Tulsa Law Review

Volume 33
Issue 1 *Dedicated to the U.S. Supreme Court*

Fall 1997

Women As Constitutional Equals: The Burger Court's Overdue Evolution

Stephanie K. Seymour

WOMEN AS CONSTITUTIONAL EQUALS: THE BURGER COURT'S OVERDUE EVOLUTION*

The Honorable Stephanie K. Seymour†

The Declaration of Independence declared in 1776, "[w]e hold these Truths to be self-evident; that all Men are created equal."[1] We learned in our civics and political science courses, from our history and our culture, that those ringing words meant just what they said—all *men* are created equal. When the Fourteenth Amendment to our Constitution was ratified in 1868, it declared that:

> [n]o 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.[2]

"Person" is a seemingly broader word than "man," but the enactment of the Fourteenth Amendment did not make women equal under the law either. In the century that followed its adoption, right through the era of the Warren Court, women were considered inferior to men under our Constitution, except where it came to child-rearing and homemaking.

The Burger Court created a defining moment in legal history by recognizing for the first time that the Constitution protects women against gender discrimination. Before 1971, the Court had rejected every challenge to legislative enactments that disadvantaged women because of their sex. By 1986, the Court had put in place an approach to gender-based laws that required them to have an exceedingly persuasive justification and a substantial relationship to the achievement of their goals. This dramatic change in our legal history, belated as it was, mirrored an equally dramatic change in the role of women in society, and the political recognition of that change.

 This paper is a revised and expanded version of the talk, given at the Burger Court Conference at the University of Tulsa College of Law on October 1, 1996.

† Chief Judge, United States Court of Appeals for the Tenth Circuit. The author acknowledges with appreciation the assistance of her law clerk, Nancy L. Vyhnal, in the composition of this paper.

1. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
2. U.S. CONST. amend. XIV, § 1.

Any examination of gender and the law during the Burger Court must recognize the extraordinary contribution to the evolutionary process made by Ruth Bader Ginsburg. Until her appointment to the United States Court of Appeals for the District of Columbia in 1980, she filed briefs with the Supreme Court in most of the cases on the path toward constitutional protection, and she argued several of them.[3] She wrote prolifically, providing thoughtful and scholarly insight and perspective on the cases as they came down, and on the effect upon them of the times in which they were decided.[4] The quality of her endeavors was itself a refutation of the stereotypical view that women had no place in the world outside the home and could make no meaningful contribution to that world. It is therefore altogether fitting that Justice Ginsburg recently wrote the latest chapter in the Supreme Court's recognition that the Fourteenth Amendment protects against gender discrimination—the *VMI* case.[5]

Before 1971, the Supreme Court had never met a gender distinction it did not like. The most egregious examples are by now well known, but they bear repeating because they are telling indications of how far the law has evolved. In the first gender case decided under the newly ratified Fourteenth Amendment, Myra Bradwell applied unsuccessfully to the Supreme Court of Illinois for a license to practice law. She challenged the denial of her application in the United States Supreme Court, which upheld the denial by concluding that admission to the bar of a state is not a privilege or immunity belonging to United States citizens.[6] In an oft-quoted concurring opinion, Justice Bradley, joined by two other Justices, said the following:

> [T]he civil law, as well as nature herself, has always recognized 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 ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband . . . .The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator.[7]

Mrs. Bradwell's desire to practice law thus violated divine ordinance, the nature of things, and the law of the Creator, all of which were so apparent to Justice

---

3. *See* Maureen B. Cavanaugh, *Towards a New Equal Protection: Two Kinds of Equality*, 12 LAW & INEQ. J. 381, 381 and n.3 (1994).

4. *See, e.g.*, Ruth Bader Ginsburg, *The Burger Court's Grapplings with Sex Discrimination*, *in* THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T 132 (Vincent Blasi ed., 1983) [hereinafter Ginsburg, *The Burger Court*]; Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375 (1985) [hereinafter Ginsburg, *Some Thoughts on* Roe v. Wade].

5. United States v. Virginia, 116 S. Ct. 2264 (1996).

6. Bradwell v. State, 83 U.S. (16 Wall.) 130 (1872).

7. *Id.* at 141.

Bradley and his Brethren that he saw no need to cite authority for these pronouncements.

Things did not improve. Two years later, Virginia Minor challenged as violative of the Fourteenth Amendment a provision of the Missouri State Constitution that restricted the right to vote to men only. The Supreme Court rejected the challenge on the ground that voting was not a privilege or immunity of citizenship, and that the states were therefore free to limit the right of suffrage to men alone.[8]

Even the *Lochner*-era Court, which disapproved of nearly every attempted government regulation of the workplace, upheld limitations on working hours for women. The Court took judicial notice "[t]hat woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence" and "that woman has always been dependent upon man."[9] The Court concluded that:

> [i]t is impossible to close one's eyes to the fact that [a woman] still looks to her brother and depends on him. Even [if] all restrictions on political, personal, and contractual rights were taken away, and she stood, so far as statutes are concerned, upon an absolutely equal plane with him, it would still be true that she is so constituted that she will rest upon and look to him for protection; that her physical structure and a proper discharge of her maternal functions — having in view not merely her own health, but the well-being of the race — justify legislation to protect her from the greed as well as the passion of man.[10]

Many years later, a woman unsuccessfully sought an injunction to restrain the enforcement of a Michigan law that restricted her from obtaining a bartender's license unless she was the wife or daughter of the male owner of a licensed liquor establishment.[11] In upholding enforcement of the law, the Supreme Court approved the state's legislative judgment that bartending by women should be limited in order to prevent moral and social problems.

As recently as 1961, the Warren Court's opinion in *Hoyt v. Florida*,[12] stands as discouraging proof that the more things had changed during the ninety years after Mrs. Bradwell tried to practice law, the more they had stayed the same. Gwendolyn Hoyt was convicted of second-degree murder by assaulting her husband with a baseball bat. "As described by the Florida Supreme Court, the affair occurred in the context of a marital upheaval involving . . . the suspected infidelity of [Mrs. Hoyt's] husband, and culminating in the husband's final rejection of his wife's efforts at reconciliation." Mrs. Hoyt claimed that her trial before an all-male jury deprived her of her right to equal protection under the Fourteenth Amendment. The jury had been selected under a state statute that allowed women to serve on juries only if they affirmatively request-

8. Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1874).
9. Muller v. Oregon, 208 U.S. 412, 421 (1908).
10. *Id.* at 422.
11. Goesaert v. Cleary, 335 U.S. 464 (1948).
12. 368 U.S. 57, 59 (1961).

ed to be put on the jury list. Few women had done so. In an opinion by Justice Harlan, the Supreme Court upheld the conviction, echoing the words of Justice Bradley:

> Despite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life. We cannot say that it is constitutionally impermissible for a State, acting in pursuit of the general welfare, to conclude that a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities.[13]

Chief Justice Warren and Justices Black and Douglas concurred in the result. All the other Justices fully joined the opinion.

Ten years after *Hoyt* in the seminal case of *Reed v. Reed*,[14] the Burger Court changed the face of equal-protection jurisprudence in a case that challenged an Idaho statute providing that as between a man and a woman equally qualified to administer an estate, the man must be preferred. The state defended the statute as a matter of administrative convenience and as a means of avoiding intra family controversy. Chief Justice Burger, writing for a unanimous Court, refused to give these reasons dispositive weight, holding instead that the statute established arbitrary preferences in violation of the Equal Protection Clause of the Fourteenth Amendment. This was the first time the Court refused to defer to a state legislature's view of the circumstances in which women should be treated differently from men.

In deciding the *Reed* case, the Court took a fresh and critical look at a statute adversely impacting women. The Court's willingness to assess for itself the legitimacy of a state's reasons for enacting gender discriminatory laws continued during the Burger Court years and beyond, and revolutionized the legal status of women. The first question that comes to mind in understanding the evolution of the revolution is, why? What factors were present in 1971 and the following years to influence and reorder the Court's thinking about a woman's place in the world that were not at work in 1961?

The paternalistic language which the pre-Burger Court cases used in approving gender distinctions reflected the ambiguous nature of society's attitude toward women that was prevalent in those times and unfortunately still persists to some extent today.[15] Women were "'both put on a pedestal and deemed not fully developed persons.'"[16] The concept of women as the weaker sex arose in the dim past when physical strength was often necessary to success in the world beyond the home. Because women were disadvantaged by their role as child-

---

13. *Id.* at 61-62.
14. 404 U.S. 71 (1971).
15. *See* John Galotto, Note, *Strict Scrutiny for Gender, Via Croson*, 93 COLUM. L. REV. 508, 538 (1993) [hereinafter Galotto, *Strict Scrutiny*].
16. *Id.* (quoting RICHARD A. WASSERSTROM, PHILOSOPHY AND SOCIAL ISSUES: FIVE STUDIES 19 (1980)).

bearer and by their relative physical weakness in a world requiring physical strength, they were viewed as unsuited for worldly endeavors and in need of protection. Kept as they were out of the commercial arena, women were seen as both unable to hold their own there, and better and more innocent because they were untainted by it. This attitude continued even after women began to become active in commerce and the trades, evidenced by the many cases justifying restrictions on women's activity as necessary to accommodate their position as the weaker sex.

Technology has long since leveled the playing field by eliminating the advantage previously resulting from physical strength. As Ruth Bader Ginsburg observed in 1980, other changes in society were also at work propelling women out of the home, off the pedestal, and out into the workforce.

> In the years 1947 to 1961, . . . there was unprecedented growth in employment outside the home of women from ages forty-five to sixty-four. A steep increase for younger women followed later, coinciding with, and shored up by, a revived feminist movement—a movement caused by, and in turn spotlighting, dramatic alterations in women's lives. Salient factors in the changing work and roles of women include a sharp decline in necessary home-centered activity; few goods we consume at home must be made there nowadays. Coupled with that, expansion of the economy's service sector opened places for women in traditional as well as new occupations. Curtailed population goals, facilitated by more effective means of controlling reproduction, count as well among important ingredients in this social dynamic. Also central to women's increasing opportunity is the phenomenon of vastly extended life spans. The combination of these last two developments creates a setting in which the typical woman, for the first time, is experiencing most of her adult years in a household not dominated by childcare requirements. In addition, inflation has boosted attraction to gainful employment for wife as well as husband. These conditions, along with changing marriage patterns, account in significant measure for the prevalence of the two-earner family, a unit increasingly more common than the family in which a man is the sole breadwinner. In fewer than a dozen years, according to mid-1970s Bureau of Labor Statistics projections, two-thirds of all women between ages twenty-five and fifty-four would be gainfully employed.[17]

One dramatic change in the legal landscape during the Burger Court years may have had the greatest impact of all on the legal status of women. When I graduated from law school in 1965, only 4% of the law school graduates were women.[18] By 1971, when the *Reed* case was decided, the number of women enrolling in law school was approximately nine percent.[19] By 1986, the end of the Burger Court era, almost forty-one percent of the enrolling law students were women.[20] In addition to graduating from law school, women began to be

17. Ginsburg, *The Burger Court*, *supra* note 4, at 139-140 (footnotes omitted).

18. *See A Review of Legal Education in the United States*, 1995 A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO THE BAR REP. 67.

19. *Id.*

20. *Id.*

appointed as judges in increasing numbers. President Carter began the revolution for the federal courts, appointing eleven women to the courts of appeals and twenty-three women to the district bench between 1976 and 1980. President Reagan continued the trend during his eight years in office by appointing Sandra Day O'Connor to the Supreme Court in 1981, six women to the courts of appeals, and twenty-four women as district judges. Similar changes were taking place on the state courts.

The changes in society and the legal field were reflected in the legislative sphere. Prior to the watershed *Reed* decision, Congress passed the Equal Pay Act[21] in 1963 and the Civil Rights Act in 1964, Title VII of which prohibited employment discrimination on the basis of sex.[22] Congressional action after the *Reed* decision continued to enhance the ability of women to enter on an equal footing areas traditionally reserved to men. In 1972, the Equal Rights Amendment was passed by Congress and began its journey to obtain approval among the states, although it ultimately failed. That same year, Congress passed Title IX of the Educational Amendments of 1972,[23] which prohibited sex discrimination in any educational program or facility receiving federal funds, and amended Title VII of the Civil Rights Act to extend protection against sex discrimination to federal employees.[24] In 1974, Congress passed the Equal Credit Opportunity Act[25] prohibiting discrimination on the basis of sex or marital status with respect to credit transactions. In 1978, in response to a case in which the Burger Court had detoured from its general trend of recognizing and striking down sex discrimination,[26] Congress again amended Title VII by passing the Pregnancy Discrimination Act.[27] And in 1980, Congress passed the Science and Engineering Equal Opportunities Act,[28] which authorized the National Science Foundation to increase the participation of women in courses of study leading to degrees in science and engineering and to encourage women to pursue careers in those fields.

This then was the social, legal, and political climate during the Burger Court years. The birth of gender equality jurisprudence was less a product of the Court than a product of the times; it was an idea whose time had clearly come. Indeed, given the across-the-board rejection of gender claims by the Court before 1971, the Supreme Court's gender discrimination doctrine had no place to go but forward. Be that as it may, when the Burger Court years were over, the law of sex discrimination had been permanently altered, along with the opportunities available to women to enter professions formerly reserved to men. The Court accomplished this alteration in a series of cases that devel-

21. 29 U.S.C. § 206(d) (1994).
22. 42 U.S.C. §§ 2000e to 2000e-2 (1994).
23. 20 U.S.C. § 1681 (1994).
24. 42 U.S.C. § 2000e-16 (1994).
25. 15 U.S.C. § 1691 (1994).
26. General Electric Co. v. Gilbert, 429 U.S. 125 (1976) (disability plan's failure to cover pregnancy-related disabilities does not violate Title VII).
27. 42 U.S.C. § 2000e(k) (1994).
28. 42 U.S.C. § 1885a (1994).

oped and applied an intermediate level of judicial scrutiny to statutes that would previously have been approved as within the legislature's prerogative to deal with woman's place in the scheme of things. In the years leading up to the *Reed* decision, most statutory classifications were evaluated for equal-protection purposes under the rational-basis test, an extremely deferential standard which required only that the difference in treatment not be "wholly irrelevant to the achievement of the State's objective," and justified by any reasonably conceivable state of facts.[29] Before *Reed*, the rational basis test was used to uphold every law that discriminated against women, the rational basis being woman's role as mother, caretaker of the home, and a person unfit or incapable of employment in a man's world.

The Court had applied a much more exacting level of scrutiny to those legislative classifications it regarded as "suspect." Footnote four of the *Carolene Products case*[30] is generally regarded to be the origin of the notion of applying strict scrutiny to suspect classifications.[31] The Court indicated there that the presumption of the constitutionality of statutes might not operate so broadly with respect to legislation directed at racial minorities, observing that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."[32] The idea that minorities might need more protection from discriminatory laws than that provided by the rational basis test was further developed in the *Korematsu* case,[33] in which the Court noted that legal restrictions limiting the civil rights of a single racial group should be viewed as suspect and subjected to strict scrutiny.[34] The rationale underlying application of this standard, as implied in the cases from which it arose, is the belief that suspect classes are not likely to be represented in the legislature, and that the political process therefore could not be relied on to ensure that their interests would be taken into account.[35] Under the strict scrutiny standard, laws must have a compelling objective and must promote that objective by the least restrictive means.[36] Although the wartime restrictions on Japanese Americans at issue in *Korematsu* survived strict scrutiny, virtually all statutes that have since been subjected to that standard have been invalidated.[37]

In the first step toward a new equal-protection landscape for women taken in *Reed*, the Court purported to apply the rational-basis test in assessing whether the statute violated the Fourteenth Amendment's equal-protection mandate. The Court thus articulated the inquiry as assessing whether the classification

29. McGowan v. Maryland, 366 U.S. 420, 425-26 (1961).
30. United States v. Carolene Prods. Co., 304 U.S. 144 (1938).
31. *See* Galotto, *Strict Scrutiny*, *supra* note 15, at 513.
32. Carolene Prods., 304 U.S. at 152 n.4.
33. Korematsu v. United States, 323 U.S. 214 (1944).
34. *Id.* at 216.
35. BERNARD SCHWARTZ, THE ASCENT OF PRAGMATISM: THE BURGER COURT IN ACTION 219 (1990).
36. Ginsburg, *The Burger Court*, *supra* note 4, at 133.
37. SCHWARTZ, *supra* note 35, at 220.

was reasonable and had a fair and substantial relationship to the legislation's objective. The outcome, however, was not the one that application of the rational-basis test had always previously produced. Although the Court accepted the statute's objectives as legitimate, that is, to avoid intra-family fights and to provide administrative convenience in estate administration, it nevertheless concluded that the means chosen were arbitrary rather than reasonable. As Ruth Bader Ginsburg noted in an article, "[T]he *Reed* decision attracted headlines; it marked the first solid break from the Supreme Court's consistent affirmation of governmental authority to classify by sex. The terse *Reed* opinion acknowledged no departure from precedent, but Court-watchers recognized that something new was in the wind."[38]

With the *Reed* decision the genie was out of the bottle, the toothpaste was out of the tube, and there was no turning back. As one commentator has noted, "[R]ights, once set loose, are very difficult to contain; rights consciousness—on and off the Court—is a powerful engine of legal mobilization and change."[39] The Burger Court had begun a journey toward recognition of gender equality. As a review of subsequent decisions reveals, however, the train was driven not by an overarching jurisprudential vision, but by social and political change and by the views of the Justices about the facts of particular cases.[40]

Two years after the Reed decision, the Court issued *Frontiero v. Richardson*,[41] the opinion many consider to be the high-water mark in the movement toward gender equality.[42] The case challenged military statutes under which families of male soldiers were granted greater benefits than families of female soldiers. A majority of a three-judge district court panel upheld the statutes on the basis of administrative convenience, which was in turn premised upon the panel's view that because the husband is generally the "breadwinner" in most families he is rarely a dependent for purposes of receiving benefits for military dependents.[43] Ruth Bader Ginsburg argued the case in the Supreme Court as amicus for the American Civil Liberties Union. After an exchange of views among the Justices concerning the standard of review,[44] Justice Brennan authored a plurality opinion holding that classifications based upon sex were suspect and therefore subject to strict scrutiny. Citing the infamous passage from the concurrence in *Bradwell*,[45] Justice Brennan pointed to the nation's long and unfortunate history of sex discrimination, "rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedes-

38. Ginsburg, *The Burger Court*, *supra* note 4, at 133.

39. Joel B. Grossman, *Constitutional Policymaking in the Burger Years*, 86 MICH. L. REV. 1414, 1416 (1988) (reviewing THE BURGER YEARS: RIGHTS AND WRONGS IN THE SUPREME COURT (Herman Schwartz ed., 1987)).

40. *See* Ginsburg, *Some Thoughts on* Roe v. Wade, *supra* note 4, at 378; Paul Bender, *Is the Burger Court Really Like the Warren Court*, 82 MICH. L. REV. 635, 652-53 (1984) (reviewing THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T (Blasi ed., 1983)); Grossman, *supra* note 39, at 1417-18.

41. 411 U.S. 677 (1973).

42. Galotto, *Strict Scrutiny*, *supra* note 15, at 520.

43. *See Frontiero*, 411 U.S. at 681.

44. *See* SCHWARTZ, *supra* note 35, at 222-26.

45. 83 U.S. (16 Wall.) 130, 141 (1872).

tal, but in a cage."[46] He noted that women still faced pervasive discrimination in educational institutions, in employment, and in the political arena.[47] Justice Brennan was unable to persuade a majority of the Court to his view that sex is a suspect class. Justice Powell concurred only in the judgment, believing that categorizing sex as suspect would preempt the political process in light of the fact that the Equal Rights Amendment had been passed by Congress and submitted to the states for ratification.[48] Interestingly, Chief Justice Burger, whose opinion in *Reed* had started it all, wrote to Justice Brennan stating that as the author of *Reed*, he had "never remotely contemplated such a broad concept."[49] The Chief Justice joined the concurrence of Justice Powell. Justice Rehnquist was the lone dissenter. A year later, the Court heard *Kahn v. Shevin*,[50] which challenged a Florida statute providing a tax break to widows but not to widowers. Ruth Bader Ginsburg again argued to the Court, contending that the statute's gender distinction violated equal protection. Justice Douglas disagreed, holding for the Court that because a single woman indisputably faced greater financial difficulties than those facing a single man, the statute undoubtedly met the "substantial relation" requirement of the rational-basis test. He distinguished *Frontiero* as a case in which the gender distinction was justified solely by administrative convenience. Justices Brennan, Marshall, and White dissented on the basis that sex was a suspect class requiring a greater justification than that offered by the state. *Kahn* is a revealing case for several reasons. It underscored the fact that Justice Brennan's position on sex as a suspect class was not that of a majority of the Court, and it did so by approving a gender distinction made in an attempt to *benefit* women and to remedy the effects of what the Court referred to as "overt discrimination or . . . the socialization process of a male-dominated culture."[51] The Court used the same rationale in *Schlesinger v. Ballard*,[52] to uphold a discriminatory up-or-out military policy favoring women. Indeed, the notion that gender distinctions pass constitutional muster when made to remedy discrimination and provide a special benefit to women is one that surfaced frequently during the Burger Court's struggle with gender issues. It often explained the Court's approval of some classifications drawn on gender lines and not others. This paternalistic view has been challenged as a short-term gain but a long-term loss for women because it perpetuates the notion that women are somehow weaker, less able to compete on their own, and in need of special treatment. To the extent that a statutory benefit favoring women is truly intended and described as a remedy for past discrimination rather than as protection for the weaker sex, however, it is in my judgment a valuable tool to boost women on their way to equality. After upholding gender distinctions

46. *Frontiero*, 411 U.S. at 684.
47. *Id.* at 686.
48. SCHWARTZ, *supra* note 35, at 224.
49. *Id.* at 225 (quoting Chief Justice Burger).
50. 416 U.S. 351 (1974).
51. *Id.* at 353.
52. 419 U.S. 498 (1975).

in *Kahn and Ballard* on the basis of their protective and remedial purposes, the Court again shifted gears. In *Taylor v. Louisiana*,[53] decided only a week after *Ballard*, the Court struck down a jury selection system identical to that upheld earlier in *Hoyt*. The Court agreed with the male defendant in *Taylor* that the challenged system denied him his Sixth Amendment right to a jury drawn from a fair cross-section of the community. In so doing, the Court rejected the *Hoyt* rationale, stating that "[i]f it was ever the case that women were unqualified to sit on juries or were so situated that none of them should be required to perform jury service, that time has long since passed . . . . Communities differ at different times and places. What is a fair cross section at one time or place is not necessarily a fair cross section at another time or a different place."[54] Times and the law were changing. The Chief Justice concurred in the result and Justice Rehnquist dissented.

In *Weinberger v. Wiesenfeld*,[55] Ruth Bader Ginsburg again appeared before the Court, arguing that a Social Security statute denied equal protection by granting benefits to the surviving spouse of a working man, while denying benefits to the surviving spouse of a working woman. Justice Brennan held for the Court that the gender distinction at issue was indistinguishable from that struck down in *Frontiero*. While acknowledging that some empirical evidence supported the notion that men were more likely than women to be the primary supporters of their spouses and children, the Court nonetheless held this rationale insufficient to "justify a gender-based distinction which diminishes the protection afforded to women who do work."[56] Justice Brennan hedged his bets in articulating the framework under which the provision was held invalid, drawing parallels with the statute struck down on the basis of strict scrutiny by the plurality in *Frontiero*, while relying on language from *Reed* to actually declare the statute unconstitutional. Justice Powell wrote a more narrowly drawn concurrence in which the Chief Justice joined. Once again, Justice Rehnquist dissented.

In 1975, the Court also invalidated a Utah statute under which women attained the age of majority at eighteen and were then no longer eligible for child support, while men did not reach majority until age twenty-one. In *Stanton v. Stanton*,[57] a divorced wife sued for support payments for her daughter after the daughter turned eighteen. The Utah Supreme Court sustained the statute against an equal-protection challenge, holding that support for male children should continue longer, based on the "'old notions . . . that generally it is the man's primary responsibility to provide a home and its essentials, [and that therefore] it is a salutary thing for him to get a good education and/or training before he undertakes those responsibilities.'"[58] Justice Blackmun, writ-

53. 419 U.S. 522 (1975).
54. *Id.* at 537.
55. 420 U.S. 636 (1975).
56. *Id.* at 648.
57. 421 U.S. 7 (1975).
58. *Id.* at 10 (quoting Stanton v. Stanton, 517 P.2d 1010, 1012 (Utah 1974)).

ing for the Court over Justice Rehnquist's lone dissent, concluded that the statute did not survive equal-protection attack "under any test—compelling state interest, or rational basis, or something in between."[59] In a blistering rejection of the "old notions" relied upon by the state court, Justice Blackmun pointed out that:

> Women's activities and responsibilities are increasing and expanding. Coeducation is a fact, not a rarity. The presence of women in business, in the professions, in government and, indeed, in all walks of life where education is a desirable, if not always a necessary, antecedent is apparent and a proper subject of judicial notice. If a specified age of minority is required for the boy in order to assure him parental support while he attains his education and training, so, too, is it for the girl. To distinguish between the two on educational grounds is to be self-serving: if the female is not to be supported so long as the male, she hardly can be expected to attend school as long as he does, and bringing her education to an end earlier coincides with the role-typing society has long imposed.[60]

Thus, approximately one hundred years after the Court took judicial notice that under the law of the Creator the paramount destiny of women was the domestic sphere, the Court now was taking judicial notice of women's activities in business, the professions, government, and indeed in all walks of life. Women had made progress not only in changing their place in the world, but in the critical area of changing the Court's underlying perception of their place in the world. The Supreme Court was finally getting the message that stereotyping all women did a great injustice to those women who did not fit the stereotype.

This progress was stabilized by the 1976 decision in *Craig v. Boren*,[61] in which the Court for the first time expressly adopted and applied an intermediate level of scrutiny to gender classifications.[62] The case presented a challenge to an Oklahoma statute that discriminated against males in the sale of 3.2% beer. Building upon language in *Reed*, Justice Brennan stated the standard for the Court as follows: "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[63] The Court pointed out that cases following *Reed* had rejected administrative convenience as a sufficiently important objective. Significantly, the Court also recognized that "increasingly outdated misconceptions concerning the role of females in the home rather than in the 'marketplace and world of ideas' were rejected as loose-fitting characterizations incapable of supporting state statutory schemes that were premised upon their accuracy."[64] Justice Powell specially concurred and, in expressing some misgivings about the opinion's discussion of the appropriate standard for equal-protection analysis of gender claims, correctly predicted that the opinion would be viewed as adopting a middle-tier approach

59. *Id.* at 17.
60. *Id.* at 15.
61. 429 U.S. 190 (1976).
62. LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-26, at 1564 (2d ed. 1988).
63. Craig v. Boren, 429 U.S. 190, 197 (1976).
64. *Id.* at 198-99.

subjecting such classifications "to a more critical examination than is normally applied when . . . 'suspect classes' are not present."[65] Chief Justice Burger dissented because he was unable to accept the Court's decision to make "gender a disfavored classification."[66]

The Court applied the intermediate level of scrutiny in the 1977 case of *Califano v. Goldfarb*,[67] in which Ruth Bader Ginsburg again appeared before the Court to assert the unconstitutionality of a Social Security benefits statute that favored widows over widowers. Justice Brennan, writing for plurality, again agreed. He denounced as unconstitutional sex classifications based on archaic and over broad generalizations about women that are more consistent with stereotypes than with reality.[68] Justice Stevens concurred in the judgment. Chief Justice Burger joined Justice Rehnquist's dissent, along with Justices Stewart and Blackmun.

Three weeks later, in *Califano v. Webster*,[69] the Court upheld another Social Security benefits statute that permitted female wage earners to exclude three more lower earning years than a similarly situated male, thereby resulting in a higher level of old-age benefits for the retired female wage earner. The Court concluded that the gender classification passed constitutional muster because it actually reduced the "disparity in economic condition between men and women caused by the long history of discrimination against women [which] has been recognized as . . . an important governmental objective."[70] In so doing, the Court cautioned that "'the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme,'" and distinguished cases in which a scheme that purported to remedy past discrimination was not enacted for that purpose or actually penalized women wage earners.[71] The Court upheld the statutory provision because it attempted to account for job discrimination that prevented women from earning as much as men and thereby operated to compensate women for that past discrimination. The Chief Justice and three other Justices concurred for the reasons given in Justice Rehnquist's dissent in *Goldfarb*.

The decision in *Webster*, when contrasted with those in *Goldfarb and Wiesenfeld*, illustrates the flexible manner in which the Court used the intermediate level of scrutiny. The middle-tier approach allowed "the Justices to base their decisions upon their individual perceptions of the reasonableness of the sexual classification and the governmental interest asserted in each case."[72] *Webster* also revealed the enduring appeal of gender classifications that are

65. *Id.* at 210 and n* (Powell, J., concurring).
66. *Id.* at 217 (Burger, J., dissenting).
67. 430 U.S. 199 (1977).
68. *See id.* at 207.
69. 430 U.S. 313 (1977) (per curiam).
70. *Id.* at 317.
71. *Id.* (quoting Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975)).
72. SCHWARTZ, *supra* note 35, at 229; *see also* Earl M. Maltz, *Legislative Inputs and Gender-Based Discrimination in the Burger Court*, 90 MICH. L. REV. 1023 (1992).

protective and remedial.

The decisions mentioned are only a fraction of those decided by the Burger Court dealing with gender classifications. This paper has focused on them because they highlight the Court's progress toward recognizing women's changing place in society and its development of a framework for analyzing gender claims that takes that change into account. The standard the Court adopted was probably as stringent as possible given the make-up of the Court and the widespread persistence of sexual stereotyping in the teeth of reality. And, despite the heightened scrutiny, the Court nevertheless persisted for a time in upholding statutes obviously enacted to protect the weaker sex. The outcomes often turned as much on the views of the individual Justices as on subtle factual distinctions. As a result, the Court's steps toward gender equality were uneven, arguably inconsistent, and subject to the charge of being result oriented.[73] Although the Court's treatment of gender was perhaps not ideal, we must remember that the Court was being asked to make rapid changes in an area long ignored. The end result was to acknowledge and give legal force and protection to women's movement out of the home and into the world.

The changing framework within which the Supreme Court evaluated the roles and rights of women in society is manifest even in cases that at least facially did not deal with gender equality. The cases defining the scope of reproductive rights are a good example. In *Griswold v. Connecticut*,[74] the Court held that it is an invasion of privacy for the State to regulate the use of contraceptives by a married couple. Several of the opinions in *Griswold* focused on the privileged place of the marital institution, and the importance of protecting decisions relating to the creation and raising of a family from interference by the government. Justice Douglas referred to the privacy surrounding marriage as "older than the Bill of Rights."[75] The Court still perceived reproductive rights to be bound up in the traditional view of womanhood as inside the family, to be given expression only within that specific social and historical context. But successive decisions by the Court gradually eroded the notion of reproductive rights rooted in the social institutions of marriage and family, in favor of a notion of privacy rights held by individuals.[76] The theory that a woman has an individual privacy right in making decisions about her own reproduction achieved full expression in the Burger Court's 1973 decision in *Roe v. Wade*.[77] Whatever one may think of the substance of *Roe* and its progeny, it is clear that the change from a view of women's rights as rooted in and derived from social institutions and history, to a vision of rights possessed by women as aspects of their individual personhood, created the necessary preconditions for broader progress in the treatment of women under the law. To persist in the

73. *See* Cavanaugh, *supra* note 3, at 391-400.
74. 381 U.S. 479 (1965).
75. *Id.* at 486.
76. *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438 (1972).
77. 410 U.S. 113 (1973).

vision of women's rights as derivative would have been dehumanizing and at odds with the changes sweeping society at large.

Three gender classification cases form a bridge from the Burger Court to the present day. In 1982, the Burger Court heard *Mississippi Univ. for Women v. Hogan*,[78] which presented an equal protection challenge to a state statute that excluded men from a state-supported nursing school. By then, Sandra Day O'Connor had been appointed as the first woman to sit on the Supreme Court. Justice O'Connor authored an opinion for the five Justices who voted to strike down the statute. In so doing, she stated several principles that had emerged from the Court's past equal protection analysis. First, she said that the statute was not exempt from scrutiny or subject to a lesser standard of review merely because it discriminated against males rather than females. She reiterated that the applicable test was the one set out in *Craig v. Boren*, under which a state must show that the classification serves important governmental objectives and that the discriminatory means used are substantially related to the achievement of those objectives. She cautioned that this test must be applied "free of fixed notions concerning the roles and abilities of males and females."[79] She criticized the view that protective and paternalistic objectives were valid, pointing out that "if the statutory objective is to exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate."[80]

Determining whether the requisite substantial relationship exists must be done "through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women."[81] Justice O'Connor recognized that in limited circumstances "a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened," but she "emphasized that 'the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme.'"[82] In rejecting the state's argument that excluding males compensated for discrimination against women and constituted educational affirmative action, Justice O'Connor pointed out that the state's policy actually perpetuated the stereotype of nursing as women's work, and helped make the assumption that nursing is a field for women a self-fulfilling prophecy.[83] Interestingly, she noted evidence that excluding men from the nursing field depressed wages, and observed that the state's policy may thus be penalizing the very class the state purported to benefit.[84] The Chief Justice dissented along with Justices Blackmun, Powell, and Rehnquist.

78. 458 U.S. 718 (1982).
79. *Id.* at 724-25.
80. *Id.* at 725.
81. *Id.* at 726.
82. *Id.* at 728 (quoting Weinberger v. Wiensenfeld, 420 U.S. 636, 648 (1975)).
83. *See id.* at 729-30.
84. *See id.* at 729 n.15.

Twelve years later, in *J.E.B. v. Alabama ex rel. T.B.*,[85] the Rehnquist Court considered whether the Equal Protection Clause prohibits peremptory challenges to potential jurors on the basis of gender. *J.E.B.* was the defendant in a paternity suit which was heard by an all-female jury due to the state's exercise of its peremptory challenges. Justice Blackmun, writing for the Court, began his discussion by observing that, because women had been excluded from jury duty for most of the country's existence, gender-based peremptory challenges were a relatively recent occurrence. This historical exclusion of women was derived from the English common law and was framed in this country as "the ostensible need to protect women from the ugliness and depravity of trials. Women were thought to be too fragile and virginal to withstand the polluted courtroom atmosphere."[86] Justice Blackmun pointed out that, beginning with *Reed v. Reed*,

> this Court consistently has subjected gender-based classifications to heightened scrutiny in recognition of the real danger that government policies that professedly are based on reasonable considerations in fact may be reflective of "archaic and overbroad" generalizations about gender, or based on "outdated misconceptions concerning the role of females in the home rather than in the 'marketplace and world of ideas.'[87]

The state's proffered justification was based upon the perception that men might be more sympathetic to a male defendant in a paternity suit, while women might be more sympathetic to the complaining witness, the mother. The Court refused to "accept as a defense to gender-based peremptory challenges 'the very stereotype the law condemns,'"[88] characterizing this rationale as

> reminiscent of the arguments advanced to justify the total exclusion of women from juries. [The state] offers virtually no support for the conclusion that gender alone is an accurate predictor of juror's attitudes; yet it urges this Court to condone the same stereotypes that justified the wholesale exclusion of women from juries and the ballot box.[89]

In addition to the harm to the rights of the litigant, Justice Blackmun emphasized the harm resulting to the community and to the individual juror caused by exercising peremptory challenges on the basis of gender stereotypes.

> The community is harmed by the State's participation in the perpetuation of invidious group stereotypes and the inevitable loss of confidence in our judicial system that state-sanctioned discrimination in the courtroom engenders.
>
> When state actors exercise peremptory challenges in reliance on gender stereotypes, they ratify and reinforce prejudicial views of the relative abilities of men and women. Because these stereotypes have wreaked injustice in so many other spheres of our country's public life, active dis-

85. 511 U.S. 127 (1994).
86. *Id.* at 132.
87. *Id.* at 135 (citations omitted).
88. *Id.* at 138 (citation omitted).
89. *Id.* at 138-39 (footnote omitted).

> crimination by litigants on the basis of gender during jury selection "invites cynicism respecting the jury's neutrality and its obligation to adhere to the law."[90]

Individual jurors are harmed because:

> [a]ll persons, when granted the opportunity to serve on a jury, have the right not to be excluded summarily because of discriminatory and stereotypical presumptions that reflect and reinforce patterns of historical discrimination. Striking individual jurors on the assumption that they hold particular views simply because of their gender is "practically a brand upon them, affixed by law, an assertion of their inferiority." It denigrates the dignity of the excluded juror, and, for a woman, reinvokes a history of exclusion from political participation.[91]

The *J.E.B.* decision stands as a strong reaffirmation of the principles developed by the Burger Court in rejecting the government's reliance, either implicitly or expressly, on gender stereotypes when defending challenges to gender discrimination.

The most recent application of the Burger Court's gender equity jurisprudence occurred this June in the case of *United States v. Virginia (VMI).*[92] In a lovely twist of fate, the opinion was authored by Justice Ruth Bader Ginsburg, named to the Court in 1993, who was given the opportunity to apply the changes in the law that her legal arguments to the Burger Court helped to bring about. In assessing the challenge presented to Virginia's refusal to admit women to the Virginia Military Institute, Justice Ginsburg drew upon both *Mississippi Univ. for Women* and *J.E.B.* to restate and reaffirm the legal framework that recognizes and protects a woman's right to share equally in the world beyond the domestic sphere. She emphasized that the proffered justification for gender discrimination must be "'exceedingly persuasive,'" "genuine," "not hypothesized or invented *post hoc*," and not grounded "on overbroad generalizations about the different talents, capacities, or preferences of males and females."[93] She pointed out that:

> Sex classifications may be used to compensate women "for particular economic disabilities [they have] suffered," to "promot[e] equal employment opportunity," to advance full development of the talent and capacities of our Nation's people. But such classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women.[94]

Applying these principles to VMI's exclusionary policy, Justice Ginsburg rejected VMI's argument that excluding women was proper in light of gender-based developmental differences, observing that "time and again since this Court's turning point decision in [*Reed*], we have cautioned reviewing courts to

90. *Id.* at 140.
91. *Id.* at 141-42 (footnote and citation omitted).
92. 116 S.Ct. 2264 (1996).
93. *Id.* at 2275.
94. *Id.* at 2276 (footnote and citations omitted).

take a 'hard look' at generalizations or 'tendencies' of the kind pressed by Virginia . . . ,"[95] and reiterating that "[s]tate actors controlling gates to opportunity, . . . may not exclude qualified individuals based on 'fixed notions concerning the roles and abilities of males and females.'"[96] Reviewing women's struggle to enter law schools, medical schools, and federal military academies, she stated that "[t]he notion that admission of women would downgrade VMI's stature, destroy the adversative system and, with it, even the school, is a judgment hardly proved, a prediction hardly different from other 'self-fulfilling prophec[ies], once routinely used to deny rights or opportunities.'"[97] Concluding that Virginia's "notably circular argument" had "bent and bowed" the applicable test,[98] Justice Ginsburg held for the Court that Virginia had fallen far short of establishing the exceedingly persuasive justification which the Court now requires to support any gender-defined classification.[99] Significantly, even Chief Justice Rehnquist joined the judgment of the Court although not its opinion. Justice Scalia dissented and Justice Thomas did not participate.

What the *VMI* case did most effectively was to quash once and for all sex stereotyping as a justification for discrimination against women. While recognizing that "most" women would likely not want to endure the extreme physical and mental discipline and minute regulation of behavior meted out at VMI, the fact that "some" women could meet the rigorous requirements of the school and wanted to was sufficient to persuade a majority of the Court that it was a denial of equal protection for the State of Virginia to provide a VMI education for men and not for women. The VMI case thus stands as the most recent articulation of the enduring legacy of the Burger Court in the area of gender discrimination: a refusal to allow gender distinctions based on stereotypical notions of a woman's abilities and her place in the world; a refusal to uphold such distinctions on the basis of purported "benign" justifications that are in fact neither actual or benign; and an exacting level of scrutiny meant to ensure that this country's history of discrimination does not repeat itself. Interestingly, the Court in both *Mississippi Univ. for Women* and *J.E.B.* had gone out of its way to note that it did not need to decide whether gender is a suspect class entitled to the highest scrutiny because the gender classifications in those cases did not withstand even intermediate scrutiny.[100] In the *VMI* case, however, the Court simply applied intermediate scrutiny without mentioning the suspect class issue. The reason for this change is clear: there is no longer a need to label gender a suspect class to achieve equality. The Congressional enactments referred to earlier, which mandated an end to gender discrimination in employment, education, and the extension of credit, have for the most part been interpreted favorably to women by both the Burger Court and the Rehnquist Court. These statu-

95. *Id.* at 2280.
96. *Id.*
97. *Id.* (footnotes and citations omitted).
98. *Id.* at 2281.
99. *See id.* at 2282.
100. *See* Mississippi Univ. for Women, 458 U.S. 724 n.9; J.E.B., 511 U.S. 137 n.6.

tory mandates have assisted women in their endeavors to compete with men in the working world. A solid majority of the current Supreme Court now views the intermediate level of scrutiny to require the state to demonstrate an "exceedingly persuasive justification" for gender distinctions,[101] with a "'strong presumption that gender classifications are invalid.'"[102] Moreover, as more women attain legislative positions in which they are involved in creating the statutes and judicial positions in which they are applying the scrutiny, the intermediate level of scrutiny will function even more effectively to weed out stereotypes and paternalism.

In sum, and in answer to the question we have been posed by this book's title, there was no Warren Court revolution on gender equality for the Burger Court to either confirm or counter. Rather, the Burger Court was swept up in the tide of political and social change wrought by women who entered the workforce by design or by necessity and who objected to being treated as though they should still be at home cooking dinner and doing the laundry. Chief Justice Burger rather innocently started the movement with *Reed v. Reed*, never intending a revolution, and Justice Brennan took up the call to arms. The addition of Justice O'Connor to the Court made it more difficult for the Brethren to continue with a straight face upholding statutes which assumed a woman's place was in the home, dependent on her husband. The ultimate serendipity, of course, was the appointment to the Court of Justice Ginsburg, who had led the charge for gender equality. Her powers of persuasion will undoubtedly ensure that the Fourteenth Amendment's promise of equal protection will be a reality for women.

101. *United States v. Virginia*, 116 S. Ct. at 2274.
102. *Id.* at 2275 (quoting J.E.B., 511 U.S. 137, 152 (Kennedy, J., concurring)).