

SOCIAL REFORM LITIGATION AND ITS CHALLENGES: AN ESSAY IN HONOR OF JUSTICE RUTH BADER GINSBURG

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In 1993, when President Bill Clinton nominated Ruth Bader Ginsburg to be the 107th justice in the history of the U.S. Supreme Court, he stated, “Many admirers of her work say that she is to the women’s movement what former Supreme Court Justice Thurgood Marshall was to the movement for the rights of African Americans.”¹ The President explained that he could “think of no greater compliment to bestow on an American lawyer.”² Such high praise was Clinton’s way of acknowledging Ginsburg’s pathbreaking service as cofounder and director of the Women’s Rights Project (“WRP”)

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This essay is, of course, dedicated to Justice Ruth Bader Ginsburg, for whom I had the good fortune to clerk in 1983–1984 when she was a judge on the United States Court of Appeals for the District of Columbia Circuit.

¹ President William J. Clinton & Justice Ruth Bader Ginsburg, President’s Announcement and Judge Ginsburg’s Remarks (June 15, 1993), *in* N.Y. TIMES, June 15, 1993, at A24.

² *Id.*

of the American Civil Liberties Union (“ACLU”), where she participated in thirty-four cases challenging various aspects of sex discrimination between 1971 and 1980.³

This essay compares and contrasts some of the challenges faced by Marshall and Ginsburg as pioneering lawyers for social reform. Part I addresses some of the obstacles they faced outside the courtroom. Part II looks at the more distinctly “legal” hurdles they had to overcome.

I. CHALLENGES OUTSIDE THE COURTROOM

A. *Litigation as Organization and Mobilization*

Thurgood Marshall won twenty-nine out of the thirty-two cases that he argued in the Supreme Court.⁴ Ruth Bader Ginsburg won five of her six high court arguments.⁵ Such impressive winning percentages might mislead one into believing that victorious litigation was their only significant contribution to social reform. Yet quite independently of the beneficial consequences of Court victories, litigation can perform important educational, motivational, and organizational functions.⁶

The head office of the National Association for the Advancement of Colored People (“NAACP”) wrote letters to southern blacks that explained their rights and the obligation of whites to abide by them.⁷ Some black communities in the South felt so hopeless and isolated that for the national office merely to make inquiries on their behalf inspired confidence.⁸ A strategy memorandum prepared by Charles Hamilton Houston, the NAACP’s special counsel in the 1930s, declared that a principal objective of litigation should be “to arouse and strengthen the will of local communities to demand and fight for their rights.”⁹

Houston and his successor, Thurgood Marshall, thought that organizing local communities in support of litigation was nearly as important as winning lawsuits. They frequently made speeches at mass rallies while visiting southern communities for court appearances. “On occasion,” a recent biographer writes, Marshall “appears to have been brought to town nominally to

³ AMY LEIGH CAMPBELL, *RAISING THE BAR: RUTH BADER GINSBURG AND THE ACLU WOMEN’S RIGHT’S PROJECT* 17 (2003).

⁴ Juan Williams, Op-Ed., *The Many Masks of Thurgood Marshall: Behind the Justice’s Curmudgeonly Persona, A Special Kind of Torment*, WASH. POST, Jan. 31, 1993, at C1.

⁵ CAMPBELL, *supra* note 3, at 23.

⁶ MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 162–67, 466–67 (2004).

⁷ *Id.* at 165.

⁸ *Id.*

⁹ *Id.*

work on pending litigation but actually to rally the troops.”¹⁰ Because of the need “to back up our legal efforts with the required public support and social force,” Houston referred to himself as “not only lawyer but evangelist and stump speaker.”¹¹

Civil rights litigation demonstrated to blacks the importance of binding together in self-defense and thus provided unparalleled fund-raising and branch-building opportunities for the NAACP.¹² The Association’s biggest case in the 1920s involved defending Dr. Ossian Sweet, a black doctor from Detroit, and several family members, who were charged with murder for allegedly killing a member of a mob attacking their home in a white neighborhood.¹³ The NAACP raised over seventy thousand dollars in connection with the Sweet case—a small fortune at the time.¹⁴ The trials of the Scottsboro Boys—nine black teenagers falsely accused of raping two white women on a freight train in northern Alabama in 1931—provided a similar fundraising bonanza for the International Labor Defense, which represented them on appeal. The defendants’ mothers went on speaking tours throughout the North, drawing large crowds and raising vast sums.¹⁵ Civil rights lawsuits were also frequently the occasions for organizing new NAACP branches. For example, several branches originated in challenges to residential segregation ordinances launched around World War I.¹⁶

Litigation may also have raised the salience of the race issue for whites. Charles Houston observed “[t]he truth is there are millions of white people who have no real knowledge of the Negro’s problems and who never give the Negro a serious thought.”¹⁷ A major challenge for the civil rights movement was educating whites about oppressive conditions under Jim Crow. From its inception, the NAACP saw its principal functions as giving “the facts of the American Negro’s situation to the civilized world” and “marshalling . . . an enlightened public sentiment in defence of the Negro’s rights.”¹⁸ Litigation furthered these objectives. Black leader and eventual Nobel Peace Prize-winner Ralph Bunche observed that “[c]ourt decisions, favorable or unfavorable, serve to dramatize the plight of the race more effectively than any other recourse; their propaganda and educative value is great.”¹⁹ William Hastie, the first black federal judge in U.S. history, re-

¹⁰ *Id.* (quoting MARK TUSHNET, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT* 30 (1994)).

¹¹ *Id.*

¹² *Id.* at 166.

¹³ *Id.* See generally KEVIN BOYLE, *ARC OF JUSTICE: A SAGA OF RACE, CIVIL RIGHTS, AND MURDER IN THE JAZZ AGE* (2004).

¹⁴ KLARMAN, *supra* note 6, at 166.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

ferred to the Supreme Court as “a forum for presenting the varied aspects of the race problem.”²⁰

It is impossible to measure any of these intangible consequences of litigation, but NAACP lawyers such as Houston and Marshall considered them nearly as important as Court victories themselves.

Ruth Bader Ginsburg had a very similar conception of her role as head of the WRP, founded in 1972. Indeed, she explicitly acknowledged that the WRP “was among the organizations inspired by the NAACP Legal Defense and Education Fund’s example.”²¹ The WRP’s strategy included not just litigating cases but also lobbying legislatures, training lawyers, and educating the general public about issues of sex equality.²²

The WRP offered assistance to ACLU affiliates throughout the country who were engaged in sex discrimination litigation.²³ It advised them on priorities and informed them of pending cases to avoid unnecessary duplication of effort.²⁴ It enlisted the assistance of other lawyers and law students in developing cases and kept a comprehensive list of all past and pending sex discrimination cases, whether brought by the ACLU or by other organizations.²⁵ It also developed a list of lawyers around the country willing to take on sex discrimination cases.²⁶ After winning high court victories, Ginsburg wrote memos to ACLU affiliates throughout the country, instructing them on how to pursue follow-up litigation and legislative lobbying.²⁷ The NAACP had sent similar instructions to its branches after *Brown v. Board of Education*,²⁸ encouraging them to petition local school boards for desegregation, on threat of litigation.²⁹

²⁰ *Id.*

²¹ Justice Ruth Bader Ginsburg, *Brown v. Board of Education in International Context*, 36 COLUM. HUM. RTS. L. REV. 493, 500 (2005).

²² Prospectus of Women’s Rights Project of the ACLU 5–7 (Oct. 1972) [hereinafter Prospectus] (on file with the Harvard Law School Library); see also Ruth Bader Ginsburg, Associate Justice, Supreme Court of the United States, Remarks for the Celebration of 75 Years of Women’s Enrollment at Columbia Law School (Oct. 19, 2002), in 102 COLUM. L. REV. 1441, 1441 (2002) (describing the goals of the WRP as “advanc[ing], simultaneously, public understanding, legislative change, and change in judicial doctrine”).

²³ Prospectus, *supra* note 22, at 5.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ CAMPBELL, *supra* note 3, at 92 (noting that after *Duren v. Missouri*, 439 U.S. 357 (1979), Ginsburg urged that ACLU affiliates in states with jury selection provisions similar to Missouri’s initiate campaigns for legislative change); *id.* at 104 (noting that after *Califano v. Goldfarb*, 430 U.S. 199 (1977), the WRP compiled and distributed a list of all state statutes with apparently nonconforming sex classifications and directed ACLU affiliates to challenge them); see also Letter from Ruth Bader Ginsburg to William C. Moss (Oct. 30, 1973) (on file with the Harvard Law School Library) (encouraging Moss to bring a lawsuit challenging the denial to him of benefits on his wife’s Social Security account because of his sex).

²⁸ 347 U.S. 483 (1954).

²⁹ KLARMAN, *supra* note 6, at 368–69.

Ginsburg devoted at least as much of her time to educating people about sex discrimination as she did to litigating sex equality cases. When some of her female students at Rutgers Law School asked for a seminar on women and the law around 1970, Ginsburg spent a month in the library reading every court decision and law review article she could find on the topic—"not a very taxing undertaking," as she later described it³⁰—and then initiated such a course.³¹ In the following years, her students were important assistants in her litigation—preparing research memoranda, drafting legal motions and briefs, conferring with clients, and participating in moot courts in preparation for oral argument.³² Occasionally, students at other schools played a supportive role as well.³³

Ginsburg and two of her colleagues also put together one of the nation's first casebooks on women and the law,³⁴ and she encouraged other schools to offer such courses.³⁵ She authored numerous journal articles on sex discrimination cases, seeking to educate readers as well as to encourage litigation.³⁶

³⁰ Hon. Ruth Bader Ginsburg, Remarks on Women's Progress in the Legal Profession in the United States, Remarks Presented at the Oklahoma Bar Association Women in the Law Conference (Aug. 28, 1997), in 33 TULSA L.J. 13, 16 (1997).

³¹ Ruth Bader Ginsburg & Barbara Flagg, Some Reflections on the Feminist Legal Thought of the 1970s, Keynote Address for the University of Chicago Legal Forum Symposium (Oct. 14–15, 1988), in 1989 U. CHI. LEGAL F. 9, 11.

³² See, e.g., Letter from Ruth Bader Ginsburg to Mr. Edgar Coffin (Oct. 17, 1974) (on file with the Harvard Law School Library) (noting that one of her students will call Coffin before the oral argument in his case to answer any questions); Letter from Ruth Bader Ginsburg to "Jane" (Sept. 6, 1973) (on file with the Harvard Law School Library) (noting that a student has been doing legislative history for Ginsburg); Letter from George Schneider to Mr. Edgar D. Coffin (Apr. 2, 1973) (on file with the Harvard Law School Library) (noting that a student in Ginsburg's clinical seminar on sex-based discrimination is investigating facts related to litigation); see also FRED STREBEIGH, EQUAL: WOMEN RESHAPE AMERICAN LAW 66–67 (2009) (describing the seminar experiences of some of Ginsburg's students). See generally Ruth Bader Ginsburg, Report of Activities Sept. 1973–Mar. 1974 of the Equal Rights Advocacy Project at Columbia University School of Law (Mar. 15, 1974) (on file with the Harvard Law School Library) (describing variety of students' activities including investigating facts, preparing legal motions and briefs, drafting model legislation, and participating in moot courts).

³³ See Letter from Ruth Bader Ginsburg to Jamie Gorelick, Women's Law Association, Harvard Law School (Feb. 5, 1974) (on file with the Harvard Law School Library) (enclosing a draft of the brief in *Califano v. Coffin*, 430 U.S. 924 (1977), soliciting suggestions, and asking for some references to be updated); Letter from Sydelle Pittas, Women's Law Association, Harvard Law School, to Ruth Bader Ginsburg (Mar. 4, 1974) (on file with the Harvard Law School Library) (enclosing the draft of the *Coffin* brief with suggested changes).

³⁴ KENNETH M. DAVIDSON, RUTH B. GINSBURG & HERMA H. KAY, SEX-BASED DISCRIMINATION: TEXT, CASES AND MATERIALS (West Publishing Co. 1974).

³⁵ Ruth Bader Ginsburg, Sex and Unequal Protection: Men and Women as Victims, Keynote Address at the Southern Regional Conference of the National Conference of Law Women at Duke University Law School (Oct. 1, 1971), in 11 J. FAM. L. 347, 347 (1971).

³⁶ See, e.g., Ruth Bader Ginsburg, *Comment: Frontiero v. Richardson*, 1 WOMEN'S RTS. L. REP. 2 (1973) [hereinafter Ginsburg, *Comment: Frontiero*]; Ruth Bader Ginsburg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1 (1975) [hereinafter Ginsburg, *Gender and the Constitution*]; Ruth Bader Ginsburg, *Sexual Equality Under the Fourteenth and Equal Rights Amendments*, Lecture Delivered at Washington University (Feb.

Ginsburg maintained a constant stream of correspondence with student law review editors, urging them to write about recent sex discrimination cases, educating them about the issues involved, and providing them with briefs and other materials to enhance their scholarship.³⁷ She wrote letters to the *New York Times* and other journals, encouraging them to cover sex discrimination issues and correcting mistakes when their coverage went awry.³⁸ She sent copies of the briefs and articles she authored on sex equality issues to friends on the bench and in legal academia.³⁹ Ginsburg also traveled throughout the country, testifying before state legislatures in support of the

14, 1979), in 1979 WASH. U. L.Q. 161 (1979) [hereinafter Ginsburg, Sexual Equality]; Ruth Bader Ginsburg, *Sex Equality and the Constitution*, Address at Tulane University (April 1979), in 52 TUL. L. REV. 451 (1978) [hereinafter Ginsburg, Sex Equality and the Constitution]; see also Letter from William C. Moss to Ruth Bader Ginsburg (Oct. 24, 1973) (on file with the Harvard Law School Library) (noting that Ginsburg's article, "The Need for the Equal Rights Amendment," published in the *ABA Journal*, inspired him to sue the Social Security Administration for denying him spousal benefits under his retired wife's account).

³⁷ Letter from Ruth Bader Ginsburg to Jack Blumenfeld, Student, Yale Law School (Oct. 24, 1974) (on file with the Harvard Law School Library) (in response to his recent query, sharing her thoughts about sex discrimination cases in the Supreme Court, sending him a chapter of her sex discrimination casebook, and inviting him to look through a couple of her litigation files); Letter from Ruth Bader Ginsburg to Harvard Law Review (Mar. 28, 1977) (on file with the Harvard Law School Library) (encouraging treatment of *Califano v. Webster*, 430 U.S. 313 (1977), in the issue summarizing the Court's 1976 Term); Letter from Ruth Bader Ginsburg to "Kahn v. Shevin note-writer," Student, Harvard Law School (Nov. 27, 1974) (on file with the Harvard Law School Library) (quarreling with the author's description of her argument in *Kahn v. Shevin*, 416 U.S. 384 (1974), and wondering why the *Harvard Law Review* was publishing a note on *Kahn* but not on *Geduldig v. Aiello*, 417 U.S. 484 (1974)); Letter from Ruth Bader Ginsburg to Jeffrey S. Saltz, Executive Editor, Harvard Law Review (Aug. 15, 1977) (on file with the Harvard Law School Library) (in response to his request, sending him briefs in recent sex discrimination cases, providing additional information about the cases, and offering to meet with him when she visits Cambridge later in the month).

³⁸ Letter from Ruth Bader Ginsburg to Editor, New York Times (May 12, 1976) (on file with the Harvard Law School Library) (providing information omitted from the *Times*' story on *Goldfarb*); Letter from Ruth Bader Ginsburg to Ms. Leslie Oelsner, Reporter, New York Times (Feb. 8, 1973) (on file with the Harvard Law School Library) (urging the *Times* to do a feature story on *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), after the complaint is filed); Letter from Ruth Bader Ginsburg to Spokeswoman (Apr. 27, 1977) (on file with the Harvard Law School Library) (correcting magazine's story on *Califano v. Goldfarb*, 430 U.S. 199 (1977), and *Webster* and supplying a memo she prepared for ACLU affiliates explaining the relationship between the cases); see also Ruth Bader Ginsburg & Susan Deller Ross, *Pregnancy and Discrimination*, N.Y. TIMES, Jan. 25, 1977, at 33 (criticizing the Supreme Court's ruling in *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976), that discrimination against pregnancy in employers' disability insurance coverage is not sex discrimination forbidden by Title VII).

³⁹ Letter from Ruth Bader Ginsburg to Judge Wilfred Feinberg, United States Court of Appeals for the Second Circuit (Feb. 16, 1973) (on file with the Harvard Law School Library) (sending a copy of her reply brief in *Frontiero v. Laird*, 409 U.S. 840 (1972)); Letter from Ruth Bader Ginsburg to Judge Jack B. Weinstein, United States District Court for the Eastern District of New York (Dec. 11, 1975) (on file with the Harvard Law School Library) (sending him a copy of her motion in *Goldfarb*); Letter from Ruth Bader Ginsburg to Professor Louis Pollak, University of Pennsylvania Law School (Apr. 18, 1977) (on file with the Harvard Law School Library) (enclosing the briefs in *Goldfarb* and a memo she wrote trying to explain how *Goldfarb* and *Webster* fit together).

Equal Rights Amendment (“ERA”) and speaking to ACLU affiliates, university audiences, and other gatherings about sex equality issues.⁴⁰

Ginsburg was an organizer, mobilizer, publicist, and educator for the sex equality movement—just as Thurgood Marshall had been for the civil rights movement a generation earlier. Social reform litigation is not just about winning cases in court; it is also about generating public support for social change.

B. *Lawyer as Role Model*

Social reform lawyers not only organize and mobilize protest, but they also provide valuable role models for members of traditionally subordinated groups. Because the systems of white supremacy and male supremacy did not permit many blacks or women to rise too high in their professions, few role models existed to demonstrate what could be accomplished once opportunities were afforded.

Soon after the NAACP’s founding in 1909, some of its leading officers had criticized the “half prepared” black lawyers who argued their cases locally.⁴¹ Through the 1920s, the association had always been represented in the Supreme Court by eminent white lawyers, such as Moorfield Storey and Louis Marshall.⁴² This began to change around 1930, however, as law schools such as Harvard and Howard began to produce increasing numbers of outstanding black lawyers—for example, Charles Houston and William Hastie from the former, and Thurgood Marshall, Oliver Hill, and Spottswood Robinson from the latter.⁴³ Black lawyers were symbolically important to black spectators witnessing their courtroom performances, and they were more reliably committed to civil rights causes than were most white lawyers, especially in the South.

Black courtroom lawyers provided salutary examples to southern black communities of the accomplishments and courage of African Americans. Watching a skilled black lawyer subject a white sheriff to a grueling cross-

⁴⁰ CAMPBELL, *supra* note 3, at 98 (noting Ginsburg speaking before state legislatures in support of the ERA); Ginsburg, *Gender and the Constitution*, *supra* note 36 (basing the article on Ruth Bader Ginsburg, Robert S. Marx Lectures at the University of Cincinnati College of Law (Nov. 18–20, 1974)); Ruth Bader Ginsburg, Address at the Minnesota ACLU (June 1977) [hereinafter Ginsburg, Address at the Minnesota ACLU] (transcript on file with the Harvard Law School Library); Ruth Bader Ginsburg, Realizing the Equality Principle, Address given at a Conference on the Policy of Compensatory Justice for Women and Racial Minorities in Education and Business, Athens, Georgia (Feb. 13–15, 1975) (on file with the Harvard Law School Library); Ginsburg, Sexual Equality, *supra* note 36; Priscilla Ruth MacDougall, Center For a Woman’s Own Name, to “Elissa” (Apr. 30, 1974) (on file with the Harvard Law School Library) (containing a note to “Ruth” mentioning a forthcoming talk Ginsburg is giving at an ACLU reception in Chicago).

⁴¹ KLARMAN, *supra* note 6, at 112.

⁴² *Id.*

⁴³ *Id.*

examination educated and empowered southern blacks, who virtually never witnessed such scenes of blacks confronting whites on an equal footing.⁴⁴ Bold and capable performances by black lawyers in southern courtrooms seemed to contravene the very premises of white supremacy. A Marshall biographer notes that the most important audience on such occasions was neither the judge nor the jury, but rather “the African-American community observing the trial.”⁴⁵ The NAACP recognized the “moral effect” of using black lawyers.⁴⁶ In 1933, Walter White, the association’s executive secretary, observed that using a black lawyer in Texas voting rights litigation would “have an excellent psychological effect upon colored people.”⁴⁷

An extraordinary case from Oklahoma in the early 1940s illustrates this role-model effect of using black lawyers in civil rights cases.⁴⁸ W. D. Lyons, a black man, was prosecuted for the brutal murder of a white couple and their four-year-old son near Hugo, Oklahoma, on New Year’s Eve, 1939. Lyons had been savagely beaten into confessing and perhaps framed in an effort to provide political cover for the governor after a white escapee from the state chain gang initially confessed to the murders. Roscoe Dunjee, the NAACP’s principal agent in Oklahoma, beseeched Thurgood Marshall to come to Hugo to participate in the trial and, along the way, to attend half a dozen organizational meetings across Oklahoma.⁴⁹

Not only did Marshall’s visit rally the troops, but his very presence in the Hugo courtroom offered important educational lessons to whites and blacks in attendance. Marshall reported that on the day of the trial, the courtroom was overflowing with a thousand spectators from around the county.⁵⁰ No black lawyer had ever before appeared in that courtroom, and everyone was curious to see the NAACP litigator from New York. Marshall had wondered what the reaction would be when he arrived, but “the building did not fall and the world did not come to an end.”⁵¹

Marshall had expected to lose at trial, as he did, yet he still believed that vital educational lessons had been conveyed: “[O]ne thing this trial accomplished—the good citizens of that area have been given a lesson in constitutional law and the rights of Negroes which they won’t forget for some time.”⁵² Children, who had been released from school for the purpose of attending what the judge perversely called a “gala” event⁵³—in which a

⁴⁴ *Id.* at 166.

⁴⁵ *Id.* (quoting MARK TUSHNET, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT* 30 (1994)).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 171, 284–85. See generally John F. Blevins, *Lyons v. Oklahoma, The NAACP, and Coerced Confessions Under the Hughes, Stone, and Vinson Courts*, 90 VA. L. REV. 387 (2004).

⁴⁹ KLARMAN, *supra* note 6, at 284.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 285.

⁵³ *Id.*

possibly framed black man was on trial for his life—received a lesson in constitutional law that they would never have learned in their classrooms. Marshall concluded: “I bet they have more respect for Negroes now.”⁵⁴ Moreover, “law enforcement officers now know that when they beat a Negro up they might have to answer for it on the witness stand.”⁵⁵

White spectators and law enforcement officers were not the only ones educated by the trial. Marshall and his white co-counsel, Stanley Belden of the ACLU, had agreed that the former would cross-examine all of the police officers “because we figured they would resent being questioned by a Negro and would get angry and this would help us. It worked perfect. They all became angry at the idea of a Negro pushing them into tight corners and making their lies so obvious.”⁵⁶ Marshall continued:

Boy, did I like that—and did the Negroes in the courtroom like it You can’t imagine what it means to those people down there who have been pushed around for years to know that there is an organization that will help them. They are really ready to do their part now. They are ready for anything.⁵⁷

Black lawyers were important not just for their role modeling function, but also because they were frequently willing to raise legal challenges that white lawyers would not. Most white lawyers in the South would not take civil rights cases at all because of the “personal odium” that attached to those who challenged “the venerable system.”⁵⁸ In criminal cases, court-appointed white lawyers often refused to challenge systematic exclusion of blacks from juries.⁵⁹ Some of these appointed white lawyers “showed no more interest than was necessary for a perfunctory trial.”⁶⁰ They failed to call witnesses, raise defenses, challenge the introduction of involuntary confessions, make new-trial motions, or appeal convictions.⁶¹ The few white lawyers who did challenge prevailing racial mores by genuinely pursuing their clients’ interests often received death threats, and some saw their legal practices destroyed.⁶²

Ruth Bader Ginsburg performed a similar role modeling function for the WRP. As of 1970, women still comprised well under ten percent of law school student bodies.⁶³ In 1966, they were only about one percent of Su-

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 459.

⁵⁹ *Id.* at 156.

⁶⁰ *Id.* at 271–72.

⁶¹ *Id.* at 272.

⁶² *Id.* at 156, 272–73.

⁶³ Ruth Bader Ginsburg, *Treatment of Women by the Law: Awakening Consciousness in the Law Schools*, 5 VAL. U. L. REV. 480, 481 n.5 (1971) [hereinafter Ginsburg, *Treatment of Women by the Law*] (noting that the percentage of women in law school classes ranged from 4.3% to 7.82% between 1966 and 1970); Ruth Bader Ginsburg, *The Su-*

preme Court litigators and less than two percent of the nation's law professors.⁶⁴ Ginsburg did not have a single female professor during her three years in law school, which were divided between Harvard and Columbia in the late 1950s.⁶⁵ Not until 1970 did the American Association of Law Schools amend its rules to bar sex discrimination at member institutions.⁶⁶ As late as 1968, a standard property law casebook noted parenthetically that, "after all, land, like woman, was meant to be possessed."⁶⁷ Standard constitutional law casebooks of the era made essentially no mention of sex discrimination issues.⁶⁸

Ginsburg understood the importance of female lawyers participating in sex equality litigation. When she learned of the ACLU's involvement in *Reed v. Reed*,⁶⁹ which turned out to be the Supreme Court's pathbreaking sex discrimination case, she asked Melvin Wulf, the legal director of the ACLU's national office, whether a woman ought not be involved as co-counsel in the case.⁷⁰ Wulf then invited her to join him in preparing the Supreme Court brief. In the WRP's litigation, Ginsburg noted, "particular attention [was] given to encouraging participation by women lawyers who seek assistance in maintaining their skills during periods when family responsibilities prevent them from working full time."⁷¹ Ginsburg appreciated that for women, "the first step in getting power is to become visible to others, and then to put on an impressive show. . . . As women achieve power, the barriers will fall."⁷²

In *Frontiero v. Richardson*,⁷³ the Court's second big sex discrimination case, Ginsburg quarreled with Joseph Levin, the general counsel of the Southern Poverty Law Center, who had handled the case in the lower courts, over who would do the oral argument in the Supreme Court.⁷⁴ Levin had initially agreed to defer to the ACLU, but as the Supreme Court hearing drew nearer, he had a change of heart. He wrote to the ACLU noting that this "is our first opportunity to argue a case before the Court," and we "have invested a great deal of time and effort in this case and would like to see it through to its conclusion."⁷⁵

preme Court: A Place for Women, Address at Southwestern University School of Law (Feb. 6, 2002), in 32 SW. U. L. REV. 189, 198 (2003) [hereinafter Ginsburg, A Place for Women] (giving the one percent figure for female Supreme Court litigators).

⁶⁴ Ginsburg & Flagg, *supra* note 31, at 9.

⁶⁵ Ginsburg, *supra* note 30, at 14.

⁶⁶ Ginsburg, *supra* note 35, at 347.

⁶⁷ Ginsburg, *Treatment of Women by the Law*, *supra* note 63, at 481 (quoting CURTIS J. BERGER, LAND OWNERSHIP AND USE (1968)).

⁶⁸ *Id.* at 483-84.

⁶⁹ 404 U.S. 71 (1971).

⁷⁰ See STREBEIGH, *supra* note 32, at 27; Ginsburg, *supra* note 30, at 17.

⁷¹ Prospectus, *supra* note 22, at 6.

⁷² Ruth Bader Ginsburg, *A Tribute to Justice Sandra Day O'Connor*, 119 HARV. L. REV. 1239, 1240 (2006) (quoting Justice O'Connor).

⁷³ 411 U.S. 677 (1973).

⁷⁴ CAMPBELL, *supra* note 3, at 46-47.

⁷⁵ Letter from Joseph J. Levin, General Counsel, Southern Poverty Law Center, to Melvin Wulf, ACLU (Oct. 17, 1972) (on file with the Harvard Law School Library).

Ginsburg thought it important that a woman present a case of this significance to the Court.⁷⁶ (Many prochoice feminists had considered it equally important that a woman argue the landmark abortion case, *Roe v. Wade*.⁷⁷) Ginsburg pointed out to Levin that, while she was “not very good at self-advertisement,” he must have “some understanding of the knowledge of the women’s rights area I have developed over the past two years.”⁷⁸ Levin responded that “I do not believe it makes one iota of difference whether a male or female makes this argument,” and he insisted that “[t]here is nothing chauvinistic in our desire to present oral argument.”⁷⁹ He proclaimed himself mystified “at exactly what point we allowed ourselves to become ‘assistants’ in our own case.”⁸⁰ In the end, a compromise was negotiated, and the argument time was divided.

Just as white and black lawyers often had different conceptions of how to litigate civil rights cases, Ginsburg and her male collaborators sometimes had different ideas of how to litigate sex equality cases. Levin not only thought it unimportant that a woman argue *Frontiero*, but he considered it unwise to enlist feminist organizations to file amicus briefs or to press the Court to apply strict scrutiny to sex classifications.⁸¹ Ginsburg disagreed on all counts. Moreover, Levin wanted to encourage the Justices to distinguish between sex classifications that harmed women and those that protected them—precisely the distinction the WRP was intent on persuading the Court to abandon.⁸²

Levin wanted to win his case—narrowly if necessary. One of his male collaborators, Charles Abernathy, a third-year student at Harvard Law School, advised keeping a “Nixonian low profile” in *Frontiero*, given the “Burger justices’ preoccupation with decisions which would have a revolutionary impact on the courts.”⁸³ Abernathy pointed out that “[a] decision for us on the merits here will set the same high precedent for other laws of this nature regardless of whether the Court realizes or acknowledges the pervasiveness of such benefit classifications.”⁸⁴ By contrast, Ginsburg was interested in the broader implications of the case for sex equality.⁸⁵

⁷⁶ Letter from Ruth Bader Ginsburg, Coordinator, ACLU Women’s Rights Project, to Joseph J. Levin, Jr., Southern Poverty Law Center (Oct. 24, 1972) (on file with the Harvard Law School Library).

⁷⁷ 410 U.S. 113 (1973); see also MARIAN FAUX, *ROE V. WADE: THE UNTOLD STORY OF THE LANDMARK SUPREME COURT DECISION THAT MADE ABORTION LEGAL* 232 (1994).

⁷⁸ Letter from Ruth Bader Ginsburg to Joseph J. Levin, Jr., *supra* note 76.

⁷⁹ Letter from Joseph J. Levin, Jr., Southern Poverty Law Center, to Ruth Bader Ginsburg, ACLU (Oct. 27, 1972) (on file with the Harvard Law School Library).

⁸⁰ *Id.*

⁸¹ CAMPBELL, *supra* note 3, at 46.

⁸² *Id.* at 51.

⁸³ Letter from Charles F. Abernathy to Brenda Fasteau, ACLU (Oct. 19, 1972) (on file with the Harvard Law School Library).

⁸⁴ *Id.*

⁸⁵ CAMPBELL, *supra* note 3, at 51; see also Ginsburg, *supra* note 35, at 356 (noting that male lawyers in a case involving exclusion of women from juries narrowly chal-

Ginsburg's leadership of the WRP and her oral advocacy in the Supreme Court were inspirational to countless women, and she received many notes of gratitude from those she had inspired. A young woman working in the Washington, D.C. office of the ACLU recalled Ginsburg's participation in a conference on Women and the Law at Duke University in the early 1970s and told Ginsburg how "very grateful" the students had been "for all of the time you gave" and how pleasing it was to be able to report that "some things changed during that time, most importantly, the women's own ideas."⁸⁶ Thanking her, Ginsburg responded by noting what "grand progress" it was that "[t]he complement of female lawyers is now 50% of ACLU's legal staff."⁸⁷ Congratulating Ginsburg on her victory in a 1977 Supreme Court case, a female business executive sent "a heartfelt Thank You from all of us for what you've done for American women—and men—not only in this case but in so many others!"⁸⁸ A female magazine editor soliciting a regular column from Ginsburg on women and the law added "a personal note of appreciation for your very significant contributions to the struggle for equality."⁸⁹

The systems of white supremacy and male supremacy did not permit many blacks or women to rise to positions of power. Black lawyers like Thurgood Marshall and female litigators like Ruth Bader Ginsburg contravened prevalent stereotypes, raised fundamental challenges to the legal status quo, and inspired legions of followers through their courageous examples.

C. *Interpersonal Skills*

Success at the organizational and motivational aspects of social reform litigation requires unique interpersonal skills, which both Marshall and Ginsburg possessed, though in very different ways.

Thurgood Marshall was a "people person"—he was gregarious and charismatic. Whether motivating NAACP foot soldiers or orchestrating strategy meetings with renowned academics and policy-makers, he commanded attention and inspired devotion.⁹⁰ Marshall was charming and could flatter big egos into line.⁹¹ He could also dissolve tension at divisive meet-

lenged the practical effect of including only female volunteers, whereas female lawyers would have been more likely to challenge the volunteer system on its face).

⁸⁶ Letter from Denise Leary to Ruth Bader Ginsburg (July 17, 1974) (on file with the Harvard Law School Library).

⁸⁷ Letter from Ruth Bader Ginsburg to Denise Leary, ACLU (July 12, 1974) (on file with the Harvard Law School Library).

⁸⁸ Letter from Muriel Fox, Executive Vice President, Carl Byoir & Associates, Inc., to Ruth Bader Ginsburg (Mar. 3, 1977) (on file with the Harvard Law School Library).

⁸⁹ Letter from Karen Wellisch, Editor and Publisher, *The Spokeswoman*, to Ruth Bader Ginsburg (Apr. 29, 1977) (on file with the Harvard Law School Library).

⁹⁰ JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY 106, 210–11 (1998).

⁹¹ *Id.* at 149.

ings by relating one of his stories, often about some big dumb southern sheriff.⁹² Marshall was funny, once protesting to the national office that if he had only been permitted to continue his organizational work in Louisville, Kentucky through Derby Day, he “would have made enough money to pay off the deficit in the legal defense fund.”⁹³ He possessed great physical courage, and his life was in serious jeopardy more than once during his southern travels—dangers that he frequently joked about.⁹⁴ Marshall also knew how to have fun. His motto was, “I intend to wear life like a very loose garment, and never worry about nothin’.”⁹⁵ He played poker, drank with gusto, and spent late nights at blues clubs—often conducting important organizational work and strategic planning in the process.⁹⁶

Ginsburg, by contrast, did not drink, gamble, or party late into the night. She was, by and large, quiet, serious, and introverted. But she possessed other, equally vital skills which enhanced her ability to organize a litigation reform movement. To collaborators, Ginsburg offered high quality legal advice and superb editing skills without appearing domineering. She could influence another lawyer’s brief without making him feel as if she had taken over the case.⁹⁷ For student authors—even those whom she never met and some of whose scholarship she found lacking—she always had an encouraging word.⁹⁸

More strikingly, Ginsburg was personally connected with her clients, never forgetting that real people’s lives were implicated in landmark legal cases. She remembered birthdays and asked about children.⁹⁹ She was sensitive to her clients’ feelings.¹⁰⁰ She stayed involved in cases after they had

⁹² *Id.* at 149, 211.

⁹³ *Id.* at 106.

⁹⁴ *Id.* at 106, 149.

⁹⁵ *Id.* at 192–93.

⁹⁶ *Id.* at 149, 192–93.

⁹⁷ For a good illustration, see CAMPBELL, *supra* note 3, at 110–11, describing Ginsburg’s correspondence with Fred Gilbert, the Oklahoma lawyer who was responsible for *Craig v. Boren*, 429 U.S. 190 (1976).

⁹⁸ Letter from Ruth Bader Ginsburg to Ms. Harriet D. Dorsey, Washington & Lee Law School (June 11, 1975) (on file with the Harvard Law School Library) (praising her Note on *Kahn* as “a very fine job”); Letter from Ruth Bader Ginsburg to Ms. E.S. Read, Emory Law School (May 2, 1975) (on file with the Harvard Law School Library) (calling her case note on *Kahn* “well-researched” even though Ginsburg had indicated in other correspondence that she not did think well of it); *see also* Letter from Ruth Bader Ginsburg to Jerry Lynch (March 28, 1977) (on file with the Harvard Law School Library) (praising the opinion Lynch had drafted as Justice Brennan’s clerk in *Califano v. Webster* and stating, “Had I been assigned the task, I could not have done better”).

⁹⁹ Letter from Ruth Bader Ginsburg to Mr. Edgar Coffin, *supra* note 32 (sending birthday wishes to client’s 102-year-old aunt); *see also* Letter from Ruth Bader Ginsburg to Denise Leary, *supra* note 87 (asking to be kept informed of the date of birth, sex, and name of the expected baby of an ACLU colleague); Letter from Ruth Bader Ginsburg to Stephen Wiesenfeld (Mar. 2, 1977) (on file with the Harvard Law School Library) (asking to be remembered to “Jason,” the boy whose mother died in childbirth and whose father sued Social Security for denying him child-care benefits because of his sex).

¹⁰⁰ Letter from Ruth Bader Ginsburg to Ms. Joan Baker (Oct. 29, 1974) (on file with the Harvard Law School Library) (noting that when she argued against a mootness mo-

been resolved in court, ensuring that her clients received the legal benefits to which they were entitled.¹⁰¹

Many clients reciprocated her warmth, inviting her and her spouse to a celebratory dinner¹⁰² or even to visit at a summer home in Maine.¹⁰³ Sometimes she remained in touch with clients even years after their litigation had ended.¹⁰⁴ In the case of Stephen Wiesenfeld,¹⁰⁵ which was particularly “dear to [her] heart,” she later co-officiated at his son’s marriage and kept track of the birth of his first grandson.¹⁰⁶ Decades later, more than one landmark women’s rights litigant visited their former lawyer at her new office—in the U.S. Supreme Court!¹⁰⁷

One exchange nicely captures the close relationship that developed between client and litigator. Edgar Coffin was an elderly gentleman who, with the assistance of the WRP, sued the Social Security Administration for denying him spousal survivors’ benefits because of his sex. (The WRP had intended Coffin’s to be the test case in the Supreme Court, but *Califano v. Goldfarb*¹⁰⁸—discussed below—was decided first in the lower courts.) After Coffin won on summary judgment in federal district court, Ginsburg wrote to the Social Security office—with a copy of the letter to the presiding judge—noting that a government request to stay the ruling on appeal had been denied and that her client’s benefits should have started promptly.¹⁰⁹ Two weeks later, Coffin began receiving his checks. He called Ginsburg’s office and left a message, reporting that he was “most happy,” calling Ginsburg “the brain,” and noting that he “is so grateful for all you’ve done. . . .

tion with her client in the courtroom, she “tried to be gentle in suggesting that his life expectancy, in common with all class members, is limited”).

¹⁰¹ Letter from Kathleen Willert Peratis, Women’s Rights Project, to James Cardwell, Administrator, Social Security Administration (June 10, 1977) (on file with the Harvard Law School Library) (demanding that the Social Security benefits due to husbands on their wives’ accounts under *Goldfarb* be paid retroactively).

¹⁰² Letter from Leon Goldfarb to Ruth Bader Ginsburg (Nov. 12, 1977) (on file with the Harvard Law School Library). Ginsburg warmly accepted, calling the dinner “a lovely idea.” Letter from Ruth Bader Ginsburg to Leon Goldfarb (Nov. 16, 1977) (on file with the Harvard Law School Library).

¹⁰³ Letter from Edgar Coffin to Ruth Bader Ginsburg (Apr. 21, 1976) (on file with the Harvard Law School Library).

¹⁰⁴ See, e.g., STREBEIGH, *supra* note 32, at 77; Letter from Ruth Bader Ginsburg to Stephen Wiesenfeld, *supra* note 99 (reporting the decision in *Goldfarb* and noting that “[w]ithout the precedent in your case we never would have achieved this success”).

¹⁰⁵ *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (striking down Social Security Act provision making widows but not widowers eligible for survivors’ benefits that included an allowance for staying home with children).

¹⁰⁶ Ginsburg, *supra* note 22, at 1445.

¹⁰⁷ *Id.* at 1444 (noting that Sally Reed and Sharron Frontiero visited Ginsburg at the Supreme Court in 1999).

¹⁰⁸ 430 U.S. 199 (1977).

¹⁰⁹ Letter from Ruth Bader Ginsburg, Coordinator, ACLU Women’s Rights Project, to Mrs. Burns, Soc. Security Admin., Dep’t of Health, Educ., & Welfare (Jan. 14, 1976) (on file with the Harvard Law School Library).

[H]e loves you and [asks] what can he do for you?"¹¹⁰ Ginsburg immediately wrote back: "The good news brightened my day. What you can do for me is enjoy the satisfaction of knowing that the wheels of justice may turn slowly, but they do turn."¹¹¹

Ginsburg also possessed the attractive quality of giving credit where it was due rather than claiming an excessive share of it for herself. In response to Coffin's lavish praise of Ginsburg's role in securing his survivors' benefits, she diverted credit to Judge George MacKinnon of the D.C. District Court, who had made inquiries of the Social Security Administration on Coffin's behalf.¹¹² Ginsburg also never neglected the contributions of past generations of feminists. In her landmark brief in *Reed*, she placed the names of pathbreaking feminists Dorothy Kenyon and Pauli Murray on the title page as a symbolic acknowledgement of the intellectual debt owed to them by contemporary feminists.¹¹³ Later, as a Supreme Court justice, she wrote several articles describing the contributions of trail-blazing feminist lawyers and judges as well as those of the wives of Supreme Court justices.¹¹⁴ Ginsburg proudly referred to herself as "a product of affirmative action."¹¹⁵ She movingly described the difference between her mother, a bookkeeper in New York City's garment district, and herself, a pioneering feminist law professor, litigator, and Supreme Court justice, as entirely one of differential opportunities.¹¹⁶ Moreover, Ginsburg was always careful to cultivate and

¹¹⁰ Anonymous Memorandum to Ruth Bader Ginsburg, Coordinator, ACLU Women's Rights Project (Jan. 30, 1976) (on file with the Harvard Law School Library).

¹¹¹ Letter from Ruth Bader Ginsburg, Coordinator, ACLU Women's Rights Project, to Edgar Coffin, client (Jan. 30, 1976) (on file with the Harvard Law School Library).

¹¹² *Id.*

¹¹³ CAMPBELL, *supra* note 3, at 31.

¹¹⁴ Ginsburg, A Place for Women, *supra* note 63 (describing roles of the wives of Justices Joseph Story and John Marshall Harlan, and noting the pioneering female law clerks at the Supreme Court); Justice Ruth Bader Ginsburg, Remarks on Women's Progress at the Bar and on the Bench, Keynote Address at the National Association of Women Judges (Oct. 9, 2003), in 89 CORNELL L. REV. 801 (2004) (describing pioneering female lawyers); Ruth Bader Ginsburg & Laura W. Brill, Women in the Federal Judiciary: Three Way Pavers and the Exhilarating Change President Carter Wrought, Address at the Annual Conference of the National Association of Women Judges (Oct. 7, 1995), in 64 FORDHAM L. REV. 281 (1995) (describing careers of Judges Florence Allen, Burnita Matthews, and Shirley Hufstедler).

¹¹⁵ Hon. Justice Ruth Bader Ginsburg, *Women on the Bench*, 12 COLUM. J. GENDER & L. 361, 370 (2003) (Ginsburg explaining how Columbia Law School hired her from Rutgers as the first tenured female professor in the school's history because the Office of Civil Rights in the Department of Health, Education, and Welfare was threatening to deprive universities of federal funding if they did not start hiring women).

¹¹⁶ Justice Ruth Bader Ginsburg, From Benjamin to Brandeis to Breyer: Is there a Jewish Seat?, Remarks at the Brandeis Honor Society Spring Banquet (Feb. 11, 2003), in 41 BRANDEIS L.J. 229, 235 (2002) ("What is the difference between a New York City garment district bookkeeper and a Supreme Court Justice? One generation my life bears witness, the difference between opportunities open to my mother, a bookkeeper, and those open to me.").

acknowledge the participation of feminist-minded men in the struggle for sex equality.¹¹⁷

II. "LEGAL" CHALLENGES OF SOCIAL REFORM LITIGATION

A. *Self-entrenching aspects of the status quo*

One of the most difficult obstacles confronting social reform litigation is that the status quo is usually self-perpetuating.¹¹⁸ Under white supremacy, political protest was generally unavailable to southern blacks, because they were almost universally disfranchised. Few southern blacks commanded sufficient financial resources to leverage social change through economic pressure. Street demonstrations, which proved so effective in the 1960s, were not a realistic option in an earlier era when lynchings were rampant and black protestors might well have been massacred.

Under such a system, litigation had two major advantages.¹¹⁹ Unlike social and political protest, litigation does not require mass participation to succeed, only a single party with a winning case and the resources necessary to pursue it. In addition, litigation offered a (relatively) safe venue for challenging the racial status quo, as it occurred in courtrooms, not on streets. Courtrooms may have been the only feasible arena for civil rights protest in an era of pervasive white-on-black violence. This is not to deny that litigation could be dangerous, but it was safer than street protest.

Yet even the legal system was rigged against black advancement during the Jim Crow era. Before World War II, no southern law school admitted blacks, which made it difficult for them to become proficient lawyers.¹²⁰ Even those southern blacks who surmounted the educational barriers to becoming lawyers increasingly found themselves out of work in the early decades of the twentieth century. A more rigid color line forbade their presence in some courtrooms and made them liabilities to clients in others, as white supremacist judges and jurors disdained black lawyers.¹²¹ Missis-

¹¹⁷ Ruth Bader Ginsburg, Keynote Address to the Hawaii ACLU Conference on Women's Legal Rights (Mar. 17, 1978) [hereinafter Ginsburg, Hawaii ACLU Conference] (transcript available in the Harvard Law School Library) (noting that one advantage of the ACLU as an organization was that "[m]en and women work together. That is important if you believe, as I do, that the social change provoking the litigation parade will effect [sic], and should involve, men as much as women"); Ginsburg, *supra* note 30, at 17 (noting "how important it is to include men in the effort to make women's rights part of the human rights agenda [because w]ithout the understanding of all humankind, as I see it, the effort cannot succeed").

¹¹⁸ See KLARMAN, *supra* note 6, at 94, 163.

¹¹⁹ See *id.*

¹²⁰ *Id.* at 160-61, 204.

¹²¹ *Id.* at 65.

issippi, which had as many as twenty-five black lawyers in 1900, had only about five in 1935.¹²²

After about 1900, there were no black judges in the South, and white judges generally shared the racial mores of their time, place, and culture. Black lawyers who challenged the constitutionality of the Texas white primary before the U.S. Court of Appeals for the Fifth Circuit in the early 1930s faced insulting judges, who literally turned their backs on the lawyers during oral arguments.¹²³ In correspondence with the NAACP's national office, these lawyers repeatedly doubted whether southern judges would ever vindicate the voting rights of southern blacks. They even wondered whether showing up for oral arguments was worthwhile, given that only an appeal to the Supreme Court held any hope of success.¹²⁴ Blacks were also universally excluded from southern juries during the early decades of the twentieth century, despite Supreme Court precedent unequivocally condemning such exclusion as unconstitutional.¹²⁵

Neither was the U.S. Supreme Court a bastion of civil rights at this time. In 1927, the Justices indicated that state-mandated school segregation was unquestionably constitutional,¹²⁶ and in 1935, they unanimously rejected a constitutional challenge to the Texas white primary, which barred blacks from the only elections that mattered in the one-party South.¹²⁷ In 1938, the notorious racist and anti-Semite, Justice James McReynolds, turned his back on the Harvard-educated black lawyer, Charles Hamilton Houston, as he challenged Missouri's policy of shipping black students out of state to attend graduate and professional school.¹²⁸ Not a single black justice sat on the U.S. Supreme Court until 1967. Only one black law clerk—William Coleman, employed by Felix Frankfurter in 1948–1949—served before the late 1960s.¹²⁹ As liberal as a white judge (or his clerk) might be on racial issues, he was unlikely to think about them in precisely the same terms that most blacks did.¹³⁰

The system of white supremacy was self-entrenching in another way as well: One of the most formidable challenges confronting the civil rights movement was simply convincing blacks that the status quo of racial subordination and oppression was not natural and inevitable, but contingent and

¹²² *Id.*

¹²³ *Id.* at 243.

¹²⁴ *Id.*

¹²⁵ *Id.* at 39–43.

¹²⁶ *Gong Lum v. Rice*, 275 U.S. 78, 85–86 (1927) (noting that lower court precedent had laid to rest the question of whether public school segregation was constitutional), discussed in KLARMAN, *supra* note 6, at 146–48.

¹²⁷ *Grove v. Townsend*, 295 U.S. 45 (1935), discussed in KLARMAN, *supra* note 6, at 137–41.

¹²⁸ KLARMAN, *supra* note 6, at 115–16.

¹²⁹ *Id.* at 209, 304.

¹³⁰ Lewis M. Steel, *A Critic's View of the Warren Court—Nine Men in Black Who Think White*, N.Y. TIMES MAGAZINE, Oct. 13, 1968, at 56.

malleable.¹³¹ A black man in Louisa County, Virginia, confided to the NAACP in 1935 that our “worst enemy is ourselves.”¹³² A southern branch officer told the national headquarters in 1924, in connection with the fight against residential segregation, that “it is a very hard matter to convince the mass of our people that segregation is not the best thing for us.”¹³³ Walter White explained in 1937 that the NAACP’s greatest difficulty was “getting over to the masses of our folks the significance of these fights.”¹³⁴ The civil rights movement not only had to overcome black hopelessness and fearfulness but also had to confront what Martin Luther King, Jr. later called the “ultimate tragedy of segregation”: the psychological damage that white supremacist ideology had inflicted on those blacks who had internalized its lessons.¹³⁵

The system of male supremacy was similarly self-entrenching. As late as 1973, not a single woman served in the U.S. Senate or as governor of a state.¹³⁶ Only fourteen women served in the U.S. House of Representatives, and females made up roughly three percent of top-level federal civil servants.¹³⁷

At the dawn of the modern feminist movement, there were hardly any women serving on the federal bench. Before 1949, there had been one female federal judge in the entire history of the United States.¹³⁸ Presidents John F. Kennedy and Lyndon Baines Johnson appointed four women to the federal bench during their eight years in office; Presidents Richard M. Nixon and Gerald R. Ford added just two more in their eight years.¹³⁹ Justice William O. Douglas hired the first female law clerk in the Court’s history during World War II; there were no more until the mid-1960s.¹⁴⁰ Even the most liberal justice of the 1970s, William Brennan, refused to hire female law clerks for many years because he did not feel comfortable working with them late into the evening.¹⁴¹

¹³¹ See KLARMAN, *supra* note 6, at 163.

¹³² *Id.* at 163.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ Joint Reply Brief of Appellants and ACLU as Amicus Curiae at 9, *Frontiero v. Laird*, 409 U.S. 840 (1972) (No. 71-1694).

¹³⁷ *Id.*

¹³⁸ Ginsburg & Brill, *supra* note 114, at 284.

¹³⁹ *Id.* at 287–88.

¹⁴⁰ Ginsburg, *A Place for Women*, *supra* note 63, at 193–94; see also David J. Danel-ski, *Lucille Lomen: The First Woman to Clerk at the Supreme Court*, 23 J. SUP. CT. HIST. 43 (1999).

¹⁴¹ TODD C. PEPPERS, *COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF SUPREME COURT LAW CLERKS* 274 (2006). For an interesting anecdote about how Brennan finally hired a female law clerk, see Letter from Lynn Hect Schafran to Ruth Bader Ginsburg (Apr. 4, 1975) (on file with the Harvard Law School Library) (noting that Boalt Law School supplied Brennan with the name of a female student as its top candidate one year, and after Brennan insisted on receiving a recommendation for a male student instead, the school told him he “had better shape up,” and then he hired a woman).

Harvard Law School did not admit women at all until 1950.¹⁴² When Dean Harlan Fiske Stone was asked in the 1920s why Columbia Law School would not admit women, his enlightened response was, “[w]e don’t because we don’t.”¹⁴³ When Ruth Bader Ginsburg entered Harvard Law School in 1956, there were 9 women—and over 500 men—in her class.¹⁴⁴ At a dinner hosted by the dean, the women were asked to explain why they were taking up slots that should have gone to men.¹⁴⁵ (Ginsburg’s reply, in retrospect, was especially rich: “All I could think to say was that my husband was in the second-year class and it was important for a wife to understand her husband’s work.”¹⁴⁶) At that time, women could not live in law school dormitories, they were denied access to dining tables at the faculty club, parts of the library were off-limits to them, and the Law Review banquet welcomed members’ fathers, but not their wives or mothers.¹⁴⁷

When Ginsburg graduated from Columbia Law School in 1959—tied for first in her class, with membership on the law reviews of both Columbia and Harvard—two of her professors tried to convince Justice Felix Frankfurter to hire her. He flatly refused to take a female law clerk (even though he had been a pioneer in hiring a black clerk a dozen years earlier).¹⁴⁸ Indeed, not a single federal judge in the New York area would hire Ginsburg as a law clerk—until one of her Columbia professors (Gerald Gunther) guaranteed that he would supply a male replacement if Ginsburg, mother of a young child, could not adequately perform the job.¹⁴⁹ On those terms, Judge Edmund L. Palmieri of the Southern District of New York hesitantly made her an offer. (The judge was subsequently so impressed with Ginsburg’s performance that, at the end of her tenure, he immediately replaced her with another woman.¹⁵⁰) Sandra Day O’Connor, graduating third in her class at Stanford Law School seven years earlier, could find employment in California law firms only as a legal secretary.¹⁵¹

Many male justices (and their male law clerks) did not take seriously claims of sex discrimination.¹⁵² In 1946, the Justices confronted the question

¹⁴² Ginsburg, *supra* note 30, at 13.

¹⁴³ Ginsburg, *Comment: Frontiero*, *supra* note 36, at 2.

¹⁴⁴ Ginsburg & Flagg, *supra* note 31, at 9.

¹⁴⁵ *Id.*

¹⁴⁶ CAMPBELL, *supra* note 3, at 22 (statement of Ruth Bader Ginsburg).

¹⁴⁷ Justice Ruth Bader Ginsburg, *The Changing Complexion of Harvard Law School*, 27 HARV. WOMEN’S L.J. 303, 307 (2004).

¹⁴⁸ CAMPBELL, *supra* note 3, at 22.

¹⁴⁹ CAMPBELL, *supra* note 3, at 22; Ruth Bader Ginsburg, *Memories of Gerald Gunther, Remarks at Stanford Law School* (Oct. 4, 2002), in 55 STAN. L. REV. 639, 639 (2002).

¹⁵⁰ CAMPBELL, *supra* note 3, at 22–23.

¹⁵¹ Adam Cohen, Editorial, *Why Justice O’Connor Could Be Affirmative Action’s Unlikely Savior*, N.Y. TIMES, Apr. 6, 2003, §4, at 12; Ginsburg, *supra* note 30, at 14.

¹⁵² See, e.g., Ginsburg, *supra* note 35, at 359 (quoting from a recent Oregon case, *State v. Bearcub*, 465 P.2d 252, 253 (Or. Ct. App. 1970), rejecting a sex discrimination challenge on the ground that “the Creator took care of classifying men and women differently, and if the legislature accepts these differences . . . we are not prepared to say the

of whether federal statutes permitted federal courts to exclude women from juries in states where women were technically eligible to serve. Internal records make clear that some of the justices considered the exclusion of women from juries to be a laughing matter. Justice Douglas, who wrote the opinion invalidating a criminal conviction because the exclusion of women made the jury unrepresentative, sent a jocular note to Justice Frankfurter proposing this revision to his draft: "Mr. Justice Frankfurter would eliminate all sex from juries by including only males."¹⁵³ Not to be outdone, Frankfurter replied with a proposed addition to Douglas's opinion: "Mr. Justice Frankfurter, being a Victorian conservative, does not believe defendants are entitled to a sexy jury."¹⁵⁴ Apparently, in the 1940s, frat boy humor was still alive and well on the Supreme Court.¹⁵⁵

Thirty years later, oral advocate Ruth Bader Ginsburg had to confront similarly condescending humor from the bench as she challenged the exclusion of women from Missouri juries. After Ginsburg concluded her oral presentation in *Duren v. Missouri*,¹⁵⁶ Justice William Rehnquist interjected one final question: "You won't settle for putting Susan B. Anthony on the new dollar then?" (eliciting laughter in the courtroom).¹⁵⁷ In a 1970 case from New York, a state judge told a civil plaintiff challenging the absence of women from her jury not to complain to the court because her "sisters" prefer "television soap operas, bridge and canasta, the beauty parlor and shopping" over jury service.¹⁵⁸ It is almost impossible to imagine Thurgood Marshall facing similar quips from the bench in the 1950s: Race discrimination, unlike sex discrimination, was no laughing matter to jurists.¹⁵⁹

classifications . . . were without good reason"). Later, as a Supreme Court justice, Ginsburg acknowledged instances in which female jurists probably detected subtle sex biases better than most of their male colleagues. See Ginsburg, *supra* note 115, at 363 (giving as an example *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), where "Justice O'Connor understood that the exclusion of men from the nursing school was no true favor to women").

¹⁵³ Letter from Justice William O. Douglas to Justice Felix Frankfurter (Nov. 6, 1946) (on file with the Harvard Law School Library) (discussing *Ballard v. United States*, 329 U.S. 187 (1946)).

¹⁵⁴ Letter from Justice Felix Frankfurter to Justice William O. Douglas (Nov. 6, 1946) (on file with the Harvard Law School Library).

¹⁵⁵ In light of such comments, perhaps it is unsurprising that in the late 1940s the Justices apparently opposed the appointment to the Supreme Court of Judge Florence Allen of the U.S. Court of Appeals for the Sixth Circuit, which President Truman was reportedly contemplating. As Ginsburg observed, "The justices feared that a woman's presence would inhibit their conference deliberations where, with shirt collars open and shoes off, they decided the legal issues of the day." Ginsburg & Brill, *supra* note 114, at 283.

¹⁵⁶ 439 U.S. 357 (1979).

¹⁵⁷ Transcript of Oral Argument at 19, *Duren*, 439 U.S. 357 (No. 77-6067).

¹⁵⁸ *De Kosenko v. Brandt*, 313 N.Y.S.2d 827, 830 (N.Y. Sup. Ct. 1970). Ginsburg frequently quoted this statement in speeches and briefs. See, e.g., Ginsburg, *Treatment of Women by the Law*, *supra* note 63, at 488.

¹⁵⁹ Cf. Ginsburg, *Treatment of Women by the Law*, *supra* note 63, at 481 (noting that one of the principal tasks facing law schools in terms of gender issues is "the elimination from law school texts and classroom presentations of attempts at comic relief via stereo-

Indeed, Ginsburg's most difficult challenge in the 1970s was probably convincing elderly male judges of the insidious consequences of sex classifications.¹⁶⁰ The problem was that virtually all sex classifications, as Ginsburg liked to say, were a double-edged sword. Many such statutes tangibly disadvantaged males, not females, though they intangibly harmed women by perpetuating stereotypes of female dependency, passivity, and lack of business acumen. Ginsburg needed to convince the Justices that women were harmed, for example, by laws permitting young girls access to a certain sort of alcohol at an earlier age than boys,¹⁶¹ requiring men but not women to pay alimony,¹⁶² or permitting women but not men the choice of whether to serve on juries.¹⁶³

By 1954, few justices doubted that state-mandated racial segregation harmed—and was intended to harm—blacks.¹⁶⁴ At the conference discussion of *Brown*, Justice Hugo Black observed that white southerners contended the purpose of racial segregation was “to prevent the mixture of the races,” but he was confident this was nonsense: The “reason for segregation is the opinion the colored people are inferior” and the “purpose of [segregation] is to discriminate because of color.”¹⁶⁵ Likewise, Chief Justice Earl Warren stated unambivalently at a subsequent conference: “separate but equal doctrine rests on [the] basic premise that the Negro race is inferior.”¹⁶⁶

By contrast, in the 1970s, many male judges retained doubts whether at least some sex classifications really harmed women.¹⁶⁷ In a telling conversa-

typed characterizations of women”); Ginsburg, *supra* note 35, at 350–53 (noting several examples, including one involving President Richard Nixon, of gender issues being treated frivolously).

¹⁶⁰ See Ginsburg, *supra* note 22, at 1442 (noting that one principal difficulty the WRP encountered is that judges and legislators “regarded differential treatment of men and women not as malign, but as operating benignly in women’s favor”); see also Ruth Bader Ginsburg, *The Need for the Equal Rights Amendment*, 59 A.B.A. J. 1013, 1015 (1973) (arguing that performance of judges in sex discrimination cases has ranged “from poor to abominable” (quoting John D. Johnston, Jr. & Charles L. Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U. L. REV. 675, 676 (1971))).

¹⁶¹ *Craig v. Boren*, 429 U.S. 190 (1976).

¹⁶² *Orr v. Orr*, 440 U.S. 268 (1979).

¹⁶³ *Duren v. Missouri*, 439 U.S. 357 (1979).

¹⁶⁴ Justice Stanley Reed was an exception. He stated at the conference discussion of *Brown*: “[A] reasonable body of opinion in the various states [was] for segregation,” which was “for [the] benefit of both [races].” KLARMAN, *supra* note 6, at 294–95.

¹⁶⁵ Conference Notes of Justice William O. Douglas, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (No. 1) (on file with the Harvard Law School Library).

¹⁶⁶ KLARMAN, *supra* note 6, at 302.

¹⁶⁷ Brief of ACLU as Amicus Curiae at 29, *Frontiero v. Laird*, 409 U.S. 840 (1972) (No. 71-1694) (quoting a recent decision of the California Supreme Court making the point that laws disadvantaging women could be characterized as “protective” and “beneficial,” whereas analogous racial classifications would be seen as obviously “invidious” and “impermissible”); see also John D. Johnston, Jr. & Charles L. Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U. L. REV. 675, 676 (1971) (observing that judges have done a much better job of freeing themselves from patterns of thought that could be called racist than they have of eliminating sexism from their thinking).

tion with Harvard Law School students early in 1973, Justice Potter Stewart expressed bewilderment as to why women wanted an Equal Rights Amendment. In his view, “the female of the species has the best of both worlds. She can attack laws that unreasonably discriminate against her while preserving those that favor her.”¹⁶⁸ Ginsburg reported being depressed when she heard the account of Stewart’s talk.¹⁶⁹ She tried to educate the Justices into seeing that all sex classifications reflected “the double-edged discrimination characteristic of laws that chivalrous gentlemen, sitting in all-male chambers, misconceive as a favor to the ladies.”¹⁷⁰ While such laws might afford tangible benefits to women, those always came with a cost—perpetuating harmful stereotypes. The most insidious of those stereotypes, Ginsburg believed, was that of male breadwinner and female homemaker.¹⁷¹

Ginsburg discovered that her task was easier when she could point to statutory classifications that tangibly disadvantaged women as well as men.¹⁷² Thus, where the male spouse of a female wage earner was denied fringe benefits that would have been provided to the female spouse of a similarly situated male wage earner, it was obvious that a woman (the wage earner) as well as a man (the would-be benefits recipient) was suffering from sex discrimination. The Justices had an easier time seeing these laws as denigrating the worth of female labor.¹⁷³ Thus, in one such case, Justice Brennan’s opinion quoted language presented to him in Ginsburg’s brief about how women’s “pedestal” was often really “a cage.”¹⁷⁴

¹⁶⁸ Ginsburg, *The Need for the Equal Rights Amendment*, *supra* note 160, at 1017 (quoting HARV. L. SCH. REC., Mar. 23, 1973, at 15).

¹⁶⁹ CAMPBELL, *supra* note 3, at 59-60.

¹⁷⁰ Brief for Appellee at 23, *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1974) (No. 73-1892).

¹⁷¹ Letter from Ruth Bader Ginsburg to Aryeh Neier (May 20, 1974) (on file with the Harvard Law School Library) (“In my view one of the principal impediments for equal opportunity for women is the ‘breadwinner’ concept still pervasive in the law.”).

¹⁷² *See, e.g.*, Brief of ACLU as Amicus Curiae, *supra* note 167, at 27 (noting that Sharron Frontiero’s labor, “by congressional mandate, is worth less than the labor of a similarly situated man in terms of the benefits it brings to the family unit”); Brief for Appellee, *supra* note 170, at 10 (noting that the Social Security provision at issue “ranks [Paula Wiesenfeld] as a secondary breadwinner, an individual whose employment is less valuable to, and supportive of, the family than the employment of the family’s man”); *see also* Letter from Ruth Bader Ginsburg to Kathleen Peratis (June 17, 1974) (on file with the Harvard Law School Library) (noting Ginsburg’s excitement about the *Hau* litigation because “it gives us the opportunity to proceed with a female named plaintiff,” given that the husband of a retired woman who was herself receiving Social Security old-age benefits was being denied his spousal benefits because of sex).

¹⁷³ *Califano v. Goldfarb*, 430 U.S. 199, 208 (1977) (noting that under the Social Security Act provision at issue “female insureds received less protection for their spouses because of their sex”); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 645 (1975) (noting that the Constitution “forbids the gender-based differentiation that results in the efforts of female workers required to pay social security taxes producing less protection for their families than is produced by the efforts of men”); *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) (noting that the statutory provision at issue operates “to deny benefits to a female [service] member” which would be available to a similarly situated male).

¹⁷⁴ *Frontiero*, 411 U.S. at 684.

However, when that element of the case was missing—when a man was being denied benefits to which a similarly situated woman would have been entitled, but there was no corresponding female laborer who had earned the benefits—the Justices had difficulty comprehending that women were being intangibly harmed by the stereotype of economic dependency. Thus, a majority of the justices upheld a Florida law awarding a property tax exemption to widows but not widowers, despite Ginsburg’s insistence that the law simply “perpetuates Victorian assumptions concerning the station of men and women.”¹⁷⁵

A lengthy exchange between Ginsburg and some of the justices at oral argument in *Califano v. Goldfarb* reveals how difficult it was to convince elderly male jurists that all sex classifications invidiously affected women because of their double-edged nature. The Social Security provision at issue in *Goldfarb* automatically provided survivors’ benefits to the widows of covered male employees, but required widowers of covered female employees to demonstrate their economic dependency on their spouses (meaning they had to show that at least fifty percent of their financial support had come from their wives). To Ginsburg, such a provision had three flaws: it discriminated against female wage-earners, it discriminated against male beneficiaries, and it perpetuated the invidious sex stereotype that males were breadwinners and females were homemakers. Some justices had difficulty seeing these points.

The first question directed to Ginsburg from the bench (apparently coming from Justice Potter Stewart) was whether the provision at issue discriminated against males or females, whether it could not be cast either way, and why Ginsburg had chosen to treat it as anti-female discrimination.¹⁷⁶ If the sexes were switched and only female beneficiaries were required to establish financial dependency, Stewart wondered, would that make a constitutional difference? Ginsburg’s response was that “[t]he line drawn here, like virtually every gender discrimination, is a two-edged sword.”¹⁷⁷

Her interlocutor persisted: Some recent Court decisions had focused on the history of discrimination against women, but he doubted that any analogous history of discrimination against men existed.¹⁷⁸ Ginsburg responded that “most anti-female discrimination was dressed up as discrimination favoring the woman.”¹⁷⁹ Stewart replied impatiently: “I know that. I know that, but the courts, through the help of advocates such as you, have been able to see through that, haven’t they?”¹⁸⁰ That comment elicited laughter

¹⁷⁵ Transcript of Oral Argument at 6, *Kahn v. Shevin*, 416 U.S. 384 (1974) (No. 73-78).

¹⁷⁶ Transcript of Oral Argument at 22–23, *Mathews v. Goldfarb*, 430 U.S. 199 (1977) (No. 75-699).

¹⁷⁷ *Id.* at 23.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

from the audience.¹⁸¹ Ginsburg gamely reiterated that sex classifications almost inevitably harmed women.¹⁸² Persisting, Stewart asked her to imagine an instance of discrimination against males: Would her constitutional argument be equally strong?¹⁸³ Ginsburg replied that her argument would remain unchanged “because I don’t know of any purely anti-male discrimination. In the end, the women are the ones who end up hurting.”¹⁸⁴

A moment later, recently appointed Justice John Paul Stevens took up the same line of questioning: Should discrimination against males be subjected to the same standard as discrimination against females or a different one?¹⁸⁵ Ginsburg repeated her previous answer: “almost every discrimination that operates against males operates against females, as well.”¹⁸⁶ Bewildered and apparently annoyed, Stevens responded: “Is that a yes or a no answer. I just don’t understand you and—Are you trying to avoid the question or”¹⁸⁷ Ginsburg insisted that she was trying to clarify, not evade: She was aware of no sex classifications that did not operate as a double-edged sword.¹⁸⁸

*Craig v. Boren*¹⁸⁹ had been argued in the Court that same morning. That case involved an Oklahoma law—described by almost everyone involved as “ridiculous”¹⁹⁰—that permitted the purchase of 3.2% “near beer” by young women at age eighteen but by young men only at age twenty-one. To some justices, that law seemed even more clearly than the one in *Goldfarb* to discriminate against males rather than females. Ginsburg was asked during her *Goldfarb* argument whether this Oklahoma law should be examined under the same standard she was advocating.¹⁹¹ She replied that Oklahoma’s law adversely affected women by perpetuating the stereotypes of female docility and passivity.¹⁹²

From the bench came the objection, “[b]ut your answer always depends on their finding some discrimination against females. You seem to put that in every answer to this question.”¹⁹³ Ginsburg, who must have been growing exasperated at this point, reiterated that “I have not yet come across a statute that doesn’t have that effect.”¹⁹⁴ Justice Stevens persisted, “[b]ut if there were one, then would you say it would be treated under a different

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 23–24.

¹⁸⁵ *Id.* at 24.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 24–25.

¹⁸⁹ 429 U.S. 190 (1976).

¹⁹⁰ Brief for ACLU as Amicus Curiae at 21, *Craig*, 429 U.S. 190 (No. 75-628).

¹⁹¹ Transcript of Oral Argument, *supra* note 176, at 25.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

standard, I take it.”¹⁹⁵ Not wishing to alienate a potential ally or make a concession that could harm her case, Ginsburg relented: If there were such a statute, she would reserve judgment on what the standard should be.¹⁹⁶ But, she repeated, she had yet to come across such a statute. Finally, Ginsburg was asked whether her case depended on the Court analyzing the sex classification in *Goldfarb* as discrimination against women.¹⁹⁷ To this she demurred, insisting that her case depended on recognizing that sex classifications are “highly questionable and should be closely reviewed.”¹⁹⁸ That answer was evidently greeted with great skepticism by Justice Stevens.¹⁹⁹

Convincing elderly male justices of the invidious consequences of ostensibly benign sex classifications was not the entirety of Ginsburg’s challenge. She needed to convince women who had internalized the gender status quo of the same thing.²⁰⁰ Much as Jim Crow shattered the confidence and sense of self-worth of many African Americans, the system of male supremacy deprived women of self-esteem and convinced many that they really were the “inferior sex” and needed the ostensible “protection” offered by sex-stereotyping classifications. One of the most formidable challenges of any social reform movement is undoing the psychological damage inflicted by an oppressive status quo.

B. Precedent

By definition, social reform lawyers seek to change the status quo. Judicial rulings tend generally to reflect existing social mores. Thus, social reform litigators must usually confront the challenge of maneuvering around hostile judicial precedent. One reason that both the NAACP and the WRP relied heavily on unorthodox legal sources such as sociological and psychological studies to establish the harms of racial segregation and sex stereotyping, respectively, is because legal precedent was not on their side.²⁰¹

The Supreme Court’s decision in *Plessy v. Ferguson*²⁰² was the biggest obstacle confronting civil rights litigators in the twentieth century. In *Plessy*, the Court had rejected a constitutional challenge to state-mandated segregation of railroads, famously ruling that separate-but-equal satisfied the command of the Equal Protection Clause. Although before *Brown v. Board*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 26.

¹⁹⁹ *See id.*

²⁰⁰ *See* Joint Reply Brief of Appellants and ACLU, *supra* note 136, at 12 (quoting a scholar who emphasized the extent to which the stereotypical image of women “has actually been internalized” and influenced women’s behavior in ways in which they are “frequently unaware”).

²⁰¹ CAMPBELL, *supra* note 3, at 57.

²⁰² 163 U.S. 537 (1896).

of *Education* the high court had technically never confronted a challenge to racial segregation in public schools,²⁰³ dozens of decisions by lower federal courts and state supreme courts had unanimously upheld the constitutionality of such segregation.²⁰⁴

In their internal deliberations in *Brown*, several justices expressed concern that precedent strongly indicated the permissibility of public school segregation. Justice Hugo Black was troubled that “the long line of decisions bars that [antisegregation] construction of the amendment.”²⁰⁵ Justice Tom Clark thought that the Court “had led the states on to think segregation is OK” and thus perhaps “should let them work it out” on their own.²⁰⁶ Justice Robert Jackson was concerned about precedent as well: “Almost a century of decisional law rendered by judges, many of whom risked their lives for the cause that produced these Amendments, is almost unanimous in the view that the Amendment tolerated segregation by state action.”²⁰⁷

If possible, Ginsburg and the WRP faced even more hostile precedent as they commenced their litigation campaign for sex equality. Before 1971, the Supreme Court had never intimated that the Equal Protection Clause posed any obstacle to sex classifications. On several occasions, the Court had unanimously rejected challenges to laws discriminating against women. In 1873, the Court upheld the exclusion of women from the Illinois bar.²⁰⁸ In a concurring opinion, Justice Joseph Bradley famously explained that the “law of the Creator” had mandated that “[t]he paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother.”²⁰⁹ Two years later, the Court denied that state laws disenfranchising women violated the Fourteenth Amendment.²¹⁰ In 1908, the Justices rejected a challenge to a maximum hours law for women, despite having narrowly invalidated a similar law for men just three years earlier.²¹¹ Justice David Brewer explained that a “woman’s physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence.”²¹² In 1948, the Court upheld a law excluding women from bartending unless they were the wife or daughter of the establishment’s

²⁰³ See, e.g., *Gong Lum v. Rice*, 275 U.S. 78 (1927) (rejecting the argument that Mississippi Chinese should not have to attend school with blacks if whites did not have to); *Cumming v. Richmond County Bd. of Educ.*, 175 U.S. 528 (1899) (rejecting an equal protection challenge to a county’s closing its black public high school while its white public high school remained open).

²⁰⁴ KLARMAN, *supra* note 6, at 304.

²⁰⁵ *Id.* at 294.

²⁰⁶ *Id.* at 297.

²⁰⁷ *Id.* at 306.

²⁰⁸ *Bradwell v. Illinois*, 83 U.S. 130 (1873).

²⁰⁹ *Id.* at 141–42 (Bradley, J., concurring). Ginsburg wryly observed in her *Frontiero* brief: “[T]he method of communication between the Creator and the jurist is never disclosed.” Brief of ACLU as Amicus Curiae, *supra* note 167, at 36.

²¹⁰ *Minor v. Happersett*, 88 U.S. 162 (1875).

²¹¹ *Muller v. Oregon*, 208 U.S. 412 (1908).

²¹² *Id.* at 421.

owner.²¹³ As late as 1961, the Court unanimously rejected a challenge to Florida's jury selection statute which required men to serve but gave women the option of volunteering.²¹⁴ Justice John Harlan observed that a "woman is still regarded as the center of home and family life," and thus the state was constitutionally permitted to delegate to women the determination of whether jury service was consistent with their "special responsibilities."²¹⁵

Each confronted with hostile precedent, the NAACP and the WRP pursued similar strategies: First, try to get one's foot in the door; then, pry it open. In 1938, in *Missouri ex rel. Gaines v. Canada*,²¹⁶ the NAACP ignored Supreme Court precedent entirely and argued that Missouri's policy of providing out-of-state scholarships for black graduate and professional students violated the "substantial equality" test that lower courts had extrapolated from *Plessy's* rule of separate but equal. The NAACP argued—and the Supreme Court agreed—that because similarly situated white students were receiving higher education *within* the state of Missouri, Gaines was being denied substantial equality.²¹⁷ In 1950, in *Sweatt v. Painter*,²¹⁸ the NAACP successfully urged the Justices to further strengthen the equality requirement by invalidating a newly created black law school on the ground that it failed to provide the *intangible* benefits afforded by the long-standing white law school—for example, scholarly reputation and stature of the alumni body.²¹⁹ The association also argued that *Plessy's* mistaken belief in the impossibility of racial assimilation and its failure to recognize the discriminatory impact of racial segregation on blacks undermined its force as precedent owing to changed circumstances.²²⁰

Then, in *Brown v. Board of Education*,²²¹ the NAACP argued that *Sweatt's* focus on intangible inequalities necessarily doomed racial segregation in public grade schools, regardless of how equal the physical facilities of the black school and the white school were.²²² In their conference deliberations, two justices explicitly asserted that *Sweatt* left nothing left to decide in *Brown*. Justice Harold Burton opined that *Sweatt* "crossed the threshold of these cases. Education is more than buildings and faculties. It's a habit of mind."²²³ Justice Sherman Minton agreed that the separate-but-equal doc-

²¹³ *Goesaert v. Cleary*, 335 U.S. 464 (1948).

²¹⁴ *Hoyt v. Florida*, 368 U.S. 57 (1961).

²¹⁵ *Id.* at 61–62.

²¹⁶ 305 U.S. 337 (1938).

²¹⁷ Petition for Writ of Certiorari at 17–20, *Missouri ex rel. Gaines*, 305 U.S. 337 (1938) (No. 57).

²¹⁸ 339 U.S. 629 (1950).

²¹⁹ Brief of Petitioner at 71–76, *Sweatt*, 339 U.S. 629 (No. 44).

²²⁰ *Id.* at 44–46.

²²¹ 347 U.S. 483 (1954).

²²² Brief for Appellants and Respondents on Reargument at 48–50, *Brown*, 347 U.S. 483 (No. 1).

²²³ KLARMAN, *supra* note 6, at 297.

trine “has been whittled away in these cases [referring to *Sweatt* and *McLaurin*].”²²⁴

For these justices to believe that they had resolved the issue in *Brown* years earlier may have been psychologically appealing. Yet the Justices’ internal deliberations in *Sweatt* plainly belie the view that in 1950 they thought they were determining the constitutionality of racial segregation in public grade schools. At conference, Justice Stanley Reed said, “It would be unfortunate at this time for us to say segregation [is] unconstitutional.”²²⁵ Justice Sherman Minton insisted that “we can meet grade and high schools when we get to it.”²²⁶ Justice Harold Burton committed himself only to the position that “at post graduate level [one] cannot have equal and separate.”²²⁷ In a memo to his colleagues, Justice Tom Clark agreed that they should “limit [their] opinion to graduate schools.”²²⁸ He continued: “It is entirely possible that Negroes in segregated grammar schools, learning arithmetic and spelling would receive skills in those elementary subjects equivalent to those of white students”²²⁹ Clark confessed that he did not know how he would vote when the grammar school cases arose: “Should they arise tomorrow I would vote to deny certiorari or dismiss the appeal, so that we would not be compelled to decide the issues.”²³⁰ As much as some justices in *Brown* wished to pretend otherwise, *Sweatt* had not resolved the constitutionality of racial segregation in grade schools.²³¹

Reed v. Reed proved to be a landmark precedent in sex discrimination jurisprudence—the first time in American history that the Justices invalidated a sex classification.²³² The case involved an Idaho law affording men priority over women in administering decedents’ estates. The facts were highly sympathetic to the law’s challenger. Sally Reed’s teenage son had committed suicide. She blamed his father—her former husband—who had been awarded custody once the boy reached the age of adolescence. Understandably, she did not wish him to become the administrator of the boy’s small estate.²³³

²²⁴ *Id.* In *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950), the Court invalidated the practice of the graduate education school of the University of Oklahoma of segregating in classrooms, the library, and the cafeteria the one black man it had admitted pursuant to federal court order. For discussion, see KLARMAN, *supra* note 6, at 208–11.

²²⁵ Conference Notes of Justice Tom C. Clark (on file with the Harvard Law School Library) (discussing *McLaurin* and *Sweatt*).

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ Letter from Justice Tom C. Clark on *McLaurin* and *Sweatt* to the Conference 4 (Apr. 1950) (on file with the Harvard Law School Library).

²²⁹ *Id.* at 5.

²³⁰ *Id.* at 6.

²³¹ See KLARMAN, *supra* note 6, at 211–12 (noting both legal and practical distinctions between racial segregation in graduate school and grade school).

²³² 404 U.S. 71 (1971).

²³³ Deborah L. Markowitz, *In Pursuit of Equality: One Woman’s Work to Change the Law*, 14 WOMEN’S RTS. L. REP. 335, 339 (1992) (relying on Ginsburg’s recounting of the facts in her oral history).

In addition, the Idaho legislature had implicitly acknowledged that the law embraced an obsolete sex stereotype by prospectively repealing it.²³⁴ Thus, for the Court to invalidate the law would impose virtually no costs and generate little controversy.²³⁵ Although Ginsburg and the ACLU argued in an amicus brief that the Court should analogize sex to race and apply strict scrutiny to such classifications,²³⁶ they did not genuinely expect the Justices to embrace that argument in their first modern sex discrimination case.²³⁷ Ginsburg's backup argument was that the Idaho law was irrational and thus violated even the lenient minimum rationality standard that applies to all legislative classifications.²³⁸ The Justices unanimously invalidated the law on that latter basis.²³⁹ The conference notes make clear that they gave the case remarkably little consideration.²⁴⁰ Justice Harry Blackmun referred to it as "a very simple little case."²⁴¹

Once having secured *Reed* as a vital first precedent, Ginsburg and her colleagues tried to read it for all it was worth.²⁴² They emphasized that the *Reed* opinion had used the word "scrutiny"—a term previously reserved for race cases.²⁴³ They also observed that the Court, quoting a *Lochner*-era precedent they had cited in their brief,²⁴⁴ had required a "fair and substantial" connection between the sex classification and the government's objective²⁴⁵—a more substantial nexus requirement than was ordinarily imposed under minimum rationality review.²⁴⁶ They insisted that *Reed* had rejected administrative convenience as a sufficient justification for a government sex classification.²⁴⁷ This was significant, if true, because administrative conve-

²³⁴ *Id.*

²³⁵ *Id.* at 339–40.

²³⁶ See Brief of the Petitioner-Appellant at 14–15, *Reed*, 404 U.S. 71 (No. 70-4). Justice Blackmun thought the ACLU brief was "filled with emotion." Memorandum from Justice Blackmun to himself on *Reed v. Reed* 1 (Oct. 18, 1971) (on file with the Harvard Law School Library).

²³⁷ STREBEIGH, *supra* note 32, at 40; Markowitz, *supra* note 233, at 341 n.86 (quoting from contemporary Ginsburg correspondence stating that "we never expected the Court to reach the suspect criterion issue when decision didn't require that giant step").

²³⁸ Brief of the Petitioner-Appellant, *supra* note 236, at 61.

²³⁹ *Reed*, 404 U.S. at 75–77.

²⁴⁰ Conference Notes of Justice William O. Douglas, *Reed*, 404 U.S. 71 (No. 70-4) (on file with the Harvard Law School Library).

²⁴¹ Memorandum from Justice Blackmun to himself, *supra* note 236, at 1. Blackmun also expressed the hope that the case could be disposed of in a "brief and fairly simple opinion" that avoided "a long and emotional discussion about women's rights." *Id.* at 4.

²⁴² See, e.g., Brief for Appellants at 9, *Kahn v. Shevin*, 416 U.S. 384 (1974) (No. 73-78) (emphasizing that *Reed* "departed significantly from the traditional equal protection analysis"); see also Ginsburg, *Comment: Frontiero*, *supra* note 36, at 3 (treating *Reed* "as a harbinger of fundamental change in the Supreme Court's perspective with regard to sex-based classifications").

²⁴³ Ginsburg, *Comment: Frontiero*, *supra* note 36, at 3.

²⁴⁴ Brief of the Petitioner-Appellant, *supra* note 236, at 8, 60–61.

²⁴⁵ *Reed*, 404 U.S. at 76 (citing *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)).

²⁴⁶ Brief of ACLU as Amicus Curiae, *supra* note 167, at 22.

²⁴⁷ *Id.* at 48–50.

nience was the principal justification offered for most sex classifications—for example, that it was cheaper for the government to assume that male workers had financially dependent spouses but that female workers did not, because that assumption largely corresponded with reality. Ginsburg also highlighted lower court decisions that had treated *Reed* as a landmark ruling on sex discrimination,²⁴⁸ and she cited commentators who had detected in *Reed* and other contemporary Court decisions²⁴⁹ a judicial inclination to apply “minimum rationality with bite” to certain classifications beyond racial ones.²⁵⁰

In her next case before the Court, *Frontiero v. Richardson*,²⁵¹ Ginsburg reiterated the argument for applying strict scrutiny to sex classifications.²⁵² She came within one vote of succeeding. Justice William Brennan, who had been assigned to draft the majority opinion, wrote a memorandum arguing for strict scrutiny and insisting that this is “the only rational explication of *Reed*.”²⁵³ In a note to Brennan, Justice Byron White agreed that “[i]f moving beyond the lesser test means that there is a suspect classification, then *Reed* has already determined that.”²⁵⁴

But more conservative justices strongly objected to Brennan’s treatment of *Reed*. Justice Blackmun, for whom *Frontiero* afforded “a good bit of difficulty,” told Brennan “that it is not advisable, and certainly not necessary, for us to reach out in this case to hold that sex, like race and national origin and alienage, is a suspect classification.”²⁵⁵ *Reed*’s rationality approach was, in Blackmun’s mind, “ample precedent” to resolve this case.²⁵⁶ A few years later, Chief Justice Warren Burger told Brennan that “you read into *Reed v. Reed* what is not there. Every gender distinction does not need

²⁴⁸ *Id.* at 32–33.

²⁴⁹ *E.g.*, *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

²⁵⁰ Joint Reply Brief of Appellants and ACLU, *supra* note 136, at 2 (relying on Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*,” 86 HARV. L. REV. 1 (1972)); *see also* Ginsburg, *supra* note 149, at 639–40 (recalling how influential Gunther’s Harvard Foreword was to her briefs in sex discrimination cases).

²⁵¹ 411 U.S. 677 (1973) (striking down policy under which wives of male military service members automatically qualified for housing and medical benefits but husbands of female military service members qualified only upon a showing of financial dependency).

²⁵² Brief of ACLU as Amicus Curiae, *supra* note 167, at 27–34.

²⁵³ Memorandum from Justice William J. Brennan to Justice Lewis F. Powell (Mar. 6, 1973) (on file with the Harvard Law School Library).

²⁵⁴ Memorandum from Justice Byron White to Justice Brennan (Feb. 15, 1973) (on file with the Harvard Law School Library).

²⁵⁵ Memorandum from Justice Blackmun to Justice Brennan (Mar. 5, 1973) (on file with the Harvard Law School Library). Paradoxically, at the time of *Reed*, Blackmun had stated himself “inclined to feel that sex can be considered a suspect classification just as race There can be no question that women have been held down in the past in almost every area.” Memorandum from Justice Blackmun, *supra* note 236, at 2.

²⁵⁶ Memorandum from Justice Blackmun, *supra* note 255.

the strict scrutiny test applicable to a criminal case. *Reed* was the innocuous matter of who was to probate an estate.”²⁵⁷

In the end, the Justices voted 8 to 1 to invalidate the sex classification at issue in *Frontiero*, which required the husbands of female military service members to prove financial dependence in order to receive certain fringe benefits that were automatically available to the wives of male service members. Yet only four justices joined Brennan’s plurality opinion treating sex as a suspect classification and “finding at least implicit support for such an approach” in *Reed*.²⁵⁸ Rather than being disappointed at coming up one vote short, Ginsburg, who called Brennan’s opinion “a joy to read,”²⁵⁹ expressed amazement that sex equality litigation had advanced so far so fast.²⁶⁰ Before 1971, literally not a single justice had ever voted for a sex equality claim.

Even thirty-five years later, a majority of justices has never ruled that sex classifications are suspect. But within three years of *Frontiero*, a majority acknowledged, on the basis of additional rulings invalidating sex classifications,²⁶¹ that an intermediate standard of scrutiny was appropriate in such cases.²⁶² The opinion in *Craig v. Boren*, also authored by Justice Brennan, again portrayed the new standard as flowing ineluctably from *Reed*.²⁶³ Twenty years after *Craig* was decided, Supreme Court Justice Ruth Bader Ginsburg managed to ratchet up that standard even higher, holding in *United States v. Virginia* (the *VMI* case) that sex classifications could be successfully defended only on the basis of “exceedingly persuasive justifications.”²⁶⁴ By that time, Ginsburg herself acknowledged that “there is no practical difference between what has evolved [through judicial interpretation] and the ERA.”²⁶⁵

C. Maintaining Control of the Litigation

Social reform litigators usually conceive a logical progression of cases, in which they initially ask courts for less controversial reforms before ultimately pressing for more aggressive changes. Yet social reform litigation is

²⁵⁷ Memorandum from Chief Justice Burger to Justice Brennan (Nov. 15, 1976) (on file with the Harvard Law School Library).

²⁵⁸ *Frontiero v. Richardson*, 411 U.S. 677, 679, 682 (1973).

²⁵⁹ Letter from Ruth Bader Ginsburg to Jane Lipset (May 15, 1973) (on file with the Harvard Law School Library).

²⁶⁰ Ginsburg, Hawaii ACLU Conference, *supra* note 117, at 12.

²⁶¹ See *Stanton v. Stanton*, 421 U.S. 7 (1975); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975).

²⁶² See *Craig v. Boren*, 429 U.S. 190 (1976).

²⁶³ See *id.* at 190, 197–99.

²⁶⁴ See *United States v. Virginia (VMI)*, 518 U.S. 515, 534 (1996). In dissent, Justice Scalia totaled up the number of times Ginsburg had used the “exceedingly persuasive” phrase—nine!—and accused her of trying to smuggle in a new standard. See *id.* at 571–72 (Scalia, J., dissenting); see also Ginsburg, *supra* note 22, at 1447 (regarding *VMI* as the “culmination of 1970s endeavor to open doors so that women could aspire and achieve without artificial constraints”).

²⁶⁵ CAMPBELL, *supra* note 3, at 116 (quoting Ginsburg).

hard to monopolize. Any aggrieved party possessing the resources necessary to hire a lawyer is free to pursue her claims independently.²⁶⁶ Thus, the best laid plans of social reform litigators often go awry.

For example, the NAACP had not planned in the late 1940s to ask the Supreme Court to consider constitutional challenges to the judicial enforcement of racially restrictive covenants. Precedent on this issue was about as clear as it ever gets—and it was adverse to the NAACP's position.²⁶⁷ Not only had dicta in a fairly recent Supreme Court decision denied that judicial enforcement of racially restrictive covenants was unconstitutional,²⁶⁸ but all nineteen state high courts to have considered the issue had reached the same conclusion, as had the District of Columbia courts.²⁶⁹ Only a single federal district judge had ruled to the contrary, and that was in 1892.²⁷⁰ By 1946, the Court of Appeals for the District of Columbia Circuit had ruled seven times that the Constitution permitted judicial enforcement of racially restrictive covenants.²⁷¹

Given the clarity of precedent and the number of NAACP defeats in the lower courts, Thurgood Marshall was reluctant to press this issue upon the Supreme Court.²⁷² Another leading civil rights lawyer, William Hastie, also opposed seeking certiorari in the high court after the restrictive covenants challenge had lost again in the lower courts.²⁷³ But the NAACP was unable to control the litigation. When the Justices voted to grant review, Hastie wondered whether their purpose was to “slap” down the NAACP.²⁷⁴ Much to the surprise and delight of Marshall and Hastie, they won a unanimous victory in *Shelley v. Kraemer*.²⁷⁵ The year 1948 was the zenith of the post-war civil rights movement (until the early 1960s), and the Justices apparently were unwilling to put the authority of the state behind the rigid residential segregation that was creating black ghettos around the country.²⁷⁶

Ginsburg was less fortunate when the WRP lost control of its litigation strategy in 1974. The WRP had intended *Frontiero* to be followed in the Supreme Court by *Weinberger v. Wiesenfeld*²⁷⁷—which Ginsburg called “a

²⁶⁶ Markowitz, *supra* note 233, at 338 (noting the difficulty of one organization controlling the order and timing of social reform litigation).

²⁶⁷ KLARMAN, *supra* note 6, at 213.

²⁶⁸ *Corrigan v. Buckley*, 271 U.S. 323 (1926).

²⁶⁹ KLARMAN, *supra* note 6, at 213.

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ 334 U.S. 1 (1948).

²⁷⁶ KLARMAN, *supra* note 6, at 214–15.

²⁷⁷ Ginsburg, Address at the Minnesota ACLU, *supra* note 40, at 16 (explaining the litigation strategy); Letter from Ruth Bader Ginsburg to John H. Fleming, et al., Editors, Harvard Law Review (Dec. 16, 1974) (on file with the Harvard Law School Library) (noting that *Wiesenfeld* “was supposed to reach the Court next in line after *Frontiero*”); see also Letter from Ruth Bader Ginsburg to James M. Klein, et al., Civil Law Clinic, University of Toledo College of Law (May 28, 1974) (on file with the Harvard Law

great case” and a “gem.”²⁷⁸ Stephen Wiesenfeld was a highly sympathetic plaintiff—a widower who had been denied the Social Security survivors’ child-care benefit that would have enabled him, but for his sex, to stay home to raise his infant son whose mother had died in childbirth.²⁷⁹ But, as Ginsburg explained in a contemporary letter, “in a movement as diffuse as this one, a well planned litigation campaign is impossible to arrange.”²⁸⁰ The “fly in the ointment” proved to be the *Kahn* case out of Florida.²⁸¹

Kahn was a widower challenging the constitutionality of a Florida property tax exemption that was available only to widows. The Florida affiliate of the ACLU assisted with the case but, contrary to organization policy and much to Ginsburg’s dismay, failed to report its involvement to the national office until after the U.S. Supreme Court had granted review.²⁸² Noting immediately that she was “not fond of the case,” Ginsburg agreed to brief and argue it only in the hope of minimizing any damage.²⁸³

School Library) (“I suspect that if the Supreme Court heard *Wiesenfeld* first, then *Abbott* or *Coffin* [both Social Security cases in which the spouses of female wage-earners received lesser benefits than the spouses of similarly situated male workers], a different result would have been achieved in *Kahn*.”).

²⁷⁸ Letter from Ruth Bader Ginsburg to Ms. Phyllis Zatlin Boring (Dec. 27, 1972) (on file with the Harvard Law School Library); see also Letter from Ruth Bader Ginsburg to Ms. Leslie Oelsner, *supra* note 38 (noting, with regard to *Wiesenfeld*, that “the facts of the case make it particularly appealing”).

²⁷⁹ See also STREBEIGH, *supra* note 32, at 65 (noting that *Wiesenfeld*, unlike Reed or Frontiero, had been Ginsburg’s client from the start, thus better enabling her to control the litigation strategy, and that *Wiesenfeld*’s case, unlike *Struck v. Secretary of Defense*, 460 F.2d 1372 (9th Cir. 1972), was very unlikely to become moot).

²⁸⁰ Letter from Ruth Bader Ginsburg to Fleming, et al., *supra* note 277.

Kahn was not the only occasion upon which the WRP saw its litigation plan go awry. The WRP had several Social Security survivors’ benefits cases being litigated simultaneously in the lower courts. Goldfarb’s was seen as the least sympathetic on the facts, because he was already receiving a large pension from his former employer and thus could be portrayed as “double dipping” off his wife’s Social Security survivorship benefits. Ginsburg, Hawaii ACLU Conference, *supra* note 117, at 18. But because the district court decided his case very quickly, his was the first to reach the Supreme Court. Ginsburg won the case, although she described it as a “cliff-hanger.” CAMPBELL, *supra* note 3, at 100; see also Markowitz, *supra* note 233, at 353 n.216 (quoting Ginsburg reflecting on *Goldfarb*: “You can’t really plan [test case] litigation with security *Goldfarb* came before Jack Weinstein in the Eastern District of New York, and he is speedy—the case was heard on a Monday and decided on a Friday.”).

Another early case that Ginsburg was eager to get before the Supreme Court was mooted by government lawyers fearing an adverse decision. Susan Struck was terminated from the U.S. Air Force under guidelines that required the dismissal of female service members who gave birth, even if they immediately put their babies up for adoption. Male service members who became fathers were, of course, not treated the same way. CAMPBELL, *supra* note 3, at 47–48. Ginsburg later reflected that had the Justices been forced to confront the issue in *Struck*, they might have better understood the relationship between pregnancy, reproduction, and sex equality. She speculated that perhaps this would even have inclined them to think about abortion more in terms of sex discrimination than privacy. Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1202 (1992).

²⁸¹ Letter from Ruth Bader Ginsburg to Jack Blumenfeld, *supra* note 37.

²⁸² CAMPBELL, *supra* note 3, at 63; Markowitz, *supra* note 233, at 347.

²⁸³ Letter from Ruth Bader Ginsburg to Gerald Gunther (Jan. 15, 1974) (on file with the Harvard Law School Library).

From Ginsburg's perspective, *Kahn* had two big disadvantages.²⁸⁴ First, unlike in cases such as *Frontiero* and *Wiesenfeld*, there was no female wage-earner who was arguably suffering sex discrimination when her spouse was denied benefits that would have accrued to the similarly situated female spouse of a male wage-earner. The only tangible harm in *Kahn* was suffered by a man. Women were intangibly harmed by the law's embrace of the conventional stereotype of female financial dependency. But this was the very sort of injury that elderly male justices sometimes had difficulty comprehending. Second, the challenge in *Kahn* was to a tax statute—an area where the Court historically had permitted legislatures large leeway in drawing classifications.

Ginsburg endeavored in her brief and oral argument to convince the Justices of two things. First, laws of this sort that seemed to confer favors on women “come at an exorbitant price”²⁸⁵ by “shor[ing] up the very attitudes and traditions that have so long served to keep women ‘in their place’.”²⁸⁶ Second, Florida's proffered justification for the law—anticipatory compensation to elderly women for the discrimination they were likely to encounter in the job market—was not the real one. Ginsburg pointed out that the property tax exemption dated from 1885, when married women in Florida were still powerless to transfer property without their husbands' consent and thus would naturally “be deemed worthy of special solicitude on the death of the person the law regarded as [their] guardian, [their] superior; not [their] peer.”²⁸⁷

Ginsburg had been prescient in her concerns about the case; her arguments to the high court were unavailing. *Kahn* was the only Supreme Court case argued by Ginsburg that she lost.²⁸⁸ The conference notes make clear what she was up against. Chief Justice Warren Burger began by noting that there was “no doubt” that the state had a compelling interest in granting the tax exemption, and there were “all kinds of reasons why women should receive favorable treatment.”²⁸⁹ Even the liberal William O. Douglas was inclined to sustain the law on the ground that “women as widows are largely destitute.”²⁹⁰ Justice Lewis Powell agreed that “before social security, widows would starve.”²⁹¹ Several justices expressed grave concern about interfering with classifications made by tax statutes. Justice Potter Stewart observed that the Court “is leery of turning down tax laws on [the] basis of

²⁸⁴ Ginsburg, *Gender and the Constitution*, *supra* note 36, at 13.

²⁸⁵ Brief for Appellants, *supra* note 242, at 16.

²⁸⁶ *Id.* at 2.

²⁸⁷ Transcript of Oral Argument, *supra* note 175, at 8.

²⁸⁸ CAMPBELL, *supra* note 3, at 64.

²⁸⁹ Conference Notes of Justice William O. Douglas, *supra* note 165.

²⁹⁰ *Id.* Although Ginsburg was harshly critical of Justice Douglas' opinion in *Kahn*, she felt a bit more sympathetic towards him after reading his autobiographical account of the tribulations faced by his widowed mother. CAMPBELL, *supra* note 3, at 77.

²⁹¹ Conference Notes of Justice William O. Douglas, *supra* note 165.

classifications,” and Justice Powell agreed that the courts “would have to tear up all tax codes to reverse this.”²⁹²

In a typically spare opinion by Justice Douglas, a majority of six upheld the Florida law, emphasizing that tax statutes warranted significant judicial deference and that the law was beneficently aimed at assisting elderly women who were likely to face discrimination in the job market.²⁹³ In a dissenting opinion joined by Justice Thurgood Marshall, Justice William Brennan objected not to the sex classification itself but to the law’s overinclusiveness: It benefitted wealthy widows as well as destitute ones. Only Justice Byron White, in his dissent, seemed to appreciate that a sex classification tangibly benefitting women could be invidious because of its stereotyping.

Ginsburg’s reaction to *Kahn* was “amazement and disappointment.”²⁹⁴ She called Douglas’s opinion “sloppy work” and “a disgrace from every point of view.”²⁹⁵ She ridiculed Douglas for deeming it benign “to rank widows with the blind and totally disabled [who also qualified for the Florida tax exemption]. Of course, there is no surer way to keep women down than to perpetuate that brand of chivalry.”²⁹⁶ Only Justice White, Ginsburg believed, had shown “complete integrity.”²⁹⁷

Although she determinedly vowed to “keep trying and someday the message will be heard,”²⁹⁸ Ginsburg privately worried that *Kahn* was a huge setback to the cause of sex equality. Her principal concern was that clever government litigators could defend any legislative sex classification that tangibly benefitted women as redress for past discrimination.²⁹⁹ She feared that

²⁹² *Id.*

²⁹³ *Kahn v. Shevin*, 416 U.S. 384, 353–54 (1974).

²⁹⁴ Letter from Ruth Bader Ginsburg to Robert A. Sedler, General Counsel, Kentucky Civil Liberties Union (Apr. 30, 1974) (on file with the Harvard Law School Library); see also Letter from Ruth Bader Ginsburg to James M. Klein, et al., *supra* note 277 (calling *Kahn* “bad news”).

²⁹⁵ Letter from Ruth Bader Ginsburg to Sara-Ann Determan, Hogan & Hartson (Apr. 26, 1974) (on file with the Harvard Law School Library).

²⁹⁶ Letter from Ruth Bader Ginsburg to Professor Norman Dorsen, New York University School of Law (Apr. 30, 1974) (on file with the Harvard Law School Library); see also Ruth Bader Ginsburg to Sara-Ann Determan, *supra* note 295 (“It is galling that Douglas sees women as appropriate objects of benign dispensation (ranked with the blind and the totally disabled) when he should know that there is no surer way to keep them down than to perpetuate that brand of chivalry.”). Ginsburg was reminded of Harvard President Nathan Pusey’s remark at the height of the Vietnam War draft: “We shall be left with the blind, the lame, and the women.” CAMPBELL, *supra* note 3, at 77 (quoting Ginsburg).

One of Ginsburg’s colleagues was even harsher in her appraisal of Douglas’s opinion: “[E]ither Douglas is senile, or is lobbying in his own way for the ERA, given the Court as it is and will continue to be towards women.” See MacDougall, *supra* note 40.

²⁹⁷ Letter from Ruth Bader Ginsburg to Sara-Ann Determan, *supra* note 295.

²⁹⁸ Letter from Ruth Bader Ginsburg to Robert A. Sedler, *supra* note 294.

²⁹⁹ Ginsburg, Hawaii ACLU Conference, *supra* note 117, at 16; Letter from Ruth Bader Ginsburg to Liz Schneider, Center for Constitutional Rights (Dec. 12, 1974) (on file with the Harvard Law School Library) (worrying that the Court in *Wiesenfeld* might be “inclined to be disingenuous by pretending that the classification is compensatory”).

Kahn had the potential to undo all of the progress achieved in *Reed* and *Frontiero*. After *Kahn*, Ginsburg referred to the law of sex discrimination as “euphemistically described as muddled.”³⁰⁰

Such fears proved to be exaggerated. To be sure, some lower courts treated *Kahn*, in Ginsburg’s words, “as a sharp about-face and a return to old ways.”³⁰¹ Moreover, *Kahn* always proved a troublesome case for Ginsburg to brief and argue her way around.³⁰² Yet she tried to persuade the Justices that it was really just a tax case or a case about compensation for past discrimination.³⁰³ In subsequent cases, where the spouses of female wage-earners were denied fringe benefits that would have been available to the spouses of male wage-earners, compensatory justifications were harder to sell.³⁰⁴ Within a year of *Kahn*, a majority of the justices were rejecting the phony compensatory justifications concocted by lawyers for litigation purposes and insisting that “the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme.”³⁰⁵ Only sex classifications that had been genuinely motivated by compensatory purposes could satisfy the Court’s heightened standard of review.³⁰⁶

Indeed, government lawyers pursued precisely this tack. See, e.g., Transcript of Oral Argument at 1, *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (No. 73-1982) (arguing, as in *Kahn*, that the Social Security survivors’ child-care benefit that was available to widows but not widowers “serves the permissible legislative objective of ameliorating the harsh economic consequences of economic job discrimination against women”).

³⁰⁰ CAMPBELL, *supra* note 3, at 77 (quoting Ginsburg).

³⁰¹ Brief for Appellee, *supra* note 170, at 35 (citing *Edwards v. Schlesinger*, 377 F. Supp. 1091 (D.D.C. 1974), *rev’d sub nom.* *Waldie v. Schlesinger*, 509 F.2d 50 (D.C. Cir. 1974); *Kohr v. Weinberger*, 378 F. Supp. 1299, 1303–04 (E.D. Pa. 1974) (dictum)).

³⁰² See, e.g., Transcript of Oral Argument, *supra* note 176, at 30 (after a colloquy involving *Kahn*, one of the justices asks Ginsburg, “I really wasn’t too clear on whether you thought we had decided that case wrongly or what your view is”).

³⁰³ Brief for Appellees at 12, *Edwards v. Healy*, 421 U.S. 772 (1975) (No. 73-759) (distinguishing *Kahn* as involving a sex classification that redressed past discrimination, unlike the one at issue in *Healy*, where at least some women were clearly being disadvantaged); Brief for Appellee, *supra* note 170, at 23, 36–37 (distinguishing *Kahn* as a case about remedying past discrimination against women and as a tax case).

³⁰⁴ Transcript of Oral Argument, *supra* note 299, at 11–12 (distinguishing *Kahn* on the ground that Paula Wiesenfeld as a worker had earned the benefits that her spouse was being denied); see also Memorandum from Justice Brennan to the Conference on *Mathews v. Goldfarb* (Jan. 6, 1977) (on file with the Harvard Law School Library) (distinguishing *Kahn* on the ground “that a classification cannot be regarded as remedial, and thus exempt from heightened scrutiny, when it penalizes working women by giving them less insurance protection for their families”); Letter from Ruth Bader Ginsburg to James M. Klein, et al., *supra* note 277 (explaining her intention to distinguish *Kahn* on the ground that the property tax exemption for widows compensated them for sex discrimination in employment, whereas in *Wiesenfeld*, female workers were suffering discrimination when their male spouses were denied employment-related benefits to which similarly situated female spouses of male workers would have been entitled).

³⁰⁵ *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975); see also *Califano v. Goldfarb*, 430 U.S. 199, 209, 224 (1977) (quoting this passage from *Wiesenfeld*).

³⁰⁶ *Califano v. Webster*, 430 U.S. 313 (1977); see also CAMPBELL, *supra* note 3, at 104 (noting that the combination of *Goldfarb* and *Webster* had clarified the limited impact of *Kahn*).

D. Acknowledging Reality: Institutional Constraints on Courts

Even when able to dictate the order of litigation, social reform lawyers must acknowledge reality: Courts act incrementally and rarely, if ever, appear at the vanguard of social reform movements.³⁰⁷ The myth of the Supreme Court as a heroic defender of oppressed minorities is largely that: a myth.³⁰⁸ The Justices did almost nothing to protect the rights of blacks before the civil rights movement, the rights of women before the women's rights movement, or the rights of gays before the gay rights movement. As Ginsburg once put it, successful social reform litigation requires "a keen appreciation of the art of the possible."³⁰⁹

Acknowledging reality, the NAACP's policy in the 1920s and 1930s was to contest the spread of school segregation in the North, but not to challenge it in the South, where it was "so firmly entrenched by law that a frontal attack cannot be made."³¹⁰ Litigating against school segregation in the South at that time would have been fruitless and potentially suicidal. As late as 1940, a black man who sued the sheriff of Leake County, Mississippi for unlawfully shooting him was promptly kidnapped and never heard from again.³¹¹ The NAACP conceded that "racial feeling [in the South] is so strong that it would be impossible to carry on [mixed] schools."³¹² The association only brought suits it expected to win, and challenges to southern school segregation were not among them. Not until 1950 did the NAACP commence its frontal assault on school segregation.³¹³

Even when challenging school segregation in the 1950s, NAACP lawyers appreciated that the Justices were unlikely to ban all racial classifications because of their reluctance to invalidate laws forbidding interracial marriage. Many southern whites charged that the real goal of the NAACP's school desegregation campaign was "to open the bedroom doors of our white women to the Negro men" and "to mongrelize the white race."³¹⁴ For the Justices to strike down anti-miscegenation laws in the immediate wake of *Brown* might have appeared to validate such suspicions. Moreover, opinion polls in the 1950s revealed that over ninety percent of white Americans—in the North as well as the South—opposed interracial marriage.³¹⁵ During oral argument in one of the original school segregation cases, when

³⁰⁷ Justice Ruth Bader Ginsburg & Dean Elena Kagan, *Remarks Commemorating Celebration 55: The Women's Leadership Summit*, 32 HARV. J.L. & GENDER 233, 249 (2009) (noting that courts are "not out in the vanguard of any social change movement") (on file with the Harvard Law School Library).

³⁰⁸ See, e.g., Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1 (1976).

³⁰⁹ Markowitz, *supra* note 233, at 359.

³¹⁰ KLARMAN, *supra* note 6, at 147.

³¹¹ *Id.* at 270–71.

³¹² *Id.* at 147–48.

³¹³ *Id.* at 292.

³¹⁴ *Id.* at 321.

³¹⁵ *Id.*

Justice Frankfurter asked whether barring school segregation would necessarily invalidate anti-miscegenation laws, he appeared relieved when NAACP counsel denied that it would.³¹⁶ Frankfurter later explained that one reason that *Brown* was written as it was—emphasizing the importance of public education rather than condemning all racial classifications—was to avoid the miscegenation issue.³¹⁷

Ginsburg, too, realistically acknowledged the limitations of what the sex equality movement was likely to get from the courts.³¹⁸ While some feminists were depressed in the 1970s that the Court had not elevated sex to suspect-classification status, Ginsburg believed that they had “hoped for too much too soon.”³¹⁹ She recognized the institutional limitations of the Court,³²⁰ and she understood the risks involved in making feminist arguments that might frighten or alienate elderly male judges.³²¹ Moreover, Ginsburg remained confident that social and economic trends were on her side and would continue to pressure legislatures (and courts) to support greater sex equality.³²² As Ginsburg liked to put it, quoting her former Harvard Law School professor Paul Freund, “the Court is affected not by the weather of the day but by the climate of the era.”³²³

Ginsburg understood that the Justices of the Burger Court were unlikely to create a presumptive ban on all sex classifications. As Chief Justice Burger noted during the conference discussion of *Frontiero*, “there are differences between men and women.”³²⁴ Justice Harry Blackmun made a similar

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ Ruth Bader Ginsburg, *Comment on Reed v. Reed*, 1 WOMEN’S RTS L. REP. 7, 8 (1972) (“[T]he small step forward in *Reed* seems a fair indication that reliance on the judiciary for firm, unequivocal constitutional commitment to equality of rights for men and women is at best a dubious course and certainly an arduous and enervating one”); Ginsburg, *Gender and the Constitution*, *supra* note 36, at 14 (noting the Court’s “reluctance to outpace other institutions of government in responses to the sex-role debate”).

³¹⁹ CAMPBELL, *supra* note 3, at 114 (quoting Ginsburg).

³²⁰ Ginsburg, *supra* note 149, at 640 (noting that good judges act “only interstitially”).

³²¹ Ginsburg, *supra* note 21, at 500 (noting the importance “of educating judicial audiences in measured movements, in ways digestible by, and palatable to, the decisionmakers”); Ginsburg & Flagg, *supra* note 31, at 17 (noting that 1980s “difference” feminists who criticized 1970s “sameness” feminists like Ginsburg for seeking to assimilate women to men were being anachronistic, because 1970s (mostly male) judges were not about to hold that the Constitution required special accommodations of women’s differences); Ginsburg, *supra* note 22, at 1443 (noting that she and her colleagues recognized “the importance of knowing the audience—largely men of a certain age”).

³²² CAMPBELL, *supra* note 3, at 114–15.

³²³ Ginsburg, *supra* note 22, at 1445–46; *see also* Ginsburg, *supra* note 115, at 379 (“There were brave women in the generations that preceded mine who thought the same things, and made the same arguments. But they were talking to the wind. In the late 1960s and the 1970s, people were beginning to listen to arguments they had tuned out earlier”).

³²⁴ Conference Notes of Justice William O. Douglas, *Frontiero v. Laird*, 409 U.S. 840 (1972) (No. 71-1694) (on file with the Harvard Law School Library).

point in the conference discussion of *Stanley v. Illinois*,³²⁵ a 1972 case in which an unmarried father had been deprived of the custody of his children when their mother died (which an unmarried mother would not have been if the children's father had died): "There are distinctions between male and female."³²⁶ At a minimum, the Justices understood that only women can get pregnant, and they believed this biological difference might justify some sex classifications. This is probably why cases involving pregnancy classifications gave them special difficulty in the mid-1970s.³²⁷ Thus, Ginsburg was careful in her briefs to challenge only those sex-based classifications that were "established for a purpose unrelated to any biological difference between the sexes."³²⁸

In another concession to reality, Ginsburg recognized after *Frontiero* that a fifth vote to treat sex classifications as suspect was not going to materialize over night and that continuing to press this position might be counterproductive. Accordingly, she stopped pushing for strict scrutiny in her briefs and oral arguments after 1974.³²⁹ In 1976 in *Craig v. Boren*, she wrote to the Oklahoma attorney whom she was trying to guide through the case: "[w]e don't have five votes for suspect classification, so play that down . . . [U]rge instead heightened scrutiny as evidenced in *Reed*, *Frontiero*, *Wiesenfeld*, and *Stanton*."³³⁰ Perhaps this compromising approach helped the Justices arrive at an intermediate scrutiny position in *Craig*. Half a loaf was better than none.

Finally, Ginsburg appreciated that the time was not ripe in the 1970s for the Justices to embrace some of the more radical claims of the feminist movement. In the early 1970s, military regulations required the dismissal of female service members who got pregnant and did not have abortions, even if they immediately gave their babies up for adoption after birth. When Ginsburg's client, Susan Struck, sued the Air Force challenging her termination after she gave birth, the government decided to moot the case by changing the regulation. Eager to keep the case alive, Ginsburg asked Struck if she had suffered any other sex-based service disabilities. Struck said her dream job was to become an Air Force pilot, but the military did not offer

³²⁵ 405 U.S. 645 (1972).

³²⁶ Conference Notes of Justice William O. Douglas, *Stanley*, 405 U.S. 645 (No. 70-5014) (on file with the Harvard Law School Library).

³²⁷ Compare *Geduldig v. Aiello*, 417 U.S. 484 (1974) (holding that exclusion of pregnancy from otherwise comprehensive employment disability coverage was not sex discrimination), with *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974) (invalidating under the Due Process Clause public school regulations requiring pregnant teachers to take unpaid leave from the fourth or fifth month of pregnancy). Trying to reconcile these apparently conflicting results, Ginsburg speculated that the Justices may have been more sympathetic to pregnant women trying to work, as with *LaFleur*, than with pregnant women seeking disability benefits, as in *Geduldig*. She thought the Justices might have regarded the latter women as "malingerers." CAMPBELL, *supra* note 3, at 87.

³²⁸ Brief of ACLU as Amicus Curiae, *supra* note 167, at 11.

³²⁹ CAMPBELL, *supra* note 3, at 97-98, 108, 111.

³³⁰ *Id.* at 111.

flight training for women. Ginsburg reluctantly abandoned the case because she understood that in the early 1970s elderly male justices were not going to require the military to train women to fly aircraft.³³¹

E. *Accounting for Social Change*

Social reform litigation capitalizes on recent social change to argue for more. Because courts are never at the vanguard of social reform, litigation victories depend on social change that has already occurred. Charles Hamilton Houston acknowledged as much when he warned that “we cannot depend upon judges to fight . . . our battles,” and he urged that “the social and public factors must be developed at least along with and if possible before the actual litigation commences.”³³² Ruth Bader Ginsburg made the same point in her speeches and writings, observing that the Court’s 1970s sex equality rulings “largely trailed and mirrored changing patterns in society—most conspicuously, the emergence of the two-career family.”³³³

Yet antecedent social change can cut in both directions. While courts may leverage it to demand further reforms, they may also treat existing social change as an argument for judicial abdication: Why should judges intervene when the ordinary channels of social and political change are already functioning unimpeded?

Thus, for example, during the Justices’ conference discussion of *Brown v. Board of Education*, Stanley Reed pointed to the “constant progress in this field [race relations] and in the advancement in the interests of the negroes.”³³⁴ Yet he treated such changes as an argument for leaving the states “to work out the problems for themselves.”³³⁵ Reed even suggested that “segregation in the border states will disappear in 15 or 20 years”—without judicial intervention!³³⁶

By contrast, other justices treated recent changes in racial attitudes and practices as a constitutional justification for eliminating segregation. In his draft concurring opinion in *Brown* (never published), Justice Robert Jackson

³³¹ Ginsburg, *supra* note 22, at 1447.

³³² KLARMAN, *supra* note 6, at 164 (internal quotation marks omitted).

³³³ Hon. Ruth Bader Ginsburg, *Remarks on Women Becoming Part of the Constitution*, 6 LAW & INEQ. 17, 24 (1988) (noting that in the gender equality area, “the Court was neither out in front of, nor did it hold back, social change” but rather that it functioned “as an amplifier—sensitively responding to, and perhaps moderately accelerating, the pace of change”); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, Remarks at University of North Carolina School of Law (Apr. 6, 1984) in 63 N.C. L. REV. 375, 378 (1985). In her *North Carolina Law Review* article, Ginsburg contrasted the Court’s early sex discrimination rulings with its contemporaneous abortion decision, where she felt the Justices “had ventured too far” and thus created “a storm center.” *Id.* at 376. She concluded with regard to *Roe*: “Heavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict.” *Id.* at 385–86.

³³⁴ KLARMAN, *supra* note 6, at 295.

³³⁵ *Id.*

³³⁶ *Id.*

wrote that “Negro progress under segregation has been spectacular and, tested by the pace of history, his rise is one of the swiftest and most dramatic advances in the annals of man.”³³⁷ This advance “has enabled him to outgrow the system and to overcome the presumptions on which it was based.”³³⁸ Black progress had been sufficient, Jackson reasoned, for the Court to conclude that race “no longer affords a reasonable basis for a classification for educational purposes.”³³⁹

In her litigation strategy, Ruth Bader Ginsburg had to confront precisely this same double-edged nature of social change. Indeed, this issue may have posed an even greater obstacle to sex equality litigation in the 1970s than it had to civil rights litigation two decades earlier. Ginsburg’s briefs and oral arguments repeatedly emphasized the extent of recent change in gender roles, especially the explosion in the number of women in the labor force.³⁴⁰ Frequently quoting her economics colleague at Columbia, Eli Ginzberg, she referred to such changes as “the single most outstanding phenomenon of our century.”³⁴¹ Ginsburg explained gender role changes as a product of several economic and social forces: technological advances in the workplace and the home, more effective birth control, the desire for smaller families, and expanded life expectancies which meant that women had more years without childcare responsibilities.³⁴²

When Ginsburg urged the Justices to invalidate sex classifications that incorporated the stereotype of male breadwinners and female homemakers, she emphasized, first and foremost, that the stereotype no longer fit the social reality, quoting statistics on female participation in the labor force.³⁴³ In several of her cases, the law under challenge had already been prospectively repealed as obsolete by the time the case reached the high court.³⁴⁴ (Thus, mootness was occasionally an obstacle to her success on the merits.³⁴⁵) In other cases, Ginsburg could point to recent legislative dismantling of analogous sex classifications as an argument for the Court to invalidate those that

³³⁷ *Id.* at 309.

³³⁸ *Id.*

³³⁹ *Id.*

³⁴⁰ Brief of ACLU as Amicus Curiae, *supra* note 167, at 24–27; Brief for Appellants, *supra* note 242, at 6–7; Brief for Appellee, *supra* note 170, at 19–20.

³⁴¹ See, e.g., Ginsburg, Sexual Equality, *supra* note 36, at 168.

³⁴² See, e.g., Ginsburg, *supra* note 35, at 349.

³⁴³ See, e.g., Brief of ACLU as Amicus Curiae, *supra* note 167, at 24–25.

³⁴⁴ *Califano v. Webster*, 440 U.S. 313 (1977) (noting that in 1972 Congress prospectively repealed the 1956 law allowing women to exclude three more years of low earnings from calculation of Social Security retirement benefits); *Reed v. Reed*, 404 U.S. 71 (1971) (indicating that the Idaho legislature prospectively repealed law giving men priority over women in administering estates); *Moritz v. Comm’r of Internal Revenue*, 469 F.2d 466 (10th Cir. 1972) (noting that the IRS had prospectively repealed tax deduction available only to a single woman—not a single man—caring for an elderly dependent).

³⁴⁵ *Edwards v. Healy*, 421 U.S. 772 (1975) (dismissing as moot because of a prospective legislative change the WRP’s challenge to Louisiana’s jury selection scheme, which required that women manifest an affirmative desire to serve before being selected).

remained.³⁴⁶ In still other cases, she challenged sex classifications embedded in state laws that were virtually unique outliers in the nation.³⁴⁷

But the fact of social and legal change was clearly an obstacle for Ginsburg as well as an aid. To the extent that legislatures were already abolishing obsolete sex classifications, why was judicial intervention necessary?³⁴⁸ The ERA posed a special problem for Ginsburg in this regard. She was an enthusiastic supporter of the amendment, which would have provided: "Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex."³⁴⁹ Ginsburg believed that enactment of the amendment would prompt legislatures to reconsider and abolish obsolete sex classifications and that it would be symbolically important.³⁵⁰ She also believed that without the ERA, the racially oriented original understanding of the Fourteenth Amendment "will continue to deter boldly dynamic judicial interpretation in [the sex discrimination] area."³⁵¹ Yet when both houses of Congress passed the ERA by overwhelming margins in 1971–1972, many observers concluded that the argument for judicial intervention on behalf of women had become much weaker: If women had the political clout to persuade Congress to pass the ERA, how could they qualify as the sort of politically powerless group for whom judicial protection was necessary?

³⁴⁶ *E.g.*, Brief of ACLU as Amicus Curiae, *supra* note 167, at 18 (noting recent congressional and presidential actions against sex discrimination); *id.* at 50–54 (arguing that numerous recent congressional actions dismantling sex classifications in spousal benefits for federal government employees belies the administrative convenience argument for retaining such a classification for the spousal benefits of military service members); Brief for Appellee, *supra* note 170, at 26 (noting the irony that Congress expressly forbids the sort of sex discrimination in private employee fringe benefit plans that still persists in the federal Social Security system).

³⁴⁷ *Duren v. Missouri*, 439 U.S. 357 (1979) (Missouri and Tennessee the only states to still use an opt-out system for women on juries); *Taylor v. Louisiana*, 419 U.S. 522 (1975) (Louisiana the only state in the country to use an opt-in system for women on juries); Brief for ACLU as Amicus Curiae, *supra* note 190, at 16 (noting that research has revealed no other state with a law similar to Oklahoma's sex classification with regard to access to "near beer").

³⁴⁸ Transcript of Oral Argument at 864, *Frontiero v. Laird*, 409 U.S. 840 (1972) (No. 71-1694) (government lawyer noting "considerable legislative activity in amending statutes containing classifications based on sex" and treating that as an argument for the Court staying its hand in *Frontiero*); *see also* Memorandum from Justice Blackmun to himself on *Wiesenfeld 2* (Jan. 14, 1975) (on file with the Harvard Law School Library) ("[T]he Court could place the responsibility for changing this legislation on the lap of Congress. That is where it belongs really if changing times are equalizing income as between men and women.").

³⁴⁹ Proposed Amendment to the United States Constitution, H.R.J. Res. 208, 92d Cong., 2d Sess., 86 Stat. 1523 (1972).

³⁵⁰ Ginsburg, *Gender and the Constitution*, *supra* note 36, at 27 (arguing that the ERA would "end legislative inertia" and also "serve as a clear statement of the nation's moral and legal commitment" to sex equality); Ginsburg, *The Need for the Equal Rights Amendment*, *supra* note 160, at 1013.

³⁵¹ Ginsburg, *Gender and the Constitution*, *supra* note 36, at 26; Ginsburg, *Sexual Equality*, *supra* note 36, at 174–75.

In *Frontiero*, the government urged the Justices not to elevate sex classifications to suspect status in order to avoid preempting the ERA.³⁵² Ginsburg replied by quoting statements made by representatives supporting the amendment in congressional debates. These ERA proponents had observed that enlightened judicial construction of the Fifth and Fourteenth Amendments could supply everything the ERA would and that the new amendment was necessary only to remove any possible doubt that people should be treated equally without regard to sex.³⁵³

Internal records in *Frontiero* reveal that several justices were troubled by Congress's recent passage of the ERA. To be sure, Justice Brennan, who ultimately wrote a plurality opinion for four justices applying strict scrutiny to sex classifications, was unimpressed by the argument that the ERA should influence the Court's posture. First, he observed that "we cannot count on the Equal Rights Amendment to make the Equal Protection issue go away."³⁵⁴ Brennan noted that eleven states had already rejected ratification, and a few more were expected to do so within the next couple of months. To him, the amendment already looked "like a lost cause," and he saw no advantage "awaiting what is at best an uncertain outcome."³⁵⁵

More important, Brennan observed that "whether or not the Equal Rights Amendment eventually is ratified, we cannot ignore the fact that Congress and the legislatures of more than half the States have already determined that classifications based upon sex are inherently suspect."³⁵⁶ Justice Byron White agreed: "I would think that sex is a suspect classification, if for no other reason than the fact that Congress has submitted a constitutional amendment making sex discrimination unconstitutional. I would remain of the same view whether the amendment is adopted or not."³⁵⁷ In his plurality opinion, Brennan treated congressional passage of the ERA as an important acknowledgement by a coordinate branch of the national government that sex classifications were invidious.³⁵⁸

By contrast, several of the more conservative justices thought that the unresolved status of the ERA was a compelling argument for the Court to avoid deciding whether sex classifications were suspect. Justice Powell wrote to Brennan: "I see no reason to consider whether sex is a 'suspect' classification in this case. Perhaps we can avoid confronting that issue until we know the outcome of the Equal Rights Amendment."³⁵⁹ Justice Potter Stewart, who was more confident than Brennan that the requisite number of

³⁵² Brief for the Appellees at 19, *Frontiero v. Laird*, 409 U.S. 840 (1972) (No. 71-1694).

³⁵³ Brief of ACLU as Amicus Curiae, *supra* note 167, at 19 n.16.

³⁵⁴ Memorandum from Justice Brennan to Justice Powell, *supra* note 253.

³⁵⁵ *Id.*

³⁵⁶ *Id.*

³⁵⁷ Memorandum from Justice White to Justice Brennan, *supra* note 254.

³⁵⁸ *Frontiero v. Richardson*, 411 U.S. 677, 687-88 (1973).

³⁵⁹ Memorandum from Justice Powell to Justice Brennan (Feb. 15, 1973) (on file with the Harvard Law School Library).

states would ratify the ERA, preferred that the Court proceed slowly in this area, and thus he declined to provide a fifth vote for strict scrutiny.³⁶⁰ Justice Harry Blackmun, acknowledging some “difficulty” with the case but largely agreeing with Powell and Stewart, thought it “not advisable, and certainly not necessary to reach” the suspect classification issue. Instead, he believed that “*Reed v. Reed* is ample precedent here and is all we need and . . . we should not, by this case, enter the arena of the proposed Equal Rights Amendment.”³⁶¹ In the end, Justice Powell, in a concurring opinion joined by Burger and Blackmun, refused to provide a fifth vote to treat sex classifications as suspect in order to avoid preempting the role of state legislatures in deciding whether to ratify the ERA.³⁶² Ginsburg thought these conservative justices were being hypocritical, extolling restraint in a sex discrimination case just months after supporting one of the most interventionist constitutional rulings of all time—*Roe v. Wade*.³⁶³

The presence of the ERA made Ginsburg’s job more difficult, in one sense, than that of the NAACP had been in the 1950s. At the time of *Brown*, it was inconceivable that Congress would enact legislation barring state-mandated school segregation. When Justice Jackson suggested inviting the judiciary committees of the House and Senate to participate in the reargument of *Brown*, because “if stirred up . . . [,] they might abolish [segregation],” he was engaging in the worst form of wishful thinking.³⁶⁴ Southern Democrats in the Senate had blocked even the most primitive form of civil rights legislation—the federal anti-lynching bill—for decades.³⁶⁵ Throughout the 1950s, liberal congressional representatives failed in their efforts to pass even purely symbolic statements affirming that *Brown* was the law of the land (not even that it was rightly decided!).³⁶⁶ When Congress in 1957 finally passed its first piece of civil rights legislation in over eighty years, the measure covered only voting rights, and even that it did ineffectively.³⁶⁷

By contrast, when Ruth Bader Ginsburg argued her first sex discrimination case in the Supreme Court in 1973, Congress had already passed a constitutional amendment guaranteeing a fuller measure of sex equality than any Court ruling was likely to provide. In one very real sense, this made her job in court harder, not easier.

³⁶⁰ CAMPBELL, *supra* note 3, at 58–59; BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS: INSIDE THE SUPREME COURT* 255 (1979).

³⁶¹ Memorandum from Justice Blackmun to Justice Brennan, *supra* note 255.

³⁶² *Frontiero*, 411 U.S. at 692 (Powell, J., concurring).

³⁶³ Ginsburg, *Comment: Frontiero*, *supra* note 36, at 4 (“The counsel of restraint against judicial preemption of political decisions, sternly offered by Justices Powell, Burger and Blackmun, may be contrasted with the less deferential attitude displayed by these Justices in the abortion decisions rendered during the same term.”).

³⁶⁴ KLARMAN, *supra* note 6, at 297.

³⁶⁵ *Id.* at 123, 451.

³⁶⁶ *Id.* at 325.

³⁶⁷ *Id.*

F. Remedial Problems

A constitutional right without a remedy to enforce it is worth precious little.³⁶⁸ Social reform litigators need to convince courts not only to vindicate the rights they advocate but also to provide remedies that make the rights meaningful.

The Supreme Court invalidated state-mandated school segregation on May 17, 1954, but it ordered no immediate remedy, instead deferring reargument on that issue until the following term.³⁶⁹ The NAACP pressed for immediate desegregation, with a completion deadline of the fall of 1956, which it called “generous in the extreme.”³⁷⁰ The Justices chose instead a vague and gradualist remedy. They remanded the cases to district courts to issue decrees in accordance with “local conditions” while keeping in mind the “flexibility” of traditional “equitable principles.”³⁷¹ They required a “prompt and reasonable start toward full compliance,” with additional time allowed if “consistent with good faith compliance at the earliest practicable date.”³⁷² District courts were to order the admission of the parties to these cases to public schools on a nondiscriminatory basis “with all deliberate speed.”³⁷³

Brown II proved to be a disaster. It left enforcement of *Brown* primarily in the hands of southern district judges, all of whom were white and the vast majority of whom thought that *Brown* had been wrongly decided—often egregiously so.³⁷⁴ Perhaps more important, *Brown II* made the Court appear weak and vacillating.³⁷⁵ Several justices had believed that they could reduce the resistance of southern whites to *Brown* by appearing sympathetic and accommodating.³⁷⁶ But many southern whites perceived *Brown II* instead as a partial judicial capitulation to the widespread threats of school closures and violence that had followed *Brown*.³⁷⁷ Some southern whites now concluded that additional pressure might induce the Justices to abandon *Brown* altogether. For example, one Florida segregationist thought the Court had “realized it made a mistake in May and is getting out of it the best way it can,” while a Texas legislator declared that the “Court got hold of a hot potato and didn’t know what to do with it.”³⁷⁸

³⁶⁸ See *Marbury v. Madison*, 5 U.S. 137, 147 (1803) (“[E]very right, when withheld, must have a remedy.”).

³⁶⁹ *Brown v. Bd. of Educ.*, 347 U.S. 483, 495–96 (1954).

³⁷⁰ KLARMAN, *supra* note 6, at 313.

³⁷¹ *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 298, 300 (1955).

³⁷² *Id.* at 300.

³⁷³ *Id.* at 301.

³⁷⁴ KLARMAN, *supra* note 6, at 354–56.

³⁷⁵ See *id.* at 318–20.

³⁷⁶ *Id.* at 315–16.

³⁷⁷ *Id.* at 320.

³⁷⁸ *Id.*

This is not to say that an order for immediate desegregation in *Brown II* would have been a panacea.³⁷⁹ Most white southerners would bitterly oppose desegregation until they were convinced that resistance was futile and costly—showings that the Court was powerless to make on its own. Still, *Brown II*, by instilling hope among white southerners that *Brown I* could be overturned, did not help the cause of desegregation.

Ginsburg also faced a complicated remedial issue in her sex discrimination litigation, though she proved somewhat more successful at negotiating it. Virtually every equal protection violation can be cured, in theory, in either of two ways—equalizing up or equalizing down. Thus, in most of Ginsburg's cases, a female worker (and a male spouse) were being denied something that was granted to a similarly situated male worker (and his female spouse). Once the Court invalidated the sex-based disparity under the Equal Protection Clause, the legislature was free to respond by extending the benefit at issue to all qualified persons regardless of sex or by denying it to everyone. Either response would satisfy the Constitution.

Ginsburg labored assiduously to convince the Justices that the appropriate remedy in such cases was to extend the benefit rather than simply to invalidate the statute, thus denying the benefit to everyone.³⁸⁰ This was no easy task. Many judges seemed to regard extending the sphere of statutory benefits as rewriting a statute in a way that eliminating the benefits altogether did not.³⁸¹ Supreme Court justices were even more reluctant to impose an extension remedy when a *state* statute was involved, such as in *Kahn*, because then federalism considerations were implicated as well as separation of powers concerns.³⁸²

Perhaps more important, by the mid-1970s Ginsburg was challenging sex-based differentials in Social Security, where extending the benefits could cost the federal government hundreds of millions of dollars.³⁸³ While, in theory, the amount in controversy was irrelevant to resolving the constitutional question, as a practical matter, the Justices were likely to hesitate before ordering the federal government to pay out such vast sums.³⁸⁴ Ginsburg privately confessed grave concern that the Justices would be intimi-

³⁷⁹ *Id.*

³⁸⁰ Brief for Appellee at 60–68, *Mathews v. Goldfarb*, 430 U.S. 199 (1977) (No. 75-699); Brief of ACLU as Amicus Curiae, *supra* note 167, at 62–70; Brief for Appellants, *supra* note 242, at 25–31; Brief for Appellee, *supra* note 170, at 45–49.

³⁸¹ Transcript of Oral Argument, *supra* note 175, at 14–16, 22.

³⁸² *Id.* at 16–22.

³⁸³ See *infra* note 391.

³⁸⁴ Letter from Ruth Bader Ginsburg to Mr. Edgar D. Coffin (Aug. 14, 1973) (on file with the Harvard Law School Library) (noting that discrimination is not “made tolerable simply because it is cheaper” but acknowledging that “you can understand the concern a conservative bench would have about the Government’s position that it is not the business of courts to tell Congress how federal money should be spent”); see also Letter from Ruth Bader Ginsburg to Hope Eastman (Aug. 14, 1973) (on file with the Harvard Law School Library) (noting that while the sex differential in *Coffin* “is precisely the same as the one in *Frontiero*, . . . the price tag is many millions higher”).

dated by the financial implications of finding an equal protection violation.³⁸⁵ In one letter, she described federal judges as being “visibly shaken by HEW’s [Health, Education & Welfare’s] chief actuary’s estimate of the cost of providing equal benefits.”³⁸⁶

With the help of her law school mentor and dear friend, Professor Gerald Gunther of Stanford Law School,³⁸⁷ Ginsburg identified what she later called “key” precedents that supported an extension remedy.³⁸⁸ She was also able to cite to legislative precedents, where Congress had recently eliminated sex-based classifications in employment and veterans benefits by extending rather than constricting availability.³⁸⁹

The chronological progression of the sex discrimination cases probably also improved Ginsburg’s chances of success on the remedial issue.³⁹⁰ *Reed* had virtually no financial implications because the statute had already been prospectively repealed. *Frontiero* had minimal implications because so few women served in the military and thus would be entitled to the spousal fringe benefits at issue. *Wiesenfeld* was the first Social Security case to reach the Court, challenging the exclusion of men from survivors’ child-care benefits that were available to the wives of recently deceased male workers. The case involved real money, but tens of millions of dollars, not hundreds of millions.³⁹¹ By the time the Court got around to adjudicating the constitu-

³⁸⁵ CAMPBELL, *supra* note 3, at 100–01 (noting that Ginsburg was pessimistic she would win *Goldfarb* given the enormous price tag associated with extending the benefits). Ginsburg also observed that, “in addition to the money, the Court will no doubt want to discourage the attitude that it is open season on social security classifications.” *Id.* at 101.

³⁸⁶ Letter from Ruth Bader Ginsburg to Mr. Edgar D. Coffin, *supra* note 384.

³⁸⁷ CAMPBELL, *supra* note 3, at 42–43.

³⁸⁸ Ginsburg, *supra* note 149, at 640. The main precedent Gunther identified was *Welsh v. United States*, 398 U.S. 333 (1970), which involved a federal statute limiting the grounds for conscientious objection to military service. Others included cases in which benefits for children were limited to those born within marriage: *Levy v. Louisiana*, 391 U.S. 68 (1968), and *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972). Ginsburg also found an old opinion written by Justice Brandeis on point, *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239, 247 (1931). See Brief of ACLU as Amicus Curiae, *supra* note 167, at 67–68.

³⁸⁹ Brief of ACLU as Amicus Curiae, *supra* note 167, at 9, 66–67.

³⁹⁰ Cf. Letter from Ruth Bader Ginsburg to Mr. Edgar D. Coffin, *supra* note 384 (explaining that it would not be wise to file Coffin’s case involving spousal survivorship benefits in the same district court that was hearing *Wiesenfeld*’s case because the larger sums involved in Coffin’s case might influence the judges’ verdict on *Wiesenfeld*).

³⁹¹ Ginsburg, *Gender and the Constitution*, *supra* note 36, at 22 (noting that the cost of equalizing in *Frontiero* was minimal, that the government estimated that the cost of equalizing in *Wiesenfeld* would be \$20 million, and that it estimated considerably higher costs for eliminating other similar gender-based differentials from the Social Security system); Letter from Ruth Bader Ginsburg to Mr. Edgar D. Coffin, *supra* note 384 (noting the government’s estimate for extending the “child-care” benefit was \$20 million annually and its estimate for eliminating the dependency requirement for husbands would cost about \$125 million annually with regard to survivors’ benefits and \$200 million annually with regard to spousal old-age benefits); see also *Social Security Rule Upset Over Sex Bias*, N.Y. TIMES, Mar. 3, 1977, at 1 (estimating that eliminating the financial dependency test for men and extending spousal survivors’ benefits to widowers will cost

tionality of sex classifications in Social Security spousal survivorship benefits and old age benefits, where hundreds of millions of dollars were at stake, enough precedent existed that a slender majority of justices felt bound to invalidate the sex classifications and extend the benefits—despite the financial implications.³⁹² Ginsburg expressed understandable delight at “the success of our \$500 million case.”³⁹³

G. “Reverse Discrimination”

Social reform lawyers dealing with equality issues must also confront the question of “reverse discrimination.” Specifically, traditionally oppressed groups may seek a constitutional ban on government classifications based on the characteristics that define them, such as race or sex. Because most such classifications historically have had the purpose and effect of harming those groups, forbidding such classifications represents progress from their perspective. But as social and political conditions change, it may become possible to enact formally analogous classifications that benefit the traditionally disfavored groups. However, an absolute judicial ban on race or sex classifications would forbid even these benevolently motivated ones.

In 1954, the reverse discrimination issue did not loom large for the NAACP. At a time when roughly one third of the states still practiced formal white supremacy, nobody could have seriously imagined a regime of race-based affirmative action. Thus, in *Brown*, NAACP lawyers argued in favor of a color-blind constitution³⁹⁴ without feeling as if they were making any sacrifice. While the Justices in 1954 did not embrace the color-blind interpretation—partially because of their reluctance to invalidate anti-miscegenation laws³⁹⁵—fifty years later, conservative justices used the NAACP

more than \$200 million annually and extending spousal old-age benefits for surviving women retirees will cost more than \$300 million annually).

³⁹² *Califano v. Goldfarb*, 430 U.S. 199 (1977). Ginsburg nearly lost her majority in *Goldfarb*. Justice Stevens, who ultimately provided a fifth vote for the majority, “had a great deal of difficulty with this case.” Memorandum from Justice Stevens to Justice Rehnquist (Jan. 3, 1977) (on file with the Harvard Law School Library). At one point, he was leaning towards sustaining the law, on the ground that *Kahn* had resolved that discrimination against males, which is how Justice Stevens understood the force of the statute in *Goldfarb*, was constitutionally permissible. Memorandum from Justice Stevens to Justice Brennan (Oct. 21, 1976) (on file with the Harvard Law School Library).

Once the Court in *Goldfarb* invalidated the sex classification with regard to spousal survivorship benefits, the sex classification with regard to spousal old-age retirement benefits was certain to fail. See Memorandum from Justice Brennan to Conference 1 (Mar. 1977) (on file with the Harvard Law School Library) (noting the sex discrimination in the two Social Security provisions is “identical”).

³⁹³ Letter from Ruth Bader Ginsburg to Esther Roditti Schachter, Ford Foundation (Mar. 4, 1977) (on file with the Harvard Law School Library).

³⁹⁴ Brief for Appellants in Nos. 1, 2 and 4 and for Respondents in No. 10 on Reargument at 15, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (No. 1).

³⁹⁵ See *supra* notes 314–17 and accompanying text.

lawyers' own words against them in a decision restricting the ability of school boards to promote racial integration.³⁹⁶

By contrast, the reverse discrimination issue was an enormous one for Ginsburg and the WRP because of the double-edged nature of most sex classifications. That is, most of the sex classifications challenged by feminist lawyers seemed tangibly to benefit women—for example, by enabling them to opt out of jury service, buy near-beer at an earlier age than men could, or entitling them but not their husbands to alimony after divorce. Despite such tangible benefits, Ginsburg and her colleagues were convinced that such measures really harmed women by perpetuating insidious gender stereotypes—that women were passive, fragile, and financially dependent. At the oral argument in *Kahn*, Ginsburg insisted that “the arguments that we give special scrutiny only to lines that appear to disfavor women, will be ultimately harmful to women.”³⁹⁷ She did not want courts “looking to see whether a [sex] classification is benign or invidious.”³⁹⁸ Indeed, she went so far as to deny that she had ever found a sex classification that genuinely helped women, except perhaps from a very short-sighted perspective.³⁹⁹

Government lawyers defending sex classifications from constitutional challenge quickly discovered that they could use the tangible benefits conferred on women by such laws to portray them as affirmative action schemes designed to redress past or future sex discrimination. Thus, the property tax exemption conferred on widows but not widowers by the state of Florida was defended as a measure intended to compensate older women for the discrimination they were likely to face in the job market.⁴⁰⁰ A majority of justices bought the argument.⁴⁰¹

An accident of timing further ensured that the constitutional status of sex classifications could not be disassociated in the Justices' minds from the affirmative action issue.⁴⁰² The same day that Ginsburg tried to convince the Justices that Florida's property tax exemption for widows was harmful sex stereotyping rather than benevolent redress for discrimination, the Justices heard argument in *DeFunis v. Odegaard*.⁴⁰³ This was the first race-based affirmative action case to reach the Supreme Court, involving the University of Washington Law School's preferential treatment of minority racial status in its admission decisions. Ginsburg worried that those justices inclined to

³⁹⁶ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2736, 2767 (2007).

³⁹⁷ Transcript of Oral Argument, *supra* note 175, at 9.

³⁹⁸ *Id.* at 11.

³⁹⁹ *Id.*

⁴⁰⁰ *Id.* at 29–31.

⁴⁰¹ *Kahn*, 416 U.S. at 356 (noting that the law furthers “the state policy of cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden”).

⁴⁰² Ginsburg, *Sex Equality and the Constitution*, *supra* note 36, at 464 (speculating that the juxtaposition of *Kahn* and *DeFunis v. Odegaard*, 416 U.S. 312 (1974), may have been a factor in how the Justices resolved *Kahn*).

⁴⁰³ 416 U.S. 312 (1974).

sustain the constitutionality of race-based affirmative action might establish “too broad a corridor” for benign discrimination—including “benign” discrimination in favor of women, which Ginsburg felt was rarely all that benign.⁴⁰⁴

Ginsburg had anticipated a question about *DeFunis* at the oral argument in *Kahn*, and she had practiced a reply:⁴⁰⁵ A “one-way suspect classification doctrine” might be defensible in race cases—meaning that race-based affirmative action measures would be subjected to something less than strict scrutiny.⁴⁰⁶ But such an approach would be dangerous with regard to sex classifications because of “the historic tendency of jurists to rationalize any special treatment as benignly in [women’s] favor.”⁴⁰⁷ In other words, the University of Washington Law School’s affirmative action policy in admissions, which was genuinely addressed toward opening opportunities for racial minorities, should be constitutionally permissible, while Florida’s property tax exemption for widows stereotypically assumed female financial dependency and thus should be invalid.⁴⁰⁸

Ginsburg was unhappy with how both cases were resolved. *DeFunis* was declared moot,⁴⁰⁹ while the only justice to reach the merits, William Douglas, thought the admission scheme was unconstitutional because it was based on race rather than merit.⁴¹⁰ Meanwhile, Douglas wrote the opinion upholding the widow’s tax exemption in *Kahn* as compensation for economic discrimination.⁴¹¹ Ginsburg believed that Douglas had gotten the results precisely backwards: “Blacks have been the victims of classifications plainly invidious. Women have been kept down by laws chivalrous gentle-

⁴⁰⁴ CAMPBELL, *supra* note 3, at 76. Others had the opposite concern—that the Justices in *DeFunis* would rule the Constitution to be color-blind and thus would feel obliged to bar sex-based affirmative action as well. *Id.*

⁴⁰⁵ Letter from Ruth Bader Ginsburg to Bill Hoppe (Mar. 8, 1974) (on file with the Harvard Law School Library) (noting that Blackmun’s question about *DeFunis* enabled her to stretch her rebuttal time from two to seven minutes and that “[s]ince I had carefully prepared an answer to that question, I was delighted with the opportunity to hammer down the distinction I tried to make [previously]”).

⁴⁰⁶ Transcript of Oral Argument, *supra* note 175, at 6.

⁴⁰⁷ *Id.* at 6–7.

⁴⁰⁸ *Id.* at 48–49; *cf.* Letter from Ruth Bader Ginsburg to Sara-Ann Determan, *supra* note 295 (expressing some sympathy for Brennan and Marshall’s position in *Kahn*—determining that the widow’s property tax exemption was over-inclusive rather than objecting to the sex classification itself—because of their desire “to avoid conflict with their probable position in *DeFunis*”—presumably, upholding the race-based affirmative action scheme).

⁴⁰⁹ *DeFunis*, 416 U.S. at 319–20.

⁴¹⁰ *Id.* at 343–44 (Douglas, J., dissenting) (“All races can compete fairly at all professional levels. So far as race is concerned, any state-sponsored preference to one race over another in that competition is in my view ‘invidious’ and violative of the Equal Protection Clause.”).

⁴¹¹ See *supra* note 293 and accompanying text.

men conceived as benign. Perhaps Douglas should have decided both cases the other way!”⁴¹²

In the end, Ginsburg was willing to back down from her position that no sex classification could possibly help women more than it harmed them. When just three weeks after *Goldfarb*, the Court in *Califano v. Webster*⁴¹³ upheld a sex classification on the ground that its genuine purpose was to compensate women for past economic discrimination, she approved. Under the 1956 Social Security amendment at issue, women could exclude more years of low earning than men in calculating their retirement benefits in order to compensate them for past discrimination in the job market. Combining *Goldfarb* with *Webster*, the Court’s constitutional standard in sex classification cases turned entirely on whether the government’s compensatory justification was the genuine motivation behind the statute or a post hoc rationalization concocted by lawyers for litigation purposes. In a letter to one of her former students who had drafted the opinions in both cases while clerking for Justice Brennan, Ginsburg approved of *Webster*, which “leaves a corridor for genuine compensation without offering encouragement to lower courts tempted to seize on *Kahn* . . . whenever confronted with a gender classification.”⁴¹⁴ Two decades later, as a justice on the U.S. Supreme Court, Ginsburg affirmed the permissibility of narrowly conceived, genuinely compensatory affirmative action for women, while elevating the standard of review to which all sex classifications were subjected.⁴¹⁵

III. CONCLUSION

With the aid of historical hindsight, the litigation victories of social reform lawyers can seem almost inevitable. Given the vast changes in racial attitudes and practices over the last half-century, state-mandated racial segregation in education seems as obviously unconstitutional as any government policy could possibly be. Thus, *Brown* strikes us today as a ridiculously easy decision. Yet for the Justices sitting in 1954, it was genuinely hard. Indeed, at the initial conference discussion in December 1952, five clear votes to strike down segregation had yet to materialize.⁴¹⁶ More-

⁴¹² Letter from Ruth Bader Ginsburg to Ms. E.S. Read, *supra* note 98; *see also* Letter from Ruth Bader Ginsburg to Professor Norman Dorsen, *supra* note 296 (expressing the hope that somebody writes “a neat comment on Douglas’s defective vision”).

⁴¹³ 430 U.S. 313 (1977).

⁴¹⁴ Letter from Justice Ginsburg to Jerry Lynch, *supra* note 98; *see also* Ruth Bader Ginsburg, *The Supreme Court Clarifies the Distinction Between Invidious Discrimination and Genuine Compensation* (Mar. 29, 1977) (unpublished manuscript, on file with the Harvard Law School Library) (synthesizing *Goldfarb* and *Webster* and approving of the idea that legislatures can remedy past sex discrimination but not engage in “romantic paternalism”).

⁴¹⁵ *United States v. Virginia (VMI)*, 518 U.S. 515, 533–34 (1996).

⁴¹⁶ KLARMAN, *supra* note 6, at 292–303.

over, but for the NAACP's pathbreaking litigation campaign that preceded *Brown*, that decision would have been inconceivable in 1954.

Similarly, the Supreme Court's sex-equality decisions of the 1970s seem easy in retrospect: At most, the Justices appeared to be chopping down some dead legislative wood.⁴¹⁷ Yet in 1971, given the racially oriented concerns of the drafters of the Fourteenth Amendment and long-standing judicial precedent rejecting sex-equality claims under the Constitution, there was no guarantee that the Court would enter the sex discrimination field at all.⁴¹⁸ Ginsburg and the WRP not only persuaded the elderly male justices to get involved; they actually convinced many of them that what had generally been conceived of as women's "pedestal" was really their "cage."⁴¹⁹

It is fitting that Thurgood Marshall and Ruth Bader Ginsburg both capped their illustrious legal careers with appointments to the U.S. Supreme Court—Marshall as the first African American justice in the Court's history, Ginsburg as the second woman. Such appointments would have been inconceivable only a decade or two before they were made. Twenty years before Marshall's appointment, African Americans still fought in a segregated U.S. army; ten years before, they still could not buy a cup of coffee at most southern lunch counters. A generation before Ginsburg's appointment, there had been only one female federal judge in the nation's history,⁴²⁰ and the #1 graduate of Columbia Law School could not find a federal judicial clerkship because no male judge would take a chance on hiring a young mother, no matter how brilliant her academic credentials.

The breathtaking accomplishments of Marshall and Ginsburg are testament not only to their extraordinary talents but also to the rapidity with which progressive social change is possible in the United States, and to the ability of lawyers "liv[ing] greatly in the law" to help bring it about.⁴²¹

⁴¹⁷ See JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 551 (1994) (noting "what a small and relatively unimportant part of the women's revolution" the Court's sex discrimination cases have been); Klarman, *supra* note 308, at 9.

⁴¹⁸ *Craig v. Boren*, 429 U.S. 190, 217 (Burger, C.J., dissenting) (arguing for a standard of relaxed minimal scrutiny given the lack of any "independent constitutional basis" for disfavoring sex classifications); *id.* at 217 (Rehnquist, J., dissenting) (advocating minimum rationality review for sex classifications that disadvantage men).

⁴¹⁹ See *supra* note 174 and accompanying text.

⁴²⁰ See *supra* note 138 and accompanying text.

⁴²¹ Oliver Wendell Holmes, Jr., *The Profession of Law*, in COLLECTED LEGAL PAPERS 29, 29–30 (1920) ("[A] man may live greatly in the law as well as elsewhere . . .").