

Pregnancy and Sex Role Stereotyping: From *Struck to Carhart*

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The guarantee of equal protection of the laws extends to women as well as men. Yet for the first 100 years of the Fourteenth Amendment's life, the Supreme Court never found a law unconstitutional on the grounds that it discriminated on the basis of sex. Between 1970 and 1980, social movement advocacy and brilliant litigation by Ruth Bader Ginsburg and others changed our constitutional law.¹ Cases beginning with *Reed v. Reed*² demonstrated that in important respects, sex was like race: familiar justifications for excluding women rested on stereotypes that denied individuals the opportunity to compete and relegated women to secondary status in

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¹ For an important forthcoming account of the role that Ruth Bader Ginsburg's arguments on stereotyping played in the emergence of modern sex discrimination law, see Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. (forthcoming 2010). For an examination of movement arguments in popular, legislative, and judicial arenas that shaped the early sex discrimination cases, see 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, 1984–2004 (2003) [hereinafter Post & Siegel]; Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CAL. L. REV. 1323, 1366–1414 (2006) [hereinafter Siegel, *Constitutional Culture*]; discussion *infra* Part III.

² 404 U.S. 71 (1971).

American society.³ Over the course of the decade, the Court extended the anti-stereotyping principle from discrimination on the basis of race to discrimination on the basis of sex.

But fidelity to the principle had its limits. In 1974, in *Geduldig v. Aiello*, the Court upheld a California law that provided workers comprehensive disability insurance for all temporarily disabling conditions that might prevent them from working, except pregnancy.⁴ Although the plaintiff argued that “[a]s with other types of sex discrimination, discrimination on the basis of pregnancy often results from gross stereotypes and generalizations which prove irrational under scrutiny,”⁵ and although the Court acknowledged that pregnancy discrimination might “effect an invidious discrimination against the members of one sex or the other,”⁶ the *Geduldig* Court upheld the exclusion, reasoning that discrimination on the basis of pregnancy was not necessarily discrimination on the basis of sex.⁷ When the Court tried to apply *Geduldig*’s rationale to federal employment

³ See, e.g., *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724–25 (1982) (“Although the test for determining the validity of a gender-based classification is straightforward, it must be applied free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions.”); *Califano v. Westcott*, 443 U.S. 76, 89 (1979) (holding unconstitutional a policy granting government aid to the children of unemployed fathers but not unemployed mothers, explaining that the presumption that “the father has the ‘primary responsibility to provide a home and its essentials,’ while the mother is the ‘center of home and family life,’” is “part of the ‘baggage of sexual stereotypes,’” and not a legitimate ground for government-imposed sex classifications (citations omitted)); *Orr v. Orr*, 440 U.S. 268, 283 (1979) (“Legislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing the stereotypes about the ‘proper place’ of women and their need for special protection.”); *Craig v. Boren*, 429 U.S. 190, 198–99 (1976) (characterizing as an invalid basis for state action “increasingly outdated misconceptions concerning the role of females in the home rather than in the ‘marketplace and world of ideas’”); *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (plurality opinion) (“There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of ‘romantic paternalism’ which, in practical effect, put women, not on a pedestal, but in a cage.” (footnote omitted)). See generally PAUL BREST ET AL., *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* 1213–19 (5th ed. 2006) (discussing these cases).

⁴ 417 U.S. 484, 497 (1974).

⁵ Brief for Appellees at 24, *Geduldig*, 417 U.S. 484 (No. 73-640); see also Brief Amici Curiae of the American Civil Liberties Union et al. at 9, *Geduldig*, 417 U.S. 484 (No. 73-640) (submitted by Ruth Bader Ginsburg and Nancy E. Stanley and arguing that “[t]he mythology of pregnancy, however, has resisted rational inspection”).

⁶ 417 U.S. at 496–97 n.20.

⁷ See *infra* notes 12, 78 & accompanying text.

discrimination law in *General Electric Corp. v. Gilbert*,⁸ Congress rejected the Court's reasoning and enacted the Pregnancy Discrimination Act (PDA), defining discrimination on the basis of pregnancy *as* discrimination on the basis of sex.⁹

Enactment of the PDA, however, did not change the Court's approach to the Constitution—at least not immediately. Supreme Court decisions of the 1970s do not closely scrutinize the regulation of pregnant women to determine whether such regulation is shaped by gender bias.¹⁰ For this reason, there seems to be little connection between the constitutional sex discrimination case law and *Roe v. Wade*'s holding that states may not criminalize abortion.¹¹

Why do the 1970s cases not fully integrate pregnancy regulation into the equal protection framework? *Geduldig* reasons that laws classifying on the basis of pregnancy do not classify on the basis of sex because many—but not all—women bear children.¹² Other cases view pregnancy as representing the

⁸ 429 U.S. 125, 136 (1976) (holding that a disability benefit plan excluding disabilities related to pregnancy was not sex-based discrimination within the meaning of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*).

⁹ Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (2006) (“The terms ‘because of sex’ or ‘on the basis of sex’ include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . .”). For the debates leading to the PDA's enactment, see Post & Siegel, *supra* note 1, at 2012–13. Concerns about sex stereotyping played a significant role in Congress's decision to amend Title VII. See, e.g., H.R. REP. NO. 95-948, at 3 (1978) (“[T]he assumption that women will become [pregnant] and leave the labor force leads to the view of women as marginal workers, and is at the root of the discriminatory practices which keep people in low-paying and dead-end jobs.”).

¹⁰ See Reva B. Siegel, *Reasoning From the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 267–80 (1992) (discussing “physiological naturalism” in equal protection and due process doctrine of the period) [hereinafter Siegel, *Reasoning*].

¹¹ 410 U.S. 113, 164 (1973).

¹² Laws burdening pregnant employees harm only female employees, but the Court emphasized that they potentially benefit a group that includes employees of both sexes:

The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes.

417 U.S. 484, 497 n.20 (1974)

most fundamental sex difference.¹³ According to these cases, society is justified in treating pregnant women differently than others for reasons of self-interest (to save money),¹⁴ or for reasons of altruism (to protect the unborn).¹⁵ The cases do not seriously explore the possibility that traditional sex-role stereotyping shapes judgments about functional rationality or altruism where matters of pregnancy are concerned.

In short, the Court's 1970s cases hold that the antistereotyping principle constrains laws that classify by sex, but do not find the principle violated where government regulates pregnancy. Our Essay unsettles this familiar story by making three points.

First, we show that in the 1970s, Ruth Bader Ginsburg and the women's movement argued that the antistereotyping principle applied to pregnancy; the movement viewed the regulation of pregnant women as a paradigmatic site of sex-role stereotyping. Second, we show that even though the Court initially had difficulty seeing that sex role stereotypes were sometimes implicated in cases concerning the regulation of pregnancy, the Court's constitutional decisions have increasingly come to recognize the relationship between pregnancy discrimination and sex discrimination. Third, we suggest that the Court and other constitutional interpreters should revisit *Geduldig* and read the decision's holding more precisely—and narrowly—as recognizing that, while there are legitimate reasons for regulating pregnancy, such regulation can be animated by invidious or traditionally stereotypical judgments. This understanding has implications for both equal protection and reproductive rights cases.

¹³ See, e.g., *Michael M. v. Superior Court*, 450 U.S. 464, 478 (1981) (Stewart, J., concurring) (“[T]here are differences between males and females that the Constitution necessarily recognizes. In this case we deal with the most basic of these differences: females can become pregnant as the result of sexual intercourse; males cannot.”).

¹⁴ See, e.g., *Geduldig*, 417 U.S. at 496 (noting that California has a legitimate interest “in distributing the available resources in such a way as to keep benefit payments at an adequate level for disabilities that are covered, rather than to cover all disabilities inadequately,” and in “maintaining the contribution rate at a level that will not unduly burden participating employees, particularly low-income employees who may be most in need of the disability insurance”).

¹⁵ See, e.g., *Roe*, 410 U.S. at 163 (explaining that at viability, “the State’s important and legitimate interest in potential life” becomes “‘compelling’” and therefore sufficient to justify treating pregnant women differently, by abrogating their right to choose whether to bear a child).

I. PREGNANCY AND THE ANTISTEREOTYPING PRINCIPLE: THE 1970S

In the 1970s, Ruth Bader Ginsburg and the women's movement challenged laws that imposed traditional sex roles on pregnant women.¹⁶ We discuss two legal documents of the era, each written in 1972. This was the year the Equal Rights Amendment was sent to the states for ratification, and when the women's movement was still trying to persuade the Court to apply heightened scrutiny to laws that discriminate on the basis of sex.

A. *Struck v. Secretary of Defense*

The first document is a brief that Ruth Bader Ginsburg wrote as general counsel for the Women's Rights Project of the American Civil Liberties Union (ACLU) in *Struck v. Secretary of Defense*.¹⁷ Captain Susan Struck was a career officer serving as a nurse in Vietnam who faced an involuntary discharge under Air Force regulations then in effect because she was pregnant.¹⁸ Government regulations barred both pregnant women and mothers from serving.¹⁹ The only way for Struck to keep her job was to abort

¹⁶ Siegel, *Constitutional Culture*, *supra* note 1, at 1385–86 & nn.169–70 (discussing feminists in the early 1970s who argued that, under the Equal Protection Clause and federal employment discrimination law, regulation of pregnancy was sex-based and wrongful when it enforced traditional stereotypes about women's roles). A number of decisionmakers responded favorably to this claim. For example, in 1972, the Equal Employment Opportunity Commission (EEOC) ruled that disability relating to pregnancy should be treated as any other disability at work. See 29 C.F.R. § 1604.10(b) (1973) (providing that an employer's general disability policies "shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities"). And courts began to recognize that mandatory discharge of pregnant women violated equal protection. See *Heath v. Westerville Board of Education*, 345 F. Supp. 501, 505 n.1 (S.D. Ohio 1972), which relied on *Reed* to invalidate regulations requiring termination of employment at a fixed stage of pregnancy and explained that the "defendant Board's . . . treatment of pregnancy . . . is more a manifestation of cultural sex role conditioning than a response to medical fact and necessity. The fact that [the plaintiff] does not fit neatly into the stereotyped vision . . . of the 'correct' female response to pregnancy should not redound to her economic or professional detriment."

¹⁷ See Brief for Petitioner, *Struck v. Sec'y of Def.*, 409 U.S. 1071 (1972) (No. 72-178), 1972 WL 135840. For a detailed analysis of this brief and what it reveals about Justice Ginsburg's views on sex discrimination, see generally Neil S. Siegel & Reva B. Siegel, *Struck By Stereotype: Ruth Bader Ginsburg on Pregnancy Discrimination as Sex Discrimination*, 59 DUKE L.J. (forthcoming 2010).

¹⁸ Brief for Petitioner, *supra* note 17, at 3.

¹⁹ *Id.* at 5. The regulation stated:

the pregnancy.²⁰ No policies similarly required discharge of men who fathered children while in the service.²¹ Ginsburg's 1972 brief challenged the exclusion as a violation of equal protection under the Fifth Amendment, insisting that government regulation of pregnant women was presumptively unconstitutional when such regulation enforced the sex roles and stereotypes of the separate-spheres tradition—the dyadic structuring of sex roles in which men are expected to perform as breadwinners and women are expected to perform as economically dependent caregivers.²² Ginsburg argued that “[s]ex discrimination exists when all or a defined class of women (or men) are subjected to disadvantaged treatment based on stereotypical assumptions that operate to foreclose opportunity based on individual merit,” and she urged that the pregnancy regulation at bar should be subject to “close scrutiny, identifying sex as a ‘suspect’ criterion for governmental distinctions.”²³

Ginsburg identified discharge-for-pregnancy rules as a paradigmatic form of the particular kind of sex-based differentiation the feminist movement was challenging.²⁴ Her brief demonstrated that exclusion of

The commission of any woman officer will be terminated with the least practical delay when it is determined that one of the conditions in (a) or (b) *below* exist . . .

a. Pregnancy:

(1) *General*:

(a) A woman will be discharged from the service with the least practical delay when a determination is made by a medical officer that she is pregnant.

. . .

a. Minor Children:

(1) *General*: The commission of any woman officer will be terminated with the least practical delay when it is established that she:

. . .

(d) Has given birth to a living child while in a commissioned officer status.

Struck v. Sec’y of Def., 460 F.2d 1372, 1374 (9th Cir. 1971) (quoting Air Force Regulation 36-12). A 1971 amendment to the regulation provided that “Discharge Action will be cancelled if Pregnancy is Terminated.” *Id.* at 1376 (quoting Part I, C of 1971 Amendments to Regulations).

²⁰ Brief for Petitioner, *supra* note 17, at 10.

²¹ *Id.* at 7.

²² *Id.* at 12–14.

²³ *Id.* at 15, 26.

²⁴ Ginsburg wrote:

In very recent years, a new appreciation of women’s place has been generated in the United States. Activated by feminists of both sexes, legislatures and courts have begun to recognize and respond to *the subordinate position of women in our*

pregnant employees was sex-based state action that enforced traditional sex roles. “Heading the list of arbitrary barriers that have plagued women seeking equal opportunity is disadvantaged treatment based on their unique childbearing function.”²⁵ Mandatory discharge of employees who became pregnant not only inflicted substantial economic harm; it also imposed traditional social roles on women. “[M]andatory pregnancy discharge,” Ginsburg contended, “reinforces societal pressure to relinquish career aspirations for a hearth-centered existence.”²⁶

To make visible the role-based assumptions the discharge rules enforced, Ginsburg compared the government’s treatment of women in the service to its treatment of men. She showed that the Air Force accommodated service members temporarily disabled for reasons other than pregnancy,²⁷ and affirmatively sought to retain men who became fathers. “[M]en in the Air Force are not constrained to avoid the pleasures and responsibilities of procreation and parenthood”²⁸ and “indeed additional benefits are provided to encourage men who become fathers to remain in service.”²⁹ By contrast, Ginsburg emphasized, Captain Struck “was presumed unfit for service under a regulation that declares, without regard to fact, that she fits into the stereotyped vision of the correct female response to pregnancy.”³⁰

Ginsburg rejected the long line of cases that justified different treatment of women as benign protection. Laws enforcing the sex roles of the separate spheres tradition did not in fact protect women; they locked women in a social order that denied them the opportunity to define themselves as individuals and subordinated them by making them dependents and second-class participants in core activities of citizenship. “[P]resumably well-meaning exaltation of woman’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 and the second-class status our institutions historically have imposed upon them. The heightened national awareness that equal opportunity for men and women is a matter of simple justice has led to significant reform

Id. at 26–27 (footnote omitted) (emphasis added).

²⁵ *Id.* at 34.

²⁶ Brief for Petitioner, *supra* note 17, at 10; *see also infra* note 35.

²⁷ Brief for Petitioner, *supra* note 17, at 23, 50.

²⁸ *Id.* at 48.

²⁹ Brief for the Petitioner, *supra* note 17, at 55.

³⁰ *Id.* at 50–51 (quoting *Heath v. Westerville Bd. of Educ.*, 345 F. Supp. 501, 506 n.1 (S.D. Ohio 1972) (internal quotation omitted); *see also id.* at 52 (“The discriminatory treatment required by the challenged regulation . . . 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.” (footnote omitted))).

society.”³¹ Ginsburg thus argued that the Equal Protection Clause requires government to give women equal freedom with men to define themselves.

The *Struck* brief challenged the mandatory discharge rule as violating constitutional guarantees of privacy as well as equality. In a separate section, Ginsburg urged that “[i]mposition of this outmoded standard upon petitioner unconstitutionally encroaches upon her right to privacy in the conduct of her personal life.”³² Privacy doctrine protects the freedom to define one’s family life that equal protection also protects when it prohibits government from enforcing traditional sex roles on women.

Relying on *Griswold v. Connecticut*³³ and *Eisenstadt v. Baird*,³⁴ Ginsburg argued that 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 thereafter devote herself to child care.”³⁵ In so doing, the policy “substantially infring[ed] upon her right to sexual privacy, and her autonomy in deciding ‘whether to bear . . . a child.’”³⁶ Ginsburg cited a series of lower court opinions that understood *Griswold* and *Eisenstadt* to protect decisions about abortion.³⁷ She thereby intimated that the cases protecting women’s decisions whether to bear a child extend to abortion—that those cases prohibit not only laws that require women to continue a pregnancy,³⁸ but also laws that pressure women to end a pregnancy, as did the Air Force regulation *Struck* challenged.³⁹

Ginsburg argued that the Constitution protected *Struck*’s decision about how to reconcile work and family from government control on equal protection, privacy, and free exercise grounds. Ginsburg thus showed how

³¹ See *id.* at 38–45 (discussing, *inter alia*, *Hoyt v. Florida*, 368 U.S. 57 (1961); *Goesaert v. Cleary*, 335 U.S. 464 (1948) *Muller v. Oregon*, 208 U.S. 412 (1908); *Bradwell v. Illinois*, 83 U.S. 130 (1872)).

³² Brief for the Petitioner, *supra* note 17, at 52.

³³ 381 U.S. 479 (1965).

³⁴ 405 U.S. 438 (1972).

³⁵ Brief for the Petitioner, *supra* note 17, at 52 (footnote omitted).

³⁶ *Id.* at 54 (quoting *Baird*, 405 U.S. at 453).

³⁷ *Id.* at 54 n.55. Ginsburg explained that “*Griswold* alone, or in conjunction with *Baird*, has been cited in numerous lower court decisions holding that women have a right to determine for themselves, free from unwarranted governmental intrusion, whether or not to bear children,” and listed the following cases as examples: *Roe v. Wade*, 314 F. Supp. 1217 (N.D. Tex. 1970); *Poe v. Menghini*, 339 F. Supp. 986 (D. Kan. 1972); *Abele v. Markle*, 342 F. Supp. 800 (D. Conn. 1972); and *YWCA v. Kugler*, 342 F. Supp. 1048 (D. N.J. 1972).

³⁸ Notably, Ginsburg filed the *Struck* brief on December 4, 1972. *Roe* was handed down on January 22, 1973.

³⁹ See *supra* note 19 (quoting the Air Force regulation).

the Air Force regulation subjected Struck to several constitutionally suspect forms of pressure, concluding “that the challenged regulation operates with particularly brutal force against women of [Captain Struck’s Roman Catholic] faith.”⁴⁰ This was because “[t]ermination of pregnancy prior to the birth of a living child was not an option [she] could choose.”⁴¹ In sum, “the regulation pitted her Air Force career against . . . her religious conscience.”⁴²

The Supreme Court never heard oral argument. During litigation, the Air Force waived Captain Struck’s discharge, retreating from its policy of automatically discharging women for pregnancy,⁴³ and Solicitor General Erwin Griswold moved to dismiss the case as moot.⁴⁴ The Court elected to vacate the judgment and remand the case to the Ninth Circuit “to consider [the] issue of mootness in light of the position presently asserted by the Government.”⁴⁵

B. Abele v. Markle

In the 1970s, the women’s movement challenged not only mandatory discharge rules, but also laws criminalizing abortion as imposing sex roles on women.⁴⁶ Feminists argued that “[r]estrictive laws governing abortion . . . are a manifestation of the fact that men are unable to see women

⁴⁰ Brief for the Petitioner, *supra* note 17, at 56.

⁴¹ *Id.*

⁴² *Id.*

⁴³ We have not been able to determine why Griswold feared a Supreme Court decision on the merits in *Struck*. We strongly suspect, however, that he perceived governmental coercion of abortion as an inadvisable context in which to vindicate the federal government’s asserted interests in the area of pregnancy discrimination. The context of *Struck* was very much one of coercion. See, e.g., Janice Goodman, Rhonda Copelon Schoenbrod & Nancy Stearns, *Doe and Roe, Where Do We Go From Here?*, 1 WOMEN’S RTS. L. REP. 20, 35 (1973) (discussing *Struck* as a case arising “[i]n the area of coercion”).

⁴⁴ For Ginsburg’s response to the motion, see Opposition to Memorandum for the Respondents Suggesting Mootness, *Struck v. Sec’y of Def.*, 409 U.S. 1071 (1972) (No. 72-178), 1972 WL 135842.

⁴⁵ *Struck*, 409 U.S. at 1071.

⁴⁶ On sex equality arguments for the abortion right in this era, see Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815, 825 (2007) (“Whether making claims on the Fourteenth Amendment, the Eighth Amendment, or the Nineteenth Amendment, briefs argued that criminal laws forcing pregnant women to bear unwanted children were the expression of sex stereotyping and sex-role reasoning.”) [hereinafter Siegel, *Sex Equality Arguments*]. See generally Linda Greenhouse & Reva B. Siegel, *On The Road to Roe v. Wade: How Americans Talked About Abortion in the Years Before the Supreme Court’s Landmark Ruling* (forthcoming 2010) (manuscript on file with author).

in any role other than that of mother and wife.”⁴⁷ In *Abele v. Markle*, a suit challenging Connecticut’s abortion law which Ginsburg cited in her *Struck* brief,⁴⁸ one can see the antistereotyping principle applied to abortion laws. What follows is an excerpt from a decision by Judge Edward Lumbard striking down Connecticut’s statute. He wrote the opinion in 1972, the same year as the *Struck* brief. The decision reasons about the unconstitutionality of Connecticut’s abortion restrictions differently than the Court would a year later in *Roe*:

The Connecticut anti-abortion laws take from women the power to determine whether or not to have a child once conception has occurred. In 1860, when these statutes were enacted in their present form, women had few rights. Since then, however, their status in our society has changed dramatically. From being wholly excluded from political matters, they have secured full access to the political arena. From the home, they have moved into industry; now some 30 million women comprise forty percent of the work force. *And as women’s roles have changed, so have societal attitudes. The recently passed equal rights statute and the pending equal rights amendment demonstrate that society now considers women the equal of men.*

The changed role of women in society and the changed attitudes toward them reflect the societal judgment that women can competently order their own lives and that they are the appropriate decisionmakers about matters affecting their fundamental concerns.⁴⁹

These brief paragraphs were penned the year before Justice Brennan made the case for extending heightened scrutiny to sex discrimination in

⁴⁷ Brief Amicus Curiae on Behalf of New Women Lawyers et al. at 24, *Roe v. Wade*, 410 U.S. 113 (1973) (Nos. 70-18, 70-40); *see also* CONGRESS TO UNITE WOMEN, RESOLUTIONS FROM THE WORKSHOP ON REPRODUCTION AND ITS CONTROL (pamphlet) (1969) (“We support the teaching of sex education to people of all ages, and demand that this sex education include instruction in all aspects of birth control and EXCLUDE instruction in so-called ‘sex roles.’”); Mary Daly, *Sexist Ethics and Abortion*, in *Female Liberation, The Right to Choose Abortion* 21, 21 (1971) (“Writings on abortion by male ethicists often give the illusion of ‘clarity’ because they concentrate upon some selected facts or data, while failing to consider the social context of the abortion problem—the assumptions, attitudes, stereotypes, customs, and arrangements which make up the fabric of the world in which women actually live.”); WOMEN VERSUS CONNECTICUT 2-3 (pamphlet) (1970) (“We believe that women must unite to free themselves from a culture that defines them only as daughters, wives and mothers. We must be free to be human whether or not we choose to marry or bear children.”).

⁴⁸ Brief for the Petitioner, *supra* note 17, at 54 n.55.

⁴⁹ *Abele v. Markle*, 342 F. Supp. 800, 802 (D. Conn. 1972) (footnotes omitted) (emphasis added).

*Frontiero v. Richardson*⁵⁰ and Justice Blackmun struck down Texas's abortion law in *Roe*.⁵¹ In *Abele*, Judge Lumbard reasoned that constitutional protection for women's decision whether to abort a pregnancy was warranted because of changing social views about women's "status" and "roles."⁵² He cited the Nineteenth Amendment's conferring on women the right to vote; *Reed v. Reed*, the first equal protection sex discrimination decision; Title VII of the 1964 Civil Rights Act (as amended in 1972, when Congress insisted on equal enforcement of sex as well as race provisions of the federal employment discrimination law); and the Equal Rights Amendment, which had just been sent to the states.⁵³ Given changing social understanding of women's "status" and "roles,"⁵⁴ Judge Lumbard decided that the state's interest in protecting the unborn was not a sufficient reason to take away from women all control over the decision whether to become a mother.⁵⁵

Suffice it to say, these are not the reasons or forms of authority to which the Court appealed when it recognized women's right to choose in *Roe*.⁵⁶ Supreme Court decisions of the 1970s did not closely scrutinize claims of pregnancy discrimination under the Equal Protection Clause, and failed to recognize equal protection as a ground for the abortion right. But after some thirty-five years of continuing argument—in the litigation of pregnancy discrimination cases, in legislation such as the Family and Medical Leave

⁵⁰ 411 U.S. 677, 682 (1973) (plurality opinion).

⁵¹ 410 U.S. 113, 164 (1973).

⁵² 342 F. Supp. at 802.

⁵³ *Id.* at 802 & nn.8–9. Judge Lumbard did not expressly cite the Equal Protection Clause; instead, he cited *Reed v. Reed*, 404 U.S. 71 (1971), the first equal protection decision to strike down a law on the ground that it discriminates on the basis of sex—a case briefed by Ruth Bader Ginsburg. See Reply Brief for Appellant, *Reed v. Reed*, 404 U.S. 71 (1971) (No. 70-4).

⁵⁴ *Abele*, 342 F. Supp. at 802.

⁵⁵ *Id.* at 802–03.

⁵⁶ The *Roe* Court more than once described the abortion right as residing with the pregnant woman's physician. The Court noted that for the period of pregnancy prior to the "compelling" point, "the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State." 410 U.S. at 163. The Court later explained that "[f]or the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician." *Id.* at 164. For other sources noting this point, see Linda Greenhouse, *How the Supreme Court Talks About Abortion: The Implications of a Shifting Discourse*, 42 SUFFOLK U. L. REV. 41, 45–46 (2008); Siegel, *Reasoning*, *supra* note 10, at 273 n.43; Reva B. Siegel, *Roe's Roots: The Women's Rights Claims That Engendered Roe* (Mar. 29, 2009) (unpublished manuscript, on file with author).

Act (FMLA),⁵⁷ and in debate over abortion rights—the law is slowly beginning to shift today.

II. INCREMENTAL CHANGE: EMERGENT ANTISTEREOTYPING CONSTRAINTS ON THE REGULATION OF PREGNANCY

We will not attempt here to document exhaustively our claim that the Court—as well as American society—has been proceeding on a path of incremental change. Rather, we will identify two locations in Fourteenth Amendment doctrine in which we can now see the antistereotyping principle applied to the regulation of pregnancy.

A. *Equal Protection*

In 2003, Chief Justice Rehnquist, on behalf of a six-Justice majority, applied the antistereotyping principle to the regulation of pregnancy in upholding the FMLA in *Nevada Department of Human Resources v. Hibbs*.⁵⁸ To demonstrate that Congress had power to enact the FMLA under Section Five of the Fourteenth Amendment as a remedy for violations of the Equal Protection Clause, the *Hibbs* opinion discussed at length evidence before Congress of equal protection violations that Congress could remedy by enacting the FMLA.⁵⁹ Chief Justice Rehnquist reported that states often gave leave to women only, but the extended time off for childbearing included leave for early childcare that men, too, might have used for parenting purposes.⁶⁰ Rehnquist observed:

Many States offered women extended “maternity” leave that far exceeded the typical 4- to 8-week period of physical disability due to pregnancy and childbirth, but very few States granted men a parallel benefit: Fifteen States provided women up to one year of extended maternity leave, while only four provided men with the same. *This and other differential leave policies were 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.*⁶¹

Where states offered female employees leave for “pregnancy disability” that far exceeded the medically recommended pregnancy disability leave

⁵⁷ 29 U.S.C. § 2612(a)(1)(C) (2006).

⁵⁸ 538 U.S. 721, 724–25 (2003).

⁵⁹ *Id.* at 730.

⁶⁰ *Id.* at 731.

⁶¹ *Id.* (citation and footnote omitted) (emphasis added).

period of six weeks, the Court in *Hibbs* reasoned, “[t]his gender-discriminatory policy is not attributable to any different physical needs of men and women, but rather to the invalid stereotypes that Congress sought to counter through the FMLA.”⁶² The length of the “pregnancy disability” leave reflected and enforced stereotypical assumptions about women’s distinctive obligations as parents.

Quoting Congress, the Court observed: “Historically, denial or curtailment of women’s employment opportunities has been traceable directly to the pervasive presumption that women are mothers first, and workers second. This prevailing ideology about women’s roles has in turn justified discrimination against women when they are mothers or mothers-to-be.”⁶³ In this passage, the Court acknowledged what its earlier analysis demonstrated and the women’s movement had long argued: that unconstitutional sex stereotyping has shaped laws governing pregnant women as well as new mothers.⁶⁴

B. *Abortion Rights*

Hibbs applied the antistereotyping principle to the regulation of pregnancy. The same is true of *Planned Parenthood of Southeastern Pennsylvania v. Casey*,⁶⁵ the Court’s 1992 decision reaffirming *Roe*. The joint opinion in *Casey* did not invoke equal protection as textual or doctrinal authority for the abortion right, but it repeatedly invoked sex equality concepts to explain the values the abortion right protects and to determine the reach of the right. Consider the language in which the joint opinion reaffirmed constitutional protection for the abortion right:

⁶² *Id.* at 733 n.6.

⁶³ *Id.* at 736 (internal quotation marks and citation omitted).

⁶⁴ Then Court then observed that sex-role stereotyping shapes the regulation of men’s conduct as well as that of women:

Stereotypes about women’s domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. Because employers continued to regard the family as the woman’s domain, they often denied men similar accommodations or discouraged them from taking leave. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers’ stereotypical views about women’s commitment to work and their value as employees. Those perceptions, in turn, Congress reasoned, lead to subtle discrimination that may be difficult to detect on a case-by-case basis.

Id.

⁶⁵ 505 U.S. 833 (1992).

Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.⁶⁶

Precisely as it reaffirmed the abortion right, the joint opinion summoned the understanding that the state cannot impose "its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture."⁶⁷ The opinion tied constitutional protection for women's abortion decision to the understanding, forged in the Court's sex discrimination cases, that government may not use law to enforce traditional sex roles on women.⁶⁸ As one of us has written, the joint opinion expresses "constitutional limitations on abortion laws in the language of [the Court's] equal protection sex discrimination opinions, illuminating liberty concerns at

⁶⁶ *Id.* at 852.

⁶⁷ *Id.*

⁶⁸ In *Casey*, the Court invoked concerns about government enforcement of traditional sex roles not only in explaining the rationale of the abortion right, but also in explaining its reach. *Casey* struck down the spousal notice requirement of Pennsylvania's abortion law on the ground that it imposed traditional sex roles on women:

There was a time, not so long ago, when a different understanding of the family and of the Constitution prevailed. In *Bradwell v. State*, three Members of this Court reaffirmed the common-law principle that "a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state" 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. . . .

The husband's interest in the life of the child his wife is carrying does not permit the State to empower him with this troubling degree of authority over his wife. The contrary view leads to consequences reminiscent of the common law. . . . A State may not give to a man the kind of dominion over his wife that parents exercise over their children.

Section 3209 embodies a view of marriage consonant with the common-law status of married women but repugnant to our present understanding of marriage and of the nature of the rights secured by the Constitution. Women do not lose their constitutionally protected liberty when they marry. The Constitution protects all individuals, male or female, married or unmarried, from the abuse of governmental power, even where that power is employed for the supposed benefit of a member of the individual's family.

Id. at 896–98 (citation omitted).

the heart of the sex equality cases in the very act of recognizing equality concerns at the root of its liberty cases.”⁶⁹

Justice Ginsburg quoted *Casey*’s sex equality reasoning in her dissent in *Gonzales v. Carhart*.⁷⁰ But she went even further. Where *Casey* drew upon sex equality principles to justify the abortion right—reasoning that government may not use the power of the state to enforce traditional sex roles on women—Justice Ginsburg’s *Carhart* dissent added a discussion of key equal protection sex discrimination precedents, including decisions Justice Ginsburg litigated or wrote.⁷¹ In her *Carhart* dissent, Justice

⁶⁹ Siegel, *Sex Equality Arguments*, *supra* note 46, at 831.

⁷⁰ 550 U.S. 124, 169 (2007) (Ginsburg, J., dissenting); *see, e.g., id.* at 170 (“In reaffirming *Roe*, the *Casey* Court described the centrality of ‘the decision whether to bear . . . a child,’ to a woman’s ‘dignity and autonomy,’ her ‘personhood’ and ‘destiny,’ her ‘conception of . . . her place in society.’”(citations omitted)); *id.* at 171 (“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)); *id.* at 172 (“[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.”); *id.* at 171 n.2 (“*Casey* described more precisely than did *Roe v. Wade* the impact of abortion restrictions on women’s liberty.” (citations omitted)); *id.* at 185 (citing *Casey* as evidence of the Court’s repeated confirmation “that ‘[t]he destiny of the woman must be shaped . . . on her own conception of her spiritual imperatives and her place in society.’”).

⁷¹ In objecting to the forms of woman-protective antiabortion arguments to which the *Carhart* majority referred, Justice Ginsburg invoked both negative and positive equal protection precedents—that is, the cases invalidated by modern understandings of sex discrimination, as well as the equal protection decisions that reflect this new understanding of women’s roles as citizens:

This way of thinking reflects ancient notions about women’s place in the family and under the Constitution—ideas that have long since been discredited. *Compare, e.g., Muller v. Oregon*, 208 U.S. 412, 422–423, 28 S. Ct. 324, 52 L. Ed. 551 (1908) (“protective” legislation imposing hours-of-work limitations on women only held permissible in view of women’s “physical structure and a proper discharge of her maternal functio[n]”) and *Bradwell v. State*, 16 Wall. 130, 141, 21 L. Ed. 442 (1873) (Bradley, J., concurring) (“Man is, or should be, woman’s protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life The paramount destiny and mission of woman are to fulfil[] the noble and benign offices of wife and mother.”), *with United States v. Virginia*, 518 U.S. 515, 533, 542, n.12, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996) (State may not rely on “overbroad generalizations” about the “talents, capacities, or preferences” of women; “[s]uch judgments have . . . impeded . . . women’s progress toward full citizenship stature throughout our Nation’s history”), and *Califano v. Goldfarb*, 430 U.S. 199, 207, 97 S. Ct. 1021, 51 L. Ed. 2d 270 (1977) (gender-based Social Security classification

Ginsburg, joined in full by three other Justices, fused the normative power of equality arguments with the textual authority of the Equal Protection Clause: “[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.”⁷² In responding to the majority’s discussion of woman-protective antiabortion argument, Justice Ginsburg reminded her audience of *Bradwell*⁷³ and other precedents enforcing traditional sex roles that the nation now repudiates. This audience includes Justice Kennedy, who enabled *Casey* and who reaffirmed its framework and protection for second-trimester abortions in *Carhart*.⁷⁴

rejected because it rested on “archaic and overbroad generalizations” “such as assumptions as to [women’s] dependency” (internal quotation marks omitted)).

550 U.S. 124, 185 (2007) (Ginsburg, J., dissenting).

⁷² Ginsburg clarified the true stakes surrounding abortion-restrictive regulation of women:

There was a time, not so long ago, when women were regarded as the center of home and family life, with attendant special responsibilities that precluded full and independent legal status under the Constitution. Those views, this Court made clear in *Casey*, are no longer consistent with our understanding of the family, the individual, or the Constitution. 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. Thus, legal 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.

Id. at 171–72 (internal citations and quotation marks omitted). For an account of Justice Ginsburg’s constitutional vision that centers on her commitment to equal citizenship stature and explores the diverse doctrinal implications of this commitment, see generally Neil S. Siegel, “*Equal Citizenship Stature*”: *Justice Ginsburg’s Constitutional Vision in President Obama’s America*, 43 NEW ENG. L. REV. (forthcoming 2009) (symposium honoring the jurisprudence of Associate Justice Ruth Bader Ginsburg).

⁷³ *Bradwell v. State*, 83 U.S. 130 (1872).

⁷⁴ In *Carhart*, Justice Kennedy applied *Casey*, which he understood to mandate protection for the most common method of second-trimester abortion. What is more, Kennedy did not understand the Court to be limiting a woman’s autonomy to decide whether to have an abortion. Rather, he wrote as if the only question presented was the method through which physicians would make the women’s decision effective. See Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694, 1770–71 (2008).

III. *GEDULDIG* IN THE TWENTY-FIRST CENTURY

As we have seen, today there are both equal protection and substantive due process decisions that apply the antistereotyping principle to laws regulating pregnancy. These decisions reflect incremental—but cumulatively substantial—changes in the way Americans view the relationship between discrimination on the basis of pregnancy and discrimination on the basis of sex.⁷⁵ It is now time to reexamine the ways we read *Geduldig v. Aiello*.⁷⁶

Geduldig has long been read as a constitutional impediment to pregnancy discrimination claims.⁷⁷ But what exactly did *Geduldig* say? We quote part of *Geduldig*'s now infamous footnote 20:

While it is true that only women can become pregnant it does not follow that every legislative classification concerning pregnancy is a sex-based

⁷⁵ Consider, for example, the political impossibility of repealing the Pregnancy Discrimination Act (PDA), 42 U.S.C. § 2000e(k), which responded to *Geduldig* and *Gilbert*. The Court recently discussed this case law and Congress's responses to it in *AT&T Corp. v. Hulteen*, 129 S. Ct. 1662 (2009). There the Court held that an employer does not necessarily violate the PDA when it pays pension benefits based in part on an accrual rule, *applied only prior to the PDA's enactment*, that gave less retirement credit for pregnancy leave than for medical leave generally. *Id.* at 1668. Only Justice Breyer joined Justice Ginsburg's passionate dissent, in which she described *Gilbert* as wrong the day it was decided; she characterized the decision as "astonishing" and "aberrational," and stated that "this Court erred egregiously." *Id.* at 1677, 1679 (Ginsburg, J., dissenting). The other justices allowed AT&T to perpetuate pay differentials in the post-PDA period that were attributable to pregnancy discrimination that occurred in the pre-PDA period. *Id.* at 1666 (majority opinion). Tellingly, however, none of them defended *Geduldig* and *Gilbert*'s reasoning. In essence, the majority reasoned that the employer's discrimination was reasonable when it occurred, even if it was no longer an acceptable way to treat women. Ginsburg's characterization of *Gilbert* provoked no defense of the decision from any other Justice. This is in stark contrast to what commonly occurs when individual Justices speak their minds forcefully in controversial areas of law. Both the narrow holding and the loud silences in *Hulteen* suggest little enthusiasm on the Court for defending the *Geduldig/Gilbert* view of the relation between pregnancy discrimination and sex discrimination.

⁷⁶ 417 U.S. 484 (1974).

⁷⁷ See, e.g., *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 751 (2003) (Kennedy, J., dissenting) (citing *Geduldig* for the proposition that "[o]ur cases make clear that a State does not violate the Equal Protection Clause by granting pregnancy disability leave to women without providing for a grant of parenting leave to men"); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 271 (1993) (noting that in *Geduldig*, "we rejected the claim that a state disability insurance system that denied coverage to certain disabilities resulting from pregnancy [violated the Fourteenth Amendment]. 'While it is true,' we said, 'that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification.'" (citation omitted)).

classification like those considered in [*Reed* and *Frontiero*]. 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.⁷⁸

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. Far from imposing a categorical bar to constitutional claims of pregnancy discrimination, *Geduldig* acknowledged that "distinctions involving pregnancy" might inflict "an invidious discrimination against the members of one sex or the other."⁷⁹ The Court concluded, however, that the principle was respected in that case.

Geduldig did not recognize gender bias in the decision of the California legislature to provide temporary disability insurance for most work-disabling conditions except pregnancy. In the early 1970s, the Court viewed as rational the legislature's decision to save money by excluding the claims of new mothers and mothers-to-be.⁸⁰ But over the course of the decade, not just the feminist movement, but Congress itself condemned practices imposing traditional sex-role constraints on pregnant women in the workplace.⁸¹ With the benefit of several decades of PDA litigation, the nation has come to recognize that employment decisions that appear grounded in functional rationality may instead reflect archaic and stereotypical conceptions of women's roles. If *Geduldig* recognized this possibility in principle, *Hibbs* pronounced its violation in practice.

In the early 1970s, the Court prohibited abortion restrictions under the Due Process Clause without exploring how criminal abortion statutes might also violate principles of equal protection. But, over time equal protection values have come to shape substantive due process law. Several passages of *Casey* recognize that constitutional restrictions on abortion also protect pregnant women against state action enforcing traditional conceptions of women's roles. In *Carhart*, four members of the Court directly invoke the

⁷⁸ 417 U.S. 484, 496–97 n.20 (1974).

⁷⁹ *Id.*

⁸⁰ See *supra* note 13 (quoting the Court's reasoning).

⁸¹ See *supra* note 8 and accompanying text (discussing the PDA).

authority of the Equal Protection Clause in reasoning about the constitutionality of abortion-restrictive regulation.

Where the Court was once inclined to view the regulation of pregnant women as presumptively benign, the 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. As Justice Ginsburg's *Carhart* dissent cautions, when regulation of pregnant women reflects or enforces sex-role stereotypes of the separate spheres' tradition, the law may violate equal protection.⁸²

⁸² For development of this argument, see generally Reva B. Siegel, *You've Come a Long Way, Baby: Rehnquist's New Approach to Pregnancy Discrimination in Hibbs*, 58 STAN. L. REV. 1871, 1891–97 (2006).