

KEYNOTE SPEECH AT THE SPRING 2012 PIPELINE TO POWER SYMPOSIUM

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How did I find my way to this conference? As Hannah and Renee mentioned earlier, I saw a little blog post back a year and a half ago about the article they were working on about media coverage and female Supreme Court nominees. It was shortly after the Senate confirmation hearings for Elena Kagan, the coverage of whose nomination I had found rather problematic in certain respects, and so I eagerly sent Hannah an email saying, “Can I please see the full article?” That did lead to my joining you here today.

I am not a scholar of this material, so I am not purporting to be a scholar. The role I agreed to undertake is to lay out the landscape on which all of the fascinating scholarly presentations tomorrow are going to fall. Reflecting the title of the Symposium, the question I address is whether the pipeline to power in the legal profession for women is half full or half empty.

People who listened to the audio of the three-day Supreme Court argument last month in the Affordable Care Act case of course heard three women’s voices.¹ No special point, in any commentary, was made of this fact, nor of the fact that all the advocates were men.² There was nothing particularly unusual about this second fact, but I wonder how many of the listeners pulled themselves away from the substance of what was going on to reflect on the first fact, the presence of three women on the Supreme Court bench.

A generation has come of age—our daughters, our students, even our graduate students, perhaps our co-workers—since the day in 1981, thirty-one years ago, when President Reagan announced the appointment of the first woman to the Supreme Court.³ That moment, from today’s perspective, may appear to have been a natural, if somewhat overdue, development—but remember that only a year earlier, a play called *First Monday in October* was a hit on Broadway. It featured a woman joining the U.S. Supreme

1. *The Affordable Care Act Cases*, OYEZ, http://www.oyez.org/cases/2010-2019/2011/2011_11_400 (last visited Feb. 12, 2013).

2. *Id.*

3. The Learning Network, *July 7, 1981: Reagan Nominates O’Connor, First Woman, for Supreme Court* (July 7, 2011), <http://learning.blogs.nytimes.com/2011/07/07/july-7-1981-reagan-nominates-oconnor-first-woman-for-supreme-court/>.

Court, and the premise was regarded as so far-fetched that it was played for laughs. It was a comedy.

The fact that women have made fitful, rather than steady, progress on the Supreme Court (after Sandra Day O'Connor's retirement in January 2006, Justice Ruth Bader Ginsburg was the solitary woman for the next three and a half years) really captures the nature of the Symposium's inquiry. So does the fact that the most recent nominees, Sonia Sotomayor and Elena Kagan, were subjected to highly gendered descriptions and dissections both in the media and in political circles.⁴ We're obviously going to hear a lot more about that tomorrow.

My point now is only that the current presence of three women is still nothing to take for granted. Not yet. In 2009, Ruth Ginsburg gave a remarkable interview to John Biskupic of *USA Today*.⁵ "It shouldn't be that women are the exception," Justice Ginsburg said.⁶ The headline on the story read: *Ginsburg: Court Needs Another Woman*.⁷ I am reminded of what Justice O'Connor said recently on a panel along with the three other female Justices celebrating her years on the Court. She said that it was nice to be the first, and she had spent her early years on the Court hoping she wouldn't be the last.

At the time of the interview that Ruth Ginsburg gave to *USA Today*, a case was pending before the Court on whether the strip search of a female middle school student had violated the Fourth Amendment. That case, *Safford Unified School District v. Redding*,⁸ had recently been argued. It was apparent during the argument that the male Justices were clueless about the trauma inflicted on a thirteen-year-old girl, forced to strip to her underwear in front of school officials on suspicion of carrying unauthorized tablets of Advil.⁹ One Justice had wondered aloud, from the bench, how this differed from changing into gym clothes in the locker room.¹⁰ "They had never been a 13-year-old girl," Justice Ginsburg said in the *USA Today* interview.¹¹ She went on: "It's a very sensitive age for a girl. I don't think that my colleagues, some of them, quite understood."¹² Her words were understated,

4. See Hannah Brenner & Renee Newman Knake, *Rethinking Gender Equality in the Legal Profession's Pipeline to Power: A Study on Media Coverage of Supreme Court Nominees (Phase I, The Introduction Week)*, 84 TEMP. L. REV. 325, 328 (2012).

5. Joan Biskupic, *Ginsburg: Court Needs Another Woman*, USA TODAY (Oct. 5, 2009), http://usatoday30.usatoday.com/news/washington/judicial/2009-05-05-ruthginsburg_N.htm.

6. *Id.* (quoting Justice Ginsburg).

7. *Id.*

8. 557 U.S. 364, 368 (2009).

9. See *Safford Unified School District v. Redding*, OYEZ, http://www.oyez.org/cases/2000-2009/2008/2008_08_479 (last visited Feb. 12, 2013).

10. *Id.*

11. Biskupic, *supra* note 5.

12. *Id.*

but the fact that a Justice would comment publicly on an undecided case spoke volumes. Justice Ginsburg, I should say, must have been quite persuasive behind the scenes as well, because seven Justices eventually agreed that the school officials' actions violated the Fourth Amendment.¹³

Social sciences regard women as having achieved critical mass when they comprise roughly one-third of the group in question.¹⁴ Now I'll quote from a social science study of this issue: "Critical mass is defined as the point at which the presence of women becomes significant enough to instigate change in the stereotypical conception of gender roles."¹⁵

Keeping that concept in mind, I'll now offer a statistical portrait of women in the law versus on the bench. Of 164 active judges on the 13 federal courts of appeals, 51 are women.¹⁶ That's 30.1%. That statistic masks the great variation among the circuits. On the Eighth Circuit, as some people in this room know very well, there's only one woman—Diana Murphy—appointed by President Clinton in 1994.¹⁷ She's the only woman ever to serve on the Eighth Circuit.¹⁸ She is seventy-seven years old.

About 30% of the federal district judges are women.¹⁹ The Obama administration has made great progress, actually, in appointing women to the bench. Of 138 nominees to Article III courts confirmed so far—not just nominated, but confirmed—42% are women.²⁰ That's a remarkable number. Just by way of comparison, here are the percentages of women named to the federal bench by the previous five Presidents: Bush II: 21%, Clinton: 29%, Bush I: 19%, Reagan: 9%, Carter: 16%²¹ and, I have to say, that was a stunning achievement for President Carter at a time when there were many fewer women in the pipeline and even in law school. President Carter deserves credit for having appointed an honor roll of distinguished women to the

13. See *Safford*, 557 U.S. at 382 (Thomas, J., dissenting).

14. CTR. FOR WOMEN IN GOV'T & CIVIL SOC'Y, WOMEN IN FEDERAL AND STATE-LEVEL JUDGESHIPS 8 (2011), available at http://www.albany.edu/womeningov/judge_ship_report_partII.pdf (citing Drude Dahlerup, *The Story of the Theory of Critical Mass*, 2 POL. & GENDER 511, 512, 514 (2006); ROSABETH MOSS KANTER, MEN AND WOMEN OF THE CORPORATION (1993)).

15. *Id.* (citing Dahlerup, *supra* note 14, at 511-12; KANTER, *supra* note 14).

16. *Women in the Federal Judiciary: Still a Long Way to Go*, NAT'L WOMEN'S L. CTR. (Dec. 13, 2012), <http://www.nwlc.org/resource/women-federal-judiciary-still-long-way-go-1> [hereinafter *Women in the Federal Judiciary*].

17. See *id.*; Lisa Montpetit Brabbit, *Infinity Project Seeks to Close the Gender Gap on the 8th Circuit*, ST. THOMAS LAW., Winter 2009, available at <http://www.stthomas.edu/news/2009/01/31/infinity-project-seeks-to-close-the-gender-gap-on-the-8th-circuit/>.

18. *Women in the Federal Judiciary*, *supra* note 16.

19. *Id.*

20. ALLIANCE FOR JUSTICE, JUDICIAL SELECTION SNAPSHOT 5 (2013), available at www.afj.org/judicial-selection/judicial-selection-snapshot.pdf; *Women in the Federal Judiciary*, *supra* note 16.

21. ALLIANCE FOR JUSTICE, *supra* note 20, at 5.

federal bench. Sadly, of course, he didn't have an opportunity to make a Supreme Court appointment. Had he been given that chance, I'm told many people believe he would have been likely to appoint Shirley Hufstедler, a Lyndon Johnson appointee to the Ninth Circuit who stepped down to serve the Carter administration as the country's first Secretary of Education.

On the state courts, women hold 27.5% of all judicial positions, including 32% on the seats of final courts of appeals.²² Six state benches overall are more than one-third female although none quite reach 40%.²³ The six are Vermont, Montana, Rhode Island, South Carolina, Oregon, and Kentucky.²⁴ Of the fifty state chief justices, eighteen are women—36%—including those from some of the reddest of red states: Alabama, Louisiana, Georgia, North and South Carolina, and Virginia.²⁵ One-third, thirteen out of thirty-nine, of Supreme Court law clerks in the current term are women.²⁶ The Supreme Court clerkship is definitely a pipeline to power. Clerks who seek careers as appellate litigators often spend a few years after their clerkship at the Solicitor General's Office, as Chief Justice John Roberts did following his clerkship with then-Justice William Rehnquist.²⁷

The route to Supreme Court clerkships begins with a position on law review, and we are going to hear more about that issue tomorrow, too. In judicial clerkships overall there actually are slightly more women than men. In 2010, women held 55% of state court clerkships, 54% of clerkships on local clerks; men held 54% of federal court clerkships overall, so it's pretty even.²⁸ In the law schools, about half the students in law school today are women.²⁹ Their initial career choices differ somewhat from those of male law graduates. Men are slightly more likely to go into law firms, considerably more likely to go into business and industry.³⁰ More women go more

22. COUNCIL OF STATE GOV'TS, CAPITOL FACTS & FIGURES: WOMEN IN STATE GOVERNMENT 1 (2011), available at knowledgecenter.csg.org/drupal/system/files/Women_in_Gov_2011_0.pdf.

23. CTR. FOR WOMEN IN GOV'T & CIVIL SOC'Y, *supra* note 14, at 2-6.

24. *Id.*

25. COUNCIL OF STATE GOV'TS, *supra* note 22, at 1-2.

26. Bridget Crawford, *Why So Few Female Supreme Court Law Clerks?*, FEMINIST LAW PROFESSORS (June 30, 2006), <http://www.feministlawprofessors.com/2006/06/why-so-few-female-supreme-court-law-clerks/>.

27. *Biographies of Current Justices of the Supreme Court*, U.S. SUPREME CT., <http://www.supremecourt.gov/about/biographies.aspx> (last visited Feb. 13, 2013).

28. *A Demographic Profile of Judicial Clerks—Patterns of Disproportionality*, NAT'L ASS'N FOR L. PLACEMENT (Nov. 2010), http://www.nalp.org/nov2010_demog_clerkships.

29. *Women in Law in the U.S.*, CATALYST (Oct. 17, 2012), <http://www.catalyst.org/knowledge/women-law-us>.

30. *Employment Patterns 1999-2010*, NAT'L ASS'N FOR L. PLACEMENT (Aug. 2011), <http://www.nalp.org/employmentpatterns1999-2010>.

often into the public interest and government sectors.³¹ These are initial placement statistics. Retention and career patterns over a lifetime tell a different story, and I think we will hear more about that tomorrow.

Women account for only 15% of equity partners at law firms, a figure that hasn't changed over the last two decades.³² Women in law firms are more likely to occupy non-partner track positions.³³ Staff attorneys and contract attorneys on whom law firms increasingly rely are likely to be experienced women who left the partnership track, whether willingly or not.³⁴ We will hear more about this tomorrow. In legal academia, women hold more than half of the entry-level assistant professor positions, but fewer than one-third of full professorships.³⁵ With the Ph.D. in addition to a law degree and a judicial clerkship quickly becoming the de facto requirement for tenure-track hiring in law schools, I wonder, although I haven't seen any scholarship on this, how this additional barrier to entry will affect women concerned with starting a family.

Corporate counsel: of the Fortune 500 general counsel positions, 21% are women.³⁶ Women hold 16% of the general counsel positions in companies on the Fortune 501 down to the Fortune 1000 list.³⁷ So that is where we are. The question for our mutual exploration is what it all means. None of us want to fall into the trap that awaited Shirley Abrahamson when in 1976 she was named to the Wisconsin Supreme Court, becoming the only woman to sit as a judge on any court in Wisconsin at that time.³⁸ At a press conference following her nomination she was asked these questions:

1. "Were you appointed because you are a woman?"
2. "[Were you] appointed as the token woman on the bench?"
3. "Do you view yourself as representing women in the courts?"
4. "Do you think women judges will make a difference . . . ?"³⁹

31. *Id.*

32. NAT'L ASS'N OF WOMEN LAWYERS & NAWL FOUND., REPORT OF THE SEVENTH ANNUAL NAWL NATIONAL SURVEY ON RETENTION AND PROMOTION OF WOMEN IN LAW FIRMS 12 (2012), available at <http://nawl.timberlakepublishing.com/files/NAWL%202012%20Survey%20Report%20final.pdf>.

33. *Id.* at 8-9.

34. *Id.* at 8.

35. 2008-2009 AALS Statistical Report on Law Faculty, ASS'N AM. L. SCH., <http://www.aals.org/statistics/2009dlt/security.html> (last visited Feb. 12, 2013).

36. See *MCCA Survey: Women General Counsel at Fortune 500 Companies Reaches New High*, METROPOLITAN CORP. COUNS. (Aug. 8, 2012), <http://www.metrocorpcounsel.com/news/19992/mcca-survey-women-general-counsel-fortune-500-companies-reaches-new-high>.

37. *Id.*

38. Shirley S. Abrahamson, *The Woman Has Robes: Four Questions*, 14 GOLDEN GATE U. L. REV. 489, 489 (1984).

39. *Id.* at 489-92.

As Chief Justice Abrahamson later recounted, she had no trouble answering the first three questions, having graduated first in her law school class.⁴⁰ In fact, she was the only woman in her law school class.⁴¹ She said that her appointment was obviously based on merit, that she was not a token anything, and that she would represent, quote: “[A]ll the people of the State of Wisconsin” just as she assumed male judges did.⁴² But the last question—do women make a difference—was trickier.⁴³ “I always take a deep breath when I hear this question, or one of its variants,” she wrote, adding:

The questioner usually has a stock list of the wonderful qualities he or she associates with women. Now I’m trapped. Naturally I want to have all of these wonderful traits attributed to me. . . . But do I believe that? I’ve spent a lifetime fighting society’s urge to stereotype both men and women. . . . So what am I to do now?⁴⁴

What she answered was that she would bring all of her life experiences to her new job, including growing up as a child of hard working immigrants, of having practiced and taught tax and business law, of marriage and parenthood, and, yes, of being female.⁴⁵ All of those experiences combined to make her the person she was and the judge that she would be. No one today would ask a female judicial nominee such a crudely direct question, although, as we will see tomorrow, there are ways to ask it indirectly.

So is the pipeline half full or half empty or something in between? I look forward to tomorrow’s exploration. Meanwhile, I’ll close by observing that, thanks to some remarkable women, the fact of a woman succeeding on the bench or in the law is itself no longer remarkable. For my own sake and the sake of my twenty-six-year-old daughter, I’m grateful for that progress that has occurred in my lifetime, and I look forward to more in the years ahead. Thanks very much.

40. *Id.* at 493.

41. *Id.* at 491.

42. *Id.* at 490-92.

43. *Id.* at 492.

44. *Id.*

45. *Id.* at 492-93.