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CRAFTING A CONSTITUTIONAL RATIONALE: RUTH BADER GINSBURG AND GENDER-BASED EQUALITY

A Dissertation
Presented for the
Doctor of Philosophy Degree
The University of Tennessee, Knoxville

Melanie K. Morris
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ABSTRACT

This dissertation analyzed the extent to which Ruth Bader Ginsburg's equal protection jurisprudence reflects her conception of the judicial function. It also examined Ginsburg's influence on the development of gender-based equal protection jurisprudence. The qualitative analysis employed follows a methodological tradition consistent with the scholarship of many political scientists. Systematic analysis focused on the position Ginsburg has communicated through scholarly publications, briefs and oral arguments, speeches, and judicial opinions written through the October 1999 Supreme Court Term (and one important equal protection decision from December 2000). This study also examined scholarly commentary by political scientists and legal scholars.

As scholar, advocate, and jurist Ginsburg has championed the equality of all individuals without regard to gender and has made distinctive contributions to the development of equal protection jurisprudence. Ginsburg's personal experience with discrimination sensitized her to its pernicious effects. As a result, Ginsburg has sought to realize the principle of genuine equal protection under law for all individuals. In doing so, she has not been a radical activist challenging the Establishment as an outsider. Rather, perhaps due in part to the proclivity for accommodation she developed early in life, Ginsburg has sought to achieve gradual progress as an Establishment insider.

Ginsburg's efforts have yielded considerable success. Adhering to a minimalist, restraintist conception of the judicial function, Ginsburg incrementally orchestrated progress

and reversed one century of Supreme Court precedent. The Court interpreted the Equal Protection Clause of the Fourteenth Amendment to include gender classifications and later raised the standard of review beyond the most permissive analysis. Writing the majority opinion in *United States v. Virginia* (1996), Justice Ginsburg adhered to precedent and applied intermediate scrutiny in striking down the Virginia Military Institute's single-sex admissions policy. Ginsburg invoked race discrimination cases as authority in fashioning a remedy, perhaps incrementally extending more rigorous protection to sex classifications even though the middle tier of review remains the applicable standard for evaluating the constitutionality of gender classifications. The majority opinion in *United States v. Virginia* constitutes the most recent step forward in the achievement of gender equality orchestrated by Ginsburg.

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CHAPTER ONE:
INTRODUCTION

On June 14, 1993 President Bill Clinton nominated Judge Ruth Bader Ginsburg to fill the Supreme Court position vacated by the retirement of Associate Justice Byron R. White. Judge Ginsburg, at the time of her nomination, was completing her thirteenth year of service on the United States Court of Appeals for the District of Columbia Circuit. President Clinton's selection garnered praise from many observers, particularly from feminists and legal scholars familiar with her achievements prior to joining the federal bench. Ginsburg's career as an advocate and law professor was distinguished by her success in formulating litigation strategy and arguing many landmark gender-based equal protection cases before the United States Supreme Court.

Pointing to this noteworthy contribution, Janet Benshoof, President of the Center for Reproductive Law and Policy characterized Ginsburg as ". . . the Thurgood Marshall of gender equality law." (Lewis 1993a) Similarly, Marcia Greenberger, Co-President of the National Women's Law Center, surmised that ". . . Ruth Ginsburg was as responsible as any one person for legal advances that women made under the Equal Protection Clause of the Constitution." (Lewis) Announcing his nomination of Ginsburg to the High Bench, President Clinton observed that ". . .over the course of a lifetime, in her pioneering work in behalf of the women of this country, she has compiled a truly historic record of achievement in the

finest tradition of American law and citizenship." (Mersky et al 1995: 10) Members of Congress also offered laudatory characterizations of Ginsburg's public life. During the confirmation debate on the floor of the United States Senate, Republican Majority Leader Robert Dole commented that Ginsburg ". . .has the temperament that one would want, and expect, in a Supreme Court Justice." (160) Democrat Frank Lautenberg concurred, noting that Ruth Bader Ginsburg's ". . . life and career have exemplified the very best values of public service." (166)

These appraisals were based in large part on perceptions of the importance of Ginsburg's contributions to equal protection jurisprudence in the 1970s.[1] This sentiment was typified by Democratic Senator Patrick Leahy's opening statement during the Judiciary Committee's confirmation hearing. Leahy surmised that although Ginsburg's record was impressive, her ". . . proudest achievements in many ways. . . [were] the landmark Supreme Court cases . . . [she] fought [sic] that literally changed the destiny of women in this country." (233) In law review articles and in briefs and oral arguments in cases before the United States Supreme Court, she took the position that gender equality should be measured by strict

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Ginsburg was principal author of the briefs for the Appellant, Appellee, or Petitioner and presented oral arguments in the following cases before the Supreme Court: *Frontiero v. Richardson* (1973), *Kahn v. Shevin* (1974), *Weinberger v. Wiesenfeld* (1975), *Edwards v. Healy* (1975), *Califano v. Goldfarb* (1977), and *Duren v. Missouri* (1979). Additionally, Ginsburg was principal author of the briefs for the Appellant, Appellee, or Petitioner but did not present oral arguments in the following cases before the Supreme Court: *Reed v. Reed* (1971), *Struck v. Secretary of Defense* (1972), and *Turner v. Department of Employment Security* (1975). (Mersky, 277) Ginsburg was also principal author of amicus briefs submitted to the Supreme Court in a number of cases including: *Geduldig v. Aiello* (1974), *Craig v. Boren* (1976), and *Orr v. Orr* (1979). (Ginsburg 1994).

scrutiny, the same standard applied to racial classifications.

Justice Ginsburg's original position on equal protection was that strict judicial scrutiny should be applied to gender discrimination claims. Although the Supreme Court has not accepted this position, it has adopted an intermediate scrutiny standard which is more demanding than the traditional rational basis approach applied to gender discrimination claims. Many observers conclude that as a Justice, Ginsburg has been able to ratchet up the intermediate scrutiny standard so that, in effect, it has become indistinguishable from the most demanding judicial test. Ginsburg herself, however, has unequivocally rejected this view.

The incremental modification of the standard of review applied to gender discrimination claims is characteristic of the approach employed by Ginsburg for more than thirty years. This dissertation examines Ruth Bader Ginsburg's conception of the role of the jurist as it is reflected in the equal protection jurisprudence she has advanced as an advocate, scholar, and jurist. More specifically, this study explores the extent to which Ginsburg has contributed to the development of gender-based equal protection jurisprudence.

Nature and scope of the study

Ginsburg first attacked notions perpetuating gender-based stereotypes in a 1971 speech delivered at Duke University Law School.[2] She observed that theories perpetuating the inferiority of some races to others ostensibly verified by scientific inquiry had long been

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Ginsburg's speech, entitled "Sex and Unequal Protection: Men and Women As Victims" was reprinted in the *Journal of Family Law*. (11 *Journal of Family Law* 347. 1971).

abandoned. However, adherence to similar gender-based theories persisted. ". . . [P]rominent social scientists," Ginsburg noted, "continue to chide women for failing to recognize that their biological programming for public life is defective: Deprived of the male genetic heritage developed through millions of years of male bonding in hunting packs, women are misguided if the pursue strict equality." (350) During her years as an advocate and law professor, Ginsburg also wrote many law review articles delineating her position on gender equality, which she grounded in the doctrine of equal protection. She consistently maintained that most gender-based distinctions were unfair to both men and women. More importantly, Ginsburg argued, most gender-based distinctions were repugnant to the Constitution (1980, 1978b, 1975, 1971). Her conception of unconstitutional "gender-based" distinctions encompasses reproductive rights, including the right to obtain an abortion. Ginsburg would ground reproductive rights in the doctrine of equal protection, rather than privacy doctrine (Ginsburg 1992, 1985).

Later, Ginsburg articulated her views in arguing several landmark cases before the United States Supreme Court. In the 1971 brief submitted on behalf of appellant Sally Reed, for example, Ginsburg insisted that an Idaho statute mandating that, where otherwise similarly situated, males must be given preference over females in being designated estate administrators offended the Equal Protection Clause of the Fourteenth Amendment. Ginsburg argued that statutory gender distinctions of the kind at issue in this case perpetuated the subordination of women to men, meriting the designation of gender as a suspect classification. Ginsburg continued, arguing that it ". . .is presumptively impermissible to distinguish on the basis of an unalterable identifying trait over which the individual has no control and for which

he or she should not be disadvantaged by the law."[3] Statutory discrimination based on gender was, she maintained, comparable to statutory discrimination based on race. Therefore, Ginsburg argued, gender discrimination claims warranted application of the most rigorous judicial inquiry reserved for review of race discrimination claims.

While sitting on the Court of Appeals for the District of Columbia Circuit, Judge Ginsburg wrote 253 majority opinions, 31 concurring opinions, and 17 dissenting opinions. Only two of these, both majority opinions, dealt with gender issues. Neither case, however, turned on analysis of the equal protection requirement. Judge Ginsburg did write opinions in two cases that raised equal protection questions, both of which focused on racial discrimination.

Although she wrote no opinions addressing gender-based equal protection claims while sitting on the Court of Appeals for the District of Columbia Circuit, Judge Ginsburg did hear oral argument in one such case early in her tenure on the bench. In *Givens v. United States Railroad Retirement Board* (1983), a three-judge panel rejected a challenged to a modification of the retirement annuity program for railroad employees as violative of equal protection and due process under the Fifth Amendment. A provision of the Railroad Retirement Act mandated the reduction of railroad annuity payments to married retirees by the amount of the Social Security benefit payment received by the spouse of the annuitant. Senior District Judge Van Pelt wrote for a unanimous bench, noting that the provision at issue was designed to preserve the solvency of the railroad pension program. The purpose of the statute at issue, then, was non-discriminatory. Further, the court held that this distinction did

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[3] *Reed v. Reed* 404 U.S. 71 (1971). Brief for Appellant.

not constitute invidious gender-based discrimination because the statute placed limits on annuity benefit payments to both male and female railroad retirees with spouses, neither favoring nor disfavoring one gender over the other.

Although the absence of gender-based equal protection opinions written by Ginsburg at the Court of Appeals level may seem striking initially, upon investigation this is unremarkable. Between 1980 and 1993, Ginsburg's duration of service on the bench, only seven gender-based equal protection cases were heard in the District of Columbia Circuit. Judge Ginsburg was assigned to hear only one of these cases. It is not unusual that a senior judge wrote the opinion for the court in that case, rather than assigning the opinion to a junior member of the panel like Judge Ginsburg. Moreover, it is important to remember that the District of Columbia Circuit hears a ". . .high volume of regulatory cases that are not conducive to broad constitutional thinking." (Idelson 1993: 1570-1) The District of Columbia Circuit in particular, then, appears to be less likely to hear cases raising this type of constitutional question than other circuits.

Most recently, as a Supreme Court Justice she has emerged as a leading proponent of an increasingly rigorous standard of review for gender equality. Through the October 1999 Term, Justice Ginsburg has written 62 majority opinions, 41 concurring opinions, and 39 dissenting opinions.[4] Equal protection questions were at issue in nine of these opinions.[5] Of

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These statistics are compiled from the November *Harvard Law Review* volumes for each year of Justice Ginsburg's service on the Supreme Court.

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This includes one instance where Ginsburg concurred in the judgment, but chose not to write a separate opinion further explaining her position.

these opinions only one, her majority opinion in *United States v. Virginia* (1996), addressed an issue of gender-based equal protection. In that landmark case, the Supreme Court invalidated the single-sex admissions policy of the Virginia Military Institute, a state-supported school, on equal protection grounds.

Although she has written only one gender equality opinion from the Supreme Bench thus far, it is an important one fraught with implications. To many observers, the standard of review articulated in Justice Ginsburg's majority opinion in *Virginia* appears to move beyond intermediate scrutiny and to approach the level of strict scrutiny accorded racial equality. Specifically, in his criticism of this approach in his dissenting opinion in *Virginia*, Justice Antonin Scalia described the Court's rationale as ". . . sweeping[,] . . . a redefinition of intermediate scrutiny that makes it indistinguishable from strict scrutiny." (518 U.S. 515, 596) In a concurring opinion, Chief Justice William Rehnquist chided the majority for deviating from the definition of the intermediate scrutiny standard traditionally employed by the Court, surmising that Justice Ginsburg's opinion ". . .introduces an element of uncertainty respecting the appropriate test." (*Id.*, at 559) Constitutional scholars remain divided on the question of whether or not Ginsburg's opinion in *Virginia* effectively raises the standard of review applied in gender equality cases to one that cannot be differentiated from strict scrutiny (Yarbrough 2000; Bowsher 1998; Ellington et al 1998; Halberstam 1998; Karst 1998; Smiler 1998; Caslin 1997; Kupetz 1997).

Justice Ginsburg provides a good example of a Justice articulating a position as both scholar and jurist. Although other Justices have argued high-profile cases before the Supreme

Court as advocates prior to joining the bench, such as Louis Brandeis[6] and Abe Fortas,[7] none has articulated a rationale as clearly as has Justice Ginsburg. Justice Thurgood Marshall also delineated a jurisprudential rationale as an advocate before the Court,[8] and it accepted his race-based equal protection rationale prior to his joining the bench. Similarly, the High Court adopted several elements of the gender-based equal protection rationale offered by Ginsburg before she became a Supreme Court Justice. Marshall (Tushnet 1997; Bland 1973) and Ginsburg both broke new doctrinal ground and contributed to the formulation of specific areas of jurisprudence as both advocates and Justices. One can draw related, though less direct, parallels from the career of Justice Ginsburg to the careers of Justices Brandeis and Fortas.

It is important to note that Brandeis' career as an advocate notably produced the "Brandeis Brief,"[9] which was certainly a significant contribution. However, the nature of his

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Muller v. Oregon (1908). The Supreme Court held that an Oregon state law imposing a ten-hour work day limitation for women but not men did not offend the Due Process Clause of the Fourteenth Amendment.

7

Gideon v. Wainwright (1963). The Supreme Court held that state courts were required by the Sixth Amendment to appoint counsel to represent indigent defendants charged with felonies.

8

Most notably, Marshall argued *Brown v. Board of Education* (1954), in which the Supreme Court held that racial segregation of public schools violated the Equal Protection Clause of the Fourteenth Amendment.

9

The "Brandeis Brief" is a legal brief that includes sociological data in addition to legal rationale to support one's legal argument. In *Muller v. Oregon*, for example, Brandeis' brief offered sociological and medical data to support the statutory imposition of maximum work hour restrictions for women but not for men. The data he cited supported the position that such restrictions were necessary health and welfare measures

influence in this regard differs from Ginsburg's and Marshall's significant impact on an area of jurisprudence as both an advocate and Justice.

Louis Brandeis made another significant contribution prior to joining the Supreme Court. In 1890, Brandeis and Samuel Warren co-authored a law review article in which they maintained that the ". . . protection of the person, and for security to the individual . . . the right 'to be let alone. . .'" should become the focus of increased judicial scrutiny (195). In 1928, Justice Brandeis again delineated this view of privacy in his well-known dissent in *Olmstead v. United States*. Brandeis' views with respect to the nature and importance of the right of privacy, a right not expressly enumerated in the Constitution, was influential in that Brandeis recognized that the Court's interpretation of the Constitution must not be so rigid and static that its provisions effectively become irrelevant to modern society.

Brandeis, like Ginsburg, articulated his views on one field of jurisprudence both before and after joining the Supreme Court, and exerted influence on the development of that area of Supreme Court doctrine. However, the nature of Brandeis' influence in this regard was more limited than that of Ginsburg's. Brandeis' influence on privacy doctrine can be traced primarily to a significant law review article and an important dissenting Supreme Court opinion. Ginsburg's influence on equal protection doctrine, however, can be traced to a number of oral arguments and briefs, law review articles, and her leadership in forging a landmark Supreme Court decision.

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designed to protect women.

Ginsburg and the Role of the Jurist

Ginsburg's conception of the role of the jurist is reflected in the equal protection jurisprudence she advanced as a law professor and advocate. Her criticism of the sweeping scope of the High Court's opinion in *Roe v. Wade* (1973) is consistent with an incremental view. As an advocate, her litigation strategy reflected an incremental approach as she sought to establish and then build upon precedent. Briefs she submitted to the Supreme Court also reveal an incremental vision of the judicial function. For example, when it became clear that she would be unable to obtain a precedential majority to adopt the strict scrutiny standard of review for gender discrimination claims, Ginsburg urged the Court to move beyond the permissive rational basis standard and offered a middle position – intermediate scrutiny – which was adopted by the High Court.

Incrementalism is also reflected in Ginsburg's judicial opinions. Her majority opinion in *United States v. Virginia*, as Sunstein (1999), for example, has observed, was a minimalist decision. It was confined to the facts of the case before the Court and did not offer commentary on broader issues or seek to formulate legal theory. Moreover, the *Virginia* opinion reflects incrementalism in that the standard of review articulated by Justice Ginsburg – controversy over the appropriate label aside – appears to move beyond the classic definition of intermediate scrutiny employed by the Court. Arguably, this incrementally moves the standard of review slightly beyond intermediate scrutiny, inching toward strict scrutiny. The gradual modification of the standard of review over time appears to be representative of Ginsburg's conception of the judicial function.

In her confirmation hearing before the Senate Judiciary Committee in 1993, Judge

Ginsburg described her view of the role of the jurist:

> My approach [to judging] . . . is neither liberal nor conservative. Rather, it is rooted in the place of the judiciary, of judges, in our democratic society. The Constitution's preamble speaks first of "We, the People," and then of their elected representatives. The judiciary is third in line and it is placed apart from the political fray so that its members can judge fairly, impartially, in accordance with the law, and without fear about the animosity of any pressure group. (Mersky, 257)

> Judges in our system are bound to decide concrete cases, not abstract issues. Each case comes to court based on particular facts and its decision should turn on those facts and the governing law, stated and explained in light of the particular arguments the parties or their representatives present. 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. (258)

Ginsburg clearly does not believe that judicial activism is an appropriate component of the duty of the judge. Rather, she continued, the judge is not ". . .appointed to apply his or her personal values, but [to] . . .apply the values that come from the Constitution, its history, its structure, the history of our country, the traditions of our people." (333)

The nature of the judicial function espoused by Ginsburg is compatible with the position articulated by many constitutional scholars and jurists. Wechsler, for example, has observed that the judicial obligation ". . .is not that of policing or advising legislatures or executives. . . ." (1961: 9) Rather, he explained, its duty is to decide cases that have come properly before it and to dispense justice with neutrality.

In his well-known dissent in *West Virginia Board of Education v. Barnette* (1943), Justice Felix Frankfurter insisted that all judges, irrespective of religious affiliation or ethnicity, for examples, are bound by the same Constitution to do impartial justice:

> As a member of this Court I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard. The duty of a judge who must decide which of two claims before the Court shall prevail. . .is not that of an ordinary person. It can never be emphasized too much that one's own opinion about the wisdom or evil of a law should be excluded altogether when one is doing one's duty on the bench. (319 U.S. 624, 646)

The separation from the political process and "the pressures of the day," Frankfurter explained, enables jurists to ". . .take a view of longer range than the period of responsibility entrusted to Congress. . . ." (*Id.*, at 665)

Similarly, Sunstein, Cox (1987, 1976), Ely (1980), and Bickel (1962) have maintained that a judiciary characterized by restraint, rather than activism, both comports with the proper place of the judiciary in the American system of governance created by the Framers of the Constitution and invigorates the democratic process. Ely, for example, surmised that judicial review ought to be exercised cautiously, with substantive decisions left to the branches of government constitutionally empowered to make and execute the law. This is representation-reinforcing judicial review, as opposed to the value-protecting judicial review concerned with substantive outcomes associated with judicial activism, because the political branches are directly accountable (and responsive) to the people. Cox warned that ventures into policy-making may erode the Court's legitimacy by appearing overtly political. More importantly, he feared that judicial activism had the potential to be democracy-eroding, because it may result in increased reliance upon the judiciary rather than the political branches to make public policy.

The careful balance jurists are asked to strike is not lost on those sitting on the bench.

Judge Learned Hand observed that judges are "in a contradictory position," pulled in oppositional directions simultaneously (1960: 109) At once the judge is expected to be neutral and impartial, leaving subjective judgments to the political branches, which reflect the will of the people, while also ". . .put[ting] into concrete form what that will is, not by slavishly following words, but by trying honestly to say what was the underlying purpose expressed. . ." by the political branches. (109) In doing so, Hand argued that the judge must never substitute his will, even if it may seem more just, for the will of the people, represented by the action of the legislative of executive branch. "Otherwise," he maintained, "it would not be the common will which prevails, and to that extent the people would not govern." (109)

Justice Benjamin Cardozo also advanced a restraintist view of the judicial function, observing that without neutrality and impartiality, jurisprudence ". . .incurs the risk of degenerating into . . . a jurisprudence of sentiment or feeling." (1921: 106) Cardozo explained that the judge, like the legislator, ". . .is legislating within the limits of his competence. . . .[T]he limits for the judge are narrower. He legislates only between the gaps. He fills the open spaces in the law." (113) Legislating between the gaps, moving cautiously and deliberately, cognizant of the relationship between the judiciary and the political branches, encapsulates the restraintist conception of the judicial function espoused by Justice Ginsburg as well.

Methodology

Constitutional scholars agree that Ruth Bader Ginsburg has made significant, unique

contributions to the evolution of gender-based equal protection jurisprudence (Daughtrey 2000; Yarbrough 2000; DeJong and Smith 1999; Sunstein 1999; Ellington et al 1998; Gunther 1998; Halberstam 1998; Karst 1998; Merritt 1998; Seymour 1997; Buergenthal 1996; Scales 1986). Smiler (1998), for example, has noted that upon appointment to the Supreme Court, Justice Ginsburg joined Justice Sandra Day O'Connor as one of only two women appointed to the Supreme Bench. Despite this noteworthy achievement, he observed that ". . .this judicial milestone in Supreme Court history pales in comparison to the myriad of landmark gender discrimination cases Justice Ginsburg had argued before the Supreme Court as the Nation's primary influential women's rights litigator." (541) Similarly, Pressman (1998) has noted that when Ginsburg began her legal career ". . . she encountered pervasive gender bias that reflected centuries of cultural stereotyping that prevented women from fully participating in society. As a result, she worked to clear away the cultural debris during the 1970's, and laid a foundation for a whole new area of jurisprudence." (335-6)

As noted previously, Ginsburg's equal protection jurisprudence – delineated as an advocate, scholar, and jurist – illustrates her conception of the judicial function. The analysis of the doctrinal position she has advanced, emphasizing gender-based equal protection, will be conducted via examination of briefs and oral arguments of cases she presented to the Supreme Court, as well as law review articles she wrote during this period. The equal protection opinions written by Ginsburg will also be systematically analyzed and evaluated, focusing on her influential opinion for the Court in *United States v. Virginia*.

The qualitative methodological approach applied in this study is consistent with a well-established body of political science literature regarding judicial biography (Bland 1973;

Brisbin 1997; Davis 1989; Howard 1971, 1968; Kalman 1990; Mason 1956, 1933; Maveety 1996; Newmyer 1985; Pohlman 1984; Strum 1993; Swisher 1969, 1935; Thomas 1960; Tushnet 1997; Yarbrough 1995, 1992, 1988). According to Howard (1971, 704-705), judicial biography can be conceived as ". . .a life-study of a judge written substantially as a case-history in the judicial process. . . [wherein]. . .the prime object is to describe and relate the judge's personality, background, and belief system to his conduct on the bench and impact on the law and politics of his time." A judicial biography, Howard explained, is essentially a case study in judicial politics, that is, an empirical study that seeks to ". . . describ[e] and explor[e] the linkages between person, process, and policy by eclectic techniques of legal analysis. . . [and] historical inference. . . ." (708) This conception of judicial biography and the methodology employed by political scientists conducting this type of research serve as models for the study undertaken here.

Although this study includes biographical information related to her public life, this dissertation is not designed to be a full-scale biographical study of Ruth Bader Ginsburg, nor is it intended to be a psychoanalysis of her judicial decision-making. Rather, this dissertation is confined to Justice Ginsburg's advocacy and jurisprudence with respect to the doctrine of equal protection – specifically, gender-based equal protection. It explores the extent of her influence on the evolution of this field of jurisprudence, as well as how her doctrinal position illustrates her view of the judicial function. This approach follows a methodological tradition consistent with the qualitative scholarship conducted by Howard, Davis, and Yarbrough, among others. It focuses on the position Ginsburg has communicated through scholarly publications, briefs and oral arguments, speeches, and judicial opinions written through the

October 1999 Term. This study will also examine scholarly commentary by political scientists and legal scholars.

The chapter outline[10] is as follows: This Introductory Chapter provides an overview of the scope of the dissertation and the importance of studying the public life of Justice Ginsburg, a review of appropriate political science literature regarding judicial biography and methodology, a brief overview of Ginsburg's conception of the judicial function, and relevant biographical information as it relates to her public life.

The Second Chapter examines Ginsburg's legal scholarship delineating her view of equal protection, analyzing law review articles she wrote as a law professor.

The Third Chapter focuses on Ginsburg's career as an advocate, analyzing briefs and oral arguments of cases she presented to the Supreme Court. It also explores the rise of the equal protection doctrine as a vehicle for addressing problems of discrimination.

The Fourth Chapter focuses on Ginsburg's tenure on the federal bench. The equal protection opinions Ginsburg wrote as a Court of Appeals Judge are analyzed. Ginsburg's nomination and confirmation to the Supreme Court are reviewed. The equal protection opinions written by Justice Ginsburg, excluding the majority opinion in *United States v. Virginia*, are also analyzed.

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In December 2000, the Supreme Court took jurisdiction in *Bush v. Gore* in order to resolve questions surrounding the outcome of the recently completed presidential election. Inclusion of this important decision in the body of this dissertation, which was announced after the principle research had been conducted, was not possible. The Court's important decision in that case, however, merits inclusion. Analysis of the decision in *Bush*, emphasizing Justice Ginsburg's powerful dissenting opinion, is provided in the Appendix.

The Fifth Chapter focuses on the landmark majority opinion written by Justice Ginsburg in the sole gender-based equal protection case to come before the Court during her tenure through the end of the 1999 Term. It also examines the litigation strategy and briefs submitted to the Court in *United States v. Virginia*. The impact of the *Virginia* decision is also assessed, evaluating scholarly commentary on Ginsburg's opinion. The precedential weight of the decision is also evaluated by examining lower court responses, and whether it is broadly applied precedent or whether its application is limited, confined largely to the facts of the case.

The Sixth Chapter concludes the study. It assesses the extent to which Ginsburg's equal protection jurisprudence reflects her view of the role of the jurist. It also evaluates the significance of Justice Ginsburg's career as an advocate and jurist with respect to her impact on the development of gender-based equal protection jurisprudence.

Biographical Sketch

Joan Ruth Bader was born on March 15, 1933 in Brooklyn, New York (<http://www.oyez.nwu.edu>).[11] Her father emigrated to the United States from Russia at the age of 13 (Halberstam). Her maternal grandparents emigrated to the United States from a small town near Cracow, Poland four months before her mother was born (Halberstam). In her testimony before the Senate Judiciary Committee in 1993, Ginsburg noted that her father and grandparents ". . . had the foresight to leave the old country, when Jewish ancestry and faith meant exposure to pogroms and denigration of one's human worth." (Mersky, 256)

[11] Hereinafter Oyez.

She, like many whose families have recently emigrated, observed that the great fortune she has enjoyed during her life "could only happen in America." (256) Ginsburg recounted for the Committee how discrimination had touched her life as a child of Jewish immigrants growing up in the 1940s: "I have memories as a child, even before the war, of being in a car with my parents and passing a place in [Pennsylvania] . . ., a resort with a sign out front that read: 'No Dogs or Jews allowed.' . . . One couldn't help but be sensitive to discrimination, living as a Jew in America" during World War II. (345)

"Neither of my parents had the means to attend college," Ginsburg explained, "but both taught me to love learning, to care about people, and to work hard for whatever I wanted or believed in." (255-6) Nathan Bader was a furrier and later worked in a men's clothing store. Celia Amster Bader did not work outside the home, but wanted her daughter to be independent, and to develop her own ideas and obtain a good education. Some of Ginsburg's earliest memories are of accompanying her mother to the library, and of her mother shopping for bargains in order to save money for her college education (Halberstam).

In high school, Ginsburg was editor of the school newspaper, a member of the "Go-Getters" pep club, and a baton twirler. In June 1950, she graduated sixth in her high school class. This milestone in her life, however, was marred by immense personal grief. The day before the graduation ceremony, her mother died of cancer. Although she lost her mother early in her life, Ginsburg's mother was clearly a very influential figure. Of her mother, Ginsburg has noted: "I think of her often when I am in challenging situations that compel a top performance." (Halberstam, 1443)

Ginsburg attended Cornell University on scholarship, and also held part-time clerical

jobs to earn extra money. She was elected to Phi Beta Kappa (junior year) and Phi Kappa Phi (Mersky). In 1954, she graduated from Cornell first in her class, with High Honors in Government and Distinction in all subjects (Halberstam).

The same month she graduated from college, Ruth Bader married Martin Ginsburg, a first year law student at Harvard, whom she had dated during their undergraduate years at Cornell. Following their marriage, the Ginsburgs moved to Fort Sill, in Lawton, Oklahoma, where Martin served two years in the Army. In Oklahoma the future advocate for gender equality and Supreme Court Justice encountered gender discrimination on the job market. Although she qualified for a higher level job, Ginsburg was given a lower-level typist position with the Social Security Administration because she was noticeably pregnant and her supervisor concluded that Ginsburg's condition would prevent her from traveling to a required training session (Halberstam). A pregnant colleague who concealed her condition, however, was given the higher-level position (Oyez). In July 1955, Ginsburg gave birth to a daughter, Jane (Halberstam).

In 1956, the Ginsburgs returned to the northeast to attend Harvard Law School. Ginsburg was one of nine female students in a class of more than 500 (Gilbert and Moore 1981). Somewhat of a novelty during the period Ginsburg attended law school, female students were often singled out by professors. At a reception for new students hosted by Dean Erwin Griswold, for example, female students were asked how they felt about occupying spaces that could have gone to qualified, deserving male students. Interestingly, Ginsburg herself has commented that although women in law school were more conspicuous than men during this period, she did not perceive intense resentment or hostility:

> If you were a male law student you could blend into the crowd, and if you weren't so well prepared you could hide from the professor's view on a back bench. But if you were one of two women in a section, you felt. . . that you were in plain view, not only in the eye of the instructor but also in full vision of your classmates. You were on your guard in a way that women law students today are not when there are over a hundred in each class. It wasn't harassment as much as it was fun and games: Let's call on the woman for comic relief. Most of the professors didn't do that, but some of them did, and they did it pointedly.
>
> There were other petty annoyances. At that time Harvard kept one room in the Lamont Library closed to women. It was symbolic of the old days, but it happened to be the old periodical room and I had to check a reference in an old periodical for the *Law Review*. I went over there rather late at night. The man at the door barred my way in. I said, "Well, I'll stand at the door and you bring me the magazine and I'll check the reference." He wouldn't do it. I had to call the *Law Review* and say, "You'll have to send a man for this job." It was a trivial thing, as were other encounters of a similar kind at law school. There was no outrageous discrimination but an accumulation of small instances. (Gilbert and Moore, 157-8)

Although she recounts ". . . many indignities one accepted as just part of the scenery, just the way it was. . ." (Mersky, 340) while she was in law school, generally, Ginsburg has indicated that she ". . . didn't have difficulty being accepted. . ."in law school, insisting – "petty annoyances" notwithstanding – that she was never ". . . treated as a person of lesser worth . . ." by professors and students (Gilbert and Moore, 156).

Ginsburg excelled academically and was elected to the Harvard Law Review. Ginsburg has noted that attending law school with the additional demands of being a wife and mother was manageable in large part because her husband has always been her "biggest supporter" (157), sharing cooking and other domestic duties. Additionally, her husband and in-laws have always been supportive of her academic and professional pursuits: "I have had the great fortune to share life with a partner . . . who believed . . .when we met, and who

believes today, that a woman's work, whether at home or on the job is as important as a man's. . . . I became a lawyer because Marty and his parents supported that choice unreservedly." (Mersky, 256)

In addition to the demands associated with attending law school, her husband developed testicular cancer and underwent surgery and radiation treatment (Oyez). Ginsburg continued to care for their small daughter, maintain her studies, and care for her husband. She also attended her husband's classes and took notes for him, and typed his papers as he dictated them to her (Oyez). He recovered from cancer and graduated from Harvard Law School in 1958.

Upon graduation, Martin accepted a position with a law firm in New York. In order to keep the family under one roof and avoid lengthy commutes, she transferred from Harvard to Columbia Law School for her third year. She was elected to the Columbia Law Review as well and, in 1959, Ginsburg graduated from Columbia at the top of her class (Oyez).

Following graduation, Ginsburg again encountered gender discrimination as she sought employment. Ginsburg's positive experience in law school may have been a mixed blessing. The comparatively tolerant atmosphere at Harvard, she surmised, ". . .may have been deceptive in that it didn't prepare me for the job market as it then was." (Gilbert and Moore, 156) For example, Harvard Law School Dean Albert Sachs and Columbia Law Professor Gerald Gunther both recommended Ruth Bader Ginsburg to Justice Felix Frankfurter for a position as a law clerk. Although Frankfurter acknowledged that her credentials were impeccable, nevertheless he declined to offer Ginsburg a clerkship, admitting that he was not ready to hire a female law clerk (Gunther 1998; Lewis 1993a). Similarly,

Judge Learned Hand declined to offer Ginsburg a clerkship, fearing that his sometimes vulgar language might be offensive to a lady (Pressman).

In addition to being denied prestigious clerkships with legendary jurists, Ginsburg was unable to secure a position with a law firm, despite her distinguished academic record. Although she was interviewed by many firms, none extended an offer of employment. A number of factors contributed to this, Ginsburg explained: ". . .[T]o be a woman, a Jew and a mother to boot, that combination was a bit much. Probably motherhood was the major impediment. The fear was that I would not be able to devote my full mind and time to a law job." (Gilbert and Moore, 158)

With assistance from Professor Gunther, Ginsburg obtained a clerkship with U.S. District Judge Edmund L. Palmieri (Gunther). Sensitive to preconceived notions about working women (particularly working mothers) pervasive during this period, Ginsburg set out to prove that neither her gender nor her family commitments would adversely impact her performance at work. Ginsburg admitted that she ". . . probably worked harder than any other law clerk in the building," staying late when needed (and when it was not needed), working on Saturdays, and bringing work home with her (Gilbert and Moore, 158).

After completing a federal clerkship in 1961, in part based on strong recommendations from Judge Palmieri, she did receive job offers from many law firms. Ginsburg, however, chose to accept a position in academia. She became a research associate for the Project on International Procedure at Columbia Law School, and later served as the Project's Associate Director. The Project, funded by the Carnegie Foundation, was designed to research civil procedure in legal systems in other countries, and to formulate recommendations to improve

the American civil procedure rules for transnational litigation (Halberstam). Ginsburg studied Swedish for several months, and traveled to Sweden twice to conduct research (Gilbert and Moore). Ginsburg brought her daughter with her each time, and her husband visited them during his vacation (Gilbert and Moore). She collaborated with a Swedish judge and published a book on Swedish civil procedure. Ginsburg later received an honorary doctorate from the University of Lund (Halberstam), where she had conducted most of her research (Gilbert and Moore).

In 1963, Professor Ginsburg joined the faculty at Rutgers Law School (Mersky), becoming the second woman ever to teach there (Ginsburg 1997). Despite arriving at Rutgers the same year the Equal Pay Act was signed into law, Ginsburg did not receive compensation equal to that of her male colleagues. The Dean cited limited state resources for the disparity, also noting that ". . .it was only fair to pay [her] . . . modestly because [her] husband had a very good job." (Ginsburg, 15) While teaching at Rutgers, she became pregnant a second time. Mindful of her previous employment experience Ginsburg, who lacked tenure, feared that her annual contract might not be renewed if her condition became known (Ginsburg). She concealed her pregnancy throughout the spring semester by wearing loose-fitting clothes borrowed from her mother in-law. In September 1965, she gave birth to a son, James (Halberstam).

In the late 1960s Professor Ginsburg became involved in the women's rights movement. Sex discrimination complaints were brought to the New Jersey affiliate of the American Civil Liberties Union (ACLU). These complaints were referred to Ginsburg because, as she explained, ". . . sex discrimination was regarded as a woman's job." (Gilbert

and Moore, 153) Additionally, her law students were interested in presenting a sex discrimination program for Law Day. Since Professor Ginsburg ". . .had not studied [that area of law] in a disciplined way. . ." (153), she went to the library to conduct research. For Ginsburg, this was a watershed experience:

> In the process, my own consciousness was awakened. I began to wonder, How have people been putting up with such arbitrary distinctions? How have I been putting up with them? I can't claim I suddenly saw a bright light one morning. It was a gradual process. Both the ACLU and my students prodded me to take an active part in the effort to eliminate senseless gender lines in the law. Once I became involved, I found the legal work fascinating. . . .(Gilbert and Moore, 153)

Ginsburg became interested in this area of law, then, almost by accident. That her personal experiences with discrimination did not pique her interest in gender equality jurisprudence – or "awaken her consciousness" – as these other experiences did is striking.

Ginsburg herself has experienced discrimination because of her gender. Growing up as the daughter of Jewish immigrants undoubtedly shaped Ginsburg's perspective as well. Her personal experiences alone did not produce an outspoken, radical activist. Rather, Ginsburg's response to her own experiences with prejudice was one of accommodation. Instead of challenging instances of discrimination and stereotypes directly, she chose to avoid direct confrontation. Aware of the stereotypes against which she had to fight, Ginsburg worked harder than most of her colleagues, seeking to dispel those preconceptions with the quality of her work. She chose not to challenge the Establishment head-on. Instead she worked hard to become part of it and to be accepted based on her ability. It was not her own experience but a combination of external factors that prompted Ginsburg to challenge the

Establishment and the stereotypes that shaped it. Once her consciousness was raised, Ginsburg's activism was not radical. Rather, she sought incremental change, making progress step by step as an Establishment insider. Significantly, she focused on gender equality, rather than women's equality, which also reflects accommodation. Seeking to eliminate stereotypes about both men and women is not divisive and does not constitute a direct assault on the Establishment.

Once Ginsburg joined the cause seeking gender equality, she quickly became one of the movement's leading figures. In 1971, following the Supreme Court victory in *Reed v. Reed*, the ACLU established the Women's Rights Project in order to ". . .build upon the *Reed* victory." (Gilbert and Moore, 153) Ginsburg became the Project's founding Co-Director. Their principal objective was, as Ginsburg explained, to educate decision-makers about sex stereotyping ". . .and how the notion that men are this way. . .and women are that way . . . ends up hurting both sexes." (153) Their strategy was ". . . to try to find the right cases, bring them before the most sympathetic tribunals, and help develop Constitutional law in the gender classification area step by step." (153)

This affiliation provided Ginsburg an opportunity to formulate litigation strategy, write briefs, and argue several cases before the Supreme Court between 1973 and 1976 (Oyez). Ginsburg and her colleagues sought to achieve gender equality under the law by departing from the strategies employed by previous generations of advocates. Prior to the 1970s, challenges to the constitutionality of gender-based distinctions typically invoked the Due Process or Privileges or Immunities provisions of the Fourteenth Amendment. Gender discrimination challenges invoking equal protection were not unknown during this period.

However, there was no systematic effort to challenge gender distinctions under the equal protection guarantee. Ginsburg diverged from this pattern, bringing gender discrimination claims under the Equal Protection Clause as part of a broader, incremental litigation strategy.

In 1972, Ginsburg joined the faculty at Columbia Law School, becoming the first tenured female on Columbia's law faculty. While at Columbia, she divided her time between teaching law and writing law review articles, and advocacy on behalf of the Women's Rights Project. Ginsburg served as both Counsel to the Project and General Counsel to the ACLU until 1980 (Mersky).

In the late 1970s President Jimmy Carter announced his intent to make merit-based appointments to increase the number of women on the federal bench. Professor Ginsburg submitted an application and was considered for a seat on the Court of Appeals for the Second Circuit. The screening committee, however, did not recommend that Ginsburg's name go forward for nomination. Ginsburg also applied for a seat on the District of Columbia Circuit (Halberstam). In 1980 President Carter appointed her to the Court of Appeals for the District of Columbia Circuit.[12]

Ginsburg served on the Court of Appeals until her appointment to the Supreme Court in 1993.[13] President Clinton offered three reasons for selecting then-Judge Ginsburg to succeed Justice White: her reputation as a progressive, balanced jurist; her path-breaking role as an advocate on behalf of gender equality; and her potential to serve as a consensus-builder

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12 Ginsburg took the oath of office on June 30, 1980 (<http://www.supct.law.cornell.edu/supct>). Hereinafter Cornell.

13 Ginsburg took the oath of office on August 10, 1993 (Cornell).

on the High Bench (Mersky, 10).

The next chapter focuses on Ginsburg's scholarship, emphasizing her contributions to gender equality.

CHAPTER TWO:
GINSBURG AS CONSTITUTIONAL SCHOLAR

Ruth Bader Ginsburg's first academic position, as noted previously, was that of a research associate with Columbia Law School's Project on International Procedure. This focused Ginsburg's scholarly pursuits on comparative law, particularly civil procedure in Sweden. Given this background, it is not surprising that as a law professor she directed her early academic publication efforts toward comparative law. As her research and professional agenda began to take shape, gender equality under the law took on greater importance. As explained in the preceding chapter, Professor Ginsburg did not become interested in gender discrimination law until the late 1960s, and did not begin to publish journal articles in this field until 1971.

During her years as a law professor, Ginsburg established herself in this field of law, publishing 24 journal articles relating to gender equality between 1971 and 1980. Although Ginsburg's seminal scholarship was published during this period, her publication efforts did not cease upon her appointments to the Court of Appeals for the District of Columbia Circuit in 1980 and the Supreme Court in 1993. Ginsburg has continued to publish scholarly works from the federal bench, although with less frequency. Several common themes recur throughout these publications. In this chapter, I draw selectively on a large number of these articles, most of which were published during the 1970s, identifying and analyzing central

points made by Ginsburg.

To achieve gender equality under the law, creating a "system of genuine neutrality" (Ginsburg 1977c: 136),Ginsburg maintained that two options could be pursued. The ideal option was working to ratify the Equal Rights Amendment (ERA). Once adopted, the ERA would eliminate – with few exceptions – gender-based distinctions in the law. The less-preferred – and less predictable – option was litigation, bringing gender-based discrimination claims under the Equal Protection Clause of the Fourteenth Amendment. Case-by-case litigation would advance gender equality incrementally, although it would require reliance on favorable judicial interpretation (Ginsburg 1978c). This chapter addresses Ginsburg's scholarly publications delineating her views on the ERA; equal protection and gender equality; and equal protection and reproductive rights.

The Equal Rights Amendment

Ginsburg has consistently maintained that an Equal Rights Amendment[1] remains a necessary addition to the Constitution, arguing that its adoption ". . . would provide a firm root for . . . [gender equality] doctrine in the nation's fundamental instrument of government." (Ginsburg 1978a: 47) In 1977, she observed that although the Supreme Court had begun to invalidate gender-based classifications during the 1970s on equal protection

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1

The proposed amendment approved by Congress and sent to the states for ratification provided, in pertinent part, "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." Equal Rights Amendment,§ 1. (H.R. J. Res. 208, 92d Cong., 1st Sess. (1971); S.J. Res. 8, 92d Cong., 1st Sess. (1971)).

grounds, it did so on an ad hoc basis. The Court's resistance to formulating broader legal theory with respect to gender equality, she suggested, was institutional. The Court was moving cautiously in the gray area between ". . . constitutional interpretation (a proper judicial task) and constitutional amendment (a job for federal and state legislatures)." (Ginsburg 1977a: 72)

The Court's reluctance to act boldly, engendered by its cognizance of the role of the judiciary in the American system of governance, is evidenced by Justice Lewis Powell's concurring opinion in *Frontiero v. Richardson* (1973). In that opinion, he pointed out that the ERA had been approved by Congress and had been sent to the states for ratification, a process that was under way. The Court, Justice Powell counseled, must be cautious not to act ". . . prematurely[,] . . . pre-empt[ing] by judicial action a major political decision which is currently in the process of resolution. . . ." (411 U.S. 677, 692)

Justice John Paul Stevens maintained that the Equal Protection Clause of the Fourteenth Amendment protected women from arbitrary government-sponsored discrimination. Therefore, the addition of the Equal Rights Amendment to the Constitution was substantively unnecessary. Its primary significance, Justice Stevens suggested, would be symbolic. "Perhaps downgraded in . . . [Justice Stevens'] assessment," Ginsburg surmised, "is the formidable historical impediment to judicial declaration of the legal equality of men and women: the absence of any intention by 18th and 19th century Constitution makers to deal with gender-based discrimination." (Ginsburg 1977b: 1) Ginsburg believed that the adoption of the ERA would "remove the historical impediment" that many jurists perceived as a restraint on their behavior because the intention of the drafters of the Fourteenth Amendment and its

legislative history focused on eradicating racial, not gender, discrimination. Adopting an ERA, Ginsburg insisted, ". . . would add to our fundamental instrument of government a principle under which the judiciary may develop the coherent opinion pattern lacking up to now." (73)

The "historical impediment" associated with the Fourteenth Amendment was the product of the circumstances surrounding its ratification. Ginsburg pointed out that many feminists, "appalled by the text of the amendment," opposed its adoption (Ginsburg 1986: 41). Their opposition was engendered by the language of §2,[2] the only place in the Constitution where the word "male" appears. It appears three times, "each time in conjunction with the word 'citizens.'" (41) The "coupling of 'male' with 'citizens'" concerned feminists, suggesting to them that "the grandly general phrases of the . . . Amendment's Due Process and Equal Protection Clauses . . . would have, at best, muted application to women." (41) Protecting former slaves from government-sponsored racial discrimination, not advancing equality between men and women, Ginsburg noted, was the intent of the drafters of the Fourteenth Amendment, as evidenced by its legislative history (Ginsburg 1979a, 1979b, 1978a, 1978b, 1978c, 1977a, 1977b, 1975). The purpose of the Equal Rights Amendment was sex equality, a standard not specifically endorsed by the Constitution.

2

The U.S. Constitution provides, in pertinent part, " . . . [W]hen 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, or in any way abridged, . . . the basis of representation therein shall be reduced in the proportion which the number of male citizens shall bear to the whole number of male citizens twenty-one years of age in such State." U.S. Const. Amend. XIV, §2.

The criticism expressed by feminists during the ratification of the Fourteenth Amendment proved to be well-founded. An early example of the "muted application" of the Fourteenth Amendment to women was provided by the Supreme Court in 1874. Women were recognized as "persons" within the meaning of the Fourteenth Amendment in *Minor v. Happersett*. Chief Justice Morrison R. Waite, writing for the majority, concluded that women may also be citizens. Nonetheless, the Supreme Court unanimously held that the Privileges or Immunities Clause of the Fourteenth Amendment did not grant women the right to vote. The Chief Justice concluded that the ". . . Constitution has not added the right of suffrage to the privileges and immunities of citizenship as they existed at the time it was adopted." (88 U.S. 162, 171) Since women did not have the right of suffrage prior to ratification, women did not have the right of suffrage after ratification. Children, Chief Justice Waite observed, were also considered "persons" within the meaning of the Fourteenth Amendment, and they may also be citizens. However, he reasoned, no one would argue that the Fourteenth Amendment had extended the franchise to them.

Another example of the Court's unwillingness to extend Fourteenth Amendment protection to women was provided as late as 1947. In *Fay v. New York*, Justice Robert Jackson, writing for the majority, rejected a challenge to a statutory provision barring women from serving on juries. Ginsburg summed up Jackson's view of the limited application of the Fourteenth Amendment: "The Constitution . . . gave women the right to vote, but only that. In other respects, our fundamental instrument of government was thought an empty cupboard for sex equality claims." (Ginsburg 1979a: 163-4)

The adoption of an Equal Rights Amendment, she concluded, ". . . would give the

Supreme Court a more secure handle for its rulings than the fifth and fourteenth amendments pressed into service *faute de mieux* [for lack of something better]." (Ginsburg 1978b: 475) Further, the ERA would provide a more complete, comprehensive remedy for gender discrimination than the limited protection resulting from a series of ad hoc judicial decisions in cases bringing claims under the Fourteenth Amendment. (Ginsburg 1979a, 1973)

The Equal Rights Amendment was more specific than the equal protection components of the Fifth and Fourteenth Amendments. "With few exceptions relating to personal privacy and physical characteristics unique to one sex," Ginsburg insisted, "the constitutional mandate would be absolute if the amendment is adopted." (Ginsburg 1971: 361) "With an ERA on the books," Ginsburg suggested, "we may expect Congress and state legislatures to undertake in earnest, systematically, and pervasively, the law revision so long deferred. History should teach that the entire job is not likely to be done until the ERA supplies the signal. In the event of legislative default, the courts will be guided by a constitutional text clearly and cleanly in point." (Ginsburg 1977a: 73)

Ginsburg has recounted an incident that took place during her presentation of oral argument before the Supreme Court in *Duren v. Missouri* (1979) that reflects a common perception about the equal rights movement during the 1970s. She had just completed her argument and was satisfied that it had gone well. As she was about to take her seat, Justice William Rehnquist asked, "You won't settle for putting Susan B. Anthony on the new dollar then?" The adoption of the Equal Rights Amendment, Ginsburg insisted, would demonstrate ". . . that a genuine sex-equality principle means tokens will not suffice. In that respect, the ERA is symbolic, indicative of a society in which men and women are equally visible and

stand side by side, with neither in the shadow of the other." (Ginsburg 1979b: 945)

Ginsburg predicted that ". . . major legislative revision [would not] . . . occur without the impetus of [an equal rights requirement in the Constitution] . . . if past experience is an accurate barometer." (Ginsburg 1973: 1014) Many of the ERA's opponents repudiated the notion of altering the Constitution as a means of achieving gender equality, opting instead for statutory restrictions against gender discrimination. However, Ginsburg argued, that alternative had provided limited relief. She noted that the Equal Pay Act of 1963, Title VII of the Civil Rights Act of 1964, and the 1972 Education Amendments to Title IX were all duly enacted federal statutes, yet considerable gender discrimination persisted.

Opponents of the ERA also suggested bringing litigation under the Equal Protection Clause of the Fourteenth Amendment. Although this would be the ultimate remedial avenue Ginsburg would pursue as an advocate, it, too, had proved an inadequate remedy. Litigating under the Fourteenth Amendment did not result in victory until 1971, after nearly a century of challenging arbitrary gender distinctions in the law.

Legislation introduced in Congress during debates over the Equal Rights Amendment reinforced Ginsburg's contention that Congress needed an explicit constitutional command to remedy gender inequality. Ginsburg noted that the Public Accommodations Provisions (Title II) of the Civil Rights Act of 1964 prohibited discrimination based on race, religion, and national origin, but not sex. "A Congress ready to close the 'White Café,'" Ginsburg observed, "was not prepared to end the 'Men's Grill.'" (Ginsburg 1979a: 173) Additionally, a 1972 congressional measure extending benefits to wives or widows of coal miners did not expressly provide benefits to husbands or widowers of coal miners. One Senator noticed this

omission. Rather than modify the language of the proposed statute, he merely commented on the language discrepancy in a Senate report accompanying the bill. (174)

These examples, as Ginsburg feared, demonstrated that Congress would be unlikely to advance gender equality in a comprehensive manner. In fact, Congress seemed to perpetuate unequal treatment by continuing to write statutes containing arbitrary gender distinctions. It would continue to do so, Ginsburg believed, absent an unequivocal constitutional requirement to do otherwise.

By 1982, the Equal Rights Amendment had failed to garner state legislative support sufficient for ratification. This development rendered litigating under the Fourteenth Amendment the most viable option for supporters of gender equality. Ginsburg argued that relying on judicial interpretation to eliminate gender distinctions in the law was clearly a risk, albeit one worth taking, since it was the best remaining option. Moreover, Ginsburg believed, litigating claims under the Equal Protection Clause of the Fourteenth Amendment and crossing one's fingers for favorable judicial interpretation was, and would remain, an incomplete remedy. In 1971 the Supreme Court departed from tradition, holding that an Idaho statute that arbitrarily favored men over women in being designated estate administrators (*Reed v. Reed*) offended the equal protection requirement. The development of equal protection jurisprudence will be reviewed in detail in the following chapter. Ginsburg's point, however, was that the outcome would be less predictable and generate noncomprehensive doctrine because the "historical impediment" dissuaded some justices from interpreting the Fourteenth Amendment more inclusively than was intended at the time of its ratification. This contention was confirmed by the results of litigation during the 1970s.

Equal Protection and Gender Discrimination

Although theories perpetuating the inferiority of some races to others ostensibly verified by scientific inquiry had been repudiated, similar notions about differences between men and women were not viewed with similar skepticism. At the time of the founding, women became civilly dead upon marriage: ". . . the woman's 'very being . . is suspended during the marriage,' incorporated into that of the man." (Ginsburg 1978b: 452) In the Declaration of Independence, Thomas Jefferson wrote that all men were created equal. With regard to women, however, that sentiment was tempered; Ginsburg quoted a remark made by Jefferson in 1816: "Were our State a pure democracy . . . there would yet be excluded from our deliberations . . . women, who, to prevent depravation of morals and ambiguity of issues, should not mix promiscuously in the public meetings of men." (Ginsburg 1997: 264-5)

This sentiment persisted throughout the 19th Century. Justice Joseph Bradley's concurring opinion in *Bradwell v. Illinois* (1873) ". . . summarized . . . history's heavy legacy" (Ginsburg 1971: 347) of protective, paternalistic treatment of women:

> 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 function of womanhood. (83 U.S. 130, 141)

Justice Bradley's view clearly comported with that espoused by Thomas Jefferson. It was not until the adoption of the Fourteenth Amendment in 1868 that "equality" became an explicit constitutional guarantee – though, as noted elsewhere, this requirement did not apply to women. For a century, every gender discrimination claim brought under the Fourteenth

Amendment was rejected by the Supreme Court, a position consistent with the drafters of the amendment. "That precedent," Ginsburg noted, "reflected a long-prevailing 'separate spheres' mentality, the notion that it was man's lot, because of his nature, to be the breadwinner, the head of household, the representative of the family outside the home; and it was woman's lot, because of her nature, to bear and alone raise children and keep the house in order." (Ginsburg 1997: 266) The Court's adherence to precedent upholding benign or protective gender-based classifications continued until the 1970s.

Despite Ginsburg's preference for the formal modification of the Constitution, she nonetheless maintained that the language of the Equal Protection Clause of the Fourteenth Amendment – legislative history notwithstanding – implicitly included women in its guarantee of equal treatment under the law. Gender, Ginsburg has consistently maintained, was an unalterable characteristic like race. "The position that sex should rank as a suspect criterion," she argued, "proceeds from a premise few would dispute: sex, like race, is a visible, immutable biological characteristic that bears no necessary relationship to ability." (Ginsburg 1977b: 3) Ginsburg insisted that gender-based classifications were comparable to race-based classifications and, consequently, merited review under the most stringent judicial standard reserved for race-based discrimination claims (Ginsburg 1997, 1977b, 1975, 1971). Critics of the extension of suspect class status to gender argue that as a numerical majority, women are not a "discrete and insular minority" meriting such protection. Ginsburg reminds these critics that for most of American history "total political silence was imposed on this numerical majority." (Ginsburg 1975: 18) In every gender discrimination claim brought before the Supreme Court during the 1970s, advocates urged the application of strict judicial scrutiny

to gender claims.

The cases brought before the Supreme Court during the 1970s, Ginsburg observed, ". . . presented different facets of the same broad issue: women's opportunity to share equally with men in the latter-20th-century social and economic life." The Court, she concluded,

> treated most of the cases as occasions for ad hoc rulings. It did not perceive the particular controversies brought to it as part of a pervasive design of sex-role allocation shored up by laws that impede social change. It did not give laws supporting sex discrimination the searching review it gives laws supporting race or national-origin discrimination. (Ginsburg 1978a: 13)

Challenges to gender-based distinctions in the law during the 1970s must be put in proper context, within a broader societal climate seeking change. Although legislators and jurists continued to enact and uphold protective statutes, society's attitude toward stereotypical notions about gender roles was beginning to change. Ginsburg identified three primary factors that contributed to this climate of change: ". . . reduction in necessary home-centered activity, curtailed population goals, and longer life spans." (Ginsburg 1978b: 457) As a result of these influences and the revival of the feminist movement during the 1960s, women increasingly joined the paid work force. As women began to enjoy many of the choices and freedoms men had enjoyed with regard to both public and private life decisions, acceptance of dissimilar treatment based solely on gender – and the assumptions underlying this arbitrary classification – became increasingly suspect. (Ginsburg 1992) Between 1974 and 1977, the Supreme Court heard more cases ". . . touching on the rights and responsibilities of men and women than it in its entire previous history." (Ginsburg 1981: 173)

Litigants challenging these arbitrary classifications, Ginsburg explained,

> did not assert that these propositions [women focused on the domestic sphere, men focused on the public sphere] were inaccurate descriptions for the generality of cases. But they questioned treatment of the growing numbers of men and women who do not fit the stereotypes as if they did and the fairness of gender pigeonholing in lieu of natural, functional description. The Court, although still holding back doctrinal development, displayed increasing awareness that the traditional legislative slotting had all the earmarks of self-fulfilling prophecy. (Ginsburg 1978b: 467-8)

Ginsburg's point here is revealing because she did not reject such distinctions outright; rather, she challenged the assumptions underlying them, and the limited choices for both men and women resulting from society's unyielding adherence to them.

Ginsburg repudiated "preferred" or protective distinctions that placed women on pedestals. These gender-based classifications, distinguished from Black Codes, were perceived as benign, and favoring or protecting the weaker sex. She argued that these distinctions were actually harmful to both men and women. "If the world belongs to men," Ginsburg wondered rhetorically, "how can they be victimized by the traditional sex role division? Haven't they everything to lose and nothing to gain if sex equality becomes a reality?" Ginsburg maintained that ". . . the traditional arrangement sometimes exacts a heavy toll from the dominant sex." (Ginsburg 1971: 358) Gender classifications with respect to jury selection, age of majority, survivor benefits, property tax exemptions, and the military draft all "advantaged" women by extending special or preferential treatment to them. However, Ginsburg argued that these ostensible "advantages" or favors to women actually were harmful and ultimately treated women as if they were incapable of performing those functions. Moreover, advantageous treatment of women in these instances necessarily treated men disadvantageously.

Ginsburg's gender equality scholarship has also offered her perspective on how the law has treated men and women with respect to parenthood, which has often been based on stereotypes about appropriate gender roles. Ginsburg emphasized the important distinction between child-rearing and child-bearing. Child-rearing can be performed equally well by both men and women. Neither gender innately possesses the ability to raise children better than the other. Therefore, as a class, she insisted, neither men nor women ought to enjoy a favored position over the other with respect to judgments about child-rearing ability. Yet, in most instances where child custody is granted to one parent over the other, the law favors women, the stereotype being that women are better, more capable parents than men. Ginsburg repudiated this arbitrary practice. Instead, she argued that such decisions ought to be made without regard to gender-based stereotypes.

Child-bearing, Ginsburg pointed out, is obviously a situation where recognition of the biological difference between the sexes matters: "If benign sex classification ever had a place, it is in this area. Ironically, it is the one area traditionally left out of 'women protective' legislation. . . . " (Ginsburg 1978d: 825-6) Many gender-based statutory distinctions, "not back of the bus" overt discrimination, were designed to benefit or protect women, long believed to be the weaker sex (Ginsburg 1978b: 451). Despite this ostensibly benign intent, Ginsburg observed, protective statutes ". . . could often, perversely, have the opposite effect." (Ginsburg 1997: 269) Legislators and jurists once believed that women required special minimum wage/maximum hour labor protection (*Muller v. Oregon* (1908)). Women were also protected from engaging in such unsuitable occupations as practicing law (*Bradwell v. Illinois* (1873)) and tending bar (*Goesaert v. Cleary* (1948)).

The perception that women needed different treatment or protection than men in many facets of life notwithstanding, Ginsburg pointed out that pregnancy had escaped inclusion as a "special" distinction. The Supreme Court's holdings in this area, as Ginsburg predicted without an equal rights requirement explicitly in the Constitution, lacked a rationale that could be extended beyond the instant case. The Court held in *Cleveland Board of Education v. LaFleur* (1974) that public school teachers could not be dismissed or involuntarily placed on leave at an arbitrarily fixed point in pregnancy. It held in *Turner v. Department of Employment Security* (1975) that pregnant women who were able and willing to work could not be denied unemployment compensation when they were excluded from certain jobs. In *Geduldig v. Aiello* (1974), however, the Supreme Court held that a state-sponsored disability income protection program that excluded coverage for pregnancy did not constitute invidious gender discrimination incompatible with the equal protection requirement of the Fourteenth Amendment. Writing for the Court, Justice Potter Stewart reasoned that the program did not discriminate against women. Rather, the California statute treated pregnant "persons" differently than non-pregnant "persons," and that all non-pregnant persons – male and female – were treated alike by the program. The Court's rationale diminishes the obvious biological fact that since only women may become pregnant "persons" this distinction represented a clear example of gender-based discrimination.

Although pregnancy and childbirth interrupt a woman's employment pattern temporarily, Ginsburg has resisted embracing a position advanced by many feminists. Historically, maternity leave with job security and insurance coverage for medical expenses were not standard employment benefits since men comprised the majority of the work force.

Although women increasingly began to work outside the home, employers were slow to provide these benefits. This left women of child-bearing age without job security while they were off work recovering from childbirth.

To remedy this disadvantageous treatment, many feminists argued that pregnancy merited special treatment. Ginsburg warned that although granting special status to pregnancy resolved immediate concerns relating to insurance coverage and job security, ". . . the doctrine that emerges [from this position] . . . may blunt the equal treatment victories of the 1970s." (Ginsburg 1985: 1110) Ginsburg believed that extending special status to pregnancy ". . . offers big brothers an opportunity to protect the weaker sex – the sex that must bear, and in their view therefore should care for, children (leaving men free for other pursuits) . . . . " (Ginsburg 1985: 1110) Ginsburg argued that instead of giving women special treatment with regard to pregnancy, pregnancy ought to be treated like any other temporarily disabling condition rendering one unable to work, such as breaking a leg or recovering from an appendectomy. This general disability protection treats men and women equally, since it extends to both men and women for a variety of conditions (including pregnancy) that temporarily interrupts their ability to work. (Ginsburg 1985, 1978b, 1978d, 1975)

Equal Protection and Reproductive Rights

Beyond providing a remedy for invidious discrimination where individuals who are similarly situated are treated dissimilarly, Ginsburg has articulated another facet of her view of equal protection jurisprudence. She has maintained that the equal protection guarantee,

rather than the privacy doctrine associated with due process, provides a stronger constitutional rationale for securing reproductive rights, including the right to obtain an abortion. Ginsburg's analysis of *Roe v. Wade* (1973), in which the Supreme Court recognized the fundamental right to obtain an abortion under privacy doctrine, may depart from what one might expect a feminist legal scholar and jurist to advance. She has been moderately critical of the Supreme Court's rationale articulated in *Roe* with respect to the provision of the Constitution under which the right to obtain an abortion was upheld, and with respect to the sweeping nature of the Court's opinion.

Ginsburg has argued that the Supreme Court erred in holding reproductive rights, including the fundamental right to obtain an abortion, constitutional under privacy doctrine (Ginsburg 1992, 1985, 1978b). Arguing that reproductive rights are inherently questions of gender equality, she has observed that the

> conflict . . . is not simply one between a fetus' interests and a woman's interests, narrowly conceived, nor is the overriding issue state versus private control of a woman's body for a span of nine months. . . . Also in the balance is a woman's autonomous charge of her full life's course . . . [and] her ability to stand in relation to man, society, and the state as an independent, self-sustaining, equal citizen. (Ginsburg 1985: 383)

Clearly, in Ginsburg's view, reproductive rights extend beyond the notion of privacy and what one may or may not choose to do without governmental intrusion. She has argued that reproductive rights, as the above quoted language indicates, inhere in the notions of individual autonomy, dignity, and equality.

Ginsburg contended that governmental restrictions on reproductive rights, including the decision to continue or to terminate a pregnancy, are obviously gender-based

classifications that discriminate against women. Therefore, Ginsburg maintained, an individual's control over one's own reproductive ability ought to be guaranteed under the equal protection requirement of the Fourteenth Amendment. Specifically, Ginsburg has argued that the holding the Supreme Court articulated in *Roe* was ". . . weakened . . . by the opinion's concentration on a medically approved autonomy idea, to the exclusion of a constitutionally based sex-equality perspective." (Ginsburg 1985: 386) As she has observed,

> [the Court's opinion in *Roe v. Wade*] . . . barely mention[s] women's rights. [The Court's holding is] . . . not tied to any equal protection or equal rights theory. Rather, the Supreme Court anchored stringent review to a concept of personal autonomy derived from the due process guarantee. As Harvard Professor Laurence Tribe [has written] . . . , nothing in the Court's analysis turned on the sex-specific impact of abortion restrictions and the toll they exact from women far beyond any limit imposed on enjoyment of sexual activity by men. (Ginsburg 1978b: 460)

In Ginsburg's view, then, conceptualizing the ability to control one's own reproductive capacity outside the context of gender-based equal protection is inherently flawed.

Moreover, Ginsburg has surmised, subsequent Supreme Court decisions upholding various state and federal provisions eroding or modifying abortion rights arguably might not have been vulnerable to constitutional challenge had the right to obtain an abortion initially been held constitutional under equal protection analysis rather than privacy doctrine (Ginsburg 1992).[3]

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Many post-*Roe* state and federal abortion regulations have been upheld by the Supreme Court. These restrictions include: state and federal prohibitions of the use of public funds for abortions for indigent women (*Maher v. Roe* (1977), *Harris v. McRae* (1980)); state provision mandating parental consent for 'unemancipated' minors (with judicial waiver provision) (*Planned Parenthood v. Ashcroft* (1983)); state prohibitions on state employees performing, assisting in, or counseling women to obtain abortions, and

Ginsburg has also criticized the sweeping scope of the *Roe* decision. In a 1985 speech delivered at the University of North Carolina Law School, she explained that an incremental, less-sweeping Court holding in *Roe* might have precluded some of the constitutional questions produced by the intense political controversy ignited by the opinion. Ginsburg (1992, 1985), as other commentators have observed, has surmised that had the Supreme Court moved in a more deliberate, minimalist fashion, the subsequent *Roe* political backlash that halted – indeed reversed – much of the progress at the state level toward the quiet decriminalization of abortion would not have been triggered. Thus, Ginsburg has argued, the divisive debate over reproductive rights for women that remains part of America's contemporary political discourse could have been avoided in large part had the fundamental right to obtain an abortion been held constitutional under equal protection rather than privacy doctrine. Moreover, Ginsburg has maintained, *Roe v. Wade* would have been ". . . more acceptable as a judicial decision" had it been confined to the facts of the case. (Ginsburg 1985: 385) Instead, ". . . [h]eavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict." (385-6)

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prohibition on use of state facilities for such purposes, and requirement that physicians perform viability tests on fetuses at or beyond 20 weeks of gestation (*Webster v. Reproductive Health Services* (1989)); federal regulation preventing federally funded birth control clinics from providing abortion information to clients (*Rust v. Sullivan* (1991)); state statute requiring waiting period, parental consent for minors, and record-keeping and reporting provisions (and application of the "undue burden" test to evaluate the constitutionality of challenges to abortion regulations)(*Planned Parenthood v. Casey* (1992)).

Summary

An Equal Rights Amendment, Ginsburg pointed out, would function as a ". . . negative check on government, a prohibition against use of gender as a factor in official classification." (Ginsburg 1979a: 175) The legislative history of the Fourteenth Amendment has caused hesitation among some jurists to invalidate gender-based distinctions in the law brought under provisions of the Constitution that arguably would provide effective remedies. The addition of an ERA to the Constitution, Ginsburg believed, would overcome the "historical impediment" associated with the Fourteenth Amendment. Without an explicit equal rights requirement in the Constitution, litigating under the equal protection components of the Fifth and Fourteenth Amendments was obviously the best remaining alternative. However, in Ginsburg's view, achievement of gender equality via this avenue would be incomplete, and would not generate comprehensive legal theory.

Ginsburg's position with respect to the most sound remedy for gender discrimination is also important because it provides another example of her incrementalist philosophy. As a legal scholar, Ginsburg is cognizant of the difference between legitimate constitutional interpretation and judicial over-reaching. Therefore, in Ginsburg's view, amending the Constitution with a provision explicitly guaranteeing gender equality under the law was and is the most credible, legitimate path. With that remedial mechanism unavailable, as an advocate Ginsburg relied on equal protection. She pursued this strategy despite her recognition that she sought to push equal protection jurisprudence beyond the intent of the framers of the Fourteenth Amendment, requiring generous judicial interpretation to accommodate this view.

Assessing the Supreme Court's ad hoc approach to gender equality jurisprudence, Ginsburg observed that ". . . since the 1970s, [the Court] has effectively carried on . . . a dialogue with the political branches of government. The Court wrote modestly, it put forth no grand philosophy. But by forcing legislative and executive branch re-examination of sex-based classifications," she concluded, "the Court helped to ensure that laws and regulations would 'catch up with a changed world.'" (Ginsburg 1992: 1205) Ginsburg chided the High Bench for failing to advance a minimalist position with respect to questions involving reproductive rights, noting that the Court's sweeping holding in *Roe v. Wade* ". . . invited no dialogue with legislators." (1205)

In more general terms, Ginsburg has acknowledged the substantial progress made during the latter part of the 20th century in the effort to achieve equality between men and women:

> Constitutional doctrine relating to gender discrimination, although still evolving, and variously interpreted, is nonetheless a remarkable judicial development. . . . [T]he Court, since 1970, has creatively interpreted clauses of the Constitution . . . to accommodate a modern vision of sexual equality in employment, in access to social benefits, in most civic duties, in reproductive autonomy. Such interpretation has limits, but sensibly approached, it is consistent with the grand design of the Constitution-makers to write a charter that would endure as the Nation's fundamental instrument of government. (Ginsburg 1989: 303)

The next chapter analyzes Ginsburg's career as an advocate before the United States Supreme Court.

CHAPTER THREE:
GINSBURG AS CONSTITUTIONAL ADVOCATE

Ideally, Ruth Bader Ginsburg preferred modification of the Constitution in a way that explicitly guaranteed equal treatment of men and women under the law. Although failure to ratify the proposed Equal Rights Amendment rendered that remedial avenue unavailable, Ginsburg was not left without a legal strategy for achieving gender equality. She believed that the language of the Equal Protection Clause of the Fourteenth Amendment, legislative history notwithstanding, implicitly guaranteed gender equality. It is under this constitutional provision that Ginsburg and her colleagues at the American Civil Liberties Union (ACLU) brought gender-based discrimination claims, seeking to eradicate such statutory classifications.

This dissertation is distinctive because the 'new' emergence or dominance of the doctrine of equal protection as a vehicle to secure civil rights coincided with Ginsburg's career as an advocate and legal scholar. Analysis of Ginsburg's contribution to the evolution of gender-based equal protection must be appreciated within the broader context of the rise of equal protection jurisprudence generally. An exhaustive exposition of case law and jurisprudential developments relating to equal protection is clearly beyond the scope of this dissertation. A cursory review, however, provides sufficient context for a more detailed discussion of the evolution of gender-based equal protection jurisprudence provided in the

next section of this chapter. An overview of the evolution of equal protection jurisprudence as a vehicle for addressing problems of government-sponsored discrimination is provided below. The final section offers analysis of Ginsburg's work as an advocate. While affiliated with the ACLU, Ginsburg was principal author of the brief for the appellant, appellee, or petitioner in nine gender equality cases brought before the Supreme Court. She also presented oral argument in six of those cases. Additionally, Ginsburg was a contributing author of fifteen amicus briefs submitted to the Court by the ACLU.

Evolution of Equal Protection Jurisprudence

Adopted in 1868, the Fourteenth Amendment was intended to extend to persons recently freed from slavery protection against government-sponsored discrimination based on race. It is important to note, however, that the language of the Amendment omits specific reference to any specific racial group (for example), referring instead to all *persons* within the jurisdiction of the states. The meaning and application of various provisions contained in the Fourteenth Amendment were tested in several cases in the years immediately following its ratification.

In the *Slaughterhouse Cases* (1873) the Supreme Court upheld the constitutionality of a Louisiana law that granted a slaughterhouse business monopoly in New Orleans. Although the law was purported to be a health measure, in reality it served as a barrier to the participation of many people from engaging in the slaughterhouse business. Writing for the Court, Justice Samuel F. Miller explained that the law was not violative of either the Due Process or Equal Protection Clauses of the Fourteenth Amendment. The intent of the

Amendment, he observed, was to protect former slaves, whereas the law at issue did not specifically target blacks for exclusion from the slaughterhouse business. Invalidating the Louisiana law, according to Miller, would require an over-broad application of the Amendment.

In *Strauder v. West Virginia* (1880) the Supreme Court struck down on equal protection grounds a state statute that restricted jury service to white men. Writing for the Court, Justice William Strong explained that color-based discrimination of the nature at issue in the instant case was precisely the behavior the Fourteenth Amendment was intended to prohibit.

One of the most significant cases invoking the Fourteenth Amendment was heard by the High Bench in 1883. In the *Civil Rights Cases* the Court invalidated various provisions of the Civil Rights Act of 1875, holding that the Fourteenth Amendment limited congressional enforcement efforts to state action. The Fourteenth Amendment, Justice Joseph P. Bradley noted, was only applicable to private action in instances where a close nexus between the state and the private actor could be demonstrated. The provisions struck down prohibited racial discrimination in privately owned public accommodations. Therefore, the Court held, private discrimination was beyond Congress' power to regulate under the Fourteenth Amendment.

In *Yick Wo v. Hopkins* (1886) the Supreme Bench held that a neutrally worded San Francisco ordinance was enforced almost exclusively against one particular class of persons, Chinese operators of laundries, in such a way that it effectively constituted a violation of equal protection. In *Plessy v. Ferguson* (1896) the High Court held that racially segregated public

transportation in Louisiana was not offensive to the Fourteenth Amendment, provided that the separate accommodations were "equal."

In the 20th century, perhaps one of the most significant cases with respect to the development of equal protection analysis was a case involving interstate commerce. In *United States v. Carolene Products* (1938), applying the rational basis standard of review, the Supreme Court upheld a federal prohibition on the interstate shipment of "filled milk." More influential than this specific holding, however, was one component of a footnote in the opinion for the Court. In his famous footnote 4, Justice Harlan Fiske Stone suggested that a more rigorous standard of review than the traditional rational basis standard may be warranted in such circumstances where ". . . prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities. . . ." (304 U.S. 144, 152 n 4) Stone's articulation that some classes of individuals merited heightened legal protection against discrimination was a significant development in the evolution of the Court's equal protection analysis, providing the foundation for the suspect classification doctrine.

In *Korematsu v. United States* (1944) Justice Hugo Black, writing for the Court, delineated the suspect classification doctrine and the application of the strict scrutiny standard of review in order to evaluate race discrimination claims. The Supreme Bench applied this more stringent standard of review in *Korematsu* and, nevertheless, upheld the federal government's internment of Japanese-Americans in "relocation camps" during World War II. The Court held that the forced detention of Japanese-Americans served a compelling governmental interest and was narrowly tailored to achieve that end.

Invoking the Equal Protection Clause, several cases were brought challenging the constitutionality of racially segregated education facilities. In *Missouri ex. Rel. Gaines v. Canada* (1938), for example, the Court invalidated a Missouri practice that denied in-state law school admission to blacks, requiring them to attend out-of-state law schools. Similarly, the Court rejected a Texas plan to circumvent integrating the University of Texas Law School by creating a separate law school for black students. In *Sweatt v. Painter* (1950) the Court found that the black law school was substantially inferior to the white law school and, therefore, offended the Equal Protection Clause. The same Term, in *McLaurin v. Oklahoma State Regents*, the High Court invalidated the segregation of a black graduate student from his white colleagues at the University of Oklahoma, holding that the practice was inconsistent with the equal protection requirement. In a landmark decision, *Brown v. Board of Education* (1954), a unanimous Supreme Court repudiated *Plessy*'s "separate but equal" doctrine and held that the racial segregation of public schools violated the Equal Protection Clause.

The Supreme Court's recognition that, in some instances, a common characteristic shared among a group of people merits designation as a "suspect classification," and the creation of differentiated tiers of review to evaluate the constitutionality of distinctions based on these classifications were clearly significant developments in the evolution of equal protection jurisprudence. As Neuman (1999) has summarized:

> The doctrine of suspect classifications attempts to identify those groups that are peculiarly vulnerable to recurrent oppressive treatment, to denial of the equal protection of the laws in the plural, and not merely to an isolated unmerited disadvantage on one occasion that may well be counterbalanced by an unmerited advantage on another. Similarly, some aspects of fundamental rights equal protection, concerning voting rights and freedom of speech, for

> example, address systematic defects that may deprive individuals or groups of influence on the lawmaking process and so expose them to recurrent disadvantage. The doctrine of 'tiers of review' has sought to list single factors that indicate the likelihood that an unequal treatment has the purpose or effect of subordinating a group. (310)

As this abbreviated overview of the development of race-based equal protection jurisprudence illustrates, challenging such classifications under the Equal Protection Clause has proven to be an effective legal remedy for government-sponsored racial discrimination. Further, the Supreme Court has extended the Fourteenth Amendment's protection beyond the beneficiaries intended at the time of its ratification to include other racial minorities as well. Given the success achieved in challenging race-based distinctions under this constitutional provision, the Equal Protection Clause of the Fourteenth Amendment was perceived as a logical vehicle to remedy gender-based discrimination as well.

Challenges to the constitutionality of gender-based distinctions began a full century before Ruth Bader Ginsburg presented her first oral argument before the Supreme Court. *Bradwell v. Illinois* (1873), *Minor v. Happersett* (1874), and *Muller v. Oregon* (1908) invoked other provisions of the Fourteenth Amendment to challenge gender-based classifications based on stereotypes (the Privileges or Immunities Clause,[1] and the Due Process Clause,[2] respectively). The Supreme Court held that the Privileges or Immunities

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1 The Fourteenth Amendment provides, in pertinent part, "No State shall make or enforce any law which shall abridge the privileges of immunities of citizens of the United States; . . ." U.S. Const. Amend. XIV, §1.

2 The Fourteenth Amendment provides, in pertinent part, ". . .nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ." U.S. Const. Amend. XIV, §1.

Clause did not extend to women either the right to be admitted to the bar (*Bradwell*) or the right to vote (*Minor*). The Supreme Bench also held, in *Muller*, that the Due Process Clause was not offended by an Oregon statute that regulated the length of the work day for women but not men. Justice David Brewer, writing for the Court, reasoned that female employees required state intervention to protect them from the physical over-exertion at work that would diminish their capacity to fulfill the primary obligations women were naturally intended to fulfill: to be wives and mothers. Brewer explained:

> That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and, as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race. (208 U.S. 412, 421)
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> [Despite improvements with respect to access to education, and greater occupational opportunities currently available to women,] [s]he will still be where some legislation to protect her seems necessary to secure a real equality of right. (*Id.*, at 422)

Judicial opinions such as these reflect a commonly held paternalistic view toward women not unrepresentative of Justice Brewer's era. By upholding ostensibly benign gender-based classifications, the Court believed that it was safeguarding women's capacity to fulfill their natural roles as wives and mothers. Therefore, the Court held that protective measures of this sort advanced societal interests and were not repugnant to the Constitution.

In 1948, representing a departure from the traditional pattern of gender discrimination

claims, the Equal Protection Clause[3] was invoked unsuccessfully in an attempt to remedy gender discrimination. In *Goesaert v. Cleary* a female bar owner challenged a Michigan statute prohibiting women from tending bar. The statute provided exceptions only for wives or daughters of bar owners. The Supreme Court upheld the Michigan statute. Writing for the majority, Justice Felix Frankfurter explained that the gender-based classification was rational social legislation that served a protective purpose. Frankfurter concluded that the Michigan statute was a preventive measure against potential exposure of females to inappropriate, corrupting behavior of male patrons. Frankfurter reasoned that the husband or father of a female bartender would provide close supervision, thereby preventing mistreatment of his female relative. Frankfurter obviously operated under the assumption that only men owned bars. The Court's holding in the instant case, however, meant that Ms. Goesaert, a bar owner, was precluded from tending her own bar because of her gender, effectively putting her out of business.

Expressing a similarly paternalistic perspective, in *Hoyt v. Florida* (1961), the Court unanimously held that Florida's statute permitting women to serve on juries only if they requested to be included in the jury pool, while men were automatically included in jury pools, was not violative of either equal protection or due process. Writing for the Court, Justice John Marshall Harlan (the younger) observed that the state's gender-based distinction with respect to jury service spared women the inconvenience of jury duty. The Court reasoned

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3 The Fourteenth Amendment provides, in pertinent part, ". . . nor [shall any State] deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, §1.

that since most women devoted their time to their children and home, extending this exemption to women allowed them to fulfill their obligations as wives and mothers without unnecessary disruptions such as those presented by fulfilling civic responsibilities.

It was not until the 1970s that the Equal Protection Clause was used systematically as part of a deliberate litigation strategy to challenge the constitutionality of gender-based distinctions. The litigation strategy crafted by Ginsburg and her colleagues was designed to render gender-based classifications unconstitutional. Using this approach, they sought to persuade the Supreme Court to extend the greatest judicial protection to gender, raising it to the level of review reserved for racial equality. A cursory review of several important cases in which the Supreme Court struck down statutory gender classifications on equal protection grounds follows, providing background for the more detailed analysis offered in the next section.

More importantly, though, these cases merit brief review here because the opinions substantially altered gender equality jurisprudence. Initially, the Court applied the rational basis standard of review. Later, the Court elevated the analysis of gender discrimination claims to a more demanding standard than rational basis scrutiny, intermediate scrutiny. Ultimately, these challenges fell short of establishing precedent[4] for extending suspect class status to gender, requiring the application of the strict scrutiny standard of review. Currently,

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Four Justices expressed the view, in *dicta*, that gender ought to be included as a suspect class. They failed to garner precedential support for this position, however. The question of including gender as a suspect classification was not properly before the Court in that case. Therefore, the Court did not formally deny extending suspect classification status to gender. The Court has not yet formally addressed this question.

gender discrimination claims are evaluated by applying the intermediate scrutiny standard of review.[5] Examination of several important Supreme Court opinions reveals that the definition of "intermediate scrutiny" has arguably been modified over time. This modification of the intermediate scrutiny definition further complicates already-esoteric conceptions of the elements comprising standards of review at each tier.

In *Reed v. Reed* (1971) the Supreme Court applied the rational basis standard of review to invalidate an Idaho statute giving preference to males over females in the designation of administrators of estates where such individuals were otherwise equally qualified. Chief Justice Warren Burger, writing for the Court, concluded that the state's gender-based classification for assigning estate administrators was not reasonably related to achieve a legitimate government objective and, consequently, violated the Equal Protection Clause.

In *Frontiero v. Richardson* (1973) eight Justices voted to strike down a federal law that presumed that servicemen were the primary household providers and, therefore, were

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Current Supreme Court doctrine utilizes three tiers of review in evaluating equal protection claims. The most permissive standard is rational basis, where the party bringing suit must demonstrate that the purpose of the challenged statute is not a legitimate state objective, and that the means employed to achieve this state objective are not rationally related to achieve this end. The middle tier, heightened or intermediate scrutiny, places the burden on the government to demonstrate that the statute being challenged is substantially related to an important government objective. Justices O'Connor and Ginsburg have elaborated on the intermediate scrutiny standard by stating that it requires the government to demonstrate an "exceedingly persuasive justification" in support of the challenged regulation. Critics have argued that this language effectively elevates the intermediate scrutiny standard for gender claims to the standard applied to race claims. This controversy will be explored in this dissertation. The top tier, strict scrutiny, places the burden on the government to demonstrate that the statute being challenged is narrowly tailored to achieve a compelling governmental interest.

automatically eligible to receive benefits for their wives. Servicewomen, however, were not automatically eligible to receive benefits for their husbands. Servicewomen were required to demonstrate that they were the primary providers in order to obtain spousal benefits. In overturning the statute, the Court splintered on its rationale. Four Justices insisted that the statute failed to satisfy the rational basis analysis articulated in *Reed*, and expressed their view that rational basis was the appropriate standard for reviewing gender discrimination claims. Four colleagues, speaking through Justice William Brennan, expressed the view that gender, an immutable characteristic, merited designation as a suspect classification. Therefore, they argued that the appropriate standard of review to apply in such cases was strict scrutiny, which the statute failed to satisfy. That a plurality supported the application of strict scrutiny is significant, as a plurality carries no precedential weight beyond the instant case.

In *Craig v. Boren* (1976) the High Court invalidated a statute mandating a lower age for females than for males for the purchase of "non-intoxicating" 3.2% beer. Justice Brennan, writing for the Court, concluded that the differentiated ages for males and females was inconsistent with the Equal Protection Clause. Perhaps more important than the invalidation of the statute at issue was the Court's rational for doing so. Unable to achieve a precedential majority of five Justices to apply strict scrutiny, Justice Brennan wrote for a majority that nonetheless racheted up the standard applied to gender discrimination claims beyond rational basis. Brennan articulated a middle position, intermediate scrutiny, in which the statute would be evaluated on whether or not the statute was substantially related to an important governmental interest. The provision in question, the Court held, failed to survive this standard. Again, a plurality of Justices also agreed that gender-based discrimination claims

ought to be evaluated under strict scrutiny analysis, although they were unable to achieve a precedential majority on that point.

An abbreviated sampling of several cases heard by the Supreme Court since the 1970s demonstrates the rather convoluted status of current gender-based equal protection doctrine. In *Mississippi University for Women v. Hogan* (1982) the Court invalidated a Mississippi measure that prohibited men from enrolling for credit in the School of Nursing at the state-supported Mississippi University for Women (MUW) as violative of the Equal Protection Clause. Writing for the Court, Justice Sandra Day O'Connor explained that the state failed to meet its burden of providing an "exceedingly persuasive justification" for its policy denying admission to the School of Nursing at MUW otherwise qualified male applicants solely on the basis of gender. Thus, the state policy failed to satisfy this definition of intermediate scrutiny and was struck down. Notably, O'Connor stated in a footnote that whether gender should be included as a suspect classification was not an issue properly before the Court. Therefore, that question was not addressed by the Justices. The question of whether gender should be designated as a suspect classification remains an open one.

In *Michael M. v. Sonoma County Superior Court* (1981) the High Bench reviewed a gender-discrimination challenge to a California statutory rape law that imposed criminal liability on males for engaging in sexual intercourse with females under the age of 18. Writing for the Court, Justice William Rehnquist explained that California's gender classification was not invidious, since men and women were not similarly situated with respect to the after-effects of sexual activity. Rehnquist pointed out that females bear the burdens of pregnancy, for example, yet males do not face similar consequences for sexual activity. California's

statute, Rehnquist surmised, was intended to function as a consequence to deter male sexual activity with minors. Rehnquist noted that a gender-neutral statute would frustrate the state's enforcement, since women would be less likely to report such activity if they would be held criminally liable under the statute as well. Therefore, the Court held, the California statute was not inconsistent with the Equal Protection Clause, since there was a "fair and substantial relationship" between the statute and the objective the state sought to satisfy, surviving intermediate scrutiny.

In *Rostker v. Goldberg* (1981) the Supreme Court upheld, under the Equal Protection component of the Fifth Amendment Due Process guarantee, a challenge to the Military Selective Service Act, mandating single-sex registration for the military draft. Writing for the majority, Justice Rehnquist observed that gender-based combat restrictions, for example, that prevented women from serving in combat zones, demonstrated that men and women were not similarly situated with respect to military service. Thus, Rehnquist concluded, it was not unconstitutional for Congress to distinguish between men and women with respect to draft registration. The gender-based distinction in the statute, then, survived intermediate scrutiny analysis.

In 1996, the Supreme Court heard a case whose facts were similar to those in *Hogan* heard fourteen years before, the primary differences being which gender was routinely advantaged (and disadvantaged) by the policy being challenged, and the scope of the policy. In *United States v. Virginia* the Court invalidated a Virginia policy that admitted only males to a state-supported military-style school. Writing for the Court, Justice Ruth Bader Ginsburg noted that the state had not provided an "exceedingly persuasive justification" for

its gender-based admissions policy at the Virginia Military Institute (VMI). The Court concluded that the state failed to satisfy this conception of intermediate scrutiny. Therefore, Virginia's single-sex admissions policy at VMI offended the Equal Protection Clause.

It is important to note, however, that the application of the Equal Protection Clause as a remedy for alleged discrimination is not an unlimited one. In instances where some degree of constitutional protection has been recognized, with respect to the basis for these claims, the Supreme Court has not extended suspect class status to these groups.

Classification based on economic status is not subject to strict scrutiny review. The Court has concluded that economic status itself does not relate to the exercise of a fundamental right, nor is it a suspect criterion. However, economic status does enjoy some degree of constitutional protection. In *Griffin v. Illinois* (1956), for example, the Court applied rational basis analysis and struck down a state statute that required criminal defendants in non-death penalty cases to pay for trial transcripts in order to proceed with an appeal of their convictions. The Supreme Bench held this provision to be violative of both the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

In *M.L.B. v. S.L.J.* (1996) the Court invalidated a state statute requiring a parent to pay for the preparation of the court record in order to appeal a civil proceeding that resulted in the termination of parental rights. Writing for the majority, Justice Ruth Bader Ginsburg explained that this requirement impeded the exercise of the fundamental right of a parent to maintain a relationship with her children. The interference of an economic burden with the exercise of a fundamental right, not economic status itself, may require the application of strict scrutiny. Since the discrimination here impinged upon a fundamental right, the Court

applied strict scrutiny and held that the provision was inconsistent with both the due process and equal protection requirements of the Fourteenth Amendment.

Despite extending some degree of constitutional protection to economic status, the Supreme Court has held that it does not merit designation as a suspect classification. In *San Antonio v. Rodriguez* (1973) the Court held that a state public school funding scheme primarily based on local property taxes was not repugnant to the Constitution. Evidence that funding schemes of this nature resulted in often substantially unequal per-pupil spending by school district notwithstanding, Texas' funding plan did not constitute invidious discrimination offensive to the Equal Protection Clause. Since economic status was not held to be a suspect class, the state's funding scheme survived judicial scrutiny under a much more permissive standard of review, rational basis.

In *Cleburne v. Cleburne Living Center* (1985) the Supreme Court invalidated a zoning ordinance that had been used to prevent a home for mentally handicapped individuals from operating in a residential neighborhood. Applying the rational basis standard of review, the Court held this ordinance to be violative of equal protection. The Justices, however, also rejected the assertion that mental disability merited suspect class status that would require the application of a much higher standard of review.

In *Romer v. Evans* (1996) the High Bench invalidated an amendment to the Colorado Constitution that prohibited state and local government from extending to gays and lesbians legal protection from discrimination based on sexual orientation. Justice Anthony Kennedy, writing for the majority, reasoned that the Colorado provision effectively stripped a class of individuals of equal protection of the law based on one shared characteristic. The Court

concluded that the Colorado provision failed to survive rational basis analysis and, therefore, was incompatible with the Equal Protection Clause of the Fourteenth Amendment.

Although the Court has extended some constitutional protection to illegitimacy, it has upheld some statutes that delineate differential treatment for legitimate versus illegitimate children. In *Labine v. Vincent* (1971), for example, the Court, speaking through Justice Hugo Black, held that a Louisiana statute preventing an illegitimate child from receiving an inheritance, even though the father had acknowledged paternity of the child prior to his death, survived rational basis analysis.

In *Weber v. Aetna Casualty and Surety Company* (1972), however, the Supreme Court invalidated a Louisiana statute that prohibited illegitimate children from receiving death benefits from workers' compensation programs. The Court, speaking through Justice Lewis Powell, concluded that the statute failed to satisfy the rational basis standard. Justice Powell's definition of rational basis, however, appears substantively to be a standard beyond the most permissive judicial standard while falling short of strict scrutiny: "The inferior classification of dependent unacknowledged illegitimates bears. . .no significant relationship to those recognized purposes of recovery which workmen's compensation statutes commendably deserve." (406 U.S. 164, 175)

In *Jimenez v. Weinberger* (1974) the Court struck down a federal law that excluded illegitimate minor children of disabled persons from receiving welfare benefits. Writing for the Court, Chief Justice Warren Burger explained that the statute failed to satisfy the rational basis standard of review.

In 1982 the High Bench explicitly raised the bar with respect to the appropriate

standard of review in evaluating the constitutionality of legitimacy-based classifications. In *Mills v. Habluetzel* the question was whether Texas' one year statute of limitations imposed on filing suit on behalf of an illegitimate child to establish paternity offended the Equal Protection Clause. The Court unanimously held that the provision was unconstitutional. In doing so, the Court applied intermediate scrutiny. Writing for the majority, Justice Rehnquist explained that a legitimacy-based classification must be substantially related to a legitimate state interest.

As this brief jurisprudential overview demonstrates, the application of the Equal Protection Clause as a remedy against alleged discrimination remains a limited one. Moreover, as these cases indicate, some instances of differential treatment based on specific classifications can survive the less stringent standards of review, either rational basis or intermediate scrutiny analysis. Therefore, under current Supreme Court doctrine, government-sponsored discrimination is not always repugnant to the Constitution.

Although some of the more influential cases with which Ginsburg was affiliated have been mentioned briefly as they contributed significantly to the development of equal protection jurisprudence, gender-based equal protection and the cases in which Ginsburg played a role will now be analyzed.

Ginsburg and Gender Equality Litigation

Reflecting on her experience with the gender equality litigation of the previous decade, then-Judge Ginsburg noted that the "venture was diffuse," an indication of the widespread support the movement had attracted (Justice and Pore 1981: 175). The immense interest,

however, was also problematic. In a 1981 interview, Ginsburg explained that the participation of advocates who chose not to adhere to the litigation strategy she had formulated presented an additional challenge:

> A major problem was the impossibility of organizing a step-by-step litigation campaign immune from disturbance by others bringing up weak cases in the wrong order and at the wrong time. The ACLU doesn't control the civil rights litigation world. . . . In the old days, when school desegregation law was in its infancy, Thurgood Marshall, the chief lawyer for the NAACP Legal Defense Fund, was able to manage the development of the litigation, building block by building block. The NAACP was then the only show in town. If you wanted representation in a school desegregation case, you went to them. That's no longer true of black civil rights cases, and it has never been true for women's rights cases. Since the women's rights litigation started, there were always lawyers somewhere who would take sex discrimination cases without thinking how they fit into a larger pattern. The courts needed to be educated. That requires patience; it may mean holding back a case until the way has been paved for it. (Gilbert and Moore 1981: 154)

As the above quote indicates, she recognized the utility of achieving progress incrementally, building upon precedent. The litigation strategy employed by Ginsburg and her colleagues was designed to accomplish precisely that.

Ginsburg's strategy consisted of several components. First, gender-based equal protection would most likely be achieved by proceeding incrementally, rather than by seeking broad, sweeping judicial decisions. Second, cases chosen must have clearly understandable issues, in order to allow her to build upon these foundational precedents as they brought subsequent cases posing more complicated issues. Third, cases involving male plaintiffs claiming gender-based discrimination, particularly in situations that perpetuated stereotypical gender roles were deliberately selected in order to demonstrate, perhaps more obviously, that both men and women were harmed by ostensibly benign gender-based classifications.

Ultimately, Ginsburg sought to persuade the Supreme Court to hold gender-based distinctions unconstitutional under the Equal Protection Clause. More specifically, Ginsburg sought to persuade the Court to designate sex as a suspect classification and to adopt the strict scrutiny standard of review for sex discrimination claims (Ginsburg 1997; Baugh et al, 1994).

While affiliated with the ACLU Ginsburg wrote nine briefs for the party, and she presented oral argument in six of those cases. The first of these briefs was submitted on behalf of the appellant in *Reed v. Reed* (1971). As previously noted, the issue was whether an Idaho statute providing that, between individuals similarly situated, men must be designated estate administrators over women offended the Equal Protection Clause. The analysis presented by Ginsburg in the *Reed* brief provided a comprehensive assault on justifications for sex-based classifications. She began by explaining that, as an immutable physical characteristic, sex was comparable to race; both were observable and unalterable traits. Additionally, Ginsburg observed that both race and sex had provided justifications for disparate treatment of individuals based on those characteristics, had been sources of stereotypes that perpetuated discrimination, and had engendered ". . . subordinat[ion] to . . . the same power group – white males." (Brief p. 19)

Ginsburg provided a detailed comparison of the ". . . stigma of inferiority and second class citizenship. . ." historically born by both racial minorities and women. (Brief p. 21) Both groups have been denied the franchise, the right to serve on juries, the right to serve as guardians of their own children, the right to own property in their own names, and the right to enter into contracts. They both have been discriminated against in employment and education opportunities. Ginsburg's brief pointed out that although historically the

discrimination against women and blacks was similar, such treatment of women had become romanticized – depicted as special favors or beneficial treatment. She insisted that under strict scrutiny analysis, were such classifications based on race rather than sex the invidious nature of the classification would be apparent, and would not be endorsed by the Court. However, she continued, the Court has upheld ostensibly benign dispensations for women and perpetuated the stereotypes underlying them.

Despite the achievement of some progress on many fronts, Ginsburg insisted that pervasive sex discrimination persisted. Men were still perceived as heads of household and domicile laws existed, and women were perceived as nurturers and were usually granted custody of small children, for examples. She predicted that absent an explicit constitutional requirement that the sexes be treated equally – such as the proposed Equal Rights Amendment – the battle to eradicate sex-based classifications would remain uphill.

The Idaho statute at issue, she argued, was a product of these traditional stereotypes that hurt both men and women. The central point articulated in Ginsburg's brief was that

> the sex line drawn by . . . the Idaho [provision] . . ., mandating subordination of women to men without regard to individual capacity, creates a 'suspect classification' for which no compelling justification can be shown. It is appellant's alternate position that, without regard to the suspect or invidious nature of the classification, the line drawn by the Idaho legislature, arbitrarily ranking the woman as inferior to the man by directing the probate court to take no account of the respective qualifications of the individuals involved, lacks the constitutionally required fair and reasonable relation to any legitimate state interest . . . . (Brief p. 9-10)

She provided the High Court two options: either take bold judicial action and designate sex as a suspect classification requiring application of strict scrutiny; or take perhaps less

controversial judicial action and apply rational basis analysis with Ginsburg's suggested modification of reversing the presumption of the statute's rationality from requiring the individual to demonstrate irrationality to requiring the government to demonstrate rationality (an "intermediate test," she suggested (Brief p. 60)). Application of either standard, Ginsburg insisted, would result in the invalidation of the statute as it could not survive even the more permissive judicial standard.

The Supreme Court accepted many aspects of Ginsburg's analysis, unanimously holding that the Idaho statute offended the Equal Protection Clause. This was the first occasion that the Court had struck down a law because of an impermissible sex classification, departing from a century of precedent. Chief Justice Warren Burger wrote that the statutory classification of the kind at issue in the instant case reflected ". . . the very kind of arbitrary legislative choice forbidden by. . ." the Fourteenth Amendment (404 U.S. 71,76). With respect to the standard of review, the High Court declined to designate sex as a suspect classification and to apply strict scrutiny analysis. The Chief Justice articulated the rational basis standard applied by the Court: the classification ". . . must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relationship to the object of the legislation." (*Id.*, at 76)

Convincing the Court to invalidate Idaho's statute, albeit not under the preferred standard of review, was nonetheless a significant victory for Ginsburg and her colleagues at the ACLU and provided the first precedential building block for subsequent challenges to the constitutionality of sex classifications. Pressman has characterized the influential brief written by Ginsburg in this case as ". . . one of the most important appellate briefs in the gender

discrimination area, the 'grandmother brief,'. . ." because it has become the ancestor to numerous briefs urging gender equality and the adoption of the strict scrutiny standard. (1998: 337) Indeed, upon examination of all the briefs Ginsburg wrote on behalf of a party, the *Reed* brief appears to have served as a model for those written in subsequent cases.

In a 1992 article Ginsburg commented on a case in which she had participated in 1972, the merits of which the Court did not address. Had *Struck v. Secretary of Defense*, which was on the Court's docket the same Term it decided *Roe v. Wade*, been given plenary review, Ginsburg surmised, it ". . . could have served as a bridge, linking reproductive choice to disadvantageous treatment of women on the basis of their sex." (1992: 1200) Air Force Captain Struck had become pregnant while stationed in Vietnam and used only her accumulated leave time for childbirth, after which she planned to allow the baby to be adopted. At the time, Air Force regulations contained three provisions relating to pregnancy: 1) a female officer must be discharged immediately upon medical determination of pregnancy; 2) a female officer must be discharged immediately upon determination that she has given birth while commissioned as an officer; and 3) a female officer could avoid discharge and elect to terminate pregnancy prior to twenty weeks gestation. The Air Force essentially offered women commissioned as officers the choices of foregoing their careers and becoming mothers or continuing their careers and aborting their pregnancies.

Ginsburg maintained that the regulations requiring female officers to choose either discharge from the service or abortion offended the equal protection component of the Due Process Clause of the Fifth Amendment. Males in the Air Force, Ginsburg pointed out, could become fathers and continue to serve, yet females in the Air Force could not become mothers

and continue to serve which, she insisted, constituted invidious sex discrimination. The regulations in question, Ginsburg suggested, ". . . declared, effectively, that responsibility for children disabled female parents, but not male parents, for other work – not for biological reasons, but because society had ordered things that way." (1202)

Shortly after the High Court granted Struck's petition for certiorari, the Air Force granted the officer a waiver and allowed her to continue to serve her country. The Court, upon suggestion by the Solicitor General, vacated the judgment and remanded the case on grounds of mootness and did not address the merits.

In *Frontiero v. Richardson* (1973) Ginsburg wrote the brief for the appellant in another case challenging disparate gender-based treatment in the military. The statute at issue provided that spouses of males serving in the military were presumed to be dependents and were granted benefits automatically, but that spouses of females serving in the military were not presumed to be dependents and were denied benefits automatically. In order to receive benefits identical to those automatically provided for wives of servicemen, husbands of servicewomen were required to demonstrate financial dependency. Sharron and Joseph Frontiero challenged the classification as violative of the Due Process Clause of the Fifth Amendment.

Ginsburg argued that essentially this was an equal pay case, pointing out the invidious discrimination mandated in the statute: procedurally, servicewomen bore an administrative burden by demonstrating dependency of their spouses that servicemen did not bear; substantively, irrespective of their spouses' dependency, servicemen automatically received additional benefits that servicewomen were routinely denied. The facts of this case also

demonstrated a point Ginsburg has consistently advanced: that sex-based classifications were two-edge swords that served no purpose and harmed both men and women. Such classifications reflected stereotypical notions about the way men and women were and punished those who deviated from the stereotype. Not only did this statute deny the employed wife equal pay based on her gender, but it also dissimilarly treated the dependent spouse by denial of benefits simply because of his gender.

On brief, Ginsburg sought to ratchet up the standard of review, noting the Court's application of rational basis in *Reed* and recommended the application of strict scrutiny review in this case. She argued that the sex classification was impermissible under rational basis analysis but this case merited the application of strict scrutiny. The statutory classification, she contended, was not protective, remedial, or neutral. Therefore, sex merited designation as a suspect classification. The statute also failed this standard in Ginsburg's view, since it advanced no compelling governmental interest.

Ginsburg's suggested remedy to the High Court reflected judicial minimalism. She asked the Court to invalidate the classification in the statute rather than the entire statute itself, which would extend benefits to all military personnel with dependent spouses without regard to the gender of the employee or the spouse.

In *Frontiero* Ginsburg presented her first oral argument before the Supreme Bench, arguing as amicus on behalf of the appellant with regard to the standard of review. Ginsburg explained to the Justices that there appeared to be confusion among lower courts as to the appropriate standard to apply to sex discrimination claims: some courts viewed sex as suspect and applied strict scrutiny; other courts interpreted *Reed* as applying the most permissive

rational basis; and still other courts were inventing in-between standards. She contended that this confusion produced different decisions in cases raising similar questions, depending on the standard applied by the particular court taking jurisdiction of a case. "To provide the guidance so badly needed, and because recognition is long overdue. . . " she urged the Court to designate sex as a suspect classification (Oral Argument p. 16)

Similar to the position articulated in the *Reed* brief, Ginsburg argued before the Court that sex was comparable to race with regard to the immutability of the trait, its total irrelevance to an individual's ability to perform or contribute to society, and the history of discriminatory treatment and stereotypical assumptions that stigmatized individuals bearing that characteristic. Moreover, sex classifications ". . . have a common effect. They help to keep woman in her place, a place inferior to that occupied by men in our society." (Oral Argument p. 19)

Addressing a point she made in scholarly publications, Ginsburg refuted the "numbers argument" advanced by appellees, suggesting that since women constituted a majority of the population they were not a discrete and insular minority meriting protection as a suspect class. She reminded the Court that women were denied the franchise until 1920 and continued to face discrimination in employment and education encountered by suspect classes. Illuminating the flaw in appellees' argument, Ginsburg wondered rhetorically whether one would suggest that race was not a suspect class in the District of Columbia because the majority population there was black.

The Court held 8-1 that the sex classification was impermissible, resulting in the remedy Ginsburg suggested, that spousal benefits be extended without regard to gender.

However the majority splintered on the rationale. Four Justices, speaking through Justice William Brennan, concluded that sex was comparable to race, alienage, and national origin; therefore, in their view, sex should be included as a suspect classification requiring application of strict scrutiny. Similar to the overview provided by Ginsburg in several briefs submitted to the High Court, Justice Brennan's plurality opinion acknowledged the long history of sex discrimination in this country, which persisted. "Traditionally," Brennan noted, "such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal but in a cage." (411 U.S. 677,684) The plurality concluded that the classification at issue failed strict scrutiny analysis.

Justice Potter Stewart concurred in the judgment, noting that he would have applied the rational basis standard articulated in *Reed*, which the statute failed to satisfy.

Three Justices, speaking through Justice Lewis Powell, also found the classification impermissible and would have applied the rational basis standard articulated in *Reed*. Justice Powell wrote separately, though, to express caution about potential judicial preemption of the states, who were considering the proposed Equal Rights Amendment. In Justice Powell's view it was premature and inappropriate for the Court to consider designating sex a suspect classification at that juncture. Rather, he encouraged his brethren to wait until the fate of the proposed amendment was determined. The resolution of such an important and divisive question by the political branches would render judicial intervention unnecessary.

In 1974 Ginsburg wrote the brief and presented the oral argument in another case illustrating her contention that sex classifications were arbitrary and harmful to both sexes. In *Kahn v. Shevin* the question before the High Court was whether a Florida statute granting

widows but not widowers a property tax exemption invidiously discriminated against men, offending the Equal Protection Clause.

On brief for the appellant, Ginsburg contended that the classification invidiously discriminated in two respects: first, special favors of this kind for women derived from stereotypical views about women and their role in society (that they were always dependent); second, favored treatment for women necessarily resulted in disfavored treatment of similarly situated men who also bore the burdens of unfair stereotypes (that they were always self-sufficient). Moreover, the classification at issue here was entirely unrelated to biological differences between men and women. Rather, Ginsburg insisted, it was another manifestation of traditional sex roles, disadvantageously treating men and women who deviated from the standard.

With regard to the standard of review, Ginsburg noted that *Reed* had established rationality review, and the *Frontiero* plurality had applied strict scrutiny analysis. She maintained that the facts in the instant case demonstrated more clearly than *Frontiero* that strict scrutiny should be applied to sex classifications. Aware that a majority of the Court had rejected that analysis in *Frontiero* Ginsburg also argued that the statute constituted invidious discrimination failing even the most permissive constitutional review, since the classification lacked a substantial relationship to a legitimate state interest.

In *Kahn* Ginsburg presented her first complete oral argument on behalf of a party before the Court. She pointed out that the classification discriminated against men whose wives had died, and it implicitly discounted the contributions made to the family by the deceased wife because her death did not merit a property tax exemption for her surviving

spouse. Ginsburg argued that the statute could be constructed in a gender-neutral manner – providing for surviving spouses rather than widows – and that sex should not be used as a proxy for determining financial need.

Although she noted that the *Reed* decision and the *Frontiero* judgment were signals that the Justices were willing to ". . . give sex classifications more than surface examination"(Oral Argument p. 6), she did not urge the Court to consider whether sex should be designated a suspect classification. However, she surmised that if sex were treated as a suspect classification – which she believed it was – then the Court must recognize that the argument for giving special scrutiny to women was still special treatment that ultimately disadvantaged women. Sex, not being female, was the suspect classification. "My point is," Ginsburg continued,

> that for women the – what will aid women most is not looking to see whether a classification is benign or invidious. . . . But whether it is a sex criterion – . . . as shorthand for what should be a functional criterion.
>
> . . . I have not yet found any classification in the law that genuinely helps. From a very short-sighted viewpoint, perhaps, such as this one, yes. But long run – no, I think that what women need is . . . a removal of exclusions and restrictive quotas. They are the only population group that today still faces outright exclusions and restrictive quotas. (Oral Argument p. 11)

Responding to specific questions posed by the Justices, Ginsburg underscored her view that special favors or benign dispensations for women such as the Florida statute at issue have kept women from equal opportunities. Moreover, they also disadvantaged men who did not receive such special favors.

As she had done in *Frontiero*, Ginsburg recommended a minimalist remedy to the

Court. She urged the Justices to invalidate the sex classification in the statute and to extend the property tax exemption to all surviving spouses without regard to gender.

The High Court, deviating from its recent trend of decisions, found Ginsburg's argument unpersuasive. Writing for the majority, Justice William O. Douglas explained that the Florida statute at issue was ". . . reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden." (416 U.S. 351, 355) The sex classification here bore a fair and substantial relation to the state's objective, surviving rational basis scrutiny.

The following Term, Ginsburg wrote the brief on behalf of the appellee seeking invalidation of a sex classification in the Social Security program. At issue in *Weinberger v. Wiesenfeld* (1975) was whether extension of survivor benefits to a deceased male wage earner's surviving children and spouse but extension of survivor benefits to a deceased female wage earner's surviving children but not spouse constituted invidious sex discrimination offensive to the Due Process Clause of the Fifth Amendment.

Drawing a parallel to the facts in *Frontiero*, Ginsburg insisted that the question at issue also focused on the provision of equal employment related benefits for workers and their families without regard to gender. Moreover, the classification in this case was more egregious because it provided no opportunity for the disadvantaged male spouse of a female wage earner to demonstrate financial need and receive benefits, despite his wife's financial contributions to Social Security. The distinction here was also entirely unrelated to financial need, treating similarly situated individuals dissimilarly solely on the basis of gender.

The purpose of the statute, she noted, was to provide financial assistance to a family

upon the death of a wage earner to allow the surviving parent to care personally for the children (as the statute was written, it allowed only the surviving wife and mother to do so). Social Security is funded by contributions made from wage earners, including those made by Paula Wiesenfeld. Essentially, the statute created a two-tiered class of contributing wage earners, both of whom made financial contributions at the same rate: ". . . wage earners who are male, and therefore receive full protection for their families; wage earners who are female and therefore receive diminished family protection." (Brief p. 6) Discrimination of this kind was invidious in three respects: ". . . [it] treat[ed] Paula Wiesenfeld as a secondary breadwinner, Stephen Wiesenfeld as an absentee parent, and the infant Jason as a child not entitled to the personal care of any parent." (Brief p. 7)

With the set-back from *Kahn* obviously on her mind, Ginsburg distinguished the Court's approval of a gender classification with regard to a property tax exemption as it had been characterized by the majority opinion, as remedial compensation for economic discrimination. The classification at issue here, however, could not be so interpreted. Rather, the sex-based discrimination advanced by the statute ". . . reflect[ed] the very brand of 'firmly entrenched practice' . . . that has operated to deny women equal opportunity and equal remuneration in the job market." (Brief p. 7) Urging the High Court not to hand down a companion decision to *Kahn* upholding invidious sex discrimination, which had departed from the trend established by *Reed* and *Frontiero*, Ginsburg cautioned that such a troublesome decision would pale in comparison to its impact. She suggested that it ". . . would turn back the clock to the day when sharp lines between the sexes drawn by the legislature were routinely approved by the judiciary." (Brief p. 8)

In presenting oral argument, she reiterated the intent of the statute to protect families financially upon the death of a wage earner by extending survivor benefits; families of deceased male workers received full protection, but families of deceased female workers received partial protection. Ginsburg presented much of the analysis submitted in the brief, demonstrating that, as with many sex distinctions, the challenged classification was the product of traditional sex-based stereotypes. The statutory classification at issue, she contended, provided additional evidence that ostensible favors to women ultimately had the opposite effect, harming both sexes.

Modifying her strategy as a result of the *Kahn* loss, Ginsburg contended that the egregious nature of the discrimination failed judicial scrutiny of any degree. She did not explicitly argue that sex was a suspect classification and urge the Court to apply strict scrutiny. Ginsburg, however, did suggest a middle position between rationality and strict review, as she had done in the *Reed* brief. Recognizing that the Justices had signaled that they were not ready to adopt strict scrutiny, as evidenced by the opinions in *Frontiero* and *Kahn*, she nonetheless sought to persuade them to impose a more demanding standard than rationality and achieve progress incrementally.

Consistent with her approach, Ginsburg's suggested remedy required invalidation of only the sex classification in the statute, permitting the extension of survivor benefits to all similarly situated individuals without regard to gender.

The High Court unanimously invalidated the sex distinction in the statute. Writing for the majority, Justice Brennan agreed with Ginsburg's analysis that the classification challenged in *Wiesenfeld* was "indistinguishable" from the distinction in *Frontiero*; the

classification here, however, was more invidious because the statute provided no exceptions to the exclusion of benefits for disadvantaged widowers. The victory in *Wiesenfeld* was limited, however; the Court applied the rational basis review it articulated in *Reed* and *Frontiero* rather than an intermediate standard that Ginsburg had urged it to adopt.

In *Edwards v. Healy* (1975) Ginsburg wrote the brief on behalf of the appellee in a case challenging the constitutionality of Louisiana's jury service exemption for women different than that available to men, based solely on gender, as offensive to the Equal Protection Clause. Women in Louisiana were not routinely included in jury pools; the statute at issue provided that women could only be included in the selection process by filing a form indicating their desire to serve. Ginsburg pointed out that this exclusion treated otherwise eligible women unfairly and also burdened men because they were required to serve while similarly situated women were not required to serve. She also emphasized that this disparate treatment disadvantaged the appellee, a female litigant in a civil case who had been denied a jury drawn from a representative cross-section of her community because women – constituting 53% of the population in that area – were automatically regarded as ineligible for service.

Ginsburg argued that the statutory scheme invidiously discriminated because ". . . it violates the requirement that no cognizable group be excluded from jury service, a requirement essential to secure equal protection of the laws to members of that group both as litigants and as potential jurors. . . "and because ". . . the scheme establishes a gender-based classification that stigmatizes all women, even those who do not wish to serve; in effect, Louisiana has decreed that male participation in the administration of justice is essential,

female participation, expendable." (Brief p. 9)

Ginsburg asked the High Court to reverse its decision in *Hoyt v. Florida* (1961), where it had upheld a state's voluntary jury service provision for women as permissible under the Fourteenth Amendment. Ginsburg insisted that *Hoyt* was irreconcilable with the recent line of decisions where the Court had repudiated classifications based on stereotypical generalizations about women and men. The new trend begun by *Reed* made ". . . plain that similarly situated adult men and women are constitutionally entitled to even-handed treatment by the law, and that 'it is manifestly unfair to indulge in generalities when speaking of women', which no one would think of using when referring to men." (Brief p. 12)

The Court, she suggested, had erred in *Hoyt* because jury service was not only a statutory duty but a critical citizenship responsibility. Excluding women relegated them to second class status. By ensuring that there was virtually no chance that a jury would constitute a representative cross-section of the population, the Louisiana scheme infringed upon a fundamental right guaranteed by the Due Process Clause of the Fourteenth Amendment.

Because the classification was invidious and because it involved a fundamental right, she urged the application of strict scrutiny analysis. Specifically, Ginsburg argued that the sex classification bore no fair and substantial relation to any legitimate state interest, the standard the Court had repeatedly articulated in recent decisions. The statutory classification was, she summarized, a ". . . remnant of 'the historical male prejudice against female participation in activities outside the family circle,' . . . [and] is at best misguided chivalry. In failing to recognize adult females as persons with full civic responsibilities as well as rights, Louisiana's

system betrays a view of women ultimately harmful to them." (Brief p. 21)

In oral argument, Ginsburg's presentation mirrored the analysis put forth in the written brief.

During the course of litigating this question, a new state constitution excluding the special jury service exemption for women was under consideration in Louisiana. At some point after oral argument, the state formally adopted the new constitution, rendering the question before the High Bench moot. Therefore, the Court vacated the decision and remanded the question to the lower court to consider the question of mootness.

Ginsburg wrote the petition for certiorari in *Turner v. Department of Employment Security* (1975) challenging a Utah unemployment compensation provision. The question presented was whether the statute's blanket exclusion of pregnant women from eligibility for benefits during an 18 week period beginning 12 weeks prior to the anticipated date of delivery and ending 6 weeks after delivery violated the Due Process Clause of the Fourteenth Amendment. The High Court granted certiorari, then summarily vacated and remanded the case. In the Per Curiam opinion the Court concluded that the blanket presumption of ineligibility and unavailability of pregnant women for employment during the 18 week period specified in the statute was virtually identical to a school board's practice of terminating the employment of pregnant teachers held invalid in *Cleveland Board of Education LaFleur* (1973). Under the Fourteenth Amendment, the opinion held, legitimate state ends must be achieved through "more individualized means when basic human liberties are at stake." (423 U.S. 44, 47) The Utah provision under challenge was struck down summarily, citing *LaFleur* as precedent.

Califano v. Goldfarb (1977) raised an equal employment benefits question virtually identical to the questions raised in *Frontiero* and *Wiesenfeld*. On brief for the appellee, Ginsburg sought to invalidate another sex classification contained in the Social Security statute. She contended that providing Social Security survivor benefits for the spouse of a male worker without regard to dependency but requiring proof of dependency for providing those same benefits to the spouse of a female worker invidiously discriminated on the basis of sex in violation of the Due Process Clause of the Fifth Amendment.

Consistent with the position Ginsburg advanced before the Court throughout the course of this litigation sequence, she insisted that the classification at issue here was the product of traditional stereotypical over-generalizations about men and women. Moreover, she maintained that this view was increasingly at odds with contemporary American society.

Comparable to *Frontiero* and *Wiesenfeld*, female wage earners contributed to the Social Security program at the same rate as male wage earners yet women and their families received less benefits. In effect, Ginsburg argued, such classifications devalued the work of women and frustrated their access to equal opportunities.

With respect to the standard of review, on brief it was Ginsburg's position that the statutory classification did not fairly and substantially advance legitimate governmental objectives. She asked only that the classification be invalidated, resulting in the provision of benefits to surviving spouses without regard to gender.

Presenting oral argument, Ginsburg reminded the Justices that the invidious discrimination advanced by the statute at issue here was comparable to the classifications invalidated in *Frontiero* and *Wiesenfeld*. One Justice asked if there was a constitutional

difference between discrimination against males versus discrimination against females, noting that this case could be characterized either way. Which was more invidious? Ginsburg responded that sex classifications were two-edge swords harming both men and women. When pressed on the question, she again responded that ". . . almost every discrimination that operates against males operates against females, as well." (Oral Argument p. 24) She added that she could not think of an instance where this was not the case.

Ginsburg summarized that the sex classification in the statute was both a product and a perpetuator of sex role stereotypes, rewarding male labor more than women's. Such over-generalizations burdened both sexes by discouraging deviation from the traditional sex roles endorsed by the classification. Consistent with remedies recommended to the Court in previous cases, Ginsburg urged only the invalidation of the classification rather than the entire statute.

Asked specifically about the appropriate standard to apply, although she did not advance this argument on brief and contended that the statute failed the intermediate scrutiny standard articulated in *Craig*, Ginsburg urged the Court to continue to raise the bar and to apply strict scrutiny. She surmised that constitutional principles evolved over time ". . . to keep pace with the nation's progress toward maturity." (Oral Argument p. 27) Such principles, Ginsburg observed, were naturally modified over time.

Justice Brennan, writing for a plurality of the Court, agreed that the question presented here was virtually "indistinguishable" from that presented in *Frontiero* and *Wiesenfeld*, noting that those cases provided precedent to invalidate the challenged sex classification in the Social Security statute. In doing so, Brennan articulated the intermediate

scrutiny standard applied in *Craig*.

Duren v. Missouri (1979) was the final case for which Ginsburg wrote the brief for the party, writing on behalf of the petitioner seeking to invalidate Missouri's gender-based exemption from jury service. Potential jurors in Missouri, chosen from voter registration lists, were sent juror questionnaires that included a notice informing women that if they wished to be excluded from the jury selection process they could return a form and automatically be exempted from the process. Ginsburg argued that the state's gender-based jury service exemption provision denied criminal defendants the Sixth Amendment right to a jury selected from a representative cross-section of the community, defying a requirement the High Court expressly articulated in *Taylor v. Louisiana* (1975). Specifically, she contended that the arbitrary classification provided in the statute, defended as a benign dispensation for women, was of the nature rejected by the Court in *Reed*, *Frontiero*, *Wiesenfeld*, *Craig*, and *Goldfarb*. Jury service, she pointed out, was an important civic duty and women should not be automatically exempted from it.

The presentation of oral argument was divided between three counsel, allowing Ginsburg to address the nature of the gender discrimination advanced by the statutory classification, leaving other questions to be addressed by co-counsel. She reminded the Justices, as she had four years earlier in *Edwards v. Healy* seeking invalidation of a similar jury exemption provision, that ostensible favors to women of this kind signaled second class status and reinforced traditional sex-role stereotypes about women and their appropriate role in society. Moreover, excluding the majority of the population from jury service undermined the Sixth Amendment right to a jury whose composition is sufficiently representative of the

community.

The Supreme Bench held that Missouri's gender-based exemption was inconsistent with the constitutional requirement that juries be drawn from representative cross-sections of the community. Writing for the majority, Justice Byron White pointed out that nearly 53% of the community constituting only 15% of the pool in jury venires did not produce demographically representative juries. Additionally, White addressed a point made by respondent that the classification advanced the state interest of safeguarding the important role women played in the home and family life. Justice White concluded that exempting all women because some women chose to focus on domestic responsibilities was an insufficient justification to save the classification. An appropriately tailored exemption to advance that objective might be permissible, White surmised, but not in the form of a blanket exemption based on over-generalizations about women.

In addition to writing briefs on behalf of the party, Ginsburg was a contributing author of fifteen amicus briefs submitted to the Supreme Court by the ACLU between 1973 and 1980. Her first amicus brief was submitted in *Pittsburgh Press Co. v. Pittsburgh Comm. on Human Relations* (1973). At issue in this case was whether a Pittsburgh ordinance, interpreted by lower state courts to prohibit a newspaper's arrangement of employment advertisements under column headings designating job preference by sex, had been interpreted in a way that violated the First Amendment rights of the newspaper. The ACLU took the position that this was entirely commercial speech evading First Amendment protection. Additionally, they contended that the sex-based classification perpetuated stereotypes and employment discrimination. The Court upheld the lower courts' interpretation, finding that

the ordinance regulated commercial speech and did not offend the First Amendment rights of the newspaper.

With respect to issues of race-based equal protection, Ginsburg contributed to two amicus briefs submitted by the ACLU. At issue in *Coker v. Georgia* (1977) was whether Georgia's provision of the death penalty for conviction of rape violated the Eight Amendment. As amicus, Ginsburg maintained that Georgia's provision offended the Constitution. Georgia's law, Ginsburg noted, derived from the view that rape as a crime was theft of a man's property rather than as violence against the victim. Additionally, she cited social science data indicating that the excessively harsh punishment effectively dissuaded juries from convicting defendants, undermining the state's goals of serving justice and protecting victims. Further, Ginsburg pointed out that until 1861 imposition of the death penalty for rape under Georgia law was reserved exclusively for black men; after 1861, white rapists were executed only very rarely. She concluded that the imposition of capital punishment for conviction of rape was both sexist and racist, arguing that it had been imposed "... in a singularly uneven fashion: it has been applied overwhelmingly to condemn black men for 'violating' Southern white women." (Brief p. 9) The High Court agreed with this position, holding that imposition of the death penalty for rape was disproportionately severe and offended the Eighth Amendment.

At issue in *University of California Regents v. Bakke* (1978) was the constitutionality of the University's admission plan formulated in a way that would guarantee the admission of a specific number of minority students. As amicus the ACLU supported the University's special admission policy for racial minorities, arguing that the program was designed to

remedy the history of discrimination inflicted upon minority groups and was not "motivated by prejudice" (Brief p. 6). The ACLU differentiated between constitutionally permissible "racial awareness" and constitutionally impermissible "discriminatory intent," and insisted that the program served "vital educational and social policies." (Brief p. 7) The Court held that the goal of achieving a diverse student body was a compelling state interest. Therefore, the University could take factors such as race into account when making admission decisions without offending the Constitution.

Several amicus briefs focused on employment-related questions brought under Title VII of the Civil Rights Act of 1964, three of which were submitted in cases raising questions relating to pregnancy and employment. At issue in *Liberty Mutual Ins. Co. v. Wetzel* (1976) was whether an insurance plan invidiously discriminated on the basis of sex. As amicus Ginsburg challenged the insurance company's disparate treatment of pregnancy and childbirth compared to all other temporarily disabling conditions for purposes of providing disability income protection benefits. She insisted that an insurance company's denial of benefits to workers temporarily disabled by pregnancy and childbirth and approval of benefits for all other conditions, both gender-neutral (such as recovering from an appendectomy) and gender-specific (such as recovering from a vasectomy), constituted gender-based discrimination that violated Title VII. Ginsburg did not seek special status for pregnancy; rather, she recommended a gender-neutral remedy. Ginsburg sought equal treatment of all temporarily disabled workers. The Supreme Court concluded that the District Court's order was not appealable to the Court of Appeals and vacated the judgment. It did not address the merits of the case.

General Electric Co. v. Gilbert (1976) brought *Wetzel*'s question back before the Court. At issue here was whether General Electric's (GE) insurance plan providing sickness and accident benefits to all employees but specifically excluding temporary disabilities related to pregnancy violated Title VII. The ACLU crafted a narrowly focused amicus brief addressing one specific point raised in the briefs on behalf of GE. Ginsburg refuted the company's contention that the legislative history of the proposed Equal Rights Amendment supported the view that Title VII allowed GE to discriminate against women employees temporarily disabled by pregnancy and childbirth by denying them disability insurance benefits available to employees for virtually all other conditions. Ginsburg argued that Congress' intent in drafting and passing the proposed ERA was to eliminate sex-based classifications in the law (including pregnancy-related classifications) which relegated women to second-class status on the job market. The Court ruled in favor of GE, holding that private companies could discriminate against pregnant women by excluding that condition from insurance coverage because the classification was gender-neutral. The High Court concluded that the plan distinguished between pregnant persons and non-pregnant persons and treated all non-pregnant persons, male and female, alike.

At issue in *Nashville Gas Co. v. Satty* (1977) was whether a company requirement that pregnant employees take leaves of absence resulting in the loss of all accumulated job-bidding seniority violated Title VII. As amicus Ginsburg contended that the company's policy of stripping female employees of job-bidding seniority after taking mandatory disability leave for childbirth was prohibited by Title VII. She distinguished this plan from the plan at issue in *Gilbert* because no additional expense was involved in preserving women's accumulated

seniority. Ginsburg noted that, consistent with Supreme Court precedent, pregnancy classifications could constitute impermissible sex discrimination under Title VII without demonstrating discriminatory intent if discriminatory effect was evident, which she insisted was clear in the instant case. No other class of temporarily disabled worker was stripped of job-bidding seniority following leave, putting women with children at insurmountable disadvantage for the rest of their lives in terms of their inability to win higher-paying jobs. Again, Ginsburg did not seek favored treatment for pregnancy; rather, she sought to eliminate disfavored treatment of pregnancy which would render it no different than any other temporary disability. The Supreme Court invalidated the company's plan, holding that the provision at issue was an imposition of a burden on women, rather than a denial of a benefit to women that men received, at odds with federal law.

Two amicus briefs were submitted in cases raising non-pregnancy related employment questions under Title VII. In *Dothard v. Rawlinson* (1977) the question was whether mandating that only males could serve as prison guards in maximum security facilities housing male prisoners was at odds with Title VII. As amicus Ginsburg maintained that the bona fide occupational qualification (bfoq) Alabama created was not a permissible bfoq exception under Title VII. It was Ginsburg's view that since sex was not a factor in job performance the real issue underlying the classification was paternalism – protecting women from potential physical danger – which was an insufficient rationale for the sex-based classification. The Court held that the legislative history behind Title VII as well as Equal Employment Opportunity Commission (EEOC) guidelines indicated that the bfoq should be very narrowly construed, and that the bfoq at issue in the instant case was a permissible sex classification.

Los Angeles Dept. of Water and Power v. Manhart (1978) brought another Title VII sex discrimination challenge before the Supreme Bench. The question was whether the Department's requirement that female employees make larger pension fund contributions than male employees, resulting in less take-home pay for women, violated Title VII. As amicus the ACLU maintained that the disparate pension benefit plans were at odds with Title VII. The company argued that because on the average women lived longer than men, providing pension benefits to women was more expensive than providing pension benefits to men. To off-set this additional cost, the company required women employees to make larger contributions to the pension fund. Ginsburg argued that the "averages" employed by the company constituted a stereotype of women as a class that was used for discriminatory purposes toward individual women to whom the stereotype frequently did not apply. The Court agreed with the position articulated by Ginsburg, holding that the pension plan at issue here was incompatible with the prohibition on sex-based classifications in Title VII.

A number of amicus briefs raised questions of sex classifications and equal protection, two of which raised pregnancy-related questions similar to questions brought before the Court under Title VII. At issue in *Cleveland Board of Education v. LaFleur* (1973) was whether a school board policy mandating unpaid maternity leave for pregnant teachers five months prior to the anticipated due date offended the Equal Protection Clause. As amicus Ginsburg contended that the school board's policy of terminating the employment of teachers at an arbitrary, fixed stage of pregnancy was the product of stereotypical notions about appropriate sex-roles at odds with the equal protection requirement. The policy singled out pregnancy, a temporary disabling condition unique to women, as sufficient reason to terminate

employment without regard to the individual's fitness, desire, or ability to continue working. As in other cases raising related questions, the school board in this case singled out pregnancy and treated it differently than all other temporarily disabling conditions which, Ginsburg argued, constituted invidious sex discrimination. The Court agreed with the position taken by Ginsburg and invalidated the school board's policy. Justice Potter Stewart, writing for the majority, observed that the school board presumed that a teacher became incapable of performing her job at an arbitrary point in pregnancy, when this was clearly an individual matter. Administrative convenience, the Court noted, was insufficient justification for the general policy. Stewart concluded that the policy bore ". . . no rational relationship to the valid state interest of preserving continuity of instruction. . ." in violation of the equal protection guarantee. (414 U.S. 632, 643)

The amicus brief Ginsburg wrote in *Geduldig v. Aiello* (1974) offered analysis similar to that presented in briefs submitted in cases bringing similar pregnancy-related questions before the Court. At issue was whether California's disability insurance program excluding from coverage pregnancy-related disabilities constituted invidious sex discrimination. Ginsburg maintained that women workers temporarily disabled due to pregnancy were similarly situated to other workers temporarily disabled due to all other conditions. Therefore, she concluded, the state's exclusion of pregnancy-related disability from its disability insurance program constituted a sex-based classification incompatible with the Equal Protection Clause of the Fourteenth Amendment. The High Court, however, disagreed with that analysis, holding that the state's distinction between pregnant persons and non-pregnant persons was not a sex-based classification. Justice Stewart, writing for the majority, observed

that the state's plan treated all non-pregnant persons alike. The state merely discriminated against pregnant persons and chose not to incur the expenses associated with providing coverage for that condition in order to preserve the plan's solvency, which was a legitimate state interest. Therefore, the classification did not constitute invidious discrimination.

Corning Glass Works v. Brennan (1974) raised a question under the Equal Pay Act of 1963. At issue was whether it was permissible for Corning to pay a higher wage to male night shift inspectors than it paid to female day shift inspectors, both of whom performed the same duties. As amicus, Ginsburg contended that comparison of jobs performed during the day to jobs performed at night was insufficient justification for circumventing the equal compensation requirement of the statute. Time of work, she argued, was not a working condition within the meaning of the Act; rather, it was an artificial distinction created to perpetuate disparate pay between men and women under the guise of compensating for work at night, which tended overwhelmingly to be performed by men. The Supreme Court found that Corning's dual wage scheme was based on no factor other than sex and, consequently, did violate the Equal Pay Act.

The stereotypical perception underlying the question at issue in *Craig v. Boren* (1976), Ginsburg observed as amicus, was similar to that addressed in *Goesaert* nearly three decades previously. The issue was whether Oklahoma's statute prohibiting the sale of "non-intoxicating" 3.2% beer to males under age 21 and to females under age 18 constituted sex discrimination offensive to the Equal Protection Clause. Ginsburg attacked the state's sex-based provision regarding the legal age to purchase alcohol as violative of equal protection, maintaining that the legislative goal of public safety was not served by the statutory

classification. Further, she noted that the older age requirement for males was the product of sex-based stereotypes. The Court held that the state's public safety interest of reducing alcohol-related traffic accidents was not served by the distinction. Justice Brennan, writing for the majority, wrote that the statute bore no substantial relationship to the achievement of an important governmental objective and constituted impermissible sex discrimination.

Craig is more significant than the general parallel it provides to *Goesaert*, albeit with a different judicial outcome. Justice Brennan's majority opinion garnered precedential support to ratchet up the standard of review in gender discrimination cases beyond the permissive rational basis standard. Unable to attract a fifth vote to adopt the most rigorous standard of review, Brennan crafted an opinion articulating a middle-tier position that did win precedential support among his brethren. Ginsburg recognized the irony in the High Court's announcement of a more rigorous standard of review for gender discrimination claims in a case characterized as one involving men's rights. "But," Ginsburg concluded, "the majority appeared to accept the argument critical to a genuine sex-equality principle; most of the justices indicated awareness that classification by gender generally cuts with two edges. Such classification sometimes snares a male victim, but it is rarely, if ever, pure favor to women." (Justice and Pore, 182)

Because sex classifications were harmful to both sexes, she consistently argued, all sex classifications must be eliminated and sex-neutrality in the law must be achieved. At issue in *Orr v. Orr* (1979) was whether Alabama's statute creating a sex-based classification mandating that only men but never women pay alimony violated the Equal Protection Clause. As amicus Ginsburg contended that the state's provision constituted sex-based discrimination

inconsistent with equal protection. It was her view that the one-way alimony provision reinforced traditional ideas about appropriate sex-roles and discriminated against those men and women who deviated from this stereotype. Ginsburg's suggested remedy was that alimony should be gender neutral and need-based, not sex-based. The Supreme Court agreed with the view supported by Ginsburg, holding that the provision at issue offended the Equal Protection Clause. Writing for the majority, Justice William Brennan explained that the legislative goal of assisting needy former spouses could be achieved via gender-neutral language, based on need rather than sex. The statute at issue, he concluded, failed intermediate scrutiny analysis because it was not substantially related to the achievement of an important governmental objective.

Califano v. Westcott (1979) presented another statutory sex classification for qualification for benefits under a provision of the Social Security Act. At issue was whether a provision that extended benefits to needy children in two-parent families whose father was unemployed but denied benefits to identically situated children in two-parent families whose mother was unemployed violated the equal protection and due process requirements of the Fifth Amendment. As amicus Ginsburg contended that this provision, like many other issues she litigated, derived from traditional, stereotypical views of gender roles and treated dissimilarly those men and women who did not conform to that standard. She again recommended a gender-neutral remedy, extending identical benefits to the disadvantaged sex, which Ginsburg believed was both the most fair and the least judicially intrusive modification of the provision. The Court held unanimously that since the gender-based classification in the statute was not substantially related to an important governmental objective it did constitute

invidious discrimination repugnant to the Constitution. The government's goal of assisting needy children was not served by the statute, but that goal could be satisfied without conditioning parental eligibility on gender.

Wengler v. Druggists Mutual Ins. Co. (1980) was the final case for which Ginsburg wrote an amicus brief. The question at issue was whether Missouri's provision of worker's compensation death benefits to a widow without regard to dependency but denial of benefits to a widower without proof of dependency violated the Equal Protection Clause. In this case, similar to the issue presented in *Frontiero* and *Wiesenfeld*, Ginsburg argued that the state provision constituted impermissible sex discrimination. As with many other cases with which the ACLU was involved, Ginsburg insisted that the disparate treatment in the program was the product of gender stereotyping.

One interesting point to note, particularly since this was the last case before the Supreme Court with which Ginsburg was involved before joining the federal bench, is that she again brought to the Court's attention the confusion among lower courts as to the appropriate standard of review to apply to gender discrimination claims. Ginsburg predicted that the confusion would persist until the Supreme Court formally designated gender as a suspect classification:

> Since *Reed* . . . this Court has reviewed a parade of cases challenging laws and official practices that pigeonhole people unfairly solely on the basis of their sex. The procession demonstrates that explicit designation of sex as a suspect criterion is overdue. Such designation provides the only wholly satisfactory starting point for addressing every remnant of the common law heritage that denied women independence and instead caused them to be covered, 'clouded and overshadowed' by men. (Brief p. 14)

The High Bench held that the plan failed to survive intermediate scrutiny and, therefore, offended the Equal Protection Clause of the Fourteenth Amendment. However, the Court declined to extend suspect classification status to gender.

Summary

Upon examination of the nine briefs written on behalf of a party, the presentation of six oral arguments, and fifteen amicus briefs submitted, the close degree to which Ginsburg followed her litigation strategy is apparent. She established precedent upon which to build incrementally, challenging the constitutionality of arbitrary sex classifications in the law. Ginsburg consistently maintained, and sought to demonstrate, that such statutory distinctions were products of stereotypical over-generalizations about both sexes that limited individual potential and disadvantaged those men and women who deviated from the traditional standard. Ginsburg sought to expose discrimination in the name of chivalry as discrimination nonetheless, which ultimately harmed both men and women. Moreover, the sex-roles endorsed by such discrimination were becoming increasingly incompatible with American society. Genuine neutrality in the law with regard to sex could be achieved without advantaging or disadvantaging either sex; this would ultimately benefit both sexes and advance genuine equal protection.

Ultimately, Ginsburg sought to persuade the High Bench to designate sex as a suspect classification and adopt strict scrutiny analysis. However, recognition that constitutional principles evolved over time heightened her sensitivity to signals sent by the Court. As early as the *Reed* brief in1971, Ginsburg argued that sex classifications failed any degree of

constitutional review – either rational basis or strict scrutiny, or some yet-to-be-crafted intermediate standard. She consistently provided alternate positions, urging adoption of a more rigorous standard while providing a less demanding fall-back position; providing two choices for the Court increased the likelihood that it would hear something it could endorse. At the very least, Ginsburg hoped to persuade the Court to invalidate the sex classification at issue; at best, she hoped to stimulate broader doctrinal development with regard to gender-based equal protection. Although Ginsburg was largely successful in persuading the Supreme Court to invalidate many statutory sex classifications and to ratchet up the standard of review, she was ultimately unsuccessful in achieving the long-range objective of persuading the Court to adopt strict scrutiny review for gender equality claims. At the time Ginsburg discontinued her tenure as an advocate and joined the federal bench in 1980, the standard of review adopted by the Court was the intermediate scrutiny standard articulated in *Craig*.

It is important to emphasize a point raised in two oral arguments where Justices posed, essentially, both sides of the "difference/sameness" question: if the sexes are the same, why are such classifications invidious? If the sexes are different, which classification is more invidious? Advancing a position compatible with Supreme Court precedent, Ginsburg consistently maintained that the sexes were not fungible; there are, obviously, some differences between males and females. However, these differences should not cause either sex to be advantaged or disadvantaged as a result of them. With regard to pregnancy, for example, provisions could be neutrally constructed with regard to benefits or leave time in order to treat all employees with temporary disabling conditions the same, neither advantaging nor disadvantaging one sex over the other.

So there are some differences, but according to Ginsburg either advantaging or disadvantaging one sex over the other is always invidious. Sex-based distinctions, even ostensible favors to women, ultimately harmed both sexes. Her point, then, was that "equality" (treating all individuals equally) was not interchangeable with "sameness" (treating all individuals according to a standard based on the way men are presumed to be, or based on the way women are presumed to be). Treating the sexes as if they were either identical or vastly different requiring special treatment did not produce equality under the law. Treating all individuals fairly without regard to sex and stereotypical notions about appropriate sex roles in society required construction of statutes with gender-neutral language. If there were instances where this could not be achieved, such classifications should be evaluated by strict scrutiny analysis.

Ginsburg's conception of the judicial function is evidenced not only by the bifurcated argument with regard to the standard of review to be adopted, but also by the remedy she frequently suggested. In several cases Ginsburg's recommended remedy was invalidation of only the sex classification in the statute, resulting in the provision of identical benefits or treatment to the disadvantaged sex, effectively rendering the challenged statute gender-neutral. Not only did this repair the defect in the law, Ginsburg noted, but it was also the least intrusive judicial action (as opposed to re-writing the statute, or legislating from the bench, or being more judicially activist). Again, Ginsburg's advocacy reflects her view of the judicial function as interstitial and minimalist.

The next chapter focuses on the judicial opinions written by Ginsburg in cases raising equal protection questions.

CHAPTER FOUR:
GINSBURG AS JURIST

In 1980 Ruth Bader Ginsburg discontinued her service as an advocate on behalf of the American Civil Liberties Union and resigned her professorship at Columbia Law School to join the federal judiciary. Over the course of twenty years of service on the federal bench, only a small minority of the cases heard by Ginsburg have raised equal protection questions. The degree to which the equal protection jurisprudence Ginsburg has articulated from the bench comports with the position she advanced as an advocate and professor will be evaluated in this chapter, analyzing the equal protection opinions written by Ginsburg as a judge on the Court of Appeals for the District of Columbia Circuit. Attention then turns to Ginsburg's nomination and confirmation to the United States Supreme Court and analysis of eight equal protection opinions she has written through the end of the 1999 Term. *United States v. Virginia* (1996) is excluded from this subset of Ginsburg's Supreme Court opinions and will be analyzed in detail in Chapter Five.

The jurisprudential position Ginsburg consistently articulated as an advocate before the Supreme Court may be restated concisely: She repudiated statutory classifications embodying the stereotypical pigeonholing of individuals based on visible biological characteristics wholly unrelated to their ability to perform and contribute to society. The minimalist remedy she frequently recommended underscored her view that neutrally

constructed statutes neither advantaging nor disadvantaging one sex over the other would genuinely advance the equality of all individuals. Ginsburg's record before the High Bench demonstrates that the litigation strategy she followed yielded impressive results; the Court reversed a century of precedent and invalidated gender-based classifications on equal protection grounds. Further, she gradually persuaded the Justices to endorse a more demanding judicial test than rationality review for the constitutional scrutiny of such classifications. Despite these impressive accomplishments, however, Ginsburg ultimately fell short of achieving her preeminent goal; the Court declined to designate sex as a suspect classification and formally adopt strict scrutiny review for sex-based distinctions.

Tenure on the Court of Appeals

Responding to President Jimmy Carter's announcement that he sought to increase the demographic diversity among judges on the federal bench, Professor Ginsburg submitted her name for consideration for appointment to either the Court of Appeals for the Second or the District of Columbia Circuit (Halberstam 1998). Passed over for a seat on the Second Circuit, Ginsburg was later selected by President Carter to fill a vacancy in the District of Columbia Circuit in 1980. Judge Ginsburg's nomination was confirmed by the Senate on June 18, 1980 (126 *Congressional Record* 100). She took the oath of office on June 30, 1980 (Cornell).

During her thirteen year tenure on the Court of Appeals, Judge Ginsburg wrote 253 majority opinions, 31 concurring opinions, and 17 dissenting opinions. Only two of these, both majority opinions, dealt with gender-related questions. In neither case, however, was

an equal protection question at issue. Ginsburg wrote opinions in two cases raising equal protection questions, both of which focused on racial discrimination. The dearth of equal protection opinions written by Judge Ginsburg is not surprising. The docket of the District of Columbia Circuit is dominated by cases presenting statutory and regulatory questions; consequently, it is less likely to hear cases raising constitutional questions than other circuits. The two equal protection opinions written by Judge Ginsburg will be analyzed next.

In *Quiban v. Veterans Administration* two Philippine World War II veterans and one surviving spouse of a veteran challenged their exclusion from certain veterans benefits as violative of the Equal Protection Component of the Due Process Clause of the Fifth Amendment. In July 1941 President Franklin D. Roosevelt invoked the power granted under the Philippine Independence Act of 1934 and called into the service of the United States members of Philippine military organizations. In 1946 Congress enacted the Supplemental Surplus Appropriation Rescission Act, which expressly stated that members of the Philippine military organizations called into service by President Roosevelt were not to be considered as having served on active duty in the United States military for purposes of determining eligibility for veterans benefits. Therefore, Judge Ginsburg concluded in the majority opinion, most Philippine World War II veterans were "statutorily ineligible" for many veterans benefits (928 F.2d 1154, 1155 (DC Cir 1991)).

The appellees urged the panel to apply strict scrutiny to evaluate the constitutionality of the classification. Ginsburg addressed their contention that because this group constituted a discrete and insular minority ". . . with no, or diminished access to channels in which political reform can be pursued, strict scrutiny is required. . . . By definition, however," she

continued, "residents of territories lack equal access to channels of political power. To require the government, on that account, to meet the most exacting standard of review. . . would be inconsistent with Congress's '[l]arge powers,' . . . to 'make all needful Rules and Regulations respecting the Territory . . . belonging to the United States.'" (*Id.*, at 1160) Ginsburg emphasized that Supreme Court precedent was unambiguous with respect to the standard of review; residents of Territories could be treated differently than residents of the States as long as the disparate treatment was rational. Therefore, Judge Ginsburg held that controlling precedent clearly indicated that rational basis rather than strict scrutiny was the appropriate standard to apply.

Moreover, Congress' intent was clear that Philippine World War II veterans could not be considered as having served on active duty with the United States military, rendering them ineligible to receive veterans benefits. Adhering to Supreme Court precedent with respect to the standard of review to apply as well as with regard to the disposition on the merits, Ginsburg held that the statutory classification crafted by Congress survived rational basis review.

In *O'Donnell Construction Co. v. District of Columbia* a white-owned construction company sought to enjoin the enforcement of a minority set-aside provision of the District of Columbia Minority Contracting Act, arguing that the classification offended the Equal Protection Component of the Due Process Clause of the Fifth Amendment. The three-judge panel reversed the District Court and granted the injunction. The panel concluded that the plaintiff would likely prevail since only general allegations of societal discrimination provided insufficient justification for enacting racial preferences and that the plaintiff would suffer

irreparable harm without an injunction.

Writing separately, Judge Ginsburg concurred with the majority opinion. Invoking *City of Richmond v. Croson* (1989), Ginsburg restated the importance that remedial racial classifications be narrowly tailored and ". . . supported by a strong factual predicate." (963 F.2d 420, 429 (DC Cir 1992)) She underscored the majority's conclusion that the provision at issue failed both requirements. Ginsburg did not reject the constitutionality of all race-based remedial classifications, however, and was careful to state explicitly that, consistent with *Croson*, ". . . minority preference programs are not *per se* offensive to equal protection principles. . . ." (*Id.*)

One must be cautious about drawing broad jurisprudential conclusions based upon a limited sampling of two judicial opinions. This conclusion, nevertheless, is incontestable: in both opinions Ginsburg expressed considerable deference to Supreme Court precedent and to the discernible will of Congress. The reasoning Judge Ginsburg articulated in these opinions suggests that she was not a result-oriented judicial activist on the Court of Appeals; rather, her rationale clearly explained that the outcome in each case was dictated by controlling precedent and discernible legislative intent. This deference is born of Ginsburg's view of the judicial function and her interpretation of the judiciary's role envisioned by the Framers of the Constitution. Attention now turns to Ginsburg's nomination and confirmation as a United States Supreme Court Justice and analysis of equal protection opinions written by her.

Nomination and Confirmation to the Supreme Court

President Bill Clinton's selection of Judge Ruth Bader Ginsburg to fill the Supreme Court seat vacated by the retiring Justice Byron R. White was announced in a Rose Garden press conference on June 14, 1993. Commenting on his selection of the 107th Justice to serve on the Supreme Bench, the President indicated that Ginsburg's significant contributions to the development of gender equality jurisprudence had distinguished her from other potential nominees. During the announcement, President Clinton identified three reasons for her selection: 1) Judge Ginsburg had distinguished herself as a progressive, balanced, and fair jurist; 2) with respect to her career as an advocate she had ". . . compiled a truly historic record of achievement in the finest traditions of American law and citizenship"; and 3) Ginsburg exhibited considerable potential to be a consensus-builder on the High Court (Mersky 1995: 10). In fact, the President noted that Ginsburg's service on the Court of Appeals resulted in a national legal journal naming her one of the country's leading centrist judges in 1991 (*Id.*).

With regard to her character, President Clinton continued:

> Quite simply, what's in her record speaks volumes about what is in her heart. Throughout her life she has repeatedly stood for the individual, the person less well-off, the outsider in society, and has given those people greater hope by telling them that they have a place in our legal system, by giving them a sense that the Constitution and the laws protect all the American people, not simply the powerful. Judge Ginsburg has also proven herself to be a healer, what attorneys call a moderate. Time and again, her moral imagination has cooled the fires of her colleagues' discord, ensuring that the rights of jurists to dissent ennobles the law without entangling the court. (Mersky, 10)

It was Judge Ginsburg's character, Clinton predicted, that would engender favorable reaction

to her nomination to the High Bench. President Clinton underscored her ". . . deep respect for others and her willingness to subvert self-interest to the interest of our people and their institutions." (*Id.*)

The Senate Judiciary Committee held confirmation hearings from July 20-23, 1993 (Mersky, 103, 108, 115, 119). The conciliatory tone of the confirmation process regarding the Ginsburg nomination to the High Court represented a departure from controversial selections preceding her, notably those of Robert Bork and Clarence Thomas (Baum 2001; Yarbrough 2000; Abraham 1999; Greenhouse 1993c). Ginsburg's centrist judicial reputation and scholarly publications, by contrast, did not portray her as a polarizing figure (Yarbrough). In fact, she was viewed as a "safe" selection expected to win confirmation easily. Interest groups, vocal in their opposition to the Bork and Thomas nominations, mounted only token resistence to the first appointee to the Supreme Court by a Democratic president in 24 years (Baum; Abraham). The majority of the testimony in opposition to her confirmation was offered by interest groups opposed to abortion (Yarbrough).

In addition to the appeal of Judge Ginsburg's mainstream reputation on the Court of Appeals, her status as an establishment insider in Washington also explains the paucity of opposition to her confirmation. Her husband, Martin, is a law professor at Georgetown University. He is also an influential tax lobbyist and a law partner in the Washington office of Fried Frank Harris and Shriver (Mersky, 218). Martin, unbeknownst to his wife, reportedly mounted a campaign designed to muster support for Judge Ginsburg's nomination to the High Bench upon the announcement of Justice White's retirement, which may have influenced President Clinton's decision (Baum).

Ginsburg's selection clearly appealed to Republicans as well as Democrats. Republican Orrin Hatch of Utah professed his confidence in Ginsburg's judicial integrity and independence, announcing that he was persuaded that her judicial opinions ". . . indicate[d] her understanding that her policy views and earlier role as advocate are distinct from her role as judge." (Mersky, 212-213) Similarly, Democrat Howard Metzenbaum of Ohio surmised that "[n]o one can seriously claim that the President selected Judge Ginsburg to carry out a political agenda." (*Id.*, 223) The opening statements given by members of the Committee uniformly acknowledged her pioneering advocacy, keen intellect, unimpeachable character, and fair and non-ideological performance as a judge on the federal bench.

In her opening statement before the Senate Judiciary Committee Judge Ginsburg touched upon the job she was about to undertake, clearly articulating a judicial philosophy respecting the role of the judicial branch in relation to the political branches as one not characterized by traditional ideological labels, but rather one that comported with the judicial role envisioned by the Framers: deference to the political branches and detachment from the nature of partisan politics to ensure institutional integrity. She invoked Alexander Hamilton's conception of the role of judges:

> . . . 'to secure a steady, upright, and impartial administration of the laws.' I would add that the judge should carry out that function without fanfare. She should decide the case before her without reaching out to cover cases not yet seen. She should be ever mindful, as Judge and then Justice Benjamin Nathan Cardozo said, 'Justice is not to be taken by storm. It is to be wooed by slow advances.' (*Id.*, 895)

Ginsburg endorsed a judicial role that is interstitial, incremental, and restraintist. Generally, the courts should not outpace the political branches; however, exceptions to this general

principle may justify bold judicial action. There have been occasions where the judiciary has had to insert itself more vigorously than this general vision endorses to compensate for the inaction of the political branches. Ginsburg clearly recognized that when the executive and legislative branches cannot or will not act it becomes incumbent upon the judicial branch to take action, noting that "when the political avenues become dead-end streets judicial intervention in the politics of the people may be essential in order to have effective politics." (*Id.*, 898)

Courts should act in a manner reflecting restraint but when the other branches fail to resolve divisive and important questions, the judiciary must necessarily intervene when such cases come before them. Striking a balance, Ginsburg acknowledged, was a delicate proposition:

> We cherish living in a democracy, and we know that this Constitution did not create a tricameral system. Judges must be mindful of their place in our constitutional order; they must always remember that we live in a democracy that can be destroyed if judges take it upon themselves to rule as Platonic guardians. (Mersky, 331)

As evidenced by the body of work Ginsburg submitted to the Committee, she viewed the proper role of the judiciary as one that follows rather than leads society.

Given the restraintist judicial philosophy Ginsburg espoused, one line of questioning focused on the degree to which she could achieve this objective in light of her history of zealous advocacy. Judge Ginsburg replied,

> . . .I have not asked you to overlook, nor have I apologized for, anything I have done. Some of the best work I have done is reflected in my briefs. But I am a judge, not an advocate. . . . Of course, the role of a judge is different from the role of an advocate. An advocate makes the very best

> case she can for her client. A judge judges impartially. A judge at my level takes what is put on her plate. We don't have a choice. (Mersky, 434-5)

The entirety of Ginsburg's testimony before the Senate Judiciary Committee, in addition to a body of work produced over the course of her career, reflects consistent adherence to this conception of the judicial function.

In addition to exploring her judicial philosophy, Senators questioned Judge Ginsburg on a number of areas of law, including her positions and judicial opinions invoking the religion clauses, labor law, and criminal law, among others. Since this dissertation focuses on Ginsburg's equal protection jurisprudence and gender equality, only that aspect of the hearings will be analyzed here. One area of discussion focused on Ginsburg's view on the constitutionality of the right to obtain an abortion. The discourse centered on her grounding of the right to choose whether to bear a child in the doctrine of equal protection and gender equality rather than privacy and liberty interests. Ginsburg explained the position she has consistently advanced throughout her professional life: denying to women the choice of whether or not to bear a child ". . .controls women and denies them full autonomy and full equality with men." (*Id.*, 414) Given the persistently divisive nature of abortion in American politics, Senators were more interested in whether or not she viewed abortion as a constitutionally protected right and less interested in the substantive difference between her view of the right versus that consistently articulated in Supreme Court case law. Although there was some discussion of Ginsburg's conception of abortion and reproductive autonomy as an essential facet of equality between men and women, analysis of the equal protection versus privacy rationale did not dominate the proceeding.

A substantial portion of the Committee's questions focused on the litigation with which Ginsburg was involved during the 1970s. Friendly questions allowed Ginsburg to summarize her involvement: the legal status of women prior to the litigation, the nature of the litigation, and the extent to which the Court found her argument persuasive and modified the law. She explained that once it became clear that a fifth vote endorsing the designation of sex as a suspect classification would not be forthcoming, she ". . . tried to establish a middle tier." (Mersky, 371) The standard of review she supported was of particular interest and was the focus of a number of Senators' questions. Ginsburg expressed her continued support for the adoption of an equal rights amendment and suggested that this position answered the question regarding the appropriate level of scrutiny. When pressed specifically as to the standard of review she would endorse, however, Ginsburg consistently demurred, reiterating her commitment to avoid commenting explicitly on matters likely to come before her as a Supreme Court Justice. Since this question has never properly been before the Court and since the Court has never formally rejected it, Ginsburg explained, that question remains an open one; therefore, she declined to state her opinion. However, Ginsburg did point out that she believed that the intermediate scrutiny standard was not necessarily a stopping point, suggesting her receptiveness to considering the adoption of strict scrutiny should that question come before the High Bench.

In addition to these indicators that Ginsburg would likely endorse the adoption of strict scrutiny for determining the constitutionality of gender-based classifications, she did offer a more revealing, albeit subtle, signal. Responding to a variety of questions, most of which related to gender equality and standards of review, Ginsburg referred the Committee

to the views expressed in the body of work produced over the course of her professional life. She explained that her contemporary positions remained consistent with the views she has articulated over time. With respect to her published articles, legal briefs, and speeches regarding gender equality plus thirteen years of judicial opinions she explained to the Committee: "That body of material . . . is the most tangible, reliable indicator of my attitude, outlook, approach, and style." (*Id.*, 258)

Following the confirmation hearings, the Senate Judiciary Committee issued a report unanimously recommending Ginsburg's approval by the full Senate. The Committee attributed its unanimity to Ginsburg's qualifications and judicial temperament, and her impressive judicial record (*Id.*, 889). The report continued: "Judge Ginsburg is a nominee who holds a rich vision of what our Constitution's promises of liberty and equality mean, balanced by a measured approach to the job of judging." (*Id.*)

With respect to her judicial philosophy and belief that constitutional principles evolved over time, the Committee emphasized that Ginsburg's view comported with the role of the judiciary in the broader constitutional scheme: that evolution of constitutional principles must be tempered by judicial restraint. The Senators expressed approval of Judge Ginsburg's endorsement of ". . . a judicial branch that moves incrementally. . . , in 'measured motions.'" (Mersky, 895) "She brings to constitutional interpretation," the report continued, "an understanding that the Constitution is an evolving document, together with an appreciation that the most secure evolution is also the most rooted." (*Id.*, 927)

The report concluded: "The balance that Ruth Bader Ginsburg achieves – between her vision of what our society can and should become, and the limits on a judge's ability to

hurry that evolution along – will serve her well on the Supreme Court." (Mersky, p. 889) The Judiciary Committee voted 18-0 to recommend Ginsburg's confirmation as Associate Justice of the Supreme Court by the full Senate on July 29, 1993 (*Id.*, 888).

On August 3, 1993 the Senate, by a 96-3 margin, voted to confirm Ginsburg (Mersky, 937). After taking the judicial oath at the Supreme Court building, Ruth Bader Ginsburg was sworn in as an Associate Justice of the United States Supreme Court at a White House ceremony on August 10, 1993 (*Id.*, 42). Speaking in the East Room, President Clinton remarked that ". . . carved into the marble above [one of] the Court's . . . entrance[s] is. . . : 'Justice, the Guardian of Liberty.' In Ruth Bader Ginsburg, I believe the nation is getting a Justice who will be a guardian of liberty for all Americans and an ensurer of equal justice under law." (*Id.*, 43)

Tenure on the United States Supreme Court

Over the course of her seven Term tenure on the Supreme Court, Justice Ginsburg has written 62 majority opinions, 41 concurring opinions, and 39 dissenting opinions. Of these 142 opinions, nine presented equal protection questions squarely before the Court. Eight of these opinions will be analyzed in next.

The first equal protection case heard by Justice Ginsburg was *United States v. Hays* (1995). The question presented was whether Louisiana's apportionment scheme created an impermissible racial gerrymander. The claim focused on the Fourth District; however, the appellees were residents of the Fifth District. The Court majority, in an opinion written by Justice O'Connor, held that the appellees lacked standing to bring suit. In order to have

standing, O'Connor explained, Court precedent is clear that individualized harm must be demonstrated. Residence in a district other than the one in which the alleged racial gerrymander occurred did not constitute sufficiently individualized injury to create standing to file suit.

Ginsburg concurred only in the judgment of the Court. However, she chose not to write separately to explain why she was unwilling to endorse the reasoning of the Court.

Justice Ginsburg participated in three highly publicized, important equal protection cases during the 1995 Term. These cases involved affirmative action, school desegregation, and voting rights. The High Court was closely divided, splintering 5-4 in each case. Ginsburg filed three separate dissenting opinions.

The issue before the Court in *Adarand Constructors v. Pena* (1995) involved minority set-aside requirements. Most federal contracts must contain provisions offering financial incentives to the primary contractor to subcontract some of the project to companies controlled by historically disadvantaged minorities. The primary contractor in this case subcontracted work to such a company. Adarand Constructors had competed for the job and submitted the lowest bid but was not awarded the subcontract because it was not a minority-controlled company. Adarand Constructors brought suit claiming that the race-based preference in the federal set-aside policy offended the Equal Protection Component of the Due Process Clause of the Fifth Amendment.

With the exception of one small sub-section, Justice O'Connor's opinion garnered majority support. The Court held that all race-based classifications – whether benign or invidious – created at any level of government must be subjected to strict scrutiny review,

reversing its decision in *Metro Broadcasting v. Federal Communications Commission* (1990). In *Metro Broadcasting* the Court had upheld a federal set-aside policy and had differentiated between affirmative action programs implemented by federal and state governments for purposes of determining the applicable standard of review. This distinction was erased by the Court's holding in *Adarand* by applying strict scrutiny to all affirmative action policies. Since precedent had been overruled and the playing field had been altered, as O'Connor noted, the case was remanded to the lower court to reconsider the constitutionality of the challenged classification consistent with the Court's instructions.

Ginsburg dissented, writing a multifaceted opinion emphasizing areas of doctrinal consensus among the Justices. She also endorsed judicial restraint, allowing the political branches to refine existing affirmative action policy. Finally, she urged accommodation, balancing the interests of the historically disadvantaged groups to overcome residual discriminatory effects without diminishing the opportunities available to historically favored groups. Ginsburg argued that since reexamination of existing affirmative action policies was under way in the legislative and executive branches, judicial intervention in the instant case was unnecessary. Moreover, she continued, considerable judicial deference was owed to the political branches in a matter more appropriately within their purview.

Ginsburg delineated areas of consensus articulated by the various opinions written in this case. Although her motivation remains unclear, perhaps she sought to influence scholarly interpretations of the Justices' opinions. Equally plausible is the possibility that Justice Ginsburg was communicating with her colleagues, attempting to define the contours of the debate for consideration of a similar question before the Court at some point in the future.

The Justices, she noted, acknowledged Congress' authority to take action to end discriminatory practices and agreed that there remains a need for intervention by the political branches to remedy the residual effects of discrimination that continue to shape the experiences and opportunities of Americans based on the color of their skin.

In Ginsburg's view the Justices also ". . . properly [endorsed a standard of] . . .review that is searching, in order to ferret out classifications in reality malign, but masquerade as benign" (515 U.S. 200, 275), drawing comparison to ostensibly benign gender-based classifications that ultimately had the opposite effect. "Today's decision," Ginsburg continued, "thus usefully reiterates that the purpose of strict scrutiny 'is precisely to distinguish legitimate from illegitimate uses of race in governmental decision making . . . to differentiate between permissible and impermissible governmental use of race . . . to distinguish between a No Trespassing sign and a welcome mat.'" (*Id.*, at 275-276) Endorsing the balancing approach articulated in Justice Souter's opinion, Ginsburg observed that strict scrutiny was also warranted because sometimes the favored group could be hurt by the "catchup mechanisms" employed to remedy past discrimination and counteract its lingering effects. Close judicial scrutiny of such classifications ". . .can ensure that preferences are not so large as to trammel unduly upon the opportunities of others or interfere too harshly with legitimate expectations of persons in once-preferred groups." (*Id.*)

Finally, Justice Ginsburg stated that she would not modify the set-aside policy at issue here and would leave its improvement to the political branches. In spite of the many reservations expressed in her dissent, Justice Ginsburg sounded a positive note in her ultimate assessment of the Court's decision. Thus, she concluded that this ruling fostered the

continued evolution of precedent ". . .still to be informed by and responsive to changing conditions." (*Id.*)

The questions presented in *Missouri v. Jenkins* (1995) involved school desegregation. Two issues were raised: whether the District Court exceeded its authority in ordering the state to fund a salary increase for nearly all employees in the Kansas City School District; and whether the District Court properly relied on the fact that student achievement scores had not improved comparable to an unspecified standard in rejecting Missouri's request to be relieved of its continued provision of remedial quality education programs.

Writing for the majority, Chief Justice Rehnquist held that the District Court had exceeded its authority in ordering the state to fund salary increases and to continue to provide remedial programs indefinitely until student performance rivaled national norms. The High Court concluded that the District Court's orders were not merely remedial measures intended to overcome the achievement deficits of minority students incurred prior to school desegregation; rather, Rehnquist maintained that they were designed to improve the schools in that district to the degree that students from other districts would transfer into the Kansas City School District. This goal exceeded the authority granted the District Court overseeing desegregation.

Although Justice Ginsburg joined Justice David Souter's dissent, she wrote separately to emphasize one critical point. The opinion of the Court, she noted, stressed that the District Court order in question had been in place for seven years. She reminded the majority that compared to more than two centuries of ". . .firmly entrenched official discrimination, the experience with the desegregation remedies ordered by the District Court have been

evanescent." (515 U.S. 70, 175) Ginsburg provided a truncated overview of history to underscore her point, emphasizing that when Missouri entered the Union it did so as a slave state. She also pointed to the state's history of state-sponsored segregation and resistance to implementation of *Brown v. Board of Education* (1954) and its progeny. "Given the deep, inglorious history of segregation in Missouri," Ginsburg concluded, "to curtail desegregation at this time and in this manner is an action at once too swift and too soon." (505 U.S. 70, 176)

Miller v. Johnson (1995) presented the question of whether a Georgia congressional district created by the legislature's apportionment plan constituted an impermissible racial gerrymander. In order to comply with the Voting Rights Act of 1965, two congressional districting plans constructed by the Georgia legislature – each of which created two majority-Black districts – were submitted to the Department of Justice (DOJ) for preclearance. The DOJ rejected each plan. Georgia ultimately obtained approval of a third plan, this one containing three majority-Black districts. The apportionment scheme that had produced the majority-Black Eleventh District was challenged by Georgia voters as wholly race-conscious in violation of the Equal Protection Clause.

Writing for the majority, Justice Anthony Kennedy invalidated Georgia's districting scheme, relying on *Shaw v. Reno* (1993). Consideration of race as the controlling factor in apportionment is impermissible. Georgia's Eleventh District, Kennedy explained, was so bizarrely shaped that a portion was only as wide as the highway it included, which he interpreted as an indicator that race was the central factor in drawing the district lines. Consistent with *Shaw*, the Court held that a district's shape was relevant not for bizarreness

per se but because the shape may provide circumstantial evidence suggesting that race alone was the central consideration in drawing the district lines. In order to offend the Constitution, it must be demonstrated that the predominance of race was the legislature's primary consideration in disregard of the race-neutral historical tradition of the state's districting practices.

In addition to the bizarre shape, Kennedy stated that other evidence made clear that the legislature was primarily motivated by race in order to comply with the DOJ's interpretation of the Voting Rights Act. Eradicating effects of past racial discrimination was a worthy state goal; the Court, however, believed that Georgia's goal was to satisfy the DOJ. Compliance with the Voting Rights Act and the Department of Justice alone, Kennedy explained, were not sufficiently compelling state interests to satisfy strict scrutiny review of the race-based classification at issue here. He opined that Georgia's previously submitted plans would not have violated the Act unless race was the central rationale for drawing the districting lines. The DOJ did not object to them based on evidence of discriminatory intent but, the Court concluded, rejected them in order to advance a specific policy interest: creating majority-Black districts wherever possible. The Court also expressed concern for the DOJ's implicit requirement that states create impermissible race-conscious classifications at odds with the Fourteenth Amendment.

Dissenting, Justice Ginsburg pointed out that questions of a political nature involving apportionment were primarily the purview of state legislatures rather than courts. However, when race is an issue, the Court has recognized the need for judicial intervention to prevent dilution of minority voting strength. Ginsburg expressed sensitivity toward the history of

discrimination suffered by Blacks, particularly with respect to exercising the franchise. The Court has been and, Ginsburg insisted, must remain sensitive to claims of state action that dilutes minority voting strength.

She disagreed with the majority's assertion that the ostensibly atypical geography of a district suggested that the shared interests of racial or ethnic communities were not preserved by such a scheme and, therefore, rendered the scheme suspect. It was entirely appropriate for the state legislature to take such factors into consideration in order to ensure that the historically-muted voices of minorities were heard in the political process. In fact, she pointed out that accommodating community interests was a factor typically considered by the legislature in drawing lines. "Apportionment schemes, by their very nature, assemble people in groups – by economic, geographical, political, or social characteristics. . ." (515 U.S. 900, 947) and do not treat people as individuals. She insisted that if people wanted to be grouped together in apportionment schemes based on their shared racial or ethnic heritage, Blacks could not be denied the same consideration. The nation, Ginsburg suggested, has not moved far enough beyond its discriminatory past to warrant less vigilance against dilution of minority votes.

Community interests could be advanced, she continued, by creating districts that were not necessarily geographically compact, and that these shared interests did, in fact, bind members of those communities together. Moreover, she rejected the High Court's conclusion that the district was oddly shaped relative to other Georgia congressional districts. Conversely, Ginsburg insisted that the Georgia scheme was entirely consistent with traditional districting practices employed by the state. Thus, the shape of the Eleventh District was not

suspect.

Ginsburg chided the majority for inventing a new, more rigorous race-as-dominant-factor standard and invalidating Georgia's plan even though it appeared to be consistent with traditional districting practices of the state. In her view, the Court's decision in the instant case expanded the role of the judiciary by encouraging federal courts to scrutinize any district whose geographic shape appears to be the product of racial consideration. Strict scrutiny review could now be triggered by not only the alleged abandonment of traditional apportionment practices, but also when it is alleged that these practices are subordinated to race. She concluded that this new standard articulated by the majority invalidated an apportionment scheme produced by adherence to traditional districting principles.

Consideration of race itself as a factor, Ginsburg maintained, should not provide sufficient grounds to invalidate districting plans. To offend the Equal Protection Clause, she argued, the legislature must do more than merely consider race. The racial consideration here did not exclude the consideration of other factors, and no evidence was presented to substantiate the contention that race was the exclusive focus of the legislature. Conversely, Ginsburg noted that a variety of factors were, in fact, taken into account by the legislature in drawing lines (elected official A wanted this county to remain in his district; elected official B wanted that neighborhood included in her district; etc.). Race itself was considered by the legislature, although it was clearly not considered to the exclusion of all other factors and therefore did not, in Ginsburg's view, offend the equal protection requirement. *Shaw*, she continued, authorized the Court to intervene in ". . . 'extremely irregular' apportionments in which the legislature cast aside traditional districting practices to consider race alone. . . ."

(*Id.*, at 934)

Voicing concern for the outcome that the Court's decision might produce, Ginsburg argued that entertaining mere allegations that race was the central consideration to the exclusion of all others invited litigation. Ginsburg expressed reluctance about encouraging such suits against states, which invited a larger judicial role in a matter that is primarily a state responsibility.

The question raised in *M.L.B. v. S.L.J.* (1996) involved a Mississippi requirement that all individuals filing civil appeals pay record preparation fees as a condition to access the judicial process. The question before the Justices was whether conditioning the appeal of a trial court's termination of parental rights on payment of such fees offended both the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

Justice Ginsburg's majority opinion struck a balance between competing state and individual interests. The narrow holding did not invalidate Mississippi's general requirement that all civil appeals be conditioned on the ability to pay the requisite fees, endorsing the position espoused by Justice Felix Frankfurter's concurring opinion in *Griffin v. Illinois* (1956) that the state should not be required to equalize access to the justice system entirely. Ginsburg also reiterated Frankfurter's qualification that the state cannot preclude access to the appellate process based solely on financial circumstances, effectively ". . . bolt[ing] the door to equal justice." (351 U.S. 12, 24)

Griffin, however, Ginsburg noted, involved the conditioning of a criminal appeal on payment of record preparation fees. The High Court has not extended that holding to civil appeals and it declined to do so here, although Ginsburg maintained that *Griffin* did have

limited application in the instant case. The Court did not dispute the state's requirement for civil appeals generally and noted that such fee requirements were subject to rationality review. However, precedent has established two exceptions: participation of voters and candidates in the electoral process conditioned on a fee, and access to the judicial process in criminal appeals conditioned on a fee. Ginsburg held the challenged classification to a more rigorous standard of review than rationality because the nature of the parent-child relationship was a fundamental liberty requiring review under a heightened degree of scrutiny.

Since the nature of the right at stake in the instant case was fundamental and the consequence of the state's action was of such a devastating and irreversible nature – the termination of parental rights – a narrow exception to the state's civil appellate procedure consistent with *Griffin* was warranted. Although the challenged provision appeared to be neutral on its face, its application was highly discriminatory in the instant case. Thus, the state's blanket requirement that all civil appellees finance the preparation of court records as a condition for access to the judicial process offended the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

The question before the Justices in *Vacco v. Quill* (1997) was whether New York's blanket prohibition on assisted suicide offended the Equal Protection Clause of the Fourteenth Amendment. Writing for the majority, Chief Justice William Rehnquist held, consistent with the equal protection requirement, that the statute survived rational basis review because the statute treated all persons alike (irrespective of physical condition, for example).

The Chief Justice differentiated between the concepts of assisting suicide and withdrawing life-sustaining treatment, a distinction respected by Court precedent as well as

statutes in many states. Refusing treatment, the Chief Justice explained, is constitutionally protected on the ground of preserving bodily integrity, not of hastening death. The distinction between assisted suicide and withdrawal of treatment, then, is not arbitrary and irrational. The state's prohibition on assisted suicide, the Court concluded, bore a rational relationship to the achievement of a legitimate state end.

Ginsburg filed an opinion concurring in judgment. She wrote separately to indicate her support for the minimalist approach offered by Justice Sandra Day O'Connor in her concurring opinion, although Ginsburg chose not to join O'Connor's opinion formally. Justice O'Connor indicated that her support for the decision resulted from her belief that there was no generalized constitutional right to commit suicide. Since the issue in the instant case presented a facial challenge to the constitutionality of the statute, she believed that the Court need not reach the narrower question of whether a mentally competent person suffering great physical pain had the right to assisted suicide. Further, O'Connor, noted that the nuances of this controversial issue were still developing in state legislatures and that more time was needed for states to deal with this issue.

At issue in *Miller v. Albright* (1998) was whether a distinction in the United States Code between illegitimate children of American citizen mothers and illegitimate children of American citizen fathers offended the Equal Protection Component of the Due Process Clause of the Fifth Amendment. The statute required that children born abroad and out of wedlock to citizen fathers, but not citizen mothers, obtain proof of paternity prior to age 18 in order to qualify for American citizenship. Justice John Paul Stevens, writing for the majority, held that the classification was neither arbitrary nor invidious and did not offend the Constitution.

Applying a heightened standard of scrutiny, Stevens explained that the government demonstrated that the classification was reasonable and justified by important governmental interests: ensuring that the child genuinely shared a blood relationship with an American citizen; fostering the development of a healthy relationship between the American citizen mother and child before the child reaches majority; and fostering the child's ties to the United States.

Additionally, Stevens argued that male and female parents of foreign-born illegitimate children were dissimilarly situated: the child's blood relationship with the mother was immediate and obvious and established by a birth certificate and hospital records. The relationship with the father, however, was not so easily established; Stevens explained that the child's relationship to the father was often undisclosed or unknown and undocumented in public records. The mother is obviously aware of the child's existence, Stevens continued, but the father may not know about the child. The classification in the statute requiring proof of paternity but not maternity, Stevens concluded, was sufficient to achieve the government's objective.

The majority opinion rejected the argument that the classification constituted an impermissible, stereotypical gender-based distinction. Stevens maintained that the government's objectives were not products of traditional stereotypical notions about men and women used as a proxy for a relevant classification, which the Supreme Bench had invalidated many times. Biological differences between the sexes, he insisted, were entirely relevant to the advancement of the government's goals.

The rationale articulated in Justice Ginsburg's dissenting opinion exhibited similarities

to the briefs she wrote as an advocate during the 1970s. Attacking a point advanced by Stevens' opinion, she insisted that the classification at issue was obviously based on stereotypes: unwed mothers were responsible for children while unwed fathers usually were not. The classification treated women one way, men another way; moreover, she argued, the classification reinforced traditional sex-based stereotypes. On its face, the statutory distinction could be viewed as a benign dispensation for women, affording them preferential treatment while disadvantaging men. This, Ginsburg explained, was the majority's view of the classification. The ostensibly benign provision at issue, however, was one of few remaining provisions in the United States Code that continued to use sex as classification for determining citizens' rights.

The classification, however, was not benign. Accepting the government's rationale for the classification arguendo, Ginsburg insisted that the distinction was nonetheless a product and perpetuator of stereotypical generalizations about the way men and women are; in fact, the majority opinion was replete with sex-based stereotypes. Ginsburg insisted that the rationale put forth by the government failed to justify the classification. Laws that genuinely advanced equality among individuals, she maintained, must be constructed in ways that do not perpetuate stereotypical generalizations about entire groups of people based on a shared characteristic.

The most recent equal protection opinion written by Justice Ginsburg that is addressed in this dissertation involved collective bargaining. In *Central State University v. AAUP* (1999) the question was whether an Ohio statute requiring public universities to develop standards for professors' teaching loads and exempting those standards from collective

bargaining offended the Equal Protection Clause. In a Per Curiam opinion summarily disposing of the case, the Court held that the Ohio Supreme Court's holding invalidating the statute was irreconcilable with equal protection. The Supreme Bench reiterated that classifications neither involving a suspect class nor relating to the exercise of a fundamental right could not run afoul of the equal protection requirement if a rational relationship between the disparate treatment created by the distinction and a legitimate governmental objective existed. Ohio's statute, the Court held, satisfied this standard. The state court inappropriately required the government to demonstrate rationality; the Supreme Court reiterated that application of rational basis – the appropriate standard of review here – presumed rationality in favor of the government, requiring the challenger to demonstrate irrationality. Since irrationality of the statute had not been demonstrated, the Supreme Court reversed the state court and upheld the constitutionality of the statute.

Justice Ginsburg concurred with the Per Curiam opinion with respect to the holding that the Ohio Supreme Court improperly applied a heightened standard of review beyond rationality. Ginsburg wrote separately to state her view that summary disposition provided an unsuitable circumstance for discussion of the Court's standards of review in cases presenting equal protection questions.

Summary

The jurisprudential position reflected in the equal protection opinions written by Ginsburg analyzed in this chapter comport with the position she articulated as an advocate: Unwavering resistence to the classification of individuals based on stereotypical

generalizations that are wholly unrelated to their ability to perform and contribute to society. Ginsburg's opinions in *Albright*, *M.L.B.*, *Johnson*, *Jenkins*, and *Adarand*, in particular, evidence her awareness of and sensitivity toward the uniquely vulnerable position of historically disfavored individuals relative to state action that may perpetuate their disadvantaged status. Ginsburg maintained that remedies of comparatively brief duration cannot overcome the lingering effects of historical discrimination. Long-term disadvantageous treatment, in her view, may necessitate long-term remedial intervention. Particularly with regard to the Supreme Court opinions, her heightened sensitivity toward historically disadvantaged individuals and the persistence of stereotypes that generate classifications resulting in unequal treatment remains steadfast.

Ginsburg's judicial opinions also reflect cognizance of the limited, interstitial function the judiciary was intended to perform in our scheme of government. Her opinions in *Vacco*, *M.L.B.*, *Johnson*, and *Adarand* exhibit adherence to the principle of judicial minimalism. Rather than develop sweeping judicial theory, Ginsburg crafted narrow opinions endorsing limited judicial intervention in order to protect the exercise of fundamental rights. These opinions also endorse the principle of judicial restraint, deferring to the political branches to modify still-evolving public policies without premature judicial intrusion.

Ginsburg's opinions also reflect considerable deference to precedent and discernible legislative intent. With regard to the opinions Ginsburg wrote as both a Judge on the Court of Appeals and a Supreme Court Justice it appears that she is not a result-oriented judicial activist. Rather, Ginsburg's judgment is grounded in deference to precedent and legislative intent. Ginsburg's desire to balance competing interests – either the state versus the

individual, or historically disfavored individuals versus historically favored individuals – is also apparent.

None of the opinions analyzed in this chapter, however, specifically raised an issue on gender equality grounds. Only one case through the end of the 1999 Term presented such a question: *United States v. Virginia*. The next chapter focuses on that decision.

CHAPTER FIVE:
JUSTICE GINSBURG, VMI, AND
AN EVOLVING STANDARD OF REVIEW?

This chapter focuses on Justice Ginsburg's opinion in *United States v. Virginia* (1996), the VMI case. Review of Justice O'Connor's majority opinion in *Mississippi University for Women v. Hogan* (1982) provides context essential for discussion of Ginsburg's opinion in VMI and precedes its analysis. In a 1997 article, Ginsburg explained that O'Connor's opinion in *Hogan* ". . .paved the way for the opinion I wrote fourteen years later in the Virginia military academy case." (270) The opinions in these cases are analyzed next. Scholarly commentary regarding Ginsburg's opinion and the precedential weight of the VMI decision are analyzed at the end of the chapter.

Justice O'Connor's Contribution

The issue before the Court in *Mississippi University for Women v. Hogan* was whether a state-supported university's policy that excluded otherwise qualified males from enrolling in its professional nursing school for credit offended the Equal Protection Clause of the Fourteenth Amendment. The Court struck down the policy, dividing 5-4.

Writing for the majority, Justice O'Connor began by rejecting an assertion made by her dissenting colleagues. It was irrelevant, she explained, which sex was disadvantaged (males rather than females) with regard to determining the applicable level of scrutiny. She

insisted that all sex-based classifications merited review under a more demanding test than rational basis. O'Connor articulated this standard as one in which the government, defending the constitutionality of the classification,

> . . . bears 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.' (458 U.S. 718, 724)

These criteria, which she cautioned must be applied without consideration of traditional sex-based stereotypes, comprise the conventional intermediate scrutiny test routinely employed by the Court. O'Connor was explicit in her adherence to that standard.

The Court identified two reasons in support of its conclusion that the long-standing single-sex admission policy at Mississippi University For Women (MUW) was not justified on the grounds of compensating women for past discrimination: 1) the policy was initially implemented with traditional notions about appropriate gender roles in mind, as the language of the enabling legislation made clear; and 2) continuation of the policy perpetuated sex-based stereotypes. Moreover, it advanced the stereotype that occupations like nursing were women's jobs. If, as Mississippi contended, the policy constituted educational affirmative action for women, O'Connor queried skeptically, why did women need an affirmative action program to compensate for past discrimination in the nursing field, an occupation traditionally dominated by women? Rather than function as an affirmative action program, O'Connor argued that the policy reinforced sex-based stereotypical generalizations.

The challenged classification, in her view, did not advance the ostensible purpose

claimed by the state. The Court also observed that Mississippi had submitted no evidence supporting its contention that MUW's single-sex admission policy advanced the ostensible purpose of compensating women for past discrimination since men, who were permitted to audit classes, were present on campus. Consequently, the High Court held that the state had failed to establish the exceedingly persuasive justification necessary to preserve the sex-based classification. MUW's single-sex admission policy was held to be violative of the Equal Protection Clause.

O'Connor emphasized the narrowness of both the question at issue and the Court's holding, which involved admission to a professional nursing school. She explicitly stated that the focus was not the constitutionality of single-sex education in general, an issue not before the Court. Rather, the minimalist opinion she wrote was confined to a narrow set of facts. O'Connor also avoided dealing with a much broader question: since the challenged classification failed intermediate scrutiny analysis, the Court need not address whether sex ought to be designated as a suspect classification meriting application of the most stringent standard of review.[1]

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"In his dissenting opinion, Justice Powell argues that a less rigorous test should apply because Hogan does not advance a 'serious equal protection claim.' . . . Justice Blackmun, without proposing an alternative test, labels the test applicable to gender-based discrimination as 'rigid' and productive of 'needless conformity.' . . . Our past decisions establish, however, that when a classification expressly discriminates on the basis of gender, the analysis and level of scrutiny applied to determine the validity of the classification do not vary simply because the objective appears acceptable to individual Members of the Court. While the validity and importance of the objective may affect the outcome of the analysis, the analysis itself does not change. Thus, we apply the test previously relied upon by the Court to measure the constitutionality of gender-based discrimination. Because we conclude that the challenged statutory classification is not substantially related to an important governmental objective, we need not decide whether

Chief Justice Warren Burger dissented. He endorsed the rationale articulated in Justice Powell's dissent and wrote separately to emphasize the narrowness of the holding. The Court had only invalidated single-sex admission to a state-supported professional nursing school and did not extend its analysis to single-sex education in general.

Justice Harry Blackmun also filed a dissenting opinion. He derided the "needless conformity" (*Id.*, at 734) embodied in the majority opinion. Blackmun suggested that unyielding adherence to "rigid rules" (*Id.*) with regard to sex equality threatened values important to some people by forbidding the state to offer them an alternative option while not depriving others of choices as well. The state, he pointed out, had provided educational opportunities to Hogan aside from the program at MUW. Hogan's access to nursing education, therefore, had not been blocked.

Blackmun attacked the ostensibly narrow holding articulated in O'Connor's opinion, insisting that broader implications were inevitable. He warned that the Court's holding in the instant case jeopardized all state-supported single-sex education, even if the state provided comparable alternatives for others.

Justice Lewis Powell wrote a third dissenting opinion, joined by Justice William Rehnquist. Powell also attacked the majority for what he perceived as its over-zealous, unnecessary conformity. He defended MUW's single-sex policy as a valuable element of diversity and chided the Court for eliminating access to an alternative preference in education. Moreover, since no other man had brought a sex discrimination claim, the discriminatory impact appeared to be anomalous. Powell also provided a truncated historical overview of

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classifications based upon gender are inherently suspect." (*Id.*, at n 9)

single-sex education and lauded its benefit, underscoring his belief that it was merely a preference rather than invidious discrimination and should be allowed to remain an option for those who wanted it.

With regard to the applicable standard of review, Powell did not perceive the alleged discrimination in the instant case as a serious affront to the equal protection requirement and rejected the application of a heightened standard of review since men, not women, were ostensibly disadvantaged by the classification. In his view, rational basis was a sufficient test, which the classification survived. Even applying a heightened standard of review, for the sake of argument, he insisted that the challenged classification still survived constitutional scrutiny because it invidiously discriminated against no one. In Powell's view, Hogan did not have a legitimate sex discrimination claim. Moreover, he insisted, equal protection was never intended to apply here.

Invalidating a sex-based classification that disadvantaged men rather than women is not remarkable. The Court invalidated several provisions of this kind during the 1970s. The *Hogan* majority opinion is notable for the way in which O'Connor articulated the standard of review. She was explicit in her adherence to the traditional test applied to sex discrimination cases. Whether it was the same standard or a modification was never addressed by any of the Justices.[2] O'Connor did not characterize the phrase "exceedingly

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A search of law review articles published shortly after the Court announced its decision in *Hogan* reveals that legal academia was not divided on the question of whether Justice O'Connor had adhered to the traditional intermediate scrutiny standard the Court had typically applied in gender discrimination claims since *Craig v. Boren* (1976). Engles (1985), Lamar (1983), and Law (1984) maintained that O'Connor had, in fact, applied intermediate scrutiny. It is noteworthy that they did not dispute this point nor did they

persuasive justification" as a component added to the existing middle tier; in fact, she did not even acknowledge that there had been an alteration of the standard. She explained that the exceedingly persuasive justification was defined substantively by the traditional intermediate scrutiny criteria, which must be satisfied in order to preserve the challenged classification.

Rather than criticize her for surreptitiously altering the standard from intermediate scrutiny to something closer to strict scrutiny (as many critics have insisted that Ginsburg did in the VMI decision), the dissenters merely disagreed with the application of intermediate scrutiny in the *Hogan* case and argued for lowering the standard of review to rationality.

The opinions in *Hogan* are also important because they reveal continued disagreement among the Justices as to the appropriate standard of review in determining the constitutionality of sex-based classifications. The opinions indicate that many Justices were skeptical that the standard was settled, as it is with race classifications, for example. Justices in the majority seem persuaded that the applicable test applied in sex discrimination cases was at least intermediate scrutiny and, arguably, hinted that they might consider raising the standard of review at an appropriate time. Conversely, many of the dissenting Justices disagreed and indicated their inclination toward lowering the level of scrutiny to rational basis. Clearly, few Justices on the *Hogan* Court seemed satisfied that the test applicable to sex-

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refer to any dispute within legal academic circles or cite scholars challenging this assertion. Comments offered by Caslin reinforce this conclusion: "Indeed, the opinion's initial call for an exceedingly persuasive justification had no effect on the substantive legal analysis beyond requiring an inquiry into Mississippi's purpose, and most Court observers looked past it. At most, the Court recognized the phrase as a shorthand referral to intermediate scrutiny." (1997: 1368) However, Justice Ginsburg clearly views O'Connor's opinion in *Hogan* as a contribution to the evolution of gender-based equal protection jurisprudence. This point will be revisited in the section of the chapter analyzing the VMI decision.

based classifications was settled, and many Justices appeared willing to reconsider the issue (Lamar 1983). In 1996, the High Bench had an opportunity to revisit the constitutionality of a gender-based classification in the context of state-supported higher education.

VMI: The Litigation History and Facts of The Case

The Virginia Military Institute (VMI), founded in 1839, remained the sole public single-sex institution of higher education in Virginia. To achieve its mission to produce "citizen-soldiers" VMI employed a distinctive methodology, the "adversative" method. This method was designed to instill mental and physical discipline in cadets under exceptionally strenuous, harsh, stressful conditions. The adversative method mandates constant imposition of physical and mental stress, completely egalitarian treatment of all cadets, absence of privacy, rigid regulation of behavior, and indoctrination of values. Rooming in barracks and dining in a mess hall, cadets lived in a communal setting in order to remove them from their social backgrounds and instill egalitarian values. VMI's program was based on a military model, and cadets regularly participated in drills. First-year students were subjected to a "rat-line" where they were tormented and hazed by upperclassmen in order to bond the new cadets together. VMI's distinctive program was not replicated anywhere in the nation. Women had no opportunity to avail themselves of this type of education.

For most of its history, VMI's mission statement characterized its central purpose as training cadets to be citizen-soldiers. Its program was designed to prepare students for both civilian and military life, and only a minority of its graduates pursue military careers. VMI graduates are also found in government, business, and the professions. Loyal alumni have

created a substantial endowment; VMI enjoys the largest per-student endowment of all public undergraduate schools in the nation.

Many women found the distinctive educational environment VMI offered appealing and sought admission. VMI, however, always chose to leave its single-sex admission policy undisturbed, denying admission to applicants solely on the basis of sex. In 1990 a prospective female applicant filed a complaint with the Attorney General. The United States sued the Commonwealth of Virginia, claiming that VMI's single-sex admission policy invidiously discriminated against women, offending the Equal Protection Clause of the Fourteenth Amendment. Pointing to the hundreds of inquiries from women VMI had received in the years immediately preceding the litigation, the District Court concluded that some women were interested in attending VMI and would attend if permitted. The court further acknowledged that some women would be able to satisfy all existing requirements of VMI cadets.

Despite these favorable conclusions, the District Court ruled in favor of VMI. Citing *Hogan* as authority, it applied the middle tier of review in making its determination. The court found that the Commonwealth had provided an exceedingly persuasive justification for the sex-based classification, which bore a substantial relationship to an important governmental objective. The court concluded that single-sex education, either for males or females, was substantially beneficial to many students. VMI brought diversity to the Commonwealth's education system, which was further enhanced by VMI's distinctive methodology. Since single-sex education was substantially important, the court reasoned, the sole means for achieving it was by classifying individuals based on sex. The court conceded

that women were deprived of such an opportunity; however, it concluded that VMI's distinctiveness would be eroded significantly by admitting women. The District Court, therefore, held that VMI's admission plan was constitutional.

The Court of Appeals for the Fourth Circuit found an equal protection violation and reversed, vacating the District Court's judgment. It was skeptical of the asserted purpose that VMI remained single-sex in order to create diversity within the system of higher education maintained by the Commonwealth. The Appeals Court recognized the discrepancy between that contention and the admonition contained in a study of higher education conducted by the Commonwealth. The study insisted that students and faculty should be treated equally without regard to race, sex, or ethnic origin. Further, the Fourth Circuit cited the integration of all other public institutions in Virginia excluding VMI, pointing to a decades-old trend in the opposite direction.

It was stipulated that some women could meet the physical standards required of men, and the Appeals Court concluded that VMI's goal of producing citizen-soldiers and its adversative method were not inherently unsuitable to women. These conclusions notwithstanding, the Fourth Circuit agreed with the lower court that three central features of VMI's program would be "materially affected by coeducation"(518 U.S. 515, 525): physical training, absence of privacy, and the adversative method. Remanding the case, the Fourth Circuit identified three remedial options available to the Commonwealth to repair the equal protection violation: 1) remain a public institution and admit women; 2) remain a public institution and establish a parallel program for women; or 3) forego public support and remain single-sex as a private institution.

The Commonwealth elected to continue to provide public single-sex education. It chose to create a parallel state-supported program for women: the Virginia Women's Institute for Leadership (VWIL), located at Mary Baldwin College, a private single-sex women's institution. The remedial VWIL program was markedly different from the program offered at VMI. Mary Baldwin's faculty contained substantially fewer Ph.D.s than the faculty at VMI, and they were paid much lower salaries. VMI also offered degrees in liberal arts, sciences, and engineering. Mary Baldwin, however, only offered degrees in liberal arts. In both quantity and quality, VMI training and athletic facilities were far superior to those available at VWIL.

A task force created to formulate and implement the parallel program concluded that use of the adversative method within a military structure would not be appropriate for most women. The task force, using the program at VMI as a model, recommended myriad modifications of that model in order to create a similar program they believed would be more suitable to women.

VWIL students participated in ROTC, which was offered at Mary Baldwin prior to the establishment of the parallel program, but they did not participate in a military program per se. Students at VWIL wore uniforms when participating in ROTC functions but did not routinely wearing uniforms as did cadets at VMI. VWIL did not require communal dining in a mess hall and communal living in barracks without privacy. Rather than implementing VMI's adversative method, VWIL employed a cooperative approach designed specifically to meet the unique needs of women: enhancing self-esteem, and training in self-defense and self-assertiveness. The Commonwealth provided equal per-student support for both programs.

However, VMI's endowment was nearly seven times larger than Mary Baldwin's endowment.

The Commonwealth sought District Court approval of the remedial plan. The court held that the plan sufficiently remedied the equal protection violation. It acknowledged that disparities between the programs existed, but concluded that the Commonwealth was not required to provide absolutely equal programs for men and women.

The Fourth Circuit affirmed the judgment of the District Court. It explained that the Commonwealth's objective must be scrutinized deferentially (although Virginia bore the burden of proof), indicating that "[r]espect for the 'legislative will,'. . . meant that the judiciary should take a 'cautious approach,' inquiring into the 'legitimacy' of the governmental objective and refusing approval for any purpose revealed to be 'pernicious.'" (*Id.*, at 528) The Fourth Circuit explained that the Commonwealth's decision to provide the option of single-sex higher education may be viewed as an important aspect of higher education. Such a goal, the Appeals Court noted, was not pernicious. Further, it stated that the adversative approach integral to the VMI program had never been successful in a coeducational setting. The court concluded that admission of women to a program using the adversative method ". . . 'would destroy . . . any sense of decency that still permeates the relationship between the sexes.'" (*Id.*)

Since the Commonwealth's goal was found to be legitimate, the Fourth Circuit then analyzed the means of implementation. In doing so, it added a third element to its equal protection analysis: determining the substantive comparability of the respective programs. Specifically, it focused on whether men at VMI and women at VWIL received substantively comparable benefits. Although the court conceded that real differences between programs

existed, it nonetheless found them to be substantively comparable to one another.

Further, the court concluded that these differences were based on sound pedagogy rather than inimical stereotypes and were justified in order to meet the different needs of women and men, particularly with respect to the use of the adversative method. Although these different programs yielded the same results, with regard to obvious curricular differences the Appeals Court cited diversity within the Commonwealth's education system as a valid defense. In fact, the court opined that offering absolutely identical programs would actually frustrate the achievement of that goal. The Fourth Circuit, therefore, held the parallel program to be a constitutionally adequate remedy to the original equal protection violation. The United States filed a petition for certiorari in the United States Supreme Court. The Court granted certiorari and scheduled oral argument for January 17, 1996.

In briefs and oral argument before the High Court, it was evident that opposing sides viewed the facts of the case from drastically different perspectives. Attacking the constitutionality of VMI's admission policy and the parallel program designed to remedy the violation, the United States cast the issues before the Court in narrow terms. It focused on the distinctiveness of VMI and the unavailability of the identical experience to women. The petition for certiorari framed the questions as whether the unconstitutional provision of state-supported single-sex military education for men was sufficiently remedied by providing women a different type of single-sex military education tailored to most women, or whether coeducation was required to repair the violation.

At specific points, language in the United States' brief was comparable to the language used by Ginsburg as an advocate some two decades previously. Although the facts

and questions presented were narrow, the brief argued, the issues were nonetheless important. The Supreme Court has maintained that equal protection rights are individual rights, not group rights. Individuals, therefore, have the right to be treated based on their own ability and capacity. They cannot be denied opportunity based on stereotypical notions about a specific group that are wholly unrelated to the individual's ability to perform and contribute to society. The United States contended that Virginia had done precisely that in its defense of the single-sex admission policy of VMI.

Defending the constitutionality of VMI's single-sex program and the adequacy of the parallel program, Virginia perceived the issues in much broader terms. It focused its defense on single-sex education generally, not confining itself to the distinctive features of the program that rendered VMI unique. In its opposition brief to the petition for certiorari, the Commonwealth framed the questions as: 1) whether the provision of a single-sex military style program for both sexes was constitutional in light of the Fourth Circuit's holding that intermediate scrutiny was satisfied; and 2) whether providing substantively comparable single-sex education was permissible when the programs were not entirely equal and identical, even though the differences were justified by expert pedagogical opinion with respect to the educational needs of men and women.

The Commonwealth explained that it provided both sexes the option to pursue single-sex public education designed to develop leadership in programs that included military training. These programs differed in methodology consistent with the needs of each sex, Virginia argued, and not providing absolutely identical programs did not create an equal protection violation.

The federal government disputed the contention that VMI's single-sex military program added diversity to the Commonwealth's system of higher education, pointing out that this had never been included in the program's mission statement. Moreover, denying women the identical opportunity provided to men (either by coeducation at VMI or the parallel program), in terms of a military-style program using the adversative approach, was not based on credible pedagogical reasoning. Rather, the policy was unconstitutional because it was based on and perpetuated sex-based stereotyping and invidiously discriminated against women. Because the Commonwealth violated the Constitution by using sex as a classification for determining admission to a public institution, the only appropriate remedy was to discontinue its use. The United States maintained that an admission classification based upon an individual's qualifications, rather than sex, would be more appropriate and would remedy the violation. This violation was exacerbated by the remedy Virginia sought to defend, which was also the product of sex-based stereotyping. The United States insisted that modest modification of VMI's program would successfully accommodate women without substantially altering the essence of its distinctive program.

The Commonwealth maintained that VMI's single-sex military program featuring the adversative method added diversity to its public higher education system. Moreover, Virginia argued that single-sex education was important and necessarily required the use of a sex-based classification to achieve the objective. The Commonwealth further insisted that VMI's program, particularly the adversative method, was inappropriate for most women. It argued that integration would require modifications so substantial as to alter fundamentally the program, rendering it an inferior version of the program offered in a single-sex format. The

Commonwealth further maintained that its conclusions were drawn by professional educators and were not determinations based upon inimical, inaccurate stereotypical generalizations about men and women.

With regard to the applicable standard of review, the United States insisted that the test employed by the Fourth Circuit conflicted with a long line of Supreme Court cases, *Hogan* among them, and was a less protective test than the intermediate scrutiny criteria traditionally employed by the Court. Although initially endorsing an intermediate scrutiny standard, the United States, on brief and in oral argument, requested that the Court adopt strict scrutiny. In the alternative, the United States argued that at the very least VMI's single-sex policy and the parallel program established to remedy the initial violation failed to survive middle tier analysis.

The Commonwealth pointed out that the insertion of the request for strict scrutiny review appeared at a late stage in the litigation, noting that the United States had previously endorsed the standard articulated in *Hogan*. It insisted that the intermediate scrutiny standard was the proper test to apply. Virginia cited Supreme Court precedent to substantiate its position, arguing that VMI's single-sex admission policy survived intermediate scrutiny review and that the VWIL remedied any constitutional defect that may have existed previously.

With regard to the remedy, the United States insisted that the obviously substantial differences between the two programs rendered VMI and VWIL far from being identical. The federal government argued that making equal opportunity available to both sexes was the only constitutionally permissible remedy. Further, making a point that Ginsburg made as an

advocate, the United States insisted that the justification for the disparities advanced by the Commonwealth were based on stereotypes about the intrinsic characteristics of men and women. Moreover, these unfair stereotypes effectively punished those who deviated from the stereotype and limited individual opportunity. The United States drew a parallel between the gender-based stereotypes advanced by Virginia in the instant case and the stereotype derided by the Court in *Hogan*. Treating women differently than men, which the parallel program did, perpetuated the constitutional violation. Therefore, the only sufficient remedy was the remedy the Court endorsed in *Hogan*: abandonment of the sex-based admission policy.

The Commonwealth insisted that although there were distinct differences, the programs achieved similar results. The Commonwealth consistently asserted that the differences between programs reflected expert opinions as to the most effective way to educate women and men and were not based on stereotypical generalizations. Moreover, because the programs offered at VMI and VWIL were substantially comparable, the parallel program sufficiently remedied the constitutional violation that may have been created by the public support of one single-sex institution. Either the provision of absolutely identical programs to both sexes or the gender-based integration of VMI, therefore, was unnecessary.

VMI: The Supreme Court's Disposition

On June 26, 1996, the Supreme Court announced its decision in the VMI case. Writing for the majority, Justice Ginsburg framed the questions narrowly: whether the Commonwealth's exclusion of women from the distinctive educational opportunity provided

at VMI denied to qualified women equal protection and, if so, what was the appropriate remedy. Dividing 7-1,[3] the High Court struck down VMI's single-sex admission plan and found that the parallel program established to remedy the violation was constitutionally inadequate.

Ginsburg reinforced the narrow focus of the Court's review. Virginia's goal of providing diverse educational opportunities was uncontested. The Court was only interested in an educational opportunity the lower courts had characterized as unique. This distinctive opportunity was provided at Virginia's only public single-sex institution. To determine the constitutionality of the challenged sex-based classification, Ginsburg invoked precedent reiterating that the government bore the burden of defending such a classification, which required an exceedingly persuasive justification. She declared her adherence to that standard, most recently articulated by O'Connor's opinion in *Hogan*. Ginsburg restated the substantive criteria required to meet that burden, which the *Hogan* opinion insisted must minimally bear a substantial relationship to an important governmental interest. She also reiterated O'Connor's admonition that these criteria be applied without regard to stereotypical sex-based generalizations. Further, Ginsburg cautioned that the rationale offered in defense of the classification must be authentic and not invented post-hoc for litigation purposes.

Referring to these criteria as "skeptical scrutiny" (*Id.*, at 531), Ginsburg offered perhaps a more suitable designation to the traditional middle tier of review which she characterized as the Court's ". . . current direction. . . "(*Id.*, at 532) in determining the

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Justice Clarence Thomas, whose son was a cadet at VMI when the Court heard this case, recused himself.

constitutionality of sex-based classifications. Use of phrases like "current direction" and *Hogan*'s "minimum" threshold may suggest possible change in the Court's position at some point in the future. However, Ginsburg was explicit that sex had not been designated as a suspect classification and would not be so designated here. She cryptically observed that the Supreme Bench had not equated gender-based classifications with proscribed race-based classifications "for all purposes" (*Id.*), which is an important signal with regard to evaluating the constitutionality of the remedy. Nonetheless, Ginsburg was explicit that she was applying the test traditionally applied by the Court in evaluating the constitutionality of gender-based classifications.

Ginsburg announced the Court's holdings as follows: first, Virginia failed to demonstrate an exceedingly persuasive justification for its denial of a VMI-caliber educational opportunity to women; second, the proposed remedial program did not afford women an equal educational opportunity and was, therefore, constitutionally inadequate. The bifurcated analysis Justice Ginsburg employed to reach these decisions will be analyzed next.

Writing a minimalist opinion, Ginsburg did not extend her analysis beyond those issues before the Court. The Court acknowledged that single-sex education was beneficial for some students, and its constitutionality was not at issue here. However, Virginia failed to persuade the Court that VMI and its single-sex admission policy had been established, or was maintained, in an effort to diversify educational opportunities available in Virginia. Ginsburg observed that the Commonwealth's invocation of diversity as a justification bore a commonality to the educational affirmative action justification offered by the State in *Hogan*: both rationales were not articulated in the stated mission of the programs.

Undermining the Commonwealth's contention, Ginsburg pointed out a trend noted by the lower court: single-sex public education in Virginia had been reduced to one institution (VMI). Additionally, she cited Virginia's history of excluding women from its public higher education system, which evolved into segregated and unequal educational opportunities, and finally to coeducation, with one exception. The Court was unpersuaded that VMI's status as a single-sex public institution served diversity purposes. Opining that such an objective would provide opportunity for all of Virginia's citizens, the Court concluded that its present system denying women this opportunity offended the Constitution: "However 'liberally. . .'this plan serves the Commonwealth's sons, it makes no provision whatever for her daughters. That is not *equal* protection." (*Id.*, at 540)

The Commonwealth offered a second justification for the sex-based classification. It argued that the adversative method yielded benefits to men but could not be used in a coeducational setting without modification so substantial as to dilute its effectiveness significantly. This, Virginia argued, would alter the program so dramatically that neither sex would benefit from its use. Men would be deprived of the opportunity currently available to them, and women would not gain an opportunity because their very participation would eliminate those aspects that distinguished VMI from all other institutions in Virginia.

With regard to the lower courts' conclusion that key features of the program – physical training, the absence of privacy, and the adversative method – would require substantial modification, Ginsburg conceded that some alterations would be necessary. However, she maintained that most of these accommodations related to housing and physical training. The adversative method would not require modification. She argued that the

adversative method could be effective for educating women and noted that there was no evidence indicating that its use was inappropriate in that context. Admission of women would not diminish VMI's stature, destroy the adversative method, or jeopardize VMI's future. Ginsburg contended that contrary notions were based on sex-based stereotypes, comparing them to the self-fulfilling prophecies repudiated in a long line of cases, including *Hogan*.

Having found that the challenged sex-based classification failed constitutional review, the Court then considered the constitutionality of Virginia's proposed remedy. Ginsburg invoked race discrimination cases as authority. Borrowing language from *Milliken v. Bradley* (1977) and *Louisiana v. United States* (1965), she insisted that the remedy must fit the constitutional violation closely:

> . . .[I]t must be shaped to place persons unconstitutionally denied an opportunity or advantage in 'the position they would have occupied in the absence of [discrimination].' . . . The constitutional violation in this case is the categorical exclusion of women from an extraordinary educational opportunity afforded men. A proper remedy for an unconstitutional exclusion. . . aims to 'eliminate [so far as possible] the discriminatory effects of the past' and to 'bar like discrimination in the future.' (*Id.*, at 547)

In electing to create a parallel program from the remedial options provided by the Court of Appeals, Virginia chose to continue the practice held unconstitutional. For women, it established a separate program vastly different from the program at VMI, unequal by both tangible and intangible indicators. The Commonwealth was required, Ginsburg insisted, to demonstrate that its remedy was "'. . . directly addressed and related . . .to' the violation. . . " (*Id.*), denying equal protection to those women seeking to benefit from a VMI-caliber education. Although Virginia described VWIL as a parallel program and insisted that its

mission was consistent with VMI, Ginsburg questioned whether VWIL could eliminate lingering effects of past discrimination and could prevent future discrimination. Comparing the inequalities between the two programs, Ginsburg concluded that the parallel program could accomplish neither objective.

Ginsburg also took issue with Virginia's justification for these differences, particularly with respect to the implementing methodology – VWIL's use of a cooperative method rather than VMI's adversative method. The Commonwealth maintained that the disparities were pedagogically justified, explaining that VWIL was tailored to meet the special needs of women. These conclusions were based on expert opinion, Virginia maintained, rather than stereotypes. Here, consistent with Ginsburg's career as an advocate, she attacked reliance on stereotypical generalizations about both sexes, noting that ". . . 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." (*Id.*, at 550)

To illustrate this point, she underscored an inconsistency in the Commonwealth's argument. VWIL was not based upon a military model because only a small percentage of graduates would pursue military careers. However, VMI's program was based upon a military model despite the fact that a small percentage of its graduates pursued military careers. Clearly, Ginsburg insisted, stereotyping was at work here. Rather than relying on these generalizations uncritically, she cited undisputed facts in the record: the adversative method was not inherently unsuited to women; some women sought that type of education and could excel in that environment; and some women would attend VMI. Affording these women the identical opportunity afforded men was the remedy the Constitution required, the

Court concluded, again invoking the authority of *Milliken* and *Louisiana*.

Additionally, Ginsburg compared the facts of the instant case to those presented in *Sweatt v. Painter* (1950), involving an all-black law school established in order to preserve racially segregated education in Texas. The parallel program in *Sweatt*, like the parallel program here, was insufficient to remedy the constitutional violation. Virginia, the Court concluded, demonstrated no exceedingly persuasive justification for the classification; further, the proposed remedy failed to repair the violation. Women deserved a VMI-caliber education and the Equal Protection Clause required Virginia to provide that equal opportunity. The Court affirmed the Fourth Circuit's first decision finding the constitutional violation and reversed the Fourth Circuit's second decision approving the remedial plan, remanding the case to the lower courts to impose the remedy consistent with the Court's instructions.

Chief Justice William Rehnquist wrote an opinion concurring in the judgment of the Court. He began by directing the Court's attention to the series of gender-based equal protection cases from *Craig* to *Hogan* in which it articulated the applicable standard of review as intermediate scrutiny. This standard, he continued, was satisfied if the government successfully defended the classification as one bearing a substantial relationship to an important governmental interest. He emphasized the Court's consistent adherence to that standard. However, he surmised that the test Ginsburg professed to apply requiring Virginia to demonstrate an exceedingly persuasive justification for the classification departed from that tradition: "While the majority adheres to this test today. . . it also says that the Commonwealth must demonstrate an 'exceedingly persuasive justification' to support the gender-based classification. . . .It is unfortunate that the Court thereby introduces an element

of uncertainty respecting the appropriate test." (*Id.*, at 559)

Directly addressing the language Ginsburg had borrowed from O'Connor, which Rehnquist did not comment on in dissent in *Hogan*, he insisted that it was ". . . best confined, as it was first used, as an observation on the difficulty of meeting the applicable test, not as a formulation of the test itself." (*Id.*) To avoid confusion, the Chief Justice encouraged adherence to the conventional intermediate scrutiny test articulated most recently in *Hogan*. Without elaboration, Rehnquist concluded that the majority had substantively modified the standard beyond that point.

Having recorded his disagreement with regard to the standard of review, Rehnquist addressed the merits of the case. He agreed with the majority that the Commonwealth had failed to demonstrate that VMI's single-sex admission policy bore a substantial relationship to an important governmental interest. In doing so, Rehnquist diminished the Court's reliance on the history of disparate treatment between men and women with regard to higher education to undermine the Commonwealth's contention that VMI advanced diversity. If maintaining diversity within the system were truly valued by the Commonwealth, he reasoned, it would offer such a benefit to both sexes rather only one sex. Moreover, Rehnquist resisted drawing negative inferences from Virginia's pre-*Hogan* history. The Court's 1982 decision alerted the Commonwealth to its potential vulnerability to litigation by maintaining a public single-sex education program in light of that decision. Because Virginia chose to leave this practice undisturbed until litigation forced a policy change, inferences as to its actions after *Hogan* could appropriately be drawn.

Rehnquist was also unpersuaded by Virginia's reliance on the ostensibly inherent

unsuitability of the adversative method for women. The use of the adversative method could only constitute an important governmental interest if it were found to be pedagogically beneficial. The Chief Justice observed that no evidence had been submitted demonstrating that the adversative method was more beneficial than other methodological approaches. Rehnquist, therefore, concurred with the majority that Virginia had unpersuasively defended the constitutionality of the challenged sex classification.

The majority, he stated, viewed the constitutional violation as the exclusion of women as a class and the denial to them of a distinctive educational opportunity afforded men by the VMI program. This conception, coupled with the Court's insistence that the remedy restore victims to the position they would otherwise have occupied but for the discrimination, forced the admission of women as the only suitable remedy. Equal protection, in his view, was violated by the absence of a benefit to women comparable to men. This afforded Virginia flexibility and did not foreclose options besides coeducation. The Commonwealth could maintain single-sex education programs for both men and women as long as the disparity between programs was minimal. "It would be a sufficient remedy," Rehnquist explained, ". . .if the two institutions offered the same quality of education and were of the same overall caliber." (*Id.*, 565) He was unwilling to conclude ". . .that the Commonwealth was faced with the stark choice of either admitting women to VMI, on the one hand, or abandoning VMI and starting from scratch for both men and women, on the other." (*Id.*, at 563-4)

Although he endorsed the constitutionality of separate but substantively comparable gender-segregated institutions consistent with the Fourth Circuit, Rehnquist concluded that the caliber of the programs offered at VWIL and VMI were not approximately comparable.

He agreed that the VWIL remedial program was "distinctly inferior" (*Id.*, at 566). Consequently, it was an inadequate remedy to the equal protection violation.

Justice Antonin Scalia filed a lengthy dissenting opinion. He lamented that the Court had departed from precedent in order to achieve a specific result. Acknowledging the imprecision inherent in the three tiers of review, he admonished the Court not to exploit abstraction by riding roughshod over long-valued traditions of the kind VMI represented. "The people," Scalia observed, "may decide to change one tradition, like another, through democratic processes; but the assertion that. . . [this] tradition has been unconstitutional through the centuries. . . is not law, but politics-smuggled-into-law." (*Id.*, at 569)

In Scalia's judgment, an "honest application" of ". . .the test the Court has been applying to sex-based classifications for the past two decades. . . " made clear that the majority had erred in its disposition. (*Id.*, at 570) Precedent unambiguously established that the appropriate test was that articulated most recently in *Hogan*. Scalia insisted that although Ginsburg articulated the criteria comprising intermediate scrutiny, she did not apply that standard. Rather, he maintained that, in effect, she had applied strict scrutiny.

Scalia, like the Chief Justice, was troubled by Ginsburg's use of the phrase "exceedingly persuasive justification" in her analysis rather than reciting the elements comprising the test. While Ginsburg purported to use the criteria requiring the government to demonstrate that the classification bore a substantial relationship to an important governmental interest,

> . . . the Court never answers the question presented in anything resembling that form. When it engages in analysis, the Court instead prefers the phrase 'exceedingly persuasive justification' from *Hogan*. The Court's . . .

> invocations of that phrase. . . would be unobjectionable if the Court acknowledged that *whether* a 'justification' is 'exceedingly persuasive' must be assessed by asking '[whether] the classification serves important governmental objectives and [whether] the discriminatory means employed are substantially related to the achievement of those objectives.' Instead, however, the Court proceeds to interpret 'exceedingly persuasive justification' in a fashion that contradicts the reasoning of *Hogan* and our precedents. (*Id.*, at 571-2)

His rigid criticism continued, charging that Ginsburg's departure from the traditional test was essential to achieve the desired result. In his view, the Commonwealth had satisfied the conventional intermediate scrutiny standard. That *some* women would attend VMI and were deprived of that opportunity was an insufficient threshold. An impermissible sex-based classification, according to Scalia, must deprive *all* women an opportunity.

Scalia continued his assault on Ginsburg's articulation of the standard of review, insisting that:

> [o]nly the amorphous 'exceedingly persuasive justification' phrase, and not the standard elaboration of intermediate scrutiny, can be made to yield this conclusion that VMI's single-sex composition is unconstitutional because there exist several women (or, one would have to conclude under the Court's reasoning, a single woman) willing and able to undertake VMI's program. Intermediate scrutiny has never required a least-restrictive means analysis, but only a 'substantial relation' between the classification and the state interest that it serves. (*Id.*, at 573)

Although precedent was unambiguous, beginning with *Reed v. Reed* (1971), that a sex-based classification cannot punish individuals who deviated from the stereotype it perpetuated, Scalia reinforced his objection: "The reasoning in our other intermediate scrutiny cases has . . . required only a substantial relationship between end and means, not a perfect fit. . . . There is simply no support in our cases for the notion that a sex-based classification is invalid

unless it relates to characteristics that hold true in every instance." (*Id.*, at 573-4)

He emphasized the potential elasticity of the language in Ginsburg's opinion. He referred to a footnoted comment explaining that "thus far" the Court had reserved strict scrutiny for racial classifications, for example. Also attracting his attention was her statement that the Court had not treated sex classifications like race classifications "for all purposes." First, Scalia insisted that Ginsburg was wrong; the Court's consistent application of the middle tier of review indicated that it had rejected the application of strict scrutiny to sex classifications. Second, he characterized Ginsburg's comments as ". . . irresponsible, insofar as they are calculated to destabilize current law." (*Id.*, at 574) This was unwarranted because it was well settled that the *Hogan* standard was the established standard for reviewing sex classifications. However, he suggested that if the Court were going to unsettle the standard, the discussion should focus on lowering the standard of review rather than raising it.

Scalia next offered his conception of intermediate scrutiny as applied to VMI, finding every aspect of the Commonwealth's argument persuasive. He maintained that the benefit of single sex education was an important governmental interest. Additionally, VMI's distinctiveness with regard to its use of the adversative method provided an element of diversity and Virginia's interest in preserving it satisfied intermediate scrutiny review under *Hogan*. The absence of a VMI-caliber program for women was "irrelevant." (*Id.*, at 590) The establishment of VWIL was based upon expert pedagogical opinion with regard to the most appropriate method for educating women, which he argued should have satisfied the Court. The parallel program was intended to be different from VMI insofar as the differences were necessary in order to tailor the program to meet the needs of its students. Virginia,

then, had provided a constitutionally adequate remedy to the ostensible equal protection violation.

Scalia also disputed the suggestion that the majority opinion was narrow and minimalist; rather, he insisted that the logic was sweeping and predicted broad implications. He concluded that ". . .[u]nder the constitutional principles announced and applied today, single-sex public education is unconstitutional." (*Id.*, at 595) Further, he surmised that private single-sex education might be in jeopardy. Summarizing his position, Scalia insisted that the ". . .rationale of today's decision is sweeping: for sex-based classifications, a redefinition of intermediate scrutiny that makes it indistinguishable from strict scrutiny." (*Id.*, at 596)

Analysis of Ginsburg's VMI Opinion

Since Conference Memoranda and Justices' notes are unavailable, one can only speculate as to Ginsburg's motive or intent with respect to the VMI opinion. A popular analysis among scholars is focusing on the standard of review to determine the extent to which Ginsburg may have modified the standard. Both Rehnquist and Scalia attacked Ginsburg for using the phrase "exceedingly persuasive justification" in a way that substantively modified the standard of review. Rehnquist viewed the opinion as a complication of the conventional intermediate scrutiny standard to something different somehow. Scalia, however, interpreted Ginsburg's opinion as a modification of the level of inquiry to the equivalent of strict scrutiny. These views, along with the conclusion that she did not alter the standard, comprise the categories of conclusions advanced by most scholars.

Many scholars also identified her use of "exceedingly persuasive justification" as a determining factor in concluding that Ginsburg did not strictly adhere to precedent. Variations on the analysis of Ginsburg's opinion are briefly delineated below.

Picking up on the potentially elastic phrases that raised Scalia's ire and the emphasis on the "exceedingly persuasive justification" phrase, Delchin (1997) concluded that the standard Ginsburg articulated was the equivalent of strict scrutiny without the formal designation. Delchin asserted that although she had borrowed that language from precedent she had misapplied it, manipulating it into a new standard.

Other scholars insisted that Ginsburg did not modify the intermediate scrutiny standard at all. Bowsher (1998), Pressman (1998), and Kelly (1997) argued that the standard articulated in VMI did not differ from the test articulated in *Hogan* and other gender discrimination cases. They concluded that she adhered to precedent.

Bowsher offered an extensive analysis to support his position. He observed that the term "skeptical scrutiny" appeared in Ginsburg's opinion only once. This suggested to him that it was another term used interchangeably with "intermediate scrutiny" as articulated in *Hogan* and *Craig*. He agreed that the level of scrutiny employed by the Court was a skeptical analysis; nevertheless, it remained intermediate scrutiny. With regard to the "exceedingly persuasive justification" phrase Ginsburg had borrowed from O'Connor's *Hogan* opinion, Bowsher maintained that the different emphasis Ginsburg placed on it did not produce a modification of the test. Further, he pointed out that the entirety of Ginsburg's analysis was grounded in, and consistent with, precedent.

Interestingly, Bowsher suggested that the "context" of the VMI decision (meaning that

Ginsburg had written the majority opinion) influenced interpretations of it. Justice Ginsburg's participation, given her work as an *advocate*, raised suspicions about a possible sleight-of-hand with regard to the standard of review. However, he insisted that this allegation of judicial activism was unsupported because there was no evidence to suggest that as a *jurist* Ginsburg sought to advance an agenda. Critics, he surmised, perceived a difference in the standard because Ginsburg wrote the opinion.

Gleason (1996) offered a slightly different characterization of Ginsburg's intermediate scrutiny standard, although it merits classification here. Ginsburg's emphasis on the "exceedingly persuasive justification" phrase created the skeptical scrutiny standard. According to Gleason, she effectively strengthened the middle tier by redefining and replacing it with a more demanding test than conventional intermediate scrutiny. She concluded that Ginsburg's "skeptical scrutiny" was still an intermediate standard between rational basis and strict scrutiny. However, it was a new, more demanding middle tier of review.

Ginsburg's emphasis on the "exceedingly persuasive justification" phrase convinced many scholars that the conventional test applied in gender discrimination cases had been modified beyond the traditional middle tier. However, they were unpersuaded that the new "skeptical scrutiny" standard was the equivalent of strict scrutiny. Daughtrey (2000); Sunstein (1999); Skaggs (1998); Smiler (1998); Caslin (1997); Douglas (1997); Kupetz (1997); Lee (1997); Seymour (1997); and Udell (1996) suggested that Ginsburg had crafted an intermediate-intermediate scrutiny position, more demanding than traditional intermediate scrutiny but less rigorous than strict scrutiny. Essentially, these scholars concluded that Ginsburg's opinion created a new, fourth tier of review wedged in between the conventional

intermediate and strict scrutiny tiers.

With respect to the level of scrutiny, my analysis comports with the position offered by Bowsher. No aspect of Ginsburg's articulation of the standard made its debut in the VMI decision. She adhered to the *Hogan* precedent. Moreover, it is perceptive to assert that Ginsburg's participation influenced interpretations departing from this position. It is particularly noteworthy in light of the absence of criticism leveled at O'Connor's *Hogan* opinion. As noted elsewhere, Caslin surmised that the *Hogan* Court interpreted O'Connor's "exceedingly persuasive justification" phrase as shorthand for intermediate scrutiny. The same conclusion can be drawn here. Rather than identifying the test by its hierarchical position or by the nature of the burden imposed, Ginsburg provided a second shorthand designation for the middle tier of review with the "skeptical scrutiny" label.

There is, however, another way to interpret the VMI decision. If there is no consensus that Ginsburg clearly altered the standard of review, why have so many scholars concluded that VMI is different from *Hogan* and that Ginsburg did something different? The answer lies in Ginsburg's analysis of the remedy: invocation of race discrimination cases as authority and her qualification that the Court, *for all purposes*, had not treated sex classifications as it had race classifications are important signals.

Ginsburg's adherence to the *Hogan* test was explicit and she recited the identical criteria in VMI. Additionally, she specifically stated that the Court had not designated sex as a suspect classification in that case. Finding that the challenged sex-based classification failed intermediate ("skeptical") scrutiny, she relied on race discrimination cases and insisted that "substantive comparability" was an insufficient threshold to evaluate the proposed

remedy. The Constitution required equality consistent with *Sweatt* and *Milliken*. Although sex classifications have not been viewed with the suspicion reserved for race classifications *for all purposes*, the Court has now established precedent for treating sex like race with respect to the remedy required to repair the constitutional violation.

Ginsburg's focus on the remedy is significant because she was able to ratchet up the degree of protection without taking the grand step of formally changing the standard. This is consistent with her incrementalist tendency, making a small gain when achieving more is not possible. Further, the standard of review applied in sex discrimination cases – beyond rationality – may no longer be significant. If a sex classification fails constitutional review more permissive than strict scrutiny (as was the case here), the remedy imposed to repair the violation may be of the rigorous nature reserved for race (as was the case here).

To the extent that Ginsburg did do something different in VMI, I agree. However, I disagree more specifically as to what she did and how she did it. The treatment of the remedy, not a modification of the level of scrutiny, is the central difference between *Hogan* and VMI. This may contribute to an explanation of Rehnquist's and Scalia's responses to Ginsburg's opinion and criticism from scholars arguing that she modified the standard to something indistinguishable from strict scrutiny without an explicit designation. It does not appear that Ginsburg did that; the "skeptical scrutiny" heightened review she applied imposed the exceedingly persuasive justification burden that O'Connor recited in *Hogan*. Ginsburg's application of the substantive criteria required to meet that burden – that the classification must bear at least a substantial relation to an important governmental interest – is also not new. The skeptical scrutiny designation, then, may be interpreted as a more appropriate

representation of the middle tier.

Ginsburg bifurcated sharply between applying criteria to determine the constitutionality of the classification and, once the classification failed review, fashioning an appropriate remedy. It bears repeating that Ginsburg's opinion was narrow and minimalist and she did not extend her analysis beyond the questions presented. Since the VMI decision did not create sweeping precedent, direct application of her analysis may be rather limited. The opinion may have broader implications, however, with regard to fashioning a remedy in sex discrimination cases. The standard of heightened review applied to sex classifications may be less relevant if, on the remedy side of the formula, there is effectively no difference.

Summary

Hogan and VMI are important decisions because they reflect persistent disagreement among the Justices as to the appropriate standard to apply in sex discrimination cases. The Justices seem to agree, however, that this question remains unsettled. This suggests that the applicable level of scrutiny remains susceptible to modification – either ratcheted up to the most demanding standard, or reduced to the most permissive test. The discord surrounding the appropriate standard bears out a prediction Ginsburg offered during oral argument as an advocate before the Court more than two decades ago. She cautioned that variance within the federal judiciary will persist until the Court provides unequivocal guidance by designating sex as a suspect classification requiring the application of strict judicial scrutiny.

Also, these decisions are important because they reinforce the middle tier as the level of scrutiny that the High Court continues to apply to sex discrimination claims. Ginsburg's

skeptical scrutiny is indistinguishable from the standard routinely applied for two decades. To the extent that Ginsburg's emphasis on specific elements comprising the standard departs from precedent, it does not constitute a substantive modification of the test. O'Connor, not Ginsburg, made minor, lateral refinements of the standard in her majority opinion. Ginsburg followed O'Connor's *Hogan* criteria. In doing so, designating the test as "skeptical scrutiny"[3] provides perhaps a more appropriate representation of the middle tier.

The VMI decision is important[4] not in terms of the standard of review, but with respect to the remedy. Invoking race discrimination cases as authority regarding the unconstitutionality of unequal gender-segregated public educational institutions, the Court established precedent for extending rigorous race-like protection to sex with regard to the remedy required to repair an equal protection violation. Perhaps this is part of Ginsburg's incremental strategy to achieve the effect of sex as a suspect classification if not its formal designation.

Ginsburg's VMI opinion is also important because it demonstrates consistency in her jurisprudential position with respect to equal protection. First as an advocate and later as a jurist, Ginsburg has repudiated sex classifications embodying sex-based stereotypes.

The next chapter concludes the dissertation and assesses the extent to which Ginsburg's equal protection jurisprudence reveals her conception of the judicial function. It

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Shepard's Citations reveals that VMI has been invoked widely, suggesting the decision's significance. These include: Cited by the United States Supreme Court; Cited by District and or Appeals Courts in all 13 Circuits; Distinguished or Explained in 2 Circuits; Cited by 8 State Supreme Courts; Distinguished or Explained in 2 State Supreme Courts.

also assesses Ginsburg's influence on the development of equal protection doctrine.

CHAPTER SIX:
GINSBURG'S INCREMENTAL APPROACH TO THE ACHIEVEMENT OF GENDER EQUALITY

This dissertation has analyzed the extent to which Ruth Bader Ginsburg's equal protection jurisprudence reflects her conception of the judicial function. It has also examined Ginsburg's influence on the development of gender-based equal protection jurisprudence. Conclusions about each of these elements are summarized briefly in this chapter. Additionally, brief commentary regarding the feminist Establishment's assessment of Justice Ginsburg is offered.

Ginsburg's Conception of the Judicial Function

The equal protection jurisprudence consistently advanced by Ginsburg for three decades reflects adherence to judicial restraint, minimalism, and incrementalism. Her endorsement of these principles is apparent in the scholarly articles, briefs and oral arguments, and judicial opinions analyzed in this dissertation. The judicial philosophy reflected in each of these arenas, analyzed in earlier chapters, is summarized next.

Writing numerous law review articles on the topic of gender-based equality, Professor Ginsburg clearly recognized that the incremental extension of the most rigorous equal protection to gender classifications was, in large part, a function of the constitutional provision under which she ultimately endorsed litigation: the Equal Protection Clause of the

Fourteenth Amendment. The adoption of the proposed Equal Rights Amendment, she maintained, would have mandated equality among individuals without regard to gender at once. Constitutional amendment was Ginsburg's preferred path because it would provide an explicit, comprehensive constitutional guarantee of equality under the law without regard to sex. However, since ratification efforts had failed, litigation under the Equal Protection Clause of the Fourteenth Amendment became the most viable remaining option. Case-by-case litigation, if successful, would advance gender equality over time.

Extending the Equal Protection Clause to gender classifications, however, was heavily dependent on favorable judicial interpretation. The legislative history associated with the Fourteenth Amendment clearly indicated that the drafters intended to protect Blacks from racial discrimination. Professor Ginsburg recognized that this "historical impediment" had dissuaded many Justices from interpreting the Equal Protection Clause to include gender classifications. Cognizant of the fine line between constitutional interpretation and judicial over-reaching, Ginsburg acknowledged that achieving success and extending the equal protection requirement to sex classifications required modest departure from judicial restraint. Achieving progress incrementally would foster interaction among the branches of government. This would allow the Supreme Court to function as a facilitator, gently guiding the political branches in a specific direction and allowing them to react, rather than imposing radical change immediately as the result of a sweeping judicial command.

This cooperative interaction among the branches, however, was absent from the litigation over abortion. Ginsburg's critique of the Supreme Court's rationale in *Roe v. Wade* (1973) also underscores her commitment to minimalism and incrementalism. She criticized

the sweeping scope of that decision; in her view a more narrow series of decisions could have achieved the same result over time. Incrementalism would have allowed other elements of the political process to respond after each judicial decision, fostering cooperation among the branches. "Measured motions," Ginsburg wrote in a 1992 law review article, "seem to me right, in the main, for constitutional . . . adjudication. Doctrinal limbs too swiftly shaped, experience teaches, may prove unstable. The most prominent example in recent decades," she continued, "is *Roe v. Wade*." (1198) A gradual approach, Ginsburg speculated, might not have triggered the subsequent political backlash that has accompanied *Roe* and its progeny. Had the High Bench confined its decision to the facts presented in *Roe* and moved more cautiously and deliberately, Ginsburg surmised that an improvident exercise of judicial activism provoking persistent conflict would have been avoided.

Ginsburg's conception of the judicial function is also reflected in her advocacy before the Supreme Court. The litigation strategy she formulated typified incrementalism, gradually building upon precedent to achieve progress. Her selection of sex discrimination cases with male plaintiffs was effective because it more clearly illustrated that sex-based classifications ostensibly advantaging one sex necessarily harmed the disadvantaged sex. Moreover, Ginsburg believed that the litigation of discrimination claims disfavoring men made obvious to jurists the outdated, traditional stereotypes upon which arbitrary sex classifications were based.

Although since 1971 – on brief, in oral argument, and in scholarly articles – Ginsburg consistently urged the adoption of strict judicial scrutiny for determining the constitutionality of gender-based classifications, she routinely bifurcated her argument. She urged the

application of strict scrutiny while hedging her bet, also offering an alternate position arguing that the challenged classification failed to survive a lower standard of review. This approach was successful for purposes of striking down statutory sex classifications but was unsuccessful for achieving the adoption of the most rigorous judicial test. Responding to signals from the Court that some Justices endorsed application of strict scrutiny, albeit insufficient support for establishing precedent, Ginsburg sought to capitalize on conditions favorable to achieving partial success. She articulated a middle tier of review between rationality and strict scrutiny. The Court did adopt that test, which remains the standard of review employed by the Court today.

In presentation of oral argument, Ginsburg frequently recommended a minimalist remedy. She urged the High Court to invalidate only the challenged gender-based classification rather than the entire statute. This approach, she suggested, repaired the defect in the statute (rendering it sex-neutral) via the least judicially intrusive action.

Ginsburg's endorsement of a limited, interstitial judicial function is also evidenced by the equal protection opinions she has written from the bench and the testimony she provided during the 1993 hearings for her confirmation to the Supreme Court. Ginsburg grounds her view of the judiciary's role in the vision articulated by the Framers of the Constitution: deference to the political branches and detachment from the nature of partisan politics to ensure institutional integrity. Although as a general principle Ginsburg believes that the courts should not outpace the political branches, she acknowledges exceptions to this position. When the legislative and executive branches cannot or will not act, it becomes incumbent upon the judicial branch to take action in order to safeguard constitutional rights.

Generally, Ginsburg espouses the view that the judiciary should follow rather than lead society.

During the hearing, many Senators posed questions relating to her view of the role of the jurist. Responding to a question from Republican Senator Charles Grassley of Iowa, Judge Ginsburg replied:

> A judge is not a politician. A judge rules in accord with what the judge determines to be right. That means in the context of the particular case, based on the arguments the parties present, in accord with the applicable law and precedent. A judge must do that no matter what the home crowd wants, no matter how unpopular that decision is likely to be. If it is legally right, it is the decision that the judge should render. (Mersky, p. 509)

The entirety of her testimony before the Senate Judiciary Committee comports with the principles of judicial restraint, incrementalism, and minimalism – neutrally applying the law to the facts of the case at bar, rather than seizing an opportunity to impose one's will under the guise of judicial interpretation. Ginsburg's endorsement of these principles inspired a journalist reporting on the confirmation process to characterize her as ". . .something of a rare creature in the modern lexicon: a judicial-restraint liberal." (Greenhouse1993b)

Ginsburg's judicial opinions also demonstrate her commitment to this conception of the judicial function. Her adherence to precedent and discernible legislative intent are clear indicators of her endorsement of judicial restraint. Additionally, her preference for moving cautiously and deliberately is apparent. Justice Ginsburg does not appear to be a result-oriented judicial activist generating sweeping judicial theory. Rather, she crafts narrow opinions and minimalist remedies endorsing limited judicial intervention in order to protect the exercise of fundamental rights. Her equal protection opinions also reflect her

endorsement of the principle of judicial restraint, deferring to the political branches to modify still-evolving public policies without premature, counter-productive judicial intrusion. Ginsburg's desire to balance often-competing interests (either the state versus the individual, or historically disfavored individuals versus historically favored individuals) is also reflected in the judicial opinions analyzed in preceding chapters.

Ginsburg's Contributions to the Development of Gender Equality Jurisprudence

Ginsburg's involvement in the development of gender equality jurisprudence is distinctive. Summarization of her contributions is also divided into the phases of her professional life: scholar, advocate, and jurist.

As a legal scholar, Professor Ginsburg steadfastly advanced the view that individuals should not be confined to rigid, stereotypical notions about gender roles that limit individual potential. In doing so, it is noteworthy that she consistently endorsed the broader concept of gender equality as opposed to focusing exclusively on women's rights. She insisted that gender classifications were comparable to race classifications because both biological characteristics were visible and immutable. Moreover, race and sex were wholly unrelated to an individual's ability to perform and contribute to society. Ginsburg argued that most gender-based classifications were invalid proxies for more relevant classifications. Most sex classifications, she insisted, were based on traditional stereotypical notions of gender roles and punished those men and women who deviated from the standard. Most of these classifications (even those defended as ostensibly benign favors to women) ultimately harmed both sexes.

The litigation strategy formulated and implemented by Ginsburg produced a departure from nearly one century of Supreme Court precedent, invalidating sex-based classifications as offensive to the Equal Protection Clause of the Fourteenth Amendment. Seizing the momentum generated from early victories, Ginsburg was able to persuade many Justices to elevate the standard of review applied to sex discrimination claims beyond rational basis analysis. Unable to garner precedential support for the designation of sex as a suspect classification requiring application of strict scrutiny, however, she articulated an intermediate level of review that was endorsed by a majority of the Court.

As a jurist, Ginsburg has had the opportunity to participate in one case presenting a gender-based equal protection question. Analyzed in detail in Chapter 5, Ginsburg's majority opinion in *United States v. Virginia* (1996) is clearly significant, although the extent of its importance may not become fully apparent until the High Court hears another gender equality case. Justice Ginsburg applied the middle tier of review articulated by Justice O'Connor in *Mississippi University for Women v. Hogan* (1982) and, concluding that the sex classification failed constitutional scrutiny, invoked race discrimination cases as authority in guiding the lower courts – on remand – to fashion a remedy sufficient to repair the equal protection violation.

As I suggested in the previous chapter, Ginsburg's reliance on race cases in tailoring a constitutionally sufficient remedy is significant. It may constitute an incremental step forward, perhaps signaling another development in gender equality doctrine. Although sex classifications have not been viewed with the suspicion reserved for race classifications, as Justice Ginsburg pointed out in her majority opinion, *for all purposes*, the High Court has

now established precedent for treating sex classifications like race classifications with respect to the remedy required to repair the equal protection violation. Perhaps Ginsburg is laying the precedential foundation for extending the most rigorous protection to sex even though the Court continues to apply the middle tier of review in such cases. If a sex-based classification fails intermediate ("skeptical") scrutiny, the remedy imposed may be of the demanding nature consistent with strict scrutiny. Thus, the formal designation of sex as a suspect classification may be of less importance because, in the remedy phase, the same rigor will be required.

Justice Ginsburg's sharp bifurcation between determining the constitutionality of the challenged sex classification and fashioning an adequate remedy in the VMI case is consistent with the tactic she employed as an advocate. She routinely recommended invalidating only the challenged sex classification rather than the entire statute, thus rendering the statute sex-neutral. Her majority opinion in the VMI case, effectively, produced the same result: elimination of the impermissible sex-based classification. As scholar, advocate, and jurist Ginsburg has consistently urged eradication of statutory sex classifications and extension of equal benefits, rights, and privileges to all individuals without regard to sex.

Ginsburg and the Feminist Establishment

Ginsburg has steadfastly championed the equality of all individuals without regard to gender. It may have been surprising, then, that she received moderate criticism from the feminist Establishment following the announcement of her nomination to the Supreme Court. There is some division between Ginsburg's positions and those espoused by the feminist

Establishment. Commentary offered here exploring this division is not intended to provide an exhaustive analysis of Ginsburg's views in the context of feminist theories, which could generate a substantial study in its own right and which exceeds the scope of this dissertation. However, brief discussion of the feminist Establishment criticism of her views during the confirmation process merits attention and is provided next.

The focus of the Establishment's criticism of Ginsburg centered on her critique of the Supreme Court's sweeping scope and rationale – not its holding – in *Roe v. Wade*. As discussed throughout this study, Ginsburg believes that in the absence of a constitutional amendment explicitly guaranteeing equality of all individuals without regard to gender, the Equal Protection Clause of the Fourteenth Amendment provides the most logical constitutional rationale for achieving gender equality. Ginsburg's conception of gender equality encompasses reproductive rights, including the right to obtain an abortion. The Court, however, has grounded the constitutional right to obtain an abortion in the right of privacy implicit in the liberty component of the due process clause of the Fourteenth Amendment. Additionally, Ginsburg's preference for proceeding incrementally rather than by giant leaps reveals further disagreement with the Court's sweeping opinion in *Roe*.

The fact that Ginsburg has not endorsed the *Roe* decision without reservation appears to have generated much of the criticism leveled at her in 1993. Specifically, commentary from many feminists seemed to focus exclusively on the fact that Ginsburg criticized *Roe* and neglected more sophisticated analysis of the substance of her criticism compared to their official positions. Her disagreement with the Court's rationale in protecting the constitutional right to obtain an abortion appears to have diminished the intensity of feminist support for

Ginsburg's confirmation, her contributions to gender equality notwithstanding (Yarbrough 2000; Berke 1993; Greenhouse 1993a; Lewis 1993a, 1993b). Interestingly, dogmatic pro-choice feminists questioned the intensity of Ginsburg's support for reproductive rights because she departed from Establishment orthodoxy; conversely, pro-life feminists derided her as an abortion rights extremist (*Id.*).

Pro-choice groups specifically repudiated her endorsement of extending constitutional protection to reproductive rights incrementally. More generally, pro-choice feminists expressed vague "concern" over her support for an alternative theoretical rationale protecting reproductive rights. It does not appear that they offered a specific critique of Ginsburg's equal protection analysis. Even President Clinton, sensitive to potential alienation of a constituency important to the favorable public opinion of his performance in office, distanced himself from the mini-controversy. He indicated that although he was uncertain whether he agreed with Ginsburg's analysis he appreciated the provocative alternative she offered (Greenhouse 1993a). Pro-life feminists predictably attacked her support for the constitutionality of the right to obtain an abortion in a manner consistent with their general position and, like their pro-choice counterparts, did not differentiate between privacy and equal protection rationales.

Certainly a thorough analysis of feminist theories and Ginsburg's place in them would yield an interesting study, one beyond the scope of my purpose here. Some brief conclusions, however, may be drawn. Both Ginsburg's endorsement of the broad application of the Equal Protection Clause to advance gender equality and her incrementalism are at odds with the feminist Establishment. The feminist Establishment rigidly subscribes to the rationale

advanced by the Court in *Roe* and its progeny, grounding reproductive rights in privacy doctrine rather than principles of equality. Further, the Establishment seems to lack Ginsburg's long-term view of achieving gender equality – which it advances by seeking equal rights for women. The Establishment critique of Ginsburg's equal protection jurisprudence at the time of her confirmation reveals much about the state of the movement and the arguably short-sighted, narrow goals that continue to motivate it, as well as its rigid adherence to one perspective. Ginsburg's departure from orthodoxy does not diminish or compromise her commitment to the achievement of gender equality. However, it appears to have diluted the enthusiasm of the feminist Establishment's support for her. It is ironic that one of the nation's leading litigators in the area of gender equality was unable to garner the undivided, enthusiastic support from women's rights groups for her confirmation as a Supreme Court Justice.

Conclusion

As scholar, advocate, and jurist Ruth Bader Ginsburg has championed the equality of all individuals without regard to gender and has made distinctive contributions to the development of equal protection jurisprudence. Ginsburg's personal experience with discrimination sensitized her to its pernicious effects. As a result, Ginsburg has sought to realize the principle of genuine equal protection under law for all individuals. In doing so, she has not been a radical activist challenging the Establishment from the outside. Instead, perhaps due in part to the proclivity for accommodation she developed early in life, Ginsburg has sought to achieve modest, gradual progress as an Establishment insider. As this

dissertation makes clear, Ginsburg's efforts have yielded considerable success. The majority opinion in *United States v. Virginia* constitutes the most recent step forward in the achievement of gender equality orchestrated by Ginsburg.

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APPENDIX

APPENDIX:
BUSH V. GORE

In this dissertation I have analyzed Ruth Bader Ginsburg's conception of the judicial function as reflected in her equal protection jurisprudence. Analysis has centered on Justice Ginsburg's gender-related equal protection work, as reflected first in her scholarly publications, legal briefs and oral arguments, and later in her majority opinion in *United States v. Virginia* (1996). The cut-off point for this study is the 1999 Supreme Court Term. However, Ginsburg's dissenting opinion in the landmark decision of *Bush v. Gore* (2000), while focusing on an equal protection issue unrelated to gender, sheds further light on her interpretation of this constitutional guarantee. It seems appropriate, therefore, to analyze this decision in some depth. In the aftermath of the November 7, 2000 presidential election the High Court took jurisdiction in a contentious, divisive case of great importance to the nation in order to resolve questions surrounding the outcome of that election. The case presented an equal protection question with respect to suffrage in the context of a state's recount of the votes cast in that election.

In addition to the Per Curiam decision, five members of the Court wrote separate opinions in *Bush v. Gore* advancing positions uncharacteristic of their traditional judicial philosophies and equal protection views. Justices usually sympathetic to states in cases presenting federalism questions, for example, endorsed federal judicial intervention to resolve

the dispute in a matter arguably left to the states. Justice Ginsburg filed a powerful dissenting opinion adhering to her restraintist judicial philosophy. Ascertaining her consistency with respect to the equal protection question, however, is less clear. An overview of the facts and analysis of the Per Curiam opinion and Ginsburg's dissent are provided below.

Facts of The Case and Litigation History: An Overview

On November 8, the day after the election, Republican candidate George W. Bush was declared the winner in Florida over Democratic candidate Al Gore by a margin of 1,784 votes out of nearly six million cast state-wide. Florida election law mandated an automatic machine recount in instances where the margin of victory was equal to or less than one-half of one percent. That recount was conducted and still showed that Bush had defeated Gore, albeit by a margin much smaller than the initial vote total.

Consistent with the protest provision provided in Florida election law, Gore requested a manual recount in four hand-picked counties. A dispute arose over the deadline for the county canvassing boards' submission of election returns to the Secretary of State, Katherine Harris. She elected not to waive the November 14 deadline prescribed by state law. The Florida Supreme Court imposed a November 26 deadline. The United States Supreme Court, skeptical of the rationale on which the Florida court relied, vacated that decision. (***Bush v. Palm Beach County Canvassing Board*** 531 U.S. ___ (December 4, 2000)(***Bush*** I)) On December 11, the Florida high court issued a decision on remand addressing the Supreme Court's concerns and reinstated the November 26 deadline.

In the meantime, on November 26 (over a week prior to ***Bush*** II) the Florida Elections

Canvassing Commission, adhering to the original mandate of the Florida Supreme Court, had certified the results of the state-wide election, declaring Bush the winner. On November 27, Gore had filed a complaint contesting the certification. The Circuit Court denied relief; on appeal, the First District Court of Appeal certified the case to the Florida Supreme Court. The Florida high court, in a sharply divided decision announced on December 8, upheld the Circuit Court's denial of Gore's challenge to the results of the certified vote in Nassau County and his challenge to the Palm Beach County Canvassing Board's determination that 3,000 ballots cast in that county did not constitute legal votes.

The Florida Supreme Court concluded that Gore had satisfied the burden of proof regarding his challenge to Miami-Dade County's failure to tabulate manually some 9,000 ballots on which machines did not register a vote for president (so-called "undervotes"). Given the closeness of the election, the state high court reasoned that not counting possible votes jeopardized determination of the outcome of the election. It further explained that a legal vote was defined as one where the intent of the voter was clearly ascertainable. Consequently, the Florida Supreme Court ordered a hand recount of the 9,000 Miami-Dade County ballots. It also indicated that the Circuit Court had the discretion to order manual recounts of undervotes in counties that had not conducted manual recounts.

Further, the Florida Supreme Court held that the additional legal votes tabulated in both the Palm Beach and Miami-Dade Counties' manual recounts yielding net gains of 215 and 168 votes for Gore could not be excluded from the certified vote total. It therefore ordered the Circuit Court to include the partial recount totals in the certified result.

The manual recounts ordered by the Florida Supreme Court had commenced when

Bush requested a stay from the U.S. Supreme Court to stop the recount. The Supreme Bench granted the stay on December 9 and granted certiorari with respect to the equal protection question raised by Bush. The oral argument in *Bush v. Gore* (*Bush* II) was scheduled for December 11, 2000.

The Supreme Court's Disposition

The Per Curiam opinion issued on December 12, 2000 framed the equal protection question presented by Bush's petition as whether the use of standardless manual recounts violated the Equal Protection Clause of the Fourteenth Amendment. The High Court divided 7-2, finding an equal protection violation.

Reviewing case law, the High Bench emphasized that a state enjoys complete discretion in choosing the method of selecting its slate of electors to vote for president in the electoral college. Accordingly, individuals have no constitutional right to vote for presidential electors. Once the state has authorized the popular election of presidential electors, however, the individuals' fundamental right to vote is fully recognized. As a fundamental right, equal weight must be accorded each vote and equal dignity must be accorded each voter. The Per Curiam opinion indicated that equal protection principles applied to suffrage upon the initial allocation of the right as well as with regard to the manner of its exercise. The Court invoked authority concluding that suffrage can effectively be denied by dilution of the weight of one's vote as effectively as by prohibiting the exercise of the right itself.

The Supreme Court identified multiple points of vulnerability with respect to Florida's tabulation of votes. The ballot format used in several Florida counties was a punch card

designed to be punctured by a stylus. Either through deliberate omission or voter error many ballots were not sufficiently punctured for the machine to register a vote for a presidential candidate. The Florida high court ordered that the intent of the voter be discerned from these ballots manually. However, the Supreme Court concluded that the recount procedures implemented in response to that order failed to satisfy minimal requirements for non-arbitrary treatment of votes essential to secure the fundamental right. The High Court acknowledged that the Florida court's order to discern the intent of the voter was acceptable in the abstract. The problem, however, arose in the absence of specific, uniform standards ensuring equal application. Thus, uniform rules must be formulated and implemented.

According to the Court majority, the Florida court had endorsed disparate treatment in several respects: 1) it mandated that recount totals from Miami-Dade and Palm Beach Counties be included in the certified total; 2) it appeared to hold that recount totals from Broward County (which were completed after the original November 14 certification by the Secretary of State) were considered part of the new certified vote total even though the county certification was not contested by Gore; 3) each county used different standards in determining what constituted a legal vote; and 4) votes certified by the court included a partial recount total from Miami-Dade County. The Florida high court did not specify that the recount totals included in the final certification must be complete. Partial recount totals existed due to the perceived time constraint. A time constraint, the Supreme Court observed, was an insufficient rationale for disregarding the equal protection requirement.

Framing the equal protection question as whether the recount procedures adopted by the Florida Supreme Court comported with the Equal Protection Clause, the High Court held

that equal protection was not satisfied. In reaching this decision, the majority identified the examples of disparate treatment ostensibly endorsed by the Florida Supreme Court delineated above. The Florida court had ordered a state-wide remedy and the Justices were unpersuaded that it could be administered in a way that comported with the equal protection requirement. The Supreme Court, therefore, reversed the Florida high court's order that a manual recount be conducted.

Although the Per Curiam opinion was supported by 7 Justices as to the equal protection violation, the Court split further with regard to the required remedy. The Justices divided 5-4 on the issue of stopping the recount versus remanding the case to allow the Florida courts to fashion a remedy. In addition to the Per Curiam opinion, one concurring and four dissenting opinions were filed. For purposes of this dissertation, only Justice Ginsburg's dissent will be analyzed.

In a concise opinion, Ginsburg offered two central objections underscoring her restraintist judicial philosophy. First, she attacked the majority for its lack of deference to a state supreme court's interpretation of its own state's law. Disagreement with the outcome, she cautioned, was not sufficient to warrant Supreme Court intrusion to correct what the majority characterized as legislating by the Florida judges.

She reviewed case law and the handful of precedents from early in the nation's history where the High Bench had not shown such deference, distinguishing them from the instant case. Conversely, Ginsburg invoked precedents underscoring the Court's recognition of the deference due state courts' interpretations of state law. The High Court's action in the instant case, in Ginsburg's view, was highly exceptional. She impugned the judicial activism

endorsed by the majority: "The extraordinary setting of this case has obscured the ordinary principle that dictates its proper resolution: Federal courts defer to state courts' interpretation of their own state's law. This principle reflects the core of federalism. . . ." (531 U.S. ___, ___)

Ginsburg's second objection focused on the disposition of the merits. Agreeing with her dissenting colleagues, she insisted that Bush had

> . . . not presented a substantial equal protection claim. Ideally, perfection would be the appropriate standard for judging the recount. But we live in an imperfect world, one in which thousands of votes have not been counted. I cannot agree that the recount adopted by the Florida court, flawed as it may be would yield a result any less fair or precise than the certification that preceded the recount. (*Id.*, at ___)

In Ginsburg's judgment, comparatively minor, unintentional, and perhaps unavoidable irregularities associated with vote tabulation directed at no particular class of individuals did not automatically offend equal protection principles.

If there were an equal protection violation, Ginsburg surmised, the majority's concern about achieving resolution by the December 12 deadline was misplaced. She pointed out that one reason that time was a pressing issue was due to the Supreme Court itself. On December 9, it stopped the recount process that had begun under the supervision of a Circuit Court judge in Leon County. "More fundamentally," Ginsburg suggested, "the Court's reluctance to let the recount go forward . . . ultimately turns on its own judgment about the practical realities of implementing a recount, not the judgment of those much closer to the process." (*Id.*, at ___)

Federal law, Ginsburg pointed out, already provided an adequate resolution procedure

to address additional problems that may arise during Florida's determination of its slate of presidential electors. Although many important guideposts were provided in Title 3 of the United States Code, she observed, the most important date was January 6, 2001, the date Congress would count the electoral college votes. Ginsburg concluded that even if the state's machinery, which had operated efficiently and productively thus far, were to miss one of the deadlines preceding the January 6 tabulation of the electoral college votes, a constitutional crisis requiring the Supreme Court's intervention would not ensue.

Rejecting the Court's judicial activism, Ginsburg summarized her position: ". . . the Court's conclusion that a constitutionally adequate recount is impractical is a prophecy the Court's own judgment will not allow to be tested. Such an untested prophecy should not decide the Presidency of the United States." (*Id.*, at ___)

Analysis of Ginsburg's Dissenting Opinion

The aftermath of the 2000 presidential election provided a unique set of facts for the unprecedented intervention by the United States Supreme Court to resolve questions that directly influenced the determination of the outcome of a national election. These peculiarities, as Justice Ginsburg suggested, likely contributed to the uncharacteristic positions endorsed by many of the Justices. In 1967 Katcher wrote: "The Supreme Court, like a cut diamond, is multifaceted and ever since John Adams appointed John Marshall to be Chief Justice, one of those facets has been political." (352) Determining the motivations of the Justices is complex and largely speculative since the judicial opinions are the primary source of information as to their positions. Nevertheless, it is plausible to surmise that the

political quality inherent in law was perhaps one of many factors comprising the complex equation explaining the behavior of individual Justices in this case. Undoubtedly, the Supreme Court's involvement in the 2000 presidential election will generate voluminous scholarship.

The deference Justice Ginsburg paid a state high court's interpretation of its own state's law is not surprising. Resisting an opportunity to take bold judicial action, Ginsburg's endorsement of judicial self-restraint is also consistent with her judicial philosophy. A state matter not raising a substantial federal question must be resolved by the state. Florida's attempt to resolve that question was under way when the Supreme Court – in Justice Ginsburg's judgment – unwisely exercised its discretionary jurisdiction and inserted itself in the process.

The more difficult challenge is explaining why Ginsburg did not conclude that the disparate treatment of ballots in this case was inconsistent with the equal protection requirement. Since the conduct of elections is primarily a state responsibility, some variation among jurisdictions remains inevitable. The chronic lack of procedural uniformity inherent in a decentralized election process was not, according to Justice Ginsburg, automatically suspect. Moreover, neither party submitted evidence substantiating allegations of fraud or discrimination. The disparate treatment the Court majority found offensive to the Constitution, then, was diffuse. In Ginsburg's judgment, disparate treatment not advantaging or disadvantaging a specific, identifiable group did not present a substantial equal protection question meriting Supreme Court intervention.

Summary

Justice Ginsburg's equal protection opinions evidence consistent adherence to a restraintist judicial philosophy. Her dissenting opinion in *Bush* II does not represent a departure; rather, it underscores Ginsburg's commitment to judicial self-restraint. Perhaps this contributes to an explanation of her disagreement with the majority that an equal protection violation had occurred. To the extent that variance within a state creates an equal protection problem, resolution must be sought first at the state level. In other contexts, however, Ginsburg has acknowledged that a state's inability to resolve an issue over time may warrant federal judicial intervention.

The unique facts associated with the 2000 presidential election cases may or may not engender state-level modifications precluding future disputes of this nature. Whether inadequate state attention to the equal protection issue raised in the election cases would elicit Justice Ginsburg's support for Supreme Court intervention in the future remains an open question.

VITA

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