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Women as Supreme Court Advocates, 1879–1979

MARY L. CLARK*

I. Introduction

As 2004 marks the 125th anniversary of women's admission to the Supreme Court bar, this is a fitting occasion to reflect on women's experiences and achievements before the Court. Given that this is a *history* piece, this paper will focus principally on the first 100 years of women's advocacy before the Court, from 1879 to 1979.¹ In this 100-year period, women's membership in the Supreme Court bar grew from two or one or *no* women per year between 1879 and 1900 (at a time when men were joining at the rate of 250 to 350 per year)² to over 5 percent of new admittees by 1979. Today, women constitute 25 percent of the roughly 4,500 to 5,000 new admittees each year,³ but only 8 percent of the bar overall.

What you find in broad brushstroke in studying the history of women's advocacy before the Court is that, in the first several decades, women advocates were drawn principally from solo and small practices—typical of most attorneys of their day—and were not litigating women's rights claims before the Court. In the first half of the twentieth century, women advocates were drawn principally from government agencies at the local, state, and national levels, and, again, with few exceptions, were not litigating women's rights claims before the Court. In the 1960s and 1970s, a

growing number of women advocates were affiliated with civil-rights advocacy groups, explicitly involved in litigating sex- and race-discrimination cases before the Court. Finally, in the last twenty-five years, women advocates before the Court have been affiliated in roughly equal measure with government agencies, non-profit advocacy groups, and law-school faculties. Women presenting argument as members of the leading law firms remain extremely rare.⁴

After highlighting some of the most notable women advocates of the last century, I

Myra Bradwell was a successful Chicago entrepreneur who made a fortune publishing legal texts. Trained as a lawyer, she was refused admittance to the Illinois bar because of her sex. The Supreme Court upheld the state bar's refusal in 1873, but women were able to join most state bars by the end of the century.

conclude with thoughts on why it matters that women have appeared, and continue to appear, before the Court.

II. Women's Initial Entry Into the Legal Profession

Women first entered the legal profession in the United States immediately following the conclusion of the Civil War. Their numbers grew modestly but steadily through the turn of the century,⁵ despite the Supreme Court's 1873 decision in *Bradwell v. Illinois*,⁶ which rejected Myra Bradwell's claim that Illinois had violated the Fourteenth Amendment's Privileges and Immunities Clause when it refused her admission to its bar on the grounds of sex. In concurring in the judgment in *Bradwell*, Justice Bradley now famously (or infamously) declared:

Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which

belongs to the female sex evidently unfits it for many of the occupations of civil life.

Ultimately, he concluded:

The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.⁷

Even with the holding and rhetoric of *Bradwell*, women succeeded in joining most states' bars in the latter part of the nineteenth century, such that by 1900, there were one thousand women lawyers in the United States.

An increasing number of law schools began to admit women at this time,⁸ with women seeking—and gaining—access on the grounds that they were equal in their abilities to men and should therefore learn the law alongside men. By contrast, women gained admission to medical schools on the ground that women's inherently nurturing natures suited them especially well for the care of women and children, with many aspiring doctors attending all-women's medical schools.⁹ Largely because of the different ideologies shaping women's entry into the two professions, there were *seven* times as many women doctors as lawyers at the start of the twentieth century.¹⁰

III. Women First Admitted to the Supreme Court Bar

Belva Lockwood (1830–1917) had been a member of the District of Columbia bar for three years when she first applied for membership in the Supreme Court bar in 1876. At that time, as now, an applicant for the Court's bar was required to “demonstrate a minimum of three years' membership in good standing in the bar of her state's highest court, and to have her application sponsored by a current member of the Supreme Court bar. If her application was approved, admission [was] . . . moved and granted in open court. It was not until the 1970s that applications for admission to the Supreme Court bar [could be] processed by

Belva Lockwood lobbied Congress hard to petition for women to be admitted to the Supreme Court bar. Part of her strategy included addressing Senators she didn't know "as though they were old familiar friends."

mail."¹¹ Once admitted, attorneys could file briefs and present argument, but most, then as now, joined the bar principally for its symbolic value.

Chief Justice Morrison Waite authored the order denying Lockwood's application, which declared:

By the uniform practice of the court, from its organization to the present time . . . none but men are admitted to practise [sic] before it as attorneys and counsellors. This is in accordance with immemorial usage in England, and the law and practice in all the States until within a recent period. . . .¹²

Not easily defeated, Lockwood lobbied Congress to amend the Court's bar admission rules to include women. Her petition to Congress read as follows:

[Y]our petitioner has been debarred from admission . . . on the ground that she is *a woman*, and that fact has

been largely published over the country much to the detriment of her law practice upon which your petitioner and her family are dependant [sic] for support.

Wherefore your petitioner prays your Honorable Body for the passage of an Act enabling her or any other woman similarly situated to be admitted to the said . . . Court on the same terms as men. . . .¹³

Lockwood proved to be a tenacious lobbyist. "Nothing was too daring for me to attempt," she later confessed. Among other things, she addressed senators she didn't know "as though they were old familiar friends."¹⁴

After three years of Lockwood's lobbying, Congress enacted an "Act to Relieve Certain Legal Disabilities of Women," providing for women's membership in the Supreme Court bar.¹⁵ Successfully reapplying for admission in 1879, Lockwood became the first woman to join the Court's bar. Albert Riddle, a white professor at Howard Law School, moved her application.¹⁶ A year later, Lockwood moved the admission of Samuel Lowery of Huntsville, Alabama, the first Southern black to be admitted to the Court's bar.¹⁷

Once the Court's doors were pried open, women began to sponsor one another's membership in the bar as a type of old-girls' network. The movants included the Pier family of lawyers—a mother and three daughters—who were without peer in sponsoring one another's Supreme Court bar membership in the 1890s.¹⁸ "These [earliest women] members were well known to one another. They worked together in the woman suffrage movement . . . and corresponded with one another about personal and professional issues."¹⁹ Addressing one another as "Sisters in Law," they grappled with issues of what to call themselves—"Lady Lawyers" or just plain "Lawyers," of how to manage competing demands of work and family, and even of what to wear as professional women. Whether to wear one's hat in court was an issue of no small concern for the earliest women

IN U. S.—ADMISSION TO THE UNITED STATES SUPREME COURT OF THE FIRST COLORED LAWYER, AT WASHINGTON, FEB. 26. FROM SKETCHES BY OUR SPECIAL ARTIST.—SEE PAGE 27.

A year after she herself was permitted to become a member of the Supreme Court bar in 1879, Lockwood (left) moved the admission of Samuel Lowry of Huntsville, Alabama. Lowry (second from left) became the first Southern black admitted to the Supreme Court bar.

lawyers. A well-dressed, modest woman of that day wore a hat whenever in public. At the same time, a lawyer was expected to take his hat off in court. Demands of modesty prevailed over those of professional custom, and women's hats remained on in court.

Despite what I would now call a widely held "feminist consciousness" among these first women (though the term "feminist" was first used only decades later),²⁰ only one of the first women Supreme Court bar members litigated a women's rights claim before the Court.²¹ This again was Lockwood, who brought an original action in the Court on behalf of herself and all other similarly situated women who were denied membership in the Virginia state bar on the ground of sex.

By contrast, the handful of earliest women members who actually appeared before the Court did so in disputes concerning wills, property, and contracts, typical of the solo or

small law offices in which they practiced. And, given men's greater participation in business and property holding at this time, it is not surprising to learn that these women advocates represented male clients more often than they did female.

IV. Belva Lockwood, the First Woman to Argue Before the Court

Belva Lockwood was the first woman to argue before the Supreme Court,²² doing so in 1880, the year following her admission to the bar. There, in the case of *Kaiser v. Stickney*,²³ Lockwood sought to use married women's legally disadvantaged status to benefit her clients, a married couple who sought to disavow the wife's transfer of property to a third party.²⁴ Though Lockwood opposed restrictions on married women's property rights as a matter of principle, she nevertheless invoked

traditional understandings of the limited nature of married women's dominion over property in pressing her clients' case. The Court rejected Lockwood's argument on factual grounds, finding that the property transfer was valid because it had been executed by both husband and wife.²⁵

After running for President on the Equal Rights party ticket in the 1880s, Lockwood petitioned the Supreme Court in 1894 to direct the state of Virginia to admit her to its bar, from which she had been excluded on the basis of sex. In relying on *Bradwell* to reject Lockwood's petition, the Court concluded that Virginia had not violated the Fourteenth Amendment's Privileges and Immunities Clause by interpreting the word "persons" to mean "male," and not "male *and female* persons," in defining who was eligible for its bar.²⁶

Lockwood's next, last, and most famous argument was on behalf of the Eastern Cherokee Indian Nation, heard for two days in 1906.²⁷ There, "the Supreme Court affirmed [a lower court] judgment, awarding over a million dollars with interest against the United States" as reparations for its forced relocation of the Cherokees.²⁸

V. Highlights of Some of the Most Notable Women to Appear Before the Court in the Century Following Lockwood

In the first decades of the twentieth century, when there was one woman attorney for every 5,000 to 10,000 lawyers in the United States, a couple of dozen women filed certiorari petitions and/or merits briefs in the Supreme Court, mostly appearing on behalf of local, state, or federal governments. As with the earliest women advocates, essentially no one in this second wave litigated cases directly framing women's rights issues before the Court.²⁹

Annette Abbott Adams (1877–1956)

Annette Abbott Adams graduated from Boalt Hall Law School in 1912, the only woman in

her class. Thereafter, Adams trained with a voice instructor to lower her voice in order to promote her career prospects.³⁰ In 1914, she appeared at trial against John Preston, the U.S. attorney for the Northern District of California. Adams is said to have so impressed Preston that he hired her as one of his assistant U.S. attorneys, making her the first woman to serve in that position. When Preston was called to Washington to serve as assistant attorney general in 1918, Adams was named to fill his vacancy as U.S. attorney, the first woman to hold that post and the only one to do so until the Carter administration.

In 1920, Adams herself was called to Washington to serve as an assistant attorney general, where her primary responsibility was enforcing Prohibition. She was again the first woman to hold this office. Adams was named to this post shortly after the 1919 ratification of the Eighteenth Amendment,³¹ prohibiting commerce in liquor, and the 1920 ratification of the Nineteenth Amendment, guaranteeing women the right to vote. Some ascribe the President's choice of Adams to an effort to "woo" the new women voters (and thus an early manifestation of concern for the gender gap in voting).³²

Though she was in office for slightly under a year, Adams argued five Supreme Court cases, losing only one. Three of the cases involved Prohibition, one railroad safety, and the other tax forfeitures. In each case, Adams was the only woman to appear on brief or at argument.³³

Mabel Walker Willebrandt (1889–1963)

Earning the moniker "Prohibition Portia," Mabel Walker Willebrandt oversaw the federal government's enforcement of Prohibition, along with tax and insurance-law matters, as Adams' successor between 1921 and 1929. In interviewing Willebrandt for this post, President Warren Harding noted that the only thing against her was her age (32), a condition,

As an assistant attorney general in the 1920s, Mabel Willebrandt gained national fame for vigorously enforcing the Prohibition Act. She argued frequently before the Supreme Court but struggled during oral arguments to understand the Justices, as she was losing her hearing.

Willebrandt assured him, that would go away with time.³⁴

Willebrandt participated in more than 270 cases at the certiorari stage³⁵ and twenty-two cases at the merits stage during her eight years with the Justice Department, presenting oral argument in at least ten cases, including four that were argued in the same month.³⁶ In each case, Willebrandt was the only woman to appear on brief or at argument.

The vast majority of cases in which Willebrandt participated related to Prohibition. While Willebrandt, like Adams, had not been a prohibitionist before coming to Washington, she “was determined to uphold the law”³⁷ once in office. Among her Supreme Court cases was one defending against a challenge to the Prohibition Act as unconstitutionally discriminating between malt liquor and “spiritous and vinuous liquors” by allowing doctors to continue prescribing wine and spirits for medicinal pur-

poses, but not beer.³⁸ The Court ruled with the government in that case.

The Associated Press called Willebrandt “the most famous woman attorney during the first half of the twentieth century.”³⁹ One of her biographers went even further, calling Willebrandt the most famous American woman of her time.⁴⁰ In eulogizing her, Willebrandt’s friend and former law partner, Judge John Sirica, declared, “If Mabel had worn trousers, she could have been President.”⁴¹

Nevertheless, Willebrandt’s time in office was a difficult one, for, among other things, she was losing her hearing.⁴² In writing to her mother the night before arguing a case in the 1923 Term, Willebrandt confessed, “Each time it’s such a struggle not to be terrified over my ears. [The Justices] talk so low.”⁴³

Though Willebrandt actively campaigned for Hoover in 1928, she was forced out of office following his 1929 inauguration—some

Susan Brandeis (right) is the only daughter of a sitting Justice to have argued before the Court. Justice Brandeis recused himself from argument and decision in the 1925 case and urged his daughter to “raise [her] professional performance as high as [her] abilities and hard work would make possible.”

say because she was too outspoken a figure in enforcing Prohibition.⁴⁴ Willebrandt’s hoped-for federal judgeship, as reward for her government service, was dashed on the same shores.⁴⁵

Susan Brandeis (1893–1975)

To date, the only daughter of a sitting Justice to argue before the Court⁴⁶ is Susan Brandeis, daughter of Associate Justice Louis Brandeis.⁴⁷ Justice Brandeis recused himself from argument and decision in the 1925 case of *Margolin v. United States*,⁴⁸ involving a challenge to a federal statute prohibiting attorneys from charging more than \$3 for work in preparing a veteran’s benefits claim.

The novelty of Brandeis’ argument won front-page attention in the *New York Times*, which announced, “Brandeis’s Daughter in Supreme Court Today to Argue New York War Insurance Fee Case.”⁴⁹ As Frank Gilbert, son of Susan Brandeis, recounts, after the argument:

Grandfather [Justice Brandeis] wrote mother [Advocate Brandeis] who was then thirty-two:

“You are certainly getting fine publicity and fruits will come later if you will raise your professional performance as high as your abilities and hard work would make possible.

Lovingly, Father.”⁵⁰

A unanimous Court rejected Brandeis' argument and upheld the attorney-fee limitation.

1940s and 1950s

As with many fields of endeavor, women's opportunities in the legal profession expanded during World War II, only to contract with men's return from war and the postwar emphasis on stability, security, and domesticity. It was during the war, for example, that the first female Supreme Court law clerk, Lucille Lomen, was hired, by Justice William O. Douglas in 1944. It would be another twenty-two years before the next woman law clerk was hired,⁵¹ and another fifteen or so years beyond that before there was anything resembling a critical mass of women serving as Supreme Court clerks. How the service of women law clerks affected the Justices' receptivity to women advocates can only be guessed,⁵² and becomes a factor only at the very tail end of the period under consideration here, if at all.⁵³

Despite women's service on many fronts during the war, the Court upheld a state law prohibiting women from serving as bartenders shortly after the war's conclusion. This was the case of *Goesaert v. Cleary*,⁵⁴ in which a woman, Anne Davidow, argued on behalf of the plaintiffs in the Supreme Court. In its opinion rejecting the women's claims, the Court made light of the idea of women tending bar, replete with references to Shakespeare's alewife.⁵⁵

Women pursuing legal careers in the postwar era spoke of being out of step with the dominant cultural expectations of the time—for women to marry young, bear children, and stay home. Indeed, as late as 1961, the Supreme Court relied on an understanding of women as the "center of home and family life" to uphold a Florida law excluding women from service as jurors unless they specially registered their interest in advance.⁵⁶ Gwendolyn Hoyt, who had been convicted of murdering her husband by an all-male jury, argued on appeal to the Court that a jury that included some women might have

responded more sympathetically to her evidence of ongoing abuse by her husband. *Hoyt* was briefed by two women—Raya Dreben for petitioner and Dorothy Kenyon for the ACLU as *amicus* in support of petitioner⁵⁷—but argued by men.

In spite of a postwar environment that discouraged the interests and ambitions of professional women, a small number were active in the Supreme Court at this time, two of whom are highlighted below.

Bessie Margolin (1909–1996). As an attorney with the Labor Department in the 1940s, 1950s, and 1960s, Bessie Margolin "rose to become assistant solicitor in charge of Supreme Court litigation" and associate solicitor for Fair Labor Standards.⁵⁸ Margolin participated in dozens of Supreme Court cases while at the Labor Department,⁵⁹ where she was *the* expert on the Fair Labor Standards Act (FLSA), the federal law regulating wages and hours of work,⁶⁰ and most of her Court arguments involved interpreting the FLSA.⁶¹

Unlike Adams and Willebrandt, who were the only women on either side of their cases, Margolin was accompanied on brief by other women attorneys with the Labor Department.⁶² As with Adams and Willebrandt, however, Margolin's cases by and large did not present women's rights issues. In reflecting on Margolin's ability as an advocate, Justice William O. Douglas observed, "She was crisp in her speech and penetrating in her analyses, reducing complex factual situations to simple, orderly problems."⁶³

Beatrice Rosenberg (1908–1989). Appearing at approximately the same time as Margolin, Beatrice Rosenberg is said to hold the women's record for presenting argument in the Court—thirty cases in as many years.⁶⁴ By contrast, the record for men in the twentieth century "belongs to Deputy Solicitor General Lawrence Wallace, who has argued more than 150 cases" in the Supreme Court.⁶⁵

A career attorney with the Justice Department's Criminal Division between 1943 and 1972, Rosenberg rose through the ranks to the position of chief of criminal appeals, where she was recognized for her expertise on search-and-seizure law.⁶⁶ Among the cases Rosenberg participated in before the Court were *Abbott Labs v. Gardner*,⁶⁷ holding pre-enforcement review of regulations issued by the Secretary of Health, Education, and Welfare not prohibited by the Food, Drug, and Cosmetics Act; and *Welsh v. United States*,⁶⁸ reversing Welsh's conviction for draft evasion on the grounds that his nontheistic conscientious objection was held with "the strength of more traditional religious convictions."

One colleague described Rosenberg's oral advocacy style as spellbinding, "[She] was a very powerful woman . . . I was awe-struck by [her]."⁶⁹ Justice Douglas, in *The Court Years*, included Rosenberg on a short list of Justice Department attorneys who, in his estimation, "made more enduring contributions to the art of advocacy before us than most of the 'big-name' lawyers."⁷⁰

Women Appointed to Represent Pro Se Parties in the Supreme Court. During the period in which Margolin and Rosenberg were appearing regularly, the Court appointed its first woman to represent the interests of a *pro se* party before it.⁷¹ This was Helen Washington, a tax attorney at the Justice Department, who was appointed in 1959.⁷² Dean Acheson, considered to be the first man to serve in this capacity, had been named more than twenty-five years earlier.⁷³

1960s and 1970s

Two of the most prominent Supreme Court advocates of all time appeared on behalf of civil rights advocacy groups in the 1960s and 1970s: Constance Baker Motley, of the National Association for the Advancement of Colored People (NAACP) Legal Defense Fund (LDF); and Justice Ruth Bader Ginsburg, of the

American Civil Liberties Union's (ACLU) Women's Rights Project.

Constance Baker Motley (1921–present). Constance Baker Motley argued ten race-discrimination cases before the Court in the early 1960s, winning nine of them.⁷⁴ The one case she lost was subsequently overturned. This was the case of *Swain v. Alabama*,⁷⁵ upholding the use of race-based peremptory challenges in jury selection, which the Court would later reject in *Batson v. Kentucky*.⁷⁶

Having joined the Inc. Fund immediately after graduating from Columbia Law School, in 1946, Motley participated in the Supreme Court briefing of all of the major race-discrimination cases of her time.⁷⁷ When Thurgood Marshall left the Inc. Fund for a federal appellate judgeship in 1961,⁷⁸ Motley and colleague Jack Greenberg took over the LDF's Supreme Court arguments.⁷⁹ The cases in which Motley argued fell into three broad categories: sit-ins, criminal procedure, and desegregation of public services.⁸⁰ Motley argued a total of five sit-in cases before the Court, prevailing in each of them, despite having to argue two on one day in the fall of 1962⁸¹ and two on another day in the fall of 1963.⁸² Back-to-back argumentation was nothing new for Motley, who once argued four appeals on the same day in the Fifth Circuit.⁸³

During Motley's argument in *Hamilton v. Alabama*,⁸⁴ establishing the right to counsel at arraignment in capital cases, Motley observed, "[Justice] Douglas seemed to pay no attention. He appeared to be writing letters and doing other work, as usual." "Apparently [he] was paying attention," she later recognized, because he wrote the opinion for a unanimous Court reversing Hamilton's conviction. Indeed, Douglas "place[d] [Motley] in the top ten of any group of advocates at the appellate level in this country,"⁸⁵ comparing her to Charles Hamilton Houston, "the highest compliment I have ever received," said Motley.⁸⁶

National Association for the Advancement of Colored People lawyer Constance Baker Motley was photographed in 1962 when she and her colleague Jack Greenberg (right) represented James Meredith (center) in his segregation case against the University of Mississippi. Motley worked with Thurgood Marshall on *Brown v. Board of Education* and other landmark litigation that desegregated schools and Southern universities.

When President Johnson invited Motley to the White House to announce his intention of naming her to the U.S. District Court for the Southern District of New York in 1966, thus making her the first African American woman nominated for a federal judgeship, Johnson told Motley that Attorney General Ramsey Clark “was the first person to bring [Motley] to his attention,” doing so on the strength of her Supreme Court arguments.⁸⁷

Ruth Bader Ginsburg (1933–present). It goes almost without saying that Justice Ruth Bader Ginsburg briefed and argued the leading women’s rights cases of the 1970s as co-founding director of the ACLU’s Women’s Rights Project.⁸⁸ The rulings that resulted from the Project’s litigation campaign represented no less than a revolution in women’s le-

gal status, overturning a century of Supreme Court precedent that had tolerated—indeed, embraced—differential treatment of women and men.⁸⁹

When the Project was formed in 1972,⁹⁰ Ginsburg had just recently joined Columbia Law School as its first tenured female faculty member and had worked out an arrangement whereby she could devote half her time to the Project. In many ways, Ginsburg and the Project followed the step-by-step approach modeled by Marshall, Motley, and the NAACP LDF in their pathbreaking litigation for racial justice. The Project’s litigation agenda was grounded in formal equality principles, maintaining that similarly situated men and women should be treated the same under the law. This may seem an unsurprising principle now, but it was by no means widely accepted at that

time. In looking back on this period, Ginsburg has observed, “In one sense, our mission in the 1970s was easy: the targets were well defined. There was nothing subtle about the way things were. Statute books in the States and Nation were riddled with what we then called sex-based differentials.”⁹¹

While Ginsburg defined the mission as “easy” in one sense, one of the biggest challenges she and the Project faced was how to persuade the Court that sex-based differentials, long viewed as benign and even beneficial to women, were instead deeply harmful—to men as well as women. Ginsburg later noted:

Our mission was to educate . . . decisionmakers in the nation’s legislatures and courts. We tried to convey to them that something was wrong with their perception of the world. We sought to spark judges’ and lawmakers’ understanding that their own daughters and granddaughters could be disadvantaged by the way things were.⁹²

In furtherance of its equality goals, the Project participated as party representative or friend of the Court in a number of cases demonstrating the ill effects of sex stereotyping on men as well as women, as in the case of *Weinberger v. Wiesenfeld*.⁹³ There, the Project represented Stephen Wiesenfeld in his efforts to obtain surviving spouse benefits to care for his infant son, where his wife had died in childbirth and the governing Social Security Act provision extended benefits only to surviving wives, on the compound assumption that mothers—and *not* fathers—were involved in the daily care of their children and that fathers—and *not* mothers—were their families’ breadwinners.⁹⁴ The Court adopted the Project’s argument that such distinctions violated the Fifth Amendment’s Due Process Clause and struck down the provision.

Between 1971 and 1979, Ginsburg filed merits briefs on behalf of parties in a total of nine cases,⁹⁵ arguing six.⁹⁶ In nearly all of the

cases, Melvin Wulf, the ACLU’s legal director, joined Ginsburg on the brief. Also joining them on the briefs were a number of women attorneys with the Project, including Brenda Feigen Fasteau, Kathleen Peratis, and Susan Deller Ross.⁹⁷ In addition to its party representation, the Project submitted *amicus* briefs in fifteen other cases raising sex discrimination questions before the Court.⁹⁸ Ginsburg did all this while pressing for legislative reform,⁹⁹ engaging in public education on the issues,¹⁰⁰ teaching law at Columbia, co-authoring one of the first casebooks on sex discrimination law,¹⁰¹ and raising two children. Reflecting on this period, Ginsburg exclaimed, “It was wonderful, it was really exhilarating . . . but we were always tired.”¹⁰²

The impact of the Project’s litigation campaign cannot be overstated. In the words of former Boalt Hall Dean Herma Hill Kay:

Quite literally, it was [Ginsburg’s] voice, raised in oral argument and reflected in the drafting of briefs, that shattered old stereotypes and opened new opportunities for both sexes. She built, and persuaded the Court to adopt, a new constitutional framework for analyzing the achievement of equality for women and men. In doing so, Ginsburg in large part created the intellectual foundations of the present law of sex discrimination.¹⁰³

Following the Project’s overwhelming success, there was a significant rise in *amicus* participation in the Court by other women’s rights advocacy groups, including the National Organization for Women, the Women’s Legal Defense Fund, and the National Women’s Law Center.

Harriet Sturtevant Shapiro. (1928-present)¹⁰⁴ The history of women’s first 100 years as Supreme Court advocates would not be complete without highlighting the career of the first woman member of the Solicitor General’s Office, Harriet Shapiro, who was hired by then—Solicitor General Erwin Griswold

"It was really exhilarating...but we were always tired," recalled Justice Ginsburg (center) about her time litigating at the Women's Rights Project in the 1970s. Her son James and nephew David (below with Ginsburg, left to right) attended her 1979 argument in *Duren v. Missouri* challenging a law that allowed women—but not men—to opt out of jury service to attend to their home and family.

in 1972. Over the course of the next twenty-nine years with the Solicitor General's Office,¹⁰⁵ Shapiro briefed seventy-two cases and argued seventeen,¹⁰⁶ a record passed only recently by Beth Brinkmann, who argued nineteen cases for the Office between 1994 and 2001.¹⁰⁷

Shapiro was not, however, the first woman from the Solicitor General's Office to argue before the Court. That distinction belongs to Jewel LaFontant,¹⁰⁸ a political appointee, who preceded Shapiro in presenting argument in the Court's 1972 Term.

I began this article by addressing the problem of the hat for early women lawyers, and I would like to conclude by highlighting the problem of the morning coat for women in the Solicitor General's Office. The charcoal-gray morning coat has been, and continues to be, the standard uniform worn by male members of the Solicitor General's Office when appearing before the Court.¹⁰⁹ What were women in the Solicitor General's Office to do with this

uniform? Some custom-designed skirt suits resembling morning coats, while others opted for other somber-colored suits. The retention of the morning-coat tradition marks women advocates as different from the norm, as "nonuniform," as had the hat of an earlier era.

VI. Why Does It Matter That Women Have Served—and Continue to Serve—as Supreme Court Advocates?

In considering the question of "why it matters" that women have served as advocates before the Court, I have developed a number of hypotheses, which are neither mutually exclusive nor exhaustive of potential explanations for the significance of women's participation in the Court.

1. Equality/nondiscrimination

This hypothesis suggests that women's participation as Supreme Court advocates is

important, regardless of its impact on case outcomes, because we as a society value equality of opportunity and freedom from discrimination in gaining access to professional experiences of this nature.

2. Legitimacy/representativeness

This hypothesis posits that having women participate in the Supreme Court process promotes public trust and confidence that justice will be served. Women's participation furthers the perceived legitimacy of the judicial process as a more inclusive and representative system.

3. Insider/outsider

Borrowing from the political-science literature, this hypothesis asserts that it is important to have "insiders" operating within the system who can advocate "outsider" perspectives for those who do not otherwise have access to or influence over decisionmakers. This hypothesis applies with particular force to advocacy before the Supreme Court, where some repeat players take on the mantle of "insiders," gaining credibility in front of and trust from the Justices, which they can then use to benefit "outsiders"—who have historically included women.

4. Educational/inspirational

This hypothesis recognizes that women's participation at the highest levels of the profession is important for shattering stereotypes and modeling possibilities of women's achievements in the law for present and future generations.

5. Difference

This hypothesis anticipates that different styles of argumentation, ideology, and/or outcomes can be associated with women's Supreme Court advocacy. Whether premised on biology, biography, or both, there is less evidence of women modeling a different style of advocacy and more of women bringing a different set of issues to the table, changing the

agenda and thereby changing the shape of the law through their participation. In this regard, there has been a notable increase in the number of cases brought before the Court raising concerns of particular interest to women as the number of women advocates has grown. I think here of cases related to employment discrimination, violence against women, sexual harassment, family-leave rights, affirmative action, and gay rights, to name but a few.

* * *

In the end, arguing before the Supreme Court connotes being the ultimate lawyer, the ultimate gentleman, and even the ultimate warrior, given that military references are not infrequent in the Supreme Court practice literature.¹¹⁰ The importance of advocacy in this forum for making a mark on history cannot be overestimated, where the greats have shaped the law, as well as the public's and the profession's understanding of what it means to be a lawyer. In a profession inextricably linked in the public's mind with authority, the exercise of that authority by women at the highest level is a powerfully symbolic act.

And in those cases in which women have presented argument on issues of particular concern to women, the effect of women's participation is that much more profound. No longer must women ask men to plead their interests. Instead, they are empowered to state their own cases, and in so doing, further empower themselves.

*Special thanks to Dean Claudio Grossman for supporting the research that enabled this talk, and to my assistants, Erin Shute, Amy Jiron, Christina Vitale, and Emily Gallas, for their wonderful work.

ENDNOTES

¹An earlier article examined the experiences of the first twenty women members of the Supreme Court bar, who joined between 1879—the year the Court's rules were changed to provide for women's admission—and 1900.

Mary L. Clark, "The First Women Members of the Supreme Court Bar, 1879–1900," 36 *San Diego L. Rev.* 87 (1999).

²In the 1883 Term, for example, there were 279 new admittees—and no women. *Id.* at 93 (citing Supreme Court Attorney Rolls, Vol. 3 [1870 Term–1883 Term] [on file with the National Archives]). In the 1889 Term, there were 322 new admittees, including five women. *Id.* (citing Supreme Court Attorney Rolls, Vol. 4 [1884 Term–1897 Term] [on file with the National Archives]).

³Clare Cushman, "Women Advocates Before the Supreme Court" 26 *J. of S. Ct. Hist.* 67, 79 (2001). While 230,000 attorneys have joined the Court's bar since its creation, women number only in the several thousand. **The Supreme Court A to Z** (Congr. Quarterly 1998) at 40.

⁴Assistant to the Solicitor General Harriet Shapiro, whose own career is highlighted below, remarked on this phenomenon in an interview with the *Washington Post*, suggesting, "Maybe one of the reasons women don't do it as much is because [the opportunity] goes to the biggest name in the firm...or the person who has the most clout in the office." Joan Biskupic, "Women Are Still Not Well-Represented Among Lawyers Facing Supreme Test; Despite Gains for Female Advocates, High Court Is Largely a Man's Venue," *Washington Post*, May 27, 1997, at A03.

⁵See Mary L. Clark, "The Founding of the Washington College of Law: The First Law School Established By Women for Women," 47 *Am. U. L. Rev.* 613, 618 n. 27, 621 n. 42, 622 n. 45, 634 n. 149 (1998) (recounting early history of women in legal education and the profession). Some of the early "firsts" for women in the legal profession include:

- Arabella Mansfield, who in 1869 became the first woman admitted to any state's bar when she successfully read for the Iowa bar;
- Washington University Law School in St. Louis, Missouri, which in 1870 became the first law school to open its doors to women;
- Ada Kepley, who graduated from the Union College of Law in Chicago in 1871, becoming the first woman to graduate from any law school; and
- Charlotte Ray, who became the first African-American woman to join a state's bar when she became the first woman member of the D.C. bar in 1872.

⁶*Bradwell v. Illinois*, 83 U.S. 130, 139 (1873).

⁷*Id.* at 141 (Bradley, J., concurring).

⁸Some law schools admitted women from the time of their founding—for example, Howard Law School (in 1869) and the University of Michigan Law School (in 1870). Others did so by amending their original male-only admission policies to include women—for example, New York University Law School, in 1890. Nevertheless, most aspiring lawyers entered the profession at this time, not

by graduating from law school, but by apprenticing in the office of an established bar member. The apprenticeship model was a significant hurdle for women to overcome, because few attorneys were willing to take a women-trainee into their practices. Those women who found apprenticeships often did so in the law offices of their husbands or fathers.

⁹Clark, *supra* note 1, at 116. See also Virginia G. Drachman, "My 'Partner' in Law and Life: Marriage in the Lives of Women Lawyers in Late 19th- and Early 20th-Century America," 14 *Law & Soc. Inquiry* 221, 228–30 (1989) (noting, "Set against women's entry into medicine, the entrance of women into the legal profession was decidedly modest. In the second half of the 19th century, 14 regular all-women's medical schools opened to provide women with the medical education unavailable to them at the male-run medical schools. By 1880, there were more than 2,400 women doctors, representing 2.8 percent of the physicians in the United States, and by 1900, their numbers had risen to more than 7,000 and they made up 5.6 percent of the doctors nationwide.").

¹⁰There were 7,000 women doctors at the turn of the century, as compared with 1,000 women lawyers. Drachman, *supra* note 10, at 228–30.

¹¹Clark, *supra* note 1, at 3 (citing McGuire, *supra* note 4, at 135). Today, approximately, two-thirds of new admissions are done by mail. **Supreme Court A to Z**, *supra* note 3, at 41.

¹²The Order went on to note, "[T]he Court does not feel called upon to make a change, until such a change is required by statute, or a more extended practice in the highest courts of the States." Order of November 6, 1876, in *Summary of Events*, 11 *Am. L. Rev.* 1876–1877, at 367 (Moorfield Storey and Samuel Hoar, eds., 1877).

¹³From Lockwood's original petition to Congress, on file with the Congressional Records Division of the National Archives. Emphasis in original.

¹⁴Jill Norgren, "Before It Was Merely Difficult: Belva Lockwood's Life in Law and Politics," 24 *J. of S. Ct. Hist.* 16 (1999). Myra Bradwell's *Chicago Legal News* gave extensive coverage to Lockwood's efforts to join the Supreme Court bar. See, e.g., "Women's Right to Practice in the U.S. Courts," *Chi. Legal News* 169 (Feb. 10, 1877) (reporting introduction in House of Representatives of "Bill to Relieve the Legal Disabilities of Women"); "Women as Lawyers," *Chi. Legal News* 271–72 (May 11, 1878) (reporting House debate on bill); see also "Summary of Events," 12 *Am. L. Rev.*, 1877–1878, at 391 (Samuel Hoar and Moorfield Storey eds., 1878) (reporting introduction in House of bill "providing that women should be admitted on the same terms as men to practise [sic] in all the Federal courts.").

¹⁵"An Act to Relieve Certain Legal Disabilities of Women," 20 *Stat.* 292 (1879) (providing "[t]hat any

woman who shall have been a member of the bar of the highest court of any State . . . for the space of three years, and who shall have maintained a good standing before such court, and who shall be a person of good moral character, shall, on motion, and the production of such record, be admitted to practice before the Supreme Court of the United States.”)

¹⁶J. Clay Smith, Jr., **Emancipation: The Making of the Black Lawyer 1844–1944** (1993) at 85 n. 224.

¹⁷Clark, *supra* note 1, at 92.

¹⁸The single biggest proponent of the old-girls’ network was Ellen Spencer Mussey, founding Dean of the Washington College of Law, the first law school established by women and for women, in 1896. Dean Mussey moved the Supreme Court bar membership of at least twenty-five of her women graduates in the first twenty years of the law school’s operation. “Women Admitted to Practice in the Supreme Court of the United States,” on file at the Supreme Court Library (listing ninety-seven women admitted to practice before the Supreme Court by 1920 and noting that Mussey sponsored twenty-five of them).

¹⁹Clark, *supra* note 1, at 88. See Virginia Drachman, **Women Lawyers and the Origins of Professional Identity in America: The Letters of the Equity Club, 1887 to 1890** (1993). The “Equity Club” was a correspondence society of women attorneys that operated in the 1880s and 1890s.

²⁰See, e.g., Nancy Cott, **The Grounding of Modern Feminism** (Yale Univ. Press 1987) at 13.

²¹The other major women’s rights case of the time, *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1875), involving a constitutional challenge to the exclusion of women from suffrage in Missouri, was briefed and argued by Mr. Francis Minor, husband of Virginia Minor, the denial of whose petition to vote gave rise to the action.

²²Norgren, *supra* note 15 at 30.

²³131 U.S. app. clxxxvii (1880). Lockwood’s co-counsel in the Court, Michael Woods, argued the appeal, which stretched on for two days, though Court records note that Lockwood also spoke on behalf of the Kaisers.

²⁴See Plaintiffs’ Bill of Complaint at 1–5, *Kaiser v. Stickney* (equity doc. 15, No. 4552), on file in the National Archives with the Supreme Court records for this case (131 U.S. app. clxxxvii).

²⁵131 U.S. app. clxxxvii.

²⁶The Court in *In re Lockwood*, 154 U.S. 116 (1894), declared, “It was for the Supreme Court of Appeals to construe the statute of Virginia in question, and to determine whether the word ‘person’ as therein used is confined to males, and whether women are admitted to practice law in that Commonwealth.” *Id.*

²⁷*United States v. Cherokee Nation*, 202 U.S. 101 (1906). Lockwood’s oral argument was reported in the *Washington Post*. “Court Hears Woman, Mrs. Lockwood Argues Before Supreme Tribunal,” *Washington Post*, January 18,

1906, at 9 (reporting, “First Time in History that the Justices Have Listened to an Oral Argument From a Member of the Gentler Sex, Spoke Rapidly, but with Clearness”).

²⁸Clark, *supra* note 1, at 105 (citing 202 U.S. at 132).

²⁹Neither *Adkins v. Children’s Hospital of D.C.*, 261 U.S. 525 (1923), nor *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), involved female counsel in the Supreme Court, though Josephine Goldmark assisted Felix Frankfurter in developing the social-science data relied on in the *Adkins* brief, just as she had assisted Brandeis in his brief in *Muller v. Oregon*, 208 U.S. 412 (1908). *Goesaert v. Cleary* was briefed and argued by a woman in the Supreme Court, Anne R. Davidow, who represented twenty-four women bartenders in the case. 335 U.S. 464, 465–66 (1948).

³⁰Beverly Blair Cook, “Annette Abbott Adams,” in **Notable American Women** (1989) at 3.

³¹The Eighteenth Amendment was repealed by the Twenty-First Amendment in 1933.

³²Kenneth Jost, “Women at Justice: Meese Was Part of the Problem. Is Thornburgh the Solution?” 75 *A.B.A. J.* 54 (Aug. 1989).

³³Upon leaving office, Adams “criticized the country for being ‘hysterical about booze’ and the government for the laxity of enforcement of prohibition laws.” Cook, *supra* note 31, at 4. Adams returned to California in 1921, engaging in private practice before being named to the California appellate court in 1942. See Joey Dean Horton, “Annette Abbott Adams,” Stanford Law School’s women’s history website, <http://www.law.stanford.edu/library/wlhb/papers/aaahtml.html> (last accessed December 18, 2004).

While in private practice, Adams filed petitions for review in seven cases in the Court. Five of these were denied outright: see *Kaneda v. United States*, 259 U.S. 583 (1922) (cert. denied from Ninth Circuit); *Baldini v. United States*, 262 U.S. 749 (1923) (cert. denied from Ninth Circuit); *Littleton v. United States*, 269 U.S. 562 (1925) (cert. denied from Ninth Circuit); *Interstate Transit Co. v. Rogers*, 284 U.S. 640 (1931) (cert. denied from California Supreme Court); and *Standard Oil Co. of California v. United States*, 309 U.S. 654 (1940) (cert. denied from Ninth Circuit). Two were dismissed after cert. had been granted: see *Higgins v. California Prune and Apricot Growers, Inc.*, 273 U.S. 781 (1927) (cert. dismissed with costs per stipulation of counsel); and *Southern California Edison Co. v. Herminghaus*, 275 U.S. 486 (1927) (cert. dismissed as improvidently granted). In several of these cases, Adams’ successor as assistant attorney general, Mabel Walker Willebrandt, was on the other side of the case.

³⁴Dorothy M. Brown, “Mabel Walker Willebrandt,” in **Notable American Women** (1989) at 734–37.

³⁵Dorothy M. Brown, **Mabel Walker Willebrandt: Power, Loyalty, and Study of Law** (Univ. of Tenn. Press 1984) at 75.

³⁶*Id.* The month was February 1927.

³⁷Brown, *supra* note 35, at 735.

³⁸*James Everard's Breweries v. Day, Prohibition Director of the State of New York*, 265 U.S. 545 (1924). Another Prohibition-era case in which Willebrandt participated was *Cunard Steamship Company v. Mellon*, 262 U.S. 100 (1923), presenting the question of whether liquor could remain in storage on foreign vessels temporarily docked in U.S. ports without violating the Eighteenth Amendment and/or the Volstead Act. Despite noting that the laws of France, Italy, and Holland required the stocking of intoxicating liquors for the benefit of crew and passengers, Justice Van Devanter, writing for the Supreme Court majority, concluded that Prohibition applied to foreign vessels, even to those in U.S. waters on a temporary basis. *Id.* at 119.

³⁹John G. Tomlinson, Jr., "Earnest and Sincere in Their Work," 10 *S. Cal. Rev. L. & Women's Stud.* 117 (2000).

⁴⁰"1985 Survey of Books Related to the Law: *Mabel Walker Willebrandt: A Study of Power, Loyalty and Law*," 83 *Mich. L. Rev.* 1057 (1985) (observing, "At one time, Mabel Walker Willebrandt was the most famous woman in America.").

⁴¹Brown, *supra* note 35, at 734–37.

⁴²At this time, she was also going through a divorce and adopting a child. Brown, *supra* note 36, at 123.

⁴³Brown, *supra* note 35, at 734–37.

⁴⁴*Id.*

⁴⁵Brown, *supra* note 36, at 50, 109. After leaving the Justice Department, Willebrandt returned to California and to private practice. She appeared once more before the Court, in 1933, in a case challenging the Federal Radio Commission's allocation of radio frequencies under the new Federal Radio Act. There she represented the owners of a radio station who intervened in support of the Federal Radio Commission to defend its allocation of frequencies as reasonable, not arbitrary or capricious. *Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co. (Station WIBO)*, 289 U.S. 266 (1933). This was the first time that the Court upheld the power of the Commission to regulate broadcasting. Brown, *supra* note 36, at 207–09.

⁴⁶The author recently confirmed this fact with Judith Gaskell, U.S. Supreme Court Librarian, whose assistance is greatly appreciated.

⁴⁷Brandeis served on the Court from 1916 to 1939.

⁴⁸269 U.S. 93 (1925).

⁴⁹**Supreme Court Decisions and Women's Rights** (Clare Cushman ed., Congr. Quarterly 2001) at 234.

⁵⁰Frank B. Gilbert, "Susan Brandeis: A Justice's Daughter Argues Before His Court," in **Supreme Court Decisions and Women's Rights**, *id.*, at 234.

Advocate Brandeis participated in a second case before the Court while her father was an Associate Justice. This case involved a dispute under the Bankruptcy Act concerning claims for future rent payments by landlords. Susan

Brandeis briefed, but did not argue, this case. But, here again, as in *Margolin*, Justice Brandeis recused himself from argument and decision. This time, Brandeis won; the Court reversed the lower court's judgment and remanded for further proceedings for the landlord to demonstrate its future rent claim. Susan Brandeis also filed two petitions for review in the Supreme Court that were denied. *See The Cuban-American Sugar Co. v. United States*, 309 U.S. 681 (1939); *Buckley v. Christmas*, 314 U.S. 679 (1941).

⁵¹This was Margaret Corcoran, who was hired by Justice Hugo Black in 1966. Corcoran was the daughter of Thomas Corcoran, a Washington insider better known as "Tommy the Cork." Subsequently, Martha Field clerked for Justice Abe Fortas in 1968, Barbara Underwood clerked for Justice Thurgood Marshall in 1971, and an increasing number of women clerked for various Justices in the years that followed. *See* Ruth Bader Ginsburg, "Founder's Day Remarks," 5 *Am. U.J. Gender and L.* 1, 3 (1996).

⁵²*See, e.g.,* Ruth B. Cowan, "Women's Rights Through Litigation," 8 *Colum. Hum. Rts. L. Rev.* 373, 381 (1976).

⁵³Indeed, one might ask the converse: to what extent was the Justices' receptivity to hiring women law clerks influenced by the advocacy of women lawyers before the Court?

⁵⁴335 U.S. 464, 467 (1948).

⁵⁵Justice Frankfurter, writing for the Court, observed, "We are, to be sure, dealing with a historic calling. We meet the alewife, sprightly and ribald, in Shakespeare . . ." 335 U.S. at 465.

⁵⁶368 U.S. 57, 64–65 (1961).

⁵⁷For more details, see Linda Kerber, **No Constitutional Right To Be Ladies** (Hill and Wang 1998).

⁵⁸*See* Cushman, *supra* note 3, at 77.

⁵⁹Though I have not been able to confirm it, Margolin is said to have presented argument in twenty-seven cases. *See, e.g.,* **Supreme Court Decisions and Women's Rights**, *supra* note 50, at 228.

⁶⁰Margolin subsequently played the same role with respect to the Equal Pay Act of 1963 and the Age Discrimination in Employment Act of 1967.

⁶¹Margolin's Supreme Court arguments included: consideration of whether a business was an employer for purposes of the Act, *Goldberg v. Whitaker House*, 366 U.S. 28 (1961); what it meant to be "engaged in commerce" for purposes of the Act, *Mitchell v. Zachry*, 362 U.S. 310 (1960); and whether a given employment practice qualified under the Act's "retail or other service" exemption, *see, e.g., A.H. Phillips, Inc. v. Walling*, 324 U.S. 490 (1945); *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388 (1960); and *Idaho Sheet Metal Works, Inc. v. Wirtz*, 383 U.S. 190 (1966).

⁶²Most frequently joining Margolin on brief was Sylvia Ellison. *See, e.g., Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388 (1960); *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28 (1961).

⁶³William O. Douglas, *The Court Years* (Random House 1980) at 184–85.

⁶⁴See *Supreme Court Decisions and Women's Rights*, *supra* note 50, at 228. I have not been able to confirm this figure.

⁶⁵See Cushman, *supra* note 3, at 77 (noting, “The all-time women’s record for arguments before the Supreme Court belongs to Beatrice Rosenberg [1908–89] a low-profile but brilliant government attorney who, as an authority on search and seizure, argued more than thirty cases before the High Court. [The men’s twentieth-century record belongs to Deputy Solicitor General Lawrence G. Wallace, who has argued more than 150 cases.]”).

⁶⁶After three decades at Justice, Rosenberg moved to the Appellate Division of the Equal Employment Opportunity Commission, where she was instrumental in arguing that sexual harassment constituted prohibited sex discrimination under Title VII of the Civil Rights Act. Rosenberg retired from the government in 1979. “Honors and Appointments,” *Legal Times* (Nov. 13, 1995) at 16.

⁶⁷387 U.S. 136 (1967). Rosenberg briefed, but did not argue.

⁶⁸398 U.S. 333 (1970). Rosenberg briefed, but did not argue.

⁶⁹*Washington Times*, December 13, 1989, at B5.

⁷⁰Douglas, *supra* note 64, at 186. Hailed as a great mentor of young attorneys, male and female, Rosenberg’s career in public service was posthumously recognized by the District of Columbia bar, which established the “Beatrice Rosenberg Award for Distinguished Service,” bestowed annually upon a member of the bar whose “career contributions to the government exemplifies the highest order of public service.” “Honors and Appointments,” *Legal Times* (Feb. 17, 1997) at 13.

⁷¹Following graduation from National University Law School (George Washington University’s predecessor), Washington practiced law with her father, who sponsored her Supreme Court Bar admission in 1939. See “Helen Washington,” *Washington Post*, March 2, 1978.

⁷²*Burns v. Ohio*, 358 U.S. 939 (1959) (order granting motion to appoint counsel for appellant). Washington succeeded in obtaining a reversal for her client. 360 U.S. 252 (1959).

⁷³Acheson was appointed in 1932. Again, the author thanks Supreme Court Librarian Judith Gaskell for uncovering this information.

⁷⁴Cushman, *supra* note 3, at 72 (“The first female African-American lawyer to join the Supreme Court bar—Chicago Law School-trained Violette N. Anderson—did so eleven years after Conley. Anderson was admitted in 1926 on motion of James A. Cobb, a black judge in the District of Columbia.”).

⁷⁵380 U.S. 202 (1965). Shortly after her argument in *Swain*, Motley was elected Manhattan borough presi-

dent. Thereafter, Motley was named to the U.S. District Court for the Southern District of New York by President Johnson in 1966. The *New York Times* reported her nomination as front-page news. Senator James O. Eastland, long-time Chair of the Senate Judiciary Committee and senior Senator from Mississippi, stalled Motley’s nomination for seven months. As part of his effort to derail her candidacy, Eastland claimed that Motley had been active in the Young Communist League. Motley believed the opposition to her appointment was motivated by gender as well as race bias: “‘There was tremendous opposition to my appointment, not only from Southern senators, but from other federal judges. Some of this opposition was racial, but some of it had to do with my being a woman.’” Mary L. Clark, “One Man’s Token Is Another Woman’s Breakthrough? The Appointment of the First Women Federal Judges,” 49 *Vill. L. Rev.* 487, 516 (2004) (quoting Linn Washington, *Black Judges on Justice: Perspectives from the Bench* 128 [New Press 1994]).

Having been rated “qualified” by the ABA, Motley was confirmed by the Senate in August 1966. Motley credited her selection by Johnson to her work as an attorney in the civil-rights movement, and not to her race or gender. When she met with Johnson on the day of her appointment, “he told me he had called every civil rights leader in the country and every one of them was backing my appointment 100 percent.” See Constance Baker Motley, *Equal Justice Under Law: An Autobiography* 213 (Farrar, Strauss, and Giroux 1998), *quoted in* Clark, *id.*

⁷⁶476 U.S. 79 (1986).

⁷⁷Motley worked with Thurgood Marshall on *Brown v. Board of Education* and other landmark litigation, including the lawsuits that resulted in the integration of the Universities of Alabama, Georgia, and Mississippi, among others. See Motley, *supra* note 77, at 106, 122.

⁷⁸President Kennedy appointed Marshall to the U.S. Court of Appeals for the Second Circuit in 1961. See “Thurgood Marshall,” Federal Judges Biographical Database, <http://www.fjc.gov/newweb/jnetweb.nsf/hisj> (last accessed December 18, 2004).

⁷⁹Motley, *supra* note 77, at 193.

⁸⁰Motley won all three of the desegregation cases that she argued before the Court: one involving the Atlanta public schools, *Calhoun v. Latimer*, 377 U.S. 263 (1964); the second a restaurant facility at a municipal airport, *Turner v. Memphis*, 369 U.S. 350 (1962); and the third a municipal park, *Watson v. Memphis*, 373 U.S. 526 (1963). In *Watson*, the Court reversed the lower court’s judgment authorizing park officials to take up to several years to desegregate their facilities, ruling instead that its “*Brown II* decision, allowing for delay in public school desegregation . . . did not apply to a city’s municipal park system” where integrating parks did not present the same administrative challenges as integrating schools. 373 U.S. at 530–32. Motley, *supra* note 77, at 196.

⁸¹These were *Gober v. Birmingham*, 373 U.S. 374 (1963), and *Shuttlesworth v. Birmingham*, 373 U.S. 262 (1963). Their decisions were also announced on the same day, in May 1963. In *Gober*, the Court overturned the convictions of students found guilty of trespass in Alabama state court for seeking service at a department-store lunch counter. In the companion case, *Shuttlesworth*, a minister active with Martin Luther King, Jr. was convicted of aiding and abetting trespass because he had counseled the students before their sit-in. The Court reversed Shuttlesworth's conviction on the grounds that, having set aside the students' convictions, "there could be no conviction for allegedly aiding and abetting them." *Shuttlesworth*, 373 U.S. at 265.

⁸²These were *Barr v. Columbia*, 378 U.S. 146 (1961), and *Bowie v. Columbia*, 378 U.S. 347 (1963). Their decisions were also announced on the same day, in June 1964. In *Barr*, "petitioners had been convicted of trespass and breach[ing] the peace for sitting at a lunch counter in a local pharmacy. The Supreme Court found no evidence that petitioners" had done anything other than ask for service. Motley, *supra* note 77, at 198–200. The third sit-in case Motley argued in 1964 was *Hamm v. Rock Hill*, 379 U.S. 306 (1964).

⁸³Washington, *supra* note 77, at 139.

⁸⁴368 U.S. 52 (1961).

⁸⁵Douglas, *supra* note 64, at 185.

⁸⁶Motley, *supra* note 77, at 194.

⁸⁷See Motley, *supra* note 77, at 213.

⁸⁸The other co-founding director was Brenda Feigen Fasteau, a 1969 graduate of Harvard Law School. See Karen O'Connor, **Women's Organizations' Use of the Courts** (Lexington Books 1980) at 127.

Other notable women advocates active in the Supreme Court at this time included: Eleanor Holmes Norton, who was Mel Wulf's second-in-command at the American Civil Liberties Union (ACLU) in the 1960s; Kathleen Peratis, who succeeded Justice Ginsburg as director of the Women's Rights Project, Project attorney Susan Deller Ross; Jane Picker of the Women's Law Fund in Cleveland; Harriet Rabb of the New York City Corporation Counsel's Office (and NYCLU board member, who left to start an employment discrimination clinic at Columbia Law School in 1971); Sarah Weddington of Texas; and Wendy Williams of the California-based Equal Rights Advocates.

⁸⁹Before addressing the Women's Rights Project's litigation directly, the author would like to recognize the influence of Pauli Murray, an African-American lawyer, political scientist, and Episcopal minister, whose writings on the parallels between race and sex discrimination shaped the thinking of a generation of students and scholars, including Justice Ginsburg. See, e.g., Pauli Murray and Mary O. Eastwood, "Jane Crow and the Law: Sex Discrimination and Title VII," 34 *George Wash. L. Rev.* 232 (1965). Murray's influence also came through her service on the ACLU Board, where, in the late 1960s,

she advocated pursuing an aggressive litigation campaign against sex discrimination. Kerber, *supra* note 58, at 194–95. (National Organization of Women founding member Faith Seidenberg, an attorney from Syracuse, New York, likewise advocated ACLU engagement on these issues at this time, as did Barbara Preiskel, then general counsel of the Motion Picture Association, and Catherine Roraback, solo practitioner in New Haven, who worked with Yale Law Professor Thomas I. Emerson on *Griswold v. Connecticut*, 381 U.S. 479 (1965).)

To honor Murray's leadership on sex discrimination issues, Ginsburg named Murray—along with Dorothy Kenyon, a leading civil-rights and women's-rights lawyer and judge—on the first brief that she filed in a sex-discrimination case in the Supreme Court. This was the ACLU's brief for the appellant in *Reed v. Reed* in the Court's 1971 Term. Brief for Appellant in *Reed*, 404 U.S. 71 (1971). See also Kerber, *supra* note 58, at 199–204 ("Neither Kenyon nor Murray had actually participated in the writing of the brief, but Ginsburg was determined to acknowledge the intellectual debt which contemporary feminist legal argument owed to 'those brave women.' The succession of names on the *Reed* brief was the sign of a torch passed by one generation and aggressively claimed by another.").

Thus, while Murray was not herself a Supreme Court advocate, she played a critical role in the history of women's Supreme Court advocacy. See, e.g., Serena Mayeri, "Constitutional Choices: Legal Feminism and the Historical Dynamics of Change," 92 *Calif. L. Rev.* 755 (2004) (highlighting Murray's pragmatic approach to advocating expansion of women's legal status).

⁹⁰A host of individuals have provided helpful accounts of the formation of the Women's Rights Project, including: Cowan, "Women's Rights Through Litigation," 8 *Colum. Human Rights L. Rev.* 373; Cushman, ed., **Supreme Court Decisions and Women's Rights**, *supra* note 50; Cynthia Fuchs Epstein, **Women in Law** 137–38 (2d ed. 1993); Herma Hill Kay, "Celebration of the Tenth Anniversary of Justice Ruth Bader Ginsburg's Appointment to the Supreme Court of the United States: Ruth Bader Ginsburg, Professor of Law," 104 *Colum. L. Rev.* 1, 12 (2004) (hereafter "Ruth Bader Ginsburg, Professor of Law"); Kerber, *supra* note 58, at 199–204 (see also Linda K. Kerber, "Sally Reed demands Equal Treatment," in **Days of Destiny** 440 [James McPherson & Alan Brinkley, eds. 2001]); O'Connor, *Women's Organizations' Use of the Courts*, *supra* note 90, at 123–30; Wendy Williams, "Sex Discrimination: Closing the Law's Gender Gap," in **The Burger Years: Rights and Wrongs in the Supreme Court, 1969–86** 109 (Herman Schwartz ed., 1987); and, of course, Justice Ginsburg herself. See, e.g., Ruth Bader Ginsburg, "Comment on *Reed v. Reed*," *Women's Rights Law Reporter* 7 (1977); Ruth Bader Ginsburg, "Comment: *Frontiero v. Richardson*," *Women's Rights Law*

Reporter 2 (1973); Ruth Bader Ginsburg, “Gender and the Constitution,” 44 *U. Cin. L. Rev.* 1 (1975); Ruth Bader Ginsburg, “Gender in the Supreme Court: The 1973 and 1974 Terms,” 1975 *Sup. Ct. Rev.* 1; Ruth Bader Ginsburg, “Sex Equality and the Constitution,” 52 *Tul. L. Rev.* 451 (1978); Ruth Bader Ginsburg, “Sexual Equality Under the Fourteenth and Equal Rights Amendments,” 1979 *Wash. U. L. Q.* 161 (1979); Ruth Bader Ginsburg, “Remarks for the Celebration of 75 Years of Women’s Enrollment at Columbia Law School,” 102 *Colum. L. Rev.* 1441 (2002) (hereafter “Remarks for the Celebration”).

⁹¹Ginsburg, “Remarks for the Celebration,” *supra* note 92, at 1441.

⁹²Ruth Bader Ginsburg, “Foreword to Symposium: Women, Justice and Authority,” 14 *Yale J.L. & Fem.* 213, 214–15 (2002) (hereafter “Foreword to Symposium”). As Justice Brennan characterized it in his opinion in *Frontiero v. Richardson*, “Traditionally, such discrimination was rationalized by an attitude of ‘romantic paternalism,’ which, in practical effect, put women, not on a pedestal, but in a cage.” 411 U.S. 677, 684 (1973). This pedestal/cage metaphor was first used by California Supreme Court Justice Peters in the *Sail’er Inn* case. *Sail’er Inn, Inc. v. Kirby*, 95 Cal. Rptr. 329, 341 (Cal. 1971).

⁹³In *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (Ginsburg briefed and argued as counsel for plaintiff appellee Wiesenfeld), the Court struck down certain sex-based distinctions in the Social Security Act that provided survivor benefits to wives and children in the case of working husbands’ deaths, but only to the children—and not to the husband—in the case of a working wife’s death. This, the Court held, violated the Fifth Amendment’s Due Process Clause because it discriminated against female wage-earners by providing them less protection for their survivors than male wage-earners received and perpetuated an archaic and overbroad generalization that women’s wages were not as vital to their families’ support as were men’s wages.

⁹⁴The Project followed a similar strategy in *Craig v. Boren*, 429 U.S. 190 (1976), where the Project filed an *amicus* brief challenging the constitutionality of a state law that set a higher minimum drinking age for men than women for 3.2 beer.

⁹⁵The Women’s Rights Project filed briefs on the merits in the following cases:

Reed v. Reed, 404 U.S. 71 (1971);
Struck v. Secretary of Defense, cert. granted, 409 U.S. 947, *judgment vacated*, 409 U.S. 1071 (1972);
Frontiero v. Richardson, 411 U.S. 677 (1973);
Kahn v. Shevin, 416 U.S. 351 (1974);
Weinberger v. Wiesenfeld, 420 U.S. 636 (1975);
Edwards v. Healy, 421 U.S. 772 (1975);
Turner v. Dep’t of Employment Security, 423 U.S. 44 (1975);

Califano v. Goldfarb, 430 U.S. 199 (1977); and
Duren v. Missouri, 439 U.S. 357 (1979).

⁹⁶Justice Ginsburg presented argument on behalf of the Women’s Rights Project in the following cases:

Frontiero v. Richardson, 411 U.S. 677 (1973);
Kahn v. Shevin, 416 U.S. 351 (1974);
Weinberger v. Wiesenfeld, 420 U.S. 636 (1975);
Edwards v. Healy, 421 U.S. 772 (1975);
Califano v. Goldfarb, 430 U.S. 199 (1977); and
Duren v. Missouri, 439 U.S. 357 (1979).

⁹⁷*See, e.g.*, Fasteau in *Frontiero*, 411 U.S. at 677 (Fasteau’s then husband, Marc Fasteau, also contributed importantly to the Project’s brief in *Frontiero*), and Ross in *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702 (1978), and *Vorchheimer v. Sch. Dist. of Philadelphia*, 430 U.S. 703 (1977).

⁹⁸The Women’s Rights Project filed *amicus* briefs in the following cases:

Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376 (1973);
Cleveland Board of Education v. La Fleur, 414 U.S. 632 (1972);
Corning Glass Works v. Brennan, 417 U.S. 188 (1974);
Geduldig v. Aiello, 417 U.S. 484 (1974);
Liberty Mutual Insurance Co. v. Wetzel, judgment vacated for want of an appealable order, 424 U.S. 737 (1976);
General Electric Co. v. Gilbert, 429 U.S. 125 (1976);
Craig v. Boren, 429 U.S. 190 (1976);
Coker v. Georgia, 433 U.S. 584 (1977);
Dothard v. Rawlinson, 433 U.S. 321 (1977);
Nashville Gas Co. v. Satty, 434 U.S. 136 (1977);
Univ. of California Regents v. Bakke, 438 U.S. 265 (1978);
Los Angeles Dep’t of Water and Power v. Manhart, 435 U.S. 702 (1978);
Orr v. Orr, 440 U.S. 268 (1979);
Califano v. Westcott, 443 U.S. 76 (1979); and
Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142 (1980).

⁹⁹Ginsburg, “Remarks for the Celebration,” at 1446.
¹⁰⁰*Id.*

¹⁰¹Kenneth Davidson, Ruth Bader Ginsburg, and Herma Hill Kay, **Text, Cases, and Materials on Sex-Based Discrimination** (1974).

¹⁰²Kerber, *supra* note 58, at 204. Three of the most significant cases on which Ginsburg worked during her time at the Project:

1. *Reed v. Reed*, 404 U.S. 71 (1971) (Ginsburg briefed).

Ginsburg filed a brief for appellant in *Reed v. Reed* in the summer of 1971 as a volunteer lawyer with the ACLU, before the Women's Rights Project was formed. *Reed* had been spotted by ACLU General Counsel Marvin Karpattkin. See Epstein, *supra* note 92, at 137. In *Reed*, a mother and father, by then divorced, each petitioned to be named estate administrator for their seventeen-year-old son, who had died of self-inflicted gunshot wounds while on a custodial visit with his father. The probate court judge appointed the father as administrator despite the fact that the mother's application had been filed first in time because Idaho law provided that, "as between persons equally entitled to administer a decedent's estate [such as a mother and father], 'males must be preferred to females.'" Ginsburg, "Remarks for the Celebration," at 1444 (quoting Idaho Code § 15-314).

Ginsburg framed the issue for decision in *Reed* as whether the sex-based distinction contained in the Idaho code "created a 'suspect classification' requiring close judicial scrutiny." Brief for Appellant in *Reed* at 5. As such, Ginsburg invited use of the strict-scrutiny standard of review, hitherto applied only to cases of fundamental rights, such as voting, and to classifications based on race and national origin. Strict scrutiny requires the government, in defending its law, to articulate a compelling justification and demonstrate that the chosen means were narrowly tailored to serve the governmental purpose.

Ginsburg analogized sex to race:

[I]t is presumptively impermissible to distinguish on the basis of an unalterable identifying trait over which the individual has no control and for which he or she should not be disadvantaged by the law. Legislative discrimination grounded on sex, for purposes unrelated to any biological difference between the sexes, ranks with legislative discrimination based on race, another congenital, unalterable trait of birth, and merits no greater judicial deference.

Brief for Appellant in *Reed*, at 5. Ginsburg appended to her *Reed* brief a compilation of sex-based differentials then currently reflected in state and federal law. According to Ginsburg, "Research for the brief and appendix was supplied by law students from NYU, Rutgers, and Yale." Ginsburg, "Foreword to Symposium," at 214. Relying on this compendium, Ginsburg argued:

The distance to equal opportunity for women in the United States remains considerable in face of the pervasive social, cultural and legal roots of sex-based discrimination.

Brief for Appellant in *Reed* at 6. Noting that the Court itself was implicit in this discrimination, Ginsburg underscored how far social norms had changed:

Prior decisions of this Court have contributed to the separate and unequal status of women in the United States. . . . [But] . . . [i]n very recent years, a new appreciation of women's place has been generated in the United States. Activated by feminists of both sexes, courts and legislatures have begun to recognize the claim of women to full membership in the class "persons" entitled to due process guarantees of life and liberty and the equal protection of the laws.

Brief for Appellant in *Reed* at 5-6, 10.

In a unanimous opinion authored by Chief Justice Warren E. Burger, the Court struck down the Idaho law as violative of the fourteenth amendment's equal protection clause. This was the first time in history that the Court struck down a law on the grounds of sex discrimination.

2. *Frontiero v. Richardson*, 411 U.S. 677 (1973) (Ginsburg briefed and argued as amicus, where local counsel—Joe Levin, Morris Dees's partner at the Southern Poverty Law Center—had agreed to allow Ginsburg to direct the litigation in the Supreme Court, but later expressed concern at Ginsburg's emphasis on heightened-scrutiny rather than rational-basis review in the merits brief).

The complainants in *Frontiero* were Sharron Frontiero, an Air Force officer, and her then husband, Joseph Frontiero, a full-time college student. Sharron Frontiero had been denied access to military housing and medical benefits for her husband on the same terms that male officers had for their wives. While a male officer's spouse was presumed dependent upon him for support, regardless of how much she earned, Sharron Frontiero had to prove that her husband relied on her earnings for more than one-half of his support in order to gain dependent spouse benefits for him.

Eight Justices voted to strike down the sex-based classification in *Frontiero* as unconstitutional. In writing for a plurality of four Justices, Justice Brennan specifically cited the data Ginsburg set forth in her brief on women's underrepresentation in politics as underscoring the need for heightened scrutiny of sex-based classifications:

[W]omen are vastly under-represented in this Nation's decisionmaking councils. There has never been a female President, nor a female member of this Court. Not a single woman presently sits in the United States Senate, and only 14 women hold seats in the House of Representatives. And, as appellants point out, this

underrepresentation is present throughout all levels of our State and Federal Government.

411 U.S. at 686 n. 17 (citing Joint Reply Brief of Appellants and American Civil Liberties Union [*amicus curiae*] at 9). Brennan proceeded to apply strict scrutiny to the military benefit program's sex-based classification, reasoning that sex-based classifications, like those based on race, were inherently suspect because sex, like race, was an immutable characteristic.

3. *Craig v. Boren*, 429 U.S. 190 (1976) (Ginsburg briefed as amicus).

Craig was most important for resolving years of uncertainty as to the level of scrutiny with which sex-based classifications would be reviewed. There, the Court articulated a new intermediate scrutiny standard, located between the traditional rational basis review and the strict scrutiny accorded fundamental rights and race-based classifications. Applying this standard to the facts at issue in *Craig*, the Court struck down an Oklahoma law setting a different legal age for purchasing 3.2 beer for women and men—18 for women, and 21 for men.

¹⁰³Kay, "Ruth Bader Ginsburg, Professor of Law," at 20.

¹⁰⁴Office of the Solicitor General, "In re Harriet S. Shapiro, Esq.: Petition for a Writ of Appreciation (2000)" at 2.

¹⁰⁵Shapiro's work with the Solicitor General's Office was divided into roughly three periods. Her first decade was spent drafting briefs and arguing cases. Her second was engaged with drafting briefs, rather than arguing. In her last decade, she assumed a variety of other tasks, including screening cert petitions in criminal cases and responding to Freedom of Information Act requests. See "Petition for a Writ of Appreciation for Harriet Shapiro," bestowed upon Shapiro on the occasion of her retirement from the Solicitor General's Office in 2001. The author thanks Beth Brinkmann for bringing this petition to her attention.

¹⁰⁶Shapiro's seventeen argued cases included:

- *Schlesinger v. Ballard*, 419 U.S. 498 (1975) (Shapiro argued, but did not brief), holding not violative of the Fifth

Amendment Due Process Clause a U.S. Navy regulation that allowed up to thirteen years of commissioned service to women before being mandatorily discharged for failure to obtain promotion, while requiring men's mandatory discharge upon being twice passed over for promotion, even when fewer than thirteen years had elapsed;

- *Califano v. Boles*, 443 U.S. 282 (1979) (Shapiro briefed and argued on behalf of the Secretary of Health, Education, and Welfare as a party; joining Shapiro on brief were two women—Assistant Attorney General Barbara Babcock and Justice Department attorney Susan Ehrlich—and a number of male colleagues), holding not violative of the Fifth Amendment Due Process Clause a provision of the Social Security Act that limited mothers' insurance benefits to widows and divorced wives of male wage-earners, thereby excluding mothers of children born outside of marriage; and
- *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983) (Shapiro briefed and argued on behalf of The Equal Employment Opportunity Commission as a party), holding violative of the Pregnancy Discrimination Act a limitation in a company's health-insurance coverage of pregnancy-related costs for male employees' spouses.

¹⁰⁷Beth S. Brinkmann, "First Arguments at the Supreme Court of the United States: A First Argument in the Tradition of Many," 5 J. App. Prac. & Process 61 (2003).

¹⁰⁸LaFontant had been promoted to the rank of deputy solicitor general by 1975. See, e.g., *Schlesinger v. Ballard*, 419 U.S. 498 (1975).

¹⁰⁹**Supreme Court A to Z**, *supra* note 3, at 427.

¹¹⁰See, e.g., Kenneth Mack, "A Social History of Everyday Practice: Sadie T. M. Alexander and the Incorporation of Black Women into the Legal Profession, 1925–1960," 87 *Cornell L. Rev.* 1405, 1414–15 (2002). ("Until women were admitted to the profession, courtrooms were battlefields where men engaged in forensic warfare in front of all-male juries and judiciaries").