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Gender and the Law: Revisiting the Legacy of a Feminist Icon

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Justice Ginsburg attained celebrity status in her later years as the voice of feminism from the bench, but her influence on law and gender was not always so venerated. For much of her career, feminist scholarly criticism of her gender jurisprudence was sharp. Critics called the approach "formal equality," pointing out that it benefited those women most similarly situated to men. The criticism echoed that leveled against her strategy as a litigator representing male plaintiffs. In recent years, Justice Ginsburg's legacy has been burnished by a fresh interpretation crediting it with a more robust vision of gender equality than previously appreciated. This chapter contends that, while far from radical, the Justice's gender jurisprudence is the product of a jurist committed to minimizing the role of gender as a site of social and economic oppression.

Although Justice Ginsburg's impact on gender equality can fill a book on its own, this chapter focuses on identifying and explaining three core themes: an antipathy toward gender stereotypes embedded in law; a vision of gender equality that transcends formal equality; and a recognition of the centrality of reproductive freedom to women's equality. Each of these themes has been advanced, albeit imperfectly, by Justice Ginsburg's career as a litigator and a jurist.

Anti-stereotyping Above All

Justice Ginsburg's views on the harms of sex-based classifications, and the stereotypes that underlie them, were formed before she became a jurist and followed her to the bench. The anti-stereotyping principle at the heart of her approach has often been maligned as a thin version of

equality. But it has proven to be strong medicine for challenging legally enforced gender conformity and the gender binary.

Some feminist scholars questioned the strategy of making gender stereotyping the cornerstone of constitutional gender equality. Mary Becker famously indicted the leading constitutional law cases applying heightened scrutiny to gender, the culmination of the Ginsburg litigation strategy, for targeting irrational generalizations instead of women's subordination.[1] Becker's critique was not merely that this approach failed to address the ways women were differently situated from men due to systemic disadvantage. Becker's indictment went further, arguing that the gender-blind model deepened gender inequality by reinforcing the gendered patterns that hurt women. Catharine MacKinnon was also scathing in her review of the model of equality most often associated with the RBG brand, which she regarded as a hollow assimilation that helped those women most closely situated to men, thereby reinforcing male dominance.[2] The emphasis on sex-based classifications left out many issues contributing to women's economic and social inequality, such as welfare, domestic violence, rape, and poverty.

While these critiques remain forceful, more recent feminist scholarship has been kinder to RBG's anti-stereotyping principle.[3] There is more than a hollow liberty at the core of the anti-stereotyping principle.[4] The breadwinner/homemaker dichotomy is problematic not only because it interferes with liberty (men's as well as women's) but also because it reinforces a hierarchy of gender power.[5] The breadwinner role is privileged precisely because it is associated with masculinity.

Recall, for example, *Weinberger v. Wiesenfeld*,[6] one of the gems in Ginsburg's litigation career with the ACLU. The plaintiff's wife was deceased, but the Social Security Act denied widowers the survivors' benefits automatically granted to widows. It took some explaining to convince the Supreme Court that the statute harmed the *women* (who were already deceased) whose spouses were denied benefits. On the surface, the statute *favored* women, since female beneficiaries—surviving spouses of deceased husbands—automatically received benefits. Only by focusing on the dual roles reflected in the statute did the harm to women come into focus. The law operated as a de facto subsidy to male wage-earners, whose families would have more resources upon their death.[7] As Martha Chamallas explained, the Court could not have understood

the harm in these cases without implicitly recognizing the devaluation of women workers.[8]

The role of male plaintiffs in the foundational gender cases has also been criticized. As a litigator, Ginsburg represented more men than women,[9] a move critics saw as a cynical tactic to appeal to male judges. Ginsburg herself viewed *Craig v. Boren*,[10] the case adopting intermediate scrutiny in a challenge to a state law barring young men from purchasing low-alcohol beer, as something of an embarrassment—despite her collaboration with the plaintiffs' attorneys challenging the law.[11] As sex discrimination law developed, cases brought by male plaintiffs played a central role. Before Justice Ginsburg joined the Court, *Mississippi University for Women v. Hogan*[12] was decided in favor of a male plaintiff's challenge to a state nursing school's exclusion of male applicants. Writing the opinion for the Court, Justice Sandra Day O'Connor closely tracked the core Ginsburg insight that gender stereotypes are a double-edged sword: even when targeting men, they also hurt women. Justice O'Connor pointedly observed that excluding men from nursing depresses women's wages.[13] When it came time for Justice Ginsburg to write the Court's opinion in a later challenge to sex-based admissions in higher education (*United States v. Virginia*, addressing the issue at the Virginia Military Institute, or VMI), she leaned heavily on Justice O'Connor's opinion in *Mississippi University for Women*.[14]

Elaborating the harms to men from gender stereotyping can now be understood as a precursor to socio-legal studies in the field of masculinities.[15] One core precept of masculinities theory is that men, while privileged by gender, pay a price for that privilege. Though men benefit as workers from the premium afforded male breadwinners, they bear a cost to the quality of their relationships, health, and lives outside of work. Relatedly, the price men pay for gender privilege is interconnected to the oppression of women. For example, lifting sex-based restrictions blocking men's access to jobs gendered feminine ("women's jobs") helps women in those jobs by raising wages and status.[16] Finally, masculinities scholars teach that, while men as a group have power over women, not all men share equally in male privilege. The cases Ginsburg litigated on behalf of male plaintiffs reflected the unevenness of male privilege; they included a primary caretaker to an elderly mother, a stay-at-home father, and husbands of higher-earning wives.[17]

Exposing sex discrimination's harms to both men and women resists framing gender equality as a zero-sum game, a "battle of the sexes" in which men lose if women advance. The zero-sum framing rests on an overly simplistic understanding of gender bias and promotes a narrative that invites backlash: if women's equality goes "too far," men lose. This lesson remains urgent, as backlash threatens to unravel feminism's gains.

One of the most transformative insights generated by Ginsburg's anti-stereotyping project is that gender stereotyping is predicated upon a polarized, binary understanding of sex. Unsettling gender stereotypes destabilizes the gender binary. Ginsburg's agenda to obtain heightened scrutiny of gender classifications opened the door to using anti-stereotyping theory to challenge the gender policing underlying antigay and antitrans bias.[18] The Supreme Court's 2020 decision in *Bostock v. Clayton County*,[19] recognizing sexual orientation and transgender discrimination as encompassed by Title VII's ban on sex discrimination, stops short of a wholesale destabilization of the gender binary. But it is a step in that direction made possible by Ginsburg-style skeptical scrutiny of sex-based classifications and the stereotypes underlying them.[20]

Yet there are limits to the transformative power of placing such an emphasis on gender stereotyping. One such limitation stems from the primacy of gender in this approach, as a single axis of bias, and the neglect of intersectional oppression. Gender stereotypes do not operate independently of race and class, and not all women are subject to the same gender stereotypes. Separate spheres ideology and the cult of domesticity (the stereotype underlying the breadwinner/homemaker dichotomy) was always racially specific. Women of color have always been expected to work—indeed, enslaved Black women were forced to work by violence and terror—and were never "protected" from the hardships of labor to preserve a revered maternal role. Challenging the gendered assumptions underlying the breadwinner/homemaker dichotomy did not necessarily dismantle the stereotypes most harmful to women of color or poor women.

Another problematic dimension of reliance on gender stereotyping as the building block of sex discrimination law is that it leaned heavily on the analogy to race discrimination. Ginsburg's litigation strategy built the case for heightened scrutiny explicitly on the comparison to race. As a Justice, Ginsburg relied on the analogy to advance the tough intermediate

scrutiny standard elaborated in her VMI opinion, citing *Sweatt v. Painter*, a precursor to the rejection of "separate but equal" for racial segregation.[21] The race-sex comparison was effective in moving the law closer to strict scrutiny. But the analogy is flawed in its implicit assumption of discrete race/sex categories, the premise that each can be understood as a singular identity unmarked by the other and the implicit assumption of a shared history of oppression. Constitutional law might have had a firmer foundation for dismantling gender oppression if it had been predicated on a deeper historical analysis of gender and the Constitution.[22]

Nevertheless, this criticism should be evaluated in historical context. The very first Title VII case decided by the Supreme Court, *Phillips v. Martin Marietta*,[23] was brought by lawyers with the NAACP Legal Defense Fund. Even though the plaintiff, Ida Phillips, was white, the civil rights community understood that a narrow interpretation of Title VII as applied to sex would eviscerate the statute's ban on race discrimination.[24] Their argument pressed the race-sex analogy to warn that permitting the different treatment of women based on a characteristic in addition to sex (in this case, discrimination against women with young children) would have equally pernicious consequences for race discrimination.[25] Situating the argument historically may not fully rehabilitate the analogy. But its role in building the case for heightened scrutiny is as much a product of the limits of legal reasoning and precedent as it is a failure of imagination by the architects of sex discrimination law.

Not Formal Only: A Gender Equality with Substance

The gender equality at the heart of Justice Ginsburg's jurisprudence has always had a substantive core. Justice Ginsburg's model of equality allows room for some gender-conscious uses of law to address gender disadvantage, with antisubordination as the ultimate goal. The anticlassification approach was a means to an end—that of uprooting the gender hierarchy that subordinated women—not merely an end in itself.[26] In the VMI decision, perhaps the opinion that best captures Justice Ginsburg's gender jurisprudence, "skeptical" scrutiny expressly permits sex-based classifications tailored to remedying women's disadvantages. She threaded the needle as carefully as the Court's precedents would allow, writing:

> "Inherent differences" between men and women . . . remain cause for celebration, but not for denigration. . . . Sex classifications may be used to compensate women "for particular economic disabilities [they have] suffered," to "promot[e] equal employment opportunity," . . . [and] to advance full development of the talent and capacities of our Nation's people. But such classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women.[27]

The line between reinforcing and remedying women's oppression is crucial and yet has proven far more difficult to discern in concrete cases than this formulation admits. There is a tension, perhaps never fully resolvable, in the push for equal treatment founded on a disdain for gender stereotypes and the acknowledgement that gender matters and may sometimes be taken into account.

The main difficulty with this formulation is in determining when the goal of antisubordination demands a departure from the equal treatment norm. It was easy to see that VMI's exclusion of women did nothing to rectify women's social and economic inferiority. But in cases with more plausible claims of doing so, Ginsburg, as a litigator, took a hard stance against sex classifications, making it difficult to see the boundaries of what she would accept in the name of substantive equality as a jurist. The one case that Ginsburg argued before the Supreme Court and lost, *Kahn v. Shevin*,[28] upheld a state property tax exemption for widows. The Court viewed the different treatment of widows and widowers as "reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for which that law imposes a disproportionately heavy burden."[29] Arguing for the plaintiff, a widower who had relied on his wife's income for support, Ginsburg agreed that women generally face greater economic burdens after the loss of a spouse, but she argued that the state should provide benefits to needy spouses regardless of gender.[30] She did not view the Florida law as affirmative action (which she supported). Rather she viewed the special treatment for widows as predicted on the breadwinner/homemaker stereotype, which the Florida law reinforced.[31]

A stronger case for upholding sex classifications to remedy women's disadvantage might be made in *Schlesinger v. Ballard*,[32] decided the year after *Kahn*. Described by Ginsburg as "a tangled, idiosyncratic case,"

the case turned on whether the United States Navy could give servicewomen extra years to compile a record for promotion to compensate for the combat restrictions that made it tougher for servicewomen to secure promotion.[33] Even here, Ginsburg held steadfast to the equal treatment approach. Although the combat restrictions were not directly at issue, Ginsburg would have had the Court review the underlying restrictions instead of upholding the piecemeal compensatory treatment layered upon discrimination.[34] Disagreeing, the Court upheld the classification as a measure targeting the reality (not the mere stereotype) of the disadvantages women faced in military service. Ginsburg viewed the decision as a capitulation to discrimination against women in the military. While it is possible to view her perspective as ensconced in formal equality, in fact, hers was the more radical view.

Another case conventionally understood as posing the formal equality/substantive equality dilemma also found Ginsburg on the equal treatment side. In the early 1980s, the Court took a case that divided the women's rights community over whether the Pregnancy Discrimination Act allowed pregnant workers to be treated more favorably than employees with other medical conditions. Ginsburg sided with the equal treatment advocates—but not out of a rigid adherence to formal equality. Rather she favored extending the favorable treatment of pregnancy to all workers with medical conditions. She believed that permitting more favorable treatment for pregnancy would end up penalizing women. Real reform, she believed, could come only from improving the treatment of all workers with conditions affecting work capacity.

During her career as a litigator, the one instance where Ginsburg approved of a sex-based classification that came before the Court was the federal government's use of a catch-up provision allowing women to subtract more low-earning years in calculating social security benefits. On this, Ginsburg agreed with the Court that the statute's narrowly tailored sex-based classification compensated women for lower wages without reinforcing harmful stereotypes.[35] This position fit with her support for affirmative action to remedy disadvantages stemming from discrimination.[36]

An important limitation to Justice Ginsburg's embrace of a substantive model of equality, however, was her vacillating approach to remedying discrimination. As a litigator, Ginsburg pressed for curing inequality

by extending the more favorable treatment to similarly situated members of the disadvantaged sex. But as a Justice, she did not always opt for leveling up. The issue came to the forefront in a case decided in 2017, *Sessions v. Morales-Santana*.[37] The Court, in an opinion authored by Justice Ginsburg, struck down a sex-based classification in the federal immigration and naturalization statute saddling U.S. citizen fathers with more onerous requirements for conferring citizenship on their nonmarital children born overseas. The statute imposed a longer U.S. residency requirement on citizen fathers than on similarly situated citizen mothers, treating the sex of the parent as a proxy for inculcating American cultural values. By striking down the classification, the Court advanced the anti-stereotyping principle at the heart of Justice Ginsburg's jurisprudence.[38] But when it came to remedying the discrimination, Justice Ginsburg explained that the equal protection violation could be cured by either extending the more favorable treatment to the children of citizen fathers or ending it for the offspring of citizen mothers. Because she believed Congress intended to end, rather than extend, the more favorable treatment in the event it was ruled unconstitutional, Justice Ginsburg opted for ending the privilege. This left the plaintiff and others similarly situated with a victory more symbolic than real.

As a Justice, Ginsburg lacked a principled theory for when to level up and when to level down. The determination in *Morales-Santana* boiled down to legislative intent. Writing before she reached the bench, Ginsburg opined that leveling down is appropriate when doing otherwise would affect a large group and impose hefty costs, especially on private parties.[39] But this approach fails to consider whether leveling down exacerbates the harm of the underlying inequality.[40] Instead of grappling with the harms of stigma, subordination, and retaliation for challenging inequality, the Justice defaulted to formal equality, assuming that the harms of discrimination can be sufficiently cured with a gender-blind rule.

Justice Ginsburg's gender equality jurisprudence, despite its limitations, continued to have force in her later years. One of her crowning achievements was her dissent in *Ledbetter v. Goodyear Tire and Rubber Company*.[41] Technically a procedural ruling on the statute of limitations, the Court's decision that Title VII's short limitations period begins running the moment gender bias infects a pay-setting decision prompted Justice Ginsburg to rebuke the majority for its formalism and inattention

to the lived realities of employees. She railed against the injustice of preventing workers from challenging ongoing pay discrimination, which may have been impossible to discover sooner. Reading her dissenting opinion from the bench, Justice Ginsburg sparked a resurgence of the equal pay movement, culminating in the first piece of legislation signed by President Barack Obama, which amended Title VII to override the Court's decision.[42] Although Justice Ginsburg has been criticized for too readily pulling back from the edges of popular opinion to avoid backlash,[43] in this instance she used her platform to mobilize equal pay advocates to press Congress to better address the institutional practices that depress women's wages.[44]

Linking Women's Equality and Reproductive Freedom

Yet another defining feature of Justice Ginsburg's gender equality jurisprudence is her recognition that women's equality and women's reproductive control are fundamentally and inextricably connected. As a litigator, Ginsburg saw no daylight between equal opportunity in the economic and social spheres and reproductive freedom. While at the ACLU, she supported a case brought by a pregnant teacher challenging a school board policy requiring pregnant teachers to take a leave of absence.[45] The Court decided the case on procedural due process grounds, holding that the rule created an irrebuttable presumption of incapacity, with no opportunity for an individual to demonstrate otherwise. But in her amicus curiae brief, Ginsburg pressed a sex equality rationale, invoking the equal protection clause as the basis for women's reproductive rights. In her view, the right to have children and the right not to have children were flip sides of the same coin.

Admittedly, Ginsburg's litigation strategy did not place abortion rights at the center of the docket. The Ford Foundation, a key funder of the ACLU, would not support litigation challenging abortion restrictions.[46] But no such constraint applied to pregnancy discrimination, which Ginsburg understood as central to reproductive freedom. As she explained in the nomination process, she would have preferred the Court address the abortion right in her own case, *Struck v. Secretary of Defense*,[47] which was on the docket the same term as *Roe v. Wade*.[48] Captain Susan Struck challenged the Air Force's directive, after learning

of her pregnancy, that she either have an abortion or leave active duty. Struck refused to have an abortion and challenged the rule. Observing that men could father children while continuing to serve, Ginsburg argued that the freedom to choose—either to have or not have—a child is crucial to women's equality. The case had been headed to the Supreme Court until the Air Force waived the rule, mooting the case and leaving *Roe* as the vehicle for the landmark abortion ruling.

Justice Ginsburg's scholarly criticism of *Roe* dogged her in the women's rights community, causing some to question her nomination to the Court. The substance of Ginsburg's criticism, however, did not disagree with the fundamental importance of women's reproductive freedom. Rather, she believed sex equality was the better framework for capturing the problems with abortion restrictions. Perhaps antiabortion activists understood the significance of her critique better; they feared that, if confirmed, she might succeed in securing abortion rights under the Equal Protection Clause.[49]

Many of Justice Ginsburg's opinions reveal her understanding of the centrality of pregnancy and reproductive freedom to sex equality. In 1974, the Court issued its infamous ruling in *Geduldig v. Aiello*,[50] holding that pregnancy discrimination is not a form of sex discrimination against women. The Court never repudiated that opinion, which has continued to haunt the case law, and Justice Ginsburg seized every chance to lambast its obtuseness. Dissenting in *Coleman v. Maryland Court of Appeals*,[51] Justice Ginsburg faulted the Court for failing to see how the Family Medical Leave Act (FMLA) self-care provision furthered the equal protection rights of women denied pregnancy leave at work. The Court placed the FMLA's guarantee of medical leave outside Congress's power to enforce the Fourteenth Amendment, rendering it unconstitutional as applied to state employers in suits for damages. But in Justice Ginsburg's view, the law's guarantee of gender-neutral self-care leave protected women's equal opportunity at work during and after pregnancy without making women singularly more costly to employ. As she explained, the freedom to have children without being penalized as workers is crucial for women to have "a more egalitarian relationship at home and at work."[52]

The ghost of *Geduldig* also surfaced in *AT&T v. Hulteen*,[53] in which the Court refused to allow retired women to challenge the continuing ef-

fects of pregnancy discrimination, even though the employer's discriminatory denial of service credit for pregnancy leave resulted in reduced pension benefits. Justice Ginsburg again dissented, excoriating the Court for its continued adherence to *Geduldig* as the correct measure of pregnancy discrimination. She viewed the Court's continued missteps, first in deciding *Geduldig* and then in adhering to its logic even after Congress enacted the Pregnancy Discrimination Act in 1978, as a fatal failure to see how "societal attitudes about pregnancy and motherhood severely impeded women's employment opportunities."[54]

Justice Ginsburg's dogged determination and urgency in pushing the Court to overrule *Geduldig* was prescient. Far from a dead letter, *Geduldig* returned with a vengeance in the Supreme Court's 2022 decision in *Dobbs v. Jackson Women's Health Organization*,[55] pulling the rug out from under a constitutional right to abortion. Justice Alito's opinion for the Court relied on *Geduldig* to slam the door on an equal protection theory that might have supported an alternative rationale for abortion rights even after overturning *Roe*.[56] Justice Ginsburg clearly foresaw this danger all along, as she made sex equality the centerpiece of her work on reproductive rights.

Both as a litigator and a jurist, Justice Ginsburg recognized that the gender stereotype she had long contested—that women are naturally suited to motherhood and have a primary duty to family life—leads directly to restrictions on abortion. Justice Ginsburg's most notable abortion opinion is her dissent in *Gonzales v. Carhart*, in which a slim majority of the Court upheld the federal statute (provocatively titled "The Partial Birth Abortion Act") banning a common late-term abortion procedure.[57] In Justice Kennedy's opinion for the Court, the woman-protective rationale that Justice Ginsburg had long railed against came home to roost. Justice Kennedy insisted, without empirical support, that women would come to regret their decision to have the procedure. On this view, women's natural affinity for motherhood leaves them vulnerable to psychological harm from abortion. The regret thesis rests upon the same stereotypical naturalization and reverence for motherhood that lies behind the sex-based classifications Justice Ginsburg spent her career dismantling. Justice Ginsburg's dissent skillfully exposed the archetypal views of motherhood lying at the heart of the Court's rationale. Behind restrictions on abortion are familiar, long-standing judgments

about women's maternal roles and an insistence that women accede to motherhood's demands. The idealization of motherhood is a double-edged sword indeed.

Conclusion

Although Justice Ginsburg's jurisprudence on gender has been faulted for being tactically driven and insufficiently substantive, she was prescient in taking the long view. Pragmatic, yes, but formalistic, no. The skeptical approach to gender stereotyping at the heart of Justice Ginsburg's jurisprudence remains relevant to a modern vision of gender justice. In particular, Justice Ginsburg's linkage of sex equality with reproductive freedom is especially relevant at this moment, when *Dobbs* has opened the door to a cascade of reactionary new laws that deprive women of control over their reproductive lives. As Justice Ginsburg recognized all along, there is no equality for women without reproductive freedom. We will never know whether, had Justice Ginsburg remained on the Court, she might have persuaded enough Justices to ground the abortion right in equal protection doctrine, or at least to keep the door open to this possibility. Surely she would have relished the opportunity to try.

NOTES

1 *See* Mary Becker, *Patriarchy and Inequality: Towards a Substantive Feminism*, 1999 U. CHI. LEGAL F. 21.

2 *See* Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1296–97 (1991) ("Until this model based on sameness and difference is rejected or cabined, sex equality law may find itself increasingly unable even to advance women into male preserves—defined as they are in terms of socially male values and biographies. . . . As a result, when sex inequality is most extreme . . . it drops off the sex inequality map."). In later writings, MacKinnon clarified that the fault lies with the Court's rendering of the theories advanced by Ruth Bader Ginsburg and not in her theories or arguments per se. *See* Catharine A. MacKinnon, *A Love Letter to Ruth Bader Ginsburg*, 31 WOMEN'S RTS. L. REP. 177, 181 (2010) ("The Supreme Court accepted only certain parts of those briefs—specifically, the abstract analysis that supported the conventional 'sameness' approach to equality"); *id.* at 183 ("Knowing that gender hierarchy socially exists is what impels [Ginsburg's] gender neutrality as a legal solution, whether or not that understanding has impelled the Court's embrace of it.").

3 *See, e.g.*, Cary Franklin, *Inventing the Traditional Concept of Sex Discrimination*, 125 HARV. L. REV. 1307 (2011); Stephanie Bornstein, *Degendering the Law Through Stereotype Theory*, *in* THE OXFORD HANDBOOK ON FEMINISM AND LAW IN THE UNITED STATES (Oxford Univ. Press, Deborah L. Brake, Martha Chamallas & Verna Williams eds. forthcoming 2023).

4 *See* Naomi Schoenbaum, *The Case for Symmetry in Antidiscrimination Law*, 2017 WIS. L. REV. 69.

5 *Cf.* Ruth Bader Ginsburg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1, 41–42 (1975) (discussing the persistence of the breadwinner/homemaker dichotomy).

6 420 U.S. 636 (1975).

7 Not all of the Justices were convinced. Califano v. Goldfarb, 430 U.S. 199, 239 (1977) (Rehnquist, J., dissenting).

8 *See* Martha Chamallas, *Deeping the Legal Understanding of Bias: On Devaluation and Biased Prototypes*, 74 S. CAL. L. REV. 747 (2001).

9 *See* Deborah Jones Merritt & Wendy Webster Williams, *Transcript of Interview of U.S. Supreme Court Associate Justice Ruth Bader Ginsburg, April 10, 2009*, 70 OHIO ST. L.J. 805, 814 (2009).

10 429 U.S. 190 (1976).

11 Amy Leigh Campbell, *Raising the Bar: Ruth Bader Ginsburg and the ACLU Women's Rights Project*, 11 TEX. J. WOMEN & L. 157, 237 (2003).

12 458 U.S. 718 (1982).

13 *Id.* at 728.

14 United States v. Virginia, 518 U.S. 515 (1996).

15 *See generally* ANN C. MCGINLEY, MASCULINITY AT WORK: EMPLOYMENT DISCRIMINATION THROUGH A DIFFERENT LENS (2016); MASCULINITIES & THE LAW: A MULTIDIMENSIONAL APPROACH (Frank Rudy Cooper & Ann C. McGinley eds. 2012).

16 *See* Martha Chamallas, *Exploring the "Entire Spectrum" of Disparate Treatment Under Title VII: Rules Governing Predominantly Female Jobs*, 1984 U. ILL. L. REV. 1, 9.

17 Franklin, *Inventing the Traditional Concept*, at 84–87.

18 *See* Martha Chamallas, *Of Glass Ceilings, Sex Stereotypes and Mixed Motives*, *in* WOMEN AND LAW STORIES (Elizabeth M. Schneider & Stephanie M. Wildman eds. 2011) (discussing gender stereotyping theory as a precursor to postmodern feminist theorizing on gender).

19 140 S. Ct. 1731 (2020).

20 *See* Bornstein, *Degendering the Law.*

21 *Virginia*, 518 U.S. at 553. *See also id.* at 532 n.6 (stating that the Court has "thus far reserved most stringent judicial scrutiny for classifications based on race or national origin," leaving open the possibility that it might yet extend strict scrutiny to sex); Harris v. Forklift Systems, 510 U.S. 17, 25–26 n.1 (1993) (Ginsburg, J., concurring) (stating that Title VII requires the same analysis for sex and race discrimination and observing: "Indeed, even under the Court's equal protec-

tion jurisprudence, which requires 'an exceedingly persuasive justification' for a gender-based classification, it remains an open question whether 'classifications based upon gender are inherently suspect.'") (citations omitted).

22 *See* Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 945 (2002).

23 400 U.S. 542 (1971).

24 Martha Chamallas, *Mothers and Disparate Treatment: The Ghost of Martin Marietta*, 44 VILL. L. REV. 337, 341 (1999).

25 *Id.* at 347–48.

26 Ruth Bader Ginsburg & Barbara Flagg, *Some Reflections on the Feminist Legal Thought of the 1970's*, 1989 U. CHI. LEGAL FORUM 9.

27 *Virginia*, 518 U.S. at 533–34 (citations omitted).

28 416 U.S. 351 (1974).

29 *Id.* at 355.

30 Brief for Appellants at 31, Kahn v. Shevin, 416 U.S. 351 (1974) (No. 73–78), 1973 WL 172384.

31 *Id.*

32 419 U.S. 498 (1975).

33 Ruth Bader Ginsburg, *Gender in the Supreme Court: The 1973 and 1974 Terms*, 1975 S. CT. REV. 1, 4 (1975).

34 *Id.* at 7; Ruth Bader Ginsburg, *Sexual Equality Under the Fourteenth and Equal Rights Amendments*, 1979 WASH. U. L.Q. 161, 165–66 (criticizing the *Ballard* decision for leaving undisturbed the underlying discrimination against women in the military).

35 *See* JANE SHERRON DE HART, RUTH BADER GINSBURG: A LIFE 264 (2020).

36 *See, e.g.*, Grutter v. Bollinger, 539 U.S. 244, 298 (2003) (Ginsburg, J., dissenting).

37 137 S. Ct. 1678 (2017).

38 Justice Ginsburg dissented from the Court's ruling in two prior cases upholding differently formulated statutory preferences for citizen mothers in the conferral of citizenship on children born overseas. *See* Nguyen v. INS, 533 U.S. 53 (2001); Miller v. Albright, 523 U.S. 420 (1998).

39 Ruth Bader Ginsburg, *Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation*, 28 CLEV. ST. L. REV. 301, 318–19, 323–24 (1979).

40 For a discussion of how leveling down can exacerbate, rather than remedy, the harms of inequality, see Deborah L. Brake, *When Equality Leaves Everyone Worse Off: The Problem of Leveling Down in Equality Law*, 46 WM. & MARY L. REV. 513 (2004); Tracy Thomas, *Leveling Down Gender Equality*, 42 HARV. J. LAW & GENDER 177 (2019). *See also* Rebecca Aviel, *Rights as a Zero-Sum Game*, 61 ARIZ. L. REV. 351 (2019) (arguing that leveling down weakens public support for equality rights).

41 550 U.S. 618, 643 (2007) (Ginsburg, J., dissenting).

42 Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111–2, 123 Stat. 5 (2009).

43 *See* Sally Kenney, *Backlash Against Feminism: Rethinking a Loaded Concept, in* THE OXFORD HANDBOOK OF FEMINISM AND LAW IN THE UNITED STATES (Oxford Univ. Press, Deborah L. Brake Martha Chamallas & Verna Williams eds. forthcoming 2023).

44 *See* Martha Chamallas, *Past as Prologue: Old and New Feminisms*, 17 MICH. J. GENDER & L. 157, 160 (2010) (describing Justice Ginsburg's *Ledbetter* dissent as "her finest hour").

45 Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (invalidating Ohio school board rule requiring pregnant teachers to take a leave of absence).

46 *See* Aryeh Neier, *How Ruth Bader Ginsburg Got Her Start at the ACLU*, ACLU. ORG, www.aclu.org.

47 460 F.2d 1372 (9th Cir. 1972).

48 *See* Olivia B. Waxman, *Ruth Bader Ginsburg Wishes This Case Had Legalized Abortion Instead of* Roe v. Wade, TIME MAG., Aug. 2, 2018, www.yahoo.com.

49 Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 84, 162 (2010).

50 417 U.S. 484 (1974).

51 566 U.S. 30, 45 (2012) (Ginsburg, J., dissenting).

52 *Id.* at 65.

53 556 U.S. 701 (2009).

54 *Id.* at 718 (Ginsburg, J., dissenting).

55 142 S. Ct. 2228 (2022).

56 *Id.* at 2246 (citing and quoting from *Geduldig* for the proposition that "[t]he regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a "mere pretex[t] designed to effect an invidious discrimination against members of one sex or the other").

57 550 U.S. 124, 169 (2007) (Ginsburg, J., dissenting).