

EQUALITY AND CHOICE: SEX EQUALITY PERSPECTIVES ON REPRODUCTIVE RIGHTS IN THE WORK OF RUTH BADER GINSBURG

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Not only the sex discrimination cases, but the cases on contraception, abortion, and illegitimacy as well, present various faces of a single issue: the roles women are to play in society. Are women to have the opportunity to participate in full partnership with men in the nation's social, political, and economic life? This is a *constitutional* issue, . . . surely one of the most important in this final quarter of the twentieth century.

Ruth Bader Ginsburg, 1978¹

This brief essay explores the sex-equality perspective on reproductive rights that Ruth Bader Ginsburg has articulated over four decades as lawyer, law professor, judge, and Justice. Throughout her career, Ginsburg has viewed laws that deprive women of control over whether and when they bear children as raising questions of equality, as well as liberty and privacy. Ginsburg and other feminists of the 1970s argued that, given the social organization of caregiving work, the state may not deprive women of control over the decision to become mothers without depriving them of equal citizenship.

Over the decades, United States constitutional law has slowly responded to Ginsburg and the movement she helped lead, initially resisting sex-equality claims for reproductive choice, and then partly internalizing these values. Sex-equality reasoning about reproduction now informs the constitutional law of abortion and shapes legislated approaches to pregnancy discrimination, yet plays little role in doctrines protecting women's access to contraception. Sex equality reasoning about reproduction is at the

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1 Ruth Bader Ginsburg, *Sex Equality and the Constitution: The State of the Art*, 4 WOMEN'S RTS. L. REP. 143, 143–44 (1978) [hereinafter *The State of the Art*].

center of the Court's holding in *Nevada Department of Human Resources v. Hibbs*² that Congress had power under the Fourteenth Amendment to enact the family leave provisions of the Family and Medical Leave Act (FMLA),³ yet is wholly absent in the plurality and concurring opinions in *Coleman v. Court of Appeals of Maryland*⁴ that Congress lacked power under the Fourteenth Amendment to enact the self-care provisions of the FMLA—a judgment from which Justice Ginsburg dissented passionately and at length.

I. As an ACLU Lawyer: *Struck v. Secretary of Defense*⁵

From the beginning, Justice Ginsburg understood government regulation of women's reproductive choices as presenting core questions of sex equality. One of Ginsburg's earliest Supreme Court briefs for the ACLU, filed in *Struck v. Secretary of Defense*, advanced the cause of a woman who had been forcibly discharged from the Air Force because she was pregnant.⁶ Under then-prevailing government policy, new mothers could not serve in the armed services, while new fathers could; a pregnant service woman could avoid discharge only if she aborted the pregnancy.⁷

As Justice Ginsburg recently recalled:

[T]he ACLU had taken on, along with *Struck*, several other cases challenging the rule, then maintained by all the Armed Forces, requiring pregnant service members to choose between abortion and ouster from the military. But Captain Struck's case was our frontrunner. We aimed to present the issue of reproductive choice through her eyes and

2 538 U.S. 721 (2003).

3 *Id.*

4 132 S. Ct. 1327 (2012).

5 *Struck v. Sec'y of Def.*, 460 F.2d 1372 (9th Cir. 1972), *cert. granted*, 409 U.S. 947 (Oct. 24, 1972) (No. 72-178). Ultimately, the Air Force opted to waive Struck's discharge before the Supreme Court could decide the case. *Struck v. Sec'y of Def.*, 460 F.2d 1372 (9th Cir. 1972), *vacated and remanded for consideration of mootness*, 409 U.S. 1071 (Dec. 18, 1972).

6 Brief for Petitioner, 460 F.2d 1372 (9th Cir. 1972), *cert. granted*, 409 U.S. 947 (Oct. 24, 1972) (No. 72-178), 1972 WL 135841.

7 *Id.* at 3. For recent accounts of the *Struck* case that I co-authored with Neil Siegel, with a comment by Justice Ginsburg, see Neil S. Siegel & Reva B. Siegel, *Struck by Stereotype: Ruth Bader Ginsburg on Pregnancy Discrimination as Sex Discrimination*, 59 DUKE L.J. 771 (2010); Ruth Bader Ginsburg, *A Postscript to Struck by Stereotype*, 59 DUKE L.J. 799 (2010); see also Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83 (2010).

experience. Captain Struck chose birth, but her Government made that choice a mandatory ground for discharge.⁸

Ginsburg's merits brief challenged Struck's exclusion from military service on equal protection and due process privacy grounds. Ultimately, the government would change its policy with the aim of mooted Struck's case.⁹

Ginsburg's 1972 brief argued that Struck's discharge for pregnancy violated the Equal Protection Clause. The brief appeals to several conceptually distinct understandings of equality, which together interact to produce a compelling argument for sex equality in the regulation of women's reproductive choices:

A. The familiar demand for equal treatment: In the *Struck* brief, Ginsburg argued that mandatory discharge from the military for mothers-to-be, but not fathers-to-be, enforced a double standard in matters of sex and family roles.¹⁰ As the brief wryly observed, unlike women in the Air Force, "[m]en in the Air Force are not constrained to avoid the pleasures and responsibilities of procreation and parenthood."¹¹

B. The anti-stereotyping principle: Ginsburg's equal protection argument objected to different treatment, and something more. It challenged (1) government imposition of (2) traditional, stereotypical sex roles on men and women. Ginsburg argued, "Mandatory pregnancy discharge reinforces societal pressure [on women] to relinquish career aspirations for a hearth-centered existence."¹² Air Force policy enforced the "discredited notion that a woman who becomes pregnant is not fit for duty, but should be confined at home to await childbirth and

8 Ginsburg, *A Postscript to Struck by Stereotype*, *supra* note 7, at 799.

9 See Siegel & Siegel, *Struck by Stereotype*, *supra* note 7, at 777-78 (describing the recommendation of Solicitor General Griswold that the Air Force waive Struck's discharge and abandon their automatic discharge policy; after the Air Force complied, Griswold moved to dismiss the case as moot). See also Memorandum Suggesting Mootness, *Struck v. Sec'y of Def.*, 409 U.S. 1071 (1972) (No. 72-178). For Ginsburg's response to the motion, see Opposition to Memorandum for the Respondents Suggesting Mootness, *Struck*, 409 U.S. 1071 (No. 72-178).

10 E.g., Brief for Petitioner, *supra* note 6, at 65 (describing "the double standard adopted by the Air Force with respect to parenthood: fathers, but not mothers are welcome in the service").

11 *Id.* at 48.

12 *Id.* at 37.

thereafter devote herself to child care.”¹³ As the quoted passages illustrate, the brief’s challenge to state-imposed sex roles was especially concerned with legal imposition of the breadwinner/caregiver family roles historically associated with the separate spheres tradition.¹⁴

C. The anti-subordination principle: The *Struck* brief characterized the harm of government-imposed sex roles in the language of subordination. Ginsburg argued that the law’s “[p]resumably well meaning exaltation of women’s unique role in bearing children has, in effect, denied women equal opportunity to develop their individual talents and capacities and has impelled them to accept a dependent, subordinate status in society.”¹⁵ The harm described here is *dignitary* as well as material: the law denies women the capacity to lead autonomous self-governing lives, and instead imposes on women, as a group, a dependent subordinate status.

Another groundbreaking aspect of the *Struck* brief is the way it connects liberty and equality. Most simply, the brief connects liberty and equality in challenging the Air Force policy by appealing to the equal protection and substantive due process components of the Fifth Amendment’s Due Process Clause.¹⁶ But the brief does not simply challenge the Air Force policy on two different constitutional grounds; it shows how each constitutional concern implicates the other. The brief demonstrates how practices that deny women equal treatment limit their freedom,¹⁷ and how practices that constrain women’s liberty

13 *Id.* at 52.

14 *See supra* note 7.

15 Brief for Petitioner, *supra* note 6, at 38; *see also* Siegel & Siegel, *Struck by Stereotype*, *supra* note 7, at 782-91 (discussing the antisubordination themes in the *Struck* brief).

16 *See* Brief for Petitioner, *supra* note 6, at 12 (“The fifth amendment due process clause encompasses guarantees of security from arbitrary treatment and of equal protection of the laws; petitioner’s case rests upon these fundamental guarantees.”); *id.* at 22 (“The sex-based classification in the Air Force regulation applied to petitioner, directing discharge for pregnancy, a physical condition unique to the female sex, while no other temporary physical condition occasions peremptory discharge, is inconsistent with the equal protection principle inherent in the due process clause of the fifth amendment.”).

17 *See id.* at 52 (“The discriminatory treatment required by the challenged regulation, barring pregnant women and mothers from continued service in the Air Force, reflects the discredited notion that a woman who becomes pregnant is not fit for duty, but should be confined at home to await childbirth and thereafter devote herself to child care. Imposition of this outmoded standard upon petitioner unconstitutionally encroaches upon her right to privacy in the conduct of her personal life.”); *id.* at 54-55 (“The Air Force regulation applied to petitioner substantially infringes upon her right to sexual privacy, and her autonomy in deciding “whether to bear . . . a child. . . . [N]o regulation discourages men in the Air Force, whether married or single, from fathering children. If a man and a woman, both Captains in the Air Force, conceive a child, the man is

deny women equality. A recurring theme of the brief is that laws that stereotype—that constrain women’s freedom in the choice of social roles—deprive women of equal citizenship.¹⁸ In so arguing, Ginsburg was giving early and especially forceful legal expression to equality arguments for reproductive rights advanced by feminists as they joined the campaign in the early 1970s to repeal abortion restrictions.¹⁹

II. Over the Decades: As a Professor and Judge

Ginsburg’s 1972 brief in *Struck* opened themes she would pursue as an advocate, as a professor, as an appellate judge, and as a Supreme Court justice. From the very beginning, Ginsburg saw regulation constraining women’s reproductive choices as presenting equal protection questions. And from the very beginning, the United States Supreme Court resisted the claims of the women’s movement that the regulation of women’s reproductive lives should be analyzed in an equal protection framework. In 1974, the Supreme Court ruled in *Geduldig v. Aiello*²⁰ (a movement case litigated by Wendy Williams) that exclusion of pregnancy from a comprehensive disability benefits program did not violate the Equal Protection Clause because discrimination on the basis of pregnancy was not necessarily “discrimination based upon gender as such.”²¹ Professor Ginsburg objected, in exasperation, in the 1975 *Supreme Court*

free to continue his service career, but the woman is subject to involuntary discharge.”).

18 See *supra* text accompanying notes 12-13.

19 See LINDA GREENHOUSE & REVA B. SIEGEL, BEFORE *ROE V. WADE*: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT’S RULING; A DOCUMENTARY HISTORY 117-218 (2d ed. 2012); Reva B. Siegel, *Roe’s Roots: The Women’s Rights Claims That Engendered Roe*, 90 B.U. L. REV. 1875, 1878-79 (2010) (describing expressions of the sex equality argument for reproductive rights within the women’s movement in the years before *Roe v. Wade*) [hereinafter *Roe’s Roots*].

20 417 U.S. 484 (1974).

21 *Id.* at 497 n.20. The majority continues:

While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed*[, 404 U.S. 71 (1971),] and *Frontiero*[, 411 U.S. 677 (1973)]. Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.

Id.

Review: “Is the answer that pregnancy can’t happen to man, therefore pregnancy classifications can’t discriminate on the basis of sex? Or because they affect women exclusively do pregnancy classifications merit particularly careful inspection?”²² She then emphasized: “Discussed at length in Appellees’ brief were the stereotypical attitudes and generalizations about sex roles in society underlying disadvantageous job-related treatment of pregnant women.”²³

In a series of papers published in 1978 after Kenneth Karst’s groundbreaking *Harvard Law Review Foreword*,²⁴ Professor Ginsburg further raised the stakes, insisting that the Court was misapprehending the sex-role logic of laws that excluded pregnant employees from work and that criminalized women’s access to contraception and abortion:

The High Court has not yet perceived the full dimension of current controversy surrounding gender-based discrimination. . . . Not only the sex discrimination cases, but the cases on contraception, abortion, and illegitimacy as well, present various faces of a single issue: the roles women are to play in society. Are women to have the opportunity to participate in full partnership with men in the nation’s social, political, and economic life? This is a *constitutional* issue, Professor Karst underscored, surely one of the most important in this final quarter of the twentieth century.²⁵

Ginsburg was concerned about the Court’s failure to recognize that there was textual authority for the movement’s constitutional claims—the Court’s failure to base its decisions about contraception and abortion on the Equal Protection Clause. But she was also concerned about the Court’s grasp of the social concerns at stake in the regulation of contraception and abortion, the Court’s inability to appreciate that laws criminalizing contraception and abortion define “the roles women are to play in society.”²⁶ Professor Ginsburg continued:

22 Ruth Bader Ginsburg, *Gender in the Supreme Court: The 1973 and 1974 Terms*, 1975 SUP. CT. REV. 1, 8 (1975).

23 *Id.* at 10.

24 Kenneth L. Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977) (looking to the constitutional origins and early development of the principle of equal citizenship to demonstrate its role in Warren and Burger Court Equal Protection Clause jurisprudence).

25 Ginsburg, *The State of the Art*, *supra* note 1, at 143-44.

26 *Id.*

Unlike Professor Karst, the Supreme Court either does not see, or is unwilling to acknowledge, all of these cases as part and parcel of a single large issue. Precedent to date generally places explicit gender-based differentials, illegitimacy, pregnancy, and abortion in separate cubbyholes. *Roe v. Wade* and *Doe v. Bolton*, the 1973 abortion decisions, for example, barely mention women's rights. They are not tied to equal protection or equal rights theory. Rather, the Supreme Court anchored stringent review to concepts of personal privacy or autonomy derived from the due process guarantee. Prof. Laurence Tribe pointed out that nothing in the Supreme Court analysis in *Roe v. Wade* and *Doe v. Bolton* turned on the sex specific impact of abortion restrictions. A broader frame for these decisions might have *made it more difficult for the Court to rule*, as it did stunningly in June 1977, that neither the Constitution nor federal statute requires medicaid reimbursement for elective abortions.²⁷

In the *Tulane Law Review* later that year, she observed:

Eventually, the Court may take abortion, pregnancy, out-of-wedlock birth, and explicit gender-based differentials out of the separate cubbyholes in which they now rest, acknowledge the practical interrelationships, and treat these matters as part and parcel of a single, large, sex equality issue. That synthesis perhaps depends on clearer directions from the political arena, but it seems a likely candidate for 1980's development.²⁸

But something else happened instead, dynamics that Susan Faludi memorably termed "backlash."²⁹ By the late 1970s, evangelical Protestants began to join conservative

27 *Id.* at 144 (emphasis added) (citing *Roe v. Wade*, 410 U.S. 113 (1973), *Doe v. Bolton*, 410 U.S. 179 (1973), and LAURENCE TRIBE, TREATISE ON AMERICAN CONSTITUTIONAL LAW, §§ 15-10, 16-27 n.6 (1978), and referencing the Supreme Court's decisions *Beal v. Doe*, 423 U.S. 438 (1977), *Maher v. Roe*, 432 U.S. 464 (1977), and *Poelker v. Doe*, 432 U.S. 519 (1977)). For a more detailed account of the Court's analysis in *Roe*, see Siegel, *Roe's Roots*, *supra* note 19, at 1896-1902 (showing how *Roe*, at best, indistinctly acknowledged the claims of the women's movement to which it was, in part, responding). For a further example of the Court overlooking the sex equality dimension of reproductive rights, see *Harris v. McRae*, 448 U.S. 297 (1980) (holding that abortion funding restrictions were presumptively benign, rationally related to the government's legitimate objective to protect potential life, and not subject to strict scrutiny).

28 Ruth Bader Ginsburg, *Sex Equality and the Constitution*, 52 TUL. L. REV. 451, 462 (1978).

29 SUSAN FALUDI, BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN (1991).

Catholics in attacking *Roe*.³⁰ These and other developments led Phyllis Schlafly to focus her campaign against the Equal Rights Amendment (ERA) on the claim that the ERA would constitutionalize abortion and same-sex marriage.³¹ In response, many feminist advocates sought to disassociate abortion and equality during the last years of the ratification campaign—a strategy that Professor Ginsburg appears at least indirectly to have supported.³²

In 1980, the year of Ginsburg's nomination by President Carter to the federal bench, Ronald Reagan was elected on a Republican platform that promised to appoint judges "who respect traditional family values and the sanctity of innocent human life."³³ (Note how the platform attacks the ERA and abortion and associates "pro-family" and "pro-life" values.³⁴) The time for ratification of the ERA expired and through twelve years of conservative governance, the composition of the federal bench began fatefully to change.

As a sitting federal judge in the 1980s and 1990s, Ginsburg lamented the Court's failure to ground the abortion right in sex equality. As she put it in 1985:

30 See Linda Greenhouse & Reva B. Siegel, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 YALE L.J. 2028, 2060-67 (2011) (describing the mobilization of Evangelical Protestants against abortion in the late 1970s).

31 See Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CALIF. L. REV. 1323, 1389-1403 (2006) (discussing Schlafly's campaign against the ERA, which linked the ERA with abortion and homosexuality) [hereinafter *The Case of the de facto ERA*].

32 For illustrations, see *id.* at 1393-94. In 1979, Ginsburg wrote that "votes against the ERA have been urged on the ground that the amendment authorizes abortion—an inflammatory, but not an accurate charge. The Supreme Court solidly anchored its 1973 rulings in the reproductive choice cases to the due process guarantee, not to an equality idea." Ruth Bader Ginsburg, *Ratification of the Equal Rights Amendment: A Question of Time*, 57 TEX. L. REV. 919, 937 (1979). Generally, however, Ginsburg's arguments in support of the ERA recounted and countered objections to the amendment without mentioning the abortion right. See also *infra* text accompanying note 35 (adverting to concerns about isolating debates on abortion and equality).

33 Plank on the Judiciary, 1980 Republican Party Platform, *reprinted in* 38 CONG. Q. 2030, 2046 (1980).

34 See, e.g., Robert C. Post & Reva B. Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. L. REV. 373, 418-24 (2007) (describing New Right coalition building and the relationship between the ERA, traditional family values, and the right-to-life movement); Rosalind Pollack Petchesky, *Antiabortion, Antifeminism, and the Rise of the New Right*, 7 FEMINIST STUD. 206 (1981) (analyzing the role of antiabortion and antifeminist politics in the New Right's rise to power); see also Allen Hunter, *Virtue with a Vengeance: The Pro-Family Politics of the New Right* 215-28 (June 1984) (unpublished Ph.D. dissertation, Brandeis University) (on file with author) (describing how the New Right developed the pro-family coalition by uniting single-issue groups).

[T]he Court's *Roe* position is weakened, I believe, by the opinion's concentration on a medically approved autonomy idea, to the exclusion of a constitutionally based sex-equality perspective. *I understand the view that for political reasons the reproductive autonomy controversy should be isolated from the general debate on equal rights, responsibilities, and opportunities for women and men.* I expect, however, that organized and determined opposing efforts to inform and persuade the public on the abortion issue will continue through the 1980s. In that process there will be opportunities for elaborating in public forums the equal-regard conception of women's claims to reproductive choice uncoerced and unsteered by government.³⁵

With prospects for renewing the ERA campaign receding, feminists became more vocal in advancing equality arguments for reproductive freedom.³⁶ While discussing the *Struck* case during her Supreme Court confirmation hearing in 1993, Judge Ginsburg was asked by Senator Hank Brown whether the equality reasoning extended to abortion, as well. Ginsburg answered:

[Y]ou asked me about my thinking about equal protection versus individual autonomy, and my answer to you is it's both. This is something central to a woman's life, to her dignity. It's a decision that she must make for herself. And when Government controls that decision for her, she's being treated as less than a fully adult human responsible for her own choices.³⁷

III. Reproductive Rights in the Supreme Court

Has United States law responded to the equality claims for reproductive rights that

35 Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 386 (1985) (emphasis added).

36 See Siegel, *The Case of the de facto ERA*, *supra* note 31, at 1398-1404 (describing how, as the ERA's prospects waned, feminists stopped self-censoring and began to assert sex-equality arguments for reproductive rights, among others). For one example, see Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1200 (1992) ("The *Roe* decision might have been less of a storm center had it . . . honed in more precisely on the women's equality dimension of the issue . . .").

37 *THE SUPREME COURT; Excerpts from Senate Hearing on the Ginsburg Nomination*, N.Y. TIMES, July 22, 1993, at A20.

Justice Ginsburg and the United States women's movement have been making since the early 1970s? *Roe* scarcely acknowledges feminist arguments of the era.³⁸ The feminist arguments associating abortion and sex equality are more legible in the campaign *against* the ERA, where opponents invoked the association as reason to oppose ratification.³⁹

Yet by the 1980s, the Supreme Court decisions concerning abortion quietly began to incorporate feminist equality claims for reproductive rights. In 1986, Justice Blackmun concluded *Thornburgh v. American College of Obstetricians & Gynecologists*⁴⁰ by rejecting legislation seeking to narrow the abortion right, writing:

Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision—with the guidance of her physician and within the limits specified in *Roe*—whether to end her pregnancy. A woman's right to make that choice freely is fundamental. Any other result, in our view, would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all.⁴¹

In the last words of his opinion, Justice Blackman emphasized that the abortion right concerned equality as well as autonomy: women's *equal freedom* with men to be self-governing.⁴²

38 See *supra* note 27.

39 Siegel, *The Case of the de facto ERA*, *supra* note 31, at 1392-94 (“On Schlafly’s account, the ERA would (1) “degrade the homemaker role and support economic development requiring women to seek careers” (and requiring government to provide child care), (2) protect the right to an abortion, on the theory that ‘any restriction of abortion would be . . . sex discriminatory because it impacts one sex only,’ and (3) grant same-sex couples the right to marry.”) (citations omitted); see also Post & Siegel, *supra* note 34, at 418-19 (“By associating the ERA and abortion as the twin aims of ‘women’s liberation,’ Schlafly used each to redefine the meaning of the other. Schlafly’s anti-ERA frames and networks helped construct the *Roe* decision that reverberated explosively through ERA debates in the 1970s and 1980s.”).

40 476 U.S. 747 (1986), *overruled by* *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

41 *Id.* at 772.

42 *Id.* (“Our cases long have recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government. . . . That promise extends to women as well as to men.”)

In the Supreme Court's 1992 decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,⁴³ the Court reaffirmed, while significantly narrowing, the abortion right, in a decision that repeatedly reasoned about the abortion right as respecting women's equality. The portion of the plurality opinion attributed to Justice Kennedy invoked dignity to explain why the Constitution protects decisions regarding family life: "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment."⁴⁴ Kennedy explained that the State could not impose "its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture."⁴⁵ This is a sex equality understanding of dignity, resonant with themes that Ginsburg as a lawyer, professor, judge, and Justice wove through the Court's equal protection sex discrimination cases. The joint opinion recognized that "the ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."⁴⁶ The joint opinion's invalidation of spousal notification requirements similarly invoked sex equality principles, which it associated with freedom from laws enforcing traditional gender roles in the family.⁴⁷ As I have elsewhere written, the joint opinion expressed "constitutional limitations on abortion laws in the language of its equal protection sex discrimination opinions, illuminating liberty concerns at the heart of the sex equality cases in the very act of recognizing equality concerns at the root of the liberty cases."⁴⁸

Despite the sex equality reasoning threading through *Casey*'s due process analysis, the Court has never done what Justice Ginsburg imagined: taken "abortion, pregnancy, out-of-wedlock birth, and explicit gender-based differentials out of the separate cubbyholes in which they now rest, acknowledge[d] the practical interrelationships, and treat[ed] these matters as part and parcel of a single, large, sex equality issue."⁴⁹

43 505 U.S. 833 (1992).

44 *Id.* at 851.

45 *Id.* at 852.

46 *Id.* at 835.

47 *E.g., id.* at 896-98. ("Only one generation has passed since this Court observed that 'woman is still regarded as the center of home and family life,' with attendant 'special responsibilities' that precluded full and independent legal status under the Constitution. These views, of course, are no longer consistent with our understanding of the family, the individual, or the Constitution.") (citations omitted).

48 See Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815, 831 (2007); Siegel, *Roe's Roots*, *supra* note 19, at 1904.

49 Ginsburg, *Sex Equality and the Constitution*, *supra* note 28, at 462.

That was terrain for Justice Ginsburg to cross in her 2007 dissent, joined by three other Justices, in *Gonzales v. Carhart*,⁵⁰ the so-called partial birth abortion ban case. Justice Ginsburg quoted *Casey*'s sex equality reasoning in her *Gonzales v. Carhart* dissent.⁵¹ But she went even further. Where *Casey* drew upon the conceptual framework of the sex equality argument for abortion rights—that government cannot use the power of the state to enforce traditional sex roles on women—Justice Ginsburg's *Carhart* dissent cited key equal protection sex discrimination precedents, including decisions she litigated and wrote, fusing the normative power of equality arguments with the textual authority of the Equal Protection Clause.⁵²

The Court's liberal Justices have now begun to reason about abortion by appeal to the authority of the Equal Protection Clause; the question is whether Justice Kennedy might ever be moved to do so. James Bopp, Jr.,⁵³ longtime lawyer for the National Right to Life Committee (and architect of *Citizens United*⁵⁴), has urged anti-abortion advocates to challenge *Roe* incrementally and cautioned against pressing personhood amendments; in Bopp's view a constitutional challenge to a personhood amendment might provide the occasion for Justice Kennedy to endorse Justice Ginsburg's understanding of the abortion right.⁵⁵ In a strategy memo to the anti-abortion movement, Bopp warned:

50 550 U.S. 124 (2007).

51 See, e.g., *id.* at 171 (Ginsburg, J., dissenting) ("As *Casey* comprehended, at stake in cases challenging abortion restrictions is a woman's 'control over her [own] destiny.' . . . Women, it is now acknowledged, have the talent, capacity, and right 'to participate equally in the economic and social life of the Nation.' Their ability to realize their full potential, the Court recognized, is intimately connected to 'their ability to control their reproductive lives.'") (citations omitted).

52 See, e.g., *id.* at 185 (Ginsburg, J., dissenting) (citing *United States v. Virginia*, 518 U.S. 515 (1996), and *Califano v. Goldfarb*, 430 U.S. 199 (1997), to suggest that the majority opinion "reflects ancient notions about women's place in the family and under the Constitution—ideas that have long since been discredited").

53 James Bopp, Jr., has served as general counsel for the National Right to Life Committee since 1978. See *NRLC General Counsel James Bopp Named Republican Lawyer of the Year*, NAT'L RIGHT TO LIFE NEWS, Sept. 2009, at 8, 8, available at <http://www.nrlc.org/news/2009/NRL09/Bopp.html>. Bopp represented *Citizens United* as the initial lawyer in their campaign finance law challenge, initiating—but ultimately not arguing—the 2010 Supreme Court case. See David D. Kirkpatrick, *A Quest to End Spending Rules for Campaigns*, N.Y. TIMES, Jan. 24, 2010, available at <http://www.nytimes.com/2010/01/25/us/politics/25bopp.html>.

54 130 S. Ct. 876 (2010).

55 See Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694, 1734-35, 1779-80 (2008).

But if 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*, 127 S. Ct. 1610 (2007), the dissent, written by Justice Ginsberg [sic], in fact did so. *See id.* at 1641 (Ginsberg, [sic] J., joined by Stevens, Souter, and Breyer, JJ.) (“[L]egal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman’s autonomy to determine her life’s course, and thus to enjoy equal citizenship stature.”) . . . A law prohibiting abortion would force Justice Kennedy to vote to strike down the law, giving Justice Ginsberg [sic] the opportunity to rewrite the justification for the right to abortion for the Court. This is highly unlikely in a case that decides the constitutionality of such things as PBA bans, parental involvement laws, women’s right to-know laws, waiting periods, and other legislative acts that do not prohibit abortion in any way, since Justice Kennedy is likely to approve such laws.⁵⁶

Like Justice Ginsburg, James Bopp believes that an abortion right expressly and textually anchored in the Equal Protection Clause would be much harder to disentrench.

IV. Sex-Equality Perspectives on Reproductive Regulation Today

Over the last several decades, the anti-stereotyping understanding of equality that informed Ginsburg’s work as an advocate, academic, and judge has increasingly come to guide Supreme Court decisions about the regulation of reproduction. As we have seen, *Casey* drew on anti-stereotyping concepts to restate and reaffirm substantive due process doctrines that protect women’s freedom to make decisions about whether to carry a pregnancy to term.⁵⁷ Even as contest narrows the abortion right, United States constitutional law remains distinctive in its concern to protect women’s role-autonomy

56 See Legal Memorandum from James Bopp, Jr. & Richard E. Coleson, Attorneys at Law, To Whom It May Concern on Pro-life Strategy Issues 3-4 (Aug. 7, 2007), available at <http://operationrescue.org/pdfs/Bopp%20Memo%20re%20State%20HLA.pdf>.

57 See *supra* text accompanying notes 44-46.

in making decisions about motherhood.⁵⁸ And, after three decades of litigation under the Pregnancy Discrimination Amendment (PDA), the exclusion of pregnant women from employment is regularly analyzed on sex-equality and sex-stereotyping grounds. PDA case law has in turn begun to shape constitutional understandings of pregnancy in the workplace.⁵⁹

That said, courts still cannot decide whether the restriction of contraceptive benefits raises a problem of sex discrimination under Title VII, and if so, why.⁶⁰ The only sustained account of pregnancy-related discrimination as unconstitutional sex discrimination that the Court has provided appears in *Nevada Department of Human Resources v. Hibbs*⁶¹ where the Court upheld Congress's power to enact the family-care provisions of the Family and Medical Leave Act (FMLA) under Section Five of the Fourteenth Amendment. At the heart of *Hibbs*'s holding that Congress had power to enact the FMLA's family leave provisions to remedy equal protection violations is the recognition that stereotyping of "women when they are mothers and mothers-to-be" plays a central role in discrimination against women at work.⁶²

58 Many jurisdictions allow women to make decisions about abortion free from criminal sanction. It is far less common for a court to interpret a constitution as requiring government to respect women's autonomy in making such decisions. See Reva B. Siegel, *The Constitutionalization of Abortion*, in THE OXFORD HANDBOOK OF CONSTITUTIONAL LAW 1057-78 (Michel Rosenfeld & András Sajo eds., 2012).

59 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, 1897-98 (2006) [hereinafter *You've Come A Long Way, Baby*].

60 In analyzing restrictions on contraception, courts are inclined to reason from legislative history and statutory text or look comparatively at whether employers include men's contraception in benefits, rather than to reason about contraception as a practice affording women control over work and family roles. See, e.g., *In re Union Pac. R.R. Emp't Practices Litig.*, 479 F.3d 936 (8th Cir. 2007) (holding that the exclusion of contraception from an employee health insurance plan did not violate the PDA or Title VII because contraception is not "related to" pregnancy for PDA purposes and because the health plan equally denied contraception coverage to men and women). Even the District Court, which found for the plaintiffs, emphasized statutory text, purpose, and agency interpretation, leaving consideration of "the social consequences of unplanned pregnancies [on women, children, and society] for discussion in the legislative arena." *In re Union Pac. R.R. Employment Practices Litig.*, 378 F. Supp. 2d 1139, 1145 (D. Neb. 2005).

61 E.g., *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (holding that because the family-care provision of the Family and Medical Leave Act of 1993 deters and remedies violations of equal protection, state employees could recover money damages in federal court in the event of state noncompliance).

62 *Id.* at 736; see Siegel, *You've Come A Long Way, Baby*, *supra* note 59, at 1897-98 ("A quarter century of women's workforce participation under the protections of the Pregnancy Discrimination Amendment changed the social meaning of laws regulating pregnancy sufficiently that such laws came vividly to represent the threat of sex-stereotyping . . . *Hibbs* presents Title VII, the Pregnancy Discrimination Amendment, and the Family and Medical Leave Act as remedies for state action reflecting sex stereotypes about 'women when

Hibbs represents a crucial development in the Court's equal protection sex discrimination jurisprudence precisely because *Hibbs* recognizes pregnancy as a key locus of sex stereotyping directed against women who "are mothers or mother-to-be" (and does not simply treat pregnancy as a ground of "real difference" between the sexes). *Hibbs* opens the door to a new generation of equal protection cases arising out of stereotypes about, or animus against, women who "are mothers or mothers-to-be." In the wake of *Hibbs*, the Court can read *Geduldig* more narrowly—and accurately—as allowing courts to find that under the Equal Protection Clause, certain acts of discrimination relating to pregnancy *are* discrimination on the basis of sex.⁶³ *Hibbs*' understanding of discrimination—focused on young women who are or who are about to become mothers—was painstakingly forged through decades of litigation under the Pregnancy Discrimination Act and in conflicts over the Court's privacy and equal protection cases.⁶⁴

But *Hibbs*'s understanding of the dynamics of sex stereotyping is conspicuously absent in the Court's recent ruling in *Coleman v. Court of Appeals of Maryland*⁶⁵ that Congress lacked power under Section Five to enact the medical leave provisions of the Family Medical Leave Act—a decision from which Justice Ginsburg forcefully

they are mothers and mothers-to-be—a form of bias *Hibbs* describes as the root of sex discrimination . . . *Hibbs* is quite frank in recounting this shift in constitutional perspective, as the nation's and as the Court's own." (citation omitted).

63 See Siegel, *You've Come A Long Way, Baby*, *supra* note 59, at 1891-92 ("In fact, *Geduldig* holds that 'not . . . every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed* . . . and *Frontiero*.' It leaves open the possibility that some legislative classifications concerning pregnancy are sex-based classifications like those considered in *Reed* and *Frontiero*." (citations omitted); Neil S. Siegel & Reva B. Siegel, *Pregnancy and Sex Role Stereotyping: From Struck to Carhart*, 70 OHIO ST. L.J. 1095, 1112 (2009) ("As the language of the Court's opinion makes clear, *Geduldig* did not hold that discrimination on the basis of pregnancy is never discrimination on the basis of sex; rather, *Geduldig* held that discrimination on the basis of pregnancy is not always discrimination on the basis of sex.").

64 See *supra* note 61; see also Siegel, *You've Come A Long Way, Baby*, *supra* note 59, at 1873 ("*Hibbs* is the first Supreme Court opinion to recognize that laws regulating pregnant women can enforce unconstitutional sex stereotypes, and so introduces an important new understanding of when discrimination on the basis of pregnancy is discrimination on the basis of sex under *Geduldig v. Aiello*." (citations omitted); Siegel & Siegel, *Pregnancy and Sex Role Stereotyping*, *supra* note 63, at 1113 ("[T]he Court is now more quick to recognize constitutional concerns at stake in the law's regulation of pregnant women. Equal protection and due process law today require scrutiny of laws governing pregnancy to ensure that exercises of public power aimed at pregnant women, however benign in purpose, are not in fact shaped by gender bias. What *Geduldig* anticipates in theory, *Hibbs* and *Casey* illustrate in practice.").

65 132 S. Ct. 1327 (2012).

dissented.⁶⁶ Justice Kennedy, writing for a plurality of the Court, voted to deny Section Five enforcement power for the medical leave provision, asserting that Congress had failed to document how providing sick-leave deterred or remedied sex discriminatory state action.⁶⁷ In a lengthy account of the deliberations shaping design of the FMLA, Justice Ginsburg demonstrated that the gender-neutral self-care and family-care provisions of the statute advanced Congress's goal of integrating work and family by means that would alleviate rather than exacerbate discrimination against women.

As Justice Ginsburg showed, Congress heard testimony that adding self-care leave to the statute would serve these ends in at least two ways. Requiring employers to provide employees self-care leave would provide female employees pregnancy-related leave, while “ward[ing] off the unconstitutional discrimination [Congress] believed would attend a pregnancy-only leave requirement.”⁶⁸ Further, adding self-care leave would balance the Act's gender-neutral family leave provisions, which employers might view as protecting women's leave, with a form of leave employers would expect employees of both sexes to use, thereby diminishing the risk that the employers would view the new federal legislation as guaranteeing leave to women only. “By reducing an employer's perceived incentive to avoid hiring women, [self-care leave] lessens the risk that the FMLA as a whole would give rise to the very sex discrimination that it was enacted to thwart.”⁶⁹ The Act's gender-neutral self-care and family leave provisions worked together, Justice Ginsburg concluded:

Essential to its design, Congress assiduously avoided a legislative package that, overall, was or would be seen as geared to women only. Congress thereby reduced employers' incentives to prefer men over women, advanced women's economic opportunities, and laid the foundation for more egalitarian relationship at home and at work. The self-care provision is a key part of that endeavor, and, in my view, a valid exercise of congressional power under § 5 of the Fourteenth

66 *E.g., id.* at 1349 (Ginsburg, J., dissenting) (“Self-care leave, I would hold, is a key part of Congress' endeavor to make it feasible for women to work and have families. By reducing an employer's perceived incentive to avoid hiring women, § 2612(a)(1)(D) lessens the risk that the FMLA as a whole would give rise to the very sex discrimination it was enacted to thwart.”).

67 *Id.* at 1335 (“Without widespread evidence of sex discrimination or sex stereotyping in the administration of sick leave, it is apparent that the congressional purpose in enacting the self-care provision is unrelated to these supposed wrongs.”).

68 *Id.* at 1346 (Ginsburg, J., dissenting).

69 *Id.* at 1349 (Ginsburg, J., dissenting).

Amendment.⁷⁰

The understanding of sex discrimination that Justice Ginsburg recognized in the design of the FMLA has animated her own work for decades. On this understanding, discrimination arises out of the interplay of real and imputed role conflicts. Employment is understood as inconsistent with pregnancy and caregiving responsibilities, and women are viewed as likely to become pregnant and engage in primary caregiving. Persisting role conflicts between caregiving and breadwinning and persisting sex-differentiated role expectations for men and women continuously interact to fuel sex stereotyping. Law can entrench the role conflicts and sex-differentiated role expectations that have long fueled sex stereotyping—or law can support individuals and households in making their own choices about the coordination of work and family.

Justice Ginsburg made sense of the self-care provisions of the FMLA in light of these understandings. She understood the FMLA's self-care provisions as part of a set of leave protections that Congress enacted in an effort to support men and women in making their own choices about the coordination of work and family in a form that would disrupt rather than entrench sex-stereotypical conflicts and expectations—and so alleviate rather than exacerbate discrimination against women. Given her understanding of the dynamics of sex discrimination, Justice Ginsburg well appreciated why Congress made self-care leave available for all—rather than offering pregnancy leave to women only. Universal benefits break would down actual conflicts between work and family without triggering historic assumptions about sex roles. Targeted benefits, by contrast, might exacerbate employers' longstanding disposition to discriminate against young women in the workforce as unreliable or expensive hires because they are presumed to be "mothers or mothers-to-be."⁷¹ Justice Ginsburg reasoned about the concerns, aspirations, and commitments animating the FMLA's design in terms the plurality seems not to have found sufficiently intelligible even to address.⁷²

CONCLUSION

From time to time, courts and the general public view laws depriving women of control over contraception, abortion, and pregnancy as presenting questions of equal citizenship for women. Indeed we have recently witnessed conservative efforts

70 *Id.* at 1350 (Ginsburg, J., dissenting).

71 *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003).

72 *See supra* note 68 and accompanying text.

to reassert traditional controls on women's reproductive lives colloquially termed a "war on women."⁷³ But today, as several decades ago, courts and the nation often do not grasp the relationships. Thirty-five years ago, Professor Ginsburg observed:

Eventually, the Court may take abortion, pregnancy, out-of-wedlock birth, and explicit gender-based differentials out of the separate cubbyholes in which they now rest, acknowledge the practical interrelationships, and treat these matters as part and parcel of a single, large, sex equality issue. That synthesis perhaps depends on clearer directions from the political arena, but it seems a likely candidate for 1980's development.⁷⁴

In 2012, we are still waiting.

73 See Luisita Lopez Torregrosa, *U.S. Culture War With Women at Its Center*, N.Y. TIMES, Apr. 3, 2012, available at <http://www.nytimes.com/2012/04/04/us/04iht-letter04.html>. For an account of the current debate over contraception, see Robert Pear, *Senate Rejects Step Targeting Coverage of Contraception*, N.Y. TIMES, Mar. 1, 2012, available at <http://www.nytimes.com/2012/03/02/us/politics/senate-kills-gop-bill-opposing-contraception-policy.html>. For the views of Republican contenders for the presidency, see Louise Trubek, *The Unfinished Fight Over Contraception*, N.Y. TIMES, Mar. 1, 2012 at A25, available at <http://www.nytimes.com/2012/03/02/opinion/contraception-war-goes-on.html>. See also Michael Barbado & Erik Eckholm, *Romney Sets Off Furor on Contraception Bill*, N.Y. TIMES, Mar. 1, 2012, at A21, available at <http://www.nytimes.com/2012/03/01/us/politics/romney-sets-off-furor-on-contraception-bill.html>.

74 Ginsburg, *Sex Equality and the Constitution*, *supra* note 28, at 462.