2. Women's Progress at the Bar and on the Bench

1. *See, e.g.*, ROBERT E. BELL, DICTIONARY OF CLASSICAL MYTHOLOGY 147 (1982); EDITH HAMILTON, MYTHOLOGY 29–30 (1942).

2. *See* AESCHYLUS, EUMENIDES.

3. *Judges* 4.

4. *See, e.g.*, Pnina Nave Levinson, Deborah–A Political Myth (Dec. 1991), *available at* http://www.bet-debora.de/2001/jewish-family/levinson.htm.

5. CYNTHIA FUCHS EPSTEIN, WOMEN IN LAW 49 (2d ed. 1993).

6. *Id.*

7. AUDREY C. TALLEY ET AL., MILESTONES FOR WOMEN ATTORNEYS 12 (1993).

8. In re Bradwell, 55 Ill. 535 (1869); *see* WOMEN IN LAW: A BIO-BIBLIOGRAPHICAL SOURCEBOOK 46 (Rebecca Mae Salokar & Mary L. Volcansek eds., 1996).

9. Myra Bradwell, Editorial, *Women Lawyers*, CHI. LEGAL NEWS, June 19, 1880, at 857.

10. CURTIS J. BERGER, LAND OWNERSHIP AND USE 139 (1968).

11. *See* Ruth Bader Ginsburg, *Remarks on Women's Progress in the Legal Profession in the United States*, 33 TULSA L.J. 13, 15 (1997); Ruth Bader Ginsburg, *The Progression of Women in the Law*, 28 VAL. U. L. REV. 1161, 1173 (1994).

12. Herma Hill Kay, *The Future of Women Law Professors*, 77 IOWA L. REV. 5, 8 (1991).

13. *See* Ruth Bader Ginsburg, Keynote Address at Hawaii ACLU Conference on Women's Legal Rights (Mar. 16-17, 1978), *quoted in* Amy Leigh Campbell, *Raising the Bar: Ruth Bader Ginsburg and the ACLU Women's Rights Project*, 11 TEX. J. WOMEN & L. 157, 207 (2002); Deborah L. Rhode, *The "No-Problem" Problem: Feminist Challenges and Cultural Change*, 100 YALE L.J. 1731, 1751 (1991).

14. *See, e.g.*, Deborah L. Rhode, *Beyond Just Potty Parity*, 25 NAT'L L.J. 45 (2003).

15. DEBORAH L. RHODE, A.B.A. COMM'N ON WOMEN IN THE PROFESSION, THE UNFINISHED AGENDA: WOMEN AND THE LEGAL PROFESSION 13 (2001).

16. A.B.A. COMM'N ON WOMEN IN THE PROFESSION, A CURRENT GLANCE AT WOMEN IN THE LAW 1 (2005) [hereinafter WOMEN IN THE LAW].

17. Statistics, A.B.A. Section on Legal Education (on file with author); *see also* Cynthia Fuchs Epstein, *Women in the Legal Profession at the Turn of the Twenty-First Century: Assessing Glass Ceilings and Open Doors*, 49 KAN. L. REV. 733, 736 (2001).

18. WOMEN IN THE LAW, *supra* note 16, at 1.

19. NAT'L ASS'N FOR LAW PLACEMENT, JOBS FOR NEW LAW GRADUATES—TRENDS FROM 1994–2004 (2005), http://www.nalp.org (follow "Recent Graduates" hyperlink).

20. Kay, *supra* note 12, at 5–6.

21. *Id.*; Herma Hill Kay, *UC's Women Law Faculty*, 36 U.C. DAVIS L. REV. 331, 337 (2003).

22. Kay, *supra* note 12, at 6.

23. Deborah Jones Merritt, *The Status of Women on Law School Faculties: Recent Trends in Hiring*, 1995 U. ILL. L. REV. 93, 94.

24. Robert J. Borthwick & Jordan R. Schau, Note, *Gatekeepers of the Profession: An Empirical Profile of the Nation's Law Professors*, 25 U. MICH. J.L. REFORM 191, 199–201 (1991).

25. WOMEN IN THE LAW, *supra* note 16, at 2; Elena Kagan, *Women and the Legal Profession–A Status Report*, *in* THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK: GINSBURG AND ARPS LECTURES 37, 42 (2006).

26. EPSTEIN, *supra* note 5, at 744.

27. Kagan, *supra* note 25, at 37.

28. *Id.* at 39–40 (citing WORKING GROUP ON STUDENT EXPERIENCES, HARV. L. SCH., STUDY ON WOMEN'S EXPERIENCES AT HARVARD LAW SCHOOL 4, 6, 18–19, 22, 25–26 & app. XX (2004), *available at* http://www.law.harvard.edu/students/experiences/FullReport.pdf).

29. *Id.* at 40 (citing LANI GUINIER ET AL., BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE 8 (1997)).

30. Sharon Begley, *He, Once a She, Offers Own View on Science Spat*, WALL ST. J., July 13, 2006, at B1.

31. Kagan, *supra* note 25, at 40.

32. WOMEN IN THE LAW, *supra* note 16, at 1–3.

33. Kagan, *supra* note 25, at 41–42.

34. *Id.* at 45–46.

35. Louise Story, *Many Women at Elite Colleges Set Career Path to Motherhood*, N.Y. TIMES, Sept. 20, 2005, at A1.

36. Carolyn Gang Irving, Letter to the Editor, N.Y. TIMES, Sept. 22, 2005, at A30.

37. Kagan, *supra* note 25, at 44 (citing SYLVIA ANN HEWLETT ET AL., THE HIDDEN BRAIN DRAIN: OFF-RAMPS AND ON-RAMPS IN WOMEN'S CAREERS 42 (2005)).

38. Ruth Bader Ginsburg & Laura W. Brill, *Women in the Federal Judiciary: Three Way Pavers and the Exhilarating Change President Carter Wrought*, 64 FORDHAM L. REV. 281 (1995).

39. *Id.* at 282–83.

40. *Id.* at 283.

41. *Id.*; JEANETTE E. TUVE, FIRST LADY OF THE LAW: FLORENCE ELLINWOOD ALLEN 163–64 (1984).

42. TUVE, *supra* note 41, at 164.

43. Sheldon Goldman & Matthew D. Saronson, *Clinton's Nontraditional Judges: Creating a More Representative Bench*, 78 JUDICATURE 68, 68 n.1 (1991).

44. Mary L. Clark, *Changing the Face of the Law: How Women's Advocacy Groups Put Women on the Federal Judicial Appointments Agenda*, 14 YALE J.L. & FEMINISM 243, 245 (2002).

45. Ginsburg & Brill, *supra* note 38, at 287.

46. *Id.* at 288; Sheldon Goldman, *Reagan's Judicial Legacy: Completing the Puzzle and Summing Up*, 72 JUDICATURE 318, 322, 325 (1989).

47. Ginsburg & Brill, *supra* note 38, at 288; Sheldon Goldman, *Bush's Judicial Legacy: The Final Imprint*, 76 JUDICATURE 282, 287, 293 (1993).

48. Federal Judicial Center, *Federal Judges Biographical Database*, http://www.fjc.gov (last visited Nov. 22, 2006).

49. *Id.*

50. *See* Sandra Day O'Connor, *Portia's Progress*, 66 N.Y.U. L. REV. 1546, 1558 (1991) (quoting David Margolick, *Women's Milestone: Majority on Minnesota Court*, N.Y. TIMES, Feb. 22, 1991, at B16).

51. Healy v. Edwards, 363 F. Supp. 1110, 1115 (E.D. La. 1973).

5. Sandra Day O'Connor

1. Stephen G. Breyer, *A Tribute to Sandra Day O'Connor*, 119 HARV. L. REV. 1242, 1244 (2006).

2. PETER HUBER, AMERICAN WOMEN OF ACHIEVEMENT: SANDRA DAY O'CONNOR 25 (1990).

3. Sandra Day O'Connor, Associate Justice, Supreme Court of the United States, Address to the 1990 Sixteenth Annual Olin Conference: Women in Power (Nov. 14, 1990).

4. Ruth V. McGregor, *A Tribute to Sandra Day O'Connor*, 119 HARV. L. REV. 1245, 1246 (2006).

5. *Surviving Cancer: A Private Person's Public Tale*, WASH. POST, Nov. 8, 1994, Health, at 7 (reprinting selections from Sandra Day O'Connor, Associate Justice, Supreme Court of the United States, Address to the Nat'l Coalition for Cancer Survivorship (Nov. 3, 1994)).

6. *E.g.*, County of Allegheny v. Am. Civil Liberties Union, Greater Pittsburgh Chapter, 492 U.S. 573, 678 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part).

7. *E.g.*, Republican Party of Minn. v. White, 536 U.S. 765, 803 (2002) (Stevens, J., dissenting); Zelman v. Simmons-Harris, 536 U.S. 639, 685 (2002) (Stevens, J., dissenting).

8. Sullivan v. Finkelstein, 496 U.S. 617, 632 (1990) (Scalia, J., concurring in part).

9. Lee v. Weisman, 505 U.S. 577, 644 (1992) (Scalia, J., dissenting).

10. SANDRA DAY O'CONNOR, OUT OF ORDER 148–50 (2013).

11. WILLIAM SHAKESPEARE, HENRY V act 5, sc. 2.

7. Remembering Great Ladies: Supreme Court Wives' Stories

1. FRANCES N. MASON, MY DEAREST POLLY: LETTERS OF CHIEF JUSTICE MARSHALL TO HIS WIFE, WITH THEIR BACKGROUND, POLITICAL AND DOMESTIC 1779–1831, at xiii (1961).

2. *See* LIFE AND LETTERS OF JOSEPH STORY, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND DANE PROFESSOR OF LAW AT HARVARD UNIVERSITY (William W. Story ed., 1851) [hereinafter LIFE AND LETTERS].

3. R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC 487 (1985).

4. *See* MRS. WILLIAM H. TAFT, RECOLLECTIONS OF FULL YEARS (1914) [hereinafter RECOLLECTIONS].

5. Circuit riding passed from the scene after enactment of the Circuit Court of Appeals (Evarts) Act, ch. 517, 26 Stat. 826 (1891) (codified as amended in scattered sections of 28 U.S.C.).

6. *See* MASON, *supra* note 1, at 151.

7. *See* CLARE CUSHMAN, THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES, 1789–1995, at 51–52 (2d ed. 1995). Ann and Bushrod Washington also shared a deep appreciation of music. *See* JUDITH S. BRITT, NOTHING MORE AGREEABLE: MUSIC IN GEORGE WASHINGTON'S FAMILY 82–86 (1984).

8. *See* HORACE BINNEY, BUSHROD WASHINGTON 24 (1858).

9. *See* HERBERT A. JOHNSON, THE CHIEF JUSTICESHIP OF JOHN MARSHALL, 1801–1835, at 98–99 (1997); JEAN E. SMITH, JOHN MARSHALL: DEFINER OF A NATION 282–95 (1996).

10. Letter from John Marshall to Polly Marshall (July 11, 1797), *in* MASON, *supra* note 1, at 98.

11. MASON, *supra* note 1, at 344.

12. *See id.* at xiii.

13. *See, e.g.*, JOHNSON, *supra* note 9, at 41.

14. *See* HENRY FLANDERS, 2 THE LIVES AND TIMES OF THE CHIEF JUSTICES OF THE SUPREME COURT OF THE UNITED STATES 536 (1881).

15. Sarah was Joseph Story's second wife, his first wife, Mary having died after only a few months of marriage. As a young man, Story wrote poetry and published a volume of his work, entitled *The Power of Solitude*, which included two poems written by Mary. The volume was poorly received, and when Mary died, Joseph gathered together all the copies he could find and destroyed them. *See* GERALD T. DUNNE, JUSTICE JOSEPH STORY AND THE RISE OF THE SUPREME COURT 31 (1970).

16. *See generally* LIFE AND LETTERS, *supra* note 2.

17. Letter from Joseph Story to Sarah Story (Mar. 3, 1844), *in* 2 LIFE AND LETTERS, *supra* note 2, at 472–73 (discussing *Vidal v. Girard's Executors*, 43 U.S. (2 How.) 127 (1844)).

18. The Last Will of Joseph Story (Jan. 2, 1843) [hereinafter Story Will], *in* JOSEPH STORY: A COLLECTION OF WRITINGS BY AND ABOUT AN EMINENT AMERICAN JURIST 211 (Mortimer D. Schwartz & John C. Hogan eds., 1959).

19. *Id.* at 211–12.

20. *See id.* at 212.

21. In the years after Justice Story made out his will, Massachusetts reformed its laws on married women's property. *See* Acts and Resolves Passed by the Gen. Ct. of Mass., ch. 208, § 1 (1845), codified as amended at Mass. Gen. Laws. Ann. ch. 209, § 25 (West 1998) (permitting a woman, upon marriage, to contract to hold her own property); Acts and Resolves Passed by the Gen. Ct. of Mass., ch. 304, § 1 (1855), codified as amended at Mass. Gen. Laws. Ann. Ch. 209, § 1 (West 1998) (woman's pre-marital property to remain her "sole and separate property, notwithstanding her marriage").

22. *See* Story Will, *supra* note 18, at 212.

23. *Id.* at 215.

24. JOHNSON, *supra* note 9, at 98 (quoting Letter from John Marshall to Joseph Story (Dec. 30, 1827)).

25. *Id.*

26. *See* DUNNE, *supra* note 15, at 271.

27. JOHNSON, *supra* note 9, at 99.

28. *See id.* at 98–99; DUNNE, *supra* note 15, at 271.

29. *See* JOHNSON, *supra* note 9, at 98.

30. *See* MALVINA S. HARLAN, SOME MEMORIES OF A LONG LIFE, 1854–1911, at 8 (revised 1915) (unpublished manuscript, Library of Congress, Washington, D.C.) [hereinafter SOME MEMORIES].

31. *See id.*

32. *See* Harriet F. Griswold, *Justices of the Supreme Court of the United States I Have Known*, SUP. CT. HIST. SOC'Y Q., No. 4, 1987, at 1, 3.

33. SOME MEMORIES, *supra* note 30, at 8.

34. *See id.* at 12, 35–36.

35. *See id.* at 117–18, 120.

36. *See id.* at 84; *see also* LOREN P. BETH, JOHN MARSHALL HARLAN: THE LAST WHIG JUSTICE 133–34 (1992).

37. *See* SOME MEMORIES, *supra* note 30, at 86–88.

38. *See id.* at 89–90.

39. *See id.* at 96.

40. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

41. *See* SOME MEMORIES, *supra* note 30, at 97.

42. *Id.* at 98.

43. Ch. 114, 18 Stat. 335 (1875).

44. SOME MEMORIES, *supra* note 30, at 100.

45. *See id.* at 8.

46. *Id.* at 101.

47. *Id.*

48. *Id.* at 101–02 (italics added).

49. 83 U.S. (16 Wall.) 130, 139–42 (1873).

50. *Id.* at 141.

51. *Id.*

52. *See* JUDITH I. ANDERSON, WILLIAM HOWARD TAFT: AN INTIMATE HISTORY 49 (1981).

53. *See* HENRY F. PRINGLE, 1 THE LIFE AND TIMES OF WILLIAM HOWARD TAFT 79 (Easton Press, 1986) (1939); ISHBEL ROSS, AN AMERICAN FAMILY: THE TAFTS—1678 TO 1964, at 86 (1964).

54. *See* ROSS, *supra* note 53, at 86.

55. Letter from William H. Taft to Alphonso Taft (July 12, 1885), *in* 1 PRINGLE, *supra* note 53, at 79.

56. *See* 1 PRINGLE, *supra* note 53, at 81.

57. Letter from William H. Taft to Helen Herron (Mar. 6, 1886), *in* 1 PRINGLE, *supra* note 53, at 81.

58. *See* ROSS, *supra* note 53, at 105.

59. Letter from William H. Taft to Helen Taft (1897), *in* ROSS, *supra* note 53, at 121.

60. *See* ANDERSON, *supra* note 52, at 60–61.

61. RECOLLECTIONS, *supra* note 4, at 22.

62. *See* ANDERSON, *supra* note 52, at 67, 72.

63. *See id.* at 74.

64. RECOLLECTIONS, *supra* note 4, at 263.

65. Excerpts from the *Washington Post*, *in* ANDERSON, *supra* note 52, at 120.

66. *Id.* at 153.

67. Excerpts from the *New York Times*, *in* ANDERSON, *supra* note 52, at 153.

68. *See* ROSS, *supra* note 53, at 220.

69. Letter from William H. Taft to Helen Taft (June 1929), *in* ANDERSON, *supra* note 52, at 260.

70. *See* ANDERSON, *supra* note 52, at 265.

71. *See id.* at 264.

72. William H. Rehnquist, *Address*, 46 AM. U. L. REV. 263, 274 (1996).

1. Women and the Law: A Symposium Introduction

1. JOHN STUART MILL, THE SUBJECTION OF WOMEN 29 (Stanton Coit ed., Longmans, Green & Co. 1924).

2. SWEDEN NOW, Apr. 1970, at 5–6 (contains a full translation of Prime Minister Palme's response to letters objecting to government, family, and taxation policies); *see also* Olof Palme, The Emancipation of Man, Address at Women's National Democratic Club (June 8, 1970). For more comprehensive treatment, see SWEDISH INST., STATUS OF WOMEN IN SWEDEN: REPORT TO THE UNITED NATIONS (1968).

3. For example, amendment of the Swedish Constitution to provide for women's suffrage occurred in 1921. Today, Swedish women hold cabinet positions and account for about 14 percent of the nation's parliament. On women's representation in professional occupations here and abroad, see CYNTHIA FUCHS EPSTEIN, A

WOMAN'S PLACE: OPTIONS AND LIMITATIONS IN PROFESSIONAL CAREERS 11–13 (1970) (United States lags behind Sweden, Great Britain, France, the Soviet Union, and Israel).

4. Britt Richards, *Single v. Married Income Tax Returns Under the Tax Reform Act of 1969*, 48 TAXES 301 (1970).

5. As child care expenses for the wife who works, Internal Revenue Code § 214 authorizes, for low income taxpayers only, a deduction not to exceed $600 for one child and $900 for two or more children. When the spouses' adjusted gross income exceeds $6,000, the deduction is reduced by each dollar of adjusted gross income above that sum. Thus, no deduction at all is available when the adjusted gross income of the husband and wife exceeds $6,900. Significantly, the deduction is available with no income limitation to single women, widows, widowers, and divorced persons. *See* PRESIDENT'S TASK FORCE ON WOMEN'S RIGHTS AND RESPONSIBILITIES, A MATTER OF SIMPLE JUSTICE 15 (1970) [hereinafter SIMPLE JUSTICE]. On the inequity in retirement benefits under the Social Security Act for families with working wives, see *id*. at 12.

6. Stanhope, Earl of Chesterfield, *Letters*, Sept. 5, 1748, *quoted in* BARTLETT, FAMILIAR QUOTATIONS 415 (14th rev. ed. 1968). *Cf.* Abbott v. Mines, 411 F.2d 353, 355 (6th Cir. 1969) ("[S]ociety no longer coddles women from the very real and sometimes brutal facts of life. Women, moreover, do not seek such oblivion.").

7. *Cf.* Frank Askin, *The Case for Compensatory Treatment*, 24 RUTGERS L. REV. 65, 74 (1969).

8. *See* EPSTEIN, *supra* note 3, at 50–85.

9. *See* Peter K. Gessner, Letter to the Editor, N.Y. TIMES, June 21, 1970, § 6 (Magazine), at 26 ("[A] show [Sesame Street] which innovates in methods of education and in the area of race relations peddles the same tired, biased, sexist stereotype of women. . . . As the father of two girls . . . , I can only hope television will stop indoctrinating female children into second-class citizenship.").

10. *See* Elizabeth Fisher, *The Second Sex, Junior Division*, N.Y. TIMES, May 24, 1970, § 7 (Book Reviews), at 6, 44; *cf.* Dorothy J. Glancy, *Women in Law, the Dependable Ones*, HARV. L. SCH. BULL., June 1970, at 22–33 (especially at 30–31 and accompanying notes). Ironically, a federal district court cited "feminine virtues"

(benevolence and lack of perceived aggressiveness) in rejecting the equal employment opportunity claim of a male applicant for the position of airline cabin attendant. The court pointed to an expert appraisal that "male passengers would subconsciously resent a male flight attendant perceived as more masculine than they . . . [but] would feel themselves more masculine and thus more at ease in the presence of a young female attendant." Diaz v. Pan American World Airways, 311 F. Supp. 559, 565–67 (S.D. Fla. 1970).

11. The initial attempt was to protect men and women alike by limiting working hours to ten per day. But in 1905, the Supreme Court invalidated such legislation covering both sexes. Lochner v. New York, 198 U.S. 45 (1905). In 1908, the Court sustained a ten-hour day law applicable to women only. Muller v. Oregon, 208 U.S. 412 (1908). Thereafter, a number of states adopted hours limitations for women only "on the principle that half a loaf was better than none." In 1941, the Supreme Court, in *United States v. Darby*, 312 U.S. 100 (1941), repudiated the reasoning responsible for the *Lochner* decision. In the years that followed, states neither repealed nor extended to men protective laws that, by this time, were operating to close desirable job opportunities to women. LEO KANOWITZ, WOMEN AND THE LAW: THE UNFINISHED REVOLUTION 184 (1969).

12. For an illuminating discussion focusing on changed societal conditions and legal climate, see *Mengelkoch v. Industrial Welfare Commission*, 437 F.2d 563 (9th Cir. 1971). Holding that female employees' equal protection challenge to state law limiting the hours women can work presents a substantial constitutional question requiring decision by a three-judge court, the Ninth Circuit observed: "In *Muller*, the statute was upheld in part because it was thought to be a necessary way of safeguarding women's competitive position. Here the statute is attacked on the ground that it gives male employees an unfair economic advantage over females." *Id.* at 567.

13. *Cf.* Lansdale v. Air Line Pilots Ass'n Int'l, 430 F.2d 1341 (5th Cir. 1970); Shultz v. Wheaton Glass Co., 421 F.2d 259 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970); Tippett v. Liggett & Myers Tobacco Co., 316 F. Supp. 292 (M.D.N.C. 1970); Richard Halloran, *Federal Lawsuit Charges Job Inequality for Women*, N.Y. TIMES, July 21, 1970, at 1.

14. *See* KANOWITZ, *supra* note 11, at 111–31, 178–92; DEP'T OF LABOR, SEX DISCRIMINATION GUIDELINES, 41

C.F.R. § 60-20.3(F) (federal contractors may not rely on state "protective" laws to justify denying a female employee the right to any job she is qualified to perform); Shultz v. American Can Co.–Dixie Products, 424 F.2d 356 (8th Cir. 1970).

In 1968, the median earnings of year-round full-time women workers were $4,457, or 58 percent of the $7,664 median earnings for fully employed men. Twenty percent of the women, but only 8 percent of the men, earned less than $3,000. Only 3 percent of women workers, but 28 percent of the men, earned $10,000 or more. The gap was narrowest among professional and technical workers; women's earnings were 66 percent of those of men. Among sales workers, the gap was widest; women's incomes were 41 percent of those of men. WOMEN'S BUREAU, DEP'T OF LABOR, BACKGROUND FACTS ON WOMEN WORKERS IN THE UNITED STATES 4 (1970) [hereinafter BACKGROUND FACTS]. *See also* SIMPLE JUSTICE, *supra* note 5, at 18–19, 21, 24 (almost two-thirds of the nation's adult poor are women).

15. Faith A. Seidenberg, *The Submissive Majority: Modern Trends in the Law Concerning Women's Rights*, 55 CORNELL L. REV. 262 (1970).

16. 29 U.S.C. § 206(d) (1964).

17. 42 U.S.C. §§ 2000e et seq. (1964); *see also Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109 (1971); Note, *The Mandate of Title VII of the Civil Rights Act of 1964: To Treat Women as Individuals*, 59 GEO. L.J. 221 (1970).

In its first decision concerning Title VII prohibition against sex-based discrimination in employment, the Supreme Court ruled unanimously that an employer cannot exclude mothers of preschool children from jobs open to fathers of preschool children, absent an affirmative showing that the mothers cannot meet a "bona fide occupational qualification." Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971).

Despite these measures, glaring disparities remain in compensation paid to men and women of equal training or scholastic standing; these disparities exist at all levels of employment, from low-income jobs to professional and executive positions. *See* BACKGROUND FACTS, *supra* note 14; NAT'L REGISTER OF SCIENTIFIC & TECHNICAL PERSONNEL, AMERICAN SCIENCE MANPOWER 1968, at 38–39 (salaries generally), 44 (women's salaries), 96–123 (salaries generally), 253–54 (women's salaries) (1970); James J. White,

Women in the Law, 65 MICH. L. REV. 1051, 1054–57 (1967); *cf*. SIMPLE JUSTICE, *supra* note 5, at 6, 10, 18–19, 24.

18. DEP'T OF LABOR, SEX DISCRIMINATION GUIDELINES, 35 Fed. Reg. 8888–89 (1970), *effective* June 9, 1970, issued in implementation of Exec. Orders Nos. 11,246, 3 C.F.R. 339 (1965), and 11,375, 3 C.F.R. 320 (1967), *amending* 41 C.F.R. § 60-20 by adding §§ 60-20.1–20.6.

19. Caterpillar Tractor Co. v. Grabiec, 317 F. Supp. 1304 (S.D. Ill. 1970).

20. 309 F. Supp. 184 (E.D. Va. 1970); *cf.* Mollere v. Se. La. Coll., 304 F. Supp. 826 (E.D. La. 1969); Perry v. Grenada Mun. Separate Sch. Dist., 300 F. Supp. 748 (N.D. Miss. 1969).

21. *See* KANOWITZ, *supra* note 11, at 149–96.

22. 374 U.S. 483 (1954).

23. *But cf.* Williams v. McNair, 316 F. Supp. 134 (D.S.C. 1970) (three-judge court), *aff'd per curiam*, 401 U.S. 951 (1971) (females only admission policy for state supported college does not violate male students' right to equal protection where no showing was made of any feature rendering all female facility more advantageous educationally than state supported institutions to which males are admitted); CHRISTOPHER JENCKS & DAVID RIESMAN, THE ACADEMIC REVOLUTION 298 (1968) ("[W]e do not find the arguments against women's colleges as persuasive as the arguments against men's colleges. This is a wholly contextual judgment. If America were now a matriarchy (as some paranoid men seem to fear it is becoming) we would regard women's colleges as a menace and men's colleges as a possibly justified defense.")

24. Sheila Tobias, *Sex, Politics, and the New Feminism*, CORNELL ALUMNI NEWS, May 1970, at 18–23.

25. However, testimony submitted by the Women's Rights Committee of New York University School of Law for hearings conducted by the House Subcommittee on Education, June 30, 1970, describes in telling detail the halting pace of progress and the pervasiveness of discrimination against women reflected in current practices, policies, and attitudes of the legal profession and the nation's law schools. *See* 116 Cong. Rec. H7948, H7980–83 (daily ed. Aug. 10, 1970).

26. Michelle Scott, *Meetings Consider Harvard Women's Complaints*, HARV. L. REC., Mar. 26, 1970, at 4, 13;

see also HARV. L. SCH. BULL., June 1970, at 14, 16–17, 22–35.

27. *Yale Coeds Invade Alumni Fete To Protest Male Predominance*, N.Y. TIMES, Feb. 22, 1970, at 1.

28. See the letter from University of Chicago Law Women's Caucus to the University of Chicago Alumni, Feb. 27, 1970. At the annual meeting of the Association of American Law Schools, December 30, 1970, member schools approved amendments to the Association's Articles and Approved Policy incorporating prohibitions against discrimination on the ground of sex in admission, hiring, and placement practices.

29. Charging more than 100 institutions with discrimination against women, these complaints are predicated upon Executive Order 11,246, as amended to include sex-based discrimination by Executive Order 11,375. *See supra* note 18. Most of the complaints have been filed by the Women's Equity Action League, under the supervision of Dr. Bernice Sandler. *See* Richard D. Lyons, *Women Forcing Colleges To Give Job Data to U.S.*, N.Y. TIMES, Nov. 8, 1970, at l; Ann Scott, *The Half-Eaten Apple: A Look at Sex Discrimination in the University*, REPORTER (State University of New York at Buffalo), May 14, 1970, *reprinted in Discrimination Against Women: Hearings Before the Spec. Subcomm. on Education of the Comm. on Education and Labor on Section 805 of H.R. 16098*, 9lst Cong., 2d Sess. at 212 (1970).

30. Smith v. Concordia Parish Sch. Bd., Civ. Action 11577 (W.D. La., findings of fact and conclusions of law filed, Sept. 3, 1970) (substitution of sex separation for race separation constitutionally invalid); Note, *The Constitutionality of Sex Separation in School Desegregation Plans*, 37 U. CHI. L. REV. 296 (1970). In 1969, New York City settled the challenge of a girl seeking admission to Stuyvesant, a previously all-boys high school offering superior instruction in science and mathematics. *See* De Rivera v. Fliedner, Civ. Action 00938-69 (N.Y. Sup. Ct. 1969); Alice de Rivera, *On Desegregating Stuyvesant High*, *in* SISTERHOOD IS POWERFUL 366 (Robin Morgan ed., 1970).

31. 309 F. Supp. 184 (E.D. Va. 1970) (three-judge court).

32. 317 F. Supp. 593 (S.D.N.Y. 1970).

33. 308 F. Supp. 1253, 1260 (S.D.N.Y. 1969). The state involvement considered necessary to the equal protection claim was found in New York's pervasive regulatory scheme for the sale of alcoholic beverages. The court concluded that the section of the Civil Rights Act of 1964 concerning public accommodations

applies neither to discrimination on the basis of sex nor to discrimination in a bar where the principal business is the sale of alcoholic beverages rather than food. It further concluded that discrimination on the basis of sex did not support a claim under state law. Hence, the court ruled out any statutory basis for the action and rested its decision exclusively on the equal protection violation.

34. McSorley's abandoned further contest on August 10, 1970, when New York City's Law on Human Rights was amended to prohibit discrimination in places of public accommodation on account of sex. *See* Local Law No. 41, *amending* NEW YORK CITY ADMINISTRATIVE CODE § Bl-7.0 ¶ 2; Eileen Shanahan, *Equal Rights Plan for Women Voted by House, 350–15*, N.Y. TIMES, Aug. 11, 1970, at 1.

35. Reed v. Reed, 465 P.2d 635 (Idaho 1970), *prob. juris. noted*, 401 U.S. 934 (1971); *cf.* DeKosenko v. Brandt, 313 N.Y.S.2d 827 (N.Y. Sup. Ct. 1970).

36. Hoyt v. Florida, 368 U.S. 57 (1961) (jury service by women may be confined to volunteers); Goesaert v. Cleary, 335 U.S. 464 (1948) (women, although permitted to serve as waitresses in taverns, may be barred by law from the more lucrative employment of bartender). *But cf.* Paterson Tavern & Grill Owners Ass'n v. Hawthorne, 270 A.2d 628 (N.J. 1970) (city's prohibition of female bartending stricken as unreasonable in light of current customs and mores). The Supreme Court has not yet found unconstitutional any law or administrative action based on classification according to sex. *Cf.* Labine v. Vincent, 401 U.S. 532 (1971) (for succession purposes, states may draw sharp lines between legitimate and illegitimate children). The Court will have an opportunity to speak again on the constitutionality of sex discrimination during the 1971 Term when it hears *Reed v. Reed*, *see supra* note 35, and *Alexander v. Louisiana*, 233 So. 2d 891 (La. 1970), *cert. granted*, 401 U.S. 936 (1971) (state limitation on jury service by women to volunteers).

37. "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." *See* SIMPLE JUSTICE, *supra* note 5; *Equal Rights for Women: A Symposium on the Proposed Constitutional Amendment*, 6 HARV. C.R.-C.L. L. REV. 215 (1971).

38. *See* Edwin L. Dale Jr., *The Economics of Pollution*, N.Y. TIMES, Apr. 19, 1970, § 6 (Magazine), at 27; *cf.* SIMPLE JUSTICE, *supra* note 5, at 18–21 ("Without any question, the growing number of families on Aid to Families with Dependent Children is related to the increase in unemployed young women. For many . . . the

inability to find a job means . . . having a child to get on welfare. Potential husbands do not earn enough to support an unemployed wife. The stability of the low-income family depends as much on training women for employment as it does on training men. . . . The task force expects welfare rolls will continue to rise unless society takes more seriously the needs of disadvantaged girls and young women.").

39. *See* Roe v. Wade, 314 F. Supp. 1217 (N.D. Tex. 1970) (three-judge court); State v. Munson (7th Jud. Cir. Ct. S.D., filed Apr. 7, 1970), *reported in* 15 S.D. L. REV. 332 (1970); Roy Lucas, *Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes*, 46 N.C. L. REV. 730 (1968); c*f.* Robert D. McFadden, *In 3 Nations with Legal Abortion, Debate Goes on*, N.Y. TIMES, Apr. 15, 1970, at 12 (in the twenty years since abortion was legalized in Japan, a once severe overpopulation problem has been conquered); Roger O. Egeberg, *Defusing the Population Bomb: New Role for Government*, TRIAL, Aug.–Sept. 1970, at 10.

40. *See* KANOWITZ, *supra* note 11, at 1–27, 35–99; *cf.* Clouston v. Remlinger Oldsmobile Cadillac, Inc., 258 N.E.2d 230 (Ohio 1970) (discarding as obsolete precedent rooted in the concept that a wife did not rank as an equal person vis-a-vis her spouse, but at most as a superior servant in his household); In re Estate of Legatos, 81 Cal. Rptr. 910 (Cal. Ct. App. 1969) (imposition of inheritance tax on certain property when devised by husband to wife but not when devised by wife to husband violates equal protection).

41. *See* White, *supra* note 17, at 1109–14; SIMPLE JUSTICE, *supra* note 5.

3. The *Frontiero* Reply Brief

1. Gerald Gunther, *The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

2. It has been suggested, however, that the Court may be moving in that direction:

> It is difficult to understand [the] result [in *Reed v. Reed*, the 1971 case in which the Supreme Court first held that a state statute favoring males over females violates the Equal Protection Clause] without an assumption that some special sensitivity to sex as a classifying factor entered into the analysis. . . . Only by importing some special suspicion of sex-related means from the [suspect classification] area can the result

be made entirely persuasive. Gunther, *supra* note 1, at 34.

3. While sex, like race, is a most visible and immutable biological characteristic, national origin, a "suspect" category, fits less comfortably within the definition.

4. *Cf.* Hernandez v. Texas, 347 U.S. 475, 478 (1954) (rejecting a "two-class" theory of equal protection); Faruki v. Rogers, 349 F. Supp. 723 (D.D.C. 1972).

5. *See generally* KIRSTEN AMUNDSEN, THE SILENCED MAJORITY: WOMEN AND AMERICAN DEMOCRACY (1971); HELEN HACKER, WOMEN AS A MINORITY GROUP, SOCIAL FORCES, no. 3 (1951); Alice Rossi, *Equality Between the Sexes*, *in* THE WOMAN IN AMERICA 106 (Robert Jay Lifton ed., 1964).

Sex discrimination charges represent the second-largest category of complaints filed with the Equal Employment Opportunity Commission; in local EEOC offices, sex discrimination charges have run as high as 60 percent of total complaints. Sonia Pressman Fuentes, *Federal Remedial Sanctions: Focus on Title VII*, 5 VAL. U. L. REV. 374, 379 nn.31–33 (1971). Despite legislation promising equal opportunity and equal pay, the earnings gap between men and women has been widening. *See* U.S. WOMEN'S BUREAU, DEP'T OF LABOR, FACT SHEET ON THE EARNINGS GAP (rev. ed. Dec. 1971). So has the gap in upward mobility. *See, e.g.*, John Hoyle, *Who Shall Be Principal, A Man or a Woman?*, THE NAT'L ELEMENTARY SCHOOL PRINCIPAL, Jan. 1969, at 23–25 (in 1928, 55 percent of elementary school principals were women; in 1968 only 12 percent of elementary school teachers, but 78 percent of elementary school principals were men); Anita Schiller, *The Widening Sex Gap*, LIBRARY J., Mar. 15, 1969, at 1097–1101 (in 1930, women were chief librarians in 19 of 74 large colleges and universities; in 1968, only 4 of these posts were occupied by women).

6. *Quoted in* S.F. CHRON., July 26, 1970, Magazine Section, at 7.

7. Congresswoman Lenore Sullivan chairs the House Merchant Marine and Fishery Committee.

8. Interview with Helen Markoss, Director, Federal Women's Program, Dep't of H.E.W., in Washington, D.C. (Jan. 8, 1973).

9. Interview with Gladys P. Rogers, Special Assistant for Women's Affairs to Deputy Under Secretary for Management, Dep't of State, in Washington, D.C. (Jan. 8, 1973).

10. State legislators number over 7700; women hold only 424 of these offices. Interview with Ruth Mandel, Eagleton Center for the American Woman & Politics, Rutgers University, in Newark, N.J. (Jan. 8, 1973). While a person need not be a member of a group by birth, religion or class affiliation to represent that group fairly and in a manner responsive to its interests, the chances of effective representation are unquestionably enhanced when group members occupy decision-making posts.

11. With the evidence of women's weakness offered at the turn of the century in *Muller*, compare ASHLEY MONTAGU, THE NATURAL SUPERIORITY OF WOMEN (rev. ed. 1968).

12. *See also* Matina S. Horner, *Women's Will To Fail*, PSYCHOLOGY TODAY, Nov. 1969, at 36–38, 62. Even women lawyers, a more self-assured group than most, exhibit anxiety about success lest it brand them "unfeminine." *See* Dorothy J. Glancy, *Women in Law, the Dependable Ones*, 21 HARV. L. SCH. BULL., June 1970, at 22, 30–31.

The originator of the suspect classification doctrine might recognize today the extent of the prejudice, often unconscious but nonetheless devastating, encountered by women who want more than a place in man's world. *See* CYNTHIA FUCHS EPSTEIN, WOMEN AND PROFESSIONAL CAREERS: THE CASE OF THE WOMAN LAWYER 140 (1968) (thesis on file at the Faculty of Political Science, Columbia University):

> [A] 1922 Barnard graduate recalled:
>
> At the time I was ready to enter law school, women were looked upon as people who should not be in law schools. . . . I wanted very much to go to Columbia, but I couldn't get in. I went over to see Harlan Stone, Dean Stone, who was later Chief Justice, and asked him to open the law school [to women] and he said no. . . . I asked why . . . and he said "We don't because we don't." That was final.
>
> (From tape of author's conversation with Frances Marlatt, Attorney, Mount Vernon, New York.)

13. As appellees acknowledge, women in the armed forces constitute a very small minority; living apart from men and working at jobs that are normally sex-segregated, they are a more "discrete and insular" group than nonwhite men who live and work alongside white men in the uniformed services. *See* B.J. Phillips, *On Location with the WACs*, MS. MAG., Nov. 1972, at 53.

14. Appellees incorrectly characterize appellants' "concession." (Br. Appellees 3.) It is conceded that the

benefit statutes challenged here exclude Joseph Frontiero as a dependent. However, Sharron Frontiero, the family's sole breadwinner, supplied over one-third of her husband's support and all of her own.

4. The Need for the Equal Rights Amendment

1. *See, e.g.*, Nikki Schwab, *Ginsburg: Make ERA Part of the Constitution*, U.S. NEWS & WORLD REPORT, Apr. 18, 2014, *available at* http://www.usnews.com/news/blogs/washington-whispers/2014/04/18/justice-ginsburg-make-equal-rights-amendment-part-of-the-constitution (quoting Justice Ginsburg).
2. MARTIN GRUBERG, WOMEN IN AMERICAN POLITICS: AN ASSESSMENT AND SOURCEBOOK 4 (1968).
3. *See* ELEANOR FLEXNER, CENTURY OF STRUGGLE: THE WOMAN'S RIGHTS MOVEMENT IN THE UNITED STATES 142–55 (1959).
4. *Hearings on H.R.J. Res. 75 Before the H. Comm. on the Judiciary*, 68th Cong., 2d Sess. at 2 (1925).
5. *Compare* Edward Clark Lukens, *Shall Women Throw Away Their Privileges?*, 11 A.B.A. J. 645 (1925), *with* Burnita Shelton Matthews, *Women Should Have Equal Rights with Men: A Reply*, 12 A.B.A. J. 117 (1926).
6. *See* Paul A. Freund, *The Equal Rights Amendment Is Not the Way*, 6 HARV. C.R.-C.L. L. REV. 234 (1971).
7. *See* SHEILA TOBIAS & LISA ANDERSON, WHAT REALLY HAPPENED TO ROSIE THE RIVETER: DEMOBILIZATION AND THE FEMALE LABOR FORCE, 1945–1947, a paper delivered to the Berkshire Conference of Women Historians, New Brunswick, N.J., Mar. 2, 1973.
8. *See* Caruthers Gholson Berger, *Equal Pay, Equal Employment Opportunity and Equal Enforcement of the Law for Women*, 5 VAL. U. L. REV. 326, 331 (1971). On implementation of the act in the 1960s, see Thomas E. Murphy, *Female Wage Discrimination, A Study of the Equal Pay Act 1963–1970*, 39 U. CIN. L. REV. 615 (1970).
9. *See Developments in the Law—Employment Discrimination and Title VII*, 84 HARV. L. REV. 1109, 1166–95 (1971).
10. Brief for Appellees at 20 n.17, Frontiero v. Richardson, 411 U.S. 677 (1973) (No. 71-1694).
11. *E.g.*, WISCONSIN LEGISLATIVE COUNCIL, REPORT ON EQUAL RIGHTS TO THE 1973 LEGISLATURE (1973); CHARLENE M. TAYLOR & STUART HERZOG, IMPACT STUDY OF THE EQUAL RIGHTS AMENDMENT—SUBJECT:

THE ARIZONA CONSTITUTION AND STATUTES (1973); Symposium, *The New Mexico Equal Rights Amendment—Assessing Its Impact*, 3 N.M. L. REV. 1 (1973).

12. UNIVERSITY OF NORTH CAROLINA, PROFILE OF THE FRESHMAN CLASS (1969).

13. *Air Academy Anticipates 80 Women in Each Class*, N.Y. TIMES, Aug. 14, 1972, at 15.

14. See the references in *supra* note 11. Comprehensive analysis of the purpose and probable impact of the amendment appears in Thomas Emerson, Barbara Brown, Gail Falk & Ann Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 872 (1971).

15. ARIZ. CONST. art. 5, §§ 1–2. *But see* ARIZ. CONST. art. 7, § 2.

16. OHIO REV. CODE § 1913.36 (cause may be submitted to the arbitration of three disinterested men).

17. WISCONSIN LEGISLATIVE COUNCIL, SUMMARY OF PROCEEDINGS, SPECIAL COMMITTEE ON EQUAL RIGHTS, Sept. 28, 1972, at 4; WIS. ATT'Y GEN. OPINION, 25 A.G. 75, 78, interpreting WIS. STAT. § 158.01.14(f).

18. GA. CODE ANN. § 53–501.

19. GA. CODE ANN. § 105–707.

20. Thomas Emerson, *In Support of the Equal Rights Amendment*, 6 HARV. C.R.-C.L. L. REV. 225, 232–33 (1971).

21. Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1874).

22. Hoyt v. Florida, 368 U.S. 57 (1961).

23. Alexander v. Louisiana, 405 U.S. 625 (1971).

24. Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873); Goesaert v. Cleary, 335 U.S. 464 (1948).

25. CYNTHIA FUCHS EPSTEIN, WOMEN AND PROFESSIONAL CAREERS: THE CASE OF THE WOMAN LAWYER 140 (1968) (thesis on file at the Faculty of Political Science, Columbia University) (reporting interview with Frances Marlatt, Mount Vernon, New York, lawyer).

26. *E.g.*, Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Cir. 1971).

27. Matthews, *supra* note 5, at 117.

28. S. COMM. ON THE JUDICIARY, *Equal Rights for Men and Women*, S. REP. NO. 92-689, 92d Cong., 2d Sess. 17–18 (1972); *see also* CITIZENS' ADVISORY COUNCIL ON THE STATUS OF WOMEN, WOMEN IN 1972, at 4–5

(1973) [hereinafter WOMEN IN 1972].

29. Deposition Transcript at 37, 44, 45, Callahan v. Laird, Civil Action 51-500-M (D. Mass.).

30. *See* Remarks of Jacqueline G. Gutwillig, Lt. Col. U.S.A. Ret., *in* WOMEN IN 1972, *supra* note 28, at 44, 46.

31. *Hearings on S. 1614 Before the Subcomm. on Organization and Mobilization of the H. Comm. on Armed Servs.*, 80th Cong., 2d Sess., No. 238, at 5563–64 (1948).

32. *See* S. REP. NO. 92-689, *supra* note 28, at 12; Emerson et al., *supra* note 14, at 900–02.

33. *See, e.g.*, WOMEN'S RIGHTS PROJECT LEGAL DOCKET, issued periodically by the American Civil Liberties Union.

34. *See* Letter Opinion of J. William Heckman, Counsel, Subcomm. on Constitutional Amendments, S. Comm. on the Judiciary, to State Senator Shirley Marsh, Neb. State Senate (Feb. 20, 1973).

35. *The Equal Rights Amendment—As of 1972*, *in* 11 REPORTS OF COMMITTEES OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK CONCERNED WITH FEDERAL LEGISLATION, Bull. 2, at 38, 41 (1972).

2. Judicial Independence

1. The Constitution guarantees that federal judges "shall hold their Offices during good Behavior . . . and shall . . . receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. CONST. art III, § 1, cl. 2.

2. *See* Judiciary Reorganization Act, S. 1392, 75th Cong. § 1(a) (1937), *reprinted in Reorganization of the Federal Judiciary*, S. REP. NO. 75-711, at 31 (1937).

3. *See* Act for the Relief of the Parents of Theresa Marie Schiavo § 5, Pub. L. No. 109-3, 119 Stat. 15, 16 (Mar. 21, 2005) ("Nothing in this Act shall be construed to create substantive rights . . . .").

4. *Quoted in* Carl Hulse & David D. Kirkpatrick, *Even Death Does Not Quiet Harsh Political Fight*, N.Y. TIMES, Mar. 31, 2005, at A1.

5. *Quoted in id*.

6. *Quoted in* Editorial, *Attacking a Free Judiciary*, N.Y. TIMES, Apr. 5, 2005, at A22.

7. Editorial, *Judges Made Them Do It*, N.Y. TIMES, Apr. 6, 2005, at A22.

8. *Quoted in* Charles Babington, *Senator Links Violence to 'Political' Decisions; 'Unaccountable' Judiciary Raises Ire*, WASH. POST, Apr. 5, 2005, at A7.

9. *Quoted in* David D. Kirkpatrick, *Republican Suggests a Judicial Inspector General*, N.Y. TIMES, May 10, 2005, at A12.

10. *Quoted in id*.

11. *Quoted in* Maurice Possley, *Lawmaker Prods Court, Raises Brows; Demands Longer Term in Chicago Drug Case*, CHI. TRIB., July 10, 2005, at C1.

12. *See* S. Res. 92, 109th Cong. (2005); H. Res. 97, 109th Cong. (2005); Constitution Restoration Act, S. 520, H.R. 1070, § 201, 109th Cong. (2005); American Justice for Americans [sic] Citizens Act, H.R. 1658, § 3 (2005).

13. *Toward "Active Liberty,"* HARV. L. BULL. 14, 18 (Spring 2006).

14. Editorial, *supra* note 7.

15. Theodore B. Olson, *Lay Off Our Judiciary*, WALL ST. J., Apr. 21, 2005, at A16.

16. Federal Judicial Center, *Impeachments of Federal Judges*, http://www.fjc.gov/history/home.nsf/page/judges_impeachments.html.

17. Maria Simon, Note, *Bribery and Other Not So "Good Behavior": Criminal Prosecution as a Supplement to Impeachment of Federal Judges*, 94 COLUM. L. REV. 1617, 1617 n.2 (1994).

18. Streamlined Procedures Act, S. 1088, H.R. 3035, 109th Cong. (2005).

19. Safeguarding Our Religious Liberties Act, H.R. 4576, § 2, 109th Cong. (2005).

20. We the People Act, H.R. 4379, § 3, 109th Cong. (2005).

21. Congressional Accountability for Judicial Activism Act, H.R. 3073, § 2, 109th Cong. (2005).

22. Charter of Rights and Freedoms § 33(1).

23. Anthony Lewis, *Why the Courts*, RECORD, Mar./Apr. 2000, at 178, 181.

24. *Id.* (quoting Aharon Barak, president of the Supreme Court of Israel).

25. *See* THE FEDERALIST NO. 51 (James Madison).

26. Bruce Fein & Burt Neuborne, *Why Should We Care About Independent and Accountable Judges?*, 84 JUDICATURE 58, 64 (2000).

4. The Madison Lecture: Speaking in a Judicial Voice

1. *See* Norman Dorsen, *Foreword* to THE EVOLVING CONSTITUTION, at x (Norman Dorsen ed., 1987).
2. 1 ANNALS OF CONGRESS 457 (Joseph Gales ed., 1789), *quoted in* Chapman v. California, 386 U.S. 18, 21 n.4 (1967). While Madison originally doubted the efficacy of bills of rights, he eventually joined Jefferson in recognizing the value of "the legal check [a declaration of rights] puts into the hands of the judiciary." Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), *in* 14 THE PAPERS OF THOMAS JEFFERSON 659 (Julian P. Boyd ed., 1958); *see also* Maeva Marcus, *The Adoption of the Bill of Rights*, 1 WM. & MARY BILL RTS. J. 115, 117–19 (1992).
3. *See* THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
4. *Id.* at 465.
5. I borrow language here from Professor Brainerd Currie's guide to analysis of choice-of-law cases in which the policies of two states are in apparent conflict. *See* Brainerd Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754, 757 (1963) ("[T]he conception should be re-examined, with a view to a more moderate and restrained interpretation both of the policy and of the circumstances in which it must be applied to effectuate the forum's legitimate purpose."); *see also* Herma Hill Kay, *A Defense of Currie's Governmental Interest Analysis*, 215 RECUEIL DES COURS 10, 68–73 (1989).
6. Dorsen, *supra* note 1, at xii (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819)).
7. *Id.* (quoting Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 443 (1934)).
8. *See id.*
9. *See* Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2 (1987).
10. *See* RICHARD B. MORRIS, THE FORGING OF THE UNION, 1781–1789, at 162–93 (1987); Linda K. Kerber, *"Ourselves and Our Daughters Forever": Women and the Constitution, 1787–1876*, THIS CONSTITUTION:

A BICENTENNIAL CHRON., Spring 1985, at 25.

11. *See* Deborah Jones Merritt, *What's Missing from the Bill of Rights?*, 1991 U. ILL. L. REV. 765, 766–69.

12. Letter from John Adams to James Sullivan (May 26, 1776), *in* 9 THE WORKS OF JOHN ADAMS 378 (Charles Francis Adams ed., 1854).

13. *See, e.g.*, Arthur Goldberg, *Equality and Governmental Action*, *in* THE EVOLVING CONSTITUTION 25 (Norman Dorsen ed., 1987); J. Skelly Wright, *Public School Desegregation*, *in id.* at 44; Abe Fortas, *Equal Rights—for Whom?*, *in id.* at 85; Thurgood Marshall, *Group Action in the Pursuit of Justice*, *in id.* at 97.

14. *See* Merritt, *supra* note 11, at 765; MORRIS, *supra* note 10, at 162–63.

15. Letter from Thomas Jefferson to Albert Gallatin (Jan. 13, 1807), *in* 1 THE WRITINGS OF ALBERT GALLATIN 328 (Henry Adams ed., 1960). Jefferson, who declared it self-evident "that all men are created equal," also expressed this once prevailing view: "Were our State a pure democracy . . . there would yet be excluded from our deliberations . . . women, who, to prevent depravation of morals and ambiguity of issues, should not mix promiscuously in the public meetings of men." Letter from Thomas Jefferson to Samuel Kercheval (Sept. 5, 1816), *in* 10 THE WRITINGS OF THOMAS JEFFERSON 46 n.1 (Paul L. Ford ed., 1899).

16. MORRIS, *supra* note 10, at 193.

17. THE FEDERALIST NO. 78, *supra* note 3, at 465.

18. *See id.* at 465, 471.

19. I have earlier addressed this topic in Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133 (1990). *See also* Ruth Bader Ginsburg, *Styles of Collegial Judging*, 39 FED. BAR NEWS & J. 199 (1992). These remarks borrow from, revise, and build upon my prior lectures.

20. *See* LOUIS BLOM-COOPER & GAVIN DREWRY, FINAL APPEAL: A STUDY OF THE HOUSE OF LORDS IN ITS JUDICIAL CAPACITY 81–82, 523 (1972); *see also* ALAN PATERSON, THE LAW LORDS 109–10 (1982) (noting that the Lords no longer routinely deliver five separate opinions).

21. It has been said of the French tradition that the ideal judgment is "considered all the more perfect for its concise and concentrated style, so that only experienced jurists are able to understand and admire it." RENÉ DAVID & JOHN E. C. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY 129 (2d ed. 1978).

22. *See* Karl M. ZoBell, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, 44 CORNELL L.Q. 186, 193 (1959); *see also* G. Edward White, *The Working Life of the Marshall Court, 1815–1835*, 70 VA. L. REV. 1, 36–47 (1984).

23. Letter from Thomas Jefferson to Thomas Ritchie (Dec. 25, 1820), *in* 10 THE WRITINGS OF THOMAS JEFFERSON 169, 171 (Paul L. Ford ed., 1899).

24. *See* ZoBell, *supra* note 22, at 196 & n.57.

25. I first used this illustration in Ruth Bader Ginsburg, *On Muteness, Confidence, and Collegiality: A Response to Professor Nagel*, 61 COLO. L. REV. 715, 718 (1990).

26. United States v. Rosenberg, 888 F.2d 1406 (D.C. Cir. 1989).

27. Letter from B. Ducamin, President, Section of Finances, Conseil d'Etat, to Judge Ruth Bader Ginsburg (Dec. 15, 1989) (on file with the *New York University Law Review*).

28. *But cf.* BLOM-COOPER & DREWRY, *supra* note 20, at 81 (observing that, as an exception to the individual opinion tradition, separate opinions in English criminal appeals are disfavored and may be presented only when the presiding judge so authorizes).

29. *See* Robert W. Bennett, *A Dissent on Dissent*, 74 JUDICATURE 255, 258–59 (1991).

30. *See* ZoBell, *supra* note 22, at 202.

31. WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 62 (1964) (quoting letter from then-Justice Stone to Karl Llewellyn (Feb. 4, 1935)).

32. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) (citation omitted); *see also* Di Santo v. Pennsylvania, 273 U.S. 34, 42 (1927) (Brandeis, J., dissenting).

33. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) (holding that federal courts must apply state law except in matters governed by the federal constitution or by Acts of Congress).

34. Colloquy, Proceedings of the Forty-Ninth Judicial Conference of the District of Columbia Circuit (May 24, 1988) (comment of Paul A. Freund), *reprinted in* 124 F.R.D. 241, 336, 347 (1989).

35. *See* SUMMARY OF ANNUAL REPORT OF D.C. CIRCUIT OPINIONS FOR STATISTICAL YEAR JULY 1, 1991–JUNE 30, 1992 (the 405 figure includes 291 opinions published in the Federal Reporter series and 114

unpublished opinions issued in cases resolved after oral argument; separate concurrences and dissents numbered 55).

36. *See The Supreme Court, 1991 Term, The Statistics*, 106 HARV. L. REV. 378, 380 (1992). For the 68 memorandum orders, however, the unanimity rate was 91.2%. *See id.*

37. *See, e.g.*, George Archibald, *Free Hill Mailings to Future Districts Banned by Court*, WASH. TIMES, July 31, 1992, at A3 ("A three-judge panel of the U.S. Court of Appeals for the District of Columbia split 2–1. . . . Judges Laurence H. Silberman, a Reagan appointee, and A. Raymond Randolph, appointed by President Bush, voted to overturn" the district court's ruling; "Judge Patricia M. Wald, a Carter appointee, voted [to affirm]."); Philip J. Hilts, *Judge Overturns Federal Seizure of Abortion Pill*, N.Y. TIMES, July 15, 1992, at A1 ("In the increasingly political battle over [the] RU486 [abortion pill], the decision favoring the woman, who brought the drug into the country to test the ban, came from a judge who had been appointed by President Jimmy Carter. Later, his order was stopped by a panel of three judges . . . : John M. Walker, President Bush's cousin and a Bush appointee, and Frank X. Altimari and Daniel J. Mahoney, both appointed by President Ronald Reagan."); Karen Riley, *Mayor To Flout Court Ruling*, WASH. TIMES, May 9, 1992, at A1 ("[Mayor Sharon Pratt Kelly] said the Bush and Reagan administrations had packed the federal bench with judges who are in 'retreat' on civil rights issues"; she "threatened to defy" a unanimous federal appeals court decision "by two Carter-appointed judges and a judge appointed by President Bush" striking down the District's minority contracting program.); Cindy Rugeley, *Abortion Fight Now Heads to Legislature*, HOUSTON CHRON., June 30, 1992, at A11 ("'President Bush has changed his opinion on abortion and so it's not surprising to see the Supreme Court—a majority of whom have been appointed by President Bush or Reagan—ignoring its own precedent and changing its opinion on a woman's right to choose.'" (quoting Texas Lieutenant Governor Bob Bullock)); Editorial, *Will DeKalb Students Win?*, ATLANTA J. & CONST., Apr. 2, 1992, at A18 (People seeking "to end the last vestiges of segregation in American schools" face "a federal judiciary dominated by conservatives appointed by Presidents Reagan and Bush"; "[t]hose judges are likely to be more sympathetic to school officials arguing for a return of local control than to minority students seeking remedies to the lingering effects of segregation."). *But see, e.g.*,

Mary Deibel, *Supreme Surprises*, STAR TRIB. (Minneapolis), July 5, 1992, at 14A ("Of the three dozen cases in which the administration advocated a position, it lost 20 times, often because of the votes of the five justices appointed by Bush and his predecessor, Ronald Reagan.").

38. *See* J. WOODFORD HOWARD, JR., COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM 189–221 (1981); Ruth Bader Ginsburg, *The Obligation To Reason Why*, 37 U. FLA. L. REV. 205, 212, 216 (1985).

39. *See supra* note 32 and accompanying text.

40. *See* Ginsburg, *supra* note 38, at 215 & n.47. If a panel opinion plainly has not stood the test of time, the court can abbreviate the en banc process. *See id.* at 215 n.48.

41. Under current District of Columbia Circuit practice, judgments that will not be published in the Federal Reporter series, as well as decisions scheduled for publication, are circulated to the full court before release to the public. *See* D.C. CIR. R. 36(a)(2), (c).

42. On the check exerted by colleagues, Chief Justice William H. Rehnquist has described the practice of one of his predecessors, Chief Justice Charles Evans Hughes:

> He approached his own decisions with his usual meticulous care, turning out innumerable drafts in order to be certain of the most correct and precise language. But he had no particular pride of authorship, and if in order to secure a vote he was forced to put in some disconnected or disjointed thoughts or sentences, in they went and let the law schools concern themselves with what they meant.

William H. Rehnquist, *Chief Justices I Never Knew*, 3 HASTINGS CONST. L.Q. 637, 643 (1976) (quoting Edwin McElwain, *The Business of the Supreme Court as Conducted by Chief Justice Hughe*s, 63 HARV. L. REV. 5, 19 (1949)).

43. *Cf.* Jon O. Newman, *The Second Circuit Review, 1987–1988 Term-Foreword: In Banc Practice in the Second Circuit, 1984–1988*, 55 BROOK. L. REV. 355, 369–70 (1989) ("[I]f we were confronting one another frequently each year as members of an in banc court, I believe there would be at least some risk to the extremely high level of civility that now pervades our relationships both in the decision-making and opinion-writing phases of our work.").

44. *See* FRANK M. COFFIN, THE WAYS OF A JUDGE: REFLECTIONS FROM THE FEDERAL APPELLATE BENCH 181–

88 (1980).

45. William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 437 (1986).

46. Coalition for the Preservation of Hispanic Broadcasting v. FCC, 931 F.2d 73, 80 (D.C. Cir. 1991) (Mikva, C.J., dissenting); *see also id.* at 84 (court's decision is "driven more by evasion than logic"; "nonsensical results will flow from [it]").

47. Roscoe Pound, *Cacoethes Dissentiendi: The Heated Judicial Dissent*, 39 A.B.A. J. 794, 795 (1953). For more recent commentary, see Brenda Jones Quick, *Whatever Happened to Respectful Dissent?*, A.B.A. J., June 1991, at 62.

48. R.A.V. v. St. Paul, 505 U.S. 377, 415 (1992) (White, J., concurring in the judgment) ("I join the judgment, but not the folly of the opinion.").

49. Lee v. Weisman, 505 U.S. 577, 633, 636, 637, 644 (1992) (Scalia, J., dissenting) (describing Court's opinion as "oblivious to our history," "incoherent," "nothing short of ludicrous," and "a jurisprudential disaster").

50. Planned Parenthood v. Casey, 505 U.S. 833, 981 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) ("I must . . . respond to a few of the more outrageous arguments in today's opinion, which it is beyond human nature to leave unanswered.").

51. Webster v. Reproductive Health Servs., 492 U.S. 490, 532 (1989) (Scalia, J., concurring in part and concurring in the judgment) ("Justice O'Connor's assertion . . . that a 'fundamental rule of judicial restraint' requires us to avoid reconsidering *Roe*, cannot be taken seriously."); *cf.* Payne v. Tennessee, 501 U.S. 808, 850 (1991) (Marshall, J., dissenting) ("[T]he majority cannot sincerely expect anyone to believe [its assertion]."); McCleskey v. Zant, 499 U.S. 467, 514 (1991) (Marshall, J., dissenting) ("It is difficult to take [the majority's] reasoning seriously."); Maislin Indus., U.S. v. Primary Steel, 497 U.S. 116, 139 (1990) (Stevens, J., dissenting) ("Even wearing his famous blinders, old Dobbin would see through the tired arguments the Court accepts today.").

52. Coleman v. Thompson, 501 U.S. 722, 767 (1991) (Blackmun, J., dissenting) (describing majority's distinction as "inexplicable" and its conception as "entirely unprecedented").

53. *Id.* at 774.

54. Morgan v. Illinois, 504 U.S. 719, 751–52 (1992) (Scalia, J., dissenting) ("Today . . . the Court strikes a further blow against the People in its campaign against the death penalty.").

55. Central States Motor Freight Bureau v. ICC, 924 F.2d 1099, 1112 (D.C. Cir. 1991) (Silberman, J., dissenting) (majority's suggestion "is naked analytical bootstrapping").

56. Synovus Fin. Corp. v. Bd. of Governors of the Fed. Reserve Sys., 952 F.2d 426, 437 (D.C. Cir. 1991) (Silberman, J., dissenting) ("The majority's opinion . . . is reminiscent for Civil War buffs of Sherman's march through Georgia. Principles of administrative law are brushed aside like Johnston and Hood's army. Our precedents are overturned like Georgia plantations."). For a restrained and moderate reply from a South Carolinian, see *id.* at 437 n.8 (Henderson, J.) ("With all respect to our colleague in dissent, to equate the legal issues in this case with a Civil War campaign manifests not only a misunderstanding of those issues but also a lack of appreciation for a wrenching event in our country's history.").

57. Planned Parenthood v. Casey, 505 U.S. 833, 995 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) ("[T]o portray *Roe* as the statesmanlike 'settlement' of a divisive issue, a jurisprudential Peace of Westphalia that is worth preserving, is nothing less than Orwellian."); County of Allegheny v. ACLU, 492 U.S. 573, 678 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part) ("Court lends its assistance to an Orwellian rewriting of history"); FCC v. League of Women Voters, 468 U.S. 364, 417 n.10 (1984) (Stevens, J., dissenting) (majority's argument "would be laughable were it not so Orwellian"); United Steelworkers v. Weber, 443 U.S. 193, 219–21 (1979) (Rehnquist, J., dissenting) (Court has behaved like "Orwellian speaker" who, in mid-sentence, "'switched from one line to the other'" (quoting GEORGE ORWELL, 1984, at 181–82 (1949))).

58. Collins J. Seitz, *Collegiality and the Court of Appeals*, 75 JUDICATURE 26, 27 (1991).

59. *Id.*

60. *Id.*

61. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856), cited as a model of "reasoned discussion" in Pound, *supra* note 47, at 797.

62. *See, e.g.*, Welsh v. United States, 398 U.S. 333, 344 (1970) (Harlan, J., concurring).

63. The various High Court and Supreme Court opinions in this case are reprinted in THE ATTORNEY GENERAL V. X AND OTHERS (Sunniva McDonagh ed., 1992).

64. IRELAND CONST. art. 40.3.3 (inserted following enactment of the Eighth Amendment of the Constitution Act, 1983). Following a referendum on November 25, 1992, two sentences were added to Article 40.3.3: "This subsection shall not limit freedom to travel between the State and another state"; "This subsection shall not limit freedom to obtain or make available, in the State, subject to such conditions as may be laid down by law, information relating to services lawfully available in another state."

65. *See* Opinion of Costello, J. (H. Ct.) (Ir.) (Feb. 17, 1992), *reprinted in* THE ATTORNEY GENERAL V. X AND OTHERS, *supra* note 63, at 9.

66. Opinion of Finlay, C.J. (S.C.) (Ir.) (Mar. 5, 1992) (quoting McGee v. Attorney General, [1974] I.R. 284, 318 (Ir.) (Walsh, J.)), *reprinted in* THE ATTORNEY GENERAL V. X AND OTHERS, *supra* note 63, at 47, 59.

67. *Id.* (quoting State (Healy) v. Donoghue, [1976] I.R. 326, 347 (Ir.) (O'Higgins, C.J.)); *cf.* text accompanying *supra* notes 6–8.

68. *Cf., e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 996 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) ("The Imperial Judiciary lives.").

69. *See* Opinion of Hederman, J. (S.C.) (Ir.) (Mar. 5, 1992), *reprinted in* THE ATTORNEY GENERAL V. X AND OTHERS, *supra* note 63, at 69, 83.

70. *Id.*

71. *Id.*

72. *See generally* MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW (1987); Donald P. Kommers, *Abortion and Constitution: United States and West Germany*, 25 AM. J. COMP. L. 255 (1977).

73. Dissents might concede, for example, more often than they do, that "[t]he majority's argument is by no means implausible." Hubbard v. EPA, 949 F.2d 453, 469 (D.C. Cir. 1991) (Wald, J., concurring in part and dissenting in part).

74. FINAL REPORT OF THE COMMITTEE ON CIVILITY OF THE SEVENTH FEDERAL JUDICIAL CIRCUIT 3 (1992).

75. *Id.* at 7A; *see also* INTERIM REPORT OF THE COMMITTEE ON CIVILITY OF THE SEVENTH FEDERAL JUDICIAL CIRCUIT 3, 13, 39–42 (1991).

76. *See generally* LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS (1988). Recent commentary on court-legislature communication includes Shirley S. Abrahamson & Robert L. Hughes, *Shall We Dance? Steps for Legislators and Judges in Statutory Interpretation*, 75 MINN. L. REV. 1045 (1991); Robert A. Katzmann, *Bridging the Statutory Gulf Between Courts and Congress: A Challenge for Positive Political Theory*, 80 GEO. L.J. 653 (1992); Deanell Reece Tacha, *Judges and Legislators: Renewing the Relationship*, 52 OHIO ST. L.J. 279 (1991).

77. Southern Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).

78. The Supreme Court's post-1970 decisions on alienage as a "suspect" category are illustrative. *Compare* Graham v. Richardson, 403 U.S. 365, 372 (1971) (invalidating state legislation denying public assistance benefits to resident aliens, Court declared that "classifications based on alienage, like those based on nationality or race, are inherently suspect [under equal protection principles] and subject to close judicial scrutiny" (footnotes omitted)), *with* Cabell v. Chavez-Salido, 454 U.S. 432, 436 (1982) (upholding citizenship requirement for a state's probation officers, Court commented that alienage cases "illustrate a not unusual characteristic of legal development: broad principles are articulated, narrowed when applied to new contexts, and finally replaced when the distinctions they rely upon are no longer tenable").

79. 410 U.S. 113 (1973).

80. Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375 (1985).

81. Justices White and Rehnquist dissented.

82. *Roe*, 410 U.S. at 164 (emphasis in original).

83. In a companion case, *Doe v. Bolton*, 410 U.S. 179 (1973), the Court, again 7–2, held unconstitutional several provisions of Georgia's abortion law. The Georgia statute, enacted in 1968, had moved a considerable distance from the Texas extreme. It was based on the American Law Institute's Model Penal Code formulation, and resembled reformed laws then in force in about one-fourth of the states. The Court

might have deferred consideration of *Doe v. Bolton* pending its disposition of *Roe*; indeed, the Court might have awaited the Fifth Circuit's resolution of an appeal taken by Georgia to the intermediate appellate court instead of ruling immediately on plaintiffs' direct appeal from a three-judge district court decision holding in substantial part for plaintiffs. *See Doe*, 410 U.S. at 187 & n.8.

84. 505 U.S. 833 (1992).

85. *See id.* at 918–22 (Stevens, J., concurring in part and dissenting in part) (maintaining that 24-hour delay requirement and counseling provisions conflicted with Court precedent); *id.* at 926, 934–40 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) (maintaining that counseling, 24-hour delay, and parental consent provisions conflicted with Court precedent).

86. *Id.* at 856. On this point, the controlling Justices—Justices O'Connor, Kennedy, and Souter—spoke for the Court.

87. *See generally* Rachel N. Pine & Sylvia A. Law, *Envisioning a Future for Reproductive Liberty: Strategies for Making the Rights Real*, 27 HARV. C.R.-C.L. L. REV. 407 (1992).

88. *See* Roe v. Wade, 410 U.S. 113, 164–65 (1973) ("abortion decision . . . must be left to the medical judgment of the pregnant woman's attending physician"; "decision [in *Roe*] vindicates the right of the physician to administer medical treatment according to his professional judgment").

89. *See* Paul A. Freund, *Storms over the Supreme Court*, 69 A.B.A. J. 1474, 1480 (1983).

90. 409 U.S. 947 (granting certiorari in 460 F.2d 1372 (9th Cir. 1971)), *remanded for consideration of mootness*, 409 U.S. 1071 (1972); *see also* Note, *Pregnancy Discharges in the Military: The Air Force Experience*, 86 HARV. L. REV. 568 (1973).

91. *See* Appendix to Brief for Petitioner at 34a, *Struck* (No. 72-178) (Memorandum of Colonel Max B. Bralliar, May 14, 1971, recommending waiver of discharge for Captain Struck).

92. *See* Brief for Petitioner at 67–69 & n.70, *Struck* (No. 72-178).

93. *See id.* at 3–5, 56.

94. Air Force Regulation 36-12(40), set out in relevant part in Brief for Petitioner at 2–3, *Struck* (No. 72-178); *see also Struck*, 460 F.2d at 1374.

95. *Struck*, 460 F.2d at 1374.

96. Appendix to Brief for Petitioner at 22a, *Struck* (No. 72-178) (quoting Air Force policy on therapeutic abortion, contained in Air Force Regulation 169-12(C2) (Sept. 23, 1970)). On his second full day in office, President Clinton ended a total ban on abortions at U.S. military facilities, imposed during the 1980s, and ordered that abortions be permitted at such facilities if paid for with non–Department of Defense funds. *See Memorandum on Abortions in Military Hospitals, Jan. 22, 1993*, 29 WEEKLY COMP. PRES. DOC. 88 (Jan. 25, 1993).

97. As earlier observed, *see* text accompanying *supra* note 14, the original Constitution and the Bill of Rights contain no equality guarantee. Since 1954, however, the Supreme Court has attributed to the fifth amendment's due process clause an equal protection principle regarding federal action corresponding to the fourteenth amendment's equal protection clause controlling state action. *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (initial recognition); *cf.* Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975) ("Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment").

98. *See Struck*, 460 F.2d at 1380 (Duniway, J., dissenting); Brief for Petitioner at 8, 54–55, *Struck* (No. 72-178). The Air Force had asserted that the purpose of its pregnancy discharge regulation was to "encourage" birth control. Brief for Respondents in Opposition to Certiorari at 11, *Struck* (No. 72-178). In response, Captain Struck observed, inter alia, that the "'encouragement' [was] directed at females only": "A man serves in the Air Force with no unwarranted governmental intrusion into the matter of his sexual privacy or his decision whether to beget a child. The woman serves subject to 'regulation'; her pursuit of an Air Force career requires that she decide not to bear a child." Brief for Petitioner at 54–55, *Struck* (No. 72-178).

99. *Struck*, 409 U.S. at 947.

100. *See* Memorandum for the Respondents Suggesting Mootness (Dec. 1972), *Struck* (No. 72-178); *Struck*, 409 U.S. at 1071 (remanding for consideration of mootness).

101. *See* Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992).

102. *Cf.* Weinberger v. Wiesenfeld, 420 U.S. 636, 653 (1975) (holding unconstitutional, as a violation of the equal protection principle, the denial to a widowed father of child-in-care Social Security benefits Congress had provided solely for widowed mothers).

103. *See* Brief for Petitioner at 26, *Struck* (No. 72-178) ("[T]he regulation applied to petitioner establishes a suspect classification for which no compelling justification can be shown.").

104. *Id.* (citing Bullock v. Carter, 405 U.S. 134, 144 (1972), as precedent for "an intermediate standard" under which the challenged classification would be "'closely scrutinized'").

105. *See* Craig v. Boren, 429 U.S. 190, 197 (1976) (sex-based classification would not be sustained if merely rationally related to a permissible government objective; defender of classification would be required to show a substantial relationship to an important objective); *see also* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982).

106. Sandra Day O'Connor, *Portia's Progress*, 66 N.Y.U. L. REV. 1546 (1991).

107. The turning-point case was *Reed v. Reed*, 404 U.S. 71 (1971). *Reed* involved a youth from Idaho who had committed suicide while in his father's custody, the "mother's preference" regarding custody having endured only while the boy was "of tender years." The boy's mother and father, long separated, had each applied to be the administrator of their son's property. The Idaho court appointed the father under a state statute that provided: as between persons "equally entitled to administer, males must be preferred to females." *Id.* at 73 (quoting Idaho Code § 15-314 (1948)). The Court unanimously ruled that the statute denied to the mother the equal protection of the laws guaranteed by the Fourteenth Amendment.

108. *See* Wendy W. Williams, *Sex Discrimination: Closing the Law's Gender Gap*, *in* THE BURGER YEARS: RIGHTS AND WRONGS IN THE SUPREME COURT 1969–1986, at 109 (Herman Schwartz ed., 1987); *see also* Ruth Bader Ginsburg, *The Burger Court's Grapplings with Sex Discrimination*, *in* THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T 132 (Vincent Blasi ed., 1983).

109. Frontiero v. Richardson, 411 U.S. 677, 688 (1973).

110. Stanton v. Stanton, 421 U.S. 7, 17 (1975).

111. Taylor v. Louisiana, 419 U.S. 522, 525 (1975) (invalidating law restricting service by women to

volunteers); Duren v. Missouri, 439 U.S. 357, 360 (1979) (invalidating law allowing "any woman" to opt out of jury duty).

112. Weinberger v. Wiesenfeld, 420 U.S. 636, 639 (1975) (extending to widowers Social Security benefits Congress had provided for widows); Califano v. Goldfarb, 430 U.S. 199, 201–02 (1977) (same); Califano v. Westcott, 443 U.S. 76, 85 (1979) (extending to unemployed mothers public assistance benefits Congress had provided solely for unemployed fathers).

113. Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 147 (1980).

114. Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981).

115. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723 (1982).

116. This expansion reflected a new reality: in the 1970s, for the first time in the nation's history, the "average" woman in the United States was experiencing most of her adult years in a household not dominated by childcare requirements. That development, Columbia University professor of economics Eli Ginzberg observed, may be "the single most outstanding phenomenon of our century." Jean A. Briggs, *How You Going To Get 'Em Back in the Kitchen? (You Aren't.)*, FORBES, Nov. 15, 1977, at 177 (quoting comment by Eli Ginzberg).

117. *See, e.g.*, Brief for Appellant at 12-13, Reed v. Reed, 404 U.S. 71 (1971) (No. 70-4) (urging Court not to repeat "the mistake" of *Plessy v. Ferguson*, 163 U.S. 537 (1896)—which had upheld a state statute requiring railway companies to provide, inter alia, separate, but equal, accommodations for blacks and whites—and to rank sex-based classifications with the recognized suspect classifications).

118. SIMONE DE BEAUVOIR, THE SECOND SEX (1949).

119. For example, the male preference at issue in *Reed v. Reed*, described at note 107 *supra*, had been repealed, but not retroactively, before the Supreme Court heard the case; the categorical exemption of women from jury service had been largely abandoned in state systems by the time the Court heard *Duren v. Missouri*, described at note 111 *supra*.

120. See the *Wiesenfeld* and *Goldfarb* cases cited in note 112 *supra*.

121. *See* Califano v. Webster, 430 U.S. 313 (1977) (upholding classification, effective from 1956 to 1972,

establishing more favorable Social Security benefit calculation for retired female workers than for retired male workers).

122. Ruth Bader Ginsburg, *Some Thoughts on Benign Classification in the Context of Sex*, 10 CONN. L. REV. 813, 823 (1978).

123. *See* Ruth Bader Ginsburg, *Some Thoughts on Judicial Authority To Repair Unconstitutional Legislation*, 28 CLEV. ST. L. REV. 301, 310–12 (1979).

124. Notably too, the equal rights or sex equality advocates of the 1970s urged no elaborate theory. They did argue that by enshrining and promoting the woman's "natural" role as selfless homemaker, and correspondingly emphasizing the man's role as provider, the state impeded both men and women from pursuit of the opportunities and styles of life that could enable them to break away from familiar stereotypes. The objective, however, was not "assimilationist" in the sense of accepting "man's world" and asking only that self-regarding, economically advantaged women be allowed to enter that world and play by men's rules. The endeavor was, instead, to remove artificial barriers to women's aspiration and achievement; if women became political actors in numbers, it was thought, they could then exercise their will and their judgment to help make the world and the rules fit for all humankind. *See* Ruth Bader Ginsburg & Barbara Flagg, *Some Reflections on the Feminist Legal Thought of the 1970s*, 1989 U. CHI. LEGAL F. 9, 17–18; *cf.* Herma Hill Kay, *The Future of Women Law Professors*, 77 IOWA L. REV. 5, 18 (1991) ("The future of women law professors is not to adapt to legal education by being 'one of the boys,' but to transform the enterprise so that all of its participants are equal members of the same team.").

125. Williams, *supra* note 108, at 123. This brand of review has been aptly called "judicial enforcement of constitutional accountability." Guido Calabresi, *The Supreme Court, 1990 Term-Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 103–08 (1991).

126. 410 U.S. 113 (1973).

127. *Id.* at 140; *see also* Ginsburg, *supra* note 80, at 385 & n.81.

128. *See* Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U.

CIN. L. REV. 1, 4–14, 26–55 (1987); *see also* Ginsburg, *supra* note 80, at 380 & n.36.

129. See Vincent Blasi, *The Rootless Activism of the Burger Court*, *in* THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T 198, 212 (Vincent Blasi ed., 1983) (*Roe* "burst upon the constitutional scene with very little in the way of foreshadowing or preparation"); Geoffrey C. Hazard, Jr., *Rising Above Principle*, 135 U. PA. L. REV. 153, 166 (1986) ("By making such an extensive change, the Court [in *Roe*] foreclosed the usual opportunities for assimilation [and] feedback . . . that are afforded in a decisional process involving shorter and more cautious doctrinal steps.").

130. *See generally* LOUIS HENKIN, THE AGE OF RIGHTS 141–80 (1990).

131. *Cf.* Archibald Cox, *Direct Action, Civil Disobedience, and the Constitution*, *in* CIVIL RIGHTS, THE CONSTITUTION, AND THE COURT 2, 22–23 (1967) ("[S]harp changes in the law depend partly upon the stimulus of protest.").

132. *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905) (state maximum hours regulation for bakery employees, covering men and women alike, held unconstitutional). *But cf.* Muller v. Oregon, 208 U.S. 412 (1908) (upholding maximum hours legislation for women only).

133. *Cf.* Calabresi, *supra* note 125, at 86 (typing bold court intervention as the "judicial supremacy" model of constitutional review).

134. 347 U.S. 483 (1954).

135. *See* Plessy v. Ferguson, 163 U.S. 537, 540 (1896).

136. *See* Ginsburg & Flagg, *supra* note 124, at 18.

137. *See* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) (suggesting heightened judicial scrutiny of legislation disadvantageous to "discrete and insular minorities," i.e., classifications tending "seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities"); *cf.* Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 152 (1976) (stressing situation of blacks as "a numerical minority" and "their economic status, their position as the perpetual underclass").

138. *See* RICHARD KLUGER, SIMPLE JUSTICE 256–84 (1976) (chronicling the efforts of Marshall and others in

connection with *Sipuel v. Board of Regents of the University of Oklahoma*, 332 U.S. 631 (1948); *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Sweatt v. Painter*, 339 U.S. 629 (1950); and *McLaurin v. Oklahoma State Regents for Higher Education*, 339 U.S. 637 (1950)); Jack Greenberg, *Litigation for Social Change: Methods, Limits and Role in Democracy*, 29 RECORD OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK 320, 327–34 (1974) (discussing the "litigation campaign" preceding *Brown*).

139. *Compare* The Orison S. Marden Lecture in Honor of Justice Thurgood Marshall, 47 RECORD OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK 227, 254 (1992) (comments of Constance Baker Motley) ("[N]o civil action was ever initiated under [Marshall's] leadership unless it was part of an overall strategy. . . . No major legal thrust was made without months if not years of careful legal research and planning such as occurred in the early voting cases, teacher salary cases, restrictive covenant cases, interstate travel cases as well as the school desegregation cases.") *with* Blasi, *supra* note 129, at 212 (*Roe* "could not plausibly [be] justif[ied] . . . as the working out of a theme implicit in several previous decisions").

140. The Court relied on the psychological harm, empirically documented, that segregated schools caused black children. *See Brown*, 347 U.S. at 493–94 & 494 n.11.

141. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 28 U.S.C. 1447, 42 U.S.C. 1971, 2000a–2000h-6 (1988 & Supp. II 1990)).

142. 388 U.S. 1 (1967).

143. The legislative reapportionment cases of the early 1960s present a second notable instance of the Court confronting blocked political processes. Before the 1960s, many state legislatures arranged their districts in ways that diluted the voting power of urban voters. Under precedent then in place, legal objections to these malapportioned schemes were not justiciable in federal court. *See* Colegrove v. Green, 328 U.S. 549 (1946). In *Baker v. Carr*, 369 U.S. 186 (1962), this changed: the Supreme Court declared challenges to malapportioned schemes justiciable and thereby opened the way for their invalidation by federal court decree. As one leading commentator on the reapportionment cases observed:

> The ultimate rationale to be given for *Baker v. Carr* and its numerous progeny is that when political avenues for redressing political problems become dead-end streets, some judicial intervention in the politics

of the people may be essential in order to *have* any effective politics. In Tennessee, [for example,] at the time its legislative composition was challenged in *Baker*, there was a history of several years of unsuccessful state court litigation and unsuccessful efforts for corrective legislation.

ROBERT G. DIXON, JR., DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS 8 (1968) (emphasis in original).

144. The decision in the legend is *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

145. LEARNED HAND, THE BILL OF RIGHTS 73 (1958).

146. *Cf.* Archibald Cox, *The Role of the Supreme Court: Judicial Activism or Self-Restraint?*, 47 MD. L. REV. 118, 124–25 (1987) (though the "style of interpretation" of Chief Justice Marshall's Court "was active and creative," that Court, "[i]n expanding national power[,] . . . was moving in step with the dominant trend in the political branches").

147. Planned Parenthood v. Casey, 505 U.S. 833 (1992).

148. Three years before its *Planned Parenthood* decision, the Court had come close to overruling *Roe. See* Webster v. Reproductive Health Servs., 492 U.S. 490 (1989), discussed in Sylvia A. Law, *Abortion Compromise—Inevitable and Impossible*, 1992 U. ILL. L. REV. 921, 923–26.

149. The hostile reaction to *Roe* has hit most heavily women who are most vulnerable—"the poor, the unsophisticated, the young, and women who live in rural areas." Law, *supra* note 148, at 931; *see also* Ginsburg, *supra* note 80, at 383–85.

150. Indicative of the changed political climate, President Clinton, on his second full day in office, January 22, 1993, signed five Memoranda terminating abortion-related restraints imposed in the 1980s. *See* 29 WEEKLY COMP. PRES. DOC. 87–89 (Jan. 25, 1993) (Memorandum for the Secretary of Health and Human Services, on Federal Funding of Fetal Tissue Transplantation Research; Memorandum for the Secretary of Health and Human Services, on the Title X [of the Public Health Services Act] "Gag Rule"; Memorandum for the Acting Administrator of the Agency for International Development, on AID Family Planning Grants/Mexico City Policy; Memorandum for the Secretary of Defense, on Privately Funded Abortions at Military Hospitals; Memorandum for the Secretary of Health and Human Services, on Importation of RU-

486). *Cf.* Law, *supra* note 148, at 931–32 (setting out opposing assessments and commenting that "[o]nly time will tell").

151. *Professor Gerald Gunther Speaks at Investiture of Judge Ruth Ginsburg in Washington, D.C.*, THE COLUM. LAW ALUMNI OBSERVER, Dec. 31, 1980, at 8.

6. Human Dignity and Equal Justice Under Law

Remarks on *Loving v. Virginia*

1. Mildred Loving, "Loving for All," statement prepared for delivery on June 12, 2007, *available at* http://archive-freedomtomarry.org/pdfs/mildred_loving-statement.pdf.

2. Douglas Martin, *Mildred Loving, Who Battled Ban on Mixed-Race Marriage, Dies at 68*, N.Y. TIMES, May 6, 2008, at B7.

3. *Id.*

4. David Margolick, *A Mixed Marriage's 25th Anniversary of Legality*, N.Y. TIMES, June 12, 1992, at B20.

5. Loving v. Virginia, 388 U.S. 1, 3 (1967).

6. *Quoted in Loving*, 388 U.S. at 3.

7. *Id.* at 12.

8. *Id.*

9. *The Right To Marry*, N.Y. TIMES, June 20, 1967, at 38.

10. R. J. Donovan, *Ban on Interracial Marriages Struck Down by 9–0 Decision*, L.A. TIMES, June 13, 1967, at 7.

11. Helen Dewar, *Victor in Mixed Marriage Case Relieved*, WASH. POST, June 13, 1967, at A11.

12. Loving, *supra* note 1.

13. Patricia Sullivan, *Quiet Va. Wife Ended Interracial Marriage Ban*, WASH. POST, May 6, 2008, at A1.

8. Highlights of the U.S. Supreme Court's 2015–16 Term

1. Interview by Mark Sherman with Ruth Bader Ginsburg, ASSOCIATED PRESS, July 8, 2016,

http://bigstory.ap.org/article/0da3a641190742669cc0d01b90cd57fa/ap-interview-ginsburg-reflects-big-cases-scalias-death.

2. 136 S. Ct. 2271 (2016).

3. 136 S. Ct. 2272 (2016).

4. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016); Mathis v. United States, 136 S. Ct. 2243 (2016); Fisher v. Univ. of Tex. at Austin, 136 S. Ct. 2198 (2016); RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090 (2016); Utah v. Strieff, 136 S. Ct. 2056 (2016); Williams v. Pennsylvania, 136 S. Ct. 1899 (2016); Ocasio v. United States, 136 S. Ct. 1423 (2016); Luis v. United States, 136 S. Ct. 1083 (2016).

5. McDonnell v. United States, 136 S. Ct. 2355 (2016); Kirtsaeng v. John Wiley & Sons, Inc., 136 S. Ct. 1979 (2016); Universal Health Servs. v. United States ex rel. Escobar, 136 S. Ct. 1989 (2016); United States v. Bryant, 136 S. Ct. 1954 (2016); U.S. Army Corps of Eng'rs v. Hawkes Co., 136 S. Ct. 1807 (2016); Ross v. Blake, 136 S. Ct. 1850 (2016); Sheriff v. Gillie, 136 S. Ct. 1594 (2016); Betterman v. Montana, 136 S. Ct. 1609 (2016); CRST Van Expedited, Inc. v. EEOC, 136 S. Ct. 1642 (2016); Simmons v. Himmelreich, 136 S. Ct. 1843 (2016); Wittman v. Personhuballah, 136 S. Ct. 1732 (2016); Nichols v. United States, 136 S. Ct. 1113 (2016); Hughes v. Talen Energy Mktg., 136 S. Ct. 1288 (2016); Halo Electronics v. Pulse Electronics, 136 S. Ct. 1923 (2016); Kingdomware Technologies v. United States, 136 S. Ct. 1969 (2016); Sturgeon v. Frost, 136 S. Ct. 1061 (2016); Nebraska v. Parker, 136 S. Ct. 1072 (2016); Americold Realty Trust v. ConAgra Foods, 136 S. Ct. 1012 (2016); Evenwel v. Abbott, 136 S. Ct. 1120 (2016); Harris v. Ariz. Indep. Redistricting Comm'n, 136 S. Ct. 1301 (2016); Menominee Tribe of Wis. v. United States, 136 S. Ct. 750 (2016); Musacchio v. United States, 136 S. Ct. 709 (2016); Bruce v. Samuels, 136 S. Ct. 627 (2016); Shapiro v. McManus, 136 S. Ct. 450 (2015); OBB Personenverkehr AG v. Sachs, 136 S. Ct. 390 (2015).

6. 136 S. Ct. 1083 (2016) (*per curiam*).

7. 431 U.S. 209 (1977).

8. 136 S. Ct. 2159 (2016).

9. 136 S. Ct. 2271 (2016).

10. 136 S. Ct. 1557 (2016) (*per curiam*).

11. 136 S. Ct. 1120 (2016).

12. *Id.* at 1129.

13. (*Fisher II*), 136 S. Ct. 2198 (2016).

14. *Fisher* v. *Univ. of Tex. at Austin* (*Fisher I*), 133 S. Ct. 2411 (2013).

15. 539 U.S. 306 (2003).

16. *Fisher II*, 136 S. Ct. at 2212.

17. *Id.* at 2214 (internal quotation marks and citations omitted).

18. 136 S. Ct. 2292 (2016).

19. 136 S. Ct. 2090 (2016).

20. 136 S. Ct. 1310 (2016).

21. Transcript of Oral Argument at 60, McDonnell v. United States, 136 S. Ct. 2355 (2016) (No. 15-474).

22. *Id.*