LITIGATING WOMEN: THE PATH TO INTERMEDIATE SCRUTINY IN AMERICAN LAW

An Undergraduate Research Scholars Thesis

by

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ABSTRACT

Litigating Women: The Path to Intermediate Scrutiny in American Law

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Literature Review

Extant scholarship explains the significance of *Muller v. Oregon* (1908)*; Goesaert v. Cleary* (1948)*; Reed v. Reed* (1971)*; Frontiero v. Richardson* (1973)*; Weinberger v. Wiesenfeld* (1975)*;* and *Craig v. Boren* (1976) as sex-based discrimination equal protection challenges. Sometimes, the Equal Rights Amendment is discussed to contextualize the cases from the Seventies. Additionally, many researchers have explored the similarities between the legal statuses of women and racial minorities, especially African Americans. The discipline of history has catalogued women's rights during the Twentieth century, and legal experts have explained the implications of relevant Supreme Court. However, a cohesive narrative of the jurisprudence leading to the pronouncement of the intermediate scrutiny test does not exist; this work fills the gap in scholarship.

Thesis Statement

The intermediate scrutiny test used by the Supreme Court to evaluate sex-based discrimination claims was developed throughout the Twentieth century as female litigators and activists brought cases to the Court, urging the justices to consider sex as a class protected from discrimination by employing the equal protection clause.

Theoretical Framework

This work will examine the development of the intermediate scrutiny test used by the Supreme Court when evaluating sex-based discrimination claims through examining six key cases in the Twentieth century.

Project Description

In the 1970s, the Supreme Court pronounced a new test for laws that treated the two sexes differently. This test, known as "intermediate scrutiny," was stricter than the Court's usual standard (the "rational basis" test), but not as stringent as the test used for cases involving racial distinction (the "strict scrutiny" test). It only applies to sex-based discrimination litigation. This work tracks and analyzes the jurisprudence in the Supreme Court that led to the implementation of intermediate scrutiny through examining different cases. These are *Muller v. Oregon* (1908)*; Goesaert v. Cleary* (1948)*; Reed v. Reed* (1971)*; Frontiero v. Richardson* (1973)*; Weinberger v. Wiesenfeld* (1975)*;* and *Craig v. Boren* (1976). *Muller* and *Goesaert* demonstrate how the Court employed the rational basis test in sex-based discrimination cases during the first half of the Twentieth century. *Reed, Frontiero,* and *Weinberger* detail litigator and activist Ruth Bader Ginsburg's efforts to persuade the court to establish a test specifically for evaluating these cases.

Craig explains the monumental case that finally convinced the Court to pronounce intermediate scrutiny. Together, these six cases provide a cohesive narrative of the jurisprudence and socio-cultural history that clearly articulated the path to intermediate scrutiny.

DEDICATION

To the women who came before — may your lives and undying struggle for equality motivate women to come like it has me.

ACKNOWLEDGEMENTS

First and foremost, I would like to thank my research advisors for their constant support throughout this project. Dr. Katherine Unterman, in addition to guiding both historical and legal research, continuously encourages me. Dr. Randy Gordon explains nuances and suggests sources to properly develop the legal aspect of this work. I could write nothing without their aid.

Thanks also belongs to those who have directed my path until this point. My mother, herself an attorney, exposed me to the law from a young age. Watching her as I grew up taught me that women, indeed all people, are capable of achieving whatever they desire if they work hard enough. She is the reason I am passionate about the law. Dr. Sara Alpern has inspired and shaped me more than she could possibly know. Her enthusiasm about women's history and equality is contagious; learning from her has given me a goal in life. Dr. Sarah Misemer relentlessly searches for opportunities for me to excel, and creates them when others do not exist. The value of her mentorship is immeasurable. My best friend, Hannah Fisher, has read every draft I've written, and reminds me to work hard but never take myself too seriously. These people have loved me unconditionally. They believe in me, even when I struggle to believe in myself. I am forever in their debt.

Thank you all.

INTRODUCTION

Constitutionally, women have a big problem– they're not in it. Searching the founding document for the words "woman" or "women," "female," ladies," or other similarly feminine words will yield no results.[1] Even though Abigail Adams raised the question of "women's role" in a "new post revolutionary society" by begging her husband John to "remember the ladies" at the Constitutional Convention, they were forgotten.[2] That is because the cultural environment in which the Framers drafted it was patriarchal.

Women possessed very few rights. The only true legal protection they were afforded was through the rights of their husbands.[3] Legal scholar Sir William Blackstone wrote that

> [b]y marriage, the husband and wife are one person in the law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least incorporated and consolidated into that of the husband: under whose wing, protection, and *cover*, she performs every thing.[4]

The Constitution did not consider women to be full persons, only subsidiaries of their male relatives.[5] Following contemporary reasoning, there was no need to include women in the constitution because their rights were secured in their husbands.

But, as one legal historian points out, the "intimate association between men and women does not in and of itself guarantee respect and protection" to women, and women's exclusion

[1] U.S. Constitution. Not even the 19th Amendment (1920), which effectively granted women the right to vote, uses gendered language. Instead, it reads, "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on the account of sex." The amendment implies this right for women, but does not explicitly extend suffrage to them.

[2] John Adams, *My dearest friend: letters of Abigail and John Adams*, ed. Margaret A. Hogan and C. James Taylor (Cambridge: Belknap Press of Harvard University Press, 2007): 110.

[3] Mary Cacioppo, "Women and the Constitution," *Ohio Northern University Law Review* 19 (1993): 692.

[4] Sir William Blackstone, *Commentaries on the Laws of England*, vol. 1 (Oxford, 1765), 442.

[5] George Edwards, "Women and the Law: From Abigail to Sandra," *University of Cincinnati Law Review* 52, no.4 (1983): 969.

from the Constitution did not safeguard them from encountering constitutional issues.[6] Discrimination on the basis of sex was perhaps the most obvious form of legal struggle women faced. Women were routinely denied the opportunity to participate in public life, instead being confined to the domestic sphere.

Take, for example, the story of Myra Bradwell. Despite having passed her examinations and character requirements, the State of Illinois denied Bradwell a license to practice law in 1869. The State reasoned that married women could not enter into binding contracts. Upon appeal, the Supreme Court of the United States affirmed Illinois' decision, and added that the right to practice law was not a fundamental right.[7] Justice Bradley concurred, and

> [r]ecognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine nature of things, indicated the domestic sphere as that which properly belongs to the domain and functions of womanhood.[8]

The Court, therefore, reasoned that confining women to their domestic realm was a fitting and justified classification. Other women met the same fate as Bradwell when they encountered discrimination.

Ironically, the Supreme Court decided *Bradwell* in 1873, only a few years after the ratification of the Fourteenth Amendment to the United States Constitution in 1868. The Amendment's purpose was to expand the definition of citizenship to incorporate former slaves into the populous following the Civil War. The Amendment guarantees that:

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[6] Akhil Reed Amar, "Women and the Constitution," *Harvard Journal of Law & Public Policy* 18 (1995): 467.

[7] Bradwell v. Illinois, 83 U.S. 130, 139 (1873).

[8] Bradwell v. Illinois, 83 U.S. 130, 141 (1873).

> *All persons* born or naturalized in the United States and subject to the jurisdiction thereof, *are citizens* of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive *any person* of life, liberty, or property, without due process of law; nor deny to *any person* within its jurisdiction the *equal protection of the laws*.[9]

This definition of citizenship would seemingly apply to Bradwell and all other native-born American women, regardless of race. Still, in *Bradwell*, the Supreme Court interpreted the Amendment in a way that still excluded women.[10] Indeed, in other cases from that period, the Court made it clear that it only considered the Fourteenth Amendment to apply to newly freed slaves, specifically black men.[11]

In addition to the newly expanded definition of citizenship, the last sentence of the Amendment, the equal protection clause, is important to discrimination claims. The equal protection clause prohibits governments from discriminating against similarly situated individuals.[12]

Most discrimination claims are evaluated using the rational basis test. In order to function, governments frequently categorize people. For example, States divide those over and under the age of twenty-one to regulate the sale and consumption of alcoholic beverages.[13] Classifications like these pass the rational basis test because they are rationally related to a legitimate governmental interest, like public safety or adolescent brain development.[14] Simply put, as long as the government can demonstrate a rational

[9] U.S. Constitution, amend. XIV, § 1. Emphasis added.
[10] Bradwell v. Illinois, 83 U.S. 130 (1873).
[11] Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1873).
[12] Jody Feder, Congressional Research Service, RL 30253, Sex Discrimination in the Supreme Court: Developments in the Law (2008), 1-2.
[13] Texas Penal Code § 106.01.
[14] Jody Feder, Sex Discrimination in the Supreme Court, 2.

relationship between a discriminatory law and a legislative goal, then the law will survive the rational basis test.

In fact, all discrimination claims were evaluated under rational basis until the Twentieth century. In the Thirties, the Supreme Court developed the doctrine of suspect classes in *United States v. Carolene Products Company* (1938).[15] The Court determined that some categorizations are inherently suspect. These classes are known as immutable traits—things one cannot control or change about oneself. The most visible suspect class is race, but national origin and alienage are also considered to be immutable traits. When a law discriminates on the basis of one of these classifications, then courts employ strict scrutiny. In order to survive the test, governments must prove that the classification is narrowly tailored to a compelling governmental interest, and that the classification accomplishes that interest in the least injurious way possible.[16] Categorizations along the lines of a suspect class are frequently invalidated. A good example of how the test was applied to nullify a suspect classification discrimination can be found in *Brown v. the Board,* which overruled the "separate but equal" doctrine of racial segregation in education.[17] Legal scholar Gerald Gunther described the test as "strict in theory and fatal in fact," meaning that review under strict scrutiny is a hurdle that very few laws overcome.[18] Strict scrutiny is the most active form of judicial review, while the rational basis test is the least active.[19]

[15] United States v. Carolene Products Company, 304 U.S. 155 (1938).
[16] Jody Feder, Sex Discrimination in the Supreme Court, 2.
[17] Brown v. the Board of Education of Topeka, 347 U.S. 483 (1954).
[18] Gerald Gunther, "The Supreme Court, 1971 Term," *Harvard Law Review* 86, no. 1 (November 1972): 8.
[19] Ashutosh Bhagwat, "Purpose Scrutiny in Constitutional Analysis," *California Law Review* 85, no. 2 (March 1997): 303.

Although one cannot help the biological sex they are assigned at birth, sex-based classifications are neither inherently suspect, not subject to strict scrutiny. Instead, they are evaluated using the intermediate scrutiny test, which is tougher than rational basis, but not as stringent as strict scrutiny. Additionally, intermediate scrutiny only applies to sex-based discriminations. This test was not enunciated until 1976.[20]

Until the 1970s, all sex-based discrimination claims were evaluated using the rational basis test. These discriminatory laws were routinely upheld as protections for women. However, some saw the link between biological sex and other suspect classes, and worked to change the process of judicial review for women. During the Twentieth century, female litigators and activists brought cases to the Supreme Court, urging the Justices to consider sex as a class protected from discrimination by employing the equal protection clause, and eventually succeeded in establishing the intermediate scrutiny test.

The work of women like Florence Kelley and Josephine Goldmark, Anne Davidow, and Ruth Bader Ginsburg in sex-based discrimination litigation reflected contemporary debates about the role of women at the time. Adamant progressive reformers, Kelley and Goldmark worked to establish and uphold in court protective labor laws for women at the beginning of the century. Then, Anne Davidow made the groundbreaking claim that women were entitled to equal protection in 1948. Later, Ruth Bader Ginsburg argued in a series of cases before the Supreme Court that sex-based discrimination claims should be evaluated using a test more rigorous than rational basis by comparing sex- and race-based classifications. Each of these women dedicated their lives to improving the legal status of women, perpetually forgotten and excluded by male

[20] Jody Feder, Sex Discrimination in the Supreme Court, 2-3.

Framers. Their work was crucial to the development and establishment of the intermediate scrutiny test, which finally secured for women at least some level of equal protection.

CHAPTER I

"THE TRADITION" AND RATIONAL BASIS

Muller v. Oregon: Progressive Reform Qualifies as Rational Basis

On Labor Day 1905, Emma Gotcher worked for more than ten hours in one day at Curt Muller's Grand Laundry in Portland, Oregon. She was forced to do so by her supervisor, Joe Haselback. This directly violated a labor law ratified by the State in 1903.[21] Ironically, this Labor Day incident (the date does not seem fortuitous) sparked a legal battle over protective labor legislation. *Muller v. Oregon* (1908) went on appeal all the way up to the Supreme Court of the United States.[22] On behalf of Oregon, Louis D. Brandeis submitted an unusual brief to the Justices that, instead of relying solely on statutes and prior court decisions, employed testimonies, scholarship and viewpoints from beyond the legal community. This extra-legal information highlighted the Oregon legislature's rationale, supporting his argument that the law was a good and necessary progressive reform that ensured the safety and wellbeing of women workers by limiting their work.[23] The untraditional Brandeis brief influenced the justices' ruling.[24] As such, *Muller v. Oregon* and its subsequent landmark decision established the practice of sociological jurisprudence during the Progressive era, and, furthermore, confirmed that legislative intent to improve health and welfare qualified as a rational basis for discrimination.

Specifically, Curt Muller's laundry violated Oregon's Ten-Hour Women's Labor Law of 1903. In years prior, tensions in Portland regarding labor ran high: 1902 saw seventeen strikes,

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[21] Nancy Woloch, *A Class by Herself*, 58.

[22] Nancy Woloch, *A Class by Herself*, 61.

[23] Louis D. Brandeis, *Curt Muller, plaintiff in error, v. the State of Oregon: Brief for Defendant in Error,* 1908.

[24] Muller v. Oregon, 208 U.S. 412, 420 (1908).

four of which involved women workers. Union leaders and strike participants used these opportunities to inform the public and government about the scientific and sociological realities of industry. Unions and labor lobbyist groups pressured the legislature to pass protective labor legislation. Over time, the goals of these groups narrowed. Instead of demanding eight hour workdays for all workers, they shifted their focus to ten hour workdays for women only. The more modest proposal was successful.[25] Passed February 19, 1903, the legislation stated that "no female [shall] be employed in any mechanical establishment, or factory, or laundry in this State for more than ten hours during any one day."[26] The law had two immediate and direct effects: it limited women's workdays within those industries to ten hours, and limited capitalists' profits derived from over-worked and underpaid laborers. The latter was bound to upset some business owners, like Curt Muller, and so it did.

Two weeks after Muller purposefully violated the law, the circuit court of Multnomah County pressed charges against him.[27] Muller originally entered a plea of not guilty, but then refiled his plea with the court to claim that no crime had been committed.[28] The district attorney was certainly aware of the rising unionism in Portland at the time.[29] He called six other women from the Shirt, Waist, and Laundry Workers' Union, the same union as Gotcher, who were also employed at Grand Laundry — Berth Gerhke, Helene Peterson, Esther Brooks, Eunice McLeod, a Mrs. Reeves, and Maude Reeves— to the stand as witnesses.[30] Their corroboration of Emma Gotcher's story easily won the case for Oregon. The court found Curt Muller guilty of violating

[25] Nancy Woloch, *A Class by Herself*, 56-57.
[26] Ten-Hour Woman's Labor Law, Oregon, Session Laws, pg. 148 (1903).
[27] Nancy Woloch, *A Class by Herself*, 58-59.
[28] Nancy Woloch, *A Class by Herself*, 59.
[29] Nancy Woloch, *A Class by Herself*, 57-60.
[30] Nancy Woloch, *A Class by Herself*, 59.

the Ten-Hour Law, charged him with a misdemeanor, and fined him the minimum fine of ten dollars on top of court costs.[31]

Had Muller not demurred his not guilty plea, the story of *Muller v. Oregon* would have likely ended in the circuit court of Multnomah County. The prosecution's job was simply too easy, as all they had to do was prove that Muller violated the law. Any appeal would have likely ended in the same ruling.[32]

Rather, Muller's claim that he had not committed a crime gave him a different way to approach the case. Instead of trying to prove that Muller had not violated the law, Muller's defense lawyers sought to convince justices that the Ten-Hour Law was in violation of the United States Constitution.[33]

When Muller appealed to the United States Supreme Court, his lawyers used this line of reasoning as the basis of their appeal. They claimed that Oregon's lawmakers exceeded the police power of the State by creating legislation that violated the Fourteenth Amendment. They cited section one of the Amendment to make a two-pronged argument.

First, Muller claimed that the law infringed his right to freedom of contract. This right is based on the clause in the Fourteenth Amendment that no "State [shall] deprive any person of life, liberty, or property."[34] This aspect of Muller's defense assumed that property included profit. By limiting the workday of Muller's workforce at the Grand Laundry, Oregon directly deprived him of profit by limiting the number of labor hours he could contract from female employees. Therefore, Muller argued, regardless of how or if the law protected women workers,

[31] Nancy Woloch, *A Class by Herself*, 60.
[32] Nancy Woloch, *A Class by Herself*, 60.
[33] Nancy Woloch, *A Class by Herself*, 59.
[34] U.S. Constitution, amend. XIV, § 1.

it violated his constitutional right to unregulated pursuit of property through the freedom of contract.

The Muller legal team tried to strengthen this argument by citing other recent Supreme Court decisions involving protective labor legislation and the Fourteenth Amendment. Most significantly, in *Lochner v. New York* (1905), a New York law created to protect the health of bakers by limiting their workweeks to sixty hours, with a maximum of ten hours per day, was disputed. Like Muller, Lochner asserted that the New York law was an unconstitutional violation of the right to freedom of contract. The Court sided five-to-four with Lochner. Their decision was largely contextualized by the growth of unionism and successful union lobbying across the country.[35] The Court feared that upholding a law that restricted labor in one industry would create precedent for similar laws regarding other industries. To articulate this anxiety, Justice Peckham wrote in the opinion that "it might be safely affirmed that almost all occupations more or less affect the health."[36] If this were the case, then "no trade, no occupation, no mode of earning one's living, could escape this all-pervading power."[37] To avoid expanding the police power of the State and to curb the rising tide of union-lobbied legislation, the Court ruled against New York law. To justify their decision to deter protective labor legislation, the Court claimed that "there is no reasonable ground, on the score of health, for interfering with the liberty of the person or the right to free contract, by determining the hours of labor."[38] Due to the similarities between the laws, Muller hoped that the legal precedent established in *Lochner v. New York*

[35] Philippa Strum, *Louis D. Brandeis: Justice for the People* (Cambridge: Harvard University Press, 1984), 118.

[36] Lochner v. New York, 198 U.S. 45, 59 (1905).

[37] Lochner v. New York, 198 U.S. 45, 59 (1905).

[38] Lochner v. New York, 198 U.S. 45, 57 (1905); Philippa Strum, *Louis D. Brandeis*, 118.

would convince the justices to rule against the Oregon law, and to protect Muller's right to freedom of contract.[39]

The second part of Muller's argument also contended that the Fourteenth Amendment rendered the Ten-Hour Law unconstitutional. The core of his argument depended on the equal protection clause, which prohibits class legislation without rational basis. This interpretation of the Fourteenth Amendment logically prohibits gendered legislation. However, the Ten-Hour Law specifically says that "no female," not no person, can work for more than ten hours during any one day within the State.[40] Furthermore, the law only applied to a certain class of woman worker—females "employed in any mechanical establishment, or factory, or laundry."[41] Thus, Muller argued that the law was unconstitutional because it did not afford equal protection to men as it did to women, nor the same protection to women employed in other industries.

Both of these arguments lent themselves to Muller's main conclusion: that the Ten-Hour Law was an overextension of the police power granted to Oregon because it violated the Fourteenth Amendment. Muller's lawyers submitted these assertions in a brief to the Supreme Court justices. Muller's argument, contextualized in the *Lochner* era, was strong.

However, the National Consumers League (NCL or the League) wanted to make sure that Oregon had even better representation. The League, a civic-minded organization run by reformer Florence Kelley and dominated by women, researched social problems related to commerce, and worked to create a fair marketplace for both consumers and workers. Thus, much of their efforts focused on lobbying for protective labor legislation and ensuring victory in subsequent

[39] Nancy Woloch, *A Class by Herself,* 73.
[40] Ten-Hour Woman's Labor Law, Oregon, Session Laws, pg. 148 (1903).
[41] Ten-Hour Woman's Labor Law, Oregon, Session Laws, pg. 148 (1903).

litigation.[42] The importance of the League is not to be underestimated: "Every significant piece of legislation that dealt with child labor, maternal and child health, working conditions for women, and the like bore Kelley's imprint and that of the Consumers League."[43] When Kelley found out that *Muller* was to be argued before the Supreme Court, she and her associate Josephine Goldmark began to eagerly search for an attorney. Kelley decided that Oregon should seek to prove that being overworked was dangerous and negatively affected women's health by providing the Court with factual evidence to support the claim.[44]

When she was out of town, other League members asked Joseph H. Choate if he would argue the case. Choate was a prominent leader in the New York Bar Association, had recently served as U.S. Ambassador to Great Britain, and his wife was honorary Vice President of the New York Consumers League. Although Choate was distinguished and would have been advantageous to Oregon, Kelley did not like Choate; she found him to be unsympathetic. More importantly, though, she thought that he would not argue the case by focusing on sociological data like she wanted.[45] Luckily, Choate declined the League's offer, opining that "a big husky Irishwoman should work more than ten hours a day… if she and her employer so desired."[46]

According to future NCL *pro bono* lawyer Felix Frankfurter, Kelley and the League endured several rejections. "[No] eminent lawyer cared to argue such a case," because "there was no money in it."[47]

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[42] Evelyn R. Benson, "Josephine Goldmark (1877-1950): A Biographical Sketch," *Public Health Nursing* 4, no. 1 (1987): 49-50.

[43] Evelyn R. Benson, "Josephine Goldmark," 49.

[44] Philippa Strum, *Louis D. Brandeis*, 115.

[45] Philippa Strum, *Louis D. Brandeis*, 115-116.

[46] Quoted in Ruth Bader Ginsburg, "Lessons Learned from Louis D. Brandeis," *BrandeisNow.* http://www.brandeis.edu/now/2016/january/ginsburg-remarks.html.

[47] Quoted in Nancy Woloch, *A Class by Herself*, 62.

Still, Kelley did not give up her search. On November 14, 1907, she approached Louis D. Brandeis, who had been her first choice all along because she knew he had an interest in including extra-legal information in his arguments. She and Goldmark, Brandeis' sister-in-law, traveled to Boston's Back Bay neighborhood to visit the prominent attorney. Brandeis happily agreed to represent the State of Oregon on two conditions: if the Attorney General of Oregon invited him as well, and if he was the lead attorney so that he could control how the case was argued.[48] Just like that, the League and Brandeis became the two major players in *Muller v. Oregon.*

Just as Kelley and Goldmark had anticipated, Brandeis used his position as lead attorney on the case to formulate the argument and write the revolutionary brief as he best saw fit. In fact, the difference between the methods employed by Muller and Brandeis exemplifies a change in legal and judicial practice during the turn of the century. Leading up to *Muller v. Oregon*, judicial formalism was common. Formalism held that analyzing the law and prior court decisions, and then applying the principles found therein could resolve all legal disputes.[49] Muller's legal team took this approach. In the Muller brief, only legal sources—the Fourteenth Amendment, the Ten-Hour Law, and *Lochner v. New York* and other cases—were cited.[50] However, the Progressive era and its concern with the general well-being of society began influencing legal thought in the late 1800s and early 1900s.

One prominent legal theorist of the time was Roscoe Pound. Pound believed that formalism stagnated the natural development of the law. Furthermore, he believed that the law

[48] Nancy Woloch, *A Class by Herself*, 54-55 and 62.

[49] Beau James Brock, "Modern American Supreme Court Judicial Methodology and Its Origins: A Critical Analysis of the Legal Thought of Roscoe Pound," *Journal of the Legal Profession* 35, no. 1 (2011):190-191; Kunal M. Parker, "Context in History and Law: A Study of the Late Nineteenth-Century American Jurisprudence of Custom," *History and Law Review* 24, no. 3 (Fall 2006): 485; Joseph H. Drake, "The Sociological Interpretation of Law," *Michigan Law Review* 16, no. 8 (January 1918): 609.

[50] Nancy Woloch, *A Class by Herself*, 70-73.

ought to be moral, supporting the good of society.[51] To combine these two ideas, Pound urged for "legal precepts [to be] regarded more as guides to results which are socially just and less as inflexible molds."[52] To ameliorate societal ills, legislatures should consider the social realities, and create laws accordingly. In court, this could be achieved by considering sociology, economics, politics, and other disciplines when ruling on laws.[53] Once cognizant of these facts, courts would allow legislative solutions to societal problems as long as the laws were not blatant violations of the Constitution.[54] Ultimately, in his opinion, the law and judicial system should support the human condition through social reform because the law and the courts affect society.[55]

Brandeis incorporated Pound's philosophies into his unconventional brief. He used the *Lochner* ruling to form his conclusion. The Court had struck down the New York law because it found "no reasonable ground, on the score of health, for interfering with the liberty of the person or the right of free contract."[56] In other words, the Justices found no rational basis to support the law. With this ruling in mind, Brandeis set out to do what New York's lawyers had failed to do. Brandeis aimed to convince the Justices that there was a direct connection between the number of hours worked and health, providing Oregon with reasonable ground to regulate workdays.

Only two of the 113 pages submitted in the Brandeis brief followed the practice of formalism by analyzing American legislation.[57] In these two pages, he informed the Court that twenty states had enacted legislation to protect the health of female laborers, and that "in no

[51] Roscoe Pound, "Spurious Interpretation," *Columbia Law Review* 7, no. 6 (June 1907): 384.
[52] Beau James Brock, "Legal Thought of Roscoe Pound," 192.
[53] Maxwell Bloomfield, "Constitutional Ideology and Progressive Fiction," *Journal of American Culture* 18, no. 1 (1995): 77.
[54] Philippa Strum, *Louis D. Brandeis*, 124.
[55] Beau James Brock, "Legal Thought of Roscoe Pound," 195.
[56] Lochner v. New York, 198 U.S. 45, 57 (1905).
[57] Louis D. Brandeis, *Brandeis Brief*, 16-17.

State has any such law been held unconstitutional, except in Illinois," with *Ritchie v. the People,* where the Supreme Court used similar reasoning as in the *Lochner* decision.[58] Although this portion of his brief was necessary to his argument, other sections of the Brandeis brief were far more consequential.

The other 111 pages submitted to the Justices relied on extra-legal sources to advance his claim that work is related to health. The bulk of the Brandeis brief sought to prove that the work is directly related to individual and public health. Kelley, Goldmark, and Brandeis all understood that articulating this point would require substantive data. The task of amassing this data fell to the League as the legislative history of the Oregon law provided no help.[59]

Goldmark gathered a team of ten researchers. Goldmark and her team searched Columbia University's library, the New York Public Library, and the Library of Congress with a fine-toothed comb for sources. They found British reports on factory and medical commissions; information about other states' maximum hour laws; expert testimony from doctors, academics, factory and sanitation inspectors, other investigators, legislators, bureaucrats, and other foreign governments; and social science studies that confirmed work and working conditions have a direct effect on one's health. Particularly helpful information came from the Massachusetts Board of Labor Statistics, which conducted social science research, and had been collecting data on women workers since 1870.[60] Brandeis stressed to the League that he would need "*facts,* published by expert knowledge of industry in its relation to women's hours of labor."[61] Goldmark delivered.

[58] Louis D. Brandeis, *Brandies Brief,* 17.
[59] Philippa Strum, *Louis D. Brandeis,* 120-121.
[60] Nancy Woloch, *A Class by Herself,* 64-65.
[61] Quoted in Nancy Woloch, *A Class by Herself,* 64.

Together, Brandeis and Goldmark then began to craft the brief using the information Goldmark had collected. They particularly focused on work in laundries, and how that related to a laundress' health to address the specificities of the Oregon law. Drawing on expert opinion, particularly medical information, the Brandeis brief informed the Justices that work in a laundry had a direct negative effect on women's health. Standing for hours on end caused varicose veins and leg ulcers; laboring in damp conditions created by the steam and wet floors developed pulmonary disease; working the irons led to burns, headaches, and sore eyes; and, mechanical accidents left women mutilated and disfigured, often without limbs.[62] Using statistics gathered from medical records, Brandeis argued that not only did work in laundries cause these ailments, but also that these injuries and illnesses were common amongst laundry employees.[63]

The sex-specific nature of the Oregon law required Brandeis to assert that women deserved protections not afforded to men. Again citing expert opinions and studies, the brief claimed "overwork… is more disastrous to the health of women than men" "because of their special physical organization."[64] Harming women's health, Brandeis argued, negatively affected society as a whole because sick women could not properly care for their children or future children. If women's labor were regulated, they would have time to raise the nation's next generation well.[65] In Brandeis' opinion, these "facts of common knowledge" and expert testimonies clearly supported the notion that woman's sexual difference from man merited her special treatment under the law.[66]

[62] Louis D. Brandeis, *Brandeis Brief*, 106-109.
[63] Louis D. Brandeis, *Brandeis Brief*, 106-109.
[64] Louis D. Brandeis, *Brandeis Brief*, 18.
[65] Nancy Woloch, *A Class by Herself*, 66.
[66] Nancy Woloch, *A Class by Herself*, 65.

The conclusion of the Brandeis brief is simple: the information gleaned from studies and expert testimony make it clear that being overworked in a laundry is detrimental to women's health, and therefore, Oregon lawmakers acted reasonably in creating the law in an effort to protect women workers' health.[67]

The Supreme Court unanimously sided with Oregon nine-to-zero. The justices agreed the *Lochner* decision only applied to men.[68] The Fourteenth Amendment, therefore, specifically protected a man's right to freedom of contract. On the other hand, the justices ruled that "the regulation of [woman's] hour labor falls within the police power of the State, and a statute directed exclusively to such regulation does not conflict with… the equal protection clause of the Fourteenth Amendment."[69] Thus, Oregon's Ten-Hour Labor law was constitutional.

Justice Brewer delivered the opinion on behalf of the Supreme Court. Although he did include legal precedent, such as the *Lochner* decision, in his discussion of the ruling, he also heavily cited the Brandeis brief. In fact, he wrote that it was the Court's "judicial cognizance of all matters of general knowledge," meaning the extra-legal information accumulated by Goldmark and presented by Brandeis, that led to the consideration of "woman's physical structure, and the functions she performed in consequence thereof."[70] These sexual differences from men are what "justify special legislation restricting or qualifying the conditions under which [women] should be permitted to toil."[71] Though he broke tradition by including non-legal information in his brief, Brandeis was able to convince the Supreme Court that there was, in fact, a reasonable connection between labor and health. This kept *Muller v. Oregon* from the same

[67] Louis D. Brandeis, *Brandeis Brief*, 113.
[68] Muller v. Oregon, 208 U.S. 412, 419 (1908).
[69] Muller v. Oregon, 208 U.S. 412 (1908).
[70] Muller v. Oregon, 208 U.S. 412, 421 (1908).
[71] Muller v. Oregon, 208 U.S. 412, 420 (1908).

fate as *Lochner v. New York*. By including data from the social sciences, Brandeis proved that Oregon had good reason to discriminate against women in order to protect them. The law passed the rational basis test. The Brandeis brief, however unconventional it was, won the case for Oregon.

Josephine Goldmark (and the League, more broadly) is largely to credit for outcome of the case. Had she not amassed the pertinent data, the Brandeis brief might not have so thoroughly convinced the justices that workplace conditions did in fact affect health. Thus, *Muller* likely would have suffered the same fate as *Lochner*. As Goldmark and Brandeis worked together on cases, he acknowledged the value of Goldmark's work in collecting data by listing her as his assistant on the title page of his briefs. According the historian Philippa Strum, "[he] had wanted to do as much in the *Muller* case… but decided that he had already made that brief unconventional enough."[72]

Although the Supreme Court's decision in *Muller v. Oregon* (1908) included sexist language expressing a belief in female physical inferiority, the success of Brandeis' brief in persuading the justices to consider extra-legal information and thus rule in favor of public health established Roscoe Pound's philosophy of sociological jurisprudence within the American courts. *Muller v. Oregon* went against the legal precedent of *Lochner v. New York.* The Court ruled that intent to enact progressive health and labor reforms is a proper and legitimate government interest, so discriminating against women workers in certain industries passed the rational basis test. The outcome of *Muller* was not unique. This rationale was frequently employed to uphold sex-based discriminations.

[72] Philippa Strum, *Louis D. Brandeis*, 123.

Women, Labor and Law until 1948

Social feminist reformers, such as Florence Kelley and Josephine Goldmark of the National Consumers League and women from other volunteer organizations, witnessed the realization of progressive goals like protective labor legislation, minimum wages, and safety regulations in the 1920s and 1930s with the establishment of government agencies intended to promote the wellbeing of the citizenry. For example, the federal Department of Labor added the Women's and the Children's Bureaus during the Twenties. Female reformers served in leadership positions, and women constituted the vast majority of the rest of the staff in these offices. The resulting bureaucratic structure that developed both "professionalized and institutionalized… reform culture," argues historian Robyn Muncy.[73] Then, during the New Deal era, women served on advisory boards for agencies such as the National Recovery Administration, the Federal Emergency Relief Administration, the Works Progress Administration, and the National Youth Administration. Women's participation in these programs maximized the influence of the social reform platform by aligning it with the federal government.[74]

Although protective labor legislation for women was a core pillar of the social feminist agenda, these laws were a temporary expedient. Eleanor Roosevelt, herself a member of the National Women's Trade Union League, articulated this point clearly when she wrote that "until we actually have equal pay and are assured a living wage for both men's work and women's work, I believe in minimum wage boards and regulating by law the number of hours women may

[73] Robyn Muncy, *Creating a Female Dominion in American Reform 1890-1935* (New York: Oxford University Press, 1991), 159.

[74] Nancy Woloch, *A Class by Herself*, 154.

work."[75] The end goal was to achieve equality amongst the sexes, particularly within the workforce.

World War II created a labor crisis in the United States that had potential to bring about equality, but ultimately served to reinforce pre-war gender roles. Responding to the "war emergency," approximately six million American women entered the workforce during the early Forties. Many of these women took well-paying jobs in industry to replace the men who had gone to war. Additionally, state governments had to modify protective labor laws to accommodate economic needs and satisfy defense industry demands. Maximum hour laws were relaxed, many sex-based exclusionary laws were repealed, and legislation allowing for overtime pay was enacted. Many of these legal changes were meant to only be effective for the duration of the war. Regardless, the women who worked during World War II appreciated access to good jobs, high wages, and premium pay for overtime work.[76]

The massive influx of women into the workforce during wartime had the potential to significantly alter gender roles and the family structure by making men and women economic equals, but widespread fear of financially independent women thwarted this change. Not only had women left the domestic sphere to enter the workforce, primarily to fill previously sex-segregated jobs, but American women had also demonstrated that they could maintain a functioning society without men.[77] Why then would Rosie the Riveter voluntarily return to the home when the men came back from war? Realizing that women would likely not willingly revert to pre-war gender roles sparked intense anxieties about the family dynamic.

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[75] Quoted in Nancy Woloch, *A Class by Herself,* 156.
[76] Nancy Woloch, *A Class by Herself,* 167-168.
[77] Elaine Tyler May, *Homeward Bound: American Families in the Cold War Era* (New York: Basic Books, 1988), 71.

Single, working women became the biggest threat to family life and morality. Wartime propaganda warned that the "greater social freedom of women … strikes at the heart of family stability… When women work, earn, and spend as much as men do, they are going to ask for equal rights with men… The decay of established moralities [comes] about as a by-product."[78] Assumptions about the disruption of the family structure and moral fabric of the nation if women were to remain in the workforce abounded. Working women were believed to be poor mothers because separation from the home necessitated separation from children and employment stole time from child rearing activities. Without women primarily acting as mothers, many professionals and observers agreed that future generations would suffer.

More importantly though, increased female participation in the wartime economy would inevitably create an unemployment crisis for men when peace came if women were to refuse to return to the domestic sphere. Anticipating disaster, popular literature and politicians begged "single women to relinquish their jobs and find husbands when the hostilities ceased."[79] Prioritizing jobs for veterans and the maintenance of the family structure, government-sponsored campaigns aimed to force women back into the home.[80]

Goesaert v. Cleary: Sexist Lobbying Disguised as Rational Basis

When Valentine and Margaret Goesaert, Caroline McMahon, and Gertrude Nadroski woke up on the morning of May 1, 1947 in Dearborn, Michigan, they were in violation of a law designed to force women out of typically male professions. Overnight their status as bartenders and bar owners became illegal.

[78] Quoted in Elaine Tyler May, *Homeward Bound,* 69.
[79] Quoted in Elaine Tyler May, *Homeward Bound,* 68.
[80] Elaine Tyler May, *Homeward Bound,* 71.

Historically, women were excluded from bartending because they were believed to neither be as conversational nor as smart as men. Bartenders frequently filled the role of confidant, and were expected to tell "patrons the score of any game, the battles of every war, and dispense advice on numerous subjects."[81] In addition, it was also commonly thought that women lacked the physical stature to keep peace in a bar and handle drunk patrons. Combining these assumptions with a desire to keep bartending a male profession, bartender's unions across the country often endorsed laws that prohibited women from bartending. In places where such laws did not exist, unionists would picket bars that hired women or police the industry themselves.[82]

However, with male labor scarce during World War II, all-male unions such as the International Union of Hotel and Restaurant Employees and Bartenders supported changing or suspending exclusionary laws and offering contracts to female bartenders with the stipulation that their employment would only last until peacetime. Women subsequently entered industry to meet the demand for labor. When hostilities ceased, unionists sought to put exclusionary laws back the books.[83] Unions and their supporters thought that removing women from their short-lived careers as bartenders and bar owners would create jobs for veterans.[84]

In Michigan, women were able to enter the bar trade earlier than their counterparts elsewhere in the country. After Prohibition ended, the state enacted the Liquor Control Act of 1933, which allowed women in Michigan to own and tend bars.[85] Under this law, Valentine Goesaert purchased her bar at the Roosevelt Hotel, Caroline McMahon owned and operated a tavern in Dearborn, and Margaret Valentine and Gertrude Nadroski began careers as bartenders.

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[81] G. Millstein, "*Lady Bartenders? Not on* your Martini!," *New York Times* (New York, NY), May 28, 1950.

[82] Nancy Woloch, *A Class by Herself,* 174; Amy Holtman French, "Mixing It Up: Michigan Barmaids Fight for Civil Rights," *Michigan Historical Review* 40, no. 1 (Spring 2014): 27.

[83] Nancy Woloch, *A Class by Herself,* 174

[84] Amy Holtman French, "Mixing It Up," 28.

[85] Amy Holtman French, "Mixing It Up," 31.

Although women had already joined the bartending industry in Michigan, the Detroit Local 562 chapter of the Michigan Bartender's Union was not unlike its unionist brothers elsewhere. Members regularly socialized with government officials, including judges, attorneys, and legislators, and advocated for a law that would prohibit women from bartending. According to union representative Thomas Kearney, the Detroit Local 562 "didn't care whether the law [was] passed by the state legislature, the Detroit Council or simply by issuance of a regulation by the Liquor Control Commission"; all the unionists cared about was insuring that the bartending industry was reserved for men and that member veterans could return to work.[86] Their lobbying efforts were successful.

In 1945, Michigan state legislators amended the state's Liquor Control Act of 1933. The changes specified eligibility for a bartending license: a bartender — defined by the law as "a person who mixes or pours alcoholic liquor behind a bar," not one who serves alcohol to customers — must be over the age of twenty-one, employed in a licensed liquor establishment in a city with a population of 50,000 or more, and male.[87] The only women permitted to be bartenders were the wives or daughters of the male bar owner.[88] The Local Detroit 562 had achieved their goal of female exclusion from the industry as any other woman bartender instantly became a criminal after the law became effective on May 1.

This created a serious financial issue for female bar owners like Valentine Goesaert and Caroline McMahon. Before the act was passed, they had legally acquired licenses to own their bars, and reserved the right to freely contract employees. Afterwards, they were faced with a choice: hire an all-male staff to work while idly supervising, or go out of business. Both options

[86] Quoted in Amy Holtman French, "Mixing It Up," 28; Nancy Woloch, *A Class by Herself,* 175.
[87] Anne Davidow, *Goesaert v. Cleary: Brief for Appellants,* 2-3.
[88] Anne Davidow, *Brief for Appellants,* 3.

would decrease profitability. Similarly, female bartenders like Margaret Goesaert and Gertrude Nadroski were robbed of their jobs and their livelihood.

Angry, the Goesaerts, McMahon and Nadroski contacted famous local Detroit lawyer Anne Davidow. Davidow was drawn to women's issues and the growing woman suffrage movement at a young age. As a teenager, she stood upon soap boxes outside factory gates, giving speeches and campaigning for women's right to vote. Her fervor for women's rights only increased with age. In 1918, Davidow applied to law schools. Although her application to the Detroit College of Law, her brother Larry's alma mater, was rejected because of her sex, she was admitted to the University of Detroit Law School as one of four women in the class of 1920. That year was monumental for Davidow: she graduated from law school, cast her first vote after the ratification of the Nineteenth Amendment, and joined Larry in practice at Davidow & Davidow. The firm was very successful, winning several cases in the Michigan Supreme Court. The Davidows gained recognition as they skillfully handled legal work for the United Automobile Workers union and other labor causes. While Larry was committed to the labor cause, Anne subscribed to the progressive agenda of social reform. A lifelong member of the Women's Lawyers' Association, she was "ready and willing to fight for a woman's right to work wherever she wanted," even in a bar.[89]

Anne Davidow agreed to represent the Goesaerts, McMahon and Nadroski, along with twenty-four other female bartenders and owners as unnamed plaintiffs. Davidow litigated a class action suit using the equal protection clause of the Fourteenth Amendment against Owen J. Cleary, Felix H. H. Flynn, and G. Mennan Williams, members of the Michigan Liquor Control

[89] Carrie Sharlow, "Michigan Lawyers in History: Anne R. Davidow," *Michigan Bar Journal* 93, no. 10 (October 2014): 40-41.

Commission (or, the Commission). When a Michigan court upheld the law, she appealed to the Supreme Court of the United States.[90]

Michigan's lawyers followed a traditional model to develop their argument. The brief submitted to the justices provided a concise history of liquor laws in Michigan meant to demonstrate that the state had the power to regulate bartending: Prior to Prohibition, the state had no centralized administrative power over liquor traffic, but delegated regulation to municipalities. Then, in 1916, the state prohibited "the manufacture, sale, keeping for sale, giving away, bartending or furnishing of any intoxicating liquors," by amending article Sixteen of the state constitution.[91] After public opinion of Prohibition had changed both in the state and nationally, Michigan legislature again amended article Sixteen to allow for the establishment "of a liquor control commission, who, subject to statutory limitations, shall exercise *complete control* of the alcoholic beverage traffic within [the] state."[92] Following the ratification of the Twenty-First Amendment to the United States Constitution, formally ending Prohibition and extending nearly unfettered power to States to regulate alcohol, the Michigan Liquor Control Commission was created on December 15 through the Liquor Control Act of 1933.[93] Finally, in 1945, the legislature amended the act to place restrictions on bartending licenses.[94]

Michigan's legal team relied on the concept of police power — the right of a government to make all necessary laws intended to protect the public. They argued that the "*complete control*" specified in the state constitution afforded to the Commission regulatory power to set qualifications for and limitations on bartenders and bar owners.[95] Therefore, they reasoned that

[90] Nancy Woloch, *A Class by Herself,* 175.
[91] Eugene F. Black, *Goesaert v. Cleary, Brief for Appellees,* 3.
[92] Eugene F. Black, *Brief for Appellees,* 4.
[93] Eugene F. Black, *Brief for Appellees,* 4
[94] Nancy Woloch, *A Class by Herself,* 175.
[95] Eugene F. Black, *Brief for Appellees,* 4

prohibiting anyone, not just women other that the wives and daughters of male bar owners, from being licensed as bartenders was a constitutional and appropriate exercise of police power.

Unlike Michigan's attorneys, Anne Davidow presented a radical argument to the Court, asserting that the law was an "unjust and unfair classification as to sex."[96] No one had ever argued before that the sexes were entitled to equal protection of the laws.[97]

Specifically, Davidow claimed that "limiting the registration of bartenders to male persons and wives and daughters of male owners was an unfair discrimination against" female bar owners, female bartenders, daughters of female bar owners, and between waitresses and female bartenders.[98] Although she conceded that the state possessed the power to regulate, even prohibit, liquor traffic, once the state had granted the right to be licensed to tend a bar, the state must apply limitations equally to all individuals. To clarify her point to the Justices, she explained that the "proviso permits the male owner, his wife and daughter to act as bartenders in his business, but denies the same privilege to both the female owner and her daughter."[99] Male and female bartenders and owners perform the same tasks in the workplace, so they ought to be considered similarly situated persons. Denying female bartenders and owners the same rights as their male counterparts, then, is "an instance of unjust discrimination against persons similarly situated in the same business, in the same relation to the purpose of the statute," and a violation of the equal protection clause of the Fourteenth Amendment.[100] Although novel and revolutionary, the crux of Davidow's argument was simple.

[96] Anne Davidow, *Brief for Appellants*, 4.
[97] Nancy Woloch, *A Class by Herself*, 178.
[98] Anne Davidow, *Brief for Appellants*, 6.
[99] Anne Davidow, *Brief for Appellants*, 14.
[100] Anne Davidow, *Brief for Appellants*, 14.

Still, the Justices sided with Michigan to uphold the law in a six-to-three decision. Justice Felix Frankfurter authored the majority opinion on behalf of the Court. He agreed with Michigan that the state could "beyond question, forbid all women from working behind a bar" as an appropriate exercise of its police power to regulate liquor traffic.[101] Thus, in the opinion of the Court, the 1945 amendment was not a violation of the equal protection clause.

Recognizing that "Michigan cannot play favorites among women without rhyme or reason," Frankfurter explained the Court's position.[102] The Court held that the Michigan law passed the rational basis test because of its legislative intent. Contemporary thought was suspicious of bartending women, fearing that they would promote immorality and other societal problems. The state may keep women from being bartenders in an effort to eliminate or reduce these issues.[103] Moreover, the Justices were convinced that Michigan legislators believed "oversight assured through ownership of a bar by a barmaid's husband or father minimized the hazards that may confront a barmaid without such protecting oversight."[104] Evaluating combined desires to preserve morality and lessen dangers through male supervision, the Court concluded that Michigan had a legitimate governmental interest, and thus the discrimination was "not without basis in reason."[105]

However, Frankfurter's tone undermined the logic of the opinion. He immediately mocked the case with sexist language: "Beguiling as the subject is, it need not detain us long," he wrote in the first paragraph and followed with a quip about Shakespearean alewives.[106] He argued that "the Fourteenth Amendment did not tear history up by the roots," nor did the "fact

[101] Goesaert v. Cleary, 335 U.S. 464, 465 (1948).
[102] Goesaert v. Cleary, 335 U.S. 464, 466 (1948).
[103] Goesaert v. Cleary, 335 U.S. 464, 466 (1948).
[104] Goesaert v. Cleary, 335 U.S. 464, 466 (1948).
[105] Goesaert v. Cleary, 335 U.S. 464, 467 (1948).
[106] Goesaert v. Cleary, 335 U.S. 464, 465 (1948).

that women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced… preclude the States from drawing a sharp line between the sexes" because the "Constitution does not require legislatures to reflect sociological insight, or shifting social standards."[107] In Frankfurter's mind, state legislatures retained the right to discriminate against women, even though their social station had improved significantly since the beginning of the twentieth century. Frankfurter even hinted that he knew "the real impulse behind this legislation was an unchivalrous desire of male bartenders" in the Detroit Local 562 "to try to monopolize the calling."[108] Regardless, the opinion relied on Michigan's supposed desire to reduce immorality and other social ills while protecting women through male oversight in order. The law survived the rational basis test.

Although the Supreme Court's majority opinion disguised sexist lobbying as legislative intent, the dissenting opinions written carry greater historical value. Judge Frank Picard, who had served as chairman of a Michigan commission that studied the Liquor Control Commission in the early Forties, though outnumbered on the three-judge panel in the district court, passionately departed from the majority opinion. He focused specifically on Valentine Goesaert's difficult situation, using it as a microcosm to illustrate the larger issue with the law's discrimination. He wrote that this

> … is not a new venture for Mrs. Goesaert. She is not just now going into the liquor business under this new law. She started business, bought property, and incurred obligation under a law that permitted her to do exactly what her license said she could do --- own and operate a business… [H]aving granted her a license, can the legislature arbitrarily and unreasonably change the rules in the middle of the game as against her alone because she happens to be a woman licensee.[109]

[107] Goesaert v. Cleary, 335 U.S. 464, 466 (1948).
[108] Goesaert v. Cleary, 335 U.S. 464, 467 (1948).
[109] Goesaert v. Cleary, 74 F. Supp. 735, 741 (1947).

He ended his discussion of the wrongs done unto Valentine Goesaert (and other women, by extension) by the state of Michigan with a poignant line: "Where is the 'equal protection' for her?"[110]

Not only was Judge Picard convinced of Davidow's radical assertion that women were entitled to equal protection under the Fourteenth Amendment, but he also made his own bold claim. In the conclusion of his dissent, he stressed "for the reasons given and because I firmly believe that if this court endorses this type of discriminating legislation it opens the door for further fine 'distinctions' that all will eventually be applied to religion, education, politics and even nationalities. I must dissent."[111] In his last two sentences, Judge Picard compared sex, a class not recognized as protected by the Fourteenth Amendment, with already existing protective classes. Picard warned that sex discrimination jeopardized other constitutional rights, and equated sex with these rights.[112]

Justice Rutledge, joined with Justices Douglas and Murphy, authored a dissent to the Supreme Court majority opinion that was even more radical than Judge Picard's, even though their diction is far more tame and succinct. The Justices concluded that "the statute should be held invalid as a denial of equal protection," and cited *State of Missouri ex. rel. Gaines v. Canada* and *Yick Wo v. Hopkins* to justify their dissent.[113] Both cases were successful race-based discrimination challenges under the Fourteenth Amendment.[114] In citing *Gaines* and *Yick Wo,*

[110] Goesaert v. Cleary, 74 F. Supp. 735, 741 (1947).
[111] Goesaert v. Cleary, 74 F. Supp. 735, 744 (1947).
[112] Goesaert v. Cleary, 74 F. Supp. 735, 744 (1947).
[113] Goesaert v. Cleary, 335 U.S. 464, 201and 468 (1948).
[114] State of Missouri ex. rel. Gaines v. Canada, 305 U.S. 337 (1938). Matthew Gaines, after graduating from Missouri's all-black state university, Lincoln University, applied for admission to the University of Missouri School of Law because his alma mater did not have a law school. He was denied admission because he was black. He sued, and the case was brought before the Supreme Court. The Court ruled that denying Gaines admission was unlawful discrimination, and that Missouri had failed to meet its constitutional duty of providing equal access to public education for all races; Yick Wo v. Hopkins, 118 U.S. 356 (1886). An 1880 San Francisco city ordinance required all owners of laundries in wooden buildings to hold a permit issued by the city, but city officials did not

Rutledge, Douglas and Murphy equated sex with race.[115] This was revolutionary because the equal protection clause was created as a Reconstruction amendment after the Civil War to specifically protect the African-American population. Doing so, the footnote suggests that sex, like race, should be a protected class.

On paper, the *Goesaert* decision further curtailed women's rights by affirming that states had the legal authority through police power to discriminate against women, as long as they could demonstrate a legitimate governmental interest in doing so. Just like Brandeis had on behalf of Oregon in *Muller,* Michigan's legal team successfully argued that prohibiting (most) women from bartending protected women and was good for society at large. However, this low point for sex equality under the law is not what makes *Goesaert* significant.

Despite losing to the Michigan Liquor Control Commission in the Supreme Court, the class action suit brought by Valentine and Margaret Goesaert, Caroline McMahon, Gertrude Nadroski, and the twenty-four other plaintiffs marked a turning point for sex-based discrimination laws.[116] Anne Davidow presented a radical but incredibly simple argument: the 1945 amendment to the Liquor Control Act of 1933 unfairly and arbitrarily discriminated against female bartenders and bar owners. Although she lost the case and was the first to make this claim, she convinced a district court judge and three Supreme Court Justices that both sexes, namely women, were entitled to the equal protection of laws under the Fourteenth Amendment.

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issue a single permit to Chinese Americans, even though they made up a vast majority of the industry. Yick Wo and Wo Lee were arrested for not having a permit, and sued under the writ of habeas corpus, and argued that the discriminatory enforcement of the ordinance violated the equal protection clause. The Supreme Court unanimously ruled in favor of the plaintiffs.

[115] Nancy Woloch, *A Class by Herself,* 178.

[116] Davidow may have lost in court, but *Goesaert* had far-reaching repercussions in Michigan. The case caught the attention of female state legislator Martha W. Griffiths, who then vowed to represent women's labor rights. Only a year after the Supreme Court decision in 1949, Michigan amended the law to allow women to tend bars. In 1955, the state repealed the entire section of the law that pertained to licensing bartenders. Nancy Woloch, *A Class by Herself,* 179.

In their dissents, these judges strengthened this notion by equating sex with race. They stressed the intent found at the heart of the equal protection clause: to ensure rights for all. Davidow, Picard, Rutledge, Douglas, and Murphy used *Goesaert v. Cleary* to push the method courts used to evaluate sex-based discrimination cases away from the rational basis test. They were at the forefront of a movement that would come to fruition in the 1970s.

CHAPTER II

"THE TURNING POINT" AND RUTH BADER GINSBURG

During the early 1970s, Ruth Bader Ginsburg and her husband, Marty, both worked after dinner in their New York City apartment. Ruth, a professor at Rutgers Law School, graded papers and prepared for class while tax lawyer Marty worked on his cases. The industrious couple rarely interrupted one another's work, but when Marty stumbled across Tax Court advance sheets for litigant Charles E. Moritz, he went to Ruth. After he handed her the sheets, "Ruth replied with a warm and friendly snarl, 'I don't read tax cases.'"[117] Marty insisted that she read this one.[118]

Charles Moritz had been denied a $600 deduction for caring for his dependent mother under §214 of the Internal Revenue Code. The statute awards a deduction to any woman (divorced, widowed, or single), married couple, widowed man, or divorced man taxpayer with a dependent. Moritz, however, was a single man who had never married. Viewing deductions as a "matter of legislative grace," the Tax Court found that he did not qualify for the deduction.[119] After quickly perusing the advance sheets, Ruth went to Marty's room, and joyfully said "Let's take it!"[120]

Ruth and Marty Ginsburg worked as co-counsel on the Tenth circuit appeal for *Moritz v. Commissioner*. It was Ruth's first sex-based discrimination case of many. In a speech he wrote just before his death, Marty jokingly took credit for what came to follow: "As you can see, in

[117] Ruth Bader Ginsburg. *My Own Words.* (New York: Simon and Schuster, 2016), 128.
[118] Ruth Bader Ginsburg. *My Own Words*, 128.
[119] Ruth Bader Ginsburg. *My Own Words*, 127.
[120] Ruth Bader Ginsburg. *My Own Words*, 128.

bringing those Tax Court advance sheets to Ruth's big room forty years ago, I changed history. For the better. And, I shall claim, thereby rendered a significant service to the nation."[121] In reality, he knew Ruth was more than worthy of all the credit; Marty simply wanted to express his pride in being involved in one of the first steps of his wife's monumental work.

Marty brought the tax advance sheets to Ruth at a pivotal hour. The Women's movement had reached a gained significant attention and power. In the decade prior, government administrations determined that women's issues were not as pressing as complaints made them seem. For example, the Kennedy administration's 1963 Commission on the Status of Women concluded that females were afforded adequate constitutional protection under the Fourteenth and Fifteenth Amendments. Furthermore, as the campaign for African American civil rights grew strength and polarized the nation, the Kennedy and Johnson administrations elected to ignore a parallel fight for gender equality. This attitude was shared on Capitol Hill. Congressmen commonly took the view that the Fourteenth Amendment's definition of citizens as "all persons born or naturalized in the United States" was broad enough to include women, and granted them equal protection of the laws.[122]

Despite this, support for women's issues and pressure for change began to increase. Betty Friedan's *The Feminine Mystique* awakened many women's sense-of-self.[123] Membership in women's rights organizations, including the newly founded National Organization for Women (NOW), increased rapidly during the Sixties and Seventies. Women emerged as a bloc and feminism as a strong political force. Members of these organizations worked to resolve issues

[121] Ruth Bader Ginsburg. *My Own Words*, 129.

[122] Graham Noble, "The Rise and Fall of the Equal Rights Amendment," *The History Review* 72 (March 2012): 32.

[123] Betty Friedan. *The Feminine Mystique.* (New York: Dell, 1963); Amy Leigh Campbell, "Raising the Bar: Ruth Bader Ginsburg and the ACLU's Women's Rights Project," *Texas Journal of Women & the Law* 11, no. 2 (Spring 2002): 164.

unique to women, such as sexist assumptions about gender roles and restrictive abortion laws, and to promote visibility of those issues. NOW's major efforts centered around the revival of the campaign for the Equal Rights Amendment (ERA).[124]

This effort began some 50 years prior. After the ratification of the Nineteenth Amendment in 1920, guaranteeing the right to vote regardless of sex, feminist groups shifted their efforts to other discriminatory practices. These included protective laws, like those contested in *Muller* and *Goesaert*. Alice Paul, leader of the radical National Women's Party (NWP) that had pressed for a federal woman suffrage amendment, asserted in 1921 that "men and women shall have equal rights throughout the United States."[125] That same year, she proposed a sweeping bill to end sex-based discrimination on the federal level, now known as the ERA.[126]

The proposed amendment met intense opposition from a variety of groups and for a variety of reasons. Even with woman suffrage, gender roles that limited women to the domestic sphere persisted. Conservatives, especially those in Congress, were turned off by the assault on tradition.[127] More importantly, liberals, socialists and progressives, including the women amongst them, were unable to unite in support of the ERA. Labor activist Florence Kelley notably rescinded her membership from the NWP because of the proposal, commenting that Alice Paul disillusioned supporters with "empty phrases about equality of opportunity."[128] She instead believed that protective legislation favoring women, particularly laws applying to labor, was a more expedient way to raise women's legal status. The liberal coalition expected to

[124] Graham Noble, "The Rise and Fall of the Equal Rights Amendment," 32.
[125] Graham Noble, "The Rise and Fall of the Equal Rights Amendment," 30.
[126] Nancy Woloch, *A Class by Herself,* 112.
[127] Graham Noble, "The Rise and Fall of the Equal Rights Amendment," 31.
[128] Nancy Woloch, *A Class by Herself,* 112.

support the ERA divided over contradictory goals: increased labor standards and equality.[129] When the Great Depression brought economic crisis during the Thirties, President Franklin Roosevelt threw his full support behind existing protective labor laws, hoping to avoid offending labor unions and retain a workforce.[130] Within a decade, opposition squashed the ERA.

However, labor's principal aversion to the ERA dissipated with new legislation. In 1963 and 1964, respectively, Congress passed the Equal Pay Act and Title VII of the Civil Rights Act. The Equal Pay Act abolished compensation disparity on the basis of sex. Title VII prohibited employment discrimination on the grounds of race, color, religion, nation of origin, or sex. Together, these laws served to repeal all protective labor legislation, and encouraged organized labor to support the ERA for the first time.

The complete coalition of women's rights activist and former supporters of protective legislation campaigned for the ERA with renewed strength in the late Sixties and early Seventies. Introduced every year since 1923, Michigan Congresswoman Martha Griffiths brought the amendment before Congress again in 1970. The House of Representatives passed the amendment, but the Senate wanted to edit the draft to include a provision that exempted women from compulsory military service. Although the ERA was tabled in Congress until the following year by the Senate, it did gain significant attention.[131]

Just as in the Twenties, the ERA was again met with criticism. This time, opponents argued not only that the ERA did not afford new protections to women and would destroy the moral fabric of the country, but also removed them from their place of privilege. Chief among these voices was Phyllis Schlafly. Her objection rested on traditional gender roles, which

[129] Nancy Woloch, *A Class by Herself*, 112.
[130] Graham Noble, "The Rise and Fall of the Equal Rights Amendment," 31.
[131] Graham Noble, "The Rise and Fall of the Equal Rights Amendment," 32.

provided women with a husband to physically protect and financially support them as well as the fulfilling opportunity to be a mother. In her mind, "of all the classes of people who ever lived, the American woman [was] the most privileged," so the ERA was an assault on their fortunate positions that would degrade women and destroy the family structure.[132]

In contrast, Ruth Bader Ginsburg was an avid supporter of the Equal Rights Amendment. She often wrote articles and position papers that clearly articulated the need for the ERA by explaining the historical and contemporary legal status of women.[133] Her writing also attacked and dismantled the views, which she coined the four "horribles," held by Schlafly and other opponents.

The first "horrible" was the fear that the ERA would bring an end to protective labor legislation for women. Ginsburg discredited this line of thinking by explaining that Title VII effectively accomplished that a decade prior. She strengthened her argument by demonstrating that legislatures were increasingly enacting laws that protected all laborers, not just women.[134]

The second "horrible" rested upon the assumption that passing the ERA would relieve men from their obligation to financially support women (and children, by extension). Ginsburg's response clarified that "the Equal Rights Amendment will occasion no change whatever in current support laws."[135] Rather, support would be determined by the earning potential of each spouse and the division of household duties on a family-by-family basis.

Between the second and third "horribles," Ginsburg broke her list to comment on traditional gender roles. She directly responded to Phyllis Schlafly's assertion that the ERA

[132] Phyllis Schlafly, "What's Wrong With 'Equal Rights' for Women?," The Phyllis Schlafly Report, *Eagle Forum* (Alton, IL), February, 1972.

[133] Ruth Bader Ginsburg, "The Need for the Equal Rights Amendment," *American Bar Association Journal* no. 59 (September, 1973): 1013.

[134] Ruth Bader Ginsburg, "The Need for the Equal Rights Amendment," 1017.

[135] Ruth Bader Ginsburg, "The Need for the Equal Rights Amendment," 1018.

would remove women from their place of privilege within the home. To Ginsburg, "the essential point, sadly ignored by the amendment's detractors, is this: the equal rights amendment does not force anyone happy as a housewife to relinquish that role."[136] Rather, for the first time, women (or, more radically, men) would be free to choose whether to work or remain at home. Each role, she argued, would be enhanced because of that choice.[137]

The third dismantling of a "horrible" addressed the draft. A ratified ERA could include women in the draft pool. Rather than dismissing opponents' fears by avoiding the topic, Ginsburg instead shifted conversation to focus on a broader issue: women in the military experienced discrimination. Military women were required to meet significantly higher standards than their male counterparts, did not receive equal training and professional development opportunities, and were regularly denied benefits granted to men. Establishing gender equality within the military would provide women with more opportunity, which outweighed the threat of the draft as the Vietnam War approached its end.[138]

The final "horrible" centered on concern that restrooms would no longer be separate for men and women. Ginsburg noted that supporters in Congress "were amused at the focus on the 'potty problem,'" because the Constitution already guaranteed the right to personal privacy.[139] To her, the concern was unfounded.

In sum, Ginsburg supported the ERA because its ratification would usher in a new understanding of each sex's rights and responsibilities wholly different from the rigidity of traditional gender roles. The new legal system under the ERA would judge each person on "the basis of individual merit and not on the basis of an unalterable trait of birth that bears no

[136] Ruth Bader Ginsburg, "The Need for the Equal Rights Amendment," 1018.
[137] Ruth Bader Ginsburg, "The Need for the Equal Rights Amendment," 1018.
[138] Ruth Bader Ginsburg, "The Need for the Equal Rights Amendment," 1018.
[139] Ruth Bader Ginsburg, "The Need for the Equal Rights Amendment," 1018.

necessary relationship to need or ability."[140] Men and women would be legal equals for the first time in the United States.

Though Ginsburg was an avid supporter of the Equal Rights Amendment, her work on behalf of the Women's Movement was not limited to promoting the proposed legislation. The intense opposition and possible failure of the amendment led her to consider other ways of bringing about legal equality for men and women. As a legal scholar, Ginsburg understood the implications of Justice Oliver Wendell Holmes' claim that "judges do and must legislate:" Supreme Court rulings function as law.[141] Ruth Bader Ginsburg's most significant contribution to the Women's Movement was her success in persuading the Supreme Court to establish a heightened level of review, now known as the intermediate scrutiny test, for use in sex-based discrimination challenges.

She looked to the work of Thurgood Marshall and the National Association for the Advancement of Colored People's Legal Defense Fund (NAACP and LDF, respectively) for inspiration and a theoretical framework. Marshall understood that he could challenge existing laws to defeat racial discrimination by overturning the "separate but equal" doctrine of *Plessy v. Ferguson*.[142] For decades, Marshall led the LDF's strategy effort to challenge segregation in state professional schools. Case by case, Marshall used the Reconstruction amendments to accumulate an impressive number of victories before the Court, establishing precedent to end segregation in schools.[143] His work culminated in bringing five cases, amalgamated as *Brown v. the Board of*

[140] Ruth Bader Ginsburg, "The Need for the Equal Rights Amendment," 1019.

[141] Southern Pacific Co. v. Jensen, 244 U.S. 205, 221 (1917); Ruth Bader Ginsburg, "Speaking in a Judicial Voice," *New York University Law Review* 67, no. 6 (1992): 1198.

[142] Plessy v. Ferguson, 163 U.S. 540 (1896).

[143] McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950); Sweatt v. Painter, 339 U.S. 629 (1950).

Education of Topeka, that finally convinced the racially-liberal Warren Court to overrule *Plessy* in 1954.[144]

Ginsburg saw the "step-by-step, incremental approach" as advantageous.[145] Marshall "didn't come to the Court on day one and say, 'End apartheid in America.'"[146] The Court would have found that request laughable. Instead, he began with law schools and universities, and "until he had those building blocks, he didn't ask the Court to end separate-but-equal."[147] He worked his way towards *Brown* and the subsequent historic ruling. Marshall's success encouraged Ginsburg to do the same. She modeled her strategy off of his.[148]

Ginsburg's litigation strategy was rooted in her deeply held conviction that single-sex laws are inherently discriminatory. Central to all of her writings as a scholar, activist and litigator is the theme that these laws sustain and perpetuate outdated and inaccurate stereotypes about women. In Ginsburg's opinion, protective legislation claimed by Phyllis Schlafly and other ERA opponents as being a "privilege" was not benign, but rather oppressive.[149] She often commented that the pedestal upon which women supposedly stand has all too often, upon closer inspection, been revealed as a cage. Her first major objective was to convince the Court of the cage by bringing "'easy' cases -- those that, based on their facts, appeared to be 'clear winners.'"[150] These straightforward and simple victories were crucial to Ginsburg's strategy of slowly building

[144] Brown v. the Board of Education of Topeka, 347 U.S. 483 (1954).

[145] Robert Cohen and Laura J. Dull, "Teaching about the Feminist Rights Revolution: Ruth Bader Ginsburg as 'The Thurgood Marshall of Women's Rights,'" *The American Historian* 14 (Nov. 2017): 14.

[146] Cohen and Dull, "Teaching About the Feminist Rights Revolution," 14.

[147] Cohen and Dull, "Teaching About the Feminist Rights Revolution," 14.

[148] Cohen and Dull, "Teaching About the Feminist Rights Revolution," 14.

[149] Phyllis Schlafly, "What's Wrong With 'Equal Rights' for Women?"; Graham Noble, "The Rise and Fall of the Equal Rights Amendment," 30-32; Ruth Bader Ginsburg, "The Need for the Equal Rights Amendment," 1017-1018.

[150] Deborah L. Markowitz, "In Pursuit of Equality: One Woman's Work to Change the Law," *Women's Rights Law Reporter* 11 (1989): 75.

precedent that would require the Court to apply a heightened level of scrutiny to sex-based discrimination challenges.

An Idaho statute used to determine the administrator of an estate provided Ginsburg with her first softball to lob at the Court. Richard Reed, a minor, died in Ada County, Idaho on March 29, 1967. His mother, Sally Reed, filed a petition with the county probate court to become the administratrix of her son's estate. A date was set for her hearing. She and her son's father, Cecil Reed, had been separated from each other for some time. Before her hearing, he filed a petition to be appointed as the administrator instead. The probate court then held a hearing to evaluate the competing petitions.

The court decided in favor of Cecil, citing §§15-312 and 15-314 as controlling statutes. §15-312 designated and ranked eleven classes of eligible persons to determine who would become the administrator of an estate when competing claims were made. One of the enumerated classes was defined as "the father or mother" of the deceased, placing Sally and Cecil within the same entitlement class, equally qualifying them as administrators. However, §15-314 divided them, providing that "of several persons claiming and equally entitled (under §15-312) to administer, males must be preferred to females, and relatives of the whole to those of the half blood."[151] The probate court judge appointed Cecil as administrator, simply because he was male.[152]

The case was eventually appealed up to the Idaho Supreme Court. Sally's attorneys argued that §15-314 was an unconstitutional violation of the equal protection clause of the Fourteenth Amendment, an inalienable rights clause in the Idaho state constitution, and the Idaho Civil Rights Act (§18-7301) that guarantees "the right to be free of discrimination because of

[151] Reed v. Reed, 404 U.S. 71, 71 (1971).
[152] Reed v. Reed, 404 U.S. 71, 71-73 (1971).

race, creed, color, sex, or national origin."[153] In short, her legal team argued that appointing Cecil administrator, preferring merely his sex to hers, was discrimination without rational basis.[154]

Furthermore, her legal team argued that had Sally and Cecil's individual merits and qualifications to administer been evaluated, the court would have appointed Sally: she had primary custody of Richard for the majority of his life. Shortly after Cecil sought and was awarded partial custody in Richard's teenage years, Richard committed suicide with a rifle Cecil owned. Just as Sally had previously opposed partial custody for Cecil because she thought he was a bad influence, she also feared his actions as administrator. She believed her status as primary caregiver supremely qualified her to administer Richard's estate.[155]

Although the Idaho Supreme Court recognized the philosophical validity of discrimination arguments against §15-314, it decided the nature of the statute was "not designed to discriminate."[156] Rather, the legislature enacted the law to alleviate judges from deciding "an issue that would otherwise require a hearing as to the relative merits as to which of the two or more petitioning relatives should be appointed."[157] Additionally, the judges assumed that the legislature "concluded that in general men are better qualified to act as administrator than women."[158] Thus, the statue was "neither illogical or arbitrary," but rational and constitutional.[159] They unanimously decided in favor of Cecil.[160]

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[153] Reed v. Reed, 93 Idaho 511, 637 (1970); Idaho Civil Rights Act §18-7301.
[154] Reed v. Reed, 93 Idaho 511, 637 (1970).
[155] Stephanie Bornstein, "The Law of Gender Stereotyping and the Work-Family Conflicts of Men," *Hastings Law Journal* 63 (2011): 1303.
[156] Reed v. Reed, 93 Idaho 511, 638 (1970).
[157] Reed v. Reed, 93 Idaho 511, 638 (1970).
[158] Reed v. Reed, 93 Idaho 511, 638 (1970).
[159] Reed v. Reed, 93 Idaho 511, 638 (1970).
[160] Reed v. Reed, 93 Idaho 511, 639 (1970).

After losing again, Sally appealed to the Supreme Court of the United States. The American Civil Liberties Union (ACLU) took her case *pro bono,* and referred it to Ruth Bader Ginsburg. In her brief on behalf of Sally Reed, Ginsburg presented her argument about the negative effect of gender stereotypes in the law to the Court for the first time. The underlying stereotype in §15-314 was that women were well-suited for childcare, but lacked the "capacity or experience relevant to the office of administrator."[161] In actuality, Ginsburg argued, "[b]iological differences between the sexes bear no relationship to the duties performed," as evidenced by Sally's prior financial guardianship of her son.[162] She continued:

> The myth that women are inherently disqualified for full participation in public life as independent persons is no longer acceptable. Yet this Court's silence has deferred recognition by the law that women are full persons, entitled as men are to due process guarantees and the equal protection of the laws. The time to break the vicious cycle which sex discriminatory laws create is overdue. If a legislature can bar a woman from service as a fiduciary on the basis of once popular, but never proved, assumptions that women are less qualified than men are to perform such services, then the myth becomes insulated from attack, because the law deprives women of the opportunity to prove it false.[163]

Still, Ginsburg tried to attack the seemingly invincible myth. She believed that the Fourteenth Amendment could be used to make women full citizens, like men, just as the Court had used it to do the opposite. The first section of reads as follows:

> *All persons* born or naturalized in the United States, and subject to the jurisdiction thereof, *are citizens* of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive *any person* of life, liberty, or property, without the due process of law; nor deny to *any person* within its jurisdiction the *equal* protection of the laws.[164]

[161] Ruth Bader Ginsburg, *Reed v. Reed: Brief for Appellant,* 7.
[162] Ruth Bader Ginsburg, *Reed v. Reed: Brief for Appellant,* 7.
[163] Ruth Bader Ginsburg, *Reed v. Reed: Reply Brief for Appellant,* 1.
[164] U.S. Constitution, amend. XIV, § 1. Emphasis added.

The phrases "all persons" and "any person" in conjunction with "are citizens" and "equal" are unambiguous. They were designed to be that way. A Reconstruction amendment, along with Amendments Thirteen and Fifteen, the Fourteenth Amendment was added to the Constitution on July 9, 1868. Following the Union's victory in the Civil War, these were adopted to extend the rights of citizenship to former slaves. In order to prohibit states from discriminating against them, it was crucial for Congress to define citizens as "[a]ll persons born or naturalized in the United States."[165] In her brief, Ginsburg noted that other minority groups, like the NAACP's LDF led by Thurgood Marshall, successfully used this clear language and the doctrine of suspect classification to achieve "full equality before the law."[166]

However, section two of the Fourteenth Amendment complicates this seemingly straightforward definition by introducing a gendered word to the Constitution for the first time.[167] It was intended to overturn the Three-Fifths Clause, which stated that "other persons" — slaves, were counted as three-fifths of a person for matters of population, by declaring that representation is tied to the "whole number of persons in each State." [168] Nevertheless, that gendered word — male — is repeated three times, invariably used with ideas of citizenship: "male inhabitants of such a State," "male citizens," and again "male citizens."[169] This section underscores the importance of the historical context of the amendment: it was designed specifically and only to extend citizenship to male former slaves.

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[165] "Fourteenth Amendment and Citizenship," Library of Congress Law Library, July 31, 2015, accessed February 4, 2018, https://www.loc.gov/law/help/citizenship/fourteenth_amendment_citizenship.php; U.S. Constitution, amend. XIV, § 1.

[166] Ruth Bader Ginsburg, *Reed v. Reed: Brief for Appellant*, 5.

[167] U.S. Constitution, amend. XIV, § 2; Kenneth M. Davidson, Ruth Bader Ginsburg and Herma Hill Kay, *Texts, Cases and Materials on Sex-Based Discrimination* (St. Paul: West Publishing Company, 1974), 2-3.

[168] U.S. Constitution, Art. 1, § 2, clause 3.

[169] U.S. Constitution, amend. XIV, § 2.

Supreme Court decisions from the Reconstruction era relied heavily on this interpretation of the Fourteenth Amendment. In the *Slaughterhouse* cases (1873), white butchers throughout Louisiana complained about a state-sponsored monopoly of the butchering industry in the New Orleans area. They felt that this economically disadvantaged other butchers in the state by making their occupation illegal. Their claim rested upon interpreting the Fourteenth Amendment and the equal protection clause as applying to all Americans, not just former slaves. The Court disagreed.

Much of the opinion underscores the relationship between the Amendment's history and their interpretation of its meaning. The decision historicizes the Amendment within the context of Reconstruction:

> The pervading purpose found in them all [the Thirteenth, Fourteenth and Fifteenth Amendments], lying at the foundation of each, and without which none of them would have been suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him… In the light of the history of these amendments, and the pervading purpose of them, which we have already discussed, it is not difficult to give a meaning to [the equal protection clause]. The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden.[170]

Clearly, the Justices saw the Reconstruction Amendments as applying only to formerly enslaved peoples. They clung so tightly to this view that they doubted "very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision."[171] The Reconstruction Court had no intention of applying the expanded definition of citizenship to women.

[170] Slaughterhouse Cases, 83 U.S. (16 Wall.) 81 (1873).
[171] Slaughterhouse Cases, 83 U.S. (16 Wall.) 81 (1873).

Ginsburg recognized this, noting that "the grand phrases of the first section of the fourteenth amendment would have, at best, qualified application for women."[172] The second section and Court decisions complicated women's citizenship status further. Unlike litigators who represented racial minorities (especially African Americans), Ginsburg needed to convince the Court to uncouple the ideas of male and citizen, and expand the definition of citizenship to the universal terms of section one. She found her method of attack in the doctrine of tiered scrutiny.

In her brief for *Reed,* Ginsburg urged the judges to abandon the rational basis test in sex-based discrimination cases, and instead apply a heightened level of scrutiny. Although she recognized that "the legislature may distinguish between individuals on the basis of their need or ability," she reminded the Court that "it is presumptively impermissible to distinguish on the basis of an unalterable identifying trait over which the individual has no control and for which he or she should not be disadvantaged by the law."[173] This claim referenced racial discrimination cases and decisions. In addition to providing context for the Fourteenth Amendment, race also dominated justifications for strict scrutiny, although national origin and alienage are also suspect classes. The Court had already declared that because race is immutable, legal classifications distinguishing persons on the basis of such a characteristic are inherently "suspect" or "invidious," requiring close judicial scrutiny. Ginsburg argued by analogy, drawing parallels between race and sex as both "are locked by the accident of birth."[174]

Equating sex and race also allowed Ginsburg to explain how their interdependent histories determined the legal statuses of racial minorities (namely, African Americans) and

[172] Kenneth M. Davidson, Ruth Bader Ginsburg and Herma Hill Kay, *Texts, Cases and Materials*, 3.
[173] Ruth Bader Ginsburg, *Reed v. Reed: Brief for Appellant,* 5.
[174] Ruth Bader Ginsburg, *Reed v. Reed: Brief for Appellant,* 20.

women. Scholarship demonstrates that the legal inferiority of women, believed to be dependent on men for protection, basic necessities like food and shelter, and happiness, provided a model for oppressing other groups. Regarding wives as property, as subject to corporal punishment, and as legally subordinate established precedent for treating other human property similarly. Paternalistic narratives of happy wives and slaves subsequently emerged, reinforcing the stereotypes.[175]

These stereotypes influenced legislation. For women, this manifested itself in protectionary laws, such as those challenged in *Muller* and *Goesaert.*[176] The constitutional "sharp line between the sexes" in these cases and others, needed to be evaluated with strict scrutiny, Ginsburg argued.[177] Like race, being female was a natural and highly visible characteristic used by legislatures to create classifications derived from stereotypes. If the legislative intent in these sex-based discriminations was akin to that of race-based discrimination, and racial classifications were deemed inherently suspect, ought sexual classifications be evaluated through the same lens? Analogizing sex and race, Ginsburg implored the Court to recognize that "designation of sex as a suspect classification is overdue."[178]

Using the equivalence of sex and race, and subsequently urging the Court to adopt a heightened level of scrutiny in sex-based discrimination challenges was bold. In doing so, Ginsburg and the ACLU broke from traditional methods of appellate advocacy in which lawyers present the least controversial argument possible to bring about the desired outcome.[179] The *Reed*

[175] Kathleen M. Brown. "Engendering Racial Difference, 1640-1670." In *Good Wives, Nasty Wenches, and Anxious Patriarchs: Gender, Race, and Power in Colonial Virginia.* (Chapel Hill: University of North Carolina Press for The Omohundro Institute of Early American History and Culture, 1996).

[176] Ruth Bader Ginsburg, *Reed v. Reed: Brief for Appellant,* 41-50; Muller v. Oregon, 208 U.S. 420 (1908); Goesaert v. Cleary, 335 U.S. 464 (1948).

[177] Ruth Bader Ginsburg, *Reed v. Reed: Brief for Appellant,* 14; Goesaert v. Cleary, 335 U.S. 466 (1948).

[178] Ruth Bader Ginsburg, *Reed v. Reed: Brief for Appellant,* 13.

[179] Deborah L. Markowitz, "In Pursuit of Equality," 79.

brief could have simply relied on arguing that §15-314 was unconstitutional by failing the rational basis test. Ginsburg did employ this argument, but its inclusion in the brief reads like an afterthought, comprising only the final seven of sixty-eight pages.[180] The primacy of the "Sex as a Suspect Classification" argument in the *Reed* brief demonstrates its centrality to Ginsburg's long-term litigation strategy.

Ginsburg's bold argument proved successful. The Court "concluded that the arbitrary preference established in favor of males by §15-314 of the Idaho Code cannot stand in the face of the Fourteenth Amendment's command that no State deny the equal protection of the laws to any person within its jurisdiction."[181] The unanimous opinion, written by Chief Justice Burger, noted that differentiating between men and women for the sole purpose of eliminating the need to hold hearings as the relative merits of competing claims "is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment."[182] The Idaho Supreme Court ruling was reversed and remanded, requiring further proceedings to comply with the United States Supreme Court's decision.[183]

Chief Justice Burger cited *Royster Guano Co. v. Commonwealth of Virginia* (1920) to justify the unanimous opinion. In *Royster Guano*, the Court articulated a much more stringent version of the rational basis test than was frequently employed. *Royster Guano* allowed "classifications for the purposes of legislation," but such classifications "must be reasonable, not arbitrary, and must rest upon some ground of difference having fair and substantial relation to the object of the legislation."[184] Although this particular form of the rational basis test was routinely

[180] Ruth Bader Ginsburg, *Reed v. Reed: Brief for Appellant.*
[181] Reed v. Reed, 404 U.S. 71, 74 (1971).
[182] Reed v. Reed, 404 U.S. 71, 76 (1971).
[183] Reed v. Reed, 404 U.S. 71, 77 (1971).
[184] Royster Guano Co. v. Commonwealth of Virginia, 253 U.S. 415, 562 (1920).

used to strike down economic legislation, it adapted well to arguments over sexual difference in which no such relationship exists. Ginsburg's progressive argument equating sex with race made this stance appear moderate, inclining the Court to adopt it. Using *Royster Guano* to rationalize the *Reed* decision represented an increase in the level of review used to evaluate sex-based discrimination cases.

The monumental decision in *Reed* provided an important precedent for Ginsburg following sex-based discrimination cases. It was the first decision that held that sex-based discrimination was an invidious violation of the Fourteenth Amendment, and the Court used a more stringent version of the rational basis test than ever used before to evaluate a sex-based discrimination claim. The advances made in *Reed* left open the possibility of applying strict scrutiny in future sex-based discrimination cases.[185]

Shortly after collaborating on *Reed,* ACLU Legal Director Mel Wulf invited Ruth Bader Ginsburg to co-found and serve as General Counsel for the organization's Women's Rights Project (WRP). The WRP's mission was identical to Ginsburg's: to convince the Supreme Court to end sex-based discrimination through use of the equal protection clause. Ginsburg's position provided her with an arsenal of cases as well as the ability to select those with particularly sympathetic facts to bring before the Court. During her decade at the WRP, Ginsburg brought thirty-four cases before the Supreme Court: she argued as either lead or co-counsel in six, and won five.[186] All of these built off the precedent established in *Reed* and employed the same arguments, tailored specifically to the case at bar.

Following *Reed,* Ginsburg worked on two cases involving sex-based discrimination in the military. The first involved Air Force Captain Susan Struck, a career military nurse. While

[185] Deborah L. Markowitz, "In Pursuit of Equality," 80.
[186] Amy Leigh Campbell, "Raising the Bar," 162.

deployed in Vietnam, Struck became pregnant. After her pregnancy was discovered, she was ordered to McChord Air Force Base in Washington for a disposition board hearing. During her hearing, she declared her intention to put the child up for adoption immediately after birth, and also stated that the leave time of sixty days was more than enough for her to recover from her temporary disability after childbirth. Regardless, Air Force Regulation 36-12(40) mandated that any pregnant woman officer be discharged from service. Captain Struck's options were therefore limited to having an abortion or being involuntarily discharged. Her Roman Catholic beliefs prompted her to decline the abortion. The hearing concluded with the decision that Captain Struck was to be discharged for "moral and administrative reasons."[187]

The Washington chapter of the ACLU took her case, challenging that the rule was discriminatory. While working on her case, the ACLU obtained orders delaying Struck's discharge. In the meantime, Struck carried the baby to term, took only her accumulated sixty days of leave, and immediately surrendered the child for adoption after birth, as she had promised. Still, the Air Force won both in the district court and the Ninth Circuit Court of Appeals.[188]

Ginsburg took over the case when it was appealed to the Supreme Court. Again, she relied upon arguments explaining that stereotypical assumptions about women and their role as mothers reflected in discriminatory laws. Ginsburg argued that the regulation specifically targeted "pregnancy, a condition unique to women involving a normally brief period of disability," when no other temporary disability required immediate involuntary discharge.[189] In fact, servicemembers who became addicted to drugs or alcohol could remain in service as long as

[187] Ruth Bader Ginsburg, *Struck v. Secretary of Defense, Brief for the Petitioner,* 3-4.
[188] Deborah L. Markowitz, "In Pursuit of Equality," 81.
[189] Ruth Bader Ginsburg, *Struck v. Secretary of Defense, Brief for the Petitioner,* 8.

they reported their condition and entered a rehabilitory program. Captain Struck's sixty days leave was far shorter than rehabilitation programs, and her medical costs were significantly less than treatment for drug or alcohol addictions. As a female, "Captain Struck engaged in the wrong kind of recreation in Vietnam."[190] Highlighting the differences between Struck's actions and those of others that did not result in discharge as well as how the regulation only affected women, Ginsburg argued that Struck's discharge was entirely arbitrary, and thus needed to be evaluated with close judicial scrutiny.[191]

The Supreme Court granted a *writ of certiorari*, meaning they would hear the case, on October 24, 1972.[192] However, following a recommendation from the Solicitor General, the Air Force waved Captain Struck's discharge. The case then became moot.[193] Despite not reaching a decision in *Struck*, Ginsburg's arguments in her brief primed the Court for another case about military discrimination.

When *Struck* became moot, *Frontiero v. Richardson* became Ginsburg's only hope for a progressive sex-based discrimination ruling in the 1972-1973 term.[194] Lieutenant Sharron Frontiero joined the Air Force in October of 1968. Over a year into her four years of obligatory service, she married her husband Joseph. Joseph was a veteran and a full-time student at Huntingdon College in Montgomery, Alabama. His total expenses amounted to $345 per month. Except for the education provisions of the G.I Bill and the $30 he earned each month at his part time job, Sharron's income solely supported both her and her husband. Sharron applied for an increase in her benefits to support Joseph.

[190] Deborah L. Markowitz, "In Pursuit of Equality," 81.
[191] Ruth Bader Ginsburg, *Struck v. Secretary of Defense, Brief for the Petitioner.*
[192] Ruth Bader Ginsburg, *Struck v. Secretary of Defense, Brief for the Petitioner, 2.*
[193] Deborah L. Markowitz, "In Pursuit of Equality," 81.
[194] Deborah L. Markowitz, "In Pursuit of Equality," 81.

Provision 37 of United States Code §401 granted supplemental housing allowances and medical benefits to all military wives, who were automatically considered dependents, regardless of the dependence on their husbands. Married servicewomen, on the other hand, had to prove that her husband relied on her income for more than half of his financial support.[195] Sharron was denied an increase in her benefits.[196]

In December of 1973, Sharron and Joseph, with the help of the Southern Poverty Law Center (SPLC), filed a complaint in a district court, asserting that the distinctions drawn between male and female service members were "arbitrary and unreasonably discriminate[d] against the appellants."[197] After the Frontieros lost in the district court and later on appeal in the Ninth Circuit, their case was appealed to the United States Supreme Court.

An overload of cases stretched SPLC attorneys too thin, so they asked Mel Wulf if the WRP could file the jurisdictional statement with the Court instead. He agreed, under the condition that the WRP and Ginsburg would control the litigation.

After probable jurisdiction was noted, Ginsburg began to work on a brief. She sent her outline to Joe Levin, the attorney responsible for the case at the SPLC. It followed the same format as the *Reed* brief, primarily urging the court to adopt strict scrutiny, and only secondarily arguing that the regulation failed the rational basis test. Levin disagreed with Ginsburg's approach; like most attorneys, he preferred the more restrained approach Ginsburg regarded as an afterthought. Letters between Ginsburg and Levin indicate that they disagreed over many things, such as framing arguments, who would take the lead in the case, who would make the oral arguments, and whether or not to submit amicus curiae (amicus) briefs. When Levin

[195] 37 United States Code Annotated §401.
[196] Joseph J. Levin, *Frontiero v. Richardson, Brief for the Appellants,* 7.
[197] Joseph J. Levin, *Frontiero v. Richardson, Brief for the Appellants,* 7.

continued to disagree with her litigation strategy, Ginsburg decided to file an amicus brief on behalf of the ACLU instead.[198]

Like the outline she sent to Levin, Ginsburg's amicus brief in *Frontiero* was patterned off of the *Reed* brief. An entire ten-page section about the historical and legal treatment of women as inferior and subordinate, with only a few modifications, was transcribed from the *Reed* brief. Also like *Reed,* Ginsburg framed her *Frontiero* argument around stereotypes about women. This time, the brief challenged the assumption that men were breadwinners and women homemakers. Ginsburg used statistics to demonstrate to the court that stereotypes of women as inconsequential wage earners did not reflect American reality, but rather that women constituted a substantial portion of the workforce and contributed to a family's economic well-being. Sharron Frontiero was a perfect example of such an industrious woman.

Debunking the breadwinner-homemaker dichotomy was strategically significant. The regulation, on its face, seemed like it aided women by extending their husbands' benefits to them. Despite this perceived advantage, servicewomen were harmed by this seemingly benign classification as they were not paid as much as their male counterparts to compensate. *Frontiero* clearly demonstrated to the Court how laws understood to protect or benefit one sex over another, like in *Muller* and *Goesaert,* actually disadvantaged women who sought to be equal to men in their own right. This clear example was especially important for an all-male Court accustomed to patriarchal views of women.

The *Frontiero* brief did, however, differ in a few ways from the *Reed* brief. First, *Frontiero* challenged the regulation under the equal protection guarantee implicit in the due process clause of the Fifth Amendment, not the Fourteenth. The implicit guarantee is "of the

[198] Deborah L. Markowitz, "In Pursuit of Equality," 82.

same dimension" of the equal protection clause of the Fourteenth Amendment, so this difference did little to change the substance of the argument. Second, because Ginsburg had become increasingly mindful of the fact that all who are oppressed are not oppressed to the same degree, she did not include the extensive comparison of sex and race. Third, dissimilar to her argument that the statute should be repealed in *Reed,* Ginsburg instead argued that the benefits provided to men should be extended to women too.

The final difference between the two briefs is the most significant. In addition to her more nuanced understanding of the legal relationship between women and racial minorities, Ginsburg recognized the advantages of pragmatism. Hoping that the Court would use the precedent established in *Reed* to further consider the need for heightened scrutiny, Ginsburg introduced the idea of a middle tier for sex-based discrimination cases, stricter than rational basis but not as stringent as strict scrutiny. This is not to say that Ginsburg abandoned her call for strict scrutiny. Just as *Reed* included how the statute failed the rational basis test as a doctrinal bottomline, *Frontiero* proposed the middle tier as the bare minimum level of review.

Ginsburg used language from the *Reed* decision to support her proposal for middle scrutiny in the *Frontiero* brief. The Court had declared in *Reed* that administrative convenience was not sufficient to justify sex-based classifications, so Ginsburg cited *Reed* to demonstrate that the administrative convenience could not support the regulation. This tactic is demonstrative of her incremental approach dependent on established precedent.[199]

Nevertheless, the Court's opinion provided mixed results. On one hand, a plurality opinion authored by Justice Brennan, and joined by Douglas, White and Marshall, recognized the continued historical and legal subjugation of women. By choosing words like "unfortunate,"

[199] Deborah L. Markowitz, "In Pursuit of Equality," 82-83.

"repugnant," and "gross," they condemned such treatment. This disapproval transitioned into their monumental declaration that:

> [S]ince 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…' And what differentiates sex from such non-suspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society. As a result, the statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members… With these considerations in mind, we can only conclude that classifications based on sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and therefore must be subjected to strict judicial scrutiny.[200]

Ginsburg had not expected Brennan's opinion, thinking rather "that Brennan might wait -- might hold back until there were about four cases -- and maybe the fifth time around [would] say, 'Yes, now we have had a procession of cases, and can see from the collection that sex indeed should be openly declared a suspect classification.'"[201] This was a major victory for Ginsburg's campaign: she had successfully convinced four judges that sex, like race, as an immutable characteristic, should be examined with strict scrutiny.

However, Brennan, Douglas, White and Marshall formed only a plurality, not a majority. Justice Powell, joined by Chief Justice Burger and Justice Blackmun, wrote a concurring opinion. Although they agreed that the regulation was unconstitutional discrimination, they did not agree that sex, like race, is inherently suspect, nor did they agree it should be evaluated using strict scrutiny. Rather, they held that the *Royster Guano* level of the rational basis test, as applied in *Reed*, should continue to be used to judge sex-based discrimination cases.[202]

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[200] Frontiero v. Richardson, 411 U.S. 677, 686-688 (1973).
[201] Deborah L. Markowitz, "In Pursuit of Equality," 83-83.
[202] Frontiero v. Richardson, 411 U.S. 677, 691-692 (1973).

Justice Stewart also concurred. His opinion, only one sentence long, "[agreed] that the statutes before [the Court worked] as an invidious discrimination in violation of the Constitution."[203] He too cited *Reed.*

Although the Court was divided four-to-four on the question of level of scrutiny, eight of the nine justices agreed that the regulation was unconstitutional. (Justice Rehnquist, recently appointed to the bench, was the sole dissenter.) The only consequential result of the decision was that the lower courts' decisions were reversed. The regulation did not stand.

Brennan's inability to attract a fifth Justice to his opinion made it apparent that the Court was unlikely to adopt strict scrutiny for gender classifications. In her continued efforts, Ginsburg accordingly adjusted her approach to coax the Court into at least enunciating an intermediate level of scrutiny.

Another key aspect of her slightly altered litigation strategy following *Frontiero* was the use of male plaintiffs. Ginsburg hoped that the all-male Court might be more sympathetic to men's issues caused by single-sex discriminatory laws. Additionally, she aimed to demonstrate to the Court that whenever a man was deprived of something by one of these laws, similar to Joseph's situation in *Frontiero*, that denial was rooted in a false and negative stereotype about women, and that "[u]ltimately discriminations [were] more harmful to women than to men."[204]

Ginsburg found an ideal plaintiff in Stephen Wiesenfeld. His wife, Paula, died in childbirth, and Stephen became the sole caregiver of his son, Jason. Prior to her death, Paula had been a schoolteacher. She was enrolled in Social Security, and each month paid the maximum contribution to her account. Following Paula's death, Stephen visited his local Social Security office to apply for benefits. He was granted child insurance benefits for infant Jason under

[203] Frontiero v. Richardson, 411 U.S. 677, 1773 (1973).
[204] Deborah L. Markowitz, "In Pursuit of Equality," 88.

Provision 42 of the United States Code §402(d), but was told that he personally was ineligible to receive his wife's social security benefits because §402(g) did not provide "mother's insurance benefits" to widowers.[205]

Ginsburg used Stephen's situation to explain the double-edged nature of rigid gender roles, leading to discrimination, that "chivalrous gentlemen, sitting in all-male chambers, misconceive as a favor to the ladies."[206] She argued that Provision 42 of the United States Code §402's

> exclusion of coverage for a father who has in his care a child of the deceased insured female worker… rest[s] on the 'arrogant assumption that merely because the male breadwinner/ female child tenderer stereotypes are accurate for some individuals the government has a right to apply them to all individuals-and, indeed, to shape its official policy toward the end that the stereotypes shall continue to be accurate.'[207]

The statute simultaneously "devalued women's efforts in the economic sector" and denigrated a man's parental status.[208]

In *Wiesenfeld* Ginsburg reasoned that "upholding the gender-based criterion would require approval of gross sex-role stereotyping as a permissible basis for legislative distinction" that the Court had already denounced in *Reed* and *Frontiero.*[209] However, remembering the Justices' reluctance to join Brennan in regarding sex as a suspect class in *Frontiero*, Ginsburg did not call for the use of the strict scrutiny test. Instead, she urged the court to evaluate Wiesenfeld's claim with "heightened scrutiny without fear of labelling."[210]

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[205] 42 United States Code Annotated §402; Ruth Bader Ginsburg, *Weinberger v. Wiesenfeld, Brief for Appellee,* 3.
[206] Ruth Bader Ginsburg, *Weinberger v. Wiesenfeld, Brief for Appellee,* 23.
[207] Ruth Bader Ginsburg, *Weinberger v. Wiesenfeld, Brief for Appellee,* 22-23.
[208] Ruth Bader Ginsburg, *Weinberger v. Wiesenfeld, Brief for Appellee,* 5-6.
[209] Ruth Bader Ginsburg, *Weinberger v. Wiesenfeld, Brief for Appellee,* 16.
[210] Ruth Bader Ginsburg, *Weinberger v. Wiesenfeld, Brief for Appellee,* 29.

Seven Justices agreed with Ginsburg's claim that denying "mother's insurance benefits" to widowers violated the equal protection guarantee of the due process clause of the Fifth Amendment, as it discriminated by providing less benefits to families of female wage earners. Chief Justice Burger and Powell concurred, arguing that the line between the sexes was arbitrarily drawn as there was no "legitimate governmental interest [supporting the] gender classification."[211] Rehnquist concurred in the judgment only, as he too found no valid legislative purpose in restricting benefits to surviving mothers, not fathers.[212] (Justice Douglas did not participate in either the consideration or decision in *Wiesenfeld.*)[213]

Justice Brennan again wrote for the Court. He adopted Ginsburg's assertion that the sex classification was invalid and based on overly broad and false assumptions about both male and female roles in the economic and domestic spheres. He also noted that "the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry," presumably recognizing and articulating how all sex-based discrimination ultimately harms women.[214]

Ginsburg's strategy had worked. Even though the Court did not address the question of suspect classification in any of the opinions, "*Wiesenfeld* plainly applied some level of heightened scrutiny."[215] The court could not find any rational basis for the gendered classification, and its repeated inability to do so in *Reed, Frontiero,* and *Wiesenfeld* indicated that the established precedent in those cases prohibited it from finding anything to uphold such a classification.

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[211] Weinberger v. Wiesenfeld, 420 U.S. 636, 654-655 (1975).
[212] Weinberger v. Wiesenfeld, 420 U.S. 636, 655 (1975).
[213] Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).
[214] Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975).
[215] Deborah L. Markowitz, "In Pursuit of Equality," 89.

Reed, *Frontiero*, and *Wiesenfeld* are representative to Ruth Bader Ginsburg's long-term litigation strategy at the Women's Rights Project. She brought case after case before the Supreme Court, incrementally establishing precedent. In all of her cases she protested assumptions about a particular sex's role in society, arguing that those stereotypes could disadvantage both men and women, but ultimately proved most harmful to women. At first, she urged the Court to use the strict scrutiny test when evaluating sex-based discrimination equal protection claims, like it did with racial discrimination. When she realized that convincing a majority of Justices to this position was unlikely, she made her plea more moderate, and proposed a middle tier that would be stricter than rational basis but not as stringent as strict scrutiny. Never once did she settle for simply asserting that the sex-discriminatory statutes failed the rational basis test; these arguments always read like afterthoughts in her briefs. Her strategy was successful. *Reed*, *Frontiero*, and *Wiesenfeld* walked the Court closer and closer to announcing a middle tier; they represent small, but crucial steps. Ruth Bader Ginsburg's strategy and successes would culminate in the Court's next major decision in which it finally enunciated the intermediate scrutiny test.

CHAPTER III

"THIRSTY BOYS" AND INTERMEDIATE SCRUTINY

Carolyn Whitner and her husband, Dwain, opened the Honk-N-Holler at the corner of Sixth and Knoblock streets in Stillwater, Oklahoma in 1962. Home to Oklahoma State University, the Honk-N-Holler was college town's first curb-service convenience store. The name of the store was derived from its method of operation: customers would drive up, honk, and holler at the attendant, who would then bring them their order.[216] Carolyn spent her days hustling in and out of the store, to and from cars in the parking lot. As in any college town, one of the most frequently purchased items was beer.[217]

The Honk-N-Holler's license to sell alcohol was listed under Carolyn's name, not Dwain's. Dwain had lost his permit to retail beer after a sale to a twenty-year-old male. Had the buyer been a female of the same age, the purchase would have been legal: Oklahoma state law prohibited the sale of 3.2% beer, non-intoxicating alcohol or "low-point beer", to males under the age of twenty-one, while only outlawing its sale to females under eighteen.[218] This difference in the age of majority between males and females was a remnant of territorial days, not uncommon in Oklahoma law.[219]

In light of *Reed v. Reed* (1971), Oklahoma (and federal) courts began to overturn these statutes. Fred Gilbert, a do-it-all attorney in Tulsa, litigated many of these cases.[220] *Lamb v.*

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[216] "Sex Appeal," November 22, 2017, in *More Perfect*, produced by WNYC Studios, podcast, MP3 audio. https://www.wnycstudios.org/story/sex-appeal/.

[217] R. Darcy and Jenny Sanbrano, "Oklahoma in the Development of Equal Rights: The ERA, 3.2% Beer, Juvenile Justice and *Craig v. Boren*," *Oklahoma City University Law Review* 22 (1997): 1025-1026.

[218] 37 Oklahoma Statutes Annotated §§241, 243, and 245. Additionally, it is important to note that it is only the purchase of beer by underage males, not its consumption, that was outlawed by these statutes.

[219] R. Darcy and Jenny Sanbrano, "Oklahoma in the Development of Equal Rights." 1014, 1025-1026.

[220] R. Darcy and Jenny Sanbrano, "Oklahoma in the Development of Equal Rights," 1019.

Brown (1972) involved the conviction of seventeen-year-old Danny Lamb for the felony burglary of an automobile. Under contemporary Oklahoma law, females under the age of eighteen could be tried as juveniles, but males over sixteen could not; Lamb was tried and convicted as an adult.[221] Upon appeal, Gilbert argued that the conviction violated Lamb's equal protection rights guaranteed under the Fourteenth Amendment by differentiating between similarly situated boys and girls. The State of Oklahoma offered no reasonable explanation for the sex-line, other than the legislature "premised upon the demonstrated facts of life" that girls ought to receive preferential treatment.[222] The three-judge panel on the Tenth Circuit determined that these "'facts of life' could mean many things," and thus could not be sufficiently be used to determine if the distinction between sexes was reasonable.[223] Using an approach very similar to Ginsburg's, Gilbert succeeded in overturning the sex-based discrimination law. Following the victory Ruth Bader Ginsburg, head of the Women's Rights Project (WRP) at the American Civil Liberties Union (ACLU), began correspondence with Gilbert. However, Gilbert's victory was short lived: a 1974 decision in *Dean v. Crisp* reasoned that *Reed* did not invalidate convictions of males as adults retroactively, effectively nullifying Gilbert's triumph in *Lamb.* Gilbert continued to look for male plaintiffs between eighteen and twenty years old, hoping to reverse *Dean.*[224]

Simultaneously, Oklahoma legislators debated the age-sex statutory classifications. The Twenty-Sixth Amendment, designed to establish a uniform national age of majority at eighteen, particularly with regard to voter eligibility, created issues for Oklahoma.[225] Like the law at issue in *Lamb,* many Oklahoma laws defined the age of majority situationally, and that age usually

[221] 21 Oklahoma Statutes Annotated §1435.
[222] Lamb v. Brown, 456 F.2d 18, 19 (1971).
[223] Lamb v. Brown, 456 F.2d 18, 20 (1971).
[224] R. Darcy and Jenny Sanbrano, "Oklahoma in the Development of Equal Rights," 1022.
[225] U.S. Constitution, amend. XXVI, § 1.

differed between the sexes. Although the Twenty-Sixth Amendment provided a national consensus of eighteen as the age of majority and *Reed* implied that the age of majority must be the same for men and women, the Oklahoma legislature was tasked with incorporating these 1971 developments into their state code.

A war of words erupted over the application of a uniform age of majority for alcohol purchase. Stillwater Democrat and freshman representative Dan Draper with Tulsa Democrat William Poulos introduced a bill to the House of Representatives that would define the age of majority at eighteen for most state purposes, including buying 3.2% beer. Their Democratic colleague in the Senate, Bob Murphy, Sr., proposed similar legislation. Both bills ultimately failed to change the status quo.

The battle in Oklahoma's conservative state legislature was never truly over age, but rather access to alcohol. Even though the Twenty-First Amendment to the United States Constitution ended federal Prohibition in 1933, Oklahoma continued Prohibition until 1959; liquor at the county level was not yet approved when the legislature met in 1972, and would not be for another twelve years.[226] Anti-alcohol groups perceived the proposed lowering of the purchasing age for males from twenty-one to eighteen as lessening the restrictions on alcohol and an attack on their Protestant values. Anti-alcohol legislators so adamantly opposed reducing the purchasing age that when the Draper-Poulos bill was being debated in the House, one member proposed increasing the beer purchasing age to forty! A more realistic preference of the anti-alcohol caucus was to raise the age of purchase for females to twenty-one as well. Regardless,

[226] U.S. Constitution, amend. XXI, § 1; R. Darcy and Jenny Sanbrano, "Oklahoma in the Development of Equal Rights," 1015.

the law remained unchanged: females could legally purchase 3.2% beer at age eighteen, but males could not until twenty-one.[227]

The Oklahoma State Legislature was also tasked with either ratifying or rejecting the Equal Rights Amendment in 1972.[228] At first, it seemed that Oklahoma would quickly ratify the amendment. Two Senators, one Republican and one Democrat, filed separate resolutions to bring the matter to a vote on Thursday, March 23. The measure easily passed shortly thereafter; the only in-house fighting that occurred was over which senator (and which party) would receive credit. Proceedings in the House of Representatives did not go as smoothly.

The following Monday, Oklahoma City Democrat Hannah Atkins sponsored the resolution to ratify the ERA. Right before the House could vote, another Democrat, C.H. Spearman, objected to the vote. He called for debate. Ann Patterson, wife of important Oklahoma politician Pat Patterson, had been lobbying the House since Monday, when Hannah Atkins introduced the resolution. She targeted Republican members of the House, reminding them of Phyllis Schlafly's arguments against the ERA. She also stressed that an amendment to the United States Constitution warranted serious consideration, and should not be rushed to a vote when members did not yet fully understand its implications. When the matter was again brought up for a vote on Wednesday, March 29, Republican representatives voiced concerns that echoed those of Phyllis Schlafly.[229] Ultimately, their concerns defeated the resolution in the House 52-to-36.[230] Only a short week after the ERA was sent out for ratification, Oklahoma became the first state to reject it.

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[227] R. Darcy and Jenny Sanbrano, "Oklahoma in the Development of Equal Rights," 1015-1016.
[228] The Equal Rights Amendment was sent to the states for ratification on March 22, 1972.
[229] R. Darcy and Jenny Sanbrano, "Oklahoma in the Development of Equal Rights," 1016-1018.
[230] Ruth Murray Brown. *For a Christian America: A History of the Religious Right.* (Amherst: Prometheus Books, 2002), 29.

Ann Patterson's efforts to defeat the ERA did not end with the Oklahoma House of Representatives; she became the leader of an Anti-ERA organization in Oklahoma called the Women for Responsible Legislation. Joined with other conservative, Christian women, she obtained Phyllis Schlafly's mailing list. They began writing to and calling women in other states, urging them to lobby their legislators as well. Their message was simple: Women in Oklahoma stopped the ERA, so women elsewhere can too. Ann Patterson was "pleased" with the fruits of her efforts.[231] By 1982, only 35 states had ratified the ERA, just three states short of the required three-fourths vote to amend the Constitution.[232]

All of the hubbub in Oklahoma in 1972 caught Oklahoma State University freshman Mark Walker's attention. Interested in politics, Mark was fascinated and intrigued by the debates over age of majority and the ERA within the statehouse, as well as Fred Gilbert's related constitutional challenges. Walker was enrolled in a required course called Introduction to American Government. His instructor was his Lambda Chi Alpha fraternity brother, graduate student Michael "Micky" Graham. Walker regularly stopped by Graham's office before and after class to talk further about the lectures. Eventually, the pair discussed the beer-purchasing age. Walker was so concerned with the sex-age discrimination that Graham told him, "if you feel that strongly about it, consult an attorney and see about filing a lawsuit."[233]

After consulting with his local congressman, Dan Draper, who declined to take the case because he preferred a legislative solution, Walker contacted Fred Gilbert. The pair were well suited for one another: Walker needed an attorney who would argue for the equality of sexes,

[231] Ruth Murray Brown. *For a Christian America,* 30.
[232] Ruth Murray Brown. *For a Christian America,* 30.
[233] R. Darcy and Jenny Sanbrano, "Oklahoma in the Development of Equal Rights," 1023.

and Gilbert was actively looking for a male plaintiff between the ages of eighteen and twenty in hopes of reversing *Dean*. Gilbert happily agreed to take Mark Walker's case, and for cheap.[234]

When the two met to discuss logistics, Gilbert presented three strategies to Walker. The first involved filing in state court, the second in federal court, and the third required Walker fabricating a criminal case by purposefully violating the law. They quickly ruled out the third option because the penalty for violating §37-241 fell on the vendor, not the purchaser.[235] Moreover, Walker was intent on challenging the beer law as an equal protection violation under federal law. As Gilbert put it, "there was still a little bit of Vietnam going on, and young men his age were dying for their country, and to say they couldn't go in and buy beer, but a draft exempt girl could just struck him as something of an outrage."[236] Gilbert agreed on the constitutional challenge under one condition: Walker needed a co-plaintiff, because the vendor penalty nuance might cast into question his standing as the plaintiff.

In November of 1972, Mark Walker paid Carolyn Whitener a visit at the Honk-N-Holler, walking out of his fraternity house through a yard littered with beer cans that were purchased by legally-of-age sorority girls for a party the night before.[237] Whitener was busy, running in and out of the store to wait on customers in the parking lot. She did not have much time to talk, but Walker waited patiently. Somewhere in between all of the honks and hollers, Walker asked Whitener what she thought about the beer law.

In a 2017 interview, Whitener recalled being very vocal with her opinion. She told him that she thought the law was senseless. She believed that drafting and shipping young men off to war in Vietnam, but prohibiting them from drinking beer when they came home was unfair, like

[234] "Sex Appeal," in *More Perfect*, produced by WNYC Studios.
[235] 37 Oklahoma Statutes Annotated §241.
[236] R. Darcy and Jenny Sanbrano, "Oklahoma in the Development of Equal Rights," 1025.
[237] R. Darcy and Jenny Sanbrano, "Oklahoma in the Development of Equal Rights," 1025.

Gilbert recalled Walker complaining. Additionally, Whitener thought the law placed an undue burden on vendors: there was no real way of telling if a girl was simply buying beer for her under-age boyfriend. Her concern over this particularly liability was deepened by the fact that her husband, Dwain, had previously lost his license. The Whitener's depended on the Honk-N-Holler for their livelihood, so the prospect of Carolyn losing her license was frightening.

Walker asked for Whitener's help. Although he was referring to her role as a co-plaintiff with more sure standing, amid all the hustle and bustle of her job, Whitener thought he was writing a term paper about the unfair law. She agreed, "always willing to help [students] because they had helped [the Honk-N-Holler] get started," by being regular, reliable customers.[238] When Walker left that day, Whitener "still thought it was a term paper."[239] She "didn't think anything more about it."[240] She did not mention it to Dwain, who was out of town on business, and let the matter end with their conversation.[241]

Months later, Dwain learned about the case in a North Carolina newspaper headline. He was "irate."[242] Carolyn's name, the Honk-N-Holler, and information about the case had made the front page. As Carolyn recalled, "it looked like we sued everybody in the State of Oklahoma that was in office, all the way down to the garbage man."[243] Dwain believed that keeping a low profile and avoiding controversy was the best way for the small business to continue to be profitable. He knew personally some of the officials named in the suit. Some of the local politicians were customers! He absolutely did not want to sue, fearing that it would irreparably

[238] "Sex Appeal," in *More Perfect*, produced by WNYC Studios.
[239] "Sex Appeal," in *More Perfect*, produced by WNYC Studios.
[240] "Sex Appeal," in *More Perfect*, produced by WNYC Studios.
[241] "Sex Appeal," in *More Perfect*, produced by WNYC Studios.
[242] "Sex Appeal," in *More Perfect*, produced by WNYC Studios.
[243] "Sex Appeal," in *More Perfect*, produced by WNYC Studios.

damage their business.[244] Carolyn expressed that she "really didn't know what happened."[245] Eventually, she figured it must have been related to Mark Walker.

A few nights later, Dwain flew home to Oklahoma, still furious. Carolyn picked him up from the airport, and drove him back to Stillwater in "the longest car ride."[246] He lectured her the entire hour and twenty minutes, constantly telling her to drop the case. She recalls that something resonated within her during the drive. She turned to him, and said "no."[247] Carolyn, who grew up in rural Oklahoma as "oil field trash," in that moment experienced a sense of awakening, just like Betty Friedan described in *The Feminine Mystique* and other women were beginning to feel throughout the country.[248] In the 2017 interview, she explained that "it was the first time [she] really put her foot down and didn't budge," because she "figured they were equal."[249] She worked as much and as hard as he did, never taking a salary in twenty-five years. She was going to fight with Mark Walker because she believed in equality.[250]

Carolyn assured Dwain that the case would be over within a short while, maybe a month or two. She was wrong. Normally, Oklahoma litigants might expect a case about a beer law to attract only local attention, but *Craig v. Boren* was not an average case. As legal historians R. Darcy and Jenny Sanbrano point out:

> The distance between Oklahoma City and Washington, D.C. has always been about 1142 miles. That is far enough that people in Washington, D.C. and Oklahoma City are not always thinking about the same things. When they do consider the same subject, they do not always reach the same conclusions… Usually great matters go forward in a way different than they would had they been decided by the Oklahoma legislature instead of the United States Congress. Once in a great while, however, it is the dynamics of Oklahoma politics and

[244] R. Darcy and Jenny Sanbrano, "Oklahoma in the Development of Equal Rights," 1027.
[245] "Sex Appeal," in *More Perfect*, produced by WNYC Studios.
[246] "Sex Appeal," in *More Perfect*, produced by WNYC Studios.
[247] "Sex Appeal," in *More Perfect*, produced by WNYC Studios.
[248] "Sex Appeal," in *More Perfect*, produced by WNYC Studios.
[249] "Sex Appeal," in *More Perfect*, produced by WNYC Studios.
[250] "Sex Appeal," in *More Perfect*, produced by WNYC Studios.

> personalities that give shape to a great national issue, and folks in Washington, D.C. are left to puzzle it out.[251]

After losing twice in federal court, Gilbert appealed his beer law case all the way to the Supreme Court of the United States. *Craig v. Boren* would become the case that finally convinced the Court to enunciate a middle tier of scrutiny to evaluate sex-based discrimination challenges, the pinnacle of Ruth Bader Ginsburg's long-term litigation strategy.[252]

A few things changed between the original filing in the Western District of Oklahoma and being placed on the Supreme Court's docket. Mark Walker tragically passed away on May 8, 1976, before the case reached the High Court.[253] One of his Lambda Chi Alpha fraternity brothers, Curtis Craig, joined the case as another co-named plaintiff in 1973 at the age of eighteen.[254] Craig had already turned twenty-one years old by the time the case bearing his name reached the Court, so Whitener became the only remaining plaintiff with sure standing. Most importantly, though, Ruth Bader Ginsburg at the ACLU's Women's Rights Project became a crucial architect of the case.

Ginsburg began seriously corresponding with Gilbert when the case was appealed to the Tenth Circuit. Gilbert faced a few serious challenges, and Ginsburg wanted to help. First, the case involved an apparent contradiction between the Fourteenth and Twenty-First Amendments. The Twenty-First Amendment, which specifies that the "transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited," transfers the power to regulate

[251] R. Darcy and Jenny Sanbrano, "Oklahoma in the Development of Equal Rights," 1013.
[252] Craig v. Boren, 429 U.S. 190, 468 (1976); Walker v. Hall, 399 F.Supp. 1304 (1975).
[253] R. Darcy and Jenny Sanbrano, "Oklahoma in the Development of Equal Rights," 1041.
[254] R. Darcy and Jenny Sanbrano, "Oklahoma in the Development of Equal Rights," 1036.

alcohol to the states.[255] The broad power granted to the states in the Twenty-First Amendment could be interpreted to overpower the provisions of the Fourteenth Amendment.

Secondly, the district court judges had mocked Gilbert's language in his brief. He wrote that young Oklahoman men experienced "the cruel denial of the physical benefits derivable from 3.2% beer" at the hands of the State's discriminatory law.[256] Perhaps Oklahoma's classification of 3.2% beer as "non-intoxicating" generated the humor. After being ridiculed, Gilbert did not include this in his argument before the Tenth Circuit. Regardless, the judges focused on the specifics of the law.[257] Young men were not prohibited from drinking beer; vendors were barred from selling it to them.[258]

Finally, attorneys for the State of Oklahoma had learned their lesson in *Lamb.* They came prepared with extensive statistical evidence and expert testimony to try to prove that young men and women are inherently different. For example, they provided records that showed more men were arrested for driving under the influence of alcohol than were women.[259] They aimed to demonstrate a proper governmental interest for the sex classification, instead of relying on the "demonstrated facts of life" that had failed them in *Lamb.*[260]

Along with advising Gilbert through letters, Ginsburg's most significant contribution to the case in lower courts was that she submitted an amicus brief on behalf of the ACLU. Her brief contained her usual argument that any discrimination against men was rooted in crippling and false stereotypes about women. The beer law specifically was "revealed as a manifestation of traditional attitudes about the expected behavior of males and females, part of the myriad signals

[255] U.S. Constitution, amend. XXI, § 2.
[256] R. Darcy and Jenny Sanbrano, "Oklahoma in the Development of Equal Rights," 1032.
[257] Walker v. Hall, 399 F.Supp. 1304 (1975).
[258] 37 Oklahoma Statutes Annotated §241.
[259] Walker v. Hall, 399 F.Supp. 1304 (1975).
[260] Walker v. Hall, 399 F.Supp. 1304 (1975).

and messages that daily underscore the notion of men as society's active members, women as men's quiescent companions."[261] She also tried to enhance Gilbert's argument in hopes that her brief would be sufficient to overcome the challenges he faced. Her brief argued that age-sex discrimination "cannot be justified on any basis- compelling state interest, or rational basis, or something in between;" that the Twenty-First Amendment does not protect Oklahoma's beer law from close scrutiny; and that the "statistical proof … fails to establish that the hypothesized legislative objective (protection of young men and the public, particularly on the road) is fairly, substantially or sensibly served by a 3.2 beer sex/age line."[262]

Ultimately, both the Western District of Oklahoma and the Tenth Circuit Court of Appeals decided in favor of Oklahoma. They determined that the arrest statistics adequately demonstrated a proper legislative intent for the age-sex discrimination, despite Gilbert and Ginsburg's protestations.[263] The only remaining option was to appeal to the Supreme Court of the United States.

When the case was added to the Supreme Court's docket, Ginsburg wrote to Gilbert to ask if he would like the ACLU to file an amicus brief. Gilbert responded, "I don't invite, I implore your appearance as amica."[264] The amicus brief she submitted to the Supreme Court was almost identical to the one she submitted to the Tenth Circuit. It contained all of the classic elements of a Ginsburg argument as well.[265] She, however, was busy with other cases, and allowed Gilbert to handle the oral argument.

[261] Ruth Bader Ginsburg, *Walker v. Hall: American Civil Liberties Union Brief Amicus Curiae,* 11.
[262] Ruth Bader Ginsburg, *Walker v. Hall: American Civil Liberties Union Brief Amicus Curiae,* i-ii.
[263] Walker v. Hall, 399 F.Supp. 1304 (1975).
[264] R. Darcy and Jenny Sanbrano, "Oklahoma in the Development of Equal Rights," 1041.
[265] Ruth Bader Ginsburg, *Craig v. Boren: American Civil Liberties Union Brief Amicus Curiae.*

Craig v. Boren was tried on October 5, 1976. Gilbert did not fare well during the oral arguments. Laughs can be heard several times in the audio recording of the case. The Justices spend roughly one-third of Gilbert's allotted thirty minutes asking about Craig's standing and whether the case was a class action. Chief Justice Burger had to prompt Gilbert to discuss a key case, *Kahn v. Shevin* (argued by Ginsburg), that provided precedent and support to his argument, as if he did not trust Gilbert to do so on his own. Gilbert also interrupted Chief Justice Burger and the other Justices numerous times, which is taboo. Moreover, he also attempted to inform Justice Marshall of the outcome of two cases Marshall himself litigated: *Brown v. the Board* and a case about alcohol regulation in an Oklahoma county. In his rebuttal, Gilbert even went as far as to talk about his own drinking skill, saying that "getting intoxicated on 3.2, let me just say something factually from my own experience. 3.2 is so diluted that the normal man will get extremely bloated on the stuff before he can get drunk. It is possible to get drunk but you have to force it down."[266] To top it all off, Gilbert broke professional dress codes by wearing combat boots to the Supreme Court.[267] His performance, overall, was sub-par.

He did, however, manage to clearly articulate the relationship between sex- and race-based discrimination. He compared *Goesaert v. Cleary* to *Plessy v. Ferguson*, the case that established the doctrine of separate but equal.[268] Gilbert stressed that as he read

> the *Goesaert* decision, it was considerably worse than *Plessy*… because in *Plessy*, while saying that the un-favored race would have to have its education and facilities and so forth separately, *Plessy* never went so far as to say the un-favored [race] could be denied these things altogether. But *Goesaert* went to so far as to say the un-favored sex could be denied these things altogether. So that is one way I view *Goesaert* is being considerably worse than *Plessy v. Ferguson*.[269]

[266] Fred Gilbert, *Craig v. Boren*: Oral argument audio recording.
[267] "Sex Appeal," in *More Perfect*, produced by WNYC Studios.
[268] Plessy v. Ferguson, 163 U.S. 537 (1896); Fred Gilbert, *Craig v. Boren*: Oral argument audio recording.
[269] Fred Gilbert, *Craig v. Boren*: Oral argument audio recording.

In comparing *Goesaert* to *Plessy*, Gilbert echoed Ginsburg's repeated claim that sex and race discrimination should be treated the same way.

He also succeeded in demonstrating that the arrest statistics provided as evidence by Oklahoma did not accurately support the purported governmental interest. He asserted that the statistics only show that police more frequently suspected males of driving under the influence of alcohol than females, not that they actually did, as conviction statistics would prove. In his rebuttal, he also importantly noted that the statistics dated from 1973, but the legislature met to discuss the beer law in 1972. He instead suggested that Protestant values and traditional gender roles casting girls as angels and boys as devils were the true motivation for the beer law.[270] Despite his other failures, he was able to assert that no rational relationship existed between the claimed governmental interest and the age-sex discrimination.

Luckily for Gilbert, Ginsburg presented the oral argument for another case, *Califano v. Goldfarb*, after *Craig* on the same day.[271] During her time, Justice John Paul Stevens asked her about *Craig.* He wanted her to further explain her claim that even discrimination against males was rooted in an underlying, negative stereotype about women, and ultimately hurt women more than men. "We heard a case this morning," he asked, "that would not permit males to make certain purchases that females could. It was attacked as a discrimination against males."[272] Ginsburg reassured him that she was familiar with *Craig*, in case he had forgotten she had authored the amicus brief and was in the room during the hearing. Justice Stevens then asked "[s]o, your case depends then on our analyzing this case as a discrimination against female?"[273] Ginsburg replied, "No, my case depends on your recognition that using gender as a classification

[270] Fred Gilbert, *Craig v. Boren*: Oral argument audio recording.
[271] Califano v. Goldfarb, 430 U.S. 199 (1977).
[272] Justice John Paul Stevens, *Califano v. Goldfarb:* Oral argument audio recording.
[273] Justice John Paul Stevens, *Califano v. Goldfarb:* Oral argument audio recording.

resorting to that classification is highly questionable and should be closely reviewed."[274] Justice Brennan then echoed her argument about the double-edged nature of sex-based discrimination ultimately harming women, as if he has finally understood and agreed: "There is always, in fact, a discrimination against women."[275]

During Justice Stevens' unusual questions about another case, in *Craig*, Ruth Bader Ginsburg was finally able to convince the Court of her view that sex-based discrimination claims ought to be reviewed with a test more stringent than rational basis. The decision, authored by Justice Brennan, explicitly states that

> Subsequent to Frontiero, the Court has declined to hold that sex is a suspect class... and no such holding is imported by the Court's resolution of this case. However, the Court's application here of an elevated or "intermediate" level scrutiny, like that invoked in cases dealing with discrimination against females, raises the question of why the statute here should be treated any differently from countless legislative classifications unrelated to sex which have been upheld under a minimum rationality standard.[276]

The Court formally enunciated a heightened level of review for sex-based discrimination equal protection challenges in *Craig v. Boren*. This new level, the intermediate test, required that "classifications by gender must serve important governmental objections and be substantially related to the achievement of those objectives."[277] Through a case about the denial of highly coveted beer to fraternity brothers, Ruth Bader Ginsburg realized her long-term goal of establishing such a test.

[274] Ruth Bader Ginsburg, *Califano v. Goldfarb:* Oral argument audio recording.
[275]Justice William J. Brennan, *Califano v. Goldfarb:* Oral argument audio recording.
[276] Craig v. Boren, 429 U.S. 190, 468 (1976).
[277] Craig v. Boren, 429 U.S. 190, 204 (1976).

CONCLUSION

In 1976, *Craig v. Boren* represented the landmark decision by the Supreme Court to evaluate sex-based discrimination claims using a new, heightened level of review known as the intermediate scrutiny test. Intermediate scrutiny, most simply put, is more rigorous than rational basis, but is not as stringent as strict scrutiny, and is only applied in sex-based discrimination cases. On the one hand, it is like rational basis because the government must demonstrate a relationship between the classification and a legislative goal. Rational basis requires the classification to be *rationally* related to a *legitimate* governmental interest, while intermediate scrutiny necessitates that the classification be *substantially* related to achieving an *important* governmental objective.[278] On the other hand, intermediate scrutiny established sex as a quasi-suspect class, similar to race, national origin, and alienage under strict scrutiny. Also like strict scrutiny, a key difference between rational basis and intermediate scrutiny is that the middle tier places the burden of proof on the party seeking to uphold the classification.

To survive intermediate scrutiny, governments must provide specific evidence to substantiate the claim of constitutionality; the burden of proof "is not satisfied by a bare assertion" that the classification meets the test's requirements.[279] An independent evaluation is also conducted by the judiciary to search for such evidence. Furthermore, to uphold the sex-based classification, governments are required to conclusively prove that a sex-neutral classification would not be equally effective in achieving the important legislative objective.[280]

[278] Jody Feder, Sex Discrimination in the Supreme Court, 1-2.

[279] George S. Crisci, "Retreat from Intermediate Scrutiny in Gender-Based Discrimination Cases," *Case Western Reserve Law Review* 32 (1982): 785.

[280] George S. Crisci, "Retreat from Intermediate Scrutiny," 785.

While these requirements seem straightforward and clearly defined, the Supreme Court has not applied the test consistently since 1976. Legal scholar George S. Crisci notes that the "pattern of decisions handed down in gender-based discrimination cases… is confusing. Some cases appear to employ the deferential standard of the rational basis test. Others use a standard requiring greater scrutiny than the rational basis test but less than the strict scrutiny test."[281] In addition to the Court's inconsistent applications and decisions, the somewhat synonymous nature of these definitions of rational basis and intermediate scrutiny has generated confusion. For a relationship to be considered substantial, how strong does it need to be? How does that differ from simply rational? What factors divide important from legitimate interests and objectives? The Supreme Court has not yet provided clear answers to these questions.

Regardless of the uncertainty, Ruth Bader Ginsburg continues her effort to extend the full guarantee of equal protection to women. Her work since 1993 has been from the Supreme Court's bench, not from behind its bar. The opinion she authored in *United States v. Virginia* (also known as the VMI case) was her first opportunity to speak for the Court in regard to sex-based classifications under the Fourteenth Amendment and the appropriate standard of review.

The Virginia Military Institute (VMI) is a public military college for males, with a rich history of producing civilian and military leaders alike. This unparalleled experience prompted some women to seek admission to VMI, but they were refused on account of their sex. In 1990, the United States government sued the Commonwealth of Virginia for denying qualified and capable women admission to VMI, arguing that the admission policy violated the equal protection clause of the Fourteenth Amendment. During the long court battle, a new program for women, called the Virginia Women's Institute for Leadership, was opened at Mary Baldwin

[281] George S. Crisci, "Retreat from Intermediate Scrutiny," 816.

College, a private school for women. The two programs did not carry the same prestige and were markedly different in their methodology. The federal government continued to assert that this alternative did not constitute equal protection. The Court sided with the United States government.

When Justice Ginsburg announced the seven-to-one opinion on June 26, 1996, she echoed her previous arguments about gender stereotypes and their negative effect on women. She also explained very clearly how the Court applied the intermediate scrutiny test to evaluate the case: the Justices required Virginia to prove that the "classification served [an] important governmental objective and that [the] discriminatory mean employed was substantially related to the achievement of those objectives."[282] Moreover, Ginsburg increased the intensity of the test by deciding on behalf of the Court that "defenders of sex-based government action must demonstrate an exceedingly persuasive justification for that action;" this was the Supreme Court's "core instruction" in the decision making process.[283]

Ginsburg's new requirement of "an exceedingly persuasive justification" is capable of standing alone, and sometimes appears to function as the intermediate scrutiny test itself.[284] Emboldening the focus of the test to depend on the phrase "gave [Ginsburg] a tougher weapon to use in exposing benign justifications and in combating the use of generalizations about women."[285] Revealing those benign justifications as not a pedestal, but a cage with the intensified test pushed forward, once again, Ginsburg's agenda to prohibit the pigeonholing of women based on broad stereotypes. She regards "the VMI case as the culmination of the 1970s

[282] United States v. Virginia, 518 U.S. 515, 515-516 (1996).

[283] United States v. Virginia, 518 U.S. 515, 515 and 530 (1996).

[284] Amy Walsh, "Ruth Bader Ginsburg: Extending the Constitution," *John Marshall Law Review* 32, no. 1 (1998): 215.

[285] Amy Walsh, "Ruth Bader Ginsburg," 216.

endeavor to open doors so that women could aspire and achieve without artificial constraints," and as "one of the most personally satisfying [opinions] she has delivered in all her years on the bench."[286]

The path to intermediate scrutiny neither began with Ruth Bader Ginsburg at the ACLU, nor ended with the enunciation of the test in 1976. It is the story of women, both litigators and litigants, and their struggle to achieve the Fourteenth Amendment's promise of equal protection. Myra Bradwell sued under the Fourteenth Amendment immediately following its ratification, hoping to secure equality for women during Reconstruction. At the turn of the twentieth century, Florence Kelley and Josephine Goldmark strived to create at least some level of protection for women, even if at the expense of equality. Anne Davidow revived this effort for equality by arguing that both men and women are entitled to equal protection. Sally Reed, Susan Struck, Sharron Frontiero, and Carolyn Whitener were brave enough to entrust their lives to Ruth Bader Ginsburg as she waged her campaign before the Supreme Court. Although she was unable to convince the Court to declare sex a suspect class, she did succeed in persuading the Justices to enunciate a heightened level of review, the intermediate scrutiny test, for evaluating sex-based discrimination. Now, as the most senior female Supreme Court Justice, Ginsburg continues to strengthen the intermediate test and fight for equality, providing aid to more litigating women.

[286] Ruth Bader Ginsburg. *My Own Words*, 163 and 150.

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