Phil 324: Law and Morality

Module 7 Reading Guide

# *Bradwell v. Illinois* (1873)

1. The paragraph preceding Justice Bradley’s concurrence provides some helpful context.
2. What is the plaintiff’s claim?
3. How did the Illinois Supreme Court rule?
4. **What is Justice Bradley’s objection to the argument that the 14th Amendment protects women’s right to practice the law? What about women who are “not affected by any of the duties, complications, and incapacities” of marriage?**
5. **Where do you think Justice Bradley’s concurrence falls along the legal positivism/natural law theory spectrum?**

# *Minor v. Happersett* (1874)

1. Skim the case, but note the holding and the reasoning, and again think about where the decision falls along the legal positivism/natural law theory spectrum. We are already discussing a lot of cases in this module, so we will unfortunately have to gloss over this one as it was decided under the Privileges or Immunities Clause of the 14th Amendment.

# *Muller v. Oregon* (1908), *Goesaert v. Cleary* (1948), and *Hoyt v. Florida* (1961)

1. **For each of these three cases, please identify the Court’s ruling and then briefly explain its reasoning for ruling that way.**

# *Loving v. Virginia* (1967)

1. What constitutional question does the case present? What is the Court’s answer?
2. Who are Mildred Jeter and Richard Loving? Where did they get married, and what happened when they returned to Virginia?
3. How did the trial court rule?
4. What does the Virginia law provide? What is the law’s origin?

## Part I

1. For which two reasons did the state supreme court uphold the law? (Note the way this Court, that is, the U.S. Supreme Court, explicitly connects the purposes of the law to white supremacy.)
2. **What does the Virginia government take the Equal Protection Clause to mean?**
3. What arguments does the Virginia government provide in defense of the law?
4. On what grounds does the Court reject the equal application theory?
5. What is the Court’s response to the Virginia government’s objection based on the intent of the Framers?
6. What does this Court think is the “clear and central purpose of the Fourteenth Amendment”?
7. **Why, according to the Court, does the Virginia law discriminate on the basis of race when it applies to members of different races equally?**
8. What level of scrutiny is the Court applying here?
9. What is the conclusion of the Court’s equal protection analysis? (Note that the Court explicitly says the Virginia law is a “measure[] designed to maintain White Supremacy.”)

## Part II

1. The Court argues the Virginia law also violates the Due Process Clause. What is the Court’s reasoning?

# Pauli Murray and Mary Eastwood, “Jane Crow and the Law: Sex Discrimination and Title VII”

1. Side note: Pauli Murray was an extraordinarily influential Black woman/nonbinary lawyer (we are not very sure what Murray’s gender identity was) who helped pioneer the legal strategy later used by then Professor Ruth Bader Ginsburg in litigating the first successful sex discrimination cases before the U.S. Supreme Court. But Murray’s legacy has been very much underrecognized. If you want to learn more about them, there is a new documentary featuring Murray’s life, [*My Name Is Pauli Murray*](https://www.amazon.com/My-Name-Pauli-Murray/dp/B09DMPMWCP), which unfortunately is now available only on Amazon Prime Video.

## Introduction

1. What’s so different about the 1960s when it comes to women’s rights?
2. Which two problems still remain?

## Antifeminism and Racism

1. Why do Murray and Eastwood (whom Murray likely met while serving on a study committee of President Kenney’s Commission on the Status of Women, whose work helped jumpstart second-wave feminism) find it useful to compare sex discrimination and racial discrimination?
2. **In which respects is sex discrimination analogous to racial discrimination?**

## Equality of Rights Under the Constitution

1. What is the Equal Rights Amendment?
2. Murray and Eastwood then explain the controversy surrounding the issue of whether the Constitution already provides women with the equal protection of the laws even without the Equal Rights Amendment.
3. Skim the discussion of *Muller*.
4. **How can the Equal Protection Clause cover sex discrimination when the U.S. Supreme Court has never invalidated a sex discriminatory law for violating equal protection?**
5. What is the distinction between sex per se and the functional attributes of sex?
6. **What are two misconceptions about what women’s equality means?**
7. **How does the distinction between sex per se and the functional attributes of sex provide a response to the second of these misconceptions?**
8. **How does the “separate-but-equal” doctrine shed light on women’s inequality?**
9. Murray and Eastwood then clarify that their interpretation of equal protection would not invalidate two categories of laws. What are they? Why would they be able to stand?
10. What are some other implications of Murray and Eastwood’s interpretation?
11. Murray and Eastwood then pivot to Title VII, which is part of the Civil Rights Act of 1964. Recall our discussion in Module 1 that the Equal Protection Clause of the 14th Amendment generally does not apply to private employers. This is where Title VII, a statutory provision, becomes relevant. We will come back to Title VII in later modules. For now, let’s focus on the constitutional issue and skip the rest of the article.

# *Reed v. Reed* (1971)

## Brief for Appellant

1. Note the co-counsel listed on the title page: Ruth Bader Ginsburg, then-professor at Rutgers Law School; Mel Wulf, ACLU’s legal director who co-authored the brief with Ginsburg; Allen Derr, the petitioner Sally Reed’s original counsel; Pauli Murray, whom we just read; and Dorothy Kenyon, another legendary women’s rights lawyer. Ginsburg reportedly included Murray’s and Kenyon’s names as an acknowledgment of her intellectual debt, even though they didn’t actually work on the case.
2. Start on Pp. 2–3 of the brief (the actual page number shown on the page): What do the Idaho statutes provide with respect to the selection of women as administrators of estates?
3. What is the question presented?
4. What are the relevant facts of the case?
5. Skim the summary of the argument on pp. 5–7.
6. What issue does the case raise?
7. What are the two standards of review the Court applies to determine whether a statute violates the Equal Protection Clause? When does each standard apply?
8. **What are the appellant’s principal and alternative positions? How are they different? Why does the difference matter?**
9. Skim the next paragraph (think about: what purpose does this paragraph serve?).
10. What remedies are available to women experiencing sex discrimination at the time? Why are these measures helpful but not adequate by themselves?
11. What does racial discrimination tell us about the need to recognize sex as a suspect classification?
12. Note that Ginsburg and co-counsel explicitly compare *Goesaert* to *Plessy*.
13. Skim the next paragraph.
14. How are race-based classifications scrutinized by courts?
15. What do Ginsburg and counsel think underlies the strict scrutiny/suspect classification doctrine?
16. Skim the first block quote.
17. Focus on the Murray quote: How are racial and sex inequalities connected?
18. The quote from the California Supreme Court decision: Which three features characterize suspect classifications?
19. Skip the rest of Subsection A.
20. *Very cursorily* skim (and I do mean it—it’s long!) Subsection B. Why do Ginsburg and co-counsel find it necessary to spend so much space meticulously explaining to the justices how women are viewed and treated, and how that differs from how women see themselves?
21. Read the first paragraph of Subsection C (p. 41), and skim or skip the rest of this Subsection. Here, Ginsburg and co-counsel argue that *Muller*, *Goesaert,* and *Hoyt* are a trilogy of embarrassment to the Court.
22. Skim Subsection D, where Ginsburg and co-counsel argue the Idaho statute serves no compelling interest.
23. Skim Section II. Which two additional arguments do Ginsburg and co-counsel offer for striking down the Idaho statute?

## Opinion of the Court

1. Skim the facts of the case.
2. **Bottom of p. 307 onto top of p. 308: What does the Court think the Equal Protection clause does and does not prohibit?**
3. **What is the legal question presented? Which of the appellant’s two positions is the Court adopting here?**
4. What is the Court’s answer?

# *Frontiero v. Richardson* (1973)

1. What is the significance of *Frontiero*?
2. On what grounds would the *Frontiero* plurality apply strict scrutiny to sex-based classifications?

# *Geduldig v. Aiello* (1974)

1. Although we will not discuss *Geduldig* much in this module, we are going to come back to it over and over again for the rest of the class.
2. What is this case about?
3. Which level of scrutiny does the Court decide is appropriate for the pregnancy-based classification at issue?
4. **Focus on footnote 20 of the majority opinion (the notes are at the bottom of the page): Why, according to the Court, does discrimination on the basis of pregnancy not inherently constitute discrimination on the basis of sex?**
5. Skip the dissent.

# *Craig v. Boren* (1976)

1. What does the Oklahoma statute prohibit?
2. **Who are discriminated against by this statute?**
3. The *Craig* majority then invents and applies intermediate scrutiny. Interestingly, it says the cases following *Reed* have “establish[ed]” and perhaps even applied this level of scrutiny already.
4. Why can’t the Oklahoma statute survive intermediate scrutiny?
5. Justice Powell would strike down the Oklahoma statute under the garden-variety rational basis review, not the new mid-tier scrutiny the *Craig* majority applies (although Powell also resists the characterization that the Court is inventing a new mid-tier scrutiny?).
6. Justice Stevens would not even want a distinction between rational basis review and strict scrutiny—one tier would do.
7. Justice Rehnquist questions what the majority is doing in inventing the mid-tier scrutiny, suggests that discrimination against men is different, and says he would uphold the Oklahoma statute under rational basis review.

# *United States v. Virginia* (1996)

## Opinion of the Court (Justice Ginsburg)

1. What is VMI? What admissions policy does VMI have?
2. What is VWIL? Is it the same as VMI in every relevant respect?
3. Which two questions does the case present?
4. **What standard must the Virginia government meet in order to defend VMI’s male-only admission policy? (Think about: is this the same standard that the Court applied in *Craig v. Boren*?)**
5. How does the Court apply this standard to VMI’s admission policy?
6. How does the Court respond to the Virginia government’s objection that having a single-sex public institution of higher education furthers its diversity interest?
7. And what is the Court’s response to Virginia’s second objection that admitting women cadets would undermine the VMI program?
8. On what grounds does the Court reject VWIL as an inadequate remedy?
9. How might one reconcile the Court’s earlier claim that there are inherent differences between women and men with the claim that Virginia cannot use inherent differences as justification for two parallel programs each suited to a different gender?
10. The Court seems to be offering two independent arguments here, but they are not always clearly distinguished: (1) VMI and VWIL are separate but *not equal*, and (2) the separation is itself wrongful even if VMI and VWIL are equal.

## Chief Justice Rehnquist’s Concurrence

1. In the first paragraph, now–Chief Justice Rehnquist worries that the Court is not strictly adhering to the intermediate scrutiny standard articulated in *Craig*.
2. Skim the next two paragraphs.
3. In the last paragraph, Rehnquist seems to agree that VWIL is not an adequate remedy because it is not actually equal to VMI. Would he think, if VWIL were separate but *really* equal, it would still violate equal protection? How about the majority?

## Justice Scalia’s Dissent

1. Why does Justice Scalia find the Court’s decision today undemocratic and “illiberal”?
2. Skim the next two paragraphs.
3. Scalia then criticizes the majority’s “exceedingly persuasive justification” standard as strict scrutiny in disguise.
4. How would Scalia apply the usual intermediate scrutiny standard to VMI’s policy?
5. Skim the rest of the Scalia dissent.

# Pregnancy Discrimination Act of 1978

1. A bit of context: In a 1976 case, *General Electric v. Gilbert*, the Court extended *Geduldig*’s interpretation of the Equal Protection Clause to Title VII, upholding General Electric (a private employer)’s analogous exclusion of pregnancy overage on analogous grounds.
2. Read only section 1 of the Act. What is Congress doing here?

# Handout: “Women’s Liberation Movement and the Law: A Chronology of Cases”

1. This handout provides a useful chronology of the major cases, laws, and events in relation to the Women’s Liberation Movement of the 60s and 70s. It gives historical context to the line of gender equality cases we just read, and previews some of the cases we will discuss later. I don’t have any reading guide questions for the chronology. Please read it on your own and use it for reference.

# Interview with Justice Ginsburg

1. It’s difficult to write reading guide questions for an interview, and I also don’t want to give out any spoilers. So, I’ll just make a couple of mostly FYI-style notes to help connect some of the interview’s highlights to the materials we just read.
2. 00:00: The interviewer is Professor Martha Minow, who was Dean of Harvard Law School at the time of the interview. Note that Minow mentions the event was delayed because Justice Ginsburg had to answer a call. They will come back to this soon.
3. 1:05: Ginsburg was appointed to the D.C. Circuit in 1980 from her positions at the ACLU and Columbia Law School (it was not until June 2023 that Dale Ho, a distinguished voting rights lawyer, became the second ACLU attorney to be confirmed directly to the federal bench). Minow was clerking for Judge David Bazelon on the D.C. Circuit from 1979 to 1980, after which she would go on to clerk for Justice Thurgood Marshall from 1980 to 1981.
4. 3:12: Ginsburg recounts how the law was a heavily male-typed profession.
5. 5:25: The social expectation was that women would go to college *in order to* find a husband.
6. 5:58: Cornell’s dorm policy for women.
7. 10:10: Harvard’s discrimination against women students.
8. 11:52: Ginsburg attended law school while caring for her child and her husband, who later fell ill.
9. 13:30: The issue of moving to live with one’s partner comes up again.
10. 15:05: Ginsburg mentions that Minow’s predecessor offered her a Harvard Law School degree every year. That predecessor was none other than then-Professor and Dean Elena Kagan, who was appointed as Solicitor General in 2009 and then to the Court in 2010.
11. 16:20: Ginsburg is interrupted again. She soon explains that it’s an emergency petition from the circuit she’s responsible for. This was before the rise of the shadow docket that Vladeck noted in the piece we read for our first module. Recall his worry about the rise of emergency petitions risking distorting the balance of the Court’s workload.
12. 16:50: Ginsburg explains what a circuit justice does.
13. 17:20: No judges offered Ginsburg a clerkship (and no law firms offered her a job) until Professor Gunther (then teaching at Columbia Law School) called every judge in the area to sell her. Note also that Ginsburg says Judge Palmieri always hired Columbia graduates as clerks. Think about the implications of premising access to opportunities in the legal profession on these kinds of personal connections and small-knit circles around prestigious law schools, even though in this case they worked to break the glass ceiling for Ginsburg.
14. 18:25: “But she has a young child.”
15. 19:35: The practical impact of Title VII.
16. 19:52: Discrimination against women and discrimination against mothers.
17. 20:00: Note the door a clerkship suddenly opens.
18. 20:30: Justice O’Connor (the first woman to serve on the U.S. Supreme Court) also shares Ginsburg’s experiences.
19. 23:00: Ginsburg’s early involvement in ACLU’s Women’s Rights Project.
20. 26:05: Influence of NAACP LDF’s litigation strategy and the relationship between racial and gender inequality litigation.
21. 27:30: Gender equality is for everybody.
22. 28:10: Ginsburg comments that the women-in-military case “came to the court too soon.” In other words, the Court was not yet prepared to rule for women. Ginsburg prefers pushing for changes in the law incrementally and slowly to give the public and the courts time to catch up. We will revisit this very Ginsburg-style of critique in an article by her that we will read for Module 11.
23. 30:20: “Law exists to serve the society, so how can you not think about what is the impact on people of the Court’s decisions?”
24. 31:20: “What do I do? I have no talent in the kitchen at all.”
25. 33:35: “He said, I didn’t want to be upstaged by the women.”
26. 34:15: The future of the Court’s famous collegiality.
27. 35:16: In *Ledbetter v. Goodyear* (2007), the Court ruled that the petitioner, Lilly Ledbetter, could not bring a salary discrimination claim against her employer because the employer’s original discriminatory salary decision had been made outside Title VII’s 180-day statutory limitation period—even though Ms. Ledbetter continued to receive discriminatory paychecks within that 180-day period. In her dissent, Justice Ginsburg called for Congress to overrule the Court because “the Court does not comprehend or is indifferent to the insidious way in which women can be victims of pay discriminations.” Congress answered the call with the Lilly Ledbetter Fair Pay Act of 2009, the first piece of legislation signed into law by a newly-elected President Obama. Here is a link to the audio recording of Ginsburg’s dissent from the bench: <https://www.oyez.org/cases/2006/05-1074> (under “Opinion Announcement”).

In *Gonzales v. Carhart* (2007), the Court upheld the constitutionality of the Partial-Birth Abortion Ban Act of 2003, a law that prohibited so-called partial-birth abortion (a political concept, not a medical concept) and failed to provide an exception for situations where the pregnant person’s health is at stake. Ginsburg commented from the bench that “[a] decision of the character the Court makes today should not have staying power.” The audio is available here: <https://www.oyez.org/cases/2006/05-380>.

1. 36:50: The influence of positive morality (society’s actual opinions on what is and is not morally permissible at the time) on the Court’s decisions.
2. 37:08: You can skip the public Q&A.