RUTH BADER GINSBURG AND GENDER EQUALITY:

A REASSESSMENT OF HER CONTRIBUTION

MELANIE K. MORRIS, PH.D.*

I. INTRODUCTION

The research presented in this article derives from my doctoral dissertation analyzing the extent to which United States Supreme Court Justice Ruth Bader Ginsburg's equal protection jurisprudence reflects her conception of the judicial function. My dissertation also examined Justice Ginsburg's influence on the development of gender-based equal protection doctrine. Part II briefly summarizes Justice Ginsburg's scholarly publications delineating her views on the Equal Rights Amendment, equal protection and gender equality, and equal protection and reproductive rights. Part III briefly delineates Justice Ginsburg's accomplishments as an advocate before the Supreme Court, the litigation strategy she employed, and her contribution to the development of the applicable standard of review for sex-based classifications. Part IV summarizes Justice Ginsburg's equal protection jurisprudence from the bench. It also briefly examines her conception of the judicial function. Part V analyzes Justice Ginsburg's controversial majority opinion in *United States v. Virginia*[1] and offers an alternative interpretation of its significance. Part VI synthesizes Justice Ginsburg's incremental approach to achieving gender equality and assesses the contribution made over the course of her professional life.

II. JUSTICE GINSBURG AS CONSTITUTIONAL SCHOLAR

Justice Ginsburg attacked gender-based stereotypes in a 1971 speech delivered at Duke University Law School.[2] She observed that theories

* Ph.D.,University of Tennessee, Knoxville, TN; M.A., B.A., Ball State University, Muncie, IN. The author wishes to thank Professor Otis H. Stephens for his comments on a draft of this article.

[1] 518 U.S. 515 (1996).

[2] For a reprint of Justice Ginsburg's speech, see Ruth Bader Ginsburg, Sex and Unequal Protection: Men and Women As Victims, Speech at the Southern Regional Conference of Law Women held at Duke University Law School (Oct. 1-3, 1971), *in* 11 J. FAM. L. 347 (1971) [hereinafter Sex and Unequal Protection].

perpetuating the inferiority of some races to others ostensibly verified by scientific inquiry had long been repudiated. However, similar gender-based theories retained an aura of legitimacy. "[P]rominent social scientists," Justice Ginsburg noted, "continue to chide women for failing to recognize that their biological programming for public life is defective: Deprived of the male genetic heritage developed through millions of years of male bonding in hunting packs, women are misguided if they pursue strict equality."[3] As a professor, Justice Ginsburg published numerous law review articles delineating her position on gender equality, which she grounded in equal protection doctrine. She consistently argued that most gender-based classifications constituted invidious discrimination repugnant to the Constitution.[4] Her conception of impermissible gender classifications encompasses reproductive rights, including the right to obtain an abortion.[5]

To achieve gender equality under the law, creating a "system of genuine neutrality,"[6] Justice Ginsburg maintained that two options could be pursued. The ideal option was working to ratify the Equal Rights Amendment ("ERA"). Justice Ginsburg argued that once adopted, the ERA would eliminate most gender-based classifications;[7] further, it would function as a "negative check on government, a prohibition against use of gender as a factor in official classification."[8]

The less-preferred (and less predictable) option was litigation.[9] Case-by-case litigation under the Equal Protection Clause would advance gender equality incrementally, although it necessitated reliance on favorable judicial interpretation.[10] The legislative history of the Fourteenth Amendment engendered hesitation among some jurists to invalidate gender-based

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[3] *Id.* at 350.

[4] *See, e.g.*, Ruth Bader Ginsburg, Some Thoughts on Judicial Authority To Repair Unconstitutional Legislation, Address at Sixteenth Cleveland-Marschall Fund Visiting Scholar Lecture at the Cleveland-Marschall College of Law (Nov. 9, 1979), *in* 28 CLEV. ST. L. REV. 301 (1980) [hereinafter Judicial Authority]; Ruth Bader Ginsburg, *Sex Equality and the Constitution*, 52 TUL. L. REV. 451 (1978) [hereinafter *Sex Equality*]; Ruth Bader Ginsburg, *Gender and The Constitution*, 44 U. CIN. L. REV. 1 (1975) [hereinafter *Gender*]; Sex and Unequal Protection, *supra* note 2.

[5] *See, e.g.*, Ruth Bader Ginsburg, *Speaking in A Judicial Voice*, 67 N.Y.U. L. REV. 1185 (1992) [hereinafter *Judicial Voice*]; Ruth Bader Ginsburg, Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade, Speech at the William T. Joyner Lecture on Constitutional Law at the University of North Carolina of Law (Apr. 6, 1984), *in* 63 N.C.L. REV. 375 (1985) [hereinafter Autonomy and Equality]; *Sex Equality*, *supra* note 4. Justice Ginsburg would ground reproductive rights in the doctrine of equal protection rather than privacy doctrine.

[6] Ruth Bader Ginsburg, *Realizing the Equality Principle*, *in* SOCIAL JUSTICE AND PREFERENTIAL TREATMENT 136 (William Blackstone et al. eds., 1977) [hereinafter *Equality Principle*].

[7] Sex and Unequal Protection, *supra* note 2, at 361.

[8] Ruth Bader Ginsburg, *Sexual Equality Under The Fourteenth and Equal Rights Amendments*, 1979 WASH. U. L.Q. 1, 175 (1979) [hereinafter *The Fourteenth and Equal Rights Amendments*].

[9] *See generally* Ruth Bader Ginsburg, *Women As Full Members of The Club: An Evolving American Ideal*, 6 HUM. RTS. 1 (1976) [hereinafter *Full Members*].

[10] Ruth Bader Ginsburg, *The Equal Rights Amendment is the Way*, 1 HARV. WOMEN'S L.J. 19, 24-26 (1978) [hereinafter *The Equal Rights Amendment Is The Way*].

classifications brought under provisions of the Constitution that arguably would provide effective remedies; the addition of an ERA to the Constitution, Justice Ginsburg reasoned, would overcome the historical impediment associated with the Fourteenth Amendment.[11] Without an explicit equal rights requirement in the Constitution, litigating under the equal protection components of the Fifth and Fourteenth Amendments was the best remaining alternative. However, in Justice Ginsburg's view, achievement of gender equality via this avenue would be incomplete.[12] Moreover, it would not generate comprehensive legal theory.[13]

Justice Ginsburg's position regarding the most sound constitutional remedy for gender discrimination is also important because it provides evidence of her adherence to a minimalist judicial philosophy. Recognizing the difference between legitimate constitutional interpretation and judicial legislation, Justice Ginsburg believed that the most credible, legitimate path to achieving gender equality dictated the addition of that explicit guarantee to the Constitution.[14]

Assessing the Supreme Court's ad hoc approach[15] to gender equality jurisprudence, Justice Ginsburg observed that "since the 1970s [the Court] has effectively carried on . . . a dialogue with the political branches of government. The Court wrote modestly, it put forth no grand philosophy. But by forcing legislative and executive branch re-examination of sex-based classifications," she concluded, "the Court helped to ensure that laws and regulations would 'catch up with a changed world.'"[16] Justice Ginsburg chided the High Bench for failing to advance a minimalist position with respect to questions involving reproductive rights, noting that the Court's sweeping holding in *Roe v. Wade*[17] "invited no dialogue with legislators."[18]

Such criticism notwithstanding, she acknowledges the substantial progress made during the latter part of the Twentieth Century in the effort to achieve equality between men and women:

> Constitutional doctrine relating to gender discrimination, although still evolving, and variously interpreted, is nonetheless a remarkable judicial development .... [T]he Court, since 1970, has creatively interpreted clauses of the Constitution ... to accommodate a

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[11] *Full Members, supra* note 9, at 2.

[12] *The Fourteenth and Equal Rights Amendments, supra* note 8; *see also* Ruth Bader Ginsburg, *From No Rights, to Half Rights, to Confusing Rights*, 7 HUM. RTS. 12, 47 (1978) [hereinafter *No Rights*]; Ruth Bader Ginsburg, *Let's Have E.R.A. as a Signal*, 63 A.B.A. J. 70, 72-73 (1977) [hereinafter *Signal*].

[13] *Signal, supra* note 12, at 73.

[14] *See, e.g., Sex Equality, supra* note 4 ; *see also Full Members, supra* note 9, at 6.

[15] *See generally No Rights, supra* note 12.

[16] *Judicial Voice, supra* note 5, at 1204-05.

[17] 410 U.S. 113 (1973).

[18] *Judicial Voice, supra* note 5, at 1205.

> modern vision of sexual equality in employment, in access to social benefits, in most civic duties, in reproductive autonomy. Such interpretation has limits, but sensibly approached, it is consistent with the grand design of the Constitution-makers to write a charter that would endure as the Nation's fundamental instrument of government.[19]

Such dramatic advancement, however, still falls short of Justice Ginsburg's ultimate goal.

III. JUSTICE GINSBURG AS CONSTITUTIONAL ADVOCATE

As counsel for the American Civil Liberties Union ("ACLU") Justice Ginsburg was the principal author of the brief for the appellant, appellee, or petitioner in nine gender equality cases brought before the Supreme Court.[20] She also presented oral argument in six of those cases.[21] Additionally, Justice Ginsburg was the co-author of fifteen *amicus curiae* briefs.[22]

Several elements comprised Justice Ginsburg's litigation strategy.[23] First, incremental progress in a series of cases was preferable to achieving total victory in one sweeping judicial decision. Second, Justice Ginsburg sought cases presenting clearly understandable issues in order to establish

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[19] Ruth Bader Ginsburg, *Sex Discrimination, in* CIVIL RIGHTS AND EQUALITY 303 (Kenneth L. Karst et al. eds., Collier Macmillan 1989) [hereinafter *Sex Discrimination*].

[20] Duren v. Missouri, 439 U.S. 357 (1979) (jury service exemption); Califano v. Goldfarb, 430 U.S. 199 (1977) (social security survivor benefits); Turner v. Dep't of Employment Sec., 423 U.S. 44 (1975) (unemployment compensation scheme exempting pregnancy); Edwards v. Healy, 421 U.S. 772 (1975) (jury service exemption); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (social security survivor benefits); Kahn v. Shevin, 416 U.S. 351 (1974) (property tax exemption); Frontiero v. Richardson, 411 U.S. 677 (1973) (military compensation scheme); Struck v. Sec'y of Defense, 409 U.S. 1071 (1972) (United States Air Force regulation regarding pregnant officers); Reed v. Reed, 404 U.S. 71 (1971) (designation of estate administrators).

[21] *Duren*, 439 U.S. 357 (1979); *Califano*, 430 U.S. 199 (1977); *Edwards*, 421 U.S. 772 (1975); *Weinberger*, 420 U.S. 636 (1975); *Kahn*, 416 U.S. 351 (1974); *Frontiero*, 411 U.S. 677 (1973).

[22] Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142 (1980) (surviving spousal benefits scheme of worker's compensation program); Califano v. Westcott, 443 U.S. 76 (1979) (Social Security Administration benefits to needy children of the unemployed); Orr v. Orr, 440 U.S. 268 (1979) (sex-based alimony requirements); Los Angles Dep't of Water And Power v. Manhart, 435 U.S. 702 (1978) (disparate pension fund contribution requirements); Univ. of Cal. Regents v. Bakke, 438 U.S. 265 (1978) (race-based admissions plan); Dothard v. Rawlinson, 433 U.S. 321 (1977) (males-only requirement for prison guards); Nashville Gas Co. v. Satty, 434 U.S. 136 (1977) (mandatory maternity leave resulting in the loss of all accumulated job-bidding seniority); Coker v. Georgia, 433 U.S. 584 (1977) (death penalty for conviction of rape); Craig v. Boren, 429 U.S. 190 (1976) (disparate age-of-majority to purchase alcohol); Gen. Elec. Co. v. Gilbert, 429 U.S. 125 (1976) (insurance plan exempting pregnancy); Liberty Mut. Ins. Co v. Wetzel, 424 U.S. 737 (1976) (insurance plan exempting pregnancy); Corning Glass Works v. Brennan, 417 U.S. 188 (1974) (shift-based compensation scheme); Geduldig v. Aiello, 417 U.S. 484 (1974) (disability insurance program exempting pregnancy); Cleveland Bd. of Educ. v. Lafleur, 414 U.S. 632 (1973) (mandatory maternity leave); Pittsburgh Press Co. v. Pittsburgh Comm. on Human Relations, 413 U.S. 376 (1973) (newspaper unemployment advertisements).

[23] *See* LYNN GILBERT & GAYLEN MOORE, PARTICULAR PASSIONS: TALKS WITH WOMEN WHO HAVE SHAPED OUR TIMES (Clarkson N. Potter, Inc. 1981).

precedent upon which to build as subsequent cases posing more complicated questions were brought. Third, cases with male plaintiffs claiming gender discrimination were deliberately selected in order to illustrate that both men and women were harmed by ostensibly benign gender-based classifications. Ultimately, she sought to persuade the High Bench to invalidate gender classifications under equal protection doctrine. More specifically, she sought to persuade the Court to designate sex classifications as "suspect," requiring application of strict judicial scrutiny.[24]

Analysis of the briefs and transcripts of oral arguments reveals the close degree to which Justice Ginsburg followed this strategy. Although her endorsement of the application of strict scrutiny is unambiguous,[25] Justice Ginsburg's recognition that constitutional principles evolved over time heightened her sensitivity to signals sent by the Court. As early as her brief in *Reed v. Reed*,[26] Justice Ginsburg maintained that sex classifications failed any degree of constitutional review - either rational basis or strict scrutiny, or some yet-to-be-crafted intermediate standard. She consistently provided alternatives, urging adoption of a more rigorous standard while providing a less demanding fall-back position; providing two choices for the Court increased the likelihood that it would hear something it could endorse. At the least, Justice Ginsburg sought to persuade the Court to invalidate the challenged sex classification; at best she sought to stimulate broader doctrinal development with regard to gender-based equal protection. Although largely successful in persuading the Court to invalidate many statutory sex classifications and to ratchet up the standard of review, she was ultimately unsuccessful in achieving the long-range objective of persuading the High Bench to adopt strict judicial scrutiny.[27]

Justice Ginsburg's minimalist conception of the judicial function is further evidenced by the remedy she frequently recommended. She urged invalidating only the challenged sex classification, thereby rendering the challenged statute gender-neutral. This repaired the defect in the law via the least intrusive judicial action.

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[24] *See, e.g.*, 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, 270 (1997) [hereinafter *Constitutional Adjudication*]; *see also* Joyce Ann Baugh et al., *Justice Ruth Bader Ginsburg: A Preliminary Assessment*, 26 U. TOL. L. REV. 1, 24-26 (1994).

[25] *See generally* Baugh, *supra* note 24; *Constitutional Adjudication*, *supra* note 24; *Full Members*, *supra* note 9; *Gender*, *supra* note 4; Sex and Unequal Protection, *supra* note 2.

[26] 404 U.S. 71 (1971).

[27] At the time Justice Ginsburg ascended the federal bench, the standard of review employed by the Court in gender discrimination cases was the intermediate scrutiny test articulated in Craig v. Boren, 429 U.S. 190, 200, 208 (1976).

IV. JUSTICE GINSBURG AS JURIST

In 1980 Justice Ginsburg joined the federal judiciary.[28] Only a small minority of the cases heard by Ginsburg, over the course of twenty years of service on the federal bench, have presented equal protection questions. In this Part, I evaluate the degree to which the equal protection jurisprudence she has articulated from the bench comports with the position she advanced as an advocate and professor.

A. Court of Appeals for the District of Columbia Circuit

During her thirteen-year tenure on the Court of Appeals, Justice Ginsburg wrote 253 majority opinions, 31 concurring opinions, and 17 dissenting opinions.[29] She wrote opinions in two cases raising equal protection questions, both of which focused on racial discrimination.[30] In both opinions she expressed considerable deference to precedent and to the discernible will of Congress. The reasoning Judge Ginsburg articulated in these opinions indicates that she was not a result-oriented judicial activist on the Court of Appeals; rather, her rationale clearly indicated that the outcome in each case was dictated by controlling precedent and discernible legislative intent.

B. United States Supreme Court

President Bill Clinton's selection of Judge Ginsburg to fill the Supreme Court seat vacated by the retiring Justice Byron R. White was announced in a Rose Garden press conference on June 14, 1993.[31] Commenting on his

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[28] On April 14, 1980, Justice Ginsburg was nominated to the Court of Appeals for the District of Columbia Circuit by President Jimmy Carter, filling the vacancy created upon the death of Harold Leventhal. *See Ruth Bader Ginsburg, Judges of the United States Courts, at* http://air.fjc.gov/ history/judges_frm.html (last visited Oct. 28, 2002). She took the oath of office on June 30, 1980. *See* http://www.supct.law.cornell.edu/supct.

[29] *See Ruth Bader Ginsburg's Opinions as a Judge on the United States Court of Appeals for the District of Columbia Circuit, in* THE SUPREME COURT OF THE UNITED STATES: HEARINGS AND REPORTS ON SUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE -1916-1993, at 1015-1037 (1995).

Although she wrote no opinions addressing gender-based equal protection claims while sitting on the court of appeals, Justice Ginsburg did hear oral argument in one such case. *See* Givens v. United States RR. Ret. Bd., 720 F.2d 196 (1983) (Van Pelt, J.) (holding that the provision was designed to preserve the solvency of the railroad pension program and, therefore, served a non-discriminatory purpose; distinction did not constitute invidious gender discrimination because the statute placed limits on annuity benefit payments to both male and female railroad retirees with spouses, neither favoring nor disfavoring one gender over the other).

[30] *See* O'Donnell Constr. Co. v. District of Columbia, 963 F.2d 420, 429 (D.C. Cir. 1992) (Ginsburg, J., concurring) (holding a minority set-aside provision in the District of Columbia contracting scheme unconstitutional); Quiban v. Veterans Admin., 928 F.2d 1154, 1163 (D.C. Cir. 1991) (Ginsburg, J.) (holding that an express act of Congress excluded a particular class of Philippine World War II veterans from certain veteran benefits).

[31] Holly Idelson, *Clinton's Choice of Ginsburg Signals Moderation,* 51 C.Q. WKL. REP. 25, June 19, 1993, at 1569-74.

selection of the 107th Justice to sit on the Supreme Bench, the President indicated that Judge Ginsburg's significant contribution to the development of gender equality jurisprudence had distinguished her from other potential nominees. Clinton identified three reasons for her selection: 1) she had distinguished herself as a progressive, balanced, and fair jurist; [32] 2) she had "compiled a truly historic record of achievement in the finest traditions of American law and citizenship"[33] as an advocate; and 3) she exhibited considerable potential to be a consensus-builder on the High Court.[34]

In her opening statement before the Senate Judiciary Committee, Judge Ginsburg touched upon the job she was about to undertake, clearly articulating a judicial philosophy consistent with that envisioned by the Framers: deference to the political branches and detachment from the nature of partisan politics to ensure institutional integrity.[35] She invoked Alexander Hamilton's conception of the role of judges:

> 'to secure a steady, upright, and impartial administration of the laws.' I would add that the judge should carry out that function without fanfare. She should decide the case before her without reaching out to cover cases not yet seen. She should be ever mindful, as Judge and then Justice Benjamin Nathan Cardozo said, 'Justice is not to be taken by storm. She is to be wooed by slow advances.'[36]

Generally, the courts should not outpace the political branches; exceptions to this general principle, however, may warrant bold judicial action. Judge Ginsburg clearly recognized that when the executive and legislative branches cannot or will not act, it becomes incumbent upon the judicial branch to take action, noting that '"when the political avenues become dead-end streets judicial intervention in the politics of the people may be essential in order to have effective politics.'"[37] Striking a balance, she acknowledged, was a delicate proposition:

> We cherish living in a democracy, and we know that this Constitution did not create a tricameral system. Judges must be mindful of their place in our constitutional order; they must always remember that we live in a democracy that can be destroyed if judges take it upon themselves to rule as Platonic guardians.[38]

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[32] Administration Of William J. Clinton, Remarks on the Nomination of Ruth Bader Ginsburg To Be a Supreme Court Associate Justice 1073, 1074 (June 14, 1993).

[33] *Id.* at 1074.

[34] *See Nomination of Ruth Bader Ginsburg, to be an Associate Justice of the United States Supreme Court*, 103d Cong. (1993), S. EXEC. REPT. No.103-6, at 8.

[35] *Id.* at 8.

[36] *Id.*

[37] *Id.* at 11 (citation omitted).

[38] *Nomination of Ruth Bader Ginsburg to be Associate Justice of the Supreme Court of the United States Before the Senate Judiciary Comm.*, 103d Cong. 125 (1993).

Clearly, Judge Ginsburg views the proper role of the judiciary as one that follows rather than leads society.

Following the hearings, the Senate Judiciary Committee issued a report unanimously recommending Judge Ginsburg's approval by the full Senate.[39] The Committee attributed its unanimity to Judge Ginsburg's qualifications and judicial temperament, and her impressive judicial record.[40] The report continued: "Judge Ginsburg is a nominee who holds a rich vision of what our Constitution's promises of liberty and equality mean, balanced by a measured approach to the job of judging."[41] On August 3, 1993, the Senate, by a 96-3 margin, confirmed Judge Ginsburg's nomination to the Supreme Court.[42]

Over the course of her eight Term tenure on the Supreme Bench, Justice Ginsburg has written seventy-one majority opinions, forty-seven concurring opinions, and forty-four dissenting opinions.[43] Of these 162 opinions, ten addressed equal protection questions squarely before the Court, nine of which presented equal protection questions unrelated to gender specifically.[44] These opinions, like the equal protection opinions she

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[39] *Nomination of Ruth Bader Ginsburg to be an Associate Justice of the United States Supreme Court, supra* note 34.

[40] *Id.* at 2.

[41] *Id.*

[42] 139 CONG. REC. S10163 (Aug. 3, 1993). Justice Ginsburg took the oath of office on August 10, 1993. *See* http://www.supct.law.cornell.edu/supct.

[43] These statistics are compiled from all of the November volumes of Harvard Law Review published during each year of Justice Ginsburg's service. *See The Supreme Court, 1993 Term—The Statistics*, 108 HARV. L. REV. 139, 372 (1994); *The Supreme Court, 1994 Term—The Statistics*, 109 HARV. L. REV. 254, 340 (1995); *The Supreme Court, 1995 Term—The Statistics*, 110 HARV. L. REV. 135, 367 (1996); *The Supreme Court, 1996 Term—The Statistics*, 111 HARV. L. REV. 197, 431 (1997); *The Supreme Court, 1997 Term—The Statistics*, 112 HARV. L. REV. 355, 366 (1998); *The Supreme Court, 1998 Term—The Statistics*, 113 HARV. L. REV. 400 (1999); *The Supreme Court, 1999 Term—The Statistics*, 114 HARV. L. REV. 390 (2000); *The Supreme Court, 2000 Term—The Statistics*, 115 HARV. L. REV. 306, 539 (2001).

[44] Bush v. Gore, 531 U.S. 98 (2000) (per curiam) (holding that Florida's use of standardless manual recounts in the 2000 presidential election violated the Equal Protection Clause) (Ginsburg, J., dissenting, arguing that deference should be paid to a state supreme court's interpretation of its own state's law, and that any disparate treatment of ballots was diffuse and, therefore, not invidiously targeted toward any discernible group); Central State Univ. v. Aaup, 526 U.S. 124 (1999) (per curiam) (holding that an Ohio statute exempting standards for professors' teaching loads from collective bargaining did not offend equal protection) (Ginsburg, J., concurring, underscoring the inappropriateness of the lower courts' application of a heightened level of review); Miller v. Albright, 523 U.S. 420 (1998) (holding that the distinction in the U.S. Code between illegitimate children of American citizen mothers and illegitimate children of American citizen fathers requiring children born abroad and out of wedlock to citizen fathers, but not citizen mothers, to obtain proof of paternity prior to age eighteen in order to qualify for American citizenship did not offend the Equal Protection component of the Due Process Clause of the Fifth Amendment) (Ginsburg, J., dissenting, arguing that the gender-based classification constituted invidious discrimination born of inimical stereotypes); Vacco v. Quill, 521 U.S. 793 (1997) (holding that a state's blanket prohibition of assisted suicide did not offend the Equal Protection Clause of the Fourteenth Amendment) (Ginsburg, J., concurring in the judgment, declaring her support for O'Connor, J., concurring); M.L.B. v. S.L.J., 519 U.S. 102 (1996) (Ginsburg, J.) (conditioning the appeal of the trial court's termination of parental rights on payment of record preparation fees offended

wrote on the Court of Appeals, endorse judicial restraint and deference to discernible legislative intent. Justice Ginsburg's desire to balance competing interests - either the state versus the individual, or historically favored individuals versus historically disfavored individuals - is also apparent.

V. JUSTICE GINSBURG, *UNITED STATES V. VIRGINIA* AND AN EVOLVING STANDARD OF REVIEW?

Review of Justice Sandra Day O'Connor's majority opinion in *Mississippi University for Women v. Hogan*[45] provides context essential for discussion of Justice Ginsburg's majority opinion in *United States v. Virginia*.[46] The opinions in these cases are analyzed next, followed by an alternative perspective on the significance of Justice Ginsburg's opinion.

A. Mississippi University for Women v. Hogan

The issue before the Court in *Hogan* was whether a state-supported university policy that excluded otherwise qualified males from enrolling in its professional nursing school for credit offended the Equal Protection Clause of the Fourteenth Amendment.[47] The Court struck down the policy,[48] dividing 5-4.[49]

Writing for the majority, Justice O'Connor insisted that all sex-based classifications merited review under a more demanding level of inquiry than rational basis, thus disagreeing with the dissenting Justices who insisted that

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the Equal Protection and Due Process Clauses of the Fourteenth Amendment); Miller v. Johnson, 515 U.S. 900 (1995) (Georgia's redistricting scheme using race as the controlling factor is impermissible) (Ginsburg, J., dissenting, noting that questions of a political nature such as this were better resolved by legislatures but, when race is an issue, courts have a duty to intervene to prevent dilution of minority voting strength, and that the scheme at issue did not offend the Constitution); Missouri v. Jenkins, 515 U.S. 70 (1995) (holding that the district court exceeded its authority to order implementation of remedial measures as part of the desegregation scheme by ordering improvements intended to foster student transfers into the school district) (Ginsburg, J., dissenting, endorsing the views expressed by Souter, J., and emphasizing the point that two centuries of discrimination cannot be reversed in seven years); Adarand Constructors v. Pena, 515 U.S. 200 (1995) (stating that race-based classifications created at any level of government must be subjected to strict scrutiny review, reversing its decision in Metro Broadcasting v. Federal Communications Commission, 497 U.S. 547 (1990)) (Ginsburg, J., dissenting, urging judicial restraint to allow the political branches to refine existing affirmative action policy, and to urge accommodation to balance interests of the historically disadvantaged groups to overcome residual discriminatory effects without diminishing the opportunities available to historically advantaged groups); United States v. Hays, 515 U.S. 737 (1995) (Ginsburg, J., concurring) (appellee residents of Louisiana's 5th Congressional District lacked standing to challenge whether Louisiana's 4th Congressional District constituted an impermissible racial gerrymander).

[45] 458 U.S. 718 (1982).

[46] 518 U.S. 515 (1996). In 1997, Justice Ginsburg explained that Justice O'Connor's opinion in *Hogan* "paved the way for the opinion I wrote fourteen years later in the Virginia Military academy case." *See Constitutional Adjudication, supra* note 24, at 270.

[47] *Hogan*, 458 U.S. at 719.

[48] *Id.* at 733.

[49] *Id.* at 719, 733-46.

the applicable level of scrutiny be determined by the sex of the disadvantaged person.[50] She articulated this standard as one in which the government must provide "an 'exceedingly persuasive justification' for the classification .... The burden is met only by showing at least that the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'"[51] These criteria, which she cautioned must be applied without consideration of traditional sex-based stereotypes,[52] comprise the conventional intermediate scrutiny test routinely employed by the Court.[53] Justice O'Connor was explicit in her adherence to that standard.

Justice O'Connor emphasized the narrowness of both the question at issue and the Court's holding, which involved admission to a professional nursing school. She explicitly stated that the focus was not the constitutionality of single-sex education in general, an issue not before the Court.[54] She also avoided dealing with a much broader question: since the challenged classification failed intermediate scrutiny analysis, the Court need not address whether sex ought to be designated a suspect classification meriting application of the most stringent standard of review.[55]

Chief Justice Warren Burger dissented.[56] He endorsed the rationale articulated in Justice Lewis Powell's dissent and wrote separately to underscore the narrowness of the holding. Justice Powell, joined by Justice William Rehnquist, rejected the application of a heightened standard of review since men, not women, were ostensibly disadvantaged by the classification.[57] In his view, rational basis was a sufficient test, which the classification survived. Even applying a heightened standard of review *arguendo,* he insisted that the challenged classification still survived constitutional scrutiny because it invidiously discriminated against no one.[58]

Justice Harry Blackmun also filed a dissent attacking the ostensibly narrow holding articulated in Justice O'Connor's opinion, insisting that broader implications were inevitable.[59] He warned that the Court's holding in the instant case jeopardized all state-supported single-sex education, even if the state provided comparable alternatives for others.[60]

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50 *Id.* at 723.
51 *Id.* at 724 (citations omitted).
52 *Hogan,* 458 U.S. at 724-25.
53 *See generally* Craig v. Boren, 429 U.S. 190 (1976).
54 *Hogan,* 458 U.S. at 723 n.7.
55 *Id.* at 724 n.9.
56 *Id.* at 733.
57 *Id.* at 735.
58 *Id.* at 741-43.
59 *Hogan,* 458 U.S. at 733.
60 *Id.* at 734.

Invalidating a sex-based classification that disadvantaged men rather than women is not remarkable; the Court struck down provisions of this kind during the 1970s. The *Hogan* majority opinion is notable for the way in which Justice O'Connor articulated the standard of review. She was explicit in her adherence to the traditional test applied to sex discrimination cases. Justice O'Connor did not characterize the phrase "exceedingly persuasive justification"[61] as a component added to the existing middle tier; in fact, she did not even acknowledge that there had been an alteration of the standard. She explained that the exceedingly persuasive justification was defined substantively by the traditional intermediate scrutiny criteria, which must be satisfied in order to preserve the challenged classification.[62]

It is notable that none of Justice O'Connor's colleagues raised the question of whether she applied the traditional middle tier of review.[63] Rather than criticize her for surreptitiously altering the standard from intermediate scrutiny to something closer to strict scrutiny (a charge leveled against Justice Ginsburg fourteen years later), the dissenters merely disagreed with the application of intermediate scrutiny in the *Hogan* case and argued for lowering the standard of review to rationality.

The opinions in *Hogan* are also important because they reveal persistent disagreement among the justices as to the appropriate standard of review in determining the constitutionality of sex classifications. Many justices were obviously skeptical that the standard was settled, as it is with race classifications, and appeared willing to reconsider the issue.[64]

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61 *Id.* at 724 (citations and internal quotation marks omitted).

62 *Id.*

63 A search of law review articles published shortly after the Court announced its decision in *Hogan* reveals that legal academia was not sharply divided on the question of whether Justice O'Connor adhered to the traditional intermediate scrutiny standard the Court had typically applied in gender discrimination claims since *Craig*. *See, e.g.*,William R. Engles, *The "Substantial Relation" Question in Gender Discrimination Cases*, 52 U. CHI. L. REV. 149 (1985); Patricia Werner Lamar, *The Expansion of Constitutional and Statutory Remedies For Sex Segregation in Education: The Fourteenth Amendment and Title IX of The Education Amendments of 1972*, 32 EMORY L.J. 1111 (1983); Sylvia K. Law, *Rethinking Sex and The Constitution*, 132 U. PA. L. REV. 955 (1984). These scholars maintained that Justice O'Connor had, in fact, applied intermediate scrutiny. It is noteworthy that they did not dispute this point nor did they reference any dispute within legal academic circles or cite scholars challenging this assertion. Comments offered by Brent Caslin reinforce this conclusion: "Indeed, the opinion's initial call for an exceedingly persuasive justification had no effect on the substantive legal analysis beyond requiring an inquiry into Mississippi's purpose, and most Court observers looked past it. At most, the Court recognized the phrase as a shorthand referral to intermediate scrutiny." Brent L. Caslin, *Gender Classifications and* United States v. Virginia; *Muddying the Waters of Equal Protection*, 24 PEPP. L. REV. 1353, 1368 (1997).

However, Justice Ginsburg clearly views Justice O'Connor's opinion in *Hogan* as a contribution to the evolution of gender-based equal protection jurisprudence. This point will be revisited in Part V.

64 *See* Lamar, *supra* note 63, at 1113, 1164-65.

B. United States v. Virginia[65]

Writing for the majority in *Virginia*, Justice Ginsburg narrowly framed the questions before the Court: whether the Commonwealth of Virginia's exclusion of women from the distinctive educational opportunity provided at Virginia Military Institute ("VMI") denied to qualified women equal protection[66] and, if so, what was the appropriate remedy.[67] Dividing 7-1,[68] the Court struck down VMI's single-sex admissions plan and found that the parallel program established to remedy the violation was constitutionally inadequate.[69]

Justice Ginsburg reinforced the narrow focus of the Court's review. The Court was only interested in an educational opportunity the lower courts had characterized as unique, a distinctive opportunity provided at Virginia's only public single-sex institution.[70] To determine the constitutionality of the challenged sex-based classification, Justice Ginsburg invoked precedent reiterating that the government bore the burden of defending such a classification, which required an exceedingly persuasive justification.[71] Declaring adherence to the standard of review most recently articulated in *Hogan*, she restated the substantive criteria required to meet that burden, which the *Hogan* Court insisted must minimally bear a substantial relationship to an important governmental interest.[72] She reiterated O'Connor's admonition that these criteria be applied without regard to stereotypical generalizations.[73]

Referring to these criteria as "skeptical scrutiny,"[74] Justice Ginsburg

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65 518 U.S. 515 (1996).

66 *Id.* at 530.

67 *Id.* at 531.

68 Justice Clarence Thomas did not participate in the disposition of the case. *Id.* at 518, 558.

69 *Id.* at 519, 555-56. The litigation over the constitutionality of VMI's single-sex admission policy began in 1990 when a prospective female applicant filed a complaint with the U.S. Attorney General. *Id.* at 523. The United States sued the Commonwealth of Virginia claiming that VMI's single-sex admission policy invidiously discriminated against women, offending the Equal Protection Clause of the Fourteenth Amendment. *Id.* The district court ruled in favor of the Commonwealth. *Id.* The Court of Appeals for the Fourth Circuit found an equal protection violation and reversed, vacating the district court's judgment. *Id.* at 524. Remanding the case, the Fourth Circuit identified three remedial options available to the Commonwealth: 1) remain a public institution and admit women; 2) remain a public institution and establish a parallel program for women; or 3) forego public support and remain single-sex as a private institution. *Id.* at 525-26. The Commonwealth elected to continue to provide public single-sex education, choosing to create a parallel program for women. *Id.* at 526. The Commonwealth sought and received district court approval of the remedial plan. *Id.* The Fourth Circuit affirmed. *Id.* at 528. The United States filed a petition for *certiorari* in the United States Supreme Court. *Id.* at 515. The petition was granted and oral argument took place on January 17, 1996. *Id.*

70 *Virginia*, 518 U.S. at 534.

71 *Id.* at 531.

72 *Id.* at 533.

73 *Id.*

74 *Id.* at 531.

offered perhaps a more suitable designation of the traditional middle tier of review which she characterized as the Court's "current direction[ ]"[75] in determining the constitutionality of sex-based classifications. Use of phrases like current direction and references to *Hogan*'s minimum threshold may suggest the possibility of change in the Court's position at some point in the future. However, Justice Ginsburg was explicit that sex had not been designated a suspect classification and would not be so designated here.[76] She cryptically observed that the Supreme Bench had not equated gender-based classifications with proscribed race-based classifications "for all purposes,"[77] which is an important signal with regard to evaluating the constitutionality of the remedy. Nonetheless, Justice Ginsburg was explicit that she was applying the test traditionally applied by the Court in determining the constitutionality of sex classifications.[78]

Justice Ginsburg announced the Court's holdings as follows: first, Virginia failed to demonstrate an exceedingly persuasive justification for its denial of a VMI-caliber educational opportunity to women;[79] second, the remedial program did not afford women an equal educational opportunity and was, therefore, constitutionally inadequate.[80] The bifurcated analysis Justice Ginsburg offered to reach these conclusions is analyzed next.

The High Bench acknowledged that single-sex education was beneficial for some students and its constitutionality was not at issue in the instant case.[81] However, Virginia failed to persuade the Court that VMI and its single-sex admission policy had been established, or was maintained, in an effort to diversify the educational system maintained by Virginia. Opining that diversification of educational opportunities would require providing options for all of Virginia's citizens, the Court concluded that its present system denying women a VMI-caliber opportunity offended the Constitution: "However 'liberally' this plan serves the Commonwealth's sons, it makes no provision whatever for her daughters. That is not *equal* protection."[82]

Having found that the challenged sex-based classification failed constitutional review, the Court then considered the constitutionality of Virginia's remedy. Justice Ginsburg invoked race discrimination cases as

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75 *Virginia*, 518 U.S. at 532.

76 *Id.* at 533.

77 *Id.* at 532.

78 *Id.* at 533-34.

79 *Id.* at 534.

80 *Virginia*, 518 U.S. at 534. For data comparing VMI and the parallel program established at Mary Baldwin College, the Virginia Women's Institute for Leadership ("VWIL"), with respect to their respective academic programs, faculty, facilities, endowment, and reputation, see *id.* at 519-23, 526-28, 548-50, 551-54.

81 *Id.* at 535.

82 *Id.* at 540 (emphasis in the original).

authority, borrowing language from *Milliken v. Bradley*[83] and *Louisiana v. United States*[84] she insisted that the remedy must fit the constitutional violation closely:

> [I]t must be shaped to place persons unconstitutionally denied an opportunity or advantage in 'the position they would have occupied in the absence of [discrimination].'. . .The constitutional violation in this case is the categorical exclusion of women from an extraordinary educational opportunity afforded men. A proper remedy for an unconstitutional exclusion . . . aims to 'eliminate [so far as possible] the discriminatory effects of the past' and to 'bar like discrimination in the future.'[85]

In electing to create a parallel program, Virginia chose to continue the practice held unconstitutional. For women it established a separate program vastly different from the program at VMI, unequal by both tangible and intangible indicators.[86] The Commonwealth was required, Justice Ginsburg insisted, to demonstrate that its remedy was '"directly address[ed] and relate[d] to' the violation,"[87] denying equal protection to those women seeking to benefit from a VMI-caliber education. Although Virginia described VWIL as a parallel program and insisted that its mission was consistent with VMI, Justice Ginsburg questioned whether VWIL could eliminate lingering effects of past discrimination and prevent future discrimination.[88] Comparing the inequalities between programs, she concluded that the parallel program could accomplish neither objective.[89]

Justice Ginsburg also took issue with Virginia's justification for these differences, particularly with respect to the implementing methodology - VWIL's use of a cooperative method rather than VMI's adversative method.[90] The Commonwealth maintained that the disparities were pedagogically justified, explaining that VWIL was tailored to meet the special needs of women.[91] These conclusions were based on expert opinion, Virginia maintained, rather than stereotypes.[92] Justice Ginsburg attacked reliance on stereotypical generalizations about both sexes, noting that "estimates of what is appropriate for *most women* no longer justify denying opportunity to women whose talent and capacity place them outside the average

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83 433 U.S. 267 (1977).

84 380 U.S. 145 (1965).

85 *Virginia*, 518 U.S. at 547 (alterations in the original) (citations omitted).

86 *Id.* at 549.

87 *Id.* at 547 (quoting Milliken v. Bradley, 433 U.S. 267, 282) (alteration in the original).

88 *Id.* at 548.

89 *Id.* at 551-56.

90 *Virginia*, 518 U.S. at 548.

91 *Id.* at 548-49.

92 *Id.* at 549.

description."[93]

Justice Ginsburg compared the facts of the instant case to those presented in *Sweatt v. Painter*,[94] challenging the constitutionality of an all-black law school established in order to preserve racially segregated education in Texas. The parallel program in *Sweatt*, like the parallel program here, was insufficient to remedy the constitutional violation.[95] Virginia, the Court concluded, failed to demonstrate an exceedingly persuasive justification for the sex-based classification; further, the proposed remedy of operating a parallel program for women failed to repair the violation.[96] Women deserved a VMI-caliber education and the Equal Protection Clause required Virginia to provide that opportunity.[97] The Court affirmed the Fourth Circuit's first decision finding a constitutional violation and reversed the Fourth Circuit's second decision approving the remedial plan.[98]

Chief Justice William Rehnquist wrote an opinion concurring in the judgment of the Court.[99] He directed the Court's attention to the series of gender-based equal protection cases from *Craig* to *Hogan* endorsing intermediate scrutiny as the applicable standard of review[100] and emphasized the Court's consistent adherence to that standard. However, he surmised that the test Justice Ginsburg professed to apply requiring Virginia to demonstrate an exceedingly persuasive justification for the classification departed from that tradition: "While the majority adheres to this test today . . . it also says that the Commonwealth must demonstrate an exceedingly persuasive justification to support the gender-based classification . . . . It is unfortunate that the Court thereby introduces an element of uncertainty respecting the appropriate test."[101]

Directly addressing the language Justice Ginsburg had borrowed from Justice O'Connor, which Justice Rehnquist did not comment on in dissent in *Hogan*, he insisted that it was "best confined, as it was first used, as an observation on the difficulty of meeting the applicable test, not as a formulation of the test itself."[102] To avoid confusion, the Chief Justice encouraged adherence to the conventional intermediate scrutiny test

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93 *Id.* at 550 (emphasis in original).

94 339 U.S. 629 (1950).

95 *Id.* at 635-36.

96 *Virgina*, 518 U.S. at 556.

97 *Id.* at 557.

98 *Id.* at 558.

99 *Id.* at 558-66.

100 *Id.* at 558-59. This standard requires the government to demonstrate that the classification bears a substantial relationship to an important governmental interest. *Id.*

101 *Virginia*, 518 U.S. at 559 (citations and internal quotation marks omitted).

102 *Id.*

articulated most recently in *Hogan*.[103] Without elaboration, he concluded that the majority had substantively modified the standard beyond that threshold.[104]

Justice Antonin Scalia filed a lengthy dissenting opinion.[105] Acknowledging the imprecision inherent in the three tiers of review, he admonished the Court not to exploit abstraction by riding roughshod over long-valued traditions of the kind VMI represented.[106] "The people," Justice Scalia observed, "may decide to change one tradition, like another, through democratic processes; but the assertion that... [this] tradition has been unconstitutional through the centuries is not law, but politics-smuggled-into-law."[107]

In Justice Scalia's judgment, "[i]t is only necessary to apply honestly the test the Court has been applying to sex-based classifications for the past two decades."[108] He made clear that the majority had erred in its disposition. Precedent unambiguously established that the appropriate test was that articulated most recently in *Hogan*.[109] Justice Scalia insisted that although Justice Ginsburg articulated the criteria comprising intermediate scrutiny, she did not apply that standard.[110] Rather, he maintained that, in effect, she had applied strict scrutiny.[111]

Justice Scalia, like the Chief Justice, was troubled by Justice Ginsburg's use of the phrase "exceedingly persuasive justification" in her analysis rather than reciting the elements comprising the test. Justice Scalia argued that:

> [o]nly the amorphous "exceedingly persuasive justification" phrase, and not the standard elaboration of intermediate scrutiny, can be made to yield this conclusion that VMI's single-sex composition is unconstitutional because there exist several women (or, one would have to conclude under the Court's reasoning, a single woman) willing and able to undertake VMI's program. Intermediate scrutiny has never required a least-restrictive means analysis, but only a 'substantial relation' between the classification and the state interest that it serves.[112]

Although precedent is unambiguous, beginning with *Reed*,[113] that a sex classification cannot punish individuals who deviate from the stereotype it

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103 *Id.*
104 *Id.* at 559-60.
105 *Id.* at 566-603.
106 *Virginia*, 518 U.S. at 566.
107 *Id.* at 569.
108 *Id.* at 570.
109 *Id.* at 571.
110 *Id.*
111 *Virginia*, 518 U.S. at 571.
112 *Id.* at 573.
113 404 U.S. 71 (1971).

perpetuated, Justice Scalia reinforced his objection: "The reasoning in our other intermediate scrutiny cases has . . . required only a substantial relationship between ends and means, not a perfect fit . . . . There is simply no support in our cases for the notion that a sex-based classification is invalid unless it related to characteristics that hold true in every instance."[114] In his view, the Commonwealth had satisfied the conventional intermediate scrutiny standard. That "*some* women"[115] would attend VMI and were deprived of that opportunity was an insufficient threshold. An impermissible sex-based classification, according to Justice Scalia, must deprive *all* women an opportunity.[116]

Justice Scalia emphasized the potential elasticity of the language in Justice Ginsburg's opinion. He referred to a footnoted comment explaining that "the Court has . . . '*thus far*' reserved strict scrutiny for [racial] . . . classifications,"[117] for example. Also attracting his attention was her statement that the Court had not treated sex classifications like race classifications "*for all purposes.*"[118] First, Justice Scalia insisted that Justice Ginsburg was wrong; the Court's consistent application of the middle tier of review indicated that it had rejected the application of strict scrutiny to sex classifications.[119] Second, he characterized Justice Ginsburg's comments as "irresponsible, insofar as they are calculated to destabilize current law."[120] In his view, this was unwarranted because it was well settled that the *Hogan* standard was the established standard for reviewing sex classifications.[121] However, he suggested that if the Court were going to unsettle the standard, the discussion should focus on lowering the standard of review rather than raising it.[122] He disputed the suggestion that the majority opinion was minimalist; rather, he insisted that the "rationale of today's decision is sweeping: for sex-based classifications, a redefinition of intermediate scrutiny that makes it indistinguishable from strict scrutiny."[123]

C. Analysis of Justice Ginsburg's Majority Opinion

1. Conventional Interpretation

A popular analysis among scholars focuses on the standard of review to determine the extent to which Justice Ginsburg may have modified the

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114 *Virginia*, 518 U.S. at 573-74.
115 *Id.* at 572 (emphasis in original).
116 *Id.*
117 *Id.* at 574 (emphasis in original).
118 *Id.* (emphasis in original).
119 *Virginia*, 518 U.S. at 574.
120 *Id.*
121 *Id.* at 575.
122 *Id.*
123 *Id.* at 596.

criteria.[124] Both Justice Rehnquist and Justice Scalia attacked Justice Ginsburg for using the phrase "exceedingly persuasive justification" as a means to modify the judicial test substantively.[125] Justice Rehnquist viewed the opinion as an esoteric complication of the conventional intermediate scrutiny standard.[126] Justice Scalia, however, interpreted Justice Ginsburg's opinion as a modification of the level of judicial inquiry to the equivalent of strict scrutiny.[127] These positions, along with the view that Justice Ginsburg left the standard of review undisturbed, depict the variance in opinion advanced by most scholars.[128]

With respect to the level of judicial inquiry, no aspect of Justice Ginsburg's articulation of the standard of review made its debut in *Virginia.* Moreover, the assertion that Justice Ginsburg's participation influenced interpretations departing from this position is perceptive.[129] It is particularly

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[124] *See infra* note 128.

[125] *Virginia,* 518 U.S. at 559, 573.

[126] *Id.* at 559.

[127] *Id.* at 573.

[128] *See, e.g.,* Steven A. Delchin, United States v. Virginia *and Our Evolving "Constitution:" Playing Peek-A-Boo with the Standard for Sex-Based Classifications,* 47 CASE W. RES. L. REV. 1121, 1152-55 (1997) (concluding that the standard articulated by Justice Ginsburg was the equivalent of strict scrutiny absent a formal declaration); *see also, e.g.,* David K. Bowsher, *Cracking the Code of* United States v. Virginia, 48 DUKE L.J. 305 (1998); Whitney Kelly, United States v. Virginia*: The United States Supreme Court Rules that the Virginia Military Institute's Male-Only Admissions Policy Violates the Equal Protection Clause of the Constitution,* 71 TUL. L. REV. 1375, 1386 (1997) (concluding that the standard articulated in VMI did not differ from the test articulated in *Hogan* and related cases); Carol Pressman, *The House that Ruth Built: Justice Ruth Bader Ginsburg, Gender, and Justice,* 14 N.Y.L. SCH. J. HUM. RTS. 311 (1998); *But cf.,* Christina Gleason, United States v. Virginia: *Skeptical Scrutiny and the Future of Gender Discrimination Law,* 70 ST. JOHN'S L. REV. 801, 809 (1996) (arguing that Justice Ginsburg's "skeptical scrutiny" was nonetheless an intermediate standard between rational basis and strict scrutiny; however, it was a new, more demanding middle tier of review); *see also, e.g.,* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999); Brent L. Caslin, *Gender Classifications and* United States v. Virginia: *Muddying the Waters of Equal Protection,* 24 PEPP. L. REV. 1353 (1997); Craig Daughtry, *Women and the Constitution: Where We Are at the End of the Century,* 75 N.Y.U. L. REV. 1 (2000); Elizabeth A. Douglas, United States v. Virginia: *Gender Scrutiny Under an Exceedingly Persuasive Justification Standard,* 26 CAP. U. L. REV. 173 (1997); Karen L. Kupetz, *Equal Benefits, Equal Burdens: Skeptical Scrutiny for Gender Classifications After* United States v. Virginia, 30 LOY. L. REV. 1333 (1997); 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 (1997); Stephanie K. Seymour, *Women as Constitutional Equals: The Burger Court's Overdue Evolution,* 33 TUL. L.J. 23 (1997); Jason M. Skaggs, *Justifying Gender-Based Affirmative Action Under* United States v. Virginia*'s "Exceedingly Persuasive Justification" Standard,* 86 CAL. L. REV. 1169 (1998); Scott M. Smiler, *Justice Ruth Bader Ginsburg and the Virginia Military Institute: A Culmination of Strategic Success,* 4 CARDOZO WOMEN'S L.J. 541 (1998); Collin O'Connor Udell, *Signaling a New Direction in Gender Classification Scrutiny:* United States v. Virginia, 29 CONN. L. REV. 521, 544, 554-55 (1996) (concluding that Justice Ginsburg had modified the conventional test beyond the middle tier; however, Justices Scalia and Rehnquist were unpersuaded that the new "skeptical scrutiny" standard was the equivalent of strict scrutiny. Instead, they maintained that Justice Ginsburg had crafted an intermediate-intermediate scrutiny position more demanding than traditional intermediate scrutiny but less rigorous than strict scrutiny; essentially, then, they view "skeptical scrutiny" as a new, fourth tier wedged in between conventional intermediate scrutiny and strict scrutiny).

[129] *See* Bowsher, *supra* note 128.

noteworthy in light of the absence of criticism leveled at Justice O'Connor's opinion in *Hogan*. It has been suggested that the *Hogan* Court interpreted Justice O'Connor's "exceedingly persuasive justification" phrase as shorthand for intermediate scrutiny.[130] The same conclusion can be drawn here. Rather than identifying the test by its hierarchical position or by the nature of the burden imposed, Justice Ginsburg provided a second shorthand designation for the middle tier of review with the "skeptical scrutiny" label.[131]

2. Alternative Interpretation

Rather than focus on the standard of review, however, there is another way to interpret Justice Ginsburg's opinion in *Virginia*. If there is no consensus that she clearly altered the standard of review, why have so many scholars distinguished *Virginia* from *Hogan*? The answer lies in Justice Ginsburg's analysis of the remedy: invocation of race discrimination cases as authority and her qualification that the Court, "*for all purposes*,"[132] had not treated sex classifications as it had race classifications are important signals.

Justice Ginsburg's adherence to the *Hogan* test was explicit and she recited the identical criteria in *Virginia*. Moreover, she specifically stated that the Court had not designated sex as suspect. Finding that the challenged sex-based classification failed intermediate ("skeptical") scrutiny, she relied on race discrimination cases and insisted that "substantive comparability" was an insufficient threshold to evaluate the proposed remedy.[133] The Constitution required equality consistent with *Sweatt* and *Milliken*. Although sex classifications have not been viewed with the suspicion reserved for race classifications "*for all purposes*,"[134] the Court has now established precedent for identical treatment with respect to the remedial requirement.

Justice Ginsburg's focus on the remedy is significant because she was

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[130] *See* Caslin, *supra* note 128.

[131] To the extent that Justice Ginsburg's emphasis on specific elements comprising that standard departs from rigid adherence to precedent (as Justice Scalia, for example, insists), it nevertheless fails to modify substantively the conventional test. Justice O'Connor, not Justice Ginsburg, laterally refined the middle tier in the *Hogan* opinion. By insisting that the defender of the classification provide an exceedingly persuasive justification met minimally by the traditional *Craig* criteria and applied without regard to stereotypes, Justice O'Connor effectively clarified the nature of the burden imposed on the defender of the classification. Justice Ginsburg closely followed Justice O'Connor's *Hogan* criteria. Justice Ginsburg's characterization of the nature of judicial inquiry as "skeptical scrutiny" provides perhaps a more appropriate representation of the existing middle tier: a sex-based classification will be subject to skeptical scrutiny review which requires the defender of the classification to demonstrate an exceedingly persuasive justification for it. That burden is satisfied by the traditional *Craig* criteria that the classification serves an important governmental interest and that the means employed bear a substantial relationship to the achievement of that goal.

[132] *Virginia*, 518 U.S. at 532.

[133] *Id.* at 555.

[134] *Id.* at 532 (emphasis in original).

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

The significance of Justice Ginsburg's opinion in *Virginia* is not disputed; rather, the Author's disagreement lies in the *nature* of its significance. The remedial requirement, not a modification of the level of judicial inquiry, is the central difference between the opinions in *Hogan* and *Virginia.* This may contribute to an explanation of Justice Rehnquist's and Justice Scalia's responses to Justice Ginsburg's opinion, and the scholarly criticism arguing that she modified the standard to something indistinguishable from strict scrutiny without explicit designation. Justice Ginsburg's "skeptical scrutiny" heightened review imposed the exceedingly persuasive justification burden that Justice O'Connor recited in *Hogan.* Justice Ginsburg's application of the substantive criteria required to meet that burden - that the classification bear at least a substantial relation to an important governmental interest - is also not her own invention. Justice Ginsburg's skeptical scrutiny designation, then, may represent more precisely the rigor of the judicial inquiry required by the conventional middle tier.

Justice Ginsburg distinguished sharply between applying criteria to determine the constitutionality of the classification and, once the classification failed review, fashioning an appropriate remedy. It bears repeating that her opinion was narrow; since the *Virginia* decision did not create sweeping precedent, direct application of her analysis may be rather limited. The opinion may have broader implications, however, with regard to fashioning a remedy in sex discrimination cases. The standard of which heightened level of review is applied to sex classifications may be less relevant if, in the remedy phase, there is effectively no difference between intermediate and strict scrutiny.

Hogan and *Virginia* are important decisions because they reinforce the middle tier as the level of scrutiny that the Supreme Bench continues to apply to sex discrimination claims. These decisions are also important because they reflect persistent disagreement among the justices as to the appropriate standard of review for sex classifications. The justices seem to agree, however, that this question remains unsettled. This suggests that the applicable level of scrutiny remains susceptible to modification - either ratcheted up to the most demanding standard, or reduced to the most

permissive test. The discord surrounding the appropriate standard bears out a prediction that Justice Ginsburg offered in an *amicus* brief submitted to the Supreme Court more than two decades ago. She cautioned that variance within the federal judiciary will persist until the High Court provides unequivocal guidance by designating sex as a suspect classification requiring the application of strict judicial scrutiny.[135]

VI. JUSTICE GINSBURG'S INCREMENTAL APPROACH TO THE ACHIEVEMENT OF GENDER EQUALITY

A. Justice Ginsburg's Conception of the Judicial Function

The equal protection jurisprudence consistently advanced by Justice Ginsburg for three decades reflects adherence to judicial restraint, minimalism, and incrementalism. Her adherence to these principles is apparent in the body of work analyzed in this article. The judicial philosophy endorsed therein is summarized next.

1. Scholar

Justice Ginsburg clearly recognized that the incremental extension of the most rigorous equal protection to gender classifications was primarily a function of the constitutional provision under which she ultimately endorsed litigation. Extending the Equal Protection Clause to sex classifications was heavily dependent upon sympathetic judicial interpretation. Cognizant of the fine line between constitutional interpretation and judicial legislation, Justice Ginsburg acknowledged that achieving success and extending the equal protection requirement to sex classifications required modest departure from judicial restraint. Progressing incrementally would foster interaction among the branches of government. This would allow the Court to function as a facilitator, gently guiding the political branches in a specific direction and allowing them to react, rather than imposing radical change immediately as the result of a sweeping judicial command.

This cooperative interaction among the branches, however, was absent from abortion litigation. Justice Ginsburg's critique of the High Court's rationale in *Roe v. Wade* also underscores her commitment to minimalism and incrementalism. She criticized the sweeping scope of that decision; in her view a more narrow series of decisions could have achieved the same result over time. Incrementalism would have allowed other elements of the political process to respond after each judicial decision, fostering cooperation among the branches. "Measured motions," she wrote in a 1992 law review article, "seem to me right, in the main, for constitutional . . .

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[135] *See* Brief of Amici Curiae of the American Civil Liberties Union et al. at 14, Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142 (1980) (No. 79-381).

adjudication. Doctrinal limbs too swiftly shaped, experience teaches, may prove unstable. The most prominent example in recent decades," she continued, "is *Roe v. Wade*."[136] A gradual approach, she speculated, might not have triggered the subsequent political backlash that has accompanied *Roe* and its progeny. Had the High Bench confined its decision to the facts presented in *Roe* and moved more cautiously and deliberately, Justice Ginsburg surmised that an improvident exercise of judicial activism provoking persistent conflict would have been avoided.[137]

2. Advocate

The litigation strategy Justice Ginsburg formulated typified incrementalism. Her selection of sex discrimination cases filed by men more clearly illustrated that sex-based classifications ostensibly advantaging one sex necessarily harmed the disadvantaged sex. Moreover, litigating discrimination claims disfavoring men made obvious to jurists the outdated, traditional stereotypes upon which arbitrary sex classifications were based.

Justice Ginsburg has consistently urged the adoption of strict judicial scrutiny for determining the constitutionality of gender-based classifications since 1971. However, she routinely bifurcated her argument; she also argued that the challenged classification failed to survive a less rigorous level of inquiry. Responding to signals from the Court that some justices endorsed application of strict scrutiny, albeit insufficient support for establishing precedent, Justice Ginsburg sought to capitalize on conditions favorable to achieving partial success. She persuaded the Court to apply a middle tier of review between rationality and strict scrutiny, which remains the standard of review employed by the Court today.

In presentation of oral argument Justice Ginsburg frequently recommended a minimalist remedy, urging the Court to invalidate only the challenged gender-based classification rather than the entire statute. This remedy repaired the defect in the statute via the least judicially intrusive action.

3. Jurist

Justice Ginsburg's endorsement of an interstitial judicial function is also evidenced by her testimony before the Senate Judiciary Committee preceding her 1993 confirmation to the High Court. Many senators sought clarification of her conception of the judicial function. Responding to a question from Republican Senator Charles Grassley of Iowa, Judge Ginsburg explained:

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[136] *Judicial Voice, supra* note 5, at 1198.
[137] *Id.*

> A judge is not a politician. A judge rules in accord with what the judge determines to be right. That means in the context of the particular case, based on the arguments the parties present, in accord with the applicable law and precedent. A judge must do that no matter what the home crowd wants, no matter how unpopular that decision is likely to be. If it is legally right, it is the decision that the judge should render.[138]

Her testimony inspired one journalist reporting on the confirmation process to characterize Justice Ginsburg as "something of a rare creature in the modern lexicon: a judicial-restraint liberal."[139]

Justice Ginsburg's judicial opinions also demonstrate her commitment to this conception of the judicial function. Her adherence to precedent and deference to discernible legislative intent are clear indicators of her endorsement of judicial restraint. Justice Ginsburg does not appear to be a result-oriented judicial activist generating sweeping judicial theory. Rather, she crafts narrow opinions and minimalist remedies endorsing limited judicial intervention in order to protect the exercise of fundamental rights. Her equal protection opinions also reflect her endorsement of the principle of judicial restraint, deferring to the political branches to modify still-evolving public policies without premature, counter-productive judicial intrusion. Justice Ginsburg's desire to balance often-competing interests (either the state versus the individual, or historically disfavored individuals versus historically favored individuals) is also reflected in the judicial opinions summarized in this article.

B. Justice Ginsburg's Contribution to Doctrinal Development

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

1. Scholar

Justice Ginsburg steadfastly advanced the view that individuals should not be confined to rigid, stereotypical notions about gender roles that limit individual potential. In doing so, it is noteworthy that she consistently endorsed the broader concept of gender equality rather than focusing exclusively on women's rights. She insisted that gender classifications were comparable to race classifications because both biological characteristics were visible and immutable. Moreover, race and sex were wholly unrelated to an individual's ability to perform and contribute to society.

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[138] *Nomination of Ruth Bader Ginsburg to be Associate Justice of the Supreme Court of the United States Before the Senate Judiciary Comm.*, 103d Cong. 125 (1993).

[139] Linda Greenhouse, *A Sense of Judicial Limits*, N.Y. TIMES, July 22, 1993, at A1.

2. Advocate

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

3. Jurist

Justice Ginsburg has had the opportunity to participate in one case presenting a gender-based equal protection question. Analyzed in detail in Part V, her majority opinion in *United States v. Virginia* is clearly significant, although the extent of its importance may not become fully apparent until the High Court hears another gender equality case. Justice Ginsburg applied the middle tier of review articulated most recently by O'Connor in *Hogan* and, concluding that the sex classification failed constitutional scrutiny, invoked race discrimination cases as authority in guiding the lower courts to fashion a constitutionally sufficient remedy.

As I have argued, Justice Ginsburg's reliance on race cases in tailoring a constitutionally sufficient remedy is significant. It may constitute an incremental step forward, perhaps signaling another development in gender equality doctrine. Although sex classifications have not been viewed with the suspicion reserved for race classifications, as Justice Ginsburg pointed out in her majority opinion, "*for all purposes*,"[140] the High Court has now established precedent for treating sex classifications like race classifications with respect to the remedy required to repair the equal protection violation. Perhaps Justice Ginsburg is laying precedential foundation for extending the most rigorous protection to sex even though the Court continues to apply the middle tier of review in such cases. If a sex-based classification fails intermediate ("skeptical") scrutiny, the remedy imposed may be of the demanding nature consistent with strict scrutiny. Thus, the formal designation of sex as a suspect classification may be of less importance because, in the remedy phase, the same rigor will be required.

Justice Ginsburg's sharp distinction between determining the constitutionality of the challenged sex classification and fashioning an adequate remedy in the *Virginia* is consistent with the tactic she employed as

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[140] *Virginia*, 518 U.S. at 532 (emphasis in original).

an advocate. She routinely recommended invalidating only the challenged sex classification rather than the entire statute. Her majority opinion in *Virginia*, effectively, produced the same result: elimination of the impermissible sex-based classification.

As scholar, advocate, and jurist Ruth Bader Ginsburg has championed the equality of all individuals without regard to gender and has made distinctive contributions to the development of equal protection doctrine. The majority opinion in *Virginia* constitutes the most recent step forward in the pursuit of gender equality orchestrated by Justice Ginsburg.