acting it. And that was the standard that Mr. Justice Frankfurter adverted to in the case I earlier described, along with the traditional deference paid to any legislation that bans liquor.

The importance of the principle decided in *Reed* became apparent to less sophisticated scholars in the *Frontiero* case where the question was the validity of a Federal statute which gave special privileges and perks to servicemen with respect to their wives, but denied exactly those perks to servicewomen.

Writing for the majority of the Court, Justice Brennan relied heavily on *Reed's* holding and observed that the Nation's unfortunate history of sex discrimination had been rationalized on bases of "romantic paternalism." And he said, and I quote, "the practical effect put women, not on a pedestal, but in a cage."

She won that case, and with it she succeeded in building the equal protection platform upon which not only she, but many others, representing both men and women, were able to establish gender as a subject of deep concern under the equal protection clause.

Long before I knew Judge Bader Ginsburg personally, I had admired her work very much as a legal scholar and as an extraordinarily able constitutional advocate. Since she has been appointed U.S. circuit judge for the District of Columbia Circuit, Ruth Bader Ginsburg has performed her judicial role as successfully as she did her earlier roles—as a professor, as a scholar, as a constitutional advocate. She has been obliged to follow the law as laid down by the U.S. Supreme Court whether she agreed with it or not, and she has faithfully done so.

Her judicial writings, like her briefs and also like her scholarly writings as a professor, are concise, tightly reasoned, and persuasive. She has also proved herself to be a healer of rifts that always exist in any close structure such as the judiciary. She is an excellent negotiator. She is a moderator who has, nevertheless, managed to maintain her intellectual integrity and her dedication to her ideals of equality for all Americans under the law.

Perhaps it would not unduly disturb Justice Bradley's ghost to know that she well performs, very well performs the only roles he would have permitted her to have: As wife, mother, and as loyal, marvelous friend.

This committee has had very few nominees come before it who begin to have the qualities of distinction that Ruth Bader Ginsburg has. She deserves your votes for swift confirmation. Her appointment is a credit to the President. Her swift confirmation will be a credit to you, and as Justice of the Supreme Court of the United States, she will be a credit to the Nation.

Thank you.

[The prepared statement of Judge Hufstedler follows:]

PREPARED STATEMENT OF SHIRLEY M. HUFSTEDLER

My name is Shirley M. Hufstedler. I was admitted to the Bar 43 years ago. Half of my professional life has been devoted to private law practice and half to public service. I was a judge on state and federal courts, trail and appellate. When President Lyndon B. Johnson appointed me United States Circuit Judge for the United States Court of Appeal for the Ninth Circuit in 1968, I became the second woman in the history of the United States to be appointed to a federal appellate court.

The first was Florence Allen who was appointed by President Franklin Roosevelt to the United States Court of Appeals for the Sixth Circuit in 1934. At the time of her appointment she was a Justice of the Ohio Supreme Court, a position to

which she had been elected by the woman of Ohio who had worked with her to obtain ratification of the Constitutional Amendment giving women the right to vote. Judge Allen had died when I was appointed, and thereafter it was many years before another woman was appointed to the federal appellate bench.

I resigned from the bench in 1979 when the Senate confirmed President Jimmy Carter's nomination of me as the Nation's first Secretary of Education. When I returned to private life in 1981, I became a partner in the law firm in which I continue to practice, Hufstedler, Kaus & Ettinger, with time out to teach as Phleger Professor of Law at Stanford Law School and to lecture in other universities and colleges throughout the United States and abroad.

The United States Supreme Court has the awesome task of interpreting and applying the United States Constitution. That great charter of our government is also, in the Bill of Rights, our great charter of freedom. The Supreme Court has been repeatedly been called upon to interpret the Bill of Rights in deciding the issues that most deeply divide our Nation. Those issues include not only the rights to speak, to follow our own religions, to vote, to own property, to enjoy privacy, but also the right to equal protection of the law no matter what may be the colors of our skins, our previous condition of servitude, our race, our ethnicity, or our gender.

When the membership of the Supreme Court has proved unequal to their task, the results have been tragic. We remember the *Dred Scott* case in which the Court's failure to resolve the issue of Black slavery was one of the causes of the country's tearing itself apart in the Civil War. When the majority of the Justices in the 1930's were unable to accommodate their Nineteenth Century views of the Constitution to the urgent demands of the country, the majority imperiled the Court itself.

When the Justices have been equal to their task, the Court has succeeded admirably—often brilliantly. Thus, the Warren Court decided that the Nation could no more long endure with legalized apartheid than it could with human slavery. The Court unanimously decided *Brown* v. *Board of Education* to strike down racial segregation in the public schools. The Warren Court produced decision after decision carefully dismantling the remnants of slavery and diminishing invidious discrimination against Black men.

The Court was much slower to recognize that invidious discrimination was not limited to Black men, but extended to all women. Even that gifted group of Colonial gentlemen who drafted the noble words of the Constitution were unable to escape the dictates of custom, the dicta of St. Paul, and centuries of dominance by men that had systematically locked women into second class citizenship. Although human slavery was recognized, women were conspicuously missing in the Constitution.

Until nearly the end of the Nineteenth Century, women were denied basic rights of citizenship. None could vote. With trivial exceptions, they could not own or dispose of their property, even their own wages. Single women were slightly better off than their married sisters because, in the eyes of the law, the personalities of the husband and wife merged on marriage, and the wife's disappeared.

The traditional excuse for that blatant discrimination was expressed by Justice Bradley in his famous concurring opinion in *Bradwell* v. *Illinois* in which a majority of the Supreme Court held that, in barring Ms. Bradwell from admission to practice law, the State of Illinois did not violate the Privileges and Immunities Clause of the Constitution.[1] Justice Bradley explained: "The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. * * * The paramount destiny and mission of a women are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator."[2]

Justice Bradley knew perfectly well that tens of thousands of women were performing hard physical labor and that frontier women worked side by side with their husbands under grueling and often perilous circumstances. He nevertheless persuaded himself that God, not man, had prescribed womens' destinies, and those who did not follow their assignments were either biological curiosities or the victims of humankind's inexcusable rebellion against God's will. Justice Bradley and those who shared his views confused the signs of a dominant culture with the signs of the Creator, and he mistook man's laws for the laws of nature.

It took decades of struggle by the suffragettes, like Florence Allen, and the men who would be enlisted in the cause, to amend the Constitution to give women the right to vote. It took decades of more work before the Supreme Court would realize that women, as well as men, were entitled the equal protection of the laws.

As late as 1948, Justice Frankfurter wrote the majority opinion upholding a state statute forbidding a woman to obtain a license as a bartender unless she was "the wife or daughter of the male owner" of the establishment, To uphold the statutory

[1] 83 U.S. (16 Wall.) 130 (Bradley, J., concurring) (1873).
[2] 83 U.S. at 141–42.

classification, Frankfurter harked back to Shakespeare's sprightly and ribald ale wife and stated that the Fourteenth Amendment "did not tear history up by the roots." He then reechoed Justice Bradley's sentiments: "The fact that women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced, does not preclude the States from drawing a sharp line between the sexes. * * * [T]he oversight assured through ownership of a bar by a barmaid's husband or father minimizes hazards that may confront a barmaid without such protection oversight. * * * [W]e cannot give ear to the suggestion that the real impulse behind this legislation was an unchivalrous desire of male bartenders to try to monopolize the calling."[3]

A majority of men undoubtedly applauded, but women did not. One of the major architects of the campaign that changed the Supreme Court's collective mind about women is Ruth Bader Ginsburg. Like every sophisticated constitutional advocate, Ruth Bader Ginsburg knew that Supreme Court's constitutional interpretations, with very rare exceptions, move forward by millimeters, not miles.

The particular case that the Supreme Court chooses for each nudge may at first seem almost trivial. The case that Ms. Ginsburg argued, *Reed* v. *Reed*,[4] was just such a case. The issue was the constitutionality of a state statute providing that, when two individuals are otherwise equally entitled to appointment as an administrator of a decedent's estate, the male applicant must be preferred to the female. She argued that the statutes giving mandatory preference to men over women without regard to their individual qualifications violated the Equal Protection Clause of the Fourteenth Amendment.

In making that argument, Ms. Ginsburg was after larger constitutional game than the right of women to administer decedents' estates. The point she succeeded in establishing was that statutory classifications based on sex, like those based on race, were constitutionally suspect, thereby requiring strict scrutiny. The result is that a statute cannot be upheld constitutionally merely on the basis that the legislature could have had some rational basis for creating it—the standard invoked by Justice Frankfurter in the women bartenders' case.

The importance of the principle decided in *Reed* became apparent to less sophisticated lawyers when she won *Frontiero* v. *Richardson* in 1973.[5] In that case, the question was the validity of a federal statute that gave servicemen the right to claim medical and other benefits on behalf of their wives who were dependents, but denied the same rights to servicewomen on behalf of their husbands.

Writing for the majority of the Court, Justice Brennan relied heavily on *Reed's* holding that classification based on sex are inherently suspect and must be subjected to close judicial scrutiny. Justice Brennan observed that the Nation's unfortunate history of sex discrimination "was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage." Citing Justice Bradley's opinion as an example of such stereotypical notions, he concluded that "statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members."[6]

After she had successfully built the equal protection platform for women, she was able to argue case after case dismantling the legal cages in which women had been so long enclosed.[7] Other advocates used the same platform to carry on her work in extirpating gender discrimination.

Long before I knew Ruth Bader Ginsburg personally, I admired her work as a legal scholar and as an outstanding constitutional advocate.

When those qualities came to the attention of President Carter, she was appointed United States Circuit Judge for the Untied States Court of Appeals for the District of Columbia Circuit. She has performed her judicial role as successfully as she did her earlier roles as a professor of law and a constitutional advocate. As a Circuit Judge, she is required to follow the law as laid down by a majority of the Supreme Court, whether she agrees with it or not. She has done so. Her opinions have nevertheless expressed her conspicuous concern for civil rights for all Americans. Like her scholarly writings as a law teacher and her briefs as an advocate, her judicial opinions are concise, tightly reasoned, and persuasive. She has also

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[3] *Goesaert* v. *Cleary*, 335 U.S. 464, 465–66 (1948).
[4] 404 U.S. 71 (1971).
[5] 411 U.S. 677 (1973).
[6] *Id.* at 686–87.
[7] Time does not permit my even mentioning them all. Here are a few: *Califano* v. *Westcott*, 443 U.S. 76 (1979); *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975); *Los Angeles Department of Water and Power* v. *Manhart*, 435 U.S. 702 (1978); *Duren* v. *Missouri*, 439 U.S. 3057 (1979); *Nashville Gas Co.* v. *Satty*, 434 U.S. 136 (1977); *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977); *Califano* v. *Goldfarb*, 430 U.S. 199 (1977).

proved herself to be a healer of rifts among judges, as excellent negotiator, and a judicial moderate who has nonetheless maintained her intellectual integrity and her dedication to the ideals of equality before the law for all our people.

Perhaps it would not disturb the shade of Justice Bradley too much to know that Judge Ginsburg has also admirably fulfilled the only roles he would have permitted her to play: She is a devoted wife and mother and a treasured friend of all those who have come to know her.

This Committee has had few nominees for appointment as Associate Justice of the Supreme Court of the United States who as richly deserve your votes for swift confirmation. Her appointment is a credit to the President. Her confirmation will be a credit to you, and she will be a credit to the Nation as Justice Ginsburg.

The CHAIRMAN. Thank you very much, Judge.

Mr. Millstein.

STATEMENT OF IRA M. MILLSTEIN

Mr. MILLSTEIN. Thank you. Mr. Chairman, I submitted a statement which I hope will be incorporated in the record, and I will try to be brief.

The CHAIRMAN. It will be.

Mr. MILLSTEIN. I have known Ruth and Martin Ginsburg since the summer of 1957 when Martin joined our firm as a summer associate. We were then about 20 lawyers located on 42nd Street in New York. And we are now about 650 in the same city, and in about nine different locations.

I have been their friend since 1957, even though we lost Marty as our partner in 1980, when Ruth came down to become a circuit court judge—a moment I remember as sort of bittersweet: sweet in being able to help her on that task, and a real loss to the firm in losing one of the very best tax lawyers in the United States when Martin's geography caused him to separate from the firm.

Ruth Ginsburg's moderate views on the interstitial role of the judiciary and the need for collegiality on the appellate benches has been demonstrated well in the last few days, and I don't intend to replicate or duplicate. You don't need to hear any more from me on that subject.

I think something else of importance is happening for the bench and the bar, and I don't think we ought to let that moment pass without comment.

Having chosen as a candidate a lawyer/judge from a pool, a very small pool of very highly qualified people, I would like to think that President Clinton and soon you in the Senate have chosen with gender-blindness a person who just happens to be a woman. If perhaps that is an overstatement this time, maybe it won't be the next time.

I have practiced law now for about 45 years, and I have watched the bench and the bar become populated with women, but ever so slowly and with a great deal of room for improvement.

Martin, Ruth, my wife Diane, also a professional woman, and I were friends when our children were small in the 1960's and 1970's. We saw each other and our children quite often. I watched with growing concern over the unfairness and indignities which were met by both of them, Ruth and Diane, and by the women lawyers whom we had begun to hire in our firm.

In those years, a person with Ruth's qualifications should have been fought over and sought for by law firms on graduation. It didn't happen. She should have had no trouble securing tenure on

a faculty like Harvard, Yale, or Columbia, and that didn't happen either. And it is no wonder that in the 1970's Ruth turned her quality mind to gender issues under the Constitution of the United States and began to focus the whole profession's conscience on what we had been ignoring for such a long time.

The legal profession had not been great in making room for women and racial minorities. It is getting better, but we are not there yet.

Now, how does our profession overcome this? Only by training and learning ourselves, sensitizing ourselves to the need to deal with gender and race in a diverse workplace, and then actually making progress.

Now, the workplace for most of us is our partnership and the courtrooms. We lawyers normally behave ourselves in courtrooms, and sometimes we take that good behavior with us out of the courtroom. When it becomes commonplace for us to appear before highly qualified, diverse judges, gender and racial distinctions in our law firms will disappear further, especially as it becomes obvious, as it is here today, that a highly qualified person is being chosen who just happens to be a woman, not because she is a woman. Happily, this is becoming easier for most of us now because there are pools of highly qualified lawyers of diversity, so the choosing can be gender-blind. And maybe today, in Ruth, marks a beginning of gender-blindness for both the bench and the bar.

Senator Hatch deserves a very honorable mention in this respect, which I would like to talk about for just a minute. When President Carter nominated Ruth to the District of Columbia Circuit toward the end of his 4-year term, it seemed to us as though the appointment would languish until after the November 1980 election. In that event, the likelihood of Ruth's confirmation, we now know, would have been slim or none. Opposition to Ruth was largely based on the assertion that she was a single-issue lawyer—women's rights.

I knew Senator Hatch from some prior dealings; I have forgotten now about what, Senator. I personally knew him to be open-minded. We didn't often agree on substance, but I was always treated courteously, and he heard me out.

I called the Senator and asked for an audience for Ruth, urging him to listen and make up his mind on the evidence, not on gossip and rumor. He agreed. We three met somewhere for lunch and talked for quite some time. I don't even remember the total substance.

When we were done, the Senator apparently concluded that Ruth Ginsburg was, indeed, a legal scholar from no ideological school, who quite certainly had some strong ideas on the laws relating to gender. But Ruth Ginsburg also demonstrated that she clearly had the makings of a judge before whom lawyers of all ideologies and persuasions would like to appear and have cases decided. The opposition thereafter seemed to have melted away.

And Ruth was confirmed and on her way to today. Senator Hatch and I recently reminisced about that day, as two proud colleagues. Coming as we do from our respective political philosophies, this is true diversity in action.

So, to repeat and conclude, the candidate is well qualified, exceptionally well qualified. That the candidate is a woman truly is incidental. When she is confirmed, President Clinton and the Senate will have taken a large step in demonstrating that gender should be and is irrelevant. The eminently well-qualified Justice O'Connor was the first woman on the Court. There had to be a first. There always has to be a first. But now, hopefully, we may be over "firsts," and into quality without regard to gender. To me it is a major event for the bar and the country. And I think we ought to pause for just one moment and acknowledge it.

Thank you.

[The prepared statement of Mr. Millstein follows:]

PREPARED STATEMENT OF IRA M. MILLSTEIN

I've known Ruth and Martin Ginsburg since the summer of 1957 when Martin joined our firm as a summer associate. We were then about 20 lawyers—all male—in smallish quarters on 42nd Street in New York City; we are now 650-plus lawyers in about nine geographic locations, at last count. I've been their friend throughout, even though we lost Marty as our partner in 1980 when Ruth became a Judge on the District of Columbia Circuit Court—a moment I recall with some bitter-sweetness. Sweetness at Ruth's appointment, her confirmation, and at being able to assist Ruth in that process; disappointment at losing from my firm the best tax lawyer in the United States, when they moved to Washington, away from our home base in New York City.

You've heard, and this morning no doubt will continue to hear, from Supreme Court scholars and practitioners about Ruth's talents and potential for being one of the great, not just good, Supreme Court Justices; surely you don't need still another exegesis on that subject. What may not have been emphasized enough is what I (and others such as Stanford Law School's outstanding Constitutional Scholar—Professor Gerald Gunther who is here today) perceive to be her greatest qualification—her non-ideological scholarship. She will be a Justice who applies the law carefully, analytically and with integrity in a clear and lean manner. She will not, however, operate in a vacuum, but, because she is who she is and has been, she will be ever mindful of the world she lives in and the men and women who inhabit it.

One recent decision, *Roosevelt* v. *DuPont*, 958 F.2d 416 (D.C. Cir. 1992), exemplifies my view of her judicial approach about as well as any decision of her's that I've read. It's meaningful to me because it deals with my practice area—business-related issues.

There, Judge Ginsburg flexibly entertained an issue first raised on appeal—because the Supreme Court had earlier suggested that appellate courts not by-pass, on technicalities, "issues of importance to the administration of federal law." She concluded that in "exceptional circumstances" Courts of Appeal "are not rigidly limited" solely to issues raised below. Moving to the merits of an important proxy issue, her reasoning followed a model process of clarity and precision. Dealing with a federal statute—she first looked to Congressional intent, and found a delegation of authority to the SEC, with very modest guidance from Congress as to how that delegated authority should be exercised. She next turned to the SEC action at issue to see if it coincided with Congress' intent. She obviously considered relevant judicial precedents, and importantly looked to expectations built upon a rather consistent interpretation of the law. Again, showing regard for not wasting litigator and judicial time with remands, she accepted a public statement of facts not strictly within the record below, but necessary to the outcome. Her decision was widely acclaimed—but, to me, the key was her flexibility, the scope of her inquiry and reasoning, and the concise nature of an opinion that said a great deal in a very short compass. You are dealing with a quiet person who possesses a legal mind of enormous scope, who recognizes the role of the Judiciary as one branch of government that, while working with co-equal branches, must be ever mindful of individual rights. And, by now, you must know that.

Her moderate views on the interstitial role of the Judiciary, and the need for collegiality on the Appellate Benches, are nowhere better stated than in her own "Madison Lecture" of March 9, 1993.

So, let's pass her obvious talents and non-ideological—rather ideal—approach to judicial decision-making. You have in Judge Ginsburg a Judge—and soon I hope a Justice—who practitioners would conclude will not only give them a fair shake, but