

UCLA

UCLA Public Law & Legal Theory Series

Title

The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law

Permalink

<https://escholarship.org/uc/item/43p548zs>

Journal

New York University Law Review, 85(1)

Author

Franklin, Cary

Publication Date

2010-04-14

THE ANTI-STEREOTYPING PRINCIPLE IN CONSTITUTIONAL SEX DISCRIMINATION LAW

CARY FRANKLIN*

This Article argues that the anti-stereotyping theory undergirding the foundational sex-based equal protection cases of the 1970s, most of which were brought by male plaintiffs, has powerful implications for current controversies in sex discrimination law which have long been obscured by the dominant narrative about these cases. For decades, scholars have criticized Ruth Bader Ginsburg for challenging the constitutionality of sex-based state action in cases featuring male plaintiffs. They have argued that the predominance of male plaintiffs caused the Court to adopt a narrow, formalistic conception of equality incapable of rectifying the subordination of women. This Article offers a new account of the theory of equal protection animating Ginsburg's campaign. It argues that her decision to press the claims of male plaintiffs was grounded not in a commitment to eradicating sex classifications from the law, but in a far richer theory of equal protection involving constitutional limitations on the state's power to enforce sex-role stereotypes. This "anti-stereotyping" theory drew on the arguments of transnational movements for sex equality that emerged in the 1960s, including the movement to combat sex-role enforcement in Sweden and the women's and gay liberation movements in the United States. The Burger Court incorporated the anti-stereotyping principle into sex-based equal protection law in the 1970s, but the significance of this doctrinal shift has long been overlooked, in part because the Court initially applied the new doctrine only in a limited set of domains. In recent years, the Court has extended anti-stereotyping doctrine beyond the provisional limitations established in the 1970s and in ways that are deeply relevant to questions at the frontiers of equal protection law today.

INTRODUCTION	84
I. THE EMERGENCE OF ANTI-STEREOTYPING THEORY IN THE 1970s	91
A. <i>The Philosophical Origins of the Sex-Role Critique</i>	92
B. <i>Women's Rights and "The Emancipation of Man" in Sweden</i>	97
C. <i>The "Revolt Against Sex-Role Structure" in the United States</i>	105
1. <i>Women and Men</i>	106

* Copyright © 2009 by Cary Franklin, Irving S. Ribicoff Fellow, Yale Law School. J.D., Yale Law School, 2005; D.Phil., University of Oxford, 2003; B.A., Yale University, 1998. For helpful comments on earlier drafts of this article, I am grateful to Bruce Ackerman, Susan Appleton, Katharine Bartlett, Nancy Cott, Joseph Fishkin, Owen Fiss, Katerina Linos, Serena Mayeri, Martha Minow, Robert Post, Neil Siegel, and, especially, Reva Siegel. Thanks are also due to the Milton Fund at Harvard University for its generous support of this project and the American Society for Legal History for recognizing this paper with the Kathryn T. Preyer Scholars Award.

2. <i>Gays and Lesbians</i>	114
II. THE DEVELOPMENT OF ANTI-STEREOTYPING DOCTRINE	119
A. <i>"The Traditional Division Within the Home"</i>	122
B. <i>Sex Roles and Reproductive Rights</i>	125
C. <i>The "Most Spectacular of the Court's Gender Discrimination Decisions"</i>	132
III. THE EVOLUTION OF ANTI-STEREOTYPING DOCTRINE ...	142
A. <i>A New Approach to "Real" Differences</i>	143
B. <i>Male Caregivers and Pregnant Workers</i>	146
C. <i>Soldiers and Mothers</i>	154
1. <i>Women in the Military</i>	155
2. <i>Reproductive Rights</i>	157
D. <i>Sex-Role Stereotyping and LGBT Rights</i>	163
CONCLUSION	173

INTRODUCTION

In 1970, Ruth Bader Ginsburg, soon to be head of the ACLU's Women's Rights Project (WRP), had a novel idea: She decided to challenge the constitutionality of sex-based state action by bringing cases with male plaintiffs. Prior to 1970, only women had brought sex discrimination claims under the Fourteenth Amendment. By the time Ginsburg's decade-long litigation campaign ended, men far outnumbered women among the ranks of constitutional sex discrimination plaintiffs to appear before the Supreme Court—a ratio that holds true to this day.

Conventional wisdom dictates that Ginsburg's decision to represent male sex discrimination plaintiffs was "a strategic choice."¹ Her aim was to rid the law of formal sex classifications and, for this purpose, plaintiffs of either sex would do. On this account, male plaintiffs were "a useful tool."² They enabled Ginsburg and her colleagues at the WRP to address "what was primarily a women's issue"³ by focusing on small but concrete harms to men. Indeed, it is a commonplace in legal scholarship that "Ginsburg was especially eager to argue cases brought by men [because] she thought judges might look more favorably on claims made by people of their own gender."⁴

¹ David Cole, *Strategies of Difference: Litigating for Women's Rights in a Man's World*, 2 LAW & INEQ. 33, 56 (1984).

² *Id.* at 39.

³ *Id.* at 55.

⁴ Judith Baer, *Advocate on the Court: Ruth Bader Ginsburg and the Limits of Formal Equality*, in REHNQUIST JUSTICE: UNDERSTANDING THE COURT DYNAMIC 216, 219 (Earl M. Maltz ed., 2003); see also Cole, *supra* note 1, at 94 (asserting that "the use of male

When Ginsburg's litigation campaign ended at the start of the 1980s, sex discrimination no longer fell outside the scope of the Fourteenth Amendment. The Court had extended heightened scrutiny to sex-based state action and eradicated most formal sex classifications from federal and state law. Despite these successes, however, many legal feminists in the 1980s judged their predecessors—and particularly Ginsburg—harshly. They argued that the conception of equality animating the WRP's campaign was formalistic⁵ and “empty at [its] core,”⁶ and that ridding the law of overt sex classifications had done little to rectify women's secondary status in the American legal system.⁷ Critics cited Ginsburg's decision to represent male plaintiffs as evidence that she was satisfied with formal equality and failed to appreciate the inability of a “sex-blind” doctrine to disrupt persistent cycles of discrimination in a society whose ground rules were created by and for men.⁸ If Ginsburg had targeted substantive inequalities between the sexes, critics charged, her campaign might have yielded a sex-based equal protection doctrine more attentive to women's subordination. Her decision to press the claims of male plaintiffs, however, foreclosed any possibility that the Court would adopt such an

plaintiffs provides several advantages for women's rights groups,” including the fact that male judges may “be more likely to perceive a harm to one of their own gender”); Debra Ratterman, *Liberating Feminist Jurisprudence*, OFF OUR BACKS, Jan. 1990, at 12, 12 (1990) (reviewing Ruth Bader Ginsburg & Barbara Flagg, *Some Reflections on the Feminist Legal Thought of the 1970s*, 1989 U. CHI. LEGAL F. 9) (“Apparently, male plaintiffs were used in an effort to get male judges to ‘empathize’ with the oppressed.”); Morrison Torrey, *Thirty Years*, 22 WOMEN'S RTS. L. REP. 147, 149 (2001) (asserting that the WRP's decision to “recruit[] male plaintiffs to fight sex discriminatory laws” was “premised upon a belief that the male-dominated judiciary would be more sympathetic, or at least empathetic, to plaintiffs who looked like them”); Jennifer Yatskis Dukart, Comment, *Geduldig Reborn: Hibbs as a Success (?) of Justice Ruth Bader Ginsburg's Sex-Discrimination Strategy*, 93 CAL. L. REV. 541, 558, 574–75 (2005) (arguing that “the Ginsburg strategy of using male plaintiffs to redress sex discrimination” was designed to capitalize on the fact that “[n]ot only are male judges more likely to help . . . an ingroup member, they are also likely to show more concern and empathy for that person”).

⁵ See, e.g., Mary E. Becker, *Prince Charming: Abstract Equality*, 1987 SUP. CT. REV. 201, 201 & n.1; Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1286–97 (1991) (“[T]he early feminist legal view was, implicitly, that if equality meant being the same as men . . . women would be the same as men. . . . The essentially assimilationist approach fundamental to this legal equality doctrine . . . was adopted in sex cases wholesale . . .”).

⁶ Mary Becker, *Patriarchy and Inequality: Towards a Substantive Feminism*, 1999 U. CHI. LEGAL F. 21, 22.

⁷ See, e.g., CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 4 (1987) (arguing that “[p]articularly in its upper reaches, much of what has passed for feminism in law has been the attempt to get for men what little has been reserved for women”); Baer, *supra* note 4, at 231 (“[S]o far men have been the primary beneficiaries of the new sexual equality doctrine. Ruth Ginsburg has given no indication that this outcome troubles her.”).

⁸ See, e.g., Baer, *supra* note 4, at 231–33.

approach: These claims obscured “women’s experience of second-class citizenship,”⁹ and were aimed only at vindicating the narrow principle that the government may not classify on the basis of sex. Thus, many concluded, “the problems that have arisen under the Supreme Court’s . . . approach [to sex discrimination] are the direct result of men successfully arguing that they were discriminated against”¹⁰

This Article takes a fresh look at the foundational sex-based equal protection cases of the 1970s and the theory of equal protection that motivated Ginsburg to bring these cases on behalf of male plaintiffs. It argues that the dominant historical narrative, which identifies formal equality as the philosophical ideal at the core of the WRP’s campaign, masks a richer set of claims regarding the constitutional limits on the state’s power to enforce sex-role stereotypes. These claims helped to shape the Court’s sex-based equal protection jurisprudence in ways that have powerful implications for current controversies involving the rights of women and sexual minorities, including disputes over workplace equality, the regulation of pregnant women and mothers, the exclusion of women from combat and the draft, and same-sex marriage. Yet the richness of these claims has largely been obscured in canonical accounts of the history of constitutional sex discrimination law.

Consider the stories we tell about the male plaintiffs who brought many of the foundational sex discrimination cases. Conventional wisdom suggests that the WRP’s reliance on male plaintiffs was a strategic and ultimately conservative choice designed to elicit sympathy and fellow feeling from male Justices. But this is not what happened. The first time a male plaintiff appeared before the Court in a sex-based equal protection case—as half of a married couple—the suggestion that he might be a victim of sex discrimination was treated as a joke.¹¹ In subsequent cases, when it became clear that the WRP was serious about establishing the right of men to be free from sex dis-

⁹ MACKINNON, *supra* note 7, at 4.

¹⁰ Mary Becker, Essay, *The Sixties Shift to Formal Equality and the Courts: An Argument for Pragmatism and Politics*, 40 WM. & MARY L. REV. 209, 252 (1998). For a synopsis of this criticism, see Ginsburg & Flagg, *supra* note 4, at 17 (noting that feminist scholars have often “portrayed the 1970s litigation as assimilationist in outlook, insistent on formal equality, opening doors only to comfortably situated women willing to accept men’s rules and be treated like men, even a misguided effort that harmed women more than it helped”).

¹¹ See Transcript of Oral Argument at 22, *Frontiero v. Richardson*, 411 U.S. 677 (1973) (No. 71-1694) in 76 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW (Philip B. Kurland, Gerhard Casper eds. 1975) (“THE COURT: . . . [D]iscrimination is against the man, is that it? MR. HUNTINGTON: I didn’t mean to imply that—[laughter][.]”).

crimination, the laughter turned to confusion and disbelief, and, in some cases, to anger and disgust.¹² On one occasion, Ginsburg even ran into standing problems because the lawyers, judges, and law clerks involved in the case found it nearly impossible to believe that her client—who was challenging the constitutionality of a statute limiting “mother’s benefits” to women—genuinely desired to stay home and care for his infant son.¹³

To understand why “[t]he fact that many of the cases Ruth Bader Ginsburg brought to the Court had male plaintiffs . . . did not make the Court’s job any easier,”¹⁴ it is useful to consider who these plaintiffs were. One of them, the first male plaintiff Ginsburg represented, was a lifelong bachelor and primary caregiver to his elderly and ailing mother.¹⁵ Another was a stay-at-home father.¹⁶ Several were married to women who contributed substantially to their support.¹⁷ Most of them, in one way or another, rejected or failed to satisfy masculine gender norms circa 1975. If Ginsburg’s aim had been to “capitalize[] on sex-based ingroup biases,”¹⁸ selecting gender-bending men as plaintiffs would not have been a wise strategy.

Ginsburg was well aware of this. The groundbreaking sex discrimination casebook she published in 1974 opened with a note explaining that men and women both encounter discrimination when they deviate from “assigned roles,” but that “the very assurance of [male] dominance marks out for even greater social disapproval men whose unconventional interests and abilities lead them to choose different lifestyles.”¹⁹ In 1975, in a series of lectures on “Gender and the

¹² See *infra* text accompanying notes 284–88.

¹³ See Transcript of Oral Argument at 60, *Wiesenfeld v. Sec’y of Health, Educ. & Welfare*, 367 F. Supp. 981 (D.N.J. 1973) (No. 268-73) (on file with the Library of Congress, Manuscript Division, Ruth Bader Ginsburg Papers, Container 10, Folder: Weinberger v. Wiesenfeld 1973) (“[T]hey say that men, of course, will work. Mr. Wiesenfeld will, of course, continue working, says the defendant, although we will debate that.”); Memorandum from Richard Blumenthal, Law Clerk, to Justice Harry A. Blackmun 8 (Dec. 23, 1974) (on file with the Library of Congress, Manuscript Division, Harry A. Blackmun Papers, Box 203, Folder 6, Weinberger v. Wiesenfeld) (advising the Justice that “[a] question should be raised at oral argument as to whether appellee is continuing to receive these benefits, or whether he has [returned to work]”).

¹⁴ Linda Greenhouse, *Harry Blackmun, Independence and Path Dependence*, 56 HASTINGS L.J. 1235, 1242 (2004).

¹⁵ *Moritz v. Comm’r*, 469 F.2d 466, 467 (10th Cir. 1972).

¹⁶ *Weinberger v. Wiesenfeld*, 420 U.S. 636, 641 n.7 (1975).

¹⁷ See, e.g., *id.* at 639 (noting that the plaintiff’s wife’s earnings were “substantially larger” than his and provided the “couple’s principle source of support”); *Frontiero v. Richardson*, 411 U.S. 677, 680 & n.4 (1973) (noting that the male plaintiff was a full-time college student with no earned income).

¹⁸ Dukart, *supra* note 4, at 569.

¹⁹ KENNETH M. DAVIDSON, RUTH BADER GINSBURG & HERMA H. KAY, TEXT, CASES AND MATERIALS ON SEX-BASED DISCRIMINATION xii (1974).

Constitution,” Ginsburg observed that even people who are “generally sympathetic to the elimination of impediments to equal opportunity for women find the notion of a central home and family role for men disquieting. The idea evokes a feeling of strangeness and the resistance that often attends the unfamiliar.”²⁰ When the Justices ruled in favor of the plaintiff who sought “mother’s benefits” in order to stay home with his infant son, a member of the ACLU’s national board lauded Ginsburg for “a great job well done, particularly in light of the fact that there wasn’t a male baby sitter among . . . them.”²¹ Nobody at the ACLU in the 1970s was under the impression that the male plaintiff cases were being argued before a “home crowd.”²²

If Ginsburg knew male sex discrimination plaintiffs would strike the Justices as odd, why did she choose to represent them? This Article argues that Ginsburg pressed the claims of male plaintiffs in order to promote a new theory of equal protection founded on an anti-stereotyping principle. This anti-stereotyping theory dictated that the state could not act in ways that reflected or reinforced traditional conceptions of men’s and women’s roles. It was not simply anti-classificationist: It permitted the state to classify on the basis of sex in instances where doing so served to dissipate sex-role stereotypes. Nor was it strictly anti-subordinationist: Because discrimination against women had traditionally been viewed as a benefit to them, Ginsburg was concerned that an anti-subordination principle would provide courts with too little guidance about *which* forms of regulation warrant constitutional concern. The anti-stereotyping approach was designed to provide such guidance; its aim was to direct courts’ attention to the particular institutions and social practices that perpetuate inequality in the context of sex.

Part I seeks to recover the philosophical and historical origins of the anti-stereotyping principle. The longstanding assumption that the WRP’s campaign rested on a narrow, formalistic conception of equality has obscured the rich array of sources on which Ginsburg drew to develop her theory of equal protection. This Part shows that Ginsburg derived the anti-stereotyping principle in part from the phi-

²⁰ Ruth Bader Ginsburg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1, 34 (1975).

²¹ Mailgram from George Slaff, Mayor, Beverly Hills, to Ruth Bader Ginsburg, Gen. Counsel, ACLU (Mar. 20, 1975) (on file with the Library of Congress, Manuscript Division, Ruth Bader Ginsburg Papers, Container 10, Folder: Weinberger v. Wiesenfeld Jan.–Mar. 1975). Slaff served as head of the ACLU of Southern California from 1965 to 1971 and was a member of the national board from 1965 to 1981. *George Slaff*, 83, *Dies; Civil Liberties Lawyer*, N.Y. TIMES, Mar. 28, 1989, at B6.

²² Ruth Bader Ginsburg, *Remarks for the Celebration of 75 Years of Women’s Enrollment at Columbia Law School*, 102 COLUM. L. REV. 1441, 1443 (2002) (internal quotation marks omitted).

losophy of John Stuart Mill and the policy innovations of Sweden, which began in the early 1960s to wage an ambitious, decades-long campaign against sex-role enforcement. What is most surprising about these sources, from the perspective of canonical accounts of Ginsburg's campaign, is the extent of the changes "Mill and the Swedes"²³ believed would be necessary to implement the anti-stereotyping principle. These thinkers viewed combating sex stereotyping as a project that would require extensive legal and social reform.

This perception was shared by progressive social movements that began to challenge sex discrimination in the United States in the late 1960s and early 1970s. Ginsburg was not the only sex equality advocate on this side of the Atlantic who began to deploy anti-stereotyping arguments in this period. The women's and gay and lesbian liberation movements launched an attack in these years on "the sex-role structure"²⁴—the set of institutions and social practices through which men and women were compelled to conform to traditional sex and family roles. These movements developed a powerful critique of sex stereotyping that emphasized its role in perpetuating the oppression of women and sexual minorities. The dominant historical narrative, which teaches that Ginsburg espoused an essentially hollow conception of equality, obscures the continuity between the WRP's anti-stereotyping arguments and those of related social movements in the 1970s. In so doing, it renders invisible the historical dimensions of the WRP's campaign most relevant to questions at the cutting edge of sex-based equal protection law today.

Part II examines how Ginsburg translated philosophical and social movement claims about sex stereotyping into constitutional arguments. Unlike the more radical critics of "the sex-role structure," the WRP aimed not to eradicate sex roles but to stop the state from enforcing them. In the early 1970s, in a series of cases involving male caregivers and pregnant workers, the WRP began to challenge laws that reflected a "'separate-spheres' mentality" and reinforced the "breadwinner-homemaker dichotomy."²⁵ By the mid-1970s, the Court itself had begun to reason about sex discrimination from an anti-

²³ Letter from Ruth Bader Ginsburg to Jamison Doig, Professor Emeritus of Politics and International Affairs, Princeton Univ. (Apr. 6, 1971) (on file with the Library of Congress, Manuscript Division, Ruth Bader Ginsburg Papers, Container 5, Folder: Moritz v. Comm'r May 1971).

²⁴ Martha Shelley, *Gay Is Good*, RAT, Feb. 24, 1970, reprinted in OUT OF THE CLOSETS: VOICES OF GAY LIBERATION 31, 32 (Karla Jay & Allen Young eds., 1972) [hereinafter OUT OF THE CLOSETS].

²⁵ Ruth Bader Ginsburg, *Remarks on Women Becoming Part of the Constitution*, 6 LAW & INEQ. 17, 19 (1988).

stereotyping perspective. It recognized—particularly in male plaintiff cases we tend to overlook today—that laws that steer men out of traditionally female roles effectively require women to assume those roles, and it interpreted the Equal Protection Clause as a bar to such “role-typing.”²⁶

At the time, this turn toward anti-stereotyping did not seem like a monumental change in the law. The Burger Court declined to apply the anti-stereotyping principle in domains where it had identified “real” differences between the sexes, so in practical terms, the doctrine was limited. It failed to reach pregnancy, abortion, rape, and sexuality—areas where sex-role stereotyping was often strongest. The rise of the New Right in the late 1970s made it politically difficult for legal feminists to challenge these limitations. Leaders in the New Right condemned Ginsburg and her colleagues as radical and out-of-step with “normal” Americans; with the fate of the Equal Rights Amendment (ERA) uncertain, legal feminists were wary of embracing the wide-ranging implications of the anti-stereotyping principle. Despite these limitations, however, anti-stereotyping had become a key mediating principle in sex-based equal protection law. Over time, this principle would significantly reshape constitutional doctrine.

Part III examines the contours of constitutional sex discrimination doctrine today. It begins by considering recent innovations in the Court’s application of the anti-stereotyping principle. In 1996, in *United States v. Virginia*,²⁷ the Court suggested that the salient question in equal protection law is not whether men and women are biologically different, but whether the state is acting in ways that translate such differences into social inequalities and gender-differentiated sex and family roles.²⁸ It suggested, in other words, that even in cases involving “real” differences, the Constitution prohibits sex-based state action that reflects or reinforces traditional conceptions of men’s and women’s roles. The Court’s most recent sex-based equal protection case, *Nevada Department of Human Resources v. Hibbs*,²⁹ applied this new approach in the domains of pregnancy and motherhood, recognizing for the first time that the state’s regulation of pregnant women and mothers can entrench sex-role stereotypes in

²⁶ *Stanton v. Stanton*, 421 U.S. 7, 15 (1975).

²⁷ 518 U.S. 515 (1996).

²⁸ *Id.* at 533–34 (asserting that “[p]hysical differences’ between men and women . . . are enduring,” but that the constitutional landscape in which those differences are regulated has changed; today, sex classifications may be used to combat the separate spheres tradition, but may not be used, as they were in the past, to perpetuate this tradition).

²⁹ 538 U.S. 731 (2003).

ways that violate equal protection. These holdings extended anti-stereotyping doctrine beyond some of the most significant limitations established by the Burger Court. This Part ends by considering the implications of these doctrinal developments for questions involving women in the military, reproductive rights, and same-sex marriage—questions sex-based equal protection law has thus far failed to reach. It shows that recovering the history and tracing the evolution of the anti-stereotyping principle can provide new insight into issues at the frontiers of equal protection law today.

I

THE EMERGENCE OF ANTI-STEREOTYPING THEORY IN THE 1970s

Ruth Bader Ginsburg wrote her first sex discrimination brief in the fall of 1970. Her client was Charles Moritz, a sexagenarian book editor and life-long bachelor who lived with and cared for his ailing mother in Denver, Colorado. Moritz's troubles began when he took a deduction on his 1968 federal income tax return for expenses related to his mother's care. Although he was otherwise qualified for the deduction, which was intended to ease the financial burden on family caregivers, the IRS determined that Moritz was ineligible on the basis of his sex. When Ginsburg learned of Moritz's predicament, she volunteered to represent him pro bono, judging his case "as neat a craft as one could find to test sex-based discrimination against the Constitution."³⁰ Her goal was to bring *Moritz v. Commissioner of Internal Revenue* to the Supreme Court, where she hoped to persuade the Justices, for the first time in American history, to invalidate a law that discriminated on the basis of sex under the Equal Protection Clause.

Moritz had obvious virtues as a test case. The issue was discrete, the discrimination overt. Less obvious was why Ginsburg should have sought to challenge the constitutionality of sex-based state action in a case with a male plaintiff. Recognizing that the sex of her client might surprise the court, Ginsburg noted the oddity in her brief. She acknowledged that "instances of discrimination against women dominate the rapidly developing case law in this area."³¹ She aimed to

³⁰ Letter from Ruth Bader Ginsburg, Professor of Law, Rutgers Univ. Sch. of Law, to Melvin L. Wulf, Legal Dir., ACLU (Nov. 17, 1970) (on file with the Library of Congress, Manuscript Division, Ruth Bader Ginsburg Papers, Container 5, Folder: Moritz v. Comm'r 1967-1970).

³¹ Brief for Petitioner-Appellant at 20, *Moritz v. Comm'r*, 469 F.2d 466 (10th Cir. 1971) (No. 71-1127) (on file with the Library of Congress, Manuscript Division, Ruth Bader Ginsburg Papers, Container 5, Folder: Moritz v. Comm'r [1971]).

show, however, that Moritz's claim was neither an aberration nor a stunt but the leading edge of a new conception of sex discrimination. Her brief in *Moritz* formulated for the first time the approach to equal protection that would guide the WRP's work for the next decade: namely, that "the constitutional sword necessarily has two edges" and that "[f]air and equal treatment for women means fair and equal treatment for members of both sexes."³²

Conventional wisdom dictates that in making this argument, Ginsburg was promoting a narrow, anti-classificationist approach to sex-based equal protection law. This Part shows that the assumption that Ginsburg's campaign was animated by a thin conception of equality has obscured the much richer theory of equal protection that actually underwrote her decision to represent male plaintiffs. Her use of male plaintiffs was inspired not by "the thin abstract 'likes alike, unalikes unlike' of Aristotelian logic,"³³ but by the thicker and more contemporary anti-stereotyping logic of John Stuart Mill. Anti-stereotyping theory had become popular among a number of movements for sex equality in the 1960s and 1970s. It emerged first in Sweden, where it fueled a remarkably influential campaign against sex-role enforcement, and subsequently in the United States, where it was adopted by the women's and gay and lesbian liberation movements. Through these sources, it made its way into the brief that Ginsburg wrote on behalf of Charles Moritz. This Part traces the history of anti-stereotyping theory from its philosophical origins in the nineteenth century to its elaboration by sex equality advocates in the 1970s in order to illuminate the powerful conception of equal protection that funded the WRP's work in the Burger Court era.

A. *The Philosophical Origins of the Sex-Role Critique*

Like many feminists in the early 1970s, Ruth Bader Ginsburg was an avid reader of John Stuart Mill. When Ginsburg finished writing her groundbreaking brief in *Moritz*, she circulated it to a colleague with a note explaining that she had decided to test the constitutionality of sex-based state action in a case featuring a male caregiver because she "believe[d], with Mill and the Swedes, that the principle must work both ways!"³⁴ This section explains what Mill meant when he argued that the sex equality principle "must work both ways" and

³² *Id.*

³³ Catharine A. MacKinnon, *The Road Not Taken: Sex Equality in Lawrence v. Texas*, 65 OHIO ST. L.J. 1081, 1085 (2004).

³⁴ Letter from Ruth Bader Ginsburg to Professor Jamison Doig, *supra* note 23.

why this understanding of equality became such an animating force in the struggle against sex discrimination a century later.

Few works have been as influential in American feminist thought as Mill's 1869 essay, *The Subjection of Women*. The leaders of the women's suffrage movement—Elizabeth Cady Stanton, Susan B. Anthony, and Carrie Chapman Catt—were ardent proponents of Mill's work. In 1869, Stanton invited Mill to attend the convention of the Equal Rights Association in New York, and when he delivered the first speech in Parliament advocating the enfranchisement of women, she and Anthony reprinted it as a tract for American audiences.³⁵ In the years before the First World War, at the apex of the campaign for women's suffrage, Catt helped to publish a new edition of *The Subjection of Women*.³⁶

Five decades after women in the United States won the right to vote, Mill's essay became one of the critical texts in the second wave of the women's movement. In 1970, sociologist Alice Rossi, a founding member of the National Organization for Women (NOW), edited a collected volume of essays on sex equality written by Mill and his partner Harriet Taylor,³⁷ which helped to inaugurate a resurgence of interest in *The Subjection of Women* among feminist philosophers and political theorists.³⁸ That same year, Ruth Bader Ginsburg embarked on her historic litigation campaign, which drew on Mill's work to explain why discrimination on the basis of sex violated the Constitution's equal protection guarantee.³⁹ Mill also figured prominently in the work of more radical feminists. In 1970, Kate Millett—a

³⁵ ALMA LUTZ, *CREATED EQUAL: A BIOGRAPHY OF ELIZABETH CADY STANTON, 1815–1902*, at 171–72 (1940).

³⁶ See Carrie Chapman Catt, *Foreword* to JOHN STUART MILL, *THE SUBJECTION OF WOMEN* (Frederick A. Stokes Co. 1911) (1869).

³⁷ See JOHN STUART MILL & HARRIET TAYLOR MILL, *ESSAYS ON SEX EQUALITY* (Alice S. Rossi ed., 1970); see also Gertrude Himmelfarb, Book Review, 77 AM. HIST. REV. 736–37 (1972) (reviewing MILL & MILL, *supra*) (referring to *The Subjection of Women* as “the sacred text of the Women's Lib movement” and noting that “[t]he theme of Mill's essay has become familiar . . . in recent years,” as “[t]he complete essay is available in several editions, and excerpts appear in numerous anthologies”).

³⁸ More academic writing on *The Subjection of Women* was published in the 1970s and 1980s than had been published in the previous hundred years combined. Critical works from this period include ZILLAH R. EISENSTEIN, *THE RADICAL FUTURE OF LIBERAL FEMINISM* 113–44 (1986); SUSAN MOLLER OKIN, *WOMEN IN WESTERN POLITICAL THOUGHT* 197–230 (1979); Julia Annas, *Mill and the Subjection of Women*, 52 PHIL. 179 (1977); Mary Lyndon Shanley, *Marital Slavery and Friendship: John Stuart Mill's The Subjection of Women*, 9 POL. THEORY 229 (1981); Kate Soper, *Introduction* to JOHN STUART MILL, *THE SUBJECTION OF WOMEN* (Virago Press Ltd. 1983) (1869).

³⁹ See, e.g., Brief for Appellant at 40–41, *Reed v. Reed*, 404 U.S. 71 (1971) (No. 70-4); Ruth Bader Ginsburg, *Introduction to Women and the Law—A Symposium*, 25 RUTGERS L. REV. 1, 1 (1970) [hereinafter Ginsburg, *Women and the Law*]; Ruth Bader Ginsburg, Speech at Vassar College (Nov. 15, 1972) (transcript on file with the Library of Congress,

member of the New York Radical Women—published *Sexual Politics*, a best-selling and hugely influential examination of sexism in Western literature, philosophy, and psychology, in which the egalitarian spirit of Mill's essay served as an important counterpoint to the patriarchal tenor of other "great books."⁴⁰ Pat Mainardi, a member of the radical feminist Redstockings, opened her wry and widely-read 1970 essay, *The Politics of Housework*, with a quote from *The Subjection of Women*.⁴¹ Jill Johnston, author of *Lesbian Nation*, a groundbreaking lesbian feminist manifesto of the early 1970s, cited Mill in her work.⁴²

The Subjection of Women appealed to feminists at the start of the 1970s for the same reason it appalled Mill's contemporaries. When the essay was published in 1869, "the reaction in the reviews was disastrous; [Mill] was denounced as mad or immoral, often as both."⁴³ Although Mill was a prominent political radical, well known for his outspoken support for unpopular causes, it was not the policy proposals in his essay that his detractors decried as indecent, even foul. It was something else, "something . . . unpleasant in the direction of indecorum" in Mill's "prolonged and minute discussions about the relations between men and women"⁴⁴ that disgusted his critics, some of whom found it difficult even to acknowledge his arguments.⁴⁵

At the root of this critical ire lay Mill's contention that "certainly most, and probably all, of the existing differences of character and intellect between men and women were due to the very different attitudes of society toward members of the two sexes from their earliest infancy."⁴⁶ When Mill wrote *The Subjection of Women*, the notion that men and women were naturally very different, and that men were innately superior to women, was widely accepted. (A few years after the publication of Mill's essay, Justice Bradley opined in *Bradwell v. Illinois* that "nature herself[] has always recognized a wide difference in the respective spheres and destinies of man and woman" and that "[t]he natural and proper timidity and delicacy which belongs to the

Manuscript Division, Ruth Bader Ginsburg Papers, Container 11, Folder: Speech File Nov.–Dec. 1972) [hereinafter Ginsburg, Speech at Vassar College].

⁴⁰ See KATE MILLETT, *SEXUAL POLITICS* (Univ. of Ill. Press 2000) (1970).

⁴¹ Pat Mainardi, *The Politics of Housework*, reprinted in *WOMEN'S LIBERATION IN THE TWENTIETH CENTURY* 104, 104 (Mary C. Lynn ed., 1975).

⁴² See Jill Johnston, *Who Is the Father of Her Child?*, reprinted in *ADMISSION ACCOMPLISHED: THE LESBIAN NATION YEARS, 1970–1975*, at 54 (1998).

⁴³ MILLETT, *supra* note 40, at 92.

⁴⁴ JAMES FITZJAMES STEPHEN, *LIBERTY, EQUALITY, FRATERNITY* 190 (R.J. White ed., 1967).

⁴⁵ Mill's commentary on the sexes was so disagreeable to the eminent Victorian jurist James Fitzjames Stephen that he found it necessary to "pass over what Mr. Mill says on this subject with a mere general expression of dissent from nearly every word he says." *Id.*

⁴⁶ OKIN, *supra* note 38, at 216.

female sex evidently unfits it for many of the occupations of civil life.”⁴⁷) Mill’s essay attacked this conventional wisdom with a simple question: If women are naturally inclined toward wife-and-motherhood, why is “the whole of the present constitution of society”⁴⁸ aimed at compelling them to adopt these roles?

The greater part of *The Subjection of Women* is devoted to showing that “[w]hat is now called the nature of women is an eminently artificial thing—the result of forced repression in some directions, unnatural stimulation in others.”⁴⁹ Mill compared the development of “women’s nature” to that of a tree, half of which was subjected to the artificial atmosphere of a hothouse: The shoots bathed in light and heat “sprout luxuriantly,” while those “left outside in the wintry air, with ice purposely heaped all round them,” wither and die of neglect.⁵⁰ When men see this malformed tree, Mill argued, they fail to “recognise their own work” and “indolently believe that the tree grows of itself in the way they have made it grow, and that it would die if one half of it were not kept in a vapour bath and the other half in the snow.”⁵¹

Because “women’s nature” was the product of artificial cultivation, Mill claimed that it was just as foolish to praise women for their virtues as it was to blame them for their shortcomings. There was no “more signal instance of the blindness with which the world, including the herd of studious men, ignore and pass over all the influences of social circumstances,” he wrote, “than their silly depreciation of the intellectual, and silly panegyrics on the moral, nature of women.”⁵² Women cultivated moral virtues because they were prized for such virtues, he argued. They did not devote their time to scholarly pursuits because they were not encouraged, or even permitted, to do so. They were admired for their helplessness, so they acted helpless. They were “called masculine, and other names intended to convey disapprobation” when they asserted their independence,⁵³ so most did not. They rarely committed crimes, not because they were innately good, but

⁴⁷ 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring).

⁴⁸ JOHN STUART MILL, *THE SUBJECTION OF WOMEN* 32–33 (Prometheus Books 1986) (1869).

⁴⁹ *Id.* at 27.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 83; *see also id.* at 47 (“If women are better than men in anything, it surely is in individual self-sacrifice for those of their own family. But I lay little stress on this, so long as they are universally taught that they are born and created for self-sacrifice.”).

⁵³ John Stuart Mill, *Periodical Literature: Edinburgh Review*, 1 WESTMINSTER REV. 505, 526 (1824).

because they had relatively few opportunities to do so.⁵⁴ There was nothing natural in any of this, Mill asserted: All of the traits associated with women—good and bad—resulted from the laws and customs that shaped their character.

This was radical, certainly, but perhaps the most radical aspect of Mill's writing on sex equality was that it debunked not only the myth of women's nature but the myth of men's nature as well. Mill argued that manliness too was a product of social and economic circumstances. "It is considered meritorious in a man to be independent: to be sufficient to himself; not to be in a constant state of pupillage";⁵⁵ so men strive to become breadwinners. "A man is despised, if he be not courageous,"⁵⁶ so men take up arms and strike out for new lands. In men, no less than in women, Mill argued, the tree grows in the way we have made it grow.

In neither case did the differential treatment of the sexes conduce to society's wellbeing. "Think what it is to a boy to grow up to manhood in the belief that . . . by the mere fact of being born a male he is by right the superior of all and every one of an entire half of the human race," Mill entreated his readers.⁵⁷ "Is it imagined that all this does not pervert the whole manner of existence of the man, both as an individual and as a social being?"⁵⁸ Inequalities in marriage, employment, and education steered men and women into separate spheres and prevented them from developing the full range of human capacities. Women suffered terribly as a result of these inequalities. But Mill asserted that sex-based inequality injured men too because it created a society far less democratic, far less productive, and far less happy than it might have been.⁵⁹ The solution to this problem, he argued, was to reform the "institutions by which the accident of sex is made the groundwork of an inequality of legal rights, and a forced dissimilarity of social functions,"⁶⁰ and to liberate individuals from the laws, customs, and attitudes that compel them to behave as "men" and "women."

Martha Nussbaum calls Mill "the first great radical feminist in the Western philosophical tradition."⁶¹ His suggestion that culture, not

⁵⁴ MILL, *supra* note 48, at 82–83.

⁵⁵ Mill, *supra* note 53, at 526.

⁵⁶ *Id.*

⁵⁷ MILL, *supra* note 48, at 86.

⁵⁸ *Id.* at 87.

⁵⁹ *Id.* at 84–89.

⁶⁰ JOHN STUART MILL, *Principles of Political Economy*, in 3 COLLECTED WORKS OF JOHN STUART MILL 765 (Univ. of Toronto Press 1965) (1848).

⁶¹ Martha C. Nussbaum, Professor of Law & Ethics, Univ. of Chi. Law Sch., Mill's Feminism: Liberal, Radical and Queer, Keynote Lecture at the Mill Bicentennial Confer-

nature, defines the sexes predated the work of Judith Butler, Anne Fausto-Sterling, and other contemporary gender theorists by more than a century.⁶² Ultimately, however, Mill was less interested in demonstrating that all sex differences are socially constructed than he was in “deny[ing] that anyone knows, or can know, the nature of the two sexes, as long as they have only been seen in their present relation to one another.”⁶³ For Mill, this epistemological doubt gave rise to two conclusions. First, existing inequalities between men and women cannot be justified by reference to “natural differences.” Second, the aim of a liberal society should be to eradicate all of the legal and social forces that press individuals into particular molds and onto particular paths on the basis of their sex.

Part II will examine how Ginsburg used these insights to develop a legal theory of why and when sex-based state action violates the Fourteenth Amendment. First, however, this Part seeks to explain in greater detail why male plaintiffs played such a central role in the litigation campaign waged by the WRP in the early 1970s. Although Mill recognized that sex discrimination shaped men’s lives, *The Subjection of Women* did not envisage the bachelor caregivers, stay-at-home fathers, and male nurses who populated the ranks of constitutional sex discrimination plaintiffs in the Burger Court era. Ginsburg’s theory of equal protection incorporated Mill’s ideas, but the prevalence of men among the WRP’s sex discrimination clients was the product of more contemporary influences.

B. Women’s Rights and “*The Emancipation of Man*” in Sweden

Ginsburg has frequently noted that her “eyes were first opened to the prospect [of a campaign for sex equality] in Scandinavia in the early 1960’s, particularly in Sweden, where the contemporary women’s movement started earlier than it did in the United States.”⁶⁴ Ginsburg’s interest in Sweden began in 1961, when she accepted a

ence, University College London (Apr. 7, 2006), *quoted in* RICHARD REEVES, JOHN STUART MILL: VICTORIAN FIREBRAND 414 (2007).

⁶² On occasion, Mill expressed skepticism that any differences between the sexes would remain once all environmental influences had been accounted for. In an essay on marriage, written in 1832, he “vehemently denied any innate inequality between the sexes apart from that of physical strength—and even this, he said, could be doubted.” OKIN, *supra* note 38, at 216.

⁶³ MILL, *supra* note 48, at 27.

⁶⁴ Ruth Bader Ginsburg, Transcript [1979], at 4 (on file with the Library of Congress, Manuscript Division, Ruth Bader Ginsburg Papers, Container 16, Folder: Writings File, Articles 1979) [hereinafter Ginsburg, 1979 Transcript]; *see also* DAVIDSON, GINSBURG & KAY, *supra* note 19, at 927 (noting that Ginsburg “was awakened to the sex-role debate during visits to Sweden in the early 1960s”).

position researching Swedish law for Columbia Law School's Project on International Procedure.⁶⁵ In the course of her work, she learned Swedish, lived intermittently in Sweden, and became an expert on Swedish law.⁶⁶ Between 1963 and 1970, she published over a dozen books and articles on the Swedish legal system,⁶⁷ including the definitive *Civil Procedure in Sweden*,⁶⁸ and incorporated Swedish law into the comparative law course she taught at Rutgers Law School.⁶⁹

Ginsburg's immersion in Swedish law and culture in the 1960s would have a profound impact on her subsequent career as a legal feminist and Supreme Court litigator. The year she began to study Swedish law, 1961, marked a major turning point in Sweden's approach to women's rights. Prior to the 1960s, the primary goal of Swedish feminists and the Social Democratic government had been to help women combine their role in the family with their role in the paid labor market.⁷⁰ In 1961, Sweden's approach to sex equality took "a new and unusual turn."⁷¹ The catalyst for this change was the publication of an article entitled *The Conditional Emancipation of Women* by a young journalist named Eva Moberg.⁷² Moberg asserted that "[b]oth men and women have *one* principal role, that of being people," and

⁶⁵ Herma Hill Kay, *Ruth Bader Ginsburg, Professor of Law*, 104 COLUM. L. REV. 2, 10–11 (2004).

⁶⁶ David Margolick, *Trial by Adversity Shapes Jurist's Outlook*, N.Y. TIMES, June 25, 1993, at A19 (noting that "[t]o this day, [Ginsburg] can follow the films of Ingmar Bergman without subtitles"); Condoleezza Rice, U.S. Sec'y of State, Remarks at the Annual Meeting of the American Society of International Law (Apr. 1, 2005), <http://www.asil.org/events/AM05/rice050401.html> ("What you may not know about Justice Ginsburg is her longstanding interest in international legal issues . . . She spent the summers of 1962 and 1963 in Sweden, where she actually learned Swedish in preparation for co-writing a book about Swedish civil procedure.").

⁶⁷ E.g., RUTH BADER GINSBURG, A SELECTIVE SURVEY OF ENGLISH LANGUAGE STUDIES ON SCANDINAVIAN LAW (1970); Anders Bruzelius & Ruth Ginsburg, *Professional Legal Assistance in Sweden*, 11 INT'L & COMP. L.Q. 997 (1962); Ruth B. Ginsburg, *Comparative Study of Hearsay Evidence Abroad: Sweden*, 4 INT'L LAW. 163 (1969); Ruth Ginsburg, *The Jury and the Nämnd: Some Observations on Judicial Control of Lay Triers in Civil Proceedings in the United States and Sweden*, 48 CORNELL L.Q. 253 (1963).

⁶⁸ RUTH BADER GINSBURG & ANDERS BRUZELIUS, CIVIL PROCEDURE IN SWEDEN (1965).

⁶⁹ Kay, *supra* note 65, at 10–11.

⁷⁰ Prominent Social Democrat Alva Myrdal and sociologist Viola Klein outlined this agenda in the 1956 bestseller, *Women's Two Roles: Home and Work*. Myrdal and Klein argued that women should not be forced to "forgo the pleasures of one sphere in order to enjoy the satisfactions of the other," and that with increased social services, women could play two roles and thereby benefit themselves and their country. ALVA MYRDAL & VIOLA KLEIN, WOMEN'S TWO ROLES: HOME AND WORK xvi (2d ed. 1968).

⁷¹ Alva Myrdal, *Foreword* to THE CHANGING ROLES OF MEN AND WOMEN 9 (Edmund Dahlström ed., Gunilla Anderman & Steven Anderman trans., Gerald Duckworth & Co. 1967) (1962).

⁷² HILDA SCOTT, SWEDEN'S "RIGHT TO BE HUMAN": SEX-ROLE EQUALITY: THE GOAL AND THE REALITY 5 (1982). Moberg was a journalist and the editor of *Herta*, the

that women would never achieve equality as long as they were expected to pursue two roles while men pursued only one.⁷³ The “fulfilment of the goals of feminism requires a radical change of the habits of living, attitudes and values of the average man,” Moberg argued.⁷⁴ It was not enough to open the public sphere to women; the home would also have to be opened to men, and they would have to “meet the women half-way.”⁷⁵

Moberg’s argument “spread like wildfire”⁷⁶ in academic and policy circles and sparked “an intensive public debate about gender roles.”⁷⁷ “Publications from the theoretical organ of the powerful blue-collar labor federation to the Swedish equivalent of *TV Guide* reviewed” her essay, and she “was called upon to defend her ideas in television debates and in the cultural pages of the leading newspapers.”⁷⁸ Ginsburg, who was living in Sweden at the height of this debate,⁷⁹ and who credits Moberg with opening her eyes to the double-edged nature of sex discrimination, recalls the controversy this way:

The gist of [Moberg’s article] was why should a woman have two jobs and the man only have one? And there was much discussion among women about this approach—that it wasn’t enough that he took out the garbage. Some women [said], “Well, I can do everything . . . I don’t need him to do anything around the house,” while others said “[that is unfair] and, besides, it will be much healthier for children to grow up with two caring parents, not just one.” So I began to think of it.⁸⁰

magazine of Sweden’s oldest women’s organization, the Fredrika Bremer Association. *Id.* at 4–5.

⁷³ *Id.* (quoting Moberg).

⁷⁴ Christina Florin & Bengt Nilsson, “*Something in the Nature of a Bloodless Revolution . . .*” *How New Gender Relations Became Gender Equality Policy in Sweden in the Nineteen-Sixties and Seventies*, in *STATE POLICY AND GENDER SYSTEM IN THE TWO GERMAN STATES AND SWEDEN, 1945–1989*, at 11, 41 (Rolf Torstendahl ed., 1999) (quoting a passage from EVA MOBERG, *KVINNOR OCH MÄNNISKOR* [WOMEN AND PEOPLE] (1962), Moberg’s 1962 book of essays reiterating her argument that changing the role of men is essential to changing the role of women).

⁷⁵ *Id.*

⁷⁶ *Id.* at 42.

⁷⁷ LINDA HAAS, *EQUAL PARENTHOOD AND SOCIAL POLICY: A STUDY OF PARENTAL LEAVE IN SWEDEN* 38 (1992).

⁷⁸ Steven Kelman, *A Nonchalant Revolution: Sweden’s Liberated Men and Women*, *NEW REPUBLIC*, Mar. 13, 1971, at 21, 21.

⁷⁹ See David Von Drehle, *Conventional Roles Hid a Revolutionary Intellect: Discrimination Helped Spawn a Crusade*, *WASH. POST*, July 18, 1993, at A1 (reporting that when Ginsburg lived in Stockholm, it seemed to her that “[e]very cocktail party in the country . . . was consumed with talk of” Moberg’s article).

⁸⁰ *Justice Ruth Bader Ginsburg: A “Lady” Who Led the Fight for Gender Equity*, *DUKE L. MAG.*, Spring 2005, at 8 (alterations in original) (quoting Ginsburg), available at <http://>

Ginsburg was not the only one who began to think of it. In 1962, an influential team of social scientists led by sociologist Edmund Dahlström published a collection of essays entitled *The Changing Roles of Men and Women*,⁸¹ which provided theoretical grounding for Moberg's argument. Dahlström's book raised serious questions about the "stereotyped view of sex roles."⁸² It suggested that sex functioned in society not predominantly as a biological class but as "a social screening device separating human needs into feminine or masculine needs, directing boys and girls into different careers, cultivating different interests, clothing them in different colours and calling them different names."⁸³ It posited that "differentiated sex roles"⁸⁴ were historically contingent and "represent[ed] the response of family members to the current structure of society, and the nature of current social policies (i.e. labour market, urban and residential planning, tax and wage policies)."⁸⁵ Dahlström and his colleagues contended that in order to liberate men and women from "stereotyped notions of what is 'feminine' and 'masculine,'"⁸⁶ it would be necessary to change "the institutional framework within which [they] act."⁸⁷ "Formal legal equality alone [would be] an insufficient means to attain this goal"⁸⁸: Only through structural change could society ensure that "[b]oth men and women have *one* main role, that of a human being."⁸⁹

Known as *jämställdhet*, or gender equality, this theory quickly "became the leading ideology of the equality movement" in Sweden.⁹⁰

www.law.duke.edu/news/pdf/lawmagspr05.pdf. Similarly, in a speech at Vassar College in 1972, Ginsburg explained: "In the early 1960's a young woman in Sweden wrote an essay she called 'The conditional emancipation of woman.' In it, she deplored the state of affairs existing in her country, as in this one, that a woman was permitted to work, but at the same time she was required to maintain her traditional functions inside the family. Why should the woman have two roles and the man only one was the question she posed. At first her view shocked some and was ridiculed by many. Now it has been officially accepted by the Swedish government." Ginsburg, Speech at Vassar College, *supra* note 39, at 35.

⁸¹ THE CHANGING ROLES OF MEN AND WOMEN, *supra* note 71.

⁸² Sverre Brun-Gulbrandsen, *Sex Roles and the Socialization Process*, in THE CHANGING ROLES OF MEN AND WOMEN, *supra* note 71, at 59, 69.

⁸³ Edmund Dahlström & Rita Liljeström, *The Family and Married Women at Work*, in THE CHANGING ROLES OF MEN AND WOMEN, *supra* note 71, at 19, 42.

⁸⁴ Brun-Gulbrandsen, *supra* note 82, at 67.

⁸⁵ Dahlström & Liljeström, *supra* note 83, at 34.

⁸⁶ Per Olav Tiller, *Parental Role Division and the Child's Personality Development*, in THE CHANGING ROLES OF MEN AND WOMEN, *supra* note 71, at 79, 102.

⁸⁷ Dahlström & Liljeström, *supra* note 83, at 34.

⁸⁸ Edmund Dahlström, *Analysis of the Debate on Sex Roles*, in THE CHANGING ROLES OF MEN AND WOMEN, *supra* note 71, at 170, 178.

⁸⁹ *Id.* at 179.

⁹⁰ Roger Klinth, *The Man and the Equal Family: A Study of the New Images of Masculinity in the Educational Radio and TV Programmes in Sweden, 1946-1971*, in STATE POLICY, *supra* note 74, at 169, 191.

Advocates of *jämställdhet* argued “that imprisonment in the masculine role is at least as great a problem to men as conformity to a feminine ideal is to women” and “that a debate on liberation and equality must be about how men as well as women are forced to act out socially determined stereotypes.”⁹¹ This new approach to sex discrimination prompted significant changes in law and policy. By the end of the 1960s, Sweden had done away with virtually all “woman-protective” labor legislation, generally by extending to male workers protections the law had traditionally reserved to women.⁹² It had also begun to expand government grants for day care,⁹³ to recruit female workers in industries where they were historically underrepresented,⁹⁴ and to encourage men to play a more active role in the home.⁹⁵

In 1969, when Olof Palme became prime minister, the emancipation of men and women from sex-role prescriptions became an official policy aim of the Swedish government.⁹⁶ Palme, the leader of the Social Democratic Party from 1969 until his assassination in 1986,⁹⁷ was an ardent proponent of *jämställdhet*. In 1970, on his first visit to the United States as prime minister, he delivered a speech entitled “The Emancipation of Man.”⁹⁸ It was a manifesto for the Swedish theory of sex equality. Measures designed to emancipate women were not enough, Palme asserted: “[I]n order that women shall be emancipated from their antiquated role the men must also be emanci-

⁹¹ SCOTT, *supra* note 72, at 43.

⁹² HAAS, *supra* note 77, at 27.

⁹³ Kelman, *supra* note 78, at 22.

⁹⁴ SCOTT, *supra* note 72, at 24–26.

⁹⁵ See Åsa Lundqvist, *Conceptualising Gender in a Swedish Context*, 11 GENDER & HIST. 583, 587–88 (1999) (discussing policy changes designed to combat sex-role stereotyping). Susan Sontag, who moved to Sweden in 1969 to make her first feature-length film, noted that “[e]quality between the sexes . . . is much more advanced here than in the States. . . . Sweden is probably the only country in Europe or the Americas where I could spend all the months it takes to make a movie without ever once having it called to my attention . . . that I was not a film director but a woman film director.” Susan Sontag, *A Letter from Sweden*, RAMPARTS, July 1969, at 32–33; see also Helen M. Hacker, *The Changing Social Roles of Men and Women*, 35 J. MARRIAGE & FAM. 149, 150 (1973) (book review) (“It is in the espousal of shared roles that Swedish thinking seems to be in advance of America.”).

⁹⁶ In 1969, the Social Democrats’ party program incorporated a declaration to the effect “that government powers over industry were to be used to eliminate sex discrimination, that labor-market and educational policies must counteract sex-determined choices of occupation, and that expanded services, especially day care and public transport, were essential requirements for an effective equality policy.” SCOTT, *supra* note 72, at 6.

⁹⁷ EDWARD OLSZEWSKI, SOCIAL DEMOCRATIC MOVEMENT AND IDEOLOGY 223, 225 (2002).

⁹⁸ Olof Palme, Swed. Prime Minister, *The Emancipation of Man*, Address Before the Women’s National Democratic Club (June 8, 1970), in DAVIDSON, GINSBURG & KAY, *supra* note 19, at 938.

pated.”⁹⁹ Echoing Dahlström and his colleagues, Palme argued that “the culturally conditioned expectations of an individual on account of sex[] act as a sort of uniform,”¹⁰⁰ forcing him or her to conform to sex-role stereotypes. Now that the state’s complicity in enforcing these stereotypes had become apparent, he argued, the state had an obligation to liberate men and women from the constraints it had placed on them. Fulfilling this obligation would require not only measures designed to increase the number and power of women in the labor market, but also measures designed to allow men to assume traditionally female roles. In fact, Palme argued, the emancipation of men was the linchpin in the struggle for sex equality, for as long as women’s pursuits remained off-limits to men, neither sex would be free from discrimination.¹⁰¹

“The Emancipation of Man,” more than any other document, encapsulates the theory of equality that animated the landmark sex discrimination cases the WRP brought to the Court in the 1970s. Because the “latter twentieth-century sex-equality movement [was] not peculiar to the United States,”¹⁰² Ginsburg believed that it made sense for American courts and litigators to consult legal traditions other than our own in thinking about what equal protection requires.¹⁰³ To this end, she included the text of Palme’s speech in her 1974 sex discrimination casebook,¹⁰⁴ and frequently cited it in law review articles and lectures.¹⁰⁵ She took key phrases and concepts in her briefs directly from Palme’s manifesto.¹⁰⁶ Her landmark brief in

⁹⁹ *Id.* at 938.

¹⁰⁰ *Id.* at 941.

¹⁰¹ *Id.* at 940–42.

¹⁰² Ginsburg, Transcript, *supra* note 64, at 4.

¹⁰³ See, e.g., *A Conversation with Justice Ruth Bader Ginsburg*, 53 U. KAN. L. REV. 957, 960 (2005) (“[W]hen our Constitution was composed, the brilliant men who wrote it looked abroad, to other systems, other thinkers. I don’t think they meant to stop us from getting whatever enlightenment we can by looking beyond our borders.”); Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 21 CARDOZO L. REV. 253, 282 (1999) (“In my view, comparative analysis emphatically *is* relevant to the task of interpreting constitutions and enforcing human rights. We are the losers if we neglect what others can tell us about endeavors to eradicate bias against women, minorities, and other disadvantaged groups.”).

¹⁰⁴ DAVIDSON, GINSBURG & KAY, *supra* note 19, at 938.

¹⁰⁵ See, e.g., Ginsburg, *supra* note 20, at 1; Ruth Bader Ginsburg, *Introduction to The Status of Women*, 20 AM. J. COMP. L. 585, 589 (1972) [hereinafter Ginsburg, *Status of Women*]; Ruth Bader Ginsburg, *Treatment of Women by the Law: Awakening Consciousness in the Law Schools*, 5 VAL. U. L. REV. 480, 480 n.3 (1971) [hereinafter Ginsburg, *Treatment of Women*]; Ginsburg, *Women and the Law*, *supra* note 39, at 2 n.6.

¹⁰⁶ Palme’s influence is particularly evident in the WRP’s discussions of “double-edged discrimination.” The phrase, “one-eyed sex-role-thinking,” Palme, *supra* note 98, at 942, which was taken from Palme’s speech, appears often in the WRP’s briefs. See, e.g., Brief for Appellee at 45, *Califano v. Goldfarb*, 430 U.S. 199 (1977) (No. 75-699); Brief for

Reed v. Reed drew not only on “The Emancipation of Man” but also on *The Changing Roles of Men and Women* and the 1968 *Report to the United Nations on the Status of Women in Sweden*, which she described as “a progress report indicating a pace more rapid than that of the United States.”¹⁰⁷

Swedish anti-stereotyping ideals went far beyond mandating formal equality. Palme and other Swedish sex equality advocates argued that a broad agenda of legal and social reforms would be necessary to combat sex-role stereotyping. In 1970, the Swedish Parliament implemented a new national school curriculum, which required schools to “work for equality between the sexes—in the family, on the labour market and within the community as a whole”—not simply by offering the same classes to girls and boys, but also “by counteracting traditional attitudes to sex roles and stimulating pupils to discuss and question the differences which exist between men and women in many fields in respect of influence, jobs and wages.”¹⁰⁸ Curricular reform was followed in 1971 by what was referred to at the time as the “greatest equality reform ever”¹⁰⁹: the abolition of joint taxation for married couples.¹¹⁰ Due to Sweden’s high marginal tax rates, joint marital taxation functioned as a significant disincentive to women’s employment. By shifting to a system in which wives’ wages were taxed on an individual basis, rather than at their husbands’ higher marginal rates, the state made paid work a more lucrative prospect for married women, increasing numbers of whom entered the labor market in the 1970s.¹¹¹

Appellee at 18 n.11, *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (No. 73-1892); Brief for Appellants at 8, *Kahn v. Shevin*, 416 U.S. 351 (1974) (No. 73-78).

¹⁰⁷ Brief for Appellant, *supra* note 39, at 15 n.11, 55 n.52. In its 1968 report to the United Nations, the Swedish Government asserted “that it was not enough to guarantee women their rights. All legislation and all social policy must support a shift from man-the-breadwinner and woman-the-homemaker to a society of independent individuals and of partnerships in which all tasks were shared.” SCOTT, *supra* note 72, at 3 (describing the report).

¹⁰⁸ Läröplan för grundskolan [Curriculum for the Basic School] (Stockholm 1969), quoted in Ingrid Fredriksson, *Sex Roles and Education*, 19 INT’L REV. EDUC. 64, 70 (1973).

¹⁰⁹ Lundqvist, *supra* note 95, at 587–88 (internal quotations omitted).

¹¹⁰ For more on the individual taxation model introduced in Sweden in 1971, see Ginsburg, *Treatment of Women*, *supra* note 105, at 485–86, and Ginsburg, *Women and the Law*, *supra* note 39, at 2–3.

¹¹¹ See Lundqvist, *supra* note 95, at 587–88 (describing tax and other reforms of early 1970s Sweden that led to increased numbers of women in the labor market); see also Siv Gustafsson & Roger Jacobsson, *Trends in Female Labor Force Participation in Sweden*, 3 J. LAB. ECON. S256, S263–65 (Supp. 1985) (demonstrating that increasing a wife’s paid work hours from zero to full-time increased one hypothetical family’s disposable income by 43 percent in 1967 and by 67 percent in 1973, after the abolition of joint taxation).

In addition to education and tax reform, Sweden implemented sweeping reforms in the realm of work and family. Palme's government vastly increased the availability of daycare.¹¹² In 1974, it guaranteed the right to abortion¹¹³ and introduced a parental leave system permitting fathers as well as mothers to take paid leave after the birth of a child, making Sweden the first country in the world to offer paid parental leave to men.¹¹⁴ To better enable men and women to share roles, the government required recipients of certain government grants to hire roughly equal numbers of male and female employees, allotted special grants to employers who trained employees for sex-atypical jobs, and mandated that schoolchildren visit job sites in fields in which their sex was underrepresented.¹¹⁵ The Social Democratic party extended its longstanding goal of full male employment to women.¹¹⁶ Affirmative action programs designed to desegregate the workforce were opened to members of both sexes.¹¹⁷ 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.¹¹⁸

Ginsburg followed these developments closely, and it is useful to keep them in mind when considering her decision to represent male plaintiffs. This decision has often been misinterpreted as a simple tactical choice, and one that elevated formal over substantive equality. But the Swedish thinkers who inspired Ginsburg to press the claims of male plaintiffs did not seek to eradicate sex discrimination against men because they were committed to formal equality. *Jämställdhet* was premised on the belief that the subordination of women would continue as long as men were required to behave in traditionally masculine ways and that the goal of feminism should therefore be to liberate both sexes from prescriptive sex stereotyping. As the next

¹¹² Jonas Hinnfors, *Swedish Parties and Family Policies, 1960–1980: Stability Through Change*, in *STATE POLICY*, *supra* note 74, at 105, 105 (noting that number of municipal daycare centers rose from 18,000 in 1965 to 125,000 in 1975); Anna-Greta Leijon, *The Origins, Progress, and Future of Swedish Family Policy*, in *FAMILY AND WORK: BRIDGING THE GAP* 31, 33 (Sylvia Ann Hewlett, Alice S. Ilchman & John J. Sweeney eds., 1986).

¹¹³ See MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 22–23 (1987).

¹¹⁴ HAAS, *supra* note 77, at 14; see also Ginsburg, *Status of Women*, *supra* note 105, at 590 n.25 (describing Social Democrats' parental leave proposal).

¹¹⁵ HAAS, *supra* note 77, at 27–28; SCOTT, *supra* note 72, at 25.

¹¹⁶ HAAS, *supra* note 77, at 26–27.

¹¹⁷ Annika Baude, *Public Policy and Changing Family Patterns in Sweden, 1930–1977*, in *SEX ROLES AND SOCIAL POLICY: A COMPLEX SOCIAL SCIENCE EQUATION* 145, 149–52 (Jean Lipman-Blumen & Jessie Bernard eds., 1979).

¹¹⁸ See Palme, *supra* note 98, at 944 (arguing that expanded services to facilitate household work and public transport systems designed to shorten commute times would “make it easier for both husband and wife to be gainfully employed”).

section shows, this anti-stereotyping philosophy had gained a strong foothold in the United States by the time the WRP began to press the claims of male sex discrimination plaintiffs. It resonated across a wide range of social movements at the start of the 1970s, a period in which many Americans were beginning to question the naturalness of sex roles and to challenge the laws and customs that enforced those roles.

C. *The “Revolt Against Sex-Role Structure” in the United States*

In the fall of 1974, Ruth Bader Ginsburg delivered a series of lectures entitled “Gender and the Constitution.”¹¹⁹ She opened her lectures by explaining that she had chosen her title carefully, as her subject was not “[w]omen’s rights,” but the “[s]ex-role debate.”¹²⁰ The aim of sex equality advocates in the 1970s, Ginsburg asserted, was to demonstrate “that distinct roles for men and women coerced or steered by law are antithetical”¹²¹ to Americans’ deepest constitutional commitments, and to persuade the Court “to confront the particular gender discrimination cases presented to it as part of a pervasive design of government-steered sex-role allocation.”¹²² Quoting Eva Moberg and Olof Palme, Ginsburg noted that the anti-stereotyping approach was “gaining currency in the United States” as increasing numbers of Americans began to challenge the “support our highest national law has provided for traditional sex-role allocations.”¹²³

This section examines the emergence of anti-stereotyping arguments in the campaign against sex discrimination in the United States in the late 1960s and early 1970s. Although these arguments coincided with those of “the Swedes,” they had distinctively American roots: The concept of stereotyping was deeply ingrained in American civil

¹¹⁹ Ginsburg, *supra* note 20.

¹²⁰ *Id.* at 1 (“‘Women’s rights’ seemed inappropriate since the issues explored concern men as much as they do women.”); *see also* Ruth Bader Ginsburg, Equal Opportunity Free from Gender-Based Discrimination, Address Before the American Arbitration Association (Feb. 20, 1974) (on file with the Library of Congress, Manuscript Division, Ruth Bader Ginsburg Papers, Container 12, Folder: Speeches File, Feb.–Mar. 1974) (“‘Women’s rights’ seems to me less clearly descriptive of our concern; that label has been used by advocates of sharp lines between the sexes, as well as by feminists who champion equal opportunity for women and men.”); Letter from Ruth Bader Ginsburg, Professor of Law, Columbia Law Sch., to Valerie Andrews Hale & Richard M. Reilly, Am. Arbitration Ass’n (Jan. 29, 1974) (on file with the Library of Congress, Manuscript Division, Ruth Bader Ginsburg Papers, Container 12, Folder: Speeches File, Feb.–Mar. 1974) (“[A]s ACLU’s docket reveals, our concern is the eradication of gender-based discrimination. . . . Focus on women’s rights may be too narrow, for many ‘men’s rights’ cases promote equal opportunity for both sexes.”).

¹²¹ Ginsburg, *supra* note 20, at 41.

¹²² *Id.* at 42.

¹²³ *Id.* at 1–2.

rights discourse by the time this campaign began. The civil rights movement had long argued that stereotyping perpetuated racial subordination by curtailing the opportunities of racial minorities and helping to justify the rigid racial stratification of American society. By the late 1960s, an interrelated set of social movements—most notably, the women’s movement and the gay and lesbian liberation movements—had begun to argue that stereotyping had analogous and overlapping effects in the context of sex. These movements varied in their tone and in their tactics; they sometimes disagreed about the aims of feminism and they often disagreed about which priorities should take precedence in the struggle against sex-based oppression. They were united, however, in their commitment to ending what they commonly referred to as “the sex-role system.” Armed with new social science, they began to challenge legal and social practices that perpetuated this system. In so doing, these movements helped to construct a popular foundation for the WRP’s claim that the state’s enforcement of sex roles violated the Fourteenth Amendment and that significant legal and social change was necessary to counteract the force of sex stereotyping in American life.

1. *Women and Men*

The word “stereotyping,” as we understand it today, entered the American vocabulary in the 1920s after the publication of Walter Lippmann’s *Public Opinion*, a groundbreaking analysis of the ways in which media shaped the public mind and influenced the political system.¹²⁴ Lippmann argued that “we do not first see, and then define, we define first and then see. In the great blooming, buzzing confusion of the outer world we pick out what our culture has already defined for us” and see what we have picked out through the lens of our cultural stereotypes.¹²⁵ This process saves time, Lippmann noted, but it “is not neutral. It is not merely a way of substituting order for the . . . confusion of reality.”¹²⁶ It is “the projection upon the world of . . . our own position and our own rights.”¹²⁷ As such, he argued, stereotypes perpetuate the status quo; they are the “fortress of our tradition.”¹²⁸ Education and careful attention could help to dismantle this fortress, Lippmann suggested, but those in power prefer to leave the fortress

¹²⁴ WALTER LIPPMANN, *PUBLIC OPINION* (1922). For more on Lippmann’s innovative and influential use of the term “stereotype,” see ELIZABETH EWEN & STUART EWEN, *TYPECASTING: ON THE ARTS & SCIENCES OF HUMAN INEQUALITY* 4–10 (2006).

¹²⁵ LIPPMANN, *supra* note 124, at 81.

¹²⁶ *Id.* at 96.

¹²⁷ *Id.*

¹²⁸ *Id.*

intact because behind its defenses they can feel assured of their dominance.

Lippmann's analysis of stereotyping did not focus exclusively, or even primarily, on race, but the concept of stereotyping would soon become a major theme in American civil rights discourse. Social scientists in the 1940s and 1950s extensively documented the ways in which racial stereotypes influenced whites' perceptions of racial minorities and helped them to rationalize the pervasive discrimination and gaping race-based inequalities in American society.¹²⁹ The civil rights movement incorporated this work into its campaign against Jim Crow, arguing that it was morally wrong, and contrary to the Fourteenth Amendment, for the state to act in ways that reflected and reinforced stereotyped judgments about the relative capacities and proper social roles of black people.¹³⁰ Because such judgments—particularly when enforced by the state—deprived racial minorities of valuable opportunities and relegated them to the status of second-class citizens, advocates of racial equality sought the “eradication of the group stereotype from the law.”¹³¹ These advocates argued that “[o]fficial action premised on the group stereotype is not to be tolerated,” and that “[n]o private citizen should be enabled to treasure his own stereotype, and

¹²⁹ See generally GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* (Transaction Publishers 1996) (1944); Guy B. Johnson, *The Stereotype of the American Negro*, in *CHARACTERISTICS OF THE AMERICAN NEGRO* 1 (Otto Klineberg ed., 1944); Daniel Katz & Kenneth W. Braly, *Verbal Stereotypes and Racial Prejudice*, in *READINGS IN SOCIAL PSYCHOLOGY* 40 (Eleanor E. Maccoby, Theodore M. Newcomb & Eugene L. Hartley eds., 3d ed. 1958); Olive Westbrooke Quinn, *The Transmission of Racial Attitudes Among White Southerners*, 33 *SOC. FORCES* 41 (1954); Alice B. Riddleberger & Annabelle B. Motz, *Prejudice and Perception*, 62 *AM. J. SOC.* 498 (1957); Marian Radke Yarrow, John D. Campbell & Leon J. Yarrow, *Interpersonal Dynamics in Racial Integration*, in *READINGS IN SOCIAL PSYCHOLOGY*, *supra*, at 623.

¹³⁰ See, e.g., Brief of Am. Jewish Cong. as Amicus Curiae at 11–16, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (Nos. 1, 2, 4, 10) (asserting that in the “magical sphere of the white man’s mind . . . the Negro is believed to be stupid, immoral, diseased, lazy, incompetent, and dangerous,” and arguing that segregated schools reinforce, and lend the state’s imprimatur to, these stereotypes (emphasis removed) (quoting MYRDAL, *supra* note 129, at 100)).

¹³¹ Louis Lusky, *The Stereotype: Hard Core of Racism*, 13 *BUFF. L. REV.* 450, 457 (1964) (emphasis omitted). Anti-stereotyping was, of course, only one strand in civil rights discourse in mid-century America, and the concept of stereotyping itself was deployed in multiple ways. One set of anti-stereotyping concerns focused on the institutions and social structures that perpetuated the subordination of racial minorities. Another set of concerns focused on the damage that racial stereotypes wrought on the black psyche. For an examination of the conservative implications of this latter set of concerns, see DARYL MICHAEL SCOTT, *CONTEMPT AND PITY: SOCIAL POLICY AND THE IMAGE OF THE DAMAGED BLACK PSYCHE, 1880–1996* (1997). My aim here is not to provide a comprehensive account of the use of the concept of stereotyping by advocates of racial equality, but simply to note that this concept did not emerge in antidiscrimination law for the first time in the 1970s.

transmit it proudly to his children, on the ground that he is simply following the lead of his government.”¹³²

The aim of these anti-stereotyping arguments was not to persuade courts and legislators that race should play no role in the law. As a leading civil rights scholar noted in the early 1960s: “[I]t does not follow [from the premise that the state cannot act on the basis of racial stereotypes] that the state must or should ignore the stereotype’s grip upon millions of Americans. Official color-blindness, in this sense, is not a constitutional imperative.”¹³³ Advocates who framed the problem in these terms argued that the Fourteenth Amendment barred the state from acting in ways that *reinforced* racial stereotypes. Taking race into account was acceptable, and sometimes required, in instances where it would *disrupt* stereotypes and counteract the oppression of racial minorities.¹³⁴ Indeed, loosening “the stereotype’s grip upon millions of Americans” would in some cases require substantive, race-conscious reform: “not only the cessation of maltreatment, but aid in recovering from its effects.”¹³⁵ Without such intervention, advocates claimed, the practice of racial stereotyping would continue to flourish and the promise of equal citizenship embodied in the Fourteenth Amendment would continue to elude disfavored racial groups.

In the 1960s, lawyers in the civil rights and women’s rights movements began to apply these insights in the domain of sex.¹³⁶ Pauli Murray, the chief architect of the “race-sex analogy,” argued—first from her seat on President Kennedy’s Commission on the Status of Women and then in an influential series of law review articles—that

¹³² *Id.* at 460.

¹³³ *Id.* at 460–61.

¹³⁴ For more on the anti-subordinationist underpinnings of the civil rights movement’s equal protection arguments in the decades before and after *Brown*, see Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470 (2004).

¹³⁵ Lusky, *supra* note 131, at 460–61. Applying anti-stereotyping principles to the question of school integration, Lusky argued that the salient constitutional question in determining whether to implement a busing plan was not whether it took race into account, but whether it would serve to ratify or dissipate racial stereotypes. In other words: “Will a color-conscious official policy, even though benevolent in purpose and not premised on any judgment as to the attributes of Negroes in general, tend on the whole to preserve the stereotype? Or will the net effect be to hasten its extirpation?” *Id.* at 461.

¹³⁶ By identifying ways in which the women’s movement built on concepts used by the civil rights movement, I do not mean to suggest that the meaning and implications of the anti-stereotyping approach remained constant across different contexts. Exploring the differences between anti-stereotyping discourse in the context of race and anti-stereotyping discourse in the context of sex is a project for the future. My point here is that the women’s movement was building on a preexisting foundation when it began, in the late 1960s, to make anti-stereotyping arguments.

women, like racial minorities, had been judged inferior and barred from a great many opportunities on the basis of a characteristic unrelated to their actual or potential capabilities.¹³⁷ Drawing on the work of Swedish social scientist Gunnar Myrdal,¹³⁸ Murray observed that the “myths built up to perpetuate the inferior status of women and of Negroes were almost identical.”¹³⁹ Both groups were widely thought to have “inferior endowments in most of those respects which carry prestige, power, and advantages in society,” but to be superior in the narrow set of roles to which they had been assigned.¹⁴⁰ Murray argued that these stereotyped judgments served to cement a social order that delimited opportunity on the basis of race and sex, and relegated women and racial minorities to positions of social and economic inferiority: “As the Negro was awarded his ‘place’ in society, so there was a ‘woman’s place.’”¹⁴¹ Building on the claims of the civil rights movement, Murray asserted that substantial legal and legislative change would be necessary to enable these subordinated (and overlapping) groups to overcome the web of stereotypes that kept them in their place. “The case for national action”¹⁴² in the area of sex discrimination was no less compelling than the case for national action to combat race discrimination, she claimed: Because sex stereotypes affected all social classes and all spheres of activity, they were particularly “intransigent” and difficult to combat.¹⁴³

¹³⁷ For more on Pauli Murray and the “race-sex analogy,” see Serena Mayeri, “A Common Fate of Discrimination”: *Race-Gender Analogies in Legal and Historical Perspective*, 110 *YALE L.J.* 1045, 1056–72 (2001).

¹³⁸ Myrdal’s *AN AMERICAN DILEMMA*, *supra* note 129, offered a comprehensive account of the ways in which racial segregation undermined the promise of American democracy. The second edition of *AN AMERICAN DILEMMA*, published in 1962, contained an appendix arguing that sex discrimination and race discrimination were “parallel” and equally troubling problems. See 2 GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* 1073–78 (1962). Pauli Murray, and later Ruth Bader Ginsburg, drew on Myrdal’s work to show that sex-based equal protection arguments were contiguous with those of the civil rights movement and founded on principles deeply rooted in American law. See, e.g., Ginsburg, *supra* note 20, at 2–3.

¹³⁹ Pauli Murray & Mary O. Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 *GEO. WASH. L. REV.* 232, 234 (1965).

¹⁴⁰ *Id.* (quoting 2 MYRDAL, *supra* note 138, at 1077).

¹⁴¹ *Id.* (quoting 2 MYRDAL, *supra* note 138, at 1077); see also Pauli Murray, *The Negro Woman’s Stake in the Equal Rights Amendment*, 6 *HARV. C.R.-C.L. L. REV.* 253, 255 (1971) (“Sexual stereotypes have undergirded laws and customs which treat *all* women as a single class and make distinctions based upon the sole factor of their sex. They disregard the fact that women vary as individuals . . . just as men do.”) [hereinafter Murray, *Negro Women’s Stake*].

¹⁴² Pauli Murray, *Economic and Educational Inequality Based on Sex: An Overview*, 5 *VAL. U. L. REV.* 237, 237 (1971).

¹⁴³ *Id.*

In 1966, Pauli Murray, Betty Friedan, and a number of other sex equality advocates founded NOW, which began to make the case for national action to combat sex discrimination. NOW argued that women, like racial minorities, were deprived of valuable opportunities on the basis of stereotyped judgments about the way they were, or ought to be, and that when the state enforced such judgments, the harm doubled. Not only was stereotyping by the state harmful in and of itself, it “also len[t] governmental support to entrenched customs”¹⁴⁴ and social practices that reinforced women’s secondary status in American society. The civil rights movement had focused its critique on institutions outside the home—schools, workplaces, voting booths, and public accommodations; the women’s movement extended this critique into the home. Feminists in the 1960s argued that the widespread expectation that women would serve “as the center of home and family life”¹⁴⁵ curtailed their educational and economic opportunities and deprived them of rights automatically accorded men, who were assumed to be (and often were) free from significant caregiving responsibilities. NOW asserted that because these mutually reinforcing stereotypes were so deeply ingrained in law and custom, loosening their grip upon millions of Americans would require significant structural reform.

In the summer of 1970, NOW organized the Women’s Strike for Equality, a mass demonstration staged in forty cities across the United States.¹⁴⁶ The strike, which drew tens of thousands of women, was intended to illustrate that “it was not possible to secure equality for women without fundamental changes in family life”¹⁴⁷ and that such changes could not occur without policies designed to alleviate the pressure on women to conform to traditional roles. To this end, the strikers sought “to publicize three core movement claims: (1) free abortion on demand, (2) free 24-hour childcare centers, and (3) equal opportunity in jobs and education.”¹⁴⁸ Reproductive rights and childcare were essential, the movement argued, because equal opportunity would remain elusive as long as women were expected to subordinate all other activities to the care of home and family.¹⁴⁹ The movement

¹⁴⁴ Murray, *Negro Women’s Stake*, *supra* note 141, at 253.

¹⁴⁵ *Hoyt v. Florida*, 368 U.S. 57, 62 (1961) (upholding a Florida law exempting women from jury service on the ground that they have “special responsibilities” at home).

¹⁴⁶ Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 *YALE L.J.* 1943, 1988–89 (2003).

¹⁴⁷ *Id.* at 1992.

¹⁴⁸ *Id.* at 1989 (internal quotation marks omitted).

¹⁴⁹ For this reason, NOW’s 1967 Task Force on the Family urged the repeal of all laws restricting women’s right to abortion and argued that “[i]f women are to participate on an

supported the Comprehensive Child Development Act (CCDA), which was drafted within months of the strike, for the same reason. Passed by both houses of Congress before President Nixon vetoed it, the CCDA appropriated \$2 billion for Head Start, day care, and supportive education programs to be provided at no, or low, cost to American families. Testifying on behalf of the Act, representatives of NOW asserted that “widespread availability of child care facilities is essential if women are to have true choice of lifestyles.”¹⁵⁰

Like advocates of *jämställdhet* in Sweden, the women’s movement in the United States argued that women would never have true choice of lifestyles if men were not afforded the same choice. NOW’s founding Statement of Purpose, drafted in 1966, rejected “current assumptions that a man must carry the sole burden of supporting himself, his wife, and family, and that . . . marriage, home and family are primarily woman’s world and responsibility—hers, to dominate—his to support.”¹⁵¹ It advocated instead a “true partnership between the sexes” based on “an equitable sharing of the responsibilities of home and children.”¹⁵² Within a few years of its founding, NOW had convened a “Task Force on the Masculine Mystique.” The Task Force asserted that neither sex could escape the confines of the sex-role system without “a breakdown in job segregation by sex; workplace and state policies that supported men’s sharing of child care equally with women; [and] changes in education and media to undermine sex role stereotyping.”¹⁵³ NOW supported “the emancipation of man” for the same reason it supported subsidized daycare and access to abor-

equitable basis with men in the world of work and of community service, child-care facilities must become as much a part of our community facilities as parks and libraries are.” NAT’L ORG. FOR WOMEN, TASK FORCE ON THE FAMILY (1967), *reprinted in* FEMINIST CHRONICLES, 1953–1993, at 201, 201–02 (Toni Carabillo et al. eds., 1993). These demands were incorporated into NOW’s 1968 Bill of Rights. *See* NAT’L ORG. FOR WOMEN, BILL OF RIGHTS IN 1968, *reprinted in* FEMINIST CHRONICLES, *supra*, at 214.

¹⁵⁰ Post & Siegel, *supra* note 146, at 2009 (quoting *Comprehensive Child Development Act of 1971: J. Hearings on S. 1512 Before the S. Subcomm. on Employment, Manpower, and Poverty and the Subcomm. on Children and Youth of the Comm. on Labor and Public Welfare, Part 3*, 92d Cong. 752 (1971) (statement of Vicki Lathom, Member, National Board of Directors, Child Care Task Force, National Organization for Women)).

¹⁵¹ NAT’L ORG. FOR WOMEN, STATEMENT OF PURPOSE, *reprinted in* FEMINIST CHRONICLES, *supra* note 149, at 159, 162.

¹⁵² *Id.* at 162–63.

¹⁵³ Michael A. Messner, *The Limits of “The Male Sex Role”: An Analysis of the Men’s Liberation and Men’s Rights Movements’ Discourse*, 12 GENDER & SOC. 255, 263 (1998). NOW’s Task Force was only one of a number of men’s groups to challenge the prescriptions of American masculinity in this period. These groups took aim at “the sex-role stereotypes that regard ‘being a man’ and ‘being a woman’ as statuses that must be achieved through proper behavior.” Jack Sawyer, *On Male Liberation* (1970), in MEN AND MASCULINITY 170, 171 (Joseph H. Pleck & Jack Sawyer eds., 1974). Their relationship to the women’s movement was sometimes quite close: Marc Feigen Fasteau, who wrote one of the

tion: All were means of counteracting the structural pressures forcing men and women to adopt traditional roles in the family.

Criticism of the sex-role system took on a sharper edge in the more radical segments of the women's movement, where activists spoke not of "humanizing" sex roles but of "annihilating" them.¹⁵⁴ Shulamith Firestone, who founded a series of radical feminist groups in this period, argued in her 1970 bestseller *The Dialectic of Sex* that "the end goal of feminist revolution must be . . . not just the elimination of male *privilege* but of the sex *distinction* itself."¹⁵⁵ In a just society, she argued, "genital differences between human beings would no longer matter culturally."¹⁵⁶ Kate Millett, author of *Sexual Politics*, argued in 1968 that sexual revolution would spell "the end of sex role and sex status," so that traits would no longer be "categorized into 'masculine' and 'feminine'" and "the sex act [would] cease[] to be arbitrarily polarized into male and female, to the exclusion of sexual expression between members of the same sex."¹⁵⁷ Although not all radical feminists shared Millett's enthusiasm for bisexuality, her fundamental claims about the pathology of prescriptive sex stereotypes resonated among many. Sex roles are oppressive, radical feminists argued, and the aim of feminism is to liberate "every individual from every aspect of the male-female system."¹⁵⁸

The critique of sex-role stereotyping generated by radical and liberal feminists in the late 1960s put considerable pressure on traditional notions of masculinity and femininity. In the 1950s, the dominant view among social scientists was that "the masculine male and feminine female . . . typify mental health"¹⁵⁹ and that healthy psychological development depended on the extent to which a child identified with a parent of the same sex. Scholars, most notably Harvard sociologist Talcott Parsons, touted this theory in academic journals.¹⁶⁰

earliest and most influential books advocating men's liberation, was married to Brenda Feigen Fasteau, who co-founded the WRP with Ruth Bader Ginsburg.

¹⁵⁴ See, e.g., *The Feminists: A Political Organization To Annihilate Sex Roles*, in RADICAL FEMINISM 368, 368–69 (Anne Koedt, Ellen Levine & Anita Rapone eds., 1973) [hereinafter *The Feminists*] ("Both the male role and the female role must be annihilated.").

¹⁵⁵ SHULAMITH FIRESTONE, *THE DIALECTIC OF SEX: THE CASE FOR FEMINIST REVOLUTION* 11 (1970).

¹⁵⁶ *Id.* at 11–12.

¹⁵⁷ Kate Millett, *Sexual Politics: A Manifesto for Revolution*, in RADICAL FEMINISM, *supra* note 154, at 365, 366–67.

¹⁵⁸ *The Feminists*, *supra* note 154, at 370.

¹⁵⁹ Sandra L. Bem & Ellen Lenney, *Sex Typing and the Avoidance of Cross-Sex Behavior*, 33 J. PERSONALITY & SOC. PSYCHOL. 48, 48 (1976).

¹⁶⁰ For more on Talcott Parsons and the "functionalist" view of sex roles, see BARBARA FINLAY, *BEFORE THE SECOND WAVE: GENDER IN THE SOCIOLOGICAL TRADITION* 215–24, 313–17 (2007).

Most Americans, however, probably encountered it in Dr. Spock's best-selling baby guide, which asserted that the healthy boy identifies with his father, "concentrat[ing] on propelling toy trucks, trains, and planes, pretending his tricycle is a car, being a policeman or fireman, making deliveries, [and] building houses and bridges," while the healthy girl identifies with her mother and will embrace "housework and baby (doll) care if these are her mother's occupations."¹⁶¹ By the 1970s, social scientists had begun to controvert this view. The Bem Sex-Role Inventory (BSRI), developed by sociologist Sandra Bem, suggested that conformity to sex roles might not be the desideratum of healthy psychological development. The BSRI differed from previous instruments for measuring gender by treating femininity and masculinity as independent dimensions of an individual's personality rather than "as bipolar ends of a single continuum."¹⁶² In a famous series of studies,¹⁶³ Bem demonstrated that men and women who evinced both masculine and feminine characteristics had "more flexible sex-role self-concepts"¹⁶⁴ and were better able to adapt to a broader range of environments than those who had developed only one dimension of gender.

Partly as a result of Bem's work, there was "an enthusiastic . . . rebirth of interest" in "[s]ex roles and sex typing" among American social scientists at the start of the 1970s.¹⁶⁵ The decade "witnessed a virtual torrent of sex-role studies."¹⁶⁶ In 1973, the American Sociological Association created a section entitled "Sex Roles" to accommodate the explosion of interest in the topic.¹⁶⁷ In 1975, the journal *Sex Roles* was founded in response to the increasing demand for original

¹⁶¹ BENJAMIN SPOCK, *BABY AND CHILD CARE* 357–58 (Pocket Books 1957) (1945).

¹⁶² Sandra L. Bem, *The Measurement of Psychological Androgyny*, 42 J. CONSULTING & CLINICAL PSYCHOL. 155, 155 (1974).

¹⁶³ See *id.*; Bem & Lenney, *supra* note 159; Sandra Lipsitz Bem, Wendy Martyna & Carol Watson, *Sex Typing and Androgyny: Further Explorations of the Expressive Domain*, 34 J. PERSONALITY & SOC. PSYCHOL. 1016 (1976).

¹⁶⁴ Bem, *supra* note 162, at 162.

¹⁶⁵ Jeffrey A. Kelly & Judith Worell, *New Formulations of Sex Roles and Androgyny: A Critical Review*, 45 J. CONSULTING & CLINICAL PSYCHOL. 1101, 1101 (1977).

¹⁶⁶ John Scanzoni & Greer Litton Fox, *Sex Roles, Family and Society: The Seventies and Beyond*, 42 J. MARRIAGE & FAM. 743, 743 (1980); see also *id.* (observing that sex-role research was sparse in the 1960s but that in the 1970s "volume is up and so is importance"). Books on sex roles published in the 1970s are too numerous to count. For a small sample, see BEYOND SEX-ROLE STEREOTYPES: READINGS TOWARD A PSYCHOLOGY OF ANDROGyny (Alexandra G. Kaplan & Joan P. Bean eds., 1976); SEX ROLES AND SOCIAL POLICY: A COMPLEX SOCIAL SCIENCE EQUATION (Jean Lipman-Blumen & Jessie Bernard eds., 1979); THE SEX-ROLE SYSTEM: PSYCHOLOGICAL AND SOCIOLOGICAL PERSPECTIVES (Jane Chetwynd & Oonagh Hartnett eds., 1978); SHIRLEY WEITZ, SEX ROLES: BIOLOGICAL, PSYCHOLOGICAL, AND SOCIAL FOUNDATIONS (1977).

¹⁶⁷ See Messner, *supra* note 153, at 258.

research on sex stereotyping and sex-role socialization.¹⁶⁸ A majority of this work focused on women, but some of it focused on men as well. One of the most important masculinity researchers in this period was Mirra Komarovsky, a professor at Barnard and close colleague of Ruth Bader Ginsburg.¹⁶⁹ Komarovsky spent the first several decades of her career documenting the psychological strain sex roles imposed on women. In the 1970s, she turned her attention to men and showed that they too experienced “difficulties in fulfilling what they conceived to be the normatively expected masculine roles.”¹⁷⁰ By 1973 (the year the Supreme Court decided a landmark sex discrimination case in favor of a female Air Force officer and her financially dependent husband),¹⁷¹ even Dr. Spock had begun to reconsider his stance on sex roles. In an article in *Redbook*, he declared that caring for children was a job for men too, and that the new edition of his guide would underscore this idea by referring to parents using gender-neutral pronouns.¹⁷²

2. *Gays and Lesbians*

In 1973, the same year Dr. Spock reported a change in his thinking about sex and family roles, the American Psychiatric Association (APA) announced a far more significant, but not unrelated, change in its stance on healthy psychological development and adherence to traditional gender norms. In December of that year, the APA issued a statement announcing its decision to eliminate homosexuality from the list of mental illnesses in the Diagnostic and Statistical

¹⁶⁸ For graphs depicting the astronomical growth in sex-role research in the 1970s, see Tim Carrigan, Bob Connell & John Lee, *Toward a New Sociology of Masculinity*, 14 *THEORY & SOC’Y* 551, 557–58 (1985).

¹⁶⁹ In the winter of 1980, Ginsburg appeared as a guest lecturer in Komarovsky’s class. Ginsburg’s notes for the class indicate that she provided “examples of how men can be hurt when they step out of their expected roles” and argued that liberating men and women from traditional sex roles would require “measures to reduce incidence of family violence[,] flexible h[ou]rs for w[or]king parents[,] quality child care[, and] assistance to [homemakers] attempting to enter or reenter the w[or]kforce.” Ruth Bader Ginsburg, Notes for Barnard M. Komarovsky Class (Feb. 13, 1980) (on file with the Library of Congress, Manuscript Division, Ruth Bader Ginsburg Papers, Container 16, Folder: Writings File, Articles 1979).

¹⁷⁰ MIRRA KOMAROVSKY, *DILEMMAS OF MASCULINITY: A STUDY OF COLLEGE YOUTH* 248 (1976).

¹⁷¹ *Frontiero v. Richardson*, 411 U.S. 677 (1973).

¹⁷² Benjamin Spock, *How My Ideas About Women Have Changed*, *REDBOOK*, Nov. 1973, at 29, 34; see also Muriel R. Schulz, *How Serious Is Sex Bias in Language?*, 26 *C. COMPOSITION & COMM.* 163, 165 (1975) (citing Spock’s announcement as a reflection of “the fact that men are changing diapers, fixing Pabulum, and bandaging cuts today, too”).

Manual of Mental Disorders.¹⁷³ This change, too, occurred as a result of social movement activism, in this case by the gay and lesbian liberation groups that emerged in full force after the 1969 raid on the Stonewall Inn.¹⁷⁴ Like the women's movement, gay and lesbian groups argued that deviation from traditional gender norms was not pathological—that, in fact, the pathology resided in the laws and social structures that enforced traditional sex roles. Indeed, a primary aim of gay and lesbian liberation in this period was to show that sex with someone of the same sex bore a family resemblance to other sex-role transgressions—including the kind recently deemed acceptable by America's most famous pediatrician—and that true sex equality entailed freedom from sex stereotyping in *all* its guises.

"Gay liberation is a struggle against sexism," declared one of the first gay manifestos published in the wake of Stonewall.¹⁷⁵ "[S]exism," declared another, is "the founding oppression—the original inequality."¹⁷⁶ This diagnosis echoed throughout the writing of gay, lesbian, and bisexual activists who emerged in large numbers at the start of the 1970s.¹⁷⁷ Heterosexual and homosexual were salient categories, they argued, only because society differentiated so sharply between men and women: "[T]he imprisoning, artificial labels of gay, straight, and bi would be meaningless without the sex roles and 'correct gender

¹⁷³ See AM. PSYCHIATRIC ASS'N, HOMOSEXUALITY AND SEXUAL ORIENTATION DISTURBANCE: PROPOSED CHANGE TO DSM-II 2-3 (6th prtg. 1973), available at http://www.psychiatryonline.com/DSMPDF/DSM-II_Homosexuality_Revision.pdf.

¹⁷⁴ See William N. Eskridge, Jr., *Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship, 1961-1981*, 25 HOFSTRA L. REV. 817, 822-23 (1997) (noting that the Stonewall riots transformed what had been a small reform movement "into a gay liberation movement populated by thousands of lesbians, gay men, and bisexuals who came out of the closet and formed hundreds of organizations").

¹⁷⁵ Allen Young, *Out of the Closet: A Gay Manifesto* (abr.), RAMPARTS, Nov. 1971, reprinted as *Out of the Closets, Into the Streets*, in OUT OF THE CLOSETS, *supra* note 24, at 6, 7.

¹⁷⁶ Third World Gay Revolution & Gay Liberation Front, *Gay Revolution and Sex Roles*, CHICAGO GAY PRIDE, June 1971, reprinted in OUT OF THE CLOSETS, *supra* note 24, at 252, 258-59; see also John D'Emilio, *Foreword* to OUT OF THE CLOSETS, *supra* note 24, at xi, xix, xxi (noting that "gay liberationists . . . saw the battle against sexism as the very heart of their struggle" and that "[a]gain and again, in their articles, their manifestos, and their political fliers, these pioneering radicals turned to the same point: sexism").

¹⁷⁷ By focusing on the anti-sexist arguments made by the gay and lesbian liberation movement in this period, I do not mean to suggest that these were the only arguments the movement made or that all gay activists in the early 1970s subscribed to these arguments. The movement was also deeply concerned with the regulation of sexuality and the enforcement of repressive and hypocritical sexual mores. In addition, "[g]ay liberation groups saw themselves as one component of the decade's radicalism and regularly addressed the other issues that were mobilizing American youth," including racism, poverty, war, and global injustice. JOHN D'EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940-1970*, at 234 (2d ed. 1998).

identification' . . . that sexism imposes."¹⁷⁸ If homosexuality was defined as sexual desire for someone of the "wrong" sex, then laws regulating homosexuality were quite literally sexist, in the sense that they discriminated on the basis of sex. But the argument ran deeper than this. Gay and lesbian activists observed that a "'real man' and 'real woman' are not so by their chromosomes and genitals, but by their respective degrees of 'masculinity' and 'femininity,' and by how closely they follow the sex-role script in their relationships with individuals and society."¹⁷⁹ They noted that people who deviated from this script in any way (female construction workers, effeminate men) were labeled "dyke," "faggot," and "queer" in order to signal that they no longer counted as proper men and women. These labels were used to keep people in check, to deter them from "cross[ing] the terrible boundary" delimiting male and female roles.¹⁸⁰

Lesbian, gay, and bisexual writers often suggested that their expulsion from the ranks of "real" men and women enabled them to see more clearly the injustice of the sex-role system. Martha Shelley, a leader in the Gay Liberation Front, noted in 1970 that the "really important thing about being gay is that you are forced to notice how much sex-role differentiation is pure artifice."¹⁸¹ Activists in this period frequently demanded an end to such differentiation. "As gays, we demand an end to the gender programming which starts when we are born (pink for girls, blue for boys)," one manifesto declared.¹⁸² Another called for "the destruction of the gender caste system."¹⁸³ A central aim of gay liberation, they argued, was the "abolition of sex-role stereotypes."¹⁸⁴ Like the women's movement, supporters of gay and lesbian liberation extended their critique into the home, where

¹⁷⁸ Third World Gay Revolution, *supra* note 176, at 258; *see also* RADICALESBIANS, THE WOMAN IDENTIFIED WOMAN (1970), *reprinted in* OUT OF THE CLOSETS, *supra* note 24, at 172, 173 (arguing that homosexuality is "a by-product of a particular way of setting up roles . . . on the basis of sex").

¹⁷⁹ Third World Gay Revolution, *supra* note 176, at 252.

¹⁸⁰ RADICALESBIANS, *supra* note 178, at 173.

¹⁸¹ Shelley, *supra* note 24, at 33; *see also* N.A. Diaman, *On Sex Roles and Equality*, ZYGOTE, Oct. 30, 1970, *reprinted in* OUT OF THE CLOSETS, *supra* note 24, at 262, 263 ("As lesbians and male homosexuals, we are put down by straights because we are not real women and real men, but we are certainly one step ahead of straights in realizing how artificial and limiting those categories are."); Young, *supra* note 175, at 29 ("Homosexuals committed to struggling against sexism have a better chance than straights of building relationships based on equality because there is less enforcement of roles. We have already broken with gender programming, so we can more easily move toward equality.").

¹⁸² Young, *supra* note 175, at 29.

¹⁸³ GAY REVOLUTION PARTY MANIFESTO, *reprinted in* OUT OF THE CLOSETS, *supra* note 24, at 342, 343.

¹⁸⁴ Chicago Gay Liberation, Working Paper for the Revolutionary People's Constitutional Convention (1970), *in* OUT OF THE CLOSETS, *supra* note 24, at 346, 346.

traditional role divisions began to funnel boys and girls into separate spheres as soon as they were born. An influential 1971 essay entitled *Gay Revolution and Sex Roles* argued that “[t]he oppression of women and that of gay people are interdependent and spring from the same roots, but take different forms”¹⁸⁵. Women are oppressed by how they fit into the traditional family structure; gay people are oppressed because they don’t fit into this structure. Another manifesto, written the same year, argued that the rigid sex roles associated with the traditional family hurt women and sexual minorities alike.¹⁸⁶ It called for “free and safe birth control information and devices on demand” and “free 24-hour child care centers” to liberate women from the strictures of traditional sex and family roles.¹⁸⁷

To many lesbian and bisexual activists, the links between sex equality and gay liberation were obvious. Groups like the Radicalesbians, which were involved in both the women’s movement and the lesbian liberation movement, saw gay rights as coterminous with women’s rights; they argued that “rigid sex roles” and “male supremacy” were interlocking forms of oppression, and that freedom from one required freedom from the other.¹⁸⁸ Kate Millett, who was also involved in both movements, asserted that women’s liberation depended on “the end of enforced perverse heterosexuality.”¹⁸⁹ Not all men in the gay liberation movement shared this sense of joint mission; there were heated conflicts in this period between lesbians and gay men over sexism and male chauvinism within the movement.¹⁹⁰ Nonetheless, quite a few male writers argued at the start of the 1970s that gay liberation was “premised on the termination of the system of male supremacy.”¹⁹¹ These writers asserted that the gay liberation movement and the women’s rights movement were working toward the same end: “the gay liberation of all people,” by which they meant

¹⁸⁵ Third World Gay Liberation, *supra* note 176, at 254–55.

¹⁸⁶ Third World Gay Revolution, *What We Want, What We Believe*, GAY FLAMES, Mar. 1971, reprinted in *OUT OF THE CLOSETS*, *supra* note 24, at 363, 365, 367.

¹⁸⁷ *Id.* at 364.

¹⁸⁸ RADICALESBIANS, *supra* note 178, at 172.

¹⁸⁹ Millett, *supra* note 157, at 367.

¹⁹⁰ See FLORA DAVIS, *MOVING THE MOUNTAIN: THE WOMEN’S MOVEMENT IN AMERICA SINCE 1960*, at 270 (1991) (noting that lesbians often encountered sexism in the gay rights movement); D’Emilio, *supra* note 176, at xxi (discussing conflicts between men and women in the gay liberation movement).

¹⁹¹ Young, *supra* note 175, at 10; see also D’Emilio, *supra* note 176, at xxi (noting that even if men in the gay liberation movement did not immediately alter their behavior toward women, many of them did elaborate “a *political* critique of sexism and male supremacy”); Diaman, *supra* note 181, at 263 (critiquing sexism and male chauvinism as a source of the oppression of women and gay people).

freedom from sex-role stereotypes and the destruction of sex-based hierarchies.¹⁹²

On occasion, women's rights and lesbian rights groups joined together and publicly affirmed their shared commitment to eradicating sex-role stereotyping. In 1970, when *Time* magazine outed Kate Millett as bisexual and suggested this revelation would discredit her and the women's movement more generally, NOW activists held a press conference in which they declared that women and sexual minorities were "struggling towards a common goal."¹⁹³ At NOW's annual convention in 1971, a large majority of delegates voted in favor of a resolution stating that lesbian "oppression is not only relevant, but an integral part of the women's liberation movement."¹⁹⁴ The resolution declared that "the distorted stereotype of the lesbian" impeded the progress of all women.¹⁹⁵ This bond was fragile, however, and severely strained by the women's movement's attempts to navigate a political climate hostile to gay rights. In the late 1960s, NOW was fearful of being tarred as a lesbian organization and shied away from discussion of homosexuality.¹⁹⁶ In the late 1970s, when the continuity between women's rights and gay rights became a political liability in the battle over the ERA, liberal feminists sought once again to disassociate themselves from their queer allies.¹⁹⁷

The women's movement felt compelled to disassociate itself from gay and lesbian liberation groups in this period in part because their claims were so often identical, or at least highly overlapping. By the late 1960s, feminist and gay and lesbian activists had begun to question the naturalness of sex roles and to challenge the legal and social strictures that enforced those roles. Deploying an interrelated set of arguments, these movements extended the concept of stereotyping—long understood as a mechanism of race discrimination—into the domain of sex. They argued that status hierarchies based on sex were no more reflective of the "natural order" than status hierarchies based on race and that sex-role stereotyping was the primary means by which sex-based hierarchies were perpetuated. Their aim was not to render sex invisible, but to render more visible the ways in which law

¹⁹² GAY REVOLUTION PARTY MANIFESTO, *supra* note 183, at 343–45; *see also* Young, *supra* note 175, at 29 ("Gay is good for all of us.").

¹⁹³ ALICE ECHOLS, DARING TO BE BAD: RADICAL FEMINISM IN AMERICA, 1967–1975, at 219 (1989) (internal quotation marks omitted).

¹⁹⁴ NAT'L ORG. FOR WOMEN, LESBIAN RIGHTS (1971), *reprinted in* FEMINIST CHRONICLES, *supra* note 149, at 221, 222.

¹⁹⁵ *Id.* at 221.

¹⁹⁶ *See* DAVIS, *supra* note 190, at 262–68.

¹⁹⁷ For more on these fissures and their effect on the development of sex-based equal protection law, *see infra* text accompanying notes 304–06.

and custom steered men and women into traditional roles and relegated women and sexual minorities to the status of second-class citizens. Like the civil rights movement, these movements argued that combating prescriptive stereotyping would in some instances require structural reform—not simply equal opportunity in education and employment, but also reproductive rights and childcare, so that women could access such opportunities on equal terms.

The next Part shows how Ruth Bader Ginsburg drew on the anti-stereotyping arguments animating movements for sex equality in the late 1960s and early 1970s in order to challenge the constitutionality of sex-based state action. Ginsburg cited gains made by these movements as evidence of a marked transformation in popular attitudes toward sex discrimination. She argued in the first brief she submitted to the Supreme Court that attitudes toward sex discrimination were “undergoing a . . . metamorphosis in the public mind” akin to earlier changes in public attitudes toward race discrimination and that the function of the Fourteenth Amendment was “to put such broad-ranging concerns into the fundamental law of the land.”¹⁹⁸ As we shall see, however, Ginsburg did not cite these movements simply as evidence of social change. She used their arguments to develop a new theory of equal protection—one that addressed the particular mechanisms and forms of injury associated with sex-based state action.

II

THE DEVELOPMENT OF ANTI-STEREOTYPING DOCTRINE

When legal feminists in the 1960s and 1970s decided to challenge the constitutionality of sex-based state action, they faced two interlocking problems. First, up to this point, the Court’s conception of discrimination had been forged primarily in the context of race. Over time, the Court had come to understand that the Jim Crow regime had marked racial minorities with a badge of inferiority and deprived them of the equal protection of the laws. Pauli Murray observed in the 1960s that sex discrimination intersected with race discrimination in important ways, leaving black women doubly disempowered.¹⁹⁹ But in many instances, sex discrimination assumed a different shape than race discrimination: Women attended gender-integrated public schools, ate in gender-integrated restaurants, and lived in the same houses and neighborhoods as men. The fact that the subordination of women did not always or even primarily take the form of segregation presented sex equality advocates with a related problem—namely,

¹⁹⁸ Brief for Appellant, *supra* note 39, at 17.

¹⁹⁹ See, e.g., Murray, *Negro Women’s Stake*, *supra* note 141.

that “[m]en holding elected and appointed offices generally considered themselves good husbands and fathers.”²⁰⁰ They believed their wives and daughters were well served by the status quo and viewed the law’s “differential treatment of men and women not as malign, but as operating benignly in women’s favor.”²⁰¹ As recently as 1961, the Court had upheld a Florida law that exempted women from jury service on the ground that it honored their status as wives and mothers and gave them more time to fulfill their “special responsibilities” at home.²⁰²

The challenge for legal feminists was to develop a theory of equal protection that would combat these dual problems. They needed an approach that would direct courts’ attention to the particular institutions and social practices that had perpetuated inequality in the context of sex and counteract the widespread perception that sex discrimination redounded to women’s benefit. Pauli Murray, who first began to develop the equal protection approach to sex discrimination in the mid-1960s, used anti-stereotyping arguments to formulate such an approach. She argued, in a canonical 1965 law review article, that in bringing claims under the Fourteenth Amendment, women were not necessarily “seeking identical treatment with men.”²⁰³ Rather, Murray argued, they were seeking “equality of opportunity for education, employment, cultural enrichment, and civic participation without barriers built upon the myth of the stereotyped ‘woman.’”²⁰⁴ This approach suggested that sex-based state action was a constitutional problem not in all cases, but only when it perpetuated stereotypes that forced the sexes into separate spheres.

When Ginsburg decided, at the start of the 1970s, to take up the effort that Murray had begun, she placed these anti-stereotyping arguments at the center of her campaign. Anti-stereotyping arguments enabled Ginsburg to foreground the state’s enforcement of the male breadwinner–female caregiver model—a set of practices that was not visible in the canonical race discrimination cases but had long entrenched women’s secondary status in the American legal system. The anti-stereotyping principle also provided an antidote to the “benign” discrimination problem. There was little consensus in the 1960s and 1970s about which institutions and social practices perpetuated women’s subordination and which did not. The women’s movement itself had been torn over this question for much of the twentieth

²⁰⁰ Ginsburg, *supra* note 22, at 1442.

²⁰¹ *Id.*

²⁰² *Hoyt v. Florida*, 368 U.S. 57, 62 (1961).

²⁰³ Murray & Eastwood, *supra* note 139, at 239.

²⁰⁴ *Id.*

century; feminists on both sides of the debate sought to combat women's oppression, but they were deeply divided on the question of whether protective labor legislation hindered or advanced that goal.²⁰⁵ For this reason, Ginsburg was wary of grounding her theory of equal protection solely in the anti-subordination principle. That principle, in and of itself, could not tell courts which forms of regulation inflicted gender-based harm, and Ginsburg was profoundly skeptical of the Justices' ability to "know[] [it] when [they] see it."²⁰⁶ The anti-stereotyping principle helped to focus attention on the separate spheres ideology through which sex had been "made the groundwork of an inequality of legal right, and a forced dissimilarity of social functions."²⁰⁷

Ginsburg's aims were not the same as those of the activists who were formulating the most radical critiques of the sex-role system in this period. Ginsburg's project, in developing a theory of equal protection based on an anti-stereotyping principle, was not to "annihilate sex roles"; she did not seek "the elimination . . . of the sex distinction itself."²⁰⁸ She was concerned not with the existence of sex roles, but with the enforcement of those roles by the state. Indeed, she was especially concerned about a particular form of sex-role enforcing state action: that which perpetuated the pervasive and mutually reinforcing stereotype that women are responsible for performing (unpaid) family care, and men are responsible for providing their families with financial support. Some other anti-stereotyping claims, like those involving differential hair-length rules for male and female employees, struck her as relatively "unimpressive."²⁰⁹

Ginsburg's project also differed from those of other critics of sex stereotyping in the early 1970s in that her project was a distinctly legal one: to crystallize a *mediating principle* that would give "meaning and content to an ideal embodied in the text" of the Equal Protection Clause.²¹⁰ Anti-stereotyping served this purpose. It provided a "guide

²⁰⁵ For a detailed account of the deep schism in the women's movement prior to the 1960s, see CYNTHIA HARRISON, *ON ACCOUNT OF SEX: THE POLITICS OF WOMEN'S ISSUES, 1945-1968* (1988).

²⁰⁶ Ginsburg, *supra* note 20, at 15 (paraphrasing Justice Stewart's famous observation about obscenity in *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)).

²⁰⁷ MILL, *supra* note 60.

²⁰⁸ FIRESTONE, *supra* note 155, at 11.

²⁰⁹ Letter from Ruth Bader Ginsburg, Women's Rights Project, ACLU, to Thomas M. Kerr, Head of Admin. & Mgmt. Sci., Graduate Sch. of Indus. Admin., Carnegie Mellon Univ. (May 21, 1973) (on file with the Library of Congress, Manuscript Division, Ruth Bader Ginsburg Papers, Container 5, Folder: "Ladies' Day" Admissions (1973)).

²¹⁰ Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 107 (1976).

for decision”²¹¹ that courts and other legal actors could understand and implement. It allowed Ginsburg to focus the Court’s attention on a particular category of laws and social practices that had contributed in deep and sustained ways to the oppression of women. It was also sufficiently capacious to cover other forms of sex-role enforcement, as courts’ understanding of which laws and social practices constitute sex stereotyping evolved over time. This was a signal advantage of the anti-stereotyping principle, but as we shall see, it was also a liability. Opponents of the women’s movement used the potentially far-reaching implications of the anti-stereotyping principle in controversial domains like abortion and same-sex marriage to attack the entire antidiscrimination project in the context of sex.

These conflicts had important effects on the early development of sex-based equal protection doctrine. They helped to generate the much-criticized limits on the reach of this doctrine in the Burger Court era. These limits, however, have obscured the profound change that occurred in this period: Anti-stereotyping became the central mediating principle in sex-based equal protection law. This Part will show how Ginsburg succeeded in persuading the Court to adopt the anti-stereotyping principle and why it remained cabined within such narrow doctrinal parameters in the 1970s.

A. “*The Traditional Division Within the Home*”

As noted above, Ginsburg wrote her first sex discrimination brief on behalf of Charles Moritz, a lifelong bachelor who took care of his elderly mother but was denied a caregiver’s tax deduction on the basis of his sex. When Ginsburg learned of Moritz’s predicament in the fall of 1970, she offered to represent him pro bono.²¹² Congress’s assumption that bachelors lacked family caregiving responsibilities, and the financial penalty it imposed on those who did shoulder such responsibilities, provided a striking illustration of the way in which the government entrenched traditional roles in the family—using carrots and

²¹¹ *Id.* at 108.

²¹² For a vivid account of how Ginsburg discovered Moritz’s case, see Martin D. Ginsburg, *A Uniquely Distinguished Service*, 10 GREEN BAG 2d 173, 174–75 (2007) [hereinafter Ginsburg, *Uniquely Distinguished*]. At the time, Ginsburg was developing one of the first courses in the United States on sex discrimination law. Her course incorporated frequent “side glances . . . at innovations in Sweden” and emphasized “the toll paid by men” as a result of state’s enforcement of sex roles. Ruth Ginsburg, *Faculty Column*, RUTGERS L. SCH. ALUMNI ASS’N NEWSL. (Newark, N.J.), Mar. 1972, at 4 (on file with the Library of Congress, Manuscript Division, Ruth Bader Ginsburg Papers, Container 16, Folder: Writings File, Articles 1971–1974). Unsurprisingly, Ginsburg concluded that the case of the disfavored male caregiver provided a perfect conduit for translating these ideas into constitutional arguments.

sticks to steer men and women into the male breadwinner–female caregiver paradigm. Ginsburg’s plan, from the moment she learned of the caregiver tax policy, was to bring *Moritz*’s case to the Supreme Court.²¹³ She judged it an ideal case, both for challenging the Court’s traditional “woman-protective” stance and for educating the Justices about the institutions and social practices that perpetuate inequality in the context of sex.

While Ginsburg was drafting her brief for the Tenth Circuit in *Moritz*, the Supreme Court granted certiorari in *Reed v. Reed*.²¹⁴ At issue in *Reed* was an Idaho law that preferred men to women in the appointment of estate administrators. The plaintiff, Sally Reed, had applied to serve as the administrator of her son’s estate following his suicide; the state granted that right instead to her estranged husband, whose sex automatically entitled him to the position.²¹⁵ When Ginsburg read *Reed*, she realized it would make an excellent companion case to *Moritz*. The two cases, presented together, could demonstrate how “sex-role pigeonholing”²¹⁶ preserved traditional role divisions in the family: Here was the woman barred from making financial decisions on behalf of her child’s estate; here was the man who ran into trouble with the IRS because he acted as primary caregiver to his mother. When Ginsburg discovered that her old friend Melvin Wulf, the legal director of the ACLU, was planning to write the brief in *Reed*, she sent him three copies of her brief in *Moritz*, suggesting that her way of framing the equal protection argument “should be useful” for the case that was headed to the Court.²¹⁷ Although *Moritz* featured a male plaintiff, Ginsburg’s brief argued that equality for women would remain a distant goal as long as men were deterred from pursuing traditionally female activities; equal protection thus meant that the state could not prescribe sex roles for either sex.²¹⁸ “Bowled over” by her innovative approach,²¹⁹ Wulf

²¹³ See Letter from Ruth Bader Ginsburg to Melvin L. Wulf, *supra* note 30 (informing Wulf of her plan to “take the case to the Tenth Circ[ui]t” and then to “make a valorous try at the Supreme Court”).

²¹⁴ 404 U.S. 71 (1971).

²¹⁵ *Id.* at 71–73.

²¹⁶ Ruth Bader Ginsburg, *Women’s Right to Full Participation in Shaping Society’s Course: An Evolving Constitutional Precept*, in *TOWARD THE SECOND DECADE: THE IMPACT OF THE WOMEN’S MOVEMENT ON AMERICAN INSTITUTIONS* 176 (Betty Justice & Renate Pore eds., 1981).

²¹⁷ Letter from Ruth Bader Ginsburg to Melvin Wulf (April 6, 1971) (on file with the Library of Congress, Manuscript Division, Ruth Bader Ginsburg Papers, Container 5, Folder: *Moritz v. Comm’r* May 1971).

²¹⁸ See Brief for Petitioner-Appellant, *supra* note 31, at 20 (arguing that “[f]air and equal treatment for women means fair and equal treatment for members of both sexes”).

²¹⁹ Ginsburg, *Uniquely Distinguished*, *supra* note 212, at 175.

invited Ginsburg to help write the brief in *Reed*. That brief—the “grandmother brief”—incorporated and expanded on the ideas she had begun to develop in *Moritz*.

Ginsburg’s brief in *Reed* sought to demonstrate that Idaho’s preference for male administrators was part of a much broader pattern of sex-role enforcement that associated men with the marketplace and women with the home. In sections entitled “Male as head of household” and “Women and the role of motherhood,” she asserted that “[t]he traditional division within the home—father decides, mother nurtures—is reinforced by diverse provisions of state law.”²²⁰ She noted that as of 1971, the law gave husbands the exclusive right to control family assets and to determine the family’s domicile; it expected wives to adopt their husbands’ names upon marriage; and it permitted girls to marry at a younger age than boys, according the latter “more time to prepare for bigger, better and more useful pursuits.”²²¹ Criminal law, too, reinforced traditional gender roles through penalties for promiscuity and prostitution that targeted women and girls; and “tax law present[ed] a significant disincentive to the woman who contemplate[d] combining a career with marriage and a family.”²²² Ginsburg argued that the state enforced traditional sex roles at the intersection of work and family by providing minimal funding for childcare and job training, banning the provision of childcare services to children under the age of two, barring men from acting as childcare providers, and treating women’s unemployment less seriously than men’s.²²³

Taken together, Ginsburg’s briefs in *Moritz* and *Reed* articulated a new constitutional argument: Sex-based state action violates equal protection when it entrenches the traditional role divisions that confine men and women to separate spheres. The Court, however, did not take the two briefs together. The Tenth Circuit foiled Ginsburg’s plan to present the cases to the Court in the same term by lingering for many months before issuing its decision in *Moritz*.²²⁴ *Moritz* was a historic victory; it was the first decision in American history to hold that the Fourteenth Amendment protected men, as well as women, from sex discrimination. Only *Reed*, however, has become part of the canon of constitutional law.

²²⁰ Brief for Appellant, *supra* note 39, at 32–35.

²²¹ *Id.*

²²² *Id.* at 35–37.

²²³ *Id.* at 37–40.

²²⁴ The Supreme Court issued its decision in *Reed* on November 22, 1971; the Tenth Circuit issued its decision in *Moritz* on the same day, one year later. *Reed v. Reed*, 404 U.S. 71 (1971); *Moritz v. Comm’r*, 469 F.2d 466 (10th Cir. 1972).

Recovering *Moritz* can help us to appreciate more fully the constitutional theory on which the WRP's litigation campaign was founded. Ginsburg offered to represent Charles Moritz because his difficulties with the IRS provided an ideal vehicle for advancing an anti-stereotyping approach to sex-based equal protection law. The state's refusal to extend to bachelors the financial incentives it granted to single women engaged in family care perfectly illustrated the point sex equality advocates had begun to make in this period: Laws and customs that steer men out of the domestic sphere reinforce restrictions on women's participation in the public sphere, and the maintenance of such role divisions perpetuates long-standing inequalities between the sexes. The fact that the government was responsible for the stereotyping in this case enabled Ginsburg to transform popular arguments about the sex-role system into sex-based equal protection arguments. She began, in *Moritz*, to construct a theory of equal protection that would bar the state from acting in ways that perpetuate the separate spheres tradition.

Ginsburg developed this theory in *Reed*. Her brief in that case famously built on the work of the civil rights movement, incorporating Pauli Murray's argument that sex discrimination was no less pernicious than, and often took the same form as, race discrimination.²²⁵ But it also deployed anti-stereotyping principles in new ways. The brief linked women's subordination with laws that enforced traditional sex roles—particularly in the domain of marriage, childrearing, and sexuality—and it urged the Court to develop a sex-based equal protection doctrine skeptical of such laws. In the fall of 1971, when *Reed* came down, it was unclear how much weight the Justices had given these arguments and how far the new constitutional protections against sex discrimination would extend. The Court's opinion was spare, even cryptic; it provided almost no explanation for its groundbreaking holding. It was, nonetheless, a start: the first case in which the Court treated the government's entrenchment of sex roles as a matter of constitutional concern.

B. Sex Roles and Reproductive Rights

After *Reed* and *Moritz*, the WRP²²⁶ turned its attention to pregnancy and motherhood—areas in which the nexus between sex-role

²²⁵ See, e.g., Brief for Appellant, *supra* note 39, at 18–19 (“Legal and social proscriptions based upon race and sex have often been identical, and have generally implied the inherent inferiority of the proscribed class to a dominant group.”).

²²⁶ Ginsburg and her colleagues at the ACLU founded the WRP in early 1972 with the intent of mounting a full-scale campaign challenging the constitutionality of sex-based state action. Ginsburg, *supra* note 22, at 1441.

stereotyping and the subordination of women was particularly tight. As we saw in Part I, no issue was more central to the women's movement at the start of the 1970s than the regulation of pregnancy and motherhood. Tens of thousands of women in cities across the nation went on strike in the summer of 1970 to demand structural changes in the legal and social institutions that regulated pregnant women and mothers.²²⁷ In 1972, when the WRP began to litigate reproductive rights cases, Ginsburg observed that some people seem to "believe in equal pay for equal work, but hope that the rest will quietly fade away."²²⁸ Echoing the strikers, Ginsburg asserted that equal pay for equal work was not enough: Genuine equality would require substantial reform in how the state regulated women's reproductive lives.

Not long after the Court issued its decision in *Reed*, Ginsburg began work on a case that perfectly illustrated "the sex equality dimension of laws and regulations regarding pregnancy and childbirth."²²⁹ The case, *Struck v. Secretary of Defense*,²³⁰ concerned an Air Force regulation mandating the immediate discharge of any female officer upon a determination that she was pregnant or had given birth to a live child. Ginsburg's client, Susan Struck, was a Captain in the Air Force who became pregnant while serving in Vietnam. The Air Force encouraged Struck to have an abortion and thereby preserve her job, but she preferred, for religious reasons, to continue her pregnancy and place the child for adoption after it was born.²³¹ Although Struck used only accumulated leave time to cover the period in which she gave birth, and was ready to return to work shortly thereafter, the Air Force ordered her discharge.²³²

Ginsburg argued that this mandatory discharge policy was "more a manifestation of cultural sex role conditioning than a response to medical fact and necessity."²³³ If Struck had instead broken a limb or developed a drug addiction, the Air Force would have granted her convalescent leave and rehabilitative services, and allowed her to use accumulated leave time to extend her recovery period before returning to active duty. Among medical conditions, pregnancy alone triggered mandatory discharge, even though the physical disability it

²²⁷ RUTH ROSEN, *THE WORLD SPLIT OPEN: HOW THE MODERN WOMEN'S MOVEMENT CHANGED AMERICA* 92-93 (2000).

²²⁸ Ginsburg, *Status of Women*, *supra* note 105, at 585.

²²⁹ Ginsburg, *supra* note 22, at 1447.

²³⁰ 409 U.S. 1071 (1972).

²³¹ Brief for the Petitioner at 56, *Struck v. Sec'y of Def.*, 409 U.S. 1071 (1972) (No. 72-178).

²³² *Id.* at 4-5.

²³³ *Id.* at 35 n.28 (quoting *Heath v. Westerville Bd. of Educ.*, 345 F. Supp. 501, 505-06 n.1 (S.D. Ohio 1972) (internal quotation marks omitted)).

entailed was briefer and less serious than numerous other disabilities that routinely afflicted Americans serving in Vietnam. It was not pregnancy, then, but pregnancy discrimination and policies limiting reproductive choice that truly disabled Captain Struck.

Ginsburg argued that the Air Force's policy toward pregnant women stemmed from its "thinly veil[ed]"²³⁴ preference for the male breadwinner–female caregiver model. The same set of regulations that mandated the discharge of pregnant women and new mothers granted men a generous array of additional benefits (including medical and dental coverage for dependents, increased housing allowances, and deferrals from new assignments) to encourage them to remain in the service when they became fathers.²³⁵ Ginsburg noted that the mandatory discharge policy punished poor women—especially poor single women—by depriving them of essential prenatal care and threatening them with destitution.²³⁶ The policy also adversely affected wealthier women, as it "reinforce[d] societal pressure to relinquish career aspirations for a hearth-centered existence."²³⁷

The Court never heard these arguments. At the eleventh hour, the Air Force granted Struck a waiver and the Court remanded to the lower court to consider whether the case was moot.²³⁸ Shortly thereafter, however, pregnancy discrimination reappeared on the Court's docket in *Geduldig v. Aiello*,²³⁹ an equal protection challenge to a provision exempting normal pregnancy disability from coverage under California's otherwise comprehensive disability insurance system. Ginsburg's amicus brief in *Geduldig* reprised her arguments in *Struck*. She argued that California's decision to insure male workers fully and female workers only partially had

all the earmarks of [a] self-fulfilling prophecy. If women are treated by the state and their employe[rs] as detached from the work force when pregnancy disables them, . . . it is not surprising that some succumb to the disincentives barring the way to return, and to appellant's stereotyped vision of women's place post-childbirth.²⁴⁰

As in *Struck*, Ginsburg's aim was to persuade the Court that the Fourteenth Amendment precluded the state from discriminating in ways that reinforced traditional conceptions of women's sex and family roles. Her arguments in *Geduldig*, however, were confined to

²³⁴ *Id.* at 55.

²³⁵ *Id.* at 55, 67.

²³⁶ Brief for the Petitioner, *supra* note 231, at 36–37.

²³⁷ *Id.* at 37.

²³⁸ *Struck v. Sec'y of Def.*, 409 U.S. 1071, 1071 (1972).

²³⁹ 417 U.S. 484 (1974).

²⁴⁰ Brief of ACLU et al. as Amici Curiae at 17, *Geduldig*, 417 U.S. 484 (No. 73-640).

an amicus brief, and the facts in the case made the prescriptive component of pregnancy discrimination more difficult to see. In *Struck*, the plaintiff was no longer pregnant and was ready and able to work; the Air Force's refusal to permit her to return to her job dramatically illustrated the law's role in enforcing traditional expectations regarding women's place in the home. Although the law in *Geduldig* played the same role, the fact that the plaintiffs were pregnant, and therefore differently situated than men, confounded the Justices, six of whom concluded that the exclusion of pregnancy from California's disability insurance system did not warrant special scrutiny because it did not discriminate between men and women, but only between "pregnant women and non pregnant persons."²⁴¹

This logic controlled the Court's reasoning about women's rights for many years to come. Reva Siegel calls it "reasoning from the body."²⁴² She and others have long noted that "[t]he Court typically reasons about reproductive regulation in physiological paradigms, as a form of state action that concerns physical facts of sex rather than social questions of gender," causing it to miss the ways in which regulations respecting "'real' physical difference between the sexes . . . can nevertheless be sexually discriminatory."²⁴³ This form of reasoning reemerged two years after *Geduldig* in *General Electric Co. v. Gilbert*,²⁴⁴ which held that pregnancy discrimination did not constitute sex discrimination under Title VII, and several years after that in *Michael M. v. Superior Court*,²⁴⁵ which upheld a sex discriminatory statutory rape law after identifying some dubious, but ostensibly "real," differences between men and women in regard to sex and reproduction.²⁴⁶ The Burger Court also applied this logic in the context of abortion. Although its opinion in *Roe v. Wade* protected women's right to abortion, it did so as a matter of due process rather than equal protection.²⁴⁷ *Roe* treated abortion as a purely physiological phenomenon, concentrating on female bodies and fetal bodies instead of inquiring if and when the regulation of pregnant women enforced stereotypes about women's family roles and deprived them of the decisional autonomy accorded to men.

²⁴¹ *Geduldig*, 417 U.S. at 496–97 n.20.

²⁴² Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 261 (1992).

²⁴³ *Id.* at 264–65.

²⁴⁴ 429 U.S. 125 (1976).

²⁴⁵ 450 U.S. 464 (1981).

²⁴⁶ *Id.* at 467, 473 (stating that "males alone can physiologically cause" pregnancy and that the risk of pregnancy acts as a "natural sanction[]" only on women's sexuality (internal quotation marks omitted)).

²⁴⁷ 410 U.S. 113 (1973).

By the time the cascade of sex-based equal protection cases that began with *Reed* tapered off in the early 1980s, the Court had yet to acknowledge the sex equality dimension of regulations concerning pregnancy, abortion, rape, and sexuality. The WRP had scored significant victories in cases like *Reed* and *Frontiero v. Richardson*,²⁴⁸ but state action restricting women's rights in more comprehensive ways remained largely beyond the law's reach. Moreover, many of the WRP's victories in the 1970s had come in cases featuring male plaintiffs, and not all of these cases seemed to implicate women's equality interests in meaningful ways. In 1976, for instance, two years after the Court held that the Equal Protection Clause offered women no protection against pregnancy discrimination, the Court held in *Craig v. Boren* that it *did* protect teenage boys in Oklahoma from a law that permitted girls to buy 3.2% beer at a slightly younger age than their male peers.²⁴⁹

Surveying these developments in the 1980s, many feminist scholars concluded that the WRP bore substantial blame for what had happened. They argued that the WRP's campaign was founded on a narrow, formalistic theory of equality and that this is what it had elicited from the Court. This theory of equality may have benefited the WRP's male clients, but it did little for women, whose apparent "difference" from men rendered the anti-differentiation principle of little use in combating the forms of discrimination that hurt women most. Ginsburg's harshest critics equated male sex discrimination plaintiffs with the white race discrimination plaintiffs who emerged in the 1970s as part of a conservative backlash against "forced busing," affirmative action, and other government programs designed to integrate schools and workplaces.²⁵⁰ These white plaintiffs urged the Court to adopt a "color-blind" or anti-classificationist approach to equal protection, perhaps with the intent, and certainly with the effect, of preserving racial status hierarchies.²⁵¹ Ginsburg's critics argued that the cases she

²⁴⁸ 411 U.S. 677 (1973) (holding that a statute which required male but not female spouses of members of the military to prove dependency in order to obtain certain benefits violated the Equal Protection Clause).

²⁴⁹ 429 U.S. 190 (1976).

²⁵⁰ See, e.g., Ann Scales, *Feminist Legal Method: Not So Scary*, 2 UCLA WOMEN'S L.J. 1, 8 (1992) (equating male plaintiffs in sex-based equal protection cases with white plaintiffs in race-based equal protection cases and citing both phenomena as evidence of "interpretative competition," the process by which dominant social groups attempt to co-opt and forestall progressive legal change).

²⁵¹ See Siegel, *supra* note 134, at 1519–32.

litigated on behalf of male plaintiffs yielded analogous results in the domain of sex.²⁵²

Much of this criticism was generated at a low point in the contemporary struggle for women's rights. After a decade of litigation, legal feminists had made little progress in persuading courts that laws regulating pregnancy, abortion, rape, and sexuality implicated the Equal Protection Clause. In 1979, in *Personnel Administrator of Massachusetts v. Feeney*,²⁵³ the Court effectively foreclosed sex-based disparate impact claims under the Fourteenth Amendment, severely limiting the ability of equal protection law to combat state action that discriminated against women without classifying them as such. In 1982, the deadline for ratifying the ERA passed before the requisite number of states had done so, and the long battle for the ERA ended in defeat for the women's movement. Despite appointing the first woman to the Supreme Court, the Reagan administration was hostile to the movement's demands and sought to appoint judges who shared its antipathy to the "feminist agenda." The Moral Majority, which was founded in 1979 and had strong ties to the administration, was waging an increasingly successful "pro-family" campaign, which focused on ending abortion, outlawing homosexuality, and preserving traditional sex roles. In 1981, Republicans in Congress introduced a Family Protection Act,²⁵⁴ which, had it passed, would have prohibited federal funding for schools whose curriculum "would tend to denigrate, diminish or deny the role differences between the sexes as they have been historically understood in the United States," and "denied government benefits, including social security, to anyone who presented homosexuality as an acceptable alternative life style or suggests that it can be an acceptable life style."²⁵⁵

Against this backdrop, feminists in the 1980s produced a large and important body of scholarship that called attention to the ways in which equal protection law failed to protect women against the most common and entrenched forms of discrimination. They questioned the logic of a doctrine that protected boys' right to drink watery beer but did nothing to combat the subordination of pregnant women and

²⁵² See, e.g., Becker, *supra* note 10, at 251–52 (arguing that as a result of Ginsburg's legal strategy, "men have been able to use the Fourteenth Amendment to challenge sex-based classifications just as whites, in post-1971 cases, have been able to use the Fourteenth Amendment to challenge racial classifications" (footnote omitted)).

²⁵³ 442 U.S. 256 (1979).

²⁵⁴ Family Protection Act of 1981, S. 1378, 97th Cong., 1st Sess., 127 CONG. REC. S. 12694 (1981).

²⁵⁵ JOHN D'EMILIO & ESTELLE B. FREEDMAN, INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA 349 (Univ. of Chi. Press, 2d ed. 1997) (1988) (internal quotation marks omitted).

mothers. They pointed out that some of the arguments legal feminists in the 1970s had adopted from the race discrimination paradigm—most notably, the argument that sex discrimination warrants constitutional concern because sex is an immutable trait—had sharpened the Court’s focus on “real” differences and made it more difficult for women to win protection in domains where they were perceived to be biologically different from men. These scholars constructed new paradigms for thinking about sex equality and articulated new constitutional arguments against sex discrimination, transforming feminist legal theory into a robust field.

What was largely absent from this outpouring of feminist scholarship, however, was a recognition of the history of ideas and social movement activism that informed the WRP’s constitutional vision and paved the way for its campaign. Many scholars in the 1980s concluded that the WRP won from the Court precisely what it sought: a commitment to treat men and women the same when the law deemed them similarly situated. The fact that Ginsburg pressed the claims of male plaintiffs seemed proof of this limited aim.²⁵⁶ But these criticisms obscured the legal theory underwriting the WRP’s campaign. The WRP often represented male plaintiffs, and it often challenged the constitutionality of formal sex classifications, but its aim was not simply to stop the state from employing such classifications. The WRP targeted formal sex classifications *because* and *only when* they prevented both sexes “from pursui[ng] . . . opportunities that would have enabled them to break away from familiar stereotypes.”²⁵⁷ Its aim, in

²⁵⁶ By highlighting the large body of feminist scholarship that criticized the WRP, I do not mean to suggest that feminists in the 1980s spoke with one voice on this subject; numerous scholars in this period were quite sympathetic to Ginsburg’s approach. See, e.g., Katharine T. Bartlett & Carol B. Stack, *Joint Custody, Feminism and the Dependency Dilemma*, 2 BERKELEY WOMEN’S L.J. 9 (1986) (arguing that meaningful social change in the domain of sex requires combating the sex-role stereotyping of both men and women, and that the law should reflect and reinforce the notion that men too are responsible for caregiving); Wendy W. Williams, *Equality Crisis: Some Reflections on Culture, Courts and Feminism*, 14 WOMEN’S RTS. L. REP. 151, 154 (1992) (defending the sex-based equal protection cases of the 1970s on the ground that they repudiated “the old breadwinner-homemaker, master-dependent dichotomy inherent in the separate spheres ideology”); Wendy W. Williams, *Equality’s Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 331 (1984–85) (“The goal of the feminist legal movement that began in the early seventies is not and never was the integration of women into a male world Rather, the goal has been to break down the legal barriers that restricted each sex to its predefined role and created a hierarchy based on gender.”). For a more contemporary defense of Ginsburg’s approach, see JOAN WILLIAMS, *Unbending Gender: Why Family and Work Conflict and What to Do About It* 208–32 (2000) (“A closer look at the cases associated with the formal equality position shows that all involve policies that either police men and women into domesticity’s gender roles, or punish those who cross gender boundaries.”).

²⁵⁷ Ginsburg, *supra* note 25, at 21.

pressing the claims of male plaintiffs, was not to promote sex-blindness—to prevent the state in all instances from taking sex into account—but rather to educate the Court about the workings of the sex-role system. It sought to promote the idea that the best way to implement the Constitution's equal protection guarantee in the context of sex is to protect everyone from laws and social practices that reflect and reinforce traditional conceptions of men's and women's roles.²⁵⁸

Claims of this nature were prevalent among sex equality advocates at the time the WRP launched its campaign. The women's movement and the gay and lesbian liberation movements at the start of the 1970s identified sex-role enforcement as the primary mechanism of sex-based inequality; they argued that equality for all Americans depended on the liberation of members of both sexes from the constraints of traditional sex roles. The WRP did not voice all of the movements' demands (gay rights cases were notably absent from its docket), and it did not persuade the Court to view issues such as pregnancy and sexuality in the movements' terms. It did succeed, however, in introducing the concept of stereotyping into constitutional sex discrimination doctrine. As we shall see in the next section, this was a critical innovation. It did not transform the law overnight, but it laid the groundwork for change in the future.

C. *The "Most Spectacular of the Court's Gender Discrimination Decisions"*

Ruth Bader Ginsburg has long contended that the "most critical"²⁵⁹ sex discrimination case the Court decided in the 1970s was *Weinberger v. Wiesenfeld*.²⁶⁰ Stephen Wiesenfeld came to Ginsburg's attention in the fall of 1972 when he wrote a letter to his local news-

²⁵⁸ Ginsburg has long defended *Craig v. Boren* on these grounds. She argued in her brief and in the press that the classification in *Craig* was unconstitutional because it was "rooted in traditional role-typing (or in gross notions of what girls and boys are made of)." Ruth Bader Ginsburg, Letter to the Editor, *Discriminating Protection*, NEW REPUBLIC, Apr. 30, 1977, at 9. The Court's opinion in *Craig* echoed this reasoning; it recognized that the statute reflected "social stereotypes" about men and women and reinforced their differential treatment in society. See *Craig v. Boren*, 429 U.S. 190, 202–03 n.14 (1976). Thus, Ginsburg has argued that *Craig* was not a setback for the women's movement but a (tiny) step toward establishing that the Equal Protection Clause prohibits the state from acting in ways that reflect and reinforce sex-role stereotypes.

²⁵⁹ Ruth Bader Ginsburg, *Interpretations of the Equal Protection Clause*, 9 HARV. J.L. & PUB. POL'Y 41, 43 (1986); see also Ginsburg, *supra* note 25, at 22 (referring to *Wiesenfeld* as "one of the key cases in the evolution of the Supreme Court's current approach"); *An Open Discussion with Justice Ruth Bader Ginsburg*, 36 CONN. L. REV. 1033, 1037 (2004) (citing *Wiesenfeld* as her "ideal case").

²⁶⁰ 420 U.S. 636 (1975).

paper protesting sex discrimination in the Social Security system.²⁶¹ Wiesenfeld explained that he and his wife Paula had “assumed reverse roles”: She acted as the primary breadwinner, and he was dependent on her earnings.²⁶² When his wife died giving birth to their first child, Wiesenfeld applied for “mother’s benefits,” a form of assistance designed to enable widows to stay home with their children after the death of the family breadwinner.²⁶³ His application was denied on the basis of sex. Determined to stay home with his baby son, Wiesenfeld wondered if anyone in the women’s movement could help him—maybe Gloria Steinem?²⁶⁴

Unbeknownst to Stephen Wiesenfeld, feminists in Congress had been attempting to extend “mother’s benefits” to men for years. Martha Griffiths and Bella Abzug had introduced numerous bills addressing the issue but had been unable to push the legislation out of the House Ways and Means Committee.²⁶⁵ When Ginsburg learned of Wiesenfeld’s troubles, she decided to challenge the constitutionality of the provision under the Equal Protection Clause. Restricting “mother’s benefits” to women perfectly illustrated the way in which the government forced men and women to organize their work and family lives along traditional gender lines: It steered women out of the workforce by compensating them less than their male co-workers (as Wiesenfeld noted, his wife “paid maximum dollars into Social Security”²⁶⁶ but received none of the benefits), and it steered men out of the home by depriving them of financial support in the event of a female breadwinner’s death.

One of the chief obstacles Ginsburg confronted in this case was the incredulity and discomfort Wiesenfeld’s desire for “mother’s benefits” aroused in the government’s lawyers. At the trial court, lawyers for the Secretary of Health, Education and Welfare argued that Ginsburg’s client lacked standing to sue because it defied credibility to suggest that a man would choose to stay home with a baby instead of going to work.²⁶⁷ At the Supreme Court, Solicitor General Robert

²⁶¹ See Stephen Wiesenfeld, Letter to the Editor, *Social Security Inequality*, THE HOME NEWS (NEW BRUNSWICK), Nov. 27, 1972 (on file with the Library of Congress, Manuscript Division, Ruth Bader Ginsburg Papers, Container 10, Folder: Weinberger v. Wiesenfeld 1972–1973). For more on Stephen Wiesenfeld, see FRED STREBEIGH, *EQUAL: WOMEN RESHAPE AMERICAN LAW* 3–10 (2009).

²⁶² Wiesenfeld, *supra* note 261.

²⁶³ *Id.*; see also 42 U.S.C. § 402(g) (2006).

²⁶⁴ Wiesenfeld, *supra* note 261.

²⁶⁵ Brief for Appellee at 19 n.15, *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (No. 73-1892).

²⁶⁶ Wiesenfeld, *supra* note 261.

²⁶⁷ See Transcript of Oral Argument, *supra* note 13, at 28–32, 60.

Bork raised similar questions about the genuineness of Wiesenfeld's desire to act as a "mother." Bork implied that with "three university degrees,"²⁶⁸ Wiesenfeld was perfectly capable of supporting himself and decidedly unlikely to forego career opportunities in order to stay home with a baby. Moreover, Bork hinted that there was a perfectly reasonable explanation for the Wiesenfelds' topsy-turvy arrangement prior to Paula's death: Stephen was financially dependent on his wife during their marriage because "he was pursuing an education."²⁶⁹ Now that his education was complete, the Solicitor General suggested, the plaintiff would (or should) enter the workforce.²⁷⁰

The primary aim of Bork's brief was to persuade the Court that the dispute over "mother's benefits" concerned only Stephen Wiesenfeld and had nothing to do with his wife, "whose entitlement to benefits on her own account [was] not in issue."²⁷¹ In part, this strategy reflected a judgment about where the Justices' sympathies would lie. Paula Wiesenfeld was a tragic figure; she died in childbirth after years of supporting her family, and the government was now devaluing her contributions to the labor market, and to her spouse and child, simply because she was a woman. But the government could portray Stephen Wiesenfeld in a less sympathetic light. Maybe he begrudged the state's attempt to help poor widows or maybe he genuinely wanted to stay home and care for a baby—either suggestion impugned his masculinity. The government also had a doctrinal reason for focusing on Stephen. As of 1975, it was not clear whether discrimination against men triggered any special concern under the Equal Protection Clause. *Reed* and *Frontiero* vindicated the rights of women; the only other case the WRP had litigated at the Court was *Kahn v. Shevin*,²⁷² a sex discrimination case brought and lost by a male plaintiff. Thus, Bork argued that the Court's equal protection jurisprudence permitted discrimination on the basis of sex in cases where it benefited women and that "mother's benefits" clearly did so: They served the "compassionate" purpose "of ameliorating the harsh economic circumstances of women with families who have been deprived of the support of a husband."²⁷³

²⁶⁸ Brief for the Appellant at 4, *Wiesenfeld*, 420 U.S. 636 (No. 73-1892).

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.* at 20.

²⁷² 416 U.S. 351, 355 n.8 (1974) (upholding, under rational basis review, a Florida law granting a property tax exemption to widows in part because it helped "to rectify the effects of past discrimination against women" (quoting *Frontiero v. Richardson*, 411 U.S. 677, 689 n.22 (1973))).

²⁷³ Brief for the Appellant, *supra* note 268, at 11-12.

Ginsburg refuted the government's contention that the statute in *Wiesenfeld* benefited women.²⁷⁴ She argued that restricting "mother's benefits" to women injured Paula Wiesenfeld, who contributed to the Social Security system on the same terms as male workers but received only a fraction of the benefits, and that it "fortifie[d] the assumption, harmful to women, that labor for pay and attendant benefits is primarily the prerogative of men."²⁷⁵ Ginsburg did not, however, resist the government's attempts to frame *Wiesenfeld* as a referendum on male sex roles. In fact, she cited Bork's conjectures about her client as a prime example of how sex stereotyping worked. The Solicitor General asserted in his brief that Stephen Wiesenfeld was financially dependent on his wife during their marriage because he was enrolled in school. In actuality, Wiesenfeld had graduated eighteen months prior to his marriage. Ginsburg observed that the government's erroneous assumption about why her client had adopted a traditionally feminine role in his marriage "reveal[ed] the tenacity of one-eyed sex-role thinking well into the 1970's."²⁷⁶ Such thinking was also behind the government's intimation that her client was too intelligent and well educated to remain at home with a child. Any suggestion that a woman, by virtue of her education, "should choose remunerative employment over personal attention to her newborn child undoubtedly would be dismissed with alacrity," Ginsburg asserted.²⁷⁷ The government's insinuation that Stephen Wiesenfeld's time was too valuable to be spent taking care of a baby indicated that it viewed childcare as a fine activity for women but a degrading one for men. Ginsburg argued that such judgments, particularly when enforced by the state, operated to keep both sexes in their place—separate and not equal.

By 1975, Ginsburg had been putting this role-based anti-stereotyping argument to the Court for nearly five years. Her efforts were rewarded in *Wiesenfeld*, which held that the restriction of "mother's benefits" to women violated the constitutional rights of *both* sexes.²⁷⁸ The Court explained that discrimination "that results in the efforts of female workers . . . producing less protection for their families than is

²⁷⁴ Ginsburg did not argue, in response to the government's claims, that sex discrimination was impermissible in all cases. Her claim in *Reed*, *Frontiero*, *Kahn*, and *Wiesenfeld* was that sex-based state action violated the Fourteenth Amendment when it enforced the separate spheres dichotomy. Sex-based state action that eroded this dichotomy was not only permissible; it was an essential component of the anti-stereotyping project.

²⁷⁵ Brief for Appellee, *supra* note 265, at 25.

²⁷⁶ *Id.* at 18 n.11. The expression "one-eyed sex-role thinking" is Olof Palme's. *See supra* note 106.

²⁷⁷ Brief for Appellee, *supra* note 265, at 22.

²⁷⁸ 420 U.S. 636 (1975).

produced by the efforts of men”²⁷⁹ is not a boon to women: The government restricted “mother’s benefits” to women not to compensate them for discrimination in the labor market, as the Solicitor General contended, but “because it believed that they should not be required to work”²⁸⁰—and that men should be. The Court held that the Fourteenth Amendment prohibited laws motivated by this kind of stereotyping. It denigrated the efforts of working women like Paula Wiesenfeld, and it denigrated the domestic contributions of Stephen Wiesenfeld, who “was dependent upon his wife for his support”²⁸¹ and had made the gender-nonconforming choice to stay home with his son. The Court ruled that the state had no legitimate interest in trying to force the plaintiff to assume a breadwinning role.²⁸² In fact, the Court asserted that, in the absence of sex-role enforcement, even men “in the typical family” might decide they wanted to stay home with their children and that the Fourteenth Amendment barred the state from deciding that these men “would, or should be required to, continue to work.”²⁸³

The idea that men might assume the role of mothers, and that the Constitution protected their right to do so, was mind-boggling to some of the Justices. When Justice Brennan, who wrote for the Court in *Wiesenfeld*, circulated his opinion, Justice Blackmun annotated the passages about stay-at-home fathers with question marks and exclamation points (Brennan’s suggestion that Stephen Wiesenfeld “may well have” stayed home with his son even if his wife had lived elicited a “WOW!”).²⁸⁴ Despite his surprise, however, Blackmun signed on. Justices Powell, Burger, and Rehnquist did not. Powell and Burger concurred in the result but wrote separately to argue that the Court should have treated *Wiesenfeld* as a simple equal pay case: The statute was unconstitutional because it deprived working women of benefits that accrued to working men.²⁸⁵ Powell argued that there was no need for the Court to condone the plaintiff’s departure from masculine

²⁷⁹ *Id.* at 645.

²⁸⁰ *Id.* at 650.

²⁸¹ *Id.* at 645.

²⁸² *Id.* at 651–52.

²⁸³ *Id.*

²⁸⁴ William J. Brennan, Second Draft of Opinion of the Court, *Weinberger v. Wiesenfeld* (circulated Mar. 1975) (on file with the Library of Congress, Manuscript Division, Harry A. Blackmun Papers, Box 203, Folder 6, *Weinberger v. Wiesenfeld*).

²⁸⁵ *Wiesenfeld*, 420 U.S. at 654–55 (Powell, J., concurring). In 1975, Rehnquist had not yet agreed that sex-based state action warranted heightened scrutiny under the Fourteenth Amendment. He argued, in a separate concurrence, that the statute violated the baby’s constitutional rights because there was no rational basis for conditioning his opportunity to benefit from the attentions of a stay-at-home parent on the sex of the parent he lost. *Id.* at 655 (Rehnquist, J., concurring).

gender norms.²⁸⁶ The statute permitted recipients to earn a small amount of money, so extending “mother’s benefits” to men did not necessarily imply that it was acceptable for them to “forgo work and remain at home to care for children.”²⁸⁷ Behind the scenes, Powell admitted that he found the thought of men receiving “mother’s benefits” repulsive. He fretted to his law clerk that the Court’s decision would induce “a high level of indolence” and swell “the ever increasing welfare rolls” as men quit their jobs in order to laze about at home with their kids.²⁸⁸

Despite Powell’s reservations, the notion that laws enforcing sex-role stereotypes violated the Equal Protection Clause soon became doctrine. In *Stanton v. Stanton*, heard the same term as *Wiesenfeld*, the Court invalidated a Utah statute that terminated parental obligations to girls at eighteen but required parents to support boys until they turned twenty-one.²⁸⁹ The state claimed that the law simply reflected the fact that girls leave school and marry at a younger age than boys, but the Court noted that such distinctions were self-serving: “[I]f the female is not to be supported so long as the male, she hardly can be expected to attend school as long as he does, and bringing her education to an end earlier coincides with the role-typing society has long imposed.”²⁹⁰ Four years later, in *Orr v. Orr*,²⁹¹ the Court struck down Alabama’s rule that husbands but not wives could be required to pay alimony on the ground that such rules “effectively announc[ed] the State’s preference for an allocation of family responsibilities under which the wife plays a dependent role.”²⁹² The Court held that equal protection precluded the state from seeking to “reinforce[] . . . that model among [its] citizens.”²⁹³ Similarly, in 1982, the Court held that Mississippi’s exclusion of men from a state nursing school violated the Fourteenth Amendment because it “lends credibility to the old view that women, not men, should become nurses, and makes the assump-

²⁸⁶ *Id.* at 654 (Powell, J., concurring) (“It is immaterial whether the surviving parent elects to assume primary child care responsibility rather than work, or whether other arrangements are made for child care.”).

²⁸⁷ *Id.*

²⁸⁸ Memorandum from Julia “Penny” Clark, Law Clerk, to Justice Lewis F. Powell, Jr. 3 (Jan. 17, 1975) (on file with the Washington and Lee University School of Law, Lewis F. Powell, Jr. Papers, Supreme Court Case Files, Powell Archives, 73-1892 Weinberger v. Wiesenfeld), quoted in Serena Mayeri, Reasoning from Race: The Civil Rights Paradigm and American Legal Feminism, 1960–1979, at 224 (May 2006) (unpublished Ph.D. dissertation, Yale University) (on file with the *New York University Law Review*).

²⁸⁹ 421 U.S. 7 (1975).

²⁹⁰ *Id.* at 14–15.

²⁹¹ 440 U.S. 268 (1979).

²⁹² *Id.* at 279.

²⁹³ *Id.*

tion that nursing is a field for women a self-fulfilling prophecy.”²⁹⁴ None of these cases were brought by the WRP.²⁹⁵ By the late 1970s, anti-stereotyping had become ingrained in the Court’s own understanding of equal protection.²⁹⁶

The Burger Court failed to extend anti-stereotyping doctrine into the domains of pregnancy, abortion, rape, and sexuality—a failure that caused critics to dismiss *Wiesenfeld* and subsequent victories by male plaintiffs as trivial and largely irrelevant to the struggle for women’s rights. And indeed, it would be many years before the Court applied this principle in a manner more directly responsive to feminist concerns. *Wiesenfeld* and subsequent male plaintiff cases did not, however, simply trace the rudimentary logic of anti-classificationism. The Court reasoned about sex discrimination in *Wiesenfeld* in much the same way Ginsburg had reasoned about sex discrimination in *Struck* and *Geduldig*. It was attentive to the way in which the law enforced sex-role stereotypes, and it concluded that such stereotyping violated the Equal Protection Clause. And not only that, it did so in a case involving motherhood, the paradigmatic site of “real” difference. Although the Court did not immediately apply these insights more broadly, in ways that more directly implicated the regulation of pregnant women and mothers, *Wiesenfeld* took a critical step in that direction. It incorporated into equal protection law an anti-stereotyping logic that raised serious questions about the state’s regulation of sex and family roles.

The Court’s reasoning about sex discrimination in *Wiesenfeld* also raised questions about the regulation of men’s and women’s roles in the domain of sexuality. As we saw in Part I, gay and lesbian activists often argued in the early 1970s that laws regulating same-sex relations

²⁹⁴ *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 730 (1982).

²⁹⁵ The WRP’s only involvement in these cases came in the form of an amicus brief in *Orr*. See Brief of ACLU, Amicus Curiae, *Orr*, 440 U.S. 268 (No. 77-1119).

²⁹⁶ Intermediate scrutiny doctrine, which emerged in tandem with the anti-stereotyping principle, dictates that sex-based state action is constitutional only when it “serve[s] important governmental objectives” and is “substantially related to achievement of those objectives.” *Craig v. Boren*, 429 U.S. 190, 197 (1976). The anti-stereotyping principle pervades both stages of this inquiry, shaping what constitutes an important interest and what means qualify as sufficiently narrowly tailored to serve this interest. Since this doctrine was introduced in 1976, the Court has never upheld a sex classification after determining that it reflects or reinforces sex stereotypes. See Mary Anne Case, “*The Very Stereotype the Law Condemns*”: *Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1449 (2000) (arguing that “the components of the intermediate scrutiny standard . . . have rarely been the moving parts in a Supreme Court sex discrimination decision. Rather, the bulk of the work in these decisions has been done by what readers of the opinions may be tempted to treat as mere decorative rhetorical flourish—the proposition that there are constitutional objections to ‘gross, stereotyped distinctions between the sexes’ . . .”) (footnote omitted)).

constituted sex discrimination because they enforced sex-role stereotypes. These activists claimed that discrimination against gays and lesbians stemmed from the same source as discrimination against women and gender non-conforming men: a desire to preserve traditional gender roles and an anxiety about the erosion of sex-based status hierarchies. These connections were not lost on the participants in *Wiesenfeld*. In his correspondence with Ginsburg, Stephen Wiesenfeld jokingly referred to stay-at-home fatherhood as an “alternate lifestyle”²⁹⁷—a term commonly used to describe homosexuality in the 1970s.²⁹⁸ Justice Powell’s condemnation of stay-at-home fatherhood as a form of “indolence” suggests that he too may have associated Wiesenfeld’s sex-role transgression with homosexuality, although perhaps less consciously and certainly less cheerfully. Prior to the advent of same-sex marriage, male homosexuality was often viewed as a form of immaturity—a failure or a refusal to move beyond the carefree life of the adolescent and assume the marital and breadwinning responsibilities that defined (and confined) adult men. As Barbara Ehrenreich notes: “In psychiatric theory and in popular culture, the image of the irresponsible male blurred into the shadowy figure of the homosexual. Men who failed as breadwinners and husbands were ‘immature,’ while homosexuals were, in psychiatric judgment, ‘aspirants to perpetual adolescence.’”²⁹⁹ Both were viewed as taking the easy way out, shirking the strenuous tasks of marriage and breadwinning in favor of a softer and more decadent (read: feminine) lifestyle.³⁰⁰

At the time the Court decided *Wiesenfeld*, one did not need to read between the lines to discover links between homosexuality and other forms of sex-role transgression. A new and increasingly pow-

²⁹⁷ Letter from Stephen Wiesenfeld to Ruth Bader Ginsburg, Professor of Law, Columbia Law Sch. (May 23, 1979) (on file with the Library of Congress, Manuscript Division, Ruth Bader Ginsburg Papers, Container 10, Folder: Weinberger v. Wiesenfeld 1976–1980).

²⁹⁸ For a contemporaneous analysis suggesting that the Burger Court’s Fourteenth Amendment jurisprudence offered (at least some) protection for “lifestyle” choices, see J. Harvie Wilkinson & G. Edward White, *Constitutional Protection for Personal Lifestyles*, 62 CORNELL L. REV. 563 (1977). Thanks to Risa Goluboff for this reference.

²⁹⁹ BARBARA EHRENRICH, *THE HEARTS OF MEN: AMERICAN DREAMS AND THE FLIGHT FROM COMMITMENT* 24 (1983).

³⁰⁰ For more on the perceived connection between male homosexuality and the adoption of female sex roles, see, e.g., Abram Kardiner, *The Flight from Masculinity*, reprinted in *THE PROBLEM OF HOMOSEXUALITY IN MODERN SOCIETY* 17, 27 (Hendrik M. Ruitenbeek ed., 1963) (arguing that many men retreat to homosexuality because they feel incapable of satisfying the demands of the adult male role); LIONEL OVESEY, *HOMOSEXUALITY AND PSEUDOHOMOSEXUALITY* 24–28 (1969) (coining the term “pseudohomosexual” to describe men who fail as breadwinners and husbands, and noting that men equate their perceived failures with homosexuality via the following logic: “*I am a failure = I am castrated = I am not a man = I am a woman = I am a homosexual*”).

erful social movement was energetically forging these links. Unlike the gay and lesbian liberation groups that flourished at the start of the decade, however, this movement argued that discrimination against gays and lesbians was a form of sex discrimination not in an effort to expand gay rights, but in an effort to discredit the women's movement. At the head of this new movement was Phyllis Schlafly, a conservative lawyer and activist who joined "the sex-role debate" in 1972 in order to galvanize conservative opposition to the ERA, which had recently passed both houses of Congress. Chief among Schlafly's arguments against the ERA was that it would destroy the American family, in significant part by outlawing discrimination against homosexuals and granting same-sex couples the right to marry. After all, Schlafly asserted, "[i]t is precisely 'on account of sex' that a state now denies a marriage license to a man and a man, or to a woman and a woman."³⁰¹ If the ERA were to pass, she argued, a "homosexual who wants to be a teacher could argue persuasively that to deny him a school job would be discrimination 'on account of sex.'"³⁰² Schlafly suggested that most Americans would not welcome this prospect: They valued traditional sex roles and believed that the law ought to protect the people who adopted those roles, not the people who deviated from them. Shortly after the Court issued its decision in *Wiesenfeld*, Schlafly published an editorial in her monthly newsletter arguing that a constitutional prohibition on sex discrimination would offer protection not to normal men and women, but to "the offbeat and the deadbeat male—that is, to the homosexual who wants the same rights as husbands [and] to the husband who wants to escape supporting his wife and children."³⁰³

The women's movement in the late 1970s responded to these charges much as it had in the late 1960s: It denied them. Leaders in the movement insisted that the campaign to end sex discrimination and combat sex-role stereotyping would have no impact on the regulation of same-sex relations. In 1979, with the threat of defeat closing in on the ERA, Ginsburg herself disavowed the connection between sex equality and gay rights, asserting that the Amendment would not disrupt the heterosexuality of marriage.³⁰⁴ When Schlafly claimed, as she

³⁰¹ PHYLLIS SCHLAFLY, *THE POWER OF THE POSITIVE WOMAN* 90 (1977). For further discussion of conservatives who opposed the ERA on the ground that it would grant same-sex couples the right to marry, see Ruth Bader Ginsburg, *Ratification of the Equal Rights Amendment: A Question of Time*, 57 TEX. L. REV. 919, 937 (1979).

³⁰² SCHLAFLY, *supra* note 301, at 90.

³⁰³ Phyllis Schlafly, *How E.R.A. Will Hurt Men*, PHYLLIS SCHLAFLY REP., May 1975, § 2.

³⁰⁴ Ginsburg, *supra* note 301, at 937.

often did, that the ERA would also protect the right to abortion because women could not be considered “equal” if they were required to carry pregnancies to term, feminists responded in much the same fashion.³⁰⁵ Ginsburg, who had articulated so clearly at the start of the 1970s why protecting women’s reproductive rights was essential to their equal stature, argued in the late 1970s that the ERA would not guarantee the right to abortion because the “Court solidly anchored its 1973 rulings in the reproductive choice cases to the due process guarantee, not to an equality idea.”³⁰⁶

With the women’s movement in retreat, and the New Right ascendant, it is not surprising that anti-stereotyping doctrine did not extend very far beyond cases like *Wiesenfeld* in the 1970s. The WRP and the women’s movement more generally—the groups best situated to explain how this principle applied to the regulation of reproductive rights and same-sex relations—were in a defensive crouch, trying to shore up, rather than build on, the gains they had made over the previous decade. Nor is it surprising that many in the next generation of legal feminists should have formed a negative opinion of their predecessors. By the 1980s, the limitations of the Court’s sex-based equal protection jurisprudence had become apparent, and the earlier generation of feminists seemed to be embracing, rather than seeking to overcome, those limitations. The WRP’s representation of male plaintiffs became a focal point of feminist criticism in this period. From the vantage point of the 1980s, the male plaintiffs who triumphed at the Court in the 1970s looked like a status-quo-affirming, or even reactionary, force in the law.

From the vantage point of the early 1970s, however, gender non-conforming plaintiffs like Charles Moritz and Stephen Wiesenfeld seemed a far more progressive force. When Ginsburg decided to litigate sex discrimination cases on behalf of male plaintiffs, the New Right had not yet appeared on the political horizon, and the widespread applicability of the anti-stereotyping principle seemed like a boon, not a threat, to the campaign for sex equality. At the time, transatlantic social movements were drawing connections between caregiving men, pregnant women, and gays and lesbians, arguing that ending sex discrimination required liberating all these groups from prescriptive sex stereotypes, particularly in cases where those stereotypes were enforced by law. From this perspective, the WRP’s founda-

³⁰⁵ See Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CAL. L. REV. 1323, 1393–1402 (2006) (examining how the rise of the New Right disciplined the women’s movement’s arguments about reproductive rights in the late 1970s).

³⁰⁶ Ginsburg, *supra* note 301, at 937 (footnote omitted).

tional victories in cases featuring male plaintiffs look less like a doctrinal dead end and more like an opening wedge. Surely this is how *Wiesenfeld* appeared to Ginsburg in 1975 when she declared it the “[m]ost spectacular of the Court’s gender discrimination decisions.”³⁰⁷

III

THE EVOLUTION OF ANTI-STEREOTYPING DOCTRINE

The Court’s embrace of the anti-stereotyping principle in cases such as *Wiesenfeld* constituted a substantial theoretical shift in constitutional sex discrimination doctrine. The Court no longer assumed that discrimination against women operated in their favor, and it identified the enforcement of sex stereotypes as a constitutional problem. In practical terms, however, change was limited. The Court issued a series of important decisions precluding the state from enforcing the male breadwinner–female caregiver model, but it did not extend its new anti-stereotyping approach very far beyond the four corners of those decisions. This Part examines three domains—the military, reproductive rights, and same-sex marriage—where the Court initially did not apply the anti-stereotyping principle. In *Rostker v. Goldberg*,³⁰⁸ the Court dodged the question of whether the exclusion of women from combat positions in the United States military perpetuates traditional conceptions of men’s and women’s roles. In *Roe v. Wade*,³⁰⁹ the Court defined the right to abortion as a matter of due process; it did not ask how regulation in this domain might implicate Fourteenth Amendment equality values. In *Baker v. Nelson*,³¹⁰ the Court dismissed a challenge to a Minnesota statute limiting the right to marry to different-sex couples on the ground that it failed to present a substantial federal question, suggesting that the regulation of same-sex marriage raised no equal protection concerns. It was not beyond the realm of imagining in the 1970s that constitutional equality principles might extend to these domains; indeed, Phyllis Schlafly and her colleagues in the New Right explicitly opposed the ERA on the ground that it would integrate the military, expand reproductive rights, and legalize same-sex marriage.³¹¹ Yet, none of these outcomes materialized in the 1970s. The ERA failed and the Burger

³⁰⁷ Ginsburg, *supra* note 20, at 14.

³⁰⁸ 453 U.S. 57 (1981).

³⁰⁹ 410 U.S. 113 (1973).

³¹⁰ 409 U.S. 810 (1972), *dismissing appeal from*, 191 N.W.2d 185 (Minn. 1971).

³¹¹ See DONALD T. CRITCHLOW, PHYLLIS SCHLAFLY AND GRASSROOTS CONSERVATISM: A WOMAN’S CRUSADE 212–42 (2005) (detailing the sex-role-based arguments against the ERA).

Court did not apply sex-based equal protection doctrine in any of these domains.

The legal and social landscape surrounding these issues has changed significantly since the Burger Court era. This Part begins by examining two relatively recent cases, *United States v. Virginia*³¹² and *Nevada Department of Human Resources v. Hibbs*,³¹³ in which the Court extended sex-based equal protection law beyond the doctrinal limitations established in the 1970s. As we shall see, these cases took a new approach to some of the key doctrinal questions the Court first confronted forty years ago, such as how constitutional sex discrimination law should treat “real” differences, and if or when the law should apply in the contexts of pregnancy and motherhood. This Part concludes by arguing that recent changes in sex-based equal protection doctrine, marked by cases like *Virginia* and *Hibbs*, have significant ramifications for contemporary legal questions. Questions that once fell outside the reach of constitutional sex discrimination law are now within its orbit.

A. A New Approach to “Real” Differences

United States v. Virginia involved a challenge to the male-only admissions policy at the Virginia Military Institute (VMI), a state-run military academy that provided its students with an atypical college experience.³¹⁴ VMI treated its students like soldiers and trained them using an “adversative method” of education, which involved “[p]hysical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values.”³¹⁵ “Cadets” who completed this program gained access to a powerful network of alumni, which included many of the state’s business and political leaders.³¹⁶ When the federal government first challenged the constitutionality of VMI’s single-sex admissions policy in 1990, the state responded by creating an alternative program for women, the Virginia Women’s Institute for Leadership (VWIL).³¹⁷ This program was intended to provide an experience equivalent to the one offered at VMI, but because the state deemed the “adversative method” appropriate for males only, VWIL relied on a kinder, gentler, “cooperative method” of education.³¹⁸ When the federal govern-

³¹² 518 U.S. 515 (1996).

³¹³ 528 U.S. 731 (2003).

³¹⁴ *Virginia*, 518 U.S. at 519.

³¹⁵ *Id.* at 522 (alteration in original) (internal quotation marks omitted).

³¹⁶ *Id.* at 520.

³¹⁷ *Id.* at 526.

³¹⁸ *Id.* at 526–27 (internal quotation marks omitted).

ment persisted in its challenge, Virginia argued that “the actual physiological, psychological, and sociological differences between males and females”³¹⁹ made integrating VMI impossible. Admitting women would require the school to abandon the “adversative method” and thereby alter its core mission of producing “‘citizen-soldiers,’ men prepared for leadership in civilian life and in military service.”³²⁰

The Court ruled in favor of the United States. The majority opinion, written by Justice Ginsburg, situated VMI’s refusal to admit women in the context of the separate spheres tradition. The Court explained that for much of American history, women had been deprived of the vote,³²¹ of the right to control their own property,³²² and of equal opportunity in the workplace³²³ on the basis of sex-role stereotypes.³²⁴ Sex-segregated education arose out of this tradition; the Court noted that, historically, male-only college admissions policies “reflected widely held views about women’s proper place.”³²⁵ Indeed, “higher education was considered dangerous for women” in the nineteenth century on the ground that it would interfere with their maternal functions.³²⁶

The Court concluded that VMI’s ongoing exclusion of women perpetuated this tradition. It deprived women of “the powerful political and economic ties of the VMI alumni network,”³²⁷ which helped graduates ascend to the highest levels of military and civilian leadership.³²⁸ VWIL did not solve this problem: It was underfunded, lacked a comparable alumni network, offered only a very poor simulation of military training, and even deprived women of the opportunity to enroll in advanced math and science courses.³²⁹ The Court observed that the state’s justifications for maintaining these sex-segregated pro-

³¹⁹ Brief for the Cross-Petitioners at 17 n.9, *Virginia*, 518 U.S. 515 (Nos. 94-1941, 94-2107) (internal quotation marks omitted).

³²⁰ *Virginia*, 518 U.S. at 520; see also Brief for the Cross-Petitioners, *supra* note 319, at 16 & n.7.

³²¹ *Virginia*, 518 U.S. at 531.

³²² *Id.* at 532.

³²³ *Id.* at 531–32.

³²⁴ See, e.g., *id.* at 543 (citing an 1876 decision holding that women were ineligible to practice law because their primary role was to “train and educate the young”).

³²⁵ *Id.* at 536–37.

³²⁶ *Id.* at 536 & n.9 (quoting a nineteenth-century text arguing that “the intellectual race . . . incapacitates [girls] for the adequate performance of the natural functions of their sex”).

³²⁷ *Id.* at 553 (internal quotation marks omitted).

³²⁸ *Id.* at 520 (“VMI has notably succeeded in its mission to produce leaders; among its alumni are military generals, Members of Congress, and business executives.”).

³²⁹ *Id.* at 551–53 (noting that the program, having been designed for women, did not “have a math and science focus” (internal quotation marks omitted)).

grams reflected a particularly tenacious set of stereotypes “about the way women are”³³⁰ and the roles they would play in society post-graduation.³³¹

This brand of analysis was familiar. But the Court’s treatment of the issue of “real” differences marked a new departure for constitutional sex discrimination doctrine. The Court declared in *Virginia* that “[p]hysical differences between men and women . . . are enduring.”³³² What has changed is the constitutional landscape in which the state regulates those differences. “[W]e have come to appreciate,” the Court asserted, that “[i]nherent differences’ between men and women” are “cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual’s opportunity.”³³³ Historically, the Court granted lawmakers broad leeway to discriminate on the basis of “real” differences. In *Virginia*, however, the Court held that even in cases involving “real” differences,

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.³³⁴

The Court reached this conclusion after surveying the foundational sex discrimination cases of the 1970s and concluding that the constitutional problem in all of those cases was “official action that closes a door or denies opportunity to women (or to men).”³³⁵

This holding signaled an important shift in the Court’s reasoning about “real” differences. In the past, “real” differences served as a check on the reach of anti-stereotyping doctrine. In *Virginia*, anti-stereotyping doctrine serves as a check on the state’s regulation of

³³⁰ *Id.* at 550 (internal quotation marks omitted). VMI just as actively perpetuated stereotypes about the way that men are. For a description of VMI’s commitment “to such old-fashioned concepts as manly ‘honor,’” and an excerpt from “The Code of a Gentleman,” which the school distributed to all students, see *id.* at 601–03 (Scalia, J., dissenting).

³³¹ *Id.* at 550 (citing the state’s assertion that VWIL “is planned for women who do not necessarily expect to pursue military careers” (internal quotation marks omitted)).

³³² *Id.* at 533.

³³³ *Id.* The Court in *Virginia* does not specify what these “inherent differences” are, and the fact that the Court places the term in quotation marks indicates at least some uncertainty about the ontological status of these differences. Whatever the status of these differences, however, the Court makes clear that they may not be used to justify sex-based state action that perpetuates the separate spheres tradition.

³³⁴ *Id.* at 533–34 (first and second alterations in original) (citations and internal quotation marks omitted).

³³⁵ *Id.* at 532.

“real” differences. *Virginia* makes clear that anti-stereotyping doctrine governs all instances of sex-based state action, whether or not “real” differences are involved. In fact, the Court’s opinion suggests that equal protection law should be particularly alert to the possibility of sex stereotyping in contexts where “real” differences *are* involved, because these are the contexts in which sex classifications have most often been used to perpetuate sex-based inequality.

This is the purpose for which anti-stereotyping doctrine was designed: to smoke out the particular forms of discrimination that enforce the separate spheres tradition. If the distinction between the anti-classification principle and the anti-stereotyping principle was sometimes hard to see in the 1980s, *Virginia* makes that distinction clear. It invalidated VMI’s sex-role-enforcing classification, but noted that not all sex-based admissions policies necessarily violate equal protection. Quoting an amicus brief by twenty-six private women’s colleges, the Court noted that “it is the mission of some single-sex schools ‘to dissipate, rather than perpetuate, traditional gender classifications.’”³³⁶ Sex classifications that serve this purpose—helping to combat forces pressing men and women into traditional roles—are consistent with the promise of the Fourteenth Amendment.

This anti-stereotyping doctrine may initially have been forged in cases with male plaintiffs, but that does not render it inattentive to the ways in which women have been deprived of equal standing in American society. Indeed, *Virginia* demonstrates in a particularly striking way how the state’s enforcement of sex-role stereotypes has served to cement women’s traditional place in the social order.

B. Male Caregivers and Pregnant Workers

Several years after *Virginia*, the Court confronted another sex-based equal protection case that raised questions about the state’s regulation of “real” differences. At issue in *Nguyen v. I.N.S.*³³⁷ was the constitutionality of a statute governing the acquisition of United States citizenship by individuals born outside the United States to one citizen parent and one noncitizen parent who were not married.³³⁸ The statute enabled unmarried citizen mothers to transmit citizenship automatically to such children but required unmarried citizen fathers to take affirmative steps to do so.³³⁹

³³⁶ *Id.* at 534 n.7 (quoting Brief of Twenty-Six Private Women’s Colleges as Amici Curiae in Support of Petitioner at 5, *Virginia*, 518 U.S. 515 (Nos. 94-1941, 94-2107)).

³³⁷ 533 U.S. 53 (2001).

³³⁸ 8 U.S.C. § 1409 (2000).

³³⁹ Under the statute, citizen fathers may transmit United States citizenship to nonmarital children born abroad only if, prior to child’s eighteenth birthday, they estab-

The Court upheld the constitutionality of the statute in a sharply contested five-four decision. The dissenters in *Nguyen* argued that the statute was “paradigmatic of a historic regime that left women with responsibility, and freed men from responsibility, for nonmarital children.”³⁴⁰ They argued that the statute treats mothers as the “natural guardians”³⁴¹ of non-marital children and exempts men—or actively discourages them—from assuming any responsibility for such children by erecting sex-specific barriers between father and child. If the government wanted to ensure that a child born overseas had a “real, practical relationship”³⁴² with his or her citizen parent before gaining citizenship, the dissenters claimed, it could do so through myriad sex-neutral means, such as requiring regular contact between the child and the citizen parent over a period of time, or simply requiring that the parent demonstrate presence at birth, knowledge of birth, or contact with the child prior to a certain age.³⁴³ The dissenters asserted that the sex-based line Congress opted to draw instead rested on “a stereotype—i.e., the generalization that mothers are significantly more likely than fathers . . . to develop caring relationships with their children.”³⁴⁴ Thus, the dissenters argued, the statute in *Nguyen* violates core equal protection principles: It “relies on the very stereotype the law condemns,” and helps to convert that stereotype into “a self-fulfilling prophecy.”³⁴⁵

The majority in *Nguyen* rejected this argument. It cited the Court’s observation in *Virginia* that “[p]hysical differences between men and women . . . are enduring,”³⁴⁶ and concluded that the statute in this case simply reflected those differences (namely, the fact that women are always present at the birth of children and men are not), and did not push men or women into traditional roles. The Court emphasized that, in analyzing the constitutionality of the statute, it was “mindful that the obligation it imposes with respect to the acquisi-

lished paternity by formally “legitimizing” the child under the law of the relevant jurisdiction, acknowledged paternity in writing and under oath, or obtained a court order of paternity. 8 U.S.C. § 1409(a)(4) (2000). The copetitioner in *Nguyen*, Joseph Boulais, was a United States citizen whose son, Tuan Anh Nguyen, had been born in Vietnam to a Vietnamese mother but had grown up in Texas with his father. Because Boulais failed to take the affirmative steps necessary to transmit citizenship to his son when he was still a minor, the I.N.S. determined that Nguyen was deportable upon his commission of two crimes at age twenty-two. *Nguyen*, 533 U.S. at 57–58, 60.

³⁴⁰ *Nguyen*, 533 U.S. at 92 (O’Connor, J., dissenting).

³⁴¹ *Id.* (internal quotation marks omitted).

³⁴² *Id.* at 88.

³⁴³ *Id.*

³⁴⁴ *Id.* at 89 (alteration in original) (internal quotation marks omitted).

³⁴⁵ *Id.* (citations and internal quotation marks omitted).

³⁴⁶ *Id.* at 68 (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996)).

tion of citizenship by the child of a citizen father is minimal.”³⁴⁷ “Congress has not erected inordinate and unnecessary hurdles to the conferral of citizenship on the children of citizen fathers,”³⁴⁸ the Court asserted: It has required only that men take one of three very simple steps to acknowledge their paternity, and it has given them an eighteen-year window in which to do so. The Court argued that this was “hardly a substantial burden”³⁴⁹ and thus did not act as a deterrent to fathers who wished to develop relationships with their children. Indeed, Justice Stevens, who provided the crucial fifth vote to uphold the statute in *Nguyen*, argued that the statute actually had an anti-stereotyping effect, because it provided an incentive for unmarried fathers to form ties with their children.³⁵⁰ Stevens argued that by encouraging men to acknowledge their paternity, the statute served to “reduce, rather than aggravate, the disparity between” the sexes when it came to bonding with nonmarital children.³⁵¹

The majority and dissenting Justices in *Nguyen* vigorously disagreed about whether, in this instance, imposing requirements on single fathers that do not apply to single mothers perpetuates sex stereotypes.³⁵² More salient from a doctrinal perspective, however, is the fact that they agreed on the basic principles the Court articulated in *Virginia*. Both the majority and the dissent in *Nguyen* agreed that if the statute had reflected or reinforced sex-role stereotypes, it would have been unconstitutional—even in a case such as this, which involved “real” differences. Although the Court in *Nguyen* viewed the sex-based citizenship statute as a simple reflection of biological realities, it did not contend that biological differences trump or obviate anti-stereotyping analysis. Indeed, the Court held that the statute passed constitutional muster only after declaring (repeatedly) that it did not instantiate sex stereotypes. Thus, although the statute in

³⁴⁷ *Id.* at 70.

³⁴⁸ *Id.* at 70–71.

³⁴⁹ *Id.* at 71.

³⁵⁰ Although Justice Stevens did not write the majority opinion in *Nguyen*, he did write in *Miller v. Albright*, 523 U.S. 420, 440 (1998), which addressed the same statute, but failed to resolve the question of its constitutionality. *Id.*

³⁵¹ *Miller*, 523 U.S. at 440 (1998).

³⁵² The disagreement between the majority and the dissent in *Nguyen* may partly have been a disagreement about the level of scrutiny that should apply in this case. The dissenters in *Nguyen* accused the Court of tacitly relaxing the searching standard of review that generally applies in sex-based equal protection cases. *Nguyen*, 533 U.S. at 74 (O'Connor, J., dissenting) (arguing that the Court applied heightened scrutiny in name only, and actually subjected the statute to rational basis review). This accusation was not unfounded. Justice Stevens suggested in *Miller v. Albright* that a more deferential standard was appropriate when reviewing the constitutionality of this statute because it was an exercise of Congress's immigration and naturalization power, and the majority in *Nguyen* reiterated (but declined to pass judgment on) this suggestion. *Nguyen*, 533 U.S. at 61.

Nguyen met a different fate than the statute in *Virginia*, the Court did not repudiate the doctrinal developments made in the earlier case; in fact, it reiterated the understanding that sex stereotyping by the state is impermissible even in the context of “real” differences.

A few years after *Nguyen*, the Court reinforced this understanding in a landmark case called *Nevada Department of Human Resources v. Hibbs*.³⁵³ Like many of the sex-based equal protection cases of the 1970s, *Hibbs* featured a male caregiver. After his wife was seriously injured in a car accident, William Hibbs sought leave from his job under the Family and Medical Leave Act (FMLA),³⁵⁴ which permits eligible employees of either sex to take up to twelve weeks per year of unpaid, job-protected leave to care for themselves or specified members of their family.³⁵⁵ Hibbs’s employer, the state of Nevada, disputed his claim to leave and responded to his lawsuit by challenging the constitutionality of the FMLA’s leave mandate under Section 5 of the Fourteenth Amendment.³⁵⁶ Section 5 had long been understood to grant Congress broad power “to enforce, by appropriate legislation” the substantive guarantees contained in Section 1 of the Amendment,³⁵⁷ but in the mid-1990s, the Court began to curtail this power. It held, in a consequential series of cases, that Congress’s enforcement power extended only to legislation remedying or deterring conduct that violated Section 1 *as the Court had interpreted it*.³⁵⁸ The problem with the FMLA’s substantive guarantee of twelve-weeks’ leave was that it seemed to extend well beyond any rights guaranteed by the Court in Section 1. So the question arose: Was providing male and female employees with an entitlement to twelve

³⁵³ 538 U.S. 721 (2003).

³⁵⁴ *Id.* at 725.

³⁵⁵ 29 U.S.C. § 2612(a)(1)(C) (2006).

³⁵⁶ See Brief for Respondent at *7–8, *Hibbs*, 538 U.S. 721 (No. 01-1368), 2002 WL 31655020.

³⁵⁷ U.S. CONST. amend. XIV, § 5.

³⁵⁸ See *City of Boerne v. Flores*, 521 U.S. 507, 519–24 (1997) (“Congress does not enforce a constitutional right by changing what the right is. . . . The power to interpret the Constitution in a case or controversy remains in the Judiciary.”); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 638 (1999) (following *Boerne*); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000) (“The ultimate interpretation and determination of the Fourteenth Amendment’s substantive meaning remains the province of the Judicial Branch.”); *United States v. Morrison*, 529 U.S. 598, 619 (2000) (“[A]s broad as the congressional enforcement power is, it is not unlimited.” (internal quotation marks omitted)); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 365 (2001) (“*City of Boerne* also confirmed . . . the long-settled principle that it is the responsibility of this Court, not Congress, to define the substance of constitutional guarantees.”).

weeks of family leave a valid means of “enforcing” the Constitution’s equal protection guarantee?³⁵⁹

The women’s movement had always viewed legislation as a central part of the anti-stereotyping project.³⁶⁰ Ginsburg herself advocated a wide range of affirmative benefits designed to combat the enforcement of “male breadwinner/female child tenderer . . . stereotypes,”³⁶¹ including publicly-funded childcare,³⁶² Medicaid-funded abortion,³⁶³ affirmative action,³⁶⁴ and programs designed to facilitate stay-at-home parents’ re-entry into the workforce.³⁶⁵ When Representative Patricia Schroeder introduced the FMLA in the House in 1985, Ginsburg suggested that “legislation of this sort”³⁶⁶ was precisely what was needed to counteract the sex-role stereotyping that remained pervasive in American society. The FMLA sought to reduce the force of prescriptive stereotypes aimed at both sexes: It “takes the woman at work as the model or motivator, but spreads out to shelter others,”³⁶⁷ helping women (who perform most family care) to remain in the workforce while simultaneously permitting men (who are often barred from taking family leave) to become caregivers. In so doing, Ginsburg argued, the FMLA continued the campaign against sex-role “prescriptions of the kind Sally Reed, Sharron Frontiero, and Stephen Wiesenfeld challenged” in the 1970s.³⁶⁸

³⁵⁹ This question arose in *Hibbs* because Congress can abrogate the states’ Eleventh Amendment immunity from suits by private litigants only when it acts pursuant to its authority under Section 5 of the Fourteenth Amendment. *Hibbs*, 538 U.S. at 726. If Congress’s power to enact the FMLA rested only on the Commerce Clause, private litigants (like William Hibbs) could not enforce the FMLA against states (like Nevada) that had not waived their Eleventh Amendment immunity. *See id.* at 726–27.

³⁶⁰ *See supra* text accompanying notes 146–50.

³⁶¹ Brief for Appellee at 22, *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (No. 73-1892).

³⁶² Ginsburg, *supra* note 20, at 34–40 (arguing that pressures to conform to traditional sex roles will persist “until child rearing burdens are distributed more evenly among parents, their employers and the tax-paying public”).

³⁶³ Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 383–86 (1985) [hereinafter Ginsburg, *Some Thoughts*] (framing the right to publicly-funded abortion as a matter of sex equality).

³⁶⁴ Ginsburg, *supra* note 20, at 28–34 (arguing that affirmative action, “far from compromising the equality principle, is an essential part of a program designed to realize that principle”).

³⁶⁵ *Id.* at 31 (advocating “extended study programs” for people seeking to combine education and childrearing and revised transfer and degree-granting policies to better enable people with family responsibilities to complete their education).

³⁶⁶ Ginsburg & Flagg, *supra* note 4, at 18.

³⁶⁷ *Id.*

³⁶⁸ *Id.* Ginsburg characterized the FMLA as a “logical progression from the 1970s litigation.” *Id.*

When the Court granted certiorari in *Hibbs*, few thought the (other) Justices would view the law in this light. Nevada argued, not without authority, that if Congress had been concerned about discrimination in the administration of family leave benefits, it could have passed a law barring such discrimination.³⁶⁹ An antidiscrimination remedy of this sort would seem to guarantee men and women equal protection as the Court had traditionally understood that term. Here, Congress had gone considerably further, enacting a substantive entitlement to leave.

The Court, however, viewed the law through an anti-stereotyping lens. It held that in some cases—particularly cases at the “faultline between work and family”—laws guaranteeing formal equality are insufficient to protect men and women from sex discrimination.³⁷⁰ The Court observed that despite the passage of Title VII and its amendment by the Pregnancy Discrimination Act, “stereotype-based beliefs about the allocation of family duties remain[] firmly rooted,” even “rampant,” in the American workplace.³⁷¹ “[P]arental leave for fathers . . . is rare,”³⁷² and even “[w]here child-care leave policies do exist, men . . . receive notoriously discriminatory treatment in their requests for such leave.”³⁷³ Women frequently encounter the opposite form of discrimination: They are encouraged to take “extended” maternity leave,³⁷⁴ and the fact that they take the leave, or simply the assumption that they will, is then used to justify sex discrimination in hiring, retention, and promotion. Taking a page from the WRP, the Court concluded that long-standing and “mutually reinforcing stereotypes” about men’s and women’s roles had given rise to “a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers’

³⁶⁹ Reply Brief for Petitioners at 18, *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (No. 01-1368).

³⁷⁰ *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, at 738 (“[A] statute . . . that simply mandated gender equality in the administration of leave benefits[] would not have achieved Congress’ remedial object.”).

³⁷¹ *Id.* at 730, 732 (internal quotation marks omitted) (quoting *The Parental and Medical Leave Act of 1987: Hearing on S. 249 Before the Subcomm. on Children, Family, Drugs and Alcoholism of the S. Comm. on Labor and Human Resources*, 100th Cong. 170 (1987) (statement of Peggy Montes, Mayor’s Comm’n of Women’s Affairs, City of Chic., Ill.)).

³⁷² *Id.* at 731 (ellipses in original) (internal quotation marks omitted) (quoting *The Parental and Medical Leave Act of 1986: Joint Hearing on H.R. 4300 before the Subcomm. on Labor-Management Relations and the Subcomm. on Labor Standards of the H. Comm. on Education and Labor*, 99th Cong. 147 (1986) [hereinafter *Joint Hearing*] (statement of Washington Council of Lawyers)).

³⁷³ *Id.* (brackets in original) (internal quotation marks omitted).

³⁷⁴ *Id.* at 731 & n.5.

stereotypical views about women's commitment to work and their value as employees."³⁷⁵

In the series of Section 5 cases leading up to *Hibbs*, the Court had acknowledged that Congress's enforcement power was not "confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment."³⁷⁶ It allowed that Congress could prohibit "a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text,"³⁷⁷ but held that when Congress exercises this broader power, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."³⁷⁸ The Court held in *Hibbs* that the FMLA satisfied this congruence and proportionality requirement.³⁷⁹ It held, in other words, that the "self-fulfilling cycle of discrimination" wrought by sex-role stereotyping was a constitutional problem of such magnitude that it justified an affirmative grant of twelve weeks leave. Had Congress attempted to combat such discrimination simply by requiring formal equality in the administration of leave benefits, employers would have been able to comply with the law by offering no family leave to employees of either sex. The Court explained that in a society where women are expected to perform the vast majority of family care, such a policy would "exclude far more women than men from the workplace,"³⁸⁰ and thus "do little to combat the stereotypes about the roles of male and female employees that Congress sought to eliminate" when it enacted the FMLA.³⁸¹

This reasoning is striking on a number of levels. Prior to *Hibbs*, the Court had never explicitly acknowledged the gap between formal and substantive equality. In *Hibbs*, the Court recognized what the women's movement had been arguing for decades: If a workplace is designed with men in mind, and its terms and conditions suited only for workers who cannot become pregnant and have limited caregiving responsibilities, then the deck is already stacked against people—primarily women—who do not fit this mold. *Hibbs* acknowledges that, in light of these background facts, enforcing the Constitution's equal protection guarantee may require more substantive forms of legisla-

³⁷⁵ *Id.* at 736.

³⁷⁶ *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000).

³⁷⁷ *Id.*

³⁷⁸ *Id.* (alteration in original) (quoting *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997)).

³⁷⁹ *Hibbs*, 538 U.S. at 740.

³⁸⁰ *Id.* at 738.

³⁸¹ *Id.* at 734.

tive intervention, even forms of intervention that might be characterized as “substantive entitlement program[s].”³⁸²

Equally striking is the Court’s discussion of the relationship between anti-stereotyping doctrine and “real” difference. As in *Virginia*, the Court in *Hibbs* affirmed the enduring nature of biological sex differences. *Hibbs* focused specifically on pregnancy; it noted that men and women are differently situated in relation to pregnancy and that giving birth temporarily disables biological mothers in ways new fathers do not experience.³⁸³ The Court suggested that employers could lawfully take this difference into account and offer pregnancy disability leave only to biological mothers.³⁸⁴

The Court warned, however, that it is important to proceed with caution in this area, because pregnancy and motherhood have long been the epicenter of sex discrimination. It noted, for instance, that the prevalence of “extended” maternity leaves, not available to fathers, was “not attributable to any differential physical needs of men and women, but rather to the pervasive sex-role stereotype that caring for family members is women’s work.”³⁸⁵ In fact, the Court observed that throughout American history, “denial or curtailment of women’s employment opportunities has been traceable directly to the pervasive presumption that women are mothers first, and workers second,” and that “[t]his prevailing ideology about women’s roles” has justified substantial “discrimination against women when they are mothers or mothers-to-be.”³⁸⁶ This is the first time the Court has explicitly recognized that discrimination against pregnant women can foster “the role-typing society has long imposed”³⁸⁷ in ways that violate the Constitution’s equal protection guarantee.

Although *Hibbs* does not explicitly overrule *Geduldig*, it casts that decision in a decidedly new light, making it clear that the earlier

³⁸² *Id.* at 737 (quoting *id.* at 754 (Kennedy, J., dissenting)). The Court’s recognition that structural change and substantive entitlements are sometimes required in order to reshape workplace norms that reinforce traditional sex roles has prompted legislators in Congress to propose a number of new laws to combat sex stereotyping. *See, e.g.*, Family Leave Insurance Act of 2008, H.R. 5873, 110th Cong. (2008) (providing up to twelve weeks of paid leave for family care or personal health reasons); Family Leave Insurance Act of 2007, S. 1681, 110th Cong. (2007) (providing up to eight weeks of paid leave under the FMLA); Healthy Families Act, S. 1085, 109th Cong. (2005) (requiring employers to provide employees with at least seven paid sick days per year in order to combat discrimination based “on persistent stereotypes about the ‘proper’ roles of both men and women in the workplace and in the home”); Healthy Families Act, H.R. 1902, 109th Cong. (2005) (same).

³⁸³ *See Hibbs*, 538 U.S. at 731.

³⁸⁴ *Id.*

³⁸⁵ *Id.*

³⁸⁶ *Id.* at 736 (internal quotation marks omitted) (quoting *Joint Hearing*, *supra* note 372, at 100 (statement of the Women’s Legal Defense Fund)).

³⁸⁷ *Stanton v. Stanton*, 421 U.S. 7, 15 (1975).

case does not (or doesn't any longer) stand for the proposition that pregnancy discrimination is not sex discrimination under the Fourteenth Amendment.³⁸⁸ *Hibbs* teaches that pregnancy discrimination can constitute sex discrimination in instances in which it reflects and reinforces traditional conceptions of women's sex and family roles. This marks a significant shift in the Court's reasoning about the rights of pregnant women. *Hibbs* echoes the concerns about sex stereotyping expressed in cases like *Wiesenfeld* but amplifies those concerns and extends them outward into new domains like pregnancy, which it recognizes for the first time as a site of pervasive sex-role stereotyping.³⁸⁹

C. Soldiers and Mothers

The concluding sections of this Article examine the implications of this expansion of anti-stereotyping doctrine for a number of constitutional questions, including women in the military, reproductive rights, and same-sex marriage. When the Court first confronted these questions several decades ago, it analyzed them in doctrinal registers other than equal protection. My aim here is to show that anti-stereotyping doctrine, as elaborated in *Virginia* and *Hibbs*, now shapes the constitutional space within which the Court decides these questions. Although the Court has adjudicated these questions in the past without reference to sex equality concerns, equal protection law

³⁸⁸ For more on the relationship between *Hibbs* and *Geduldig*, see Reva B. Siegel, *You've Come a Long Way, Baby: Rehnquist's New Approach to Pregnancy Discrimination in Hibbs*, 58 STAN. L. REV. 1871 (2006). Siegel points out that *Geduldig* did not hold that pregnancy discrimination could never constitute sex discrimination for the purposes of equal protection law. *Id.* at 1873. Rather, it held that the fact that women can become pregnant and men cannot does not mean that "every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed* and *Frontiero*." *Geduldig v. Aiello*, 417 U.S. 484, 496–97 (1974) (internal citations omitted). Siegel thus argues that *Hibbs* resolves a question *Geduldig* left open (i.e., whether pregnancy discrimination can ever constitute sex discrimination) and that *Hibbs* answers this question by holding that the regulation of pregnancy does constitute sex discrimination when it reinforces sex-role stereotypes. Siegel, *supra*, at 1873.

³⁸⁹ *Hibbs*'s fulsome account of sex-role stereotyping in the context of pregnancy raises questions about the Court's holding two years earlier in *Nguyen v. I.N.S.*, 533 U.S. 53 (2001). See *supra* text accompanying notes 337–52. The Court in *Nguyen* concluded that a sex-based immigration statute did not reflect or reinforce sex-role stereotypes, in part because the statute simply acknowledged the fact that women, unlike men, will always be present at the birth of their children, and in part because the burden it imposed on fathers seeking to confer citizenship on their children was minimal. *Nguyen*, 533 U.S. at 62–63, 70–71. This determination reflected a relatively laissez-faire approach to sex discrimination in the contexts of pregnancy and caregiving. *Hibbs*, however, suggests that a particularly searching review is necessary in these contexts because sex-role stereotyping has traditionally been strongest here. *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003).

has now expanded in ways that render this doctrinal segregation untenable.

1. *Women in the Military*

It would be difficult to conceive of an activity more antithetical to the traditional conception of women's role than military service. Historically, eligibility to serve in the military functioned as a defining characteristic of American manhood; like the franchise, it marked one as a full citizen of the United States.³⁹⁰ Women traditionally counted as citizens in a different way; their contributions to the nation were defined principally in relation to wife- and motherhood. These mutually reinforcing stereotypes about men's and women's roles surfaced frequently in the 1970s in the debates over the ERA, which opponents attacked by arguing that it would send women to war. Sam Ervin, a prominent senator from North Carolina, argued that women were needed at home to provide "nurture, care, and training to their children during their early years."³⁹¹ "It is absolutely ridiculous," he claimed, "to talk about taking a mother away from her children so that she may go out to fight the enemy and leave the father at home to nurse the children."³⁹² Representative Emanuel Celler of New York concurred. "Women represent motherhood and creation," he argued, and must therefore be shielded from the destruction of war.³⁹³

In the early 1980s, the debate over women's eligibility for military service reached the Court in the form of *Rostker v. Goldberg*, a sex-based equal protection challenge to the government's policy of requiring only men to register for the draft.³⁹⁴ The Court did not ask whether this classification reflected or reinforced sex-role stereotypes; it upheld the constitutionality of women's exclusion from selective service registration (and by implication, from combat) in a terse opinion deferring to congressional and military judgment.³⁹⁵ The Court issued its decision in *Rostker* in the shadow of "real" differences doctrine. A few months earlier, in *Michael M.*, the Court had upheld a sex-specific

³⁹⁰ For a powerful account of the ways in which women's exclusion from combat and the draft enforces their secondary status in the American legal system, see Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499 (1991).

³⁹¹ S. REP. NO. 92-689 (1972), at 49 (minority views of Mr. Ervin).

³⁹² 118 CONG. REC. 9102 (1972) (statement of Sen. Ervin).

³⁹³ 117 CONG. REC. 35,785 (1971) (statement of Rep. Celler). For further discussion of the sex-role stereotypes informing the debate over the ERA, see Jill Elaine Hasday, *Fighting Women: The Military, Sex, and Extrajudicial Constitutional Change*, 93 MINN. L. REV. 96, 109-21 (2008).

³⁹⁴ 453 U.S. 57 (1981).

³⁹⁵ *Id.*

statutory rape law—without asking whether it enforced sex stereotypes—on the ground that it reflected physical differences between men and women.³⁹⁶ Had the Court examined the statute in *Rostker* more closely, it would likely have concluded that such differences justified women's exclusion from combat and the draft.

Today, the landscape surrounding questions involving women and the military looks quite different, on the ground and in the law. On the ground, the United States' entry into two major wars at the start of the twenty-first century has exponentially increased the need for trained soldiers, sex notwithstanding.³⁹⁷ Tens of thousands of women have served in the military in Iraq and Afghanistan, and for the first time, they have routinely participated in combat.³⁹⁸ Indeed, the military has increasingly treated women as essential to its combat operations.³⁹⁹ Official policy still bars women from a range of combat positions, but the military has consistently found ways around these restrictions in order to allow women to serve.⁴⁰⁰ This has greatly expanded women's integration in the armed services and vastly increased the number of high-ranking women and women in command of all-male units.

This shift in social reality has been accompanied by an equally notable shift in the law. Today, "real" differences do not automatically justify sex-based state action that perpetuates traditional conceptions of men's and women's roles, and courts have become correspondingly more skeptical of laws that associate women with home and family and men with the world beyond the domestic sphere. The Court registered deep concern in *Virginia* about the ways in which the exclusion of women from VMI perpetuated the separate spheres tradition and deprived women of access to valuable opportunities for advancement

³⁹⁶ *Michael M. v. Superior Court*, 450 U.S. 464 (1981).

³⁹⁷ Steven Lee Myers, *Living and Fighting Alongside Men, and Fitting In*, N.Y. TIMES, Aug. 17, 2009, at A1 (quoting Brig. Gen. Mary A. Legere, director of intelligence for the American war effort in Iraq, explaining that "[w]e've needed—needed—the contributions of both our men and women").

³⁹⁸ Lizette Alvarez, *G.I. Jane Stealthily Breaks the Combat Barrier*, N.Y. TIMES, Aug. 16, 2009, at A1 ("Before 2001, America's military women had rarely seen ground combat. Their jobs kept them mostly away from enemy lines, as military policy dictates. But the Afghanistan and Iraq wars, often fought in marketplaces and alleyways, have changed that. In both countries, women have repeatedly proved their mettle in combat.").

³⁹⁹ *Id.* (quoting a retired lieutenant colonel who helped write the Army's new counterinsurgency field manual asserting that "[w]e literally could not have fought this war without women"); *id.* (quoting a retired lieutenant colonel who commanded American women in combat stating that the female combat exclusion was eviscerated in Iraq: "Debate it all you want folks, but the military is going to do what the military needs to do. And they are needing to put women in combat").

⁴⁰⁰ *Id.* ("On paper, for instance, women have been 'attached' to a combat unit rather than 'assigned.'").

in public life. These concerns are compounded in the context of the United States military, where the exclusion of women has historically been justified as a means of protecting the nation's mothers and has long deprived women of equal citizenship, equal public benefits, and equal access to the national political arena.⁴⁰¹ The evolution of sex-based equal protection doctrine and changed social circumstances have brought the nation to a different place than it was thirty years ago when the Court decided *Rostker*. These changes have rendered the constitutional questions surrounding women's exclusion from combat and the draft more acute. In the 1970s, women's exclusion from combat positions and diminished access to the upper ranks of the armed services was understood to reflect "real" differences between the sexes. Now that women are routinely serving in combat, and "real" differences no longer shield sex classifications from skeptical scrutiny, the military's official exclusion of women from combat has become more difficult to justify within an equal protection framework.

2. Reproductive Rights

The evolution of anti-stereotyping doctrine and related social changes over the past thirty years have also sharpened constitutional concerns regarding certain aspects of the state's regulation of reproductive rights. The Burger Court did not analyze laws implicating reproductive rights from an equal protection standpoint. In 1973, *Roe* cast the regulation of abortion as a matter of due process. *Geduldig*, decided the next year, widened the gulf between abortion and equal protection by suggesting that the regulation of pregnant women did not implicate constitutional equality values. As a result, concerns about sex-role stereotyping in the context of abortion were largely invisible to the Court in the 1970s.

By the time the Court decided *Hibbs*, it had become apparent even to Chief Justice Rehnquist, an erstwhile opponent of the anti-stereotyping approach, that the regulation of pregnant women often enforced traditional conceptions of women's roles.⁴⁰² Taking on board

⁴⁰¹ For a thorough investigation of the ways in which women's exclusion from military service and men's eligibility for such service have shaped men's and women's political and economic citizenship, see THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES* (1992).

⁴⁰² The evolution of the former Chief Justice's views in constitutional sex discrimination cases provides a vivid illustration of how anti-stereotyping doctrine has expanded over the past three decades. Rehnquist voted against nearly every sex-based equal protection plaintiff who reached the Court in the 1970s. He ended his career on the Court by voting in favor of the integration of VMI and writing *Hibbs*—the most expansive anti-stereotyping opinion in the Court's history.

at least some of the arguments of the women's movement, the Court in *Hibbs* identified pregnancy as a site of special concern for anti-stereotyping doctrine, suggesting that laws regulating pregnant women must be scrutinized with particular attention to ensure that they do not reflect or reinforce sex-role stereotypes. In so doing, the Court narrowed the doctrinal gap that opened in the 1970s between equal protection and the regulation of pregnant women.

This change in the relationship between pregnancy and equal protection situates abortion regulation in a new constitutional space—one constrained by the anti-stereotyping principle. Since 1992, the Court has framed its analysis of laws regulating abortion in terms of the undue burden test.⁴⁰³ Equality concerns have played an implicit role in undue burden analysis: In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the case that announced the undue burden test, the Court invalidated a spousal notification provision (which required married women to produce signed statements attesting to the fact that they had notified their husbands of their intention to obtain an abortion) on the ground that it reflected “a common-law understanding of a woman’s role within the family” and granted men a “troubling degree of authority” over their wives.⁴⁰⁴ These concerns, however, have remained latent within abortion jurisprudence. For the most part, courts have adjudicated questions involving abortion restrictions without reference to constitutional equality values; when they have smuggled equality concerns into substantive due process analysis, they have done so in an inarticulate and under-theorized manner. But the extension of anti-stereotyping doctrine into the domain of pregnancy means that concerns about sex equality are now part of the doctrinal landscape in which cases involving abortion are decided.

The anti-stereotyping principle has important implications for the constitutional legitimacy of different kinds of justifications the state might offer for restricting the right to abortion. Until recently, the dominant forms of justification for restricting women’s right to abortion focused primarily on protecting fetal life.⁴⁰⁵ Over the past decade or so, anti-abortion advocates have increasingly abandoned this fetal-protective argument in favor of a “woman-protective” argument that

⁴⁰³ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992) (articulating the undue burden test, which asks whether a law regulating abortion “has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus”).

⁴⁰⁴ *Id.* at 897–98.

⁴⁰⁵ See, e.g., Brief for Appellee at 31, *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70-18) (seeking to demonstrate “how clearly and conclusively modern science—embryology, fetology, genetics, perinatology, all of biology—establishes the humanity of the unborn child”).

portrays both the fetus and the woman as victims of abortion providers and the pro-choice movement.⁴⁰⁶ This argument rests on the premise that a woman's natural role is to be a mother and that a mother's interests always coincide with the best interests of her unborn child. For this reason, a woman can never truly consent to an abortion; she can only be coerced into having one. Anti-abortion advocates argue that women who have been victimized in this way are susceptible to "post-abortion syndrome," a condition marked by grief, depression, isolation, alienation, substance abuse, and increased risk of suicide.⁴⁰⁷ In 2007, in *Gonzales v. Carhart*,⁴⁰⁸ the Supreme Court embraced this reasoning, citing "post-abortion syndrome" as a justification for upholding the Partial-Birth Abortion Ban Act.⁴⁰⁹ The Court suggested in *Carhart* that restricting a woman's right to abortion is beneficial to her because it fosters "the bond of love the mother has for her child," and protects her from the "severe depression," "loss of esteem," "grief," and "sorrow" that may afflict women who opt, against their very nature, to terminate "the infant life they once created and sustained."⁴¹⁰

This form of reasoning about women and motherhood is deeply suspect in sex-based equal protection law. The Court in *Hibbs* expressed particular concern about laws that reflect and reinforce the notion that "women are mothers first,"⁴¹¹ and that they have special responsibilities to children that men do not share and that naturally and consistently take precedence over all other commitments in their lives. The conflict between *Hibbs*'s reasoning about pregnancy and the way the Court reasoned about pregnancy in *Carhart* was not lost on the four Justices who dissented in the latter case. Justice Ginsburg, writing for the dissenters in *Carhart*, strongly objected to the suggestion that restricting women's right to abortion helps them to realize their true nature as mothers and to experience the maternal fulfillment that results from giving birth to and nurturing a child. She and her colleagues argued that "[t]his way of thinking reflects ancient

⁴⁰⁶ For a fuller account of the origins and dissemination of the "woman-protective" argument, see Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641 (2008).

⁴⁰⁷ See, e.g., *id.* at 1663 n.77 (citing amicus briefs submitted by anti-abortion groups discussing the negative psychological effects of abortion).

⁴⁰⁸ 550 U.S. 124 (2007).

⁴⁰⁹ 18 U.S.C. § 1531 (Supp. IV 2000).

⁴¹⁰ 550 U.S. at 159.

⁴¹¹ *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003) (internal quotation marks omitted) (quoting *Joint Hearing*, *supra* note 372, at 100 (statement of the Women's Legal Defense Fund)).

notions about women's place in the family and under the Constitution—ideas that have long since been discredited.”⁴¹²

This Article has traced this process of discrediting, showing how the forms of reasoning about pregnancy and motherhood that surfaced in *Carhart* have lost credibility over time as a means of justifying sex-based state action. Historically, courts did not subject laws regulating women's role in reproduction to scrutiny under the Equal Protection Clause because pregnancy was perceived as a “real” difference, the existence of which was understood to obviate any equal protection concerns. *Virginia* and *Hibbs*, however, adopted a new approach to “real” differences. These cases suggest that the biological nature of pregnancy no longer immunizes reproductive regulation from skeptical scrutiny and that this form of regulation should arouse constitutional equality concerns when it reinforces stereotyped conceptions of motherhood and women's role in the family.

The increased sensitivity of equal protection doctrine to the ways in which the regulation of “mothers and mothers-to-be” can reinforce sex-role stereotypes suggests that the doctrine may finally have gained “the critical capacity to discern gender bias in reproductive regulation.”⁴¹³ Feminist scholars have been arguing for forty years that the regulation of pregnant women raises equal protection concerns. In 1974, Katharine Bartlett argued that because the most deeply rooted stereotypes about women are related to their childbearing function, “discrimination on the basis of sex-role stereotyping can be eliminated only by subjecting classifications based on pregnancy” to heightened scrutiny.⁴¹⁴ Catharine MacKinnon argued in the early 1980s that analyzing abortion as a matter of privacy obscures the background conditions of gender inequality in which women become pregnant and perpetuates the state's longstanding disregard for women's status and wellbeing.⁴¹⁵ In 1984, Sylvia Law argued that “[i]f women are to achieve fully equal status in American society, including a sharing of power traditionally held by men, . . . our understanding of sex equality must encompass a strong constitutional equality guarantee” that applies to laws governing reproductive biology.⁴¹⁶ Law asserted that the salient constitutional question should not be whether pregnancy is

⁴¹² *Carhart*, 550 U.S. at 185 (Ginsburg, J., dissenting).

⁴¹³ Siegel, *supra* note 242, at 264.

⁴¹⁴ Katharine Bartlett, *Pregnancy and the Constitution: The Uniqueness Trap*, 62 CAL. L. REV. 1532, 1536 (1974); *id.* at 1532 (“Woman's role as childbearer has given rise to many of the most common Western stereotypes about women.”).

⁴¹⁵ CATHARINE A. MACKINNON, *Privacy v. Equality: Beyond Roe v. Wade*, in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW, *supra* note 7, at 93, 93–102.

⁴¹⁶ Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1007 (1984).

a “real” difference but whether the state regulates pregnancy in a way that “oppresses women or reinforces cultural sex-role stereotypes.”⁴¹⁷ Ruth Bader Ginsburg seconded this assertion the following year, arguing that the Court in *Roe* had “presented an incomplete justification for its action.”⁴¹⁸ Ginsburg argued that it was insufficient “to charge it all to women’s anatomy—a natural, not man-made, phenomenon”⁴¹⁹: When the state deprives women of control over their own reproductive capacity, it is making a social, not a biological, statement about women’s roles and stature in the community.⁴²⁰ Several years later, Reva Siegel demonstrated that laws restricting abortion have historically reflected stereotyped forms of reasoning about women’s role in the family. She noted that the Burger Court’s approach to “reproductive regulation [had] obscure[d] the possibility that such regulation may be animated by constitutionally illicit judgments about women.”⁴²¹

As long as the regulation of pregnant women remained outside the scope of sex-based equal protection doctrine and the question of abortion was sequestered within the substantive due process framework, equality-based arguments for reproductive rights had difficulty gaining a foothold in the law. Now that the Court has begun to revise its approach to “real” differences, however, the terrain has shifted. This fact has not been lost on some of the leaders in the pro-life move-

⁴¹⁷ *Id.* at 1033.

⁴¹⁸ Ginsburg, *Some Thoughts*, *supra* note 363, at 382. Ginsburg credits Kenneth Karst for making this argument years earlier. See Kenneth L. Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 53–59 (1977) (arguing that although the Court had ignored the equality dimension of the abortion question, *Roe* could be viewed through an equal protection lens as a case about women’s “right to control [their] own social roles”). Of course, Ginsburg herself had explored the connection between sex equality and reproductive rights years earlier in her brief in *Struck v. Secretary of Defense*. See *supra* text accompanying notes 231–37.

⁴¹⁹ Ginsburg, *Some Thoughts*, *supra* note 363, at 382.

⁴²⁰ See *id.* at 382–83. “Society, not anatomy, places a greater stigma on unmarried women who become pregnant than on the men who father their children,” Ginsburg argued. “Society expects, but nature does not command, that women take the major responsibility . . . for child care and that they will stay with their children, bearing nurture and support burdens alone, when fathers deny paternity or otherwise refuse to provide care or financial support for unwanted offspring.” *Id.* (alteration in original) (internal citations and quotation marks omitted).

⁴²¹ Siegel, *supra* note 242, at 264. Siegel has continued to elaborate the constitutional equality argument for protecting women’s right to abortion. In recent years, she has written a number of articles demonstrating that sex-role stereotypes continue to fund the passage of abortion laws today. See, e.g., Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991 (showing that South Dakota’s near-total ban on abortion, enacted in 2006 and since repealed, was motivated by a stereotyped conception of women’s role as wives and mothers).

ment. James Bopp, Jr., a prominent conservative lawyer and longtime general counsel to the National Right to Life Committee, issued a memorandum in 2007, after the Court decided *Carhart*, warning anti-abortion activists to proceed with caution.⁴²² Bopp counseled the movement to halt its campaign to ban abortion for fear that a constitutional challenge would prompt the Court to consider the implications of such a ban for women's equality. He argued:

[I]f the U.S. Supreme Court, as presently constituted, were to actually accept a case challenging the declared constitutional right to abortion, there is the potential danger that the Court might actually make things worse than they presently are. The majority might abandon its current "substantive due process" analysis (i.e., reading "fundamental" rights into the "liberty" guaranteed by the Fourteenth Amendment against infringement without due process) in favor of what Justice Ginsberg [sic] has long advocated—an "equal protection" analysis under the Fourteenth Amendment. In *Gonzales v. Carhart*, the dissent, written by Justice Ginsberg, in fact did so. If this view gained even a plurality in a prevailing case, this new legal justification for the right to abortion would be a powerful weapon in the hands of pro-abortion lawyers⁴²³

Rather than seek to ban abortion, Bopp counseled anti-abortion activists to chip away at the right through incremental forms of legislation like "partial-birth abortion" bans and parental involvement laws.⁴²⁴ He argued that these laws were less likely to trigger the Court to make the connection between abortion and women's equality, whereas an outright ban "would force Justice Kennedy to vote to strike down the law, [and give] Justice Ginsberg the opportunity to rewrite the justification for the right to abortion" in equal protection terms.⁴²⁵

In the 1970s, when the basic framework for adjudicating abortion cases was constructed, "real" differences doctrine prevented the Court from inquiring if and when the regulation of women's reproductive lives might reinforce the stereotypes associated with the separate spheres tradition. Today, the Court's evolving understanding that stereotypes about pregnancy and motherhood implicate equal protection

⁴²² Memorandum from James Bopp, Jr. & Richard E. Coleson, Attorneys at Law, Bopp, Coleson, & Bostrom, on Pro-life Strategy Issues (Aug. 7, 2007), available at <http://personhood.net/docs/BoppMemorandum1.pdf>. For more on the Bopp memorandum and its reception in the pro-life community, see Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694, 1788–89 & n.266 (2008).

⁴²³ Memorandum from James Bopp, Jr. & Richard E. Coleson, *supra* note 422, at 3 (internal citations omitted).

⁴²⁴ *Id.* at 3–4.

⁴²⁵ *Id.*

concerns provides a new vantage point for thinking about the constitutionality of laws limiting women's reproductive rights.

D. Sex-Role Stereotyping and LGBT Rights

2003 was a banner year for the gay rights movement. In June, the Court issued its historic decision in *Lawrence v. Texas*, holding that a statute outlawing same-sex sodomy violated the Fourteenth Amendment.⁴²⁶ *Lawrence* marked the end of a long campaign against laws criminalizing same-sex intimacy. It overruled *Bowers v. Hardwick*⁴²⁷ and provided a foundation for challenging other legal regulations that demean and stigmatize sexual minorities. Laurence Tribe predicted that the decision would "be remembered as the *Brown v. Board of* gay and lesbian America,"⁴²⁸ and it was greeted and understood as such on the day it came down. *Lawrence*, however, was not the only groundbreaking civil rights decision issued in the summer of 2003 that had powerful implications for LGBT rights. Although *Hibbs* was not widely hailed as a victory for the gay rights movement, this section suggests that sex-based equal protection law has a significant role to play in the adjudication of claims involving sexual orientation and gender identity.

As this Article has shown, the anti-stereotyping principle was linked from the start with gay and lesbian rights—in both positive and negative ways. The advocates who led the "revolt against the sex-role structure"⁴²⁹ in the aftermath of the Stonewall riots argued that sex stereotyping played a significant role in the oppression of gays and lesbians and that women and sexual minorities had a shared interest in fighting sex-role enforcement. This point was not lost on opponents of the women's movement. Leaders in the New Right argued that if the Constitution were amended or interpreted to forbid the state from enforcing sex-role stereotypes, the state would be compelled to permit same-sex marriage and to stop discriminating against gays and lesbians more generally.⁴³⁰ These concerns were not borne out in the 1970s; same-sex marriage and other gay rights claims were not credible to courts forty years ago. In 1972, when the Court confronted a same-sex marriage claim for the first and only time in its history, it felt no need to justify the marital sex classification under the Equal Pro-

⁴²⁶ 539 U.S. 558 (2003).

⁴²⁷ 478 U.S. 186 (1986) (holding that the Fourteenth Amendment offers no protection against laws barring private sexual activity by consenting adults of the same sex).

⁴²⁸ Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1895 (2004).

⁴²⁹ Shelley, *OUT OF THE CLOSETS*, *supra* note 24, at 32.

⁴³⁰ See *supra* notes 301–02 and accompanying text.

tection Clause.⁴³¹ Thus, throughout the 1970s, tensions between the anti-stereotyping principle articulated in sex-based equal protection cases and the state's ongoing enforcement of sex stereotypes in the context of sexual orientation and gender identity remained latent in the law.

These tensions have come to the surface in recent years as same-sex marriage claims have achieved a new prominence in public discourse and in the American legal system. In the past, it was possible for courts to dismiss gay rights claims as "facetious."⁴³² It did not seem necessary (or difficult) to justify discrimination against gays and lesbians because their claims were considered beyond the legal pale. Over time, however, the legal and social landscape surrounding gay rights claims has changed dramatically. The Court has recognized that discrimination against gays and lesbians can violate the Fourteenth Amendment.⁴³³ Tens of thousands of same-sex couples are legally married and many more identify themselves as married.⁴³⁴ These developments have made it necessary for opponents of same-sex marriage to proffer substantial legal reasons for their position and for courts to analyze more carefully the state's justification for retaining the sex classification in marriage. In response to these new demands, both same-sex marriage opponents and courts rejecting same-sex marriage claims have increasingly offered justifications for retaining the sex classification in marriage that are grounded in traditional conceptions of sex and family roles.

Opponents of same-sex marriage made extensive use of sex-role-based arguments in response to the California Supreme Court's 2008 decision granting same-sex couples the right to marry. When California changed the categories on its marriage license from "bride" and "groom" to "Party A" and "Party B," gender "traditionalists" organized a boycott, urging different-sex couples not to obtain such licenses until the documents indicated once again that men and women have distinctive roles in marriage.⁴³⁵ One heterosexual couple

⁴³¹ See *supra* note 310 and accompanying text.

⁴³² *Bowers*, 478 U.S. at 194.

⁴³³ *Lawrence v. Texas*, 539 U.S. 558 (2003) (invalidating a Texas law barring consensual homosexual sodomy in an opinion grounded in due process and equal protection values); *Romer v. Evans*, 517 U.S. 620 (1996) (invalidating on equal protection grounds a state constitutional amendment banning antidiscrimination laws and ordinances designed to protect homosexuals or bisexuals).

⁴³⁴ GARY J. GATES, THE WILLIAMS INST., SAME-SEX SPOUSES AND UNMARRIED PARTNERS IN THE AMERICAN COMMUNITY SURVEY, 2008, at 3 (2009), [http://www.law.ucla.edu/williamsinstitute/pdf/ACS2008_final\(2\).pdf](http://www.law.ucla.edu/williamsinstitute/pdf/ACS2008_final(2).pdf).

⁴³⁵ Jennifer Garza, *Bride and Groom Reject State's Gender-Neutral Terminology*, SACRAMENTO BEE, Sept. 16, 2008, at A1 (internal quotation marks omitted).

even sued the state, claiming that their traditional beliefs about sex roles in marriage precluded them from obtaining a gender-neutral license.⁴³⁶ A lawyer for the Pacific Justice Institute, representing the couple, noted that “[t]hose who support (same-sex marriage) say it has no impact on heterosexuals. . . . This debunks that argument.”⁴³⁷ On his account, removing the words “bride” and “groom” from state marriage licenses deprives men and women of the guidance those terms provide and the values they instantiate: When the parties to a marriage are labeled “A” and “B,” it is not clear who is expected to care for the children and who is expected to protect and provide for the family. In response to these and other such protests throughout the state, the California Department of Public Health announced in October 2008 that boxes for “bride” and “groom” would be reinstated on marriage licenses.⁴³⁸ One month later, a majority of the California electorate voted in favor of Proposition 8, which stripped same-sex couples of the right to marry.⁴³⁹

Sex-role-based arguments against same-sex marriage have fared surprisingly well in court. They played a prominent role in *Hernandez v. Robles*, a 2006 New York Court of Appeals decision upholding that state’s restriction of marriage to different-sex couples.⁴⁴⁰ The court in *Hernandez* deemed the restriction constitutional in part because “[i]ntuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like.”⁴⁴¹ The court also suggested that stereotyped

⁴³⁶ Jennifer Garza, *Bride and Groom To File Suit Over License Language*, SACRAMENTO BEE, Oct. 3, 2008, at B3.

⁴³⁷ Garza, *supra* note 435 (alteration in original) (internal quotation marks omitted); see also Garza, *supra* note 436 (quoting the organizer of the boycott who asserted that the purpose of the license lawsuit was “to take back traditions that we feel . . . have been taken away from us,” and that licenses with “gender-neutral terms violate the rights of the majority” (internal quotation marks omitted)); Cal Thomas, *An End of “We the People,”* TULSA WORLD, Oct. 14, 2008, at A13 (“An indication that the objectives of the gay rights movement go far beyond what any two individuals wish to do with each other can be seen in what California has tried to impose on heterosexuals wishing to marry.”).

⁴³⁸ Jennifer Garza, *Goodbye, Party A and Party B: State Relents on Marriage Licenses*, SACRAMENTO BEE, Oct. 7, 2008, at B1.

⁴³⁹ Randal C. Archibold & Abby Goodnough, *California Voters Ban Gay Marriage*, N.Y. TIMES, Nov. 5, 2008, <http://www.nytimes.com/2008/11/06/us/politics/06ballot.html> (“[T]he same-sex marriage ban initiative known as Proposition 8 won 52 percent of the vote.”); see CAL. CONST. art. I, § 7.5 (“Only marriage between a man and a woman is valid or recognized in California.”).

⁴⁴⁰ 855 N.E.2d 1 (N.Y. 2006).

⁴⁴¹ *Id.* at 7. Intuition may suggest parents of different sexes are best, but research has consistently shown that children living with two parents of the same sex do as well on every measure as children living with two parents of different sexes. “Many leading organizations, including the American Academy of Pediatrics, the American Psychiatric Association, the American Psychological Association, the National Association of Social Workers,

assumptions regarding (heterosexual) men's inconstancy and lack of commitment to their female partners and children could justify the restriction of marriage to different-sex couples.⁴⁴² This line of reasoning, increasingly common in same-sex marriage cases, assumes that the purpose of marriage is to "formally bind[] the husband-father to his wife and child, and impos[e] on him the responsibilities of fatherhood," lest he decide to abandon his dependents.⁴⁴³ A related line of reasoning suggests that the state may restrict the right to marry to different-sex couples because men and women play "opposite" or

and the Child Welfare League of America, weighed the available research and supported the conclusion that gay and lesbian parents are as effective as heterosexual parents in raising children." *Varnum v. Brien*, 763 N.W.2d 862, 874 (Iowa 2009); see also AM. PSYCHOLOGICAL ASS'N, APA POLICY STATEMENT: RESOLUTION ON SEXUAL ORIENTATION, PARENTS, & CHILDREN (2004), available at <http://www.apa.org/pi/lgbcpolicy/parents.html> (noting that "research has shown that . . . the children of lesbian and gay parents are as likely as those of heterosexual parents to flourish").

⁴⁴² See *Hernandez*, 855 N.E.2d at 7 (holding that the legislature could "rationally decide that, for the welfare of children, it is more important to promote stability, and to avoid instability, in opposite-sex than in same-sex relationships" because only heterosexual sex can lead to accidental pregnancy and single motherhood). This is a relatively new rationale for denying same-sex couples the right to marry; conservative law professors and think tanks developed the "accidental procreation" argument in the late 1990s. Kerry Abrams & Peter Brooks, *Marriage as a Message: Same-Sex Couples and the Rhetoric of Accidental Procreation*, 21 YALE J.L. & HUMAN. 1, 26–29 (2009). This argument was embedded in a set of claims about the importance of preserving traditional gender roles, limiting divorce, and encouraging marital procreation; the purpose of these claims was to promote the idea that procreative sex within marriage is the only acceptable form of sexual expression and that responsible parenting requires the presence of a mother and father in the home because men and women provide children with different lessons and different kinds of love. See, e.g., Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833, 857 (arguing that the state has an interest in ensuring children are raised in the context of heterosexual marriage because "there are gender-linked differences in child-rearing skills [and] men and women contribute different (gender-connected) strengths and attributes to their children's development").

⁴⁴³ *Morrison v. Sadler*, 821 N.E.2d 15, 26 (Ind. Ct. App. 2005) (quoting *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 996 (Mass. 2003) (Cordy, J., dissenting)) (internal quotation marks omitted). Gender traditionalists frequently argue that marrying a woman and becoming the head of a household is the primary means through which boys achieve a healthy adult male identity. See, e.g., STEVEN L. NOCK, *MARRIAGE IN MEN'S LIVES* 61 (1998) ("[T]he core dimensions of adult masculinity include three distinct roles. Men must be (1) married fathers, (2) providers for, and (3) protectors of their wives and children."); Katherine K. Young & Paul Nathanson, *The Future of an Experiment*, in *DIVORCING MARRIAGE: UNVEILING THE DANGERS IN CANADA'S NEW SOCIAL EXPERIMENT* 41, 47–48 (Daniel Cere & Douglas Farrow eds., 2004) (arguing that society has an interest in channeling men into heterosexual marriage because the institution helps them to develop a "healthy form of masculine identity"—an identity that is under threat "now that women have entered the public realm" and men can no longer automatically lay claim to the role of "provider and protector"); Lynn D. Wardle, "Multiply and Replenish": *Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 HARV. J.L. & PUB. POL'Y 771, 798 (2001) (arguing that if same-sex couples were permitted to marry, "[t]he paternal role, which historically and culturally has been linked with [heterosexual] marriage, would be loosed from its social and moral moorings").

“complementary” roles in the family.⁴⁴⁴ This mode of reasoning draws directly on the separate spheres conception of sex, which assumes that women are responsible and specially built for caregiving work while men are more suited to breadwinning and decisionmaking.⁴⁴⁵

These holdings are in tension with anti-stereotyping precedents extending back to the 1970s. Sex-based equal protection law has been concerned, from its inception, with the enforcement of sex and family roles in marriage. The Court held in *Wiesenfeld* (and suggested in *Reed* and *Frontiero*) that the state had no legitimate interest in encouraging men and women to assume gender-typical roles in marriage. It has reiterated this holding on numerous occasions. It held in *Orr v. Orr* that Alabama’s requirement that husbands, but not wives, could be required to pay alimony was unconstitutional because it “effectively announc[ed] the State’s preference for an allocation of family responsibilities under which the wife plays a dependent role” and sought to “reinforce[] . . . that model among [its] citizens.”⁴⁴⁶ It held in *Califano v. Westcott* that the practice of granting benefits to families with unemployed fathers, but not to families with unemployed mothers, violated equal protection because it was “part of the baggage of sexual stereotypes that presumes the father has the primary responsibility to provide a home and its essentials, while the mother is the center of home and family life.”⁴⁴⁷ These holdings were

⁴⁴⁴ *Lewis v. Harris*, 875 A.2d 259, 276–77 (N.J. Super. Ct. App. Div. 2005) (Parrillo, J., concurring), *modified in part*, 908 A.2d 196 (N.J. 2006). Opponents of same-sex marriage argue that marriage serves the important function of “bridging the male-female divide” and “conferring and transforming the identity and status of a male into husband/father, and a female into wife/mother.” Monte Neil Stewart, *Eliding in Washington and California*, 42 GONZ. L. REV. 501, 505 (2006/07). They also argue that modeling these behaviors enables men and women to transmit healthy gender roles to their children. *See, e.g.*, Douglas W. Kmiec, *The Procreative Argument for Proscribing Same-Sex Marriage*, 32 HASTINGS CONST. L.Q. 653, 655 n.6 (2004) (endorsing a decision sustaining Florida’s prohibition of same-sex adoption on the ground that the state has an interest in “emphasizing [the] vital role that dual-gender parenting plays in shaping [children’s] sexual and gender identity” (first alteration in original) (quoting *Lofton v. Sec’y of the Dep’t of Children & Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004))).

⁴⁴⁵ For a more comprehensive survey of sex stereotyping in same-sex marriage decisions, see Deborah A. Widiss, Elizabeth L. Rosenblatt & Douglas NeJaime, *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence*, 30 HARV. J.L. & GENDER 461 (2007).

⁴⁴⁶ 440 U.S. 268, 279 (1979).

⁴⁴⁷ 443 U.S. 76, 89 (1979) (citations and internal quotation marks omitted) (quoting *Orr*, 440 U.S. at 283; *Stanton v. Stanton*, 421 U.S. 7, 10 (1975); and *Taylor v. Louisiana*, 419 U.S. 522, 534 n.15 (1975)). Other cases have also found assumptions about gender-differentiated family roles insufficient to justify sex classifications. *See, e.g.*, *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142 (1980) (invalidating a Missouri law that automatically granted workers’ compensation benefits to widows but required widowers to prove that they were dependent on their wives’ earnings or mentally or physically incapacitated); *Caban v. Mohammed*, 441 U.S. 380 (1979) (invalidating a New York law that permitted unwed

amplified more recently in *Virginia*⁴⁴⁸ and *Hibbs*, which suggested that even “real” differences (such as women’s ability to become pregnant) cannot justify sex classifications that steer men and women into traditional roles in the family.

The implications of *Hibbs* for LGBT rights were immediately apparent to Phyllis Schlafly. Shortly after *Hibbs* came down, she published a spirited essay entitled *Justice Ginsburg Would Put a Dress on the Lone Ranger*, which characterized *Hibbs* as the “shock[ing]” product of “feminist fantasies about a gender-neutral society.”⁴⁴⁹ Although Chief Justice Rehnquist wrote the majority opinion in *Hibbs*, Schlafly noted that the opinion used the word “stereotype” nineteen times—a sure sign of “Ginsburg’s influence.”⁴⁵⁰ In fact, Schlafly suggested that *Hibbs* pushed the radical “equality principle” Ginsburg had been promoting since the 1970s to new extremes.⁴⁵¹ This “equality principle” sought to abolish “the concept of ‘breadwinning husband’ and ‘dependent, homemaking wife.’”⁴⁵² Schlafly suggested that someday soon, the Court might find that it also guaranteed the right to same-sex marriage.⁴⁵³

Thus far, this has not happened. Even courts that have decided in favor of plaintiffs in same-sex marriage cases have almost universally avoided the question of whether limiting marriage to “one man, one woman” reflects or reinforces sex-role stereotypes. They have emphasized instead that marriage is a fundamental right and that depriving gays and lesbians of this right perpetuates their secondary status in the

mothers but not unwed fathers to block the adoption of their children simply by withholding consent); *Califano v. Goldfarb*, 430 U.S. 199 (1977) (invalidating a federal law that granted Social Security survivors’ benefits to widows regardless of dependency but required widowers to prove they had been dependent on their wives’ earnings).

⁴⁴⁸ Opponents of same-sex marriage have cited the Court’s discussion in *Virginia* of the enduring nature of sex differences, *United States v. Virginia*, 518 U.S. 515, 553 (1996), as an argument for reserving marriage to “one man, one woman.” They argue that this passage effectively acknowledges that men and women bring different traits and skills to marriage and that “genderless” marriage is a poor substitute for the real thing. *See, e.g.*, Kmiec, *supra* note 444, at 656 n.6 (arguing that in *Virginia*, “Justice Ginsburg fairly rejects the same-sex claim that the modern individuation of women has resulted in the kind of fluidity of gender roles for men and women that makes the presence of both genders within a family unnecessary” (internal quotation marks omitted)). But the Court’s point in *Virginia* was that “inherent differences” between the sexes, whatever they may be, may not be used to justify sex-based state action that reflects and reinforces the separate spheres tradition—the very tradition opponents of “genderless” marriage seek to preserve.

⁴⁴⁹ Phyllis Schlafly, *Justice Ginsburg Would Put a Dress on the Lone Ranger* (Aug. 18, 2003), <http://townhall.com/columnists/PhyllisSchlafly/2003> (follow “Justice Ginsburg would put a dress on the Lone Ranger” hyperlink).

⁴⁵⁰ *Id.*

⁴⁵¹ *Id.*

⁴⁵² *Id.*

⁴⁵³ *Id.*

American legal system.⁴⁵⁴ These courts typically approach the question of same-sex marriage through an analogy to race. In *Goodridge v. Department of Public Health*, the groundbreaking 2003 marriage decision issued by the Supreme Judicial Court of Massachusetts, the court held that sex-based marriage restrictions, like race-based marriage restrictions, “deprive[] individuals of access to an institution of fundamental legal, personal, and social significance—the institution of marriage—because of a single trait: skin color in *Perez* and *Loving*, sexual orientation here.”⁴⁵⁵

One of the primary reasons courts have not applied sex-based equal protection principles to the sex classification in marriage is that they do not recognize any connection between discrimination on the basis of sex and discrimination on the basis of sexual orientation. The California Supreme Court, in its groundbreaking 2008 decision, dismissed the notion that sex-based equal protection precedents were relevant to the question of same-sex marriage. The court claimed that those precedents were about “societal and legal discrimination against *women* (rather than against gay individuals).”⁴⁵⁶ It explained that the sex classification in marriage was not properly defined as discrimination on the basis of sex because the real target of this classification was not men or women, but people who were attracted to members of the same sex.⁴⁵⁷ The court reasoned that the classification did not treat men and women differently because it permitted members of both sexes to marry across sex lines.⁴⁵⁸ Thus, although the marital sex classification looks like a sex classification, the court held that “in realistic terms,” it “cannot fairly be viewed as embodying the same type of discrimination at issue in” sex-based equal protection cases.⁴⁵⁹

⁴⁵⁴ See, e.g., *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008); *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003). In 1993, the Hawaii Supreme Court held that the restriction of marriage to different-sex couples constitutes sex discrimination. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). The court did not develop the anti-stereotyping argument, however; it held that laws restricting marriage to different-sex couples constitute sex discrimination because they rely on formal sex classifications. *Id.* at 64.

⁴⁵⁵ 798 N.E.2d at 958. *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948), and *Loving v. Virginia*, 388 U.S. 1 (1967), invalidated bans on interracial marriage under the Fourteenth Amendment.

⁴⁵⁶ *In re Marriage Cases*, 183 P.3d at 439.

⁴⁵⁷ *Id.* at 437.

⁴⁵⁸ *Id.* at 436.

⁴⁵⁹ *Id.* at 437–38, 440. The court’s analysis here is difficult to square with basic doctrinal principles. The court decided first that the sex classification in marriage is innocuous and then relied on that determination to justify not subjecting it to heightened scrutiny. But the law subjects sex classifications to heightened scrutiny precisely in order to determine whether they are innocuous or whether they perpetuate sex-role stereotypes. The court’s a

This reasoning about the sex classification in marriage reflects an impoverished understanding of the principle at the core of constitutional sex discrimination law. The Court extended equal protection law into the domain of sex in the 1970s in response to a mobilized women's movement. The legal feminists who translated the movement's demands into constitutional claims argued that the way to implement the nation's evolving commitment to sex equality was through an anti-stereotyping principle—a principle that precludes the state from acting in ways that reflect or reinforce traditional conceptions of men's and women's roles. The fact that male plaintiffs brought and won so many of the foundational sex-based equal protection cases is a testament to the broad contours of this principle: It protects everyone from sex-based state action that enforces sex-role stereotypes. The gay and lesbian liberation movements of the early 1970s helped to popularize the anti-stereotyping approach for precisely this reason.

In the past decade, a few courts have begun to grapple with the implications of the anti-stereotyping principle for LGBT rights in the context of Title VII. In the fall of 2008, a federal district court in Washington, D.C., found that the Library of Congress had violated the rights of a transgendered job applicant when it rescinded an offer of employment after learning of the applicant's impending male-to-female transition.⁴⁶⁰ The court found "that the Library's hiring decision was infected by sex stereotypes," and that by refusing to employ the plaintiff "because her appearance and background did not comport with . . . sex stereotypes about how men and women should act and appear," the Library had unlawfully discriminated on the basis of sex.⁴⁶¹ This ruling echoes an earlier pair of cases in which the Sixth Circuit held that "discrimination against a plaintiff who is transsexual—and therefore fails to act and/or identify with his or her gender"—constitutes sex discrimination, and that "[s]ex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior."⁴⁶²

priori approval of the law short-circuited this inquiry. Moreover, equal protection doctrine does not exempt sex classifications from heightened scrutiny whenever a court suspects those classifications actually target not men and women, but some other group. *See, e.g.*, *Nguyen v. I.N.S.*, 533 U.S. 53, 64–67 (2001) (applying heightened scrutiny to a sex-based immigration statute even though the Court seemed to suspect it was actually aimed at limiting the number of foreign-born children who could claim American citizenship).

⁴⁶⁰ *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008).

⁴⁶¹ *Id.* at 305, 308.

⁴⁶² *Smith v. City of Salem*, 378 F.3d 566, 574–75 (6th Cir. 2004); *see also Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005) (upholding jury verdict in favor of a transgender plaintiff who argued that he had been discriminated against on the basis of his failure to conform to sex stereotypes). Numerous scholars have written about the undertheorized and often confused relationship between sex, gender, and sexual orientation in

A handful of judges have likewise argued—in concurring and dissenting opinions—that the anti-stereotyping mandate at the core of sex-based equal protection law precludes the state from maintaining the sex classification in marriage. In *Baker v. State*, Justice Johnson asserted that “the sex-based classification contained in [Vermont’s] marriage laws is . . . a vestige of sex-role stereotyping that applies to both men and women.”⁴⁶³ She argued that the State’s assertion that it restricts marriage to different-sex couples “to celebrate the ‘complementarity’ [sic] of the sexes and provid[e] male and female role models for children [is] based on broad and vague generalizations about the roles of men and women that reflect outdated sex-role stereotyping.”⁴⁶⁴ Four years later, Justice Greaney argued in *Goodridge* that same-sex marriage litigation “requires that we confront ingrained assumptions with respect to historically accepted roles of men and women within the institution of marriage and requires that we reexamine these assumptions.”⁴⁶⁵ Thus far, however, the issue of sex-role stereotyping has remained on the margins of same-sex marriage jurisprudence.

The California Supreme Court and other courts adjudicating same-sex marriage cases have treated gay litigants’ claims as if they were entirely distinct from sex-based equal protection claims. The fact that discussion of sex-role stereotyping has been almost entirely absent from the public debate over same-sex marriage—even among those who advocate the right of gays and lesbians to marry—has no doubt contributed to this doctrinal disconnect.⁴⁶⁶ This silence about stereotyping stems at least in part from the widely-held view that same-sex marriage has little to do with sex equality—that “the sex

the context of Title VII law. Among the most thoughtful works on this subject are Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1 (1995); Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1 (1995); and Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society*, 83 CAL. L. REV. 1 (1995).

⁴⁶³ 744 A.2d 864, 906 (Vt. 1999) (Johnson, J., concurring in part, dissenting in part).

⁴⁶⁴ *Id.* at 909 (alteration in original).

⁴⁶⁵ *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 973 (Mass. 2003) (Greaney, J., concurring) (arguing that the statute limiting marriage to opposite-sex couples is unconstitutional sex discrimination).

⁴⁶⁶ Susan Frelich Appleton, *Missing in Action? Searching for Gender Talk in the Same-Sex Marriage Debate*, 16 STAN. L. & POL’Y REV. 97, 101–02, 122 (2005) (noting the near absence of “gender talk” among prominent advocates of same-sex marriage); see also Edward Stein, *Evaluating the Sex Discrimination Argument for Gay and Lesbian Rights*, 49 UCLA L. REV. 471, 500 (2001) (arguing that the sex discrimination argument has no place in gay rights litigation because “[i]t mischaracterizes the nature of laws that discriminate against lesbians and gay men to see them as primarily harming women”).

discrimination argument for homo equality has a transvestic quality, dressing up gay rights in sex equality garb.”⁴⁶⁷ As this Article has shown, however, anti-stereotyping arguments against the enforcement of sex roles in marriage and the privileging of heterosexual, over homosexual, relationships are as old as constitutional sex discrimination law itself and spring from the same philosophical roots.⁴⁶⁸

Situating same-sex marriage claims in the context of this broader anti-stereotyping jurisprudence would help to illustrate the constitutional infirmities of the stereotyped justifications courts are increasingly using to uphold the sex classification in marriage. It would also highlight a dimension of these cases that often gets lost even when gay and lesbian plaintiffs win—namely that laws restricting the right to marry to “one man, one woman” reflect and reinforce a thickly gendered conception of sex roles and what it means to be a “husband” or a “wife.” The enforcement of these roles has deprived women and gay men of equal social status, and it has “impeded both men and women from pursuit of the very opportunities that would have enabled them to break away from familiar stereotypes.”⁴⁶⁹ It has defined not only men’s and women’s roles as spouses but also their roles as citizens, workers, parents, and children. Making these connections visible would help to demonstrate that although equal protection claims challenging the marital sex classification itself are relatively new, they are deeply rooted in an antidiscrimination project in which the Court has been engaged for the past forty years.⁴⁷⁰

⁴⁶⁷ William N. Eskridge, Jr., *Multivocal Prejudices and Homo Equality*, 74 IND. L.J. 1085, 1110 (1999). Eskridge himself agrees with “feminist and lesbian-feminist writers [who] have long maintained [that] antihomosexual attitudes are connected with attitudes sequestering women in traditional gender roles.” *Id.* His concern is to demonstrate that sex stereotyping is not the whole story: Fear of unregulated sexuality, particularly in relation to gay men, has always played a central role in discrimination against sexual minorities. *Id.* at 1113–16.

⁴⁶⁸ See *supra* text accompanying notes 185–90; see also Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 206–12, 220 (describing the philosophical continuities between the claims of the women’s liberation movement and those of the gay liberation movement in the 1970s and arguing that “[t]he assumption and prescription of heterosexuality is one important piece in the mosaic that gives meaning to sexuality and to cultural concepts of gender”).

⁴⁶⁹ Ginsburg, *supra* note 25, at 21.

⁴⁷⁰ Numerous scholars and activists have raised concerns about forms of argument for same-sex marriage that focus primarily on the fundamental importance and normativity of marital relationships; securing the right of same-sex couples to marry on this ground could further stigmatize and punish those who lack access to marriage or opt to arrange their intimate and domestic lives in other ways. See, e.g., Ariela R. Dubler, *From McLaughlin v. Florida to Lawrence v. Texas: Sexual Freedom and the Road to Marriage*, 106 COLUM. L. REV. 1165, 1187 (2006) (cautioning that viewing *Lawrence* only as a stepping stone to legalized marriage obscures “the possibility that, for some people, the right to engage in sex outside of marriage might be as significant as the right to enter into a legal marriage”);

CONCLUSION

This Article has offered a new perspective on sex-based equal protection law. As the California Supreme Court's discussion of the relationship between same-sex marriage and sex equality illustrates, there persists in contemporary legal discourse an idea that the contours of constitutional sex discrimination law were set in the 1970s—that the kinds of sex stereotyping the second wave of the women's movement challenged are the only kinds of sex stereotyping that constitute sex discrimination under the Equal Protection Clause. The anti-stereotyping principle that became law in those cases was more capacious and more capable of expansion than this conventional wisdom suggests. It has expanded beyond the doctrinal limitations imposed by the Burger Court. It has begun to raise pressing constitutional questions in the contexts of reproductive rights and same-sex marriage. From this perspective, litigants like Charles Moritz and Stephen Wiesenfeld represent not the law's conservatism, but its cutting edge. Bolstered by an interrelated set of social movements, and in their own queer way, these male plaintiffs inaugurated an anti-stereotyping project whose implications are still being elaborated today.

Katherine M. Franke, *The Domesticated Liberty of* *Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1414 (2004) (noting that “[m]arriage is not a freedom” and expressing concern that the mainstream gay rights movement’s pursuit of marriage may “have created a path dependency that privileges privatized and domesticated rights and legal liabilities, while rendering less viable projects that advance nonnormative notions of kinship, intimacy, and sexuality”). The anti-stereotyping principle makes it possible to formulate arguments for the right to marry that do not rely on the normativity of marriage and that maintain a skeptical stance toward laws regulating intimate relationships in ways that perpetuate traditional conceptions of the family.