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Better Bitch than Mouse: Ruth Bader Ginsburg, Feminism, and VMI

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BETTER BITCH THAN MOUSE: RUTH BADER GINSBURG, FEMINISM, AND VMI

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INTRODUCTION

Throughout her career as a litigator and a jurist, Ruth Bader Ginsburg has understood that the Constitution has routinely denied protection to large classes of Americans. She has also understood the capacity of the Constitution to expand, through time and interpretation, and include those once excluded in its guarantees. During the 1970s, Ginsburg's arguments figured prominently into the Supreme Court's slowly developing formula granting gender discrimination cases heightened scrutiny under the equal protection clause of the Fourteenth Amendment. Through her spoken voice before the justices of the Supreme Court and with her written voice in numerous briefs, she was a central figure in the major gender discrimination cases of the decade.[1]

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[1] Ginsburg argued and collaborated in briefs for the American Civil Liberties Union's Women's Rights Project in: Frontiero v. Richardson, 411 U.S. 677 (1973) (held unconstitutional the military's practice of requiring a female member to prove that she paid more than half of her husband's expenses to receive increased benefits while a serviceman did not have to prove his wife's dependency); Kahn v. Shevin, 416 U.S. 351 (1974) (sustained a Florida law that granted a property tax exemption to widows but not to widowers); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (overturned a provision of the federal Social Security Act that awarded survivor's benefits to widows but not to widowers); Edwards v. Healy, 421 U.S. 772 (1975); Califano v. Goldfarb, 430 U.S. 199 (1977) (held in violation of the Equal Protection Clause of the Fifth Amendment the section of the Social Security Act in which a widow received benefits

regardless of dependency on her spouse, but a widower had to prove that he had received at least half of his support from his spouse); Duren v. Missouri, 439 U.S. 357 (1979) (held that Missouri's exemption of women from jury duty service on request violated the defendant's rights guaranteed by the Sixth and Fourteenth amendments). Ginsburg collaborated in briefs for the petitioners: Reed v. Reed, 404 U.S. 71 (1971) (struck down a law that preferred males to females for selecting administrators of estates); Struck v. Sec'y of Def., *cert. granted*, 409 U.S. 947, judgment vacated, 409 U.S. 1071 (1972); Turner v. Dep't of Employment Sec. of Utah, 423 U.S. 44 (1975) (held that a statute denying unemployment benefits to pregnant women twelve weeks before her expected due date until six weeks after delivery violated the Equal Protection Clause of the Fourteenth Amendment). Ginsburg assisted in amicus briefs in: Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973) (held that a Pittsburgh ordinance as construed to forbid newspapers to carry sex-designated advertising columns for nonexempt job opportunities does not violate petitioner's First Amendment right to freedom of speech); Cleveland Bd. of Educ. v. La Fleur, 414 U.S. 632 (1973); Corning Glass Works v. Brennan, 417 U.S. 188 (1974) (held that petitioner violated the Equal Pay Act of 1963 by paying a higher base wage to male night shift inspectors than to female inspectors performing the same tasks during the day); Geduldig v. Aiello, 417 U.S. 484 (1974); Liberty Mutual Ins. Co. v. Gen. Elec. Co. v. Gilbert, 429 U.S. 125 (1976) (held that petitioner's failure to cover pregnancy related disabilities in its disability benefits plan does not violate Title VII of the Civil Rights Act of 1964); Craig v. Boren, 429 U.S. 190 (1976) (held that cases involving sex-based classifications were subject to intermediate scrutiny: a statute which classifies on the basis of sex "must serve important governmental objectives and must be substantially related to those objectives"); Coker v. Georgia, 433 U.S. 584 (1977) (in a case involving a man who was sentenced to death for rape, the Court held that the Eighth Amendment's proscription of cruel and unusual punishments prohibited punishments that are grossly disproportionate to the crime); Dothard v. Rawlinson, 433 U.S. 321 (1977) (held that Title VII prohibited the application of Alabama's statutory height and weight requirement to work as a state prison guard); Nashville Gas Co. v. Satty, 434 U.S. 136 (1977) (held that petitioner's policy of denying employees returning from pregnancy leave their accumulate seniority violates Title VII); Univ. of Cal. Regents v. Bakke, 438 U.S. 265 (1978) (held that a university may consider racial criteria as a single aspect of a competitive admissions process as long as fixed quotas were not used); City of Los Angeles, Dep't of Power & Water v. Manhart, 435 U.S. 702 (1978) (held that petitioner's policy requiring female employees to make larger contributions to its pension fund than male employees violated Title VII); Orr v. Orr, 440 U.S. 268 (1979) (applying the intermediate scrutiny test from Craig v. Boren, the Court found that Alabama's law allowing alimony orders only against males was not substantially related to the state's proffered goals); Califano v. Westcott, 443 U.S. 76 (1979) (held that Section 407 of the Social Security Act providing

As a litigator, Ginsburg sought to prod the Supreme Court to adopt a heightened standard of review when deciding gender discrimination cases. To this end, she pursued cases she deemed to be "clear winners," that is, cases challenging laws the Supreme Court could not possibly uphold.[2] In addition, she believed that each case was a stepping stone, moving the Court closer and closer to adopting strict scrutiny in gender discrimination cases.[3]

In this article, I analyze two aspects of judicial decision-making: judicial background characteristics and lower court impact. First, I look at the background factors that have heightened Ginsburg's sensitivity to discrimination, discuss the various categories of feminist jurisprudence and place her within that framework, and discuss her judicial philosophy.[4] Ginsburg's

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benefits to families whose dependent children have been deprived of parental support because of the unemployment of their father, but not because of the unemployment of their mother, violated the Equal Protection Clause of the Fifth Amendment); Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142 (1980) (found that the gender-based distinction in Missouri's workers' compensation law governing death benefits for widows and widowers violated the Equal Protection Clause of the Fourteenth Amendment).

[2] Deborah Markowitz, *In Pursuit of Equality: One Woman's Work to Change the Law*, 11 WOMEN'S RTS. L. REP. 73, 75 (1989). Markowitz cites Ginsburg's oral history, recorded February 24, 1986 in Washington, D.C. [hereinafter *Pursuit of Equality*].

[3] *Id.*; Until the 1970s, the Court recognized only two levels of scrutiny when evaluating the constitutionality of discriminatory programs: strict scrutiny (requiring that a discriminatory law be narrowly tailored to achieve a compelling governmental interest) for cases involving race and national origin, and rational scrutiny (requiring only a rational relationship between the law and the governmental interest) for everything else. Thus, before the 1971 cases Reed v. Reed, gender discrimination cases were routinely reviewed using the lower form of scrutiny. The Supreme Court did not articulate a level of heightened scrutiny specific to gender discrimination until Craig v. Boren in 1976.

[4] Scholars have recognized for decades that background factors, including race, religion, and gender, influence the behavior of justices. BARBARA A. PERRY, A "REPRESENTATIVE" SUPREME COURT?: THE IMPACT OF RACE, RELIGION, AND GENDER ON THE APPOINTMENTS 20 (1991). Studies by scholars who favor background analysis include: S. Sidney Ulmer, *Social Background as an Indicator to the Votes of Supreme Court Justices in Criminal Cases 1947-56 Terms*, 17 AM. POL. SCI. REV. 622 (1973); C. Neal Tate, *Personal Attribute Models of the Voting Behavior of U.S. Supreme Court Justices: Liberalism in Civil Liberties and Economics Decision, 1946-1978*, AM. POL. SCI. REV. 355

(1981); Stuart S. Nagel, *Political Party Affiliation and Judges' Decisions*, 55 AM. POL. SCI. REV. 844 (1961); Sheldon Goldman, *Backgrounds, Attitudes and the Voting Behavior of Judges*, 31 J. OF POL. 214 (1969). Opponents of the method doubt whether certain values can be explained by background characteristics, noting that background is not distinguished from individual experiences and that this method of explanation ignores the impact of the interaction of the other justices on their votes. For example see, Joel B. Grossman, *Social Backgrounds and Judicial Decisions: Notes for a Theory*, 29 J. OF POL. 334 (1967) and *Further Thoughts on Consensus and Conversion*, 31 J. OF POL. 223 (1969).

The author believes, however, that gender will be the prevailing variable in this case. Studies on Justice Sandra Day O'Connor, the first woman on the Supreme Court, indicate that gender does impact the justice's decisions, at least in cases of overt gender discrimination. While O'Connor is by no means an uncompromising champion of women's rights, in gender discrimination cases, she often votes against the conservative block with which would otherwise align. Barbara Palmer, Note, *Feminist or Foe? Justice Sandra Day O'Connor, Title VII Sex Discrimination, and Support for Women's Rights*, 13 WOMEN'S RTS. L. REP. 159, 170 (1991). However, scholars have found that even though she recognizes some manifestations of gender discrimination and seeks to eliminate them, she is not necessarily as sensitive to subtle forms of negative stereotypes. Nadine Taub, *Sandra Day O'Connor and Women's Rights*, 13 WOMEN'S RTS. L. REP. 113, 116 (1991).

In this paper, background is assessed by looking at how Ginsburg's experience as a woman and as a Jew sensitized her to discrimination, as well as how her prior legal experience as a litigator and a judge shaped her conception of how issues of discrimination should be dealt with in the legal realm. Ginsburg's feminist jurisprudence is determined by discussing the characteristics of the three primary categories of feminist jurisprudence and then examining her articles and speeches to determine which category best characterizes her orientation. Finally, I consider Ginsburg's judicial role orientation. This refers to a jurist's concept of the proper behavior for someone in her institutional position. Scholars generally recognize two role orientations to explain the voting behavior of jurists: judicial restraint and judicial activism. The idea of restraint rests on the assumption that a jurist seeks to curtail her involvement in policy making. The premises underlying the doctrine of judicial restraint include the judicial limitations outlined in the 1936 case Ashwander v. Tennessee Valley Auth., 297 U.S. 288 (1936): (1) the Court will not determine the constitutionality of legislation in nonadversary proceedings; (2) it will not anticipate questions of constitutional law; (3) it will not formulate a rule broader than necessary; (4) it will pass on ruling on constitutionality if there is another ground for deciding the case; (5) the party protesting must show direct injury; (6) it will not invalidate a statute if the party has already taken advantage of its benefits; and (7) it will always interpret the statute in a constitutional manner if at all possible. In

dedication to combating discrimination did not occur in a vacuum. Rather, it developed as a result of a perceived inequality on the basis of gender, which she became aware of over time. This perception of inequality laid the foundation for her personal framework for feminism. However, not only has Ginsburg written extensively on gender discrimination and the law, but she has also been quite outspoken in the area of judicial behavior – she praises judicial restraint. Thus, I consider these factors as I explore the gender discrimination jurisprudence and judicial role orientation of Justice Ginsburg considering her decision in VMI as the capstone case illustrating this behavior. Finally, I examine whether Justice Ginsburg's opinion is consistent with her goal as a litigator of trying to shift the Supreme Court's standard of scrutiny for gender-based classifications closer to strict scrutiny and explore how that VMI influenced the outcome of gender discrimination cases in lower federal courts from July 1996 to May 2001.[5]

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contrast, judicial activists theoretically shed the constraints limiting judicial action, molding the law to fit her policy preferences and asserting the courts as policymakers. STEVEN HALPERN & CHARLES LAMB, SUPREME COURT ACTIVISM AND RESTRAINT 37-50 (1982).

[5] The Supreme Court depends on lower courts to implement, through interpretation, the decisions that it hands down. Often, the initial interpretation of Supreme Court decisions is made by state courts and lower federal courts – what Bradley Canon and Charles Johnson refer to as the interpreting populations. BRADLEY C. CANON & CHARLES A. JOHNSON, JUDICIAL POLICIES: IMPLEMENTATION AND IMPACT 29 (1999). Lower courts often enjoy a sense of discretion in deciding their cases because these decisions often are not appealed and are usually final. Higher courts rely on the clarity of decisions, effective communication of decisions, and continued support by lower court judges of their decisions. *Id.* at 29-51.

I examine the impact of VMI on lower federal courts only. While the interpretation of decisions in both state and federal courts is significant, the limitations of this project require me to focus on only one. To determine impact, the number of published cases in which federal district and circuit court judges adopt Ginsburg's terminology and refer to her opinion as precedent are examined. Only published opinions are considered.

Fifteen United States District Court opinions cited United States v. Virginia in this period: Coalition for Econ. Equity v. Wilson, 946 F. Supp. 1480 (N.D. CA 1996); Eng'g Contractors Assoc. v. Metro. Dade County, 943 F. Supp. 1546 (S.D. FL 1996); Zoch v. City of Chicago, 94 C. 4788 (N.D. IL 1997); Barnett v. Texas Wrestling Assoc., 16 F. Supp. 690 (N.D. Tex. 1998); Breyer v.

There is inevitably a tension between judicial restraint and feminism, yet Ginsburg has considered both in the course of her career. In *Reed v. Reed* and subsequent cases she asked the Supreme Court to ignore its own precedent and reconstruct the Constitution to include the rights of women. How does she balance these two competing philosophies? Does she, as a jurist, maintain the activism she valued as a litigator challenging codified gender stereotypes?[6] Does this tension result in inconsistent imprecise decisions in gender discrimination cases?

Meissner, 23 F. Supp. 2d 521 (E.D. Penn. 1998); *In re* Sherbrooke Sodding, 17 F. Supp. 2d 1026 (Minn. 1998); N. Shore Concrete & Assoc. v. City of New York, 94 Cv. 4017 (E.D.N.Y. 1998); Thorpe v. Virginia State Univ., 6 F. Supp. 2d 507 (E.D. Va. 1998); Jefferson v. City of Harvey, 1999 U.S. Dist. LEXIS 20158 (N.D. Ill. 1999); Richmond Med. Ctr. v. Gilmore, 55 F. Supp. 441 (E.D. Va. 1999); Sheriff's Silver Star Assoc. of Oswego County, Inc. v. County of Oswego, 56 F. Supp. 2d 263 (N.D.N.Y. 1999); Ashann-Ra v. Virginia, 112 F. Supp. 2d 559 (W.D. Va. 2000); Assoc. Util. Contrs. of Md., Inc. v. Mayor of Baltimore, 83 F. Supp. 613 (D. Md. 2000); Assoc. for Fairness in Bus., Inc. v. New Jersey, 82 F. Supp. 2d 353 (D. N.J. 2000); Deblasio v. Johnson, 128 F.Supp. 2d 315 (E.D. Va. 2000)

Fourteen United States Court of Appeals cases cited United States v. Virginia: Cohen v. Brown Univ., 92 F.3d 446 (1st Cir. 1996); Keevan v. Smith, 100 F.3d 644 (8th Cir. 1996); Miller v. Christopher, 96 F.3d 1467 (D.C. Cir. 1996); Nabozny v. Podlesny, 92 F.3d 466 (7th Cir. 1996); Women Prisoners of the D.C. v. D.C., 93 F.3d 910 (D.C. Cir. 1996); Coalition for Econ. Equity v. Wilson, 122 F.3d 692 (9th Cir. 1997); Crawford v. Davis, 109 F.3d 1281 (8th Cir. 1997); Eng'g Contractors Assoc. of S. Florida. v. Metro. Dade County, 125 F.3d 702 (11th Cir. 1997); Klinger v. Dep't of Corrections, 107 F.3d 609 (8th Cir. 1997); Monterey Mech. Co. v. Wilson, 125 F.3d 702 (9th Cir. 1997); Franks v. Kentucky School, 142 F.3d 360 (6th Cir. 1998); Buzzetti v. City of New York, 140 F.3d 134 (2nd Cir. 1998); Terrell v. INS, 157 F.3d 806 (10th Cir. 1998); Hill v. Ross, 183 F.3d 586 (7th Cir. 1999); United States v. Ahumada-Aguilar, 189 F.3d 1121 (9th Cir. 1999); Tuan Ahn Nguyen v. INS, 208 F. 3d 528 (5th Cir. 2000).

[6] I use the expression "better bitch than mouse" to illustrate this tension. It originates from an incident related in THE NEW REPUBLIC:

> A few days after the president nominated here to the Supreme Court, Ruth Bader Ginsburg received a fax from a member of the Rotary Club in Bernardsville, New Jersey. On June 18, the writer reported, one of Judge Ginsburg's law school classmates had presided over a Rotarian induction ceremony; and during his formal remarks after dinner, the classmate recalled that he had known Ginsburg "by her law school

Section I presents a biography of Ginsburg, including her famous 1970s case sequence, and discusses the major premises of feminist jurisprudence. Section II examines her judicial philosophy through an examination of her writings and speeches. Section III analyzes Ginsburg's decision in VMI by outlining the changes it makes to traditional intermediate scrutiny. Section IV assesses the impact of the VMI case on the decisions of lower federal courts, that is, the extent to which lower courts utilize the decision.

SECTION I

Ruth Bader Ginsburg was born on March 15, 1933 in Brooklyn, New York. Her father, Nathan Bader, immigrated from Russia in his early teens and her maternal grandparents came to the United States from Poland shortly before her mother's birth.[7] She credits her mother with imparting a love of learning.[8] Ginsburg's mother died of cervical cancer in June 1950, the day before she was to see her daughter graduate at the top of her high school class.[9] Though she died when Ginsburg was only 17, her mother had a profound impact on her life. In her speech accepting her nomination to the Supreme Court, Ginsburg said that her mother was "the bravest and strongest person [she had] known, who was taken from [her] much too soon."[10] She went on to say that she regretted that her mother could not have "lived in an age when women could aspire and achieve and daughters are cherished as much as sons."[11] While Ginsburg's blossoming as a feminist came

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> nickname 'Bitch.'" Apologizing profusely, the writer assured Ginsburg that he had asked Rotary club authorities to ban "sexist and scatological statements" at all meetings in the future. Ginsburg read the fax silently. She then exclaimed, "better bitch than mouse."

Jeffery Rosen, *The Book of Ruth*, NEW REPUBLIC, August 2, 1993, p.19.

[7] Malvina Halberstam, *Ruth Bader Ginsburg: The First Jewish Woman on the United States Supreme Court*, 19 CARDOZO L. REV. 1441, 1443 (1998).

[8] *Id.*

[9] *Id.*

[10] Transcript of President's Announcement and Judge Ginsburg's Remarks, N.Y. TIMES, A1, June 15, 1993.

[11] *Id.*

years after her mother's death, she was already nurturing seeds of equality at a young age.

In the fall of 1950, Ginsburg entered Cornell University. As an undergraduate, her interest in law was stimulated by Professor Robert Cushman.[12] Ginsburg graduated with high honors in Government and with distinction in all subjects in 1954.[13] Soon after graduation, she married Martin Ginsburg.[14] A year older than his partner, Martin had completed his first year at Harvard law school before their marriage.[15] Although Ruth had also been accepted to the law school, Martin received his draft notice and the Army relocated the young family to Fort Sill, Oklahoma.[16] The move forced Ginsburg to receive her first bitter taste of gender based employment discrimination. While in Oklahoma, she accepted a position in the local Social Security office. When she disclosed she was pregnant, her superior decided that she could not travel to a training session required for a promotion for which she was otherwise qualified. Consequently, Ginsburg received a lower position with less pay.[17]

When Martin's period in the Army ended in 1956, the Ginsburgs returned to Boston. The Harvard Law School experience provided endless humiliation and discrimination for the few women accepted in the 1950s. As was common at many law schools at the time, professors called on women just for "comic relief."[18] At a dinner given for the nine female first year students, Dean Erwin Griswold demanded that each woman explain how she

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[12] Lynn Gilbert & Gaylen Moore, Particular Passions 156 (1981).

[13] Halberstam, *supra* note 7, at 1445. Years after graduating from Cornell, Ginsburg recalled:

It was the heyday of McCarthyism and Cushman defended our deep-seated national values – freedom of thought, speech and press. ... The McCarthy era was a time when courageous lawyers were using their legal training in support of the right to think and speak freely. That a lawyer could do something that was personally satisfying and at the same time work to preserve the values that have made this country great was an exciting prospect for me.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] GILBERT & MOORE, *supra* note 12, at 158.

justified taking a place in the class that would otherwise have gone to a man.[19] Not wanting to appear too assertive, Ginsburg answered that she thought that studying law would make her a better wife.[20] Still, Ginsburg excelled. Even though she was married, had a small child, and took notes in her Martin's classes as well as her own, she defied the odds by serving on the law review and ranking among the top ten students in her class.[21]

In 1958, Martin graduated from Harvard and accepted a position with a New York law firm and Ginsburg transferred to Columbia for her final year.[22] She graduated in 1959 as a Kent Scholar and tied for first in her class. In spite of her outstanding credentials, she had great difficulty securing a job. Not a single law firm in New York offered her a position.[23] Coveted clerkships also proved elusive for the young lawyer. Legendary jurists Felix Frankfurter and Learned Hand refused to hire Ginsburg because of her gender.[24] Eventually she was hired by Judge Edmund L. Palmieri of the United States District Court for the Southern District of New York.[25]

Following her clerkship, Ginsburg did receive offers from a number of law firms, but declined them in order to join the

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[19] Halberstam, *supra* note 7, at 1445.

[20] David Margolick, *Judge Ginsburg's Life a Trial by Adversity*, N.Y. TIMES, A1, A9, June 25, 1993.

[21] Henry Abraham, Justices, Presidents, and Senators 319 (1999).

[22] *Id.*

[23] As she explained later: "In the fifties, the traditional law firms were just beginning to turn around on hiring Jews. . . . But to be a woman, a Jew, and a mother to boot, that combination was a bit much." *Id.* at 1446.

[24] *Id.* at 1442; Margolick, *supra* note 20, at A9. Oddly enough, while she did not have the opportunity to clerk for Judge Hand, Ginsburg saw the jurist daily while she sat in the back seat of Palmieri's car as he drove Hand to and from work. While he claimed that he did not want to hire a woman because he deemed his language inappropriate for the sex, he felt no reason to protect Ginsburg from his crass language in that venue because, in his words, "'Young lady, here I am not looking you in the face.'" Margolick, *supra* note 20, at A9.

[25] However, she did not secure her clerkship for Palmieri easily either. While the judge was impressed with her outstanding record, he only accepted her after receiving a written promise from a male lawyer who agreed to leave his law firm job to assume her place if her work was unsatisfactory. Halberstam, *supra* note 4, at 1443.

Columbia Law School Project on International Civil Procedure.[26] The Carnegie Foundation project conducted research on foreign systems of civil procedure and the U.S. rules on transnational litigation with the aim of proposing improvements to the latter.[27] Ginsburg's experience in Sweden proved to be a turning point in her views on gender equality. While she did not enter law to champion women's rights, as she observed an unfamiliar system in which women were well integrated into the legal profession, where female judges were common, and even pregnancy did not discourage the participation of women, Ginsburg began to envision a broader role for women in American society in general and the legal profession in particular.[28]

In 1963, Ginsburg returned to the United States and began teaching at Rutgers Law School in Newark, New Jersey, one of the few law schools at the time willing to accept women on its faculty.[29] During this time Ginsburg became involved in the legal struggle for women's rights. Initially, she was involved with the New Jersey affiliate of the American Civil Rights Union (ACLU) and, as gender discrimination complaints began to increase in the late sixties, they were referred to her because, as she has explained, "well, sex discrimination was regarded as a women's job."[30] She was inspired both by her students at Rutgers as well the women referred to her by the ACLU to take an even more active role in

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[26] *Id.* at 1446.

[27] *Id.*

[28] Margolick, *supra* note 20, at A9; Ruth Bader Ginsburg, *The Equal Rights Amendment is the Way*, 1 HARV. WOMEN'S L. J. 19 (1978).

[29] *Id.* at 20. Ginsburg applied for a position at Columbia Law School, but was rejected because of her gender. While a professor at Rutgers, Ginsburg initiated a number of projects that sought to highlight the treatment of women by the legal system including what would become the Women's Rights Law Reporter.

[30] GILBERT & MOORE, *supra* note 12, at 153.

challenging senseless gender lines in the law.[31] Her intellect and tenacity brought her success and her success brought her notoriety.[32] In 1970, she became nationally active in the ACLU, co-authoring the petitioner's brief in *Reed v. Reed*.[33] Following *Reed*, she founded and became co-director of the ACLU's Women's Rights Project (WRP).[34] In this capacity she participated in scores of cases in the 1970s, presenting oral arguments in six, collaborating in the briefs of three, and assisting in *amicus curae* briefs on an additional fifteen.[35]

The Supreme Court Dismisses Gender Discrimination Before Reed

"'Were our state a pure democracy there would still be excluded from our deliberations . . . women, who, to prevent deprivation of morals and ambiguity of issues should not mix promiscuously in the gatherings of men.'"[36] Ginsburg has often utilized this quote by Thomas Jefferson to illustrate that women were not meant to be included in the freedoms embodied in the

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[31] *Id.*; In a recent lecture, Ginsburg recalled some of the cases that came to her attention as council for the New Jersey ACLU in the late 1960s and early 1970s: early in her pregnancy, Eudoxia Awadallah, a secondary school teacher was asked to go on unpaid maternity leave with no guarantee that her job would be waiting for her after she delivered her baby; a Lipton Tea Company employee was denied the privilege of transferring her family to her insurance policy (which was more generous than her husband's policy) because she was married; Princeton University sponsored a summer math and science program for pre-teem boys but not girls because, the school maintained, they were a distraction to boys. Ruth Bader Ginsgurg, *Introduction to Women and the Law: Facing the Millennium*, 32 IND. L. REV. 1161, 1162 (1999) [hereinafter *Facing the Millennium*].

[32] Ginsburg's notoriety as a litigator seemed to overpower her gender as a barrier to employment. Leaving Rutgers for Columbia in 1972, she became the first tenured woman on the Columbia Law School faculty. Halberstam, *supra* note 2, at 1447.

[33] Reed v. Reed, 404 U.S. 71 (1971).

[34] *Id.*

[35] *See supra*, note 1.

[36] Quoting Thomas Jefferson in Martin Gruberg, Women in American Politics 4 (1968).

Declaration of Independence or the United States Constitution.[37] Not only were women excluded from the original understanding of the Constitution, until 1971 the Supreme Court routinely upheld statutes that created classifications based on gender, founding its conclusions on two traditional concepts: women are naturally ordained to be subordinate to men, and laws that treat women different from men are "benign," designed to protect, not repress, women.[38] Thus, courts endorsed institutionalized unequal treatment of women, often expressing paternalistic concern for the "ladies" and notions of "chivalry."[39] Limitations on the economic opportunities for women and chivalric protections of the sex constituted the very flesh of Supreme Court doctrine toward women from the founding of the republic until nearly three-quarters of the way through the twentieth century.[40] A woman's identity, not to mention her financial stability, rested on her husband, a tradition that the Court was unwilling to challenge even

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[37] *See e.g.*, Ruth Bader Ginsburg, *Sex and Unequal Protection: Men and Women as Victims*, 11 J. FAM. L. 347 (1971) [hereinafter *Sex and Unequal Protection*].

[38] Ruth Bader Ginsburg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1, 2-3 (1975). Ginsburg notes that:

> [T]wo themes dominated Anglo-American literature and case reports. Their strains are echoed even to this day. First, women's place in a world controlled by men is divinely ordained; second, the law's differential treatment of the sexes operates benignly in women's favor. *Supra* at 2.

[39] Ruth Bader Ginsburg, *From No Rights, To Half Rights, To Confusing Rights*, 7 HUM. RTS., 12, 13 (1978) and Ginsburg, *Sex and Unequal Protection*, *supra* at note 37, at 350.

[40] In Bradwell v. Illinois, 83 U.S. 130 (1872), the Court ruled that the Equal Protection Clause of the Fourteenth Amendment did not prohibit a state from barring women from the bar. Two years later, the Court held that the privileges and immunities clause of the Fourteenth Amendment did not include the right of women to vote, Minor v. Happersett, 38 U.S. 162 (1874). At the turn of the century, in Muller v. Oregon, 208 U.S. 412 (1908), the Court found that a state law limiting the hours that a laundress could work did not violate the Equal Protection Clause, though it suggested that similar restrictions for men would. In 1948, the Court upheld a law which prohibited a woman from bartending unless her husband or father owned the tavern to protect women from the "moral and social problems," Goesart v. Cleary, 335 U.S. 464, 465-466 (1948), which the state argued could arise from female bartending.

during the Civil Rights/Civil Liberties heyday under the Chief Justiceship of Earl Warren.[41]

Out of the Cage – Free At Last?: Ginsburg From Litigator to Judge

When she approached the Supreme Court with gender discrimination cases, Ginsburg believed that "the challenge of the 1970s [was] to dislodge artificial props that continue[d] to support a sex role division made obsolete by technology and society's drastically curtailed child-production goals."[42] As an advocate, her strategy was to expose the sexist assumptions underpinning statutes by revealing them as flagrant generalizations.[43] As director of the WRP, Ginsburg orchestrated much of the strategy at the

[41] One of the few cases involving gender discrimination decided by the justices during this era was Hoyt v. Florida, 368 U.S. 57 (1961). This 1961 case involved a Florida statute challenged on Fourteenth Amendment grounds because it exempted women from mandatory jury service. The Supreme Court, in a unanimous decision, found that the statute was constitutional because it was based on a reasonable classification and that Florida had not arbitrarily undertaken to exclude women from jury service.

[42] *Supra* note 2, at 350.

[43] Markowitz, *Pursuit of Equality*, *supra* note 2, at 79. Because of her role as an advocate before the Supreme Court, Ginsburg is often hailed as the "Thurgood Marshall of gender equality law." However, some scholars have questioned this comparison. Michael Confusione argues that, while as litigators both justices utilized the court system to achieve their ends, as justices they maintained highly different conceptions of both equal protection and judicial role theories. Michael James Confusione, *Justice Ruth Bader Ginsburg and Justice Thurgood Marshall: A Misleading Comparison*, 26 RUTGERS L.J. 887 (1995). He has asserted that Ginsburg favors "procedural equality" which emphasizes class-blind legislation. *Id.* at 887-895. While Marshall employed a "substantive equality" approach stressing that sometimes classifications must be upheld to redress the disadvantages that these groups face. *Id.* at 895-898. In addition, Confusione finds that Ginsburg has more concern for the form of judicial ruling. *Id.* at 898-901. Marshall was concerned about the impact of the decisions. *Id.* at 901-3.

Supreme Court level selecting only those cases she deemed "'ripe for change through litigation.'"[44]

Reed v. Reed in 1971 was the first time in the history of the nation that the Supreme Court declared a sex based classification unconstitutional. Notably, it did so unanimously. The case involved an Idaho statute that preferred males to females when administering estates.[45] Both Sally and Cecil Reed petitioned the probate court to administer their son's small estate. However, in accordance with the statute, the court automatically awarded custody to Cecil. While the Idaho statute was repealed before the case was heard, the new code only applied prospectively, thus not affecting the suit between the Reeds.[46] So, while the appellee requested that the case be dismissed for lack of a substantial federal question, the Court kept the case on its docket.[47]

Ginsburg's goal in the brief was to emphasize three factors that she believed had altered the social fabric in such a way to give women the freedom to discover a place in society beyond the home: advances in technology that reduced the need for a full-time homemaker, advances in medicine that allowed women to control reproduction, and longer life spans which provided women with years free of caring for children.[48] She doubted that the Court would take the monumental step of adopting strict scrutiny as the standard in gender discrimination cases; rather, she hoped that the case would lay the foundation for future change.[49]

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[44] Ruth B. Cowan, *Women's Rights Through Litigation: An Examination of the American Civil Liberties Union Women's Rights Project, 1971-1976*, 8 COLUM. HUM. RTS. L. REV. 373, 393 (1976).

[45] IDAHO CODE, § 15-312 (1971) (cited in Reed v. Reed, 404 U.S. 71, 72-73 (1971)). The dispute concerned two Idaho citizens, Sally and Cecil Reed, who separated when their adopted son Richard was a child. As was the custom in Idaho at the time, the court awarded the mother custody during the child's "tender years," and the father assumed custody when the boy reached adolescence. Richard spent some time in a juvenile home, and ultimately committed suicide with his father's gun.

[46] Markowitz, *supra* note 2, at 77.

[47] *Id.*

[48] Ruth Bader Ginsburg, *Sex Equality and the Constitution*, 52 TUL. L. REV.451, 457-458 (1978) [hereinafter *Sex Equality*].

[49] Years later Ginsburg said, "I never expected the Court to buy our broad argument. That would have been a giant step for even a more liberal tribunal."

The Court accepted much of Ginsburg's argument, unanimously holding that a classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly situated shall be treated alike."[50] The Court also embraced Ginsburg's interpretation of the equal protection principle stating that "by providing dissimilar treatment for men and women who are . . . similarly situated, the challenged section violates the Equal Protection Clause."[51] While *Reed* left open the prospect of applying stricter review in future gender discrimination cases, the Court was still far from taking that step.

When the WRP was founded, Ginsburg was working on two cases involving sex discrimination in the military: Struck *v. Secretary of Defense*[52] and *Frontiero v. Richardson*[53] The first case arose when Air Force nurse Captain Susan Struck challenged the Air Force's automatic "discharge-for-pregnancy" rule. Under this rule, a pregnant service member could either obtain an abortion at government expense or be involuntarily discharged. For religious reasons, Struck declined the abortion option, but planned to utilize the leave that she had accumulated for the birth and then immediately surrender the child for adoption.[54] The Washington state ACLU challenged the mandatory discharge-for-pregnancy policy and obtained a court order staying the discharge.[55] The Air

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Deborah Markowitz, *In Pursuit of Equality: One Woman's Work to Change the Law*, 14 WOMEN'S RTS. L. REP. 355, 341-342 (1992) (quoting Ginsburg's Oral History)).

[50] 404 U.S. 71, 76 (1971); the Court cited Royster Guano Co. v. Virginia, 253 U.S. 4412 (1920), an equal protection case, albeit an old one, that Ginsburg included in her brief. In *Royster*, the Court had articulated a far tougher standard of review than which is used most often in modern rational basis test jurisprudence. However, Ginsburg admitted that she was reluctant to cite the case as it dated back to a period when the Court used due process to strike down economic legislation. Markowitz, *Pursuit of Equality* (1989), *supra* note 2, at 80.

[51] 404 U.S. 71, 76 (1971).

[52] 460 F.2d 1372 (9th Cir. 1971), *cert. granted*, 409 U.S. 947, *vacated* 409 U.S. 1071 (1972).

[53] 411 U.S. 677 (1973).

[54] Markowitz, *Pursuit of Equality*, *supra* note 2, at 81.

[55] *Id.*

Force, on the recommendation of the Solicitor General, waived her discharged rendering the case moot, and Struck returned to duty after the birth.[56]

With the *Struck* case moot, the first case that Ginsburg argued before the Supreme Court was *Frontiero v. Richardson* in 1973. This case involved a challenge by a female Air Force lieutenant to a federal statute that provided for different treatment for married male and female servicemembers.[57] While the Supreme Court upheld Frontiero's claim 8-1, still no majority congealed to establishing sex as a suspect classification.

Two years later Ginsburg suffered her sole loss before the high court[58] *Kahn v. Shevin* was initiated by a man who claimed that a Florida statute allowing for a tax break for widows but not widowers discriminated against him on the basis of his gender. The Court upheld the statute, ruling that it had a benign effect on women.[59] The majority reasoned that the law was "reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for which the loss imposes a disproportionately heavy burden."[60] *Edwards v. Healy*[61] challenged a Louisiana law virtually identical to the one upheld over a decade earlier in *Hoyt v. Florida.* The challengers, including a woman whose hair fell out because of a home permanent kit and a slip and fall victim, all sought a jury trial before those who would most accurately appraise damages.[62] The

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[56] *Id.*

[57] The law allowed a man to claim his wife as a "dependent," qualifying for increased housing and family medical benefits, whether or not she was dependent upon him for more than half of her support, while it required a woman to prove that her husband was dependent on her income. 411 U.S. at 688.

[58] Kahn v. Shevin, 416 U.S. 351 (1974). Ginsburg did not select Kahn, but inherited the case when it was already on the Court's docket. Even before the Court rendered a decision, Ginsburg expressed doubts about whether the case was ripe and later said "Kahn should never have come up that year." Cowan, supra note 44, at 391.

[59] 416 U.S. at 352.

[60] *Id.* at 355.

[61] 421 U.S. 772 (1975).

[62] Markowitz, *Pursuit of Equality, supra* note 2, at 87.

case was paired with *Taylor v. Louisiana*[63] which challenged the statute on behalf of a criminal defendant. Both cases were argued in October of 1974, but *Healy* became moot shortly thereafter when Louisiana adopted a new Constitution without the gender exception.[64] Ultimately, *Taylor* did not explicitly overrule *Hoyt* and it was not decided on equal protection grounds. Instead, the majority rested its decision on the Sixth Amendment.[65]

Weinberger v. Wiesenfeld[66] involved a man whose wife had died in childbirth. He wanted to care for their son, but was denied social security benefits. While the Social Security Act provided survivor's benefits to women with children, it did not extend to men with children, even though men and women paid the same rate of social security taxes. Ginsburg argued that, while the statute may appear to protect women, it had the effect of denying women workers the protection provided to male workers.[67] Even though the Court ruled in Ginsburg's favor, it did not hold that gender-based distinctions were inherently suspect.

Califano v. Goldfarb,[68] a second social security case, was regarded by Ginsburg as an extra case for the WRP because, although it did not have particularly outstanding facts, she felt that it would be heard before a sympathetic court and serve to strengthen gender discrimination case law in her favor.[69] As in *Weinberger*, she asserted that while the statute appeared on its surface only to disadvantage men, it was actually "double edged" because it accorded people who are identically situated different treatment on the basis of an immutable characteristic.[70]

Despite these victories, it was not until the 1976 case *Craig v. Boren,*[71] that a majority on the Supreme Court enunciated an intermediate standard of review for gender-based classifications.

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[63] 419 U.S. 522 (1974).
[64] Markowitz, *Pursuit of Equality*, *supra* note 2, at 87.
[65] 419 U.S. at 537 (1974).
[66] 420 U.S. 636 (1975).
[67] Halberstam, *supra* note 7, at 1448.
[68] 430 U.S. 199 (1977).
[69] Markowitz, *Pursuit of Equality*, *supra* note 2, at 87.
[70] *Id.* at 92.
[71] 429 U.S. 190 (1976).

Craig challenged an Oklahoma law that allowed women to purchase 3.2 been (near-beer) at the age of 18, but prohibited men from buying the beverage until they were 21. The plaintiffs in the case were Curtis Craig, a teenage fraternity member who wanted to purchase near-beer, and Carolyn Whitener, an entrepreneur, who wanted to sell the product to men under the age of 21.[72]

When the case reached the Supreme Court, Ginsburg offered her assistance to local attorney Fred Gilbert.[73] Because of the distance between the two attorneys, Ginsburg agreed to write an amicus brief instead of co-authoring the main brief.[74] During their correspondence about the briefs and oral argument, Ginsburg urged Gilbert to use "heightened scrutiny" because she felt they did not have enough votes for strict scrutiny.[75] In the end, both the amicus and the appellant's briefs presented a united front urging the Court to apply some form of heightened scrutiny rather than specifically insisting on strict scrutiny.[76] In a 7-2 decision, the Court agreed that the Oklahoma law denied young men equal protection because the state did not show that the law was substantially related to the achievement of its asserted objective.[77]

However, even with Ginsburg's victories, the decade did not represent a hands down victory against gender discrimination. In addition to Ginsburg's loss in *Kahn v. Shevin*, the Court made several other notable decisions against women. In the 1974 case *Gedulig v. Aiello*,[78] the Court upheld required extended unpaid

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[72] Although the case is named for Craig, standing to sue ultimately depended on Whitener because Craig turned 21 before the case reached the Supreme Court. Markowitz, *Pursuit of Equality*, *supra* note 2, at 93.

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] 429 U.S. at 208. The Craig test specifically states that to pass constitutional muster "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives," *Id.* at 204. While Ginsburg was not surprised at the outcome in Craig, she admits that she finds it ironic that the elevated review standard for ex classifications was announced in "a case charging discrimination against boys Ruth Bader Ginsgburg, *Sex Equality and the Constitution: The State of the Art*, 4 WOMEN'S RTS. L. REP. 143, 145 (1978) [hereinafter *State of the Art*].

[78] 417 U.S. 484 (1974).

maternity leaves. The Court also denied certiorari to a Sixth Circuit case which held that a woman has no constitutional right to retain her original surname.[79] Furthermore, cases like *Struck* and *Healy*, which could have had a substantial impact on the development of an equal protection theory in gender discrimination jurisprudence, were rendered moot.

Ginsburg as Circuit Court Judge

Ginsburg resigned from her post as general counsel for the WRP in 1980 when President Jimmy Carter nominated her to the U.S. Court of Appeals for the District of Columbia. On the Court of Appeals, she carved out a reputation as a swing vote, siding more often with the Republican-appointed judges than her Democratic colleagues.[80] However, her voting record is most conservative in cases involving regulatory issues. When one just considers cases involving civil liberties and civil rights, Ginsburg's record leans slightly to the left, but only slightly.[81]

In *Cmty. for Creative Non-Violence v. Watt*,[82] a 1983 case requiring the judges to balance free speech and government regulation, Ginsburg voted in favor of free speech, but refused to

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[79] Whitlow v. Hodges, 539 F.2d 582 (6th Cir. 1976), *cert. denied*, 429 U.S. 1029 (1976).

[80] While on the appellate court, in non-unanimous cases, she often voted with Republican appointees Kenneth Starr and Laurence H. Silberman. Joyce Ann Baugh et al., *Justice Ruth Bader Ginsburg: A Preliminary Assessment*, 26 TUL. L. REV. 1, 4-5 (1994). A study of cases decided by the Circuit Court in 1987 also indicated that Ginsburg voted most often with her Republican colleagues. Kenneth Karpay, *Bork or No Bork, GOP Bloc a Force on the D.C. Circuit*, LEGAL TIMES, January 18, 1988, 10. In non-unanimous cases, she voted with Robert Bork, a loyal conservative and failed Reagan appointee to the Supreme Court, 85 percent of the time, and Patricia Wald, one of the staunchest liberals on the D.C. Circuit at the time, only 38 percent of the time. Neil A. Lewis, *Judge Ginsburg's Opinions: At Center, Yet Hard to Label*, N.Y. TIMES, June 26, 1993, A1, 10.

[81] Baugh, *supra* at 80.

[82] 703 F.2d 586 (D.C. Cir. 1983). This case emerged in 1981 when protesters erected a tent city in Lafayette Park, across from the White House, to symbolize the plight of the homeless. At issue was whether the participants could sleep on-site.

agree to a sweeping statement about free speech. Ginsburg provided the swing vote for the 6-5 plurality which upheld the protestor's demonstration as speech, but she refused to join the opinion of the court which was a sweeping statement about free speech.[83] She clearly sought a middle ground between Antonin Scalia's protection of only "spoken and written thought" and her colleagues' broad interpretation of the free speech clause. She concluded her opinion stating that

> in reviewing regulation of the time, place, and manner of expressive activity, I believe courts should draw no bright line between verbal speech and other comprehensible symbols of expression, or between "traditional communicative activity" and non-traditional modes of expression.[84]

Thus, she upheld the rights of the protesters, but only on very narrow grounds.

Cases involving religious freedom and civil rights often, but not always, received similar narrow treatment by Judge Ginsburg. She dissented in an appellate court decision not to reconsider *Goldman v. Sec'y of Def.*[85] In the 1981 case *Wright v. Regan*, Ginsburg wrote for the majority on the D.C. Circuit maintaining that a group of black parents had a right to bring a nationwide class action suit against the Internal Revenue Service because it did not disallow tax-exempt status for schools that discriminated on a racial basis. However, she joined with two other judges in *O'Donnell Const. Co. v. District of Columbia*,[86] to strike down a government program that set aside 35 percent of construction contracts for minority companies reasoning that it was inconsistent with recent Supreme Court precedent.

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[83] In a separate opinion, she said that she found "the case close and difficult," *Id.* at 604 (Ginsburg, concurring).

[84] *Id.* at 608.

[85] 734 F.2d 1531 (D.C. Cir. 1984). This case involved a Jewish serviceman, who was also a rabbi, who wanted to wear his yarmulke while on duty.

[86] 963 F.2d 420 (D.C. Cir. 1992).

"I'm Ruth, Not Sandra": The *Second* Female Justice

President Bill Clinton nominated Ginsburg to fill the vacancy left by the retirement of Byron White in 1993. While the President was impressed with her judicial career as well as her efforts on behalf of the women's movement, leading women's organizations were skeptical of her criticism of *Roe v. Wade.*[87] Nevertheless, Ginsburg's nomination received bipartisan support in the Senate. The Senate Judiciary hearings were exceptionally uneventful. The Senators focused their questioning primarily on her positions on abortion, women's rights, discrimination, and the death penalty. While Ginsburg made no attempt to distance herself from her previous positions, she refused to preview her votes when questioned about the death penalty and sexual orientation.[88] After only four days of hearings, the Senate Judiciary Committee unanimously approved her nomination and she was quickly confirmed by the whole Senate, 96-3.[89]

Feminist Jurisprudence

Unlike Sandra Day O'Connor, Ginsburg was well entrenched in the scholarly debate over feminist jurisprudence before her nomination to the Supreme Court. Furthermore, while Ginsburg was involved in the legal struggle for women's rights in the 1970s, few would portray O'Connor as an aggressive women's rights advocate.[90] Thus, while it would not necessarily be necessary

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[87] ABRAHAM, *supra* note 21, at 318-19.

[88] Ginsburg reminded the Committee that they had access to volumes of her speeches, writings, and decisions, but would "offer no forecasts, no hints" regarding how she would vote on specific issues to which she had not specifically spoken previously. Confirmation of Ruth Bader Ginsburg as Supreme Court Justice. Before the Senate Judiciary Committee. July 20, 1993. morning session. 103rd Congress. (Statement of Ruth Bader Ginsburg.)

[89] ABRAHAM, *supra* note 21, at 319. The three conservatives that voted against her were Jesse Helms (R-NC), Don Nickles (R-OK), and Bob Smith (R-NH).

[90] In an article comparing the two female justices, Shelia Smith notes that, while O'Connor's record on sex discrimination cases has been somewhat mixed, Ginsburg's pioneering efforts to achieve equal protection for women under the law would appear to make her future as a justice committed to extending the law

to define O'Connor as a feminist, it is essential in a discussion of Ginsburg.

The umbrella term "feminist jurisprudence" refers to a kaleidoscope of perspectives, or, as Katherine Bartlett describes them, "frameworks" employed to analyze the relationship between law and gender.[91] While none of these theories are mutually exclusive, three distinct frameworks are manifest in virtually any discussion of feminist jurisprudence: egalitarian theory,[92] difference theory,[93] and dominance theory.[94] Even though these perspectives are by no means exhaustive in their representation of feminist jurisprudence, they do provide a simplified framework which serves to manage the important overall themes of the concept.

Egalitarian Theory

Egalitarian feminists, also referred to as liberal feminists and equal treatment feminists, propose a system in which men and women are treated as equals under the law.[95] This view assumes that women are equal rather than inferior to men and, therefore, do not need special protection under the law.[96] Laws providing special treatment, even those for pregnant women in the workforce, are seen as divisive, serving only to emphasize the differences between the sexes.[97]

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in this area more promising. Sheila M. Smith, *Justice Ruth Bader Ginsburg and Sexual Harassment Law: Will the Second Female Supreme Court Justice Become the Court's Women's Rights Champion?*, 63 U. CIN. L. REV. 1893 (1995).

[91] Katherine T. Bartlett, *Perspective in Feminist Jurisprudence* in FEMINIST JURISPRUDENCE, WOMEN, AND THE LAW 3 (Betty Taylor et al., eds.).

[92] While the terms "liberal" and "egalitarian" are often used interchangeably in many texts, the author finds the former to be somewhat misleading because of is broader political connotation. Thus, "egalitarian" is exclusively adopted, as it is far more descriptive and focused for this discussion. This theory is discussed in detail supra notes 100-111 and accompanying text.

[93] Discussed in detail *supra* notes 112-120 and accompanying text.

[94] Discussed in detail *supra* notes 121-133 and accompanying text.

[95] Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

[96] *Id.*

[97] *Id.*

Even so, the concept of "equality" within the feminist debate has evolved over centuries.[98] Generally, modern egalitarian feminists take the notion of equality very literally, advocating the elimination of gender-based distinctions in the law.[99] Egalitarian feminists typically reject laws that are designed to protect women.[100] However, ratification of the Equal Rights Amendment was promoted heartily by egalitarian feminists who saw the amendment as an avenue for gender neutral law.[101]

Ginsburg's feminist jurisprudence, as evidenced in her scholarly works and decisions, echoes the core premises of egalitarian feminism. In the 1970s, as the ERA snaked its way through state legislatures, Ginsburg voiced strong support for its ratification.[102] In fact, as recently as 1992 Ginsburg has written in favor of the passage of the amendment to provide judges a firm

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[98] Seventeenth-century feminists argued that a woman's power to reason was equal to that of a man's. Thus, their concerns focused on equal access to educational and social opportunities to improve their minds. Julie Mitchell, *Women and Equality* in FEMINISM AND EQUALITY 31 (1987). In the eighteenth-century, feminists continued to focus on education, but, as MARY WOLLSTONECRAFT'S A VINDICATION OF THE RIGHTS OF WOMEN, published in 1792, demonstrates, feminists of this period also emphasized the damaged done to women and to society by conditioning women as inferior social beings. *Id.* at 35. But the nineteenth-century, the notion of equality had changed from an abstract philosophical debate to an organized political movement. *Id.* at 37. In the twentieth-century, the meaning of equality, particularly in the realm of feminist jurisprudence, has been influenced by the evolution of the equal protection doctrine. KATHERINE T. BARTLETT & ANGELA P. HARRIS, GENDER AND THE LAW: THEORY, DOCTRINE, COMMENTARY 122-3 (1998) [hereinafter GENDER AND THE LAW].

[99] *Id.* at 123.

[100] *Id.*

[101] *Id.*

[102] The language of the proposed amendment read, "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." It was proposed in March 1972 with an original seven-year deadline. After an unprecedented three-year extension, the proposal was declared dead in 1982. The ERA ultimately needed the support of only three additional states for ratification. THE CONSTITUTION OF THE UNITED STATES: AN UNFOLDING STORY 45-46 (J.T. Keenan, ed., 2nd ed., 1988). Some credit the failure of the proposal to Justice Powell's vote in Frontiero. Collin O'Connor Udell, *Signaling a New Direction in Gender Classification Scrutiny: United States v. Virginia*, 29 CONN L. REV. 521, n. 39 (1996).

base for ruling on issues of gender equality.[103] She also says that she learned while writing the *Reed* brief "how important it is to include men in the effort to make women's rights part of the human rights agenda"[104] in order to achieve success.[105] Her assimilationist method, including pursuing cases where men were clients to achieve equal rights for men and women, grew out of her pragmatic approach to feminism.[106]

Difference Theory

Difference theory holds that because there are basic biological differences between the sexes, such as pregnancy, the law should accommodate such differences.[107] Because of these differences, some feminists suggest that women should be given special treatment under the law when faced with situations unique to women.[108] Likewise, laws protecting women who are pregnant or on maternity leave exemplify difference theory.[109]

The debate between the necessity of equality for women and the differences between women and men initiated the search for a feminist jurisprudence.[110] Egalitarian and difference feminists disagree on how women could be viewed at "equal" if they must be treated differently when it comes to pregnancy. Feminist scholars and litigators in the 1970s concluded that the abstract standard of equality should be based on the Aristotelian notion that likes would be treated alike and unlikes would be treated unlike.[111]

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[103] Ginsburg, *Sex Equality, supra* note 38, at 361.
[104] Ginsburg, *Facing the Millennium, supra* note 31, at 1163.
[105] *Id.*
[106] *Id.*
[107] Francis Schmid Holland, Feminist Jursprudence: Emerging From Plato's Cave 11 (1996) [hereinafter Feminist Jurisprudence].
[108] Ann Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L. J. 1373, 1394 (1986).
[109] *Id.* at 1397.
[110] For further discussion see CAROL SMART, FEMINISM AND THE POWER OF LAW 82-85 (Routledge 1989); HOLLAND, *supra* note 107, at 13-16; *see generally*, LESLIE FRIEDMAN GOLDSTEIN, FEMINIST JURISPRUDENCE: THE DIFFERENCE DEBATE (Leslie Friedman Goldstein ed. 1992).
[111] *Supra* note 123, at 211.

Difference feminists argue that egalitarian feminism has caused women to lose many of their historical benefits such as automatic custody.[112] Because man typically earn more than women and standards used for measuring stability tend to value financial security, under a gender neutrality standard in family law, a man may appear to have a more stable status.[113] However, egalitarian feminists counter that statutory schemes based on gender isolate women as a class and emphasize the differences between men and women rather than achieving equality between the sexes.[114] Some scholars advocate, then, the need to abandon the notion of sexual dichotomy in favor of a plurality of differences by integrating male and female insights.[115]

Thus, while one may argue that Ginsburg's feminist philosophy might accord with difference feminism, particularly because of her experience with pregnancy discrimination in employment – her philosophy ultimately varies from that of difference theorists due to her belief that even pregnancy does not make women fundamentally different than men.

Dominance Theory

Ginsburg discerns no distinctively male or female manner of thinking or writing; that is, women do not have a "distinctive voice." She quotes jurist Jeanne Coyne's statement that "wise old man and a wise old woman reach the same conclusion."[116] In

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[112] Catharine MacKinnon, *Legal Perspectives on Sexual Difference* in THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE 213, 218 (Deborah L. Rhode ed. 1990).

[113] *Id.* at 278; In the words of law professor Drucilla Cornell, "equal" rights "do not have as their sole or even their main goal creating a space for women in a male world from which they have previously been shut out." Drucilla L. Cornell, *Gender, Sex, and Equivalent Rights*, 280, 282 in FEMINISTS THEORIZE THE POLITICAL (Judith Butler & Joan W. Scott, eds., 1992).

[114] ZILLAH EISENSTEIN, THE FEMALE BODY AND THE LAW 103 (University of California Press 1988).

[115] *Id.*

[116] Ruth Bader Ginsburg, *Forward on the Report of the Special Committee on Gender*, 84 GEO. L. J. 1651, 1654 (1996) [hereinafter *Special Committee on Gender*].

contrast, dominance theorists believe that the authentic voice of women is suppressed by a patriarchal system.[117] Dominance theory, at times referred to as radical feminism, states that the current legal system has been developed and maintained by a male hierarchy which treats women as inferiors in society.[118]

Like difference theorists, dominance feminists respond to issues of reproductive freedom by suggesting that women must be treated differently to be treated equally.[119] However, dominance feminists suggest that sexism is so deeply imbedded in American institutions, particularly law, that superficial changes in the law will not redress gender inequality.[120] They say that this is demonstrated by the way that women are treated within literature, emphasizing the widespread use of sexist language.[121] Dominance feminists believe that the social "norm" of male oppression of women and male influence over the woman's world is so strong, that the norms must be removed in order for the authentic voice of women to be heard.[122] As a whole, this framework sees the idea of an objective reality as a subjective experience that mirrors and conforms to the male point of view.[123] Within this "objectivity," women are relegated to a different, separate, and unequal sphere.[124]

Indeed, some of the harshest criticism of Ginsburg leaks from the pens of dominance theorists.[125] David Cole, for example,

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[117] Ruth Colker, *Feminism, Sexuality, and Authenticity* in AT THE BOUNDARIES OF LAW: FEMINISM AND LEGAL THEORY 135, 141 (Martha Albertson Fineman & Nancy Sweet Thomadsen 1991).

[118] *Supra* note 8, at 238.

[119] See generally, Ann Scales, Towards a Feminist Jurisprudence, 56 IND. L. J. 375 (1981) [hereinafter Towards a Feminist Jurisprudence]; Nadine Taub, Symposium on Reproductive Rights: the Emerging Issues, 7 WOMEN'S RTS. L. REP. 169 (1982).

[120] *Supra* note 124, at 384.

[121] Cathy J. Jones, Sexist Language: An Overview for Teachers and Librarians, 86 LAW LIBR. J. 673, 681 (1990).

[122] *Supra* note 122, at 141.

[123] Catharine MacKinnon, *Feminism, Marxism, and Method, and the State: An Agenda for Theory*, J. WOMEN IN CULTURE & SOC'Y 515, 536-44 (1982).

[124] *Id.*

[125] *See e.g.*, David Cole, *Strategies of Difference: Litigating for Women's Rights in a Man's World*, 2 LAW & INEQ. 33(1984). Cole argues that, faced with the precedents where the Court denied complaints of sex discrimination by citing

argues that by working from standards set by men, sex discrimination law demands that women present themselves as "similarly situated" to men before they can be considered worthy of equal treatment.[126] However, when Ginsburg addressed the Supreme Court with the invidious effects of sexism, her classic argument was to insist that women were like men by arguing on behalf of a male plaintiff, or showing that men suffered like men by arguing on behalf of male plaintiff, or showing that men suffered harm through the execution of "benign" laws.[127] Cole criticizes Ginsburg's assimilationist method because it fails to address the fact that "neutrality" must be redefined to recognized the inherent paternalism of benign discrimination and to account for both women's experience as well as men's experience.[128] Cole's argument can be extended to Ginsburg's entire feminist philosophy: for her, the end of feminism is "equality," whether is occurs through the courts, legislation, or an Equal Rights Amendment, and that equality consists of elevating women's rights to meet the male standard.

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women's differences, Ginsburg orchestrated a different approach of emphasizing the similarities between men and women. For Ginsburg, litigating in a man's world meant rejecting difference theory. *Id.* at 53-54. However, he charges that the "assimilationist method" cannot traverse the expanse of women's rights issues, especially reproductive freedom. *Id.* at 55. Indeed, while Ginsburg's intentional use of male plaintiffs to secure "equal" rights for women may have met with limited success, according to Cole it fails to accommodate women's "irreducible differences." *Id.* at 95.

[126] *Id.* at 34.

[127] *Id.* at 55; In Frontiero v. Richardson, the man served as the critical link by concretely refuting the stereotyped assumption of the statute: women are financially dependent upon their husbands, not the other way around. *Id.* at 59-60. Weinberger v. Wiesenfeld and Califano v. Goldfarb were aimed at eradicating discriminatory provisions of the Social Security Act, but both portrayed male plaintiffs as victims of discrimination under the act. *Id.* at 71-2. Finally, when the Court finally articulated a heightened standard of review for gender discrimination cases in Craig, the plaintiff, again, was a male. *Id.* at 80.

[128] *Id.* at 38.

SECTION II

Ginsburg's Role Orientation and Judicial Philosophy

Understanding Ginsburg's judicial philosophy and judicial role orientation are key means of analyzing her voting behavior. This section evaluates Ginsburg's written and oral statements about judicial prerogative and her actions as a jurist to assess the accuracy of her self-characterization as exercising restraint.

A Critical Mass

Predicting that Court observers would confuse the two women, the National Association of Women Judges, presented newly confirmed Justice Ginsburg with a t-shirt that read, "I'm Ruth, not Sandra."[129] This commentary critiques not only the gender makeup of the Supreme Court, but the disparity between the genders in the federal judiciary as a whole.[130] Early in her Supreme Court career, Ginsburg commended Clinton's appointment of unprecedented numbers of women to federal courts as bringing the federal courts a step closer to being "in touch with the diverse society law exists to serve."[131] However, she was skeptical that women in the federal judiciary would soon constitute a critical mass.[132] In 1999, Ginsburg again spoke on the critical mass of women on the judiciary.[133] While she praised Clinton's continued appointments of women to the federal bench – nearly thirty percent of his total appointments as of July 1998 – she rhetorically implored "Are we really there?"[134] Given that men and women in judicial power today learned from textbooks with

[129] Ginsburg, Special Committee on Gender, supra note 116, at 1653.
[130] As late as 1999, she remarked that, with some regularity, she is still addressed as Justice O'Connor. Ginsburg, *Facing the Millennium*, *supra* note 31, at 1164.
[131] Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185 (1992) [hereinafter *Judicial Voice*].
[132] Ginsburg, *Special Committee on Gender*, *supra* note 116, at 1653.
[133] Ginsburg, *Facing the Millennium*, *supra* note 31, at 1164.
[134] *Id.*

routinely declared the propriety of female subordination,[135] Ginsburg maintains that even if women did occupy a proportional number of seats in the judiciary, there is not a clear basis of review from the Fifth and Fourteenth Amendments for judges to treat gender equal protection problems uniformly.[136] To rectify this dilemma, she continues to advocate ratification of an Equal Rights Amendment to complement the Fifth and Fourteenth Amendments and to provide jurists with a clear guidepost when ruling on gender issues.[137]

Ginsburg's continued support of an Equal Rights Amendment rather than the pursuit of gender equality through the Equal Protection Clause of the Fourteenth Amendment, echoes the hesitancy of former Supreme Court Justice Lewis Powell who, in his concurring opinion in *Frontiero v. Richardson*, stated that the latter would "shape new constitutional doctrine without a firm root for that doctrine."[138] Ginsburg credits the expansion of the Court's interpretation of the Equal Protection Clause to include gender discrimination with jurists' awareness of a changing political atmosphere.[139] Adding her own twist to the philosophy of legal realists, she maintains that the tide of justices' attitudes are "affected, not by the weather of the day . . . but the climate of the era."[140]

Change Law Slowly

In "Speaking in a Judicial Voice," an article that was published mere months before her nomination to the Supreme Court, Ginsburg reiterates two positions that she feels are critical

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[135] Ginsburg often cites a widely used property textbook from the late 1960s which declared that "land, like woman, was meant to be possessed." Ginsburg, *Special Committee on Gender*, *supra* note 141, at 1654. (citing CURTIS J. BERGER, LAND OWNERSHIP AND USE 139 (1968).

[136] Ginsburg, *The State of the Art*, *supra* note 77, at 361.

[137] *Id.*

[138] Ginsburg, *Sex Equality*, *supra* note 48, at 474-475.

[139] Ruth Bader Ginsburg, Constitutional Adjudication in the United States as a Means of Advancing the Equal Stature of Men and Women Under the Law, 26 HOFSTRA L. REV. 263 (1997).

[140] *Id.*

for a strong judiciary: (1) the importance of a judiciary which recognizes its interdependence on the other branches of the political system; and (2) the significance of collegiality among judges.[141] Ginsburg's caution is evident in her insistence that law develop slowly rather than as a result of sweeping changes of a judicial pen. Indeed, as a litigator, a jurist, and a scholar, Ginsburg has warned that the law must evolve slowly to be effective. In the 1970s, as a litigator, she insisted that the WRP choose cases that move the law forward incrementally. In a 1987 article on the Intercircuit Committee, Ginsburg, at that time an appellate court judge, commented that "the Supreme Court remains a vehicle for gradual, considered change, at least under the open-ended mandates of the Bill of Rights and similarly general statutes and the common law."[142] However, Ginsburg's scholarly criticism of *Roe v. Wade* is the most telling example of her desire for glacial changes in case law. She believes that the issue was not ripe when the justices heard the case, and the Court sought to change the law to far, too quickly. In her writings on this case,[143] Ginsburg engages in a "what if" speculation about reproductive rights had Roe not been decided the way it was.[144] Furthermore, Ginsburg charges that the courts paradoxically treat gender discrimination under the equal protection clause of the Fourteenth Amendment, but uphold reproductive rights under substantive due process and the right to privacy.[145] The latter, she argues, is a far weaker basis

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[141] Ginsburg, *Judicial Voice, supra* note 131, at 1185.

[142] Ruth Bader Ginsburg & Peter W. Huber, *The Intercircuit Committee*, 100 HAR L. REV. 1417, 1427 (1987).

[143] "Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade" in particular.

[144] Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 374, 374-5 (1985); Had the Court not been so specific, particularly about the trimester approach, would state legislatures have gradually enacted laws that would have been more enduring than Roe? *Id.* Would the abortion-rights movement not have become as complacent if it felt the issue was not resolved by the decision? *Id.* Would the anti-abortion movement have been less tenacious without a single decision to rally behind? *Id.*

[145] *Id.*

as it hinges on a premise of judicial creation while the former offers the stronger backing of a constitutional amendment.[146]

Ginsburg's reproductive rights jurisprudence provides merely one example of her reluctance to wander too far from the established path of precedent. In addition, she firmly believes that the Court should "reinforce" or, at most, "moderately add impetus" to social change.[147] She maintains that the decisions of the Court between 1971 and 1980 do not represent great leaps in jurisprudence, but instead demonstrate that the justices were slowly responding to social change, and that her role was merely to be the impetus for that change.[148] As they became cognizant that laws designed to help women often had a negative effect, the justices were able to construct a constitutional doctrine to counter the injustice that had plagued the female sex.[149]

The Jurist

One way that Ginsburg has attempted to eschew labels is by "reinventing" traditional concepts. In "Styles of Collegial Judging," Ginsburg expounds on a judicial role orientation model that she claims is more meaningful than that of activist versus restraint or strict versus loose constructionists.[150] She finds the "individualist" versus "institutionally-minded" dichotomy far more accurate.[151] American jurisprudence, says Ginsburg, leans toward

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[146] *Id.*

[147] Ruth Bader Ginsburg, Constitutional Adjudication as a Means of Realizing the Equal Stature of Men and Women Under the Law, 14 TOCQUEVILLE REV. 125, 134 (1993).

[148] Ruth Bader Ginsburg, *Remarks On Women Becoming Part of the Constitution*, 6 LAW & INEQ. 17, 20-21 (1988).

[149] *Id.*

[150] Ruth Bader Ginsburg, *Styles of Collegial Judging: One Judge's Perspective*, 39 FEDERAL BAR NEWS & J. 199 (1992) [hereinafter *Collegial Judging*].

[151] *Id.* According to Ginsburg, individualist judges deliver separate judgments without a desire to reconcile their differences with other jurists. Generally speaking, this is exemplified by the Law Lords of Great Britain's Supreme Court, Ginsburg cites Justice Hugo Black as an example of this style as he sought answers to constitutional questions without much concern for the input of his colleagues. Institutionally minded judging yields a collective judgment in which disagreement is not made public as in the French system.

institutionally-minded judging, but there is no explicit constraint on a jurist who wishes to write separately.[152] Collective agreement with room for measured dissent seems to be Ginsburg's preferred method of judging.

Ginsburg is known for her advocacy of a collegial court. As a judge, she hoped that shorter *per curiam* opinions for unanimous panels in the D.C. Court of Appeals would increase unity.[153] She has said that the Supreme Court retains the most legitimacy when separate opinions are utilized sparingly,[154] and, when used, the dissenting justice should not castigate the opinion of the majority, but affirm her own view.[155] According to Ginsburg, a justice should utilize dissents to make consistent statements on "major matters."[156] While she admits that a dissent may be therapeutic for the writer, it takes away from a jurist's limited time and loses potency when overused.[157]

A Liberal of a Conservative Approach?

In reference to her judicial philosophy, Ginsburg states: "My approach, I believe, is neither liberal nor conservative active. Rather, it is rooted in the place of the judiciary of judges in our democratic society."[158] But, what, exactly, is the place of the judiciary in a democratic society? At her hearings, Ginsburg quoted Alexander Hamilton as saying a judge should administer

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[152] *Id.*

[153] Ginsburg, *Judicial Voice, supra* note 131, at 1192. The potential success of her proposal is unknown because it was rejected.

[154] *Id.* "[O]verindulgence in separate opinion writing may undermine both the reputation of the judiciary for judgment and the respect accorded court dispositions."

[155] *Id.* at 1197.

[156] She points to William Brennan's repeated dissent in death penalty cases as an example. Ruth Bader Ginsburg, *Remarks On Writing Separately*, 65 WASH. L. REV. 141, 143 (1990) [hereinafter *Writing Separately*].

[157] Ginsburg, *Collegial Judging, supra* note 150, at 201. As a Supreme Court justice, Ginsburg has not overindulged in separate opinions, though she does not abstain significantly more than her colleagues. From the 1993 to 1997 terms of the Supreme Court, the justice averaged about 13 separate opinions per term; Ginsburg averaged 12. *Leading Cases*, HAR. L. REV. 1994-1998.

[158] Ginsburg, *Writing Separately, supra* note 156, at 143.

the law impartially.[159] She continued by expounding on the internal limitations that a jurist should observe:

> [T]he judge should carry out [her] function without fanfare, but with due care. She should decide the case before her without reaching out to cover cases not seen. She should be ever mindful, as Judge and then Justice Benjamin Nathan Cardozo said: 'Justice is not to be taken by storm. She is to be wooed by slow advance.'[160]

Ginsburg also remarked that "the judiciary is third in line" in the Constitution.[161] She states that the document begins with "We the People," flows into the responsibilities of their elected representatives, and ends with the obligations of the judicial branch.[162] She suggests that the structure was no accident, but an intentional act by the framers. Setting the judiciary "apart from the political fray"[163] allowed the members of this institution to "judge fairly, impartially, in accordance with the law, and without fear about the animosity of any appreciated group."[164]

Judicial Construction

In "Speaking in a Judicial Voice," Ginsburg claims that she does not consider the Framers' intent in her constitutional decision-making.[165] Instead, she believes that judges are true to the "original understanding" when they "adhere to traditional ways courts have realized the expectation Madison expressed"[166] when he urged jurists to be "guardians"[167] of and "impenetrable

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[159] Confirmation of Ruth Bader Ginsburg as Supreme Court Justice. Before the Senate Judiciary Committee. July 20, 1993. 103rd Congress. (Statement of Ruth Bader Ginsburg)
[160] *Id.*
[161] *Id.*
[162] *Id.*
[163] *Id.*
[164] *Id.*
[165] Ginsburg, *Judicial Voice*, *supra* note 131, at 1186.
[166] *Id.*
[167] *Id.*

bulwark"[168] defending the rights embodied in the Bill of Rights.[169] As Ginsburg says in *United States v. Virginia*, she sees the Constitutional history of the United States as the extension of original rights to once-excluded groups.[170] Thus, Ginsburg views the Constitution as an evolving document, intended to endure for ages to come and sees the role of the federal courts in that evolution as one "in touch with the diverse society [the] law exists to serve."[171]

While she claims some adherence to original intent, Ginsburg does not deny that judges are policymakers.[172] Even though judges do not solicit cases or choose litigants, policymaking by those who don the black robes dates back to *Marbury v. Madison*[173] in 1803.[174] In light of the diverse set of plaintiffs that bring suit on assorted issues demanding judicial intervention, Ginsburg maintains that a jurist's focus should be on the larger constitutional issues rather than his or her personal preferences.[175] In addition, she believes that jurists should consider congressional intent when determining the constitutionality of laws. For example,

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[168] Id.

[169] *Id.* She qualifies this statement with a reference to Charles Evans Hughes' 1934 opinion in Home Bldg. & Loan Assoc. v. Blaisdell, 298 U.S. 398, 443 (1934), when he rejects the interpretations of the Framers as controlled by the conditions and outlook of their time. *Id.* at 1187.

[170] 518 U.S. at 557.

[171] Ginsburg, *Judicial Voice*, *supra* note 131, at 1187.

[172] Ruth Bader Ginsburg, *Inviting Judicial Activism: A "Liberal" or "Conservative" Technique?*, 15 GEORGIA L. REV. 539, 540 (1981) [hereinafter *Judicial Activism*].

[173] 5 U.S. (1 Cranch) 137 (1803).

[174] Ginsburg, *Judicial Activism*, *supra* note 172, at 540.

[175] *Id.* at 546. However, she does admit that judges often have no choice but to make policy decisions when legislatures delegate broad authority in general terms. *Id.* at 547. Ginsburg utilizes the 1975 D.C. Court of Appeals decision Rodway v. United States Department of Agriculture, 514 F.2d 809 (D.C. Cir. 1975), to exemplify this notion. *Id.* at 548. In amending the Food Stamp Act in 1971, the Senate adopted a far more generous allotment per family than the House. The concrete proposal to split the difference at conference was not accepted and the Act was left with the vague instruction that recipients receive the "opportunity to obtain a nutritionally adequate diet." *Id.* When the case went before the appellate court, the judges were forced to make political decisions that the legislators declined to make.

when Senator Edward Kennedy asked Ginsburg to discuss her view of the Court's majority approach to constructing civil rights law in employment discrimination cases she said that "it is the obligation of judges to construe statutes in the way that Congress meant them to be construed"[176] and to be mindful of the spirit of the law.[177]

Supreme Court Confirmation Congressional Hearings

Clearly Ginsburg sought to portray herself at her Supreme Court confirmation hearings as a measured and consistent jurist who seeks the middle road and dutifully follows judicial restraint.[178] While hopeful judicial candidates often seek to illuminate themselves in the soft, appealing glow of judicial restraint before the Judiciary Committee, it was of particular importance in Ginsburg's case. Undoubtedly, her potential opposition on the Committee had doubts about how a person who formerly works as a strong proponent of women's rights and who appeared before the Supreme Court as an advocate six times, could claim to be a follower of judicial restraint in her capacity as judge. As if to preempt this criticism, Ginsburg carefully distinguished her role as an advocate from that of judge in her opening statements at her confirmation hearings, reminding the Committee that, in spite of her positions as litigator, she "[came] to [the] proceeding to be judged as a judge, not an advocate."[179]

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[176] Confirmation of Ruth Bader Ginsburg as Supreme Court Justice. Before the Senate Judiciary Committee. July 22, 1993. 103rd Congress.

[177] *Id.*

[178] Because of Ginsburg's moderate voting record as a U.S. Circuit Court judge and her commitment to sweeping changes in judicial restraint, scholars such as Shelia Smith have been reluctant to predict that Ginsburg will initiate sweeping changes in gender discrimination law. Smith, *supra* note 90, at 1950-55. Rather, she hypothesizes that if any expansion in equal protection occurs, it will be in the area of sexual harassment law because Supreme Court precedent in this area of law is scattered and the legislative intent of Title VII of the Civil Rights Act of 1964 and Title IX of the Education Act of 1972 to eliminate gender discrimination in employment and education is extensive. *Id.* at 1943-45.

[179] Confirmation of Ruth Bader Ginsburg as Supreme Court Justice. Before the Senate Judiciary Committee. July 20, 1993. 103rd Congress. (Statement of Ruth Bader Ginsburg)

Yet, while reminding the Judiciary Committee that it had access to volumes of her speeches, writings, and appellate decisions, Ginsburg would "offer no forecasts, no hints"[180] regarding how she would vote on particular issues to which she had not specifically spoken previously, as it would cause her to act "injudiciously."[181] She remained steadfast to her initial assertion throughout the course of the hearings. As the Senators focused their questioning on her positions on abortion and women's rights, she did not shy away from what she had written and said about reproductive choice, maintaining her defense of abortion as well as her distaste for *Roe*. Yet she remained relatively ambiguous when questioned about discrimination on the basis of sexual orientation,[182] and also refused to preview her votes on the death penalty. At one point she responded that that she does not think that it is appropriate for jurists to decide issues based on a set of hypotheticals or to prejudge any issue, and that a jurist's votes should transcend her own opinions and reflect precedent.[183]

Ginsburg's written and spoken record indicates a wont toward restraint. She has said that judges should limit their decisions and not attempt to decide things beyond the case at hand. At her hearings, she indicated that a jurist should decide cases based on precedent, not on her own opinions. Her desire for a constitutional amendment to secure women's equality suggests that the judiciary should follow the lead of the popularly elected branches instead of initiating change itself. Instead of giant leaps in case law, she suggests that the courts are most effective when the law changes slowly.

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[180] *Id.*

[181] *Id.*

[182] *Id.* Though vague, her assertion suggests that something, perhaps her own encounters with discrimination, has made her aware of the pervasiveness of discrimination in society and also indicates that she would interpret the Constitution in a way that would correct such discrimination. She said that she believes "rank discrimination against anyone is against the tradition of the United States and it is to be deplored. Rank discrimination is not part of our nation's culture. Tolerance is."

[183] *Id.* "My own view on the death penalty, I think, is not relevant to any question that I would be asked to decide as a judge. I will be scrupulous in applying the law on the basis of legislation and precedent."

Ginsburg has not readily shed all of her earlier activist inclinations. She hints, however unknowingly, at activism when she suggests that the Constitution is an evolving document. Furthermore, her footnote in *Harris v. Forklift Sys.*[184] leaves open the possibility for future expansion regarding women's rights: "[E]ven under the Court's equal protection jurisprudence, when requires 'an exceedingly persuasive justification' for a gender-based classification, it remains an open question whether 'classifications based upon gender are inherently suspect.'"[185] Yet, to this point is it still little more than a hint.

SECTION III

Sex Discrimination, the Fourteenth Amendment, and *United States v. Virginia*

In a constitutional law casebook published in 1987, Robert Cushman noted that "until [*Mississippi Univ. for Women v. Hogan*[186] in 1982], a state could still establish a one-sex school."[187] However, while the *Hogan* Court found single-sex admissions policies at state supported colleges in violation of the equal protection clause of the Fourteenth Amendment, it seemed to allow a loophole exempting military colleges, such as the Citadel and the Virginia Military Institute which admitted only men, from conforming to the decision. Ironically, years later, it was one of Cushman's former students who authored the majority opinion in United *States v. Virginia* which finally sounded the death knell for all state sponsored single-sex institutions of higher learning.[188]

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[184] 510 U.S. 17 (1993).

[185] *Id.* at 26.

[186] 458 U.S. 718 (1982).

[187] ROBERT F. CUSHMAN, CASES IN CONSTITUTIONAL LAW 516 (1987).

[188] Between 1980, the year that Ginsburg was appointed to the D.C. Circuit Court of Appeals, and 1993, the year that she was appointed to the Supreme Court, the Court decided a series of cases which further defined the limits to which one could claim protection from gender discrimination.

In 1981, the Court rendered three such decisions, Kirchberg v. Feenstra, 450 U.S. 455 (1981), Michael M. v. Super. Ct. of Sonoma County, 450 U.S. 464 (1981), and Rostker v. Goldberg, 453 U.S. 57 (1981). In Kirchberg, the Court, in

an opinion written by Justice Thurgood Marshall, invalidated a statute that granted husbands the right to serve as "head and master" over property owned jointly by a couple, and to dispose of it without their spouses' consent.

Michael M. presented an equal protection challenge to California's statutory rape law. The law provided that, when a male and female between the ages of fourteen and seventeen engaged in sexual intercourse, the male was guilty of statutory rape was not. The majority upheld the law using the Craig v. Boren intermediate scrutiny test. The prevention of teenage pregnancy, said the plurality, was an important governmental interest which was "substantially furthered" by this statute, since females and males were not similarly situated regarding the effects of pregnancy. In dissent, Justice John Paul Stevens criticized the majority for overlooking the concept that "a rule authorizing punishment of only one of two equally guilty wrongdoers violates the essence of the constitutional requirement that the sovereign must govern impartially," 450 U.S. 464, 502 (Stevens, J., dissenting). Justice William Brennan's dissent charged that the majority upheld the law, not based on precedent, but on "sexual stereotypes," *Id.* at 488 (Brennan, J., dissenting).

In Rostker, the Court rejected Goldberg's assertion that male-only conscription was unconstitutional based on the equal protection principle contained in the Fifth Amendment's Due Process Clause. The majority reasoned that judicial deference is at is peak when the Court is considering the combined executive-legislative power over national security. Likewise, the "heightened scrutiny" test articulated in Craig v. Boren was satisfied because military flexibility was an important government goal.

The following year in Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982), the Court applied the intermediate scrutiny standard to the college's female-only admissions policy finding that the exclusion of men from a nursing college did not, as the state claimed, compensate women for discrimination against them. The Court found that the policy did not "substantially further" the alleged objective since men were permitted to attend classes as auditors.

Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986), was the first time that the Supreme Court confirmed that a supervisor's advances the retaliation constituted sex-discrimination: "Without questions, when a supervisors sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminates' on the basis of sex," 477 U.S. at 64. Finally, in 1992, in Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992), the Court held that a litigant can seek monetary damages under Title IX of the Education Amendments of 1972.

In addition, before VMI but during Ginsburg's first two terms as justice, the Court decided three cases that further refined the standard of scrutiny for gender discrimination. In Harris v. Forklift Systems, 510 U.S. 17 (1993), the Court found that in making an "abusive work environment" harassment claim, a plaintiff need not necessarily demonstrate that the conduct of the employer "'seriously affect[ed]' [an employee's] psychological well-being or cause the

VMI Case History[189]

The Virginia Military Institute is a rare and prestigious military college which operated as a single-sex school since its creation in 1839.[190] Its mission is to produce "citizen soldiers:" men who are suited for military and civilian leadership.[191] To accomplish this, VMI employs an "adversative method" of education which stresses character development, physical and mental discipline, and a strong moral code designed to instill in its students the capacity to deal with duress and stress as leaders.[192]

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plaintiff to 'suffer injury,'" 510 U.S. at 22 (1993). Ginsburg offers a brief concurrence in Harris in which she applauds the Court's reaffirmation of Meritor. Yet, in a footnote, she leaves open the possibility for future expansion: "[E]ven under the Court's equal protection jurisprudence, which requires 'an exceedingly persuasive justification' for a gender-based classification, it remains an open question whether 'classifications based upon gender are inherently suspect,'" *Id.* at 26. J.E.B. v. Alabama Ex. Rel T.B, 511 U.S. 127 (1994), addressed gender discrimination in jury selection. The Court extended to gender the 1986 decision of Batson v. Kentucky, 476 U.S. 79 (1986), which held that the Equal Protection Clause prohibits the use of peremptory challenges on the basis of race. In Landgraf v. USI Film Products, 511 U.S. 244 (1994), the Court found that the 1991 Civil Rights Act does not apply to cases pending on appeal at the time of enactment.

Though she voted with the majority in these cases, Ginsburg was a judicial onlooker because each time another justice was assigned to author the opinion of the Court. It was not until United States v. Virginia in 1996 that the Chief Justice assigned the opinion to the Court's leading authority on gender discrimination jurisprudence.

[189] Before reaching the Supreme Court, this case made its way through the lower courts twice.

[190] 518 U.S. 515, 520 (1996).

[191] *Id.*

[192] *Id.* At the District Court trial Colonel Normal Bissell, the Commandant of Cadets at VMI, stated "I like to think VMI literally dissects the young student that comes in there, kind of pulls him apart, and through the stress, everything that goes on in that environment, would teach him to know everything about himself," 766 F. Supp. 1407, 1421 (W.D. Va. 1991).

The United States Files Suit

VMI I: District Court

In 1990, a female high-school student, seeking admission to VMI, filed a complaint with the Attorney General on the grounds that Virginia's all-male military academy violated the equal protection clause of the Fourteenth Amendment. The action prompted the United States to file suit against Virginia and the school. Reasoning that Virginia met the burden of proof required by *Mississippi Univ. for Women v. Hogan*, the District Court for the Western District of Virginia ruled in favor of the Commonwealth.[193] Ultimately, the District Court reasoned that Virginia's interest of providing a "single-gender environment, be it male or female"[194] provided important benefits consistent with the Supreme Court's ruling in *Hogan*.[195] While the trial court did find that "women are denied a unique educational opportunity that is available only at VMI,"[196] it concluded that integrating them into the school would have a detrimental effect on the school's status and method of teaching.[197]

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[193] The District Court distinguished the cases on two grounds. First, in Hogan, where the Court found that the women-only admission policy of the state-supported Mississippi University for Women nursing school violated the equal protection clause, it was not necessary to exclude men from the program to advance the education goals of the institution. *Id.* at 1410. However, VMI asserted that the program would be fundamentally altered if the college was forced to admit women. *Id.* Second, according to the district court, the reasons that the two schools gave defending their single-sex admissions policies differed substantially. The Mississippi University for Women asserted that its female-only admission policy was justified as a form of compensatory affirmative action. *Id.* On the other hand, VMI alleged that its male-only admission policy diversified the state's educational system. *Id.* Indeed, VMI was the only one of Virginia's fifteen public colleges and universities that catered only to one sex.

[194] *Id.* at 1415.

[195] *Id.*

[196] *Id.* at 1432.

[197] *Id.* For example, the district court claimed that "allowance for personal privacy would have to be made," *Id.* at 1412, and "physical education requirements would have to be altered, at least for women," *Id.* at 1413.

VMI I: Court of Appeals

On appeal, the Court of Appeals for the fourth circuit vacated the District Court's judgment, holding that Virginia could not favor one gender in educational opportunities.[198] The case was remanded, and the court instructed Virginia to comply with one of three remedies: to admit women to VMI, to establish a parallel institution for women, or to abandon state support for the institution.[199]

The Remedial Approach

VMI II: District Court

In response to the appellate court ruling, the state created the Virginia Women's Institute for Leadership (VWIL) at Mary Baldwin College, a four-year private liberal arts college for women. On remand, the District Court ruled that the plan satisfied the equal protection clause.[200] While the court found that the VWIL plan did not "provide a mirror image of VMI for women,"[201] it felt that the outcomes were "substantially similar"[202] concluding that "if VMI marches to the beat of a drum, then Mary Baldwin marches to the melody of a fife and when the march is over, both will have arrived at the same destination."[203]

VMI II: Court of Appeals

The United States again appealed to the court of appeals. This time, however, the fourth circuit affirmed the trial court's judgment. Even though it recognized that a degree from VWIL

[198] United States v. Virginia, 976 F.2d 890, 892 (9th Cir. 1992) "The Commonwealth of Virginia has not . . . advanced any state policy by which it can justify its determination under an announced policy of diversity, to afford VMI's unique type of program to men and not to women.

[199] *Id.* at 899.

[200] United States v. Virginia II, 852 F. Supp. 471, 473 (W.D. Va. 1994).

[201] *Id.* at 481.

[202] *Id.*

[203] *Id.* at 484.

"lacks the historical benefit and prestige"[204] of a degree from VMI, it held that the educational opportunities were "sufficiently comparable."[205] The court also altered its previous application of the important governmental interest/substantially related means test by deferring to the "democratically chosen branch."[206] Instead of focusing on the end, the court held that the means should be more carefully scrutinized.[207] The United States proceeded to appeal the ruling to the Supreme Court.[208]

The Supreme Court Addresses VMI

In a 7-1 decision, the Supreme Court found VMI's single-sex admission policy unconstitutional.[209] Ginsburg's subtly heightened form of the "important governmental interest with substantially related means test,"[210] discredited both of Virginia's objectives and ruled that denying women admission to VMI violates the equal protection clause of the Fourteenth Amendment.[211] Thus, Ginsburg alters the standard by which

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[204] United States v. Virginia II, 44 F.3d 1229, 1241 (4th Cir. 1995).

[205] *Id.*

[206] *Id.* at 1236-7.

[207] *Id.* However, the fourth circuit was not unanimous. In a biting dissent, Judge Phillips criticized the court for not holding Virginia to the burden of showing the "exceedingly persuasive justification" outlined in Hogan. *Id.* at 1247. In his view, short of integrating women into VMI itself, Virginia could meet the Hogan standard only by providing women with "substantially comparable curricular and extra-curricular programs, funding, physical plant, administration and support services, and faculty and library resources." *Id.* at 1250.

[208] The Court agreed to address two issues: (1) Does Virginia's exclusion of all women, regardless of ability, from the educational opportunities provided by VMI violate the equal protection of the laws guaranteed by the Fourteenth Amendment? (2) If so, what is the remedial requirement?

[209] Ginsburg's majority opinion garnered the support of five of her colleagues: Breyer, Kennedy, O'Connor, Souter, and Stevens. Rehnquist filed a concurring opinion and Scalia dissented. Thomas recused himself because his son attended VMI. Shannon M. Gregor, *The Virginia Military Institute is Given the Opportunity to Create "Citizen Soldiers" Out of Qualified Women*, 73 N. DAK. L. REV. 323, 328 (1997).

[210] She also refers to this as "skeptical scrutiny," 518 U.S. at 518.

[211] Virginia offered two justifications for excluding women from the school: First, Virginia claimed that single-gender education provided educational

gender discrimination claims are reviewed in two significant ways. First, the state must present an "exceedingly persuasive" justification for maintaining a gender-based practice. That is, it must show *at least* that the sex-based classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives. Second, the objective must be genuine and not based on stereotypical notions about women. The test inherently requires the judge to begin with a strong presumption that the classification is invalid.[212] In effect, skeptical scrutiny becomes intermediate plus: a standard not quite as strong as strict scrutiny, but with more teeth than pre-VMI intermediate scrutiny.

The majority opinion finds Virginia's actions unconstitutional in three steps. First, the Court requires a successful defense of gender-based classification to show and "exceedingly persuasive justification." Second, the Court rejects Virginia's proffered objective of diversity in the education system because there is no historical evidence that this has ever been the Commonwealth's intent in maintaining the school.[213] Finally, the Court rejected the remedial plan on the basis that the program was inferior in prestige, academics, and funding.

Ginsburg begins her opinion by outlining the differences and the resulting inequalities of the two schools by examining their "academic offerings, methods of education, and financial resources."[214] She addresses Virginia's reasons for not accepting

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benefits and contributed to diversity in the Commonwealth's education system. Second, the Commonwealth argued that admitting women would force VMI to modify its unique style of education, compromising its reputation. *Id.* at 525.

[212] Deborah A. Widiss, *Re-viewing History: The Use of the Past as Negative Precedent in United States v. Virginia*, 108 YALE L. J. 238, 249 (1998).

[213] However, even if this was an objective, the school only provided diversity for males.

[214] 518 U.S. at 526. She points to a variety of tangible and intangible inequalities in the schools. The average SAT scores for freshmen at Mary Baldwin was about 100 points lower than at VMI. The faculty at Mary Baldwin held fewer Ph.D.'s than at VMI and received lower salaries. The women's college did not offer degrees in the sciences or in engineering. The Court also noted the large discrepancy in endowment between the two schools: Mary Baldwin's endowment was about $19 million with the prospect of adding $35 million based

women and concludes that, while single-sex education does afford benefits to some students and "diversity among public educational institutions can serve the public good,"[215] Virginia does not show that "VMI was established, or has been maintained, with a view of diversifying, by its categorical exclusion of women, educational opportunities within the Commonwealth."[216] In reference to Virginia's claim that admitting women would mean changes to the adversative method rendering it beyond recognition, Ginsburg countered that it is undisputed that some women are capable of meeting the challenges of the method.[217] In her conclusion to this section, she rebukes Virginia for focusing their argument on "means rather than end."[218]

Ginsburg's opinion designates the exceedingly persuasive justification language as the "core instruction of [the] Court's path marking decisions."[219] This specification elevates the phrase from an adjective in the subtext of the standard two-prong *Hogan* test, to an independent focus in the new "skeptical scrutiny" test. Yet, "exceedingly persuasive" is a highly amorphous and incredibly subjective term. The only concrete guideposts that Ginsburg offers

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on future commitments. On the other hand, VMI had an endowment of $131 million with $220 million in future commitments. Instead of stressful physical and mental training which is the hallmark of VMI, the VWIL Task Force, which designed the VWIL program, favored "'a cooperative method which reinforces self-esteem'" for the women. It was proposed, then, that the women at VWIL learn their leadership skills through seminars and externships. The would not have been required to eat or live together as the cadets at VMI. Finally, the military component at Mary Baldwin was only ceremonial, while it was a fundamental aspect of a VMI education. *Id.* at 526-7.

[215] *Id.* at 535.

[216] *Id.* When VMI was founded in 1839, Virginia was far from considering the educational opportunities of women. The prospect of providing for the higher education of women in the Commonwealth was not even raised by the State Senate until 1879, and even then no new opportunities for women were immediately allowed. Furthermore, VMI continued to remain a single-sex institution based on an inherently sexist tradition, not as a program of diversity. *Id.* at 536-537.

[217] *Id.* at 540-4. She notes that similar arguments and predictions were made when women first sought entry to federal military academies.

[218] *Id.* at 545. This is exactly the opposite of the appellate court's instruction.

[219] *Id.* at 525.

come in the form of attacks on two objectives asserted by Virginia: (1) that the adversative method is harmful for women and (2) that admitting women would be harmful to the institution.[220] At the trial stage, Virginia drew on contemporary "experts" in the field of education who testified that the adversative atmosphere at VMI would be harmful to women who require a "cooperative atmosphere."[221] To discredit this claim, Ginsburg juxtaposed the arguments of Virginia's experts with experts on women and education in the mid-nineteenth century who believed that higher education for women was harmful to female health.[222] A century of coeducation has made it clear that the process does not harm women as the "experts" feared.[223] Ginsburg also recites fears from the distant past about women entering law[224] and medicine,[225] as well as more recent fears about women working as law enforcement officers.[226] Essentially, the problem with Virginia's remedy was not that it recognized a difference based on sex, but

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[220] Widiss, *supra* note 212, at 251.

[221] 518 U.S. at 541 (quoting United States v. Virginia, 766 F. Supp. 1407, 1434 (W.D.Va. 1991).

[222] The nineteenth century experts included Edward H. Clarke of Harvard Medical School who, in his influential book Sex in Education, said "identical education of the two sexes is a crime before God and humanity, that physiology protests against, and that experience weeps over." 518 U.S. at n. 9 (quoting EDWARD H. CLARKE, SEX IN EDUCATION 127 (1873). Henry Maudsley who said, "it is not that girls have not ambition, nor that they fail generally to run the intellectual race [in coeducational settings], but it is asserted that they do it at the cost to their strength and health which entails life-long suffering, and even incapacitates them for the adequate performance of the natural functions of their sex," *Id.* (quoting HENRY MAUDSLEY, SEX IN MIND AND IN EDUCATION 17 (1874)); Charles D. Meigs, who said "after five or six weeks of 'mental and educational discipline,' a healthy woman would 'lose . . the habit of menstruation' and suffer numerous ills as a result of depriving her body for the sake of her mind." *Id.* (quoting CHARLES D. MEIGS, REMALES AND THEIR DISEASES 350 (1848)).

[223] Widiss, *supra* note 212, at 254. Widiss calls this approach the "negative precedent." She is careful to note, however, that Ginsburg does not discredit history or case aside the achievements of past leaders, but she does insist that one recognize the adverse impact that these actions had on women. *Id.* at 267.

[224] 518 U.S. at 543-544.

[225] *Id.* at 544.

[226] *Id.* at 542.

that it turned the difference into a disadvantage for one group.[227] While the Court does acknowledge the importance of diversity in an educational system, it finds that Virginia fails to prove that diversity is the actual purpose of the practice, and thus, it appears to the Court to be merely a rationalization.

Second, the majority specifies that the states' asserted objectives "must be genuine, not hypothesized or invented *post hoc* in response to litigation,"[228] and cannot rely on overly broad generalizations about the different talents, capacities, or preferences of males and females."[229] Virginia tried to convince the Court that it was caught in a catch-22: since the adversative method is harmful for women, if VMI is forced to admit women, the system would have to be changed beyond recognition, thereby harming the institution by destroying its prestige and reputation. The Court refused to accept the premise on which Virginia's argument was based. The majority stressed that state actors should disregard the capabilities and preference of "average" men and women,[230] as VMI's mission and approach might be appropriate for and preferred by some women, just as it is preferred by some men, and focus on the individuals who were otherwise qualified for the program.[231]

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[227] Cass R. Sunstein, *The Supreme Court 1995 Term: Leaving Things Undecided*, 110 HARV. L. REV. 6, 74-5 (1996). "Inherent differences remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity," 518 U.S. at 536. Furthermore, Ginsburg is careful to note that, while gender classifications may not be used to discriminate against women, they "may be used to compensate women 'for particular economic disabilities [they have] suffered, to promot[e] equal employment opportunity, [and] to advance full development of the talent and capacities of our Nation's people.'" *Id.* at 525 (quoting Califano v. Webster, 430 U.S. 313, 320 (1977) (per curiam) and California Fed. Sav. & Loan Assoc. v. Guerra, 479 U.S. 272, 289 (1987)). In this way, Ginsburg seeks to preempt any attempt to utilize this decision to strike down affirmative action plans geared to redress discrimination against women.

[228] *Id.* at 526.

[229] *Id.*

[230] Indeed, the "average" women is no more or less suited for life at VMI as is the "average" man.

[231] "State actors controlling gates to opportunity ... may not exclude qualified individuals based on 'fixed notions concerning the roles and abilities of males

Once the Court determined that Virginia had violated the Constitution by not providing an "exceedingly persuasive" justification for excluding women, it concentrated on the remedy. The majority found, however, that VWIL failed to meet the remedial standard outlined in *Milliken v. Bradley*[232] in which a remedial degree "must be shaped to place persons unconstitutionally denied an opportunity or advantage in 'the position they would have occupied in the absence of [discrimination].'"[233] The majority found that VWIL was a poor substitute for VMI.[234]

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and females,'" *Id.* at 532 (quoting Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982)).

[232] 433 U.S. 267 (1977).

[233] 518 U.S. at 533 (quoting Milliken v. Bradley, 433 U.S. at 280).

[234] Perhaps the best way to demonstrate how "skeptical scrutiny" differs from traditional "intermediate scrutiny" is by applying the new test to Michael M. v. Super. Ct. of Sonoma County, an earlier case in which a law that discriminated on the basis of sex was upheld. *Michael M.* presented an equal protection challenge to the statutory rape law of California. Under the law, when two people between the ages of fourteen and seventeen engaged in consensual heterosexual intercourse, the male was guilty of statutory rape but the female had committed no crime. The law was designed to decrease teenage pregnancy (though, arguably by a complex formula). The lawmakers reasoned that absolving (pregnant) young women of guilt would provide an incentive for them to turn in their cohorts, thereby increasing convictions, deterring teens from having sex, and, ultimately, decreasing the number of teenage pregnancies. The government argued that if the law was gender neutral, women would be deterred from reporting the men. The California Supreme Court upheld the law using strict scrutiny. The United States Supreme Court upheld the law using the Craig test. The prevention of teenage pregnancy, said the plurality, was an important governmental interest which was "substantially furthered" by the statute because females and males were not similarly situated with regard to the burdens of pregnancy.

Even though the law withstood this threshold of traditional intermediate scrutiny, it would not necessarily survive skeptical scrutiny. Under the VMI decision, the objective proffered by the state must be genuine and not based on stereotypical notions about women. While the desire to reduce pregnancy was doubtlessly a genuine objective by the state, that it nonetheless rests heavily on two stereotypes. State policies that perpetuate antiquated and outdated gender stereotypes that are derogatory and condescending toward women do not form the basis for proper discriminatory purpose. First, the law, and the Court in its analysis assume that women are inclined to tell on others when they risk

Judicial Role Orientation, Feminism, and VMI

Ginsburg's opinion illustrates her judicial role orientation as well as her feminist jurisprudence. She relies heavily on precedent, particularly the *Hogan* decision. At the same time, she tinkers with the Court's focus, elevating the phrase "exceedingly persuasive justification" from an adjective modifying the standard two-prong test in *Hogan* to an additional, independent prong in VMI.[235]

Though deeply rooted in precedent, the additional prohibitions that Ginsburg sets in place in VMI go a step further than previous decisions by the Supreme Court to secure an even higher standard of scrutiny in gender discrimination cases. Instead of proscripting discrimination based on stereotypes, women could not be categorically excluded on the basis of real, inherent physiological differences between the sexes.[236] Ginsburg demands that the objective be the actual one in mind at the time the discriminatory classification was devised, thereby making the "exceedingly persuasive justification" even more difficult to prove, even without the full force of "strict" scrutiny.[237]

In addition, Ginsburg's decision is consistent with several of the goals that she held as litigator. The opinion disallows benign, or "protective," justifications for gender discrimination in

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embarrassment. Second and more importantly, the plurality assume that women are not similarly situated because of pregnancy. As Blackmun points out in his concurring opinion, the Court is partly to blame for this because it refused to require Medicaid coverage for abortions. If women and men have essentially the same control over their reproductive capabilities, the sexes are arguably similarly situated.

[235] Udell, *New Direction*, *supra* note 102, at 533; Kathryn A. Lee, *Intermediate Review "With Teeth" In Gender Discrimination Cases: The New Standard in United States v. Virginia*, 7 TEMP. POL. & CIV. RTS. L. REV. 221, 235 (1997).

[236] Amy Walsh, *Ruth Bader Ginsburg: Extending the Constitution*, 32 J. MARSHALL L. REV. 197, 218 (1998); Ginsburg says that while "sex classification" can be used as grounds for compensating women for past wrongs, it cannot be used to "create or perpetuate the legal, social and economic inferiority of women," 518 U.S. at 533-4.

[237] 518 U.S. at 536.

the law.[238] Furthermore, while she concedes that most women would not want to attend VMI and that the average woman would not be able to meet the rigorous physical standards required by the institution, she shifts the focus to women who would *want* to attend by focusing on "whether the State can constitutionally deny to women who have the will and capacity, the training and attendant opportunity that VMI uniquely affords."[239] In this sense she attempts to divorce the acceptability of traditional gender stereotypes and generalizations from case law.

In analyzing the objectives that Virginia set forth for setting up VWIL, Ginsburg reaffirms her belief in equal treatment of men and women under the law.[240] She refutes Virginia's use of supposed feminine "differences" to women's disadvantage. Instead, she insists that the proposed remedy must be tailored to the women who want to attend VMI and are capable of the system's rigors, rather than holding all women to the lower standard of the "average" woman.[241] As Ginsburg put it, "kept away from the pressures, hazards and psychological bonding characteristic of VMI's adversative training, VWIL students will not know the 'feeling of tremendous accomplishment' commonly experienced by VMI's successful cadets."[242] At the same time, Ginsburg does not treat men and women as interchangeables. She concedes that some changes must be made to ensure privacy between the sexes, and that some changes will have to be made in women's physical regimen. The distinctions that she makes here are very similar to the exceptions that she allowed when arguing for the ERA: the "potty problem"[243] and legislation dealing with subjects that inherently only affected one gender.[244]

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[238] *See e.g.*, Ruth Bader Ginsburg, *Some Thoughts on Benign Classification in the Context of Sex*, 10 CONN. L. REV. 813 (1978).

[244] 518 U.S. at 542.

[239] *Id.*

[240] *See e.g.*, Ruth Bader Ginsburg, *Some Thoughts on the 1980s Debate of Special Versus Equal Treatment for Women*, 4 LAW & INEQ. J. 143 (1986).

[241] 518 U.S. at 550.

[242] *Id.* at 549.

[243] She explains that the "ERA would coexist peacefully with separate public restrooms, separate sleeping and bathroom facilities for male and female military personnel and prisoners." Ruth Bader Ginsburg, *Sex Equality Under the*

Some scholars question whether Ginsburg really maximized her opportunity to make a statement about gender discrimination and even whether the opinion actually changes the standard at all. Cass Sunstein, professor of jurisprudence at the University of Chicago, discusses the Court's rulings in VMI and *Romer v. Evans* as essentially minimalist decisions.[245] Specifically, he places VMI in this category because it addressed the distinct circumstances of VMI instead of single-sex education in general and because the Court emphasized the lack of an actual purpose promoting diversity without ruling that the objective itself was unconstitutional.[246]

Other Opinions

Rehnquist's concurring opinion and Scalia's dissenting opinion offer some insight into opposition to heightening the level of scrutiny used in gender discrimination cases. In his concurrence, Rehnquist focuses on the ambiguity of the majority's "exceedingly persuasive justification" as the test that litigants must meet when they classify on the basis of gender.[247] Instead, he says that he would have clung more closely to the "firmly established" intermediate scrutiny test for the sake of clarity.[248] He states that Virginia could have met the demand of the Constitution by

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Fourteenth and Equal Rights Amendments, 1979 WASH. U. L.Q. 161, 175 (1979).

[244] For example, laws dealing with subjects like sperm donation or pre-natal care would be excepted. *Id.*

[245] Sunstein, *supra* note 227, at 6. Sunstein's minimalist/maximalist approach loosely resembles judicial restrain/activism. However, instead of labeling the jurist, the decision is categorized. Thus, a jurist's approach can vary from case to case. According to his dichotomy, minimalist judges "decide no more than they have to decide," "leave things open," and "make deliberate decisions about what should be left unsaid." *Id.* Maximalists assume an aggressive judicial posture "necessary to promote the goals of deliberative democracy." *Id.* at 28.

[246] *Id.* at 9-10.

[247] While Rehnquist thinks that the term "substantially related to an important governmental interest" from the traditional test is ambiguous enough, he believes that it is more specific than the term "exceedingly persuasive justification." 518 U.S. at 559 (Rehnquist, C.J., concurring).

[248] *Id.*

demonstrating that "its interest in educating men in a single-sex environment is matched by its interest in educating women in a single-sex institution."[249] The two schools, he maintains, would not have had to be equal in every aspect, only in "quality of education" and "caliber."[250] Furthermore, Rehnquist disputes Ginsburg's consideration of the history of the institution and the state before the Supreme Court's decision in *Hogan*. After 1982, the state should have been aware that the male-only policy at VMI was constitutionally questionable, and was responsible only from that point on to take steps necessary to create a similar institution for women to avoid violating the Equal Protection Clause.[251]

In contrast, Scalia focuses on the ideological obstacles to implementing strict scrutiny.[252] In a passionate dissent, he accuses his colleagues of "rejecting the factual findings of the courts below, sweeping aside the precedents of the Court, and ignoring the history of our people."[253] He believes that Virginia's proffered objective of diversifying the educational system by maintaining a single-sex school satisfied the "important governmental objective with substantially related means" test.[254] He states that the Court has found that strict scrutiny is inapplicable to sex-based classifications, and that there is not a strong argument for extending strict scrutiny to include gender.[255] In fact, he feels that

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[249] *Id.* at 565. Rehnquist is not alone in his allegation that the majority's decision only asserted a more confusing standard in the case. Some scholars even assert that VMI was not only unnecessarily confusing, but it also did not heighten the standard of scrutiny for gender-based equal protection claims. David Bowsher, *Cracking the Code of the United States v. Virginia*, 48 DUKE L. J. 305, 308 (1997).

[250] 518 U.S. at 565.

[251] *Id.*

[252] It should be noted from the outset that, much like Ginsburg's previous experience with gender discrimination, Scalia's experience attending St. Francis Xavier High School, a private, all-male military academy, likely influenced his perception of the case. Udell, *supra* note 102, at n. 214.

[253] 518 U.S. at 576 (Scalia, J., dissenting).

[254] *Id.*

[255] *Id.* at 574-575. In defense of his argument, Scalia cites the 1984 Supreme Court case Heckler v. Matthews, 456 U.S. 728 (1984), in which the Court, using intermediate scrutiny, found that a pension offset provision which applied to nondependent men but not to nondependent women did not violate the due

if the level of scrutiny should change at all, there is a stronger argument for decreasing the standard of review to rational-based.[256] In his opinion, fundamental rights should be limited to those rights which are "traditionally protected by our society."[257] Scalia cites footnote number four in *United States v. Carolene Prod. Co.*,[258] which suggests that strict scrutiny may be used when there is a "discrete and insular minority."[259] He finds it "hard to consider women a 'discrete and insular minority' unable to employ 'the political processes ordinarily to be relied upon,' when they constitute a majority of the electorate."[260]

Scalia also attempts to empirically prove that the majority is replacing the "important objective/substantially related" test[261] with the term "exceedingly persuasive justification."[262] Furthermore, he finds that Ginsburg's characterization of "exceedingly persuasive justification" as the "core instruction" of precedent before the Court signified an extension of strict scrutiny to gender classifications.[263]

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process clause of the Fifth Amendment. He also cites Michael M. v. Super. Ct. of Sonoma Cty., 450 U.S. 464 (1981), in which the Court held that a statutory rape law which applied only to men was constitutional.

[256] *Id.* at 567.

[257] *Id.*

[258] 304 U.S. 144 (1938).

[259] 518 U.S. at 575 (citing United States v. Carolene Prod. Co., 304 U.S. 144 (1938)).

[260] *Id.*

[261] He counts only two mentions of intermediate scrutiny. Furthermore, he argues, it "never answered the question presented in anything resembling that form and instead preferred the phase 'exceedingly persuasive justification' from Hogan." *Id.* at 577.

[262] He says that this phrase is invoked nine times in the course of the opinion of the majority. *Id.*

[263] *Id.* at 578.

SECTION IV

Skeptical of "Skeptical" Scrutiny: Lower Courts Interpret VMI

The Supreme Court's ruling in VMI forever changed the complexion of the Virginia Military Institute.[264] On August 18, 1997, the first coed class assembled at the institution, and in March of the following year, 23 of the original 30 women and 361 of 430 men remained.[265] However, understanding the impact of a case reaches beyond the immediate, or even long-term, effect on the parties involved.[266] For that reason, this section analyzes federal district and circuit court opinions in cases involving gender discrimination to determine how VMI has been interpreted at lower levels of the judicial system.

Impact is analyzed in this project by examining each case's citation or failure of citation of VMI and the case's ultimate holding. Accordingly, each case is classified in one of five categories: interpreting the VMI standard as granting gender discrimination cases strict scrutiny, finding that the VMI standard calls for intermediate scrutiny plus, citing VMI as the Court's most recent restatement of intermediate scrutiny, citing VMI as precedent decreasing the standard of scrutiny in VMI, and failure by the lower court to cite VMI. The way in which the lower court puts VMI into practice is central to this analysis. It is noted if the court explicitly interprets the test to be a restatement of the important objectives/substantial means test (making the reference to VMI only a restatement of traditional intermediate scrutiny). Next, I examine the language that the court adopts from the VMI

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[264] VMI's Board of Visitors considered refusing federal funding to remain an all-male institution. In a nine to eight vote, however, the Board agreed to accept women. Widiss, *supra* note 212, at 268 (1998).

[265] *Id.*

[266] The reception of VMI by lower courts impacts far more than single-sex educational institutions. For example, women prisoners have challenged unequal educational and vocational opportunities under Title IX without challenging the facial classification of gender-segregation. Rosemary M. Kennedy, *The Treatment of Women Prisoners After the VMI Decision: Application of a New "Heightened Scrutiny,"* 6 AM. U. J. GENDER & L. 65 (1997).

decision: Does it mention "exceedingly persuasive justification" or "skeptical scrutiny"? Finally, I ask if the court views "important governmental objectives" as a threshold and how stringently it examines the means by which the statute or practice was implemented. From July 1996 to May 2001, fifteen federal district court opinions and fifteen circuit court opinions cite *United States v. Virginia* as precedent in cases dealing with gender discrimination.[267]

Ginsburg's opinion neither explicitly calls for strict scrutiny (Scalia's criticism aside), nor does it expressly reiterate intermediate scrutiny. Within he analysis, she refers to her standard as skeptical scrutiny. Thus, VMI initiates a standard often referred to as intermediate plus.

Strict Scrutiny

In *N. Shore Concrete & Assoc. v. City of New York*,[268] the District Court of the Eastern District of New York stated that "*United States v. Virginia* has called the use of intermediate scrutiny for gender-based distinctions into question by using an 'exceedingly persuasive justification' standard."[269] While it did not necessarily believe that the new standard was equivalent with strict scrutiny, in its analysis the court found that New York's Minority Business Enterprise and Women Business Enterprise programs withstood even strict scrutiny. Similarly, the United States District Court for the District of Minnesota applied strict scrutiny in another affirmative action case, in *In re: Sherbrooke Sodding*.[270] However, this court found that the program was not narrowly tailored to serve a compelling governmental interest and therefore failed the test.

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[267] *See supra* note 2 for full listing of cases.
[268] 94 Cv. 4017 (E.D.N.Y. 1998).
[269] *Id.* at 4022.
[270] 17 F. Supp. 2d 1026 (Minn. 1998).

Intermediate Scrutiny Plus

In a citizenship case, *Breyer v. Meissner*,[271] a man who assisted in persecution under the Nazi regime was denied citizenship even though his mother was a U.S. citizen living overseas at the time of his birth in 1925 when only males could transfer citizenship to their children. The court rejected his claim in light of the Supreme Court's ruling in *Miller v. Albright*[272] and the district court's recognition of an increased standard of scrutiny in gender discrimination cases.[273] The fifth circuit came to a similar conclusion in *Tuan Ahn Nguyen v. INS*.[274]

The Seventh Circuit, in *Hill v. Ross*,[275] addressed the implementation of an affirmative action plan for hiring professors at the University of Wisconsin at Whitewater. While the Psychology Department at the institution initially voted to offer Paul Hill a tenure track position in clinical psychology, the department received strong objections from Howard Ross, Dean of the College of Letters and Sciences, who wanted the university to hire a woman instead.[276] Ross ultimately blocked Hill's

[271] 23 F. Supp. 2d 521 (E.D. Penn. 1998).

[272] 523 U.S. 420 (1998). Miller involved a woman whose mother was an alien and whose father was a U.S. citizen. She was denied U.S. citizenship under the same statute as Ahumada-Aguilar. In a plurality opinion, the Court ruled, using rational basis scrutiny, that the statute survived the petitioner's constitutional challenge. Without the father's affirmative participation, a gender bias claim did not afford a litigant heightened scrutiny ordinarily applicable to such cases. Miller v. Albright originated in the eighth circuit as Miller v. Christopher. It is discussed in the section on cases that did not cite VMI.

[273] 23 F. Supp. 2d 521, 530 (E.D. Penn. 1998). The district court stated that VMI held that "to withstand an equal protection challenge under heightened scrutiny, where the government engages in gender-based action, it 'must show at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives'"

[274] 208 F. 3d 528 (5th Cir. 2000).

[275] 183 F.3d 586 (7th Cir. 1999).

[276] In 1995, the Psychology Department proposed to make two appointments: one is clinical psychology and one in social psychology. Both proposed candidates were male. Ross reminded the Department that "the hiring goals for the [psychology] department was 61.8 percent women." At the time, the department needed at least three women to reach the target. *Id.* at 590.

nomination, leaving the position vacant.[277] The United States District Court for the Western District of Wisconsin granted summary judgment for the University, concluding that its decision was guided by a valid affirmative action plan.

On appeal, the court of appeals found that "such a plan neither rests on a powerful justification nor uses sex in a way that is narrowly tailored to the justification" as is required for affirmative action plans, and overruled the judgment of the district court. First, it charged that Ross used Hill's gender as the sole basis for his decision. Second, the court states that Hill acted in a way that was inconsistent with the university's affirmative action plan. The Psychology department was not required to submit more than one name to the dean, and he was not bound to reject the names if the department only submitted male names. Finally, utilizing the language of VMI, the seventh circuit states that the justification by the university "must be 'exceedingly persuasive,'"[278] a burden that the circuit does not feel the state met. This appellate decision cites both VMI and utilizes key phrases like "exceedingly persuasive justification" in the opinion. However, the case also demonstrates that one negative result of strengthening the standard of review in gender discrimination cases is the weakening of affirmative action programs.

In *Monterey Mech. Co. v. Wilson*,[279] the U.S. Court of Appeals for the seventh circuit notes that "even sex discrimination against males requires the state to bear the burden of justification." While the section of the statute favoring minority businesses does not survive constitutional muster, the court does not attempt to determine if a more tolerant constitutional regime is in order for sex discrimination.

In *Barnett v. Texas Wrestling Assoc.*,[280] the United States District Court for the Northern District of Texas said that women who were members of a varsity wrestling team but were denied permission to participate in mixed-gender wrestling because of

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[277] *Id.* at 588.
[278] *Id.* at 590 (citing United States v. Virginia, 518 U.S. 515, 531 (1996)).
[279] 125 F.3d 702 (9th Cir. 1997).
[280] 16 F. Supp. 2d 690 (N.D. Tex. 1998).

their gender were entitled to injunctive relief and compensatory and punitive damages. In their analysis, the district court relied on Ginsburg's wording in VMI rather than just the traditional wording of the test. The district court for the Eastern District of Virginia also cited Ginsburg's language in a title IX claim in *Thorpe v. Virginia State University*.[281]

In *Buzzetti v. City of New York*,[282] the U.S. Court of Appeals for the second circuit found that the disparate treatment in the law between clubs featuring topless male and female dancers did not constitute an equal protection violation. The court used the language of VMI in its finding that the statute not only passed the important objective/substantial means test, but also did not "rely on an overbroad generalization about the different talents, capacities, or preferences of males and females."

In *Franks v. Kentucky Sch. for the Deaf*,[283] the U.S. Court of Appeals for the sixth circuit found that Congress intentionally abrogated the immunity of the states from suit in Title IX cases.[284] The appellate court cites VMI as the authority in finding that Section 5 of the Fourteenth Amendment gives Congress the authority to enforce the substantive provisions of the Amendment, including the proscription of gender discrimination in education.[285]

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[281] 6 F. Supp. 2d 507 (E.D. Va. 1998).

[282] 140 F.3d 134 (2nd Cir. 1998).

[283] 142 F.3d 360 (6th Cir. 1998).

[284] In this case, the plaintiffs, Holly Franks and her daughter HBL, a student at the Kentucky School for the Deaf, allege that the State Board for Elementary and Secondary Education of Kentucky violated Title IX because they "knowingly failed to take action to remedy a hostile environment caused by [a] male student's sexual harassment, thereby denying HBL the benefits of and subjecting her to discrimination under the educational program of the school." While incidents of harassment and were reported to officials at the school, no action was taken, and the boy was able to later rape HBL at knife point during a school trip. *Id.* at 361-2.

[285] The Eleventh Amendment bars individuals from suing a state in federal court. However, under some circumstances, Congress may rescind the states' sovereign immunity under the Eleventh Amendment. A state may also waive its immunity. The plaintiffs in this case claim that Congress abrogated immunity and the state waived their immunity by accepting federal funds. The Supreme Court articulated a two-prong test in Seminole Tribe v. Florida, 517 U.S. 44 (1996), that allows states to retain their immunity unless Congress unequivocally

The importance of this opinion in impact analysis is great: the appellate court does more than mechanically apply the principle to the case at hand, but it also utilizes it as a springboard to extend the logic of the case.

Restatement of the "Traditional" Intermediate Scrutiny Standard

In *Crawford v. Davis*,[286] the U.S. Court of Appeals for the eighth circuit does not refer directly to the language of VMI, but uses the case as an example of the Supreme Court's repeated pronouncements that substantive provisions of the Fourteenth Amendment proscribe gender discrimination in education. The case dealt with a series of incidents of "quid pro quo" sexual harassment of Michelle Crawford by one of her instructors at the University of Central Arkansas.

The U.S. Court of Appeals for the eleventh circuit, in *Eng'g Contractors Assoc. of S. Florida v. Metro. Dade County*,[287] recognized that "the phrase 'exceedingly persuasive justification'

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expresses an intent to abrogate the immunity and Congress acts in a way pursuant to a valid exercise of power. 517 U.S. 44, 55 (1996). The circuit court maintains that, while Title IX did not originally state whether or not it applied to state governments, the Rehabilitation Act Amendments of 1986 included explicit language 42 U.S.C. § 2000d-7(a)(1) which clearly satisfied the first requirement. Congress acted pursuant to Section 5 of the Fourteenth Amendment that grants Congress the power to abrogate the immunity of states. Even though Congress did not expressly invoke the authority of Section 5, Title IX proscribes gender discrimination in education, which is allowed.

[286] 109 F.3d 1281 (8th Cir. 1997).

[287] 122 F.3d 895 (11th Cir. 1997). The case involved three affirmative action programs enacted by the Dade County Board of Commissioners which collectively provided minority and women owned businesses to qualify for "participation goals" set by the county. It affirmed the district court's ruling that the county's usage of race-, ethnicity-, and gender -conscious measure in connection with county construction projects was unconstitutional. The county's race- and ethnicity-conscious programs were not narrowly tailored to serve a compelling governmental interest. The gender-conscious program, though sufficiently flexible to satisfy the substantial relationship prong of intermediate scrutiny, was still unconstitutional because the county failed to present sufficient probative evidence of discrimination against women in the relevant parts of the local construction industry.

permeates the Court's VMI opinion . . . and that phrase connotes more intense scrutiny than do customary descriptions of intermediate scrutiny."[288] However, it also found that the district court correctly applied intermediate scrutiny to the program because it does not read the phrase as creating a new constitutional standard for judging gender preferences. Furthermore, it states that "a holding that the Supreme Court has abandoned traditional intermediate scrutiny in favor of a more restrictive formulation would mean that the Court has overruled *sub silentio* its long line of precedents applying intermediate scrutiny to gender classifications"[289] which suggests that intermediate scrutiny is still the appropriate test to apply. In another affirmative action case, the ninth circuit upheld California's Proposition 209 quoting Ginsburg's opinion in VMI "without equating gender classifications, for all purposes, to classifications based on race or national origin, the Court ... has carefully inspected official action that closes a door or denies opportunity to women (or to men)."[290] The District Court of Colorado followed the lead of the Eleventh Circuit's interpretation of VMI in affirmative action cases declaring that the Supreme Court needed to give more clarification about the standard.[291]

In enjoining Dade County, Florida from using racial, ethnic, or gender criteria in deciding whether a bid submitted for construction work will be awarded in *Engineering Contractors Assoc. of S. Florida v. Metro. Dade County*,[292] the District Court for the Southern District of Florida applied intermediate scrutiny. The court said that it was unnecessary to consider the higher form of scrutiny if the program failed at the lower level. Thus, this court also avoided having to pinpoint what the Supreme Court meant by "skeptical scrutiny" because it was "unnecessary to decide whether the VMI decision required the County to meet an even more

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[288] *Id.* at 907.

[289] *Id.* at 908.

[290] Coalition for Econ. Equity v. Wilson, 122 F.3d 692, 701 (9th Cir. 1997) (quoting United States v. Virginia, 518 U.S. 515, 526 (1996)).

[291] Concrete Works of Colorado, Inc. v. City & County of Denver, 86 F. Supp. 2d 1042 (D. Colo. 2000).

[292] 943 F. Supp. 1546 (S.D. Fla. 1996).

difficult burden of proof."[293] The United States District Court for the Northern District of New York,[294] for New Jersey,[295] and Maryland[296] avoided having to determine the level of scrutiny that should be applied in affirmative action cases by determining that the programs would have failed at the lower level regardless.

United States v. Ahumada-Aguilar,[297] involved 8 U.S.C. Sec. 1409 (a)(3) and (4) which state that a child born "out of wedlock" whose father is a United States citizen and whose mother is an alien must show that the putative father has agreed to provide financial support to the child, and has acknowledged paternity or that paternity has been legally declared for the child. However, there is no such requirement for a child who is born to a U.S. mother and alien father.[298] Ricardo Ahumada-Aguilar appealed his conviction on two counts of illegal reentry by an alien with prior felony convictions on the grounds that the law violates the equal protection rights of males as the law requires men to overcome more obstacles than females when passing U.S. citizenship to their children.[299]

While the Appellate Court for the ninth circuit relied on *Miller* as the controlling case, the court acknowledges, as the Supreme Court did in *Miller*, that the applicable standard of review in gender discrimination cases is outlined in *United States v. Virginia*: "A statute that discriminates on the basis of gender typically is subjected to heightened scrutiny."[300] Conversely, in

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[293] *Id.* at 1556.

[294] Sheriff's Silver Star Assoc. of Oswego County v. County of Oswego, 56 F. Supp. 2d 263 (N.D.N.Y.1999).

[295] Assoc. for Fairness in Bus., Inc. v. New Jersey, 82 F. Supp. 2d 353 (D. N.J. 2000).

[296] Assoc. Util. Contrs. of Md., Inc. v. Mayor of Baltimore, 83 F. Supp. 2d 613 (D. Md. 2000)

[297] 189 F.3d 1121 (9th Cir. 1999).

[298] U.S.C. § 1409(c).

[299] Ahumada-Aguilar admitted at a 1991 deportation hearing that he had been convicted of possession of cocaine and the immigration judge ordered that he be deported. He returned to the United States without the prior approval of the Attorney General and was deported again in 1994. He was indicted on two counts of illegally entering the United States after deportation as a convicted felon in 1995. United States v. Ahumada-Aguilar, 189 F.3d at 1123.

[300] *Id.* at 1125.

Terrell v. INS,[301] the U.S. Court of Appeals for the tenth circuit relied on VMI and *Miller* to stay Kerry Suthridge Terrell's deportation because her father was not a party to the action and, therefore, her gender bias claim did not afford her the heightened scrutiny ordinarily applicable in citizenship claims.

In *Cohen v. Brown Univ.*,[302] the U.S. Court of Appeals for the first circuit found that the university violated Title IX of the Education Amendments by not making a good faith effort to equally fund men's and women's sports. However, in its analysis, the court explicitly emphasizes that it believes VMI did not change caselaw.[303] The first circuit found that the shift in emphasis from the phrase "substantially related to an important governmental objective" to "exceedingly persuasive justification" meant little because it felt the high court still utilized intermediate scrutiny and not a stronger variation.[304]

In *Nabozny v. Podlesny*,[305] the U.S. Court of Appeals for the seventh circuit only mentioned VMI in a footnote and was careful to add that they "express no opinion on whether the Court's ruling heightens the level of scrutiny applied to gender discrimination in [their] circuit."[306] Likewise, the court relied on the common understanding of intermediate scrutiny in the case.

The District Court for the Northern District of California granted an injunction against the implementation of California Proposition 209 partially because of its language regarding gender in *Coalition for Econ. Equity v. Wilson*.[307] While careful to note that the Supreme Court's jurisprudence in the area of gender

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[301] 157 F.3d 806 (10th Cir. 1998).

[302] 101 F.3d 155 (1st Cir. 1996). This case was a class action lawsuit against Brown University charging the school with discrimination against women in the operation of its intercollegiate athletics program. The petitioners charged that the university disproportionately funded men's sports over women's sports even though the enrollment distribution between the sexes was nearly equal.

[303] *Id.* at n. 22. "We point out that Virginia adds nothing to the analysis of equal protection challenges to gender-based classifications that has not been part of the analysis since 1979."

[304] *Id.*

[305] 92 F.3d 466 (7th Cir. 1996).

[306] *Id.* at n. 6.

[307] 946 F. Supp. 1480 (N.D.CA 1996).

discrimination is somewhat unsettled since VMI, the court does specify that "gender and racial classifications do not receive identical treatment under the Equal Protection Clause. . . . Gender classifications are subject to less stringent intermediate scrutiny review."[308] Though the court seemed to reaffirm intermediate scrutiny in its decision, it managed to avoid having to decide the exact standard to use in gender discrimination cases by finding that the proposition fails to survive even intermediate scrutiny which made it unnecessary to apply the more stringent strict scrutiny test.[309] The court of appeals, using intermediate scrutiny, vacated the injunction because it felt that the plaintiffs would not succeed on the merits of the equal protection or preemption claims.[310]

In 2000, the Eastern and Western Districts of Virginia addressed cases involving disparities in the grooming standards for male and female prisoners.[311] While both courts note the use of "exceedingly persuasive justification" language, they do not suggest that this makes the scrutiny any stronger than it was previously. In both cases the courts dismiss the challengers' objection to the policy.

In enjoining Dade County, Florida from using racial, ethnic, or gender criteria in deciding whether a bid submitted for construction work will be awarded in *Eng'ng Contractors Assoc. of S. Florida v. Metro. Dade County*,[312] the District Court for the Southern District of Florida applied intermediate scrutiny. The court said that it was unnecessary to consider the higher form of scrutiny if the program failed at the lower level. Thus, this court also avoided having to pinpoint what the Supreme Court meant by "skeptical scrutiny" because it was "unnecessary to decide whether the VMI decision required the County to meet an even more difficult burden of proof."[313] The United States District Court for

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[308] *Id.* at 1501.
[309] *Id.* at 1508.
[310] Coalition for Econ. Equity v. Wilson, 122 F.3d 692 (9th Cir. 1997).
[311] Deblasio v. Johnson, 128 F.Supp. 2d 315 (E.D.Va. 2000); Ashann-Ra v. Virginia, 112 F.Supp. 2d 559 (W.D.Va. 2000).
[312] 943 F.Supp. 1546 (S.D. Fla. 1996).
[313] *Id.* at 1556

the Northern District of New York cited VMI as a restatement of the important interest/substantially related means test in holding that the state violated the Equal Protection Clause by limiting the job opportunities of female corrections officers in the 1999 case *Sheriff's Silver Star Assoc. of Oswego County v. County of Oswego.*[314]

In *Zoch v. City of Chicago*,[315] the District Court for the Northern District of Illinois cites VMI as well as *Craig v. Boren* and states that gender discrimination is a "quasi-suspect" class. Likewise, in *Richmond Med. Center v. Gilmore*,[316] the District Court for the Eastern District of Virginia mentioned VMI only in passing and reiterated the traditional intermediate scrutiny standard.

In *Jefferson v. City of Harvey*,[317] the United States District Court for the Northern District of Illinois found that the female citizens of a particular city did not constitute a protected class, but that woman in general are a protected class. In reference to VMI, the court did state that "there is some disagreement over how far the protection [of women as a class] extends,"[318] suggesting that this court, too, was unsure of the extent that VMI changed the standard.

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[314] 56 F. Supp. 2d 263 (N.D.N.Y. 1999).

[315] 94 C. 4788 (N.D. Ill. 1997).

[316] 55 F. Supp. 2d 441 (E.D. Va. 1999).

[317] 1999 U.S. Dist. LEXIS 20158 (N.D. Ill. 1999). In this case, Raymond Eaves, brother of a Harvey police department officer, strangled, raped and otherwise threatened and terrorized women of the town of Harvey and bragged that he could continue to do so without fear of arrest because of his relationship with his brother. In fact, multiple times women who had been attacked identified Raymond Eaves as their assailant, but no police action was ever taken against him. Plaintiffs sued the town of Harvey when, in the course of the trial against Raymond for the rape and murder Denise Shelby, it was learned that the police department had intentionally refused to investigate Raymond after earlier attacks.

[318] *Id.*

Decreasing Standard of Scrutiny

In *Keevan v. Smith*,[319] women inmates brought action against prison officials charging that they denied them equal access to post-secondary educational programs and to prison industry employment. The U.S. Court of Appeals for the eighth circuit affirmed the decisions of the Western District of Missouri which held that the availability of post-secondary educational courses hinged on fiscal decisions made by the academic providers and on a lack of demand by female inmates rather than discriminatory action taken by the Missouri Department of Corrections and Human Resources. The court, however, relied on VMI only to the extent that it specifically limited state action on the basis of facially gender-based classifications.[320] Therefore, the court interpreted the focus of gender discrimination jurisprudence to be on facially discriminatory means rather than the end.

Opinions in Gender Discrimination Cases Failing to Cite VMI

In analyzing the impact of VMI on lower federal courts, it is important to call attention to cases in which the courts decided gender discrimination cases without mentioning VMI. The invocation of VMI requires the involvement of some level of the federal, state, or local government through the execution of an officially adopted policy that causes injury and a causal connection between the policy and the deprivation of the constitutional right to Equal Protection. Therefore, one cannot merely search for equal protection discrimination cases involving gender because cases which exclusively involve private parties without any form of governmental action will not be subjected to equal protection.[321] Furthermore, while one can argue that the relationship between sexual orientation, gender identification, social norms and so on

[319] 100 F.3d 644 (8th Cir. 1996).

[320] *Id.* at 655.

[321] The Supreme Court did decide in McMillian v. Monroe County, 520 U.S. 781 (1997), that a single act by a municipal official is sufficient to establish municipal liability if that individual possessed "final policy-making authority with respect to the case in which the action was taken," *Id.* at 785.

are a crucial aspect of "gender discrimination," the law is not necessarily as sensitive to this relationship, and the focus of litigation is not always clearly on the gender and sex issues in cases.[322] The following cases are but a sample of those cases that ignore VMI and, likewise, shrink the scope of the decision.

Miller v. Christopher,[323] involved 8 U.S.C. § 1409 (a)(3) and (4) which applies to persons born out of wedlock outside of the United States to an American father and an alien mother.[324] Lorelyn Penero Miller's application for citizenship was denied for failing the requirements of the act. Without citing VMI, the U.S. Court of Appeals for the D.C. circuit rejected Miller's challenges to the law. The circuit court did find, however, that the district court erred in holding that Miller lacked standing to bring her claim and remanded the case back to the district court.[325]

In a Title IX case, *Klinger v. Dep't of Corrections,*[326] the U.S. Court of Appeals for the eighth circuit found that the Nebraska Department of Correctional Services and several DCS officials did not violate the rights of the women prisoners

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[322] For example, in Farmer v. Hawk-Sawyer, 69 F.Supp. 2d 120 (D.C. Cir. 1999), Dee Deidre Farmer, a pre-operative male-to-female transsexual suffering from the medically recognized psychological disorder gender dysphoria who was an inmate in a federal correction facility, brought action to challenge the constitutionality of the Bureau of Prison's (BOP) policy regarding the medical treatment of transsexuals. The BOP did not provide Farmer with hormone therapy as treatment for her gender identity disorder even though she had been undergoing the treatment for several years before her incarceration. There is no explicit sex and/or gender Equal Protection claim in this case. Rather, Farmer charged that the government denied her Equal Protection because the prison administered appropriate medications to other inmates suffering from a variety of other mental illnesses including schizophrenia and depression.

[323] 96 F.3d 1467 (D.C. Cir. 1996).

[324] Not long after her twenty-first birthday, Lorelyn Penro Miller applied for registration as a United States citizen. While her birth certificate does not name a father, she claims to be the daughter of Charlie R. Miller, a U.S. citizen who, at the time of her birth, was a member of the U.S. military stationed at the Philippines.

[325] When Madeline Albright assumed the position of Secretary of State, the case became Miller v. Albright. On appeal to the United States Supreme Court, Miller prevailed. This is the best example in this study of the Supreme Court clarifying a precedent misinterpreted by lower courts.

[326] 107 F.3d 609 (8th Cir. 1997).

incarcerated at the Nebraska Center for Women by failing to provide equal educational opportunities for male and female Nebraska prisoners. The court rejected the claim stating that the differences between male and female populations within a state's correction system, such as unequal population sizes and length of stay, must be taken into consideration. Instead of relying on VMI as the controlling case, the court modeled its opinion after *Jeldness v. Pearce*,[327] in which the ninth circuit considered the differences between circumstances of female and male prison populations in the Oregon prison system and held that "although the programs need not be identical in number or content, women must have reasonable opportunities for similar studies and must have an equal opportunity to participate in programs of comparable quality."[328]

The Court of Appeals for the ninth circuit found in *Neal v. Bd. of Trustees of the California State Univ.*[329] that Title IX does not prevent a university in which male students occupy a disproportionately higher percentage of the athletic roster spots from making gender-conscious decisions to decrease the proportion of roster spots assigned to men as a remedial solution.

In an employment discrimination suit, *Coleman v. B-G Maint. Mgmt. of Colorado*,[330] the Court of Appeals for the tenth circuit reversed a jury award based on findings of gender-plus-marriage discrimination stating that Coleman only proved that the company discriminated against her because of gender, not that it discriminated on the basis of gender-plus-marriage.

Twin brothers, J. and H. Doe, were sexually harassed at their city jobs because of their perceived sexual orientation by their coworkers. They filed suit against the city and, in retaliation, were fired. In *Doe v. City of Belleville*,[331] the Court of Appeals for the seventh circuit held that sexual harassment of men by other men is actionable under Title VII of the Civil Rights Act of 1964.

For the most part, the lower courts seem to be in agreement that the Supreme Court's emphasis on "exceedingly persuasive

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[327] 30 F.3d 1220 (9th Cir. 1994).
[328] *Id.* at 1228-9.
[329] 198 F.3d 763 (9th Cir. 1999).
[330] 108 F.3d 1199 (10th Cir. 1997).
[331] 119 F.3d 563 (7th Cir. 1997).

justification" strengthens the intermediate scrutiny standard and that the Court's condemnation of codified gender-based stereotypes is not merely a loose guideline. Eight district and appellate court decisions suggested the use of some form of intermediate plus, generally relying on the Court's stress of the phrase "exceedingly persuasive justification." While this may seem to comprise a large percentage of all of the cases in this study, the lower courts tended to word their opinions in a way that suggests that they would have reached the same conclusion had they used traditional intermediate scrutiny. Up to this point, then, the lower courts have given little shape to the amorphous phrase "skeptical scrutiny" and it appears unlikely they will in the future without more direction from the Supreme Court. The two cases that utilized strict scrutiny did so in conjunction with race cases in affirmative action law suits. They did not suggest that all gender discrimination cases should utilize strict scrutiny, but do so because they seem to be at a loss for the "correct" standard to use in these cases.

In fourteen cases, the lower federal courts cited VMI but suggested that the case restated the standard in *Craig v. Boren*. Some of these opinions, like *Zoch v. City of Chicago*[332] and *Richmond Med. Ctr. v. Gilmore*,[333] just mentioned VMI in passing suggesting that it was just the most recent restatement of the intermediate scrutiny test. Other cases, like *Eng'g Contractors Assoc. of S. Florida v. Metro. Dade County*,[334] avoided pinpointing an exact definition of "skeptical scrutiny" stating that it was unnecessary to decide whether VMI initiated a higher burden of proof.

While the lower courts were very likely to refer to the "exceedingly persuasive justification" language and several suggested that the important interest/substantially related means test from *Craig v. Boren* should be viewed as a threshold rather than the final test, the courts were reluctant to call the test "skeptical scrutiny." Perhaps this is not surprising since the Court has used the first phrase before and this case only gives them new

[332] 94 C. 4788 (N.D. Ill. 1997).
[333] 55 F. Supp.2d 441 (E.D.Va. 1999).
[334] 943 F. Supp. 1546 (S.D. Fla. 1996).

emphasis. Skeptical scrutiny, however, is Ginsburg's own invention. Only two cases, *Breyer v. Meissner*[335] from the Eastern District of Pennsylvania and *Buzzetti v. City of New York*[336] from the Court of Appeals for the second circuit, refer to "skeptical scrutiny."

The class of women least affected -- or, perhaps, most *adversely* affected -- by VMI, have been women in prisons. In *Keevan v. Smith*[337] and *Klinger v. Dep't of Corrections*,[338] the court of appeals for the eighth circuit suggests that VMI is limited to women at large in society. Without specifying the exact standard to be used, the appellate court's distinction places a clear limitation on VMI. Should other courts follow the example of the eighth circuit, the courts could severely curb the extent to which incarcerated women are protected from discrimination.

CONCLUSION

While it is difficult to quantify the impact that Ginsburg's background had on the development of her feminism and judicial role orientation, it is clear that it did have an impact.[339] Consequently, Ginsburg's background would seem to explain, at least in part, her development as a feminist. Because many of her brushes with discrimination came in the form of norms that distinguished indiscriminately on the basis of sex, it is not entirely a surprise that Ginsburg seems to fit the profile of an egalitarian feminist. Her background also seems to be the source of her caution as a litigator and her restraint in gender discrimination cases as a jurist: she does not want to witness the evaporation of hard won victories.

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[335] 23 F. Supp. 2d 521 (E.D. Penn. 1998).
[336] 140 F.3d 134 (2nd Cir. 1998).
[337] 100 F.3d 644 (8th Cir. 1996).
[338] 107 F.3d 609 (8th Cir. 1997).
[339] Unfortunately, because in-depth information on Ginsburg is not readily available, analysis in this paper, as elsewhere, was limited to anecdotes about employment discrimination, pregnancy discrimination, and humiliation at law school. It is possible that these instances are taken out of context or that they were individually given too much emphasis.

Ginsburg's efforts as a litigator to obliterate gender lines within the law and her support for the ERA exemplify her identification with egalitarian feminism. She recognized that, though women constitute a numerical majority, their power is diluted because they are separated by socio-economic class.[340] As a litigator she felt that the most effective way for women to combat this watered down power was through the courts. By hand-picking the cases that she pursued with the Women's Rights Project, she was able to choose cases that she thought could be won. However, the most successful of these cases involved male plaintiffs or men as victims of a system that favored women through benign classifications.[341] Thus, "equality" became a synonym for assimilation.

While the assimilationist method succeeded in bringing women within the purview of the Constitution, it also may have managed, as David Cole suggests, to limit protection based on gender discrimination.[342] The premise of the egalitarian argument rests on the assumption that equality means that women are like men and, therefore, should be treated the same without seriously accounting for the different biological traits of the sexes. While Ginsburg won cases like *Reed v. Reed*[343] in which she emphasized factors in modern society which allowed women to conceivably carve out a place beyond the home, as a whole her case sequence relied heavily on male plaintiffs who challenged statutes that discriminated against them because of the way they sought to "protect" women. The same Court which granted gender discrimination heightened scrutiny stature, also upheld mandatory unpaid maternity leaves[344] and denied certiorari to a court of

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[340] *Id.*

[341] *See e.g.*, Frontiero v. Richardson, 411 U.S. 677 (1973); Kahn v. Shevin, 416 U.S. 351 (1974); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Craig v. Boren, 429 U.S. 190 (1976); Califano v. Goldfarb, 430 U.S. 199 (1977).

[342] Cole, *supra* note 125, at 33.

[343] 404 U.S. 71 (1971).

[344] Gedulig v. Aiello, 417 U.S. 484 (1974).

appeals case which upheld a statute denying women the right to retain their surname after marriage.[345]

Ginsburg's prior legal experience seems to have had the greatest impact on her judicial role orientation and judicial philosophy. As a lawyer for the Women's Rights Project, she sought to change the law slowly, and as a jurist she reiterated that position insisting again and again that judges recognize their interdependence with the other branches of the government.[346] However, she does eschew the activist versus restraint model in favor of the individualist versus institutionally-minded dichotomy, suggesting that collegiality among justices with some room for dissent is best for the judiciary.

Ginsburg's voting record on the District of Columbia Court of Appeals reveals that she has moderate to conservative leanings as a jurist. As a Supreme Court justice, she has become slightly more moderate. Still, her statements suggest restraint. She has said that judges should limit their decisions and not decide things beyond the case at hand. She believes that precedent, not a jurist's opinion, should be the guiding factor in deciding cases. She also supports an Equal Rights Amendment to guide judges in gender equal protection cases. In addition, she believes that the Constitution is an evolving document, and hints, particularly in gender discrimination cases, that judicial standards are not set in stone.

Though it seems that Ginsburg did seek to expand the understanding of what is included under the purview of gender discrimination, VMI seems to have yielded more confusion than clarity for the lower courts. While none of the opinions suggest that VMI heightened the standard of scrutiny to strict, several found a way to employ strict scrutiny and suggested that if the law could pass the highest form of scrutiny, it would pass "skeptical" scrutiny. Cases involving female prisoners seemed to be the only

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[345] Whitlow v. Hodges, 538 F.2d 582 (6th Cir. 1976), *cert. denied*, 426 U.S. 1029 (1976).

[346] Ginsburg has made this argument in several articles including *Speaking in a Judicial Voice*, *supra* note 131; *Styles of Collegial Judging*, *supra* note 150; and *Remarks On Writing Separately*, supra note 156; as well as in her statements during her Supreme Court confirmation hearing.

ones that received rational or rational plus scrutiny as the courts deferred to the popularly elected branches. A surprising number of cases failed to cite VMI altogether.

For now, it seems that Chief Justice Rehnquist's criticism that the verbiage employed by the majority's opinion muddied the waters of gender discrimination jurisprudence rather than purified them rings true. Along with failing to be a stepping stone toward strict scrutiny, VMI seems to have fulfilled little of the promise suggested soon after the Court announced the decision. Rather than exploring the words that Ginsburg chooses to stress, district and appellate courts cling to the more firmly established standards of earlier cases. For now it seems that, at most, the legacy of VMI will endure only at the Supreme Court level, by providing leverage for future Equal Protection claims.[347]

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[347] Yet, even at the Supreme Court level, gender discrimination law still lurks in murky waters. Just prior to the publication of this article, the Supreme Court handed down a decision affirming the the fifth circuit's review of Tuan Anh Nguyen v. INS, __ U.S. __, 121 S. Ct. 2053, 150 L. Ed. 2d 115 (2001). While Justice Kennedy's opinion does cite VMI as the authority for gender discrimination cases, he does not utilize Ginsburg's language. Instead, he relies on the previous test stating "a gender-based classification withstands equal protection scrutiny if it serves important governmental objectives and the discriminatory means employed are substantially related to the achievement of those objectives," 121 S. Ct. at 2059. In a passionate dissent, Justice O'Connor (joined by Justices Breyer, Ginsburg, and Souter) critisized the majority's interpretation of VMI arguing that it accepted as justification for the discrepancy stereotypes, thinly disguised as important objectives.