CONSTITUTIONAL ADJUDICATION IN THE UNITED STATES AS A MEANS OF ADVANCING THE EQUAL STATURE OF MEN AND WOMEN UNDER THE LAW

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I will begin my remarks with a case decided on June 26, 1996. On that day, with only one dissenting opinion, the Supreme Court held that, under the Constitution's equal protection principle, the Commonwealth of Virginia could not exclude from a public military college, the Virginia Military Institute ("VMI"), women who wished to attend and could meet the entrance requirements.[1] The VMI decision is a stunning change from the Court's rulings in 1873, in Myra Bradwell's case, that women could be excluded from the practice of law in Illinois, without offense to the Federal Constitution,[2] and in 1961, in Gwendolyn Hoyt's case, that women in Florida need not be placed on lists from which jurors are drawn.[3] My remarks center on case law, evolving since 1970, concerning the equal stature of men and women under the law—case law that made the VMI decision a predictable judgment, and not the extraordinary (indeed inconceivable) ruling it would have been a generation earlier.

Before taking up that development, I will set the stage by commenting on the idea of equality, specifically, on how that idea figured in the Constitution, as originally drafted in 1787 and later amended.

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* Former Associate Justice, Supreme Court of the United States. This piece was originally published in Volume 26 of the *Hofstra Law Review*. *See* 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 (1997). It is taken from a lecture that was presented on July 15, 1997 at the Hofstra University School of Law summer program in Nice, France. It is published here substantially as delivered. To aid the reader, footnotes have been added.

1. *See* United States v. Virginia, 518 U.S. 515, 519, 558, 566 (1996).
2. *See* Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 140-41 (1873) (Bradley, J., concurring).
3. *See* Hoyt v. Florida, 368 U.S. 57, 61-65 (1961).

As Constitution readers know, the word "equal" or "equality" does not even appear in the body of the U.S. Constitution or in the first ten Amendments, ratified in 1791—the Amendments composing the Bill of Rights. What explains the absence of any reference to equality in the original U.S. Constitution, despite the prominence of that idea in the contemporaneous (1789) French Declaration of the Rights of Man, which declared (in Article 1): "Men are born and remain free and equal in rights," and (in Article 6) "Law . . . must be the same for all, whether it protects or punishes."[4] To compound the question, why did the eighteenth-century U.S. Constitution fail to incorporate the 1776 Declaration of Independence, which declared in ringing tones:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.[5]

The existence of slavery in all but five of the thirteen States of the United States when our Nation was new is part of the answer, but the reason is more encompassing. John Adams, who became the second President of the United States, wrote a revealing letter to a friend in 1776, the very year the Declaration of Independence was proclaimed. Adams explained to his friend why he thought voting qualifications should not be lowered in his home State of Massachusetts:

> [I]t is dangerous [Adams wrote] to open so fruitful a source of controversy and altercation, as would be opened by attempting to alter the qualifications of voters; there will be no end of it. New claims will arise; women will demand a vote; lads from twelve to twenty-one will think their rights not enough attended to; and every man who has not a farthing, will demand an equal voice with any other, in all acts of state. It tends to confound and destroy all distinctions, and prostrate all ranks to one common level.[6]

Concerning women, please place in the context of the early nineteenth century, the words of a very great, extraordinarily gifted man, Thomas Jefferson, principal author of the Declaration of Independence, later third President of the United States. Jefferson said in 1816: "Were our State a pure democracy . . . there would yet be excluded from [our]

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4. DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN arts. I, VI (Fr. 1789), https://avalon.law.yale.edu/18th_century/rightsof.asp.

5. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

6. Letter from John Adams to James Sullivan (May 26, 1776), *in* 9 THE WORKS OF JOHN ADAMS 378 (Charles F. Adams ed., 1854).

deliberations . . . [w]omen, who, to prevent depravation of morals and ambiguity of issue, could not mix promiscuously in the public meetings of men."[7]

Not until 1868, after the Civil War ended slavery, did the U.S. Constitution provide, as it has ever since, that no State "shall . . . deny to any person the equal protection of the laws." And women did not become part of the U.S. political community until 1920 when, by constitutional amendment, they gained the right to vote.

Thurgood Marshall, leader of the struggle in the courts for an end to odious racial classifications, said prior to his 1991 retirement as a Supreme Court Justice, that he did not celebrate what the Constitution was in the beginning (as originally framed, the Constitution protected the slave trade until 1808 (art. I, sec. 9) and it required the return of persons who had escaped from human bondage, a provision in force until the Civil War (art. IV, sec. 2)). Instead, Thurgood Marshall celebrated how our fundamental instrument of government had evolved over the span of two centuries. The "true miracle," he said, is the Constitution's "life nurtured through two turbulent centuries."[8]

I share that view, but I appreciate, too, that the equal dignity of individuals is part of the U.S. constitutional legacy, shaped by the original framers, in this vital sense. The founding fathers rebelled against the patriarchal power of kings and the idea that political authority may legitimately rest on birth status. Their culture held them back from fully perceiving or acting upon ideals of human equality in rights and opportunities, and of individual freedom to aspire and achieve. But they stated a commitment in the Declaration of Independence to equality and in the Declaration and Bill of Rights to individual liberty. Those commitments had growth potential. They received further expression in the nineteenth century, after the Civil War ended slavery, through the addition of the Equal Protection Clause to the Constitution, and again in the twentieth century, when women were made voting citizens. As historian Richard Morris wrote: a prime (and still evolving) portion of the history of the U.S. Constitution, and a cause for celebration, is the story of the extension (through amendment, judicial interpretation, and practice) of constitutional rights and protections to once ignored or excluded people: to humans who were once held in bondage, to men

7. Letter from Thomas Jefferson to Samuel Kercheval (Sept. 5, 1816), *in* 10 THE WRITINGS OF THOMAS JEFFERSON 46 n.1 (Paul L. Ford ed., 1899).

8. Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 5 (1987).

without property, to the original inhabitants of the land that became the United States, and to women.[9]

With that background in mind, I will now recall the story of when, why, and how women began to count in constitutional adjudication.

I will start with a scene in a Hillsborough County, Florida, courtroom in 1957, some forty years ago. Gwendolyn Hoyt stood trial there for murdering her husband; the instrument of destruction, her young son's broken baseball bat. Gwendolyn Hoyt was what we would today call a battered woman. Her philandering husband had abused and humiliated her to the breaking point. Beside herself with rage and frustration, she spied her son's bat in the corner of the room, seized it, brought it down on her husband's head, causing him to fall back, hit his head against a hard surface, and instantly die.

Florida placed no women on the jury rolls in those days, out of concern for women's place at "the center of home and family life."[10] (Louisiana followed the very same practice until the mid-1970s.)[11] Gwendolyn Hoyt was convicted of second-degree murder by an all-male jury. Her thought, ably argued in a brief to the U.S. Supreme Court by American Civil Liberties Union volunteer lawyer, Dorothy Kenyon, was that if women were on the jury, they might have better comprehended Gwendolyn Hoyt's state of mind, casting their ballot, if not for an acquittal, then at least to convict her of the lesser offense of manslaughter.

The Supreme Court, in 1961, rejected Gwendolyn Hoyt's plea.[12] The Court did so, following an unbroken line of precedent. That precedent reflected the long-prevailing "separate-spheres" mentality, the notion that it was man's lot, because of his nature, to be the breadwinner, the head of household, the representative of the family outside the home; and it was woman's lot, because of her nature, to bear and alone to raise children and keep the house in order.

Just ten years later, the Supreme Court turned in a new direction. So did lower courts all over the nation. I had the good fortune to be alive and a lawyer—in fact, a law teacher—in the 1970s and could participate in the gender equality cases of that decade. For ten years, my major work (done—like Dorothy Kenyon—as a volunteer lawyer for the American Civil Liberties Union) was to help advance the vibrant idea of the equal stature and dignity of men and women as a matter of

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9. *See* RICHARD B. MORRIS, THE FORGING OF THE UNION, 1781-1789, 193 (Henry S. Commager & Richard B. Morris eds., 1987).

10. Hoyt v. Florida, 368 U.S. 57, 62 (1961).

11. *See* Taylor v. Louisiana, 419 U.S. 522, 525 (1975).

12. *See Hoyt*, 368 U.S. at 65.

constitutional principle. I will describe a few of the key cases and offer a brief account of why the courts were prepared, starting in the 1970s, to listen to arguments they had earlier refused to entertain.

The turning point case was *Reed v. Reed*,[13] decided by the Supreme Court in 1971. The case involved a teenage boy from the State of Idaho, Richard Lynn Reed, who died under tragic circumstances. His parents were long separated, and the court gave custody to his mother, Sally Reed, while the boy was "of tender years." Then, when Richard reached his teens, the court placed him in the custody of his father, Cecil Reed, to prepare Richard for his manhood years. The boy fell in with a bad crowd and spent some time in a corrections facility. When he was released, again to his father's custody, he was deeply depressed, and one day committed suicide, using his father's gun. Sally Reed, the mother, sought to take charge of her son's few belongings, and so applied to the court to be administrator of Richard's death estate. The father, some days later, applied for the same appointment.

The Idaho court turned down Sally Reed's application, although it was first in time, and appointed the father, under a state statute that read: as between persons equally entitled to administer a decedent's estate, males must be preferred to females. Sally Reed was not a sophisticated woman. She earned her living by caring for elderly people, taking them into her home. She probably did not think of herself as a feminist, but she had the strong sense that her state's law was unjust. And I sensed that she would prevail.

In preparing Sally Reed's appeal to the Supreme Court, I placed on the brief the names of two women, one was Dorothy Kenyon, who had represented Gwendolyn Hoyt, the other was Pauli Murray, a lawyer, poet, novelist, and later minister who had long fought for racial and gender justice. Both were then too old to be part of the fray, but people of my generation owed them a great debt, for they bravely pressed arguments for equal justice in days when few would give ear to what they were saying.

The Supreme Court unanimously declared Idaho's male preference statute unconstitutional, a plain denial to Sally Reed of the equal protection of the State's law.[14] Two years later in *Frontiero v. Richardson*, the Court held it unconstitutional to deny female military officers housing and medical benefits covering their husbands on the same automatic basis as those family benefits were accorded to male

13. 404 U.S. 71 (1971).
14. *See id.* at 76-77.

military officers for their wives.[15] Air Force Lieutenant Sharron Frontiero was the successful challenger, and I co-argued her case before a Supreme Court that included my current Chief Justice (his was the only dissenting vote). Lt. Frontiero had this clear view: she saw the laws in question as plain denials of equal pay. Two years after Sharron Frontiero's victory, the Court declared unconstitutional a state law allowing a parent to stop supporting a daughter once she reached the age of eighteen but requiring parental support for a son until he turned twenty-one.[16]

That same year, 1975, the Court decided a case very dear to my heart.[17] It began in 1972, when Paula Wiesenfeld, a New Jersey public school teacher, died in childbirth. Her husband, Stephen Wiesenfeld, sought to care for the baby boy (Jason) personally, but was denied child-in-care Social Security benefits then available only to widowed mothers, not to widowed fathers. Stephen Wiesenfeld won a unanimous judgment in the Supreme Court (yes, my now-Chief voted in baby Jason's favor).

In defense of the sex-based differential, the government had argued that the distinction was entirely rational, because widows, *as a class*, are more in need of financial assistance than are widowers. True in general, the Court acknowledged, but laws reflecting the situation of the *average* woman or the *average* man were no longer good enough. Many widows in the United States had not been dependent on their husbands' earnings, the Court pointed out, and a still small, but growing number of fathers like Stephen Wiesenfeld were willing to care personally for their children. Using sex as a convenient shorthand to substitute for financial need or willingness to bring up a baby did not comply with the equal protection principle, as the Court had grown to understand that principle.[18] (As a result of the decision, childcare benefits were paid to Stephen Wiesenfeld, who has been an extraordinarily devoted parent. Today, his son Jason is a student completing his third year at Columbia Law School.)

What caused the Court's understanding to dawn and grow? Judges do read the newspapers and are affected, not by the weather of the day, as distinguished Constitutional Law Professor Paul Freund once said, but by the climate of the era. Supreme Court Justices, and lower court judges, as well, were becoming aware of a sea change in United States society. Their enlightenment was advanced publicly by the briefs filed in

15. *See* 411 U.S. 677, 690-91, 691 n.25 (1973).
16. *See* Stanton v. Stanton, 421 U.S. 7, 9-10, 17 (1975).
17. *See* Weinberger v. Wiesenfeld, 420 U.S. 636, 636 (1975).
18. *See id.* at 645, 651-52.

Court and privately, I suspect, by the aspirations of the women, particularly the daughters and granddaughters, in their own families and communities.

The altered conditions accounting for the different outcomes in Gwendolyn Hoyt's case in 1961, and in Sally Reed's, Sharron Frontiero's, and Stephen Wiesenfeld's cases in the 1970s were these. In the years from 1961 to 1971, women's employment outside the home had expanded rapidly. That expansion was attended by a revived feminist movement, fueled in the United States, in part, by the movement of the 1960s for racial justice, but also, as elsewhere in the world, by the force of new thinking both represented and sparked by Simone de Beauvoir's remarkable 1949 publication, *The Second Sex*. Changing patterns of marriage, access to safer methods of controlling birth, longer life spans, even inflation—all were implicated in a social dynamic that yielded this new reality: in the 1970s, for the first time in the nation's history, the "average" woman in the United States was experiencing most of her adult years in a household not dominated by childcare requirements. That development may indeed be, as Columbia University economics professor Eli Ginzberg described it in 1977, "the single most outstanding phenomenon" of the late twentieth century.[19]

Before jurists could turn in the new direction, however, they had to comprehend that legislation apparently designed to benefit or protect women could often, perversely, have the opposite effect. This was of critical importance, for most laws that differentiated on the basis of sex, in contrast to obviously odious race-based laws, did so ostensibly to shield or favor the sex regarded as fairer, but weaker, and dependent-prone. Laws prescribing the maximum number of hours or the times of day women could work or the minimum wages they could receive;[20] laws barring females from "hazardous" or "inappropriate" occupations (lawyering in the nineteenth century,[21] bartending in the mid-twentieth century[22]); remnants of the common law regime which denied to married women rights to hold and manage property, to sue or be sued in their own names, or to get credit from a financial institution (thus saving them from their own folly or misjudgment);[23] the "head and master" rule that long held sway in community property states, vesting

19. Jean A. Briggs, *How You Going to Get 'Em Back in the Kitchen? (You Aren't.)*, FORBES, Nov. 15, 1977, at 177, 177 (quoting comment by Eli Ginzberg).

20. *See, e.g.*, Muller v. Oregon, 208 U.S. 412, 416-17 (1908).

21. *See* Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 130-31 (1873).

22. *See* Goesaert v. Cleary, 335 U.S. 464, 465-67 (1948).

23. *See* John D. Johnston, Jr., *Sex and Property: The Common Law Tradition, the Law School Curriculum, and Developments Toward Equality*, 47 N.Y.U. L. REV. 1033, 1087-89 (1972).

in husbands sole control of community assets[24]—all these prescriptions and proscriptions were premised on the notion that women could not cope with the world beyond hearth and home without a father, husband, or big brother to guide them. Absent a male relative to lean on, the U.S. Supreme Court said in 1908, a woman would fall prey to "the greed as well as the passion of man."[25]

Cases of the kind I just described placed a spotlight on the burdensome nature of legislation that confined women to a separate sphere. By enshrining and promoting the woman's "natural" role as selfless home-maker, and correspondingly emphasizing the man's role as provider, the state impeded both men and women from pursuit of the very opportunities and styles of life that could enable them to break away from traditional patterns and develop their full, human capacities. Thus, for example, excluding qualified men from attending a nursing school tends, as the Supreme Court held in 1982, to "perpetuate the stereotyped view of nursing as an exclusively woman's job"; instead of advancing women's welfare, Justice Sandra Day O'Connor recognized, this occupational reservation may in fact have helped to hold down wages in the nursing profession.[26]

When Justice O'Connor, in her first year as the first woman on the U.S. Supreme Court, wrote the decision opening to men the Mississippi University for Women's school for nurses, she paved the way for the opinion I wrote fourteen years later in the Virginia Military Academy case. Indicating how the new understanding took hold, Justice O'Connor wrote in 1982 for a Court that divided 5-4. The vote in 1996 in the Virginia Military Academy case was 7-1, with the Chief Justice writing a concurring opinion in support of the judgment.

The Supreme Court, since the 1970s, has effectively carried on in the gender discrimination cases a dialogue with the political branches of government. The Court wrote modestly, it put forth no grand philosophy. But by forcing legislative and executive branch re-examination of sex-based classifications, the Court helped to ensure that laws and regulations would "catch up with a changed world."[27]

Thus Congress, in the late 1970s, mooted a court case challenging the exclusion of women from the U.S. military academies—West Point, Annapolis, the Air Force Academy—by opening the doors of those

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24. *See* Kirchberg v. Feenstra, 450 U.S. 455, 456-58 (1981).

25. *Muller*, 208 U.S. at 422.

26. Miss. Univ. for Women v. Hogan, 458 U.S. 718, 729 & n.15 (1982).

27. Wendy W. Williams, *Sex Discrimination: Closing the Law's Gender Gap*, *in* THE BURGER YEARS: RIGHTS AND WRONGS IN THE SUPREME COURT 1969-1986, 109, 123 (Herman Schwartz ed., 1987).

academies to women.[28] By the time of the Virginia Military Academy case, women cadets had graduated at the top of every class at the U.S. academies for over a decade.[29] The Marine Corps had elevated a career female officer to the rank of three-star General in charge of manpower and planning. Litigation pursued by lawyers in the public interest had helped to make it ever more possible for our daughters, as well as our sons, to aspire and achieve according to their individual talent and capacities. That prospect, I hope and anticipate, will be enduring.

28. *See* Pub. L. No. 94-106, § 803(a), 89 Stat. 537, 537-38 (1975); Edwards v. Schlesinger, 377 F. Supp. 1091, 1091 (D.D.C. 1974), *rev'd sub nom*. Waldie v. Schlesinger, 509 F.2d 508, 508 (D.C. Cir. 1974).

29. *See* United States v. Virginia, 518 U.S. 515, 544 n.13 (1996); Brief of Amicus Curiae Lieutenant Colonel Rhonda Cornum et al. in Support of Petitioner at 10-11 nn.24-25, United States v. Virginia, 518 U.S. 515 (1996) (No. 94-1941), 1995 WL 703393.