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## Justice Ginsburg's Advocacy and the Future of Equal Protection

*This Essay was adapted from remarks delivered at Equality's Frontiers, a panel discussion celebrating Justice Ginsburg's gender-equality jurisprudence and analyzing its relationship with new developments in the law of equality. The discussion preceded Justice Ginsburg's Gruber Distinguished Lecture in Women's Rights, held on October 19, 2012, at Yale University.*

I would like to start by thanking everyone who made this event possible, especially Judith Resnik and Reva Siegel, and Justice Ginsburg herself for taking the time in the middle of a busy Term to join us. This is a very special occasion—and with cases concerning affirmative action and very likely same-sex marriage before the Court this Term, it is a particularly fitting time to reflect on Justice Ginsburg's contributions to equality jurisprudence in this country.

Our panel today is called *Equality's Frontiers*. "Frontier" is an evocative word for me now that I live in Texas. You can still see the frontier in Texas: dry, deserted land stretching out forever until it meets an equally endless sky. If you come from east of the Mississippi River, I will have a hard time conveying to you just how empty the landscape is, but I think if you try to imagine it—tumbleweeds, cacti—that will help you to appreciate what the doctrinal landscape looked like in the early 1970s when Ruth Bader Ginsburg began to litigate constitutional cases about sex discrimination. At that point, the Supreme Court had never invalidated a law on the ground that it discriminated on the basis of sex, and laws that discriminated on the basis of sex triggered no special scrutiny under the Fourteenth Amendment. So, as a lawyer, Justice Ginsburg faced a substantial obstacle: she had to persuade the Court that, contrary to what it had believed for the first two centuries of this nation's history, sex discrimination was a problem of constitutional magnitude. But she

also had a significant opportunity to shape the Court's understanding of what sex discrimination was and when it ran afoul of the Constitution.

At the start of her litigation campaign, Ginsburg made a highly consequential, nonobvious choice. She decided to challenge the constitutionality of sex discrimination in cases with male plaintiffs. As a result, sex-based equal protection law in the United States was constructed, in significant part, in cases brought by men. To this day, men outnumber women among the ranks of constitutional sex discrimination plaintiffs who have reached the Supreme Court.

Why did Ruth Bader Ginsburg decide to bring sex discrimination cases on behalf of men? Commentators have often assumed that Ginsburg chose to represent male plaintiffs because her aim was simply to rid the law of formal sex classifications. Such classifications could be challenged by men or women, so, this account suggests, Ginsburg decided to bring claims on behalf of men because she thought that male judges might empathize with plaintiffs of their own sex. Thus, although the foundational sex discrimination cases of the 1970s were historic and groundbreaking—they established that sex discrimination was a matter of constitutional concern—this account suggests that they guaranteed only formal, rather than substantive, equality. Teenage boys in Oklahoma won the right to buy low-alcohol beer at the same age girls could,<sup>1</sup> but pregnancy discrimination fell under the radar of constitutional concern because it did not technically classify on the basis of sex.<sup>2</sup>

I want to suggest that this account misunderstands the early constitutional sex discrimination cases. It misconceives both the theory of equal protection that motivated Ginsburg to press the claims of male plaintiffs and the constitutional doctrine that those plaintiffs helped to create. It also obscures the relevance of the foundational sex discrimination cases of the 1970s to questions at the cutting edge of equal protection law today.

So, why did Justice Ginsburg decide to represent male plaintiffs? In 1971, she wrote a letter to a colleague in which she explained that she derived the idea to bring sex discrimination cases on behalf of men from “Mill and the Swedes.”<sup>3</sup> What did she mean by this? What do John Stuart Mill and “the Swedes” have to do with male plaintiffs at the Supreme Court?

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1. See *Craig v. Boren*, 429 U.S. 190 (1976).

2. See *Geduldig v. Aiello*, 417 U.S. 484 (1974).

3. Letter from Ruth Bader Ginsburg, Professor, Rutgers Univ. Sch. of Law, to Jamison Doig, Professor Emeritus of Politics & Int'l Affairs, Princeton Univ. (Apr. 6, 1971) (on file with the Library of Congress) (Ruth Bader Ginsburg Papers, container 5, folder “Moritz v. Comm’r May 1971”).

There was a resurgence of interest in the late 1960s in John Stuart Mill's writing on women, particularly among participants in the newly emergent women's movement. Mill argued in *The Subjection of Women*,<sup>4</sup> published in 1869, that we do not know what men or women are really like, because they have for so long been compelled to conform to sex stereotypes. He compared women's character to that of a tree, half of which had been tended in a hothouse and thus sprouted luxuriantly, and the other half of which had been left in the snow and withered and died. He argued that it would be a fallacy to look at the vegetation that resulted from this experiment as a product of nature. His point was that people, too, grow in the way we have made them grow. And, importantly, he applied this concept to both sexes. He argued that men and women are both constrained by sex-role stereotyping, and that equality depends on alleviating the pressure on everyone to conform to such stereotypes.

One reason this antistereotyping approach to issues of sex equality appealed to Ginsburg is that, before she became a litigator, she spent a significant amount of time in Sweden. In the early 1960s, Ginsburg accepted a position researching Swedish law for Columbia Law School's Project on International Procedure and, in the course of her work, learned Swedish, lived intermittently in Sweden, and became an expert on Swedish law.<sup>5</sup> (When she was confirmed to the Supreme Court, the *New York Times* reported that she still watched Ingmar Bergman films without subtitles.<sup>6</sup>) In the period when Ginsburg was there, Sweden was undergoing a revolution in its approach to sex discrimination, and men were very much at the center of this new approach. Prominent Swedish journalists, intellectuals, and politicians began to argue in the 1960s that the enforcement of traditional sex roles injured members of both sexes, and that, as long as men were discouraged from taking on women's roles, women would never attain equal social standing. As a result, combating sex-role enforcement became an official policy aim of the Swedish government during this period. The government instituted affirmative-action programs for both sexes, and Sweden became the first country in the world to

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4. J.S. MILL, *THE SUBJECTION OF WOMEN* (1869), reprinted in *ON LIBERTY AND OTHER WRITINGS* 144 (Stefan Collini ed., Cambridge Univ. Press 1989).

5. Between 1963 and 1970, Ginsburg published more than a dozen books and articles on the Swedish legal system, including a definitive text on Swedish civil procedure. For more on Ginsburg's engagement with Swedish law and feminism, see Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 97-105 (2010).

6. David Margolick, *Trial by Adversity Shapes Jurist's Outlook*, N.Y. TIMES, June 25, 1993, <http://www.nytimes.com/1993/06/25/us/trial-by-adversity-shapes-jurist-s-outlook.html>.

make parental leave available to men. The government even began to consider how planning and zoning and public-transportation networks could be redesigned to make it easier for both sexes to work outside the home.<sup>7</sup>

In the early 1970s, the women's movement in the United States was also starting to think about sex equality in these terms. Ruth Bader Ginsburg translated those ideas into constitutional arguments. She argued in the briefs she submitted to the Supreme Court that sex-based state action violates the Fourteenth Amendment when it steers men and women into separate spheres and presses them to conform to traditional roles. Her aim, in including men among the ranks of constitutional sex discrimination plaintiffs, was to provide the Court with a mediating principle for determining when sex-based state action warrants constitutional concern. She did not argue that the state could never take sex into account; rather, she argued that the Constitution prohibits the state from acting in ways that reflect or reinforce traditional conceptions of men's and women's roles.

Ginsburg's great achievement in the male-plaintiff cases was to persuade the Burger Court to adopt this more robust antistereotyping approach to sex-based equal protection law. Let me cite one example: a 1975 case called *Weinberger v. Wiesenfeld*.<sup>8</sup> It's a sad case. The plaintiff, Stephen Wiesenfeld, was a man whose wife had died while giving birth to their first child. If he had been a woman, he would have been entitled to "mother's benefits"—benefits designed to allow mothers to stay home with their children upon the death of the family breadwinner. Wiesenfeld's wife had been the primary breadwinner in the family, and he wanted to stay home with his baby son after her death. But New Jersey denied his application for "mother's benefits" on the ground that men were categorically ineligible for such benefits. The Court in *Wiesenfeld* held that rule unconstitutional. It did not hold that sex classifications are per se unconstitutional. It held that *this* benefits scheme was unconstitutional because it reflected and reinforced traditional sex roles. The Court pointed out that the state was assuming that widows would stay home with their children and that widowers would go to work, and that it was using powerful economic levers to make those assumptions a reality. Indeed, the

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7. For instance, Prime Minister Olof Palme argued in 1970 that expanding services to facilitate household work and redesigning public transportation systems in order to shorten commute times would "make it easier for both husband and wife to be gainfully employed." Olof Palme, Prime Minister of Swed., *The Emancipation of Man*, Address Before the Women's National Democratic Club (June 8, 1970), in KENNETH M. DAVIDSON, RUTH BADER GINSBURG & HERMA HILL KAY, *TEXT, CASES AND MATERIALS ON SEX-BASED DISCRIMINATION* 938, 944 (1974).

8. 420 U.S. 636 (1975).

Court went so far as to observe that, absent the myriad ways in which the state endorsed and enforced the male-breadwinner/female-caregiver model, some men might choose to stay home with their children even in cases where their wives remained alive.<sup>9</sup>

That's positively Swedish! And *Wiesenfeld* was far from the only case in which the Burger Court invalidated sex-based state action on antistereotyping grounds. By the early 1980s, the antistereotyping principle was firmly embedded in constitutional sex discrimination doctrine.

Now, as you know, the Burger Court is rarely likened to the Swedish legislature. This is the Court that failed to recognize pregnancy discrimination as a form of sex discrimination.<sup>10</sup> As a result of that and other failings, commentators have often concluded that the Court in the 1970s adopted a narrow, anticlassificationist understanding of when sex-based state action violates the Equal Protection Clause. The problem, however, is not with the principle the Court adopted, but with the way the Court applied that principle. The Burger Court applied the antistereotyping principle only narrowly, and generally not at all in cases involving the regulation of pregnant women. But it would be a mistake to conclude on this basis that the principle the Court adopted in the 1970s is incapable of doing significant equality work in the twenty-first century. In fact, the implications of the antistereotyping principle are still emerging today. That is precisely why Ginsburg championed this principle when sex discrimination law was in its infancy. She was keenly aware, as a litigator, that the project of combatting sex discrimination would take time—and that the promise of the antistereotyping principle would emerge slowly, as the Court, in dialogue with social movements and the other branches of government, came to recognize that certain forms of regulation that once seemed natural and innocuous actually serve to reinforce sex stereotypes in constitutionally problematic ways.

Because of her position on the Court, Justice Ginsburg herself has played a significant role in recent years in articulating implications of the antistereotyping principle that went unrecognized in the 1970s. The Court has now recognized on multiple occasions that the regulation of pregnant women and mothers may run afoul of the antistereotyping mandate at the core of constitutional sex discrimination law. In fact, the Court has suggested that we should be particularly concerned about the regulation of pregnancy and motherhood, because, historically, stereotyping has been at its most intense in

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9. *Id.* at 651-52.

10. *See, e.g.*, *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976); *Geduldig v. Aiello*, 417 U.S. 484 (1974).

these areas. Ten years ago, the Court even held that affirmative benefits, like federally mandated family-caregiving leave for both men and women, might be necessary in order to combat powerful male-breadwinner/female-caregiver stereotypes.<sup>11</sup>

The Court's 2003 family-leave decision was a particularly remarkable tribute to Justice Ginsburg because she did not write it. It was written by Chief Justice Rehnquist—the only Justice in the 1970s who did not view the mother's benefits statute in *Weisenfeld* as a constitutionally problematic form of sex stereotyping.<sup>12</sup> After spending a decade on the Court with Justice Ginsburg, however, the Chief Justice penned an opinion that sounded for all the world as if she had written it. That seems to me a formidable achievement on the part of both Justices.

Let me conclude by mentioning another context in which the implications of the antistereotyping principle are only just beginning to emerge—a context the Court might consider this very Term (or so someone with a good deal of inside knowledge of the Court has suggested<sup>13</sup>). To show how the antistereotyping principle might apply in this new area of the law, let me return briefly to *Weisenfeld*. When Justice Brennan circulated his majority opinion in the case, noting that Stephen Wiesenfeld intended to stay home with his young son and suggesting that he might even have elected to do so if his wife had lived, some of his fellow Justices were quite shocked. Drafts of the circulated opinion, now at the Library of Congress, reveal heavy underlining and exclamation marks at the point at which Justice Brennan discusses the allocation of responsibilities in the Wiesenfelds' marriage. His suggestion that Stephen Wiesenfeld may well have stayed home with his son even if his wife had lived elicited a "WOW!" from Justice Blackmun.<sup>14</sup> The Wiesenfelds' marriage did not accord with the traditional male-breadwinner/female-caregiver model. In terms of gender, the Wiesenfelds' marriage did not look like other marriages. I think it is fair to say that the Justices found the

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

12. Although then-Justice Rehnquist declined to endorse the Court's antistereotyping reasoning, he did vote to strike down the statute in *Weisenfeld* on other grounds—namely, that the state had no rational basis for depriving the “child of a deceased contributing worker . . . the opportunity to receive the full-time attention of the only parent remaining to it.” *Weisenfeld*, 420 U.S. at 655.

13. Eyder Peralta, *Justice Ginsburg Predicts Gay Marriage Question Headed to High Court*, NPR: TWO-WAY (Sept. 20, 2012, 1:40 PM), <http://www.npr.org/blogs/thetwo-way/2012/09/20/161483885>.

14. William J. Brennan, Second Draft of Opinion of the Court, *Weinberger v. Wiesenfeld* (circulated Mar. 1975) (on file with the Library of Congress) (Harry A. Blackmun Papers, box 203, folder 6).

arrangement *very queer*. But, ultimately, they agreed with Wiesenfeld's lawyer that equal protection prohibits the state from regulating marriage in ways that reflect and reinforce traditional conceptions of men's and women's roles. If you listen to arguments against same-sex marriage today, you will hear a great many justifications that run afoul of this antistereotyping principle. Indeed, it is not clear that laws restricting marriage to different-sex couples can survive antistereotyping analysis. *This* is the principle that was established in the male plaintiff cases of the 1970s – and it continues to operate at the frontiers of equal protection law today.

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*Justice Ginsburg offered the following response:*

Thank you, Cary, for an informative, thoroughly engaging presentation. My dear old Chief, then-Justice William H. Rehnquist, subscribed to the unanimous judgment in *Wiesenfeld*, although he wrote separately.<sup>15</sup> Justice Brennan thought the law according benefits to widowed mothers, but not widowed fathers, discriminated against women because women paid the same Social Security tax as men, but the women's payments did not net the same benefits for the family.<sup>16</sup> Justice Stevens thought that the "mother's benefits" discriminated against the male as parent.<sup>17</sup> Why shouldn't a sole surviving father have the same opportunity as a sole surviving mother to care for the child? Justice Rehnquist thought the law was utterly irrational with regard to the baby.<sup>18</sup> Why should a child who lost a parent at birth have the opportunity for personal care by a mother but not by a father?

Perhaps part of the explanation for Justice Rehnquist's view was his loving involvement in the upbringing of his granddaughters. Perhaps that life experience, more than my lawyer's arguments, led to his decision in favor of the father, Stephen Wiesenfeld.

A quick note on pregnancy. The Court did recognize that discrimination against pregnant women was unconstitutional in the

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15. *Wiesenfeld*, 420 U.S. at 655 (Rehnquist, J., concurring in the result).

16. *Id.* at 645 (majority opinion).

17. *Califano v. Goldfarb*, 430 U.S. 199, 218 & n.2 (1977) (Stevens, J., concurring in the judgment) (stating that "the relevant discrimination in this case is against surviving male spouses, rather than against deceased female wage earners," and adding that the "contrary analysis" in *Wiesenfeld* "was not necessary to the decision of that case").

18. *Wiesenfeld*, 420 U.S. at 655 (Rehnquist, J., concurring in the result).

cases involving schoolteachers forced to take unpaid maternity leaves with no guaranteed right to return.<sup>19</sup> Plaintiffs in those cases argued, “We are ready, willing, and able to work. Don’t force us out of the classroom the moment we begin to show.” The women wanted to do a day’s work and get a day’s pay. They could be trusted. The understanding fell off for the pregnant women who sought disability benefits. They argued, “Yes, we are disabled for the time surrounding childbirth. We must miss work then, and want to have the health benefits that workers would get for any other temporarily disabling condition.” The Supreme Court ruled against them, I suspect, because the Justices didn’t trust women who were making that complaint. It was one thing for the schoolteacher to say, “I want to do my job in the classroom and get paid for it.” Quite another for a woman to plead, “I need these benefits temporarily, but I will rejoin the workforce some weeks after childbirth.” The concern was that she would be a dropout and should not be counted as a member of the workforce entitled to benefits. That same distrust, I think, helps to explain the *Gilbert* case,<sup>20</sup> in which the Court held, for Title VII purposes, that discrimination on the basis of pregnancy is not discrimination on account of sex.

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<sup>19</sup>. *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974).

<sup>20</sup>. *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976).