

2012

Reed v. Reed at 40: Equal Protection and Women's Rights

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/jgspl>



Part of the [Law Commons](#)

Recommended Citation

(2011) "Reed v. Reed at 40: Equal Protection and Women's Rights," *Journal of Gender, Social Policy & the Law*: Vol. 20: Iss. 2, Article 1. Available at: <http://digitalcommons.wcl.american.edu/jgspl/vol20/iss2/1>

This Special Event is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in Journal of Gender, Social Policy & the Law by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact fbrown@wcl.american.edu.

REED V. REED AT 40: EQUAL PROTECTION AND WOMEN'S RIGHTS

BEGIN TRANSCRIPT*

NINA TOTENBERG: I'm Nina Totenberg, and I'm delighted to be here at this wonderful event celebrating the fortieth anniversary of *Reed v. Reed*.¹ If any of you are in the corridor, please come in. Don't be afraid to sit in the front; that's where the seats are. Actually, at this point, because this is still like class, everybody's afraid to come to the front row. There are so many professors here.

This is really a wonderful event. There are 700 people who are registered for it, and there's another group of Georgetown Law students in an auditorium where this is being broadcasted. And we have every school in the area cosponsoring: American University, George Washington University, Georgetown University, Howard University, and UDC Colleges of Law. They all have their separate names, but I won't go into that. Also, the National Women's Law Center and the Women's Bar Association for the District of Columbia, and I don't think I've left anybody out. But if I have, I will be reminded of that, I'm sure.

I am old enough that I actually remember *Reed v. Reed* being argued. I was a novice Supreme Court reporter, brand new on the beat, and I didn't know anything from Shinola, and I was just reading everything I could get my hands on. And I found that, by and large, I really could understand

* Adapted transcript of *Reed v. Reed at 40: Equal Protection and Women's Rights* held at the National Press Club on November 17, 2001. Panel: Nina Totenberg, Legal Affairs Correspondent, NPR (moderator); Justice Ruth Bader Ginsburg, Principal Author of Brief for Sally Reed in *Reed v. Reed*; Emily Martin, Vice President & General Counsel, National Women's Law Center; Professor Earl Maltz, Rutgers Law School; Jacqueline A. Berrien, Chair, U.S. Equal Employment Opportunity Commission; Professor Nina Pillard, Georgetown University Law Center.

1. 404 U.S. 71 (1971).

things if I just read all the briefs. But I came across this case, *Reed v. Reed*, which said that women were covered by the Fourteenth Amendment. And I thought to myself, “Hmm, I thought the Fourteenth Amendment was for freed slaves and for blacks. How does that apply to women?” And I flipped to the front of the brief to see who had written it. It was this Rutgers law professor named Ruth Bader Ginsburg. And I said, “Well, I’m going to call her up.”

I called her up and she gave me about an hour-long lecture, the bottom line of which is the Fourteenth Amendment says no person shall be denied equal protection of the law; and as she put it, the last she checked, women were people. [laughter]. And it was the beginning of a long friendship and association, first on the phone and then in person. And p.s., after my late husband died and I remarried, she performed the wedding ceremony. She’s definitely a person.

It’s my really nice duty to introduce her. She’s the right person to be headlining this event since she did write the briefs in *Reed*. And she will introduce the wonderful man who argued the case, who we’re very lucky to have in the audience today. But none of us would probably be here in the jobs that we’re in without Ruth Ginsburg. She truly revolutionized the law for women. None of us work in a workplace that bears any resemblance to the workplaces of thirty and forty years ago. I should just mention that Marcia Greenberger, who was going to be on this panel and who is co-head of the Women’s Law Center, but [was unable to make it at the last minute].

But I asked her last night, I said, “By the way, who provided the seed money for the Women’s Law Center way back when?” I really couldn’t remember. And she said, “The Ford Foundation did, and we were part of the Center for Law and Social Policy.” And they decided that they would have a Women’s Law section of that, and they hired Marcia to do it. Her first job was to ascertain whether there really was enough work for a single lawyer to do, because they assumed that there probably wasn’t and that she should do some other things as well. So that’s how much life changed over the course of time. So now, let me introduce Justice Ruth Bader Ginsburg. [applause].

JUSTICE RUTH BADER GINSBURG: My role is simply to introduce *Reed v. Reed* in a nutshell. Sally Reed lived in Boise, Idaho. She was an everyday woman who made her living by caring for people unable to cope for themselves. She had a son. She and her husband were divorced. When the boy reached teen years, the judge thought it was a good idea for him to spend some time with his father to be prepared for a man’s world. Sally opposed that. She didn’t think the father would be a very good influence on the boy. And she was right.

One day, the boy was shot from one of his father's rifles. It was an apparent suicide. Sally wanted to be appointed administrator of his estate, not for any economic advantage—there was very little there—but for sentimental reasons. Her ex-husband put in a rival application and although his application was second in time, he was selected. The probate judge had no choice. The Idaho code read: “As between persons equally entitled to administer a decedent's estate, males must be preferred to females.”² Sally thought the law was unjust and she engaged a lawyer from Boise, Allen Derr, who is with us this afternoon. [applause]. Allen took Sally's case through three levels of the Idaho courts, losing in the first round, winning in the second, but then losing in the third.

When Law Week reported the Idaho Supreme Court's decision in *Reed v. Reed*,³ one of my colleagues at the ACLU, a great lawyer named Marvin Karpatkin, read the summary and said, “This will be the turning point gender discrimination case.” And so the ACLU filed a request for Supreme Court review. The Supreme Court took the case. I then asked the ACLU's legal director, Mel Wulf, if I could write the brief. Allen Derr had said he was glad to have the ACLU do the written part, but he would present the case in the Supreme Court.

I regard *Reed v. Reed* as the grandparent brief. We had many other cases before the Court in the seventies. They were all variations on the same theme. A law that provides males must be preferred to females does not recognize women's equal citizenship stature.

To end this introduction, I will relate how the news of the *Reed* decision came to me. I was coming home from Rutgers the evening of November 22, 1971. Seated in a train, I saw a man reading a newspaper that had a banner headline. It filled the entire first page of *The New York Post*. The headline read, “High Court Outlaws Sex Discrimination.”⁴ Well, we'll find out if it did from our panelists. [applause].

NINA TOTENBERG: So in that regard, I just want to tell you one little story. Last year, or the year before, there was a case at the Supreme Court involving the strip search of a high school girl after they found an Advil on her when there was no drugs permitted in school.⁵ The question was whether this was basically excessive, whether there were some grounds for a lawsuit. It comes to the Supreme Court. And at that point, Justice Ginsburg was the only—I guess it's two years ago—was the only female

2. IDAHO CODE ANN. § 15-314 (1948).

3. *Wills and Estates*, 38 U.S.L.W. 2481 (1970).

4. *High Court Outlaws Sex Discrimination*, N.Y. POST, Nov. 22, 1971, at 1.

5. *Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364 (2009).

member of the Court. And without regard to ideology, all of the male justices seemed to think this was no big deal. I remember Justice Breyer saying he remembered people trying to stuff things in his pants and all kinds of stuff like that in the gym and at some point, this small person to my left lost her temper, basically. And you could almost literally—I mean, I’m sitting there, I’m just going nuts. I suddenly look up and I see the steam coming out of her ears. At the end of the argument, it really didn’t look like this young woman and her mother would win a cause, the right to sue. But as we left the press section—which these days is, I’d say, at least half female—all of the women were saying, “What’s wrong with those men? Are they crazy?” And p.s., of course I don’t know what went on in the conference, but maybe they were all sufficiently humiliated by the press accounts that it turned out that she won.

So, I want to introduce this panel and you all have biographies, so I’m not going to waste your time with anything special here. I’m just going to say who all these folks are. Jackie Berrien is head of the Equal Employment Opportunity Commission; Earl Maltz is a professor at Rutgers Law School; Emily Martin is the Deputy Chair of the Women’s Law Center, pinch-hitting for Marcia Greenberger today; and Nina Pillard is a professor at Georgetown. And, of course, any panel that has two Ninas on it has to be good.

Each of these folks is going to speak for about five minutes. They wanted to speak for ten, but I wouldn’t let them. Who wants to go first?

EMILY MARTIN: I think I’m first.

NINA TOTENBERG: You’re first?

EMILY MARTIN: I believe so.

NINA TOTENBERG: So there’s a batting order here?

EMILY MARTIN: There is.

NINA TOTENBERG: That’s been kept from the moderator. Okay, I’ll let you guys go. You will not hear from me for twenty minutes.

EMILY MARTIN: Hello. My name’s Emily Martin, and as Nina Totenberg more or less said, I’m Vice President and General Counsel at the National Women’s Law Center, and I’m very excited to be here today to talk about the watershed decision that was *Reed v. Reed*, when in a unanimous decision, the Supreme Court for the first time in its history

struck down a law that discriminated against women in violation of the Equal Protection Clause. And what the Court said was to give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, so merely to make things more administratively more convenient, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment.

And it's important to realize how different this was from the cases that had come before. The Supreme Court hadn't heard a lot of gender discrimination cases prior to *Reed v. Reed*, but those that it had heard were very different in tone in the decisions. So, just ten years before *Reed v. Reed* was decided, in *Hoyt v. Florida*,⁶ the Supreme Court had found that there was no constitutional problem with prohibiting women from serving on a jury unless they opted in to jury service affirmatively, which in practice meant there were no women on juries. And the Court explained that was because women were the seat of home and family life. And so obviously, it made sense to have this different rule.

Basically, that holding echoed back to a Supreme Court decision almost 100 years before, *Bradwell v. Illinois*,⁷ which was under a different clause in the Fourteenth Amendment—Myra Bradwell sought to practice law and was denied a law license because she was a woman and said this violated the privileges and immunities clause of the Fourteenth Amendment. And the Court there said, “No, civil law as well as nature herself has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.”⁸ So that notion of women being fundamentally different and creatures of the home really survived in law in many, many ways for the century after *Bradwell* until *Reed v. Reed*.

And *Reed* really represented a historic change that began to fulfill the promise of the broad language of the Equal Protection Clause, which does prohibit denying any person the equal protection of the law. And it is important to recognize the Equal Protection Clause, there were conversations about how to draft it, there were versions that would have just prohibited discrimination on the basis of race or color or previous condition of servitude, those were rejected in favor of the broad promise that *Reed* recognized.

6. 368 U.S. 57 (1961).

7. 83 U.S. 130 (1872).

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

Reed recognized the arbitrariness and, thus, injustice of assuming in law that men are more competent in regard to matters outside the home than women. And in recognizing that, it was the seed of what becomes a very important principle in equal protection law: gender stereotypes, the over-broad generalizations about how women are, how men are, what woman's role is, and what man's role is, are inappropriate bases for legal rules that say only men can do some things or only women can do some things.

Later cases that came in the seventies and the forty years since have developed this jurisprudence in part by analogy to race, recognizing the parallels between how the law historically treated women and how the law historically treated people of color in denying them rights to serve on juries, rights to vote, and property rights.

Through that analogy to race, which like sex is a highly visible characteristic with very little correlation to ability to contribute to society, through that analogy, the Supreme Court has developed intermediate heightened scrutiny for laws that discriminate on the basis of sex. Which means that a law that distinguishes on the basis of sex is only constitutional if it is substantially related to an important state interest and based on an exceedingly persuasive justification, not a gender stereotype.

The standard is generally understood to be somewhat more relaxed than the standard of review that applies to laws that discriminate on the basis of race, which is called strict scrutiny. However, it's so many miles away from where we were before *Reed v. Reed*, when in essence any law that discriminated on the basis of sex was presumed to be constitutional. And as long as any sort of rationale could be dreamed up, whether or not it was the actual rationale that motivated the legislators, that was presumed to be a sufficient basis for a law that distinguished between men and women.

So, in the cases that followed *Reed*, there were decisions that changed the world, that led to equal treatment and government benefits, for instance, discarding the legal presumption that the man is always the breadwinner and the woman is always the dependent. For example, in 1975, in *Weinberger v. Wiesenfeld*,⁹ another case brought by Ruth Bader Ginsburg, the Supreme Court opened the door for thousands of widowed fathers to receive social security benefits that before were only available to widowed mothers of dependent children. This meant that thousands of working mothers were able to protect their families after their death through the benefits that they had earned by working in a way that was unavailable to them before this decision.

Two years later in another case, *Califano v. Goldfarb*,¹⁰ it did away with

9. 420 U.S. 636 (1975).

10. 430 U.S. 199 (1977).

the dependency test for widowers to receive social security benefits. There had been a rule that if you were a widow, you got social security benefits. But if you're a widower, you had to prove that you'd actually been dependent on your wife, on the wage earner, in order to get those benefits. That rule was struck down, as based on gender stereotypes, in *Califano v. Goldfarb*. And as a result, today tens of thousands of widowers are awarded these benefits every year. Immediately after it was struck down, twenty times as many widowers received those benefits, which reflected the wage earning that their wives had done over the years.

It changed the law in public education. As a result, there have been cases ruling that public nursing schools, state nursing schools, must be open to men and that state military colleges must be open to women. That neither can have single-sex admission policies based on assumptions about what sort of education is best for one sex or the other. It led to a revolution in control over marital property as the Court struck down laws saying the husbands had exclusive control over jointly-owned property. Fundamentally, it led to a change in how we think about what is permissible and what the law can do—a change in the legal assumptions about how gender matters to the law.

Now, not every distinction between men and women has been struck down under the Equal Protection Clause, but it took this protection first recognized in *Reed v. Reed* to reach many of these rules that today seem archaic but were the law of the land not so very many years ago.

And so *Reed* and its progeny represent a strong and robust precedent. There are many cases in the forty years since *Reed*, reaffirming that the Equal Protection Clause provides heightened scrutiny to laws that discriminate against women. But it's important to recognize that this conversation is not completely settled, as we'll hear today on this very panel. *Reed* was decided unanimously; less than a handful of gender equal protection cases in the forty years since then have been decided without dissent. And indeed, none in the past thirty years has been decided without dissent. This area of the law remains contested with high stakes for women, and that's one reason why we think it's important to talk about this law and what it means today. So with that, I will turn to my co-panelist, Professor Maltz.

JUSTICE RUTH BADER GINSBURG: A few footnotes. The quote you heard from *Bradwell v. Illinois* came from a concurring opinion. The main opinion was the soul of simplicity. It provided that the practice of law is not a privilege or immunity of United States citizenship, or state

citizenship.¹¹ One of the Justices, Justice Bradley, had an expansive view of the privileges and immunities clause, which he had just announced in dissent in the Slaughterhouse Cases. So he had to come up with a different reason to justify prohibiting women from practicing law. He penned the famous line that comes just after the passage you heard. He wrote, “This is the law of the Creator.”¹² So nevermind the Constitution. It was divine law that women should not serve as lawyers. No one ever asked Justice Bradley by what means the law of the Creator was communicated to him. It wasn’t mentioned in any brief.

I would like to mention just one other case, a decision that seemed to me the epitome of the way things were in the not so good old days. The case is titled *Goesaert v. Cleary*,¹³ it was decided in 1948. It involved a woman who owned a tavern. Her daughter worked as her very able bartender. But the state—Michigan—had a law that prohibited women from working as bartenders, unless they were the wife or the daughter of the tavern owner. The tavern owner had to be male.

The Supreme Court didn’t get it in that case. The Justices thought that women needed to be protected from the tough guys that sometimes frequent bars. They didn’t think about the people who were bringing the drinks to the table. They were women—waitresses—and they were in more danger than a person standing behind a bar. Michigan’s law put mother and daughter Goesaert out of business with the cheers of the bartenders’ union. That kind of thinking had absolutely nothing to do with the ability of the mother and daughter in question. Simply because they were women, they couldn’t be bartenders.

Emily Martin mentioned a number of cases. You heard that widowers got the same rights that widows had enjoyed. I was involved in those cases and some people said to me, “You’re supposed to be a women’s rights advocate. But many of the cases that you’re bringing are about men’s rights.” I responded, “Where does the discrimination start? Why is the husband or the widower denied benefits? The wife who’s a wage earner is paying the same social security taxes as her male peer, but her taxes do not get for her family the same protection.” Yes, a man got the benefits as a result of the Court’s decisions. But why did the law deny them to him? Because his wage-earning working wife was not considered to be a real worker. She was considered, at most, a pin-money earner.

Think, too, of the nursing school case, *Mississippi University for Women v. Hogan*.¹⁴ The case came up during Sandra Day O’Connor’s very first

11. *Bradwell*, 83 U.S. at 139 (majority opinion).

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

13. 335 U.S. 464 (1948).

14. 458 U.S. 718 (1982).

year on the Court. Hogan was a man who wanted to attend what he considered the best nursing school in his State, but it was closed to men. Justice O'Connor wrote a fine opinion for the Court. Between the lines you could glean what she understood. She knew there's nothing better for women in the nursing profession than to have men do that job, too. When jobs are exclusively female, they tend to be underpaid. Justice O'Connor thought the more men coming into the nursing profession, the better off everyone would be.

NINA TOTENBERG: Okay, Professor Maltz?

EARL MALTZ: I just have one comment that, looking around this room, I think it's the tough guys in the bar who should have been worried. In any event, I want to thank everyone, the sponsors, for the opportunity to participate in this wonderful event. It's really an honor to be on such a distinguished panel. But I'm here as the official representative of the dark side. [laughter]. I believe that *Reed v. Reed* was wrongly decided, and it's based on my general theory of constitutional interpretation rather than any particular views about the role of women in society or the particular statute in Idaho.

My views are based upon three basic positions. First, I am an unrepentant originalist. I believe that in constitutional cases, judges should be bound by the meaning that can be derived by the legal materials that were available to those who drafted and ratified the relevant constitutional provision. Second, I believe that in cases where the original meanings are unclear, there should be the presumption of deference. And in case you're wondering, I believe that the same presumptions should be applied in cases involving guns, property rights, affirmative action generally, and race-conscious districting.

Third, the historical record does not support the widely-shared view that in 1866, the language of the Fourteenth Amendment would be understood to constitutionalize open-ended notions of liberty, equality, or some similar concept. The evidence on this point is particularly strong with respect to the Equal Protection Clause. But unfortunately because I can't explain that evidence, or go through that evidence in five minutes, I'm going to—well, no, if people are interested in talking about that evidence in the question and answer period, I'm particularly interested in it because I have no life. [laughter]. But I'll be happy to discuss it during the question and answer period.

Now, my basic view is because I think that judicial activism, which I define as the practice of invoking the Constitution to strike down either actions of state governments or federal legislature, carries with it

substantial costs. First, there are the costs of uncertainty. And second, there are the costs in terms of governmental flexibility. That is, everyone would agree that the government shouldn't be allowed to do certain things; to take a clear example that I think everyone in the room would agree with, the government should not be allowed to legalize slavery. But I think also we would agree in general that the government needs to have flexibility to adapt to changing conditions. Basically, what invoking the Constitution against particular kinds of practices does is to deprive the government of that flexibility.

Now at this point, I'm going to have to talk real fast. Originalist activism is not based upon a consequentialist analysis like this. It's based upon a purely formal idea that, basically, the courts are supposed to follow the Constitution for the same reason that they follow statutes. And that's what originalist activism is based on. But in contrast to originalist activism, the basic justification for non-originalist activism is entirely instrumental. That is, at least implicitly, that is the idea that at least in the long run, society will be better off if judges feel more or less free to enforce some set of values based on general ideas such as liberty, equality, or rights that are deeply rooted in our history and tradition, even if the framers had no way of knowing that the language would be interpreted that way.

Now, one of the problems in evaluating this is each of us, if we could all say, "I don't like this law, I don't like that law, therefore, the Court should strike it down," that would be easy. If I were king of the world, we would do that. If I were on the Court, I guess the address to write is 1600 Pennsylvania Avenue. But the problem is we can't do that. We can't know in advance what the ideology of judges are likely to be, and the same kind of philosophy that supports—in terms of judicial philosophy rather than political philosophy—decisions like *Reed v. Reed* also supports decisions like *Cronson*¹⁵ and such that are anathema to progressives.

Now against this background, I suspect the affinity that many progressives apparently have for non-originalist activism is something of a hangover from the Chief Justiceships of Earl Warren and Warren Burger—under Earl Warren where activism is invariably invoked in favor of progressive causes, and under Warren Burger, I think the cases of conservative activism were dwarfed by the liberal activism of cases such as *Roe v. Wade*.¹⁶ And even the far more conservative Rehnquist and Roberts' courts have produced signal victories for progressives such as *United States v. Virginia*,¹⁷ *Lawrence v. Texas*,¹⁸ and *Boumediene v. Bush*,¹⁹

15. *Cronson v. Clark*, 810 F.2d 662 (7th Cir. 1987).

16. 410 U.S. 113 (1973).

17. 518 U.S. 515 (1996).

18. 539 U.S. 558 (2003).

apparently creating the impression among some progressive commentators that, in the long run, non-originalist activism will have an inherent bias toward the left.

For my progressive friends, I have a message. From your perspective, non-originalist activism could easily have produced much worse results. One need only imagine a world in which the first George Bush, or as I refer to him George I, had selected a nominee whose ideology was a little less stealthy than David Souter. The only thing that one can say for sure is that non-originalist activist decisions will be a lagging indicator of the political perspective of whatever portion of the legal and political elite that dominates the Court at some particular time. One can have no assurance that the cumulative effect of those decisions will be positive in any meaningful sense.

With the benefits thus uncertain and the costs clear, if I ruled the world—now there's a grizzly thought—I would not have judicial review at all. But because we have a written constitution, we're likely to accept non-originalist activism in clear cases. Beyond that, I would leave the state governments and other branches of the federal government the flexibility necessary to do their jobs. I concede I would lose the benefits of cases such as *Reed* and its progeny. But on the other hand, progressives would not be stuck with decisions such as, for example, *Citizens United*.²⁰ You know, it's one of those things where you pay your money, you take your chances, and in the immortal words of The Who, "[P]ray we won't get fooled again."²¹ Thank you.

JUSTICE RUTH BADER GINSBURG: Nina, just a few comments. One is, did the Court spark resentment, resistance in Congress as a result of the decision in *Reed v. Reed*? Quite the contrary. What followed was a conversation between the Court and the Legislature. In the wake of *Reed*, hundreds of laws, state and federal, were changed. Congress went through all of the provisions of the U.S. Code and changed almost all that classified overtly on the basis of gender. So Congress and the Court were in sync.

I have a different originalist view. I count myself an originalist, too, but in a quite different way than Professor Maltz. Equality was the motivating idea, it was the idea enshrined in the Declaration of Independence. But equality was not mentioned in the original Constitution. Why? Because the odious practice of slavery was retained. So the equality principle does not appear in the Constitution until after the Civil War, when the

19. 553 U.S. 723 (2008).

20. *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

21. THE WHO, *Won't Get Fooled Again, on WHO'S NEXT* (Decca Records & Track Records 1971).

Fourteenth Amendment was adopted.

The genius of the United States has been its growth capacity. Recall that “We, the People,”²² were once white, property-owning men. That concept, “We, the People,” has become ever more embracive. Native Americans were originally not part of “We, the People,” nor were people held in human bondage, women, newcomers to our shores. Today, “We, the People,” has a marvelous diversity, wholly absent in the beginning.

Was women’s equality so far from the minds of the framers of the Fourteenth Amendment? I don’t think so in this sense. What they were getting at basically—you’ll find this cropping up again and again in the legislative record—they were against caste. They did not want the United States to have any classes or castes that would identify people by their birth status. They referred to the situation in India a number of times. What they didn’t want was castes in the U.S.A.

On the other hand, they surely did not consider women equal citizens. After all, women didn’t have what was the most basic right, the right to vote, until ratification of the Nineteenth Amendment in 1920. So I recommend to you a recent article by a professor who counts himself an originalist, Steven Calabresi of Northwestern.²³ He explains that when women got the right to vote, that ended the possibility of leaving them out of the equality norm. The Fourteenth Amendment was sparked by the idea that there should be no castes. Its framers didn’t understand that the legal status of women resembled a caste system. But when women were made full citizens, when they gained the right to vote, then, they were embraced as equals within the Fourteenth Amendment.

NINA TOTENBERG: Ms. Berrien?

JACQUELINE BERRIEN: Thank you so much. I will take a little of the time that I have to note that this is not only recognition of an important anniversary but also an event that has been organized to attract and to involve students from across the city in the various law schools, and I would be remiss if I didn’t say what a tremendous opportunity it is to be a part of this discussion, this historic discussion. Justice Ginsburg, I have been privileged over my career to see you at work on the bench, and I fortunately began my career when Justice Marshall was still sitting on the bench. And I have been privileged to work for both the ACLU Women’s Rights Project, which Justice Ginsburg founded, and the NAACP Legal

22. U.S. CONST. pmb1.

23. Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1 (2011).

Defense Fund, which Justice Marshall founded, so the connection between being a part of this discussion today and the things that I dreamed of doing when I was a student is something I want to note particularly for the students who are part of this audience today.

I am a bit of an outlier in this discussion in this sense: I'm not going to focus on the Constitution and the constitutional standards, the professors will be focusing on those issues. But I want to talk a bit about the role of the federal statutes and the federal enforcement structure that I am now responsible for leading at the EEOC. And Justice Ginsburg's remarks actually are a terrific segue to what I'd like to focus on.

As the Justice said, *Reed v. Reed* opened important doors in terms of the constitutional analysis that applied to sex-based classifications in the law. But at the same time—and really I would say almost as bookends to what was happening in the courts in terms of constitutional litigation—Congress passed a range of statutes that were also addressing inequality and discrimination of various kinds. And in some instances, the statutes were ahead of court decisions in terms of recognizing and protecting rights, and in other instances the statutes followed important court decisions like *Reed v. Reed*, as the Justice noted.

So the importance of *Reed*, I think, is properly discussed alongside the significance of the whole range of statutes that Congress enacted and that the courts have interpreted over the years. The Constitution and statutes have operated together to advance women's rights in the workplace, and in other spheres of life as well.

The EEOC was created by the Civil Rights Act of 1964,²⁴ which recognized women's right to work free from various forms of sex discrimination. The Equal Pay Act²⁵ was passed a year before the Civil Rights Act of 1964 and initially was enforced by the Department of Labor. It was related to the Fair Labor Standards Act,²⁶ which is the federal law that ensures that people who are working for pay receive the pay they're entitled to. And the Equal Pay Act ensured that you could not be paid less or be compensated differently for equal work based on your sex.

In 1964, Title VII prohibited employment discrimination on the basis of race, color, sex, national origin, and religion and also prohibited discrimination in retaliation for exercising any rights under that statute. The EEOC has enforced that law for the last forty-six years. We also

24. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C. (2006)).

25. Equal Pay Act, Pub. L. No. 88-38, 77 Stat. 56 (codified as amended in scattered sections of 29 U.S.C. (2006)).

26. Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060 (codified as amended in scattered sections of 29 U.S.C. (2006)).

enforce the Equal Pay Act today. We enforce the Pregnancy Discrimination Act,²⁷ which was passed by Congress in 1978 after two Supreme Court decisions called into question whether Title VII's prohibition on sex discrimination meant that employers could not discriminate on the basis of pregnancy. We also enforce the Age Discrimination in Employment Act,²⁸ the Americans with Disabilities Act,²⁹ and the Genetic Information Non-Discrimination Act.³⁰

And I mention those because one of the real hallmarks of our enforcement responsibility and reach today is that we not only enforce laws that obviously and directly relate to discrimination on the basis of sex, we also enforce laws that address other forms of discrimination that impact women, and as a result we must be mindful that workplace discrimination can occur in intersecting ways. When a woman comes to us for assistance, we have to consider if more than one of the laws that we enforce might apply to her, and if her rights in the workplace and the remedies available to her are based upon multiple statutes. For example, a woman with a family history of breast cancer who seeks assistance from us today could be simultaneously protected by Title VII and the Genetic Information Non-Discrimination Act, depending upon the specific facts of her case. We recognize that sex discrimination could be just one of the barriers to workplace advancement that a woman might encounter, and our outreach, public education, enforcement and litigation reflect awareness of the possibility of "intersectional" discrimination.

So there's no question that when you think about *Reed v. Reed* and what's different in the workplace and what's different for working women today, clearly the constitutional standards are critical. But the statutes that were passed alongside, and as bookends to constitutional decisions like *Reed* are also critical and have played an important role in improving the quality of life and opening doors to a broader array of opportunities for working women and men.

NINA TOTENBERG: That leaves you, Nina.

JUSTICE RUTH BADER GINSBURG: Now, just—okay.

27. Pregnancy Discrimination Act (PDA), Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified as amended in scattered sections of 42 U.S.C. (2006)).

28. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified as amended in scattered sections of 29 U.S.C. (2006)).

29. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended in scattered sections of 42 U.S.C. (2006)).

30. Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, 122 Stat. 881 (codified as amended in scattered sections of 29 U.S.C. (2006)).

NINA TOTENBERG: Originally, I thought you were going to come at the end, so okay. Go for it.

JUSTICE RUTH BADER GINSBURG: I'll also come at the end. [laughter]. Title VII in '64, now that's seven years before *Reed*, how did women get there? Title VII was originally for race, national origin, religion. And then a congressman from Virginia who wanted to defeat the measure said, "Well, women are discriminated against too, so why not put sex in there?" He thought adding sex would help to defeat the entire Title VII. Instead, sex came in by floor amendment and it stayed.

In the same year *Reed v. Reed* was decided, the first ever Title VII gender discrimination case came before the Court. It was a case called *Phillips v. Martin Marietta*.³¹ Ida Phillips was a woman who wanted to work for Martin Marietta. She was a waitress and she knew that the pay was better at Martin Marietta. But the company had a rule. It was, "We do not hire mothers of preschool children." Fathers, of course, are welcome.

A sex discrimination case was supported by the NAACP Legal Defense Fund. Why? Ida Phillips was a white woman. But the NAACP lawyers realized what a tremendous benefit a victory for Phillips could be for women of color, women in the same situation, women who had children, preschool children, and wanted the best paying job they could get. There's been a symbiotic relationship between race and sex, race discrimination cases under Title VII have been used as precedent for sex discrimination cases, and the other way around.

The Supreme Court said that Martin Marietta could not say flat out, "We don't hire women with preschool children." But the majority suggested that perhaps, if the employer could prove that having preschool children demonstratively affected women more than men, then maybe sex would be a so-called bona fide occupational classification.

Justice Thurgood Marshall, in a concurring opinion, said forget bona fide occupational classification.³² The Court appeared to be falling for the ancient canard Title VII should end—the notion that women are more responsible for children than men are, so women should be kept from the best jobs.

NINA TOTENBERG: I should say that I was at that argument, the Martin Marietta argument and I remember two questions that tell you how much times have changed. I think it was Chief Justice Burger who said, "Well, there are certain skills that women have that are better for men. For

31. *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971).

32. *Id.* at 544-47 (Marshall, J., concurring).

example, they're the best typists." Of course, it turned out that the fastest typist in the world was a man. And then I think it was Justice Stewart who said, "Well, you wouldn't expect men to be stewardesses, would you?" [laughter]. They were different times, what can I say? Okay, Nina Pillard?

NINA PILLARD: Thank you, Nina, and thank you to all of you for being here. Thank you to the National Women's Law Center and the cosponsors, fellow panelists and Supreme Court oralist Allen Derr. But especially thank you, Justice Ginsburg, for honoring us by being here today and for assisting us by being there in that day, in 1971. It's just really moving to be part of this with you.

So I want to make three points. I want to elaborate a little bit on what the principle is that's at the core of the *Reed v. Reed* doctrine as it's been carried forth in the sex discrimination equal protection cases. And that's this principle against stereotyping, or as it's even more accurately been articulated by Justice Ginsburg in *Virginia Military Institute*,³³ a principle against over-generalization based on sex. And I want to talk a little bit about the impact of *Reed v. Reed* on Congress's power to legislate. And finally, if I have time, make a few comments about constitutional interpretation in response to Professor Maltz.

One thing that strikes me about this case, though, just hearing the Justice recount the story of Sally Reed is how it was a tiny thing, in a way, that she stood up for. Being the administrator of her son's estate, it was a few hundred dollars and one way or another, it was probably going to be administered the same way. But as the Justice said, she had a sentimental attachment to the idea of tending to her son's business in this way. It just makes me think so often, and I think in some ways increasingly, we think, "Oh, don't make a federal case out of it. Don't fuss over things that we can just be generous and let roll." And I think those of you who are parents, this comes up constantly when you're navigating if there's a co-parent on the scene. "Oh, should I just make a deal out of this or not?" And those are things that are very fraught with equality implications. And I just want to sort of remark that we're so fortunate that Sally Reed did make a big deal out of this and that these really small issues in the real world add up to and reinforce really major principles that really transform our lives.

So, what *Reed v. Reed* characterized as arbitrary was this notion that men would be better administrators. And we now know that sex-based classifications in the law are subject to heightened scrutiny, intermediate or skeptical scrutiny. But when the Court decided *Reed*, it didn't actually adopt any new level of scrutiny. It purported to be applying rational basis

33. *Va. Military Inst. v. United States*, 508 U.S. 946 (1993).

review. Of course, looking at it in hindsight we know that just the kinds of rationales that were brought forward by the state—that generally men would be more comfortable with administering an estate—are the kinds of things that would be fine under rational basis review, but that the higher level of scrutiny really digs into and rejects.

So we see in *Reed* the seeds of this opposition to reliance on over-broad, sex-based generalizations. So when we see people concluding in policy or in law that there needs to be a line between the treatment of men and the treatment of women because men are a certain way or women like certain things, or don't like certain things, that's the thing that raises the constitutional red flag under equal protection. And the thing that's sort of distinctive about this is that, even if government action is done without any invidious motive, any kind of anti-woman bigotry or any real effort to denigrate women or men in any regard, it's the over-generalization that is seen as driving the harm.

And in fact, one of the things that was sort of tricky at the beginning of sex discrimination, both statutory law and constitutional law, was this sense that nobody means any harm. And so there's a way in which the over-generalization principle gives us a way of rooting out the kind of lazy or unnecessary reliance on sex as a criterion, when other more relevant criteria are available.

And *Reed* is very alive. There was a case just last term, the *Flores-Villar*³⁴ case, in which the Court of Appeals had sustained a sex-based provision of the Immigration and Nationality Act.³⁵ And that case was actually the lower court opinion upholding this sex-based distinction and was affirmed by an equally divided court four-four. And the ninth justice was Elena Kagan. And because she had dealt with this issue as Solicitor General, she recused herself. So you see how important the latest appointment to the Court is. That when she logs in on this issue, she's going to be the tiebreaker.

Just a couple of words about congressional power. On the face of *Reed v. Reed*, and in its most immediate and direct applications, it's about constraining governmental action. If the statute at the state level or at the federal level uses this sex-based classification, *Reed v. Reed* says we're going to look at that and maybe reject it. But a less obvious implication of *Reed* that's just as important is that it empowers government to work against sex discrimination. It is the basis on which Title VII and the many laws that the EEOC, under Jackie Berrien's leadership, the basis on which those laws can be applied to state employer, notwithstanding the states'

34. *Flores-Villar v. United States*, 131 S. Ct. 2312 (2011).

35. Immigration and Nationality Act, Pub L. No. 89-236, 79 Stat. 911 (1965) (codified as amended in scattered sections of 8 U.S.C. (2006)).

sovereign immunity from Commerce Clause legislation. So there's a way in which it's because there's special heightened scrutiny for sex discrimination that Congress has the power to use the strong tools to go out and eradicate sex discrimination.

There was a case called *Nevada v. Hibbs*,³⁶ which sustained as anti-sex discrimination legislation, the Family and Medical Leave Act.³⁷ And that case was decided by a court after a line of cases that had invalidated other laws. There was a case invalidating provisions of the Age Act and a case invalidating provisions of the Disabilities in Employment Act because Congress wasn't thought to have the power to apply those laws, at least to state employees.

The reason why the Family and Medical Leave Act was sustained and why Title VII also applies, the 1964 act also applies to state employers, is because of the *Reed* principle, because of the greater constitutional scrutiny that's given to classifications that are based on sex. So when you're talking about kind of institutional competence and whether it should be Congress or whether it should be the Court, it's important to know that the fate of the two powers, the judicial power to enforce equality and the congressional power to act and enforce equality, are very linked and really go back to their roots in *Reed*.

And just a couple of comments about originalism. You know, we're all originalists to the extent that we all consider ourselves to be bound by the Constitution. But, what Professor Maltz so ably argued is a view that I don't share, and I think shouldn't be applied to the Equal Protection Clause. He said, among other things, the Framers had no way of knowing the Equal Protection Clause would be interpreted in the way it was in *Reed*. And I would say that at some level, that's true, they had no way of knowing we'd have iPhones today. But they did anticipate the kind of change that we've seen in a broad sense. The language of the Equal Protection Clause is broad; it's pitched at a high level of generality, and purposely so. The Framers wrote the most important provisions of the Constitution generally because they anticipated that, over time, new circumstances would demand that we take these general principles and apply them to new facts.

And our Constitution did not have to be a broad brush in that way. There are plenty of state constitutions and constitutions of other nations that are written much more precisely and are much more frequently amended. But the choice of the broad terms is really an invitation to the kind of common law case-by-case interpretation that the courts engaged in.

36. *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003).

37. Family Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified as amended in scattered sections of 29 U.S.C. (2006)).

NINA TOTENBERG: Justice Ginsburg?

JUSTICE RUTH BADER GINSBURG: One point about *Nevada v. Hibbs*, which upheld against constitutional challenge the family leave provisions of the Family Medical and Leave Act. As one lives, one learns. Recall the author of the opinion, the Title VII opinion, in *Gilbert v. General Electric*,³⁸ holding that discrimination on the basis of pregnancy is not discrimination on the basis of sex. That same Justice, my later Chief, wrote the opinion for the Court in *Hibbs* upholding the relevant provisions of the Family Medical and Leave Act. Chief Justice Rehnquist explained why it was important that this leave be given to men as well as women, because men are, or should be, caretakers of the family as women are. In fact, when I brought the opinion home to my dear husband, the opinion in *Nevada v. Hibbs*, he said, “Ruth, did you write that?” [laughter].

NINA TOTENBERG: So when you said he lived and learned, do you suppose that might have had something to do with the fact that he had a daughter?

JUSTICE RUTH BADER GINSBURG: Maybe even more, he had granddaughters.

NINA TOTENBERG: That’s true. So, I’m going to ask a couple of questions first to the whole panel, and I’m also going to urge the panelists to ask each other some questions. My broad question for the whole panel, as somebody who has fortunately lived through this revolution, is we are celebrating the anniversary of *Reed v. Reed*, but do you really think that there now are so many statutes protecting women’s rights that would it matter terribly if, now, there weren’t *Reed v. Reed*? There’s employment pay, all kinds of statutes that protect women’s rights. And the women sitting in this room are a sort of testament to that. So, if tomorrow there weren’t *Reed v. Reed* there, would it make a huge difference? Even assuming that everything stays as it is, does it matter that we don’t have strict scrutiny as opposed to heightened scrutiny? Haven’t we ended up, in some sense, almost in the same position? Jackie?

JACQUELINE BERRIEN: Well, I think Nina actually made the point very well. I don’t think it’s an either/or. I think that the statutes and the constitutional standards are very symbiotic and that the authority that Congress has in its perception, and really the public perception, the public

38. *Gen. Electric Co. v. Gilbert*, 429 U.S. 125 (1976).

that elects those members of Congress and its belief about whether Congress has not just the authority but I'll say the responsibility to act to address conditions that it finds in society. And that it is rooted in constitutional principles, I think is significant in our structure of government, in the system in which we live. And I think that's exactly why the organizations like the NAACP Legal Defense Fund and the ACLU Women's Rights Project focused not only on how the statutes would be interpreted, but also ultimately on what the constitutional underpinning for those statutes would be. Clearly, the statutes have made in terms of real application of the Constitution a tremendous, tremendous difference in every way.

Title IX is another great example. It's not a part of the Civil Rights Act. But Title IX, which removed many of the barriers to women's participation, women and girls participation in sports and educational opportunities, has made a tremendous difference. But the fact that Congress acts, and that the public understands that Congress acts, based on an understanding of what the Constitution requires for all of the people of the nation is significant. And that is what the Fourteenth Amendment is about, is protection for the people.

NINA TOTENBERG: Professor Maltz?

EARL MALTZ: I'd just like to observe one thing about that, specifically in connection to *Reed v. Reed*. It's not an accident that *Reed v. Reed* was decided unanimously in 1971 because, and I know a few years before that in my mind is—I'm just getting old—that it was an almost unanimous Congress. I know it wasn't exactly unanimous, but an overwhelming majority of Congress had proposed the Equal Rights Amendment. So my point about that in terms of my basic constitutional theory rap is that the reason it was unanimous is that it reflected basically the views of the governing elites of the time, both liberal and conservative. And as we see those views change for a variety of different reasons, we see a different change dynamic on the Court. And that's all I have to say about that.

NINA TOTENBERG: Emily?

EMILY MARTIN: Well, I think it would make a difference. One reason is the reason that Nina Pillard talked about briefly, in that it makes a real difference as far as what laws Congress can pass, not just the very important symbolic foundational principle that the United States is a country in which men and women are equal before the law, which is

incredibly important. But also in real terms whether when Congress passes a law against discrimination, it applies to state governments and how they treat their employees, or if it's state run public housing, how they treat their tenants. Whether Congress has the authority to tell state governments, "You can't discriminate against women" really depends upon the heightened scrutiny of sex discrimination that the Equal Protection Clause permits. So in that way, it has an immediate concrete effect, even if we assume that statutory protections are strong and at this point not going to go away.

But it's also the case that while we do have very strong and important statutory protections in Title VII and Title XI and the Pregnancy Discrimination Act and the Fair Housing Act against sex discrimination that it doesn't cover the waterfront. I also am very proud to say that I was a litigator at the ACLU Women's Rights Project for many years, and we brought equal protection cases because sometimes you need the Constitution. Sometimes, the Constitution doesn't reach the question that you are talking about.

Take a small example, one of the equal protection cases we brought was one about softball fields versus baseball fields in a municipality in Oregon.³⁹ And the girls' softball fields were terribly run down, and the boys literally had a stadium. And because it was municipal fields, it wasn't a school, Title XI didn't reach it. There's no law that says that you can't treat boys far better in your municipal athletics program than girls in your municipal athletics program except the Constitution. And it's a small case, but it's an important principle, that sometimes you need that foundational rule, that foundational law that we treat people fairly here to reach inequities. So I think the importance of *Reed v. Reed* lives on in many ways.

NINA PILLARD: I mean, the way that I see it is without *Reed*, there would be nothing wrong under the Constitution with states using sex-based generalizations. For example, about men's and women's different work and family roles. And they could use those generalizations to drive policies about, well, let's not really give leave to men because it's really women who need it, I mean, generally, on average. And let's not give these challenging jobs to women because, I mean generally, typically on average, women are going to have babies and they're going to run home and not really be as committed to the workforce.

39. See Press Release, ACLU, ACLU Seeks 'Level Playing Field' for City Sponsored Girls' Softball League in Oregon (Apr. 4, 2002), <http://www.aclu.org/womens-rights/aclu-seeks-level-playing-field-city-sponsored-girls-softball-league-oregon>.

I mean, those are the over-generalizations that although true in some factual, general sense, are the very thing that we use this constitutional test to sort of discipline. And if we really lived in a world in which we didn't have any constitutional rule against that kind of over-generalization, then we would disadvantage the atypical people who really are the spearhead of social change on gender roles. And what do I mean by that? The law stands out and protects someone who wants to be the stay-at-home dad, even though he's atypical. If you didn't have the rule against over-generalizations, and if you had policies that were driven by what women and the men generally want, you wouldn't have protection for him.

The woman who decides she wants to run for President. It's part of our attitudes, it is part of our constitutional law, that even though typically, maybe, people of one gender or another don't want to do these things, that we want to privilege the atypical, we want to see how far genders can go out of our kind of more majoritarian, more conventional impulses. I was thinking about this panel, and I was thinking about forty years ago and when I was about a little younger than my daughter is today, and I was thinking about how much more athletic opportunity kids have and how they do things in sports that we thought women were physically incapable of doing. And that is because we've tested ourselves, our own impulses in part with the help of this *Reed* principle.

NINA TOTENBERG: Before that little voice says to me, "Nina?" [laughter]. Do you have anything you want to say? You can pass if you want to.

JUSTICE RUTH BADER GINSBURG: Why 1971? Why was that the year? Professor Maltz referred to the governing elites that sent out the Equal Rights Amendment for ratification. I think the idea started with the people. There was, at the start of the seventies, a burgeoning women's rights movement, a revival of the women's rights movement not only in the United States, but all over the world. As a great professor of constitutional law, Professor Paul Freund, famously said, "The Supreme Court should not be affected by the weather of the day. But inevitably, the Court will be affected by the climate of the era."⁴⁰ The climate of the era, I think, was responsible for the different responses the Supreme Court gave in 1961 and in 1971. In 1961, the liberal Warren Court said it was okay not to put women on jury rolls. The not so liberal Burger Court said it's not okay to exclude Sally Reed from being an administrator of an estate. So it was the

40. Ruth Bader Ginsburg, *Constitutional Adjudication in the United States as a Means of Advancing the Equal Stature of Men and Women Under the Law*, 26 HOFSTRA L. REV. 263, 268 (1997).

movement in society for change. It has to start with the people. And if it doesn't, then nothing's going to happen in government circles.

Yes, the people's elected representatives can take account of the climate of the era. That's their job. But remember that after World War II, constitutional courts were created in a number of European countries to rule definitively on constitutional questions, including questions involving basic human rights. Why? Because Europe had seen that popularly elected legislatures cannot always be trusted to keep society in tune with its most basic values. So a detached, impartial, removal-proof body, a constitutional court, would help to ensure against a return to the kind of autocratic governments that did not respect human dignity.

The idea of a court performing this role, the role of reviewing legislative and executive acts for constitutionality, really took off after World War II. It did so in the wake of a most virulent brand of racism, to which good people said, "Never again."

NINA TOTENBERG: You know, it's very interesting to me, I'm doing something that I—for those of you who haven't done it—suggest you do it, and that is read Jeff Shesol's book called *Supreme Power*,⁴¹ which is about the Roosevelt court-packing plan. And many of the ideas, for example, that we hear out of Newt Gingrich's mouth today, were coming out of the mouth of Franklin Roosevelt then. And it is just really fascinating to see the shoe on the other foot in a different era and to see the Court in the middle. And in the case of the court-packing plan, the Court actually did start to change because of the climate of the era, you could argue. But it's worth thinking about and remembering.

Professor Maltz, I wanted to ask you one question and you're really to be commended. To come to an event like this and be the—

EARL MALTZ: I'm used to it. [laughter].

NINA TOTENBERG: Be the pincushion, as it were, for everybody here almost, is that—but I did want to ask you one thing. And that is if you look at the framers of the Fourteenth Amendment and their intent and what I thought as a young reporter just reading the briefs, you would have to say, though, that the Court was wrong in *Brown*,⁴² too, because certainly the Court did not envision integrated schools in the District of Columbia. This was a sleepy southern city in which they were very much segregated, and that wasn't contemplated at the time. In fact, education was even

41. JEFF SHESOL, *SUPREME POWER* (2010).

42. *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

somewhat different at the time.

EARL MALTZ: Yes. Look, can I just say a couple of things?

NINA TOTENBERG: You can say anything you want.

EARL MALTZ: Really? [laughter]. I want to start, if I can, with talking about what Justice Ginsburg and what Nina said about, other Nina, said about the language of the Equal Protection Clause.

NINA TOTENBERG: That may be the only time in your life you ever get called “the other Nina.”

EARL MALTZ: Long story, I’m going to have to make it really short. It’s not about protection of equal laws, it’s about equal protection of the laws. And, as I say, I’m going to have to make it really—a complicated story made really—short. There actually was something called the right to protection of the laws that was in Chancellor Kent, one of my friends, among other people, well established, prior to 1866. And the rest of the problem is about the evidence. Is that in fact, one of the things they were really concerned about was federalism and there was an earlier version of the amendment, which talked about giving Congress the authority to enforce equal protection of life, liberty, and property. And it was defeated and every Republican who spoke against that amendment, that language, specifically complained about the fact that it was open-ended.

And so to me, the evidence says we moved from this equal protection of life, liberty, and property, to equal protection of the laws. As I say, it’s a long story, I’m sorry.

NINA TOTENBERG: It’s clear.

EARL MALTZ: No, you’re not sorry I don’t go on longer about that, I assure you. About *Brown*, yeah, you’re right. Can’t get there. I’m willing to say I can’t—a lot of people have tried to get there, can’t get there. And for a lot of people, that’s sort of the end of the debate. But it’s sort of like it seems to me, still, that there is—now, if I were in a different group, a very different group, a group of committed pro-life people—I doubt that there are a lot of committed pro-life people in this room, there might be some—they would say, “Yeah, but there’s also *Roe*,” which they see—now, I understand that that viewpoint is foreign to most people in this room, but if you were a very committed pro-life person you would see—*Roe* as basically constitutionalizing a really, really, really bad value.

And my point about that is all you can say is that over time, it gets back to my basic thing about what is described as judicial activism generally, but in particular what I describe as non-originalist or sometimes neo-originalist activism. That what you are going to get is basically a lagging indicator of the views of a particular group—the pejorative term would be the “governing elite”—but basically the powerful people in the country who appoint people and are appointed to the Court.

And since in my view, I know Keynes said “In the long run, we are all dead,”⁴³ that in the long run, I don’t think that there is actually evidence in the long run that what I describe as judicial activism, has advanced society generally. Again, the Warren Court is something of an anomaly. And I think that there are costs. And so I understand that I am sort of against the tide not only in this world, but the tide of world opinion or whatever about constitutional courts, but that’s my story and I’m sticking to it.

NINA TOTENBERG: Well, I guess we know he’s not going to be nominated to the Supreme Court.

EARL MALTZ: Not this year.

NINA TOTENBERG: Not for a while. [laughter]. Yes?

JUSTICE RUTH BADER GINSBURG: *Brown* was a tremendously important decision, but it’s not the decision that ended apartheid in America. That decision didn’t come until twelve years later. The case was *Loving v. Virginia*,⁴⁴ its target was miscegenation laws. The law said, in effect, there is a lower caste and the dominant race is not to be made impure by mixing with the lower caste. I don’t know, Professor Maltz, what you would say about miscegenation laws which several of our . . .

EARL MALTZ: I’m against them.

JUSTICE RUTH BADER GINSBURG: . . . Yes, of course you are. But would you have decided *Loving v. Virginia* differently?

EARL MALTZ: Would I have decided *Loving v. Virginia* differently? Well, I could sort of dodge and say that—there’s a complicated relationship between theories of precedent and theories of originalism—I can say, “Oh look at *Brown*.” I guess I’m going to have to admit that I think it’s very

43. JOHN MAYNARD KEYNES, A TRACT ON MONETARY REFORM 80 (1923).

44. 388 U.S. 1 (1967).

difficult to get to most of the Warren Court decisions about segregation and miscegenation and such was an originalist theory. Can some people say, “Oh, that’s easy for you to say? Here he is, a privileged white male.” But, it is what it is.

NINA TOTENBERG: Jackie, could I ask you about—we have been talking a great deal about women. I’m wondering how much there is of discrimination against men that comes to the EEOC? And other kinds of discrimination that most people don’t think of, frankly?

JACQUELINE BERRIEN: Sure. Well, I think it’s important to remember that what Title VII prohibits is discrimination on the basis of sex. So it does not apply only to women, by any means. And just as Justice Ginsburg mentioned earlier, the first case the Supreme Court decided under Title VII and its sex discrimination provision, was argued by the NAACP Legal Defense Fund and it wasn’t obvious, perhaps, to some why that made sense. But one of the reasons was that the Fund also recognized that the way that Title VII was interpreted would impact everyone who was protected by Title VII. And that went beyond the immediate facts of the specific case.

And I should mention that the person who argued that case is an EEOC alum, Bill Robinson, and is also affiliated with the D.C. School of Law represented here today.

Ultimately, we do continue to see a full range of cases brought by men and women that are challenging various forms of sex discrimination. We get harassment cases, for example, that involve men who have been harassed either by other men, more often by other men in the workplace. We have resolved those both in court and in out-of-court settlements. As several people have mentioned today, the principles that have supported things like the Family Medical Leave Act, certainly as we interpret and apply not only Title VII but also the related statutes like the Family Medical Leave Act, what’s important is not whether the person who brings the case is a man or a woman. What’s important is whether there is discrimination in granting leave or in a term of condition of employment that is prohibited by the law.

And certainly we have, for example, equal pay cases that are brought not only by women but by men of various races. I would be remiss if I didn’t say here, as I sit here as the African American woman on this panel, that part of the discussion—and perhaps it’s inevitable because of the different standards under the constitutional interpretation of the Court—part of the discussion has proceeded under a construct that women have no race, or that people of color have no sex. And obviously, neither of those things are

true.

And it's also true in terms of the EEOC and its enforcement responsibility that we see people workers, both male and female, who are coming to us with a range of complaints or range of concerns about conditions in the workplace. So, for example, when we had a meeting earlier in the year about the issue of how people who are unemployed are treated in job announcements, whether announcements and other efforts by employers to recruit employees can exclude the unemployed. One of the people who testified was Fatima Goss Graves from the National Women's Law Center, and she was able to talk about the impact of that policy on women. It may not have been intuitive to some that there might be different aspects of how that policy might affect women.

And she was able to talk about, for example, for some women care-giving leave may be the reason that they are unemployed at the time they're seeking employment. So the assumption that a person who's unemployed may be less qualified for particular work would be not only invalid, but would effectively impact them on the basis of their care-giving responsibilities and sex.

So really, I would say that now we are committed to looking at any policy that comes before us, any claim, and being sure that while there may be an obvious ground that we're not only looking at it from the standpoint that may first, or immediately, present itself and that we really look at a broad range of issues that might affect different people in the workplace in different ways.

The Center last week, exactly a week ago, recognized women who were part of the Freedom Rider Movement, and it was a tremendous, tremendous recognition. And I think it is an appropriate thing to happen in the same month that the Center is recognizing this anniversary of *Reed*. Because the truth is that both in court and out of court, it's been action that a lot of people, many of them ordinary people, as you heard today, about the people who were involved in the *Reed* case, the people who made a difference, the women who made a difference in the Freedom Rides; those are the people who in many ways have stepped up to open the doors. And while the constitutional standards and decisions are things that live with us and are an important legacy, it's certainly true that as Nina Pillard said earlier, those people's willingness to come forward are a critically important part of how I know I sit here today with the opportunities that are available to me and the commitment that I feel today to continue to broaden those opportunities for other girls and women who come behind me, as well as men and boys.

NINA TOTENBERG: So, I wanted to leave a few minutes to take some

questions from the audience before we—believe it or not, we’ve eaten up an hour and twenty-one minutes. It doesn’t seem that long at all. So let me just ask for a few questions. Yes, over here? Hold on a second, I think somebody’s got a microphone.

AUDIENCE: I have a question about the separate standard—the intermediate scrutiny for sex discrimination. I was wondering what the Court’s rationale was for deciding on the separate standard? Do you think it’s rightly decided, and what effect does this have on cases where there is an intersection between, for instance, race and sex?

JUSTICE RUTH BADER GINSBURG: Examples work more forcibly on the mind than precepts. I wonder about law schools that teach you there are three tiers; there’s rational basis; then there’s intermediate scrutiny; and, finally, there’s suspect classification. My counsel would be, watch what the Court does more than what it says. In *Reed*, the Court purported to use the lowest tier—rational basis review. And yet, a unanimous court struck down an overt sex-based classification.

I like the expressions, heightened scrutiny, skeptical scrutiny, and exceedingly persuasive justification. Does it make any difference that those are used words. Remember the birth of the strict scrutiny standard. The Supreme Court first enunciated that standard in a case called *Korematsu*.⁴⁵ The Court’s decision justified detaining people on the basis of their race and national origin, justified rounding them up and putting them in detention camps for the duration of World War II. Strict scrutiny was the standard, but the result today, I think—whatever the standard invoked—would be government cannot do that.

NINA TOTENBERG: In other words, watch what we do, not what we say. Nina Pillard?

NINA PILLARD: I was just going to add, I think that the Justice is exactly right. There are rational basis cases like *Reed* that are rational basis, arguably, with teeth. There are intermediate scrutiny cases like the *Virginia Military Institute* case that really sound like strict scrutiny cases and use a different formulation, skeptical scrutiny. So I think there’s really a range of different ways in which the courts confront specific scenarios and test them and try to use a form of analysis that’s going to root out harmful discrimination.

I think just the short answer to the first part of your question, why was it

45. *Korematsu v. United States*, 323 U.S. 214 (1944).

intermediate? I think at the time that analysis was adopted, it was thought that there were probably a bunch of kinds of sex-based classifications that would be okay more so than race-based classifications. And one thing that we've seen is that the more experience we have with sex equality, the harder it is to really see where men need to be excluded or women need to be excluded and where roles need to be assigned based on sex.

And so the standard, I think, has sort of drifted toward a strict scrutiny standard in practice because the practice that we have, the experience that we have, makes us more confident that full equality is going to work.

NINA TOTENBERG: Anybody else? Yes?

AUDIENCE: So the strip search of the high school girl case was mentioned, but in cases that are less obviously about gender explicitly, what do you think the effect of the genders of the justices has on their decisions?

NINA TOTENBERG: Oh, I'm going to give that one to Justice Ginsburg.

JUSTICE RUTH BADER GINSBURG: I will quote the line Justice O'Connor often uses. It was first expressed by a judge of the Supreme Court of Minneapolis, Jeanne Coyne: "At the end of the day a wise old man and a wise old woman will reach the same judgment."⁴⁶ But, Justice O'Connor would add, and as I would, "We bring to the table something that is lacking. We bring knowledge gained from growing up inside a female body." The *Safford*⁴⁷ case, the strip search case, is a perfect example. Every woman would understand what a mortifying experience that was for a thirteen-year-old girl. Every man did not have that understanding. It was good to have people at the table who could explain the girl's extreme discomfort to others.

The most important thing, I think, is the public perception of the Court these days. Now one-third of the members are women, and we're all over the bench. When Justice O'Connor left, for a couple of years, I was the lone woman. I'm not a very large person. It wasn't the right picture. But now, I am seated near center and Justice Kagan sits to my left, Justice Sotomayor, to my right. It looks like we're really there. Women belong on the Court and it will never be otherwise. Those of you who have attended

46. See Jennifer M. Fitzenberger, *M. Jeanne Coyne, Who Served on State Supreme Court From 1982-96, Dies at 71*, STAR TRIB., Aug. 7, 1998.

47. *Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364 (2009).

344 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 20:2

court hearings lately will have observed that my two newest colleagues are hardly shrinking violets. [laughter].

NINA TOTENBERG: I have to say, as somebody who's covered the Court for many decades, I certainly knew that there were three members of the Court who were female when Justice Kagan, the first day that Justice Kagan was sitting for oral argument. But to walk into that courtroom and see, and they are brackets. There's a woman at each end, and because of seniority, Justice Ginsburg is quite close to the center. To walk into that courtroom after years in which there was decades I covered the Court in which there were no women. And then there was one, and then there was two, and it was back to one again. To see that sort of density, it was really—you try as a reporter not to have a stake in cases that are before the Court. But, to walk into that courtroom and see that, it just really made my heart swell with pride to be able to see that in my lifetime. Anybody else?

Well, okay. We've done this exactly on time. But that's what you expect when you have a woman running the show, right? [laughter and applause].

END