Study of whether united states supreme court sex-discrimination jurisprudence is well-grounded in fourteenth amendment legislative history

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STUDY OF WHETHER UNITED STATES SUPREME COURT SEX-DISCRIMINATION JURISPRUDENCE IS WELL-GROUNDED IN FOURTEENTH AMENDMENT LEGISLATIVE HISTORY

by

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Abstract

The purposes of the following thesis is to research United States Supreme Court sex-discrimination jurisprudence and ascertain if Fourteenth Amendment legislative history was used, referred to, cited to, or quoted from, by the Supreme Court Justices in their opinions regarding sex-discrimination cases since the Amendment was ratified in 1868. Legislative history is a window into the drafting, debating, and intricate crafting of laws and amendments. When words and phrases that are used in the statutes, codes, and amendments are ambiguous or unclear, judges and justices should use the legislative history to ascertain the intent of the framers of the legislation.

The methodology that was employed for this thesis was through the researching of all relevant United States Supreme Court cases as to what was written by the Justices in their opinions. Research was conducted into the relevant law review articles on the subject of legislative history of the Fourteenth Amendment, Supreme Court sex-discrimination jurisprudence, and the historical impact of Court decisions on the law relative to sex-discrimination. After extensive research, it was discovered that the United States Supreme Court has established over 144 years' worth of sex-discrimination jurisprudence. The law review article research revealed that the lack of legislative history research by the Court has not gone unnoticed by the legal community or the women's rights community since the Fourteenth Amendment was originally drafted. The research and analysis of the sources of sex-discrimination from cases, law review articles, and books on the subject, led to the conclusion that no Fourteenth Amendment legislative history was ever used by the Supreme Court of the United States as part of its development of sex-discrimination jurisprudence.

Dedication

For my wonderful family and my loving wife,
who all have encouraged me throughout this endeavor,
to keep working hard and strive to do my very best.

For all the professors and instructors,
whose sacrifice in pursuing a career in education
has made a difference in my life and the lives of many others.
We stand on your shoulders.

Thank you one and all.

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Introduction

The Fourteenth Amendment to the United States Constitution was finally ratified by three-fourths of the States in the Union by July 9, 1868. But the real work by the duly elected legislators was done between 1865 and 1867. The Amendment's Framers worked in committees, party caucuses, and finally in the main chambers of the Congress to draft and complete this important addition to the supreme law of the land. The congressional members of the committees charged with crafting the language for the Amendment debated long and hard regarding what words should, could, and needed to be used, and the intentions behind them. The record of these debates ended up as legislative history.

When a statute, code, or Amendment contains language that is unclear, or purposefully ambiguous to allow for expansion through future interpretation, courts are supposed to use the legislative history of a Constitutional Amendment or statute when developing its interpretation if the intentions of the Amendment or statute are not clear.[1] When the text of a statute or other legislation is ambiguous, as in the case of the Fourteenth Amendment, "the interpreter charged with determining the meaning of the ambiguous legal text must necessarily resort to sources outside the text itself."[2]

Sex-discrimination jurisprudence established by the United States Supreme Court in the decades after the ratification of the Fourteenth Amendment is not well-grounded in the legislative history from the Amendment. If the legislative history had been used by the Supreme

[1] *See* John Choon Yoo, *Marshall's Plan: The Early Supreme Court and Statutory Interpretation*, 101 YALE L.J. 1607, 1607-08 (1991-1992).
[2] Michael F. Roessler, *Mistaking Doubts and Qualms for Constitutional Law: Against the Rejection of Legislative History as a Tool of Legal Interpretation*, 39 Sw.L.Rev. 103, 146 (2009).

Court when interpreting the application of the Fourteenth Amendment, it would have shown the documented discussions of "the legislators that considered, debated, and adopted ambiguous-phrased texts [that outlined the] lengthy, nuanced discussions of just what [the Congress] was … doing when the law being interpreted by the judiciary was enacted or ratified."[3]

The Framers of the Fourteenth Amendment to the United States Constitution used terms and language that were purposefully ambiguous, which caused "argu[ments] and debate[s]" between Congressional members regarding "the Amendment's meaning in the years immediately following its ratification."[4] Those documented historical debates and discussions between members of Congress helped establish "the idea that the meaning of the Fourteenth Amendment is not limited by the text of the Amendment," but has an established "open-endedness" meant to act as a "guide [to] its interpretation and application."[5] Principle players involved in the framing of the Fourteenth Amendment spent years after its ratification reinforcing the concept that the Fourteenth Amendment's ambiguous language extended the protection of fundamental rights for all citizens from not only the national government but also all the state governments.[6]

Without the use of the legislative history from the Fourteenth Amendment, and the guidance the Framers intentions would have implied, early Supreme Court sex-discrimination cases looked to draw parallel analysis to cases that changed public policy related to race issues. Ultimately, this thesis will argue that since the ratification of the Fourteenth Amendment to the Constitution, the United States Supreme Court has not used legislative history of the Fourteenth Amendment to assist in the process of interpreting and applying the principles intended by the

[3] Roessler, *supra* note 2, at 146.
[4] *Id*. at 141.
[5] *Id*.
[6] *See generally Id*.

Framers of the Amendment to the sex-discrimination cases that have been heard before it throughout the past 144 years of Supreme Court history.

Early Jurisprudence: From the Drafting and Ratification of the Fourteenth Amendment to just before the Supreme Court decision in *Reed v. Reed*.[7]

Established Supreme Court Jurisprudence calls for the use of Legislative History. According to well established United States Supreme Court jurisprudence, the Court must look to the legislative history of a Constitutional Amendment or statute when developing its interpretation if the intentions of the Amendment or statute are not clear.[8] Supreme Court Justices have relied on a "rich tradition of sources" to "guide and constrain interpretation" of the Constitution, "including pre- and post-enactment history."[9]

In his 1999 article published in the Harvard Journal on Legislation, Michael H. Koby stated that "[o]ne of the least controversial uses of legislative history" is when the courts "examine the intent of the drafters" of legislation in the process of "avoid[ing] an absurd [judicial] result."[10] Koby asserts that when, as in the *Fourteenth Amendment*, the text is ambiguous, "the interpreter charged with determining the meaning of the ambiguous legal text must necessarily resort to sources outside the text itself."[11] Koby continues his commentary by stating that,

> [O]ut of deference to the legislature and legislators that consider and adopt legal text pursuant to Article I or in deference to the national and state legislators that propose and ratify constitutional amendments, legislative history may also sometimes be determined to be a reliable tool of interpretation, as the legislators that considered, debated, and adopted ambiguous-phrased texts may have engaged

[7] Reed v. Reed, 404 U.S. 71 (1971).
[8] *See* Yoo, *supra* note 1, at 1607-08.
[9] Jack M. Balkin, *Fidelity to Text and Principle in* THE CONSTITUTION IN 2020, 11-24, (Jack M. Balkin & Reva B. Siegel eds., 2009).
[10] Michael H. Koby, *The Supreme Court's Declining Reliance on Legislative History: The Impact of Justice Scalia's Critique*, 36 HARV.J. ON LEGIS. 369, 375 (1999).
[11] Roessler, *supra* note 2, at 145-146.

> in lengthy, nuanced discussions of just what it was they were doing when the law being interpreted by the judiciary was enacted or ratified.[12]

Koby went on to include quotes from Abner Mikva, a judge and former member of Congress, stating that "the language of a statute may admittedly be vague, and therefore judges construing the enacted statute "'cannot afford to ignore those obvious tools [such as legislative history] which members of Congress use to explain'" the process of legislative development and "'describe the meaning of the words used'" in the legislation.[13] The language used by the Framers of the *Fourteenth Amendment* must have been crafted to allow there to be a flexible understanding of its intent. "[T]he broader and more ambiguous language of the Fourteenth Amendment," writes Serena J. Hoy in her year 2000 article, "would seem to lend itself to more liberal interpretation."[14] The Framers of the *Fourteenth Amendment* to the United States Constitution used terms and language that were purposefully ambiguous, which caused "argu[ments] and debate[s]" between Congressional members regarding "the Amendment's meaning in the years immediately following its ratification."[15] Those documented historical debates and discussions between members of Congress helped establish "the idea that the meaning of the Fourteenth Amendment is not limited by the text of the Amendment," but has an established "open-endedness" meant to act as a "guide [to] its interpretation and application."[16] As part of a post-ratification debate in the Forty-Second Congress of the United States, Representative John A. Bingham of Ohio supported his position that the *Fourteenth Amendment*,

[12] *Id*. at 146.
[13] Koby, *supra* note 10.
[14] Serena J. Hoy, *Interpreting Equal Protection: Congress, the Court, and the Civil Rights Acts*, 16 J. L. & POLITICS 381, 462 (2000).
[15] Roessler, *supra* note 2, at 141.
[16] *Id*.

which his involvement in its drafting played a "key role," made "the first eight Amendments" or "the Bill of Rights applicable to the states."[17]

Rep. Bingham said:

> Mr. Speaker, that the scope and meaning of the limitations imposed by the first section, fourteenth amendment of the Constitution may be more fully understood, permit me to say that the privileges and immunities of citizens of the United States, as contradistinguished from citizens of a state, are chiefly defined in the first eight amendments to the Constitution of the United States.[18]

As the excerpt above shows, even the principal players involved in the framing of the *Fourteenth Amendment* spent years after its ratification reinforcing the concept that the *Fourteenth Amendment's* ambiguous language extended the protection of fundamental rights for all citizens from not only the national government but also all the state governments.[19] In reality however, the United States Supreme Court has been willing to only selectively incorporate pieces and parts of the Bill of Rights, and not in its entirety, to apply to the States over the last 144 years since the ratification of the *Fourteenth Amendment*.

In *Corfield v. Coryell*, 4 Wash. C.C. 371 (1823),[20] United States Supreme Court Associate Justice Bushrod Washington was sitting as a Federal Circuit Court judge.[21] In his opinion in the case, Justice Washington opined a sweeping description of the rights incorporated in Article IV, Section 2, Clause 1 of the Constitution; containing the language regarding the privileges and immunities of citizens of the United States.[22] Justice Washington used the case as an opportunity to refer to the definitional concepts of the fundamental rights encompassed in the privileges and

[17] *Id.*
[18] *Id.*
[19] *See Id.*
[20] *See generally* Corfield v. Coryell, 4 Wash. C.C. 371 (1823)
[21] *See* Roessler, *supra* note 2, at 130-32.
[22] *See Id.*

immunities clause of the Constitution.[23] Justice Washington asked "what are the privileges and immunities of citizens in the several States?"[24] His answer was, they "are, in their nature fundamental; which belong of right to the citizens of all free Governments."[25] Justice Washington explained that to list the all-encompassing "fundamental principles" in the privileges and immunities "would be perhaps more tedious than difficult to enumerate."[26] Justice Washington's personal attempt to list the fundamental rights included the "protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety."[27] He wrote that these are "mentioned as some of the particular privileges and immunities of citizens . . . and the enjoyment of them by the citizens of each State, in every other State, was manifestly calculated."[28]

Representative Samuel Shellabarger of Ohio, Senator Arthur I. Boreman of West Virginia, and Representative George F. Hoar of Massachusetts, all said in post-ratification of the *Fourteenth Amendment* debates that Justice Washington's "descriptions of the privileges and immunities of citizenship protected by Article IV also describe the scope of such privileges or immunities in the Fourteenth Amendment."[29] Representative James Monroe, a member of the Forty-Second Congress, explained that the Constitution's interpretation, including the *Fourteenth Amendment*, should not be limited to those perceptions as they existed in the late 1800's.[30]

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[23] *See Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.* at 131.
[30] *Id.* at 136-137.

Representative Monroe said,

> [I]n time, new circumstances will arise, new social conditions appear, and minds will then be found who will propose to include the new phenomena under the old rule. This will startle many as an innovation, as a violation of the constitution, whereas it may only be the application of known and admitted principles to new circumstances. From the nature of things the field to which constitutional law may be applied will constantly change or be enlarged, and we must not confound this natural expansion with a violation of the instrument itself.[31]

These documented assertions found in the legislative history, made by Congressional lawmakers regarding the *Fourteenth Amendment*, requested that future legislators and jurists look at the Constitution as a pronouncement of fundamental rights whose list was expansive and *expandable*. Those requests, and the legislative history that proves them, were not referred to by the Justices of the Supreme Court in their decisions as the decades have gone by since the ratification of the *Fourteenth Amendment*.

"[F]ormer Representative John M. Broomall," a framer of the *Fourteenth Amendment*, "assumed [] that equality in civil rights was guaranteed to women by the Amendment."[32] When Mr. Broomall was "[a]t the Pennsylvania Constitutional Convention of 1872–1873," he expressed his beliefs regarding the rights of women when he said,

> Four hundred years ago women, according to the popular notion of that day, had no souls … Still later than that, the women were beasts of burden … Still the world moves, and in our time they have been granted equal civil rights with men. The next step is coming, and there are those living who will see it … That step is equality of all human beings both before the law and in the making of the law.
>
> Thus it is that the world moves, and the man who is not prepared to keep pace with its motion had better get out of the way.[33]

[31] *Id*. at 137.
[32] Steven G. Calabresi & Juli T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 56 (2011).
[33] *Id*. at 56-57.

Representatives James Monroe and John M. Broomall, and many other *Fourteenth Amendment* framers like them, it appears, "believed that equal political rights would make women the complete equals of men under the law."[34] And that "[e]qual political rights would necessarily mean equal civil rights."[35] But the *Fourteenth Amendment's* "Section 1 is premised on the idea that all citizens enjoy equal civil rights which it calls 'privileges' or 'immunities.'"[36] "The Fifteenth Amendment establishe[d] that a *subset* of citizens with equal civil rights," which were white and African-American men, "enjoy[ed] equal *political rights* like the right to vote in addition to equal civil rights."[37] With this concept in mind, it stands to reason that "[p]olitical rights are … harder to get than civil rights."[38]

***Bradwell v. Illinois* (1873).[39]** Post-ratification Fourteenth Amendment United States Supreme Court sex-discrimination jurisprudence began in 1873 with the Court decision in *Bradwell v. Illinois*. Myra Bradwell brought her case as a "challenge [to] an Illinois law that prohibited women from practicing law."[40] Ms. Bradwell's attorney presented the question to the Court; "'Can a female citizen, duly qualified in respect of age, character, and learning, claim, under the fourteenth amendment, the privilege of earning a livelihood by practicing at the bar of a judicial court?'"[41] In the majority opinion for the Supreme Court, Justice Miller stated,

> In regard to [The Fourteenth] [A]mendment[,] counsel for the plaintiff… says that there are certain privileges and immunities which belong to a citizen of the United States… , and he proceeds to argue that admission to the bar of a State of a person

[34] *Id*. at 57.
[35] *Id*.
[36] Steven G. Calabresi & Nicholas P. Stabile, *Symposium: The Second Founding: On Section 5 of the Fourteenth Amendment*, 11 U. PA. J. CONST. L. 1431, 1443-1444 (2009).
[37] *Id*. at 1444. [emphasis added]
[38] *Id*. at 1443-1444.
[39] Bradwell v. The State of Illinois, 83 U.S. 130 (1873).
[40] Calabresi, *supra* note 32, at 60.
[41] *Id*.

> who possesses the requisite learning and character is one of those which a State may not deny. In this latter proposition we are not able to concur with counsel.[42]

Ms. Bradwell's attorney argued that even though "[t]he legislature may say at what age candidates shall be admitted [to the bar]" and may also "elevate or depress the standard of learning required" for a license to practice law, "a qualification, to which a whole class of citizens never can attain, is not a regulation of admission to the bar, but is, as to such citizens, a prohibition."[43] Counsel for Bradwell went on to say,

> If the [Illinois] legislature may, under the preten[s]e of fixing qualifications, declare that no female citizen shall be permitted to practice law, it may as well declare that no colored citizen shall practice law; for the provision in the Constitution of the United States which secures to colored male citizens the privileges of admission to the bar, or the pursuit of the other ordinary avocations of life, is the provision that 'no State shall make or enforce any law which shall abridge the privileges or immunities of a citizen.'"[44]

As powerful as those words may have been, they did not sway the Court. Justice Miller responded to Bradwell's attorney directly in the Court's opinion by stating, "[w]e agree with him that there are privileges and immunities belonging to citizens of the United States, in that relation and character, and that it is these and these alone which a State is forbidden to abridge. But the right to admission to practice in the courts of a State is not one of them."[45] The Court did stop short of "reasoning that women were not protected by the Fourteenth Amendment."[46] Although the brief opinion of the Court was delivered by Justice Miller, the revealing language that expressed what this author believes was the true sentiment of the Court is contained in the concurring opinion delivered by Justice Bradley.

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[42] Bradwell, *supra* note 39, at 138-39.
[43] Calabresi, *supra* note 32, at 60.
[44] *Id*.
[45] Bradwell, *supra* note 39, at 139.
[46] Calabresi, *supra* note 32, at 60.

Associate Justice Bradley began his concurring opinion by acknowledging the fact that Myra Bradwell was "a married woman."[47] Justice Bradley continued his analysis by stating that Ms. Bradwell's claim "assumes" that "women as citizens" have the right "under the fourteenth amendment of the Constitution … to engage in any and every profession, occupation, or employment in civil life."[48] Justice Bradley states that the "natural and proper timidity and delicacy" of women makes them unfit "for many of the occupations of civil life."[49] This author believes if Susan B. Anthony would have had the opportunity, she would have delivered quite a strong contrary rebuttal to Justice Bradley's remarks regarding women's overall fitness for civil life.

As the concurring opinion continued, Justice Bradley stated it was the "constitution of the family" and the "harmony" which was "founded in [its] divine ordinance" that would be "repugnant to the idea of a woman adopting a distinct and independent career from that of her husband."[50] But it was a common law incapacity for a married woman to make contracts "without her husband's consent" that Justice Bradley used to fundamentally justify why women could not "perform the duties and trusts that belong to the office of an attorney and counselor."[51]

Justice Bradley concluded his opinion by reasoning that it is "[t]he paramount destiny and mission of woman [] to fulfill the noble and benign offices of wife and mother. This is the law of the Creator."[52] It is not clear from Justice Bradley's dicta if he felt that the "law of the Creator"[53]

[47] Bradwell, *supra* note 39, at 140.
[48] *Id.*
[49] *Id.*
[50] *Id.* at 141.
[51] *Id.*
[52] *Id.*
[53] *Id.*

trumped the Supreme law of the land. Additionally, nowhere in the opinion offered by the Court is there any reference to the legislative history of the drafting of the *Fourteenth Amendment*.

According to the Supreme Court Historical Society web site, the Justices that were sitting on the bench of the Supreme Court for the 1872 – 1873 session to hear *Bradwell v. Illinois* were all born between 1803 and 1816.[54] Specifically, Justices Clifford (1803), Swayne (1804), and Strong (1808), were all born when Thomas Jefferson was President.[55] Remarkably, these Justices were born only a few short years after President George Washington's death in 1799.[56] Justice Clifford was born a mere 27 years after independence was declared from England in 1776. The remaining Justices on the Court were all born within the presidency of James Madison, another colonial Founding Father. The significance this author is attempting to allude to is the fact that the era in which these Justices were reared was squarely in the shadow of the Founding Fathers of the United States of America; a group that had come to power through the writing of the Declaration of Independence in the generation before the sitting Supreme Court of 1873. There can be no doubt that their Colonial-American upbringing played an integral role in the Justices' mindset when they were establishing the earliest Supreme Court sex-discrimination doctrine. Unfortunately for Ms. Bradwell, and the rest of America's women, the Supreme Court Justices, raised by colonial fathers from the Eighteenth Century, could not see into the future where the year 1900 A.D. and the Twentieth Century lie only a scant 26 years ahead.

Early Indications: The Fourteenth Amendment and its Potential Impacts. In the days and months leading up to the passing of the *Fourteenth Amendment* in Congress, bits and pieces

[54] *See* "The Supreme Court Historical Society - Home." N.p., n.d. Web. 09 July 2012. Found at http://www.supremecourthistory.org
[55] *See Id.*
[56] *See* "George Washington." The White House. N.p., n.d. Web. 09 July 2012. Found at http://www.whitehouse.gov/about/presidents/georgewashington

of the Amendment were circulated through media outlets of the time, like newspapers and other periodical publications. These releases gave the post-Civil War citizenry a glimpse at what would become the *Fourteenth Amendment*. Once the full document was ratified, women's groups, like the National Woman's Suffrage Association, began to "claim the right to vote" based on the belief that the "new constitutional amendment" entitled women to vote "under the Privileges and Immunities Clause."[57] The National Woman's Suffrage Association (NWSA) leadership headed by the now legendary Susan B. Anthony and Elizabeth Cady Stanton, "petitioned Congress for a Section Five statute declaring that the Fourteenth Amendment protected women's right to vote."[58] At the same time that NWSA leadership was working on the United States Congress for legislative action regarding women's enfranchisement into the political system, "women across the nation engaged in civil-disobedience voting" in an effort to "produce test-case constitutional litigation."[59] This strategy ultimately led to the United States Supreme Court decision in *Minor v. Happersett* in 1875.[60]

***Minor v. Happersett* (1875).**[61] It had been "[t]wo years [][since] the U.S. Supreme Court's decision in *Bradwell*" when the Court, in *Minor v. Happersett*, ruled on "whether women ha[d] the right to vote under the Fourteenth Amendment."[62] Chief Justice Waite delivered the opinion for the Supreme Court in *Happersett*.[63] In the Court's opinion, Chief Justice Waite chose to first

[57] Reva B. Siegel, *Social Movements and Law Reform: Text in Contest: Gender and The Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 334-335 (2001).
[58] *Id.*
[59] *Id.* at 335.
[60] *Id.*
[61] Minor v. Happersett, 88 U.S. 162 (1875).
[62] Calabresi, *supra* note 32, at 60.
[63] Happersett, 88 U.S. at 162.

address whether "women have always been considered as citizens the same as men."[64] Chief Justice Waite wrote that the "abundant proof" as to women's citizenry "is to be found in the legislative and judicial history of the country." [65] The Court's opinion stated that Mrs. Minor "has always been a citizen [of the United States] from her birth, and entitled to all the privileges and immunities of citizenship."[66]

Attorneys for Mrs. Virginia Minor "argued the restrictions on women's suffrage violated the Privileges and Immunities Clause[]"[67] of the *Fourteenth Amendment*. Justice Waite wrote in the Court's *Happersett* opinion that if suffrage was a "privilege[] of a citizen of the United States[,]" set out in the *Privileges and Immunities Clause of the Constitution*, then "[t]he direct question is, therefore, presented whether all citizens are necessarily voters."[68] Chief Justice Waite stated that "[t]he Constitution does not define the privileges and immunities of citizens."[69] He wrote that to find "that definition we must look elsewhere[,]" but "[i]n this case we need not determine what they are, but only whether suffrage is necessarily one of them."[70]

In the opinion of the Court, Chief Justice Waite stated that "the Constitution has not added the right of suffrage to the privileges and immunities of citizen[,] … [i]t simply furnished an additional guaranty for the protection of such as *he* already had."[71] From that point in the opinion, Chief Justice Waite embarked on a lengthy discussion and testimonial of the history of

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[64] *Id*. at 169.
[65] *Id*.
[66] *Id*. at 170.
[67] Samantha Barbas, *Symposium on Gender, Parenting, and the Law: Note: Dorothy Kenyon and the Making of Modern Legal Feminism*, 5 STAN. J.C.R. & C.L. 423, 434 (2009).
[68] Happersett, 88 U.S. at 170.
[69] *Id*.
[70] *Id*.
[71] *Id*. at 171. [*emphasis added*]

voter laws established in the original colonies of the United States.[72] Justice Waite stated in the Court's opinion that they were then seeking to ascertain the intentions of the Framers of the Constitution as it related to whether or not they "intended to make all citizens of the United States voters."[73] Justice Waite stated "if it had been intended to make all citizens of the United States voters, the framers of the Constitution would [] have … [made it] expressly declared."[74]

Even though Chief Justice Waite acknowledged in the Court's opinion that the Court researched the intent of the Framers of the *Fourteenth Amendment* and the Constitution through "legislative and judicial history,"[75] and how they "must look elsewhere"[76] for the defined privileges and immunities, and that considerations "outside [the Constitution] is equally effective[,]"[77] an analysis of the legislative history of the drafting of the *Fourteenth Amendment* is conspicuously missing.

Ultimately, "the Court in *Minor v. Happersett* did not deny that women's civil rights were equally protected by the Fourteenth Amendment," but ruled that the Constitution did not guarantee any citizens' "right to vote because the Amendment protected only civil and not political rights."[78] In reaction to the *Happersett* ruling, the National Woman's Suffrage Association (NWSA) "began to pursue a constitutional amendment."[79] Even though "Congress

[72] *See Id*. at 172-173.
[73] *Id*. at 173.
[74] *Id*.
[75] *Id*. at 169.
[76] *Id*. at 170.
[77] *Id*. at 176.
[78] Calabresi, *supra* note 32, at 62-63.
[79] Siegel, *supra* note 57, at 335.

initially appeared receptive to the Amendment, [] the movement did not secure its ratification for another three decades."[80]

***Muller v. Oregon* (1908).**[81] Thirty-three years after the decision in *Happersett*, the U.S. Supreme Court decided *Muller v. Oregon*, 208 U.S. 412 (1908), a labor case. As was the case in *Muller*, "a number of laws effectively excluded women from traditionally male jobs."[82] The appellant in the case, the owner of a laundry, was criminally cited for allowing female employees to work longer than was permitted under an Oregon state statute.[83] The laundry owner argued that the law that restricted the hours of labor allowable by females violated the *Fourteenth Amendment* of the Constitution.[84] "[I]n the name of 'protecting' [][women] from supposedly sex-specific harms[,]" laws were enacted and upheld that "limit[ed] their hours and time of work, and [] regulat[ed] other conditions of employment."[85]

Justice Brewer delivered the opinion of the Court in *Muller* stating that "[t]he single question [of the case] is the constitutionality of the statute … as it affects the work of a female in a laundry."[86] Justice Brewer chose to "put[] to one side the elective franchise[]" for women in his analysis of the Oregon statute while acknowledging that according to Oregon law a woman's "personal and contractual rights [] stand on the same plane as the other sex."[87] This is a quite progressive stance for the State of Oregon since U.S. Supreme Court Associate Justice Bradley's

[80] *Id*.
[81] Muller v. Oregon, 208 U.S. 412 (1908).
[82] Ann E. Freedman, *Sex Equality, Sex Differences, and the Supreme Court*, 92 YALE L.J. 913, 920 (1983).
[83] Muller, *supra* note 81, at 412.
[84] *Id*.
[85] Freedman, *supra* note 82, at 920.
[86] Muller, *supra* note 81, at 417.
[87] *Id*. at 418.

concurring opinion in *Bradwell*, in which he basically said for a married woman to make contracts "without her husband's consent"[88] was impermissible under "the law of the Creator."[89]

Attorneys for the laundry owner in *Muller* argued that under the *Fourteenth Amendment* "th[e] law interfered with [the] constitutional rights of liberty of contract previously established for men[,]"[90] "under the rule of *Lochner v. New York*."[91] Justice Brewer stated in the Court's opinion that it was due to a "woman's physical structure and the performance of [her] maternal functions" that warranted the Court's denial of women's "general right to contract" that the Court had previously protected for men in *Lochner*.[92] Justice Brewer stated that the reason the Court opted to deny women the same rights the Court afforded men was "not merely [due to] her own health, but the well-being of the race – justify[ing] [the] legislation to protect her from the greed as well as the passion of man."[93] Justice Brewer states in the opinion that "history discloses the fact that woman has always been dependent upon man[,]"[94] but nowhere in the opinion is mentioned the legislative history regarding the *Fourteenth Amendment*.

***Adkins v. Children's Hospital* (1923).**[95] The Supreme Court of the United States ruled in another labor case, *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), in which the significance of this case was that it was "the first sex discrimination case to be decided by the Supreme Court following the adoption of the [Nineteenth] Amendment in 1920."[96] Although this case was decided through the *Due Process clause of the Fifth Amendment* to the Constitution and not the

[88] Bradwell, *supra* note 33, at 141.
[89] *Id*.
[90] Freedman, *supra* note 82, at 920.
[91] Calabresi, *supra* note 32, at 63.
[92] Muller, *supra* note 81, at 421.
[93] *Id*. at 422.
[94] *Id*. at 421.
[95] Atkins et al. v. Children's Hospital of the District of Columbia, 261 U.S. 525 (1923).
[96] Calabresi, *supra* note 32, at 93.

Fourteenth Amendment, the sex-discrimination jurisprudence established in this case bears analysis. Justice Sutherland, writing for the majority in *Adkins*, referenced the previously decided *Muller* case in which the Court had used "the fact that historically woman has always been dependent upon man," and that man has "established his control [over woman] by superior physical strength."[97] Justice Sutherland went on the state:

> But the ancient inequality of the sexes, otherwise than physical, as suggested in the Muller Case has continued "with diminishing intensity." In view of the great – not to say revolutionary – changes which have taken place since that utterance, in the contractual, political and civil status of women, culminating in the *Nineteenth Amendment*, it is not unreasonable to say that these differences have now come almost, if not quite, to the vanishing point.[98]

These words by Justice Sutherland are substantial. Justice Sutherland said that the Court could no longer "accept the doctrine that women of mature age … may be subjected to restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances."[99] Although Justice Sutherland and "[t]he majority in *Adkins* [] premised [their decision] on the idea that after 1920, sex discrimination was, as a constitutional matter, a form of caste[,]"[100] not every member of the Court was ready to embrace the idea. In their dissent, "Justice Holmes and Chief Justice Taft both denied that the Nineteenth Amendment should have any effect on the constitutional analysis."[101] And, with Justice Holmes holding stern to traditional beliefs of women, he stated in the dissent that "'[i]t will need more than the

[97] Atkins, *supra* note 95, at 553.
[98] *Id*.
[99] *Id*.
[100] Calabresi, *supra* note 32, at 95.
[101] *Id*. at 94.

Nineteenth Amendment to convince me that there are no differences between men and women, or that legislation cannot take those differences into account.'"[102]

It is not disputed, in the earlier United States Supreme Courts or in the modern Courts, that Congress regularly "delegate[d] the drafting of statutory text in its chambers, its conferences, and its committees."[103] These meetings and sessions can be found and used by the Court by accessing Congress's legislative history. "The Supreme Court began using legislative history in 1860."[104] The time period of the New Deal legislation in the 1930s and the Supreme Court's "overthrow of the "'plain meaning rule'" ushered in "the modern era of fuller, more accurate use of legislative history."[105] But as we will see, the use of *Fourteenth Amendment* legislative history on sex-discrimination cases is remarkably absent.

***West Coast Hotel Co. v. Parrish* (1937).[106]** In the forty plus years following the ratification of the *Nineteenth Amendment* and the decision in *Adkins*, the United States Supreme Court ruled on three sex-discrimination cases; *West Coast Hotel Co. v. Parrish* (1937), *Goesaert v. Cleary* (1948), and *Hoyt v. Florida* (1961). First, the labor case between Elsie Parrish and her former employer, West Coast Hotel Company, was heard by the Court in December of 1936 and decided in March of 1937.[107] In the majority opinion, Justice Hughes opined that the Supreme Court of the State of Washington properly upheld that the State of Washington statute establishing a minimum wage for women "invoked principles long established by [] [the United

[102] *Id*.
[103] Charles Tiefer, *The Reconceptualization of Legislative History in the Supreme Court*, 2000 WIS. L. REV. 205, 212 (2000).
[104] *Id*.
[105] *Id*. at 212-213.
[106] West Coast Hotel Co. v. Parrish et al, 300 U.S. 379 (1937).
[107] *See Id*.

States Supreme] Court in the application of the *Fourteenth Amendment*."[108] The appellant in the case, West Coast Hotel Company, "relie[d] upon the decision of th[e] Court in *Adkins v. Children's Hospital*, 261 U.S. 525, which held invalid the District of Columbia Minimum Wage Act, which was attacked under the *due process clause of the Fifth Amendment*."[109] Justice Hughes stated in the opinion that the State of Washington's "legislature was entitled" to enact a statute that addressed "the evils of the "'sweating system,'" [and] the exploiting of workers at wages so low as to be insufficient to meet the bare cost of living."[110] Justice Hughes went on to state that the fact that other states in the Union had adopted "similar requirements" as the State of Washington statute amounted to "a deepseated conviction" nationally to address poverty for women; and concluded that the "[l]egislative response" by the State of Washington "[could] []not be regarded as arbitrary or capricious."[111]

Even though it may be accepted today that contemporary labor laws protect the rights of employees, in the early to mid-1930s the Supreme Court of the United States' jurisprudence regarding the right to contract appeared firmly entrenched. This author perceives the majority's opinion in *West Coast Hotel Co. v. Parrish*, in a patriarchal protectionist stance; as still viewing women as a class of citizens that needed protection stemming from long held views of women's inability to compete with men. Justice Hughes stated that "[w]hat can be closer to the public interest than the health of women and their protection from unscrupulous and overreaching

[108] *Id*. at 389.
[109] *Id*.
[110] *Id*. at 398-399.
[111] *Id*. at 399.

employers?"[112] A gender-neutral law protecting both men and women from "unscrupulous … employers" would have been more appropriate.[113]

As part of the *West Coast Hotel Co. v. Parrish* dissent, Justice Sutherland forwarded his views still fresh in his mind from the majority opinion in *Adkins*.[114] With the *Lochner* doctrine echoing in his dissent, Justice Sutherland still manages to advocate for the rising tide of the rights of women and how they are becoming more equal to men.[115]

Justice Sutherland wrote,

> The common-law rules restricting the power of women to make contracts have, under our system, long since practically disappeared. Women today stand upon a legal and political equality with men. There is no longer any reason why they should be put in different classes in respect of their legal right to make contracts; nor should they be denied, in effect, the right to compete with men for work paying lower wages which men may be willing to accept.[116]

Essentially, Justice Sutherland was saying that if women wanted to work for wages that did not earn them enough money to afford life's basic necessities alongside of men, consequently, the *Lochner* doctrine afforded them that right.[117] In principle, Justice Sutherland argued for an economic equality for women to work in poverty, but it was at least a measure of equality, nonetheless. Both Justice Hughes and Justice Sutherland cited to previous Supreme Court cases upholding principles from the *Fourteenth Amendment*, but neither opinion cited to, or quoted from, the legislative history of the Amendment itself.

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[112] *Id*. at 398.
[113] *Id*.
[114] *See Id*. at 401-414.
[115] *See Id*. at 411-412.
[116] *Id*.
[117] *See Id*. at 401-414.

***Goesaert v. Cleary* (1948).**[118] As is the case in life and nature, everything has a retreat of sorts from time to time. The decision in *Goesaert v. Cleary* (1948) marks a clear step backwards regarding the forward progression of United States Supreme Court sex-discrimination jurisprudence.[119] In the majority opinion of an 6-3 decision, Justice Frankfurter stated that the issue before the Court was whether "Michigan can[] forbid females generally from being barmaids and at the same time make an exception in favor of the wives and daughters of the owners of liquor establishments."[120] In Justice Frankfurter's rational analysis of the case through the Equal Protection Clause of the Fourteenth Amendment, he states that the "Constitution in enjoining the equal protection of the laws upon States precludes irrational discrimination as between persons or groups of persons in the incidence of a law[,]"[121] but he adds the caveat that "[t]he Fourteenth Amendment did not tear history up by the roots."[122]

Justice Frankfurter writes in the *Goesaert v. Cleary* majority opinion that "despite the vast changes in the social and legal position of women … [t]he Constitution does not require [State] legislatures to reflect sociological insight, or shifting social standards" and, additionally, States have the right to "draw[] a sharp line between the sexes."[123] Justice Frankfurter and the majority sided with the State of Michigan's patriarchal belief "that the oversight assured through ownership of a bar by a barmaid's husband or father minimizes hazards that may confront a barmaid without such protecting oversight."[124]

[118] Goesaert v. Cleary, 335 U.S. 464 (1948).
[119] *See Id.*
[120] *Id*. at 465.
[121] *Id*. at 466.
[122] *Id*. at 465.
[123] *Id*. at 465-466.
[124] *Id*. at 466.

Alternatively, Justice Rutledge's sharp, but concise, dissent begins with the statement that "the *equal protection clause* ... require[s] lawmakers to refrain from invidious distinctions."[125] Justice Rutledge goes on to write that although "[a] male owner" may be "absent from his bar, [he] may employ his wife and daughter as barmaids. [But] [a] female owner may neither work as a barmaid herself nor employ her daughter in that position."[126] In language that will be echoed in *Reed v. Reed* some 23 years later, Justice Rutledge stated,

> [T]here could be no [] conceivable justification for … [a] statute [that] *arbitrarily* discriminates between male and female [bar] owners … [due to] a legislative solicitude for the moral and physical well-being of women, but for the law, would be employed as barmaids.[127]

Although Justices Frankfurter and Rutledge chose to not cite to any *Fourteenth Amendment* legislative history within the Court's majority and dissenting opinions in *Goesaert v. Cleary*, the Supreme Court had used legislative history in rendering its Court decisions in the relatively recent past. Use of legislative history became increasingly necessary by the Court due to "changes in the nature of statutes" brought on "by New Deal legislation."[128] "For example, in 1941, the Supreme Court made use of legislative history to interpret the word "'hire'" under the National Labor Relations Act."[129] Later, in 1944, "the Supreme Court clarified the meaning of "'public utility'" as used in the Emergency Price Control Act in part by relying on House committee hearings."[130] Although it is difficult to predict an alternate outcome in every case, it is the contention of this author that had the Supreme Court of the United States used the legislative history of the *Fourteenth Amendment* when conducting its analyses of sex-discrimination cases,

[125] *Id*. at 467-468.
[126] *Id*. at 468.
[127] *Id*. [emphasis added].
[128] Koby, *supra* note 10, at 371.
[129] *Id*.
[130] *Id*.

the intent of at least some of the framers to extend to women the plethora of rights found within the *Privileges and Immunities Clause*, along with new meaning to the *Equal Protection* and *Due Process* clauses, would have been recognized and taken more into consideration as part of the Court's decision making process.

***Hoyt v. Florida* (1961).**[131] In 1961, the Court rendered its decision in *Hoyt v. Florida*.[132] Justice Harlan submitted the unanimous opinion for the Court that considered whether Mrs. Gwendolyn Hoyt's second degree murder "trial before an all-male jury violated rights assured by the Fourteenth Amendment."[133] Mrs. Hoyt's claim stated that the all-male jury selected for her second degree murder trial was an unconstitutional "product of a state jury statute which works [to the] … exclusion of women from jury service."[134] Justice Harlan started the opinion by first addressing the challenge that the statute was unconstitutional on its face.[135]

Justice Harlan wrote,

> We of course recognize that the Fourteenth Amendment reaches not only arbitrary class exclusions from jury service based on race or color, but also all other exclusions which "single out" any class of persons "for different treatment not based on some reasonable classification.[136]

Justice Harlan chose to focus the Court's rational basis opinion hinging on whether the exemption of women from registering for jury duty amounted to an "exclusionary device."[137] Justice Harlan stated that "the relevant inquiry is whether the exemption itself is based on some reasonable classification and whether the manner in which it is exercisable rests on some rational

[131] Hoyt v. Florida, 368 U.S. 57 (1961).
[132] *Id*.
[133] *Id*. at 58.
[134] *Id*.
[135] *See Id*. at 59.
[136] *Id*. at 59-60.
[137] *Id*. at 61.

foundation."[138] Justice Harlan and the unanimous Court ruled that the statute did rest on a rational basis.[139] Justice Harlan wrote that the State of Florida statute was "acting in pursuit of the general welfare" and that due to a woman's "own special responsibilities[,]" she "should be relieved from the civic duty of jury service" unless "she herself determines" otherwise.[140] The "special responsibilities" that Justice Harlan wrote about were due to the fact the Court opined that a "woman is still regarded as the center of [the] home and family life."[141] This finding by the Court in 1961 was in spite of "the enlightened emancipation of women from the restrictions and protections of bygone years."[142]

Justice Harlan, in the *Hoyt* opinion for the Court, wrote that the instant "case in no way resemble[d] those [cases] involving race or color" and that "neither the unfortunate atmosphere of ethnic or racial prejudices … nor the long course of discriminatory administrative practice[s]" were present.[143] This author believes that the Court used language in the *Hoyt* opinion like "enlightened emancipation of women"[144] specifically due to the nearly 100 years of Supreme Court sanctioned "discriminatory administrative practice[s]."[145] As has been the case to this point in the establishment of sex-discrimination jurisprudence by the Court, Justice Harlan did not use legislative history of the *Fourteenth Amendment* in the opinion.

Throughout the decade between the Court's decision in *Hoyt* and the decision in *Reed v. Reed*, the challenge "was essentially to get the Court to see the problem[]" with sex-

[138] *Id*.
[139] *See Id*.
[140] *Id*. at 62-63.
[141] *Id*. at 62.
[142] *Id*. at 61-62.
[143] *Id*. at 68.
[144] *Id*. at 61.
[145] *Id*. at 68.

discrimination.[146] The Warren Court of the 1960s "steadfastly refused applications to review a number of cases in which state and lower federal courts had upheld official discrimination against women."[147] National Organization of Women attorney Mary Eastwood, in 1967, "advised her organization that pursuing constitutional change through both lawmaking and adjudication might serve … the movement and strengthen its case."[148] Speaking about the Equal Rights Amendment to the Constitution, Ms. Eastwood said,

> Even if the ERA fails to pass, vigorously pushing for it now will show women are demanding equal rights and responsibilities under the law by the most drastic legal means possible – a constitutional amendment. The effect, provided we make clear we think [the] 14th [amendment] properly interpreted should give women [the] same unqualified protection, would be to improve our chances of winning the 14th amendment cases.[149]

Modern Supreme Court sex-discrimination jurisprudence has been established through using an analogous doctrine to race-discrimination.[150] By using "the concept of the "'stereotype'" that the civil rights movement" employed during the 1960s, feminists "explain[ed] why laws distinguishing between men and women did not rationally reflect differences in the family roles[,]" like those cited in the decision in *Hoyt*, "but instead inflicted constitutionally cognizable harm on "'individuals.'"[151] Future Supreme Court Justice, Professor Ruth Bader Ginsburg, then a "young law professor[,] [was] chosen by the ACLU" to write the brief for the appellant in *Reed v. Reed*.[152] In her brief, Professor Ginsburg "honed the race/sex analogy into an

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[146] Paul J. Mishkin, *Equality*, 43 LAW & CONTEMP. PROBS. 51, 60 (1980).
[147] *Id*.
[148] Reva B. Siegel, *The Brennan Center Jorde Symposium on Constitutional Law: Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA; 2005-06 Brennan Center Symposium Lecture*, 94 CALIF. L. REV. 1323, 1367 (2006).
[149] *Id*. at 1368.
[150] *See* Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 945, 953-54 (2002).
[151] Siegel, *supra* note 148, at 1371.
[152] *Id*.

argument for applying to sex-based state action the same strict scrutiny the Court had recently begun to apply to race-based state action."[153] "Notwithstanding the power of the civil rights movement in the 1960s, there were important differences between race and sex classifications – points of disanalogy that haunt sex discrimination law to this day."[154] Still, the continued effectiveness of current sex-discrimination jurisprudence relies on "the race/gender analogy to deflect attention from" the fallacies regarding the legislative "history of the Fourteenth Amendment."[155]

[153] *Id*.
[154] *Id*. at 1372.
[155] Siegel, *supra* note 150, at 966.

Cases decided during the Chief Justice Warren Burger Court

Burger Court Cases from 1971 – 1980

Reed v. Reed **(1971).**[156] In its landmark sex-discrimination decision in *Reed v. Reed*, 404 U.S. 71 (1971), the United States Supreme Court ruled for the first time that, under the *Equal Protection Clause of the Fourteenth Amendment*, States could not enact legislation that placed a "mandatory preference to members of either sex over members of the other."[157] The Court did acknowledge "that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways;"[158] but the distinction the Court found in *Reed* was that the *Equal Protection Clause* did not afford a State the right to "legislate [] different treatment … [of] persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute."[159]

As part of its *Reed* decision, the Court cited to a 1920 United States Supreme Court decision, *Royster v. Virginia*, 253 US 412 (1920), which gave rise to the rational basis language, when the Court said "a classification "'must be reasonable, not arbitrary, and must rest upon some ground or difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'"[160] The Court in *Reed*, for the first time in United States Supreme Court history, ruled a statute unconstitutional through the application of a rational basis test for sex-discrimination stating that the differences between males and females in the United States of America did not cause them to be dissimilarly

[156] Reed v. Reed, 404 U.S. 71 (1971).
[157] *Id*. at 76.
[158] *Id.*
[159] *Id*.
[160] *Id*.

circumstanced for the purposes of the *Equal Protection Clause of the Fourteenth Amendment*. Unfortunately, the Court in *Reed* did not seek to undo past sex-discrimination jurisprudence by identifying any particular cases to overturn, nor did the *Reed* Court cite to any *Fourteenth Amendment* legislative history in its reasoning.[161]

After the Supreme Court's decision in *Reed*, a flurry of 19 cases regarding sex-discrimination under the *Fifth* and *Fourteenth Amendments* were heard by the Court in the seven years up to and including 1980. This is significant because the Court was only willing to hear a total of seven cases from 1873 – 1971, a span of almost 100 years. Although our focus in this thesis is on *Fourteenth Amendment* cases, some notable *Fifth Amendment* cases will also be covered.

***Frontiero v. Richardson* (1973).**[162] The case of *Frontiero v. Richardson*, decided in 1973, was not based on the *Fourteenth Amendment* due to the fact that the issue stemmed from a member of the United States Air Force in a suit over family benefits provided by the Air Force.[163] Although this case does not come under the purview of the *Fourteenth Amendment*, it does arguably represent "the high-water mark in the [Supreme] Court's treatment of sex discrimination."[164] Justice Brennan wrote for the four justice plurality opinion of the Court. Justice Powell delivered a concurring opinion with two other Justices in agreement with his opinion. Only Justice Rehnquist dissented. The appellant, Lieutenant Sharron Frontiero had sought an increase in "quarters allowances, and housing and medical benefits for her husband …

[161] *Id*.
[162] Frontiero v. Richardson, Secretary of Defense, 411 U.S. 677 (1973).
[163] *See Id*.
[164] John Galotto, *Note: Strict Scrutiny for Gender, via Croson*, 93 COLUM. L. REV. 508, 520 (1993).

on the ground that he was her "'dependent.'"[165] The fringe benefits were established by Congress "[i]n an effort to attract career personnel through reenlistment."[166] "Although such benefits would automatically have been granted to the *wife* of a male member[,]" Mrs. Frontiero's "application was denied" because she was forced to prove her husband's dependency.[167] It was believed at the time, that because "99% of all the members of the uniformed services [were] male," the government stood to realize a "considerable saving of administrative expense and manpower" by only forcing female service-members to prove their spouses dependency.[168] Justice Brennan and Powell ruled in their separate opinions that the Congressional statutes were discriminatory on the basis of sex in violation of the *Due Process Clause of the Fifth Amendment*.[169]

What causes this case to stand out at this moment in time was how Justice Brennan, and the other three justices who joined him, opined that this case should move the classification of gender to a "suspect" class and have strict scrutiny applied in all future cases.[170] For the first time in the history of the Supreme Court, an opinion admitted that "[t]here can be no doubt that our Nation has had a long and unfortunate history of sex discrimination."[171] Justice Brennan wrote that a "[t]raditional[] … attitude of 'romantic paternalism' … [has] in [] effect, put women, not on a pedestal, but in a cage."[172] Justice Brennan went on to point out the concurring opinion in *Bradwell v. Illinois* by Justice Bradley as evidence of the "unfortunate history of sex

[165] Frontiero, *supra* note 162, at 680.
[166] *Id*. at 679.
[167] Id. at 680. [emphasis added].
[168] *Id*. at 682.
[169] *See Id*. at 677.
[170] *Id*. at 682.
[171] *Id*. at 684.
[172] *Id*.

discrimination."[173] Referring to Justice Bradley's *Bradwell* concurring opinion, Justice Brennan said,

> As a result of notions such as these, our statute books gradually became laden with gross, stereotyped distinctions between the sexes and, indeed, throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes.[174]

Also for the first time in the history of the United States Supreme Court, an opinion held that "sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth."[175] Justice Brennan made note that "over the [previous] decade, Congress ha[d] itself manifested an increasing sensitivity to sex-based classifications[,]"[176] and that due to the increased sensitivity, "Congress itself ha[d] concluded that classifications based upon sex are inherently invidious," and that the "conclusion of a coequal branch of Government" [177] was significant and an important consideration of the Court in the development of its opinion in the instant case. Justice Brennan, representing the four members of the plurality opinion, held that "classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny."[178] Oddly enough, Justice Brennan in the plurality opinion did refer to "legislative history" [179] from the Congress of the United States; but, alas, it was from research into the United States Code statutes dealing with the Armed Forces fringe benefits and not the *Fifth* or *Fourteenth Amendments*.

[173] *Id*.
[174] *Id*. at 685.
[175] *Id*. at 686.
[176] *Id*. at 687.
[177] *Id*. at 687-688.
[178] *Id*. at 688.
[179] *Id*. at 681.

Sex-discrimination being elevated to strict scrutiny was only one vote away from becoming the majority opinion in *Frontiero*, and therefore, the law of the land; and that vote most likely would have come from Justice Powell. In the three member concurring opinion written by Justice Powell, the challenged statute was held to be unconstitutional in violation of the *Due Process Clause of the Fifth Amendment*, but Justice Powell felt it unnecessary to elevate "classifications based on sex" to strict judicial scrutiny.[180] Justice Powell had two reasons for not raising gender to a suspect class. His first rationale for this decision was a belief that the recent decision in *Reed v. Reed* held the sufficient rational support to overturn the challenged statutes without "add[ing] sex to the narrowly limited group of classifications which are inherently suspect."[181] His second rationale was "because he felt that such a statement was more appropriately left to the Equal Rights Amendment."[182]

"The Equal Rights Amendment," Justice Powell wrote, "which if adopted will resolve the substance of this precise question, has been approved by the Congress and submitted for ratification by the States."[183] Justice Powell stated that he felt that the "traditional democratic process" was underway and that he did not want the Court to act "prematurely" in elevating gender to a suspect class, giving deference and the "appropriate respect for [the] duly prescribed legislative process."[184] Ultimately, the Equal Rights Amendment as of yet has not been ratified by the States, and an opportunity was missed when "the book was closed on the Powell opinion as a statement against strict scrutiny for gender."[185] "[U]niformly accepted gender classifications

[180] *Id*. at 691.
[181] *Id*. at 692.
[182] Galotto, *supra* note 164, at 521.
[183] Frontiero, *supra* note 162, at 692.
[184] *Id*.
[185] Galotto, *supra* note 164, at 521.

such as single-sex bathrooms[] … and locker rooms[,]" along with a "fear of military draft on women" ultimately "led to the defeat of the ERA."[186] Perhaps if Justice Brennan had "articulated a [strict scrutiny] standard that required [a more] meaningful judicial review of means and ends[,]"[187] his opinion in *Frontiero* would have garnered more support within the Court.

***Kahn v. Shevin* (1974).[188]** With the opinion from *Frontiero* fresh in the minds of the Court, the next case to be heard was *Kahn v. Shevin* in 1974; Justice Douglas delivered the majority opinion for the Court.[189] Mr. Kahn, a widower and a citizen of Florida, had brought suit against the State of Florida because he believed widowers should be entitled to the same $500.00 tax exemption as widows are afforded, and that his denial by the Dade County Tax Assessor's Office was a violation of the *Equal Protection Clause of the Fourteenth Amendment*.[190]

In his opinion, Justice Douglas wrote that "[t]here can be no dispute that the financial difficulties confronting the lone woman in Florida or in any other State exceed those facing the man."[191] Justice Douglas did acknowledge the struggles facing women in America at the time by stating that "[w]hether from overt discrimination" in employment stemming from a "male-dominated culture, the job market is inhospitable to the woman seeking any but the lowest paid jobs."[192] Justice Douglas continued by stating that although a "widower can usually continue in the occupation" he had prior to his wife's death, alternatively, "the widow will find herself

[186] *Id*. at 521-522.
[187] *Id*. at 521.
[188] Kahn v. Shevin, 416 U.S. 351 (1974).
[189] *See Id*.
[190] *See Id*. at 352.
[191] *Id*. at 353.
[192] *Id*.

suddenly forced in a[n] [unfamiliar] job market … [and] because of her former economic dependency [on her deceased husband], she will have fewer skills to offer."[193]

In application of his rational basis test, Justice Douglas stated that "Florida's differing treatment of widows and widowers "'rest[s] upon some ground of difference having a fair and substantial relation to the object of the legislation[,]'" citing to a quote used in *Reed* from *Royster*.[194] The State tax law was "reasonably designed[,]" wrote Justice Douglas, in furtherance of "the state policy of cushioning the financial impact … upon the sex for which th[e] loss imposes a disproportionately heavy burden."[195] "Gender has never been rejected as an impermissible classification in all instances[,]" wrote Justice Douglas; and to cap off an almost complete digression away from the plurality opinion in *Frontiero*, Justice Douglas chose to end his opinion by quoting Chief Justice Hughes in the 1908 decision in *Muller v. Oregon*, in which the Chief Justice stated that the *Fourteenth Amendment* "imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to schemes of taxation … [and] to hold otherwise would be to subject the essential taxing power of the State to an intolerable supervision."[196] Although Justice Douglas quoted and cited to sex-discrimination cases like *Reed* and *Muller*, he did not cite to, nor did he quote from, legislative history of the *Fourteenth Amendment*.

Obviously frustrated with the decision from Justice Douglas and the majority, Justice Brennan's dissent rails against "a legislative classification that distinguishes potential

[193] *Id*. at 354.
[194] *Id*. at 355.
[195] *Id*.
[196] *Id*. at 356.

beneficiaries solely by reference to their gender-based status."[197] As in *Frontiero*, Justice Brennan argues that a "close judicial scrutiny" is warranted for "gender-based classifications [that] too often have been inexcusably utilized to stereotype and stigmatize politically powerless segments of society."[198] Justice Brennan's vehement insistence that there are "readily available" gender-neutral or narrowly tailored alternatives at the disposal of the State of Florida unfortunately fell on the deaf ears of the majority."[199] As was the case in *Frontiero*, Justice Brennan did not use *Fourteenth Amendment* legislative history to make his case for invalidating the constitutionally challenged Florida statute.

***Geduldig v. Aiello* (1974).[200]** During the same 1974 Supreme Court session that had heard *Kahn v. Shevin*, the case of *Geduldig v. Aiello* was decided. This time, Justice Stewart wrote the opinion for the majority.[201] The case was brought by four California women who believed that the State of California mandated "disability insurance system" that "exclude[d] from coverage certain disabilities resulting from pregnancy … violate[d] the *Equal Protection Clause of the Fourteenth Amendment*."[202] As part of his rational analysis of the California employment disability insurance program, Justice Stewart acknowledged that "California [] created a program to insure most risks of employment disability, it has not chosen to insure all such risks."[203] Justice Stewart continued by insisting that "[t]his Court has held that, consistently with the *Equal Protection Clause*, a State may take one step at a time, addressing itself to the problem … select[ing] one phase of one field and apply[ing] a remedy there, [while] neglecting the others

[197] *Id*. at 357.
[198] *Id*.
[199] *Id*. at 360.
[200] Geduldig v. Aiello, 417 U.S. 484 (1974).
[201] *See Id*.
[202] *Id*. at 486. [emphasis in original].
[203] *Id*. at 494-495.

…"[204] And he added that "'[t]he *Equal Protection Clause* does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all.'"[205] In upholding the program and holding the women's contention invalid, Justice Stewart wrote that "although [the appellee] has received insurance protection equivalent to that provided all other participating employees," the appellee invalidly feels that she "has suffered discrimination because she encountered a risk that was outside the program's protection."[206] Although Justice Stewart referred to the *Equal Protection Clause of the Fourteenth Amendment* numerous times in his opinion, he did not refer to recent Supreme Court sex-discrimination cases or legislative history of the Amendment.

Once again, Justice Brennan delivered a dissenting opinion chastising the majority for not using a higher standard than a rational basis. Oddly enough, Justice Douglas, the author of the majority opinion in *Kahn v. Shevin*, joined him in the dissent with Justice Marshall as well.[207] Justice Brennan wrote that due to the fact that the condition of a woman's pregnancy was used to exclude coverage, he believe that this amounted to a "dissimilar treatment of men and women, on the basis of physical characteristic inextricably linked to one sex, inevitably constitut[ing] sex discrimination."[208] Justice Brennan voiced his concern with the Court's backslide away from a higher standard of review of sex-discrimination issues when he wrote,

> [B]y its decision today, the Court appears willing to abandon that higher standard of review without satisfactorily explaining what differentiates the gender-based classification employed in this case from those found unconstitutional in *Reed* and *Frontiero*. The Court's decision threatens to return men and women to a time when "traditional" equal protection analysis sustained legislative classifications

[204] *Id*. at 495. [emphasis in original].
[205] *Id*. [emphasis in original].
[206] *Id*. at 497.
[207] *See Id*.
[208] *Id*. at 501.

> that treated differently members of a particular sex solely because of their sex. See, e.g., *Muller v. Oregon, 208 U.S. 412 (1908); Goesaert v. Cleary, 335 U.S. 464 (1948); Hoyt v. Florida, 368 U.S. 57 (1961)*.[209]

Justice Brennan cited to several Supreme Court sex-discrimination cases in his dissent. Some to use as examples of what precedent the Court should not use as in the cases of *Muller*, *Goesaert*, and *Hoyt*[210]; and what cases Justice Brennan thought the Court should use as in *Reed* and *Frontiero*.[211] Nevertheless, Justice Brennan did not include any legislative history of the *Fourteenth Amendment* in his dissent in an attempt to sway the Court to an alternate decision.

***Taylor v. Louisiana* (1975).**[212] In 1975 the Court heard the case of *Taylor v. Louisiana*, a jury selection case eerily similar to the case in *Hoyt*. The 8 – 1 decision produced the majority opinion written by Justice White and the lone dissenting opinion written by Justice Rehnquist.[213] The appellant, "Billy J. Taylor," was convicted for "aggravated kidnaping"[214] by a jury that contained no women. A State of Louisiana Constitutional provision mandated that "a woman should not be selected for jury service unless she had previously filed a written declaration of her desire to be subject to jury service."[215] Taylor brought the case to the Supreme Court because he was "deprived of what he claimed to be his federal constitutional right to "'a fair trial by jury of a representative segment of the community …,'"[216] in violation of "his *Sixth* and *Fourteenth Amendment* right[s]."[217]

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[209] *Id*. at 503.
[210] *See Id*.
[211] *See Id*.
[212] Taylor v. Louisiana, 419 U.S. 522 (1975).
[213] *See Id*.
[214] *Id*. at 524.
[215] *Id*. at 523.
[216] *Id*. at 524.
[217] *Id*. at 525. [emphasis in original].

Justice White began his analysis of the case by writing that the holding in *Duncan v. Louisiana* (1968) was part of the background of the case because "the *Sixth Amendment's* provision for jury trial [was] made binding on the States by virtue of [its selective incorporation into] the *Fourteenth Amendment*."[218] Justice White stated that it was an "unmistakable import" of the Supreme Court "that the selection of a petit jury from a representative cross section of the community is an essential component of the *Sixth Amendment* right to a jury trial."[219] Remarkably, Justice White referred to the legislative history of the "Federal Jury Selection and Service Act of 1968" in the form of "Committee Reports of both the House and the Senate" in his argument.[220]

Justice White wrote that the Court was "persuaded that the fair-cross-section requirement is violated by the systematic exclusion of women, who in the judicial district involved here amounted to 53% of the citizens eligible for jury service."[221] In the process of reaching this conclusion, Justice White wrote "the judgment that women are sufficiently numerous and distinct from men and that if they are systematically eliminated from jury panels, the *Sixth Amendment's* fair-cross-section requirement cannot be satisfied."[222] Justice White next moved to distinguish the decision the Court made in *Hoyt*. Justice White wrote that the jury selection "system" employed in the *Hoyt* case passed a "sufficiently rational basis" test, but, that

> *Hoyt* "did not involve a defendant's *Sixth Amendment* right to a jury drawn from a fair cross section of the community and the prospect of depriving him of that right if women as a class are systematically excluded. The right to a proper jury cannot be overcome on merely rational grounds. There must be weightier reasons if a distinctive class representing 53% of the eligible jurors is for all practical

[218] *Id*. [emphasis in original].
[219] *Id*. at 528. [emphasis in original].
[220] *Id*. at 529-530.
[221] *Id*. at 531.
[222] *Id*.

> purposes to be excluded from jury service. No such basis has been tendered here.[223]

It is not clear if the "weightier reasons" (or *heightened scrutiny*) that Justice White was referring to was meant to cover laws and statutes concerning strictly jury selection, or if laws and statutes involving the discrimination of women required a "weightier reasons."[224] Regardless of that quandary, Justice White was crystal clear when he opined that "[i]f it was ever the case that women were unqualified to sit on juries or were so situated that none of them should be required to perform jury service, that time has long since passed."[225] To his credit, Justice White did cite to and quote from the legislative history involving the Federal Jury Selection and Service Act of 1968, but unfortunately for our case, he did not refer to legislative history from the *Fourteenth Amendment*.

***Stanton v. Stanton* (1975).[226]** The Supreme Court reviewed the case between *Stanton v. Stanton* in 1975 to decide if it was constitutionally justifiable under the *Fourteenth Amendment* for a father to be obligated to pay child support for his daughter until the age of 18 years old, while his child support obligations to his son do not end until he is 21 years old.[227] The 8 – 1 decision produced the majority opinion written by Justice Blackmun and the lone dissenting opinion written by Justice Rehnquist. Justice Blackmun wrote that the members of the Court "find it necessary in this case to decide whether a classification based on sex is inherently suspect."[228] Justice Blackmun wrote that the Court felt that *Reed v. Reed* was the "controlling"

[223] *Id*. at 534. [emphasis in original].
[224] *Id*.
[225] *Id*. at 537.
[226] Stanton v. Stanton, 421 U.S. 7 (1975).
[227] *See Id*.
[228] *Id*. at 13.

case in this matter and that "[t]he test here, then, is whether the difference in sex between children warrants the distinction … drawn by the Utah statute. We conclude that it does not."[229]

In a noteworthy portion of the opinion, Justice Blackmun writes that; "We therefore conclude that under any test – compelling state interest, or rational basis, *or something in between* – [the Utah statute], in the context of child support, does not survive an equal protection attack."[230] "[*O*]*r something in between*"[231] rational basis and compelling/strict scrutiny is a not so subtle code by Justice Blackmun and the Court that there may be a heightened scrutiny that the Court would be willing to accept regarding gender. The upward movement toward this more stringent test for sex-discrimination was encouraging for American women, but, Justice Blackmun and the majority in this opinion still did not refer to, or cite to, legislative history from the *Fourteenth Amendment* as part of its decision.

***Craig v. Boren* (1976).[232]** In the case *Craig v. Boren*, Justice Brennan delivered the opinion for the majority of the Court. Not since the plurality opinion in *Frontiero* from three years earlier has Justice Brennan's name been mentioned as the author of a non-dissenting sex-discrimination case opinion. This time he had the majority of the Court with him. The case before the Court involved a pair of Oklahoma statutes. Both statutes prohibiting the sale of 3.2% beer; one prohibited the sale to males under the age of 21, and the second to females under the age of 18.[233] The appellants Craig, a male between the age of 18 and 21 years old, and Whitener,

[229] *Id*. at 14.
[230] *Id*. at 17. [emphasis added].
[231] *Id*. [emphasis added].
[232] Craig v. Boren, 429 U.S. 190 (1976).
[233] *See Id*. at 191.

a licensed vendor of 3.2% beer, brought a complaint that claimed the "gender-based differential" in the statutes amounted to an "invidious discrimination against males 18-20 years of age."[234]

Justice Brennan began his analysis of the statutes by reviewing the precedents set in *Reed v. Reed*. Justice Brennan wrote "that Reed emphasized that statutory classifications that distinguish between males and females are "'subject to scrutiny under the *Equal Protection Clause*.'"[235] Justice Brennan also wrote that "[t]o withstand [a] constitutional challenge, previous cases establish that classifications by gender *must serve important governmental objectives and must be substantially related to achievement of those objectives*."[236] This language "established intermediate scrutiny as the standard of review for sex classifications."[237]

Justice Brennan gave *Reed v. Reed* the credit for "provid[ing] the underpinning" for later Supreme Court decisions that "invalidated statutes" that employed gender "as an inaccurate proxy for other, more germane bases of classification."[238] Justice Brennan's *Craig* opinion gave life to words and phrases that would be later echoed in other Supreme Court sex-discrimination opinions; phrases like "'archaic and overbroad'" generalizations," and "increasingly outdated misconceptions concerning the role of females."[239]

Although the Court agreed with Oklahoma "that traffic safety was an important governmental objective," Justice Brennan and the majority of the Court did not believe that "the sex classification, based on statistical evidence indicating a greater propensity in males to drive

[234] *Id*. at 192.
[235] *Id*. at 197. [emphasis in original].
[236] *Id*. [emphasis added].
[237] Galotto, *supra* note 164, at 522.
[238] Craig, *supra* note 232, at 198.
[239] *Id*. at 198-199.

while intoxicated, to be substantially related to that objective."[240] Therefore, the Court held that the Oklahoma "3.2% beer statute invidiously discriminate[d] against males 18-20 years of age."[241] In a process of ruling that the *Twenty-first Amendment* argument of the appellee did not "save the invidious gender-based discrimination from invalidation as a denial of equal protection of the laws in violation of the *Fourteenth Amendment*[,]"[242] Justice Brennan quoted an unnamed "commentator [that] remarked[]" about the "history of the *Twenty-first Amendment*,"[243] but no other history, legislative or otherwise, was mentioned regarding the *Fourteenth Amendment* in his opinion in *Craig*.

It is worth noting that Justice Brennan and the majority in *Craig* "did not discuss the origin of its new "'intermediate'" standard."[244] The opinion just continued to "simply cite[] *Reed*."[245] Although the Court in *Reed* applied the minimum rationality test, it did so while engaging "in an analysis and reach[ing] a result far less forgiving than usual under that standard."[246] Therefore, Justice Brennan used the opinion in *Craig* to "set[] out in concrete terms the *unstated* heightened scrutiny employed in *Reed*."[247]

***Orr v. Orr* (1979).[248]** Justice Brennan is once again at center stage as the author of the majority opinion in *Orr v. Orr*. In the 1979 decision, the Court heard a case regarding the constitutionality of male only alimony in a divorce case.[249] Justice Brennan said that just because the "classification expressly discriminates against men rather than women does not protect it

[240] Galotto, *supra* note 164, at 522.
[241] Craig, *supra* note 232, at 204.
[242] *Id*. at 205. [emphasis in original].
[243] *Id*. at 206. [emphasis in original].
[244] Galotto, *supra* note 164, at 522.
[245] *Id*.
[246] *Id*.
[247] *Id*. [emphasis added].
[248] Orr v. Orr, 440 U.S. 268 (1979).
[249] *See Id*. at 270.

from scrutiny" under the *Equal Protection Clause of the Fourteenth Amendment*.[250] The Court applied the intermediate standard of review to the case stating that "'classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.'"[251] The Court agreed with Mr. Orr's views that the "Alabama alimony statutes [] effectively announc[ed] the State's preference for an allocation of family responsibilities under which the wife plays a dependent role."[252]

Justice Brennan and the majority decided that the "[reduction] of the disparity in economic condition between men and women" was an important governmental objective and that what remained to be determined was "whether the classification at issue here is "'substantially related to achievement of those objectives.'"[253] In holding the statutes in violation of the *Equal Protection Clause,* the Court found that the "gender-based distinction [in the Alabama statutes] [was][] gratuitous[]" and that "it would cost the State nothing more, if it were to treat men and women equally by making alimony burdens independent of sex."[254] Justice Brennan warned that statutes designed to "compensate" for the "effects of past discrimination must be *carefully tailored*[,]" as not to fall into the "inherent risk of reinforcing stereotypes about the "'proper place'" of women and their need for special protection."[255] Once again, Justice Brennan cites to many previous Supreme Court cases involving sex-discrimination, but he does not cite to or refer to the legislative history of the *Fourteenth Amendment* in the majority opinion of the Court.

[250] *Id*. at 279.
[251] *Id*.
[252] *Id*.
[253] *Id*. at 280.
[254] *Id*. at 282.
[255] *Id*. at 283. [emphasis added].

***Parham v. Hughes* (1979).**[256] In the unfortunate case of *Parham v. Hughes*, the Court was split into two plurality opinions with Justice Powell concurring with the prevailing group of justices led by Justice Stewart. No real precedent was set with this case as there was no five justice majority opinion, although the Georgia statute was upheld.[257] The case was brought by an appellant whose illegitimate child and birth mother were killed in a car accident.[258] A Georgia statute made it impossible by law for the father of an illegitimate child to recover for the wrongful death of that child; alternatively, the mother of an illegitimate child could recover.[259] Justice Stewart, writing for the prevailing plurality opinion, stated that "[i]n the absence of invidious discrimination [] a court is not free under the aegis of the *Equal Protection Clause* to substitute its judgment for the will of the people of a State as expressed in the laws passed by their popularly elected legislatures."[260] Meaning that unless there is a legitimate discrimination calling for a heightened review of a State statute, a rational basis test must be used which gives great deference to the duly elected legislators who created the law. Justice Stewart and three other justices did not see an invidious discrimination involving the statute; what they saw was a statute that differentiated between fathers of legitimate children and fathers of illegitimate children.[261] This circumstance, as Justice Stewart saw it, warranted a rational analysis.[262]

Justice White, writing for the other non-prevailing plurality justices in their dissent, saw it a different way.[263] Justice White saw it as a "particular discrimination in this case [that] is but

[256] Parham v. Hughes, 441 U.S. 347 (1979).
[257] *See Id*.
[258] *See Id*. at 350.
[259] *See generally Id*. at 348-359.
[260] *Id*. at 351. [emphasis in original].
[261] *See generally Id*. at 348-359.
[262] *See Id*. at 352.
[263] *See generally Id*. at 361-368.

part of the pervasive sex discrimination in the statute conferring the right to sue for the wrongful death of a child."[264] Justice White wrote that because the "[a]ppellant is the father, rather than the mother, of a deceased illegitimate child[]" it is that "reason alone he may not bring an action for the wrongful death of his child."[265] Justice White accused the prevailing plurality of a "startling circularity" to their argument, but to no avail.[266] Neither plurality opinions, nor the concurring opinion, cited to or referred to the legislative history of the *Fourteenth Amendment* in their arguments.

***Caban v. Mohammed* (1979).[267]** The case of *Caban v. Mohammed* was heard by the Supreme Court in 1979 as a *Fourteenth Amendment* challenge to a New York statute that gave unwed mothers veto rights on their natural children's adoption but did not afford those same rights to unwed fathers of the same children, basing the distinction solely upon gender.[268] In this case, Abdiel Caban's two "natural children were adopted by their natural mother and stepfather without his consent."[269] Justice Powell delivered the opinion of the five justice majority and used the intermediate standard of review for this case.[270]

As part of its analysis, Justice Powell and the majority looked into the legislative history of the New York statute for guidance in reviewing the State's argument that it's important governmental interest was "in promoting the adoption of illegitimate children."[271] Justice Powell

[264] *Id*. at 368.
[265] *Id*. at 361.
[266] *Id*.
[267] Caban v. Mohammed, 441 U.S. 380 (1979).
[268] *See Id*.
[269] *Id*. at 381.
[270] *See Id*. at 388.
[271] *Id*. at 389.

wrote that the history behind the statute was "sparse"[272] but agreed with New York that the "State's interest in providing for the well-being of illegitimate children is an important one."[273] But Justice Powell did not agree with New York that "the distinction in [the statute] between unmarried mothers and unmarried fathers … [provided] a substantial relation to the State's interest."[274] Justice Powell wrote in closing that "we believe that [the New York statute] is another example of "'overbroad generalizations'" in gender-based classifications."[275] Other than Justice Powell and the majority's research into the legislative history behind the New York statute in controversy, which is refreshing to report, no other legislative history was mentioned regarding the *Fourteenth Amendment*.

***Personnel Administrator of Massachusetts v. Feeney* (1979).**[276] The year 1979 was a busy one for sex-discrimination cases heard before the Supreme Court of the United States. Next on our list is the case *Personnel Administrator of Massachusetts v. Feeney*.[277] The seven justice majority opinion was authored by Justice Stewart.[278] Ms. Helen B. Feeney had brought the suit against the Personnel Administrator of Massachusetts in an effort to challenge "the Massachusetts veterans' preference statute, [] on the ground that it discriminate[d] against women in violation of the *Equal Protection Clause of the Fourteenth Amendment*."[279] Ms. Feeney believed the statute that said that "all veterans who qualify for state civil service

[272] *Id*. at 390.
[273] *Id*. at 391.
[274] *Id*.
[275] *Id*. at 394.
[276] Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979).
[277] *See Id*.
[278] *Id*. at 259.
[279] *Id*. [emphasis in original].

positions must be considered for appointment ahead of any qualifying nonveterans[] … operate[d] overwhelmingly to the advantage of males."[280]

Justice Stewart, in keeping with the prevailing precedent, analyzed the case using the intermediate standard of review.[281] As part of that standard, Justice Stewart wrote that "to withstand a constitutional challenge under the *Equal Protection Clause of the Fourteenth Amendment* … any state law overtly or covertly designed to prefer males over females in public employment would require an exceedingly persuasive justification."[282] This intermediate scrutiny language would surface again in *Mississippi University v. Hogan* and *United States v. Virginia* some years into the future. The majority held that, after research into the legislative history of the statute, Ms. Feeney did not prove "that a gender-based discriminatory purpose has, at least in some measure, shaped the Massachusetts veterans' preference legislation."[283] Ms. Feeney argued that the dominant sex in the military leads to a dominance in the number of males as veterans of the military.[284] In a matter of fact tone, Justice Stewart wrote that "[t]he enlistment policies of the Armed Services may well have discriminated on the basis of sex[] [but] … the history of discrimination against women in the military is not on trial in this case."[285] In the end, the majority viewed the statute as having no discriminatory scheme in "a law that by design …prefers veterans as such[,]" with simply the gender-neutral term *veteran* carrying the day.[286]

In the dissent, Justice Thurgood Marshall, joined by Justice Brennan, opined that even though the statute was gender-"neutral in form, the statute [was][] anything but neutral in

[280] *Id*.
[281] *See Id*. at 273.
[282] *Id*. [emphasis in original].
[283] *Id*. at 276.
[284] *See Id*.
[285] *Id*. at 278.
[286] *Id*. at 277.

application[,]" and that it should be the "burden" of the "State to establish that sex-based considerations played no part in the choice of the particular legislative scheme."[287] Justice Marshall wrote that the "legislative history of the statute" showed the State of Massachusetts recognized "the impact the preference system would have on women," and took steps to "mitigate that impact only with respect to certain traditionally female occupations."[288] Justice Marshall stated that the "statutory scheme … perpetuates … archaic assumptions about women's roles" that the Court had previously struck down; and that the majority's "conclusion to the contrary … displays a singularly myopic view of the facts."[289] In this case, both sides of the decision used legislative history in the process of rendering its opinions, but neither side chose to use the legislative history from the *Fourteenth Amendment*.

***Califano v. Westcott* (1979).**[290] In the case of *Califano v. Westcott*, two New England married couples brought what would be a class action suit challenging Section 407 of the Social Security Act which "provides benefits to families whose dependent children have been deprived of parental support because of the unemployment of the father, but does not provide such benefits when the mother becomes unemployed."[291] The couples said that the gender-based section of the Social Security Act violated their rights under the *Fifth* and *Fourteenth Amendments*,[292] but Justice Blackmun and the majority analyzed the section against the *Fifth Amendment's Due Process Clause*.[293]

[287] *Id*. at 284.
[288] *Id*. at 285.
[289] *Id*. at 285-286.
[290] Califano v. Westcott, 443 U.S. 76 (1979).
[291] *Id*. at 78.
[292] *Id*. at 81.
[293] *Id*. at 78. [emphasis in original].

In writing for the majority, Justice Blackmun said that "[f]or mothers who are the primary providers for their families, and who are unemployed, [the challenged section] is obviously gender biased, for it deprives them and their families of benefits solely on the basis of their sex."[294] Justice Blackmun pointed out that in the recent past the Supreme Court of the United States "has not hesitated to strike down gender classifications … [in which] the statute "'discriminates against one particular category of family – that in which the female spouse is a wage earner.'"[295] Administrators for the government argued that the challenged section was designed by Congress to make desertion by fathers more difficult, but after extensive research into the legislative history of the challenged section by Justice Blackmun and the majority, this argument was dismissed.[296] To that end, Justice Blackmun wrote that "[t]here is no evidence, in the legislative history or elsewhere, that a father has less incentive to desert in a family where the mother is the breadwinner and becomes unemployed, than in a family where the father is the breadwinner and becomes unemployed."[297] Justice Blackmun continued by stating, "Congress, with an image of the "'traditional family'" in mind, simply assumed that the father would be the family breadwinner, and that the mother's employment role, if any, would be secondary."[298]

In the application of the intermediate standard of review, Justice Blackmun concluded "that the gender classification [in the challenged section] is not substantially related to attainment of any important and valid statutory goals." Additionally, Justice Blackmun wrote that the challenged section represented "part of the "'baggage of sexual stereotypes,'" that presumes the father has the "'primary responsibility to provide a home and its essentials,'" while the mother is

[294] *Id*. at 84.
[295] *Id*.
[296] *See generally Id*. at 84-87.
[297] *Id*. at 87.
[298] *Id*. at 88.

the "'center of the home and family life.'"[299] Justice Blackmun warned that any "[l]egislation that rest[ed] on such presumptions, without more, [could not][] survive under the *Due Process Clause of the Fifth Amendment*[;]"[300] and presumably under the *Equal Protection Clause of the Fourteenth Amendment*.

This opinion by Justice Blackmun appears to show evidence of substantial research by the Supreme Court of the United States into the legislative history behind Congressional legislation. Unfortunately for our purposes here, the analysis was under the *Due Process Clause of the Fifth Amendment* and not the *Equal Protection Clause of the Fourteenth Amendment*. At the dawn of the 1980s, "opinions from all points on the ideological spectrum cited legislative history freely and generously."[301] Justices used the legislative history to both "support … the controversial proposition of how to implement a mix of broad congressional purposes absent specific intent," but just as often to "support [] noncontroversial propositions."[302] As we will see, this sentiment of free and generous use of legislative history is not reflected in the 1980s sex-discrimination cases.

***Wengler v. Druggists Mutual Insurance Company* (1980).[303]** In the case of *Wengler v. Druggists Mutual Insurance Company*, the appellant Mr. Wengler, a widower, brought a case claiming a violation of the *Equal Protection Clause of the Fourteenth Amendment*, in which a provision of the Missouri workers' compensation laws denied him benefits from his wife's work-related death.[304] Mr. Wengler claimed it was an invalid provision due to a "gender-based

[299] *Id*. at 89.
[300] *Id*. [emphasis in original].
[301] Tiefer, *supra* note 103, at 215.
[302] *Id*.
[303] Wengler v. Druggists Mutual Insurance Co., 446 U.S. 142 (1980).
[304] *See Id*.

discrimination"[305] stemming from the provision that would not allow a husband to collect work-related death benefits unless that husband proved that he was either "incapacitated []or dependent on his wife's earnings," of which the Mr. Wengler was neither.[306] The provision did not have a similar requirement for female beneficiaries.[307]

Justice White authored the opinion for the seven justice majority and applied the intermediate standard of review to the analysis of the Missouri statutory provision.[308] Justice White wrote that the challenged provision of the Missouri workers' compensation law "indisputably mandates gender-based discrimination[] … [and that] it is apparent that the statute discriminates against both men and women."[309] Justice White stated that due to the statutory scheme, "Mrs. Wengler would have been conclusively *presumed* to be dependent" on Mr. Wengler in the event of his death, with an automatic "statutory amount for life or until she remarried."[310] Justice White opined that "this kind of discrimination against working women … [is] found unjustified."[311] "Accordingly," wrote Justice White, "we reverse … and remand the case … for further proceedings."[312] No legislative history, *Fourteenth Amendment* or otherwise, was cited to, or referred to, as part of Justice White's majority opinion.

[305] *Id*. at 143.
[306] *Id*. at 146.
[307] *See Id*.
[308] *See generally Id*. at 143-153.
[309] *Id*. at 147.
[310] *Id*. [emphasis added].
[311] *Id*.
[312] *Id*. at 153.

Burger Court Cases from 1981 – 1986

***Michael M. v. Superior Ct. of Sonoma County* (1981).[313]** In the case of *Michael M. (a minor) v. Superior Court of Sonoma County*, the justices were split into a four justice plurality opinion authored by Justice Rehnquist, with one concurring opinion by Justices Stewart and one opinion concurring in the judgment by Justice Blackman; so no substantial constitutional case law was created from the decision.[314] The case was brought by a minor male charged under California's statutory rape law that "made[] men alone criminally liable for the act of sexual intercourse[]" with a female under the age of 18 years.[315] The petitioner Michael M. claimed that the statute was discriminatorily schemed in violation of the *Equal Protection Clause of the Fourteenth Amendment*.[316]

Justice Rehnquist recalled in the plurality opinion that the Supreme Court had "consistently upheld statutes where the gender classification [was] not invidious, but rather realistically reflect[ed] the fact that the sexes are not similarly situated in certain circumstances."[317] The plurality justices felt "satisfied" that the State of California had a "strong interest in [the] preventi[on] [of illegitimate] [] pregnancy" due to the fact that those children who are born of the "illegitimacy makes them likely candidates to become wards of the State."[318] Justice Rehnquist and the other justices of the plurality ruled that the California statute that

[313] Michael M. v. Superior Court of Sonoma County, 450 U.S. 464 (1981).
[314] *See Id*.
[315] *Id*. at 466.
[316] *See Id*.
[317] *Id*. at 469.
[318] *Id*. at 470-471.

"directly [] prohibit[ed] a male from having sexual intercourse with a minor female … [was] sufficiently related to the State's objective to pass constitutional muster."[319]

Unsatisfied with the opinion from Justice Rehnquist and the plurality, Justice Brennan authored a dissent from the judgment challenging the notion that the California statute could not be drafted into a gender-neutral form and still remain effective for the States purposes.[320] Justice Brennan wrote that "at least 37 States [] have enacted gender-neutral statutory rape laws[,]" of which, the States of "Arizona, Florida, and Illinois permit prosecution of both minor females and minor males for engaging in mutual sexual conduct."[321] "California has introduced no evidence[,]" wrote Justice Brennan, "that those States have been handicapped by the enforcement problems the plurality finds so persuasive."[322] Although a modest review of the legislative history of the California statute was mentioned by multiple justices in the several opinions in the case, there was no mention of a review of the legislative history of the *Fourteenth Amendment* having been done by any justices involved with this case.

***Kirchberg v. Feenstra* (1981).[323]** In the case of *Kirchberg v. Feenstra*, the Court ruled on whether a "Louisiana statute that gave a husband, as "'head and master'" of property jointly owned with his wife, the unilateral right to dispose of such property without his spouse's consent[]" violated the *Equal Protection Clause of the Fourteenth Amendment*.[324] Authoring what, except for a modest technicality, would have been a rare unanimous ruling by the Court, Justice Marshall's opinion garnered the full support of six justices and a concurring opinion

[319] *Id*. at 472-473.
[320] *See generally Id*. at 488-496.
[321] *Id*. at 492.
[322] *Id*. at 492-493.
[323] Kirchberg v. Feenstra, 450 U.S. 455 (1981).
[324] *Id*. at 456.

which covered the remaining two justices.[325] Applying the intermediate standard of review to the case, Justice Marshall said that,

> [b]y granting the husband exclusive control over the disposition of community property, [the challenged statute] clearly embodies the type of express gender-based discrimination that we have found unconstitutional absent a showing that the classification is tailored to further an important governmental interest.[326]

In ruling that the Louisiana statute clearly violated the *Equal Protection Clause*, Justice Marshall reminded the losing appellant that the "'absence of an insurmountable barrier'" will not redeem an otherwise unconstitutionally discriminatory law."[327] Alternatively, Justice Marshall wrote that "the burden remains on the party seeking to uphold a statute that expressly discriminates on the basis of sex to advance an "'exceedingly persuasive justification'" for the challenged classification."[328] In what was a straight-forward and relatively short opinion, Justice Marshall did not cite to or refer to any legislative history, *Fourteenth Amendment* or otherwise.

***Mississippi University for Women v. Hogan* (1982).[329]** The case of Mississippi University for Women v. Hogan finds the first woman justice to the Supreme Court of the United States, Justice Sandra Day O'Connor, authoring the majority opinion for the Court.[330] The issue presented to the Court for review was "whether a state statute that excludes males from enrolling in a state-supported professional nursing school violates the Equal Protection Clause of the Fourteenth Amendment."[331] Justice O'Connor aptly applies the firmly entrenched intermediate standard of review to the case citing the "burden" of the State in displaying an "'exceedingly

[325] *See Id*.
[326] *Id*. at 459-460.
[327] *Id*. at 461.
[328] *Id*.
[329] Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982).
[330] *See Id*. at 719.
[331] *Id*.

persuasive justification'" in which the challenged classification serves "'important governmental objectives and that the discriminatory means employed'" are "'substantially related to the achievement of those objectives.'"[332]

For the State of Mississippi, the argument they forwarded to the Court was that "maintaining the single-sex admissions policy of MUW's School of Nursing is that it compensates for discrimination against women and, therefore, constitutes educational affirmative action[;]" but that argument, the Court found, was "unpersuasive."[333] Justice O'Connor stated in a footnote that the "State ha[d] failed to establish that the legislature intended the single-sex policy to compensate for any perceived discrimination."[334] Ultimately, Justice O'Connor and the majority ruled that "MUW's policy of denying males the right to enroll for credit in its School of Nursing violate[d] the Equal Protection Clause of the Fourteenth Amendment."[335] Although Justice O'Connor pointed out that the State of Mississippi did not provide proof of the legislator's intent with the challenged statute through legislative history of the statute, Justice O'Connor and the majority did not offer legislative history of the *Fourteenth Amendment* or its Framers' intent for expanding women's rights.

In the absence of legislative history from the *Fourteenth Amendment* to rely on, Justice O'Connor and the majority relied on a decades-worth of past sex-discrimination Supreme Court cases, including; *Reed v. Reed*, *Caban v. Mohammed*, *Orr v. Orr*, *Kirchberg v. Feenstra*, *Personnel Administrator of Mass. v. Feeney*, and *Wengler v. Druggists Mutual Ins. Co.*, to just name those cited in Justice O'Connor's recounting of the intermediate standard of review for

[332] *Id*. at 724.
[333] *Id*. at 727.
[334] *Id*. at 730.
[335] *Id*. at 731.

gender-based discrimination cases.[336] Without the need for research into the legislative history of the *Fourteenth Amendment* and the documented evidence that some of the Framers intended to establish expanded rights for women, the modern Supreme Court has well established Court decisions lacking in grounding from legislative history to cite to for its sex-discrimination jurisprudence.

[336] *See Id*. at 724.

Cases decided during the Chief Justice William Rehnquist Court

Rehnquist Court Cases from 1986 – 1996

***J.E.B. v. Alabama ex rel. T.B.* (1994).**[337] In the case of *J. E. B. v. Alabama ex rel. T. B. (a minor child),* Justice Blackmun authored the opinion by the narrow majority of the Court regarding "whether the Equal Protection Clause forbids intentional discrimination on the basis of gender, just as it prohibits discrimination on the basis of race."[338] Justice Blackmun and the majority, requiring an exceedingly persuasive justification through the intermediate standard of review, held that "gender, like race, is an unconstitutional proxy for juror competence and impartiality."[339] The background of the case involved a complaint for paternity and child support brought by the State of Alabama.[340] For trial, the lower court assembled "36 potential jurors," to which the State used "peremptory strikes" as part of the *voir dire* process to ultimately attain a jury comprised of only female jurors.[341] Before the all-female jury was "empaneled," the petitioner voiced his objection to the use of the peremptory challenges "solely on the basis of gender" by the State "in violation of the Equal Protection Clause of the Fourteenth Amendment."[342] The petitioner's logic was that it was previously ruled in *Batson v. Kentucky* that "peremptory strikes solely on the basis of race" in the *voir dire* process violates the *Fourteenth Amendment*, and that because the Amendment "similarly forbids intentional

[337] J. E. B. v. Alabama ex rel. T. B., 511 U.S. 127 (1994).
[338] *Id*.
[339] *Id*.
[340] *See Id*.
[341] *Id*.
[342] *Id*.

discrimination on the basis of gender[,]" the State action in the instant case should be ruled unconstitutional as well.[343] The Court agreed.

In the majority opinion, Justice Blackmun set forth to recite the history of sex-discrimination in the United States starting from the English common law exclusion of women from juries "under "'the doctrine of *propter defectum sexus*, literally, the 'defect of sex[,]'" a brief stop at *Bradwell v. State*, up to and through *Frontiero v. Richardson*; a lengthy testimonial to say the least.[344] Justice Blackmun opined that for the purposes of this case it was not necessary to determine "whether women or racial minorities have suffered more at the hands of discriminatory state actors during the decades of our Nation's history[;]"[345] nor was it necessary for the instant case to decide the "open question" from Justice Ginsburg as to "whether classifications based on gender are inherently suspect[,]" raising the review of gender-based classifications to a strict scrutiny standard of review.[346]

In ruling that the lower court's decision was reversed and ordered to be remanded back for further proceedings, Justice Blackmun cautioned that due to the fact that "gender and race are overlapping categories[]" in the case of minority women, "gender can be used as a pretext for racial discrimination[] … allowing parties to remove racial minorities from the jury not because of their race, but because of their gender."[347] This would allow, wrote Justice Blackmun, the erosion of "well-established equal protection principles and could insulate effectively racial discrimination from judicial scrutiny."[348]

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[343] *Id*.
[344] *See generally Id*. at 132-135. [emphasis in original].
[345] *Id*. at 136.
[346] *Id*. [see footnote #6].
[347] *Id*. at 145.
[348] *Id*.

In *J. E. B. v. Alabama ex rel. T. B.*, Justice Blackmun's opinion for the majority did not cite to or refer to the legislative history of the *Fourteenth Amendment*, but Justice Kennedy's concurring opinion came *extremely* close to doing just that.[349] Although Justice Kennedy admitted that he was in "full agreement" with the majority opinion, he felt it necessary to "explain [his] understanding of why [the Court's] [] precedents lead to [the] [] conclusion[]" by the majority.[350] Justice Kennedy wrote;

> Though in some initial drafts the Fourteenth Amendment was written to prohibit discrimination against "persons because of race, color or previous condition of servitude," the Amendment submitted for consideration and later ratified contained more comprehensive terms: "No State shall … deny to any person within its jurisdiction the equal protection of the laws." See Oregon v. Mitchell, 400 U.S. 112, 172-173, 27 L. Ed. 2nd 272, 91 S. Ct. 260 (1970) (Harlan, J., concurring in part and dissenting in part); B. Kendrick, Journal of the Joint Committee of Fifteen on Reconstruction, 39th Congress, 1865-1867, pp. 90-91, 97-100 (1914).[351]

Admittedly, the blocked quote from above does not contain any citations from *actual* legislative history of the *Fourteenth Amendment*, but it does come tantalizingly close. Interestingly, Justice Kennedy cites to a *Journal of the Joint Committee of Fifteen on Reconstruction* from the 39th Congress of 1865-1867 by Benjamin B. Kendrick, originally published in 1914, for his commentary regarding the "initial drafts of the Fourteenth Amendment" and the Amendment's eventually ratified "comprehensive terms."[352] Justice Kennedy curiously chose to reference the 1914 publication, even though actual transcripts from the 1865-1867 39th Congressional committee meetings were readily available to the Supreme Court justices, and the entire populous of this country for that matter, through the archives of the

[349] *See Id*. at 151.
[350] *Id*.
[351] *Id*.
[352] *Id*.

library of Congress. The specific reasons for Justice Kennedy's use of Mr. Kendrick's publication rather than actual transcripts from the archives are not readily available to this author for use as part of this thesis.

As Justice Kennedy continued to opine his "understanding of why [the Court's] [] precedents lead to [the] [] conclusion[]"[353] by the majority in *J. E. B. v. Alabama ex rel. T. B.*, Justice Kennedy wrote that due to the fact that there was "the necessity for the Nineteenth Amendment in 1920," too much time that had passed "before the Equal Protection Clause was thought to reach beyond the purpose of prohibiting racial discrimination and to apply as well to discrimination based on sex."[354] Justice Kennedy wrote that the Supreme Court had "subjected governmental classifications based on sex to heightened scrutiny[] … [i]n over 20 cases beginning in 1971," and that the "case law [] reveal[ed] a strong presumption that gender classifications are invalid."[355]

Justice Kennedy stated that "[t]he Equal Protection Clause and our constitutional tradition" are grounded in the concept that "individual [] rights [] are protected against lawless action by the government."[356] "The neutral phrasing of the Equal Protection Clause," wrote Justice Kennedy, in extending its protections to "'any *person*,'" reveals its concern with the rights of individuals."[357] Concluding his understanding, Justice Kennedy stated that it was the "neutrality" in the language of the *Fourteenth Amendment's* guarantee to equal protection from the law that

[353] *Id*.
[354] *Id*. at 152.
[355] *Id*.
[356] *Id*.
[357] *Id*. [emphasis added].

was "confirmed by the fact that the Court ha[d] no difficulty in finding a constitutional wrong in this [gender-based] case."[358]

***United States v. Virginia* (1996).**[359] In what should only be described as the universe coming around full circle, Supreme Court Justice Ruth Bader Ginsburg authored the majority opinion in *United States v. Virginia*, a quarter century after arguing on the side of Sally Reed in 1971, and as an ACLU lead attorney, arguing on a majority of the cases that compile the sex-discrimination jurisprudence we see today.[360] The *U.S. v. Virginia* case started in 1990, "prompted by a complaint filed … by a female high-school student seeking admission to VMI, … alleging that VMI's exclusively male admissions policy violated the Equal Protection Clause of the Fourteenth Amendment."[361] Justice Ginsburg once again applied the intermediate standard of review to the case ruling that VMI and the State of Virginia "ha[d] shown no "'exceedingly persuasive justification'" for excluding all women from the citizen-soldier training afforded by VMI."[362]

In the process of explaining how the majority developed its decision in the case, Justice Ginsburg wrote that the Court's "skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history."[363] Justice Ginsburg acknowledged that for over 130 years of history of the United States, "women did not count among voters composing "'We the People.'"[364] And in recalling the decision in *Reed*, Justice Ginsburg wrote that "[i]n 1971, for the first time in our Nation's history, this Court ruled in favor of a woman

[358] *Id*. at 153.
[359] *United States v. Virginia*, 518 U.S. 515 (1996).
[360] *See Id*. at 519.
[361] *Id*. at 523.
[362] *Id*. at 534.
[363] *Id*. at 531.
[364] *Id*.

who complained that her State had denied her the equal protection of its laws."[365] The history continued from cases including *Reed v. Reed*, to *Kirchberg v. Feenstra*, through *Stanton v. Stanton*."[366] Justice Ginsburg wrote that the Supreme Court "carefully inspected official action … that denie[d] opportunities to women (or to men) … in post-*Reed* decisions … [w]ithout equating gender classifications, for all purposes, to classifications based on race or national origin."[367] While it is true that Justice Ginsburg cited to a majority of the cases that make up the modern sex-discrimination jurisprudence of the Supreme Court, she did not cite to or refer to the legislative history of the *Fourteenth Amendment* as proof that it was used as part of the Court's decision making process in ruling in *United States v. Virginia*.

The majority's decision in the VMI case appeared to reinforced the concept that future controversies regarding gender-based discrimination, for the most part, will be viewed with a heightened scrutiny, but what that elevated scrutiny actually means was the cause for much debate by dissenter Justice Scalia and concurring dissenter Chief Justice Rehnquist.[368] The use of the phrase "'exceedingly persuasive justification'" numerous times by Justice Ginsburg in the majority opinion in the VMI case "provoked a bitter dissent from Justice Scalia, who essentially accused the majority of abandoning intermediate for strict scrutiny on the sly."[369] In his opinion concurring in Justice Scalia's dissent, Chief Justice Rehnquist wrote that "terms like "'important governmental objective'" and "'substantially related'" are hardly models of precision, [but] they have more content and specificity than does the phrase "'exceedingly persuasive

[365] *Id*. at 532.
[366] *Id*.
[367] *Id*.
[368] *See generally Id*. at 559-602.
[369] Ben Glassman, *Dialogic Fidelity: The Fourteenth Amendment, Historical Meaning, and Appropriate Scrutiny for Sex Discrimination*, 18 HARV. BLACKLETTER J. 139, 163 (2002).

justification.'"[370] Chief Justice Rehnquist felt like "[t]hat phrase is best confined, as it was first used, as an observation on the difficulty of meeting the applicable test, not as a formulation of the test itself."[371] Additionally, Justice Scalia forwarded the contention that the "decision ignored history, … but he did not seriously attempt to conduct [his own] [] inquiry."[372]

Legislative History: Justice Breyer and Inquiries into Congressional Intent. As has been the case for hundreds of years, "[t]he language of a statute may admittedly be vague," and judges who are attempting to construe the meaning of terms from an enacted statute (*or Amendment*) "'cannot afford to ignore those obvious tools (such as legislative history) which members of Congress use to explain what they are doing and to describe the meaning of the words used in the statute.'"[373] Current Supreme Court Justice Stephen Breyer believes that legislative history is "an essential channel of communication between those who create the law and those who interpret and enforce it."[374] Some are concerned that due to the Supreme Courts' doctrine based on a "bifurcated framework of review[,]" there is little "dialog between the courts and the political branches about the meaning of the Fourteenth Amendment[,]" which "grants Congress the power to enforce the amendment's provisions by appropriate legislation."[375] But Justice Breyer insists that preserving "the use of legislative history serves one of the most important goals of our legal system – creating and maintaining laws "'consistent with the reasonable expectations of those who live within it."[376]

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[370] Virginia, *supra* note 359, at 559.
[371] *Id*.
[372] Glassman, *supra* note 369, at 163.
[373] Koby, *supra* note 10, at 376.
[374] *Id*.
[375] Jack M. Balkin & Reva B. Siegel. *Remembering How to Do Equality*, *in* THE CONSTITUTION IN 2020 93-108 (Jack M. Balkin & Reva B. Siegel eds., 2009).
[376] Koby, *supra* note 10, at 376.

As the former Chief Counsel for the Senate Judiciary Committee, Justice Breyer possesses a unique perspective regarding legislative history.[377] As examples of other organizations that function similarly to Congress's "'group mind'" regarding "collective intent[,]" Justice Breyer cites – "law school faculty setting tuition levels, a basketball team making a play, and a tank corps implementing a battle plan" – groups that are all enthralled in a "coordinated action with a collective intent, though the individuals may not have identical subjective awareness."[378] Similarly, Congress with its "bureaucratic organization" working through "committees actively engaged … [in] generating legislation[,]" lawmakers occupy roles in which they participate via "supervising and handling active discussions on the controversial subjects of proposed bills," all while the "legislative history [is being] record[ed] [regarding] the details of real choices and decisions."[379]

[377] *See* Tiefer, *supra* note 103, at 223.
[378] *Id*. at 224.
[379] *Id*. at 223.

Conclusion

"Modern Supreme Court jurisprudence has never sought to ascertain the historical meaning of the Fourteenth Amendment for sex discrimination."[380] What that statement says is that there is 140 years of sex-discrimination jurisprudence based upon the *Fourteenth Amendment* without even a trace of information included in Supreme Court opinions regarding indications of what the actual intent of the Framers of the Amendment could have been. This thesis has established the concept that throughout the history of the Supreme Court of the United States, legislative history has been used at least from time to time in the process of adjudicating cases. So then, why is there a complete absence of legislative history from the *Fourteenth Amendment* regarding sex-discrimination from Supreme Court opinions?

"The Constitution's text alone is evidence of the Fourteenth Amendment's broad scope."[381] "The Framers of the Fourteenth Amendment were free to use language that was either broad or narrow[,]"[382] but the Framers chose to use broad and ambiguous language. If a statute or Amendment has language that is vague or ambiguous, Supreme Court justices throughout the decades have turned to legislative history to ascertain the meaning the Framers of the legislation intended it to mean. But the Court's legislative history research is non-existent related to sex-discrimination and women's rights under the *Fourteenth Amendment*. This author is not contending that all it would have taken was for Justice Bradley in 1873 to look into committee transcripts from the drafting of the *Fourteenth Amendment* in 1866 and he would have decided to let Mrs. Bradwell become an attorney; but maybe it would not have taken almost 100 years

[380] Glassman, *supra* note 369, at 163.
[381] Calabresi, *supra* note 32, at 6.
[382] *Id*. at 49.

before the highest court in the land held that a State had violated the rights of women under the *Equal Protection Clause of the Fourteenth Amendment*.

In the modern era, United States Supreme Court sex-discrimination jurisprudence has been established through a rereading of the Fourteenth Amendment, although, the current interpretation only "prevent[s] *certain* kinds of discrimination based on sex."[383] The question regarding if gender should be considered to be analogous with race or if female rights should be stand alone may be better answered via a look into the legislative history regarding what the Framers intended. The legislative history of the *Fourteenth Amendment* could provide support for or against what is perceived as the ultimate congressional purposes for the Amendment. Regardless, the history should be accessed. One argument is that the "Fourteenth Amendment's meaning … was designed to be applied to [] facts as we [see] … them today, not as people understood [them] [150] years ago."[384] But the only way to know for sure is for the Supreme Court to research the *Fourteenth Amendment* legislative history relating to women and gender and use that information as part of an opinion. If the Framers intended us to view the text of the Fourteenth Amendment specifically as it was known as in the 19th century, the Amendment would have "call[ed] on subsequent generations to apply it based on misinformation prevalent in 1868."[385]

For certain, the Framers "could have explicitly excluded women from Section One's protections, but they did not do so."[386] Due to the absence of research into the legislative history of the *Fourteenth Amendment* and the documented evidence that some of the Framers intended to

[383] Judith Resnik, *What's Federalism For?, in* THE CONSTITUTION IN 2020 273 (Jack M. Balkin & Reva B. Siegel eds., 2009). [emphasis added].
[384] Calabresi, *supra* note 32, at 52.
[385] *Id*.
[386] *Id*. at 49.

establish expanded rights for women, the modern Supreme Court has well established Court decisions lacking in grounding from legislative history, and will continue to lack, as the Court crafts its future sex-discrimination jurisprudence.

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