred in this opinion. *See id.* at 500 (Harlan, J., concurring).

[241] *Id.* at 500 (Harlan, J., concurring).

[242] *See* Eisenstadt v. Baird, 405 U.S. 438 (1972).

[243] 505 U.S. 833 (1992).

[244] *Id.* at 848-49.

[245] *See id.*

[246] For example, Harlan probably would not have supported allowing unmarried couples to purchase birth control. *See Eisenstadt*, 405 U.S. at 438; *see also supra* notes 49-50 and accompanying text. The right to privacy has been argued in support of such things as the right of same sex couples to marry. *See* Baehr v. Lewin, 74 Haw. 530, 852 P.2d 46 (1993). In *State v. Mueller*, 66 Haw. 616, 671 P.2d 1351 (1983), the Hawai'i Supreme Court cited Harlan's *Poe* dissent in evaluating whether the right to privacy included the right for an adult to engage in consensual prostitution in the privacy of the home. *See id.* at 621, 671 P.2d at 1356 n.4. However, the Hawai'i Supreme Court found there was no privacy right implicated. *See id.* at 626, 671 P.2d at 1361 (Padgett, J., concurring).

gender classifications.[247] Ginsburg noted that Thurgood Marshall in his campaign against racial injustice "carefully set the stepping stones leading up to the landmark ruling in *Brown v. Board of Education*."[248] Ginsburg too set up a path in her early work in gender cases, a pattern that led commentators to compare her to Thurgood Marshall.[249] Ginsburg began her path with *Reed v. Reed*,[250] her first case as an advocate for the ACLU. Ginsburg presented the federal question in her brief as the constitutional right of a person to evaluation on individual qualifications, rather than pre-judgement by acts of a male legislature.[251] Her brief also suggested that the Court had not yet settled the question of whether the Constitution established the principle of equality of women before the law.[252] By suggesting that the Court had not settled this question, Ginsburg thus introduced strategies in *Reed* that she could later use to advocate a higher standard of review for gender classifications, by focusing on stereotypes and comparing the status of similarly situated men and women.[253]

By the time Ginsburg became a judge on the D.C. Circuit, she had paved the way for the Supreme Court's adoption of an intermediate level of scrutiny in gender classifications.[254] In her thirteen years as a D.C. Circuit judge, Ginsburg continued to write and speak on women's rights issues.[255] After reaching the Supreme Court, she continued to lay a path, in a manner

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[247] For a full discussion of this path toward the standard of review for gender classifications, *See* Toni J. Ellington et al., *Ruth Bader Ginsburg and Gender Discrimination*, *supra* this volume, U. HAW. L. REV.

[248] 387 U.S. 483 (1954). *See also* Ginsburg, *Judicial Voice*, *supra* note 23, at 1207.

[249] *See* Confusione, *supra* note 10, at 887. It has been said that Marshall never took an action unless it was part of an overall strategy. *See* Ginsburg, *Judicial Voice*, *supra* note 23, at 1207, nn.138-39 (discussing the record of Justice Thurgood Marshall). Ginsburg recognized the need for established pathmarkers before bold decisions could be made, and she accordingly developed a long-range strategy designed to chip away at precedent, one step at a time. *See* Henry J. Reske, *Developments, Two Paths for Ginsburg: The Trailblazing Women's Rights Litigator Became a Moderate Judge*, A.B.A. J., Aug. 1993, at 16, 19.

[250] 404 U.S. 71 (1971).

[251] *See* Brief for Appellant at 2, Reed v. Reed, 404 U.S. 71 (1971)(No. 70-04).

[252] *See id.*

[253] *See id.*

[254] *See, e.g.*, Duren v. Missouri, 439 U.S. 357 (1979); Califano v. Goldfarb, 430 U.S. 199 (1977); Craig v. Boren, 429 U.S. 190 (1976); Weinberger v. Weisenfeld, 420 U.S. 636 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971).

[255] *See, e.g.*, Ruth Bader Ginsburg, *Sex Equality and the Constitution: The State of the Art*, 14 WOMEN'S RTS. L. REP. 361 (1992); Ginsburg, *Judicial Voice*, *supra* note 23, at 1885; Ruth Bader Ginsburg, *Judicial Authority*, *supra* note 126, at 301; Ginsburg, *Autonomy*, *supra* note 102, at 375.

procedurally similar to Harlan's, piecing together precedents and writings from her separate opinions and the Court's rulings.[256]

The first gender-related case Ginsburg heard on the Supreme Court was *Harris v. Forklift Systems, Inc.*,[257] in which the Supreme Court granted *certiorari* to resolve the question of whether the Title VII[258] prohibition on sexual harassment protected employees from an abusive or hostile work environment.[259] Justice O'Connor's opinion for the Court held that the conduct need not seriously affect an employee's psychological well-being or lead to injury for it to be actionable under Title VII.[260] The Court found that sexual harassment under Title VII included making an employee's workplace a "discriminatorily hostile or abusive environment."[261]

Ginsburg laid her pathmarker in a footnote in her concurring opinion, discussing constitutional violations rather than Title VII violations, and noting that the Court must require an "exceedingly persuasive justification" to classify by gender.[262] "It remains an open question whether 'classifications based on gender are inherently suspect[,]'" she wrote.[263] With these words, Ginsburg marked the path for future Court evaluation of gender classifications under strict scrutiny by suggesting that gender could be a suspect class.[264] Prior Court opinions had considered gender a semi-suspect class and had reviewed gender classifications under an intermediate scrutiny standard.[265]

In fact, the Court relied on Ginsburg's pathmarker just a year later, in *J.E.B. v. Alabama*.[266] Justice Blackmun, writing for the majority, cited Ginsburg's footnote from her *Harris* concurrence, and reviewed the discriminatory

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[256] See *infra* Part V.B. for a discussion of *United States v. Virginia*.

[257] 510 U.S. 17 (1993).

[258] 42 U.S.C. § 2000e-2(a)(1)(1964). Title VII provides, in pertinent part, that it is "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." *Id.*

[259] *See* Harris v. Forklift Systems, 510 U.S. 17, 20 (1993). The harassment included the following comments directed toward Harris in the presence of co-workers: "[Y]ou're a woman, what do you know"[;] "[W]e need a man as the rental manager;" and "[you're] a dumb ass woman." *Id.* at 19. The defendant also made sexual innuendoes about Harris' clothing, suggested she go to a motel to negotiate her raise, and asked Harris and other female employees to take coins from his front pants pocket. *See id.*

[260] *See id.* at 21.

[261] *See id.*

[262] *See id.* at 26 n* (Ginsburg, J., concurring).

[263] *See id.*

[264] Suspect classifications, such as race or national origin, receive a "strict scrutiny" review, and to justify them, a government must show there is a compelling government interest. *See, e.g.*, Adarand v. Pena, 515 U.S. 200 (1995); *see also supra* note 107.

[265] *See Craig*, 429 U.S. at 197 (establishing the "intermediate scrutiny" standard expressly).

[266] 511 U.S. 127 (1994).

conduct under the "exceedingly persuasive justification" test.[267] Ginsburg's language in the *Harris* footnote also appeared later as part of the standard of review for gender-based classifications in Ginsburg's own opinion in *United States v. Virginia*.[268] Ginsburg was able to raise the standard of review for gender classifications to its highest level ever in *United States v. Virginia*.[269] In this way, Ginsburg's separate concurrence in *Harris* became a significant marker, establishing language that could be used in subsequent cases.[270] Ginsburg's standard of review as it appears in *United States v. Virginia* described classifications based on sex as inherently suspect, and stated that "[p]arties who seek to defend gender-based government action must demonstrate an exceedingly persuasive justification for that action."[271]

It is interesting to note that the "exceedingly persuasive justification" language first appeared in *Kirchberg v. Feenstra*;[272] Ginsburg repeated it in her *Harris* footnote.[273] Similarly, *Mississippi University for Women v. Hogan*[274] suggested but failed to determine whether "classifications based upon gender are inherently suspect,"[275] language which later appeared in the *United States v. Virginia* opinion. The *United States v. Virginia* standard evolved from pathmarkers that Ginsburg had established throughout her years as an advocate and judge, combined with precedent from prior Supreme Court cases, and brought forward to the majority opinion in this key decision.[276]

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[267] *See id.* at 137. The case involved gender-based peremptory challenges to remove male jurors. *See id.* at 129.

[268] 518 U.S. 515 (1996). The case concerned an equal protection challenge to the admissions policy of the Virginia Military Institute, a male-only, state-funded school. *See id.*

[269] *See id.* at 596 (Scalia, J., dissenting)("[F]or sex-based classifications, a redefinition of intermediate scrutiny that makes it indistinguishable from strict scrutiny."). Ginsburg explained the standard of review as requiring an "exceedingly persuasive justification" to classify based on gender. *Id.* at 533. In his dissenting opinion, Justice Scalia equated the standard to strict scrutiny. *See id.* at 567 (Scalia, J., dissenting).

[270] *See id.* at 546 (citing Mississippi University for Women v. Hogan, 458 U.S. 718, 631 (1982)). In *Harris v. Forklift Systems*, Ginsburg used the language, "exceedingly persuasive justification" to describe the standard for reviewing gender classification. 510 U.S. 17, 26 n* (1993). Three years later, when Ginsburg had the opportunity to write the majority opinion in *United States v. Virginia*, those same words became part of the Court's standard of review for gender classifications. 518 U.S. at 533.

[271] *Virginia*, 518 U.S. at 531. In the opinion, Ginsburg cited hallmark cases in gender discrimination jurisprudence, which she had argued for the ACLU, including *Reed v. Reed*, 404 U.S. 71 (1971), and *Frontiero v. Richardson*, 411 U.S. 677 (1973).

[272] 450 U.S. 455, 461 (1981). This is an example of Ginsburg's diligent adherence to prior writing of the Court, even when using pathmarking language.

[273] *See Harris*, 510 U.S. at 26 n*.

[274] 458 U.S. 718 (1982).

[275] *Id.* at 724.

[276] *See supra* notes 267-69.

Both Harlan and Ginsburg have demonstrated time and again that establishing ordered changes in the law through adjudication requires careful, deliberate pathmarking. "The good judge . . . recognizes that a felt need to act only interstitially does not mean the relegation of judges to a trivial or mechanical role, but rather affords the most responsible room for creative important judicial contributions."[277] Harlan was respected for his faith that adhering to the proper judicial process would yield the correct result.[278] This faith in the judicial process, and the willingness to work through it, not against it, are qualities that Ginsburg shares with her hero, Harlan.[279] It is this faith in the role of the Court that best characterizes both Harlan and Ginsburg.

VI. CONCLUSION

Both Harlan and Ginsburg succeeded in making changes in the law by establishing pathmarkers, sometimes in dissenting or concurring opinions, that served as stepping stones for future decisions.[280] Devotion to the process of judicial decision-making motivated Harlan more than the ultimate result, a fact that occasionally astonished his colleagues on the Supreme Court. [281] "He was the model of legal process. He taught us all—or reminded us all—of reasoned exposition, and of procedural regularity."[282]

Ginsburg's performance on the Court too has surprised some commentators.[283] During her confirmation hearings, one senator characterized Ginsburg, by saying: "Is Judge Ginsburg a moderate as the press has attempted to portray her? Probably not. Do her views fall within the mainstream of liberal philosophy? Probably so."[284] A recent survey by the Libertarian Institute for Justice examined Supreme Court opinions between 1993 and 1996, and "lamented the fact that the Justices least likely to strike down laws infringing civil and economic liberties were President Clinton's appointees, Justices Ginsburg and Stephen Breyer[.]"[285] This is a true indicator of Ginsburg's independence as a jurist, as one who said in her Confirmation Hearings, when asked how she might rule on this question or

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[277] Ginsburg, *Judicial Voice*, *supra* note 23, at 1208 (quoting Gerald Gunther).

[278] *See supra* note 77 and accompanying text.

[279] *See supra* notes 88-89 and accompanying text.

[280] *See supra* Parts IV.A. & IV.B.

[281] *See* Field, *supra* note 7, at 175-77.

[282] *Id.* at 177.

[283] *See, e.g.*, Rosen, *supra* note 5, at 62; *see also* Christopher E. Smith et al., *The First Term Performance of Justice Ruth Bader Ginsburg*, 78 JUDICATURE 74 (Sept. & Oct. 1994). In her first year on the Court, "contrary to the hopes of some liberals, Ginsburg did not align herself most frequently with the court's two most liberal justices, John Paul Stevens and Harry Blackmun." Smith, *supra* this note, at 75.

[284] 139 Cong. Rec. S10159-02, 10160 (daily ed. Aug. 3, 1993)(quoting Senator Dan Coats).

[285] Rosen, *supra* note 5, at 62.

that question: "Were I to rehearse here what I would say and how I would reason on such questions, I would act injudiciously."[286] Ginsburg, like her hero, Harlan, has proven to be a Justice who defies arbitrary classification[287] by suppressing her personal viewpoints[288] and demonstrating "deep, great, genuine sincerity," a characteristic of "all men [and women] in any way heroic."[289]

Both Harlan and Ginsburg have made use of the separate concurrence or dissent to mark paths for change, or to clarify Court opinions, or finally, when all else failed, to speak out against the Court's action.[290] Ginsburg, like Harlan, has spoken out against liberalism and increased federal power. She has emphasized the value of stare decisis, noting that hasty, ungrounded opinions result in confusion in the law and frequent litigation.[291] At times, Ginsburg, like Harlan, has of necessity resorted to separate opinions to express these principles. The separate opinion can be a tool of power in the hands of an eloquent justice. Cardozo once wrote that:

> [t]he voice of the majority may be that of force triumphant, content with the plaudits of the hour, and recking little of the morrow. The dissenter speaks to the future, and his voice is pitched to a key that will carry through the years. Read some of the great dissents . . . and feel after the cooling time of the better part of a century the glow and fire of a faith that was content to bide its hour. The prophet and martyr do not see the hooting throng. Their eyes are fixed on the eternities.[292]

Some of Harlan's dissents stand as ideas that speak for the future, and his performance on the Court demonstrated a "faith that was content to bide its hour,"[293] while advocating change. Ginsburg, although still young on the Court, has established herself as a follower of Harlan's model. Like Harlan, Ginsburg has been criticized for "being more interested in the fine print rather than the big picture," and for being a legal technician rather than an interpretative philosopher. These, however, are "criticisms that Judge Ginsburg should wear as a badge of honor."[294]

Toni J. Ellington[295]

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[286] 51 CONG. Q. WKLY. REP. 30, July 24, 1993.

[287] *See supra* note 52 and accompanying text.

[288] *See supra* note 12.

[289] *See* CARLYLE, *supra* note 1, at 45. *See also supra* note 18 and accompanying text.

[290] *See* discussion *supra* Parts IV.A & IV.B.

[291] *See supra* note 101 and accompanying text.

[292] BENJAMIN N. CARDOZO, LAW AND LITERATURE, *supra* note 61, at 36.

[293] *Id.*

[294] 139 Cong. Rec. S10097-01 (daily ed. Aug. 2, 1993)(quoting Sen. Bob Dole).

[295] Class of 1999, William S. Richardson School of Law.

Appendix A

*Table 1***

Separate Writings of Justice Harlan

Year	Total Cases Heard*	Dissents Written	Dissenting	Concurring Votes
1954	82	2	4	1
1955	94	8	17	2
1956	115	17	33	4
1957	110	17	30	4
1958	112	9	18	7
1959	105	25	33	3
1960	118	13	22	8
1961	96	15	27	7
1962	117	27	45	8
1963	127	24	42	4
1964	101	16	25	11
1965	10	23	33	11
1966	119	24	40	5
1967	127	27	32	20
1968	122	24	34	20
1969	94	7	12	15

** Statistics taken from PERCIVAL E. JACKSON, DISSENT IN THE SUPREME COURT 500 (1991) and Volumes 67-85 HARV. L. REV. covering the Supreme Court terms.

Table 2

Separate Writings of Justice Ginsburg

Year	Total Cases Heard*	Dissents Written	Dissenting	Concurring Votes
1993	87	8	12	10
1994	86	7	12	5
1995	79	3	15	7
1996	86	3	17	5

*Includes only cases for which a full opinion was written.
Cases in which the justices concurred in part and dissented in part were counted as dissenting votes.

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I. INTRODUCTION

> Doesn't stare decisis derive from the notion that departures from the status quo, i.e., innovations, are the exceptions rather than the rule in judicial decision making? . . . [T]he question [is] not whether, but when, innovation is in order[.]
>
> ——————— Ruth Bader Ginsburg[1]

In *United States v. Virginia Military Institute*[2] ("*VMI*"), the United States challenged the constitutionality of the Virginia Military Institute's admission policy, which denied enrollment to women. Writing for the majority, Justice Ruth Bader Ginsburg ("Justice Ginsburg") acknowledged that the existing test for gender classification is the intermediate level of scrutiny,[3] but characterized the test as requiring the "party seeking to uphold [the challenged] government action based on sex [to] establish an 'exceedingly persuasive justification' for the classification."[4] Even though she quoted language from a prior Supreme Court opinion, several of her colleagues immediately attacked her analysis as having changed the governing test.[5] Indeed, Justice Scalia vigorously criticized Justice Ginsburg's opinion as "sweep[ing] aside the

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[1] *See* Ruth Bader Ginsburg, *On Muteness, Confidence, and Collegiality: A Response to Professor Nagel*, 61 U. COLO. L. REV. 715, 717 (1990).

[2] 518 U.S. 515 (1996)(holding that excluding women from a citizen-soldier program offered at Virginia Military Institute is a violation of equal protection under the 14th Amendment of the Constitution).

[3] *See id.* at 524 (quoting Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)). Decisions preceding *VMI* established the intermediate level of scrutiny for gender cases, which mandates that "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Id.* at 558 (Rehnquist, J., dissenting). To support his argument that gender classification commanded the application of an intermediate level of scrutiny, Justice Rehnquist's dissent began by listing thirteen cases where the Court followed the intermediate level of scrutiny, including *Califano v. Goldfarb*, 430 U.S. 199 (1977), *Califano v. Webster*, 430 U.S. 313 (1977), *Orr v. Orr*, 440 U.S. 268 (1979), *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979), *Michael M. v. Superior Court, Sonoma County*, 450 U.S. 464 (1981), *J.E.B. v. Alabama* ex rel. *T.B.*, 511 U.S. 127 (1994). *See id.* at 558-59.

[4] *See id.* at 524; *see also Hogan*, 458 U.S. at 724 (O'Connor, J.). Justice O'Connor stated: "[T]he party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an 'exceedingly persuasive justification' for the classification." *Id.* (quoting Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981); *Feeney*, 442 U.S. at 273). "The burden is met only by showing at least that the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *Id.* (quoting Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 150 (1980)).

[5] *See VMI*, 518 U.S. at 558-60 (Rehnquist, J., concurring); *see also id.* at 566-75 (Scalia, J., dissenting).

precedents of this Court"[6] and drastically revising firmly established standards for reviewing sex-based classification.[7] Although Justice Ginsburg acknowledged that strict scrutiny had been reserved for race or national origin,[8] she analogized gender with these classifications because she believed these three classifications are based on the same wrongful presumption of "inherent differences."[9]

The *VMI* gender classification standard is a highly debated and discussed issue.[10] Some commentators, including Justice Scalia, have argued that Justice Ginsburg's acknowledgment is an implicit admission that *VMI* represents de facto strict scrutiny.[11] Others argue that *VMI*'s "exceedingly persuasive justification" standard[12] is an innovation by Justice Ginsburg, introducing a deviation from the status quo.[13] Contrary to the analysis of these commentators, Justice Ginsburg contends that the "exceedingly persuasive justification" standard adopted in *VMI* was not an innovation, but an extension of accepted precedent.[14] Thus, *VMI* raises a question of whether Justice Ginsburg ignored existing precedent and rejected stare decisis. To answer this question properly, it is necessary to examine the stare decisis doctrine and the evolution of Justice Ginsburg's approach to stare decisis.

Rather than exclusively focusing on a discussion of *VMI*, this Comment will provide an in-depth review of Justice Ginsburg's jurisprudence and the myriad of factors that influence her decisions to follow or overrule precedent. This

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[6] *Id.* at 566 (Scalia, J., dissenting).

[7] *See id.* (Scalia, J., dissenting).

[8] *See id.* at 533 n.6; *see also* Christina Gleason, Comment, *United States v. Virginia: Skeptical Scrutiny and the Future of Gender Discrimination Law*, 70 ST. JOHN'S L. REV. 801, 819-20 (1996)(stating that the test used in *VMI* edges the Court closer to strict scrutiny without equating gender classifications to race classifications).

[9] *VMI*, 518 U.S. at 533.

[10] *See* notes 6-14 and accompanying text.

[11] *See id.* at 596 (Scalia, J., dissenting). Justice Scalia pointed out: "[T]he rationale of today's decision is sweeping: for sex-based classifications, a redefinition of intermediate scrutiny that makes it indistinguishable from strict scrutiny." *Id.*; *see also* Gleason, *supra* note 8, at 817.

[12] *VMI*, 518 U.S. at 531. Justice Ginsburg phrased the test as "skeptical scrutiny of official action denying rights or opportunities based on sex[.]" *Id.* at 531. The essence of the test is that "[p]arties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action." *Id.*

[13] *See* Marcia Coyle, *High Court Goes for "Skeptical" Scrutiny on Gender*, NAT'L L.J., July 8, 1996, at A12 (arguing that the "exceedingly persuasive justification" standard represents a heightened standard of review); *see also* Hope Viner Samborn, *Scrutiny Scrutinized*, ABI J., Sept. 1996, at 29 (discussing mixed reaction and debate over relative strength of the test adopted in *VMI*); *see also* Gleason, *supra* note 8, at 807 n.21.

[14] *See* Justice Ruth Bader Ginsburg, Address at the William S. Richardson School of Law (Feb. 3, 1998) (tape on file with the University of Hawai'i Law Review).

Comment will also explore Justice Ginsburg's impact on the Supreme Court's jurisprudence through her application of stare decisis. Part II, Section A, introduces the stare decisis doctrine and its historical and theoretical justifications.[15] Part II, Section B, discusses the doctrinal framework for stare decisis and the various factors that influence its application. These sections provide the necessary background for discussing and understanding Justice Ginsburg's application of the doctrine.[16] Part III addresses Justice Ginsburg's judicial philosophy,[17] and how it influenced her approach to stare decisis in our legal system.[18] Through an examination of Justice Ginsburg's jurisprudence, Part IV concludes that Ginsburg's approach to stare decisis values and respects established precedent.

II. THE STARE DECISIS DOCTRINE

A. Historical and Theoretical Introduction

Under the stare decisis doctrine,[19] a decision or principle of law that emerges within a case is a binding rule of law in the same court or in courts of lower rank, where the point in controversy or the relevant facts of subsequent cases are substantially similar.[20] The United States Supreme

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[15] *See infra* Part II.A.

[16] *See infra* Part II. This part discusses six primary factors which govern a court's or judge's decision to follow or overrule a particular precedent: (1) the promotion of stability and certainty in the law; (2) attainment of a coherent and uniform system of laws; (3) accommodation of legal and social changes; (4) reliance interest; (5) fairness and justice; and (6) retention of public confidence, administrative efficiency and judicial restraint.

[17] *See infra* Part III.A. Section A will discuss six factors which form Justice Ginsburg's approach of stare decisis. These factors are organized in a way that best demonstrate her personal legal experiences: her role as an appellate court judge, President Clinton's nominee to the Supreme Court, a female advocate, legal scholar, and in her present role as a Supreme Court justice.

[18] *See infra* Part III.B.1-3, using case examples to demonstrate the interplay of two groups of factors influencing Justice Ginsburg's approach of stare decisis: six factors of doctrinal value of stare decisis in our legal system as identified in *infra* Part II and the other six factors of Ginsburg's personal judicial philosophy as discussed in *infra* Part III.A.

[19] "[S]tare decisis" is an abbreviated form of the Latin phrase "*stare decisis et non quieta movere* [sic]," which represents the policy of courts to "stand by matters that have been decided and not to disturb what is tranquil." *See* John Wallace, *Stare Decisis and the Rehnquist Court: The Collision of Activism, Passivism, and Politics in Casey*, 42 BUFF. L. REV. 187, 189 (1994).

[20] *See, e.g.*, Horne v. Moody, 146 S.W.2d. 505, 509-10 (Tex. Civ. App. 1940); State v. Mellenberger, 95 P.2d 709, 719-20 (Or. 1939). The *Mellenberger* court quoted Daniel H. Chamberlain's statement about the doctrine of stare decisis:

> A deliberate or solemn decision of a court or judge, made after argument on a question of law fairly arising in a case, and necessary to its determination, is an authority, or binding precedent, in the same court or in other courts of equal or lower rank, in

Court, however, as the court of last resort, can deviate from stare decisis and overrule precedent.[21] Although the decision to follow or depart from precedent is entirely within the discretion of the Supreme Court, the Court nevertheless must examine its own precedent.[22]

The stare decisis doctrine encompasses common law, as well as constitutional and statutory precedent.[23] One must distinguish these forms of precedent because the nature of the precedent influences the results of any given case. Furthermore, understanding these differences will provide a better understanding of where Justice Ginsburg falls on the continuum from a strict application of precedent to a more flexible approach.

The common law is an enormous body of rules.[24] The origin of the common law stare decisis doctrine dates back to medieval England and is the cornerstone of English common law.[25] This doctrine is equally as important in the United States. Alexander Hamilton, in *The Federalist*,[26] cited stare decisis as a vital component of preserving a jurisprudential system that is not based upon arbitrary discretion.[27] More recently, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[28] ("*Casey*"), Justices O'Connor, Kennedy, and Souter stated that stare decisis is of fundamental importance to the rule of law; "it is indisputable that [it] is a basic self-governing principle within the Judicial Branch."[29]

> subsequent cases, where 'the very point' is again in controversy; but the degree of authority belonging to such a precedent depends, of necessity, on its agreement with the spirit of the times or the judgment of subsequent tribunals upon its correctness as a statement of the existing or actual law, and the compulsion or exigency of the doctrine is, in the last analysis, moral and intellectual, rather than arbitrary or inflexible.

Id. at 719.

[21] *See* Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405 (1932) (Brandeis, J., dissenting) ("Stare decisis is not . . . [a] universal and inexorable command.").

[22] *See* 5 AM. JUR. 2D *Appellate Review* § 600 (1996); *see also* Wallace, *supra* note 19, at 192.

[23] *See* EVA H. HANKS ET AL., ELEMENTS OF LAW 105-52 (1994). Statutory and constitutional precedent in the stare decisis context and as discussed in this Comment are also common law precedent, but these terms refer to prior decisions that have interpreted a statute or the constitution. Therefore, when the judiciary observes statutory or constitutional precedent, it generates decisions that are consistent with the purposes and provisions of the Constitution or the particular statute and the legislature's expectations. *See* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 415 (1991); BLACK'S LAW DICTIONARY 311 (6th ed. 1990).

[24] *See* HANKS ET AL., *supra* note 23, at 150.

[25] *See* Wallace, *supra* note 19, at 189.

[26] *See* THE FEDERALIST NO. 78 (Alexander Hamilton)(1888).

[27] *See id.* at 490; *see also* HANKS ET AL., *supra* note 23, at 150.

[28] 505 U.S. 833 (1992).

[29] *Id.* at 864-65; *see also* Richard Rainey, *Stare Decisis and Statutory Interpretation: An Argument for a Complete Overruling of the National Parks Test*, 61 GEO. WASH. L. REV. 1430,

The stare decisis doctrine is greatly influenced by the nature of the controversy, primarily, whether it is a constitutional, statutory, or common law issue. Generally, the Supreme Court is unwilling to overrule a decision concerning federal statutory construction or interpretation because Congress is able to alter a statutory court decision and rectify it by legislation.[30] For example, the Court, in *United States Department of Defense v. Federal Labor Relations Authority*[31] ("*FLRA*"), was reluctant to overrule precedent interpreting a statutory provision.[32]

In *FLRA*, the Court considered whether unions were entitled to obtain the home addresses of the agency employees they represented.[33] The Court held that the Federal Service Labor-Management Relations Statute did not allow unions to obtain such addresses because this disclosure would clearly constitute an unwarranted invasion of personal privacy.[34] Accordingly, the Supreme Court declined to rewrite the Privacy Act[35] and instead affirmed the Freedom of Information Act ("FOIA")[36] principle followed in *United States Dep't. of Justice v. Reporters Committee for Freedom of the Press*[37] ("*Reporters Comm.*").

In reaching its conclusion, the Court applied the principle adopted in *Reporters Comm.* requiring the privacy interest of the employees to be balanced against the public interest of the unions in disclosure of the information.[38] The Court was reluctant to overrule the statutory precedent in the absence of Congress enacting an exception in FOIA to prohibit the disclosure of employees' addresses to the unions.[39]

In the dissent of *Burnet v. Coronado Oil & Gas Co.*,[40] Justice Brandeis articulated that "[s]tare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that

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1461 n.241 (1993)(citing Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989)). *See also Casey*, 505 U.S. at 864-65.

[30] *See* Critical Mass Energy Project v. Nuclear Regulatory Comm'n, 975 F.2d 871, 875 (D.C. Cir. 1992); *see also* 5 AM. JUR. 2D *Appellate Review* § 600 (1995).

[31] 510 U.S. 487 (1994)[hereinafter *FLRA*].

[32] *See id.* at 509.

[33] *See id.* at 487.

[34] *See id.*

[35] 5 U.S.C.A. § 552 (1994).

[36] 17 U.S.C.A. § 705 *et seq.* (West 1998); 37 C.F.R. § 203.1 *et seq.* (1994).

[37] 489 U.S. 749 (1989)(denying a third party's request for law enforcement records or information about a private citizen).

[38] *See FLRA*, 510 U.S. at 495 (citing *Reporters Comm.*, 489 U.S. at 776). The Court also discussed congressional power in its analysis that disclosure of the addresses is prohibited by the Privacy Act, unless it satisfies an exception. *See id.* at 495.

[39] *See FLRA*, 510 U.S. at 495.

[40] 285 U.S. 393 (1932).

it be settled right[;] . . . even where the error is a matter of serious concern, provided correction can be had by legislation."[41] However, noting the difficulty of amending the Constitution, Justice Brandeis also concluded that an erroneous or unjust decision would be perpetuated if the Court were unable to overrule constitutional precedent.[42] Unlike statutory precedent which may be remedied by "simple" congressional legislation, constitutional issues remain open to judicial review due to the laborious nature of the constitutional amendment process.[43] Thus, the nature of the precedent may influence a court's observation of stare decisis.

B. The Strict - Liberal Stare Decisis Doctrinal Framework: Factors Influencing the Application of Stare Decisis

This section discusses the two approaches to observing precedent that will provide a framework for analyzing Justice Ginsburg's approach to stare decisis. As commentators have suggested, stare decisis consists of both a strict and liberal approach to precedent.[44] Under the strict rule of precedent, a court is bound by both its previous decisions and those of all higher courts, unless the factual situation of the case is distinguishable.[45] In comparison, the liberal rule, which accounts for societal innovations and legal progressions, as well as erroneous decision-making, provides a court with greater flexibility.[46]

Both approaches have apparent strengths. The strict rule not only provides society with a comprehensive behavioral guide, but also fosters equality by applying the same principles of law to factually similar situations, irrespective of time.[47] The liberal rule, however, is more effective in creating a useful system of rules that addresses changes in our society and accommodates the public's values and needs.[48] The liberal rule enables government to overrule obsolete precedent so that the law can account for societal advances, such as

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[41] *Id.* at 406 (Brandeis, J., dissenting); *see also* Wallace, *supra* note 19, at 193.

[42] *See Burnet*, 285 U.S. at 405-08 (Brandeis, J., dissenting).

[43] *See id.* (Brandeis, J., dissenting).

[44] *See* Wallace, *supra* note 19, at 191. *See also* Ruth Bader Ginsburg & Peter W. Huber, *The Intercircuit Committee*, 100 HARV. L. REV. 1417, 1425 (1987). The disparate views of stare decisis can also be categorized as either precisionist (those who emphasize stability, uniformity, and predictability) or percolationist (those who place greater value on flexibility, experimentation, and adaptation in the judicial system). *See* Ginsburg & Huber, *supra*, at 1424.

[45] *See* Wallace, *supra* note 19, at 190.

[46] *See id.* at 192.

[47] *See* discussion *infra* Part II.B.2 and notes 84-105 and accompanying text.

[48] *See* discussion *infra* Part II.B.3 and notes 173-86 and accompanying text.

technological innovations, the changing role of women in our society, and the presence of greater international relations.[49]

This strict-liberal dichotomy represents the continuum upon which a court's approach to stare decisis can be measured. A court's decision to follow or overrule precedent is guided by various factors and values. The following sections briefly enumerate and discuss the factors cited by courts as reasons for following or overruling precedent.

To better explain this dichotomy, however, the "legal-system values" must first be discussed.[50] The legal-system values consolidate the diverse, independent factors into central themes that govern stare decisis application. A discussion of such values will aid one in understanding the reasoning behind Justice Ginsburg's decisions to follow or overrule precedent. This section will also outline the factors and values that encourage the observation or overruling of precedent.

1. The legal-system values

A judge's decision to follow or overrule precedent is based upon many factors. For instance, the application of stare decisis is greatly influenced by the context surrounding an issue, as well as the court's desire to achieve particular values and balance the tensions exhibited by these values. Legal-system values create a useful framework from which to discuss stare decisis. This framework reveals the competing tensions that influence the application of stare decisis.

Legal-system values include (1) predictability;[51] (2) replicability;[52] (3)

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[49] *See id.*

[50] Professor Karen Gebbia-Pinetti coined this term to reflect the values and ideals by which to measure the law's success in structuring society. *See* Karen Gebbbia-Pinetti, *Statutory Interpretation, Democratic Legitimacy and Legal-System Values*, 21 SETON HALL LEGIS. J. 233, 240-55 (1997).

[51] *See* Gebbia-Pinetti, *supra* note 50, at 244-46 (noting that "[p]redictability relates to the ability of courts, legal advisors, and persons affected by the law to determine with a relatively high degree of probability . . . the likely result in a particular case"); *see also* Gebbia-Pinetti, *supra* note 50, at 244 nn.28 & 34; Larry G. Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation be Justified?*, 73 CAL. L. REV. 1482, 1520 (1985) ("The principle [sic] virtues of the rule of law are . . . that behavior can be chosen on the basis of predictable legal consequences [and] that the law is relatively stable and changes are reasonably predictable[.]"); BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW 44 (1924) ("[L]aw [is] that body of principle and dogma which with a reasonable measure of probability may be predicted as the basis for judgment in pending or in future controversies.").

[52] *See* Gebbia-Pinetti, *supra* note 50, at 246 n.38; *see also* H.L.A. HART, THE CONCEPT OF LAW 159 (2d ed. 1994)("[J]ustice is traditionally thought of as maintaining or restoring a balance or proportion, and its leading precept is often formulated as '[t]reat like cases alike . . . and treat different cases differently.'"); Fredrick Schauer, *Precedent*, 39 STAN. L. REV. 571,

doctrinal stability of rules or doctrines of law across time;[53] (4) systematic consistency among the related legal rules and principles;[54] (5) responsivity;[55] (6) fostering individual and societal growth;[56] (7) shaping social values and morals;[57] and (8) fairness and justice.[58] As suggested by Professor Karen Gebbia-Pinetti, "[t]he legal system is in a continual struggle to balance the inherent tensions among these values."[59] The greatest tension is exhibited by the strict-liberal dichotomy: the law and the application of stare decisis need to be "rigid enough to ensure predictability, replicability, and doctrinal

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595-97 (1987)(fairness, in the sense of replicability, requires that courts treat like cases alike).

[53] *See* Gebbia-Pinetti, *supra* note 50, at 246-47; *see also* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 239 (1994)(noting that under vertical coherence "the interpreter demonstrates that her interpretation is coherent with authoritative sources situated in the past . . . and traditional or customary norms"); MELVIN ARON EISENBERG, THE NATURE OF THE COMMON LAW 47-49 (1988)(stating that doctrinal stability is seen in stare decisis which serves support, replicability, objectivity, and reliance).

[54] *See* Gebbia-Pinetti, *supra* note 50, at 247-48 (horizontal coherence or systematic consistency requires that the legal rules and principles at any one time be consistent with each other and that newly crafted rules fit into the existing body of law); *see also* Gebbia-Pinetti, *supra* note 50, at n.41; JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF LAW 303 (1927 ed.)("[R]ules of the Law should be harmonious, and should be extended harmoniously.").

[55] *See* Gebbia-Pinetti, *supra* note 50, at 248-49 (stating that "'[r]esponsivity' or 'social congruence' requires that law be responsive to society and societal change" by addressing society's needs and embodying society's customs, choices, values, or morals); *see also* Gebbia-Pinetti, *supra* note 50, at nn.45 & 47; BENJAMIN N. CARDOZO, THE PARADOXES OF LEGAL SCIENCE, 37 (1928)("Law accepts as the pattern of its justice the morality of the community whose conduct it assumes to regulate."); JEROME FRANK, LAW AND THE MODERN MIND 6 (1930)("Our law would be strait jacketed were not the courts . . . constantly overhauling the law and adapting it to the realities of ever-changing social, industrial, and political conditions[.]").

[56] *See* Gebbia-Pinetti, *supra* note 50, at 250.

[57] *See id.* n.48; *see also* ROGER COTTERELL, THE POLITICS OF JURISPRUDENCE: A CRITICAL INTRODUCTION TO LEGAL PHILOSOPHY 127 (1989)("[L]egal understanding seems to demand not merely technical guidance about the nature of valid law but moral or political theory."); WILLIAM N. ESKRIDGE, JR. & PHILLIP P. FRINCKEY, LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 421 (2d ed. 1995)("[T]he main value of legal rules is constitutive: The formulation of rules is how we create and express shared values."); Owen M. Fiss, *The Death of the Law?*, 72 CORNELL L. REV. 1, 15 (1986)("[L]aw appears as generative of public values as it is dependent upon them.").

[58] *See* Gebbia-Pinetti, *supra* note 50, at 252-53 nn.51-52 & 56; *see also* Margaret G. Farwell, *Daubert v. Merill Dow Pharmaceutical, Inc.: Epistemology and Legal Process*, 15 CARDOZO L. REV. 2183, 2204-05 (1994)("Law is an effort to define the rightness of things . . . . The goal of law is not truth, but justice."); Soia Mentschikoff & Irwin P. Stotzky, *Law - The Last of the Universal Disciplines*, 54 U. CIN. L. REV. 695, 706-07 (1986)("The aspirational aspects of law reflect the values we hold dear in our society, such as truth, freedom, and justice."); RONALD DWORKIN, LAW'S EMPIRE 225 (1986)("[P]ropositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process[.]").

[59] Gebbia-Pinetti, *supra* note 50, at 254-55.

stability,"[60] but "flexible enough to adjust to changes in society and achieve fair and just results in individual cases[.]"[61] Therefore, stare decisis is critical to achieving a legal-system's values, and the nature and extent of its application is dependent upon the balancing of these tensions. The legal-system values overlap and reflect a court's attempt to achieve numerous, similar objectives.[62]

2. *When should a judge follow precedent?*

The core ideals of doctrinal stability and systematic consistency encourage the following of precedent to achieve predictability, replicability, vertical coherence, and horizontal coherence.[63] Public confidence in the judicial process, administrative efficiency, and the nature of the controversy at issue also encourage the following of precedent.[64] Although no standard approach exists, the Court in *Casey* utilized a four-factor test in examining stare

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[60] *Id.* at 255.

[61] *Id.* at 255 n.57; *see also* John Hasnas, *The Myth of the Rule of Law*, 1995 WIS. L. REV. 199, 213 (1995)(stating that the goal of the law is to provide an orderly and just social environment and that a less definite and rigid legal system provides greater individual justice); ROBERT E. KEETON, VENTURING TO DO JUSTICE: REFORMING PRIVATE LAW 24 (1969)("The judiciary is, . . . on the one hand a guardian of the law's continuity, stability, evenhandedness, and predictability and on the other hand a participant in creative evolution that keeps law contemporary and viable."); ROSCOE POUND, INTERPRETATIONS OF LEGAL HISTORY 1 (1923)("Law must be stable and yet it cannot stand still.").

[62] These objectives promote stability and certainty in the law, the attainment of a coherent and uniform system of laws, the accommodation of changed legal and social circumstances, the role of law to address prevailing social values and needs, and the installment of public confidence in the judicial process through judicial restraint and administrative efficiency. *See* Eskridge, *supra* note 23, at 373 (citing the Supreme Court as a means to preserve legal coherency); Justice Lewis F. Powell Jr., *Stare Decisis and Judicial Restraint*, 47 WASH. & LEE L. REV. 281, 286 (1990)(noting it is justified to overrule decisions that damage coherence of law); Wallace, *supra* note 19, at 191 (stating that stare decisis is adaptable to the "spirit of the times" and is "tempered by judicial perceptions of the political, economic, and social realities of the day"); HANKS ET AL., *supra* note 23, at 174 & 184 (treating similar cases alike to attain fairness and justice); Gebbia-Pinetti, *supra* note 50, at 252 (declaring that society expects the law to produce fair and just results in individual cases); *Nomination of Ruth Bader Ginsburg, to be Associate Justice of the Supreme Court of the United States: Hearing before the Comm. on the Judiciary, U.S. Senate*, 103d Cong. 51, 197 (1993) (testimony of Justice Ruth Bader Ginsburg)(noting stare decisis as a means of judicial restraint) [hereinafter *Hearing*].

[63] *See* HANKS ET AL., *supra* note 23, at 179 ("[M]inimizing internal inconsistency by standardizing decisions within a decisionmaking environment may generally strengthen that decisionmaking environment as an institution."); Gebbia-Pinetti, *supra* note 50, at 253-54; *see also infra* text accompanying notes 73-109.

[64] *See* HANKS ET AL., *supra* note 23, at 178-79; *see also infra* text accompanying notes 110-13.

decisis.[65] A court must look at whether the central holding is: (1) practically unworkable; (2) subject to reliance interests that an overruling would lead to special hardships; (3) an abandoned doctrine due to subsequent changes or developments in the law; and (4) inapplicable, irrelevant, or unjustified because the facts, underpinnings, and circumstances surrounding the case have changed.[66]

After a careful analysis of these four factors, the *Casey* Court reaffirmed the holding of *Roe v. Wade*,[67] which recognized a woman's right to an abortion before fetal viability.[68] The Court suggested that the opposition to *Roe* did not render the decision unworkable and incapable of enforcement.[69] Rather, there was societal reliance on *Roe* as women looked to the option and availability of abortion in the event of contraceptive failure.[70] Further, there was no evolution of a legal principle to weaken the doctrinal footing of *Roe*.[71] Finally, the Court reasoned that despite advances in maternal and neonatal health care, these medical advances did not warrant abandonment of *Roe*'s central holding.[72]

Society's substantial reliance upon a fundamental principle within a decision, even if it is erroneous,[73] is one of the most frequently invoked justifications for stare decisis.[74] When discussing stare decisis at her Nomination Hearing, Justice Ginsburg remarked that in addition to the soundness of reasoning, the Court should also consider reliance interests when determining whether to abandon a statutory precedent.[75] Reliance can be determined by noticing the lack of opposition or criticism of a decision, coupled with political and social acceptance.[76] If there is little political pressure and controversy to a particular decision, that decision will more likely be protected from an overruling.[77]

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[65] *See Casey*, 505 U.S. at 854-55. The four-factor test is a valuable, practical guide to aid the Court in determining whether to follow or overrule precedent.

[66] *See Casey*, 505 U.S. at 854-55; *see also* Wallace, *supra* note 19, at 215.

[67] 410 U.S. 113 (1973).

[68] *See Casey*, 505 U.S. at 834.

[69] *See id.* at 855.

[70] *See id.* at 855-56.

[71] *See id.* at 857.

[72] *See id.* at 860.

[73] *See* Wallace, *supra* note 19, at 196.

[74] *See, e.g.*, Hubbard v. United States, 514 U.S. 695, 714 (1992) (arguing to deviate from precedent because "the reliance interests at stake in adhering to *Bramblett* are notably modest"); Helvering v. Griffiths, 318 U.S. 371, 403 (1943)(stating that reliance upon an "older decision sometimes requires [the Court] to adhere to an unsatisfactory rule to avoid unfortunate practical results from a change").

[75] *See Hearing*, *supra* note 62, at 197 (statement of Ruth Bader Ginsburg).

[76] *See* Wallace, *supra* note 19, at 197-98.

[77] *See id.* at 197.

A court should be cautious in overruling decisions that generate reliance, because society's settled expectation demonstrates that a substantial portion of the populace considers the precedent to be correctly reasoned.[78] Justice Stevens in *Hubbard v. United States*,[79] noted that stare decisis has "a special force when legislators or citizens have acted in reliance on a previous decision, for . . . overruling the decision would dislodge settled rights and expectations or require an extensive legislative response."[80] For example, in *Helvering v. Griffiths*,[81] the Supreme Court adhered to an unsatisfactory rule of law concerning tax administration because of the presence of a reliance interest by the government and taxpayers.[82] The Court followed precedent not only to avoid the difficulties of tax readjustments that would accompany a change in law, but to prevent the probability of extensive litigation that would result from an overruling.[83]

During her Nomination Hearing, Justice Ginsburg remarked that abiding by decisions that have generated substantial reliance effectuate the stability, certainty, and predictability of the law.[84] Furthermore, a legal system that fails to treat people in the same way as their predecessors, contemporaneous equals, and future generations will be deemed arbitrary, unjust, and disruptive to the fundamental notion of equality.[85] Failure to account for justified reliance might promote governmental and societal chaos through the lack of clear and certain judicial pronouncements and make the legal system ill-conceived, irresponsible, and vicious,[86] while inducing unfair surprise to those who have substantially relied upon an established body of law.[87]

The Supreme Court regards itself as a means for preserving legal coherency.[88] Stare decisis "promotes the even-handed, predictable, and consistent development of legal principles."[89] A court can promote stability and

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[78] *See id.* at 197-98.

[79] 514 U.S. 695 (1995).

[80] *See id.* at 714 (internal quotation omitted).

[81] 318 U.S. 371 (1943).

[82] *See id.* at 403 (following precedent because the consequences of disturbing precedent would "unsettle tax administration and subject the Treasury itself to many demands," as well as produce extensive litigation and adjustments.).

[83] *See id.*

[84] *See Hearing*, *supra* note 62, at 197.

[85] *See* HANKS ET AL., *supra* note 23, at 174.

[86] *See id.* at 175 & 189.

[87] *See* EISENBURG, *supra* note 53, at 43.

[88] *See* Eskridge, *supra* note 23, at 373.

[89] United States v. IBM, 517 U.S. 843, 856 (1996)(citation omitted)[hereinafter *IBM*].

certainty in the law by abiding by an established and well-reasoned precedent.[90]

Adherence to precedent improves our ability to plan our lives and avoid the paralysis of the unknown by providing a structured and consistent body of law.[91] In *United States v. International Business Machines Corp.*[92] ("*IBM*"), the Court followed its decision in *Thames & Mersey Marine Ins. Co. v. United States*.[93] IBM filed suit when it was denied a refund claim on taxes paid on insurance premiums to cover the shipment of goods to its foreign subsidiaries.[94] In holding that the export clause did not permit assessment of federal taxes on goods in export transit, the Court analyzed *Thames & Mersey*, where it enforced the Export Clause's prohibition against federal taxation of imported goods.[95]

The Court upheld *Thames & Mersey* because the decision was consistent with the statute, well-reasoned, and had been controlling precedent for more than eighty years.[96] The Court found no evidence that the decision was unworkable or would cause uncertainty in commercial export transactions.[97] *IBM* reinforced the Court's reluctance to overrule cases without special justification and its desire to promote a predictable, consistent development of the law.[98]

The decisions in *FLRA*,[99] *Critical Mass Energy Project v. Nuclear Regulatory Commission*,[100] and *Quiban v. Veterans Admin.*[101] also reflect a

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[90] *See Hubbard*, 514 U.S. at 713 n.13 (emphasizing that stability and certainty in the law is achieved when the stare decisis doctrine is observed and similarly situated cases are ruled in a consistent manner); *see also* Eskridge, *supra* note 23, at 373 (stating that by following well-established rules of law, a court furthers important legal values, such as predictability, replicabilty, certainty, and objectivity).

[91] *See* HANKS ET AL., *supra* note 23, at 175; *see also* Eskridge, *supra* note 23, at 373; Gebbia-Pinetti, *supra* note 50, at 254.

[92] 517 U.S. 843 (1996)(addressing the refund of taxes assessed on insurance premiums paid to foreign insurers to insure exports).

[93] 237 U.S. 19 (1915).

[94] *See IBM*, 517 U.S. at 845.

[95] *See id.* at 849 ("[T]he taxation of policies insuring cargoes during their transit to foreign ports is as much a burden on exporting as if it were laid on the charter parties, the bill of lading, or the goods themselves.")(citing *Thames & Mersey*, 237 U.S. at 27).

[96] *See id.* at 862-63.

[97] *See id.*

[98] *See id.* at 856.

[99] 510 U.S. 487 (1994)(ruling that a federal agency was prohibited from disclosing its civil service employees' home addresses to collective-bargaining representatives pursuant to requests made under the Federal Service Labor-Management Relations Statue because such a decision was consistent with the language of the Privacy Act).

[100] 975 F.2d 871 (D.C. Cir. 1992). In this case, the court examined the disclosure of safety reports under the Freedom of Information Act. *See id.* at 874. The court reaffirmed the test in *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), because the

court's observation of common law and statutory precedent. In these cases, the Court followed precedent because the reasoning of the precedent was fully consistent with the statutory language and intent of Congress.[102] Additionally, in *FLRA*, there was widespread acceptance of the precedent by other courts,[103] and the constitutional validity of the precedent was also apparent.[104] Furthermore, in *Critical Mass*, the precedent was upheld because congressional cognizance of the precedent existed, as evidenced by the enactment of subsequent legislation.[105]

Advantages to following well-reasoned precedent are the establishment of unity between the governmental branches and the creation of a uniform and coherent system of related laws.[106] The preamble to the United States Constitution provides that one of its goals was to form a "more perfect union" among the states and between the individual states and the federal government.[107] Justice Ginsburg's article exploring the role of the judiciary, *Speaking in a Judicial Voice*, references Hamilton's statement in *The Federalist* that "judges have the authority to check legislation and acts of the executive for constitutionality . . . to secure a steady, upright, and impartial administration of laws."[108] Stare decisis furthers governmental unity and promotes a coherent system of laws by reinforcing a court's responsibility to examine relevant precedent and align its decisions and legal developments with the existing body of law.[109]

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precedent was widely adopted by other circuits, accepted by Congress as evidenced by subsequent enactments, and was not unworkable as to disrupt the coherence and consistency in the law. *See id.* at 876-77.

[101] 928 F.2d 1154 (D.C. Cir. 1991). The court held that the exclusion of two Filipino World War II veterans and one surviving spouse from veterans benefits did not violate equal protection. *See id.* at 1162. The court noted its decision was consistent with the precedent *Harris v. Rosario*, 446 U.S. 651, 651-52 (1980), and the federal congressional intent as exhibited in the Supplemental Surplus Appropriation Decision Act. *See id.* at 1163.

[102] *See, e.g.*, *FLRA*, 510 U.S. at 500; *Critical Mass*, 975 F.2d at 871; *Quiban*, 928 F.2d at 1163.

[103] *See FLRA*, 510 U.S. at 499; Federal Labor Relations Auth. v. United States Dep't of Veterans Affairs, 958 F.2d 503, 512 (2d Cir. 1992); Federal Labor Relations Auth. v. United States Dep't of Treasury, Fin. Management Serv., 884 F.2d 1446 (D.C. Cir. 1988).

[104] *See FLRA*, 510 U.S. at 497.

[105] *See Critical Mass*, 975 F.2d at 877.

[106] *See infra* notes 107-09 and accompanying text.

[107] *See* U.S. CONST. preamble.

[108] *See* Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1185-86 (citing THE FEDERALIST NO. 78, at 466).

[109] *See* Wallace, *supra* note 19, at 197 (remarking on the Court's responsibility to faithfully interpret the Constitution and the laws of the land by examining and adhering to relevant case decisions or overruling erroneous interpretations).

Stare decisis is also essential to the retention of public confidence in the legitimacy of the court.[110] Such confidence permits a court to better serve the public because it facilitates a court's ability to function effectively as the ultimate arbitrator of the law.[111] By applying stare decisis, a court becomes more effective in achieving two fundamental goals: earning the respect of the public and generating public adherence to the law.[112] The public's ability to adhere to the law is enhanced when a court applies stare decisis because the public's planning of activities and resolution of disputes will be easier and more reliable.[113]

Stare decisis also promotes administrative efficiency and judicial restraint.[114] Justice Cardozo best explained the administrative efficiency argument in favor of observing stare decisis when he wrote that: "[T]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him."[115] It is impossible and ineffective for courts to re-examine every issue presented. Stare decisis, therefore, is an indispensable tool for limiting the court's agenda by allowing judges to dispose of cases by resorting to precedent and, thereby, enabling the court to focus its attention on new and unresolved questions of law.[116] Furthermore, stare decisis enables a judge to take advantage of the long hours of legal study and reflection which often accompanies the difficult decisions arising from the Supreme Court.[117]

At her Confirmation Hearing, Justice Ginsburg indicated that stare decisis is one of "the restraints against a judge infusing his or her own values into the interpretation of the Constitution."[118] Judicial restraint is vital in circumstances when an individualistic, idiosyncratic, or even activist judge wishes to utilize the law as an impetus for injecting his or her personal beliefs, biases, and preferences to further his or her personal agenda for social change.[119] Elimination of the doctrine would undermine the validity of the courts, create public doubt as to the objectivity of judges, drastically decrease respect for the tribunal, and create confusion as to the applicable body of law in a particular

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[110] *See id.* at 199.
[111] *See id.* at 198.
[112] *See* Gebbia-Pinetti, *supra* note 50, at 241.
[113] *See id.* at 244, 248; *see also* EISENBURG, *supra* note 53, at 47-49.
[114] *See infra* notes 115-21 and accompanying text.
[115] BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1921).
[116] *See* Powell, *supra* note 62, at 286.
[117] *See* Wallace, *supra* note 19, at 200.
[118] *Hearing*, *supra* note 62, at 197.
[119] *See* Wallace, *supra* note 19, at 201.

situation.[120] Since the delineated duty of the judicial branch is to interpret the law and not create it, stare decisis checks the individuality of our judges in tolerable bounds and compels a court to observe and employ the decisions of its predecessors when examining issues and deciding cases.[121]

3. When should a judge overrule precedent?

Although stare decisis is a fundamental legal and judicial principle, a court has discretion to either follow or depart from precedent.[122] The Supreme Court, however, has held that any departure from the doctrine demands special justification,[123] such as whether the precedent was erroneously decided or contained a plainly inconsistent or unreasonable constitutional or statutory interpretation.[124] Special justifications also include determining whether overruling the precedent will promote coherence of law, whether the factual assumptions of the prior decision have become invalid because of a change in circumstances, or whether the attainment of fairness and justice is needed in individual cases.[125]

Applying stare decisis promotes systematic consistency by insuring unity across the related areas of law and consensus among the government entities.[126] Ironically, courts also promote stability and certainty in the law by overruling decisions that are erroneously reasoned or contain an inconsistent constitutional or statutory interpretation. Supreme Court justices generally agree that an erroneous precedent no longer in accordance with sound reasoning should be corrected rather than perpetuated.[127] Because judges are fallible, Justice Sutherland suggested that they should not hesitate to overrule a prior decision that is erroneous or devoid of sound reason.[128] Moreover,

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[120] *See id.* at 199-201; *see also* HANKS ET AL., *supra* note 23, at 180. (eliminating the doctrine of stare decisis would endorse the idea that the Constitution is nothing more than what five justices say it is and would generate inconsistent decisions which fluctuate with the composition of the Supreme Court).

[121] *See* Wallace, *supra* note 19, at 201.

[122] *See id.* at 191-92.

[123] *See Critical Mass*, 975 F.2d at 875.

[124] *See infra* text accompanying notes 126-62.

[125] *See infra* text accompanying notes 163-90.

[126] *See supra* notes 88-109 and accompanying text.

[127] *See* Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468, 519-21 (1987)(showing a willingness to abandon stare decisis when a precedent has proven unstable and has no historical foundation); *see also* City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 458 (1983)("[W]hen convinced of a formal error, this Court has never felt constrained to follow precedent."); Vasquez v. Hillery, 474 U.S. 254, 269 (1986)("[B]adly reasoned decisions may be departed from.").

[128] *See* DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 211 (2d ed. 1990).

Justice Douglas, emphasized that all judges must examine their own decisions without fear and revise them without reluctance.[129]

Errors in decisions arise from human error,[130] an unworkable decision,[131] or misapplication of a doctrine or rule of law.[132] In *Payne v. Tennessee*,[133] the Court recognized that stare decisis should not apply to prior erroneous decisions.[134] Payne was convicted of two counts of first-degree murder and one count of first-degree assault with intent to murder.[135] The jury sentenced Payne to death on each of the murder counts after hearing the prosecutor's comments regarding the continuing effects of the crimes on both the victims and the victims' families.[136] At his capital sentence hearing, Payne contended that under *Booth v. Maryland*[137] and *South Carolina v. Gathers*,[138] evidence relating to the victims and the impact of the victims' death on their families was inadmissible under the Eighth Amendment.[139]

Booth and *Gathers* stood for the proposition that evidence relating to the victim or harm to the victim's family does not reflect the defendant's blameworthiness, and that only evidence relating to blameworthiness is relevant to the capital sentencing decision.[140] Rejecting Payne's contention, the Court reasoned that states have the primary responsibility of defining state crimes and establishing the procedure for state criminal trials.[141] Thus, a state can permit consideration of this evidence, without violating the Eighth Amendment.[142] The Court overruled *Booth* and *Gathers* on the grounds that they were poorly reasoned.[143] Since victim impact evidence is potentially relevant to convey to the jurors the underlying events, the Court found that

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[129] *See* William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 747 (1949).

[130] *See* Wallace, *supra* note 19, at 241.

[131] *See Casey*, 505 U.S. at 851.

[132] *See* Wallace, *supra* note 19, at 234.

[133] 501 U.S. 808 (1991).

[134] *See id.*; *see also IBM*, 517 U.S. at 843 (Kennedy, J., dissenting) (arguing in the dissenting opinion by Justices Kennedy and Ginsburg for the overruling of *Thames & Mersey*, 237 U.S. 19 (1915), because its decision to prohibit federal taxation of export goods was unworkable since its reasoning was poor, and its holding was at odds with recent cases); Fulton Corp v. Faullkner, 516 U.S. 325 (1996)(the language of the Export Clause, and the need to accommodate the change from a service-intense to an export-oriented economy).

[135] *See Payne*, 501 U.S. at 811.

[136] *See id.*

[137] 482 U.S. 496 (1987).

[138] 490 U.S. 805 (1989).

[139] *See Payne*, 501 U.S. at 817.

[140] *See id.* at 819.

[141] *See id.* at 824.

[142] *See id.* at 831.

[143] *See id.*

there were no compelling reasons to treat the evidence differently from other evidence.[144]

Decisions that contain an inconsistent or unreasonable constitutional or statutory interpretation provide another special justification for not observing stare decisis.[145] The Court has overruled precedent, not only where a decision departed from a proper understanding of the Constitution,[146] but also where it contained an unreasonable or inconsistent interpretation of a statute[147] or represented a misunderstanding of the legislative intent.[148] As of 1992, commentators, judges, and Congress have discovered that the Supreme Court has overruled 216 decisions.[149] In three-fourths of these cases, the Court overruled the earlier decisions because the previous court incorrectly interpreted the Constitution.[150]

Hubbard v. United States represents such a decision to overrule erroneous precedent. [151] In *Hubbard*, the Court examined whether the making of a false statement in a federal bankruptcy fraud case was governed by a statute criminalizing false statements and misconduct in any department or agency of the United States.[152] The Court proceeded, however, to overrule *United States v. Bramblett*[153] and held that "judicial proceedings" were not encompassed within the term "department."[154] The Court concluded that *Bramblett* erroneously interpreted the statute by broadening the definition of "department" to include the executive, legislative, and judicial branches.[155]

Overruling precedent that erroneously interprets statutes or the Constitution also addresses the value of responsivity, which "requires that law be

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[144] *See id.*

[145] *See* Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 702-03 (1994); *Hubbard*, 514 U.S. at 713-14.

[146] *See* Wallace, *supra* note 19, at 234.

[147] *See* Rainey, *supra* note 29, at 1450-51.

[148] *See id.*

[149] *See* Eskridge, *supra* note 23, at 420-21 (apps. II and III).

[150] *See id.*

[151] 514 U.S. 695 (1995); *see also* Adarand Construction, Inc. v. Pena, 515 U.S. 200 (1995)(overruling precedent applying intermediate scrutiny to federal affirmative action programs because the Court held that the application of strict scrutiny was more consistent with the constitution). In *Save our Cumberland Mountains, Inc. v. Hodel*, 857 F.2d 1516 (D.C. Cir. 1988), the court determined the attorney fee award for private attorneys who represented prevailing parties. *See id.* at 1516. The court overruled *Laffey v. Northwest Airline, Inc.*, 746 F.2d 4 (D.C. Cir. 1984), because it was inconsistent with the intent of Congress and it misconstrued the fee award statutes and the Court's decision in the *Blum v. Stevenson* decision, 465 U.S. 886 (1984). *See Hodel*, 847 F.2d at 1518.

[152] *See Hubbard*, 514 U.S. at 698-99.

[153] 348 U.S. 503 (1995).

[154] *See Hubbard*, 514 U.S. at 709.

[155] *See id.* at 702.

responsive to society and to societal change."[156] Legislative enactments and amendments usually emerge as a result of dissatisfaction with the current state of the law, which is reflected in opposition from interest groups, the unworkability of the law, society's need and desire to expand upon the law, or the emergence of new ideologies and information.[157] To achieve responsivity, stare decisis should be applied flexibly so the law can be modified to address erroneous decisions and to conform such decisions to the established, as well as prevailing, social values, morals, and choices.

When judges are provided with flexibility in applying stare decisis, stability and certainty in the law actually emerge. Perpetuating an erroneous decision disrupts the formation of a consistent body of law necessary to guide public behavior and structure societal relations.[158] When a court acknowledges and overrules erroneous or inconsistent precedent, it achieves doctrinal stability and systematic consistency by ensuring that the rectified precedent and the current decision are consistent with the surrounding areas of law.[159] Furthermore, when the stability of a developed doctrine is established, not only is the planning and execution of social conduct easier, but the results of litigation and dispute resolutions will be "predictable, replicable, and acceptable by society as fair and just."[160] Additionally, when the law is consistent and uniform, the law will be easier to implement, its results more readily accepted, and the public can more effectively take steps to avoid violating the law.[161] Overruling precedent institutes greater order in our society and decreases conflict in our relations.[162]

Courts also attain a coherent and uniform system of law by overruling prior decisions that were detrimental because of inherent confusion in the decision, the presence of a circuit split,[163] or irreconcilability with competing legal doctrines or policies.[164] For instance, in *Casey*, the Court reconsidered and

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[156] Gebbia-Pinetti, *supra* note 50, at 242.

[157] *See* Eskridge, *supra* note 23, at 359-61.

[158] *See* Mentschikoff & Stozky, *supra* note 58, at 703 ("[L]aw bears a strong relationship to the ways people act, the ways people are organized, and the ways people use their intellectual and material resources . . . . [L]aw provides the maintenance aspect of order which is a precondition to any complex civilization."); *see also* Gebbia-Pinetti, *supra* note 50, at 346 n.23.

[159] *See* Gebbia-Pinetti, *supra* note 50, at 254-55.

[160] *Id.* at 254.

[161] *See id.* at 241.

[162] *See id.*

[163] *See* Rainey, *supra* note 29, at 1460.

[164] *See Critical Mass*, 975 F.2d at 875-76.

affirmed *Roe*.[165] The Court overruled decisions following *Roe*[166] that were inconsistent with its central holding—a women's right to an abortion before fetal viability,[167] because "the state of abortion law had become so confused and muddled that it was impossible for lower courts to implement."[168]

The decision in *Hubbard* was also influenced by a desire to attain greater uniformity in the state of the law. Although the Court desired to correct *Bramblett*'s erroneous interpretation of the term "department," it also sought to overrule the decision because the intervening development of the law created competing legal doctrines, which led to a split in the circuits.[169] In comparison, the *Critical Mass* court upheld the test in *National Parks and Conservation Ass'n v. Morton*[170] to determine the confidentiality of a commercial or financial matter and exempt its disclosure under the FOIA.[171] The court followed the *National Parks* test because it was workable and widely accepted "as to constitute a positive detriment to coherence and consistency in the law."[172]

A court's decision to follow or depart from precedent is also influenced by the social and legal context surrounding a case. Stare decisis is tempered by judicial perceptions of the political, economic, and social realities of the day and adaptable to the spirit of the times.[173] A change in circumstances that renders a previous decision unworkable and obsolete is another special justification for departing from precedent.[174] A change in circumstances can include a change in the law or a change in the factual assumptions of a case. A court should not abide by stare decisis when it is clearly convinced that the

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[165] *See Casey*, 505 U.S. at 860-61 (holding that the doctrine of stare decisis requires affirmance of *Roe's* essential holding recognizing a woman's right to choose an abortion before fetal viability).

[166] *See Casey*, 505 U.S. at 950, (Rehnquist, J., concurring in part and dissenting in part). *See, e.g.*, Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Myer v. Nebraska, 262 U.S. 390 (1923); City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416 (1983); Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502 (1990); Hodgson v. Minnesota, 497 U.S. 417 (1990).

[167] *See Casey*, 505 U.S. at 846.

[168] Wallace, *supra* note 19, at 227 (citing *Casey* as reflecting the Court's decision to reconsider *Roe* because of the confusing state of the abortion law).

[169] *See Hubbard*, 514 U.S. at 697-99 (overruling *Bramblett* for interpreting "department of the United States" to erroneously and broadly include the bankruptcy court when the term was meant to describe the executive, legislative, and judicial branches).

[170] 498 F.2d 765 (D.C. Cir. 1974).

[171] *See Critical Mass*, 975 F.2d at 879.

[172] *Id.* at 876.

[173] *See* Wallace, *supra* note 19, at 189.

[174] *See id.* at 189; *see also* 5 AM. JUR. 2D *Appellate Review* § 600(1995).

rule of law is unsound due to changed conditions and more good than harm will be achieved by departing from precedent.[175]

Henderson v. United States[176] embodies the Court's ability to overrule precedent based on a change in law. *Henderson* looked at the period allowed for service of process in a civil action commenced by a seaman injured aboard a United States vessel.[177] A dispute arose as to whether the 120 days of service under Rule 4 of the Federal Rules of Civil Procedure or the "forthwith" instruction for service under the Suits in Admiralty Act should govern the case.[178] Writing for the majority, Justice Ginsburg held that the Suits in Admiralty Act was superseded by the Federal Rules of Civil Procedure Act[179] because of a "shift in the responsibility for service from the United States marshals to the plaintiff," requiring greater time control and leading to Congress implementing the 120 days for service.[180]

Applying stare decisis in a manner that reflects the prevailing standards and expectations of society addresses the legal-system value of responsivity.[181] For a legal system to be an effective guide for structuring social relations and resolving disputes, a liberal rule of stare decisis is necessary to reflect and respond to social and legal progressions, such as expanding technological advances, emerging international relations, the prevailing role of women in the society, increasing influx of immigrants, continuing civil rights movements to promote equality, and implementing enactments or amendments by Congress to "improve [the] general welfare or common good" and set "public-seeking national policy."[182]

Fairness and justice are additional values that affect a court's observance of stare decisis. Society expects the law to institute order and produce just and fair results in individual cases.[183] Although the facts of two cases may be similar, following a prior decision can result in disparate impacts or detrimental harm to a party in the latter case. To ensure fairness and justice, recent

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[175] *See* 5 AM. JUR. 2D *Appellate Review* § 600(1995).

[176] 517 U.S. 654 (1996).

[177] *See id.* at 656.

[178] *See id.*

[179] *See* Federal Rules of Civil Procedural Amendments Act, 96 Stat. 2527, §2 (1982).

[180] *Henderson*, 517 U.S. at 662.

[181] *See* Gebbia-Pinetti, *supra* note 50, at 248-49 (emphasizing that responsivity "requires that the law be responsive to society and to societal change" by embodying society's current customs, choices, values, morals and needs and adapting to changes in society and in social values).

[182] Eskridge, *supra* note 23, at 354; *see also* Payne v. Tennessee, 501 U.S. 808, 825 (1991)(amending the law to give states greater freedom to include victim impact evidence in capital cases because of law's role to incorporate "new procedures and new remedies to meet [the] felt needs" of the society).

[183] *See* Gebbia-Pinetti, *supra* note 50, at 241.

cases have acknowledged that the needs of the litigants and the unique circumstances surrounding a case may dictate whether to follow or overrule precedent. Two dissenting opinions by Justice Ginsburg, *Consolidated Rail Corp. v. Gottshall*[184] and *Center for Nuclear Responsibility, Inc. v. United States Nuclear Regulatory Commission*, [185] address the need for law to accommodate the specific facts of a case. In both of these cases, Justice Ginsburg dissented from the majority's decision to uphold relevant precedent because it would result in unfairness and injustice to the litigants.[186]

As noted in the preceding discussion, numerous factors influence the application of stare decisis. The same legal-system values are often served by a court following precedent in some cases and overruling them in others. For example, doctrinal stability and systematic consistency can be achieved by both adhering to stare decisis and following well-reasoned and relevant precedent[187] or deviating from stare decisis and overruling erroneous precedent.[188] For a court to adequately balance the tensions exhibited by these values, maximize its ability to serve the needs of society, and provide a consistent body of law to guide public behavior,[189] the law and the application of stare decisis need to be flexible enough to accommodate legal developments, social changes, and prevailing views.[190]

For these reasons, a liberal rule of stare decisis should be adopted. The judiciary can promote the virtues of stare decisis, such as predictability, replicablity and stability, yet have the flexibility to modify the law to accommodate social changes and legal developments.[191] The liberal approach also permits the court to acknowledge the particulars of each case, rather than rigidly observe precedent, to achieve fairness and justice in individual cases.[192]

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[184] 512 U.S. 532 (1994).

[185] 781 F.2d 935 (D.C. Cir. 1986).

[186] *See Consolidated Rail*, 512 U.S. at 559 (Ginsburg, J., dissenting); *Center for Nuclear Responsibility*, 781 F.2d at 944 (Ginsburg, J., dissenting). *See also* discussion *infra* Part III.B.3.

[187] *See, e.g., Casey*, 505 U.S. at 854; *IBM*, 517 U.S. at 851; *FLRA*, 510 U.S. at 508; *Critical Mass*, 975 F.2d at 876-77; *Quiban*, 928 F.2d at 1163.

[188] *See, e.g., Payne*, 501 U.S. at 809; *Kiryas School*, 512 U.S. at 702; *Hubbard*, 514 U.S. at 715.

[189] *See* Mentschikoff & Stozky, *supra* note 58, at 703; *see also* Gebbia-Pinetti, *supra* note 50, at 241 & n.23.

[190] *See* Wallace, *supra* note 19, at 191. The stare decisis doctrine is adaptable to the "spirit of the times" and "judicial use of the doctrine is tempered by judicial perceptions of the political, economic, and social realities of the day." *Id.* (quoting Robert A. Sprecher, *The Development of the Doctrine of Stare Decisis and the Extent to Which it Should be Applied*, 31 A.B.A.J. 501, 502 (1945)); *see also Consolidated Rail*, 512 U.S. at 572; *Center for Nuclear Responsibility*, 781 F.2d at 944.

[191] *See* Gebbia-Pinetti, *supra* note 50, at 255.

[192] *See, e.g., Consolidated Rail*, 512 U.S. at 572; *Center for Nuclear Responsiblity*, 781 F.2d at 944; *see also* discussion *supra* nn.183-86 and accompanying text and *infra* Part III.B.3.

III. JUSTICE GINSBURG AND STARE DECISIS

The preceding sections have revealed that numerous factors and values govern the application of stare decisis. These factors and values, however, are not the only elements that affect a judge's approach to stare decisis. A judge's personal background and jurisprudence must also be considered when analyzing his or her decision-making. Section A will discuss six factors that appear to have impacted Justice Ginsburg's judicial philosophy. Section B is a preliminary evaluation of Ginsburg's approach to stare decisis, which is an approach that values and respects precedent as an important guide.[193] It is difficult to definitively place Justice Ginsburg on either extreme of the continuum. Her limited record on the Supreme Court demonstrates the strict-liberal tension, where she has overruled precedent to account only for errors or for unique circumstances.[194] This section will also examine Justice Ginsburg's jurisprudence and writings to reveal her approach to stare decisis and the interaction between the stare decisis framework and her judicial philosophy.

A. Factors Influencing Justice Ginsburg's Judicial Philosophy

Six factors appear to affect Justice Ginsburg's judicial philosophy, thereby shaping her approach to operating stare decisis: (1) her image of a common-law judge;[195] (2) her acknowledgment of presidential expectations;[196] (3) her gender consciousness;[197] (4) her admiration of the civil law system;[198] (5) her advocacy of the Court's response to societal changes;[199] and, (6) her efforts to attain collegiality among the justices.[200] Each factor will be discussed in turn.

1. Justice Ginsburg's image of a common-law judge

Justice Scalia described the common-law judge as having the intelligence to discern the best rule of law for the case at hand: "[D]istinguishing one prior case on the left, straight-arming another one on the right, high-stepping

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[193] *See, e.g.*, Northwest Airlines v. County of Kent, 510 U.S. 355 (1994); Barclays Bank v. Franchise Tax Bd. of Cal., 512 U.S. 298 (1994); Powell v. Nevada, 511 U.S. 79 (1994).

[194] *See, e.g.*, *Hubbard*, 514 U.S. at 702; *IBM*, 517 U.S. at 851; *Henderson*, 517 U.S. at 662.

[195] *See infra* Part III.A.1.

[196] *See infra* Part III.A.2.

[197] *See infra* Part III.A.3.

[198] *See infra* Part III.A.4.

[199] *See infra* Part III.A.5.

[200] *See infra* Part III.A.6.

away from another precedent about to tackle him from the rear, until (bravo!) he reaches the goal—good law."[201] However, Justice Scalia's precedent-bound common-law judge image neglects an important dimension of a judge—the ability to look forward.[202] Professor Frederick Schauer suggests that the forward-looking aspect of stare decisis imposes on a judge the responsibility to account for the future when deciding the case at hand.[203] It has been said that a judge is required not only to observe case law precedents, but also to interact with other organs of the system, such as the legislative or executive branches.[204] Then Judge Ginsburg, sitting on the Court of Appeals for the District of Columbia, was fully aware of this three-dimensional common-law judge paradigm and its implication on her judgeship.[205]

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[201] Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION FEDERAL COURTS AND THE LAW 3, 9 (1997).

[202] *See* Schauer, *supra* note 52, at 572-73.

[203] *See id.*

[204] *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 165-66 (1982). To clarify, the three-dimension common-law judge image means, in a common-law system, that a judge is bound by a prior case law precedent, responsible for future decision-makers, and called upon to interpret legislative enactment. *See id.* Calabresi concludes:

> It is no more and no less than the critical task of deciding when a retentionist or a revisionist bias is appropriately applied to an existing statutory or common law rule. It is the judgmental function of deciding when a rule has come to be sufficiently out of phase with the whole legal framework so that, whatever its age, it can only stand if a current majoritarian or representative body reaffirms it. . . . [The courts'] main job would still be to give us continuity and change by applying the great vague principle of treating like cases alike. They would exercise the same capacity to define what are "like" cases at different levels of generality, in terms of different sources of law (statutory, jurisprudential, case, scholarly comment) and in response to technological, societal, and even ideological changes. . . . Two principal changes are: First, the courts would not be bound to declare or promulgate the new in order to find that the old fails to fit. To some extent that has always been the case, for often an old rule was destroyed at common law while the new one was only hinted at by the courts. In a statutory world, that may occasionally be appropriate. Often, however, the appropriate technique will be to enter into a dialogue, to ask, cajole, or force another body (usually the legislature but sometimes the agencies) to define the new rule or reaffirm the old. Second, . . . the judicial common law would attach to statutory rules that are out of phase just as much as to common law precedents or doctrines. . . . This fact (rather than the existence of statutes as such) calls for new judicial techniques designed to bring forth legislative and administrative revisions in old rules, and would call for them whether the old rules are statutory or court-made.

See id.

[205] *See* Sue Davis et al., *Voting Behavior and Gender on the U.S. Court of Appeals*, 77 JUDICATURE 129, 133 (1993)(studying judicial behavior of female judges on the court of appeals). Then-Judge Ginsburg was appointed to the Court of Appeals for the District of Columbia by President Jimmy Carter on June 18, 1980. *See id. See also Hearing, supra* note

Justice Ginsburg's early years as a judge were marked by her great judicial restraint in preserving precedent. She paid utmost respect to a settled body of law.[206] When faced by a precedent conflicting with her moral beliefs, she still followed the precedent and abided by one of the primary tenants of stare decisis—" to keep judges from infusing their own moral beliefs."[207]

She was also mindful of her responsibility to look forward.[208] Stare decisis operates like a double-edged sword[209] because it imposes a duty on subsequent decision-makers to be mindful of the original decision and, yet, be cognizant of its possible binding ramifications on later cases.[210] Mindful of a judge's

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62, at 10 (Senate Daniel Patrick Moynihan's introduction of Ginsburg's biography).

[206] *See Nomination Hearings: Ginsburg Adroit, Amiable But Avoids Specifics*, 51 CONG. Q. WKLY. REP. 34, July 24, 1993, *available in* 1993 WL 7766528 [hereinafter *Ginsburg Adroit*]. When asked by Senate Leahy how much weight she put on the precedent, she identified the major factors as "how it has been working, what expectations, what reliance has built up around it." *Id.*

[207] *Ginsburg Adroit*, *supra* note 206, at 34. During her Confirmation Hearing, Ginsburg stated that she would be "scrupulous in applying the law on the basis of legislation and precedent." *Hearing*, *supra* note 62, at 198 (statement of Justice Ruth Bader Ginsburg). Ginsburg's scrupulousness in applying precedent is demonstrated in her concurring opinion in *Mosrie v. Barry*, 718 F.2d 1151 (D.C. Cir. 1983). The case is relevant in that it demonstrates the mandate by stare decisis for a lower court to follow the precedent set out by the United States Supreme Court. *See* discussion *supra* Part II.A. In *Mosrie*, a police officer brought a civil action, alleging that his lateral transfer and public criticism of his performance by supervisory officials deprived him of a liberty interest and, thereby, violated his due process rights. *See Morrie*, 718 F.2d at 1155. In determining whether reputation stigma caused by the government gives rise to a due process violation, the circuit court completely relied upon *Paul v. Davis*, 424 U.S. 693 (1976), and its analysis of prior cases. *See id.* at 1157. *Paul* involved a due process claim brought by an individual who had been defamed by public officials. *See Paul*, 424 U.S. at 696. The Supreme Court in *Paul* held that reputation is not among the interests "comprehended within the meaning of either 'liberty' or 'property.'" *See id.* at 701.

Ginsburg firmly believed that the security of one's reputation had been traditionally recognized as an important right that served as a basis for a person to enjoy other advantages or rights. *See Mosrie*, 718 F.2d at 1163 (Ginsburg, J., dissenting). Ginsburg disagreed with the majority's decision to dismiss Mosrie's complaint. *See id.* (Ginsburg, J., dissenting). Nevertheless, she concurred with the decision on the ground that:

> [This case and *Paul v. Davis*] are not subject to sensible distinction. Until the Court revisits the question whether a person's good name is a liberty interest, protected by the Constitution against arbitrary government deprivation, we are obliged to follow *Paul v. Davis*, and its strained reading of earlier decisions.

See id. at 1163 (Ginsburg, J., concurring).

[208] *See* Schauer, *supra* note 52, at 576.

[209] *See id.* at 576.

[210] *See id.* at 588. Professor Schauer illustrated:

> A rule of precedent tells a current decisionmaker to follow the decision in a previous similar case. But of course the current decisionmaker of today is the previous decisionmaker of tomorrow .... Even without an existing precedent, the conscientious decisionmaker must recognize that future conscientious decisionmakers will treat her

obligation to the future decision-maker, Justice Ginsburg advocated a cautious approach in deciding cases,[211] fearing that an over-broad ruling would create an unfair future burden.[212] During her thirteen years as an appellate judge, Justice Ginsburg adhered to the notion that "appellate courts, even the United States Supreme Court, must tread carefully when developing a new doctrine, going only as far as necessary for the instant case to be decided and building upon previous precedent whenever possible."[213] As Justice Ginsburg noted at her Confirmation Hearing, a judge should "strive to write opinions that both get it right and keep it tight."[214]

> decision as precedent, a realization that will constrain the range of possible decisions about the case at hand. If the future must treat what we do now as presumptively binding, then our current decision must judge not only what is best for now, but also how the current decision will affect the decision of other and future assimilable cases .... The decisionmaker must then decide on the basis of what is best for all of the cases falling within the appropriate category of assimilation .... [T]oday's conscientious decionmakers are obliged to decide not only today's case, but assimilable facts, then there is no problem. But if what is best for today's case might not be best for a different (but likely to be assimilated) situation, then the need to consider the future as well as the present will result in at least some immediately suboptimal decisions.

Id.

[211] *See Hearing, supra* note 62, at 51.

[212] *See id.* Justice Ginsburg defined her judicial approach as "neither liberal nor conservative," rather "it is rooted in the place of the judiciary of judges in the democratic society." *Id.* She agreed with Alexander Hamilton in that the "mission of judges is to secure a steady, upright, and impartial administration of the laws." *Id.* In addition, she stated, "the judge should carry out that function without fanfare but with due care." *Id.* She should decide the case before her without reaching out to cover cases not yet seen. *See id.* She should be ever mindful, as judge and then Justice Benjamin Cardozo said, "justice is not to be taken by storm. She is to be wood [sic] by slow advances." *Id.*

[213] Sheila M. Smith, Comment, *Justice Ruth Bader Ginsburg And Sexual Harassment Law: Will the Second Female Supreme Court Justice Become the Court's Women's Rights Champion?*, 63 U. CIN. L. REV. 1893, 1905 (1995).

[214] *Hearing, supra* note 62, at 52-53. Ginsburg further pointed out:

> Supreme Court justices, most notably, participate in shaping a lasting body of constitutional decisions; they continuously confront matters on which the framers left things unsaid, unsettled, or uncertain .... As Justice Oliver Wendell Holmes counseled, one of the most sacred duties of a judge is not to read her convictions into the Constitution. I have tried and I will continue to try to follow the model Justice Holmes set in holding that duty sacred .... [Justice Byron R. White] expressed a hope shared by all lower court judges. He hoped the Supreme Court's mandates will be clear and crisp, leaving as little room as possible for disagreement about [t]heir meaning. If [my nomination is confirmed], I will take that counsel to heart and strive to write opinions that both get it right and keep it tight.

Id.

Her emphasis on a judge's recognition of possible future ramifications is exemplified in her criticism of the Supreme Court's decision in *Roe*.[215] Justice Ginsburg criticized the decision as "ventur[ing] too far in the change it ordered[.]"[216] Moreover, she considered *Roe* as imposing a burden upon the future decision-maker, who would be compelled to follow the decision.[217]

Furthermore, with an increasing number of statutes, a judge is expected to exercise respect for cases from different sources of law (statutes, case law, the Constitution, and scholarly comments) and respond to technological, societal, and ideological changes.[218] The judge's new task is to engage in dialogue with the legislature and other government entities "to define the new rule or reaffirm the old."[219] This dialogue fosters stability, certainty, and predictability in law.[220] Justice Ginsburg explains that stare decisis requires the adherence to statutory precedents because "it's more than just the soundness of the reasoning[,] . . . the reliance interests are important[.]"[221]

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[215] *See* Ruth Bader Ginsburg, *Some Thoughts On Autonomy And Equality In Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 380 (1985). In *Roe*, the Supreme Court struck down the Texas law which made abortion a crime excepting those abortions performed to medically save the mother's life. *See Roe*, 410 U.S. at 152-55. The joint opinion by Justices O'Connor, Souter and Kennedy declared that a woman had a fundamental privacy right to abort a pregnancy as provided by the due process clause. *See id.* The Court went even further by formulating a trimester test. *See id.* at 164.

[216] Ginsburg, *Judicial Voice*, *supra* note 108, at 1199. To illustrate her point, she said, "[a] less encompassing *Roe*, one that merely struck down the extreme Texas law and went no further on that day, . . . might have served to reduce rather than to fuel controversy." *Id.*

[217] Ginsburg cited Justice O'Conner's description of *Roe*'s trimester test in *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 442 (1983). *See* Ginsburg, *Some Thoughts on Autonomy*, *supra* note 215, at 381. Ginsburg noted that O'Connor criticized the approach as "on a collision course with itself" which "impelled legislatures to remain *au courant* with changing medical practices and called upon courts to examine legislative judgments, not as jurists applying 'neutral principles,' but as 'science review boards.'" *Id.* at 458 (quoting Justice O'Connor). For instance, Ginsburg emphasized that in the dissenting opinion of *Akron*, Justice O'Connor expressed that the majority acted consistently with stare decisis when it felt compelled to uphold *Roe*. *See id.* 383 (citing *Akron*, 462 U.S. at 422 ("[Stare decisis is [a] doctrine that demands respect in a society governed by the rule of law.")).

[218] *See* CALABRESI, *supra* note 204, at 165-66.

[219] *Id.*

[220] *See id.*

[221] Ruth Bader Ginsburg, *Inviting Judicial Activism: A "Liberal" or "Conservative" Technique?*, 15 GA. L. REV. 539, 547 (1981)(discussing the judicial restraint and activism in facing legislative enactments). Ginsburg also discussed Justice Rehnquist's dissenting opinion in *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 595 (1980), where when criticizing a provision of the Clean Air Act, he remarked that "[t]he effort to determine congressional intent here might better be entrusted to a detective than to a judge[.]" *Id. See also*, David A. Levy, *The Constitutional Court: A Bulgarian Response To Obsolescent Law*, 4 U. MIAMI Y. B. INT'L L. 1 (1995); Ruth Bader Ginsburg, *A Plea For Legislative Review*, 60 S. CAL. L. REV. 995, 996 (1987) (calling on Congress to install a system of legislative review and revision under which

2. Presidential expectation

After thirteen years on the D.C. Circuit, Justice Ginsburg was nominated to the Supreme Court by President Bill Clinton.[222] The United States Senate rigorously reviewed her nomination. The Senate Judiciary Committee ("Committee") views the hearing process as an opportunity to inquire into the nominee's values concerning constitutional interpretation.[223] In having the nominee define and explain his or her core constitutional values, the Committee attempts to seek assurances that the nominee has a satisfactory understanding and command of the Constitution.[224]

President Clinton's primary purpose for nominating Justice Ginsburg[225] was "his need for a nominee who was risk-free, one who would not only sail smoothly through the Senate but also might . . . reconfirm his move to the political center and give new momentum to his Administration."[226] Concerned about maintaining his support from his liberal constituents in the Democratic Party, President Clinton was also interested in appointing someone who would support the pro-choice abortion position and provide greater support for the protection of individuals' constitutional rights than the predominantly conservative justices of the Rehnquist Court.[227] In Justice Ginsburg, he found

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it would take a second look at a law once a court opinion or two highlighted the measure's infirmities).

[222] *See* Christopher E. Smith & Kimberly A. Beuger, *Clouds In the Crystal Ball: Presidential Expectations and the Unpredictable Behavior of Supreme Court Appointees*, 27 AKRON L. REV. 115, 115 (1993).

[223] *See* Stephen J. Wermiel, *Confirming the Constitution: The Role of the Senate Judiciary Committee*, 56 LAW & CONTEMP. PROBS. 121, 122-23 (1993).

[224] *See id.* at 125. The Senate has defined its role in the confirmation hearing as "trying to satisfy itself that a nominee has the 'intellectual capacity, competence and temperament,' the 'good moral character,' and the commitment to upholding the Constitution that are required for the Supreme Court." *Id.* at 122. The Committee seeks assurances because once a nominee is confirmed, the Committee loses control of the nominee due to the tenure term of the Supreme Court Justice. The confirmation process reveals "the interest on both sides of the political aisle in influencing the course of constitutional decision-making." *Id.* at 129.

[225] *See* Smith & Beuger, *supra* note 222, at 135-36. In 1993, Ginsburg was appointed as the Associate Justice to the Supreme Court by President Clinton, the first Democratic president who had placed a justice on the Supreme Court in the preceding 26 years. *See id.* at 115. The prior three Republican presidents, Richard Nixon, Ronald Reagan, and George Bush, replaced the remaining Justices from the Warren Court era with their conservative appointees. The conservative transformation of the Court continued in the ensuing Burger and Rehnquist periods. It is not surprising if the liberals hoped that Clinton's first appointment would signal a starting point of moving the Court in a more liberal direction. *See id.* at n.2.

[226] *Id.* at 135-36.

[227] *See id.*

a nominee with established credentials from years of experience as the foremost legal advocate of equal rights for women.[228]

Justice Ginsburg's exemplary record as a civil rights attorney posed little risk of concerted opposition from Republican senators and conservative interest groups because of her own "conservative" judicial demeanor.[229] With this assurance, President Clinton announced at her Senate Confirmation Hearing: "If this is a time for consensus building on the Court—and I believe it is—Judge Ginsburg will be an able and effective architect of that effort."[230] Ginsburg responded, "if confirmed, I [will] try in every way to justify his faith in me."[231]

In her opening statement to the Committee, Justice Ginsburg first declared that her approach as a judge would be "neither liberal nor conservative."[232] She then recognized that the judiciary was "third in line" in the Constitution and judges should not reach beyond cases immediately before them to decide other issues.[233] When repeatedly asked about the death penalty, she reiterated that she would "be scrupulous in applying law on the basis of legislation and precedent."[234]

Ginsburg's approach to constitutional interpretation involves a two-step process: first, an inquiry must be made as to what the framers might have intended at the time of writing the Constitution; and second, the framers' larger expectation that the Constitution would govern the future must be explored.[235] She rejected the notion that constitutional precedent may be easily overruled[236] and asserted that a judge should consider if any reliance interests have been built up around it.[237]

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[228] Ginsburg argued six seminal gender discrimination cases before the Supreme Court in the 1970's. The cases are: Duren v. Missouri, 439 U.S. 357 (1979); Califano v. Goldfarb, 430 U.S. 199 (1977); Edwards v. Healy, 421 U.S. 772 (1975); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Kahn v. Shevin, 416 U.S. 351 (1974); Frontiero v. Richardson, 411 U.S. 677 (1973). *See* Michael James Confusione, Note, *Justice Ruth Bader Ginsburg and Justice Thurgood Marshall: A Misleading Comparison*, 26 RUTGERS L.J. 887, 888 n.7 (1995).

[229] *See* Smith & Beuger, *supra* note 222, at 135-36.

[230] *Hearing of the Senate Judiciary Committee*, FEDERAL NEWS SERVICE, June 14, 1993, at 66, *available in* LEXIS, Nexis library, FEDNEW file.

[231] Ruth Bader Ginsburg, Remarks on the Investiture of the United States Supreme Court Justice Ruth Bader Ginsburg (August 10, 1993)(reprinted in Ruth B. Ginsburg, *The Progression of Women in the Law*, 28 VAL. U. L. REV. 1161, 1174 (1994)).

[232] *See Hearing*, *supra* note 62, at 53.

[233] *See id.*

[234] *Id.*

[235] *See id.* at 127.

[236] *See id.* at 16.

[237] *See id.* at 198.

The pivotal decision of *Adarand Constructors, Inc. v. Pena*[238] provides further evidence of Justice Ginsburg's fulfillment of President Clinton's expectations. Overturning its decision in *Metro Broadcasting, Inc. v. F.C.C.*[239] and questioning its ruling in *Fullilove v. Klutznick*,[240] the *Adarand* Court adopted the standard of strict scrutiny for benign-racial classifications by Congress.[241] Justice Ginsburg joined the dissenting opinions of Justice Stevens and Justice Souter, stating that stare decisis compels the application of *Metro Broadcasting* and *Fullilove* precedents.[242] She noted that applying a heightened level of scrutiny would ignore past discrimination and disregard reliance interests.[243] Her rationale in *Adarand* echoed President Clinton's sentiment "that '[w]hen affirmative action is done right, it is flexible, it is fair, and it works'" and "citizens should take a simple approach toward affirmative action programs, 'Mend it, but don't end it.'"[244]

Thus, Justice Ginsburg's limited record on the Supreme Court mirrors a pendulum between President Clinton's expectations and her independent jurisprudence. On one hand, she may adhere to relevant precedents despite her strong personal beliefs to the contrary. On the other hand, she may deviate from such judicial restraints and invite a more liberal social change.[245]

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[238] 515 U.S. 200 (1995). *See also* Elder v. Holloway, 510 U.S. 510 (1994). *Elder* was the only unanimous decision in which Justice Ginsburg authored the majority opinion. Despite the fact that both the parties and the trial court had overlooked the precedent in the initial decision, Ginsburg permitted an appellate court to rely upon precedents. *See id.* at 515. *See also* Joyce Ann Baugh et al., *Justice Ruth Bader Ginsburg: A Preliminary Assessment*, 26 U. TOL. L. REV. 1, 17 (1994).

[239] 497 U.S. 547 (1990).

[240] 448 U.S. 448 (1979).

[241] *See Adarand*, 515 U.S. at 227; *see also* C. Wayne K. Davis, *Raising The Standard: The Supreme Court Embarks On A New Era Of Equal Protection Jurisprudence With the Institution Of the Strict Scrutiny Paradigm In Adarand Constructors, Inc. v. Pena*, 40 ST. LOUIS U. L.J. 543, 564 (1996). *See also* Charles J. Falter, *Fifth And Fourteenth Amendments—Due Process and Equal Protection—Federal Affirmative Action Programs, Like Those Of a State, Must Serve a Compelling Governmental Interest and Must be Narrowly Tailored to Further That Interest—Adarand Constructors, Inc. v. Pena*, 6 SETON HALL CONST. L.J. 295, 312-13 (1995).

[242] *See Adarand*, 515 U.S. at 266-67 (Stevens, J., dissenting). *See also* Davis, *supra* note 241, at 562-63.

[243] *See id.* at 275 (Ginsburg, J., dissenting). *See also* Davis, *supra* note 241, at 563.

[244] Davis, *supra* note 241, at 571 nn.190-91 (quoting 141 Cong. Rec. S10, 305-05, 307-09 (statement of Sen. Kennedy)).

[245] In this regard, two comments are worth mentioning: First, one way in which Ginsburg's Supreme Court performance may differ from Clinton's expectations is her belief in a restrained judicial role; a belief that may lead her to endorse conservative outcomes that are unpopular with liberal Democrats who supported her nomination. *See* Smith & Beuger, *supra* note 222, at 137. The second:

> Justice Ginsburg appears to be playing the same role in 1996 as she did in the 1970's, albeit from a much more powerful position. Motivated by the same goal she had in the

3. Justice Ginsburg's gender consciousness

As the nation's pioneering gender equal protection advocate, Justice Ginsburg's precedent-building efforts in gender discrimination litigation exemplify the successful role of a lawyer in employing stare decisis to his or her advantage. This subsection will examine her strategy of precedent-building in gender discrimination cases where her gender awareness served as its driving force.

Two comparisons will be developed to illustrate Justice Ginsburg's seemingly paradoxical approach concerning gender issues.[246] The first will compare the only two female justices in the nation's highest court, Justice Ginsburg and Justice O'Connor. An analysis of their jurisprudence suggests that Justice Ginsburg appears to be more gender-conscious than Justice O'Connor. Justice Ginsburg's experience as a gender discrimination victim[247] taught her that the best way to attack, from a disadvantaged position, the unequal and disparate treatment between men and women is to argue in the name of the general principle, rather than in the name of the particular exception.[248]

The second comparison will compare Justice Ginsburg and Justice Thurgood Marshall and how both Justices followed the motto: Gain a small victory in one case to establish precedent for the next. While both adhered to this belief, Justice Ginsburg's universalist perspective led her to advocate for a legal rule that could be applied neutrally to either sex; whereas, Justice Marshall argued for a benign treatment of racial minorities.[249]

> days of *Frontiero*, she is moving the Court, gradually and strategically, to a point where it will finally endorse strict scrutiny for gender classifications. She did not have to look outside precedent for the more rigorous formulation of the intermediate scrutiny test she employed, the "exceedingly persuasive justification" formulation.

Collin O'Connor Udell, Note, *Signaling A New Direction In Gender Classification Scrutiny: United States v. Virginia*, 29 CONN. L. REV. 521, 553 (1996).

[246] On one hand, in contrast to Justice O'Connor, Justice Ginsburg acknowledged her gender identification and zealously advocated equal treatment for women; on the other hand, she adopted a universalistic approach to treat male and female clients alike in the litigation, which is different from Justice Marshall's approach for benign treatment to disadvantaged minorities. *See infra* text accompanying notes 256-88.

[247] *See* Neil A. Lewis, *Rejected as Clerk, Chosen as a Justice: Ruth Joan Bader Ginsburg*, N.Y.TIMES, June 15, 1993, at A1-2. Although she graduated with top grades from the Columbia Law School, she could not find a single job in New York City, and Justice Frankfurter refused to give her a position as his law clerk. *See id.*

[248] *See also* Jeffrey Rosen, *The New Look of Liberalism on the Court*, N.Y. TIMES, Oct. 5, 1997, §.6, (magazine) at 64.

[249] *See* discussion *supra* Part III.A.1; *see also* Elizabeth E. Gillman & Joseph M. Micheletti, *Justice Ruth Bader Ginsburg*, 3 SETON HALL CONST. L.J. 657, 659-60 (1993); *see also*

a. Justice Ginsburg and Justice O'Connor

Commentators have observed that the female perspective concerning society, distinct from that of males, can be reflected in the jurisprudence of a female judge.[250] Women emphasize "connection, subjectivity, and responsibility," whereas men "emphasize autonomy, objectivity, and rights."[251] Although Justice Ginsburg and Justice O'Connor agree that female judges contribute to the diversity of the legal profession,[252] neither accepts the existence of a distinct feminist jurisprudence.[253]

Ironically, the two justices have held different views on this issue despite the fact that they have shared similar experiences of employment-related

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Confusione, *supra* note 228, at 902-03.

[250] *See* Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 580-84 (1986)(suggesting that men and women have distinctly different perspectives on the world and that while the masculine vision parallels pluralist liberal theory, the feminine vision is more aligned with classical republican theory).

[251] *Id.* at 582; *see also* Michael E. Solimine & Susan E. Wheatley, *Rethinking Feminist Judging*, 70 IND. L.J. 891, 895 (1995).

[252] *See* Solimine & Wheatley, *supra* note 251, at 905-06. Ginsburg once stated:

> Justice Sandra Day O'Connor recently quoted Minnesota Supreme Court Justice Jeanne Coyne, who was asked: Do women judges decide cases differently by virtue of being women? Justice Coyne replied that, in her experience, "a wise old man and a wise old woman reach the same conclusion." I agree, but I also have no doubt that women, like persons of different racial groups and ethnic origins, contribute what a fine jurist, the late Fifth Circuit Judge Alvin Rubin, described as "a distinctive medley of views influenced by differences in biology, cultural impact, and life experience." A system of justice will be the richer for diversity of background and experience. It will be poorer, in terms of appreciating what is at stake and the impact of its judgments, if all of its members are cast from the same mold.

Elaine Martin, *Women on the Bench: A Different Voice?* 77 JUDICATURE 126, 129 (1993).

[253] O'Connor's aversion to such a label was evidenced by her comments that "gender differences currently cited are surprisingly similar to stereotypes from years past." Sandra Day O'Connor, *Portia's Progress*, 66 N.Y.U. L. Rev. 1546, 1553 (1991); *see also* Jilda M. Aliotta, *Justice O'Connor and the Equal Protection Clause: A Feminine Voice?* 78 JUDICATURE 232 (1995). However, she could not ignore the effect of gender difference in general: "[O]ne need not be a sexist to share the intuition that in certain cases a person's gender and resulting life experience will be relevant to his or her view of the case." J.E.B. v. Ala. ex rel. T.B., 511 U.S. 149 (1994)(O'Connor, J., concurring). She reluctantly acknowledged the existence of such a difference: "[T]he different voices will teach each other." O'Connor, *Portia's Progress*, *supra*, at 1557. A more willing and aggressive acknowledgment was proclaimed by Ginsburg at her Senate Confirmation Hearings. She quoted a description of female attorneys—" tough yet tender, wanting to win but not vindictive, cautiously optimistic with the sense to settle for victories that do not leave one's opponents bloodied and bowed, willing to be a link in a chain that is strong, yet pliable." *See* Martin, *supra* note 252, at 129.

gender discrimination.[254] Justice Ginsburg acknowledged that people who have known discrimination are bound to be sympathetic, and want to understand how it feels to be exposed to disparate treatment for reason which "bear[s] no relation to one's performance or contributions to society."[255] Accepting her gender identification, Justice Ginsburg praised the diverse backgrounds and experiences of women judges.[256] Commentators suggest that "[g]ender certainly appears to qualify as one such attribute [to a judge's decisional propensities]"[257] and "[t]his contribution seems most evident in areas involving issues of gender fairness."[258]

The nuance in gender consciousness that distinguishes Justice Ginsburg from Justice O'Connor is apparent in *J.E.B. v. Alabama ex rel. T.B.*[259] In *J.E.B.*, the Supreme Court held that the use of peremptory challenges to exclude all women from a jury violated the equal protection clause.[260] While Justice Ginsburg agreed whole-heartedly with the holding,[261] Justice O'Connor argued that the peremptory challenge "remains an important litigator's tool."[262] Justice O'Connor asserted that ancient customary court practices, such as the peremptory challenge, should not be questioned even at the risk of gender discrimination.

b. Justice Ginsburg and Justice Marshall

A comparison between Justice Thurgood Marshall[263] and Justice Ginsburg reveals the similarities and differences between their precedent building approaches to equal protection litigation. Having gained the reputation of

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[254] *See* Gillman & Micheletti, *supra* note 249, at 657-59; *see also* Smith, *supra* note 213, at 1896-98.

[255] Udell, *supra* note 245, at 554.

[256] *See* Martin, *supra* note 252, at 129.

[257] Aliotta, *supra* note 253, at 232.

[258] Martin, *supra* note 252, at 129.

[259] 511 U.S. 127 (1994).

[260] *See id.*

[261] *See id.*

[262] *Id.* at 148 (O'Connor, J., concurring).

[263] Thurgood Marshall (1908-1993) committed himself to a life-long pursuit of equal opportunity and fought against racial discrimination. He played a major role in the litigation of *Brown v. Board of Education*, 347 U.S. 483 (1954). He held positions as a private practice attorney in Baltimore (1933-35), Assistant Special Counsel of the NAACP (1936-38), Chief Legal Officer of the NAACP (1938-40), Director and Counsel of the NAACP Legal Defense and Education Fund (1940-61), Circuit Court Judge, United States Court of Appeals for the Second Circuit (1965-67) and Associate Justice of the U.S. Supreme Court (1967-91). *See* Ruth Johnson Hill, *Mr. Justice Thurgood Marshall 1908-1993: A Bio-Biographic Research Guide*, 20 S.U. L. REV. 113 (1993). *See also* DANIEL FARBER ET AL., CONSTITUTIONAL LAW 29, 1993.

being the "Thurgood Marshall of gender equality law,"[264] Justice Ginsburg's efforts to achieve equal status for women mirror the approach adopted by Thurgood Marshall in achieving equality for African-Americans.[265]

Justice Ginsburg's first gender discrimination case before the Supreme Court was *Reed v. Reed*,[266] where she sought to persuade the Court to adopt a standard higher than a "rational relationship" in reviewing an Idaho statute preferring men over women as estate administrators.[267] In adopting a seemingly intermediate level of review, the Court seemed to open the door to embracing a strict scrutiny standard of review at a later date, giving Ginsburg the confidence to patiently establish precedent for gender rights.[268] Two years later, in *Frontiero v. Richardson*,[269] she challenged military statutes granting housing and medical benefits for dependents of married male personnel but denying female personnel the same benefits unless the female personnel proved that they supplied over half of their spouses' support.[270] Justice Ginsburg argued that technological and economic advances had enabled women to participate in the labor market and become breadwinners, and such societal changes invalidated laws based on traditional gender-role stereotypes.[271] Because only four justices were convinced by her argument for a strict scrutiny standard, Justice Ginsburg changed her strategy and argued for a lower standard of review, i.e., an intermediate level.[272]

Interestingly, her strategy of advocating for a heightened level of judicial scrutiny for gender classifications became more effective when she argued on behalf of male clients.[273] Her efforts to build precedent were stalled when the

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[264] Baugh, *supra* note 238, at 4.

[265] *See* Gillman & Micheletti, *supra* note 249, at 659-60.

[266] 404 U.S. 71 (1971).

[267] Ginsburg was amicus curiae for *Reed*. *See* Debrah L. Markowitz, *Ruth Bader Ginsburg: Women's Rights Advocate—Supreme Court Justice*, 20-OCT. B. J. & L. DIG. 9 (1994)(studying Justice Ginsburg's achievements in gender discrimination cases) [hereinafter Markowitz, *Women's Rights Advocate*].

[268] *See* Smith, *supra* note 213, at 1900.

[269] 411 U.S. 677 (1973).

[270] *See* Markowitz, *Women's Rights Advocate*, *supra* note 267, at 10.

[271] *See* Brief for American Civil Liberties Union at 24-25, Frontiero v. Richardson, 411 U.S. 677 (1973)(No. 71-1694). *See also* Ruth Bader Ginsburg, *Sex Equality and the Constitution*, 52 TUL. L. REV. 451, 457-58 (1978). In this earlier article, Ginsburg noted that three factors had altered women's lives and given them the freedom to pursue new places in society: technological and economic advances that reduced a family's dependence on a woman's work in the home; new ability to control reproduction; and women's longer life spans that provide many adult years free of responsibility of childrearing. *See id.*

[272] *See* Smith, *supra* note 213, at 1902.

[273] Following *Kahn v. Shevin*, 416 U.S. 351 (1974), four of her gender discrimination cases were representing male clients. *See* Smith, *supra* note 213, at 1904-05. Finally, in the second case, *Craig v. Boren*, 429 U.S. 190 (1977), the Court adopted Ginsburg's heightened level of

Court, in *Kahn v. Shevin* neither overruled nor followed *Reed* or *Frontiero*, but upheld a statute giving property tax exemption to widows, but not to widowers.[274] Despite this temporary setback, her litigation strategy of continuing to argue the same point—advocating a heightened level of judicial scrutiny for gender classifications—in a succession of cases enabled the Court to build a body of precedent.[275]

Justice Ginsburg's success in building precedent is also attributed to her novel approach in identifying precedent.[276] She has noted that the legal similarity between her female and male clients was that each was a "person" and therefore, deserved "equal treatment by the government regardless of sex."[277] It is this legal philosophy that sharply contrasts with that of Justice Marshall.

Justice Marshall firmly believed that courts should protect "discrete and insular" minorities through sensitive application of the equal protection clause.[278] He persistently advocated the application of a different level of scrutiny to benign racial classifications.[279] In contrast, Justice Ginsburg has consistently suggested that "any differential treatment of women, whether benign or even intended to provide special benefits for women, actually

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scrutiny. *See* Smith, *supra* note 213, at 1904-05.

[274] *See Kahn*, 416 U.S. at 355; *see also* Smith, *supra* note 213, at 1903; Markowitz, *Women's Rights Advocate*, *supra* note 267, at 10.

[275] *See* Deborah L. Markowitz, *In Pursuit of Equality: One Woman's Work to Change the Law*, 11 WOMEN'S RTS. L. REP. 73 (1989)(describing Ginsburg's litigation strategy for selecting gender discrimination cases and for preparing the briefs and arguments before the Supreme Court).

[276] *See* Schauer, *supra* note 52, at 577 (defining "identifying a precedent" as "some way of determining whether a past event is sufficiently similar to the present facts to justify assimilation of the two events"). In Justice Holmes' churn story, the Vermont justice's failure to identify churn within the broad definition of "property" resulted in a dismissal of the complaint. *See id.* at 577-78. In the story, a farmer brought a suit before the Vermont justice of peace, alleging that another farmer broke his churn. *See* Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 474 (1897). The Vermont justice labored himself searching the relevant statute to apply. *See id.* at 474-75. After exploring the statutes, the disappointed justice found for the defendant, because there was nothing about churns mentioned in the statute. *See id.* at 475. The Vermont justice simply failed to identify the right precedent in a broad and theoretical description like "property" in the statute; rather, his hopeless search for "churn" in the statute resulted in an unjust decision—an impairment of the plaintiff's property interest. *See* Schauer, *supra* note 52, at 578.

[277] Ginsburg, *The Progression of Women*, *supra* note 231, at 1161; *see also* Markowitz, *supra* 267, at 10.

[278] *See* Confusione, *supra* note 228, 902-03.

[279] *See id.*

harmed women."[280] She rejected the "reasonable woman" standard and used the gender-neutral term "reasonable person."[281] One commentator concluded:

> Justice Ginsburg will not become the liberal, activist champion of women's rights on the Supreme Court that Justice Marshall was for minority rights. The reason lies not in Justice Ginsburg's lack of passion for her cause; she is still lecturing and writing about her 'grand ideal' that one day men and women will be treated equally by the law. . . . Rather the reason lies in her commitment to a particular judicial philosophy that will prevent her from advocating great doctrinal changes except in small steps; even if designed to advance women's rights, her support of women sexual harassment plaintiffs will come only when Supreme Court precedent or her interpretation of legislative intent allows it.[282]

Justice Ginsburg's universalist judicial philosophy is likely to prevent her from becoming the Court's champion of women's rights.[283] If asked to decide a sexual harassment case, Justice Ginsburg would probably be compelled to follow precedent, even if she is sympathetic to female plaintiffs.[284] However, where precedent on a particular issue does not exist or is in the plaintiff's favor, she strives to build a consensus in favor of the female plaintiff.[285] This is especially true in *VMI*.[286] Justice Ginsburg broadly interpreted the test established in *Hogan*, where a nursing school's female-only policy failed the "exceedingly persuasive justification" standard.[287] Applying the same test, Ginsburg reasoned that stare decisis could force VMI, a traditionally male-only military institution, to open its door to women.[288]

4. Admiration of the civil law system

A broad, in-depth examination of stare decisis demands a comparison between common law and civil law systems. This sub-section will discuss the essential distinction between these two systems—the existence of stare decisis in common law systems and its absence in civil law systems. Ironically, the

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[280] *Id.*

[281] Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993)(conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview).

[282] *See* Smith, *supra* note 213, at 1945.

[283] *See id.* at 1933-34.

[284] *See, e.g.*, Director, Office of Workers' Compensation Programs v. Greenwich Collieries, 512 U.S. 267, 271 (1994)(O'Connor, J.); Staples v. United States, 511 U.S. 600, 613 (1994)(Ginsburg, O'Connor, JJ., Concurring).

[285] *See* Smith, *supra* note 213, at 1933-34.

[286] 518 U.S. 515 (1996).

[287] *See id.* at 530; *see also supra* note 4 (discussing the test used in *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982)).

[288] *See VMI*, 518 U.S. 556-58.

values that promote stare decisis in the common law tradition are the same ones that repress stare decisis in the civil law tradition.[289] This sub-section will also analyze the effect of Ginsburg's admiration of the civil law system on the observation of precedent, especially with statutory issues.[290] Her legal scholarship enriched her jurisprudence of stare decisis from a comparative perspective.[291] A review of her law review articles and speeches reveal an insightful respect of the civil law system.[292]

One merit of the civil law system is that it is governed by statute rather than case law.[293] Ginsburg observed that the civil law's underlying principle is the notion that a right answer always exists in the law, and it is the judge's duty to identify the correct and only possible interpretation.[294] Civil law judgments

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[289] *See* JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION 48-49 (2d ed. 1985).

[290] Ginsburg's admiration of the civil law society is a feature attributable to her experience as a legal scholar. *See Hearing*, *supra* note 62, at 264-65. When being asked about the constitutionality of the death penalty, she replied: "You know that teaching and appellate judging are more alike than any two ways of working at the law. I tried to be scholarly in my approach to the question then." *Id.*

[291] After Ginsburg's clerkship, she first taught at Rutgers University Law School, and left two years later to teach part time at Harvard Law School. In 1972, she became the first female faculty member to be tenured at Columbia Law School. *See* Gillman & Micheletti, *supra* note 249, at 669.

[292] *See, e.g.*, Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 150 (1990); *see also* Ginsburg, *On Muteness*, *supra* note 1, at 717-19 (1990).

[293] Uttern and Lundsgaard first commented: "Instrumentally, the [civil law] limited the functions of the [civil law] judge through the use of comprehensive codes of legal norms and the lack of a doctrine of precedent or stare decisis." Robert F. Uttern & David C. Lundsgaard, *Judicial Review in the New Nations of Central and Eastern Europe: Some Thoughts from a Comparative Perspective*, 54 OHIO ST. L.J. 559, 563 (1993). They then summarized the basic features of the civil law systems as follows: "The foundational principle of the [civil law] system has been the supremacy and sovereignty of the legislature, which traditionally has been considered to be the purest expression of the collective will." *Id.* at 563-64. They continued: "The legislature, being sovereign, enjoyed the exclusive prerogative for the enunciation of policy. The judiciary, in contrast, was merely an administrative tool for the application and implementation of the legislatively determined policies in the context of concrete cases." *Id.* at 564. They further observed:

> On a theoretical level, the function of the judiciary dictated by this strict separation of powers was made possible by a widespread belief in a particularly strong version of legal positivism, the notion that positive law as laid down by a legislature could be neutrally applied by a judge without resort to the judge's own value judgments. Pursuant to this belief, judges could be considered merely legal experts rather than active participants in the process of governmental decisionmaking. . . . On a practical level, the [civil law] judiciary was constrained in its activity by the use of comprehensive codes and by the absence of a system of precedent.

Id.

[294] *See* Ginsburg, *Remarks on Writing Separately*, *supra* note 292, at 133-34.

arguably do not function as precedents, and the stare decisis doctrine does not exist.[295]

In the civil law system, the lack of binding decisions is a reason for differentiating the opinion-writing functions of the civil law judge from those of the common law judge.[296] The existence of comprehensive legal codes and the lack of a tradition of precedent circumscribes the duties of the civil law judge. In the absence of binding precedents, the importance of statutory interpretation can never be over-emphasized.[297]

A fundamental difference exists between the common law and civil law systems regarding statutory interpretation. In a civil law system, the statute is binding; whereas, in a common law system, a prior decision concerning the statute controls.[298] Because of the absence of stare decisis in the civil law tradition, judicial decisions interpreting statutes are not controlling in later cases involving the same statutes.[299] Since a judicial interpretation could not add anything to a statute, there would be "no need to refer to such interpretations in the process of deciding subsequent cases."[300] However, the legal developments in both systems are beginning to render such an observation obsolete.

Recent studies have revealed that judicial decisions play an important role in a civil law system, similar to decisions in a common law system.[301]

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[295] *See id.* at 150. In civil law systems, the judiciary views their role as strictly limited to deciding the particular dispute at hand and a single case has no binding effect on another. *See* Mary Ann Glendon, *Comment, in* ANTONIN SCALIA, A MATTER OF INTERPRETATION 102 (Amy Gutmann ed., 1997).

[296] The essential feature of the civil law system is illustrated by Uttern and Lundsgaard: "Traditionally, the civil law has prescribed an extremely limited role for judges in the processes of government. Philosophically, the civil law derived this position from principles of legislative supremacy and strict legal positivism." Uttern & Lundsgaard, *supra* note 293, at 563. The authors continued:

> Because virtually the entire corpus of the civil law was contained within comprehensive codes, the opportunities for civil law judges to exercise independent law-creating authority were limited, even when such judges could overcome the influences of legal positivist ideals. The civil law conception of the judge as a skilled mechanic was also furthered by the lack of precedent in the civil law system. . . . Overall, the classical civil law judiciary was a relatively insignificant part of the governmental structure. Its limited role was defined by a stringent doctrine of the separation of powers, based on legislative supremacy, and a firm belief in the ideals of legal positivism.

Id. at 565.

[297] *See id.* at 564-65

[298] *See id.*

[299] *See id.* at 564.

[300] *Id.* at 565.

[301] *See, e.g.*, David J. Luban, Essay, *Legal Traditionalism*, 43 STAN. L. REV. 1035, 1049 (1991). Professor Luban stated that:

> [B]oth common law and civil law systems are amalgams of statute and lines of judicial

Although stare decisis does not have the formal status as a source of law, Daniel A. Farber argued that the importance of precedent in the German legal system lies in the precedent's persuasive effect.[302] If a German lawyer fails to cite governing precedent, he or she may face liability for malpractice.[303] This trend of rethinking the role of precedent in civil law systems maintains predictability and consistency.[304] The common goals[305] of the two distinct legal systems have mutually influenced the other system's manner of dealing with precedent. As a pioneer of the legal profession, Ginsburg predicted this symbiosis and advocated for incorporating this view of precedent in the legal practice.

Ginsburg's scholarly writings reveal her deference to the legislature and adherence to statutory precedent.[306] Like Justice Brandeis, she urged that valuable goals, such as certainty and stability, can be achieved only by judicial constraint and interactions between the judicial and legislative branches.[307] In describing a judge's approach to statutory stare decisis, Ginsburg advocated that "a judge must do more than just read the specific words."[308] She

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decisions. However, the observation cuts in both directions: Just as the rule of precedent obtains even in civil law systems, the supremacy of statute obtains even in common law systems. This supremacy ensures that statute, which has little to do with traditionalism or with the rule of precedent, characterizes law more truly than does precedent.

Id. *See also* Daniel A. Farber, *The Hermeneutic Tourist: Statutory Interpretation in Comparative Perspective*, 81 CORNELL L. REV. 513, 519 (1996). The author discussed the important role of precedent in German law despite the fact that the doctrine of stare decisis is often taken to be the critical distinction between the common law and the civil codes. Farber stated:

> [P]recedent is quite important in German law (and in other civil law countries, for that matter). . . . There is nevertheless an important difference between the German and American attitudes toward precedent. Protection of reliance interests is central to our idea of stare decisis. But while giving weight to precedent, the Germans have made a conscious decision to ignore reliance on prior decisions as a factor in determining whether to overrule prior law.

Id.

[302] *See* Farber, *Hermeneutic Tourist*, *supra* note 301, at 519-21.

[303] *See id.* at 519.

[304] *See* Glendon, *supra* note 295, at 102-03.

[305] *See* discussion *supra* Part II.

[306] *See, e.g.*, Ginsburg, *The Intercircuit Committee*, *supra* note 44 (proposing for an "Intercircuit Panel" to render federal statutory interpretation more coherent, thereby assisting federal judges to better identify and implement the legislature's will); *see also* Ginsburg, Judicial Activism, *supra* note 221.

[307] *See* Ginsburg, *Judicial Activism*, *supra* note 221. Justice Ginsburg quoted Justice Brandeis's famous dissent in *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393 (1932)("[I]t is more important that the applicable rule of law be settled than be settled right."). *See also* discussion *supra* notes 27-30 and accompanying text.

[308] *Hearing*, *supra* note 62, at 128.

suggested that, when looking at precedent, a judge should ask how the words in the particular provision or a similar provision are construed.[309] The effort, therefore, is always to acknowledge the intent of the legislature.[310]

In her writings, Ginsburg also advocates for collegiality among appellate judges. In doing so, she again expressed her admiration of the civil law tradition which calls for collective and corporate judgments.[311] She proposed that when panels are unanimous, to encourage brevity and efficiency, the standard practice should be to issue the decision *per curiam* without disclosing the opinion writer.[312] Ginsburg's view of unanimous decisions also applies to administrative decisions of federal agencies, provided that the agency has the authority to make such a decision and the decision was well-reasoned and cognizant of all the facts.[313] For example, in *Consumer Federation of America v. Consumer Product Safety Commission*,[314] then Judge Ginsburg deferred to the Consumer Product Safety Commission decision to terminate a rule imposing safety restrictions on the sale of all-terrain vehicles.[315]

During her 1993 term on the Supreme Court, Justice Ginsburg wrote eight dissenting opinions, primarily criticizing the majority for failing to properly adhere to relevant precedent.[316] She additionally expressed her concern for the Court's refusal to follow the legislative intent when interpreting statutes.[317] She noted that "jurists . . . might serve the public better if they heightened their appreciation of the values so prized in the civil law tradition: clarity and certainty in judicial pronouncements."[318]

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[309] *See id.*

[310] *See id.*

[311] *See* Ginsburg, *Judicial Voice*, *supra* note 108, at 1189. *See also* Uttern & Lundsgaard, *supra* note 293, at 563-65. In their article, the authors pointed out that the judiciary's function in a civil law system is not to create laws, but to find the right answer within the statutes to solve disputes. *See id.* As a result, judges presiding on the same case can only produce one collective opinion without infusion of their personal values. *See id.* See also Glendon's description of the partnership relation between the judiciary and legal academics in a civil law system. Such relationship further enhances the collective feature in the system as a whole. *See* Glendon, *supra* note 295, at 112.

[312] *See* Ginsburg, *Judicial Voice*, *supra* note 108, at 1192.

[313] *See* Edward A. Fallone, *Neither Liberal Nor Laissez Faire: A Prediction Of Justice Ginsburg's Approach to Business Law Issues*, 1993 COLUM. BUS. L. REV. 279, 295 (1993).

[314] 990 F.2d 1298 (D.C. Cir. 1993).

[315] *See id.* In determining the proper standard of review, Ginsburg expressed that the court's regard for the Commission's decision should be "highly respectful." *Id.* at 1305. Therefore, the degree of deference that the court should give to the Commission is "very substantial." *See id.*; *see also* Wint v. Yeutter, 902 F.2d 76 (D.C. Cir. 1990).

[316] *See* Baugh, *supra* note 238, at 21.

[317] *See id.*

[318] Ginsburg, *Remarks on Writing Separately*, *supra* note 292, at 150.

5. *Responding to social changes*

Justice Ginsburg's experience as a legal scholar, female advocate, appellate judge, presidential nominee to the Supreme Court, and Supreme Court justice all shed light on her approach to stare decisis. This sub-section will analyze how she resolves the strict-flexibility tension that governs stare decisis. While stare decisis maintains the consistency of the legal system and its derivative values, such as predictability and system integrity,[319] stare decisis, however, is not blind to social realities. The judiciary must be aware of and adapt to changing conditions in order to preserve the fundamental legal-system values, especially fairness and justice.

Justice Ginsburg's suggestion for solving this inherent tension is a sound one. She acknowledges that "judges play an interdependent part in our democracy [and] they do not alone shape legal doctrine[,]" therefore, they need to engage in "dialogue with other organs of government, and with the people as well."[320] Justice Ginsburg urged courts to initiate dialogue with the legislature before stepping into the legislature's shoes in situations where legislative power controls.[321]

Prior to the *Roe* decision, legislative efforts to change the status of abortion laws occurred across the nation.[322] Without consulting the state legislatures, the Supreme Court impatiently outlawed the abortion laws of every state.[323] Congress and the state legislatures vigorously reacted to the Court's legislative conduct.[324] To minimize *Roe*'s impact, legislatures adopted measures such as "notification and consent requirements, prescriptions for the protection of fetal life, and bans on public expenditures" for indigent women's abortions.[325]

Justice Ginsburg stated that the judiciary should follow and not lead changes in society because of the Court's inability to enforce and authorize

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[319] *See supra* Part II.A for a discussion of the doctrinal values of stare decisis in our legal system.

[320] Ginsburg, *Judicial Voice*, *supra* note 108, at 1198.

[321] *See id.*

[322] *See* Ginsburg, *Some Thoughts on Autonomy*, *supra* note 215, at 379-80. Several states had adopted the American Law Institute's Model Penal Code approach which set out grounds upon which abortion could be justified at any stage of pregnancy. *See id.* at 380. New York, Washington, Alaska, and Hawaii permitted physicians to perform first trimester abortions without imposing any restrictions. *See id.*

[323] *See id.* at 381-82.

[324] *See id.* at 381.

[325] *Id. See, e.g.*, Maher v. Roe, 432 U.S. 464 (1977)(holding that the equal protection clause did not require a state that participates in the medicaid program to pay the expenses incident to nontherapeutic abortions for indigent women, even though the state had made a policy choice to pay expenses incident to childbirth).

legislation.[326] She also noted that the judiciary's response to social changes should be conducted in a cautious manner: to "reinforce or signal a green light for a social change" rather than to take "giant strides and thereby risking a backlash too forceful to contain[.]"[327] At her Confirmation Hearing, Ginsburg reaffirmed her belief that the judiciary was to reflect social changes and put the imprimatur of the law in the direction of change ongoing in society.[328]

However, she criticized *Roe* because it halted the political process that was moving towards reform, prolonged divisiveness, and prevented a stable settlement of the issue.[329] Justice Ginsburg observed that, by formulating "a regime blanketing" of the entire subject of abortion, the Court fueled much more controversy than it solved.[330] By its actions, the Court failed to lead the trend of liberalizing the abortion statute,[331] but unintentionally stimulated the mobilization of a right-to-life movement and legislative reaction to impede abortions.[332]

Despite her criticism of *Roe*, Justice Ginsburg has departed from stare decisis when the situation called for a change from the status quo.[333] In a speech after her *VMI* decision, Justice Ginsburg admitted that the decision

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[326] *See* Ginsburg, *Judicial Voice*, *supra* note 108, at 1208.

[327] *Id.*

[328] *See Hearing*, *supra* note 62, at 166-67. Ginsburg announced her belief that "[j]udicial use of the doctrine [of stare decisis] is tempered by judicial perceptions of the political, economic, and social realities of the day." *Id.* Following the above quotation, she provided two cases as examples: Hoyt v. Florida, 368 U.S. 57 (1961)(women excluded from jury in a case where a woman was convicted of second degree murder for hitting her husband with her son's broken baseball bat); and Goesaert v. Cleary, 335 U.S. 464 (1948)(disallowing a mother and daughter to tend the bar they owned, under a Michigan law prohibiting woman from tending bar unless she was the wife or daughter of a male bar owner). *See id.*

In summarizing her victories in gender discrimination litigation, Ginsburg praised the Supreme Court's great exercise of judicial restraint in following only social changes occurring during that period. *See Hearing*, *supra* note 62, at 170-71. Starting with World War II when women began taking jobs that had been traditionally considered for men, women gained more and more autonomy and rights, such as their rights to control their reproductive capacity. *See id.* The two-earner family pattern gave women life both at home and at work. *See id.* In one of her articles, Ginsburg again acclaimed the Court's efforts of allowing her as an advocate to build precedents in gender litigation in the 1970s. She commented: "It approved the direction of change through a temperate brand of decision-making, one that was not extravagant or divisive." Ginsburg, *Judicial Voice*, *supra* note 108, at 1208.

[329] *See* Ginsburg, *Judicial Voice*, *supra* note 108, at 1208.

[330] *Id.* at 1199; *see also* Ginsburg, *Some Thoughts on Autonomy*, *supra* note 215, at 379.

[331] *See* Ginsburg, *Some Thoughts on Autonomy*, *supra* note 215, at 381-82. *See also supra* note 325 and accompanying text.

[332] *See* Ginsburg, *Some Thoughts on Autonomy*, *supra* note 215, at 382.

[333] *See* Rosen, *supra* note 248, at 65. *See also* Ginsburg, *On Muteness*, *supra* note 1, at 718-19.

ordering VMI to admit women was "a stunning change" from the treatment of women in prior decisions.[334] History has come a long way from 1873 when women could be excluded from the practice of law in Illinois,[335] and from 1961 when women in Florida were not placed on lists from which jurors are drawn,[336] to 1996 when a male-exclusive military institution was forced to open its doors to equally qualified females.[337] While Professor Gerald Gunther called her a "crusader" on the gender issue,[338] Justice Scalia accused her of "sweep[ing] aside the precedents of [the] Court, and ignor[ing] the history of our people."[339]

In their labeling of Justice Ginsburg, both Professor Gunther and Justice Scalia overlooked Ginsburg's well-drafted precedential reasoning in the *VMI* decision.[340] Ginsburg relied heavily on *Hogan*, in which the Court struck down a female-only admission policy for entrance into a nursing school.[341] Based on her belief that law should afford equal treatment to men and women, Justice Ginsburg reaffirmed *Hogan*'s intermediate level of scrutiny test.[342] Indeed, the very language of "exceedingly persuasive justification" was taken from *Hogan*.[343] One commentator accurately voiced Justice Ginsburg's position that *VMI* "seems to represent nothing more than the codification of a social revolution in the role of military academics that had occurred a decade earlier."[344]

6. *Integrating with other justices to promote collegiality*

Since our legal system is built upon precedent, collegiality among justices is crucial for maintaining certainty and predictability, as well as the credibility

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[334] *See* Rosen, *supra* note 248, at 65.

[335] *See* Bradwell v. State of Ill., 83 U.S. (16 Wall.) 130 (1872)(affirming the judgment which denied Myra Bradwell's application for a license to practice law solely because she was a married women).

[336] *See* Hoyt v. Florida, 368 U.S. 57 (1961)(unanimously upholding a statute that excluded women from juries unless they had affirmatively requested the court clerk to place their names on the jury lists).

[337] *See generally VMI*, 518 U.S. at 515; *see also* Rosen, *supra* note 248, at 65.

[338] *See* Rosen, *supra* note 248, at 65.

[339] *VMI*, 518 U.S. at 566 (Scalia, J., dissenting).

[340] *See id.* (Scalia, J., dissenting); *see also* Rosen, *supra* note 248, at 65.

[341] *See VMI*, 518 U.S. at 522-25.

[342] *See id. Hogan* held that the party seeking to uphold a statutory gender classification "must carry the burden of showing an 'exceedingly persuasive justification' for the classification. . . . The burden is met only by showing at least that the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *Hogan*, 458 U.S. at 724.

[343] *See VMI*, 518 U.S. at 522-25 (citing *Hogan*, 458 U.S. at 724).

[344] Rosen, *supra* note 248, at 65.

of the court.[345] This system of precedent can create the "aura of similarity" among judges. Such similarity will subsequently increase the internal consistency of a court, thereby strengthening its external credibility.[346]

Justice Ginsburg shared the same view with others concerning the importance of judges compromising with their colleagues' views.[347] She suggested that unanimity on a court can sometimes be nearly as important as the merits of a case.[348] She also argued that judges should not only avoid taking "zealous positions" but also avoid writing "over wrought" opinions criticizing their colleagues.[349] She further noted that when confronted with disagreement from a fellow judge, one should "pause and rethink" one's own views and ask "is this conflict really necessary?"[350] "[T]he effective judge," Justice Ginsburg concluded, "strives to persuade, and not to pontificate."[351] Moreover, a judge should speak "in 'a moderate and restrained' voice, engaging in a dialogue with, not a diatribe against, . . . her own colleagues."[352]

Ginsburg's interest in collegiality was a factor that made her an attractive Supreme Court candidate.[353] Although she may have a tendency to elevate the importance of collegiality to the level of a substantive issue, Justice Ginsburg realizes that "although courtesy may be a fine value, a judge should not

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[345] *See* Schauer, *supra* note 52, at 600.

[346] *See id.* Professor Schauer stated:

> The system of precedent must operate to dampen the variability that would otherwise result from dissimilar decisionmakers. . . . Using a system of precedent to standardize decisions subordinates dissimilarity among decisionmakers, both in appearance and in practice. . . . Even more substantially, this subordination of decisional and decisionmaker variance is likely in practice to increase the power of the decisionmaking institution. If internal consistency strengthens external credibility, then minimizing internal inconsistency by standardizing decisions within a decisionmaking environment may generally strengthen that decision making environment as an institution.

Id.

[347] *See Hearing*, *supra* note 62, at 200-02; *see also* Ginsburg, *Judicial Voice*, *supra* note 108, at 1194.

[348] *See Hearing*, *supra* note 62, at 201. *See also* Ginsburg, *Remarks on Writing Separately*, *supra* note 292, at 144-45 (quoting Justice Brandeis' statement: "[I]n most matters it is more important that the applicable rule of law be settled than that it be settled right. This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation.").

[349] *See Hearing*, *supra* note 62, at 201.

[350] *Id.*

[351] Ginsburg, *Judicial Voice*, *supra* note 108, at 1186.

[352] *Id.* (quoting Brainerd Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754, 757 (1963)).

[353] *See Hearing*, *supra* note 62, at 200 (statement of Sen. Howell Heflin). She suggested that a judge who is inclined to disagree might stop and think: "Is this a case where it really doesn't matter which way the law goes as long as it's clear?" *Id.* at 201 (statement of Justice Ruth Bader Ginsburg).

abandon or tailor her beliefs to please colleagues."[354] In defending her position, Justice Ginsburg argued:

> [Brandeis] realized that the Court is not the place for solo performances, that random dissents and concurrences weaken the institutional impact of the Court and handicap it in the doing of its fundamental job. Dissents and concurrences need to be saved for major matters if the Court is not to appear indecisive and quarrelsome, [for] the appearance of indecision and quarrelsomeness are drains on the energy of the institution, leaving it in a weakened condition at those moments when the call upon it for public leadership is greatest . . . . To have discarded some of [his separate] opinions is a supreme example of sacrifice to strength and consistency of the Court. And he has his reward: his shots are all the harder because he chose his ground.[355]

As one commentator stated, to achieve the goal of coherence in the law, justices should strive for consensus whenever possible and accord greater respect for precedent under a reinvigoration of stare decisis.[356] Justice Ginsburg has distinguished herself with her approach to "preserve the greatest extent of doctrinal coherence possible by emphasizing . . . points of agreement and seeking consensus."[357]

Prior to Ginsburg's appointment, many of the Rehnquist Court's opinions seemingly lacked a sense of coherence.[358] The ideological difference of individual justices on the existing Court was exhibited in *Casey*. Three voting blocks existed in *Casey*. First, two traditionally "liberal" Justices, Justices Stevens and Blackmun, voted to reaffirm *Roe v. Wade* completely.[359] Second, the "conservative" block, consisting of Chief Justice Rehnquist and Justice White, Justice Scalia and Justice Thomas, voted to overturn *Roe*.[360] The "middle of the road" block, including Justice O'Connor, Justice Souter and Justice Kennedy, voted to reaffirm the "central principle" of *Roe*, but to allow state regulation that did not "unduly burden" a woman's right to abortion.[361]

The joint opinion by the three "middle of the road" Justices held that stare decisis did not require adherence to *Roe*, but only to its "essential holding."[362] Justice Scalia's dissenting opinion accused the plurality of adopting a "keep-

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[354] *See Hearing*, *supra* note 62, at 201.

[355] Ginsburg, *Remarks on Writing Separately*, *supra* note 292, at 143.

[356] *See* Andrew M. Jacobs, *God Save This Postmodern Court: The Death Of Necessity and the Transformation Of the Supreme Court's Overruling Rhetoric*, 63 U. CIN. L. REV. 1119, 1181-82 (1995).

[357] *Id.*

[358] *See id.* at 1182-83.

[359] *See Casey*, 505 U.S. at 912-14 & 923.

[360] *See id.* at 944.

[361] *See id.* at 845-46.

[362] *Id.* at 846. *See also* Wallace, *supra* note 19, at 233-34.

what-you-want-and-throw-away-the-rest" version of stare decisis.[363] Many commentators viewed *Casey* as marking where the current members of the Court stood on the ideological scale with regard to stare decisis. The "legal conservatives," consisting of Justices O'Connor, Kennedy and Souter, were characterized as having substantial respect for precedent, occupying the "centrist" position.[364] Justice Stevens stood on the left, while Chief Justice Rehnquist, Justice Thomas, and Justice Scalia stood on the right.[365]

Before her nomination to the Supreme Court, Justice Ginsburg was well aware that it would be difficult to achieve consensus and agreement at the Supreme Court.[366] Her belief that "members of the judicial panel must strive to cooperate with each other and to minimize dissent" would certainly be tested by the other eight Justices.[367] It would be a matter of how she would integrate with the other Justices. However, her reputation of emphasizing collegiality, sometimes even over the merits of the case itself, and her thoughtful approach in applying stare decisis, made her transition and integration to the Court a smooth one.[368]

During her first term on the Court, Justice Ginsburg wrote nine majority opinions,[369] matching the Court's average and exceeding by one the number assigned to four of her colleagues during the same period.[370] Her thirteen years of experience as an appellate judge "enabled her to impress her colleagues with her competence in appellate opinion writing."[371] Such an explanation, however, is not convincing when challenged by the argument that the other Justices were equally as competent in opinion writing. Therefore, the true reason lies in her voting performance as a consensus-builder. Clearly,

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[363] *See* Wallace, *supra* note 19, at 233; *see also Casey*, 505 U.S. at 982-85 (Scalia, J., dissenting).

[364] *See* Wallace, *supra* note 19, at 247.

[365] *See id.*

[366] *See* Ginsburg, *Judicial Voice*, *supra* note 108, at 1191-94; *see also* Ginsburg, *Styles of Collegial Judging: One Judge's Perspective*, 39 FED. B. NEWS & J. 199 (1992); Smith, *supra* note 213, at 1907.

[367] Smith, *supra* note 213, at 1906-07.

[368] *See* Linda Greenhouse, *The Court's Counterrevolution Comes in Fits and Starts*, N.Y. TIMES, July 4, 1993, at E1, E5.

[369] *See* Barclays Bank v. Franchise Tax Bd., 512 U.S. 298 (1994); Ibanez v. Florida, 512 U.S. 136 (1994); Northwest Airlines v. County of Kent, Mich., 510 U.S. 355 (1994); John Hancock Mut. v. Harris Trust & Sav. Bank, 510 U.S. 86 (1993); Reed v. Farley, 512 U.S. 339 (1994); Powell v. Nevada, 511 U.S. 79 (1994); United States v. Granderson, 511 U.S. 39 (1994); Ratzlaf v. United States, 510 U.S. 135 (1994); Elder v. Holloway, 510 U.S. 510 (1994). *See also* Baugh, *supra* note 238, at 12-17.

[370] *See* Christopher E. Smith et al., *The First-Term Performance of Justice Ruth Bader Ginsburg*, 78 JUDICATURE 74, 78 (1994).

[371] *Id.*

Ginsburg was the more "attractive . . . candidate to speak on the Court's behalf."[372]

Her early opinions evinced her desire for consensus building. In her first opinion, Ginsburg induced Chief Justice Rehnquist and Justice Scalia to join her broad construction of the Employee Retirement Income Security Act of 1974 ("ERISA"),[373] in contradiction to the previously restrictive interpretation of ERISA in *Massachusetts Mutual Life Ins. Co. v. Russell*[374] and *Mertens v. Hewitt Ass'n.*[375] Her consensus-building efforts were further exemplified in by her concurring opinion in *Harris v. Forklift Systems, Inc.*,[376] a Title VII sexual harassment case. Justice O'Connor authored the decision which held that the Court must consider the totality of the circumstances in determining if there was an "abusive work environment."[377] Although Justice Ginsburg felt strongly that an open question remained on whether gender classifications are suspect and subject to the strictest scrutiny, she nevertheless concurred with the majority opinion.[378] These cases suggest that her support of collegiality could help the Court reclaim the elements of compulsion and doctrinal consistency.[379] As Professor Gunther had predicted, Justice Ginsburg bridged the gap between the splintered centrists, creating a powerful coalition.[380]

Her success in balancing her obligation of consensus-building with her efforts to maintain an independent jurisprudence was exemplified in the *VMI* decision. There, her ability of persuasion won her support from other

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[372] *See id.* By agreeing most frequently with Justices Souter and Kennedy, two Justices constituting the "dominant middle," she was true to her words that "[m]y approach, I believe, is neither liberal nor conservative." *Id.* at 75-76.

[373] 29 U.S.C.A. § 1001 *et seq.*

[374] 470 U.S. 1081 (1985). *See also* Russell v. Massachusetts Mut. Life Ins. Co., 722 F.2d 482 (9th Cir. 1983)(involving a discharged employee who brought an action to recover damages allegedly resulting from termination of employment and the improper processing of a claim for employee disability benefits). The court held that ERISA permits the award for compensatory damages proximately caused by a breach of fiduciary duty, and damages are not limited to the amount of any benefit loss; and, in appropriate circumstances, the ERISA allows the granting of punitive damages. *See Russell*, 722 F.2d at 482.

[375] 508 U.S. 248 (1993). The suit against the plan's actuary was brought by former employees who participated in a retirement plan. *See id.* at 250. The employees alleged that the actuary caused losses by allowing the employer to select the plan's actuarial assumptions, by failing to disclose that the employer was one of its clients and the plan's funding shortfall. *See id.* at 250-51. The Court held that ERISA does not authorize suits for money damages against nonfiduciaries who knowingly participate in a fiduciary's breach of duty, instead the court allowed plan participants to bring civil actions to obtain "appropriate equitable relief" to redress violations of the statute or plan. *See id.* at 260.

[376] 510 U.S. 17 (Ginsburg, J., concurring).

[377] *Harris*, 510 U.S. at 21-23.

[378] *See Harris*, 510 U.S. at 17, 26 (Ginsburg, J., concurring).

[379] *See* Solimine & Wheatley, *supra* note 251, at 903.

[380] *See* Wallace, *supra* note 19, at 248.

presiding justices, except for Justice Scalia, the lone dissenter.[381] When *VMI* was criticized as her "activist determination to write her radical feminist goals into the Constitution,"[382] Justice Ginsburg defended herself by noting that "[t]he judgment was 7-1, for goodness sake!"[383]

B. Justice Ginsburg's Approach—When She Follows, When She Overrules

Justice Ginsburg's opinions and writings reveal that she has a conservative and respectful approach to stare decisis. To determine where Justice Ginsburg's approach falls on the strict-liberal continuum, one must examine the factors influencing the application of stare decisis and those influencing Justice Ginsburg's judicial philosophy.

1. Preliminary assessment of Justice Ginsburg's approach to stare decisis

Justice Ginsburg defines herself as a moderate whose jurisprudence is neither liberal nor conservative.[384] One commentator has characterized her thirteen years on the D.C. Circuit as a conservative record, resulting from her adherence to precedent.[385] Although she is not bound by such restrictions as a Supreme Court Justice, Justice Ginsburg's testimony at her Nomination Hearing suggested that she would continue to give substantial weight to legislation and court precedent when applying the law.[386]

Her voting record during her first term on the Supreme Court confirmed this, as Justice Ginsburg generally followed precedent in her decision-making process.[387] During her first year, Justice Ginsburg took a "liberal" position in

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[381] *See VMI*, 518 U.S. at 566. Justice Thomas recused himself because his son was attending VMI. *See id.* at 558.

[382] Rosen, *supra* note 248, at 65 (quoting Phyllis Schlafly's criticism).

[383] *Id.*

[384] *See* Baugh, *supra* note 238, at 7.

[385] *See* Gillman & Micheletti, *supra* note 249, at 661; *see also Mosrie v. Barry*, 718 F.2d 1151 (D.C. Cir. 1983), and *Quiban v. Veterans Administration*, 928 F.2d 1154, 1156 (D.C. Cir. 1992), as examples demonstrating Justice Ginsburg's conservative record and determination to adhere to precedent.

[386] *See Hearing*, *supra* note 62, at 198 (statement of Justice Ginsburg)(commenting that "stare decisis is a firm principle of our law" and vital to attaining stability, certainty, and clarity in the law); *see also* Baugh, *supra* note 238, at 8 (citing Justice Ginsburg's opinion that "judges are to 'secure a steady, upright and impartial administration of the laws' and that they should not reach beyond cases immediately before them to decide other issues").

[387] *See* Baugh, *supra* note 238, at 11; *see also infra* Section III.B.2 (discussing cases where Justice Ginsburg adhered to precedent).

fifty-two percent of civil rights cases and only fifty-eight percent of all cases decided.[388] One commentator noted that Justice Ginsburg heavily relied upon precedent or specific points of reasoning in her opinions.[389] As the following will reveal, Justice Ginsburg's approach to stare decisis is guided by both the factors and values in the stare decisis doctrinal framework, as well as the values that formulate her judicial philosophy. Furthermore, Justice Ginsburg's decisions, opinions, and writings reflect her struggle to balance the strict-liberal tension.

2. *Justice Ginsburg's high regard of stare decisis and the factors influencing her adherence to precedent*

In *Speaking in a Judicial Voice*, Justice Ginsburg alludes to the importance of stare decisis. Effective and thoughtful opinions should be supported by precedent, developed by the court, and responsive to the facts of the case.[390] She has noted that stare decisis provides "one of the restraints against a judge infusing his or her own values,"[391] that ensures the preservation of an unarbitrary judiciary.[392] Moreover, stare decisis clarifies legal standards,[393] supports the gradual expansion of law by building a groundwork for more difficult problems,[394] and strengthens or justifies a difficult decision.[395]

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[388] *See* Baugh, *supra* note 238, at 11.

[389] *See id.* at 24.

[390] *See* Ginsburg, *Judicial Voice*, *supra* note 108, at 1194.

[391] *Hearing*, *supra* note 62, at 197.

[392] *See, e.g.*, Hubbard v. United States, 514 U.S. 695, 704 (1992); Baugh, *supra* note 238, at 8 (discussing that throughout the nomination hearing, Justice Ginsburg emphasized her commitment to judicial restraint and mentioned that a fundamental role of judges is to "secure a steady, upright, and impartial administration of the law," which should be accomplished by not reaching beyond cases immediately before them).

[393] *See, e.g.*, Northwest Airlines v. County of Kent, 510 U.S. 355 (1994); Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc., 405 U.S. 707 (1972). In *Northwest Airlines*, Justice Ginsburg resorted to the precedent established in the case of *Evansville*. *See Northwest Airlines*, 510 U.S. at 373-74. The Court upheld the airport fees assessed against commercial airlines as being reasonable and not violating the Anti-Head Tax Act ("AHTA"). *See id.* As the AHTA did not set a standard for determining a fee's reasonableness, Justice Ginsburg relied on precedent to clarify the applicable legal standard of analysis. *See id.* at 369.

[394] *See, e.g.*, Powell v. Nevada, 511 U.S. 79 (1994); Griffith v. Kentucky, 479 U.S. 314 (1989). In *Powell*, Justice Ginsburg turned to the precedent of *Griffith* to build a foundation to support her ruling that warrantless arrests applied retroactively. *See Powell*, 511 U.S. at 84. To support her ruling, Justice Ginsburg quoted *Griffith*'s statement that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final." *Id.* (quoting *Griffith*, 479 U.S. at 323).

[395] *See, e.g.*, Barclays Bank v. Franchise Tax Bd., 512 U.S. 298 (1994); Container Corp. of Am. v. Franchise Tax Bd., 483 U.S. 159 (1983). In *Barclays*, Justice Ginsburg referenced precedent to support the expansion of the taxation law regarding domestic-based multi-national

The primary factors that influence Justice Ginsburg's adherence to precedent include the presence of relevant and well-reasoned precedent, promotion of collegiality, substantial societal reliance, systematic consistency, and doctrinal stability. In *FLRA*, the Court ruled that the Privacy Act prohibited the disclosure of civil service employees' addresses. Justice Ginsburg concurred with the judgment despite the fact that the holding was inconsistent with Congress' intent under the Federal Service Labor Management Relations Statute.[396] Her concurrence in *FLRA* revealed that Justice Ginsburg agreed with the general consensus that stare decisis applies with diminished force in constitutional, as opposed to statutory precedent.[397]

FLRA upheld *Reporters Committee*.[398] Justice Ginsburg argued for the preservation of *Reporters Committee* because she was "mindful that the pull of precedent is strongest in statutory cases."[399] Moreover, despite *Reporters Committee*'s erroneous interpretation of Congressional intent, Justice Ginsburg upheld the decision as she was keenly aware of its solid approval from her colleagues on the Court.[400] Her desire to promote collegiality and civility in the legal profession[401] through consensus fulfills President Clinton's expectation of her as a risk-free nominee and a consensus builder of the Court.[402]

Justice Ginsburg has also been touted as a coalition builder through her successful efforts in mediating between the Court's warring liberal and conservative factions.[403] A preliminary examination of her participation on the Court shows that she has effectively fulfilled expectations of her as a consensus builder.[404] A block voting analysis of the 1993 term of the Supreme Court revealed that Justice Ginsburg, with a rate of seventy-one percent and higher, had "fairly high interagreement rates with all the other justices."[405] Justice Ginsburg's tendency to abide by the settled law laid by

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corporations to foreign multi-nationals. *See Barclay*, 512 U.S. at 320-21 nn.19-20. In *Barclays*, which involved a controversial state method of taxing multinational corporations, Justice Ginsburg relied on the precedent of *Container Corp.*, as legal support for justifying her ruling that the domestic taxation scheme could be extended to apply to foreign multi-national corporations as it did not violate the Commerce Clause. *See id.*

[396] *See* United States Dep't of Defense v. FLRA, 510 U.S. 487, 504 (1994) (Ginsburg, J., concurring).

[397] *See id.* at 509 (Ginsburg, J., concurring).

[398] *See FLRA*, 510 U.S. at 500 (Ginsburg, J., concurring).

[399] *Id.* at 509 (Ginsburg, J., concurring).

[400] *See id.* (Ginsburg, J., concurring).

[401] *See* Ginsburg, *Judicial Voice*, *supra* 108, at 1197-98.

[402] *See* Smith & Beuger, *supra* note 222, at 135-36.

[403] *See id.*

[404] *See* Baugh, *supra* note 238, at 10-11.

[405] *Id.* at 11.

her predecessors or concur with the majority even when the decision tends to conflict with her moral belief is attributed to the high value she places on collegiality, her desire to fulfill presidential expectations, and her admiration of the civil law tradition, which promotes "clarity and certainty in judicial pronouncements."[406]

However, her desire to maintain collegiality did not prevent Justice Ginsburg from disagreeing with her colleagues on several issues. Many of her dissents criticized the majority for not applying relevant precedent that was clear, well-reasoned, and consistent with the Constitution or Congressional intent.[407] In *Security Service v. K-Mart Corp.*,[408] the Court held that a motor carrier in a bankruptcy proceeding could not rely on filed tariff rates as a basis for recovering undercharges owed to it by a contractee.[409] In her dissent, Ginsburg criticized the majority for misconstruing a clear and relevant precedent as established by *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*,[410] when it interpreted an Interstate Commerce Commission tariff regulation.[411] She noted that "[i]t is difficult to regard the Commission's approach, and the Court's approval of it, as anything other than an end-run around the filed rate doctrine so recently and firmly upheld in *Maislin*."[412]

Justice Ginsburg's reluctance to overrule precedent is further evidenced by her belief that a court should not abandon precedent merely because it is unworkable or unsound, but rather it should first consider whether the decision generated substantial reliance interest.[413] Reliance interests are important aspects of stare decisis because overruling precedent that has generated substantial reliance would disrupt the "stability, certainty, [and] predictability of the law."[414] Justice Ginsburg recognized the importance of stare decisis as a means of influencing the way a court and society behaves.[415] Stare decisis has a special force as society has acted in reliance on a previous decision and overruling the "decision would dislodge settled rights and

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[406] Ginsburg, *Remarks on Writing Separately*, *supra* note 292, at 150.

[407] *See, e.g.*, Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415, 450-51 (1994) (Ginsburg, J., dissenting). In *Honda*, Ginsburg dissented from the majority's decision that the Oregon punitive damages scheme violated the Due Process Clause because the Oregon scheme was consistent with precedent regarding due process limits. *See id. See also* Baugh, *supra* note 238, at 21.

[408] 511 U.S. 431 (1994).

[409] *See id.* at 443.

[410] 497 U.S. 116 (1990).

[411] *See K-Mart*, 511 U.S. at 461 (Ginsburg, J., dissenting).

[412] *Id.* at 458 (Ginsburg, J., dissenting).

[413] *See Hearing*, *supra* note 62, at 197.

[414] *See id.*

[415] *See id.*

expectations or require extensive legislative response."[416] At her Confirmation Hearing, Justice Ginsburg suggested that without stare decisis, there would be instability, uncertainty, and insecurity within society.[417] Stare decisis would undoubtedly clarify the law and generate stability and certainty in the legal realm and social sphere.[418]

Critical Mass exemplifies the interplay between the factors and values influencing stare decisis.[419] *Critical Mass* involved a dispute between the Critical Mass Energy Project (the "CMEP") and the Nuclear Regulatory Commission ("NRC").[420] To promote the safe operation of nuclear power plants, the Institute for Nuclear Power Operations ("INPO") voluntarily submitted safety reports to the NRC on the condition of nondisclosure to third parties.[421] The CMEP demanded the NRC disclose the information supplied by the INPO.[422] The NRC refused disclosure, stating that the information was "confidential" and "commercial," and accordingly, protected under Exemption 4 of the FOIA.[423]

The D.C. Circuit Court re-evaluated the two-part test in *National Parks and Conservation Ass'n v. Morton*[424] and limited its applicability.[425] In her dissenting opinion, then Judge Ginsburg argued that under stare decisis, the *National Parks* test should not have been redefined because the decision was not flawed.[426] She argued that *National Parks* did not misinterpret the legislative will and was a better indication of the FOIA than the redefined test.[427] To support her position that the *National Parks* test was intended to

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[416] Hubbard v. United States, 514 U.S. 695, 714 (1992)(citing Hilton v. South Carolina Pub. Ry. Comm'n, 502 U.S. 197 (1991)).

[417] *See Hearing*, *supra* note 62, at 197.

[418] *See id.*

[419] *See* Critical Mass Energy Project v. Nuclear Regulatory Comm'n, 975 F.2d 871, 874-77 (D.C. Cir. 1992).

[420] *See id.* at 874.

[421] *See id.* at 874-75.

[422] *See id.* at 874.

[423] *See id.* at 874-75. *See also* Rainey, *supra* note 29, at 1438-39.

[424] 498 F.2d 765 (D.C. Cir. 1974).

[425] *See id.* at 766. In *National Parks*, the plaintiffs requested information supplied by park vendors to the government as a prerequisite to obtaining a vending license. *See id.* The court ruled that information is confidential if disclosure is likely: "(1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." *Id.* at 770. Applying this test to the facts of *National Parks*, the court found that disclosure will not impede the government's access to similar information in the future; but the court remanded for examination of the second prong of the test. *See id.* at 770-71. *See also* Rainey, *supra* note 29, at 1432.

[426] *See Critical Mass*, 975 F.2d at 884-85 (Ginsburg, J., dissenting).

[427] *See id.* (Ginsburg, J., dissenting).

apply to both voluntary and compelled submissions, Ginsburg argued that the *National Parks* court had not contemplated application of the test to voluntarily provided information.[428] She further reasoned that the majority contradicted Congressional will since Congress had intended the FOIA exemptions to be read narrowly.[429]

This reasoning is consistent with Justice Ginsburg's judicial philosophy that the common law judge is obligated to discern the best rule of law for the case at hand,[430] not reach beyond cases immediately before them in his or her decision-making process,[431] and expand upon previous precedent in developing new doctrines.[432] Justice Ginsburg commented that "stare decisis has not been appropriately observed in [*Critical Mass*]."[433] She reasoned that there was reliance by courts on the *National Parks* confidentiality test, no special justification existed to stray from the precedent, and *National Parks* did not generate disagreement among the circuits.[434]

3. Case examples in which Justice Ginsburg advocates for the overruling or inapplicability of precedent

Justice Ginsburg respects stare decisis and recognizes its vital role in the judiciary to generate predictability, replicability, doctrinal stability, and systematic consistency.[435] However, she realizes that stare decisis is not absolute, as there may be instances that dictate the overruling of precedent.[436] Justice Ginsburg has cited to several justifications in overruling or holding precedent inapplicable: (1) the facts of the precedent were dissimilar to the present case,[437] (2) the precedent was erroneous, (3) the need to accommodate social changes and legal progressions,[438] (4) the desire for law to respond to

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[428] *See id.* at 883-84 (Ginsburg, J., dissenting); *see also* Rainey, *supra* note 29, at 1453 n.192.

[429] *See Critical Mass*, 975 F.2d at 884 (Ginsburg, J., dissenting); *see also* Rainey, *supra* note 29, at 1453-54.

[430] *See supra* Part III.A.1.

[431] *See Hearing*, *supra* note 62, at 197 (statement of Justice Ruth Bader Ginsburg).

[432] *See Smith*, *supra* note 213, at 1905.

[433] *Critical Mass*, 975 F.2d at 882 (Ginsburg, J., dissenting).

[434] *See id.* at 884 (Ginsburg, J., dissenting).

[435] *See* discussion *supra* Part II.B.1; *see also supra* note 83 and accompanying discussion of the legal system values.

[436] *See* discussion *supra* Part II.B.3 on changed circumstances as justification for overruling precedent; *see also supra* note 329 and accompanying text.

[437] *See* discussion *supra* Part III.A.1 on the process of identifying legal similarity between a precedent and a dispute at hand.

[438] *See* discussion *supra* Part III.A.5 on the judiciary's interaction with societal changes; *see also* notes 173-82 and accompanying text.

the needs of the society, (5) and the attainment of fairness and justice.[439] Moreover, Justice Ginsburg's desire to promote collegiality in the Court has influenced her decisions to overrule precedent.[440]

Justice Ginsburg joined Justice Blackmun's principal dissent in *Nichols v. United States*[441] which provides insight into her view concerning the inapplicability of a precedent.[442] In *Nichols*, the Court held that no Sixth Amendment violation occurred when a sentencing court used a defendant's previous conviction in enhancing punishment for a later conviction.[443] In her dissenting opinion, Justice Ginsburg argued that the issue differed from that in *Custis v. United States*[444], a previously decided case.[445]

In *Custis*, the Court analyzed the forum in which a defendant can collaterally attack a state conviction used to enhance his sentence.[446] Because the issue and facts of *Custis* were dissimilar to *Nichols*, Justice Ginsburg argued for the inapplicability of *Custis* and charged that the majority's decision was unconstitutional as it enlarged the impact of an uncounseled conviction.[447] Clearly, Justice Ginsburg remains faithful to her declaration that judges "should not reach beyond cases immediately before them to decide other issues,"[448] especially in constitutional cases.

One of the most recognized special justifications for overruling a precedent or finding it inapplicable is a change in circumstances,[449] whether it be a change in the legal doctrine or factual conditions of a case.[450] Justice

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[439] *See generally* discussion *supra* Part III.B.2 and *infra* Part III.B.3 mentioning cases illustrating the factors influencing the observation of stare decisis.

[440] *See* discussion *supra* Part III.A.6.

[441] 511 U.S. 738 (1994).

[442] *See id.* at 764 (disregarding relevant precedent because the "rule is unworkable") (Blackmun, J., dissenting).

[443] *See id.* at 749.

[444] 511 U.S. 485 (1994).

[445] *See Nichols*, 511 U.S. at 765 (Ginsburg, J., dissenting). Justice Ginsburg framed the issue as "where, not whether, the defendant could attack a prior conviction for constitutional infirmity." *Id.* The majority, however, framed the issue differently: "Whether the Constitution prohibits a sentencing court from considering a defendant's previous uncounseled misdemeanor conviction in sentencing him for a subsequent offense[?]" *Id.* at 740, 747. The *Nichols* Court relied on *Scott v. Illinois*, 440 U.S. 367 (1979), which held that a "prior uncounseled misdemeanor conviction could not be used collaterally to impose an increased term of imprisonment upon a subsequent conviction." *Nichols*, 511 U.S. at 743-44.

[446] *See Custis*, 511 U.S. at 1735-37.

[447] *See Nichols*, 511 U.S. at 765-66.

[448] *See* Baugh, *supra* note 238, at 8; *see also supra* and accompanying text notes 445, 446 & 448 (discussing Justice Ginsburg's view of the operation of stare decisis in constitutional cases as revealed by her statements at the nomination hearing).

[449] *See* Wallace, *supra* note 19, at 191.

[450] *See* discussion *supra* Part III.A.5 that in applying stare decisis, the judiciary branch should be aware of society changes; *see also* discussion *supra* Part II.B.3 that changed

Ginsburg realized that stare decisis should not be blind to social and legal changes.[451] Rather, it should be tempered by judicial perceptions of the political, economic, and social realities of the day.[452] Justice Ginsburg further believed that any court in the land, including the Supreme Court, should not drastically divert from established law until the overwhelming societal and legal changes justify the overruling of precedent.[453]

Cases such as *Hubbard*, *IBM* and *Henderson* exemplify a change in circumstances scenario that justify the overruling of precedent.[454] In *Hubbard*, the Court overruled precedent that erroneously interpreted a federal statute.[455] Justice Ginsburg, joining Justice Stevens' opinion, agreed with the majority on the basis of the erroneous statutory interpretation.[456] However, the decision also noted the unusual development in the law created a competing doctrine which led to a split in the circuit courts.[457]

Hubbard also exemplified the strong influence of the civil law tradition of statutory interpretations on Justice Ginsburg and her colleagues.[458] The Court's deviation from the precedent, which erroneously interpreted a statute, evidenced a growing recognition of the supremacy of statutes in common law systems.[459] By overruling precedent and re-interpreting the statute, the ultimately succeeded in maintaining consistency and certainty within our legal system.[460]

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circumstances are justifications for overruling precedent.

[451] *See Hearing*, *supra* note 62, at 166.

[452] *See id.*

[453] *See* discussion *supra* Parts II.B.3 and III.A.5.

[454] *See* Henderson v. United States, 517 U.S. 654, 663 (1996); *see also supra* text accompanying notes 176-78 and *infra* text accompanying notes 464-65.

[455] *See* Hubbard v. United States, 514 U.S. 695, 697 (1992).

[456] *See id.* at 697-99.

[457] *See id.* The court further stated that the doctrine of stare decisis did not require the Court to accept *Bramblett*'s erroneous interpretation of 18 U.S.C. § 1001. *See id.* at 713. The Court explained:

> Reconsideration of that case is permitted here (1) because of a highly unusual intervening development of the law—the judicial function exception—which is fairly characterized as a competing legal doctrine that can lay a legitimate claim to respect as a settled body of law, and (2) because of the absence of significant reliance interests in adhering to *Bramblett* on the part of prosecutors and Congress.

Id.

[458] *See* Luban, *supra* note 301, at 1049. Professor Luban pointed out, just as that in civil law systems, "the supremacy of statute obtains even in common law systems[,]" because "this supremacy ensues that statute . . . characterizes law more truly than does precedent." *Id. See also* discussion *supra* Part III.A.4 on Admiration of the Civil Law System.

[459] *See* Luban, *supra* note 301, at 1049.

[460] *See* discussion *supra* Part III.A.4 on Mary Ann Glendon's study of the common goals in both common law and civil law systems.

IBM and *Henderson* also reflect Justice Ginsburg's view that changed circumstances justify the overruling of precedent. In *IBM*, Justice Ginsburg joined the dissent in refusing to uphold a precedent prohibiting federal taxation of export goods.[461] The dissent argued that the precedent was poorly reasoned, unworkable, and at odds with more recent cases.[462] Furthermore, the dissent asserted that there was a shift in the economy from a more service-intensive economy to export-oriented economy making the precedent inapplicable.[463] The *Henderson* Court analyzed a dispute as to the allotted days for service of process.[464] In holding that the Suits in Admiralty Act was superseded by the federal law, Justice Ginsburg cited to several reasons, such as a "shift in the responsibility for service from the United States marshals to the plaintiff," which required greater time control and led Congress to implement the 120 days for service.[465]

Justice Ginsburg also recognized that the legal-system values of responsivity, fairness, and justice influenced the application of stare decisis.[466] Her recognition of such values and sensitivity in analyzing the specific facts of a case to attain fair and just results for individual litigants buttress her reputation as a thoughtful jurist.[467] In both *Consolidated Rail*, and *Center for Nuclear Responsibility*, Justice Ginsburg dissented from the majority's decision to uphold relevant precedent because such decisions would result in unfairness to the litigants and were not in the interests of justice.[468]

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[461] *See* 517 U.S. at 843, 863 (1996)(Kennedy, J., dissenting); *see also supra* notes 90-97 for a discussion of *IBM* in greater detail.

[462] *See IBM*, 517 U.S. at 863-881 (Kennedy, J., dissenting).

[463] *See id.* (Kennedy, J., dissenting). Justice Ginsburg joined Justice Kennedy's dissenting opinion in which he stated that the majority reasoning of stare decisis is unconvincing: "Stare decisis does not protect a constitutional decision where the reasoning is as poor as it is in *Thames & Mersey*, nor when the precedent, even if not yet proven unworkable, is at odds with more recent cases." *Id.* at 878 (Kennedy, J., dissenting). "It is, moreover, just a matter of time before *Thames & Mersey* proves itself unworkable; prior to today, it had not been given the chance to work its mischief." *Id.* (Kennedy, J., dissenting).

[464] *See* 517 U.S. at 663.

[465] *Id. See also supra* notes 176-80 and accompanying text discussing *Henderson* in detail and Part III.A.5 discussing a court's interaction with society change.

[466] *See supra* discussion at Part II.B.2 on overruling precedent to attain fairness and justice in individual cases and Part IV.A.1 on the process of identifying legal similarity between cases by judges.

[467] During her confirmation hearing, Ginsburg refused to discuss how she would vote in future cases and stated: "[I]t would be wrong for me to say or preview . . . how I would cast my vote on questions the Supreme Court may be called upon to decide." *Hearing*, *supra* note 62, at 52. She continued, "A judge sworn to decide impartially can offer no forecasts, no hints, for that would show not only disregard for the specifics of the particular case; it would display disdain for the entire judicial process." *Id. See also* Lewis, *supra* note 247, at A1.

[468] *See Consolidated Rail*, 512 U.S. at 569 (Ginsburg, J., dissenting); *Center for Nuclear Responsibility*, 781 F.2d at 943 (Ginsburg, J., dissenting). *See also* discussion *supra* Part

In *Consolidated Rail*, Gottshall, a railroad employee who suffered posttraumatic stress disorder after watching a co-employee and friend die of a heart attack while working on an intensely hot and humid day, sued the railroad under the Federal Employers' Liability Act ("FELA") for negligent infliction of emotional distress.[469] After judgment was entered for the railroad, the Supreme Court reversed and remanded the decision with an instruction that claims for negligent infliction of emotional distress under FELA must be examined under the common law "zone of danger test."[470]

The majority's decision to expose such claims to the "zone of danger" standard made it more difficult for employees to receive compensation because plaintiffs must demonstrate that they either "sustain[ed] a physical impact as a result of [the] defendant's negligent conduct, or who [were] placed in immediate risk of physical impact by that negligence."[471] In her dissenting opinion, Justice Ginsburg argued for a more individualized standard that accounted for the specific facts of each case.[472] She asserted that "the appropriate FELA claim threshold should be keyed to the genuineness and gravity of the worker's injury" because the "zone of danger" standard would leave "severely harmed workers remediless, however negligent their employers."[473]

In *Center for Nuclear Responsibility*, Justice Ginsburg also dissented despite supporting precedent, because the decision would create an unfair result.[474] A suit was brought challenging the ruling of the Nuclear Regulatory Commission, where certain proposed amendments to a nuclear power plant's operating license were immediately effective without a predetermination hearing because such amendments presented "no significant hazards."[475] The D.C. district court dismissed the suit for lack of jurisdiction.[476] The D.C. Court of Appeals also dismissed the suit due to the appellant's failure to file a notice of appeal within the jurisdictional time limit of sixty days as established by the Federal Rules of Appellate Procedure.[477] The appeals court relied upon prior decisions upholding the validity of the time limit on the

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II.B.3 on *Consolidated Rail* and *Center for Nuclear Responsibility*.

[469] *See Consolidated Rail*, 512 U.S. at 535-37.

[470] *See id.* at 554. Upon remand, the United States Court of Appeals in *Consolidated Rail* held that the railroad was not liable because the employee was not placed in immediate risk of physical harm as the sun's rays and heated air could not constitute immediate risks of physical harm to the employee. *See* Gottshall v. Consolidated Rail Corp., 56 F.3d 530, 535 (1995).

[471] *Consolidated Rail*, 512 U.S. at 547-48.

[472] *See id.* at 572 (Ginsburg, J., dissenting).

[473] *Id.* (Ginsburg, J., dissenting).

[474] *See* 781 F.2d at 945 (Ginsburg, J., dissenting).

[475] *Id.* at 937.

[476] *See id.* at 935.

[477] *See id.* at 942-43.

grounds that it avoided uncertainties as to the date on which a judgment is entered[478] and that a timely notice of appeal was necessary to correct legal errors.[479]

Justice Ginsburg dissented because courts "should not turn away litigants who were understandably 'confused about the proper forum for review.'"[480] She argued that the appeals court should have, in the interest of justice and as provided for under the Federal Courts Improvement Act, transferred the action to any other federal court in which the action could have been brought.[481] *Consolidated Rail* and *Center for Nuclear Responsibility* suggest that fairness to the litigant and the promotion of justice greatly influence Ginsburg's decision to depart from relevant precedent and focus on the individual circumstances of a case. Advocating a case-by-case approach indicates that Justice Ginsburg is cautious and sympathetic in her decision-making when faced with cases involving parties of different bargaining powers. Commentators have suggested that Justice Ginsburg tends to show sympathy to disadvantaged parties because of her experiences with gender discrimination early in her career.[482]

IV. CONCLUSION

Examining the stare decisis doctrinal framework and determining Justice Ginsburg's placement on the strict-liberal continuum has a predictive and practical value for the legal community. As one commentator has predicted, because of Justice Ginsburg's thoughtful, well-reasoned jurisprudence, President Clinton may appoint her as the first female Chief Justice after Justice Rehnquist's retirement.[483] Indeed, on a predictive level, examining Ginsburg's operation of stare decisis provides insight into how she will rule on future issues and influence the decisions of the Supreme Court. On a practical level, understanding the various factors and values of the stare

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[478] *See id.* at 938-39 (citing United States v. Indrelunas, 411 U.S. 216, 220 (1973); Diamond v. McKenzie, 770 F.2d 225, 230 n.10 (D.C. Cir. 1985)).

[479] *See Center for Nuclear Responsibility*, 781 F.2d at 940. *See also* Morris v. Adams-Mills Corp., 758 F.2d 1352, 1357-59 (10th Cir. 1985); Barrier v. Beaver, 712 F.2d 231, 234 (6th Cir. 1983); Liberty Mut. Ins. Co. v. Equal Employment Opportunity Comm'n, 691 F.2d 438, 441 (9th Cir. 1982).

[480] *See Center for Nuclear Responsibility*, 781 F.2d at 945 (Ginsburg, J., dissenting)(quoting American Beef Packers, Inc. v. ICC, 711 F.2d 388, 390 (D.C. Cir. 1983)).

[481] *See id.* at 944 (Ginsburg, J., dissenting).

[482] *See supra* notes 299-301 and accompanying text. *See also* Martin, *supra* note 252, at 127.

[483] *See* Rosen, *supra* note 248, at 62. Justice Ginsburg once stated, "[t]oday, . . . no one would laugh at [the] prophecy [that the Chief Justice's chair may one day be occupied by a woman]." *Id.* at 96.

decisis framework will force practitioners to account for the legal and situational contexts in addition to the judge's jurisprudence when analyzing a particular issue.

Stare decisis is not only a vital doctrine in our common law legal system,[484] but it is also a significant element that influences Justice Ginsburg's decision-making process.[485] Since Justice Ginsburg's approach to stare decisis is guided by various factors, values, experiences, and objectives, it is difficult to definitively place her on the strict-liberal continuum.[486] A preliminary assessment of Ginsburg's writings and decisions suggest that Justice Ginsburg has remained true to her reputation as a judicial moderate[487] by abiding by well-reasoned and relevant precedent.[488] However, Justice Ginsburg has struggled with the strict-liberal tension,[489] recognizing the existence of special justifications to overrule a relevant precedent.[490]

Justice Ginsburg's careful balance of these tensions has enhanced her image as a thoughtful jurist. Although she respects prevailing legal doctrines, her struggle with the strict-liberal tension reflects that she is mindful of the importance of the specific facts and context of a case. Justice Ginsburg's most controversial opinion to date has been *VMI*. Commentators have criticized her application of the "exceedingly persuasive justification" test to *VMI*'s facts, contending that she deviated from relevant precedent on gender discrimination.[491]

Contrary to these opinions, Justice Ginsburg did not in fact overrule precedent. The very language of her "exceedingly persuasive justification" standard was taken from *Hogan*, a highly acknowledged precedent in gender

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[484] *See supra* Part II.B. The sub-sections in section B highlight both the factors influencing the application of stare decisis and its many values, including its ability to promote doctrinal stability, ensure systematic coherency, and provide the public with clarity of the existing body of law.

[485] *See* discussion *supra* Part III.B.2.

[486] *See supra* Part III.B.2 & 3 discussing Ginsburg's case opinions which demonstrate her struggle with the tension as exhibited by her reasoning in whether to follow or overrule a particular precedent.

[487] *See* Baugh, *supra* note 238, at 7; *see also* Smith & Beuger, *supra* note 222, at 135-36.

[488] *See, e.g.*, United States v. IBM, 517 U.S. 843, 863 (Kennedy J., dissenting) (1996); United States Dep't of Defense v. Federal Labor Relations Auth., 510 U.S. 487 (1991); Critical Mass Energy Project v. Nuclear Regulatory Comm'n, 975 F.2d 871 (D.C. Cir. 1992); Quiban v. Veterans Admin., 928 F.2d 1154, 1156 (D.C. Cir. 1992).

[489] *See supra* Part III section B subsections 2 and 3 which compare the reasoning underlying Ginsburg's decisions to follow or overrule a precedent.

[490] *See, e.g.*, *Hubbard*, 514 U.S. at 696-99 (1992); *IBM*, 517 U.S. at 863-81; *Henderson*, 517 U.S. at 663; *Consolidated Rail*, 512 U.S. at 572 (Ginsburg, J., dissenting); *Center for Nuclear Responsibility*, 781 F.2d at 945 (Ginsburg, J., dissenting).

[491] *See supra* note 12 and accompanying text.

equality.[492] Indeed, Justice Ginsburg remained true to her judicial philosophy by being idealistic in the ends, but pragmatic in the means.

One can attribute the respect for Justice Ginsburg as a Supreme Court justice to her thoughtful decision-making process. It is a process that does not merely follow the black letter law, but considers the actual consequences of a decision on the litigants and society. Her struggle to balance the competing tensions of stare decisis in her decision-making process has generated admiration among her colleagues, the general public, and even her critics. For these reasons, Justice Ginsburg should advance to the position of Chief Justice of the Supreme Court. Her sense of fairness and justice, her minimalist approach to stare decisis,[493] her reserved judicial philosophy, and her personal restraint weigh in favor of "mak[ing] her an effective Chief Justice for a divided Court."[494]

Mei-Fei Kuo
Kai Wang[495]

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[492] *See* discussion *supra* notes 341-44 and accompanying text.

[493] Ginsburg's approach is minimalist as she generally follows a relevant and well-reasoned precedent and only overrules precedent in the presence of special justifications. *See* discussion *supra* Part III.B.3.

[494] Rosen, *supra* note 248, at 62.

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