

# THE WAY PAVERS: ELEVEN SUPREME COURT-WORTHY WOMEN

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## Introduction

Four women have served as associate justices on the United States Supreme Court. Since the Court's inception in 1789, more than 160 individuals have been nominated to serve as Supreme Court justices.<sup>1</sup> Five nominees, or roughly 3 percent, have been women.<sup>2</sup> To help put this gender dearth in perspective, more men named "Samuel" have served as Supreme Court justices than women.<sup>3</sup> Thirteen U.S. presidents have each nominated more people to the Supreme Court than the total number of women that have served on the Court.<sup>4</sup> Finally, there are *currently* as many Catholics serving on the Supreme Court as the number of women confirmed in the Court's *entire history*.<sup>5</sup>

Women, once thought of as "one-at-a-time-curiosities" on the bench, now constitute nearly one-third of all state and federal judges.<sup>6</sup> They occupy the highest posts on state supreme courts and can be found, in similar numbers, at the trial and appellate

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<sup>1</sup> *Supreme Court Nominations, present-1789*, U.S. SENATE,

<https://www.senate.gov/pagelayout/reference/nominations/Nominations.htm> [<https://perma.cc/KPK6-ZJHX>].

<sup>2</sup> *Id.* In addition to the four women who have served as Justices—Justice Sandra Day O'Connor, Justice Ruth Bader Ginsburg, Justice Sonia Sotomayor, and Justice Elena Kagan—Harriet Miers was also nominated but voluntarily withdrew her nomination.

<sup>3</sup> *Id.* The five Samuels are Samuel Chase, Samuel Nelson, Samuel Miller, Samuel Blatchford, and Samuel Alito.

<sup>4</sup> *Id.*

<sup>5</sup> This remains true even with the retirement of Justice Kennedy in July, 2018. Justice Kennedy is Catholic. Prior to Justice Kennedy's retirement, the Court had five practicing Catholics and three Jewish Justices. Justice Gorsuch, who was appointed in 2017 was raised Catholic but attended the Episcopal Church while on the Tenth Circuit.

<sup>6</sup> *Cf.* IRIN CARMON AND SHANA KNIZHNIK, NOTORIOUS RBG 80 (2015). President Jimmy Carter, who first opened the door to women regularly serving as federal judges noted that such appointments mark "the end of the days when women . . . appear in high places only as one-at-a-time performers." *See also id.* at 131 (noting that females were "one-at-a-time-curiosit[ies]" and not the norm).

levels.<sup>7</sup> If we limit our consideration to the current Supreme Court, women held one-third of the seats on our Supreme Court at the time of Justice Kennedy’s 2018 retirement. Yet, this number is deceptive since women on the highest court is a modern phenomenon.

Qualified women have been available for selection for many years—long before Justice Sandra Day O’Connor became the first woman on the Supreme Court, or FWOTSC,<sup>8</sup> as she refers to herself. It was not until a 1980 campaign promise by then-Governor Ronald Reagan to appoint the first female justice to the Supreme Court that a woman broke one of our government’s last gender barriers.<sup>9</sup> Presidents prior to that time were complicit in allowing male members of the Court, among other influences, to stave off appointments of well-qualified women.<sup>10</sup> So, women waited. But now, women account for four of the last thirteen Supreme Court appointments and five of the past seventeen nominees.<sup>11</sup> Clearly, the numbers are increasing.

This Essay presents the second scholarly ranking of female jurists deserving of a seat on the highest court in the land.<sup>12</sup> The list celebrates eleven judicial way pavers: Ruth Bader Ginsburg, Sandra Day O’Connor, Sonia Sotomayor, Elena Kagan, Florence Allen, Constance Baker Motley, Shirley Huftstedler, Patricia Wald, Cornelia Kennedy, Harriet

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<sup>7</sup> See AM. BAR ASS’N, COMM’N ON WOMEN IN THE PROFESSION, A CURRENT GLANCE AT WOMEN IN THE LAW 2017, at 5 (2017). The ABA reports that women comprise 36 percent of all women on federal circuit courts—or, sixty positions out of 167 active positions. *Id.* Women likewise occupy 33 percent of all federal district court judgeships. *Id.* On the state level, the ABA notes that women occupy roughly one-third of all state court positions, breaking these down into five distinct categories. *Id.*

<sup>8</sup> See *infra* 223-226 and accompanying text. In this regard, the moniker is similar to POTUS, which is a commonly-used abbreviation for “President of the United States.”

<sup>9</sup> See Steven R. Weisman, *Reagan Nominating Woman, an Arizona Appeals Judge, to Serve on Supreme Court: Reaction is Mixed*, N.Y. TIMES (July 7, 1981), <https://archive.nytimes.com/www.nytimes.com/learning/general/onthisday/big/0707.html> [<https://perma.cc/88J9-CD8S>]. Weisman notes that President Reagan also considered Judge Cornelia Kennedy. See also Mary L. Clark, *Changing the Face of the Law: How Women’s Advocacy Groups Put Women on the Federal Judicial Appointments Agenda*, 14 YALE J.L. & FEMINISM 243, 250–51 (2002). Clark notes that President Carter refused to take the pledge to appoint a woman were he to be re-elected because he believed such pledge to be akin to sex discrimination. *Id.* at 250. However, President Carter was believed to have strongly considered Judge Shirley Hufstedler had an opening occurred during his presidency. See *id.* at 251.

<sup>10</sup> See Mary L. Clark, *One Man’s Token is Another Woman’s Breakthrough - The Appointment of the First Women Federal Judges*, 49 VILL. L. REV. 487, 503 (2004).

<sup>11</sup> The four unsuccessful nominees are: Judge Robert Bork, Judge Douglas Ginsburg, Harriet Miers, and Judge Merrick Garland.

<sup>12</sup> The first, “The Sistren,” is an essay written for *Green Bag*. See Meg Penrose, *The Sistren: Ranking the Top 10 Female Supreme Court Justices*, 18 GREEN BAG 2D 447 (2015).

Miers and, Belva Lockwood.<sup>13</sup> Each of these women is, or was, Supreme Court-worthy. Yet only four of them actually occupy or have occupied a place on the Court.

My previous ranking, “The Sistren,” predicted it would take another sixty years before we have ten female justices to compare and rank.<sup>14</sup> Impatient for that time to come, this Essay focuses on the four women who have served and includes another seven extraordinary “way pavers” that had the ability, intellect, and skill to serve, but were not selected. Time was not on their side. Being given the opportunity to attend law school and become a judge was—at their various stages in our country’s history—often, itself, a high achievement.<sup>15</sup> Progress comes slowly. And the progress of women actively serving in the judiciary has been no exception.<sup>16</sup>

Only four justices, or fewer than 4 percent,<sup>17</sup> of our 113 Supreme Court justices, have been female. These numbers are small. They provide an important glimpse into history. Did we, as a country, miss anyone that *should* have been given the opportunity to serve?

Standing alone, the numbers paint an incomplete picture. The increase in female representation on the Supreme Court has—in the brief thirty-six-year history that women have served—been steadily on the rise. Their appointment has also been tied to the presidential party in power. Since President Reagan fulfilled his campaign promise by appointing the first woman to the Supreme Court,<sup>18</sup> no Republican president has appointed

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<sup>13</sup> The term “way pavers” was coined by Justice Ruth Bader Ginsburg. In several articles, she has used this term to describe the “brave and bright women who served as judges with extraordinary devotion and distinction.” See, e.g., Ruth Bader Ginsburg & Laura W. Brill, *Women in the Federal Judiciary: Three Way Pavers and the Exhilarating Change President Carter Wrought*, 64 *FORDHAM L. REV.* 281 (1995). Two of Justice Ginsburg’s way pavers in the cited article are also included in this ranking: Florence E. Allen and Shirley Hufstедler. See *id.* at 281.

<sup>14</sup> See Penrose, *supra* note 12, at 447.

<sup>15</sup> See Larry Berkson, *Women on the Bench*, 65 *JUDICATURE* 286, 287 (1982). As Berkson notes, “[t]he history of women in the judiciary must begin with a history of women’s struggle to become lawyers, since it is from the pool of women lawyers that women judges emerge.” *Id.*

<sup>16</sup> See, e.g., Clark, *supra* note 10, at 244. Clark notes that before President Carter mounted a campaign to appoint more women to judicial positions, “women’s judicial appointments remained token, isolated events, occurring on a largely once per presidential administration basis.” *Id.*

<sup>17</sup> The precise number is 3.5 percent.

<sup>18</sup> See The Learning Network, *July 7, 1981 | Reagan Nominates O’Connor, First Woman, for Supreme Court*, *N.Y. TIMES* (July 7, 2011), <https://learning.blogs.nytimes.com/2011/07/07/july-7-1981-reagan-nominates-occonnor-first-woman-for-supreme-court/> [<https://perma.cc/D4DX-N6F4>]. “In announcing the appointment, President Reagan declared, ‘I made a commitment that one of my first appointments to the Supreme Court vacancy would be the most qualified woman that I could possibly find. Now, this is not to say that I would appoint a woman merely to do so. That would not be fair to women nor to future generations of all

another woman.<sup>19</sup> Although President George H.W. Bush did appoint the second African American justice to the Court, his other selection was a white male.<sup>20</sup> Much like women, racial minorities have been disproportionately omitted from Supreme Court service.<sup>21</sup>

The raw numbers in both categories, four women and three racial minorities, are trifling. In total, this amounts to only six individual justices, as one of the female justices is also a racial minority.<sup>22</sup> In considering the past twelve Republican Supreme Court appointments, spanning four presidencies,<sup>23</sup> one was female and one a racial minority.<sup>24</sup> In contrast, the past four Democratic appointments, spanning two presidencies, included three females—all born in New York—one of whom is also a racial minority.<sup>25</sup> Depending on the future parties controlling the White House (and the Senate), the number of vacancies, and the ability to get nominees confirmed, there could be a dramatic gender, and perhaps

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Americans whose lives are so deeply affected by decisions of the court. Rather, I pledged to appoint a woman who meets the very high standards that I demand of all court appointees. I have identified such a person.” *Id.*

<sup>19</sup> President George W. Bush *nominated* Harriet Miers to replace Justice O’Connor. But after generating opposition from both sides of the political aisle, Miers withdrew her nomination. Thereafter, President Bush nominated Judge John Roberts to fill Justice O’Connor’s seat. Following the death of Chief Justice Rehnquist, President Bush nominated Judge Roberts to fill the Chief Justice’s seat and nominated Judge Samuel Alito to, ultimately, fill Justice O’Connor’s seat. Both Roberts and Alito were confirmed.

<sup>20</sup> President George H.W. Bush nominated Clarence Thomas, an African American Catholic, to fill the seat of Justice Thurgood Marshall. Following a contentious confirmation hearing process, Thomas was confirmed. He remains on the Court today. President Bush’s other selection was David Souter, a white Protestant male. *See Supreme Court Nominations, supra* note 1.

<sup>21</sup> There have been eight Jewish Justices. *See* Elizabeth Dias, *Obama’s Supreme Court Pick Would Be a High-water Mark for Jews on the Court*, TIME (March 16, 2016), <http://time.com/4261417/merrick-garland-supreme-court-barack-obama-jewish/> [<https://perma.cc/3W6K-PGVN>]. There have also been two African American Justices and one Hispanic Justice. There has never been a Native American, Asian American, Indian American, Muslim, Hindu, or Mormon Supreme Court justice.

<sup>22</sup> Justice Sonia Sotomayor is Hispanic and of Puerto Rican descent. SONIA SOTOMAYOR, MY BELOVED WORLD 12 (2013).

<sup>23</sup> Presidents Reagan, George H.W. Bush, George Bush, and Donald Trump are all considered. President Richard Nixon and Ford totaled seven nominees and five appointments—all white men. Because President Reagan is the first President to have broken the gender barrier, it seemed appropriate to begin the modern count with him. *See Supreme Court Nominations, supra* note 1.

<sup>24</sup> President Donald Trump’s first appointment, Justice Neil Gorsuch, is a white male. The purported finalists for this position—to fill Justice Scalia’s seat—were Judge Gorsuch and Judge Thomas Hardiman. *See* Robert Barnes, *Trump Narrows Finalists to Two as Unconventional Fight Over Supreme Court Begins*, WASH. POST (Jan. 31, 2017), [https://www.washingtonpost.com/politics/courts\\_law/trump-brings-finalists-for-supreme-court-nomination-to-washington/2017/01/31/21dd9280-e7e6-11e6-bf6f-301b6b443624\\_story.html](https://www.washingtonpost.com/politics/courts_law/trump-brings-finalists-for-supreme-court-nomination-to-washington/2017/01/31/21dd9280-e7e6-11e6-bf6f-301b6b443624_story.html) [<https://perma.cc/53K6-2QLZ>].

<sup>25</sup> President Bill Clinton appointed Ruth Bader Ginsburg to the Court. His other appointment, Stephen Breyer, is a white Jewish male. President Barack Obama, in contrast, appointed two women to the Court. His last nominee, Merrick Garland, a white Jewish male, was not confirmed. *See* Dias, *supra* note 21; Ariane de Vogue, *How McConnell Won, and Obama Lost, the Merrick Garland Fight*, CNN (Nov. 9, 2016), <http://www.cnn.com/2016/11/09/politics/merrick-garland-supreme-court/index.html> [<https://perma.cc/SLN7-NLTR>].

racial, shift in the next few decades.<sup>26</sup> With an aging Supreme Court, many observers predict that numerous vacancies will arise in the near future.<sup>27</sup> In fact, Justice Kennedy's July, 2018, retirement provides an immediate vacancy. But will this, or future vacancies, result in more women or minorities serving on the Court?

This Essay seeks to highlight the accomplishments of eleven incredible female lawyers. It does not call for more women or minorities on the Supreme Court. It does not complain that women and minorities have been unfairly denied such opportunities. I leave those articles, if they are to be written, to others. This piece merely celebrates the accomplishments of a group of talented women, whose achievements ensure there will always be a women's restroom in the Supreme Court robing room.<sup>28</sup>

### Why Highlight Female Judges?

Many scholars have prepared top listings of Supreme Court Justices.<sup>29</sup> From former Justices Hughes and Frankfurter, to Bernard Schwartz,<sup>30</sup> to Cass Sunstein,<sup>31</sup> these lists have focused on the great justices, the worst justices,<sup>32</sup> the funniest justices,<sup>33</sup> but never the

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<sup>26</sup> It is worth noting that President Jimmy Carter is credited with firmly opening the judicial entrance to the federal courthouse for women and minorities. Amber Fricke & Angela Onwuachi-Willig, *Do Female "Firsts" Still Matter? Why They Do for Female Judges of Color*, 2012 MICH. ST. L. REV. 1529, 1532–1533 (2012). President Carter was dedicated to moving beyond tokenism. During his one term in office, the number of female federal judges increased from eight to forty. *See id.* at 1533.

<sup>27</sup> With Justice Kennedy's July, 2018 retirement (at age 82), there will be two justices at or the age of eighty in August 2018: Justice Ginsburg (the oldest member of the Court at eighty-five) and Justice Breyer (who will be 80). Justice Thomas is seventy. Justice Alito is sixty-eight. Justice Sotomayor is sixty-four. Justice Roberts is sixty-three. Justice Kagan is fifty-eight. And, the youngster on the Court, Justice Gorsuch, will be fifty-one in August.

<sup>28</sup> Remarkably, it was not until the second female joined the Supreme Court that a women's restroom was added to the justice's robing room. *See* LINDA HIRSHMAN, *SISTERS IN LAW* 231 (2015). *See also* Catherine Ho, *Justice Ginsburg Happy to No Longer Be Confused with Sandra Day O'Connor*, WASH. POST (Dec. 17, 2013), [https://www.washingtonpost.com/business/capitalbusiness/justice-ginsburg-happy-to-no-longer-be-confused-with-sandra-day-oconnor/2013/12/17/d8ba9c5c-6731-11e3-a0b9-249bbb34602c\\_story.html](https://www.washingtonpost.com/business/capitalbusiness/justice-ginsburg-happy-to-no-longer-be-confused-with-sandra-day-oconnor/2013/12/17/d8ba9c5c-6731-11e3-a0b9-249bbb34602c_story.html) [<https://perma.cc/9DVB-MMG6>] (noting that prior to Justice Ginsburg's arrival, Justice O'Connor was required to return to her own chambers to change clothes or use the restroom as only a men's restroom was provided in the justices' robing room).

<sup>29</sup> *See, e.g.*, Robert C. Bradley, *Who Are the Great Justices and What Criteria did they Meet?*, in GREAT JUSTICES OF THE U.S. SUPREME COURT: RATINGS & CASE STUDIES (William D. Pederson & Norman W. Provizer eds., 1993).

<sup>30</sup> Bernard Schwartz, *Supreme Court Superstars: The Ten Greatest Justices*, 31 TULSA L. REV. 93 (1995).

<sup>31</sup> Cass R. Sunstein, *Home-Run Hitters of the Supreme Court* (Sept. 24, 2014), <https://www.bloomberg.com/view/articles/2014-04-01/home-run-hitters-of-the-supreme-court> [<https://perma.cc/C2L3-AZPG>].

<sup>32</sup> *See e.g.*, Ian Millhiser, *The Five Worst Supreme Court Justices in American History Ranked* (Mar. 24, 2015) <https://thinkprogress.org/the-five-worst-supreme-court-justices-in-american-history-ranked-f725000b59e8/> [<https://perma.cc/48WF-W4QF>].

female justices. In fact, to the extent that I am aware, only one previous scholarly listing even includes a female justice.<sup>34</sup>

Although scholars have not included female justices in most “Top Ten” listings, there is one list of “famous female judges.”<sup>35</sup> The listing website is [ranker.com](http://ranker.com) and, astonishingly, has more television judges in the Top Ten than actual Supreme Court Justices.<sup>36</sup> The list gives Judge Judy, the top nod as the “most famous” female judge.<sup>37</sup> Remarkably, Judge Judy, is ranked above the three Supreme Court Justices listed.<sup>38</sup> And, while the list celebrates the journalist Catherine Crier, Judge Jeannie Pirro of Fox News fame, and Judge Marilyn Milian of the People’s Court, the most recently seated female Justice, Elena Kagan, is not mentioned.<sup>39</sup>

Justice Kagan’s omission from this list may be viewed in light of an August 2015 survey conducted by the American Council of Trustees and Alumni<sup>40</sup> that asked the following question:

Which of the following people serves on the U.S. Supreme Court?

- a. Elena Kagan
- b. Lawrence Warren Pierce
- c. John Kerry
- d. Judith Sheindlin<sup>41</sup>

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<sup>33</sup> See Jay D. Wexler, *Laugh Track*, 9 GREEN BAG 59–61 (2005); see also Jay D. Wexler, *Laugh Track II – Still Laughin!*, 117 YALE L.J. POCKET PART 130 (2007).

<sup>34</sup> Bradley, *supra* note 29, at 17 (noting that the only published ranking of “great” justices was created by using student survey responses). Justice Sandra Day O’Connor is listed as the third “great” justice in one of the four surveys conducted by Bradley. *Id.*

<sup>35</sup> See *Famous Female Judges*, RANKER: VOTE ON EVERYTHING, <https://www.ranker.com/list/famous-female-judges/reference> [<https://perma.cc/UF4S-TNWB>].

<sup>36</sup> See *id.*

<sup>37</sup> See *id.*

<sup>38</sup> *Id.* Judge Judy comes in as the first “most famous” female judge. Thereafter, placing second, third, and fourth are Justice Sandra Day O’Connor, Justice Sonia Sotomayor, and Justice Ruth Bader Ginsburg, respectively.

<sup>39</sup> *Id.* Judge Catherine Crier is ranked the fifth most famous judge. Judge Jeannie Pirro is ranked seventh. Judge Marilyn Milian is ranked as the eighth most famous judge.

<sup>40</sup> See Rachel Dicker, *10 Percent of College Graduates Think Judge Judy is on the Supreme Court*, U.S. NEWS & WORLD REPORT (Jan. 20, 2016), <https://www.usnews.com/news/articles/2016-01-20/judge-judy-on-the-supreme-court-some-college-grads-think-so> [<https://perma.cc/U9K8-8QKA>].

<sup>41</sup> See John Sides, *Don’t Believe that Splashy Finding that 10 Percent of College Graduates Think Judge Judy is on the Supreme Court*, WASH. POST (Jan. 20, 2016), <https://www.washingtonpost.com/news/monkey-cage/wp/2016/01/20/dont-believe-that-splashy-finding-that-10-percent-of-college-graduates-think-judge-judy-is-on-the-supreme-court/> [<https://perma.cc/2YPF-PMUN>].

Answer “d” is “Judge Judy,” the judge ranked above the three Supreme Court Justices listed in the ranker.com survey. About 10 percent of college graduates chose answer “d,” indicating their belief that Judge Judy sits on the U.S. Supreme Court.<sup>42</sup> It is important to note, however, that 66 percent of college graduates in this same survey accurately selected Justice Kagan.<sup>43</sup>

Thus, while there appears to be some measure of familiarity with our four female justices, more discussion about Supreme Court-worthy women is necessary.<sup>44</sup> It is necessary to recognize that for many years, highly qualified women have been available to serve. From Belva Lockwood to Florence Allen to Constance Baker Motley to Cornelia Kennedy to Patricia Wald to Shirley Hufstедler, our country has a proud tradition of female jurists.<sup>45</sup> These women have been way pavers. They deserve recognition. They deserve our respect. And to fill a scholarly void, these women fill out this first ranking of women who have, or should have, served on our Supreme Court.

#### **What Makes a “Way Paver”**

Ten women on this list have been considered for service on the Supreme Court. Five have been nominated. Four have served. Only one, Belva Lockwood, escaped consideration altogether for the Supreme Court. That oversight was due solely to “the accident of birth,”<sup>46</sup> in that Lockwood was born far too early to gain access to the education and experience necessary to be considered for a seat on the Court.

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<sup>42</sup> See Dicker, *supra* note 40.

<sup>43</sup> See Sides, *supra* note 41. In breaking down the full results of the question, another 22 percent chose Pierce while only 6 percent selected John Kerry. While the math, as described in the article, actually equates to 104 percent, these remain the numbers reported. *Id.*

<sup>44</sup> See, e.g., Meredith Dost, *Dim Public Awareness of Supreme Court as Major Rulings Loom*, PEW RESEARCH CENTER (May 14, 2015), <http://www.pewresearch.org/fact-tank/2015/05/14/dim-public-awareness-of-supreme-court-as-major-rulings-loom/> [<https://perma.cc/S3UA-W5RK>] (“In Pew Research Center’s most recent knowledge quiz, just 33% knew that there are three women on the Supreme Court – Justices Ruth Bader Ginsburg, Elena Kagan and Sonia Sotomayor. A higher percentage (39%) said that there are two women on the high court, while 14% said there is one and 4% said four.”).

<sup>45</sup> An early draft of this article included the indomitable Sarah T. Hughes, the only female judge to provide the oath of office to a U.S. President. Judge Hughes, a Texas federal judge, also sat on the three-judge panel that issued the initial opinion in *Roe v. Wade*, which was ultimately affirmed by the Supreme Court. See 410 U.S. 113 (1973).

<sup>46</sup> The term “accident of birth” was first used by Supreme Court Justice William Brennan in the gender discrimination case, *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). Justice Brennan, writing for the plurality, stated that “since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate ‘the basic concept of our system that legal burdens should bear some relationship to individual responsibility. . . .’” *Id.*

The criteria I used in creating this ranking are:

- 1) Service on the Supreme Court (automatically receives top ratings);
- 2) Legal impact while on the bench;
- 3) Legal impact while off the bench (i.e., other impactful legal positions or work);  
and
- 4) Lasting influence and transcendence.

Past authors have not always included their methodology in ranking the “great” judges.<sup>47</sup> Those that have done so underscore that no particular criteria have been consistently relied upon,<sup>48</sup> from legal writing skills (however those can be measured), to leadership, to intellectual ability, legal rankings are largely subjective.<sup>49</sup> In this regard, the “greatness” of a jurist is often in the eye of the beholder.

Still, I seek to provide some measure, so that when sixty or so years pass and we finally have ten female justices to evaluate, a template exists for comparison’s sake. In reconsidering my first listing, I have already made one change, which is how to rank Elena Kagan relative to Sonia Sotomayor. As others review my work, I hope they are able to improve the requisite criteria, create new listings and improve on this effort. Like the eleven women I profile, this article is a way paver. To the women on this list that have made this article possible for me to write, I am eternally grateful.

## **Ranking the Way Pavers**

### Number 11: The First Way Paver

Belva Lockwood.

Belva Lockwood was the first woman to argue a client’s case before the Supreme Court.<sup>50</sup> In fact, when her application to join the Supreme Court bar was denied solely due to her gender, Lockwood petitioned Congress directly to pass legislation enabling her to

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<sup>47</sup> See Bradley, *supra* note 29, at 6–11.

<sup>48</sup> See *id.*

<sup>49</sup> See *id.* at 19–21.

<sup>50</sup> See John H. Tinney, *President’s Page: Women Pioneers*, THE W. VA. LAWYER 4 (2001). Tinney notes that Lucy Terry Prince actually was the first woman to present a case to the Supreme Court when she argued her own land dispute. Not only would this make Prince the first woman to argue before the Supreme Court, but, as a freed slave, Prince would have also been the first African American lawyer. *Id.*



practice.<sup>51</sup> The 1879 Act, which “relieve[d] certain legal disabilities of women,” required women to be in good standing before the bar and highest court of any state for three years to gain Supreme Court bar admission.<sup>52</sup> In March of 1879—two weeks after the Act’s passage—Lockwood was admitted to practice.<sup>53</sup>

After being widowed at age twenty-two, Lockwood became a school teacher and administrator to support her child.<sup>54</sup> Lockwood fought hard to obtain formal legal education, eventually securing her law degree by imploring the president, Ulysses S. Grant, who served as *ex officio* Dean of the National University to issue the degree.<sup>55</sup> She had completed all the requisite classes but was denied a diploma for fear that it would diminish the value of men’s diplomas.<sup>56</sup> Within two weeks, the University Chancellor forwarded her diploma.<sup>57</sup> Lockwood put her education to use by securing admission to the Supreme Court bar and formally representing clients. She also helped diversify the Supreme Court bar by moving to admit the first African American lawyer to the bar.<sup>58</sup> The fights that Lockwood led helped open doors to women and minorities for years to come. In addition, Lockwood was an early pioneer for women’s suffrage, equal pay and employment opportunities—unusually modern ideas for the late 19th century.<sup>59</sup> It would be another seventy years before women were permitted membership in the American Bar Association.<sup>60</sup>

While many perceive former Senator and Secretary of State Hillary Clinton’s presidential run as a first for women, Lockwood ran for President, twice, before women

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<sup>51</sup> See Berkson, *supra* note 15, at 289.

<sup>52</sup> Act of Feb. 15, 1879, ch. 81 20 Stat. 279. This law was superseded, but largely unchanged, in 1911. See Act of Mar. 3, 1911, ch. 231, § 255, 36 Stat. 1160.

<sup>53</sup> See Berkson, *supra* note 15, at 289.

<sup>54</sup> See Kenneth L. Karst, *Principles and Persons: Ruth Bader Ginsburg, Raconteuse*, 63 HASTINGS L.J. 1197, 1208 (2012).

<sup>55</sup> See *id.* Lockwood, unhappy that the University refused to give her a diploma for “fear of reducing the value of men’s diplomas,” wrote to President Grant indicating that “she had completed the work” and demanding her diploma. *Id.*

<sup>56</sup> See *id.*

<sup>57</sup> See *id.*

<sup>58</sup> Ruth Bader Ginsburg, 2007 *James P. White Lecture on Legal Education*, 40 IND. L. REV. 479, 480 (2007). Lockwood moved that Samuel R. Lowery, an African-American, be admitted to the Supreme Court bar. See *id.* Thus, Lockwood helped secure admission for both the first woman and first African-American members of the Supreme Court bar.

<sup>59</sup> See *id.*

<sup>60</sup> See Mattie Belle Davis, *Women in the Legal Profession*, 68 WOMEN’S L.J. 153, 153 (1982).

even secured the right to vote.<sup>61</sup> Formal barriers never discouraged her as she dismantled many impediments during her legal career. Lockwood's unsuccessful presidential campaigns, largely unknown and rarely reported, helped pave the way for Secretary Clinton's more recent attempt. For these reasons, many women today stand upon Lockwood's shoulders.

Lockwood was the first way paver—someone who forged the first path for every name that follows in this ranking.

#### Number 10: The Unsuccessful Nominee

Harriet Miers.

Five women have been nominated to serve on the Supreme Court. Only one fell short of Senate confirmation. Harriet Miers was nominated by George W. Bush to replace Justice Sandra Day O'Connor.<sup>62</sup> While some could argue that her record is less compelling than others ranked on this list, due to her lack of judicial service, I believe her nomination—standing alone—is a remarkable achievement. Even without securing confirmation, Harriet Miers is an important way paver.

Born and raised in Dallas, Texas, Miers received her undergraduate degree in mathematics and law degree from Southern Methodist University.<sup>63</sup> She then served as a law clerk for U.S. District Judge Joe Estes in Texas.<sup>64</sup> Upon completing her clerkship, she went to work for Locke, Purnell, Boren, Laney & Neely, the first woman to be hired by the firm.<sup>65</sup>

Miers built a stellar legal career as a litigator and public servant. She served on the Dallas City Council and the Texas Lottery Commission.<sup>66</sup> When then-Governor George W. Bush won the Presidency, Miers moved to Washington to work as part of his White House

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<sup>61</sup> Ginsburg, *supra* note 58, at 480–81. Lockwood ran unsuccessfully in 1884 and 1888 as nominee of the Equal Rights Party; her running mate, Marietta Stow, was also a woman. *See id.* at 480.

<sup>62</sup> *See Transcript of President Bush's Nomination of Miers to the Supreme Court*, NPR (Oct. 3, 2005), <https://www.npr.org/templates/story/story.php?storyId=4933801> [<https://perma.cc/75A8-95H7>].

<sup>63</sup> *See id.*

<sup>64</sup> *See* Vincent J. Allen, *Harriet Miers Selected for DBA Professionalism Award*, DALLAS BAR ASS'N (Sept. 28, 2015), <http://www.dallasbar.org/book-page/harriet-miers-selected-dba-professionalism-award> [<https://perma.cc/Z5X7-PBU8>].

<sup>65</sup> *See id.*

<sup>66</sup> *See Transcript of President Bush's Nomination of Miers to the Supreme Court*, *supra* note 62.

staff, and, ultimately, served as his White House Counsel.<sup>67</sup> Unlike every other woman ranked ahead of her on this list, however, Miers has never served as a judge.

Yet, Miers achieved many firsts. She was the first female managing partner of Locke, Purnell, Boren, Laney & Neely and the first woman to lead a Texas firm of that size.<sup>68</sup> She was the first female President of the Dallas Bar Association.<sup>69</sup> She was the first female President of the State Bar of Texas.<sup>70</sup> And despite her many achievements, Miers was the first female nominated to the Supreme Court to withdraw her nomination.<sup>71</sup>

In a fitting editorial, Professor Anita Hill reminds us that many of the credentials Presidents seek in a Supreme Court nominee

were denied to women of Miers' age, and continue to be limited for women today. The focus on federal judicial experience and education in only the top law schools shows a lack of value given to state court judicial experience or legal experience that includes other forms of public service that have been more open to women.<sup>72</sup>

One can only wonder whether Miers might have risen even higher, and faster, based on her talent had she been born at a later time.

Harriet Miers, as one of only five women to be nominated to serve on the Supreme Court, remains an important, and capable, pioneer on this list.

### Number 9: Close and Capable

Cornelia Kennedy.

Cornelia Kennedy has been called “the first lady” of the Michigan judiciary.<sup>73</sup> Like many of the women on this list, she graduated at the top of her law school class.<sup>74</sup> Thereafter, she became the first woman to serve as a judicial law clerk on the D.C. Court

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<sup>67</sup> See Allen, *supra* note 64.

<sup>68</sup> See *id.*

<sup>69</sup> See *id.*

<sup>70</sup> See *id.*

<sup>71</sup> See Elisabeth Bumiller and Carl Hulse, *Bush's Court Choice Ends Bid; Conservatives Attacked Miers*, N.Y. TIMES (Oct. 28, 2005), <http://www.nytimes.com/2005/10/28/politics/politicsspecial1/bushs-court-choice-ends-bid-conservatives-attacked-miers.html> [<https://perma.cc/NB8L-FUPZ>].

<sup>72</sup> Anita F. Hill, *Why Harriet Miers Mattered*, MS MAGAZINE (2006), <http://www.msmagazine.com/winter2006/miers.asp> [<https://perma.cc/PG8H-DMFZ>].

<sup>73</sup> Derek J. Sarafa, *Judge Cornelia G. Kennedy: First Lady of the Michigan Judiciary*, 79 MICH. B.J. 850, 850 (2000).

<sup>74</sup> See *id.*

of Appeals.<sup>75</sup> As one colleague noted, Judge Kennedy came to the law “at a time when women in the profession were both scarce and scorned.”<sup>76</sup> But she still managed to play a revolutionary role in the legal world.

Judge Kennedy was one of the founding members of the National Association of Women Judges (NAWJ),<sup>77</sup> the purpose of which included securing the appointment of a woman to the Supreme Court.<sup>78</sup> After working for nearly twenty years in private practice, Judge Kennedy ran for a seat on the Wayne County Circuit Court in Michigan.<sup>79</sup> She lost that first election.<sup>80</sup> Not to be deterred, she ran again the following year and won.<sup>81</sup> Within five years, Judge Kennedy would be elevated to the federal bench by President Nixon.<sup>82</sup> She was the first woman to sit on a federal court in Michigan.<sup>83</sup> Ultimately, she would become the first woman to serve as Chief Judge for *any* U.S. District Court.<sup>84</sup> All told, Kennedy’s judicial legacy would span four decades.<sup>85</sup>

Judge Kennedy has had many lasting influences on the legal world. Among them, albeit arguably a smaller one, is the achievement of gender-neutral language in addressing, and referencing, Supreme Court justices.<sup>86</sup> As Justice John Paul Stevens recalls, Judge Kennedy took offense to be called “Madame Justice” while serving as a moot court judge at Notre Dame.<sup>87</sup> Finally, after being called “Madame Justice” for several rounds, Judge Kennedy challenged an advocate as to why the participants kept referring to her as “Madame Justice.”<sup>88</sup> In a very telling comment, Judge Kennedy informed the advocate that the “word ‘Justice’ is not a sexist term.”<sup>89</sup> Judge Kennedy’s comments had an impact

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<sup>75</sup> See *id.* Judge Kennedy was a law clerk to Judge Harold Stephens, who at the time was the Chief Judge for the D.C. Circuit. See *id.*

<sup>76</sup> Judge Alice M. Batchelder, In Memoriam *of Judge Kennedy*, 75 OHIO ST. L.J. 1015, 1016 (2014).

<sup>77</sup> See Lynn C. Rossman, *Women Judges United: A Report from the Founding Convention of the National Association of Women Judges*, 10 GOLDEN GATE L. REV. 1237, 1238 n.5 (1980).

<sup>78</sup> See *id.* at 1237.

<sup>79</sup> See Sarafa, *supra* note 73, at 850.

<sup>80</sup> See *id.*

<sup>81</sup> See *id.*

<sup>82</sup> See *id.*

<sup>83</sup> See Justice Sandra Day O’Connor, *Remembering Judge Cornelia Kennedy*, 75 OHIO ST. L.J. 1010, 1010 (2014).

<sup>84</sup> See *id.*

<sup>85</sup> See *id.*

<sup>86</sup> See Justice John Paul Stevens, *Fond Memory*, 75 OHIO STATE L.J. 1009, 1010 (2014).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

beyond the Notre Dame moot court competition and permanently changed Supreme Court nomenclature.<sup>90</sup> Upon returning to the Supreme Court, Justice Stevens relayed the story to Justice Potter Stewart. Stewart, aware that a woman would eventually join the brethren on the high court, then brought a proposal to the full court to drop the prefatory “Mr.” and simply address a Supreme Court member as “Justice.”<sup>91</sup> The proposal passed 8–1.<sup>92</sup> Thus, Judge Kennedy helped ensure that her sister Sandra Day O’Connor would not be addressed with sex-specific language in the courtroom once she was confirmed as a Supreme Court justice.<sup>93</sup>

Judge Kennedy’s foresight and commitment to equality on matters of language resulted in the Court striking the term “Mr. Justice” in every official court document.<sup>94</sup> Starting with Volume 449 of the United States Reports, the official Supreme Court reporter, the name of each opinion writer is noted simply by the designation “Justice \_\_\_\_\_” rather than “Mr. Justice \_\_\_\_\_.”<sup>95</sup> This change, though subtle, acknowledged that female justices would soon the ranks among the brethren at the Supreme Court. Dropping the gendered term, Mister, presaged transformation on the Court.

Judge Kennedy’s judicial talent was appreciated by both political parties.<sup>96</sup> President Carter elevated Judge Kennedy to the Sixth Circuit Court of Appeals<sup>97</sup>—the same court that Florence Allen, ranked number five on this list, occupied. Although Judge Kennedy was seriously considered for the Supreme Court by President Reagan, that seat ultimately went to Sandra Day O’Connor.<sup>98</sup> In a fitting tribute, Justice O’Connor remarked: “I am convinced that my own path to the United States Supreme Court was made more likely because of the exemplary service Judge Kennedy was already providing on the federal bench.”<sup>99</sup>

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<sup>90</sup> *See id.*

<sup>91</sup> *Id.*

<sup>92</sup> *See id.*

<sup>93</sup> *See id.*

<sup>94</sup> Miriam Goldman Cedarbaum, *Women on the Federal Bench*, 73 B.U. L. REV. 39, 42 (1993).

<sup>95</sup> *Id.*

<sup>96</sup> *See* Judge Laurie J. Michelson, “*Thank You, Judge Kennedy*”: *Thoughts from a Former Law Clerk*, 75 OHIO STATE L.J. 1018, 1018 (2014). Judge Michelson notes that “[t]hree presidents shortlisted [Judge Kennedy] for the United States Supreme Court.” *Id.*

<sup>97</sup> *See* Sarafa, *supra* note 73, at 850.

<sup>98</sup> *See id.* at 851.

<sup>99</sup> O’Connor, *supra* note 83, at 1010.

Number 8: The Renaissance Judge

Patricia Wald.

Judge Wald was a judicial fixture for five decades. Like Judge Kennedy, she was a founding member of the NAWJ.<sup>100</sup>

In a 1979 survey of the National Association of Woman Lawyers, Patricia Wald was mentioned as one of the top women qualified to serve on the Supreme Court.<sup>101</sup> That survey, however, predates Judge Wald's later extraordinary federal Circuit Court experience and her service on the United Nations International Criminal Tribunal for the Former Yugoslavia. Judge Wald has served her country well—both here and abroad.

Judge Wald graduated from Yale Law School.<sup>102</sup> She served as an Editor on the Yale Law Journal.<sup>103</sup> She began her legal career as a judicial law clerk for Judge Jerome Frank on the Second Circuit Court of Appeals, who said she was “the best clerk he ever had.”<sup>104</sup>

After becoming the first woman lawyer accepted into the famed law firm, Arnold & Palmer,<sup>105</sup> Wald left the firm in 1953 and spent the next ten years raising her five children.<sup>106</sup> When she re-entered the profession, she came back with the same measure of success she left. In 1979, President Carter appointed Judge Wald to what some consider a “feeder” court to the Supreme Court: the D.C. Circuit Court of Appeals.<sup>107</sup> In doing so, Judge Wald was the first woman appointed to the D.C. Circuit—a court that future-Justice Ruth Bader Ginsburg would join a year later. In 1986, Judge Wald became the Chief Judge for the D.C. Circuit Court.<sup>108</sup> She was a “prodigious” writer on the court, and also served as the American Law Institute (ALI)'s Vice-President for a decade.<sup>109</sup> Of the more than eight hundred judicial opinions authored by Judge Wald, only four were overturned by the

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<sup>100</sup> See Rossman, *supra* note 77, at 1238 n.5.

<sup>101</sup> See Lee Ellen Ford, *Do We Have American Women Qualified for the Appointment to the United States Supreme Court*, 66 WOMEN LAW. J. 7, 7–8 (1980).

<sup>102</sup> See Lucy Reed, *Introduction of Judge Patricia Wald, Dinner Keynote Speaker*, 42 STUD. TRANSNAT'L LEGAL POL'Y 115, 116 (2010).

<sup>103</sup> See Justice Ruth Bader Ginsburg, *Remarks in Honour of Patricia M. Wald*, 11 INT'L CRIM. L. REV. 371, 371 (2011).

<sup>104</sup> *Id.*

<sup>105</sup> See Reed, *supra* note 102, at 116.

<sup>106</sup> See Kelly Askin, *Tribute to Patricia Wald*, 11 INT'L CRIM. L. REV. 375, 377 (2011).

<sup>107</sup> See Ginsburg, *supra* note 103, at 371.

<sup>108</sup> See *id.*

<sup>109</sup> See *id.* at 372.

Supreme Court.<sup>110</sup> Rather than to simply retire, however, Judge Wald—after a distinguished career on the D.C. Circuit—continued her remarkable public service career by becoming a judge on the United Nations International Criminal Court for the Former Yugoslavia.<sup>111</sup>

In 2016, in honor of her distinguished career, Judge Wald received the Henry J. Friendly Medal from the ALI.<sup>112</sup> Additionally, Judge Wald received the Presidential Medal of Freedom in 2013, the highest civilian honor in the country, for her contributions to justice.<sup>113</sup> The White House opined in a statement that Judge Wald “is one of the most respected appellate judges of her generation.”<sup>114</sup> The only other woman to receive both the ALI and the Presidential Medal of Freedom is the FWOTSC, Justice Sandra Day O’Connor.<sup>115</sup> These awards prove a fitting tribute to a way paver that carved her path both domestically and abroad.

#### Number 7: President Carter’s Would-Be Nominee

Shirley Hufstедler.

Judge Hufstедler had an incredible legal career, both on and beyond the bench. Hufstедler was the Article and Book Review Editor on the first volume of the Stanford Law Review.<sup>116</sup> After graduating from Stanford Law School and practicing law for several years, Hufstедler was appointed to the Los Angeles Superior Court.<sup>117</sup> Hufstедler was then appointed to the California Court of Appeal in 1966.<sup>118</sup> Two years later, President Johnson appointed Judge Hufstедler to the Ninth Circuit Court of Appeals where she served for

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<sup>110</sup> See Askin, *supra* note 106, at 377.

<sup>111</sup> See *id.* at 378. In accepting the U.N. Secretary General’s appointment to the International Criminal Tribunal for the Former Yugoslavia, Judge Wald replaced the other American female that had served, the Honorable Gabrielle Kirk McDonald. See *id.*

<sup>112</sup> Awards, AM. L. INST (May 20, 2016), <https://www.ali.org/about-ali/awards/> [<https://perma.cc/AF5Y-B357>]. This medal is not awarded annually. *Id.*

<sup>113</sup> *The Presidential Medal of Freedom*, WHITE HOUSE, <https://obamawhitehouse.archives.gov/node/349666> [<https://perma.cc/RZS3-LKZH>].

<sup>114</sup> *Id.*

<sup>115</sup> See *id.* Justice O’Connor was awarded the Presidential Medal of Freedom in 2009. See also *Henry J. Friendly Medal*, *supra* note 112. There have been a total of twelve ALI Friendly Medal recipients as of November 2017. *Id.*

<sup>116</sup> See Sandra Day O’Connor, *Fiftieth Anniversary Remarks*, 50 STANFORD L. REV. 1, 2 (1997–98).

<sup>117</sup> See Am. Bar Ass’n, *ABA Honors Shirley Hufstедler*, 81 A.B.A. J. 108, 111 (1995).

<sup>118</sup> See *id.*

eleven years.<sup>119</sup> At the time of her appointment, Hufstedler was the only woman serving on a federal appellate court.<sup>120</sup> Florence Allen, another way paver and the only other woman to have served on a federal appellate court, had retired nine years earlier.<sup>121</sup> During Hufstedler's time on the bench, however, "few if any other Court of Appeals judges . . . equaled the quality or quantity of her work product."<sup>122</sup>

In 1979, Judge Hufstedler gave up her judicial position to serve as President Jimmy Carter's Secretary of Education.<sup>123</sup> Hufstedler was the first person to hold this newly created position, though she was not the first woman to serve in a presidential cabinet.<sup>124</sup> Two years later, she returned to private practice, and in 1995, she became the first woman to receive the American Bar Association's Medal, its highest award.<sup>125</sup>

Judge Hufstedler was an active member of the ALI and became the first woman to serve on its prestigious council.<sup>126</sup> Her scholarly work sets her apart from nearly everyone else on this list, except Justice Ruth Bader Ginsburg. Her publications and the influence of those publications rank her highly among those on the list not nominated to the Supreme Court. As has been noted, Judge Hufstedler was "[a] judge for all seasons. Many . . . long considered Judge Hufstedler the prime candidate (not just the prime *female* candidate) for the Supreme Court of the United States."<sup>127</sup>

The greatest compliment given to Judge Hufstedler is that "[t]hrough the efforts and talents of women like Shirley Hufstedler we have moved, perhaps, to the point where for those who now follow in her path, it would be inappropriate to make reference to gender."<sup>128</sup> "But," as that same author reminds us, "for a woman of Shirley Hufstedler's

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<sup>119</sup> *See id.*

<sup>120</sup> *See* Rossman, *supra* note 77, at 1238 n.5.

<sup>121</sup> *See id.* at 1240.

<sup>122</sup> Robert B. McKay, *Tribute to Shirley Mount Hufstedler*, 1982 ANN. SURV. AM. L. xxi, xxi (1982).

<sup>123</sup> *See* Am. Bar Ass'n, *supra* note 117, at 111.

<sup>124</sup> President Franklin Delano Roosevelt appointed Frances Perkins, of New York, to serve as Labor Secretary on March 4, 1933. *See* CONGRESS IN THE ARCHIVES, *First Woman Cabinet Member*, TUMBLR, <http://congressarchives.tumblr.com/post/18844566163/todaysdocument-first-woman-cabinet-member> [<https://perma.cc/8JDJ-PBUN>]. The appointment letter contains a note from Edwin A. Halsey, Secretary of the Senate, that "[t]his is the first instance of a woman being appointed to a Cabinet position." *Id.* This appointment also made Perkins the first female to enter the Presidential line of succession. *See id.* She remains the longest serving Labor Secretary in our country's history. *See id.*

<sup>125</sup> *See* Am. Bar Ass'n, *supra* note 117.

<sup>126</sup> *See id.*

<sup>127</sup> McKay, *supra* note 122.

<sup>128</sup> Dean Norman Redlich, *Shirley Hufstedler, One of our Own*, 1982 ANN. SURV. AM. L. xxxii, xxxiii (1982).



time and place, failing to mention gender would omit an important part of her achievement and would allow to go unnoticed the barriers she has had to overcome.”<sup>129</sup>

Shirley Hufstедler, like so many of these way pavers was “no ordinary mortal.”<sup>130</sup>

### Number 6: The Woman Behind *Brown*

Constance Baker Motley.

Many people know that the man behind *Brown v. Board of Education* was Thurgood Marshall. But few have heard of the woman who crafted the legal pleadings that helped him ascend to the U.S. Supreme Court.<sup>131</sup> Constance Baker Motley was as much a part of the victory in *Brown* as the men who argued the case that ultimately struck down the “separate but equal” doctrine.<sup>132</sup>

Ironically, it was an act of discrimination—being turned away from a public beach—that inspired Baker Motley to fight for an end to legal discrimination and, eventually, to go to law school.<sup>133</sup> After graduating from Columbia Law School, Baker Motley would join the National Association for the Advancement of Colored People (NAACP)’s Legal Defense and Education Fund.<sup>134</sup> She spent twenty years dismantling segregated education, housing and restaurants.<sup>135</sup> Her clients included Martin Luther King, Jr., Medgar Evers, James Meredith and the Little Rock Nine.<sup>136</sup>

Baker Motley was one of the first women to successfully argue before the Supreme Court. She won nine of her ten Supreme Court cases,<sup>137</sup> and her only loss was vindicated twenty-one years later by the Supreme Court.<sup>138</sup> Her legal prowess before the Supreme

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<sup>129</sup> *Id.* Dean Redlich explains that in dedicating the 1982 volume of the Annual Survey of American Law to Judge Hufstедler (a first for any woman), “she is not being honored by the Editors . . . because of her accomplishments as a woman.” Rather, “[h]er career is a gender-neutral record of accomplishment.” *Id.*

<sup>130</sup> McKay, *supra* note 122.

<sup>131</sup> See S. Res. 272, 109th Cong., 151 Cong. Rec. S11333 (2005) (statement of Sen. Barack Obama) (observing that Baker Motley “drafted the complaint that would become *Brown v. Board of Education*”).

<sup>132</sup> S. Res. 272, 109th Cong., 151 Cong. Rec. S11328 (2005) (acknowledging that Baker Motley was the only woman on the *Brown v. Board of Education* legal team).

<sup>133</sup> See Douglas Martin, *Constance Baker Motley, Civil Rights Trailblazer, Dies at 84*, N.Y. TIMES (Sept. 29, 2005), <http://www.nytimes.com/2005/09/29/nyregion/constance-baker-motley-civil-rights-trailblazer-dies-at-84.html> [<https://perma.cc/7JP4-VN9R>].

<sup>134</sup> See *id.*

<sup>135</sup> See *id.*

<sup>136</sup> See S. Res. 272, 109th Cong., 151 Cong. Rec. S11333 (2005) (statement of Sen. Barack Obama).

<sup>137</sup> See S. Res. 272, 109th Cong., 151 Cong. Rec. S11328 (2005).

<sup>138</sup> Her only loss was in *Swain v. Alabama*, 380 U.S. 202 (1965). *Swain* was later overturned by the Supreme Court in *Batson v. Kentucky*, 476 U.S. 79 (1986).

Court—and her lasting impact as a result of these cases—is rivaled only by the ultimate way paver, Justice Ruth Bader Ginsburg. What Justice Ginsburg achieved as an advocate for women, Baker Motley achieved for racial minorities. The goal of her life’s work was simple: “dignity for all people.”<sup>139</sup>

Baker Motley also had a brief stint in politics. In 1964, she was nominated to the New York State Senate—a first for any African American woman.<sup>140</sup> A year later, she was chosen by the City Council to serve as borough president for Manhattan, another first for *any* woman.<sup>141</sup> Her short political career ended, however, when President Lyndon B. Johnson appointed Baker Motley to serve as a federal trial judge for the Southern District of New York in 1966.<sup>142</sup> She became the first African American woman—and the fifth woman overall—to be appointed to the federal bench.<sup>143</sup> In 1982, Baker Motley became the first African American woman to serve as the Chief Judge for any federal trial court,<sup>144</sup> and notably, the nation’s largest federal trial court.

Baker Motley’s influence both off and on the bench rivals that of the four women who have served on the Supreme Court. She received the Presidential Citizens’ Medal<sup>145</sup> and is one of five female judges to be enshrined in the National Women’s Hall of Fame.<sup>146</sup> Baker Motley “rejected the notion that [her] race or sex would bar [her] success in life.”<sup>147</sup> Neither did. Under any measuring stick, Baker Motley was a transcendent way paver. It is only fitting that her judicial role model,<sup>148</sup> Florence Allen, is the only non-Supreme Court justice to outrank her on this list.

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<sup>139</sup> Martin, *supra* note 133.

<sup>140</sup> S. Res. 272, 109th Cong., 151 Cong. Rec. S11328 (2005).

<sup>141</sup> *See id.*

<sup>142</sup> *See id.*

<sup>143</sup> *See id.*

<sup>144</sup> *See id.*

<sup>145</sup> *See* COLUMBIA250, *Constance Baker Motley*, COLUMBIA UNIV., [http://c250.columbia.edu/c250\\_celebrates/remarkable\\_columbians/constance\\_motley.html](http://c250.columbia.edu/c250_celebrates/remarkable_columbians/constance_motley.html) [<https://perma.cc/BX9G-D39Q>] (noting that the Presidential Citizens’ Medal was awarded “in recognition of her achievements and service to the nation.”).

<sup>146</sup> *See Discover the Women of the Hall*, NAT’L WOMEN’S HALL OF FAME, <https://www.womenofthehall.org/inductee/constance-baker-motley/> [<https://perma.cc/4LL9-LM83>]. The four other women are all on this list. The first, Belva Lockwood is my eleventh way paver. The other three, Florence Allen, Sandra Day O’Connor and Ruth Bader Ginsburg are fifth, second, and first, respectively, on this list.

<sup>147</sup> CONSTANCE BAKER MOTLEY, *EQUAL JUSTICE UNDER LAW: AN AUTOBIOGRAPHY* 41–42 (1998).

<sup>148</sup> *See* COLUMBIA250, *supra* note 145.

Number 5: The First Original

Florence Allen.

“When the *Christian Science Monitor* recommended to President Hoover in 1930 that he appoint a woman to [the Supreme Court], there was only one eminent woman judge in the country—Florence Allen.”<sup>149</sup> At the time, Judge Allen was sitting on the Ohio Supreme Court.<sup>150</sup>

Judge Allen was the first woman to serve on any Article III court.<sup>151</sup> In 1934, President Franklin D. Roosevelt appointed Allen to the Sixth Circuit Court of Appeals.<sup>152</sup> After Allen’s appointment, Attorney General Homer Cummings noted, “Florence Allen was not appointed [to the federal bench] because she was a woman. All we did was to see that she was not rejected because she was a woman.”<sup>153</sup>

Judge Allen’s influence spans far beyond the courtroom. She was the only female student in her law school class at the University of Chicago.<sup>154</sup> After placing second in her class, she moved to New York to work with the settlement-house movement and transferred to New York University.<sup>155</sup> Allen had sought admission to Columbia University, but Columbia—like many Ivy League schools at the time—did not open its doors to female students until much later.<sup>156</sup>

Allen dedicated her early years to women’s suffrage.<sup>157</sup> Following law school, she returned to Ohio, where suffrage battles were being waged.<sup>158</sup> After voting rights for women were secured in East Cleveland, she defended this victory before the Ohio Supreme Court.<sup>159</sup> Allen’s lasting impact for women’s suffrage preceded the Nineteenth Amendment and helps fortify her ranking on this list.

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<sup>149</sup> Beverly B. Cook, *Women as Supreme Court Candidates: From Florence Allen to Sandra O’Connor*, 65 JUDICATURE 314, 323 (1982).

<sup>150</sup> *Florence Ellinwood Allen*, THE SUPREME COURT OF OHIO & THE OHIO JUDICIAL SYSTEM, <http://www.supremecourt.ohio.gov/SCO/formerjustices/bios/allen.asp> [<https://perma.cc/K2VX-B9M8>]. Judge Allen was the 90th Justice to serve on the Ohio Supreme Court. *See id.*

<sup>151</sup> *See* Rossman, *supra* note 77, at 1240.

<sup>152</sup> *See id.*

<sup>153</sup> Cedarbaum, *supra* note 94, at 45.

<sup>154</sup> *See id.* at 40.

<sup>155</sup> *See* Ginsburg & Brill, *supra* note 13, at 282.

<sup>156</sup> *See id.*

<sup>157</sup> *See id.*

<sup>158</sup> *See id.*

<sup>159</sup> *See id.*

Following ratification of the Nineteenth Amendment, Allen was elected to serve as a county court judge.<sup>160</sup> She is the first woman to have been elected—as opposed to appointed—to a judgeship other than a Justice of the Peace.<sup>161</sup> In 1922, Allen was elected to the Ohio Supreme Court.<sup>162</sup> Six years later, she was re-elected.<sup>163</sup> Allen was the first woman to serve on any state’s highest court.<sup>164</sup>

Allen ran unsuccessfully for both the U.S. Senate in 1926 and the House of Representatives in 1930.<sup>165</sup> Then, at age fifty, Allen was nominated to the Sixth Circuit Court of Appeals by President Franklin D. Roosevelt.<sup>166</sup> She was unanimously confirmed by the Senate.<sup>167</sup> Allen later became the Chief Judge of the Sixth Circuit, breaking another glass ceiling by being the first woman to serve as the Chief Judge of any federal Circuit.<sup>168</sup> Allen remained on the Sixth Circuit for thirty-two years.<sup>169</sup>

Allen was considered for the Supreme Court by President Truman, but the male justices’ reticence at having a woman in their midst<sup>170</sup> and public opinion against such appointment<sup>171</sup> imposed formidable barriers that she could not overcome. Still, her very presence as an Article III judge created a crucial gap, which would give room for others to widen the opening. When she sat on the Sixth Circuit, Allen doubted she would see a woman on the Supreme Court during her lifetime.<sup>172</sup> That prediction held true. But it was Allen’s early efforts that paved the way for others.

Allen is ranked highest among those not nominated to the Supreme Court, due to both her initial and lasting influence. Allen’s commitment to gender equity and suffrage,

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<sup>160</sup> *See id.*

<sup>161</sup> *See Berkson, supra note 15, at 291.*

<sup>162</sup> *See Ginsburg & Brill, supra note 13, at 282–83.*

<sup>163</sup> *See Florence Ellinwood Allen, supra note 150.*

<sup>164</sup> *See Ginsburg & Brill, supra note 13, at 283.*

<sup>165</sup> *See id.*

<sup>166</sup> *See id.*

<sup>167</sup> *See Florence Ellinwood Allen, supra note 150.*

<sup>168</sup> *See id.*

<sup>169</sup> *See id.*

<sup>170</sup> *See Cook, supra note 149, at 325* (“When India Edwards, director of the Women’s Division of the Democratic National Committee, asked [President Truman] to appoint Allen in 1949, he said he would have ‘to talk to the Chief Justice about it and see what he thinks.’ He found out that the justices did not want a woman.”).

<sup>171</sup> *See id.* at 324. Only 37 percent of Americans favored a female Supreme Court Justice in Gallup’s 1938 poll. That number increased to 47 percent in 1945. It was not until 1972 that more than 50 percent of Americans supported having a woman on the Court. *See id.*

<sup>172</sup> *See Cook, supra note 149, at 323–24.*

and her high degree of success in each position she held, ensured that at some future point women would occupy seats on the highest court in the land. She broke several judicial gender barriers. Her performance, not just her gender, paved the way for all who followed. Because of Florence Allen, we have four women to consider when ranking who is our country's best female Justice.

#### Number 4: The Academic

Elena Kagan.<sup>173</sup>

In my first ranking of the female Supreme Court justices, I ranked Elena Kagan ahead of Justice Sonia Sotomayor. The two remain nearly equivalent, for ranking purposes, and it is difficult to choose whom to rank higher. It is too soon to discern which of these two justices will be more notable for historical purposes. Both remain extraordinary additions to the Supreme Court, with many similarities as well as distinctions. Both are from New York.<sup>174</sup> Both graduated from Princeton—both *summa cum laude*, both with history degrees.<sup>175</sup> Both were appointed by President Barack Obama. Both are unmarried.<sup>176</sup> Both are the only members on the current Court without children.<sup>177</sup> They

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<sup>173</sup> Justice Kagan was nominated to the Supreme Court on May 10, 2010. *See, e.g., Obama chooses Elena Kagan for Supreme Court*, CNN POLITICS (May 12, 2010) <http://www.cnn.com/2010/POLITICS/05/10/scotus.kagan/index.html> [<https://perma.cc/H7GW-A57C>]. She was confirmed by a vote of 63–37 on August 5, 2010. *See Roll Call Vote 111<sup>th</sup> Congress – 2<sup>nd</sup> Session*, U.S. SENATE, [https://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=111&session=2&vote=00229](https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=2&vote=00229) [<https://perma.cc/9DUF-N8HD>].

<sup>174</sup> Their New York roots, however, are miles apart. While Justice Sotomayor grew up in the public housing projects of the Bronx, Justice Kagan grew up in Manhattan's Upper West Side the daughter of a lawyer and school teacher. *See SOTOMAYOR, supra* note 22, at 15; Sheryl Gay Stolberg, Katharine Q. Seelye & Lisa W. Foderaro, *A Climb Marked by Confidence and Canniness*, N.Y. TIMES (May 10, 2010), <https://www.nytimes.com/2010/05/10/us/politics/10kagan.html> [<https://perma.cc/M7F3-KPNA>].

<sup>175</sup> Cass Cliatt, *Princeton Alumna Confirmed to U.S. Supreme Court*, PRINCETON UNIV. (Aug. 5, 2010), <https://www.princeton.edu/news/2010/08/05/princeton-alumna-confirmed-us-supreme-court> [<https://perma.cc/JGH6-ZNTN>].

<sup>176</sup> While Justice Sotomayor had a brief marriage and is currently divorced, Justice Kagan is not married. *See* Mary L. Dudziak, *The Supremes and the Single Girl*, HISTORY NEWS NETWORK (May 11, 2010), <http://historynewsnetwork.org/article/126577> [<https://perma.cc/TFT6-MKSD>]. In fairness, several male justices have been unmarried, included the extraordinary Benjamin Cardozo and the recently retired David Souter. *See id.*

<sup>177</sup> *See* Lisa Belkin, *Judging Women*, N.Y. TIMES MAG. (May 18, 2010), <https://www.nytimes.com/2010/05/23/magazine/23FOB-wwln-t.html> [<https://perma.cc/2Y4F-NN7K>] (observing that Justice Scalia had nine children; Justices Kennedy and Breyer each have three children; Justices Roberts and Alito each have two children; and Justice Thomas has one child). The story further notes that “only 4 of the 12 women who held cabinet-level positions in the Clinton and Bush administrations had children.” *Id.*

are President Obama's only two successful nominees and may well become his most lasting legacy.<sup>178</sup>

But there are also many differences. Justice Kagan, lacking Sotomayor's judicial experience, is the quintessential academic. She grew up wanting to be a Supreme Court justice, even taking her high school senior photo in a robe with a gavel.<sup>179</sup> Beyond degrees from Princeton and Harvard Law School, where she served as Supervising Editor on the *Harvard Law Review*, she also holds a Masters of Philosophy degree from Oxford's Worcester College.<sup>180</sup> She is the only person on this list to serve as a Supreme Court law clerk, having clerked for Justice Thurgood Marshall.<sup>181</sup> Like Ruth Bader Ginsburg, she was a tenured law professor.<sup>182</sup> She taught at both the University of Chicago and Harvard Law School.<sup>183</sup> In fact, in her testimony at her Senate confirmation hearing, she described herself as a "famously excellent teacher."<sup>184</sup>

President Clinton nominated Kagan to the D.C. Circuit Court of Appeals, a feeder court for future Supreme Court justices like Antonin Scalia, Clarence Thomas, and Ruth Bader Ginsburg. Republicans, refusing to hold any confirmation hearing, ultimately secured the seat for future Chief Justice John Roberts. Ironically, denying her a hearing

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<sup>178</sup> Judge Merrick Garland, President Obama's unsuccessful nominee, was considered as a finalist when Justice Kagan was selected. Bypassing the safer choice in Garland for his second selection, the President opted for Justice Kagan. Peter Baker & Jeff Zeleny, *Obama Picks Kagan, Scholar but Not Judge, for Court Seat*, N.Y. TIMES (May 10, 2010), <http://www.nytimes.com/2010/05/11/us/politics/11court.html> [<https://perma.cc/6BJC-WMTJ>].

<sup>179</sup> See Stolberg, Seelye & Foderaro, *supra* note 174. The picture also bore Justice Felix Frankfurter's quote: "Government is itself an art, one of the subtlest arts." *Id.*

<sup>180</sup> See Baker & Zeleny, *supra* note 178. See also Elena Kagan's Responses to U.S. Senate Committee on the Judiciary, Questionnaire for Non-Judicial Nominees at 1 (Jan. 15, 2009), <http://online.wsj.com/public/resources/documents/kagan0509.pdf>.

<sup>181</sup> See Baker & Zeleny, *supra* note 178. Justice Kagan followed in the footsteps of her mentor, Justice Marshall, first by becoming Solicitor General, and, second, by moving directly from the Solicitor General position to Justice of the Supreme Court. See *id.* Justice Kagan also clerked for Judge Abner Mikva on the D.C. Circuit Court of Appeals from 1986 to 1987. See also Elena Kagan's Responses, *supra* note 180, at 2.

<sup>182</sup> Kagan actually taught at the University of Chicago while President Barack Obama, who nominated her to the Court, served there as a lecturer in law. See Jessica Gresko, *Kagan: From a Mock Supreme Court to the Real Thing*, BOSTON.COM (June 24, 2010), [http://archive.boston.com/news/education/higher/articles/2010/06/24/kagan\\_from\\_a\\_mock\\_supreme\\_court\\_to\\_the\\_real\\_thing/](http://archive.boston.com/news/education/higher/articles/2010/06/24/kagan_from_a_mock_supreme_court_to_the_real_thing/) [<https://perma.cc/FR7F-MPHE>]. She taught at Chicago from 1991 to 1995, where she received tenure, and taught at Harvard from 1999 until her appointment as Dean in 2003. See Sam Dillon, *First Woman Is Appointed as Dean of Harvard Law*, N.Y. TIMES (Apr. 4, 2003), <https://www.nytimes.com/2003/04/04/us/first-woman-is-appointed-as-dean-of-harvard-law.html> [<https://perma.cc/XG5U-S77X>].

<sup>183</sup> See also Elena Kagan's Responses, *supra* note 180, at 2.

<sup>184</sup> Gresko, *supra* note 182.

later resulted in denunciations that she never served as a judge.<sup>185</sup> Critics observed she was “the first Justice in more than forty years who had never been a judge.”<sup>186</sup>

Like so many on this list, Elena Kagan’s life is filled with “firsts” and new traditions. She was the first woman to serve as Dean of Harvard Law School, a position she held for six years.<sup>187</sup> She is the first, and so far, only, female U.S. Solicitor General—a parallel to her former boss, Justice Thurgood Marshall, who was the first African American to serve in that position.<sup>188</sup> Prior to becoming Solicitor General, she had not argued any case in *any court*.<sup>189</sup> Neither judge, nor traditional lawyer,<sup>190</sup> Justice Kagan, the academic, brought new traditions to the Court. Unwilling to wear the Solicitor General’s traditional striped pants and morning coat, she eschewed the formal outfit for more subdued pantsuits.<sup>191</sup> Once a justice, she also brought frozen yogurt to the Supreme Court cafeteria.<sup>192</sup> Her style has always been her own—both on and off the bench.

Perceived as one of the Court’s preeminent writers already during her short tenure, there is no doubt that Justice Kagan, “a wonderful combination of brains and passion,” will leave a remarkable legacy.<sup>193</sup>

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<sup>185</sup> See Baker & Zeleny, *supra* note 178.

<sup>186</sup> Robert Barnes, *Verdict on Kagan’s First Year on the Supreme Court*, WASH. POST (Sept. 25, 2011), [https://www.washingtonpost.com/politics/verdict-on-kagans-first-year-on-supreme-court/2011/09/21/gIQAnJ14wK\\_story.html](https://www.washingtonpost.com/politics/verdict-on-kagans-first-year-on-supreme-court/2011/09/21/gIQAnJ14wK_story.html) [<https://perma.cc/D2MC-AXRA>].

<sup>187</sup> See Sam Dillon, *supra* note 182.

<sup>188</sup> See Nina Totenberg, *Solicitor General Holds Views Close to Her Chest*, NPR (Dec. 22, 2009), <https://www.npr.org/templates/transcript/transcript.php?storyId=121712227> [<https://perma.cc/2VGQ-MY4K>]. See also President Lyndon B. Johnson, *Remarks at the Swearing in of Judge Thurgood Marshall as Solicitor General*, AM. PRESIDENCY PROJECT (Aug. 24, 1965), <http://www.presidency.ucsb.edu/ws/?pid=27178> [<https://perma.cc/H76Y-DNAG>] (stating that Thurgood Marshall is the first African-American in American history to become Solicitor General).

<sup>189</sup> See Totenberg, *supra* note 188.

<sup>190</sup> Prior to serving as Solicitor General, Kagan was not even a member of the Supreme Court Bar. Her Senate Judiciary Committee questionnaire notes she was admitted to the Supreme Court Bar only in 2009. See Elena Kagan’s Responses, *supra* note 180, at 4.

<sup>191</sup> See Debra Cassens Weiss, *SG Dumped Traditional Morning Coat, Wore Pantsuit of Unknown Design*, ABA JOURNAL (Sept. 11, 2009), [http://www.abajournal.com/news/article/sg\\_dumped\\_traditional\\_morning\\_coat\\_for\\_first\\_high\\_court\\_appearance/](http://www.abajournal.com/news/article/sg_dumped_traditional_morning_coat_for_first_high_court_appearance/) [<https://perma.cc/NAU4-9775>].

<sup>192</sup> See Penrose, *supra* note 12, at 451.

<sup>193</sup> Stolberg, Seelye & Foderaro, *supra* note 174 (quoting Sean Wilentz, a Princeton history professor who taught Justice Kagan).

Number 3: The Public Servant

Sonia Sotomayor.<sup>194</sup>

She was born in the year that *Brown v. Board of Education* was decided.<sup>195</sup> She is the third racial minority to sit on the Supreme Court, and the first Hispanic.<sup>196</sup> When she graduated from law school, there were no women on either the highest court in New York or the U.S. Supreme Court.<sup>197</sup>

From growing up in a Bronx public housing project to reaching the pinnacle of legal success, Justice Sotomayor has spent her life overcoming obstacles.<sup>198</sup> She lost her father when she was just nine years old.<sup>199</sup> But that loss did not stop her from becoming her high school valedictorian and graduating *summa cum laude* and Phi Beta Kappa at Princeton.<sup>200</sup> She has endured diabetes since she was a child.<sup>201</sup> Under my criteria, Justice Sotomayor’s compelling life story does not count towards her judicial ranking. But, her success is, as President Obama noted, “[a]n American Story.”<sup>202</sup>

During law school, Justice Sotomayor served in editorial positions on the *Yale Law*

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<sup>194</sup> Justice Sotomayor was nominated to the Supreme Court on June 1, 2009. She was confirmed by a vote of 68 to 31 on August 6, 2009. All negative votes were cast by Republican Senators. See *Roll Call Vote 111th Congress - 1st Session*, U.S. SENATE, [https://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=111&session=1&vote=00262](https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=1&vote=00262) [<https://perma.cc/PR83-LF4M>].

<sup>194</sup> See *Supreme Court Nominations*, *supra* note 1.

<sup>195</sup> See Sonia Sotomayor, *A Latina Judge’s Voice*, 13 BERKELEY LA RAZA L.J. 87, 89 (2002).

<sup>196</sup> See Timothy O’Neill, *Commentary: Sotomayor’s Frustrating Testimony*, CNN (July 16, 2009), <http://www.cnn.com/2009/POLITICS/07/16/oneill.sotomayor.difference/index.html> [<https://perma.cc/6JK2-FA5M>] (observing that not only is Justice Sotomayor Hispanic, but that her “journey from the East Bronx to Princeton and Yale and then to a federal judgeship is a journey few have taken”).

<sup>197</sup> See *Historic Supreme Court Appointment—Sonia Sotomayor ’79*, YALE LAW SCHOOL (Aug. 6, 2009), <https://law.yale.edu/yls-today/news/historic-supreme-court-appointment-sonia-sotomayor-79> [<https://perma.cc/6DN3-ZN7M>] (noting that Sotomayor graduated from law school in 1979); Sam Roberts, *Judith S. Kaye, First Woman to Serve as New York’s Chief Judge, Dies at 77*, N.Y. TIMES (Jan. 7, 2016), <https://www.nytimes.com/2016/01/08/nyregion/judith-s-kaye-first-woman-to-serve-as-new-yorks-chief-judge-dies-at-77.html> [<https://perma.cc/72QJ-KB87>] (reporting that Kaye was the first woman named to New York’s Court of Appeals when she was nominated in 1983); see also Weisman, *supra* note 9 (stating that Sandra Day O’Connor was nominated to the Supreme Court in 1981).

<sup>198</sup> See *Background on Judge Sonia Sotomayor*, THE WHITE HOUSE, OFFICE OF THE PRESS SEC’Y (May 26, 2009), <https://obamawhitehouse.archives.gov/the-press-office/background-judge-sonia-sotomayor> [<https://perma.cc/VY2N-9FX9>].

<sup>199</sup> See *id.*

<sup>200</sup> See *id.*; see also Sheryl Gay Stolberg, *Sotomayor, a Trailblazer and Dreamer*, N.Y. TIMES (May 26, 2009), <http://www.nytimes.com/2009/05/27/us/politics/27websotomayor.html> [<https://perma.cc/Y3XH-266D>].

<sup>201</sup> See *Background on Judge Sonia Sotomayor*, *supra* note 198.

<sup>202</sup> *Id.*



*Journal* and *Yale Studies in World Public Order*.<sup>203</sup> Upon graduating, she became a Manhattan prosecutor and then worked as a civil litigation partner in a New York law firm until President George H.W. Bush nominated her to serve on the U.S. District Court for the Southern District of New York.<sup>204</sup> My ranking of her ahead of Justice Kagan is largely due to her federal judicial experience, including her trial court decision that many believe saved baseball.<sup>205</sup> When then-Judge Sotomayor issued a temporary injunction against Major League Baseball and in favor of the players, she was the youngest judge serving on the Southern District of New York.<sup>206</sup> The Second Circuit Court of Appeals affirmed her decision.<sup>207</sup> Judge Sotomayor's decision ensured that although the 1995 season would be shortened, America's favorite pastime would endure.<sup>208</sup>

After she spending six years at the trial level, President Clinton elevated her to the Second Circuit Court of Appeals.<sup>209</sup> This appointment broke another barrier, as she became the first Latina to serve on the Second Circuit.<sup>210</sup> As an appellate judge, she played a role in shaping the National Football League's (NFL) draft eligibility rules.<sup>211</sup> Writing for the court, Judge Sotomayor found that the NFL's collective bargaining process allowed it to place a hiring limit on players that had not yet been out of high school for three full football seasons.<sup>212</sup> The plaintiff, Maurice Clarett, had sought refuge in the NFL after being suspended by Ohio State University following off-field incidents.<sup>213</sup> Judge Sotomayor's opinion upheld the NFL's constitution and by-laws against Clarett's antitrust challenge.<sup>214</sup> It is hard to overlook Justice Sotomayor's unique role in these notable cases involving both professional baseball and football in a country consumed with sport. These

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<sup>203</sup> *See id.*

<sup>204</sup> *See id.*

<sup>205</sup> *See Silverman v. Major League Baseball Player Relations Comm., Inc.*, 67 F.3d 1054, 1054 (2d Cir. 1995) (upholding Judge Sotomayor's temporary injunction). *See also* Richard Sandomir, *Sotomayor's Baseball Ruling Lingers, 14 Years Later*, N.Y. TIMES (May 26, 2009), <http://www.nytimes.com/2009/05/27/sports/baseball/27sandomir.html> [<https://perma.cc/6N3T-D9T4>].

<sup>206</sup> *See* Sean Gregory, *How Sotomayor 'Saved' Baseball*, TIME (May 26, 2009),

<http://content.time.com/time/nation/article/0,8599,1900974,00.html> [<https://perma.cc/YPV9-PZR3>].

<sup>207</sup> *See id.*

<sup>208</sup> *See id.*

<sup>209</sup> *See Background on Judge Sonia Sotomayor*, *supra* note 198.

<sup>210</sup> *See id.*

<sup>211</sup> *See Clarett v. Nat'l Football League*, 369 F.3d 124, 124 (2d Cir. 2004).

<sup>212</sup> *See id.* at 125, 130.

<sup>213</sup> *See id.* at 126 (noting Clarett's impressive athletic achievements at Ohio State University, including Big Ten Freshman of the Year and national champion).

<sup>214</sup> *See id.* at 125, 127.

two cases help demonstrate her lasting impact while on the bench, even before her appointment to the Supreme Court.

When nominating Sonia Sotomayor to the Supreme Court, President Obama indicated that the judicial experience that she brought with her would exceed that of any justice in the past seventy years.<sup>215</sup> That experience included presiding over approximately 450 federal trial cases and participating in 3,000 appellate decisions.<sup>216</sup> Notably, she is the only person on this list to have served at every level of the federal court system. And, she is the only person on this list to have been nominated by three different presidents, one Republican and two Democrats.

Her rare prosecutorial experience appears to shape many of her opinions, which often embrace a common-sense approach to criminal procedure issues.<sup>217</sup> One of the few regrets she admittedly holds that she never served as a judicial law clerk.<sup>218</sup> Fortunately, with her many years of federal judicial service, others have benefited from serving as *her* law clerk.

In this most recent ranking, I give Justice Sotomayor the slightest edge over Justice Kagan due largely to her judicial rulings preceding her Supreme Court appointment. Time alone will determine which of these two fine jurists ranks above the other. For now, both receive largely equal ratings.

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<sup>215</sup> See *Background on Judge Sonia Sotomayor*, *supra* note 198. The White House press release further emphasize that she would bring more *federal* judicial experience to the Supreme Court than any nominee in one hundred years. See *id.*

<sup>216</sup> See *id.* Justice Sotomayor is credited with personally authoring approximately four hundred published appellate decisions. See *id.*

<sup>217</sup> The only other current SCOTUS member with prosecutorial experience is Justice Samuel Alito. However, Justice Alito was a federal prosecutor—a United States Attorney—something that Justice Sotomayor emphasized in a public discussion as a distinction from her own state prosecutorial experience. See Justice Sonia Sotomayor & Linda Greenhouse, *A Conversation with Justice Sotomayor*, 123 YALE L.J.F. 375, 377–78 (2013–14).

<sup>218</sup> See Stolberg, *supra* note 200.

Number 2: FWOTSC

Sandra Day O'Connor.<sup>219</sup>

Sandra Day O'Connor deserves credit as a great justice, not merely as a female justice. She famously remarked that “the important thing about my appointment [to the Supreme Court] is not that I will decide cases as a woman, but that I am a woman who gets to decide cases.”<sup>220</sup> At the time she was nominated, women comprised roughly 7 percent of all federal judges.<sup>221</sup> Senator Ted Kennedy noted that in

two centuries of Federal judicial history, only 50 women [had] been appointed to the lower Federal courts . . . 33 of them [] approved by this committee during the past Congress. All of us who care about this issue look forward to the day when appointments to the federal bench and to the other high public offices will not stand out as an historic event simply because the appointees are women.<sup>222</sup>

Justice O'Connor refers herself as FWOTSC. The acronym was born after a 1983 *New York Times* editorial bemoaning acronyms in general noted that “[t]he nine men who interpret [the laws] are often [called] the SCOTUS.”<sup>223</sup> The gender faux pas—coming nearly two years *after* Justice O'Connor had arrived at the Court—prompted Justice O'Connor to draft a letter to the editor explaining that the SCOTUS was no longer comprised solely of men.<sup>224</sup> With levity and grace, Justice O'Connor penned the following: “If you have any contradictory information, I would be grateful if you would forward it— as I am sure the POTUS, the SCOTUS and the undersigned (FWOTSC) would be most

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<sup>219</sup> Justice O'Connor was nominated to the Supreme Court on August 19, 1981. She was confirmed by a vote of 99 to 0 on September 21, 1981. The only Senator who did not vote was Max Baucus. *See To Confirm the Nomination of Sandra D. O'Connor, of Arizona, to be an Associate Justice of the Supreme Court. (Motion Passed)*, GOVTRACK, <https://www.govtrack.us/congress/votes/97-1981/s274> [<https://perma.cc/4VLK-XTXD>]. The only other modern justices to be confirmed without a negative vote include Justice Harry Blackmun (94 to 0); Justice John Paul Stevens (98 to 0); and Justice Antonin Scalia (98 to 0). *See Supreme Court Nominations*, *supra* note 1.

<sup>220</sup> Andrew Cohen, *Former Justice Forrest Gump*, CBS NEWS (May 29, 2009), <https://www.cbsnews.com/news/former-justice-forrest-gump/> [<https://perma.cc/BCR5-LYYL>]

<sup>221</sup> *See Nomination of Sandra Day O'Connor: Hearings Before the S. Comm. on the Judiciary, 97th Cong. 6* (1981) (statement of Sen. Edward Kennedy).

<sup>222</sup> *Id.*

<sup>223</sup> William Safire, *On Language: Potus and Flotus*, N.Y. TIMES MAG. (Oct. 12, 1997), <https://www.nytimes.com/1997/10/12/magazine/on-language-potus-and-flotus.html> [<https://perma.cc/7CNX-VBW7>].

<sup>224</sup> *See id.*

interested in seeing it.”<sup>225</sup> While noted linguist, William Safire, critiqued the shortening for violating “the first rule” of acronyms that they “be easily pronounceable,” his retelling of this story underscored the fact that Justice O’Connor had made her point.<sup>226</sup> The Court was no longer nine men. The first woman *really* was on the Supreme Court.

In the late 1980s, male justices began preparing for the eventuality of a female justice. Justice John Paul Stevens, then an associate justice, petitioned the Clerk of Court to begin dropping the honorific “Mr.” from all official court documents.<sup>227</sup> This change presaged the arrival of Sandra Day O’Connor. But, as author Linda Hirshman notes, the change was not welcomed by all the male justices.<sup>228</sup> In fact, it was not until the second female justice was confirmed that a women’s restroom was permanently placed in the justices’ robing room.<sup>229</sup>

Despite her self-proclaimed title of FWOTSC, Justice O’Connor was far more than simply a *female* justice. She was a consensus builder, a gifted politician (both on and off the Court) and, ultimately, the swing vote in several of the Court’s most important and contentious cases. Her value on the Court often seemed to cast a shadow far wider than a single justice. She remains the only female Supreme Court justice with significant political experience. In fact, Justice O’Connor is the only female justice to have served in the executive, legislative, and judicial branches of government.<sup>230</sup>

Justice O’Connor graduated from Stanford Law School at the top of her class.<sup>231</sup> In fact, she and later-Chief Justice William Rehnquist were classmates.<sup>232</sup> When law school ended, Rehnquist had little difficulty finding a job as a Supreme Court law clerk, while O’Connor could not secure *any* paying legal job.<sup>233</sup> As a woman—despite graduating

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<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> See Cedarbaum, *supra* note 94, at 42.

<sup>228</sup> HIRSHMAN, *supra* note 28, at 151.

<sup>229</sup> RUTH BADER GINSBURG, MY OWN WORDS 75 (2016).

<sup>230</sup> Justice O’Connor’s experience was all at the state level in Arizona. Nonetheless, much was made during her Senate Confirmation hearings of her diverse background in preparing her for the Supreme Court. See *Nomination of Sandra Day O’Connor*, *supra* note 221, at 57–59.

<sup>231</sup> *Sandra Day O’Connor*, O’CONNOR INST., <http://oconnorinstitute.org/programs/oconnor-history/sandra-day-oconnor-library-and-archives/biography/> [https://perma.cc/GUF6-TGRD].

<sup>232</sup> See B. Drummond Ayres, Jr., ‘A Reputation for Excelling’ – Sandra Day O’Connor, N.Y. TIMES (July 8, 1981), <http://www.nytimes.com/1981/07/08/national/08OCON.html> [https://perma.cc/2F8M-VWJU]. Chief Justice Rehnquist graduated first in the class, Justice O’Connor third. See *id.*

<sup>233</sup> See HIRSHMAN, *supra* note 28, at 18. While Rehnquist secured a coveted clerkship with Justice Robert Jackson, O’Connor was relegated to working for the San Mateo Deputy Attorney for free. See *id.*

Order of the Coif and serving as a member of the *Stanford Law Review*—she was relegated to a volunteer position with the San Mateo Deputy Attorney. The absence of a paying job and an office to perform her tasks did not deter her.<sup>234</sup> She still managed to succeed.

Justice O'Connor made the most of her opportunities, serving three years as an Assistant Attorney General for Arizona and five years as a State Senator.<sup>235</sup> She was ultimately elected as the Arizona Senate Majority Leader—a first for any woman in the country.<sup>236</sup> She had limited judicial experience, serving briefly as a trial court judge in Maricopa County, Arizona, and then, being elevated by the governor, as a state appellate judge.<sup>237</sup> At age 51, O'Connor had the privilege of bringing her talents and experience to bear on the country's most important constitutional questions.

Before she was Justice O'Connor, she was an extraordinary lawyer and politician. Justice O'Connor understood her role and served us well in it. As she once explained:

For both men and women the first step in getting power is to become visible to others, and to put on an impressive show. . . . As women achieve power, the barriers will fall. As society sees what women can do, as *women* see what women can do, there will be more women out there doing things, and we'll all be better off for it.<sup>238</sup>

This way paver deserves credit, and gratitude, for being such a wonderful FWOTSC.

#### Number 1: Notorious

Ruth Bader Ginsburg.<sup>239</sup>

RBG. Notorious RBG. No woman has done more while practicing law to advance

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<sup>234</sup> See *id.* at 18–19. Hirshman notes that when O'Connor was told there was no available officer for her either, she simply said “I got along with your secretary pretty well; maybe she'll let me put my desk with hers.” *Id.* at 18.

<sup>235</sup> See Ayres, *supra* note 232.

<sup>236</sup> *Reagan's Nomination of O'Connor*, NAT'L ARCHIVES, <https://www.archives.gov/legislative/features/oconnor.html> [<https://perma.cc/8ARK-5Q45>].

<sup>237</sup> Then Judge O'Connor served only eighteen months in her position on the Arizona Court of Appeals, “fac[ing] few of the nettlesome issues routinely taken up by the United States Supreme Court.” *Id.*

<sup>238</sup> Ginsburg, *supra* note 58, at 482 (emphasis in original) (retelling Justice O'Connor's own story).

<sup>239</sup> Justice Ginsburg was nominated to the Supreme Court on June 22, 1993. She was confirmed by a vote of 96 to 3 on August 3, 1993. All three negative votes came from Republican Senators: Senator Helms, Senator Nickles, and Senator Smith. Michigan Democratic Senator, Senator Riegle, did not vote. See *U.S. Senate Roll Call Votes 103rd Congress – 1st Session*, U.S. SENATE, [https://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm?congress=103&session=1&vote=00232](https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm?congress=103&session=1&vote=00232) [<https://perma.cc/2NE6-ZRZV>].

gender equality before the Supreme Court than Ruth Bader Ginsburg (“RBG”). Even former Harvard Dean Erwin Griswold, the man who challenged her very presence at Harvard Law and refused to give her leave to complete her studies as a visiting student at Columbia, considered Ginsburg “the Thurgood Marshall of the women’s movement.”<sup>240</sup> From breaking glass ceilings in academia by becoming the first tenured female law professor at Columbia Law School to heading the ACLU Women’s Law Project, Justice Ginsburg fought for full equality.<sup>241</sup>

Justice Ginsburg graduated Phi Beta Kappa from Cornell University with a government degree. While at Cornell, she met her life partner, Marty. Together they would start their legal studies at Harvard. When Marty graduated and received an impressive job opportunity in New York, Dean Griswold refused to allow Ginsburg to take visiting status. So, in order to keep her family together—by then, the pair had been joined by a daughter, Jane—Ginsburg transferred to Columbia Law School where she ultimately graduated at the top of her class. Remarkably, Ginsburg earned positions on both the *Harvard Law Review* and the *Columbia Law Review*—a first for any woman.<sup>242</sup>

Like Justice O’Connor, Justice Ginsburg could not secure a law firm job upon graduating from law school despite her many academic accomplishments.<sup>243</sup> Justice Ginsburg believes that being a woman, Jewish, and the mother to a young child, all worked against her.<sup>244</sup> Similarly, though she was being strongly supported in her search for a judicial clerkship, only one federal judge—Judge Edmund Palmieri, a federal trial judge—would agree to hire her.<sup>245</sup> Others, such as Justices Felix Frankfurter and William Brennan and famed appellate judge, Learned Hand, refused to hire a woman.<sup>246</sup>

Similar to Judge Baker Motley, the discrimination Ginsburg experienced would

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<sup>240</sup> HIRSHMAN, *supra* note 28, at 206.

<sup>241</sup> See Karst, *supra* note 54, at 1199.

<sup>242</sup> See President William J. Clinton, Remarks Announcing the Nomination of Ruth Bader Ginsburg to be a Supreme Court Associate Justice, AM. PRESIDENCY PROJECT (June 14, 1993), <http://www.presidency.ucsb.edu/ws/index.php?pid=46684> [<https://perma.cc/9NU3-2G67>].

<sup>243</sup> See *id.*

<sup>244</sup> See Malvina Halberstam, *Ruth Bader Ginsburg: The First Jewish Woman on the United States Supreme Court*, 19 CARDOZO L. REV. 1441, 1446 (1998) (“As Ruth explained in a recent interview: ‘In the fifties, the traditional law firms were just beginning to turn around on hiring Jews . . . . But to be a woman, a Jew, and a mother to boot, that combination was a bit much.’”).

<sup>245</sup> See HIRSHMAN, *supra* note 28, at 20–21.

<sup>246</sup> See *id.* at 21. Justice Frankfurter reportedly said, “I’m not hiring a woman.” In contrast, Judge Hand was concerned that a female presence in chambers would “inhibit his salty style of speech.” *Id.*

motivate her to work for equality.<sup>247</sup> She did not distinguish between male or female clients, recognizing that gender equality meant equal rights for men *and* women, regardless of which gender was experiencing an issue.<sup>248</sup> Every major sex discrimination case that appeared before the Court from the 1970s, through her first federal court appointment, bears her influence. She either drafted the winning petition and brief, argued the case, or participated as a judge in the decision. Ginsburg *is* the voice of gender-based equal protection.

She has been a teacher and a scholar, tenured at the law schools of both Rutgers and Columbia, an accomplished lawyer, and a successful judge. In many positions, she has changed the face of the law. Prior to her Supreme Court appointment by President Clinton, she sat on the D.C. Circuit Court of Appeals for thirteen years.<sup>249</sup> President Jimmy Carter, who began the normalization of nominating female judges, appointed Ginsburg to the D.C. Circuit Court in June, 1980—one year after he had appointed Judge Patricia Wald.<sup>250</sup> Both have had a tremendous impact on the law, as indicated by their inclusion on this list, and prove that a president’s most enduring legacy is often his judicial appointments.<sup>251</sup>

Geoffrey Stone calls Ginsburg “simply the most important woman lawyer in the history of the Republic.”<sup>252</sup> And, while that may be a bit overstated, Justice Ginsburg has done more to advance women’s rights—both *on* the Supreme Court and *in front of* the Supreme Court—than any other person. She won five of the six cases she argued before the Supreme Court.<sup>253</sup> All six cases advanced gender equality. Once on the Court, she authored the majority opinion in *United States v. Virginia*, which integrated Virginia

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<sup>247</sup> See Clinton, *supra* note 242.

<sup>248</sup> See, e.g., Ruth Bader Ginsburg, *Sex and Unequal Protection: Men and Women as Victims*, 11 J. FAMILY LAW 347, 358 (1971).

<sup>249</sup> See Clinton, *supra* note 242.

<sup>250</sup> See Ginsburg *supra* note 103, at 371; Philip Galanes, *Ruth Bader Ginsburg and Gloria Steinem on the Unending Fight for Women’s Rights*, N.Y. TIMES (Nov 14, 2015), <https://www.nytimes.com/2015/11/15/fashion/ruth-bader-ginsburg-and-gloria-steinem-on-the-unending-fight-for-womens-rights.html> [<https://perma.cc/EP9T-JB45>].

<sup>251</sup> President Carter also appointed Judge Abner Mikva to the D.C. Circuit Court of Appeals. As set forth above, Justice Kagan served as a law clerk for Judge Mikva prior to clerking for Justice Marshall.

<sup>252</sup> HIRSHMAN, *supra* note 28, at 44.

<sup>253</sup> The six cases are: *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Kahn v. Shevin*, 416 U.S. 351 (1974); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Edwards v. Healy*, 421 U.S. 772 (1975); *Califano v. Goldfarb*, 430 U.S. 199 (1977); and, *Duren v. Missouri*, 439 U.S. 357 (1979). Equally importantly, Ginsburg drafted much of the legal briefing behind the first gender equality case argued before the Supreme Court, *Reed v. Reed*, 404 U.S. 71 (1971), while teaching law at Rutgers. See HIRSHMAN, *supra* note 28, at 37–44.

Military Institute (VMI).<sup>254</sup> When Ginsburg later visited VMI to address the student body, a 2003 female graduate gave Ginsburg her combat ring to “thank her for battling for us.”<sup>255</sup> In a similarly poignant fashion, Justice Ginsburg was wearing a 1967 male graduate’s “keydet” pin that mothers of graduates received in the 1960s.<sup>256</sup> The graduate sent it to Justice Ginsburg upon his mother’s death, thinking his mother would be proud if the justice wore it. So, in tribute, she did.<sup>257</sup> These gifts—given by both male and female graduates of VMI—anecdotally illustrate the breadth of Justice Ginsburg’s impact on gender equality.

Humbly, she notes simply that she was “lucky to be in the right place, at the right time”<sup>258</sup> But, she is also quick to repeat Sarah Grimke’s 1837 request: “I ask no favor for my sex. . . . All I ask of our brethren is, that they take their feet off our necks.”<sup>259</sup>

Notorious RBG has been much more than lucky. She has been extraordinary. Her lasting influence, due to cases she argued before the Court coupled with decisions she has made on the Court, sets her apart as the greatest female jurist we have had. She, singlehandedly, has likely done more for gender equality than any other judge or person. Her dedication to equality, and unparalleled success in achieving equality for all, is what places her as the greatest female justice on this list.<sup>260</sup>

For now, with only four to compare, RBG is the ultimate way paver.

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<sup>254</sup> See *United States v. Virginia*, 518 U.S. 515 (1996).

<sup>255</sup> Ariane de Vogue, *At VMI, Ruth Bader Ginsburg Reflects on a Monumental Ruling*, CNN (Feb. 2, 2017), <http://www.cnn.com/2017/02/02/politics/ruth-bader-ginsburg-vmi/index.html> [<https://perma.cc/RFU5-AA8Y>].

<sup>256</sup> *Id.*

<sup>257</sup> See *id.*

<sup>258</sup> Karst, *supra* note 54, at 1211.

<sup>259</sup> Ginsburg, *supra* note 248, at 362.

<sup>260</sup> While my prior effort, “The Sistren,” noted the cult-like following of Justice Ginsburg, her notoriety is not factored into this ranking. Still, it is worth noting that Emmy award-winning Saturday Night Live actress Kate McKinnon has brought the “Ginsburn” into pop culture parlance. More than any other sitting justice, Justice Ginsburg seems to have a cult following that counters the usual truism that our justices are little known outside legal circles.