One Step at a Time: Key Cases and Players in Women's Involvement in the Law

An Honors Thesis (HONR 499)

by

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Abstract

At the turn of the 20th century, women all over the United States were denied admission to their state bars, to law school, and to the legal profession in general. Today, women make up over a third of the profession. As women fought to gain representation within and access to the law, they also fought for their legal rights as American citizens, and without the presence of women in judicial positions, many of these legal rights would not have been attained. In this thesis I discuss key cases, women, and events that led to women's increased involvement in the law, and I assert that until equality within the legal field is reached, women and men in the United States will remain unequal.

Acknowledgements

I would like to thank Jennifer Grove for advising me this semester as I completed this paper. Although times were strange with the university closing and with our inability to work together in person, she was supportive and helpful not only in my completion of this huge project, but also in some big decisions I have made this year.

I would also like to thank Dr. John Emert for his support and willingness to help me do what is best for me. He is a huge reason why I was able to complete this project and finalize my time at Ball State University in a manner that I'm proud of.

I would like to thank my parents, as well, for gladly reading this entire 50-page paper and for always supporting me no matter what.

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Process Analysis Statement

Researching, writing, and finishing this paper is one of the tasks I accomplished during my three years at Ball State University that I am proudest of. It took countless hours of research, numerous days of writing, and a significant amount of time editing to complete, but it is a piece that I personally think is well-written, meaningful, and insightful.

My idea for this thesis arose while taking Jennifer Grove's course, Women and Politics. I was shocked by the process women underwent to gain their legal rights and to become recognized citizens who could use their voices to contribute to governmental decisions. As a legal studies major at the time, I began to wonder what the process was like for women who wanted to work within the legal field, and further, how women within the field used their authority as lawyers and judicial officials to further the rights of women. Thus, the idea for this thesis was formed.

Because the COVID-19 pandemic arose as I was completing this project, much of my research was conducted online. Through reading and compiling statistics and meaningful information from various scholarly articles, textbooks and other books published online, and documentaries, I was able to form an extensive collection of discussions about women's involvement in the legal field. From there, I decided that the most logical way to organize this research was

chronologically, beginning in the late 1870s to today. I sectioned off my research and, later, the content of my thesis, into areas of important context, key cases that changed the legal landscape for all American women, and significant women within the field who contributed to this shift. I then compiled my research and my own contributions into a discussion and analysis of primary events in United States history and how these events affected women's involvement in the law, of the first women to make significant advancements in the field and how their work has caused enduring change, and of key cases that both furthered the rights of women and sparked a flame within them to continue their fight.

My biggest challenge while writing this thesis was maintaining a sense of calm and remaining collected in the very beginning of the process. I was incredibly overwhelmed by the idea of writing an entire thesis and by how much work would be required of me, but I learned quickly that if I split up my thesis into smaller, manageable sections, it was so much easier and realistic to accomplish finishing the thesis in its entirety. I learned to prioritize, manage my time and expectations, and focus on the task at hand. I didn't think I could do this, or if I could do it, do it well, but I surprised myself.

I think this thesis adds to the academic discussion of the history of women's involvement in the law in that it provides a informed, analyzed approach to the topic. I not only wrote about the historical context surrounding women's

contributions within the field, but I also discussed primary cases within that context and significant women who influenced these cases. By doing so, I was able to provide a well-rounded analysis of all of these areas. I also tried to include what I felt to be the deeper meanings, consequences, and insights of the cases I broke down, and I think these discussions add a lot of weight to the significance of the cases and their repercussions on all American women. Overall, this project is one that I'm most proud of, and I hope it not only educates readers about how women became gradually involved in the legal profession, but that it also encourages them to consider the importance of having women's representation in the law.

Introduction:

In 1869, Myra Bradwell sat for and passed the Illinois bar exam, becoming the first woman in the state to earn admission to the bar (Wills). In 1870, however, she was denied admission to the bar by the Illinois Supreme Court based upon her incapacity to enter contracts as a married woman without the express consent of her husband. Three years later, the United States Supreme Court upheld the state court's decision, ruling that the right to practice a profession was not among the privileges of the Privileges and Immunities Clause of the Fourteenth Amendment, and further asserting that because of their inherently inferior qualities, women should not be employed in the field of law; rather, they were better and more naturally suited for the domestic sphere of life and should leave the more sophisticated reasoning that the law required to qualified men (*Bradwell v. The State, 1872*).

Today, nearly 150 years after the Supreme Court of the United States upheld the Illinois Supreme Court's decision in *Bradwell v. The State of Illinois*, over 400,000 women make up more than a third of the legal profession in the United States (Day). Women now outnumber men in law school attendance, and an equal number of men and women are earning their law degrees. Of 160 circuit court of appeals judges and 570 federal district court judges, 59 and 194 are women, respectively (American Bar Association Media Relations and Strategic Communications Division). Most notably, three women currently sit on the Supreme Court Bench, thus comprising one-third of the most powerful judicial position in the country. Within all of these areas and levels of the law, women have and continue to influence the legal landscape for all American citizens.

As the rationale and obvious sexist ideology behind the Supreme Court's decision in *Bradwell v. The State of Illinois* suggests, the process of women gaining acceptance into the legal

field, and thus an authoritative voice in the shaping of American policy, has been a difficult one. The traditional institution of marriage and of the family unit in the United States was so deeply rooted that women like Bradwell found it extremely difficult to break away from their seemingly predestined roles to find a meaningful place for themselves within any public sphere of life, let alone power within the judicial system.

Founding director of the American Civil Liberties Union's (ACLU) Women's Rights Project and current United States Supreme Court Justice Ruth Bader Ginsburg once said that "Real change, enduring change, happens one step at a time" (Millhiser). This is exactly how she and other women who entered the legal field at a time when they were not welcome paved the way and opened doors for hundreds of thousands of women lawyers after them. By slowly chipping away at an institutionalized judicial system that hardly even recognized the existence of gender inequality (*RBG*), they changed the lives of women forever.

The fight for women's involvement in the law coincided with their fight for suffrage and other rights. As women were rallying for their legal rights as citizens of the United States, so too were they arguing for their right to serve within various facets of government, including the judicial branch. If women were not allowed to become lawyers, if they could not serve on juries, and if they could not work as judges, then they were being unfairly coerced into following laws that they had no say in creating, implementing, and enforcing.

Further, as much of the policy implemented over the last century concerning equal rights and many of the cases argued and decided in front of the United States Supreme Court indicate, the involvement of women in the legal system and their gradual gaining of rights are inextricably intertwined. If it weren't for the contributions of powerful women lawyers who championed such issues, women's rights would have never been granted to the extent that they have been.

This thesis explores the careers of three key women who were instrumental in the inclusion of women in the legal profession of the United States: Florence Allen, Sandra Day O'Connor, and Ruth Bader Ginsburg. It also contains analyses of three significant court cases that either dealt with the overall concept of women practicing the law or were influenced in some meaningful way by a woman lawyer, judge, or justice, including *Bradwell v. The State of Illinois*, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, and *United States v. Virginia*. It explains through a chronological, historical perspective the ways in which the development of women's participation in the law and the development of women's rights were materially linked. Finally, this thesis takes a look at the state of women in the legal profession today and discusses how equality has yet to be fully reached.

Throughout the last century, women's involvement in the legal field has grown immensely, and accompanying this growth has been their influence in the shaping of American policy. Without the significant changes women lawyers, judges, and justices have prompted, women wouldn't have the legal status that they have the privilege of enjoying today. Despite these great efforts and contributions, however, women remain underrepresented and prejudiced against in the legal profession, and until these issues are approached, not only will equality within the field fail to exist, but so too will equality in the entirety of the United States.

Case Study: *Bradwell v. The State of Illinois* (1873):

In 1868, Myra Bradwell, an Illinois resident, launched the *Chicago Legal News*, the first American legal publication that was edited by a woman (Wills). Bradwell served as its founder, publisher, and editor-in-chief. The *News* "eventually became the official medium for the

publication of all court records in Illinois and became the most widely circulated legal newspaper in the nation" (Giffen).

One year later, Bradwell passed the Illinois bar exam and applied for a license to practice law, a petition which was denied by the Illinois Supreme Court despite her presentation to the Court of a certificate proving her good character and qualifications to practice law, an affidavit confirming her citizenship, and a paper asserting that, on the basis of these facts, she was entitled to a license to practice law (*Bradwell v. The State, 1872*). The Illinois Supreme Court justified their denial of her application on the grounds that as a married woman, Bradwell did not have the legal capacity to enter into contracts without the consent of her husband under the common law doctrine of coverture (Wills). When a woman married, her legal status was subsumed into her husband's; thus, Bradwell legally "'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'" (*Bradwell v. The State, 1872*).

The Bench did not only base its decision on the coverture doctrine; it also referenced its perception of the inherent differences between men and women. The Court held "'That God designed the sexes to occupy different spheres of action, and that it belonged to men to make, apply, and execute the laws, was regarded as an almost axiomatic truth'" (*Bradwell v. The State, 1872*), and that it was "certainly warranted in saying, that when the legislature gave to this court the power of granting licenses to practice law, it was with not the slightest expectation that this privilege would be extended equally to men and women" (Giffen). This ideology, that women and men exist in separate spheres and thus have separate and exclusive rights and duties, was used to justify the Court's prohibition against women practicing law in the state.

Bradwell filed an appeal to the United States Supreme Court, asserting that the Illinois Supreme Court violated her Fourteenth Amendment rights in denying her a license to practice law. She claimed that as a United States citizen, she was granted the right under the Fourteenth Amendment's Privileges and Immunities Clause to practice law (*Bradwell v. The State, 1872*). The Fourteenth Amendment states that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," (U.S. Const. amend. XIV, sec 1) and the Privileges and Immunities Clause further states that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states" (U.S. Const. art. IV sec 2). In other words, the amendment and clause protect citizen's fundamental rights from state efforts to restrict them. Therefore, the issue at hand in this case was whether or not the right for a woman to engage in any profession was protected under the Privileges and Immunities Clause of the Fourteenth Amendment.

The United States Supreme Court affirmed the decision of the Illinois Supreme Court. It ruled that admission to the bar and the right to practice law, or any profession for that matter, was not a privilege that was protected from the abridgment of the states. In his opinion, Justice Samuel Freeman Miller wrote, "there are privileges and immunities belonging to citizens of the United States, in that relation and character, and that it is these and these alone which a State is forbidden to abridge, but the right to admission to practice in the courts of a State is not one of them" (*Bradwell v. The State, 1872*). Therefore, Bradwell was denied admission to the Illinois bar and the right to practice law.

Justice Joseph Philo Bradley agreed with the decision of the Court, but went beyond purely constitutional bounds in his rationale by applying his personal belief that the perceived

fundamental qualities of a woman should naturally exclude her from the type of work conducted by lawyers. In his concurrence, Justice Bradley wrote:

> The civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood...I am not prepared to say that it is one of her fundamental rights and privileges to be admitted into every office and position, including those which require highly special qualifications and demanding special responsibilities (*Bradwell v. The State, 1872*).

It is Justice Bradley's rationale in this concurrence that is of importance in the discussion of women's involvement in the law early on in their efforts to gain representation in the field. While Justice Miller denied Bradwell admission to the Illinois bar, he did so on a constitutional basis. This is not to say that Justice Miller was correct in his reasoning, but his thoughts did at least come from a somewhat substantive origin. He strictly applied the contents of the Fourteenth Amendment and prior precedent to the facts of Bradwell's case and came to the conclusion that the right to engage in a profession was not a privilege protected from state intervention. While Bradwell's sex played a primary role in the state's prevention of her legal licensing and in the Illinois Supreme Court's decision, Justice Miller did not uphold the Court's ruling on this fact exclusively. Rather, he asserted that it was not within the power of the Supreme Court to restrict

the states from behaving in such a manner because he felt that the constitutional authority in question did not apply to the case.

Justice Bradley, on the other hand, introduced his and many other men's personal, sexist ideologies as his sole reasoning for denying Bradwell admission to the Illinois bar. Mentioning that civil law has long recognized gender inequalities as valid and grounds for certain policy implementation was an unfortunate statement of fact, but by including nature and religion in these assumptions, Justice Bradley elevated the inferior legal status of women far beyond the sphere of law into two of the strongest entities in existence. Thus, this suggested the justice's belief that the respective places of man and woman in society, man in the public arena and woman in domestic settings, were fundamental to the very essence of humankind. Justice Bradley presented generalizations of the female sex that were unfounded. By writing within the context of a Supreme Court decision that women were delicate, unfit for occupations outside of the home, and inherently unequal to man, Justice Bradley used his power as a justice on the highest court in the nation to undermine the entire race of women. It is also ironic that he stated that becoming a lawyer required specialized qualifications and responsibilities, those which women were not capable of, yet Bradwell proved herself competent in the various affidavits and certificates she provided for the Court, in her widely successful legal publication, and in her passing of the bar exam itself. These facts negate Justice Bradley's rationale, for they eliminate the idea that the inherent inequalities of women Justice Bradley spoke of are applicable to all women, especially Bradwell. This indicates that Justice Bradley's reasoning for his opinion was not based on the facts of this specific case, but on his preconceived sexist ideology.

Justice Bradley certainly did not stand alone in this perspective. Two other Supreme Court justices concurred with his opinion (*Bradwell v. The State, 1872*), and the ideas expressed

within the opinion reflected the ideologies of men across the nation. This case was not only the first to handle the concept of women's involvement in the legal field, but it was also the first to demonstrate that without women's input at the legal level, the rights of women would always be stunted by men who would not, and could not, relate to them.

Context: Growth between 1870s-1920s:

The United States Supreme Court's ruling in *Bradwell v. The State of Illinois* did not stand for long. Partly in response to this case, in 1872 the Illinois legislature enacted a statute that stated that no person could be precluded from an occupation, excluding the military, on the basis of sex, and in 1890, both the Supreme Court of Illinois and United States Supreme Court retroactively granted Bradwell her license to practice law, dating her license with the year 1869, the year she sat for and passed the Illinois bar exam (Wills).

Before the 1870s, women had extremely limited opportunities concerning employment at all, let alone in the legal profession. Both cultural norms, like traditional familial roles, and legal restrictions, like the common law doctrine of coverture, prevented women from entering public life. As important historical events in the United States developed, however, so too did women's gradual entrance into both general employment and the legal field.

The first wave of feminism, which began in 1848 with the first women's rights convention in Seneca Falls and concluded with the passage of the Nineteenth Amendment to the United States Constitution, is of particular importance when discussing the progression of women's rights and women's involvement in the law. The movement's primary goal was to gain for all women the right to vote in the hopes that other rights would soon follow after women were officially given a voice in government ("What was the First Wave Feminist Movement?").

The first wave of feminism paralleled the abolitionist movement, and when the Civil War broke out, women reformers temporarily switched their efforts from organizing the women's movement to concentrating on the war effort and ending slavery (Lange). This decision disrupted the successes the movement had earned, and after the conclusion of the Civil War, the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution that guaranteed rights to now freed slaves were not applied to other segments of the population, including women, despite calls from many reformers that women also be added to the language of the amendments (Cushman 2).

Regardless of Congress's refusal to apply the provisions of the Civil War Amendments to women, the post-Civil War efforts of women advocates did result in some progress. In 1869, for example, the St. Louis Law School admitted the first American women into law school, and a year later, the first woman graduated from an accredited university with a law degree. That same year, a woman was admitted to the bar of Iowa, becoming the first woman to be admitted to the bar of any state. Various state statutes limiting the ability of women to gain admission into their state's bar were gradually reworded or abolished completely. The case of *Bradwell v. The State of Illinois* and other cases that ruled similarly in state courts were a major setback, but they also proved that the Privileges and Immunities Clause of the Fourteenth Amendment was not the most effective provision to use to argue sex discrimination cases; this caused reformers to turn to the Equal Protection Clause of the Fourteenth Amendment, an approach that proved much more constructive in later cases argued before the Supreme Court (Cushman 3).

In 1870, four women were attending law school in the United States; in 1890, attendance had risen to 135. By the turn of the century, women were admitted to the bar in almost every state (Weisberg 494). Tensions began to intensify as the world faced World War I, and as

conditions around the world escalated, women advocates in the United States further pressured President Woodrow Wilson and Congress to pass an amendment that would grant women the right to vote. Women suffragettes approached the First World War much more aggressively than the Civil War. Whereas in the latter reformers conceded their strive for suffrage to participate in the war effort, in the former women used the war to their advantage by arguing that the United States could not fairly fight for liberty and freedom abroad when half of their own citizens were not fully free. Public sentiment began to shift in favor of establishing a federal amendment extending the right to vote to all women, especially after people were exposed to the brutal conditions imposed upon women reformers who were imprisoned for peacefully picketing outside of the White House. Despite President Wilson's original opinion that voting rights for women should be left to the states to decide, he eventually encouraged the establishment of a Constitutional amendment, stating to the United States Senate on September 13, 1918 that he perceived the extension of the franchise to women "as vitally essential to the successful prosecution of the great war of humanity in which we are engaged." With President Wilson's backing, the Nineteenth Amendment to the United States Constitution was passed by both houses of Congress on June 4, 1919 and ratified on August 18, 1920 ("Women's Suffrage and World War I").

By the time the Nineteenth Amendment was ratified, women were admitted to the bar in every single state (Bowman 3). Many of the women who fought for suffrage and other women's rights in the beginning of the 20th century were, in fact, lawyers. Members of the Women's Lawyers Club served as prominent suffragettes, and they published in their *Women's Lawyers' Journal* articles about various suffragettes, suffrage organizations, women lawyers who were given top positions in suffrage associations, and suffrage events that they expected fellow

women lawyers to attend (Weisberg 502). Their involvement in the first wave of the women's movement is the first example of many that demonstrates that the growth of women's participation in the law was intertwined with women's gradual gaining of rights.

Florence Allen:

In the legal world, Florence Allen was a woman of many revolutionary firsts. Born on March 23, 1884, Allen attended Western Reserve University, now called Case Western Reserve University, in Cleveland, Ohio at the age of 16. After graduating with a bachelor's degree and spending two years in Germany, Allen enrolled at Western Reserve University for the second time and graduated with a master's degree in political science and constitutional law. She was entering a field in which women were not welcome, which she realized quickly as she was denied admission to Western Reserve University's law school, which did not admit any women at the time. Allen, therefore, chose to attend law school at the University of Chicago, where she was the sole woman in her class of 100 men. By the end of the term, she was second in her class ("Florence Ellinwood Allen").

In 1910 Allen moved to New York City, where she worked to defend immigrants arriving in the United States for the New York League for Protection of Immigrants. She also lectured in public schools. While in New York, Allen enrolled in the New York University Law School to finish her legal education ("Florence Ellinwood Allen"). During her time in New York City, Allen was an adamant supporter of women's rights, and she actively worked with organizations that campaigned for women's suffrage ("Judge Florence Allen Biography"). After graduating in 1913, and like so many women after her, she was refused employment from every law firm she applied to, despite graduating second in her class ("Florence Ellinwood Allen"). Rather than let

this be the end of her legal career, Allen opened her own firm in Cleveland upon being admitted to the Ohio Bar. ("Judge Florence Allen Biography").

In 1919, Allen was appointed as the assistant prosecutor for Cuyahoga County, becoming the first woman in the United States to earn the position. A year later, after the 19th Amendment was ratified, Allen's colleagues and friends within the Woman Suffrage Party urged her to run for judgeship on the Court of Common Pleas in Cuyahoga County. In only two days, 2,000 signatures were gathered to petition for her name on the ballot. She was elected on November 2, 1920 with the endorsement of most of the major Cleveland newspapers, community leaders and women who could vote for the first time, thus becoming the first woman elected to a judicial position in the state of Ohio ("Florence Ellinwood Allen").

Two years later, Allen was encouraged by her supporters to run for election to the Supreme Court of Ohio. She again petitioned for her name on the ballot rather than seek the backing of either political party, as she believed the judiciary should be nonpartisan. Women from all over Ohio formed "Florence Allen Clubs," and she was endorsed again by major newspapers. On November 7, 1922, Allen was elected Justice of the Supreme Court of Ohio, becoming the first woman to be elected to the highest court of any state in the country. She was re-elected in 1928, but before she could seek election to a third term, President Franklin D. Roosevelt nominated her as a candidate for the United States Sixth Circuit Court of Appeals. With the unanimous approval of the United States Senate, Allen became the first woman appointed as a federal appeals court judge. She was briefly appointed Chief Judge for five months between 1958 and 1959, becoming the first woman to serve as the Chief Judge of any circuit court of appeals ("Judge Florence Allen Biography"). She resigned in October of 1959 after 32 years of service on the Sixth Circuit ("Florence Ellinwood Allen").

During her time working as a state Supreme Court Justice and circuit court judge, Allen influenced public policy in many areas, including the federal regulation of economy, labor rights, and immigration, to name a few. She fought to better the conditions of those in the working class, of those who immigrated to the United States, and of women. Her work in the courts, for example, helped to ensure that women could retain their employment after male employees returned from deployment in the First World War ("Judge Florence Allen Biography"). She also helped to reform Ohio's judicial procedures regarding material witnesses, which culminated in the disposal of nearly 900 cases ("Florence Ellinwood Allen"). Allen served as the assistant secretary of the National College Equal Suffrage Association and as a member of the executive board of the Ohio Women Suffrage Association ("Judge Florence Allen Biography"). Not only, therefore, did she advocate for women's rights through her work in the judicial system, but she also campaigned alongside other women suffragists.

Allen's legal career is significant for a number of reasons. As stated earlier, she was a woman of many firsts for the entire race of women in the legal field. These firsts were momentous in the introduction of women to meaningful positions within the law. To obtain these positions, Allen had to successfully rise above the many men who ran against her, a feat never before accomplished to this extent. With the sense of independence and power that came with the passage of the Nineteenth Amendment and with the determination of women across the entire state of Ohio, Allen was able to come out victorious at a time when women were adamantly believed to be less capable than men, especially in the legal sphere. Her success is an excellent example of the power of many to achieve a common goal and of the drive women had within themselves to make their abilities, intelligence, and inherent equality to man known.

Allen refused to conform to the standards women were held to. She never married, nor had any children ("Florence Ellinwood Allen"); rather, she devoted her life to her work and to furthering the causes she believed in. When men attempted to strike her down by not hiring her upon her completion of law school at the top of her class, she opened her own firm. With her legal work, Allen made many meaningful contributions to the rights of women and other minorities. What she was able to do within the legal field was unprecedented at the time, and she helped to pave the way for the women who followed her. Allen, and the work she did to make the legal field and other areas of life accessible to women, is one of the earliest examples of how the women's rights movement and women's involvement in the law not only coincided with one another, but were also shaped and created by one another.

Context: Growth between 1920s-1980s:

The passage of the Nineteenth Amendment to the United States Constitution and various laws that followed it had a lasting impact on American women. A new-found sense of independence and less restrictive laws barring women from entering the workforce inspired women to leave their homes and find meaningful employment, including employment as lawyers. In 1920, the top 12 law schools with the highest women enrollment had 84 women students. Deans of nationally ranked law schools noted in 1925 that many women were at the top of their class, and that they were equal to, if not better, than their male counterparts. Once the first group of women lawyers graduated law school, however, this spirit of enthusiasm was dampened by the reality of their inability to find employment in law offices. Most women were fully denied jobs within law offices, and even those lucky enough to be hired were given either

temporary jobs or were assigned to clerical positions; they were not conducting the real legal work that they had worked so hard to gain the right to practice (Bowman 3-4).

When the Great Depression struck and decimated the United States economy between 1929 and 1933, conditions for women lawyers and employed women in general only worsened. People made women feel guilty for attempting to take positions that could be given to a man who had his family members to look after; this disdain for women intervention in the dying job market led to the call for legislation that would severely restrict the ability of women to work if, for example, they had a husband who was already employed. On the other side of the Great Depression, however, was the New Deal, which greatly expanded the role government played in the lives of the American people; naturally, this meant that the field of law also played a larger role. As New Deal legislation was passed, the need for lawyers to work within new agencies and bureaucracies increased, and as such women lawyers were able to find employment within the federal government, though they often worked in nonlegal, secretarial positions. Despite the setbacks of the Great Depression, women during this period were still attending law school. In 1939, the top 12 law schools with the highest women enrollment had 370 women students, and nearly 15 percent of New York's lawyers were women (Bowman 4-5).

Similar to the suffrage movement during World War I, women used World War II in the 1940s to their advantage to further their involvement in the workforce. Many men who worked as attorneys within law firms were also in the military. When they were deployed to Europe and Asia for military duty, legal offices became hard pressed for personnel to uphold the work the attorneys left behind. With nowhere else to turn, these firms looked to women to fill the void. Law schools, too, were making up for the shortage of male law students with women. During the war, the percentage of the proportion of women to men attending law school jumped from three

to 12 percent. These wartime conditions, however, returned to pre-war levels at the conclusion of the Second World War. While very few women remained as associates in the law firms that hired them during the war, most were removed from their positions upon the return of the veterans who had originally worked there, and the number of women attending law school declined upon the resurgence of male enrollment, as well. Those who were given permanent positions as attorneys faced discrimination. They were paid lower salaries, physically segregated from men within the office, and assigned to cases that were low profile or within areas of the law that were not highly regarded (Bowman 5-8).

By the beginning of the 1950s, many women were obviously well suited to and experienced in the work of a lawyer, as they had been relied upon to step into men's shoes to carry on important legal work during their absences in World War II. Although firms occasionally hired women attorneys in the 1950s and 1960s, employers compiled multitudes of reasons as to why they would normally not hire women to work in their firms: they did not want to expend time training women for them to eventually leave to bear children, they felt that women were more expensive than men and thus did not want to add them to their insurance policies, and they feared that their clients would not want to be represented by women, who were widely viewed as less valuable and less educated than their male colleagues. In one survey of various law firms, employers rated being a woman as a hindrance to an attorney's employment prospects, and they cited the following reasons as justification for their ratings: "Women can't keep up the pace," women have a "bad relationship with the courts," a woman's "responsibility is in the home," and they were "afraid of emotional outbursts" that women attorneys may display. New York University claimed that 90 percent of the law firms reaching out to its

placement office would not interview women candidates, even those who were top of their class (Bowman 8-13).

During the 1960s and 1970s, the second wave of the women's movement commenced. Women influenced by the Civil Rights Movement were inspired to fight for their own rights and for an equal place in society, particularly in education and employment ("Second-wave feminism"). Women who were attending law school were becoming frustrated by the constant rejection they were receiving from potential employers (Bowman 13). Regardless of Title VII of the Civil Rights Act of 1964, which prohibited discrimination in employment on the basis of sex ("Second-wave feminism"), even years later women were reporting that law firms were not hiring them because they were perceived as less valuable than male candidates. Women across the country began taking complaints of persistent employment discrimination, both within and outside of the field of law, to court (Bowman 13). In the 1970s, Ruth Bader Ginsburg and other attorneys working on the Women's Rights Project of the ACLU, for instance, argued a series of cases before the Supreme Court of the United States that challenged laws that discriminated on the basis of sex under the Equal Protection Clause of the Fourteenth Amendment. Three of these cases, *Reed v. Reed, Frontiero v. Richardson, and Craig v. Boren* served as instrumental turning points in establishing gender equality in the United States (Cushman 39).

On March 29, 1967 in Ada County, Idaho, minor Richard Lynn Reed died intestate. Seven months after Richard's death, his mother Sally filed a petition in the probate court, desiring to be appointed adimistratrix of his estate. Before the date of her hearing, Cecil Reed, Sally's ex-husband and Richard's father, also filed a petition in the probate court seeking to be appointed the administrator of Richard's estate. The probate court named Cecil administrator of Richard's estate based upon a provision in Idaho's probate code that specified that in the case of

equal entitlement to the position of administrator or administratrix of a person's estate, males must be preferred to females. Sally appealed the decision, which the District Court reversed. Cecil then appealed the District Court's decision, and the Idaho Supreme Court reversed the District Court's decision, thus reinstating the original decision of the probate court. Sally appealed this decision to the United States Supreme Court, contending that the Idaho statute, which explicitly preferred males over females in naming the administrator or administratrix of an estate, violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. On November 22, 2971, the United States Supreme Court agreed with Sally and reversed the Idaho Supreme Court's decision, ruling that the statute was unconstitutional, as it violated the Equal Protection Clause of the Fourteenth Amendment. In his opinion, Chief Justice Warren Burger wrote, "To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment" (*Reed v. Reed,* 1971).

The Bench's decision in *Reed v. Reed* made national headlines; over 100 years after the establishment of the Fourteenth Amendment, it was the first case in which the Court struck down a state statute based upon its discrimination against women in violation of the Equal Protection Clause ("Breaking New Ground—Reed v. Reed"). This was monumental for women who were trying to gain rights through the judicial system. For the first time, they had found an avenue through which gender discrimination could be successfully attacked. It is noteworthy that the opinion written by Chief Justice Burger was relatively brief, and that the decision of the Court was unanimous amongst the nine justices. This suggested that the Bench easily found the statute to be an obvious violation of the Equal Protection Clause, which opened the door to the

questioning of a multitude of similar discriminatory statutes both on a state and federal level. It also served as a warning to Congress and state legislatures that women could not be discriminated against purely for convenience or other arbitrary reasons in future legislation.

Reed v. Reed is also significant for what it failed to do. Sally's attorneys pushed for the strict scrutiny test, rather than the rational basis test, to be applied to the classification of gender. The brief they submitted to the Court, in fact, argued in 46 pages the importance of applying the strict scrutiny standard to such cases; it focused on the rational basis test as a backup option in only seven pages ("Breaking New Ground—Reed v. Reed"). In the Court's opinion, however, Chief Justice Burger made no mention of subjecting gender classification to strict scrutiny, and the Bench decided this particular case on the grounds of rational basis (*Reed v. Reed,* 1971). What is significant about the Court's failure to mention the strict scrutiny standard, however, is that it did not strike down the idea; rather, it simply ignored it. This meant that future cases dealing with gender discrimination could continue to argue for its importance.

This is exactly what *Frontiero v. Richardson* did. In 1973, Sharron Frontiero, a married Air Force officer, sought benefits for her husband as a dependent under federal law. These particular statutes, however, stated that spouses of male members of the military could be named dependents for allowances and medical and dental benefits automatically; spouses of female members of the military, on the other hand, could not be classified as dependents unless they were actually dependent upon their wives for over one-half of their support. Frontiero, therefore, was denied these additional spousal benefits. Frontiero brought the suit to a federal district court, arguing that the statutes deprived her of her due process rights under the Fifth Amendment because they treated men and women differently by giving men an unfair advantage over women in the ability to gain benefits for their families (*Frontiero v. Richardson,* 1972). Because this

case was a federal suit, the Equal Protection Clause of the Fourteenth Amendment, which only applies to state actions, could not be used. The district court did not believe that this difference in treatment between male and female military members constituted sex discrimination at all, and further concluded that even if it did, it was not significant enough to amount to a violation of a Constitutional provision ("A Double Standard for Benefits—Frontiero v. Richardson"). Frontiero appealed directly to the Supreme Court of the United States.

The Bench was not unanimous in its rationale of its decision, and for the first time the discussion of which standard of review was appropriate for gender classification cases was of primary focus, a step up from the result of *Reed v. Reed*. The Court ultimately ruled that Frontiero's rights had been violated under the Due Process Clause of the Fifth Amendment. Four justices applied the strict scrutiny standard, and in their opinion, Justice William Brennan argued that their "departure from 'traditional' rational-basis analysis with respect to sex-based classifications is clearly justified" because sex, like the other suspect classes of race and national origin, is not something that can be controlled or determined manually, and because sex, unlike other nonsuspect classes, does not usually correlate with inferiority or the inability to meaningfully contribute to society. They further contended that statutes that distinguished between men and women had the effect of pigeonholing all women into an inferior position regardless of individual capabilities within the class. For these reasons, the plurality opinion concluded "that classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny" (*Frontiero v. Richardson,* 1972).

A minority of concurring justices agreed that Frontiero's rights had been violated, but cited the decision in *Reed v. Reed* in reasoning that sex did not constitute a suspect class, and that

it was not appropriate for the Court to discern whether or not it was. Following *Reed v. Reed*, they applied the rational-basis test in their determination of the laws unconstitutionality (*Frontiero v. Richardson,* 1972).

While the plurality's use of the heightened strict scrutiny standard in this sex discrimination case was not adopted by the Court and therefore did not gain the force of law, it did reflect the slowly shifting perspective of the Bench. Justice Brennan and those who agreed with him reasoned that women were not inherently inferior to men, and that to classify them in this way generalized the entire race of women with no regard to individual differences. They also recognized that sex is unalterable, and for this reason, it should be treated as equal to other unalterable classes, like race and national origin. These concepts were unprecedented within the Court; the simple fact that they were being considered and decisions were being made upon them at all was remarkable. Although attorneys arguing for a heightened standard were yet again unsuccessful, they were one large step closer to reaching their ultimate goal.

The case that finally determined the standard used today for gender classification cases was brought to the Supreme Court in 1976. Curtis Craig, a male between the ages of 18 and 21, and Carolyn Whitener, a female licensed alcohol vendor, brought a suit against an Oklahoma statute that prohibited the sale of "nonintoxicating" 3.2 percent beer to males under 21 years of age and to females under 18 years of age. They contended that the statute violated the Fourteenth Amendment's Equal Protection Clause because it discriminated against men between the ages of 18 and 20 on the basis of their sex. In accordance with the ruling of *Reed v. Reed*, and thus applying the rational basis test, the district court held that statistics demonstrating male drunk-driving arrests and traffic-related injuries were sufficient to prove that these gender-based

distinctions substantially furthered the government interest of promoting traffic safety (*Craig v. Boren*, 1976).

When the case reached the United States Supreme Court upon appeal, once again the discussion of which standard of review to apply to gender classifications arose. The Court ruled in favor of Craig and Whitener, reasoning that the "appellees' statistics in our view cannot support the conclusion that the gender-based distinction closely serves to achieve [a public health and safety] objective and therefore the distinction cannot under Reed withstand equal protection challenge" (*Craig v. Boren*, 1976). Craig's Fourteenth Amendment rights under the Equal Protection Clause had been violated. Not only did *Craig v. Boren* result in the striking down of this discriminatory Oklahoma statute; more importantly, it also resulted in the emergence of an entirely new standard of review for gender discrimination cases: the intermediate scrutiny test. In his opinion, Justice Brennan wrote, "To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives" (*Craig v. Boren*, 1976). This test falls between rational basis and strict scrutiny, thus serving as a compromise between the two. In a rational basis case, the restriction of rights must be reasonably related to a legitimate government interest, while in a case applying the strict scrutiny standard, the restriction of rights must be narrowly tailored to serve a compelling state interest ("Justice for Beer Drinkers—Craig v. Boren"). The intermediate scrutiny test, in which the restriction of rights must be substantially related to an important government objective, applies to quasi-suspect classes, including sex, to this day.

The opinion of the majority in *Craig v. Boren* was the first official recognition by the Court that sex discrimination was a much more serious, present, and profound issue than it had

been considered before. This recognition manifested into the establishment of the intermediate scrutiny test, which acknowledged that sex, though not quite considered by the Court to be a suspect class, was something important that needed to be reckoned with. This was an incredibly significant step for women who were navigating the courts as a means to protect and gain their rights.

It is also interesting to consider that the statute called into question in *Craig v. Boren* was discriminatory against men, not women. This suggested that sex discrimination was more than a false belief or concept that only applied to women; rather, it applied to every American citizen, regardless of sex. Not only did this broaden the scope of gender discrimination, but it also reached the Supreme Court Bench from their perspectives as men. Where once the Bench refused to even recognize the existence of gender discrimination, now they had a solid reason to realize for a fact that it existed: men like themselves were being discriminated against, too.

Reed v. Reed, *Frontiero v. Richardson*, and *Craig v. Boren* cannot be spoken about without noting the influence of the women lawyers who worked on them. These three cases were a part of a sequence of cases adopted by the ACLU's Women's Rights Project, an initiative undertaken by attorneys who were determined to gain rights for women by gradually chipping away at discriminatory laws through the judicial system. At the forefront of these cases were women attorneys, including now Supreme Court Justice Ruth Bader Ginsburg. Ginsburg wrote the brief for *Reed v. Reed* that stressed the importance of heightening the standard of review for gender discrimination cases. *Frontiero v. Richardson* was the first case Ginsburg argued in front of the Supreme Court. In the case of *Craig v. Boren* and on behalf of the ACLU, Ginsburg filed an amicus curiae brief which demonstrated that gender discrimination was harmful to men just as it was to women and also attacked gender stereotypes commonly relied upon in the law

(Blakemore). Without Ginsburg's input and the input of other women lawyers championing the objectives of the Women's Rights Project through these cases, the rights that women have gradually gained through the courts would have never been recognized, let alone granted.

These three primary cases and others that challenged gender discrimination across the country had an enduring impact on the employment of women in every profession, including the law. After these sequences of cases, women began flooding the legal field. Between 1950 and 1970, only three percent of lawyers were women (American Bar Association Media Relations and Strategic Communications Division). By 1980, however, the number of women lawyers in the United States had more than quadrupled (Bowman 15). Likewise, in 1950 three women held federal judiciary positions; by 1980, 46 women were appointed as federal judges (American Bar Association Media Relations and Strategic Communications Division). These cases, and the approach women advocates took by slowly chipping away at laws that discriminated on the basis of gender under the Equal Protection Clause of the Fourteenth Amendment, proved incredibly effective and greatly expanded the rights of women within every professional field, as well as in other areas of life.

Sandra Day O'Connor:

Sandra Day O'Connor accomplished something a woman had never done before and only three have done since: she was appointed as a United States Supreme Court justice, the highest position obtainable within the legal field. Becoming a Supreme Court justice is a prestigious achievement earned by only a few in and of itself; for O'Connor to become a Supreme Court justice as a woman was nothing short of groundbreaking.

Born on March 26, 1930 in El Paso, Texas, O'Connor grew up on a ranch outside of the city while spending her school months with her grandmother in El Paso. While living on the ranch and as an only child, O'Connor learned at a young age how to shoot, ride horses, drive a truck, and find entertainment through reading novels and newspapers. She exceeded in school, influenced by her grandmother's exceptionally high expectations. At the age of 16, O'Connor attended Stanford University and graduated in 1950 with a degree in economics with great distinction. She continued her education at Stanford Law School, serving for the *Stanford Law Review* and joining a legal honor society. She graduated only two years later in 1952, third in her class of 102 students (Cushman 247-248).

Like all other women at this time, O'Connor was consistently turned down from every law firm she applied to because they refused to hire women. The only job she was offered was a position as a legal secretary, which she declined, opting to work for free as a deputy county attorney in San Mateo, California instead ("Sandra Day O'Connor"). It was this job, O'Connor once stated, that "'influenced the balance of my life because it demonstrated how much I enjoyed public service'" (Cushman 248). She spent the rest of her career dictating court decisions that would influence such public policy for all Americans.

O'Connor moved in 1954 with her husband to Frankfurt, Germany, where she worked as a civilian lawyer. Upon returning to the United States in 1957, she opened her own firm, but stopped working after her second child was born. Between 1960 and 1965, O'Connor was a full-time mother; she continued her involvement in the legal sphere, however, through her volunteer work. This volunteer work launched her into a political and judicial career that culminated in her nomination to the United States Supreme Court. Within this five-year period, O'Connor wrote questions for the Arizona bar exam, helped initiate the state bar's lawyer referral service, worked

for the local zoning commission, served as a member of the Maricopa County Board of Adjustments and Appeals and the Governor's Committee on Marriage and Family, worked as an administrative assistant at the Arizona State Hospital, served as an advisor to the Salvation Army, and volunteered in a school for blacks and Hispanics. During this time O'Connor also became involved in politics, working as a county precinct officer and district chairman of the Republican party (Cushman 248).

O'Connor returned to full-time employment in 1965 as an assistant state attorney general, and in 1969 she replaced Isabel A. Burgess, who was appointed to a position in Washington, D.C., in the Arizona Senate. O'Connor won re-election twice and was elected majority leader in 1972, becoming the first woman to hold the position of majority leader in any state senate. While in the Arizona Senate, O'Connor usually voted moderately to conservatively, excluding cases concerning discrimination, in which she adopted a more liberal perspective (Cushman 248-249).

In 1974, O'Connor won election to a state judgeship on the Maricopa County Superior Court, and in 1979 she was selected by Arizona's Democratic governor as his first appointee to the Arizona Court of Appeals. Two years later President Ronald Reagan nominated her to the United States Supreme Court. 17 of the 18 members of the Judiciary Committee supported her nomination, the sole dissenter citing her refusal to denounce the Supreme Court's decision in *Roe v. Wade* as the reason behind his disapproval. O'Connor was approved by the Senate 99-0, and she took the oath of office on September 26, 1981, becoming the first woman justice on the United States Supreme Court. As the only member of the Bench who had been elected to public office, she brought with her appointment the broad experience she had gained from working for all three branches of government (Cushman 249).

In the beginning of her service as a Supreme Court justice, O'Connor usually voted conservatively. In her first term, however, she made clear her support for equality between man and woman in her vote with the liberal half of the Court in *Mississippi University for Women v. Hogan*, a case in which a man was refused admission into a nursing program at a traditionally all-women school. In her majority opinion, O'Connor stressed that by denying men admission, the school was perpetuating the negative stereotype that nursing was a job fit for only women and that men should be involved in more sophisticated, intense work ("Sandra Day O'Connor").

While O'Connor was a conservative voter, it was not uncommon for her to write her own centrist concurrences that limited the more extreme rulings of the Court. These central perspectives often became law because they fell within the middle of the ideological scale of the Bench. One observer of O'Connor's work stated in 1990, "'As O'Connor goes, so goes the Court.'" She eventually became the swing vote on a number of intense issues, from abortion to affirmative action to the death penalty to religious freedom, the latter of which she is notable for her opinion that established the legal standard for determining when practices do and do not violate the Constitution and for a dissent in which she expressed her belief that certain religious practices that do not interfere with a compelling government interest should be exempt from laws that would restrict that practice. She is also notable for her support of affirmative action, but only when it was narrowly applied to correct an obvious wrong (Cushman 249-250).

O'Connor ruled on sexual harassment in the workplace, as well, which made the claim of sexual harassment more accessible to women; instead of being required to prove psychological injury due to the harassment they had experienced, women now only had to prove that a reasonable person would find her work environment to be hostile or abusive. She promoted the interests of women again in a case involving the sexual harassment of a girl student by a boy

student in a public school. In her opinion for the majority, O'Connor wrote that under federal law, a school board could be held liable for the sexual harassment of a student if the board purposefully did nothing to prevent or deter the child's conduct. This decision ensured, O'Connor wrote, that "little Mary may attend class" without fear of being harassed by her male counterparts (Cushman 251-252).

As suggested by her voting trends, majority opinions, separate writings, and dissents, O'Connor was both conservative, yet open-minded and flexible as a Supreme Court justice. This middle-of-the-road stance propelled her to a very important, influential position on the Court as the swing vote in many crucial issues, and she did not take this position lightly. When asked to comment on her careful approach, O'Connor once compared making a decision on the Supreme Court to "'walking through a patch of recently poured concrete. You look back and you see those steps forever. You see them! They aren't easily covered up or removed. It makes me want to tread softly'" (Cushman 252). O'Connor knew the weight of her power as the swing vote in the highest Court of the United States, and she knew that her decisions would have real-life repercussions for the American people for years to come. By balancing her conservative roots with her liberal sympathies for women and other minorities who had been wronged, O'Connor was able to promote the rights of all citizens. As the first woman to serve on the United States Supreme Court Bench, she used the power she held to further the rights of women, who, like her, had faced discrimination all of their lives.

Case Study: Planned Parenthood of Southeastern Pennsylvania v. Casey (1992):

Since the landmark 1973 decision of *Roe v. Wade* ruled that the Fourteenth Amendment of the Constitution protects a woman's freedom to choose to have an abortion without the undue

interference of state government, people, institutions, and state governments alike have challenged this ruling in an attempt to regulate abortion, and thus, to regulate the liberty of women to have control over their own bodies. This case, *Planned Parenthood of Southeastern Pennsylvania v. Casey,* arose nearly 20 years after *Roe v. Wade* determined this aspect of liberty for women, suggesting that abortion and preservation of possible life are two enduring state interests that have always been and continue to be placed at high priority, despite the irony that those who are attempting to create and enforce such legislation and restrictions are still mostly men.

In this landmark 1992 case, O'Connor served as the swing vote, as she did in many of the cases she decided on the Supreme Court, in her decision to uphold the rights of women to obtain an abortion as determined by *Roe v. Wade.* In a plurality opinion written by O'Connor, Justice Anthony Kennedy, and Justice David Souter, the three justices, who were all notably appointed by Republican presidents during an era in which Republicans were pushing to overturn what they perceived as an incorrect ruling in *Roe v. Wade,* defied expectations in their reaffirming of the right of women to obtain an abortion under the Fourteenth Amendment of the Constitution ("Sandra Day O'Connor").

Planned Parenthood of Southeastern Pennsylvania v. Casey arose as a challenge to five provisions of the Pennsylvania Abortion Control Act of 1982. These provisions included the requirement that a woman who was seeking an abortion must give informed consent before the procedure, the implementation of a 24-hour waiting period before the performance of the abortion, the requirement that a married woman must sign a statement which indicated that her husband had been notified of her decision to proceed with the procedure, and a mandate that a minor must obtain the informed consent of at least one parent before the abortion would be

completed, amongst others. The petitioners, five abortion clinics, a physician, and a class of doctors who provided abortion services, challenged these provisions, claiming that they violated a woman's right to an abortion as guaranteed under the Fourteenth Amendment of the Constitution by the ruling of *Roe v. Wade*. The district court held that all of the provisions stated above were unconstitutional, but upon appeal, only the husband notification provision was found to be unenforceable. The petitioners appealed to the United States Supreme Court, where the decision was affirmed in part and reversed in part (*Planned Parenthood of Southeastern Pennsylvania v. Casey,* 1991).

In a 5-4 decision with O'Connor as one of the swing votes, the Supreme Court upheld the "essential holding" of *Roe v. Wade*: that women have the right to choose to have an abortion up to a certain point in the pregnancy without the undue interference of the state, that the state can impose some restrictions on abortion after this point in the pregnancy, and that the state does have a legitimate interest in protecting both the health of the pregnant woman and the life of the fetus that could one day potentially become a child. In their plurality opinion, O'Connor, Kennedy, and Souter wrote that personal decisions in matters relating to marriage, procreation, contraception, family relationships, child rearing, and education are "the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, [and] are central to the liberty protected by the Fourteenth Amendment" (*Planned Parenthood of Southeastern Pennsylvania v. Casey,* 1991). Included in these crucial personal choices protected by the Fourteenth Amendment, the Bench found, is the decision to terminate a pregnancy.

The plurality opinion discussed the importance of precedent and stare decisis in judicial decision making, and used these concepts to argue for its application to this particular case. It

recognized that “no judicial system could do society's work if it eyed each issue afresh in every case that raised it,” and that consistency and predictability in the courts would be compromised if stare decisis was not viewed as necessary. While they provided their recognition that the decision in *Roe v. Wade* was not without strong opposition, they did not find it to be “unworkable,” and thus ruled that it must be adhered to (*Planned Parenthood of Southeastern Pennsylvania v. Casey,* 1991).

This is not to say, however, that the entirety of the decision in *Roe v. Wade* was upheld in *Planned Parenthood of Southeastern Pennsylvania v. Casey*. *Roe v. Wade* established the trimester framework, which ruled that during the first trimester, the state was prohibited nearly fully from regulating the pregnancy. During the second trimester, only regulations that were designed to protect the pregnant woman’s health were permitted, and during the final trimester of pregnancy, when the fetus was viewed as viable, the state was permitted to implement regulations that furthered its interest in the potential life of the fetus as long as the life or health of the mother was not at stake. Due to continued advancements in the medical field, however, the plurality found that the viability of a fetus could be established before the third trimester begins. Therefore, the Supreme Court abandoned the trimester framework in favor of an analysis of viability. Before this point, the woman has the option to terminate her pregnancy unhindered by state involvement. The state may express concern and ensure that the woman is well informed of what her decision entails, but it may not prohibit the abortion from being performed. After the point of viability, however, the state may support its interest in the promotion of human life through the prohibition or limitation on abortion rights, providing that the life and health of the mother is not at stake. O’Connor, Kennedy, and Souter thought that this new framework had an “element of fairness” in that it balanced the most central principle of *Roe v. Wade*, the

constitutional right of the woman to terminate her pregnancy before viability, with the legitimate interest of the state to promote potential life (*Planned Parenthood of Southeastern Pennsylvania v. Casey,* 1991).

With their rejection of the trimester framework and preference for the viability analysis came the replacement of the strict scrutiny analysis of *Roe v. Wade* with the new undue burden standard, a test developed by O'Connor, herself, in her dissent in *Akron v. Akron Center for Reproductive Health.* The undue burden standard states that "only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause." In other words, if the regulation poses a "substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus," it will not be enforceable because the ability of the woman to choose is fundamental to her Fourteenth Amendment rights. The plurality also noted, however, that not all regulations on abortion will be found to be undue because the state's interest in protecting potential life is substantial and valid. The undue burden standard, they argued, "is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty." Under this standard, the Supreme Court upheld all but one of Pennsylvania's abortion provisions. They struck down the spousal notice requirement, finding that it had the ability to empower husbands with a "troubling degree of authority" over their wives, which would certainly place an undue burden on them. The other provisions, the Court held, did not place such a burden on the women interested in seeking an abortion (*Planned Parenthood of Southeastern Pennsylvania v. Casey,* 1991).

While the plurality decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey* did place more restrictions on women's abortion rights than the original ruling of *Roe v.*

Wade, it had the effect of upholding the most important, central principle of *Roe v. Wade*: the fundamental constitutional right of women to have control over their bodies over state interference when it came to abortions, despite the push by conservative policy makers to entirely overturn *Roe v. Wade* and enforce harsher, more restrictive legislation. This decision by the plurality defied expectations in that it was three Republican-appointed justices who supported the upholding of this essential principle. O'Connor was heavily influential in the Court's decision, as it was her undue burden standard that became law. Had she and her two concurring colleagues sided with the more conservative bloc of dissenters, *Roe v. Wade* could have been rejected entirely, which would have been an enormous step backwards in the constant fight for women's rights. O'Connor's standard provided a compromise that could be validated by both sides of the Bench, thus enabling the fundamental rights of women outlined by *Roe v. Wade* to remain law while also satiating those with more conservative opinions. In this very meticulous way, O'Connor, Kennedy, and Souter were able to balance the promotion of the rights of women with the appeasement of conservatives who presented this case to the Supreme Court with the intention that it be used to overrule *Roe v. Wade*. This did not end up happening, much to the credit of O'Connor, whose position as middle-man on the Court resulted in the retaining of women's fundamental right to choose.

Ruth Bader Ginsburg:

Ruth Bader Ginsburg built her legal career on the fight for women's rights, a career that culminated in the argument of hundreds of gender discrimination cases and a position on the United States Supreme Court as the second woman justice. Without her work and advocacy, women today would live with far less freedoms.

Born in Brooklyn, New York on March 15, 1933, Ginsburg grew up the daughter of a woman who accepted the conventional roles of a woman as a mother and homemaker for herself, but who also envisioned a different life for her daughter. She was determined to ingrain in Ginsburg a sense of the importance of both independence and achievement. When Ginsburg was a child her mother took her to the library weekly and saved as much money as possible for her future college education. Although she never lived to see her daughter's success, having died of cervical cancer at the end of Ginsburg's high school career, Ginsburg credits her mother for her persistent will and tenacity, qualities that undoubtedly transferred into her legal victories (Cushman 252-253).

Ironically, while attending Cornell University, Ginsburg became interested in the law after taking a constitutional law course but was skeptical of her ability to thrive in law school and beyond. Upon graduating Cornell in 1954, she and her husband briefly moved to Oklahoma, where she was employed in a Social Security Office. At this time, Ginsburg was pregnant with her first child; when she informed her employer, he determined that she was unfit for her current position and relocated her within the office to a lower paying position. This was Ginsburg's first real, personal encounter with gender discrimination in the workplace, and she began to see firsthand the unfair treatment of women in American society (Cushman 253).

In 1956, with the encouragement of her husband, Ginsburg began her legal studies at Harvard Law School. She was one of only nine women in her class of over 500 men. During her first year of law school, her husband was diagnosed with cancer, and Ginsburg became responsible for both her legal studies and his. Despite being a mother and wife of a law student with cancer and despite being questioned by the dean of the college himself as to why she was taking a seat that could have been given to a man, at the conclusion of her first year of law

school she was at the top of her class and was invited to join the law review. In her husband's final year of study, he accepted a position with a New York law firm, so Ginsburg finished her studies at Columbia University, where she graduated tied for first in her class (Cushman 253-254).

Like so many other women before her, Ginsburg was rejected by every law firm in New York that she applied to, regardless of her impressive achievements in law school. With the help of one of her former teachers, Ginsburg was given a clerkship with a judge of the federal district court of Manhattan. While there Ginsburg poured herself into her work, determined to prove wrong those who did not hire her purely because of her sex. At the end of her clerkship, she became a research associate on a comparative law project, which required her to spend time abroad in Sweden, where she was struck by the many progresses Swedish women had made in the workforce compared to American women. Shocked and inspired, Ginsburg felt for the first time feminist sentiments (Cushman 254).

After her return to the United States, Ginsburg was employed as a professor of law at Rutgers Law School, becoming the second woman to join their faculty. Remembering the discrimination she had faced in her previous employment the first time she was pregnant, Ginsburg hid her second pregnancy from the faculty at Rutgers Law School until she gave birth (Cushman 254).

The gender discrimination that Ginsburg had experienced for herself and witnessed in others became something of professional interest to her. When her students requested that she teach a course on discrimination, she found in her research that issues pertaining to gender equality were hardly ever litigated and that legal scholars did not regard them with much seriousness. She eventually came to see discrimination on the basis of sex as a problem deeply

rooted within society, but also as a problem she could help to fix with the use of the judicial system (Cushman 255).

After the passage of the 1964 Civil Rights Act, more and more women felt comfortable stepping forward and revealing their personal experiences with gender discrimination in the workplace. Ginsburg joined forces with the ACLU to launch the Women's Rights Project in 1972 to begin litigating these cases. The goal of this project was to secure rights for women as equal citizens through court action by challenging legislation under the Equal Protection Clause of the Fourteenth Amendment. Part of this task meant convincing the courts, which tended to take the stance that the law was meant to safeguard and shelter women, to strike down laws that it perceived as protective of women. In reality, Ginsburg and other women's advocates contended that these laws perpetuated the stereotype that women were weak, inferior, and in need of such legal protection. The launching of this campaign occurred closely after the victory of *Reed v. Reed*, the first case in which the Supreme Court struck down legislation on the grounds that it unconstitutionally discriminated against women, a case that Ginsburg was heavily influential in winning (Cushman 255).

Ginsburg adopted a gradual approach when it came to arguing gender discrimination through the courts. She held that in order for momentous, enduring change to occur, small steps that slowly chipped away at the institutionalization of gender discrimination was necessary. Meaningful change could not take place overnight, nor would attacking the issue head on be effective, especially in front of a Court that was reluctant to admit even the mere existence of gender discrimination. Therefore, Ginsburg chose to take easy, non-ambiguous cases to the Court first and gradually built toward more substantial cases that she believed could cause significant change.

One particularly meaningful case for Ginsburg was *Weinberger v. Wiesenfeld*, a case she used to show that legislation purporting to protect women was not only harmful to women, but harmful to men as well. After a young man's wife died in childbirth in 1972, he applied to receive Social Security benefits that would enable him to work part time so he could care for his child. His application was denied by the government, which claimed that he was ineligible to receive such benefits as a man; only women could do so after the passing of their male spouse. Ginsburg argued and won this case before the United States Supreme Court, which ruled that the man had been unfairly discriminated against because of his sex. For Ginsburg, this case "'epitomized for me all that we were doing in the '70s'" (Cushman 256). Like *Craig v. Boren*, this case exemplified the broadness of gender discrimination: it was a problem that effected everyone, not only women. It also reached the Supreme Court Bench from a perspective they could relate to and understand as fellow men.

Between 1972 and 1979, Ginsburg argued six gender discrimination cases before the Supreme Court. Of these six cases, she won five. She also filed petitions for review and amicus curiae briefs for numerous other cases, all pertaining in some way to gender discrimination (Cushman 256). Amongst these cases were *Frontiero v. Richardson* and *Craig v. Boren*, which were discussed earlier.

By 1980, Ginsburg had built a national reputation for herself which led to her nomination by President Jimmy Carter to the United States Court of Appeals for the District of Columbia Circuit, one of the highest-profile federal courts in the country. Critics of her nomination feared she would not be able to separate herself from her past of fierce liberal advocacy, but she proved them wrong in her 13 years of serving on the court. It was not uncommon for Ginsburg to side with her conservative colleagues, and she often served as a source of consensus in particularly

difficult cases. Through her previous judicial work and in her own personal experiences Ginsburg had garnered an acute awareness of the real affects judicial decisions can have on people and their lives, and she carefully made her decisions on the bench with that context in mind (Cushman 256-257).

In 1993, a vacancy arose on the Supreme Court Bench. President Bill Clinton announced that he was searching for a candidate with "'a fine mind, good judgment, wide experience in the law and the problems of real people, and someone with a big heart'" (Cushman 257). Within 15 minutes of speaking to Ginsburg for the first time, President Clinton knew he had found his perfect candidate (*RBG*). She took the oath of office on August 10, 1993, becoming the second woman to ever serve on the United States Supreme Court Bench. Her decision-making on the Bench is described as meticulous, careful, and non-ideological (Cushman 259). As a Supreme Court Justice, she continues to fight for the rights of women. In the groundbreaking 2007 case *Ledbetter v. Goodyear Tire & Rubber Co.,* for instance, Ginsburg wrote a powerful dissent that later resulted in the passing of President Barack Obama's first piece of legislation, a law that amended the Civil Rights Act of 1964 to reset the statute of limitations on equal-pay lawsuits upon every paycheck (Blakemore). Ginsburg's opinions and separate writings for the Court, including her dissent in *Ledbetter v. Goodyear Tire & Rubber Co.* reflect that she has never lost sight of the work she has done to propel herself to the Supreme Court Bench: her goal to see an equal society for all.

In her more than 40 years of legal work, Ginsburg has fought valiantly for the rights of women. During her time working for the ACLU she argued over 300 gender discrimination cases, and since joining the Supreme Court she has broken new ground for gender equality in the United States (Blakemore). Her strategy to secure these rights was meticulous and well thought

out. Instead of attempting to create sweeping changes that would have likely failed or been short-lived, she approached different avenues of gender discrimination slowly and once at a time. Doing so gradually chipped away at the system, leaving behind a more equal landscape for American women.

Ginsburg changed the world for American women forever through her work in the judicial system. She devoted her life and work to reverse the injustices imposed upon women in the United States, and through her years of tireless effort she has continued to come closer and closer to equalizing the playing field. If it were not for Ginsburg and her relentless conviction that the Constitution was meant to apply to every American citizen, not only a select few, women would not have the legal status they have today.

Case Study: *United States. v. Virginia* (1996):

Since joining the United States Supreme Court, Ginsburg has authored over 200 opinions, but her best known opinion was written in 1996 for the case *United States. v. Virginia* (Cushman 259). At this time, the Virginia Military Institute (VMI) was the only exclusively male public institution of higher learning. VMI focused on developing "'citizen-soldiers,'" men who were both prepared for military service and life as American civilians. To do so, VMI employed a strict adversarial education method that stressed physical and mental discipline. The United States sued both Virginia and VMI after a female high school student was denied admission, claiming that by not admitting women into its program, the school was violating the Fourteenth Amendment's Equal Protection Clause. VMI and Virginia contended that allowing women to attend VMI would greatly hinder the experience for male students, lower the quality of education

students would receive, and would require the abandonment of its adversarial education system (*United States v. Virginia,* 1995).

The district court ruled in favor of VMI, finding that their refusal to admit women was not a violation of the Fourteenth Amendment. On appeal, the Fourth Circuit Court reversed the district court's decision, and Virginia proposed a parallel program to VMI for women as a remedy. This program, called Virginia Women's Institute for Leadership (VWIL), would share VMI's mission, but it would differ from VMI in course offerings, style of education, and in financial aid. Despite these and other significant differences, the district court and Fourth Circuit court found this remedy to be satisfactory, determining that the two schools would provide a sufficiently comparable education (*United States v. Virginia,* 1995).

The petitioners appealed to the United States Supreme Court, where the Bench decided 7-1 that VMI's male-only admission policy was, in fact, unconstitutional. In writing for the majority, Ginsburg stated that "Parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action." Virginia and VMI's justification, that single-sex education supports diversity and that women would degrade the level of education provided by the institution, was not found to be sufficient to warrant discrimination in their admission policies. Ginsburg also wrote that the remedy provided by Virginia, VWIL, did not cure this violation because it would not provide women with the same educational opportunities that VMI provided to its male students. Furthermore, Ginsburg wrote that the Fourth Circuit erred in analyzing the differences between VMI and VWIL based upon a standard "of its own invention," rather than the appropriate heightened standard established by the Court for gender-based classifications. Although the Fourth Circuit found under its substantive comparability standard that the opportunities provided by VWIL would be

sufficiently comparable to those provided by VMI, under the established heightened scrutiny standard, the Supreme Court found that the "substantially different and significantly unequal" VWIL program did not satisfy the requirements of the Equal Protection Clause of the Fourteenth Amendment. The Court contended that there was "no reason to believe that the admission of women capable of all the activities required of VMI cadets would destroy the Institute rather than enhance its capacity to serve the 'more perfect Union.'" Because of this, VMI's policy was found to be unconstitutional (*United States v. Virginia,* 1995).

In her opinion for the Court, Ginsburg notably wrote that "neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature-equal opportunity to aspire, achieve, participate in and contribute to a society based on their individual talents and capabilities" (*United States v. Virginia,* 1995). This statement reflects Ginsburg's decades of work to equalize the playing field for men and women in the United States, and also indicates that her work advocating for women was not complete after she was nominated to the United States Supreme Court. Behind the Bench, just as she did before it, Ginsburg continues to argue for the rights of women to be treated as equals to their male counterparts in all aspects of life.

It is interesting to note that in her opinion, Ginsburg mentioned that the exclusion of women from VMI was reflective of the exclusion of women from law schools across the country in the late 1800s and early 1900s. Women were thought to be ineligible for the practice of law, she commented, because they were perceived to lack the capabilities to meet the responsibilities required of a lawyer. By resisting the admission of women into their law schools, institutions claimed they were preserving the quality of the profession, just as VMI was attempting to claim by denying women admission (*United States v. Virginia,* 1995). Ginsburg's use of this

comparison is striking, especially because she and O'Connor both sat on the Supreme Court bench as incredibly successful lawyers in deciding this case. Her observations of these similar situations serve to strike down the presumption that because women are women, they are inherently weak. Those listening to her opinion need only to look to her and her work in the legal profession for a first-hand example that demonstrates the opposite to be the truth.

Conclusion:

After the sequence of cases presented before the Supreme Court in the 1970s had established the heightened intermediate scrutiny standard, much due the efforts of Ginsburg and other women lawyers who headed the Women's Rights Project of the ACLU, women began joining the legal profession at an unprecedented rate. Between 1980 and 1990, the percentage of women lawyers increased by 12 percent, and by 2000, 27 percent of lawyers were women. Today, over a third of the legal profession in the United States is comprised of women. Before 1980, less than 50 federal judges were female. Today, there are over 350. More women today are attending law school than are men, and an equal number of men and women are earning their law degrees (American Bar Association Media Relations and Strategic Communications Division). As women were gaining rights through the judicial system, they were also gaining access to employment and influence within it, which resulted in more rights being gained. This cyclical, intertwined nature of women involvement in the law and women's rights suggests that without one, the other would not exist in its fullest capacity.

Although in the last century women have gained rights they never before could have imagined, and while the legal profession has come a long way since the case of *Bradwell v. The State of Illinois*, more work must be done. Sexism, underrepresentation, bias, and discrimination

against women all still exist within the legal profession, and until these issues are remedied, neither will women be seen as exact equals to their male counterparts, both within the field and without, nor will an entire population of people be fairly represented and decided for or against in the judicial system.

In 2016, the American Bar Association's (ABA) Commission on Women in the Profession, the Minority Corporate Counsel Association, and the Center for WorkLife Law at the University of California, Hastings College of the Law conducted a survey to garner a sense of the extent of workplace bias within the legal profession. Not only do national statistics suggest that women's advancement in the field has not changed significantly in the past few decades, but the statistics collected from this survey also demonstrate that the women who do work in the profession have reported experiencing bias in all basic workplace processes, including hiring, assignments, business development, performance evaluations, promotions, compensation, and support. Women of color reported the highest level of bias in all of these areas. Both women of color and white women reported that they feel they must go "'above and beyond'" to gain the equal respect of their coworkers. Women of all races reported receiving clear messages that they do not fit the typical image of a lawyer, and women of color stated that they have been mistaken for administrative staff or janitorial staff 50 percent more often than white men, while white women face a similar bias 44 percent more often than white men. Women of all races stated that they feel pressure in the workplace to behave in stereotypically feminine manners, and that they are criticized for engaging in more masculine behaviors. They are assigned to more administrative tasks than men, and their competence is called into question more often than their male coworker's competence is. A high level of bias was reported by mothers, who feel they have been discriminated against after they had children. They were denied promotions, assigned

to low-profile cases or administrative work, demoted or compensated significantly less, and criticized for working only part-time. Half of people of color and nearly 60 percent of white women surveyed agreed that if they felt compelled to take family leave, their careers would be negatively impacted. Women reported being hired less often, being paid less, and being promoted less than men. Sexual harassment in the workplace was also more relevant to women lawyers. Nearly 25 percent of women, and less than ten percent of men, reported that they had experienced unwanted and unwarranted sexual harassment at work, and one in eight women reported having lost their career due to their rejection of a sexual advance (American Bar Association Commission on Women in the Profession, "You Can't Change").

In all areas of the legal profession, from being hired to being compensated to being promoted to being assigned cases, women are obviously discriminated against. Regardless of their backgrounds and abilities, women are placed in unfair, unfounded, and unequal positions within the field simply because they are women. The American Bar Association on Women in the Profession and the Minority Corporate Counsel Association work to combat this bias, and have determined that in order to do so, its origins must be considered. Gender stereotypes play a significant role. Women have always been considered more soft and less assertive than men, but when they attempt to exert characteristics stereotypically associated with success within the legal field, however, they are harshly perceived. Women are also unable to network as efficiently as men. Attorneys prefer to provide support to those who are similar to themselves; because there are significantly fewer women in senior positions, especially women of color, female attorneys are given less opportunities to be mentored or developed within these positions. A challenge that all lawyers face is the unbalanced structure of life as a lawyer. Nearly two-thirds of surveyed lawyers reported that they had experienced conflict between their work and family, and most

reported that this fact is the greatest barrier to women's advancement in the field. Because lawyers are expected to work excessive hours, to meet all client needs, and maintain a flexible schedule for these purposes, women with family obligations are severely disadvantaged. Sexual harassment is a culprit, as well. Women account for 90 percent of sexual harassment complaints in the field, yet fewer than ten percent of women ever file any formal complaint for fear of retaliation and derision. Women who are harassed report experiencing both economic and psychological repercussions, including loss of employment, unwanted transfers or demotions, lowered pay, anxiety, depression, and other stress-induced symptoms. Finally, gender bias deeply rooted in the judicial system is culpable for the unequal treatment of women within the field. Disparities are present in all areas of the judicial system, such as the bench, bar, court personnel, and in the results of litigation by male attorneys compared to female attorneys (American Bar Association Commission on Women in the Profession, "The Unfinished Agenda").

The ABA presented with its survey a list of possible solutions to help mitigate the bias experienced by women working within the legal field, suggesting that this problem can, and should, be rectified. The ABA recognized that bias stems from stereotypes, and while people cannot resist making assumptions about others based upon stereotypes, they can choose not to act on those assumptions. To do this, and to refrain from discriminating against prospective and current employees, the ABA listed the following recommendations for people working within law firms and in other areas of the law: encourage people associated with the hiring process to notice and prevent bias, try to tap into diverse networks of possible employees, change the wording of job postings and descriptions to contain more inclusive language, ensure that all resumes are considered based upon a single, fair scale, when looking at resumes and applications

do so blindly, without knowing the gender of the applicant, use structured interviews in which the same questions are asked to every prospective employee, hold everyone in the firm, court, or other legal office equally accountable for their actions, establish a rotation for administrative tasks, and take specific measures to establish transparency and equality in the work environment. All of these steps are conducive to a more inclusive, unbiased profession, but only if they are adopted, emphasized, and practiced with vigor (American Bar Association Commission on Women in the Profession, "You Can't Change").

It is incredibly important that judicial institutions take these steps to ensure a more balanced legal field, not only because it would result in greater equality and less discrimination against the women who work within the profession, but also because it is necessary for the future advancement of women's rights in all aspects of life. As seen by the efforts of women like Florence Allen, Sandra Day O'Connor, and Ruth Bader Ginsburg, it is women in the field who are changing the legal landscape for all American women. Without women lawyers, women cannot be fairly represented in the judicial system. In order to be properly represented, one must be properly understood. A man cannot inherently understand the struggles of womanhood, for he is not himself a woman and has never, nor will ever, experience the state of being one. Women's rights and women's involvement in the law are inextricably intertwined; there is not one without the other. As women become more active and forceful in the legal field, more rights for all women are won. And if this trend fails to continue, women will never reach full equality to man in this nation. Women have fought hard since the days of *Bradwell v. The State of Illinois* to secure a voice in the judicial system which has always attempted to silence them and coerce them into following its dictations without any say in the matter. But the fight is not over. Equality must be fully attained, one step at a time, for all American people to truly be free.

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