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Carol Pressman

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**THE HOUSE THAT RUTH BUILT:
JUSTICE RUTH BADER GINSBURG,
GENDER AND JUSTICE**

Carol Pressman

I. INTRODUCTION

In 1959, Justice Ruth Bader Ginsburg and eleven other female law students graduated from Columbia Law School.¹ Despite graduating first in her class, she received no offers from law firms. “I applied for clerkships to every judge in the southern district, in the eastern district, and again, no one was interested.”² Finding her first job out of law school was difficult.³ According to Ginsburg, “I had three strikes against me. I was Jewish, I was a woman, and I was a mother.”⁴ “I was fortunate to finally get a clerkship because one of my teachers worked very hard on my case, and persuaded [Judge Edmund Palmieri, U.S. District Court, Southern District of New York that] I would do the work and I wouldn't be running home to take care of [my daughter] Jane constantly.”⁵ After teaching at Rutgers Law School, Ginsburg eventually established herself at Columbia

* The “House that Ruth Built” was the name given to Yankee Stadium and refers to their star player, George Herman “The Babe” Ruth. MICKEY MANTLE & PHIL PEPE, *MY FAVORITE SUMMER 1956* x (1991). Ruth led the Yankees to four World Series wins and hit sixty home runs during the 1927 season. *BASEBALL LEGENDS* at 251 (1997).

¹ See *Primetime Live: 'Top of the Class' - Ruth Bader Ginsburg* (ABC television broadcast, Dec. 29, 1994) (explaining that Ginsburg's graduating class at Columbia Law School consisted of twelve women and 341 men).

² *Primetime Live*, *supra* note 1.

³ See Stephanie B. Goldberg, *The Second Woman Justice: Ruth Bader Ginsburg Talks Candidly About a Changing Society*, 79 ABA J. 40, 41 (1993). Ginsburg was turned down by Justice Felix Frankfurter, who said he “wasn't ready to hire a woman,” and by Judge Learned Hand, who was concerned that his off-color language was too raw for a lady. ELEANOR H. AYER, *RUTH BADER GINSBURG: FIRE AND STEEL ON THE SUPREME COURT* 34, 35 (1994).

⁴ Goldberg, *supra* note 3, at 41.

⁵ *Id.*

Law School where she was granted tenure.⁶ Ginsburg recalled that:

When I started teaching, you could count on the fingers of two hands the number of women teaching law across the country. Women were about 3 percent of my students. And most jobs in the law were closed to women. In the days when I clerked from 1959 to 1961, the U.S. attorney would hire no women in the criminal division, because that was considered inappropriate work for a woman.⁷

The difficulty Ginsburg encountered in finding legal employment was not her first experience with gender discrimination in the workplace. Shortly after graduation from Cornell University in 1954 and her subsequent marriage to Martin David Ginsburg several days later, the newlyweds moved to Fort Sill, Oklahoma.⁸ The Ginsburgs moved there because Martin had interrupted his legal studies at Harvard to join the army.⁹ While living there, Ruth Bader Ginsburg obtained employment at a local Social Security office and was scheduled to attend a training session in Maryland.¹⁰ When she told her superiors that she was pregnant, "they decided she could not travel across the country . . . [and she] was assigned a lower position . . . where she received lower pay."¹¹

In 1956, the Ginsburgs and their one-year-old daughter, Jane, moved to Cambridge where her husband Martin returned to Harvard Law

⁶ *Id.* at 40. Ginsburg was the first woman ever to be granted the honor of tenure by Columbia Law School. AYER, *supra* note 3, at 49.

⁷ Goldberg, *supra* note 3, at 41.

⁸ AYER, *supra* note 3, at 24. See also Joyce Ann Baugh et al., *Justice Ruth Bader Ginsburg: A Preliminary Assessment*, 26 U. TOL. L. REV. 1, 3 (1994) (discussing Justice Ginsburg's confrontation with gender discrimination in Oklahoma while her husband Martin Ginsburg served two years in the army).

⁹ AYER, *supra* note 3, at 25.

¹⁰ *Id.*

¹¹ *Id.*

School,¹² and Ruth Bader Ginsburg entered her first year at Harvard Law School, beginning her extraordinary legal career as “one of only nine women in a class of over four hundred students.”¹³ Justice Ginsburg has acknowledged the importance of the support Martin provided, admitting that without his help with child-care and house-work “she might have dropped out of school.”¹⁴ Martin Ginsburg admits that his willingness to assist with housework was not entirely selfless:

I learned very early in our marriage . . . that Ruth was a fairly terrible cook and, for lack of interest, unlikely to improve. This seemed to me comprehensible: my mother was a fairly terrible cook also. Out of self-preservation I decided I had better learn to cook because Ruth, to quote her precisely, was “expelled from the kitchen by her food-loving children nearly a quarter century ago.”¹⁵

Despite excellent grades and making Law Review, Ruth Bader Ginsburg still experienced gender bias at Harvard Law School.¹⁶ She recalled that women were excluded from the periodical room in the library despite the fact that it was the only place where certain research materials could be found.¹⁷ Ginsburg also recalled how Dean Erwin Griswold invited the women students to dinner, and asked them how they could

¹² *Id.* at 27.

¹³ *Id.*

¹⁴ AYER, *supra* note 3, at 27.

¹⁵ Nina Totenberg, *Working Parents and the Demands of Raising a Family* (NPR radio broadcast, Oct. 11, 1996).

¹⁶ AYER, *supra* note 3, at 28 (quoting Ginsburg as recounting that, “[t]here was no outrageous discrimination but an accumulation of small instances. . .”).

¹⁷ *Id.* (“This rule [excluding women] was kept as a symbol of the old days when women were not allowed in many rooms at Harvard. Late one night, finding that she absolutely had to check a reference there, Ruth pleaded with the guard to let her in. He refused; he also refused to get the magazine . . .”).

justify taking places away from men.¹⁸ When her husband got a job in New York after graduation, Ginsburg transferred to Columbia for her final year.¹⁹

It was not until Ginsburg became involved with the American Civil Liberties Union, while teaching at Rutgers Law School, that she began her professional interest in the crusade against gender discrimination.²⁰ While teaching at Rutgers, Ginsburg took part in the first gender bias case in which the Supreme Court struck down a sex-based regulation, *Reed v. Reed*.²¹ Prompted by the success, she became the co-director of the ACLU Women's Rights Project.²² "Under the leadership of Ruth Bader Ginsburg . . . the ACLU Women's Rights Project charted a litigation strategy for enshrining women's equality as a matter of constitutional law, relying on the Equal Protection Clause of the Fourteenth Amendment."²³ Part of her strategy involved showing how gender discrimination "hurt men, sometimes in the pocketbook."²⁴ She argued six cases in front of the Supreme Court during the 1970's and only

¹⁸ *Id.* at 29 (stating that Ginsburg answered the Dean's question by stating, "studying law would help her better understand her husband's work, and could possibly lead to part-time employment for herself.")

¹⁹ *Id.* at 31. Despite the fact that Harvard commonly conferred degrees on students who attended for two years and finished elsewhere, she was denied that option until 1972, when she declined the long overdue honor. *Id.*

²⁰ *Id.* at 40.

²¹ 404 U.S. 71, 74 (1971) (holding that IDAHO CODE § 15-314, "giving mandatory preference to males over females" when choosing a person to administer the estate of one who dies intestate, is unconstitutional under the Equal Protection Clause). Ginsburg was the primary author of the brief presented in the case. Brief for Appellant, *Reed v. Reed*, 404 U.S. 71 (1971) (No. 430) *microformed on* U.S. Supreme Court Records and Briefs (Microform Inc.).

²² AYER, *supra* note 3, at 49.

²³ Nadine Strossen, *The American Civil Liberties Union and Women's Rights*, 66 N.Y.U. L. REV. 1940, 1950 (1991).

²⁴ Goldberg, *supra* note 3, at 40. See also Sheila M. Smith, *Justice Ruth Bader Ginsburg and Sexual Harassment Law: Will the Second Female Supreme Court Justice Become the Court's Women's Rights Champion?*, 63 U. CIN. L. REV. 1893, 1902 (1995) (discussing Justice Ginsburg's opinion that women had become a vital part of the labor market and could provide for their husbands).

lost one.²⁵ She also filed several amicus briefs on behalf of the ACLU, including briefs in *Craig v. Boren*,²⁶ *Orr v. Orr*,²⁷ and *Wengler v. Druggists Mutual Insurance Co.*²⁸

Justice Ginsburg was appointed to the U.S. Court of Appeals by President Carter in 1980.²⁹ On June 14, 1993, President Clinton nominated Ruth Bader Ginsburg to be the second woman to ever sit on the United States Supreme Court.³⁰ On October 4, 1993, Ruth Bader Ginsburg began her first term on the United States Supreme Court.³¹

II. GENDER AND THE CONSTITUTION

The history of women's rights under the United States Constitution, provides ample support for the need for the strategy developed by Justice Ginsburg while working with the ACLU.³² In 1873, the U.S. Supreme Court upheld an Illinois Supreme Court decision

²⁵ *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Kahn v. Shevin*, 416 U.S. 351 (1974); *Edwards v. Healy*, 421 U.S. 772 (1975); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Duren v. Missouri*, 439 U.S. 357 (1979) (losing only in *Kahn*).

²⁶ 429 U.S. 190 (1973).

²⁷ 440 U.S. 268 (1979).

²⁸ 446 U.S. 142 (1980).

²⁹ AYER, *supra* note 3, at 65, 66. See also Elizabeth E. Gillman & Joseph M. Micheletti, *Justice Ruth Bader Ginsburg*, 3 SETON HALL CONST. L.J. 657, 660-661 (1993) ("During her thirteen-year tenure on the D.C. Circuit, Ginsburg gained a reputation as the 'Thurgood Marshall of gender discrimination law,' but nonetheless left the bench with a remarkably conservative record.")

³⁰ AYER, *supra* note 3, at 88. The first female to be appointed to the Supreme Court was Justice Sandra Day O'Connor. Justice O'Connor was appointed by Ronald Reagan in 1981. See generally Lisa R. Graves, Note, *Looking Back, Looking Ahead: Justice O'Connor, Ideology, and the Advice and Consent Process*, 3 CORNELL J.L. & PUB. POL'Y 121, 122 (1993). See also Jeffrey Rosen, *The New Look of Liberalism on the Court*, N.Y. TIMES, Oct. 5, 1997, §6 (Magazine), at 62 (noting that President Clinton called Ginsburg the "Thurgood Marshall of the women's rights movement").

³¹ AYER, *supra* note 3, at 96. In addition to being only the second female Justice in Supreme Court history, Ginsburg was the first person of Jewish descent appointed to the Supreme Court since Justice Warren E. Burger was appointed in 1969. *Id.*

³² See Strossen, *supra* note 23 and accompanying text.

denying a married Chicago woman, Myra Bradwell, admission to the State bar.³³ The U.S. Supreme Court agreed with the lower court's decision that Myra Bradwell was not entitled to protection under the Fourteenth Amendment or the Privileges and Immunities Clause.³⁴ Since the Illinois statute referred only to males, "the legislature . . . [had] . . . not the slightest expectation that this privilege would be extended to women."³⁵ The Illinois Court stated "[t]hat God designed the sexes to occupy different spheres of action, and that it belonged to men to make, apply and execute the law."³⁶

The Illinois Court stated in dicta that "as a married woman [Myra Bradwell] would be bound neither by her express contracts nor by those implied contracts which it is the policy of the law to create between attorney and client."³⁷ Supreme Court Justice Joseph P. Bradley concurred in the Court's decision, reasoning that, "[m]an 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."³⁸

Women did not get the right to vote until 1920.³⁹ Even as late as

³³ *Bradwell v. State*, 83 U.S. (16 Wall.) 130, 139 (1873) (holding that, once Myra Bradwell relocated from Vermont to Illinois, her right to practice law in Vermont was not federally transferrable to Illinois under the Fourteenth Amendment and the Privileges and Immunities Clause).

³⁴ *Id.* at 139 ("We agree . . . that there are privileges and immunities belonging to the citizens of the United States . . . which a State is forbidden to abridge. But the right to practice in the courts of a State is not one of them.")

³⁵ *Id.* at 133 (referring to 705 ILL. COMP. STAT., 205, amended by Laws 1895, p. 79, §1; Laws 1965, p. 34, § 1, eff. July 1, 1965; Laws 1967, p. 3675, §1, eff. Sept. 7, 1967).

³⁶ *Id.* at 132 (quoting *Bradwell v. State*, 55 Ill. 535, 539 (1869)). *But see* *Frontiero v. Richardson*, 411 U.S. 677, 685 (noting that the concepts of the "destiny and mission" of woman that are contained in the *Bradwell* opinion have resulted in "our statute books gradually [becoming] laden with gross, stereotyped distinctions between the sexes.")

³⁷ *Bradwell*, 83 U.S. (16 Wall), at 131 (quoting *Bradwell v. State*, 55 Ill. 535, 535-36 (1869)).

³⁸ *Id.* at 141 (Bradley, J., concurring).

³⁹ U.S. CONST. amend. XIX ("The right of citizens of the United States to vote shall not be denied or abridged by any State on account of sex.")

1948, after many women joined the work force during World War II,⁴⁰ Justice Felix Frankfurter, writing for the Court in *Goesaert v. Cleary*,⁴¹ upheld the constitutionality of a Michigan law that prohibited women from being licensed bartenders unless they were either married to or the daughter of a male bar owner.⁴² Frankfurter acknowledged that “[w]e are, to be sure, dealing with a historic calling. We meet the alewife, sprightly and ribald in Shakespeare, but centuries before him she played a role in the social life of England.”⁴³ Colorful history notwithstanding, Frankfurter concluded that the law was permissible because “[t]he Fourteenth Amendment did not tear history up by the roots, and the regulation of the liquor traffic is one of the oldest and most untrammelled of legislative powers.”⁴⁴ He further reasoned that, “bartending by women may . . . give rise to moral and social problems,”⁴⁵ allowing Michigan to draw a distinction between women bar owners and women employed as bartenders in male-owned establishments.⁴⁶ Frankfurter used a test of

⁴⁰ “Women comprised 37 percent of the work force by war’s end, compared with 27.6 percent before Pearl Harbor, and women in factory work increased 460 percent during the war.” *Rosie the Riveter Symbolized Wartime Changes For Women, Blacks*, Deborah Zabarenko, December 1, 1991, available in LEXIS, Reut file. See also Jean H. Baker, *Child Care: Will Uncle Sam Provide a Comprehensive Solution For American Families?*, 6 J. CONTEMP. HEALTH L. & POL’Y 239, 275 (Spring 1990).

⁴¹ 335 U.S. 464 (1948)

⁴² *Goesaert*, 335 U.S. at 466 (discussing the constitutionality of 1934 Mich. Pub. Acts 133 § 19 (a), Mich. Stat. Ann. § 18.990 (1) (Cum. Supp. 1947) (repealed after 1948)).

⁴³ *Id.* at 465 (citing JUSSEURAND, ENGLISH WAYFARING LIFE I THE MIDDLE AGES, 133, 134, 136-37 (1889)).

⁴⁴ *Goesaert*, 335 U.S. at 465. See also *Duckworth v. Arkansas*, 314 U.S. 390 (1941) In this case the Supreme Court upheld an Arkansas statute that required interstate transporters of intoxicating liquors to apply for and obtain a permit for a nominal fee against a Commerce Clause attack. “[The Twenty-first Amendment] grants the states much greater control over interstate liquor traffic than over commerce in any other commodity.” *Id.* at 397 (Jackson, concurring).

⁴⁵ *Goesaert*, 335 U.S. at 466 (“Michigan evidently believes that the oversight assured through ownership of a bar by a barmaid’s husband or father minimizes hazards that may confront a barmaid without such protecting oversight.”).

⁴⁶ *Id.* at 467 (“Nor is it unconstitutional for Michigan to withdraw from women the occupation of bartending because it allows women to serve as waitresses where liquor is dispensed.”).

reasonableness, stating that, “[s]ince the line they have drawn is not without basis in reason, we cannot give ear to the suggestion that the real impulse behind this legislation was an unchivalrous desire of male bartenders to try to monopolize the calling.”⁴⁷

Ginsburg later caustically commented that “the High Court said it was all right for the State of Michigan to put the ladies Goesaert, a bar-owning mother and daughter, out of business.”⁴⁸ She noted that, “[t]he majority opinion in *Goesaert* reflects an antiquarian male attitude toward women -- man as provider, man as protector, man as guardian of female morality,”⁴⁹ and that “enlightened jurists in federal and state courts have found *Goesaert* a burden and an embarrassment.”⁵⁰

The Supreme Court did not strike down a sex-based regulation until 1971.⁵¹ After coming very close to ruling that gender should be subject to strict scrutiny in 1973,⁵² the Supreme Court finally settled on an intermediate standard ruling, in 1976, that gender was a quasi-suspect

⁴⁷ *Id.* at 467.

⁴⁸ The Honorable Ruth Bader Ginsburg, *Remarks on Women Becoming Part of the Constitution*, 6 LAW & INEQ. J. 17, 18 (1988).

⁴⁹ Brief of American Civil Liberties Union, *Amicus Curiae* at 40, *Frontiero v. Richardson*, 411 U.S. 677 (1973) (No. 71-1694) reprinted in 76 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 739, 795 (Philip B. Kurland & Gerhard Cooper eds., 1976).

⁵⁰ *Id.* at 795. See, e.g., *Sailor Inn v. Kirby*, 5 Cal. 3d 1, 485 P.2d 529 (1971); *Paterson Tavern & Grill Owners v. McSorleys' Old Ale House*, 57 N.J. 180, 270 A.2d 628 (1970); *Bennett v. Dyer's Chop House*, 350 F. Supp. 153 (N.D. Ohio, 1972).

⁵¹ *Reed v. Reed*, 404 U.S. 71 (1971) (striking down an Idaho statute which designated preference to males over females in administering the estate of one who dies intestate when both are in the same entitlement class, and ruling in favor of the decedent's mother as the estate's administrator instead of the decedent's father).

⁵² *Frontiero v. Richardson*, 411 U.S. 677 (1973) (holding that the federal statutes which declare the wives of uniformed servicemen as dependents for the purposes of obtaining increased quarters, allowances and health benefits violates due process because the husbands of women in the uniformed services do not get such statutory status, and the women must prove their husbands dependency in order to get the same benefits). “[W]e can only conclude that classifications based upon sex, like classifications based upon race, alienage, or natural origin, are inherently suspect, and must therefore be subject to strict judicial scrutiny.” *Id.* at 688.

class, subject to heightened scrutiny.⁵³ Most recently, in 1996, the Supreme Court ruled under heightened scrutiny that the Virginia Military Institute ("VMI"), a publicly-funded all-male college, violated the Equal Protection Clause of the Constitution by excluding women from its rigorous military education.⁵⁴

III. DEVELOPING A STANDARD

Attorneys who are the victims of societal injustice rarely get the opportunity to successfully chart a strategy for changing the entire jurisprudential system regarding that injustice.⁵⁵ According to Ginsburg, the history of gender discrimination jurisprudence is distinct from other areas of social change.⁵⁶ Beginning her career in a world where a state could force a woman out of business based on her gender if it was rationally related to a legitimate state interest,⁵⁷ Justice Ginsburg now sits on the court where the standard of review in cases of sex discrimination

⁵³ *Craig v. Boren*, 429 U.S. 190, 210 (1976) (holding that the Oklahoma statute that makes it illegal to sell 3.2% beer to males under the age of twenty-one while allowing the sale of beer to females over the age of eighteen is a denial of equal protection). "To withstand constitutional challenge, previous case law has established that classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives." *Id.* at 197.

⁵⁴ *United States v. Virginia*, 116 S. Ct. 2264, 2269 (1996) ("[W]e conclude that Virginia has shown no 'exceedingly persuasive justification' for excluding all women from the citizen-soldier training afforded by VMI.").

⁵⁵ Compare with Leon Higginbotham, Jr., Public Address, *Justice Thurgood Marshall: He Knew the Anguish of the Silenced and Gave Them a Voice*, 3 GEO. J. ON FIGHTING POVERTY 163, 164 (stating that, "[a]t oral arguments and conference meetings, in his opinions and dissents, Justice Marshall imparted not only his legal acumen but also his life experiences, constantly pushing and prodding us to respond not only to the persuasiveness of legal argument but also to the power of moral truth.>").

⁵⁶ See Ginsburg, *supra* note 48, at 24 (explaining that, "[i]n the gender-equality area, the Supreme Court was neither out in front of, nor did it hold back, social change. Instead . . . the Court function[ed] as an amplifier-sensitively responding to, and perhaps moderately accelerating, the pace of change, change toward shared participation by members of both sexes in our nation's economic and social life.>").

⁵⁷ See, e.g., *Goesaert v. Cleary*, 335 U.S. 464 (1948) (upholding a law denying women the right to be bartenders unless their husbands or fathers owned the bar).

is so stringent that, to paraphrase Gerald Gunther, it is "strict" in theory and fatal in 'fact'."⁵⁸

A. Reed v. Reed

During the 1970's, the Court grappled with the applicable standard for gender review.⁵⁹ In *Reed v. Reed*, the Court used a rational relationship test to strike down an Idaho statute that gave preference to the idea of selecting male family members as executors of a person's estate.⁶⁰ The Court noted that administrative convenience was not a legitimate basis for preferring men over women.⁶¹

Ginsburg's brief in *Reed* "became known as the 'grandmother brief,' for it was the ancestor of many future legal opinions on women's rights."⁶² Ginsburg provided a fascinating history of legal and social distinctions, both past and present, to reinforce her argument that women should not be discriminated against in the name of chivalry.⁶³ Ginsburg quoted, among others: Thomas Jefferson on record as saying that "[w]ere

⁵⁸ Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1978).

⁵⁹ Compare *Reed v. Reed*, 404 U.S. 71, 76 (1971) (using a rational basis standard by taking the statutory classification based on sex and seeing whether it bears a rational relationship to the state objective that is sought to be advanced by the statute); *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) ("[C]lassifications based on sex . . . are inherently suspect and must therefore be subjected to close judicial scrutiny.") and *Craig v. Boren*, 429 U.S. 190, 197 (1976) ("To withstand constitutional challenge . . . classifications based on gender must serve important governmental objectives and must be substantially related to the achievement of those objectives.).

⁶⁰ *Reed*, 404 U.S. at 75-76.

⁶¹ *Id.* at 76 (holding that the objective of the State to reduce the workload of the probate courts by eliminating one class of contestants is arbitrary and unconstitutional under the Equal Protection Clause).

⁶² AYER, *supra* note 3, at 48. In the brief, Ginsburg argued for strict scrutiny for gender based regulations. Brief for Appellant at 21, 40, 41, *Reed v. Reed*, 404 U.S. 71 (1970) (No. 430) *microformed* on U.S. Supreme Court Records and Briefs (Microform Inc.) [hereinafter *Reed Brief*] (arguing that "sexual classifications are properly treated as suspect" and "strict scrutiny of classifications" is warranted).

⁶³ *Reed Brief*, *supra* note 62, at 25-32.

our state a pure democracy there would still be excluded from our deliberations women, who, to prevent deprivation of morals and ambiguity of issues, should not mix promiscuously in gatherings of men,"⁶⁴ Alexis de Toqueville, who in the early nineteenth century observed the distinctions that withdrew women from many aspects of American life,⁶⁵ and Gunnar Myrdal, who wrote that "[w]hen a legal status had to be found for the imported Negro servants in the seventeenth century, the nearest and most natural analogy was the status of women and children."⁶⁶ She explained that there is "kinship between race and sex," and that:

The history of western culture, and particularly of ecclesiastical and English common law, suggests that the traditionally subordinate status of women provided models for the oppression of other groups. The treatment of a woman as her husband's property, as subject to his corporal punishment, as incompetent to testify under canon law, and as subject to numerous legal and social restrictions based upon sex, were precedents for the later treatment of slaves.⁶⁷

Ginsburg then highlighted areas where, despite some legislation, women were still treated unequally under the law. These areas included: men being the presumed head of the household,⁶⁸ women and their role as

⁶⁴ *Id.* at 26

⁶⁵ *Id.*

⁶⁶ *Id.* at 29.

⁶⁷ *Reed Brief, supra* note 62, at 18 (quoting Dr. Pauli Murray, *The Negro Woman's Stake in the Equal Rights Amendment*, 6 HARV. CIV. RTS. CIV. LIB. LAW REV. 253, 257 (1971)).

⁶⁸ *Id.* at 32-34. See, e.g., Cheryl I. Harris, *Finding Sojourner's Truth: Race, Gender, and the Institution of Property*, 18 CARDOZO L. REV. 309, 349 (1996) (noting that married women did not have the right to own property because that right was reserved for the male head of the household); Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C.L. REV. 1103, 1112 (1989) (stating that when a woman "fulfilled her marital obligations" and did not challenge "her husband's primacy as head of the household" she was entitled to his economic support even in divorce, but when she failed to perform those domestic obligations she was

mothers,⁶⁹ women's rights and responsibilities in criminal law, including jury service⁷⁰ and sex crimes,⁷¹ and women's issues involving employment.⁷²

Ginsburg had to explain away disturbing precedents, including *Muller v. Oregon*,⁷³ and *Goesaert v. Cleary*,⁷⁴ which she did admirably. She found support for these arguments in both state and lower federal court cases which either disregarded the rational basis analysis in favor of strict scrutiny, or found that there was no rational basis for the challenged statute.⁷⁵

Using strict scrutiny because gender is a suspect class, she next

then "guilty of marital offense and thus forfeited her right to spousal support . . .").

⁶⁹ *Reed Brief, supra* note 62, at 34-35. See, e.g., Elizabeth A Reiley, *The Rhetoric of Disrespect: Uncovering the Faulty Premises Infecting Reproductive Rights*, 5 AM. U. J. GENDER & L. 147, 157-8 (1996) (noting that "the United States Supreme Court has consistently viewed woman through their reproductive capacity" and the "law has treated women first and foremost as potential or actual mothers" and not as "an independent person with interests and needs.").

⁷⁰ *Reed Brief, supra* note 62, at 35. See, e.g., Reiley, *supra* note 69, at 172 (discussing how depriving women of their civil responsibilities such as jury duty "treats women as unworthy and incapable of exercising responsibility and, therefore, power . . .").

⁷¹ *Reed Brief, supra* note 62, at 35-36. See, e.g., Reiley, *supra* note 69, at 174 (noting that the Supreme Court upheld a statutory rape law which allowed males to be potential violators due to the "Court's belief that males had to be deterred from teenage sex by the criminal law, whereas females were deterred by always being the victims of intercourse and pregnancy . . .").

⁷² *Reed Brief, supra* note 62, at 37-40. See, e.g., Kathryn Branch, Note, *Are Women Worth as Much as Men?: Employment Inequities, Gender Roles, and Public Policy*, 1 DUKE J. GENDER L. & POL'Y 119, 120 (1994) (reiterating that men earn more than women and that women are forced into "lower paying, gender-segregated jobs with few opportunities for upward mobility").

⁷³ 208 U.S. 412 (1908) (upholding labor regulations that limited the hours women could work during the sweatshop era).

⁷⁴ 335 U.S. 464 (1948) (upholding a Michigan law that prohibited women from becoming licensed bartenders unless they were either married to or the daughter of a male bar owner).

⁷⁵ *Reed Brief, supra* note 62, at 41-53 (referring to *Mengelkoch v. Industrial Welfare Commission*, 437 F.2d 563 (9th Cir. 1971); *Seidenberg v. McSorleys Old Ale House*, 317 F.Supp. 593 (S.D.N.Y. 1970); *Paterson Tavern & Grill Owners Ass'n v. Borough of Hawthorne*, 57 N.J. 180 (1970)).

showed there was simply no compelling state interest.⁷⁶ For example, if credence was given to the proffered justification under the Idaho statute,⁷⁷ there would still be a hearing if there were "three brothers and one sister each [seeking] appointment . . . even though the female applicant would be eliminated from the competition."⁷⁸ She concluded this portion of her argument by requesting analysis under strict scrutiny, noting that, "[t]hrough this device of law-mandated subordination of 'equally entitled' women to men, the dominant male society, exercising its political power, has secured women's place as the second sex."⁷⁹

Finally, she argued that even if the court analyzed the Idaho statute under the standard rational basis test, with the presumption in favor of the regulation, it would not pass.⁸⁰ "[T]he statute is readily assailable under the less stringent reasonable-relationship test" and "[t]he mandatory preference to males lacks the constitutionally required fair and substantial relation to a permissible legislative purpose."⁸¹ According to Ginsburg, women were not mentally inferior to men, and therefore men were not "better qualified to act as [] administrator[s]."⁸² She bolstered her position by explaining that by the late 1960's, women were well represented in the work force, well represented in institutions of higher learning, and had a

⁷⁶ *Id.* at 53-59.

⁷⁷ The justification offered for IDAHO CODE § 15-314 was for administrative convenience to reduce the number of hearings required when estate control was challenged by two parties. *Reed Brief, supra* note 62, at 58.

⁷⁸ *Reed Brief, supra* note 62, at 58.

⁷⁹ *Id.* at 59. Perhaps the most remarkable aspect of the brief is that Ginsburg used a variation on rational basis analysis as the first portion of her fall-back position in the event that the Court refused to grant suspect class status to gender. Ginsburg wrote, "appellant urges application of an intermediate test," and suggested a simple change in the rational basis test. She asked the court to "reverse the presumption of a statute's rationality when the statute accords a preference to males." *Id.* at 60.

⁸⁰ *Id.* at 60-67.

⁸¹ *Reed Brief, supra* note 62, at 60 (citing *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920); *Gulf, Colorado & S. & F. Ry. v. Ellis*, 165 U.S. 150, 155 (1897)).

⁸² *Id.* at 62.

good showing in the military.⁸³ Moreover, the requirements of an estate administrator were minimal, and required little business experience.⁸⁴ Most housewives, responsible for running a household, and often, the family's financial affairs, would be more qualified than many men.⁸⁵

She concluded:

To eliminate women who share an eligibility category with a man, when there is no basis in fact to assume that women are less competent to administer than are men, is patently unreasonable and constitutionally impermissible. A woman's right to equal treatment may not be sacrificed to expediency.⁸⁶

The *Reed* Court accepted Ginsburg's version of the standard rational basis analysis, incorporating the "substantially related" language into the final decision.⁸⁷

B. *Frontiero v. Richardson*

By 1972, Ginsburg's amicus brief in *Frontiero v. Richardson*⁸⁸

⁸³ *Id.* at 63-64 ("In 1971, 4,500,000 women were employed as professional or technical workers as compared to 6,706,000 men. In 1967, women comprised 40.6% of institutions of higher learning with close to 300,000 women enrolled. In 1971, 13,000 women were in the Armed Forces.").

⁸⁴ *Id.* at 65.

⁸⁵ *Id.* at 66.

⁸⁶ *Reed Brief, supra* note 62, at 67.

⁸⁷ *Reed v. Reed*, 404 U.S. at 76 (citing *Royster Guano Co. v. Virginia*, 235 U.S. 412, 415 (1920) as stating a classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relationship to the object of the legislation").

⁸⁸ Amicus Brief for Appellant at 22, *Frontiero v. Richardson*, 411 U.S. 677 (1973)(No. 71-1694) reprinted in 91 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 165-204 (Philip B. Kurland & Gerhard Casper eds., 1976) [hereinafter *Frontiero Brief*]. Ironically, Erwin Griswold was the United States

described two commonly articulated review standards: strict scrutiny, requiring a compelling government interest, and rational basis, requiring reasonableness and "a fair and substantial relation to the object of the legislation."⁸⁹ Ginsburg wrote that:

some of the decisions of this court suggest an intermediate standard: the legislation is 'closely scrutinized,' and the proponent of the challenged classification is required to show that it is 'necessary to the accomplishment of legitimate [legislative] objectives.'⁹⁰

Arguing that the regulations at issue⁹¹ were unconstitutional under all of the standards, Ginsburg discussed the close scrutiny portion of the intermediate standard based on Justice Burger's analysis in *Bullock v. Carter*,⁹² just prior to discussion of the substantially related portion of the rational basis test based on *Royster Guano v. Virginia*.⁹³

Oral arguments were also interesting in *Frontiero*.⁹⁴ Ginsburg again requested that the Court grant suspect class status to gender-based discrimination, noting that courts were confused after *Reed* and needed

Attorney General at the time and was listed as the lead attorney on the Brief for Appellee.

⁸⁹ *Id.*

⁹⁰ *Id.* at 23 (citing *Bullock v. Carter*, 405 U.S. 134, 144 (1972))(alteration in original).

⁹¹ 37 U.S.C. §§ 401, 403 (1997) and 10 U.S.C. §§ 1072, 1076 (1997) (requiring that male spouses of female military personnel prove that they are at least one-half dependent on their female counterpart in order to get benefits while giving a presumption of dependency to female spouses of male military personnel).

⁹² 405 U.S. 134 (1972) (holding a Texas statute that required candidates for local office to pay a fee as high as \$8,900 in order to run was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment).

⁹³ *Frontiero Brief, supra* note 88, at 59-60 (discussing *Royster Guano v. Virginia*, 235 U.S. 412 (1920)).

⁹⁴ Ruth Bader Ginsburg, Oral Argument on Behalf of the Amicus Curiae (Jan. 17, 1973) in 91 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 165-204 (Philip B. Kurland & Gerhard Casper eds., 1978).

guidance.⁹⁵ Ginsburg stated:

In asking the Court to declare sex a suspect criterion, *amicus* argues a position forcibly stated in 1837 by Sarah Grintey, noted abolitionist and advocate of equal rights for women. She spoke, not elegantly, but with unmistakable clarity. She said, 'I ask no favor for my sex. All I ask of our brethren is that they take their feet off our necks.'⁹⁶

She then concluded by requesting reversal of the lower court's decision and that relief be granted.⁹⁷

Although the regulation was struck down, the *Frontiero* Court was deeply divided regarding the standard of review. Four Justices, Brennan, Marshall, White, and Douglas, voted in favor of strict scrutiny, while Stewart, Powell, Burger and Blackmun concurred in the judgment but refused, for various reasons, to decide on the proper standard of review.⁹⁸ Justice Rehnquist provided the lone dissenting vote.⁹⁹

Justice Brennan's opinion for a plurality of the Court incorporated more than the strict standard of review requested by Ginsburg.¹⁰⁰ It incorporated the history of gender discrimination as articulated by Ginsburg in both the *Reed* and the *Frontiero* briefs.¹⁰¹

⁹⁵ *Id.* See also *supra* note 59 and accompanying text.

⁹⁶ *Id.*

⁹⁷ *Id.* at 204.

⁹⁸ *Frontiero v. Richardson*, 411 U.S. 677, 691 (1973). Justices Powell, Blackmun, and Burger concurred partly because of the ongoing but ultimately unsuccessful ratification process of the Equal Rights Amendment. *Id.* at 692.

⁹⁹ *Id.* at 691 ("[D]issenting for the reasons stated by Judge Rives in his opinion for the district court.").

¹⁰⁰ *Id.* at 682.

¹⁰¹ See, e.g., *Reed Brief*, *supra* note 62, at 25-31 and *Frontiero Brief*, *supra* note 88, at 11-19. These sections are virtually identical and were incorporated in abbreviated form into the plurality opinion in *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973).

C. Craig v. Boren

By the time Ginsburg wrote the amicus brief in *Craig v. Boren*¹⁰² in 1976, the Court and litigators had a body of cases in addition to *Reed* and *Frontiero*, with only one loss in *Kahn v. Shevin*.¹⁰³

*Craig v. Boren*¹⁰⁴ involved an Oklahoma law that allowed women over the age of 18 to purchase 3.2 beer, while denying that option to men until they reached 21.¹⁰⁵ The state provided two justifications for the regulation. First, they argued that highway accident statistics indicated that young men were more likely to be involved in automobile accidents while intoxicated.¹⁰⁶ Second, they argued that the state had the right to regulate alcohol under the Twenty-first Amendment, finding support in Justice Frankfurter's acceptance and support of that argument in *Goesaert*.¹⁰⁷

By the time Ginsburg wrote the *Craig* amicus brief, most of the factors that make up the current intermediate scrutiny test were in place and articulated in the brief. Notably absent was a strenuous argument in favor of strict scrutiny. Instead, Ginsburg referred to the multiple standards used by the Court in recent precedents.¹⁰⁸ She briefly mentioned "close scrutiny" as the standard of review, and argued that the "state

¹⁰² 429 U.S. 190 (1976).

¹⁰³ 416 U.S. 351 (1974) (upholding a lower real estate tax rate for widows rather than for widowers because it compensated women for past and present economic disadvantage).

¹⁰⁴ 429 U.S. 190 (1976).

¹⁰⁵ *Craig*, 429 U.S. at 191-92 (discussing OKLA. STAT. tit. 37, § 241, 245 (1958 & Supp. 1976)).

¹⁰⁶ *Id.* at 199.

¹⁰⁷ *Id.* at 204. The Court was not impressed by the *Goesaert* argument noting that "that decision is disapproved." *Id.* at 210 n.23.

¹⁰⁸ Amicus Brief for Appellant at 15, *Craig v. Boren*, 429 U.S. 190, 195 (1976) (No.75-628) reprinted in 91 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 165-204 (Philip B. Kurland & Gerhard Cooper eds., 1976)[hereinafter *Craig Brief*] (questioning the uncertainty from the Court in applying the "compelling state interest" standard, the "rational basis" standard, or the "something in between" standard to determine the constitutional test for sex discrimination in *Stanton v. Stanton*, 421 U.S. 17 (1975)).

officials have utterly failed to demonstrate that the supposed legislative objective...is fairly, *substantially* and sensibly served by a 3.2 beer sex/age line."¹⁰⁹ She also discussed the Court's condemnation of "*over broad generalization[s]*" concerning the behavior, proclivities and preferences of the two sexes,"¹¹⁰ and of similar disapproval of "*post hoc attempts to hypothesize an appropriate rationale.*"¹¹¹

All the elements were basically in place and the burden was now on the state to prove the validity of the regulation rather than on the challenging party.¹¹² All that was missing from the current intermediate standard in Ginsburg's *Craig* brief was the appropriate name for the government interest, and the phrase "exceedingly persuasive."¹¹³

The Court finally found an appropriate name for the government objective.¹¹⁴ Ruling that the Oklahoma regulation was unconstitutional, they articulated a new standard for analysis of gender-based regulations, requiring "an *important* government objective" and that the regulation be "substantially related" to that objective.¹¹⁵

D. The Current Test

The final portion of the current test, and an ongoing source of irritation to Chief Justice Rehnquist, does not appear to be penned by

¹⁰⁹ *Craig Brief, supra* note 108, at 12,13 (emphasis added).

¹¹⁰ *Id.* at 13 (emphasis added).

¹¹¹ *Id.* at 20 (emphasis added)

¹¹² Brief of Appellees at 1-2, *Craig v. Boren*, 429 U.S. 190 (1976) (No. 75-628) *reprinted in* 91 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 165-204 (Philip B. Kurland & Gerhard Casper eds., 1978).

¹¹³ *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 273 (1979). The Court, in recognizing that "public employment is not a constitutional right" and that "states have wide discretion in framing employee qualifications," sharpened its test to determine sex discrimination within the scope of governmental jobs by adding "exceedingly persuasive" to the justification of seeking equal protection under the Fourteenth Amendment.

¹¹⁴ *Craig*, 429 U.S. at 197.

¹¹⁵ *Id.* In *Craig*, the statistical differences between male and female intoxicated-driving records were insufficient criteria to differentiate the gender distinctions under Oklahoma's 3.2% beer statute. *Id.* at 204.

Ginsburg. It was first articulated by the Court in *Personnel Administrator of Mass. v. Feeney*.¹¹⁶ The Court noted that "precedents dictate that any state law overtly or covertly designed to prefer males over females in public employment would require an exceedingly persuasive justification to withstand a constitutional challenge under the Equal Protection Clause."¹¹⁷ In 1981, Justice Marshall used the same phrase in *Kirchberg v. Feenstra*,¹¹⁸ where he wrote that the "[b]urden remains on the party seeking to uphold a statute that expressly discriminates on the basis of sex to advance an 'exceedingly persuasive justification' for the challenged classification."¹¹⁹ Justice O'Connor articulated that standard in her decision for the Court in *Mississippi University for Women v. Hogan*,¹²⁰ where she wrote that there must be an "exceedingly persuasive justification" for any gender based government regulation.¹²¹

Notwithstanding the fact that she did not pen all the factors that make up the current test, Ginsburg's work with the Court, by both feeding it ideas and receiving ideas back to mold into subsequent arguments, helped make the test what it is today. It was fitting, therefore, to have United States Supreme Court Justice Ruth Bader Ginsburg write the majority decision in *United States v. Virginia*.¹²² Justice Ginsburg defined the standard of review for gender discrimination cases as follows:

Focusing on the differential treatment or denial of

¹¹⁶ 442 U.S. 256 (1979) (holding that a Massachusetts statute giving lifetime preference in civil service jobs to male and female veterans over non-veterans, regardless of test score achievement, does not discriminate against women in violation of the Equal Protection clause of the Fourteenth Amendment).

¹¹⁷ *Id.* at 273.

¹¹⁸ 450 U.S. 455, 461 (1981) (holding that a Louisiana statute which gave a male spouse the unilateral right to dispense with jointly owned property without spousal consent was unconstitutional).

¹¹⁹ *Id.* at 461.

¹²⁰ 458 U.S. 718 (1982) (holding *Mississippi University for Women*, a state-supported school whose policy limited enrollment to women and denied acceptance to qualified males, violated the Equal Protection Clause of the Fourteenth Amendment).

¹²¹ *Id.* at 724.

¹²² 116 S. Ct. 2264 (1996).

opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is "exceedingly persuasive." The burden of justification is demanding and it rests entirely on the State. The State must show "at least that the [challenged] classification serves "important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives. The justification must be genuine, not hypothesized or invented post hoc in response to litigation. And it must not rely on over broad generalizations about the different talents, capacities, or preferences of males and females."¹²³

The seven-to-one decision¹²⁴ declared the state supported Virginia Military Institute ("VMI") policy of excluding women, as well as the state's proposal to set up a separate all-female school, a violation of the Equal Protection Clause of the United States Constitution.¹²⁵

IV. EQUAL PROTECTION AND VMI

The question in VMI was straightforward: whether a prestigious publicly funded military college could exclude women without violating the Equal Protection Clause of the United States Constitution.¹²⁶ Virginia contended that not only was it promoting diversity in its education system, but that VMI's unique and rigorous "adversarial" system with its lack of

¹²³ 116 S. Ct. at 2275 (footnotes deleted).

¹²⁴ Justice Antonin Scalia provided the lone dissenting vote. Justice Thomas recused himself because his son was a student at VMI. See Donald P. Baker, *By One Vote, VMI Decides to Go Coed; Nation's Last All-Male Military School to Enroll Women Starting in '97*, WASH. POST, Sept. 22, 1996, at A01.

¹²⁵ *United States v. Virginia*, 116 S. Ct. at 2287.

¹²⁶ *Id.* at 2264.

privacy and its rigorous physical training was unsuited for women.¹²⁷ Virginia further contended that by providing women with a similar program at the Virginia Women's Institute for Leadership ("VWIL") at Mary Baldwin College, they had remedied any injustice or inequality created by the exclusion.¹²⁸

A. Important Governmental Interest or Post Hoc Justification

Writing for the Court, Justice Ginsburg quickly disposed of Virginia's claim that maintaining an all male military college to promote diversity was an important governmental interest.¹²⁹ She pointed out that the University of Virginia, established in 1839, did not admit women until 1970, making the struggle the longest and bitterest "struggle for the admission of women to a state university".¹³⁰ Virginia's "recent [and] past history . . . indicates action more deliberate than anomalous: First, protection of women against higher education; next, schools for women far from equal in resources and stature to schools for men; finally, conversion of separate schools to coeducation."¹³¹

B. Substantially Related/Exceedingly Persuasive Justification

Ginsburg concluded that there was no persuasive evidence that excluding women "further[s] . . . a state policy of diversity. . . . However 'liberally' this plan serves the State's sons, it makes no provision whatever for her daughters."¹³² Of course, without an important governmental interest, there was nothing for the State policy to be substantially related to.

¹²⁷ *Id.* at 2272.

¹²⁸ *Id.* at 2272 (discussing Virginia's assertion that the proposed remedial course of action to set up "a parallel program for women: Virginia Women's Institute for Leadership" is consistent with the State's policy to promote diversity).

¹²⁹ *Id.* at 2277.

¹³⁰ *Virginia*, 116 S. Ct. at 2277-78 (footnotes deleted).

¹³¹ *Id.* at 2278.

¹³² *Id.* at 2279.

C. Over broad Generalizations

Ginsburg next disposed of the claim that women could not go to VMI without dramatic alterations to the program that would "transform, indeed 'destroy', VMI's program."¹³³ VMI claimed that few women could cope with the lack of privacy and that most women would be totally incapable of dealing with the intense physical training program and the adversative system.¹³⁴ It defended the VWIL program by asserting that in order to make the VMI program available to women it would have to alter the program and that:

[n]either sex would be favored by the transformation . . . as [m]en would be deprived of the unique opportunity currently available to them; women would not gain that opportunity because their participation would 'eliminate the very aspects of [the] program that distinguish [VMI] from other institutions of higher education in Virginia.'¹³⁵

Ginsburg pointed out that during the lower court proceeding, expert witnesses for VMI and the State of Virginia acknowledged that "some women . . . are capable of all the individual activities required of VMI cadets" and that "some women can meet the physical standards [VMI] now imposes on men."¹³⁶

She paralleled the battle for entrance to VMI with the historical battles for access to law school, medical school and the federal military academies.¹³⁷ Women, a court noted in 1876, must spend their time and

¹³³ *Id.*

¹³⁴ See *United States v. Commonwealth*, 766 F. Supp. 1407, 1412-1413 (W.D.Va. 1991) (explaining expert testimony which stated that "[t]he adversative model of education is simply inappropriate for a vast majority of women.").

¹³⁵ *Virginia*, 116 S. Ct. at 2279 (citations omitted)

¹³⁶ *Id.* at 2279 (citing *United States v. Commonwealth*, 766 F.Supp. at 1412).

¹³⁷ *Id.* at 2280.

energy to "train and educate the young" leaving them insufficient time to "attain[] the eminence to which the true lawyer should aspire."¹³⁸ In 1925, Columbia Law School expressed concern that if it admitted women "the choicer, more manly and red-blooded graduates of our great universities would go to Harvard Law School."¹³⁹

Women were also unwelcome in medical school, prompting a medical textbook author in 1869 to express concern that men and women would be in the same class discussing reproduction.¹⁴⁰ Finally, despite resistance, women entered all the federal military academies, and "have graduated at the top of their class at every [one]."¹⁴¹ Ginsburg concluded that "[s]urely [the school's] goal is great enough to accommodate women . . . [and] . . . is not substantially advanced by women's categorical exclusion."¹⁴²

Justice Ginsburg then disposed of the argument that VMI and VWIL "afford[ed] . . . both genders benefits comparable in substance, [if] not in form and detail."¹⁴³ VWIL provided only a watered down military program far less physically demanding than that offered at VMI.¹⁴⁴ Furthermore, the student body was less rigidly screened academically, the faculty included fewer Ph.D recipients, and the school did not offer the math, science, and engineering programs offered at VMI.¹⁴⁵ The physical training facilities at VWIL were inferior, offering only "'two multi-purpose fields' and 'one gymnasium'" compared to VMI, with its extensive outdoor facilities, which included a football stadium, baseball, soccer and lacrosse

¹³⁸ *Id.*

¹³⁹ *Id.* at 2281.

¹⁴⁰ *Virginia*, 116 S. Ct. at 2281.

¹⁴¹ *Id.* at 2281 n.13 (citing the Defense Advisory Committee on Women in the Services, Report on the Integration and Performance of Women at West Point 64 (1972)).

¹⁴² *Id.* at 2282.

¹⁴³ *Id.* at 2282 (quoting *United States v. Commonwealth*, 44 F.3d 1229, 1240 (4th Cir. 1995)).

¹⁴⁴ *Id.* at 2283. See *United States v. Commonwealth*, 766 F. Supp. 1407, 1413-1414 (W.D.Va. 1991) ("No other school in Virginia or in the United States, public or private, offers the same kind of rigorous military training as is available at VMI.").

¹⁴⁵ *Virginia*, 116 S. Ct. at 2284.

fields and numerous multi-purpose fields, and its similarly extensive indoor facilities, which included an eleven lap track, pool, rifle range and a wrestling and martial arts center.¹⁴⁶ VMI had an endowment of \$131 million compared to \$5.4625 million at VWIL and \$19 million at Mary Baldwin College.¹⁴⁷ Finally, Justice Ginsburg noted that VWIL graduates would receive none of the benefits that come from the network of graduates and admirers who would hire a VMI graduate.¹⁴⁸

D. Gender and Race Revisited

Justice Ginsburg compared the program, the facilities and the benefits afforded women at VWIL to those in *Sweatt v. Painter*,¹⁴⁹ where the Court struck down a similar remedy created to keep African Americans out of the University of Texas Law School.¹⁵⁰ A separate Texas law school created for African Americans with no network, sub-standard facilities, and no accreditation was in no way providing equal opportunity to the African American law students excluded from the University.¹⁵¹ She concluded that "Virginia has not shown substantial equality in the separate educational opportunities that the State supports at VWIL and VMI."¹⁵²

In sum, Ginsburg found no "important government objective" in keeping women out of VMI and no "exceedingly persuasive justification" for the classification based on gender.¹⁵³ She found that "[t]he justification . . . [was] invented post hoc in response to litigation."¹⁵⁴ Finally, she found

¹⁴⁶ *Id.* at 2284-2285.

¹⁴⁷ *Id.* at 2285.

¹⁴⁸ *Id.*

¹⁴⁹ 339 U.S. 629 (1950).

¹⁵⁰ *Id.* at 635 ("Petitioner may claim his full constitutional right: a legal education equivalent to that offered by the State to students of other races.").

¹⁵¹ *United States v. Virginia*, 116 S.Ct. at 2285.

¹⁵² *Id.* at 2286.

¹⁵³ 458 U.S. 718, 724 (1982).

¹⁵⁴ *Id.* at 2275 (quoting *Mississippi Univ. For Women v. Hogan*, 429 U.S. 718, 724 (1982)).

that the decision to exclude women "rel[ie]d] on over broad generalizations about the different talents, capacities, or preferences of males and females."¹⁵⁵

Notwithstanding those on the Court who disagree with the current standard, heightened scrutiny is the rule for sex-based discrimination.¹⁵⁶ It is a standard that evolved gradually despite adversity and opposition to women being equal under the law.¹⁵⁷ After VMI, it is highly unlikely that gender distinctions that are based on old cultural and legal stereotypes will survive Supreme Court scrutiny.¹⁵⁸ And, as Martha Stewart (who has made a fortune expounding the joy and art of homemaking) says, "It's a good thing."¹⁵⁹

V. THE HOUSE THAT RUTH BUILT

When Ruth Bader Ginsburg graduated from Columbia Law School, she encountered pervasive gender bias that reflected centuries of cultural stereotyping that prevented women from fully participating in

¹⁵⁵ *Id.* (citing *Weinberger v. Wiesenfeld*, 420 U.S. 636, 643, 648 (1975) and *Califano v. Goldfarb*, 430 U.S. 199, 223-224 (1977)).

¹⁵⁶ In his concurrence, Chief Justice William Rehnquist objected to the addition of the "exceedingly persuasive" standard as too confusing. *Id.* at 2288 (Rehnquist, C.J., concurring in judgment). In vigorous dissent, Justice Antonin Scalia objected to the decision, writing that "the rationale of today's decision is sweeping: for sex based classifications, [it amounts to] a redefinition of intermediate scrutiny that makes it indistinguishable from strict scrutiny." *Id.* at 2306. Justice Scalia believed that the VMI and VWIL programs were not violative of Equal Protection under a heightened scrutiny analysis. *Id.* at 2292. Moreover, he argued that if the standard required alteration, history provided more justification for altering the standard downward to rational basis scrutiny than for upgrading it to strict scrutiny. *Id.* at 2295-96.

¹⁵⁷ See *supra* text accompanying notes 116-125.

¹⁵⁸ See *supra* text accompanying notes 126-149.

¹⁵⁹ "Stewart has been voted one of America's 20 most influential people by TIME Magazine. It's a good thing" - a phrase Stewart used in a 1994 American Express commercial is a household word." Simone Worrall, *Million Dollar Apple Pie; Profile: Martha Stewart*, INDEPENDENT (London), Oct. 12, 1997, at 2, available in 1997 WL 12350595.

society.¹⁶⁰ As a result, she worked to clear away the cultural debris during the 1970's, and laid a foundation for a whole new area of jurisprudence.¹⁶¹ With the VMI decision, she finally finished building the house, except that it was a school. It was a school that tried hard to keep women out because women were not considered tough enough, or strong enough, or important enough.¹⁶²

In the house that Ruth built, men and women do not have to be the same, but they can be if they so desire. Men can collect benefits from their wives' employment without having to overcome a presumption that they do not need the money.¹⁶³ Men can even become the family cook. Women can be estate executors without having to overcome a presumption that a man should have the job if both a woman and a man are qualified.¹⁶⁴ Women can go to military school, and get their heads shaved and undergo adversity training if they so desire.¹⁶⁵ Most importantly, women can even be members of the United States Supreme Court.¹⁶⁶ This would have been hard to believe in 1970 when Ruth Bader

¹⁶⁰ See Marsha S. Stern, *Courting Justice: Addressing Gender Bias in the Judicial System*, 96 ANN. SURV. AM. L. 1, 5-6 (1996) (noting that even though Ruth Bader Ginsburg graduated first in her class at Columbia Law School in 1959, all the law firms to which she applied denied her employment due to cultural stereotypes such as: women should not have independent careers from their husbands, law is a "gentlemen's profession" which is unsuitable for women, and women do not possess the necessary "qualifications for forensic strife").

¹⁶¹ See generally Ruth Bader Ginsburg, Essay, *The Progression of Women in the Law*, 28 VAL. U. L. REV. 1161 (1994).

¹⁶² See *United States v. Commonwealth*, 44 F.3d 1229, 1235 (4th Cir. 1995) (stating that "the Commonwealth of Virginia is relying on false stereotypes and generalizations 'that women are not tough enough to succeed in VMI's rigorous, military style program'").

¹⁶³ See, e.g., *Silbowitz v. Secretary of Health, Educ., and Welfare*, 397 F. Supp. 862 (S.D. Fla. 1975) (holding that a Social Security Act provision which required a husband who was seeking Social Security insurance benefits through his wife's employment benefits show that he received one-half or more of his support from her violated the Equal Protection Clause of the Fourteenth Amendment because the provision did not require the same from a woman and therefore was a sex-based discrimination).

¹⁶⁴ See *Reed v. Reed*, 404 U.S. 71 (1971).

¹⁶⁵ See *United States v. Virginia*, 116 S. Ct. 2264 (1996).

¹⁶⁶ To date, only two women have been appointed to the U.S. Supreme Court: Justice Sandra Day O'Connor and Justice Ruth Bader Ginsburg. Sheila M. Smith, Comment, *Justice Ruth Bader Ginsburg and Sexual Harassment Law: Will the Second Female Supreme Court*

Ginsburg wrote one of the most important appellate briefs in the gender discrimination area, the "grandmother brief."¹⁶⁷

Justice Become the Court's Women's Right Champion?, 63 U. CIN. L. REV. 1893 (1993).

¹⁶⁷ Brief for Appellant, *Reed v. Reed*, 404 U.S. 71 (1970) (No. 430) *microformed on U.S. Supreme Court Records and Briefs* (Microform Inc.).

