

NEW YORK UNIVERSITY LAW REVIEW

VOLUME 67

DECEMBER 1992

NUMBER 6

SPEAKING IN A JUDICIAL VOICE

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*An active participant in the women's movement of the 1970s and, since 1980, a member of the federal judiciary, Ruth Bader Ginsburg has held influential positions as both an advocate and a judge. In this Madison Lecture, then Judge Ginsburg drew upon her experiences to examine the "judicial voice" from two different perspectives. First, she explores the relationship among members of the bench, advocating a greater sense of collegiality among judges. Second, she contrasts the Supreme Court's sweeping opinion in *Roe v. Wade* with the Court's more restrained approach in contemporaneous cases involving explicitly gender-based discrimination, offering a vision of judicial decisionmaking that recognizes the interdependent role of the judiciary within the American political system.*

INTRODUCTION

The Madison Lecture series has exposed and developed two main themes: human rights and the administration of justice, particularly in our nation's federal courts.¹ My remarks touch on both themes; I will speak first about collegiality in style, and next, about moderation in the substance of appellate decisionmaking. My views on these matters reflect experiences over a span of three decades. They have been shaped from my years as a law teacher beginning in the 1960s, through the 1970s when I helped to launch the American Civil Liberties Union's Women's Rights Project, and most recently during the nearly thirteen years I have had the good fortune to serve on the United States Court of Appeals for the District of Columbia Circuit. What I hope to convey about courts, I believe, is in line with the founders'—Madison's and Hamilton's—expect-

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¹ See Norman Dorsen, Foreword to *The Evolving Constitution*, at x (Norman Dorsen ed., 1987).

tation. As a preface, I will comment on that expectation.

James Madison's forecast still brightens the spirit of federal judges. In his June 1789 speech introducing to Congress the amendments that led to the Bill of Rights, Madison urged:

If [a Bill of Rights is] incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark . . . naturally led to resist every encroachment upon rights . . . stipulated for in the Constitution by the declaration of rights.²

Today's independent tribunals of justice are faithful to that "original understanding" when they adhere to traditional ways courts have realized the expectation Madison expressed.

In *The Federalist* No. 78, Alexander Hamilton said that federal judges, in order to preserve the people's rights and privileges, must have authority to check legislation and acts of the executive for constitutionality.³ But he qualified his recognition of that awesome authority. The judiciary, Hamilton wrote, from the very nature of its functions, will always be "the least dangerous" branch of government, for judges hold neither the sword nor the purse of the community; ultimately, they must depend upon the political branches to effectuate their judgments.⁴ Mindful of that reality, the effective judge, I believe and will explain why in these remarks, strives to persuade, and not to pontificate. She speaks in "a moderate and restrained" voice,⁵ engaging in a dialogue with, not a diatribe against, co-equal departments of government, state authorities, and even her own colleagues.

I spoke of the founders' "original understanding" a moment ago, and that expression, as I comprehend it, bears clarification in this preface. In his 1987 *Foreword to The Evolving Constitution*, the second collection of Madison Lectures, Norman Dorsen stressed, as Chief Justice John Marshall did in 1819, that our fundamental instrument of govern-

² 1 Annals of Congress 457 (Joseph Gales ed., 1789), quoted in *Chapman v. California*, 386 U.S. 18, 21 n.4 (1967). While Madison originally doubted the efficacy of bills of rights, he eventually joined Jefferson in recognizing the value of "the legal check [a declaration of rights] puts into the hands of the judiciary." Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), in 14 *The Papers of Thomas Jefferson* 659 (Julian P. Boyd ed., 1958); see also Maeva Marcus, *The Adoption of the Bill of Rights*, 1 *Wm. & Mary Bill of Rts. J.* 115, 117-19 (1992).

³ See *The Federalist* No. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

⁴ *Id.* at 465.

⁵ I borrow language here from Professor Brainerd Currie's guide to analysis of choice-of-law cases in which the policies of two states are in apparent conflict. See Brainerd Currie, *The Disinterested Third State*, 28 *Law & Contemp. Probs.* 754, 757 (1963) ("[T]he conception should be re-examined, with a view to a more moderate and restrained interpretation both of the policy and of the circumstances in which it must be applied to effectuate the form's legitimate purpose."); see also Herma Hill Kay, *A Defense of Currie's Governmental Interest Analysis*, 215 *Recueil des Cours* 10, 68-73 (1989-III).

ment is an evolving document, "an instrument 'intended to endure for ages to come.'" ⁶ Professor Dorsen quoted Chief Justice Charles Evans Hughes's 1934 rejection of the notion that "the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them."⁷ That understanding, as Professor Dorsen commented, has been and should remain common ground.⁸

In the recent decade and more of bicentennial celebrations, Supreme Court Justice Thurgood Marshall reminded us that while the Constitution's endurance is indeed something to celebrate, the framers had a distinctly limited vision of those who counted among "We the People."⁹ Qualified voters when the nation was new bore more than a passing resemblance to the framers: the franchise was confined to property-owning adult white males, people free from dependence on others, and therefore considered trustworthy citizens, not susceptible to influence or control by masters, overlords, or supervisors.¹⁰ In 1787, only five of the thirteen states had abolished slavery, women did not count as part of the franchise-holding, politically active community in any state, and wealth qualifications severely limited voter eligibility even among white males.¹¹ In correspondence with a friend about the qualifications for voting in his home state of Massachusetts, patriot and second President John Adams elaborated:

[I]t is dangerous to open so fruitful a source of controversy and altercation as would be opened by attempting to alter the qualifications of voters; there will be no end of it. New claims will arise; women will demand a vote; lads from twelve to twenty-one will think their rights not enough attended to; and every man who has not a farthing, will demand an equal voice with any other, in all acts of state. It tends to confound and destroy all distinctions, and prostrate all ranks to one common level.¹²

Our second President notwithstanding, equalizing voices and destroying rank distinctions have been dominant concerns in recent genera-

⁶ N. Dorsen, *supra* note 1, at xii (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819)).

⁷ *Id.* (quoting *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 443 (1934)).

⁸ See *id.*

⁹ See Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 *Harv. L. Rev.* 1, 2 (1987).

¹⁰ See Richard B. Morris, *The Forging of the Union, 1781-1789*, at 162-93 (1987); Linda K. Kerber, "Ourselves and Our Daughters Forever": Women and the Constitution, 1787-1876, *This Constitution: A Bicentennial Chron.*, Spring 1985, at 25.

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

¹² Letter from John Adams to James Sullivan (May 26, 1776), in 9 *The Works of John Adams* 378 (Charles Francis Adams ed., 1854).

tions and, as one would expect, the focus of several Madison Lectures.¹³ Although the word "equal," or "equality," in relation to individual rights does not even appear in the original U.S. Constitution or in the first ten amendments that compose the Bill of Rights,¹⁴ the equal dignity of individuals ideal is part of our constitutional legacy, even of the pre-Civil War original understanding, in this vital sense. The founding fathers rebelled against the patriarchal power of kings and the idea that political authority may legitimately rest on birth status. Their culture held them back from fully perceiving or acting upon ideals of human equality and dignity. Thomas Jefferson, for example, when President, told his Secretary of the Treasury: "The appointment of a woman to [public] office is an innovation for which the public is not prepared, nor am I."¹⁵ But the founders stated a commitment in the Declaration of Independence to equality and in the Declaration and the Bill of Rights to individual liberty. Those commitments had growth potential. As historian Richard Morris has written, a prime portion of the history of the U.S. Constitution is the story of the extension (through amendment, judicial interpretation, and practice) of constitutional rights and protections to once-excluded groups: to people who were once held in bondage, to men without property, to Native Americans, and to women.¹⁶

I

COLLEGIALITY IN APPELLATE DECISIONMAKING

I turn now to the first of the two topics this lecture addresses—the style of judging appropriate for appellate judges whose mission it is, in Hamilton's words, "to secure a steady, upright, and impartial administration of the laws."¹⁷ Integrity, knowledge, and, most essentially, judgment are the qualities Hamilton ascribed to the judiciary.¹⁸ How is that essential quality, judgment, conveyed in the opinions appellate judges write? What role should moderation, restraint, and collegiality play in

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

¹⁴ See Merritt, *supra* note 11, at 765; R. Morris, *supra* note 10, at 162-63.

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

¹⁶ R. Morris, *supra* note 10, at 193.

¹⁷ *The Federalist* No. 78, *supra* note 3, at 465.

¹⁸ See *id.* at 465, 471.

the formulation of judicial decisions? As background, I will describe three distinct patterns of appellate opinion-casting: individual, institutional, and in-between.¹⁹

The individual judging pattern has been characteristic of the Law Lords, who serve as Great Britain's Supreme Court. The Lords sit in panels of five and, traditionally, have delivered opinions seriatim, each panel member, in turn, announcing his individual judgment and the reasons for it.²⁰

In contrast to the British tradition of opinions separately rendered by each judge as an individual, the continental or civil law traditions typified and spread abroad by France and Germany call for collective, corporate judgments. In dispositions of that genre, disagreement is not disclosed. Neither dissent nor separate concurrence is published. Cases are decided with a single, *per curiam* opinion generally following a uniform, anonymous style.²¹

Our Supreme Court, when John Marshall became Chief Justice, made a start in the institutional opinion direction. Marshall is credited with establishing the practice of announcing judgments in a single opinion for the Court.²² The Marshall Court, and certainly its leader, had a strong sense of institutional mission, a mission well served by unanimity. Marshall was criticized, in those early days, for suppressing dissent. Thomas Jefferson complained: "An opinion is huddled up in conclave, perhaps by a majority of one, delivered as if unanimous, and with the silent acquiescence of lazy or timid associates, by a crafty chief judge, who sophisticates the law to his own mind, by the turn of his own reasoning."²³

But even Marshall, during his long tenure as Chief Justice, ultimately dissented on several occasions and once concurred with a separate opinion.²⁴ We continue in that middle way today. Our appellate courts

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

²⁰ See Louis Blom-Cooper & Gavin Drewry, *Final Appeal: A Study of the House of Lords in Its Judicial Capacity* 81-82, 523 (1972); see also Alan Paterson, *The Law Lords* 109-10 (1982) (noting that the Lords no longer routinely deliver five separate opinions).

²¹ It has been said of the French tradition that the ideal judgment is "considered all the more perfect for its concise and concentrated style, so that only experienced jurists are able to understand and admire it." René David & John E.C. Brierley, *Major Legal Systems in the World Today* 129 (2d ed. 1978).

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

²³ Letter from Thomas Jefferson to Thomas Ritchie (Dec. 25, 1820), in 10 *The Writings of Thomas Jefferson* 169, 171 (Paul L. Ford ed., 1899).

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

generally produce a judgment or opinion for the court. In that respect, we bear some resemblance to the highly institution-minded civil law judges, although our judges individually claim authorship of most of the opinions they publish. In tune with the British or common law tradition, however, we place no formal limit on the prerogative of each judge to speak out separately.

To point up the difference between individual and institutional modes of judging, I have drawn upon a 1989 letter from a civilian jurist.²⁵ The letter came from a member of the Conseil d'Etat, the illustrious body created by Napoleon that still serves, among other functions, as Supreme Administrative Court for France. The conseiller who wrote to me had observed, together with several of his colleagues, an appellate argument in the District of Columbia Circuit. The appeal was from a criminal conviction; the prime issue concerned the fifth amendment's double jeopardy ban.²⁶ When the case was decided, I sent our French visitors copies of the slip sheet. It contained the panel's judgment, and three opinions, one per judge. I paraphrase the conseiller's reaction:

The way the decision is given is surprising for us according to our standards. The discussion of theory and of the meaning of precedents is remarkable. But the divided opinions seem to me very far from the way a judgment should issue, particularly in a criminal case. The judgment of a court should be precise and concise, not a discourse among professors, but the order of people charged to speak in the name of the law, and therefore written with simplicity and clarity, presenting short explanations. A judgment that is too long indicates uncertainty.

At the same time, it is very impressive for me to see members of a court give to the litigants and to the readers the content of their hesitations and doubts, without diminishing the credibility of justice, in which the American is so confident.²⁷

The conseiller seems at first distressed, even appalled, at our readiness to admit that legal judgments (including constitutional rulings) are not always clear and certain. In his second thought, however, the conseiller appears impressed, touched with envy or admiration, that our system of justice is so secure, we can tolerate open displays of disagreement among judges about what the law is.²⁸

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

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

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

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

But overindulgence in separate opinion writing may undermine both the reputation of the judiciary for judgment and the respect accorded court dispositions. Rule of law virtues of consistency, predictability, clarity, and stability may be slighted when a court routinely fails to act as a collegial body.²⁹ Dangers to the system are posed by two tendencies: too frequent resort to separate opinions and the immoderate tone of statements diverging from the position of the court's majority.

Regarding the first danger, recall that "the Great Dissenter," Justice Oliver Wendell Holmes, in fact dissented less often than most of his colleagues.³⁰ Chief Justice Harlan F. Stone once wrote to Karl Llewellyn (both gentlemen were public defenders of the right to dissent): "You know, if I should write in every case where I do not agree with some of the views expressed in the opinions, you and all my other friends would stop reading [my separate opinions]."³¹ In matters of statutory interpretation, Justice Louis D. Brandeis repeatedly cautioned: "[I]t is more important that the applicable rule of law be settled than that it be settled right." "This is commonly true," Brandeis continued, "even where the error is a matter of serious concern, provided correction can be had by legislation."³² Revered constitutional scholar Paul A. Freund, who clerked for Justice Brandeis, recalled Justice Cardozo's readiness to suppress his dissent in common law cases (the Supreme Court had more of those in pre-*Erie*³³ days), so that an opinion would come down unanimous.³⁴

Separate concurrences and dissents characterize Supreme Court decisions to a much greater extent than they do court of appeals three-judge panel decisions. In the District of Columbia Circuit, for example, for the statistical year ending June 1992, the court rendered 405 judgments in cases not disposed of summarily; over eighty-six percent of those decisions were unanimous.³⁵ During that same period, the

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

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

³¹ Walter F. Murphy, *Elements of Judicial Strategy* 62 (1964) (quoting Letter from then Justice Stone to Karl Llewellyn (Feb. 4, 1935)).

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

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

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

³⁵ See Summary of Annual Report of D.C. Circuit Opinions for Statistical Year July 1, 1991 - June 30, 1992 (the 405 figure includes 291 opinions published in the *Federal Reporter* series and 114 unpublished opinions issued in cases resolved after oral argument; separate concurrences and dissents numbered 55).

Supreme Court decided 114 cases with full opinions; only 21.9% of the decisions were unanimous.³⁶ A reality not highlighted by a press fond of separating Carter from Reagan/Bush appointees³⁷ accounts in considerable measure for this difference: the character of cases heard by courts of appeals combines with our modus operandi to tug us strongly toward the middle, toward moderation and away from notably creative or excessively rigid positions.³⁸ (The tug is not so strong, however, as to make a proposal I recently advanced acceptable. At a meeting of U.S. court of appeals judges in February 1993, I suggested that when panels are unanimous, the standard practice should be to issue the decision per curiam, without disclosing the opinion writer. That would encourage brevity, I thought, and might speed up dispositions. Few of the judges in attendance found the idea appealing.)

Concerning the character of federal cases, unlike the Supreme Court, courts of appeals deal far less frequently with grand constitutional questions than with less cosmic questions of statutory interpretation or

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

³⁷ See, e.g., George Archibald, *Free Hill Mailings to Future Districts Banned by Court*, Wash. Times, July 31, 1992, at A3 ("A three-judge panel of the U.S. Court of Appeals for the District of Columbia split 2-1. . . . Judges Laurence H. Silberman, a Reagan appointee, and A. Raymond Randolph, appointed by President Bush, voted to overturn" the district court's ruling; "Judge Patricia M. Wald, a Carter appointee, voted [to affirm]."); Philip J. Hiltz, *Judge Overturns Federal Seizure of Abortion Pill*, N.Y. Times, July 15, 1992, at A1 ("In the increasingly political battle over [the] RU486 [abortion pill], the decision favoring the woman, who brought the drug into the country to test the ban, came from a judge who had been appointed by President Jimmy Carter. Later, his order was stopped by a panel of three judges . . . : John M. Walker, President Bush's cousin and a Bush appointee, and Frank X. Altamari and Daniel J. Mahoney, both appointed by President Ronald Reagan."); Karen Riley, *Mayor to Flout Court Ruling*, Wash. Times, May 9, 1992, at A1 ("[Mayor Sharon Pratt Kelly] said the Bush and Reagan administrations had packed the federal bench with judges who are in 'retreat' on civil rights issues"; she "threatened to defy" a unanimous federal appeals court decision "by two Carter-appointed judges and a judge appointed by President Bush" striking down the District's minority contracting program.); Cindy Rugeley, *Abortion Fight Now Heads to Legislature*, Houston Chron., June 30, 1992, at A11 ("President Bush has changed his opinion on abortion and so it's not surprising to see the Supreme Court—a majority of whom have been appointed by President Bush or Reagan—ignoring its own precedent and changing its opinion on a woman's right to choose.") (quoting Texas Lieutenant Governor Bob Bullock); *Will DeKalb Students Win?*, Atlanta J. & Const., April 2, 1992, at A18 (editorial) (People seeking "to end the last vestiges of segregation in American schools" face "a federal judiciary dominated by conservatives appointed by Presidents Reagan and Bush"; "[t]hose judges are likely to be more sympathetic to school officials arguing for a return of local control than to minority students seeking remedies to the lingering effects of segregation."). But see, e.g., Mary Deibel, *Supreme Surprises*, Star Trib. (Minneapolis), July 5, 1992, at 14A ("Of the three dozen cases in which the administration advocated a position, it lost 20 times, often because of the votes of the five justices appointed by Bush and his predecessor, Ronald Reagan.").

³⁸ See J. Woodford Howard, Jr., *Courts of Appeals in the Federal Judicial System* 189-221 (1981); Ruth Bader Ginsburg, *The Obligation to Reason Why*, 37 U. Fla. L. Rev. 205, 212, 216 (1985).

the rationality of agency or district court decisions. In most matters of that variety, as Justice Brandeis indicated, it is best that the matter be definitively settled,³⁹ preferably with one opinion. Furthermore, lower court judges are bound more tightly by Supreme Court precedent than is the High Court itself.

Turning to the way we operate, I note first that no three-judge panel in a circuit is at liberty to depart from the published decision of a prior panel; law of the circuit may be altered only by the court en banc.⁴⁰ To assure that each panel knows what the others are doing, the District of Columbia Circuit, and several other federal circuit courts of appeals, circulate opinions to the full court, once approved by a panel, at least a week in advance of release.⁴¹

Second, in contrast to district judges, who are the real power holders in the federal court system—lords of their individual fiefdoms from case filing to first instance final judgment—no single court of appeals judge can carry the day in any case. To attract a second vote and establish durable law for the circuit, a judge may find it necessary to moderate her own position, sometimes to be less bold, other times to be less clear.⁴² We can listen to and persuade each other in groups of three more effectively than can a larger panel.

On the few occasions each year when we sit en banc—in the District of Columbia Circuit, all twelve of us when we are full strength—I can appreciate why unanimity is so much harder to achieve in Supreme Court judgments. Not only do the Justices deal much more often with constitutional questions, where, in many cases, only overruling or constitutional amendment can correct a mistake. In addition, one becomes weary after going round the table on a first ballot. It is ever so much easier to have a conversation—and an exchange of views on opinion drafts—among three than among nine or twelve.⁴³

³⁹ See note 32 and accompanying text *supra*.

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

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

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

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

William H. Rehnquist, Chief Justices I Never Knew, 3 *Hastings Const. L.Q.* 637, 643 (1976) (quoting Edwin McElwain, *The Business of the Supreme Court as Conducted by Chief Justice Hughes*, 63 *Harv. L. Rev.* 5, 19 (1949)).

⁴³ Cf. Jon O. Newman, *The Second Circuit Review, 1987-1988 Term—Foreword: In Banc*

In writing for the court, one must be sensitive to the sensibilities and mindsets of one's colleagues, which may mean avoiding certain arguments and authorities, even certain words.⁴⁴ Should institutional concerns affect the tone of separate opinions, when a judge finds it necessary to write one?

I emphasize first that dissents and separate concurrences are not consummations devoutly to be avoided. As Justice William J. Brennan said in thoughtful defense of dissents: "None of us, lawyer or layman, teacher or student, in our society must ever feel that to express a conviction, honestly and sincerely maintained, is to violate some unwritten law of manners or decorum."⁴⁵ I question, however, resort to expressions in separate opinions that generate more heat than light. Consider this sample from an April 1991 District of Columbia Circuit decision. The dissenter led off: "Running headlong from the questions briefed and argued before us, my colleagues seek refuge in a theory as novel as it is questionable. Unsupported by precedent, undeveloped by the court, and unresponsive to the facts of this case, the . . . theory announced today has an inauspicious birth."⁴⁶ That spicy statement, by the way, opposed an en banc opinion in which all of the judges concurred, except the lone dissenter.

It is "not good for public respect for courts and law and the administration of justice," Roscoe Pound decades ago observed, for an appellate judge to burden an opinion with "intemperate denunciation of [the writer's] colleagues, violent invective, attributi[on]s of bad motives to the majority of the court, and insinuations of incompetence, negligence, prejudice, or obtuseness of [other judges]."⁴⁷ Yet one has only to thumb through the pages of current volumes of United States Reports and Federal Reporter Second to come upon condemnations by the score of a court or colleague's opinion or assertion as, for example, "folly,"⁴⁸ "ludi-

Practice in the Second Circuit, 1984-1988, 55 *Brook. L. Rev.* 355, 369-70 (1989) ("[I]f we were confronting one another frequently each year as members of an in banc court, I believe there would be at least some risk to the extremely high level of civility that now pervades our relationships both in the decision-making and opinion-writing phases of our work.").

⁴⁴ See Frank M. Coffin, *The Ways of a Judge: Reflections from the Federal Appellate Bench 181-88* (1980).

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

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

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

⁴⁸ *R.A.V. v. St. Paul*, 112 S. Ct. 2538, 2560 (1992) (White, J., concurring in the judgment) ("I join the judgment, but not the folly of the opinion.").

crous,"⁴⁹ "outrageous,"⁵⁰ one that "cannot be taken seriously,"⁵¹ "inexplicable,"⁵² "the quintessence of inequity,"⁵³ a "blow against the People,"⁵⁴ "naked analytical bootstrapping,"⁵⁵ "reminiscent . . . of Sherman's march through Georgia,"⁵⁶ and "Orwellian."⁵⁷

"[L]anguage impugning the motives of a colleague," Senior Third Circuit Judge Collins J. Seitz recently commented, may give momentary satisfaction to the separate opinion writer, but "does nothing to further cordial relationships on the court."⁵⁸ Judge Seitz counseled "waiting a day"—I would suggest even a week or two—"before deciding whether to

⁴⁹ *Lee v. Weisman*, 112 S. Ct. 2649, 2679, 2681, 2685 (1992) (Scalia, J., dissenting) (describing Court's opinion as "oblivious to our history," "incoherent," "nothing short of ludicrous," and "a jurisprudential disaster").

⁵⁰ *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2875 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) ("I must . . . respond to a few of the more outrageous arguments in today's opinion, which it is beyond human nature to leave unanswered.").

⁵¹ *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 532 (1989) (Scalia, J., concurring in part and concurring in the judgment) ("Justice O'Connor's assertion . . . that a 'fundamental rule of judicial restraint' requires us to avoid reconsidering *Roe*, cannot be taken seriously."); cf. *Payne v. Tennessee*, 111 S. Ct. 2597, 2622 (1991) (Marshall, J., dissenting) ("majority cannot sincerely expect anyone to believe [its assertion]"); *McCleskey v. Zant*, 111 S. Ct. 1454, 1481 (1991) (Marshall, J., dissenting) ("It is difficult to take [the majority's] reasoning seriously."); *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 139 (1990) (Stevens, J., dissenting) ("Even wearing his famous blinders, old Dobbin would see through the tired arguments the Court accepts today.").

⁵² *Coleman v. Thompson*, 111 S. Ct. 2546, 2574 (1991) (Blackmun, J., dissenting) (describing majority's distinction as "inexplicable" and its conception as "entirely unprecedented").

⁵³ *Id.* at 2578.

⁵⁴ *Morgan v. Illinois*, 112 S. Ct. 2222, 2242 (1992) (Scalia, J., dissenting) ("Today . . . the Court strikes a further blow against the People in its campaign against the death penalty.").

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

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

⁵⁷ *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2882 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) ("[T]o portray *Roe* as the statesmanlike 'settlement' of a divisive issue, a jurisprudential Peace of Westphalia that is worth preserving, is nothing less than Orwellian."); *County of Allegheny v. ACLU*, 492 U.S. 573, 678 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part) ("Court lends its assistance to an Orwellian rewriting of history"); *FCC v. League of Women Voters*, 468 U.S. 364, 417 n.10 (1984) (Stevens, J., dissenting) (majority's argument "would be laughable were it not so Orwellian"); *United Steelworkers v. Weber*, 443 U.S. 193, 219-21 (1979) (Rehnquist, J., dissenting) (Court has behaved like "Orwellian speaker" who, in mid-sentence, "switched from one line to the other") (quoting George Orwell, 1984, 181-82 (1949)).

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

send a biting response.”⁵⁹

The most effective dissent, I am convinced, “stand[s] on its own legal footing”;⁶⁰ it spells out differences without jeopardizing collegiality or public respect for and confidence in the judiciary. I try to write my few separate opinions each year as I once did briefs for appellees—as affirmative statements of my reasons, drafted before receiving the court’s opinion, and later adjusted, as needed, to meet the majority’s presentation. Among pathmarking models, one can look to Justice Curtis’s classic dissent in the *Dred Scott* case,⁶¹ and, closer to our time, separate opinions by the second Justice John Marshall Harlan.⁶²

Taking a comparative sideglance, I find instructive the March 5, 1992 judgment of the Supreme Court of Ireland in the case of *Attorney General v. X*.⁶³ The case involved a fourteen-year-old girl who, it was alleged, had been raped by the father of a school friend and had become pregnant. She and her parents had gone to England to secure an abortion. But they promptly returned home when notified that the Attorney General had obtained an order from the High Court (the court of first instance) in Ireland enjoining their travel and its purpose. At issue was a clause of the Constitution of Ireland that read: “The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.”⁶⁴

In fact, no implementing laws had been passed, so the courts were called upon to interpret the Constitution directly. The Supreme Court, composed of five judges, voted four to one to set aside the High Court’s February 17, 1992 injunction.⁶⁵ Each judge spoke separately, but the majority agreed that, in view of the documented “real and substantial” risk that the girl would take her own life, termination of her pregnancy was permissible, even in Ireland itself. In so ruling, the Chief Justice referred to precedent calling upon judges to bring to bear on their judg-

⁵⁹ *Id.*

⁶⁰ *Id.*

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

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

⁶³ The various High Court and Supreme Court opinions in this case are reprinted in *The Attorney General v. X and Others* (Sunniva McDonagh ed., 1992).

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

⁶⁵ See Opinion of Costello, J. (Ir. H. Ct.) (Feb. 17, 1992), reprinted in *The Attorney General v. X and Others*, *supra* note 63, at 9.

ments the instruction in the Constitution's preamble that the fundamental instrument of government was adopted by the People "to promote the common good, with due observance of prudence, justice and charity so that the dignity and freedom of the individual might be assured."⁶⁶ Those concepts and judicial interpretations of them, the Chief Justice said, "may gradually change or develop as society changes and develops."⁶⁷

The dissenting Justice spent no energy characterizing his colleagues' opinions as "activist" or "imperial."⁶⁸ He simply stated affirmatively his view that the evidence did not justify overturning the injunction.⁶⁹ "Suicide threats," he reasoned, "can be contained."⁷⁰ "The choice," he said, was "between the certain death of the unborn life and a feared substantial danger . . . but no degree of certainty of the [mother's death] by way of self-destruction."⁷¹ The Constitution's "equal right" provision, he concluded, required the judiciary to prevent the certain death, not the one that could be guarded against.

I did not select this example as a springboard to comparison of positions on access to abortion under constitutional prescriptions and legal regimes here and abroad.⁷² I chose *Attorney General v. X* only to demonstrate that even in the most emotion-laden, politically sensitive case, effective opinion writing does not require a judge to upbraid colleagues for failing to see the light or to get it right.⁷³

Concerned about the erosion of civility in the legal profession, the Seventh Circuit, commencing in the fall of 1989, conducted a "study and investigation into litigation practices and the attending relationships among lawyers, among judges, and between lawyers and judges."⁷⁴ The Final Report of the committee in charge of the study, released in June

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

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

⁶⁸ Cf., e.g., *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2882 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) ("The Imperial Judiciary lives.").

⁶⁹ See Opinion of Hederman, J. (Ir. S.C.) (Mar. 5, 1992), reprinted in *The Attorney General v. X and Others*, supra note 63, at 69, 83.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² See generally Mary Ann Glendon, *Abortion and Divorce in Western Law* (1987); Donald P. Kommers, *Abortion and Constitution: United States and West Germany*, 25 *Am. J. Comp. L.* 255 (1977).

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

⁷⁴ Final Report of the Committee on Civility of the Seventh Federal Judicial Circuit 3 (1992).

1992, urges judges to set a good example by staying on the high ground. Specifically, the Report calls on judges to avoid "disparaging personal remarks or criticisms, or sarcastic or demeaning comments about another judge," and instead to "be courteous, respectful, and civil in opinions, ever mindful that a position articulated by another judge [generally] is the result of that judge's earnest effort to interpret the law and the facts correctly."⁷⁵ To that good advice, one can say "amen."

II

MEASURED MOTIONS IN THIRD BRANCH DECISIONMAKING

Moving from the style to the substance of third branch decision-making, I will stress in the remainder of these remarks that judges play an interdependent part in our democracy. They do not alone shape legal doctrine but, as I suggested at the outset, they participate in a dialogue with other organs of government, and with the people as well.⁷⁶ "[J]udges do and must legislate," Justice Holmes "recognize[d] without hesitation," but "they can do so," he cautioned, "only interstitially; they are confined from molar to molecular motions."⁷⁷ Measured motions seem to me right, in the main, for constitutional as well as common law adjudication. Doctrinal limbs too swiftly shaped, experience teaches, may prove unstable.⁷⁸ The most prominent example in recent decades is *Roe v. Wade*.⁷⁹ To illustrate my point, I have contrasted that breathtaking 1973 decision with the Court's more cautious dispositions, contemporaneous with *Roe*, in cases involving explicitly sex-based classifications,⁸⁰ and will further develop that comparison here.

⁷⁵ *Id.* at 7A; see also Interim Report of the Committee on Civility of the Seventh Federal Judicial Circuit 3, 13, 39-42 (1991).

⁷⁶ See generally Louis Fisher, *Constitutional Dialogues: Interpretation as Political Process* (1988). Recent commentary on court-legislature communication includes Shirley S. Abrahamson & Robert L. Hughes, *Shall We Dance? Steps for Legislators and Judges in Statutory Interpretation*, 75 *Minn. L. Rev.* 1045 (1991); Robert A. Katzmann, *Bridging the Statutory Gulf Between Courts and Congress: A Challenge for Positive Political Theory*, 80 *Geo. L.J.* 653 (1992); Deanell Reece Tacha, *Judges and Legislators: Renewing the Relationship*, 52 *Ohio St. L.J.* 279 (1991).

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

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

⁷⁹ 410 U.S. 113 (1973).

⁸⁰ *Ruth Bader Ginsburg, Some Thoughts on Autonomy and Equality in Relation to Roe v.*

The seven to two judgment in *Roe v. Wade*⁸¹ declared “violative of the Due Process Clause of the Fourteenth Amendment” a Texas criminal abortion statute that intolerably shackled a woman’s autonomy; the Texas law “except[ed] from criminality only a *life-saving* procedure on behalf of the [pregnant woman].”⁸² Suppose the Court had stopped there, rightly declaring unconstitutional the most extreme brand of law in the nation, and had not gone on, as the Court did in *Roe*, to fashion a regime blanketing the subject, a set of rules that displaced virtually every state law then in force.⁸³ Would there have been the twenty-year controversy we have witnessed, reflected most recently in the Supreme Court’s splintered decision in *Planned Parenthood v. Casey*?⁸⁴ A less encompassing *Roe*, one that merely struck down the extreme Texas law and went no further on that day, I believe and will summarize why, might have served to reduce rather than to fuel controversy.

In the 1992 *Planned Parenthood* decision, the three controlling Justices accepted as constitutional several restrictions on access to abortion that could not have survived strict adherence to *Roe*.⁸⁵ While those Justices did not closely consider the plight of women without means to overcome the restrictions, they added an important strand to the Court’s opinions on abortion—they acknowledged the intimate connection between a woman’s “ability to control [her] reproductive life” and her “ability . . . to participate equally in the economic and social life of the Nation.”⁸⁶ The idea of the woman in control of her destiny and her place in society⁸⁷ was less prominent in the *Roe* decision itself, which coupled with the rights of the pregnant woman the free exercise of her

Wade, 63 N.C. L. Rev. 375 (1985).

⁸¹ Justices White and Rehnquist dissented.

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

⁸³ In a companion case, *Doe v. Bolton*, 410 U.S. 179 (1973), the Court, again 7-2, held unconstitutional several provisions of Georgia’s abortion law. The Georgia statute, enacted in 1968, had moved a considerable distance from the Texas extreme. It was based on the American Law Institute’s Model Penal Code formulation, and resembled reformed laws then in force in about one-fourth of the states. The Court might have deferred consideration of *Doe v. Bolton* pending its disposition of *Roe*; indeed, the Court might have awaited the Fifth Circuit’s resolution of an appeal taken by Georgia to the intermediate appellate court instead of ruling immediately on plaintiffs’ direct appeal from a three-judge district court decision holding in substantial part for plaintiffs. See *Doe*, 410 U.S. at 187 & n.8.

⁸⁴ 112 S. Ct. 2791 (1992).

⁸⁵ See *id.* at 2841-43 (Stevens, J., concurring in part and dissenting in part) (maintaining that 24-hour delay requirement and counseling provisions conflicted with Court precedent); *id.* at 2846, 2850-52 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) (maintaining that counseling, 24-hour delay, and parental consent provisions conflicted with Court precedent).

⁸⁶ *Id.* at 2809. On this point, the controlling Justices—Justices O’Connor, Kennedy, and Souter—spoke for the Court.

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

physician's medical judgment.⁸⁸ The *Roe* decision might have been less of a storm center⁸⁹ had it both homed in more precisely on the women's equality dimension of the issue and, correspondingly, attempted nothing more bold at that time than the mode of decisionmaking the Court employed in the 1970s gender classification cases.

In fact, the very Term *Roe* was decided, the Supreme Court had on its calendar a case that could have served as a bridge, linking reproductive choice to disadvantageous treatment of women on the basis of their sex. The case was *Struck v. Secretary of Defense*;⁹⁰ it involved a Captain the Air Force sought to discharge in Vietnam War days. Perhaps it is indulgence in wishful thinking, but the *Struck* case, I believe, would have proved extraordinarily educational for the Court and had large potential for advancing public understanding. Captain Susan Struck was a career officer. According to her commanding officer, her performance as a manager and nurse was exemplary.⁹¹ Captain Struck had avoided the drugs and the alcohol that hooked many service members in the late 1960s and early 1970s,⁹² but she did become pregnant while stationed in Vietnam. She undertook to use, and in fact used, only her accumulated leave time for childbirth. She declared her intention to place, and in fact placed, her child for adoption immediately after birth. Her religious faith precluded recourse to abortion.⁹³

Two features of Captain Struck's case are particularly noteworthy. First, the rule she challenged was unequivocal and typical of the time. It provided: "A woman officer will be discharged from the service with the least practicable delay when a determination is made by a medical officer that she is pregnant."⁹⁴ To cover any oversight, the Air Force had a back-up rule: "The commission of any woman officer will be terminated with the least practicable delay when it is established that she . . . [i]as given birth to a living child while in a commissioned officer status."⁹⁵

A second striking element of Captain Struck's case was the escape

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

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

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

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

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

⁹³ See *id.* at 3-5, 56.

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

⁹⁵ *Struck*, 460 F.2d at 1374.

route available to her, which she chose not to take. Air Force regulations current at the start of the 1970s provided: "The Air Force Medical Service is not subject to State laws in the performance of its functions. When medically indicated or for reasons involving medical health, pregnancies may be terminated in Air Force hospitals . . . idically before 20 weeks gestation."⁹⁶

Captain Struck argued that the unwanted discharge she faced unjustifiably restricted her personal autonomy and dignity; principally, however, she maintained that the regulation mandating her discharge violated the equal protection of the laws guarantee implicit in the fifth amendment's due process clause.⁹⁷ She urged that the Air Force regime differentiated invidiously by allowing males who became fathers, but not females who became mothers, to remain in service and by allowing women who had undergone abortions, but not women who delivered infants, to continue their military careers.⁹⁸ Her pleas were unsuccessful in the lower courts, but on October 24, 1972, less than three months before the *Roe* decision, the Supreme Court granted her petition for certiorari.⁹⁹

At that point the Air Force decided it would rather switch than fight. At the end of November 1972, it granted Captain Struck a waiver of the once unwaivable regulation and permitted her to continue her service as an Air Force officer. The Solicitor General promptly and successfully suggested that the case had become moot.¹⁰⁰

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

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

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

⁹⁹ *Struck*, 409 U.S. 947, 947 (1972).

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

Given the parade of cases on the Court's full calendar, it is doubtful that the Justices trained further attention on the *Struck* scenario. With more time and space for reflection, however, and perhaps a female presence on the Court, might the Justices have gained at least these two insights? First, if even the military, an institution not known for avant-garde policy, had taken to providing facilities for abortion, then was not a decision of *Roe's* muscularity unnecessary? Second, confronted with Captain Struck's unwanted discharge, might the Court have comprehended an argument, or at least glimpsed a reality, it later resisted—that disadvantageous treatment of a woman because of her pregnancy and reproductive choice is a paradigm case of discrimination on the basis of sex?¹⁰¹ What was the assumption underlying the differential treatment to which Captain Struck was exposed? The regulations that mandated her discharge were not even thinly disguised. They declared, effectively, that responsibility for children disabled female parents, but not male parents, for other work—not for biological reasons, but because society had ordered things that way.¹⁰²

Captain Struck had asked the Court first to apply the highest level of scrutiny to her case, to hold that the sex-based classification she encountered was a "suspect" category for legislative or administrative action.¹⁰³ As a fallback, she suggested to the Court an intermediate standard of review, one under which prescriptions that worked to women's disadvantage would gain review of at least heightened, if not the very highest, intensity.¹⁰⁴ In the course of the 1970s, the Supreme Court explicitly acknowledged that it was indeed applying an elevated, labeled "intermediate," level of review to classifications it recognized as sex-based.¹⁰⁵

Justice O'Connor carefully traced that development in last year's Madison Lecture,¹⁰⁶ and I will recall it only summarily. Until 1971, women did not prevail before the Supreme Court in any case charging

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

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

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

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

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

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

unconstitutional sex discrimination.¹⁰⁷ In the years from 1971 to 1982, however, the Court held unconstitutional, as violative of due process or equal protection constraints, a series of state and federal laws that differentiated explicitly on the basis of sex.¹⁰⁸

The Court ruled in 1973, for example, that married women in the military were entitled to the housing allowance and family medical care benefits that Congress had provided solely for married men in the military.¹⁰⁹ Two years later, the Court held it unconstitutional for a state to allow a parent to stop supporting a daughter once she reached the age of 18, while requiring parental support for a son until he turned 21.¹¹⁰ In 1975, and again in 1979, the Court declared that state jury-selection systems could not exclude or exempt women as a class.¹¹¹ In decisions running from 1975 to 1980, the Court deleted the principal explicitly sex-based classifications in social insurance¹¹² and workers' compensation schemes.¹¹³ In 1981, the Court said nevermore to a state law designating the husband "head and master" of the household.¹¹⁴ And in 1982, in an opinion by Justice O'Connor, the Court held that a state could not limit admission to a state nursing college to women only.¹¹⁵

The backdrop for these rulings was a phenomenal expansion, in the years from 1961 to 1971, of women's employment outside the home,¹¹⁶

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

¹⁰⁸ See Wendy W. Williams, *Sex Discrimination: Closing the Law's Gender Gap*, in *The Burger Years: Rights and Wrongs in the Supreme Court 1969-1986*, at 109 (Herman Schwartz ed., 1987); see also Ruth Bader Ginsburg, *The Burger Court's Grapplings with Sex Discrimination*, in *The Burger Court: The Counter-Revolution that Wasn't* 132 (Vincent Blasi ed., 1983).

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

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

¹¹¹ *Taylor v. Louisiana*, 419 U.S. 522, 525 (1975) (invalidating law restricting service by women to volunteers); *Duren v. Missouri*, 439 U.S. 357, 360 (1979) (invalidating law allowing "any woman" to opt out of jury duty).

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

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

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

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

¹¹⁶ This expansion reflected a new reality: in the 1970s, for the first time in the nation's history, the "average" woman in the United States was experiencing most of her adult years in a household not dominated by childcare requirements. That development, Columbia Univer-

the civil rights movement of the 1960s and the precedents set in that struggle,¹¹⁷ and a revived feminist movement, fueled abroad and in the United States by Simone de Beauvoir's remarkable 1949 publication, *The Second Sex*.¹¹⁸ In the main, the Court invalidated laws that had become obsolete, retained into the 1970s by only a few of the states.¹¹⁹ In a core set of cases, however, those dealing with social insurance benefits for a worker's spouse or family,¹²⁰ the decisions did not utterly condemn the legislature's product. Instead, the Court, in effect, opened a dialogue with the political branches of government. In essence, the Court instructed Congress and state legislatures: rethink ancient positions on these questions. Should you determine that special treatment for women is warranted, i.e., compensatory legislation because of the sunken-in social and economic bias or disadvantage women encounter, we have left you a corridor in which to move.¹²¹ But your classifications must be refined, adopted for remedial reasons, and not rooted in prejudice about "the way women (or men) are."¹²² In the meantime, the Court's decrees removed no benefits; instead, they extended to a woman worker's husband, widower, or family benefits Congress had authorized only for members of a male worker's family.¹²³

The ball, one might say, was tossed by the Justices back into the legislators' court, where the political forces of the day could operate. The Supreme Court wrote modestly, it put forward no grand philosophy;¹²⁴ but by requiring legislative reexamination of once customary sex-

sity professor of economics Eli Ginzberg observed, may be "the single most outstanding phenomenon of our century." Jean A. Briggs, *How You Going to Get 'Em Back in the Kitchen? (You Aren't.)*, *Forbes*, Nov. 15, 1977, at 177 (quoting comment by Eli Ginzberg).

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

¹¹⁸ Simone de Beauvoir, *The Second Sex* (1949).

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

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

¹²¹ See *Califano v. Webster*, 430 U.S. 313 (1977) (upholding classification, effective from 1956 to 1972, establishing more favorable social security benefit calculation for retired female workers than for retired male workers).

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

¹²³ See Ruth Bader Ginsburg, *Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation*, 28 *Clev. St. L. Rev.* 301, 310-12 (1979).

¹²⁴ Notably too, the equal rights or sex equality advocates of the 1970s urged no elaborate theory. They did argue that by enshrining and promoting the woman's "natural" role as selfless homemaker, and correspondingly emphasizing the man's role as provider, the state im-

based classifications, the Court helped to ensure that laws and regulations would "catch up with a changed world."¹²⁵

Roe v. Wade,¹²⁶ in contrast, invited no dialogue with legislators. Instead, it seemed entirely to remove the ball from the legislators' court. In 1973, when *Roe* issued, abortion law was in a state of change across the nation. As the Supreme Court itself noted, there was a marked trend in state legislatures "toward liberalization of abortion statutes."¹²⁷ That movement for legislative change ran parallel to another law revision effort then underway—the change from fault to no-fault divorce regimes, a reform that swept through the state legislatures and captured all of them by the mid-1980s.¹²⁸

No measured motion, the *Roe* decision left virtually no state with laws fully conforming to the Court's delineation of abortion regulation still permissible.¹²⁹ Around that extraordinary decision, a well-organized and vocal right-to-life movement rallied and succeeded, for a considerable time, in turning the legislative tide in the opposite direction.

Constitutional review by courts is an institution that has been for some two centuries our nation's hallmark and pride.¹³⁰ Two extreme modes of court intervention in social change processes, however, have

peded both men and women from pursuit of the opportunities and styles of life that could enable them to break away from familiar stereotypes. The objective, however, was not "assimilationist" in the sense of accepting "man's world" and asking only that self-regarding, economically advantaged women be allowed to enter that world and play by men's rules. The endeavor was, instead, to remove artificial barriers to women's aspiration and achievement; if women became political actors in numbers, it was thought, they could then exercise their will and their judgment to help make the world and the rules fit for all humankind. See Ruth Bader Ginsburg & Barbara Flagg, *Some Reflections on the Feminist Legal Thought of the 1970s*, 1989 U. Chi. Legal F. 9, 17-18; cf. Herma Hill Kay, *The Future of Women Law Professors*, 77 Iowa L. Rev. 5, 18 (1991) ("The future of women law professors is not to adapt to legal education by being 'one of the boys,' but to transform the enterprise so that all of its participants are equal members of the same team.").

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

¹²⁶ 410 U.S. 113 (1973).

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

¹²⁸ See Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and its Aftermath*, 56 U. Cin. L. Rev. 1, 4-14, 26-55 (1987); see also Ginsburg, *supra* note 80, at 380 & n.36.

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

¹³⁰ See generally Louis Henkin, *The Age of Rights* 141-80 (1990).

placed stress on the institution. At one extreme, the Supreme Court steps boldly in front of the political process, as some believe it did in *Roe*.¹³¹ At the opposite extreme, the Court in the early part of the twentieth century found—or thrust—itsself into the rearguard opposing change, striking down, as unconstitutional, laws embodying a new philosophy of economic regulation at odds with the nineteenth century's laissez-faire approach.¹³² Decisions at both of these poles yielded outcries against the judiciary in certain quarters. The Supreme Court, particularly, was labeled “activist” or “imperial,” and its precarious position as final arbiter of constitutional questions was exposed.¹³³

I do not suggest that the Court should never step ahead of the political branches in pursuit of a constitutional precept. *Brown v. Board of Education*,¹³⁴ the 1954 decision declaring racial segregation in public schools offensive to the equal protection principle, is the case that best fits the bill. Past the midpoint of the twentieth century, apartheid remained the law-enforced system in several states, shielded by a constitutional interpretation the Court itself advanced at the turn of the century—the “separate but equal” doctrine.¹³⁵

In contrast to the legislative reform movement in the states, contemporaneous with *Roe*, widening access to abortion, prospects in 1954 for state legislation dismantling racially segregated schools were bleak. That was so, I believe, for a reason that distances race discrimination from discrimination based on sex. Most women are life partners of men; women bear and raise both sons and daughters. Once women's own consciousness was awakened to the unfairness of allocating opportunity and responsibility on the basis of sex, education of others—of fathers, husbands, sons as well as daughters—could begin, or be reinforced, at home.¹³⁶ When blacks were confined by law to a separate sector, there was no similar prospect for educating the white majority.¹³⁷

¹³¹ Cf. Archibald Cox, *Direct Action, Civil Disobedience, and the Constitution*, in *Civil Rights, the Constitution, and the Court* 2, 22-23 (1967) (“[S]harp changes in the law depend partly upon the stimulus of protest.”).

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

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

¹³⁴ 347 U.S. 483 (1954).

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

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

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

It bears emphasis, however, that *Brown* was not an altogether bold decision. First, Thurgood Marshall and those who worked with him in the campaign against racial injustice, carefully set the stepping stones leading up to the landmark ruling.¹³⁸ Pathmarkers of the same kind had not been installed prior to the Court's decision in *Roe*.¹³⁹ Second, *Brown* launched no broadside attack on the Jim Crow system in all its institutional manifestations. Instead, the Court concentrated on segregated schools;¹⁴⁰ it left the follow-up for other days and future cases. A burgeoning civil rights movement—which *Brown* helped to propel—culminating in the Civil Rights Act of 1964,¹⁴¹ set the stage for the Court's ultimate total rejection of Jim Crow legislation.

Significantly, in relation to the point I just made about women and men living together, the end of the Jim Crow era came in 1967, thirteen years after *Brown*: the case was *Loving v. Virginia*,¹⁴² the law under attack, a state prohibition on interracial marriage. In holding that law unconstitutional, the Court effectively ruled that, with regard to racial classifications, the doctrine of "separate but equal" was dead—everywhere and anywhere within the governance of the United States.¹⁴³

¹³⁸ See Richard Kluger, *Simple Justice* 256-84 (1976) (chronicling the efforts of Marshall and others in connection with *Sipuel v. Board of Regents of the Univ. of Oklahoma*, 332 U.S. 631 (1948); *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Sweatt v. Painter*, 339 U.S. 629 (1950); and *McLaurin v. Oklahoma St. Regents for Higher Educ.*, 339 U.S. 637 (1950)); Jack Greenberg, *Litigation for Social Change: Methods, Limits and Role in Democracy*, 29 *The Record of the Ass'n of the Bar of the City of New York* 320, 327-34 (1974) (discussing the "litigation campaign" preceding *Brown*).

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

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

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

¹⁴² 388 U.S. 1 (1967).

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

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

The framers of the Constitution allowed to rest in the Court's hands large authority to rule on the Constitution's meaning; but the framers, as I noted at the outset, armed the Court with no swords to carry out its pronouncements. President Andrew Jackson in 1832, according to an often-told legend, said of a Supreme Court decision he did not like: "The Chief Justice has made his decision, now let him enforce it."¹⁴⁴ With prestige to persuade, but not physical power to enforce, with a will for self-preservation and the knowledge that they are not "a bevy of Platonic Guardians,"¹⁴⁵ the Justices generally follow, they do not lead, changes taking place elsewhere in society.¹⁴⁶ But without taking giant strides and thereby risking a backlash too forceful to contain, the Court, through constitutional adjudication, can reinforce or signal a green light for a social change. In most of the post-1970 gender-classification cases, unlike *Roe*, the Court functioned in just that way. It approved the direction of change through a temperate brand of decisionmaking, one that was not extravagant or divisive. *Roe*, on the other hand, halted a political process that was moving in a reform direction and thereby, I believe, prolonged divisiveness and deferred stable settlement of the issue. The most recent *Planned Parenthood* decision¹⁴⁷ notably retreats from *Roe*¹⁴⁸ and further excludes from the High Court's protection women lacking the means or the sophistication to surmount burdensome legislation.¹⁴⁹ The latest decision may have had the sanguine effect, however, of contributing to the ongoing revitalization in the 1980s and 1990s of the political movement in progress in the early 1970s, a movement that addressed not simply or dominantly the courts but primarily the people's representatives and the people themselves. That renewed force, one may hope, will—within a relatively short span—yield an enduring resolution of this

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

Robert G. Dixon, Jr., *Democratic Representation: Reapportionment in Law and Politics* 8 (1968) (emphasis in original).

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

¹⁴⁵ Learned Hand, *The Bill of Rights* 73 (1958).

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

¹⁴⁷ *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992).

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

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

vital matter in a way that affirms the dignity and equality of women.¹⁵⁰

CONCLUSION

To sum up what I have tried to convey in this lecture, I will recall the counsel my teacher and friend, Professor Gerald Gunther, offered when I was installed as a judge. Professor Gunther had in mind a great jurist, Judge Learned Hand, whose biography Professor Gunther is just now completing. The good judge, Professor Gunther said, is "open-minded and detached, . . . heedful of limitations stemming from the judge's own competence and, above all, from the presuppositions of our constitutional scheme; th[at] judge . . . recognizes that a felt need to act only interstitially does not mean relegation of judges to a trivial or mechanical role, but rather affords the most responsible room for creative, important judicial contributions."¹⁵¹

¹⁵⁰ Indicative of the changed political climate, President Clinton, on his second full day in office, January 22, 1993, signed five Memoranda terminating abortion-related restraints imposed in the 1980s. See 29 Weekly Comp. Pres. Doc. 87-89 (Jan. 25, 1993) (Memorandum for the Secretary of Health and Human Services, on Federal Funding of Fetal Tissue Transplantation Research; Memorandum for the Secretary of Health and Human Services, on the Title X [of the Public Health Services Act] "Gag Rule"; Memorandum for the Acting Administrator of the Agency for International Development, on AID Family Planning Grants/Mexico City Policy; Memorandum for the Secretary of Defense, on Privately Funded Abortions at Military Hospitals; Memorandum for the Secretary of Health and Human Services, on Importation of RU-486). Cf. Law, *supra* note 148, at 931-32 (setting out opposing assessments and commenting that "[o]nly time will tell").

¹⁵¹ Professor Gerald Gunther Speaks at Investiture of Judge Ruth Ginsburg in Washington, D.C., *The Colum. Law Alumni Observer*, Dec. 31, 1980, at 8.