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Beginning with *Brown*: Springboard for Gender Equality and Social Change

THE HONORABLE M. MARGARET MCKEOWN*

To paraphrase Winston Churchill, the Supreme Court's opinion in *Brown v. Board of the Education*¹ was not the end of litigation over discriminatory practices, nor was it the beginning of the end. It was, however, the end of the beginning. *Brown* marked a dramatic capstone to a series of lawsuits challenging the concept of "separate but equal" embodied in *Plessy v. Ferguson*.² But it also signaled a new phase of civil rights litigation: advocates emboldened by *Brown*'s resounding endorsement of equality sought new constitutional protections against discrimination. Among them were women seeking to extend *Brown*'s logic towards a constitutional mandate for gender equality. Both the antidiscrimination principle articulated in *Brown* and women's expanding role in society led to the development of Equal Protection jurisprudence that rejects the codification of gender stereotypes.

In the late nineteenth century, the Supreme Court rejected challenges to state laws that discriminated on the basis of gender and race. In the now-disgraced case of *Plessy v. Ferguson*, the Court upheld segregation in part because "enforced separation of the races" in public spaces "promot[ed] . . .

* © 2015 The Honorable M. Margaret McKeown. Judge, United States Court of Appeals for the Ninth Circuit. My thanks to my law clerks, Mark Middaugh (Stanford 2014) and Tatiana Sainati (Duke 2013), for their assistance with this essay.

1. 347 U.S. 483 (1954).
2. 163 U.S. 537 (1896).

the public good.”³ Justice Harlan, in dissent, presciently wrote: “Our Constitution is color-blind . . . all citizens are equal before the law.”⁴

The Court’s same paternalistic, sociological view was reflected in an earlier notable case involving Myra Bradwell, a female attorney. In *Bradwell v. Illinois*, the Court brushed aside a claim that the Fourteenth Amendment required the Illinois Bar to accept a female attorney’s application for admission.⁵ The majority sidestepped the issue of sex and instead focused on the absence of a right to practice law in state courts under the Privileges and Immunities Clause.⁶ Three Justices upheld the decision of the Illinois Supreme Court to deny Bradwell a license because the “natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.”⁷ One Justice posited that the policy properly confined women to the “domestic sphere,” thus allowing them to fulfill their “paramount destiny and mission”—“the noble and benign offices of wife and mother.”⁸

Of course, these stereotypes were not universally applicable: not all nineteenth century women were timid or delicate and many had no domestic obligations that prevented them from attaining professional success. Within five years of the *Bradwell* decision, Belva Ann Lockwood successfully lobbied Congress to pass a law permitting women to practice in the federal courts.⁹ Nonetheless, the Supreme Court saw no constitutional problem in permitting states to maintain laws that reflected stereotypes about women’s interests, desires, and capabilities.

Despite dramatic changes in women’s roles in society—some small, some cataclysmic—the Court was not so quick to abandon the conception of gender roles reflected in the *Bradwell* concurrence. These same stereotypes about women’s physical and mental limitations repeatedly came into play over the next ninety years. In the 1908 case *Muller v. Oregon*¹⁰—decided three years after the Court in *Lochner v. New York* held that “[t]here is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor”¹¹—the Court upheld an Oregon statute banning women from working more than ten hours a day “without questioning [*Lochner*’s holding] in

3. *Id.* at 548–50.

4. *Id.* at 559 (Harlan, J., dissenting).

5. 86 U.S. (16 Wall.) 130 (1873).

6. *Id.* at 139.

7. *Id.* at 141 (Bradley, J., concurring).

8. *Id.*

9. JILL NORGREN, *BELVA LOCKWOOD: THE WOMAN WHO WOULD BE PRESIDENT* 82 (2007).

10. 208 U.S. 412 (1908).

11. 198 U.S. 45, 57 (1905).

any respect.”¹² Rationalizing the difference in treatment between male and female workers primarily on the basis that women’s “physical well-being” was “an object of public interest,” the Court zeroed in on the notion that “healthy mothers are essential to vigorous offspring.”¹³ Additionally, in the Court’s view, women were reliant upon masculine protection and guidance and thus required “some legislation to protect [them].”¹⁴

Forty years later, similar concerns about women’s special need for protection prompted the Court to uphold a Michigan statute prohibiting women from working as bartenders unless they were related to the bar owner.¹⁵ In *Goesaert v. Cleary*, the Court reasoned that female bartenders created “moral and social problems,” which would be mitigated if a “barmaid’s husband or father minimizes hazards” through his “protecti[ve] oversight.”¹⁶ Once again, female inferiority carried the day.

And then came *Brown*, where the Court emphatically rejected the theory of race relations that undergirded *Plessy*. The opinion emphasized that societal changes and emerging sociological research amply demonstrated that “the policy of separating the races is usually interpreted as denoting the inferiority of the negro group.”¹⁷ Segregating public facilities by race was thus “inherently unequal.”¹⁸ The Equal Protection Clause took on new meaning. In the wake of *Brown*, the Court struck down racial distinctions in buses,¹⁹ public parks,²⁰ and marriage.²¹

Even after *Brown*, and its unequivocal teaching that “in the field of public education, the doctrine of ‘separate but equal’ has no place,”²² the Court persisted in its reliance on stereotypes to justify differential treatment of men and women. In a challenge to Florida’s policy of automatically enrolling men in jury service while requiring women to affirmatively opt in to serve,²³ the American Civil Liberties Union invoked *Brown* in its amicus brief urging reversal:

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12. *Muller*, 208 U.S. at 423.
 13. *Id.* at 421.
 14. *Id.* at 422.
 15. *Goesaert v. Cleary*, 335 U.S. 464 (1948).
 16. *Id.* at 466.
 17. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954).
 18. *Id.* at 495.
 19. *Gayle v. Browder*, 352 U.S. 903 (1956) (mem.).
 20. *Muir v. Louisville Park Theatrical Ass’n*, 347 U.S. 971 (1954) (mem.).
 21. *Loving v. Virginia*, 388 U.S. 1 (1967).
 22. *Brown*, 347 U.S. at 495.
 23. *Hoyt v. Florida*, 368 U.S. 57 (1961).

We cannot turn the clock back to 1878, much less to 1215. The “separate but equal” doctrine, disposed of in *Brown v. Board of Education*, . . . persisted far beyond its time, teaching and spreading injustice for Negroes all the way. Suddenly there came a fresh breeze across our national life and the evil clouds were swept away. It was the impact of World War II, the coming of the United Nations into our lives and our awakening to the world around us that brought this revolution in our thinking. Integration, we suddenly saw, was inevitable everywhere.

Just so with the advancement of women.²⁴

A unanimous Court in *Hoyt v. Florida* rejected the ACLU’s impassioned plea. Without reference to *Brown*, but with echoes of *Bradwell*, the Court deemed “rational” the Florida legislature’s view that excluding women from compulsory jury service was necessary to protect women’s role “as the center of home and family life.”²⁵ At the same time, the Court recognized that many women would be capable jurors—indeed, at that time thirty states compelled women to serve as jurors on equal terms with men—but nonetheless found no constitutional infirmity in Florida’s decision to codify the state’s presumption of female domesticity.²⁶

What happened next was nothing short of remarkable. Whereas ninety years of social change after *Bradwell* failed to convince a single member of the Court that laws predicated on protecting a woman’s place in the domestic sphere constituted gender discrimination, the thirteen years after *Hoyt* prompted a “complete swing of the judicial pendulum.”²⁷ A series of three key cases marked a watershed in the Court’s recognition of equality for women. For the first time, the Court in *Reed v. Reed* established that a distinction founded on sex “establishes a classification subject to scrutiny under the Equal Protection Clause”²⁸ and accordingly struck down an Idaho probate statute that gave preferential treatment to males.²⁹ Following *Reed*, the Court in *Frontiero v. Richardson*³⁰ tackled a disparity in family benefits offered by the military and held unconstitutional a policy that favored military wives over their husbands.³¹ The plurality’s recognition of America’s “long and unfortunate history of sex discrimination”³² and the acknowledgment that “the sex characteristic frequently bears no

24. Brief for American Civil Liberties Union as Amici Curiae supporting Appellant, *Hoyt v. Florida*, 368 U.S. 57 (1961) (No. 31), 1961 WL 102288.

25. *Hoyt*, 368 U.S. at 61–62.

26. *Id.* at 62–63.

27. *Taylor v. Louisiana*, 419 U.S. 522, 540 (1975) (Rehnquist, J., dissenting).

28. *Reed v. Reed*, 404 U.S. 71, 75 (1971).

29. *Id.* at 76–77.

30. 411 U.S. 677 (1973).

31. *Id.* at 690–91.

32. *Id.* at 684.

relation to ability to perform or contribute to society”³³ was a far cry from the rhetoric of *Bradwell*.

Just two years later, in *Taylor v. Louisiana*, eight Justices—including four Justices who voted to uphold the constitutionality of Florida’s jury selection scheme—found unconstitutional a jury service system nearly identical to the one at issue in *Hoyt*.³⁴ Although much of the opinion centered on changes in Sixth Amendment jurisprudence, the Court expressly repudiated *Hoyt*’s statements about women’s domestic role.³⁵ Citing Department of Labor statistics on women’s participation in the workforce, the Court wrote that the “evolving nature of the structure of the family unit in American society . . . put[s] to rest the suggestion that all women should be exempt from jury service based solely on their sex and the presumed role in the home.”³⁶ The expanding role of women in public life—when combined with the imperative of giving effect to the Constitution’s demand for equality—was simply too powerful for the Court to ignore.

Over time, the Court paid increasing attention to the accuracy of gender assumptions underlying sex-based classifications. One key issue became the breadth of certain assumptions about women, such as the perception that women are not as physically strong as men. While this may hold true in a general sense, not all women are weaker than all men. Recognizing the limitations of broad generalizations, the Court began interpreting the Equal Protection Clause to mean that women must be given a chance to prove their capabilities.

This interplay between changing perceptions about women and the meaning of the Equal Protection Clause for gender equality is perhaps nowhere more evident than in *Price Waterhouse v. Hopkins*, a case brought by Ann Hopkins against Price Waterhouse after being denied partnership despite her “outstanding performance” and proven track record in securing major contracts for the firm.³⁷ *Price Waterhouse* brought into sharp relief the damaging impact sex stereotypes have on women’s ability to succeed in male-dominated environments. The evidence confirmed that some partners took issue with Hopkins because of her gender, referring to her variously as “macho,” as overcompensating for her sex, or as needing “a course at

33. *Id.* at 686.

34. *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975).

35. *Id.* at 534 n.15.

36. *Id.* at 535 n.17.

37. 490 U.S. 228, 232–33 (1989).

charm school.”³⁸ Hopkins’s expert witness testified that the negative remarks, including those by partners who didn’t know her, were the result of sex stereotyping, and were compounded by the fact that Hopkins was the only woman in the pool of partnership candidates.³⁹ The scarcity of other female candidates made it all too easy to reduce Hopkins to her social category. And because her behavior appeared counter-stereotypical, she stood out from the pack.⁴⁰

The ghost of stereotypes returned to haunt women again in *United States v. Virginia*,⁴¹ a case arising from the Virginia Military Institute’s (VMI) male-only admissions policy. In declaring that constitutional equal protection guarantees precluded VMI’s practice, the Court canvassed historical justifications for gender discrimination. Notably, at each turn, fears that women would prove incompetent or destabilizing had been refuted by experience. Female lawyers, doctors, police officers, and soldiers have enriched—not denigrated—our society.⁴² Undisputed evidence established that, notwithstanding obvious “developmental differences” between men and women, at least “some women” would be able to thrive in the grueling curriculum of VMI.⁴³ A state policy denying women the opportunity to attend such a prestigious institution based on stereotypes about what most women might want or be capable of “is not *equal* protection.”⁴⁴

Now, less than twenty years later, the observation that some women can thrive in a grueling environment has become a reality. Not only are women serving critical and dangerous missions in the military, two women recently became the first to graduate from the legendary and prestigious Army Ranger School, where they passed all the same physical and mental tests as their male peers and impressed their fellow graduates.⁴⁵

Apart from constitutional advances, a growing host of civil rights statutes offer protection from both race and sex discrimination, among other classifications.⁴⁶ But the common-sense observation that race is not the same as sex or gender also holds true in the law. While race is treated

38. *Id.* at 235.

39. *Id.* at 235–36.

40. Martha Chamallas, *Listening to Dr. Fiske: The Easy Case of Price Waterhouse v. Hopkins*, 15 VT. L. REV. 89, 97 (1990).

41. 518 U.S. 515 (1996)

42. *Id.* at 543–45.

43. *Id.* at 540–41.

44. *Id.* at 539–40.

45. Army News Serv., *First Female Rangers Believe Experience Makes Them Better Leaders*, WWW.ARMY.MIL (Aug. 20, 2015), http://www.army.mil/article/154253/First_female_Rangers_believe_experience_makes_them [<http://perma.cc/B658-JWPB>].

46. See, e.g. Title IX, 20 U.S.C. § 1681(a) (2012); Equal Pay Act, 29 U.S.C. § 206(d) (2012); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000 to 2000e-17 (2012); Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (2012).

as a suspect classification⁴⁷ demanding strict scrutiny, sex-based distinctions were traditionally evaluated under the minimal rational basis test and only later under the heightened standard of intermediate scrutiny.⁴⁸ When the Supreme Court later introduced the more precise standard of “exceedingly persuasive justification” in *Personnel Administrator of Massachusetts v. Feeney*,⁴⁹ the bar arguably became higher, though still not parallel with race discrimination.⁵⁰ The Court in *VMI* referred to this standard as “skeptical scrutiny,”⁵¹ which interestingly derives not from the legal realm but from the scientist Carl Sagan: “[S]keptical scrutiny is the means, in both science and religion, by which deep thoughts can be winnowed from deep nonsense.”⁵² Sex discrimination is indeed deep nonsense.

Just as the benchmark for measuring sex discrimination has shifted upwards over the years, equal protection jurisprudence also needs to be refined to confront the issue of race and gender “essentialism”—the analytical parsing of minority women’s lives in a manner that reduces gender *and* race discrimination to *either* gender *or* race discrimination.⁵³ Essentialism thus “ignore[s] the complex ways in which race and gender intersect to create social disadvantage,” perversely allowing minority women to “fall through an anti-discrimination gap.”⁵⁴

Aided by the Court’s equal protection jurisprudence, women have made substantial progress since the days of *Bradwell*, *Muller* and *Goesaert*. But let’s be honest—two steps forward and one step back hardly calls for a celebration. In the legal profession alone, women make up 47 percent of law

47. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

48. *Craig v. Boren*, 429 U.S. 190 (1976). Justice Rehnquist in his dissent termed the standard of scrutiny articulated in *Craig* as “intermediate.” *Id.* at 218 (Rehnquist, J., dissenting).

49. 442 U.S. 256, 273 (1979).

50. Jason M. Skaggs, *Justifying Gender-Based Affirmative Action Under United States v. Virginia’s “Exceedingly Persuasive Justification” Standard*, 86 CALIF. L. REV. 1169, 1169–70 (1998).

51. *United States v. Virginia*, 518 U.S. 515, 531 (1996).

52. CARL SAGAN, *BROCA’S BRAIN: REFLECTIONS ON THE ROMANCE OF SCIENCE*, at xiv (1979).

53. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 587–89 (1990).

54. Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES, 701, 712–13, 715 (2001).

school classes,⁵⁵ occupy 54 percent of leadership positions on law reviews⁵⁶ and constitute 45 percent of law firm associates.⁵⁷ Even so, women lawyers continue to earn just under 80 cents on the dollar compared to their male colleagues⁵⁸ and remain significantly underrepresented in legal leadership positions: women make up only 17 percent of equity partners in law firms,⁵⁹ only 20 percent of law school deans,⁶⁰ and only 24 percent of federal judges.⁶¹ For women lawyers, the glass ceiling and the “sticky floor”⁶² are more than theoretical barriers to equality.

While there has been considerable research on women in the legal profession, broader research reveals that the disparities are even greater in the workforce at large. Women make up almost half of the workforce, yet full-time female workers earn only 77 cents on the dollar compared to men.⁶³ Women’s overall participation in the workforce has dropped since 2002.⁶⁴ Additionally, “[o]ccupational segregation continues to be a persistent feature of the U.S. labor force,” with female-dominated industries paying less than those dominated by men.⁶⁵ Frequently, these differences in treatment are rooted in unconscious bias rather than deliberate discrimination.⁶⁶

55. COMM’N ON WOMEN IN THE PROFESSION, AM. BAR ASS’N, A CURRENT GLANCE AT WOMEN IN THE LAW: JULY 2014 at 4 (2014), http://www.americanbar.org/content/dam/aba/marketing/women/current_glance_statistics_july2014.authcheckdam.pdf [<http://perma.cc/Y5LV-DTZ5>].

56. *Id.*

57. *Id.* at 2.

58. *Id.* at 6.

59. *Id.* at 2.

60. *Id.* at 4.

61. *Id.* at 5.

62. REBECCA SHAMBAUGH, IT’S NOT A GLASS CEILING, IT’S A STICKY FLOOR: FREE YOURSELF FROM THE HIDDEN BEHAVIORS SABOTAGING YOUR CAREER SUCCESS (2007) (referring to “sticky floor” as career blocks that prevent women from moving up).

63. Bryce Covert, *Five Signs of Stalled Progress on the Gender Wage Gap 50 Years After the Equal Pay Act*, INST. FOR WOMEN’S POL’Y RES. (June 10, 2013), <http://www.iwpr.org/press-room/press-clips/five-signs-of-stalled-progress-on-the-gender-wage-gap-50-years-after-the-equal-pay-act-june-10-2013> [<http://perma.cc/7BME-A4QG>]. In some fields, such as social services, recent female college graduates actually earn more than their male counterparts, although the advantage evaporates when they reach ages 35 to 45. See Laura Colby, *Women Earn More than Men in These Fields After College*, BLOOMBERG BUS., (Aug. 5, 2015, 10:59 AM), <http://www.bloomberg.com/news/articles/2015-08-05/women-outearn-men-in-29-fields-at-start-of-careers> [<http://perma.cc/6D6N-DHF2>].

64. INST. FOR WOMEN’S POLICY RESEARCH, THE STATUS OF WOMEN IN THE STATES: 2015: EMPLOYMENT AND EARNINGS 25 (2015), <http://statusofwomendata.org/app/uploads/2015/02/EE-CHAPTER-FINAL.pdf> [<http://perma.cc/NB8C-UA3N>].

65. *Id.*

66. Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 460 (2001).

To some, these disparities are the result of women's biological make-up and personal choices—particularly, the decision to prioritize family over profession—rather than discrimination, and thus a legal remedy is neither necessary nor warranted.⁶⁷ To those critics, I say bah humbug. Gender equality and having a family and personal life are not mutually exclusive. What is missing is institutional recognition of this fact and the will to change and knock down barriers to women's advancement. Yet stereotypes persist and continue to play a role in impeding women's professional advancement and full equality. For example, mothers who take time from work to deal with family issues may be perceived as uncommitted, whereas it reflects well on men to take time to handle family matters.⁶⁸ Likewise, where men's success is typically attributed to skill, women's achievements are frequently denigrated as mere luck.⁶⁹ Research reveals that women must prove themselves time and again, and often are judged only on their past achievements, whereas men are measured by their future potential.⁷⁰ Since employers and others may mask blatant discrimination, courts have an important role in addressing these tacit forms of bias and the underlying persistent stereotypes that inform them.

Of course, it is naïve to think the equality principle articulated in *Brown* and the cascade of cases that followed will eliminate gender stereotypes. Nor is the mere existence of a stereotype necessarily discrimination: as the Court recognized in *VMI*, there are “inherent differences” between men and women—and these “remain cause for celebration.”⁷¹ But what the sixty years since *Brown* have made clear is that the Constitution forbids laws and practices that enshrine discriminatory stereotypes into government policy and denigrate the female sex. Such assumptions may not be used

67. See, e.g., Kingsley R. Browne, *Sex and Temperament in Modern Society: A Darwinian View of the Glass Ceiling and the Gender Gap*, 37 ARIZ. L. REV. 971, 1065–66 (1995) (arguing that women are seen being less likely to possess traditionally masculine traits like “aggressiveness, ambition and drive, strong career orientation . . . , and risk-taking” than men and that these temperamental differences, together with women’s “greater commitment to families . . . have a powerful effect”); Richard A. Posner, *Conservative Feminism*, 1989 U. CHI. LEGAL F. 191, 199–200 (hypothesizing that nature may be the reason women “are more devoted to children” and less “involved in career” than men, but that regardless of the reason, we should not “greet governmental regulation of the family structure with open arms”).

68. COMM’N ON WOMEN IN THE PROFESSION, AM. BAR ASS’N, FAIR MEASURE: TOWARD EFFECTIVE ATTORNEY EVALUATIONS app. 7, at 71 (2d ed. 2008).

69. *Id.*

70. *Id.* at 72.

71. *United States v. Virginia*, 518 U.S. 515, 533 (1996).

“as they once were . . . to create or perpetuate the legal, social, and economic inferiority of women.”⁷² That our forebears may not have envisaged women performing brain surgery or serving as judges is of no moment: because “some women” have proved that they can do so, denying that opportunity to all women violates the Fourteenth Amendment.

That historically disadvantaged groups will continue to break new ground in American life is inevitable. That constitutional law evolve to preserve and expand the principle of equality announced in *Brown* is imperative.

72. *Id.* at 534.