Law & Inequality: A Journal of Theory and Practice

Volume 6 | Issue 1 Article 4

1988

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The Honorable Ruth Bader Ginsburg*

We have a 200-year-old Constitution, the oldest written constitution still in use, but only since 1971 have we had an evolving jurisprudence of equal rights, responsibilities, and opportunities for women and men. The 1787 notion of "We the People," as Justice Marshall recently reminded us, was incomplete — indeed, it left out the majority of the adult population: slaves, debtors, paupers, Indians, and women. As framed in 1787, the Constitution was a document of governance for and by white, propertied adult males — a document for people who were free from dependence on others and therefore not susceptible to influence or control by masters, overlords, or superiors.[1]

With that original understanding in view, a too strict "jurisprudence of the framers' original intent" seems to me unworkable, and not what Madison or Hamilton would espouse were they with us today. It cannot be, for example, that although the founding fathers never dreamed of the likes of Dolly Madison or even the redoubtable Abigail Adams ever serving on a jury, we would today say it is therefore necessary or proper to keep women off juries.

We still have, cherish, and live under our eighteenth century Constitution because, through a combination of three factors or forces — change in society's practices, constitutional amendment, and judicial interpretation — a broadened system of participatory democracy has evolved, one in which we take just pride. Women are the numerically largest example. They did not figure as public actors in the days when the Constitution and the post-Civil War Amendments were originally conceived, but women are today unquestionably part of "We the People." My assignment this morning is to summarize that chapter in constitutional history — when,

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1. Richard B. Morris, *Where Were the Women?* 12 Columbia 40 (April 1987). *See generally* Linda K. Kerber, *"Ourselves and Our Daughters Forever" : Women and the Constitution, 1787-1876,* in this Constitution: A Bicentennial Chronicle 25 (Spring 1985) (published by Project '87 of the American Historical Association and the American Political Science Association).

why and how did women come to count in constitutional adjudication.

Women's status under the law continued largely unaltered at the Constitution's centennial 100 years ago. In 1887, women were still thirty-three years away from securing the right to vote. And the fourteenth amendment, added to the Constitution in 1868, despite its grandly general, growth-susceptible equal protection clause, did not inspire feminists of that day. Rather, the amendment alarmed them; for its second section added to the Constitution for the very first time the word "male," and linked that word to the word "citizens."[2] The suggestion seemed to be that, even if women counted as citizens, as they did for some purposes, they were (like children) something less than full citizens.[3]

If the post-Civil War Amendments did not immediately bear on women's situation, was the critical date August 18, 1920, the date on which the nineteenth amendment secured to women citizens the right to vote? Not so, the Supreme Court informed us more than a generation later in 1947 and 1948, and then again in 1961. In 1948, in *Goesaert v. Cleary*,[4] the High Court said it was all right for the State of Michigan to put the ladies Goesaert, a bar-owning mother and daughter, out of business by legislating that women could not tend bar except as wives and daughters of male tavern owners. Justice Jackson explained the prevailing view most cogently in *Fay v. New York*,[5] a 1947 decision upholding wholesale exemption of women from jury service. Justice Jackson wrote:

> The contention that women should be on the jury . . . is based on a changing view of the rights and responsibilities of women . . . which has progressed in all phases of [public] life, . . . but has achieved constitutional compulsion on the states only in the grant of the franchise by the Nineteenth Amendment.[6]

Except for the franchise, in other words, the Constitution remained an empty cupboard for people seeking to promote the equal status and stature of men and women under the law.

In 1961, in the same context — jury service — a unanimous

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2. U.S. Const. amend. XIV, § 2. This section provides for reduction in the number of Representatives when the state denies "male citizens" the right to vote. The intent was to assure grant of the franchise to black men. *See* Eleanor Flexner, Century of Struggle 146-150 (rev. ed. 1975).

3. *See* Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1874) (women qualify as persons and citizens within the fourteenth amendment's compass, so too do children; but status as a person and citizen does not carry with it the right to vote).

4. 335 U.S. 464 (1948).

5. 332 U.S. 261 (1947).

6. *Id.* at 290.

Warren Court reaffirmed the 1947 stand pat position. The Court said, in *Hoyt v. Florida*,[7] that it was rational, and therefore constitutional, for a state to spare women from the obligation to serve on juries in recognition of women's place at "the center of home and family life." The Warren Court of the 1960s thus held the base line set by the Supreme Court in the 1870s,[8] at the turn of the century,[9] and in the 1940s.[10] That base line tied tightly into the prevailing "separate-spheres" mentality, or breadwinner-homemaker dichotomy: It was man's lot, because of his nature, to be breadwinner, head of household, representative of the family outside the home; and it was woman's lot, because of her nature, not only to bear, but also to raise children, and keep the home in order.

Against this background, the Supreme Court's position on gender-based classifications in the 1970s stands out in bold relief. At odds with its "conservative" reputation, the Burger Court's performance was comparatively unrestrained, one might even say modestly revolutionary, in this area. Beginning in 1971, the Court declared law after law, both federal and state, unconstitutional for discriminating impermissibly on the basis of sex.[11] In 1974, to cite one of several 1970s examples, a Louisiana jury-selection system virtually identical to the Florida system unanimously upheld by the Warren Court in 1961 encountered a different fate: the High Court declared the system unconstitutional, voting 8-1.[12]

What happened in the intervening years — the years from

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7. 368 U.S. 57 (1961).

8. Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873) (rejecting woman's claim of constitutional right to be admitted to state bar if, apart from her sex, she possesses necessary qualifications).

9. Muller v. Oregon, 208 U.S. 412 (1908) (upholding state law restricting hours women permitted to work).

10. *See supra* text accompanying notes 4-5.

11. *See* Wendy W. Williams, *Sex Discrimination: Closing the Law's Gender Gap*, in The Burger Years: Rights and Wrongs in the Supreme Court 1969-1986, at 109, 123 (H. Schwartz ed. 1987) ("In the seventeen years during which Warren Burger was Chief Justice, equal protection doctrine in sex discrimination cases underwent a modest revolution."); Ruth Bader Ginsburg, *The Burger Court's Grapplings with Sex Discrimination*, in The Burger Court: The Counter-Revolution That Wasn't 132 (Vincent Blasi ed. 1983). *See also* Lewis F. Powell, Jr., *The Burger Court*, 44 Wash. & Lee L. Rev. 1, 6 (1987) (while Warren Court "seemed almost uninterested in sex discrimination," Burger Court "repeatedly has removed barriers to equality among the sexes").

The principal proscription invoked by the Court is the constraint expressed in the fourteenth amendment inhibiting government from "deny[ing] to any person . . . the equal protection of the laws." The equal protection clause of the fourteenth amendment applies by its terms only to actions by states. However, the Supreme Court has declared an equality guarantee of the same quality implicit in the due process clause of the fifth amendment, which controls actions by the federal government. *See, e.g.*, Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975).

12. Taylor v. Louisiana, 419 U.S. 522 (1975). *See* Duren v. Missouri, 439 U.S. 357

1961 to 1971 — that might explain this remarkable switch in the direction of the Supreme Court's judgments? Nothing new was added to the text of the Constitution. An equal rights amendment was proposed by Congress early in the 1970s,[13] but eventually failed to gain ratification by the legislatures of three-fourths of the states.

The change in the Justices' responses, I believe, reflected more than anything else a growing comprehension by jurists of a pervasive change in society at large. Rapid growth in women's employment outside the home, attended and stimulated by a revived feminist movement; changing patterns of marriage and reproduction; longer lifespans; even inflation — all were implicated in a social dynamic that yielded this new reality: in the 1970s, for the first time in our nation's history, the "average" woman in the United States was experiencing most of her adult years in a household not dominated by childcare requirements. Columbia economics professor Eli Ginzberg has called this development "the single most outstanding phenomenon" of the era in which we are living.[14]

Why did the Warren Court fail to foresee that development, and why did the Burger Court grasp it? In part the Court stood pat in the 1961 *Hoyt* case because the Justices were unable to view the differential treatment of men and women in the jury-selection context as in any sense *burdensome* to women. To turn in a new direction, the Court first had to comprehend that legislation apparently designed to benefit or protect women could often, perversely, have the opposite effect.

This was of critical importance, for most laws that drew an explicit line between men and women did so ostensibly to shield or favor the sex regarded as fairer but weaker, and dependent-prone. Laws prescribing the maximum number of hours or time of day women could work, or the minimum wages they could receive; laws barring females from "hazardous" or "inappropriate" occupations (lawyering in the nineteenth century, bartending in the twentieth); remnants of the common-law regime which denied to married women rights to hold and manage property, to sue or be sued in their own names, or to get credit from financial institu-

(1979) (holding unconstitutional state statute allowing "any woman" to opt out of jury duty).

13. On March 22, 1972, the Senate passed the amendment, thus completing congressional approval of the measure that had passed the House of Representatives in 1971. Proposed Amendment to the Constitution, S.J. Res. 8, 92d Cong., 1st Sess., 117 Cong. Rec. 271-72 (1971); S.J. Res. 9, 92d Cong., 1st Sess., 117 Cong. Rec. 272 (1971); H.R.J. Res. 208, 92d Cong., 1st Sess., 117 Cong. Rec. 526 (1971).

14. Quoted in Jean A. Briggs, *How You Going to Get 'Em Back in the Kitchen? (You Aren't)*, Forbes, Nov. 15, 1977, at 177.

tions (thus protecting them from their own folly or misjudgment) — all these prescriptions and proscriptions were premised on the base line assumption or belief that women could not fend for themselves; they needed a big brother's assistance.[15] Until the Supreme Court perceived that women were unfairly constrained by laws of this kind — laws of the bread-winning male/homemaking female mold — the Justices could not be expected to grapple with the formulation of constitutional doctrine capable of curtailing that injustice.

In retrospect, it is not difficult to discern the burdensome nature of legislation that confined women to a separate sphere. By enshrining and promoting the woman's "natural" role as homemaker, and correspondingly emphasizing the man's role as provider, the state impeded both men and women from pursuit of the very opportunities that would have enabled them to break away from familiar stereotypes. Thus, for example, excluding otherwise qualified men from attending a nursing school tends, as the Supreme Court held in 1982,[16] to "perpetuate the stereotyped view of nursing as an exclusively woman's job."[17] Instead of advancing women's welfare, this occupational reservation worked to assure lower wages in the nursing profession. Similarly, providing social security spousal (derivative) benefits to wives and widows automatically, but to husbands and widowers only on actual proof of "dependency,"[18] diminishes the worth of a woman's gainful employment, and can reinforce other disincentives to her work outside the family's home.

The changes in women's work and days, visible throughout society by the 1970s, eventually exposed to noticing judges the self-fulfilling potential of legislation once accepted as benign. Alteration and expansion of women's pursuits insistently called into question the once largely unchallenged assumption of women's "natural" dependence on men, and their lack of fitness for men's occupations. As women in ever-increasing numbers began to pursue economic opportunities outside the home, it became even harder to sustain the notion that their roles as wife and mother needed a panoply of special, sex-specific confining guards lest the very fabric of society disintegrate. And once the protective labels were stripped away from traditional legal restrictions and classifications governing women, the pervasive discriminatory effects of

15. *See* Ruth Bader Ginsburg, *Gender and the Constitution*, 44 U. Cin. L. Rev. 1, 2-7 (1975).

16. Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982).

17. *Id.* at 729.

18. *See* Califano v. Goldfarb, 430 U.S. 199 (1977).

those gross rankings stood out more clearly; most laws governing women *only* (or men *only*) could now be seen by people in the mainstream as hindering, not preserving, achievement of a genuinely natural division or sharing of labor between the sexes.

In 1976, following a series of path-marking cases,[19] the Supreme Court acknowledged that it had begun — and would continue — to scrutinize sex lines in the law carefully. The Court would not sustain differential treatment of men and women that was merely *rationally* related to some *permissible* government objective; the Court would instead strike out any gender classification absent a *substantial* relationship to an *important* objective.[20]

The word changes in the Supreme Court's formulation of doctrine — from "rational" to "substantial," and from "permissible" to "important" — may seem trivial, the kind of fine distinction only a lawyer could love. But judicial application of a closer look test in gender-based classification cases has real significance. With an eye on the clock, I will illustrate the point by describing only one of the key cases in the evolution of the Supreme Court's current approach.

When Paula Polatschek died in childbirth in 1972, her husband, Stephen Wiesenfeld, applied for Social Security benefits for himself and their infant son. He discovered that the Social Security Act awarded so called child-in-care benefits only to mothers, not to fathers. Stephen Wiesenfeld challenged this gender-based distinction, and ultimately won a unanimous judgment in the Supreme Court.[21] In defense of the sex line, the government had argued, first, that the distinction between widowed-mothers and widowed-fathers was entirely rational — that, in fact, widows, *as a class*, were more in need of financial assistance than were widowers. True in general, the Court replied, but defenses of sex stereotyping in laws as accurately reflecting the situation of the *average* woman or the *average* man were no longer good enough. The Court looked more closely at a United States society changing from old ways to new. That society included many widows who

19. The turning point case was Reed v. Reed, 404 U.S. 71 (1971), in which Chief Justice Burger wrote a brief opinion for a unanimous Court holding that it was unconstitutional for a state to accord men an automatic preference over women for estate administration purposes. Next, the Court held 8-1 in Frontiero v. Richardson, 411 U.S. 677 (1973), that it was unconstitutional to deny to female military officers housing and medical benefits covering their husbands on the same automatic basis as those family benefits were accorded to male military officers for their wives.

20. *See* Craig v. Boren, 429 U.S. 190, 197 (1976). *See also* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982).

21. Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).

had not been dependent on their husbands' earnings, and a still small but growing number of fathers like Stephen Wiesenfeld prepared to care personally for their children. Using sex as a convenient shorthand to substitute for financial need or willingness to bring up a baby, while not irrational, failed to survive the Court's more exacting mode of review.

The government sounded another theme in the *Wiesenfeld* case, however, one with a modern ring. The challenged distinction, it claimed, was not an instance of "romantic paternalism," the sort of "favor" that in fact operated to keep women in their place; on the contrary, the government urged, the mother's benefit could be viewed as a kind of affirmative action — it served to compensate women for the economic discrimination they still routinely encountered. This claim too withered under careful inspection. As Justice Stevens, concurring in a follow-up Social Security case,[22] remarked: "Congress simply assumed that all widows should be regarded as 'dependents' in some general sense . . . . Habit, rather than analysis or actual reflection, made it seem acceptable to equate the terms 'widow' and 'dependent surviving spouse.' "[23] This old "habit" or traditional way of thinking about women, the Supreme Court has indicated, is no longer acceptable to explain or excuse a gender-based legal classification attacked as unconstitutional.

The High Court in *Wiesenfeld* and a number of cases thereafter took a genuinely intermediate position. It did not utterly condemn the legislature's product. In essence, the Court instructed Congress and state legislatures: Rethink and reanalyze your position on these questions. Should you determine that compensatory legislation is in fact warranted because of the persistence of economic discrimination against women, we have left you a corridor in which to move. But your classifications must be refined, tied to an income test, for example, and not grossly drawn solely by reference to sex. The ball, one might say, was tossed gently back into the legislators' court where the political forces at work as a result of the new social dynamic could operate. The Supreme Court wrote moderately. It imposed no specific philosophy on the public, but by forcing legislative reexamination of the question, it helped ensure that the sometimes glacial pace of legal change would be speeded up.

The framework evolving at the time of the *Wiesenfeld* case persists to this day. It has enabled the Supreme Court effectively

22. Califano v. Goldfarb, 430 U.S. 199 (1977).
23. *Id.* at 222 (Rehnquist, J., dissenting).

to break the hold of the breadwinner-homemaker dichotomy by impelling equalization of the treatment of men and women with regard to estate administration,[24] military pay and allowances,[25] social insurance and welfare benefits,[26] workers' compensation,[27] the right to spousal support after divorce,[28] the right to parental support[29] — even the right to purchase alcoholic beverages.[30]

Some dramatic descriptions of the role the Supreme Court plays in the process of social change feature two extreme models. In one model, the Court aggressively seizes the lead rein of social progress, as some believe the Court did when it mandated the desegregation of public school systems beginning with the decision in *Brown v. Board of Education*[31] in 1954. At the opposite extreme, the Court in the early part of the twentieth century found — or thrust — itself into the vanguard of *resistance* to change, striking down as unconstitutional laws embodying a new philosophy of economic regulation at odds with the nineteenth century's *laissez-faire* approach.[32] During both periods, the Supreme Court was the object of intense public outcries in certain quarters and its precarious position in our constitutional system was exposed.

In the gender-equality area, the Court's performance fit neither of these descriptions. For the most part, the Court was neither out in front of, nor did it hold back, social change. Instead, what occurred was what engineers might call a "positive feedback" process, with the Court functioning as an amplifier — sensitively responding to, and perhaps moderately accelerating, the pace of change, change toward shared participation by members of both sexes in our nation's economic and social life.

I do not want to leave you with the impression that the judiciary has proceeded automaton-like — securely on course without missteps, detours, inconsistencies, and the like. Occasional fog is

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24. Reed v. Reed, 404 U.S. 71 (1971).

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

26. *See, e.g.*, Califano v. Westcott, 443 U.S. 76 (1979) (aid to families with dependent children).

27. Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142 (1980).

28. Orr v. Orr, 440 U.S. 268 (1979). *See also* Kirchberg v. Feenstra, 450 U.S. 455 (1981) (holding unconstitutional Louisiana's former "head and master" rule under which husband had unilateral right to dispose of jointly-owned property without his wife's consent).

29. Stanton v. Stanton, 421 U.S. 7 (1975).

30. Craig v. Boren, 429 U.S. 190 (1976) (boys must be permitted to buy 3.2 percent beer at the same age as girls).

31. 347 U.S. 483 (1954).

32. *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905) (state maximum hours regulation for bakery employees, covering men and women alike, held unconstitutional).

inevitable in this domain. Registration for the military draft[33] and statutory rape,[34] to take two 1980s examples, proved perplexing for the Justices.[35] And no bold line waiting to be revealed divides justifiable and genuinely helpful "affirmative action"[36] from action that reinforces the harmful notion that women need a boost or preference, because they cannot make it on their own.[37] A court too sure of itself on these matters may, in its zeal, take a giant stride, only to find itself perilously positioned on an unstable doctrinal limb.

A prime portion of the history of the Constitution, historian Richard Morris has said,[38] is the story of the ways constitutional rights and protections came to be extended to once ignored or excluded groups. The gender-equality line of cases commencing in the 1970s compose a vital chapter in that story. The chapter, as I read it, illustrates the kind of interplay among the people, the political branches, and the courts that has kept the "more perfect Union" ordained by the Constitution alive and vibrant over these last 200 years.

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33. Rostker v. Goldberg, 453 U.S. 57 (1981) (upholding as constitutional military draft registration limited to males).

34. Michael M. v. Sonoma Superior Court, 450 U.S. 464 (1981) (upholding state statutory rape law penalizing males but not females).

35. The Court has also wavered in dealing with claims of unwed fathers to full parental status, *see* Williams, *supra* note 11, at 120-21, and with classifications based explicitly on pregnancy. *Id.* at 115.

36. *See* Johnson v. Transp. Agency, Santa Clara County, 107 S. Ct. 1442 (1987) (upholding as moderate and flexible a plan to effect a gradual increase in representation of minorities and women in skilled craft worker job classifications).

37. *Cf.* Kahn v. Shevin, 416 U.S. 351 (1974) (upholding state property tax advantage reserved for widows); Associated Gen. Contractors of California, Inc. v. County of San Francisco, 813 F.2d 922 (9th Cir. 1987) (upholding provisions of ordinance that 1) reserved 2 percent of city's purchasing dollars for women-owned businesses, and 2) granted such businesses a 5 percent bidding preference).

38. Morris, *supra* note 1, at 41.