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## WOMEN AND THE CONSTITUTION: WHERE WE ARE AT THE END OF THE CENTURY

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*In this Madison Lecture, Judge Martha Craig Daughtrey addresses the evolution of the women's rights movement and the Equal Rights Amendment (ERA). Judge Daughtrey traces the history of the ERA from its passage by Congress through its eventual failure during the state ratification process, and considers the parallel development of an equal rights jurisprudence based on the Equal Protection Clause of the Fourteenth Amendment, particularly noting the successes of Justice Ruth Bader Ginsburg in arguing cases before the Supreme Court. After examining this jurisprudence, as well as ensuing changes in social mores and the composition of the Court, Judge Daughtrey asks whether a renewed effort to pass and ratify the ERA is necessary.*

When an amendment is added to the Constitution it has an infinite capacity to bless America if it be wise, and an infinite capacity to curse America if it be unwise.<sup>1</sup>

The basic premise of the Equal Rights [A]mendment is that sex should not be a factor in determining the legal rights of women, or of men.<sup>2</sup>

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\* Circuit Judge, United States Court of Appeals for the Sixth Circuit. This is the revised text of the twenty-ninth annual James Madison Lecture on Constitutional Law delivered at New York University School of Law on October 6, 1999. Appreciation goes to Lewis Bossing for his assistance in the research for this Lecture.

<sup>1</sup> Equal Rights 1970: Hearings on S.J. Res. 61 and S.J. Res. 231 Before the Senate Comm. on the Judiciary, 91st Cong. 8 (1970) [hereinafter Hearings] (statement of Sen. Ervin) (arguing against passage of Equal Rights Amendment (ERA)).

<sup>2</sup> Id. at 298 (statement of Professor Thomas I. Emerson) (testifying in favor of ERA). Professor Emerson's remarks "In Support of the Equal Rights Amendment" are reprinted at 6 Harv. C.R.-C.L. L. Rev. 225 (1971), along with those of Professor Norman Dorsen and Susan Deller Ross, see id. at 216 (in favor of ERA), and of Professors Paul A. Freund, see

First, let me say that I am greatly honored to speak at the Law School today, in the company of friends I have made during the almost twenty-five years that I have been privileged to have an association with the School. New York University has a faculty that is unrivaled in its scholarship and its pedagogical talent, and an accomplished student body from which I am proud to claim two of my current law clerks, Rebecca Henry and Lewis Bossing, both of whom are in the audience today. I am particularly honored to be asked to give the James Madison Lecture and, I must say, somewhat intimidated, given the intellectual gifts of the speakers who have preceded me at this podium. My presence here today proves, Dean Sexton, that you can talk me into doing almost anything if you call two years in advance!

Let me begin informally, by telling you how I spent my summer vacation this year. I did not go trekking along the Thames River in England, as I had originally planned, or traipsing up the coast of Maine, as my husband had hoped we would do. Instead, we spent several weeks dickering with mortgage brokers, packing and unpacking boxes, making innumerable trips to Home Depot, and doing the heavy lifting that is associated with buying a new house and moving into it. In the course of cleaning out closets and drawers that had collected much too much stuff over a dozen years, I found this political button, brought home—as I recall—from an ABA meeting some years ago. It reads: “Happy Birthday E.R.A. 1923-1993, You Are Long Overdue!”

About the same time that I found the button, the ABA Journal published a cover story on the renewed efforts to amend the United States Constitution to prohibit discrimination on the basis of gender.<sup>3</sup> As it turns out, the Equal Rights Amendment (ERA) which, if ratified, would have become the twenty-seventh amendment to the Federal Constitution<sup>4</sup>—but which “died” for lack of ratification by three

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id. at 234 (in opposition to ERA), and Philip B. Kurland, see id. at 243 (same), as part of a symposium edition on the proposed constitutional amendment.

<sup>3</sup> See Debra Baker, *The Fight Ain't Over*, A.B.A. J., Aug. 1999, at 52.

<sup>4</sup> In the years since the defeat of the ERA, the last necessary states ratified the current Twenty-Seventh Amendment, which provides that “[n]o law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.” U.S. Const. amend. XXVII. This Amendment was one of twelve proposed by the first Congress in 1789. See Gerald Gunther & Kathleen M. Sullivan, *Constitutional Law* app. A at A-15 n\* (13th ed. 1997). Ten of those twelve were ratified and became the Bill of Rights. See id. A sufficient number of states did not ratify the congressional compensation amendment until 1992, a stretch of over two hundred years. See id. Six states had ratified by the end of the eighteenth century; Ohio ratified in 1873. See Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 *Yale L.J.* 677, 678 (1993). The next to

additional states in 1982—has been reintroduced in the current session of Congress.<sup>5</sup> The prospect of a renewed effort to pass the ERA in Congress and to mount ratification campaigns in the fifty state legislatures raises a number of questions that I would like to explore with you this evening.

Setting aside the issue of symbolic desirability for the moment, the most obvious question, of course, is whether such an undertaking is even necessary at this point in our constitutional history. The answer depends on an understanding of where we are as the century and the millennium turn, and that, I believe, can only be measured in terms of how far we have come, how far we still have to go, and what would be the quickest and, not incidentally, the safest route to take to reach the goal of gender equality. You will indulge me, I hope, as I retrace what will be for many of you a bit of familiar history.

## I

### THE EQUAL RIGHTS AMENDMENT AS HISTORY

One of the milestones in my legal career was my appointment to the faculty of the Vanderbilt University School of Law in the fall of 1972. When I arrived on campus in September, I was the first and the only woman on the law faculty, undoubtedly the beneficiary of some early affirmative action in hiring, and as the comedienne Minnie Pearl would say, I was “just so proud to be there.” I had left behind the fairly narrow and decidedly conservative world of criminal prosecution and had come, I supposed, to a bastion of liberal, politically progressive thought. On my first day at school, I was particularly pleased to be invited to lunch by the two constitutional law professors on the faculty—neither of them “old fogies,” both of them only a year or two older than I. As we walked across campus to the University Club, I brought up the subject of the ERA. It had just passed Congress in March of that year and appeared to be steamrolling its way through the state legislatures. What did these constitutional scholars think of the amendment’s prospects, I asked, and was stunned at the answer: Not much—an effort to “junk up the Constitution,” I was told, that would result in trivializing the field of equal protection. They were solidly against ratification. As I recall, I raised a brief argument in favor of ratification and then fell silent through most of lunch, wondering if the academy was going to be the wonderland of progressive thought that I had imagined it would be. It was not, of course, but

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ratify was Wyoming in 1978. See Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law* 404 (3d ed. 1999).

<sup>5</sup> See H.R. Res. 37, 106th Cong. (1999).

after all, no one is quite as naive as a brand new assistant professor of law. In the end, theirs was the winning position, although the amendment failed, in my judgment, not because of academic arguments about its worth.

In its original form and even in its current stage of development, the United States Constitution speaks only in the male gender. Moreover, as Walter Dellinger has pointed out,

[T]hroughout the process of drafting the Constitution, every draft of every provision used the pronoun "he." It is a commonplace observation that "he" is used in the Constitution in its generic sense as encompassing both genders. This is, of course, technically true. But [one] draft provision casts a very different light on the Constitution's use of the pronoun "he." For this provision, adopted unanimously for the next-to-last draft of the Constitution, uses the phrase "he or she." Although the pronouns drop out altogether from the final wording of this provision of the Constitution, it is nonetheless extraordinary to find the Convention unanimously adopting a draft provision using the phrase "he or she." At the conclusion of the compromise over navigation and slavery, Mr. Butler moved to insert the following clause: "If any person bound to service or labor in any of the U[nited] States shall escape into another State, *he* or *she* shall not be discharged from such service or labor . . . but shall be delivered up to the person justly claiming their service or labor." Throughout the Constitution and all its drafts, "he" is used to refer to President, Vice-President, Senator; "she" appears but once in the evolving drafts of the Constitution, and "she" can be one, and only one thing: a fugitive slave.<sup>6</sup>

The leaders of the nineteenth-century women's rights movement had hoped, of course, that the Fourteenth Amendment's Equal Protection Clause would enfranchise women as well as former male slaves and provide a basis for establishing America's women as first-class citizens in every respect. Given that the word "male," although it nowhere appears in the substantive clause of the Amendment, is used three times in the second section,<sup>7</sup> there was little basis for optimism. Indeed, when Susan B. Anthony was arrested for voting in the 1872 presidential election, she was prohibited by the court from testifying on her own behalf because she was a woman.<sup>8</sup> Equally outrageous is the fact that the trial judge directed a verdict of guilty, giving the jury

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<sup>6</sup> Walter E. Dellinger III, 1787: The Constitution and "The Curse of Heaven," 29 *Wm. & Mary L. Rev.* 145, 153 (1987) (footnote omitted).

<sup>7</sup> See U.S. Const. amend. XIV, § 2.

<sup>8</sup> See Sandra Day O'Connor, Speech on 75th Anniversary of Women's Right to Vote, 27 *U. West L.A. L. Rev.* 7, 11 (1996).

no option but to convict<sup>9</sup>—a course of conduct, to my knowledge, otherwise unknown to American criminal procedure. (The judge did give Anthony a chance to speak before pronouncing sentence, and—as you might imagine—she said a mouthful.<sup>10</sup>)

It would be another half century before universal suffrage was finally achieved. During that period, Anthony, her stalwart compatriot Elizabeth Cady Stanton, and their followers, having failed repeatedly in their efforts to secure enfranchisement by means of the Federal Constitution, attacked the problem on a state-by-state basis. They had some success in the new western states such as Wyoming and Utah,<sup>11</sup> and with local elections here and there around the country, but the piecemeal approach was costly and largely ineffective. As Carrie Chapman Catt, Anthony's protégée, later described it:

To get the word male . . . out of the constitution cost the women of the country [more than seventy] years of pauseless campaign . . . . During that time they were forced to conduct fifty-six campaigns of referenda to male voters; 480 campaigns to get Legislatures to submit suffrage amendments to voters; 47 campaigns to get State constitutional conventions to write woman suffrage into State constitutions; 277 campaigns to get State party conventions to include woman suffrage planks; 30 campaigns to get presidential party conventions to adopt woman suffrage planks in party platforms, and 19 campaigns with 19 successive Congresses. Millions of dollars were raised, mainly in small sums, and expended with economic care. Hundreds of women gave the accumulated possibilities of an entire lifetime, thousands gave years of their lives, hundreds of thousands gave constant interest and such aid as they could. It was a continuous, seemingly endless, chain of activity. Young suffragists who helped forge the last links of that chain were not born when it began. Old suffragists who forged the first links were dead when it ended.<sup>12</sup>

Included among those who did not live to see the fulfillment of the suffrage movement was Susan B. Anthony herself, affectionately known as "Aunt Susan." She died at age eighty-six in 1906, fourteen

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<sup>9</sup> See *United States v. Anthony*, 24 F. Cas. 829, 832 (C.C.N.D.N.Y. 1873) (No. 14,459).

<sup>10</sup> See Barbara Alien Babcock et al., *Sex Discrimination and the Law 9-10* (1975) (relating Anthony's impassioned speech given despite obvious hostility from bench).

<sup>11</sup> See Eleanor Flexner & Ellen Fitzpatrick, *Century of Struggle: The Women's Rights Movement in the United States 149-56, 167-70* (1996).

<sup>12</sup> Carrie Chapman Catt & Nettie Rogers Shuler, *Woman Suffrage and Politics 107-08* (1923).

years before the Nineteenth Amendment,<sup>13</sup> the “Susan B. Anthony Amendment,” was finally ratified in 1920.<sup>14</sup>

Three years later, in 1923, the original Equal Rights Amendment was first introduced into Congress. The initial language, changed in 1943, provided: “Men and women shall have equal rights throughout the United States and every place subject to its jurisdiction.”<sup>15</sup> It had been drafted by the radical suffragist Alice Paul, whose National Woman’s Party had split from the ranks of mainstream suffragism, led by Anthony and later by Catt.<sup>16</sup> It was Alice Paul and her sisters-in-arms who chained themselves to the White House gates and were force-fed in prison when their protests took the form of hunger strikes.<sup>17</sup> Once the Nineteenth Amendment took effect in 1920, Paul’s followers continued to agitate for the expansion of women’s rights, convinced that the vote would not be sufficient to bring about equality between the sexes. The old-line suffragists formed the League of Women Voters, convinced to the contrary that they could rally newly enfranchised women to vote in the reforms they deemed necessary to protect women and children in post-war America.<sup>18</sup> It was an early indication of the dichotomy between the philosophies of “equality feminism” and “difference feminism,” which persists to this day.<sup>19</sup>

Some form of the Equal Rights Amendment was introduced in nearly every succeeding session of Congress,<sup>20</sup> but it garnered little

<sup>13</sup> The Amendment provides:

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have the power to enforce this article by appropriate legislation.

U.S. Const. amend. XIX.

<sup>14</sup> Anthony’s last and perhaps most famous public utterance, “Failure is impossible!” came at the conclusion of her remarks at a suffrage rally in Washington, D.C., three days before her death. See Lynn Sherr, *Failure Is Impossible* 324 (1995).

<sup>15</sup> S.J. Res. 21, 68th Cong. (1923).

<sup>16</sup> See William Henry Chafe, *The American Woman* 112-13 (1972).

<sup>17</sup> See *id.* at 113.

<sup>18</sup> It was the League’s defense of protectionist legislation that caused the wide post-suffrage split between the two groups of activists. According to one historian:

[T]he two opposing camps were engaged in a bitter war. One side fought for the exclusive goal of female equality; the other side for social reform. One side believed that suffrage was only the first step in the campaign for freedom; the other that the Nineteenth Amendment had substantially finished the task of making women equal to men. Protective legislation became the crux of the differences between the two groups.

*Id.* at 119.

<sup>19</sup> For a discussion of the principles underlying “equality feminism” and “difference feminism,” see generally Carol Gilligan, *In a Different Voice* (1982).

<sup>20</sup> See Barbara A. Brown et al., *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 *Yale L.J.* 871, 981-85 (1971).

serious attention until 1970, a half century after passage of the Suffrage Amendment. That year a renewed effort, influenced by political agitation from the outside, pressed by the Citizen's Council on the Status of Women, and managed on the inside by sponsors Representative Martha Griffiths and Senators Birch Bayh and Marlow Cook, led to hearings that included testimony urging ratification by several prominent constitutional scholars, including New York University's own Norman Dorsen.<sup>21</sup> Sponsors finally achieved passage on March 22, 1972,<sup>22</sup> principally because politically antagonistic factions within the women's movement were able to coalesce, joined finally by various labor leaders, liberal religious groups, the National Federation of Republican Women—even the League of Women Voters.<sup>23</sup>

Following passage by wide margins in both the House and the Senate,<sup>24</sup> the ERA met with initial success, as states vied to see which could be the first to ratify. Despite the early momentum, however, the amendment fell three states short of ratification at the end of the seven-year ratification period specified in the resolution that accompanied the proposed amendment.<sup>25</sup> Congress then extended the period three years, until June 30, 1982.<sup>26</sup> When no new states had ratified by that date, the amendment famously died,<sup>27</sup> and activists turned their attention to conceivable alternate ways to achieve gender equality—efforts that were already underway across the land.

The alternatives were basically two: piecemeal legislation and extension of the Equal Protection Clause of the Fourteenth Amendment. Viewed from the perspective of the 1970s, neither looked particularly attractive. Until 1971, the year before passage of the ERA, the Fourteenth Amendment had never been invoked success-

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<sup>21</sup> See Hearings, *supra* note 1, at 312 (statement of Professor Norman Dorsen).

<sup>22</sup> See Flexner & Fitzpatrick, *supra* note 11, at 322. The final vote in the House was 354 to 24, see 117 Cong. Rec. 35,815 (1971), and in the Senate was 84 to 8, see 118 Cong. Rec. 9598 (1972).

<sup>23</sup> The AFL-CIO and the International Ladies Garment Workers Union continued to oppose the amendment. See Babcock et al., *supra* note 10, at 132-33. Also opposing the amendment were fundamentalist religious groups and the John Birch Society, from which Phyllis Schlafly's Eagle Forum and its STOP ERA campaign later sprang. See Donald G. Matthews & Jane Sherron De Hart, *Sex, Gender, and the Politics of ERA* 59, 67, 153 (1990).

<sup>24</sup> The vote in the Senate came despite Sen. Ervin's impassioned recitation of Rudyard Kipling's sentimental verse, "O, Mother of Mine." See 118 Cong. Rec. 9517 (1972).

<sup>25</sup> See Baker, *supra* note 3, at 53.

<sup>26</sup> H.R.J. Res. 638, 95th Cong. (1978).

<sup>27</sup> It is somewhat surprising that the time restriction on ratification of the proposed twenty-seventh amendment was not seriously challenged. Ironically, the Amendment that ultimately became the Twenty-Seventh was first passed and submitted to the states for ratification in 1789. See *supra* note 4.

fully in a case involving gender discrimination. Moreover, the prospect of overhauling thousands of individual state and federal laws to protect against the many forms of discrimination existing at that point in the country's history was also daunting. As women's rights activist Florynce Kennedy repeatedly described the challenge, it amounted to winning the Civil War one plantation at a time. Nevertheless, men and women committed to the notion of equality rallied to the challenge and commenced a process of major law reform that continues to this day.

## II

### EXTENSION OF THE EQUAL PROTECTION CLAUSE

It was in the arena of constitutional litigation, however, that the most dramatic changes first occurred, and the success of that litigation can be largely attributed to the ACLU's newly formed Women's Rights Project and to its founder and indomitable director, Ruth Bader Ginsburg. Her first case in pursuit of gender equity, mounted while she was still a law professor at Rutgers, involved a New Jersey law under which school teachers who became pregnant lost their jobs. There followed a string of Supreme Court cases in which Ginsburg was either the prime mover or the force behind the litigation. Of the six cases she argued before the Court during this period, she was successful in five.

The first of these was the ground-breaking case of *Reed v. Reed*,<sup>28</sup> in which Ginsburg represented an Idaho mother who applied, unsuccessfully, to become the executor of her son's estate.<sup>29</sup> So did her ex-husband, and state law provided that as between persons equally qualified to administer estates, males were to be preferred to females. In representing Sally Reed, Ginsburg had a long-term goal to get the Supreme Court to abandon the rational basis test that had always been utilized in sex discrimination cases. Instead, Ginsburg campaigned for a strict scrutiny test, the standard that the Court had begun to formulate and apply to race-based classifications in the late 1940s and that had been applied to race discrimination uniformly since the Court abandoned the "separate but equal" doctrine in 1954.<sup>30</sup> It was undoubtedly clear to her, as it must have been to Thurgood Marshall two decades earlier, that the barriers would not all fall at once, like the walls of Jericho. That proved to be the case with

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<sup>28</sup> 404 U.S. 71 (1971).

<sup>29</sup> See *id.* at 71-72. Ginsburg and her colleague, Mel Wulf, co-wrote the *Reed* briefs, and the case was argued by Allen Derr, local counsel in Boise, Idaho. See *id.* at 71.

<sup>30</sup> See *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954).

*Reed*, in which the Court declined to apply the higher standard but did reverse the state court's ruling and held that "a difference in the sex of competing applicants for letters of administration bears [no] rational relationship to a state objective that is sought to be advanced by the operation of [the Idaho statute]."31

Despite the fact that she had fallen short in convincing the Court to treat gender as a suspect classification, Ginsburg had scored a significant victory—the first successful equal protection challenge on the basis of gender. As Judge Stephanie K. Seymour so vividly put it: "With the *Reed* decision the genie was out of the bottle, the toothpaste was out of the tube . . . '[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.'"32

Indeed, it was. Two years later, in 1973, Ginsburg was back before the Court in the case of *Frontiero v. Richardson*33 and again urged the Court to apply strict scrutiny to statutes that provided that wives of servicemen were automatically considered dependents for purposes of obtaining increased quarters allowances and medical benefits, but that husbands of servicewomen were not considered covered dependents unless their wives provided more than one-half of their support.34 This round, four members of the Court bought Ginsburg's argument in a strong plurality opinion by Justice Brennan, finding that the statute could not withstand strict scrutiny on the asserted ground of administrative convenience.35 Justice Stewart, however, was the "swing vote" in the case and was unwilling to go beyond the holding in *Reed*, as were three other Justices who concurred separately in the judgment.36 And, although the Court periodically notes that applica-

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<sup>31</sup> *Reed*, 404 U.S. at 76.

<sup>32</sup> Stephanie K. Seymour, *Women as Constitutional Equals: The Burger Court's Overdue Evolution*, 33 *Tulsa L.J.* 23, 30 (1997) (quoting Joel B. Grossman, *Constitutional Policymaking in the Burger Years*, 86 *Mich. L. Rev.* 1414, 1416 (1988)).

<sup>33</sup> 411 U.S. 677 (1973).

<sup>34</sup> See *id.* at 680. Ginsburg wrote the jurisdictional statement in *Frontiero*, filed an amicus brief for the Women's Rights Project, and jointly filed the reply brief with the Southern Poverty Law Center. Ginsburg, who was given ten minutes of the 30-minute argument, urged the adoption of strict scrutiny. The principal lawyer for the appellant argued only that the statute was irrational. For background on Ginsburg's role in the case, see Deborah L. Markowitz, *In Pursuit of Equality: One Woman's Work to Change the Law*, 14 *Women's Rts. L. Rep.* 335, 344-46 (1992).

<sup>35</sup> See *Frontiero*, 411 U.S. at 690-91.

<sup>36</sup> See *id.* at 691-92. In a separate concurring opinion, Justice Powell, writing for himself, Chief Justice Burger, and Justice Blackmun, also relied on rational basis analysis and added this tantalizing paragraph:

There is another, and I find compelling, reason for deferring a general categorizing of sex classifications as invoking the strictest test of judicial scrutiny. The Equal Rights Amendment, which if adopted will resolve the substance of

tion of the strict scrutiny standard in gender discrimination cases is still an open question, this split would turn out to be as close to the outright adoption of gender as a suspect classification as the Court would come.

The next case in the series, *Kahn v. Shevin*,<sup>37</sup> represented a setback for Ginsburg. Just a year after her near total victory in *Frontiero*, the Court held, in an opinion authored by Justice Douglas (who had been in the plurality in the prior case), that a Florida statute giving widows but not widowers a five-hundred-dollar exemption from property taxes did not violate equal protection.<sup>38</sup> In the six-to-three decision, the majority held that the challenged statute was designed to further the "state policy of cushioning the financial impact of spousal loss upon the [gender] for which that loss impose[d] a disproportionately heavy burden."<sup>39</sup> Thus, the Court concluded, the distinction in the law rested on "some ground of difference having a fair and substantial relation to the object of the legislation,"<sup>40</sup> in its view a justifiable variation of the rational basis standard applied in *Reed*.

Undaunted, Ginsburg arrived back at the Supreme Court during its next term, again representing a male client, as she would in so many of the cases she litigated in the 1970s. *Weinberger v. Wiesenfeld*<sup>41</sup> involved another widower, this time one who wanted to raise his infant son himself after his wife died in childbirth. He applied for and was denied survivor benefits under the Social Security Act because it was strictly a mother's benefit.<sup>42</sup> Perhaps because of the outcome in *Kahn*, Ginsburg changed her strategy in *Wiesenfeld*, arguing not for strict scrutiny but for a "heightened scrutiny" falling somewhere between rational basis analysis and strict scrutiny analysis. Although she won the case for her client,<sup>43</sup> Ginsburg did not succeed in convincing the Court to adopt the intermediate standard that she

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this precise question, has been approved by Congress and submitted for ratification by the States. If this Amendment is duly adopted, it will represent the will of the people accomplished in the manner prescribed by the Constitution.

Id. at 692 (Powell, J., concurring). Justice Rehnquist dissented but did not file a separate opinion. See id. at 691 (Rehnquist, J., dissenting).

<sup>37</sup> 416 U.S. 351 (1974).

<sup>38</sup> See id. at 355-56.

<sup>39</sup> See id. at 355.

<sup>40</sup> Id. at 355 (quoting *Reed v. Reed*, 404 U.S. 71, 76 (1971) (quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)) (internal quotation marks omitted)).

<sup>41</sup> 420 U.S. 636 (1975).

<sup>42</sup> Unlike *Frontiero* and *Goldfarb*, see *infra* note 45, the Social Security Act was strictly a mother's benefit, and it did not rely on establishing dependence. Therefore, the plaintiff was automatically denied the benefit, even though his wife's salary had been greater than his own. See id. at 640-41, 645.

<sup>43</sup> See id. at 653.

had presented. Instead, the Court invalidated the provision, which allowed survivors' benefits automatically for widows, but not for widowers on the basis of their wives' covered employment. The Court noted that the "gender-based distinction made by [the statute] is indistinguishable from that invalidated in *Frontiero*" and that it operated "to deprive women of protection for their families which men receive as a result of their employment."<sup>44</sup> Writing for the Court, Justice Brennan did give lip service to the ruling in *Kahn* regarding the weight to be given a "reasonably designed" state policy, but he went on to make clear 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,"<sup>45</sup> a pronouncement that signaled a retreat from *Kahn* and presaged the Court's subsequent departure from rational basis analysis in the gender discrimination setting.

The breakthrough came in 1976, in a case in which Ginsburg filed an amicus brief but did not argue: *Craig v. Boren*.<sup>46</sup> The substance of the case was certainly not weighty. The equal protection challenge concerned an Oklahoma statute that permitted young women to buy "near-beer" at age eighteen, but restricted men to age twenty-one.<sup>47</sup> Once again, Ginsburg argued in her brief for heightened rather than strict scrutiny, and this time she succeeded where she had failed before. Justice Brennan, writing for a majority of six, interpreted prior holdings of the Court to require that "classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives."<sup>48</sup> The new standard prevails, at least ostensibly, as I shall later note, to this day.

Ginsburg's final victory before the Supreme Court as a lawyer was not in an equal protection case but one decided under the Sixth Amendment's provision guaranteeing the right to an impartial jury. *Duren v. Missouri*,<sup>49</sup> announced in 1979, less than two years before her appointment to the Court of Appeals for the D.C. Circuit, invalidated a Missouri jury selection statute that permitted women to opt

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<sup>44</sup> Id. at 642-43, 645.

<sup>45</sup> Id. at 648. The *Wiesenfeld* Court noted that "it is apparent both from the statutory scheme itself and from the legislative history . . . that Congress' purpose in providing benefits to young widows with children was . . . to permit women to elect not to work and to devote themselves to the care of children." Id. In 1977, in *California v. Goldfarb*, 430 U.S. 199 (1977), another of Ginsburg's successful equal protection lawsuits, the Supreme Court extended the ruling in *Wiesenfeld* to cover widowers without dependent children.

<sup>46</sup> 429 U.S. 190 (1976).

<sup>47</sup> See id. at 191-92.

<sup>48</sup> Id. at 197.

<sup>49</sup> 439 U.S. 357 (1979).

out of jury service based on nothing other than their gender.<sup>50</sup> (The decision is one that I want to mention again briefly in another context.) As Ginsburg left the world of lawyering for the rarefied atmosphere of the judiciary, where she would continue to have an impact on the development of equal protection doctrine, her legacy as an advocate for women's rights stood unequalled. As Lynn Hecht Schafran noted at the time of Ginsburg's elevation to the Supreme Court, "I can't imagine how anyone could get from where we were in 1970 to . . . contemporary theories [of gender equality] if Ruth had not done her equal protection work. People forget how things were."<sup>51</sup>

### III THE WAY THINGS WERE

In preparing for this lecture, I pulled off the shelf in my office the three casebooks that were available for a course I taught on women and the law in the early 1970s at Vanderbilt Law School. The earliest, *Sex Roles in Law and Society*, appeared in 1973.<sup>52</sup> It was authored by New Mexico Law School professor Leo Kanowitz, who, in 1969, had written *Women and the Law: The Unfinished Revolution*.<sup>53</sup> The whole enterprise was so new that there is pencilled on the flyleaf of the casebook in my handwriting the dictionary definition of the word "stereotype." Within the next two years, Little, Brown and Company published *Sex Discrimination and the Law*, a casebook by Barbara Allen Babcock, Ann E. Freedman, Eleanor Holmes Norton, and Susan C. Ross, all of whom had litigated in the area of women's rights.<sup>54</sup> Only Babcock was a law professor at the time, at Georgetown University, but Norton had taught, and Ross initiated, the country's first women and the law course at New York University School of Law in 1969. Ross later taught the course herself at George Washington University. The third casebook appearing at about the same time was a West publication entitled *Text, Cases and Materials on Sex-Based Discrimination*, by Professors Kenneth M. Davidson, Ruth Bader Ginsburg, and Herma Hill Kay, at Buffalo, Columbia, and Berkeley respectively.<sup>55</sup>

Undoubtedly, much of the inspiration for the development of these teaching materials can be traced to a conference titled "Sympo-

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<sup>50</sup> See *id.* at 359-60.

<sup>51</sup> David Von Drehle, *A Trailblazer's Step-by-Step Assault on the Status Quo*, *Wash. Post (Nat'l Wkly. Ed.)*, July 26-Aug. 1, 1993, at 8.

<sup>52</sup> See Leo Kanowitz, *Sex Roles in Law and Society: Cases and Materials* (1973).

<sup>53</sup> See Leo Kanowitz, *Women and the Law: The Unfinished Revolution* (1969).

<sup>54</sup> See Babcock et al., *supra* note 10, at v.

<sup>55</sup> See Kenneth M. Davidson et al., *Sex-Based Discrimination* (1974).

sium on the Law School Curriculum and the Legal Rights of Women," which turned out to be a truly seminal meeting held here at New York University School of Law in the fall of 1972.<sup>56</sup> I was lucky enough to attend and, as a result, to meet virtually everyone writing and teaching in the area of women's rights at that time. It was a pretty heady time: The ERA was gaining steam around the country, and the halls of the academy were filled with talk about strategies for the great transition period following ratification. Looking at the casebooks' tables of contents gives a remarkable snapshot of how much there was to be done. The following recitation hits only some highlights.

Materials on the development of equal protection were key, of course, with explorations of the well known constitutional trio *Bradwell v. Illinois*,<sup>57</sup> *Goesaert v. Cleary*,<sup>58</sup> and *Hoyt v. Florida*,<sup>59</sup> and the recent appearance on the scene of *Reed* and *Frontiero*. But the casebooks also concentrated on employment law, where adequate enforcement of Title VII<sup>60</sup> and the Equal Pay Act<sup>61</sup> had yet to develop. Job restrictions abounded, some the result of the so-called "protective labor laws" still in existence around the country that generally had the effect of barring women from holding higher paid positions. The existence of segregated "help wanted" notices perpetuated the problem also. Discrimination abounded in pension plans, insurance benefits, what was at the time called workman's compensation, in the Social Security statutes, and, most significantly, in the determination of what constituted a "bona fide occupational qualification," which was the usual defense raised in employment discrimination cases in the 1970s and one that all too often succeeded on the basis of flimsy excuses rather than actual job functions. The fact that some women could and did become pregnant raised barriers for all women workers.

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<sup>56</sup> For an article based on a paper presented at the conference, see John O. Johnston, Jr., *Sex and Property: The Common Law Tradition, the Law School Curriculum, and Developments Toward Equality*, 47 N.Y.U. L. Rev. 1033 (1972).

<sup>57</sup> 83 U.S. (16 Wall.) 130 (1873) (denying that Fourteenth Amendment guarantees women right to admission to practice in state courts). Justice Bradley, concurring, opined on the ill-suitedness of the female character to the practice of law: "The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life." *Id.* at 141 (Bradley, J., concurring).

<sup>58</sup> 335 U.S. 464 (1948) (finding constitutional statute forbidding women from acting as bartenders, with exception of wives and daughters of male owners).

<sup>59</sup> 368 U.S. 57 (1961) (holding that state statute permitting women to serve as jurors only if they explicitly waive their exemption from duty does not violate Fourteenth Amendment); see also discussion *infra* Part IV (placing *Hoyt* within development of Court's recognition of women's rights to serve on juries).

<sup>60</sup> See Civil Rights Act of 1964 §§ 701-718, 42 U.S.C. §§ 2000e to 2000e-17 (1994).

<sup>61</sup> See Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1994).

“Sexual harassment” as a form of discrimination had not yet been recognized.

In the area of family law, distinctions based on gender and the inequality that resulted were systemic and far-reaching. The casebooks covered the effects of the doctrine of “feme covert”<sup>62</sup> in all of its many manifestations, including its effect on grounds for divorce in the virtually universal fault-based system of the era, on a married woman’s domicile, her name, her credit rating, the doctrine of interspousal immunity, loss of consortium, the ability of a wife to contract freely, inheritance laws, property settlement and the right of support following dissolution of the marriage.<sup>63</sup> Inequities abounded not only in property law, but even in community property law. For example, in 1972 when the ERA was passed, and as late as 1980, the Louisiana community property statute, ostensibly giving married women joint ownership of marital property, included this provision: “The husband is the head and master of the partnership or community of gains; he administers its effects, disposes of the revenues which they produce, and may alienate them by an onerous title, without the consent and permission of his wife.”<sup>64</sup>

In education, Title IX,<sup>65</sup> which has played such a crucial role in literally leveling the playing field for women, had yet to exert its influence. In 1971, the Supreme Court declined to invalidate a South Carolina scheme that barred men from a women’s college that was part of the state university system.<sup>66</sup> Thinking ahead to *Mississippi University for Women v. Hogan*,<sup>67</sup> authored by Justice O’Connor, and *United States v. Virginia*,<sup>68</sup> the VMI decision written by Justice Ginsburg, it is easy to substantiate the claim that having women on the appellate bench makes a difference in the development of constitutional law. Actually, one of my favorite discrimination cases came out of the Sixth Circuit and involved a state university, this one in Eastern Ken-

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<sup>62</sup> See Black’s Law Dictionary 617 (6th ed. 1990) (defining “feme covert” as “A married woman. Generally used in reference to the former legal disabilities of a married woman”).

<sup>63</sup> See Babcock et al., *supra* note 10, at 561-818; Davidson et al., *supra* note 55, at 117-418; Kanowitz, *supra* note 52, at 183-298.

<sup>64</sup> La. Civ. Code Ann. art. 2404 (West 1971) (repealed 1979), invalidated by *Kirchberg v. Feenstra*, 450 U.S. 455, 458, 460-61 (1981) (holding that provision violated Equal Protection Clause).

<sup>65</sup> See Civil Rights Act of 1964, tit. IX, 20 U.S.C. §§ 1681-1688 (1994).

<sup>66</sup> See *Williams v. McNair*, 401 U.S. 951 (1971).

<sup>67</sup> 458 U.S. 718 (1982) (holding that state statute excluding males from state-supported nursing school violates Equal Protection Clause).

<sup>68</sup> 518 U.S. 515 (1996) (holding that exclusion of women from prestigious military school violates Equal Protection Clause and that violation cannot be cured by creation of parallel women’s school).

tucky.<sup>69</sup> During the academic year 1971-1972, the school had a curfew that applied only to its women students—known in those days as “coeds”—and that required them to be in their dorms by 10:30 p.m. Monday through Thursday, 1:00 a.m. Friday and Saturday, and midnight Sunday.<sup>70</sup> One of the students, Ruth Robinson, sued, claiming a violation of equal protection. The court responded as follows:

The State's basic justification for the classification system is that of safety. It asserts that women are more likely to be criminally attacked later at night and are physically less capable of defending themselves than men. It concludes that the safety of women will be protected by having them in their dormitories at certain hours of the night. The goal of safety is a legitimate concern of the Board of Regents and this court cannot say that the regulations in question are not rationally related to the effectuation of this reasonable goal.

The appellant claims that the safety justification is undermined by the shifting curfew for different nights of the week asserting that the streets are no safer at 12:30 a.m. on Saturday than they are at 12:30 a.m. on Wednesday. We hold, however, that the State could properly take into consideration the fact that on weekend nights many coeds have dates and ought to be permitted to stay out later than on weekday nights. A classification having some reasonable basis does not offend the equal protection merely because it is not drawn with mathematical nicety.<sup>71</sup>

*Robinson* was an easy case to teach. Invariably, someone in the class would raise her hand and suggest that if safety were truly the concern, and if the court was correct in its implication that men were the threat to the women students' safety, then perhaps the men on campus should be subject to curfew and the “coeds” should be allowed to go wherever and whenever they pleased.

Not to belabor the point, let me just observe briefly that gender restrictions were likewise legally sanctioned in public accommodations, in the military, in criminal law—especially in the area of sentencing—and in many other areas of American life. According to one review of the Davidson, Ginsburg, Kay casebook, “[t]he text contains an insuperable exposition of the fact that our legal system simply has not shown basic fairness to men or women *qua* persons, and, indeed, that there has been and continues to be a sex-divided legal system on many fronts.”<sup>72</sup> For some of you in the audience who were not born

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<sup>69</sup> See *Robinson v. Board of Regents*, 475 F.2d 707 (6th Cir. 1973).

<sup>70</sup> See *id.* at 708.

<sup>71</sup> *Id.* at 711.

<sup>72</sup> Mary Cynthia Dunlap, Book Review, 27 *J. Legal Educ.* 120, 124 (1975) (reviewing Kenneth M. Davidson et al., *Sex-Based Discrimination: Text, Cases & Materials* (1974)). The review indicates that gender discrimination casebooks initially met with negative criti-

until the mid-70s, these early sex discrimination casebooks would be a revelation. To the rest of us, they are a fascinating reminder of how far we have come in the quarter century since debate about the ERA was last abroad in the land. But I cannot leave the discussion without a few words about the subject I have always found the most intriguing: jury service for women.

#### IV

##### EXHIBIT A: JURY SERVICE

In a new study of women and the obligations of citizenship entitled *No Constitutional Right to Be Ladies*,<sup>73</sup> Linda K. Kerber, a professor of history at the University of Iowa, devotes over a quarter of her book to the history of women's jury service in America. That history traces its roots to Blackstone's pronouncement that women were ineligible for jury service due to *propter defectum sexus*, a "defect of sex."<sup>74</sup> In the United States, the Supreme Court indicated in dictum in its 1879 decision in *Strauder v. West Virginia*<sup>75</sup> that states may "prescribe the qualifications of . . . jurors, and in so doing make discriminations" and "may confine the selection to males."<sup>76</sup> More than half a century later, the Supreme Court, in the exercise of its supervisory powers over the federal courts, imposed a cross-sectional requirement in federal jury selection, based, apparently, on a largely unarticulated due process analysis.<sup>77</sup> In *Ballard v. United States*,<sup>78</sup> a 1946 decision, the Court extended the cross-sectional principle to require the inclu-

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cism and that, like courses on "Law and Native Americans" or "Race and Police," separate courses on "Women and the Law" were seen at the time by old-line teachers of "standard" law courses, such as Torts and Contracts, as pedagogically illegitimate. See *id.* at 123-24.

<sup>73</sup> See Linda K. Kerber, *No Constitutional Right to Be Ladies* (1998). The book explores the forces behind a legal system that would require women citizens to pay taxes on a par with men but deny them the other obligations (and some would say, rights) of citizenship, including voting, jury service, and military service. See generally Shirley S. Abrahamson, *Justice and Juror*, 20 *Ga. L. Rev.* 257 (1986); Barbara Allen Babcock, *A Place in the Palladium: Women's Rights and Jury Service*, 61 *U. Cin. L. Rev.* 1139 (1993); Martha Craig Daughtrey, *Cross Sectionalism in Jury-Selection Procedures After Taylor v. Louisiana*, 43 *Tenn. L. Rev.* 1 (1975); Carol Weisbrod, *Images of the Woman Juror*, 9 *Harv. Women's L.J.* 59 (1986).

<sup>74</sup> 3 William Blackstone, *Commentaries* \*362. The other two principal "defects" were those of liberty and estate. See *id.*

<sup>75</sup> 100 U.S. 303 (1879).

<sup>76</sup> *Id.* at 310. *Strauder* held that trial by a jury from which members of a racial group have been excluded violates a defendant's right to equal protection when the defendant is a member of the excluded group. See *id.* at 305-10. In *Hernandez v. Texas*, 347 U.S. 475 (1954), the Court extended the systematic exclusion principle to a group other than one defined by race.

<sup>77</sup> See *Glasser v. United States*, 315 U.S. 60, 83-88 (1942).

<sup>78</sup> 329 U.S. 187 (1946).

sion of women in jury venires, but only on federal courts and only in those states in which women were otherwise qualified to serve.<sup>79</sup> At the time, some seventeen states still prohibited women from serving on juries, a situation that was slowly changing as more and more men were drafted into the armed services during World War II. Many others limited women's service. However, it was not until 1975, in *Taylor v. Louisiana*,<sup>80</sup> that the Court identified a constitutional basis for the cross-sectional requirement in the Sixth Amendment.<sup>81</sup>

Hence, as the ERA was being sent from Congress to the states for ratification in 1972, the state of the law with regard to women's jury service was represented by the Supreme Court's 1961 opinion in *Hoyt v. Florida*.<sup>82</sup> The "story behind the story" of *Hoyt* is set out in exquisite detail in *No Constitutional Right to be Ladies*,<sup>83</sup> and is alone worth the price of the book. It reveals that Gwendolyn Rogers Hoyt was charged in Tampa, Florida, in 1956 with the murder of her husband under circumstances that today would undoubtedly be defended as a response to domestic violence.<sup>84</sup> Although Florida permitted women to serve on criminal juries at the time (several Southern states did not, or similarly restricted service<sup>85</sup>), service was possible only if a woman went to the county courthouse and registered to serve. As a result, at the time Hoyt was tried, 220 women had registered and were theoretically eligible for jury service, along with approximately 10,000 men whose names had been entered on a master list in conformity with prevailing jury selection practices in Hillsborough County—a representation of two percent.<sup>86</sup> However, the court clerk had entered only ten women's names on the master list, for an actual representation of 0.1%—a ratio of one woman to every thousand men.<sup>87</sup> At trial, Hoyt's attorney objected to the dearth of women in the jury pool, arguing that under the circumstances of the prosecution, it was crucial that his client not be tried by an all-male jury.

Despite the equal protection argument mounted by Hoyt in the state courts and on certiorari in the United States Supreme Court,

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<sup>79</sup> See *id.* at 191-96.

<sup>80</sup> 419 U.S. 522 (1975).

<sup>81</sup> For a discussion of the convoluted route the Court took to get to *Taylor*, see Daughtrey, *supra* note 73, at 39-50.

<sup>82</sup> 368 U.S. 57 (1961).

<sup>83</sup> See Kerber, *supra* note 73, at 124-94.

<sup>84</sup> See *id.* at 124-27.

<sup>85</sup> Alabama did not permit women to sit on juries until 1966. See Daughtrey, *supra* note 73, at 66 n.284. South Carolina was the last state to allow jury service by women, holding out until 1967. See *id.*

<sup>86</sup> See *Hoyt*, 368 U.S. at 65.

<sup>87</sup> See *id.*

none of the judges—all male, we can be sure—heeded the words of Justice Douglas from the *Ballard* decision fifteen years earlier, involving women's service on federal juries, in which he observed:

The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded. The exclusion of one may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded.<sup>88</sup>

Instead, the Supreme Court upheld the Florida jury statute, noting that it did not “purport to exclude women” from jury service, but merely gave women “the privilege to serve” rather than “impose service as a duty.”<sup>89</sup> Thus, the Court held, the statute was not facially invalid, nor did the fact that it operated to produce venires virtually devoid of women constitute an equal protection violation. Justice Harlan explained:

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.<sup>90</sup>

Writing for the Court, Justice Harlan found it unnecessary to decide whether a state might completely bar women from jury service, but he nevertheless noted that the “constitutional proposition” of *Strauder's* dictum that jury service could be confined to males “has gone unquestioned for more than eighty years in the decisions of the Court.”<sup>91</sup>

Ultimately, of course, that proposition would be successfully questioned. When the Court first held in 1972 in *Alexander v. Louisiana*<sup>92</sup> that discrimination on the basis of race violated a criminal defendant's right under the Sixth Amendment, as applied to states through the Fourteenth Amendment, to a grand jury from which no

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<sup>88</sup> *Ballard v. United States*, 329 U.S. 187, 193-94 (1946) (footnote omitted).

<sup>89</sup> *Hoyt*, 368 U.S. at 60.

<sup>90</sup> *Id.* at 61-62.

<sup>91</sup> *Id.* at 60.

<sup>92</sup> 405 U.S. 625 (1972).

“cognizable” group in the community had been excluded, the Court deliberately pretermitted the question of exclusion on the basis of gender, an issue that had also been raised in the case.<sup>93</sup> Finally, three years later, the Court tackled the issue head on in *Taylor v. Louisiana*<sup>94</sup> and ruled that Louisiana’s jury statute, which, like the statute at issue in *Hoyt*, required women to register in order to become eligible for jury service, was in violation of the cross-sectional requirement of the Sixth Amendment established in *Alexander*.<sup>95</sup>

And, three years after *Taylor* invalidated the “opt-in” statute, Ruth Bader Ginsburg convinced the Supreme Court in *Duren v. Missouri*<sup>96</sup> to invalidate Missouri’s “opt-out” provision, which allowed any woman, in response to a prominently placed notice on the jury summons, to decline service by returning the summons or by simply not reporting for jury duty.<sup>97</sup> Some two decades later, the final chapter has been written. In the 1994 decision in *J.E.B. v. Alabama*,<sup>98</sup> the Court, in a logical extension of *Batson v. Kentucky*,<sup>99</sup> held that “the Equal Protection Clause forbids peremptory challenges on the basis of gender as well as on the basis of race.”<sup>100</sup> The tone of the opinion, written by Justice Blackmun, is almost one of surprise, as if the Court had merely overlooked something that should have been obvious all along. Noting that “[m]any States continued to exclude women from jury service well into the present century, despite the fact that women attained suffrage upon ratification of the Nineteenth Amendment in 1920,”<sup>101</sup> the Court said:

Today we reaffirm what, by now, should be axiomatic: Intentional discrimination on the basis of gender by state actors violates the Equal Protection Clause, particularly where, as here, the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women.<sup>102</sup>

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<sup>93</sup> See *id.* at 633.

<sup>94</sup> 419 U.S. 522 (1975).

<sup>95</sup> See *id.* at 531-33.

<sup>96</sup> 439 U.S. 357 (1979).

<sup>97</sup> See *id.* at 360, 362. A similar statute still existed in Tennessee. See *id.* at 360 n.6. Alabama, which until 1966 had prohibited women from jury service, revised its law to provide an exemption for women “for good cause.” See *id.* at 359 n.4. Massachusetts allowed the court to excuse any women requesting not to serve in a case involving sex crimes. See *id.* at 360 n.7.

<sup>98</sup> 511 U.S. 127 (1994).

<sup>99</sup> 476 U.S. 79 (1986).

<sup>100</sup> *J.E.B.*, 511 U.S. at 130.

<sup>101</sup> *Id.* at 131 (emphasis added).

<sup>102</sup> *Id.* at 130-31. Contrast this to Justice Blackmun’s comments in a dissenting opinion a dozen years earlier, in *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982), in which the majority invalidated a single-sex admissions policy:

Although the Court had no difficulty in the jury setting with equating the status of women as citizens with that of African Americans,<sup>103</sup> the Court once again ducked the long-pending question of whether gender should be considered a suspect category for equal protection purposes. A footnote to the opinion reads: "Because we conclude that gender-based peremptory challenges are not substantially related to an important government objective, we once again need not decide whether classifications based on gender are inherently suspect."<sup>104</sup>

The Court then cited *Mississippi University for Women v. Hogan*,<sup>105</sup> a 1982 opinion by Justice O'Connor that is about to bring us full circle to the original question: Taking as a given the need for the Equal Rights Amendment in 1972, at the time of its initial passage, is there any longer a need for the amendment? Or has a gender-neutral millennium truly arrived?

## V

### IS A TWENTY-FIRST CENTURY EQUAL RIGHTS AMENDMENT NECESSARY?

In its 1982 opinion in *Hogan*, the Supreme Court held that a state-supported university's policy of limiting enrollment in its School of Nursing to females, and thereby denying admission to otherwise qualified males, violated equal protection.<sup>106</sup> The Court split five-to-four in the case, and the deciding vote was cast by the author of the opinion, newly appointed Justice Sandra Day O'Connor. She noted that the party seeking to uphold a statute that classifies on the basis of gender has the burden of "showing at least that the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of

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I have come to suspect that it is easy to go too far with rigid rules in this area of claimed sex discrimination, and to lose—indeed destroy—values that mean much to some people . . . .

I hope that we do not lose all values that some think are worthwhile (*and are not based on differences of race or religion*) and relegate ourselves to need-less conformity. The ringing words of the Equal Protection Clause of the Fourteenth Amendment . . . do not demand that price.

*Id.* at 734-35 (Blackmun, J., dissenting) (emphasis added).

<sup>103</sup> See *J.E.B.*, 511 U.S. at 136 ("Certainly, with respect to jury service, African-Americans and women share a history of total exclusion, a history which came to an end for women many years after the embarrassing chapter in our history came to an end for African-Americans.").

<sup>104</sup> *Id.* at 137 n.6.

<sup>105</sup> 458 U.S. 718.

<sup>106</sup> See *id.* at 733.

those objectives,'"<sup>107</sup> the routine middle ground standard of review in sex discrimination cases. However, O'Connor provided, too, that the burden also requires the establishment of an "exceedingly persuasive justification" for the gender-based classification.<sup>108</sup> This language went unremarked by the dissenters, who were much more interested in a lengthy exposition on the history and virtues of single-sex higher education. But the language was picked up and emphasized by Justice Ginsburg in *United States v. Virginia*,<sup>109</sup> the VMI admissions case decided fourteen years after *Mississippi University for Women*:

To summarize the Court's current directions for cases of official classification based on gender: Focusing on the differential treatment or denial of 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 justification must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.<sup>110</sup>

In formulating these "directions," had Justice Ginsburg ratcheted up the already "heightened scrutiny" another notch or two? The Chief Justice certainly thought so. Concurring in the judgment and thus producing a seven-to-one decision, with Scalia dissenting and Thomas, whose son was a VMI student, not sitting, Rehnquist pointed to the "exceedingly persuasive justification" language of the Court's opinion and noted that "[i]t is unfortunate that the Court thereby introduces an element of uncertainty respecting the appropriate test."<sup>111</sup>

Justice Ginsburg was most certainly not oblivious to what she had accomplished in the VMI opinion. According to a New York Times report:

[She] recounted in a 1997 speech to the [Washington, D.C.] Women's Bar Association . . . that a year earlier, as she announced her opinion declaring unconstitutional the all-male admissions policy at the Virginia Military Institute, she looked across the bench at Justice O'Connor and thought of the legacy they were building together.

Justice Ginsburg's opinion in the Virginia case cited one of Justice O'Connor's earliest majority opinions for the Court, a 1982

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<sup>107</sup> Id. at 724 (quoting *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980)).

<sup>108</sup> Id. (citing *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981)). *Kirchberg*, by Justice Marshall, invalidated a Louisiana statute giving unfettered control over community property to the husband. See 450 U.S. at 456; see also *supra* note 64 and accompanying text.

<sup>109</sup> 518 U.S. 515 (1996).

<sup>110</sup> Id. at 532-33 (citation omitted).

<sup>111</sup> Id. at 559.

decision called *Mississippi University for Women v. Hogan* that declared unconstitutional the exclusion of male students from a state-supported nursing school. Justice O'Connor, warning against using "archaic and stereotypic notions" about the roles of men and women, herself cited in that opinion some of the Supreme Court cases that Ruth Ginsburg, who was not to join the Court for another 11 years, had argued and won as a noted women's rights advocate during the 1970's.

Addressing the women's bar group, Justice Ginsburg noted that the vote in Justice O'Connor's 1982 opinion was 5 to 4, while the vote to strike down men-only admissions in Virginia 14 years later was 7 to 1.

"What occurred in the intervening years in the Court, as elsewhere in society?" Justice Ginsburg asked. The answer, she continued, lay in a line from Shakespeare that Justice O'Connor had recently spoken in the character of Isabel, Queen of France, in a local production of "Henry V": "Haply a woman's voice may do some good."<sup>112</sup>

Did the VMI decision move us to the point that an equal rights amendment might have? Ginsburg herself apparently thinks so. She has been quoted as saying, in an address to the University of Virginia School of Law shortly after the VMI decision was announced, "There is no practical difference between what has evolved and the ERA."<sup>113</sup>

## VI

### SO, SHOULD WE "JUNK UP" THE CONSTITUTION?

The advocates of a renewed effort at ratification of the ERA contend not only that women deserve a place in the Federal Constitution, but that amendment of the Constitution is required in order to insure that we are not forced to retreat on any of the fronts on which progress for women's rights has been so long in coming and so laboriously achieved. They argue that by retaining the language of the failed amendment, the legislative history will remain intact. Moreover, much of the opposition to ratification in the 1970s surely will have dissipated. As the ABA Journal reporter points out in this summer's article:

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<sup>112</sup> Linda Greenhouse, *From the High Court, A Voice Quite Distinctly a Woman's*, N.Y. Times, May 26, 1999, at A1.

<sup>113</sup> Baker, *supra* note 3, at 55. Justice Ginsburg, however, remains an ERA supporter. See David Harper, *Justice Assesses Gender Issue*, Tulsa World, Aug. 29, 1997, available in Lexis, News Library, ARCNWS file (quoting Justice Ginsburg on ERA: "[I]t belongs in our Constitution as a norm society embraces. It's what you'd like to teach ninth graders in civics class."); Jeffrey Rosen, *The New Look of Liberalism on the Court*, N.Y. Times, Oct. 5, 1997, § 6 (Magazine), at 60 (quoting Justice Ginsburg on ERA: "I would still like it as a symbol to see the E.R.A. in the Constitution for my granddaughter.").

When Congress sent the equal rights amendment to the states for ratification in 1972, ERA opponents warned of dire consequences: co-ed bathrooms, women drafted into the military, the repeal of spousal support laws.

The ERA failed, but the consequences happened anyway. Unisex bathrooms are in college dorms around the country. Women are joining the armed forces—by choice. And modern alimony laws look at sex-neutral factors, such as need and contribution, when determining who should receive support.<sup>114</sup>

The Equal Rights Amendment has the dubious distinction of being one of only six amendments submitted by Congress to the states that have failed at ratification.<sup>115</sup> They were originally among the over five thousand bills proposing amendments to the Federal Constitution introduced in Congress since 1789.<sup>116</sup> Currently, for example, there are a handful of proposed amendments, in addition to the ERA, that are under debate in Congress, in the press, and in the academy. They include a "Ten Commandments" amendment passed by the House of Representatives on June 17, 1999.<sup>117</sup> Its first section provides that "[t]he power to display the Ten Commandments on or within property owned or administered by the several States or political subdivisions thereof is hereby declared to be among the powers reserved to the States respectively."<sup>118</sup> A second section purports to protect "[t]he expression of religious faith by individual persons on or within property owned or administered by the several States."<sup>119</sup> Similarly, the House has passed the so-called "flag burning amendment," giving Congress the power to "prohibit the physical desecration of the flag of the United States."<sup>120</sup> And there are perennial attempts to amend the Constitution to permit prayer in the schools and to ban abortion. It seems to me that there is a legitimate question whether a renewed Equal Rights Amendment would be in very good company if it, too, were to be passed by the House of Representatives, as its House sponsor, Representative Carolyn Maloney (D-N.Y.) proposes.<sup>121</sup>

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<sup>114</sup> Baker, *supra* note 3, at 53.

<sup>115</sup> The six failed amendments are set out in Rotunda & Nowak, *supra* note 4, at 375-78.

<sup>116</sup> See Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 *Harv. L. Rev.* 386, 427 (1983). For a history of the amendment process, see *id.* at 427-30.

<sup>117</sup> See 145 *Cong. Rec.* H4486 (daily ed. June 17, 1999).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> H.R.J. Res. 33, 106th *Cong.* (1999).

<sup>121</sup> See Baker, *supra* note 3, at 53.

Perhaps the ERA, resubmitted to the states, would draw little opposition and would be ratified without controversy, as a quasi-dead letter. However, while the “foxhole issue” and the “potty issue” seem to have disappeared from the scene, we can imagine that the forces opposed to gay rights will see the amendment as a threat and vocally and vociferously rejoin the fight against ratification. They would do well to note that in the seven states that have an equal rights amendment in their state constitutions,<sup>122</sup> as well as in the thirteen other states with some provision guaranteeing equality as a matter of constitutional right,<sup>123</sup> society continues to progress without the social, legal, and cultural upheavals that the Stop ERA adherents predicted a quarter century ago.<sup>124</sup>

In conclusion today, I am going to ask your indulgence—to allow me to drop my academic distance from the subject and speak personally for a few moments. It is altogether fitting to honor Ruth Bader Ginsburg for her many accomplishments, and for the gumption and the dedication she continues to evidence by pulling on her black robe and showing up for the opening of Court this past Monday, less than three weeks after undergoing major cancer surgery. But while Ruth Ginsburg was busy litigating and deciding equal protection cases, many others in this country were busy in the political arena, fighting the good fight for gender equity on many fronts, committed to bringing about a better world through law reform in the name of constitutional rights and responsibilities. In tribute to them, I could end with a ringing quotation of some kind from James Madison, whose Dolley would certainly smile on us this evening. Instead, I am going to take the liberty of quoting one of the many influential women activists of the 1970s, Jill Ruckelshaus, a cofounder of the National Women’s Political Caucus. In 1977, she spoke words that have stayed with me over two decades. She said:

We are in for a very, very long haul . . . . I am asking for everything you have to give. We will never give up . . . . You will lose your

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<sup>122</sup> Colorado, Hawaii, Illinois, Maryland, Pennsylvania, Washington, and Wyoming. See Colo. Const. art. II, § 29; Haw. Const. art. I, § 3; Ill. Const. art. I, § 18; Md. Const. art. 46; Pa. Const. art. I, § 28; Wash. Const. art. XXXI, § 1; Wyo. Const. art. I, § 3.

<sup>123</sup> California, Connecticut, Florida, Iowa, Louisiana, Massachusetts, Montana, New Hampshire, New Jersey, New Mexico, New York, Rhode Island, and Texas. See Cal. Const. art. I, § 31; Conn. Const. art. I, § 1; Fla. Const. art. I, § 2; Iowa Const. art. I, § 1; La. Const. art. I, § 3; Mass. Const. pt. I, art. I; Mont. Const. art. II, § 4; N.H. Const. pt. I, art. 1.2; N.J. Const. art. I, § 5; N.M. Const. art. II, § 18; N.Y. Const. art. I, § 11; R.I. Const. art. I, § 2; Tex. Const. art. I, §§ 3-3a.

<sup>124</sup> They included, in addition to Phyllis Schlafly’s Eagle Forum members, representatives from the insurance industry, the armed services, and some labor organizations. There were also groups such as Utah’s HOTDOG (Humanitarians Opposed To Degradation of Our Girls) and various offshoots of the John Birch Society.

youth, your sleep, your arches, your patience, your sense of humor . . . and occasionally . . . the understanding and support of the people that you love very much. In return, I have nothing to offer you but . . . your pride in being a woman, all your dreams you've ever had for your daughters, and nieces, and granddaughters, your future and the certain knowledge that at the end of your days you will be able to look back and say that once in your life you gave everything you had for justice.<sup>125</sup>

My thanks to Dean Sexton and Professor Dorsen for inviting me to be here today, and to all of you for your patience in listening to what I have had to say.

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<sup>125</sup> Jill Ruckelshaus, Speech at the National Women's Political Caucus California State Convention, San Jose, California (1977) (on file with author).