

THOUGHTS FROM A "REAL" WOMAN

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I would like to use the short time that has been allotted to me to convey to you my own rather personal, but somewhat educated and, in these rather trying times, rather hard-won convictions on the subject that this panel has been convened to address.¹ I am going to share with you, in very few words, but in as plain terms as I can manage, the broad outlines of my principal reasons for having become convinced, as I have, that women should not be a specially protected class under the Constitution, and for thinking, as I do, that gender classifications should not merit even "intermediate scrutiny."

In a speech delivered before she was nominated to take her seat on the Supreme Court, now-Justice Ruth Bader Ginsburg defended intermediate scrutiny on the ground that it is a fairly benign form of judicial intervention.² She claimed, in effect, that intermediate scrutiny does not even entail the exercise of substantive constitutional judgment by the Court. Its purpose instead was merely to let the Court, on occasion, instruct Congress and state legislatures to go back and rethink and re-analyze the solution they had previously reached to a particular legislative problem. As she put it, "[t]he ball, one might say, [is] tossed by the Justices back into the legislators' court, where the political forces of the day [can] operate."³

Such an analysis begs the all-important question: how did the ball ever get out of the legislature's court in the first place? Justice Ginsburg's analysis implies that, unless the Court "tosses the ball back into the legislators' court," the political forces of today are somehow impotent to bring the challenged law into step with today's political realities. Surely, however, legislatures do not

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1. As I edit these remarks for publication, I am aware that my talk may strike readers as more conclusory and elliptical than analytical. Readers will notice that I chose neither to describe the analytical foundations of the point of view that my talk expresses, nor to offer a point-by-point refutation of the point of view it rejects. The context of the occasion, coupled with my goal of using the time allotted me to sharpen the debate rather than to deepen it, explain these choices. I trust that readers will bear these factors in mind.

2. See Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1202-1205 (1992).

3. *Id.* at 1204.

need the Court to tell them when issues are ripe for political re-examination. The analysis also implies that, unless the Court strikes down laws that classify along gender lines, the Court will be seen as having put its implicit imprimatur on the wisdom or morality of such classifications. Yet to say a law is constitutional is not to say that it is either wise or good. When the Court sustains the constitutionality of a law, remember, its only message to the legislature is "You *may* do this, because the Constitution permits it." The message is not "you *must* do it" and certainly not "you *must* do it because we approve of it."⁴

What I have just said suggests that a significant theoretical reason for thinking that women should not be made a specially protected class under the Constitution has to do with the nature of the political process. The argument is not about the substantive correctness of political outcomes. Rather it is a claim about the responsiveness of the political process to emerging social realities. The point is this: women have the right to vote. They have had it for some time now.⁵ At this point in time, issues of concern to women have such political salience that it is quite implausible to claim that women need special constitutional protection because politicians routinely ignore them.⁶

The argument from women's political strength is persuasive enough to undermine severely the case for special constitutional protection for women. Further, to those for whom constitutional rights are a matter of substantive claims rather than of supposed process malfunctions, I would make another point: the Constitution does not, in fact, seem to have anything specific of substance to say about how legislatures should treat women *qua* women. For constitutional purposes, of course, women are persons, and they are entitled, each and every one of them, to be treated by their government as such.⁷ But that tells us only that they have rights as individuals, not that they have rights as women. I do not know, and I have not found anyone who does know, what the substantive criteria ought to be for the constitutionally appropri-

4. See generally ROBERT F. NAGEL, *CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW* (1989).

5. See U.S. CONST. amend. XIX (prohibiting denial of voting rights based on sex). This amendment was ratified on August 18, 1920.

6. See Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 829 (1991) (noting that women were voting in roughly the same numbers as men by 1971).

7. See *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 165 (1874) (stating that women are persons under the Constitution).

ate legislative treatment of women as such. What is the baseline against which to measure what would be of benefit to women as such, or what would be detrimental to them as such? Professor Cass Sunstein has shown us that baselines matter.⁸ One cannot do normative constitutional law, one cannot pass normative judgments on legislative outcomes, unless one can at least specify and hopefully achieve some genuine consensus on the content of the appropriate baseline of constitutional treatment. But again, the Constitution does not seem to have much to say on the question of how women as such should be treated by legislatures.

But now let me put this brief dabbling in theory aside, because I want to get to the heart of my remarks and to share my more personal reasons for thinking as I do. First, I am going to make an observation about myself. I hope you find it obvious and believable, even non-controversial. I am a woman. I am, in fact, a real woman. I am not a "female impersonator."⁹ I am speaking to you in a "public voice," and it is a voice that I hope is not "uninflected by the experiences of the female body."¹⁰ You will understand shortly why I am telling you these things.

Now let me tell you something else about myself. On many of the significant issues of the day, I am in agreement with the conservative point of view. Let's face it, I am a member of the Federalist Society. I think government should be smaller, not bigger. I fear the abuse and corruption of the coercive power of the state more than I worry about what goes on in the private sector. I think crime is caused by criminals—that is, by people who disobey the law. I think people who commit crimes should be punished for them. I believe in equality of opportunity, not in equality of results. I believe that individuals have rights and that groups do not. I think free competitive markets are usually better at allocating resources and guiding productive effort than even the best, most "reinvented" government regulation. And I think that rather than promising that government will guarantee its citizens security, as President Clinton has been wont to do, our leaders should promise that government will be accountable to

8. See Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987), *Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1 (1992), and *Why the Unconstitutional Conditions Doctrine is an Anachronism (With Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593 (1990).

9. See *infra* text accompanying note 11.

10. See *infra* text accompanying notes 12-13.

them, and should insist on personal responsibility from the citizens in exchange.

When I tell you these beliefs, I am not trying to turn this talk into some sort of a personal conservative manifesto. I am trying to give you reasons to know what I mean when I say that on many of the "hot-button" political issues of the day, I find myself on the conservative side. The juxtaposition of my first self-revelation, that I am a woman, and the second one, that I often agree with conservative positions on the merits, is deliberate. It is meant to tell something about the source of my views on the subject of women and the Constitution. It tells you something, but not quite everything. I need to fill it in with a few stories gleaned from the political landscape of the day.

I'll begin with what Gloria Steinem reportedly said, on the election of Kay Bailey Hutchison to United States Senator from Texas: Ms. Steinem referred to Senator-elect Hutchison as "a female impersonator."¹¹ Second, there's Naomi Wolf's toting up of female by-lines on editorial pages in *The New Republic*.¹² Jeane Kirkpatrick's by-line didn't count for much because, to Ms. Wolf's ear, Ms. Kirkpatrick's voice is "so Olympian, so neck-up and uninflected by the experiences of the female body, that the subtle message received by young female writers is to enter public voice, one must abide by the no-uterus rule."¹³ My last example comes from Ellen Goodman in *The Atlanta Journal and Constitution*, where she opined that Republicans hate Hillary Clinton because she is a strong, powerful, "too-independent woman."¹⁴ Wrong! Speaking for myself, I disagree on the merits with just about every policy position Ms. Clinton has ever espoused. And the only part about her being a strong, powerful, independent woman that troubles me is that her positions of public power derive from the fact of her husband's having been elected and that it is he, not she, that is accountable for how that power is exercised. Unaccountable power, which is what she wields, bothers me in principle.

11. Sam Attlesey & David Jackson, *Bentsen, Krueger on Tour; Hutchison in Dallas*, THE DALLAS MORNING NEWS, May 23, 1993, at 22A (quoting Steinem).

12. Naomi Wolf, *Are Opinions Male? The Barriers that Shut Women Up*, THE NEW REPUBLIC, Nov. 29, 1993, at 20.

13. *Id.* at 22.

14. Ellen Goodman, *GOP Goes Too Far in the Bashing of Hillary Clinton*, ATLANTA J. AND CONST., Aug. 22, 1992, at 19.

What attitudes like Gloria Steinem's, Naomi Wolf's and Ellen Goodman's suggest is that the very concept of women that is publicly embraced by the feminist movement of today explicitly excludes women like me.¹⁵ Using their gender to confer upon themselves and their political allies the status of victims—falling prey to constant barrages of inequality and oppression and patriarchy, complaining about the unfairness of being made to undergo the agony and discomfort of childbirth, and appointing themselves the guardians and protectors of the rights of all women—many of the spokeswomen of the modern feminist movement have found it necessary to redefine the term "woman" so that only women with certain views on current issues, only women with their views, are included as real women.

The modern feminist cause, I once thought, was born of a rejection of certain stereotypes about women's essential nature, stereotypes that trapped many women in roles that they were ill-suited to play and in which, more importantly, their capacities to contribute their talents and energies to the affairs of the world were thwarted.¹⁶ In its inception, the movement was premised on the conviction that women are different from one another. They are not just different from men, but they are different from one another as well. The old stereotypes were ill-fitting, but the more basic point was that the idea of stereotyping itself was illegitimate. "One size" just could not be made to fit all. Hence, to cast all women in the same mold, no matter how benign, was understood to be unjust to those women who do not fit. It was also understood to misallocate foolishly an enormous amount of human potential.

There is sad irony in the fact that a movement that had its genesis in a claim about the injustice of treating all women the same instead of as individuals has succumbed in its most often encountered political manifestation to the ideological trap of insisting that real women must all think alike. As long as there persists the notion that there are "real" women, and there are the counterfeits like me, and that the equality being sought for wo-

15. I recognize that any generalization about modern feminism is overbroad. See, e.g., Daniel Ortiz, *The Family and Three Theories of Feminism*, 18 HARV. J.L. & PUB. POL'Y 523 (1995) (exploring the major differences among broad groupings of feminist theory).

16. See, e.g., BETTY FRIEDAN, *THE FEMININE MYSTIQUE* 69-79, 71 (1984) (exploring the crisis in women's identity and noting that "[t]he feminine mystique permits, even encourages, women to ignore the question of their identity" by becoming mothers and housewives).

men is being sought only on behalf of the real ones, then the counterfeits like me will have to renounce the offered straight-jacket and call for a reality check on those who insist that we wear it.

I have a second personal reason for rejecting the idea that the Constitution embodies special solicitude for women as a class. My role as a woman has cast me into a number of relationships that make it simply impossible, either as a personal or as an intellectual matter, to think that the right question to ask about any social policy should be: does this help or hurt women? That just cannot be the right question, for it cannot be right to care about the effects of a social policy on only one group of people within the society. It cannot be right to say, in effect, that only women's welfare matters. The right question about any social policy has to be: does this help or hurt society as a whole? Asking what is good or bad just for women—even assuming, counter-factually, that there is a relatively stable consensus about who fits the category “women,” and whose views get to count on the question of what's good or bad for them—cannot tell us what we ought to do. This is so for several reasons.

First of all, as Richard Epstein has suggested, posing the question in this way implies that we are stuck in a zero-sum game, that the size of the social pie is static, and the only question is how we should divide it up.¹⁷ This is a false assumption; in the first place, the pie is not static. And in the second place, concentrating on dividing up a static pie and framing the debate in terms to suggest that if I—because I am a woman—win, you—because you are a man—must lose, will deter cooperation between men and women, and entrench the divisions that already tend to exist between them. Especially when it is put in constitutional terms, where the legal stakes are at their very highest, framing the debate in terms of women versus men creates perverse incentives to perpetuate and intensify the war between the sexes. To seek grievances and tout instances of oppression, rather than looking for and celebrating ways for everyone in society to live together productively and harmoniously, is a deeply flawed approach.

I see another reason why the question—“What is good for women?”—is the wrong question to ask about any policy issue when

17. See Richard A. Epstein, *Two Challenges for Feminist Thought*, 18 HARV. J.L. & PUB. POL'Y 331, 339 (1995).

I consider the circumstances of my own life, the people whom I care about and who care about me, and about what makes our life together possible. Here it will be clear to you that I embrace a completely different vision from that which animates Martha Fineman's work.¹⁸ When I consider families in general, and women's roles in families in particular, I do not see oppression and despair. Rather, what strikes me is how families are a miraculous example of the human drive to cooperate for mutual advantage. When Professor Fineman spoke last night of women in families as being paradigmatically uncompensated, unappreciated, and unnoticed, I silently took issue.¹⁹ The family as an institution just would not have survived as the building block of society were it the chamber of misery and oppression that Professor Fineman envisions.²⁰

I am a daughter, a sister, a wife, and a mother. My father was a man, my half-brother was as well, as is my husband, and so are my sons. Some of the people I love most dearly, and who love me in return, are men. I realize that I am fortunate, but I do not believe that I am unique in that the men in my family notice and appreciate me, and do not constantly try to oppress or dominate me. More importantly, a world in which either they preferred their own welfare as men systematically to mine and my daughter's, or in which I and my daughter systematically put our own welfare as women ahead of theirs is not a world in which any of us would want to live. My welfare is so bound up with theirs, and theirs so bound up with mine, that thinking in terms that suggest a dichotomy between my welfare as a woman and theirs as men would get us all completely off track.

My point is that we are all in this together. Whether we like it or not, the fates of men and women in families and in society at large are inextricably linked. A world in which women's gain is men's loss is intolerable. Their fates are linked, so if men lose, then so do women — and vice versa. This is why it seems to me wrong to set ourselves the task of adopting policies and embrac-

18. See, e.g., Martha L. Fineman, *Images of Mothers in Poverty Discourses*, 1991 DUKE L.J. 274, *Implementing Equality: Ideology, Contradiction and Social Change: A Study of Rhetoric and Results in the Regulation of the Consequences of Divorce*, 1983 WIS. L. REV. 789, and *The Neutered Mother*, 46 U. MIAMI L. REV. 653 (1992).

19. See Martha A. Fineman, *Feminist Theory and Law*, 18 HARV. J.L. & PUB. POL'Y 349 (1995).

20. And that families are a nearly universally prevalent form of social organization cannot be doubted. CARL N. DEGLER, *AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT* 3-4 (1980).

ing constitutional arguments on the grounds that they are “good for women.” Instead, our job is to look for ways for women and men to build a world together, one in which we can all be winners.