_Smoothing the Path: Gender Discrimination and the Supreme Court_
Compiled by the National Portrait Gallery, Smithsonian Institution

**Target Grade Level:** 9-12 in social studies classes

**Objectives:**
After completing this lesson, students will be better able to:

- Identify and analyze key components of a portrait and relate visual elements to relevant historical context and significance
- Analyze the connections between the first four female Supreme Court justices.
- Analyze landmark Supreme Court gender-discrimination cases and understand how they relate to each other and to the careers of the first female justices.

**Portrait:**
The Four Justices by Nelson Shanks, oil on canvas, 2012

**Background Information for Teachers**

**About the Portrait:**
A major step in women’s struggle for equality came on March 3, 1879, when Belva Lockwood became the first woman to argue before the Supreme Court. In the 1940s, distinguished jurist Florence Allen was considered for the Court, but opposition, including from the sitting justices, precluded her nomination.

In 1981 Sandra Day O’Connor (born 1930) became the first woman to serve on the Court. O’Connor, a graduate of Stanford Law School, was serving on the Arizona Court of Appeals when President Ronald Reagan nominated her as an associate justice. O’Connor retired from the Court in 2006.

Ruth Bader Ginsburg (born 1933) graduated from Columbia Law School. She was serving on the U.S. Court of Appeals for the District of Columbia when President Bill Clinton nominated her as an associate justice of the Supreme Court in 1993.

Sonia Sotomayor (born 1954) received her J.D. from Yale Law School. She was serving on the United States Court of Appeals, Second Circuit, when President Barack Obama nominated her as an associate justice in 2009. She became the first Latino to sit on the Supreme Court.

Elena Kagan (born 1960) graduated from Harvard Law School. She was President Obama’s solicitor general when the president nominated her as an associate justice of the Supreme Court in 2010.

Nelson Shanks was commissioned to create this portrait to recognize the accomplishments of all four justices. He has drawn on the traditions of Dutch group portraiture for his composition, and the setting is based on interiors and a courtyard within the Supreme Court Building in Washington.
About the ACLU’s Women’s Rights Project
For a comprehensive overview of the founding and work of the ACLU’s Women’s Rights Project in gender discrimination law, visit https://www.aclu.org/womens-rights and https://www.aclu.org/womens-rights/aclu-history-protecting-womens-equality

Lesson Procedures

Portrait Analysis
Show students the portrait *The Four Justices* by Nelson Shanks. Discuss and analyze the portrait using the following questions as a guide:

1. **Looking Questions:**
   - Describe what each sitter is wearing. How are their outfits similar and how are they different?
   - Describe the setting of this portrait. What do you see in the room? What do you see outside the window?
   - What objects do you see in the portrait? What is on the couch next to the seated women?
   - Describe the sitters’ pose. Are they standing? Sitting? How much of their bodies can you see? Where are their hands positioned?
   - Describe the sitters’ facial expressions. In what direction are they looking?

2. **Analysis Questions:**
   - What can you tell about the sitters’ jobs based on their clothing?
   - What can you determine about the setting of the portrait? Where might this be? Why might the artist have chosen this setting?
   - Why might the artist have chosen to include these objects in this portrait? How do they relate to the sitters?
   - Do all of the sitters look like they are close to each other in age? Do some of the women look older than others? If so, which?
   - Why might the artist have arranged the women in this particular pose, with some women sitting and some standing? What can we determine about the relationship between these women based on their pose?

Using the students’ analysis as a springboard, explain/discuss the following:
- This is a portrait of the first four women to be appointed as Supreme Court justices.
- The setting is based on the Supreme Court building in Washington DC.
- The Supreme Court was established in 1789, but there wasn’t a female justice until 1981, when Sandra Day O’Connor became the first woman to sit on the bench.
- Discuss why that might have been the case, making sure that students are aware of the gender discrimination in many areas (not just suffrage) that kept women off the Court for almost two centuries.
- Since 1981, four women have been appointed, with three currently serving (on a bench of nine).
• Point out which justice is which in the portrait and in what order they were appointed, and have students again consider the analysis question about why the artist chose to arrange the sitters in this particular pose.
• Guide students towards the idea that the two seated justices (O’Connor and Ginsburg) represent the older pioneering generation that inspired and opened doors for the younger two justices (Kagan and Sotomayor, both standing).

Activity: Smoothing the Path
1. Building on the discussion of the sitters’ pose and their relation to each other, share the following excerpt with students:

Kagan Says Her Path to Supreme Court Was Made Smoother by Ginsburg’s

They share New York City roots, a liberal outlook and a personal trainer. But a gap separates Justices Ruth Bader Ginsburg and Elena Kagan, one they explored during an often lighthearted joint appearance last week at the New York City Bar Association.

Justice Ginsburg, 80, is the oldest member of the Supreme Court, and she came of age when many legal careers were closed to women. Justice Kagan, 53, is the court’s youngest member, and she seemed to have little trouble compiling a glittering résumé. She was the first female dean of Harvard Law School and the first female United States solicitor general.

“What explains this gulf between Justice Ginsburg’s experience and mine?” Justice Kagan asked. “In large part the answer is simply Justice Ginsburg. As a litigator and then as a judge she changed the face of American antidiscrimination law.”

Justice Ginsburg, having been turned down by law firms and refused judicial clerkships, became a professor at Rutgers Law School, where she experienced the sort of blatant discrimination that was common at the time. “Rutgers told her that she was going to be paid less than her male colleagues because, quote, your husband has a very good job,” Justice Kagan said.

As a lawyer, Justice Ginsburg framed and argued cases that established an entirely new body of constitutional law, one requiring the equal treatment of women. As a judge, she kept pushing, sometimes in the face of headwinds from her more conservative colleagues.

2. Discuss the excerpt, focusing on what it means that Kagan’s path was made smoother by Ginsburg. Explain that as a lawyer and judge, Ginsburg was involved with several court cases that helped to define most forms of gender discrimination as unconstitutional and illegal.

3. Divide students into six small groups and give each group the Fact Sheet for one case (see handout below). Have each group read and analyze their case and be able to explain the situation, the question raised, the decision of the Court, and the significance.

4. Jigsaw students into new groups and have them present the cases to each other.
5. In their new groups, give students a copy of the *Four Justices* portrait and have them create a graphic organizer using the following guidelines:

- Create a symbol for each of the six cases.
- Cut out the faces of each justice in the portrait.
- Using the symbols, figure out a way to represent visually how the cases connect to each other.
- Using the faces, add into your organizer a visual representation of a way in which the cases relate to each justice.

6. Have each group share their graphic organizer to the whole class. Discuss the similarities and differences, focusing on the theme of the older two justices smoothing the path for the younger two.

**Learning Standards**

**CCSS.ELA-LITERACY.CCRA.R.1**
Read closely to determine what the text says explicitly and to make logical inferences from it; cite specific textual evidence when writing or speaking to support conclusions drawn from the text.

**CCSS.ELA-LITERACY.CCRA.R.7**
Integrate and evaluate content presented in diverse media and formats, including visually and quantitatively, as well as in words

**CCSS.ELA-LITERACY.CCRA.SL.1**
Prepare for and participate effectively in a range of conversations and collaborations with diverse partners, building on others' ideas and expressing their own clearly and persuasively.

**CCSS.ELA-LITERACY.CCRA.SL.4**
Present information, findings, and supporting evidence such that listeners can follow the line of reasoning and the organization, development, and style are appropriate to task, purpose, and audience.

**CCSS.ELA-LITERACY.RI.9-10.7**
Analyze various accounts of a subject told in different mediums (e.g., a person's life story in both print and multimedia), determining which details are emphasized in each account.

**CCSS.ELA-LITERACY.RH.11-12.7**
Integrate and evaluate multiple sources of information presented in diverse formats and media (e.g., visually, quantitatively, as well as in words) in order to address a question or solve a problem.
CCSS.ELA-LITERACY.RI.11-12.8
Delineate and evaluate the reasoning in seminal U.S. texts, including the application of constitutional principles and use of legal reasoning (e.g., in U.S. Supreme Court majority opinions and dissents) and the premises, purposes, and arguments in works of public advocacy (e.g., *The Federalist*, presidential addresses).

CCSS.ELA-LITERACY.SL.9-10.1
Initiate and participate effectively in a range of collaborative discussions (one-on-one, in groups, and teacher-led) with diverse partners on grades 9-10 topics, texts, and issues, building on others' ideas and expressing their own clearly and persuasively.

CCSS.ELA-LITERACY.SL.9-10.4
Present information, findings, and supporting evidence clearly, concisely, and logically such that listeners can follow the line of reasoning and the organization, development, substance, and style are appropriate to purpose, audience, and task.

CCSS.ELA-LITERACY.SL.11-12.1
Initiate and participate effectively in a range of collaborative discussions (one-on-one, in groups, and teacher-led) with diverse partners on grades 11-12 topics, texts, and issues, building on others' ideas and expressing their own clearly and persuasively.

CCSS.ELA-LITERACY.SL.11-12.4
Present information, findings, and supporting evidence, conveying a clear and distinct perspective, such that listeners can follow the line of reasoning, alternative or opposing perspectives are addressed, and the organization, development, substance, and style are appropriate to purpose, audience, and a range of formal and informal task.
LANDMARK SUPREME COURT CASES IN GENDER-DISCRIMINATION LAW

This handout was compiled using the following resources:
The Oyez Project at IIT Chicago-Kent College of Law (www.oyez.org)
The ACLU Women’s Right Project (https://www.aclu.org/womens-rights)
The Supreme Court Historical Society (http://www.supremecourthistory.org/)
PBS’s The Supreme Court website (http://www.pbs.org/wnet/supremecourt/)

CASE #1: REED V. REED (1971)

Facts of the Case: An Idaho law (dating back to 1864) specified that “males be preferred to females” in appointing administrators of estates. An estate administrator is someone who is responsible for deciding what happens to the property and assets left by someone who has died without a will. After the death of their adopted son, both Sally and Cecil Reed sought to be named administrator of their son’s estate (the Reeds were divorced). According to the Idaho law, Cecil was automatically appointed administrator because he was male and Sally was not. Sally challenged the law in Idaho state court, but the state court upheld the law, so the case made its way up to the Supreme Court.

Question Raised: Did the Idaho law violate the Equal Protection Clause of the 14th Amendment, which states that no state can “deny to any person within its jurisdiction the equal protection of the laws?”

Connection to Ruth Bader Ginsburg and/or Sandra Day O’Connor: Ruth Bader Ginsburg, a lawyer working on behalf of the American Civil Liberties Union, wrote a brief arguing that the law did in fact violate the 14th Amendment.

Supreme Court’s Conclusion:
Yes. In a unanimous decision, the all-male court held that the law’s dissimilar treatment of men and women was unconstitutional. The Court argued that it violated the 14th Amendment to have men preferred automatically over women. This was the first time ever that the United States Supreme Court had struck down a state law on the ground that it discriminated against women in violation of the 14th Amendment.
CASE #2: FRONTIERO V. RICHARDSON (1973)

Facts of the Case: Sharron Frontiero, a lieutenant in the United States Air Force, sought a dependent’s allowance for her husband. Under federal law, a dependent’s allowance provides housing, medical care, and other benefits for the spouses of members of the U.S. military. At the time, wives of military members were automatically considered as dependents and granted the allowance. Husbands, however, were not eligible for the benefits unless they could prove that they were actually dependent on their wives for at least one-half of their support. Frontiero’s request for an allowance for her husband was turned down, even though a wife in the same situation would have received one. Frontiero sued the United States Defense Department.

Question Raised: Did a federal law, requiring different qualification criteria for male and female military spousal dependency, unconstitutionally discriminate against women, thereby violating the Fifth Amendment’s Due Process Clause which states that a person cannot “be deprived of life, liberty, or property without due process of law?”

Connection to Ruth Bader Ginsburg and/or Sandra Day O’Connor: Ginsburg, a lawyer working for the newly created Women’s Rights project at the American Civil Liberties Union, argued this case in front of the Supreme Court. It was her first time arguing before the Court. She argued that the law was unconstitutional.

Supreme Court’s Conclusion: Yes. The all-male Court ruled 8-1 that the law in question clearly required “dissimilar treatment for men and women who are similarly situated,” thereby violating the Due Process Clause.
CASE #3: WEINBERG V. WEISENFELD (1975)

Facts of the Case: Stephen Weisenfeld’s wife Paula died in childbirth, leaving Stephen as the sole provider for their infant son Jason. Stephen wanted to cut his work hours in order to care for the baby himself. A woman whose husband had died would have been able to draw on Social Security survivor’s benefits to help support her and her child, but the federal Social Security Act made these benefits available only to women with children, not to men with children (even though men and women paid Social Security taxes at the same rate).

Question Raised: Does the provision of the Social Security Act granting survivor benefits to widows but not to widowers, violate the Fifth Amendment’s Due Process Clause, which states that a person cannot “be deprived of life, liberty, or property without due process of law?”

Connection to Ruth Bader Ginsburg and/or Sandra Day O’Connor:
Ginsburg, a lawyer working for the Women’s Rights project at the American Civil Liberties Union, argued Weisenfeld’s side of this case in front of the Supreme Court.

Supreme Court’s Conclusion:
Yes. A unanimous (and all-male) Court ruled that the gender-based distinctions in the regulation violated the Constitution’s Due Process Clause. Justice William Brennan wrote in the Court’s opinion that “since the Constitution forbids the gender-based differentiation premised upon assumptions as to dependency made in the statutes before us in Frontiero [a 1973 case in which the Court struck down gender discrimination in a law about military spouse benefits], the Constitution also forbids the gender-based differentiation that results in the efforts of female workers required to pay social security taxes producing less protection for their families than is produced by the efforts of men.”
CASE #4: CALIFANO V. GOLDFARB (1977)

Facts of the Case: Leon Goldfarb was a widower who applied for survivor’s benefits under the Social Security Act. Even though his wife Hannah had paid Social Security taxes for 25 years, his application was denied. To be eligible for benefits under Section 402 of the federal Social Security Act, he must have been receiving half his support from his wife at the time of her death. Section 402 did not impose this requirement on widows whose husbands had recently passed away. Goldfarb challenged this statute in District Court under the Due Process Clause of the Fifth Amendment. The District Court ruled that the statute was unconstitutional. The federal government appealed to the Supreme Court.

Question Raised: Do the gender-based requirements for survivor’s benefits in Section 402 violate the Due Process Clause of the Fifth Amendment, which states that a person cannot “be deprived of life, liberty, or property without due process of law?”

Connection to Ruth Bader Ginsburg and/or Sandra Day O’Connor: Ginsburg, a lawyer working for the Women’s Rights project at the American Civil Liberties Union, argued before the Supreme Court on behalf of Goldfarb.

Supreme Court’s Conclusion:
Yes. In a 5-4 decision, the Supreme Court agreed with the District Court that the statute is unconstitutional. Justice Brennan described this situation as “indistinguishable” from the one in Weinberger v. Weisenfeld (1975), where a similar statute was invalidated. In this case, a female worker’s family was less protected than the family of a male worker. The court rejected the “archaic and overbroad” generalizations that a wife is more likely to be dependent on her husband than a husband on his wife. The “old notions” of gender roles were not sufficient to justify the different treatment of widows and widowers, and which was therefore in violation of the Due Process Clause.
CASE #5: MISSISSIPPI UNIVERSITY FOR WOMEN V. HOGAN (1982)

Facts of the Case: Joe Hogan, a registered nurse and qualified applicant, was denied admission to the Mississippi University for Women School of Nursing’s baccalaureate program because of his sex. Created by a state law in 1884, MUW was the oldest state-supported all-female college in the United States. Hogan, who lived and worked in the same city as the university, could have earned a nursing degree at one of two other Mississippi institutions, but both were located over 100 miles from his home. Hogan filed an action in U.S. District Court claiming that the single-sex admissions policy of MUW’s School of Nursing violated the Equal Protection Clause of the Fourteenth Amendment.

Question Raised: Did the state statute which prevented men from enrolling in MUW violate the Equal Protection Clause of the 14th Amendment, which states that no state can “deny to any person within its jurisdiction the equal protection of the laws?”

Connection to Ruth Bader Ginsburg and/or Sandra Day O’Connor: O’Connor was a justice on the Supreme Court when this case was argued. She wrote the opinion for the majority, citing the precedents of several cases argued by Ginsburg when she was a lawyer for the ACLU’s Women’s Rights Project, including Reed v. Reed (1971), Frontiero v. Richardson (1973) and Weinberger v. Weisenfeld (1975).

Supreme Court’s Conclusion: Yes. The Court held 5-4 that the state did not provide an “exceedingly persuasive justification” for the gender-based distinction. The state’s primary argument, the policy tried to correct historic discrimination against women in higher education, was “unpersuasive” to the Court because women traditionally have not lacked opportunities to enter nursing. If anything, argued Justice O’Connor, the statute “tends to perpetuate the stereotyped view of nursing as an exclusively women’s job.”
CASE #6: UNITED STATES V. VIRGINIA (1996)

Facts of the Case: The Virginia Military Institute (VMI) boasted a long and proud tradition as Virginia’s only exclusively male public undergraduate higher learning institution. The United States brought suit against VMI and the state of Virginia, arguing that the school’s male-only admissions policy was unconstitutional because it violated the 14th Amendment’s Equal Protection Clause. When an appellate court agreed that the policy was unconstitutional, Virginia proposed to create the Virginia Women’s Institute for Leadership (VWIL) as a parallel program for women. The appellate court ruled that the two programs would offer “substantively comparable” educational benefits, and therefore VMI could remain exclusively male. The United States government appealed to the Supreme Court.

Question Raised: Does Virginia’s creation of a women’s-only academy, as a comparable program to the male-only academy, satisfy the 14th Amendment’s Equal Protection Clause, which states that no state can “deny to any person within its jurisdiction the equal protection of the laws?”

Connection to Ruth Bader Ginsburg and/or Sandra Day O’Connor: By this point, Ginsburg and O’Connor were both justices on the Court. Ginsburg wrote the majority opinion in this case, joined by O’Connor and 5 other justices. In her opinion, she cited O’Connor’s opinion in another case about gender discrimination in university admissions, Mississippi University for Women v. Hogan (1982).

Supreme Court’s Conclusion: No. In a 7-1 decision, the Court held that VMI’s male-only admissions policy was unconstitutional. According to Justice Ginsburg’s opinion, Virginia violated the Equal Protection Clause because it failed to show “exceedingly persuasive justification” for VMI’s gender-based admissions policy. Furthermore, Virginia’s VWIL could not offer women the same benefits as VMI offered men. The VWIL would not provide women with the same rigorous military training, faculty, courses, facilities, financial opportunities, or alumni reputation and connections that VMI gives to its male cadets. Therefore, the argument that VMI and VWIL offer “comparable” benefits does not hold, and denying women the right to enroll at VMI violates their constitutional rights to equal protection under the law.