

# Of Tiers of Scrutiny and Time Travel: A Reply to Dean Sullivan

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Conspicuously absent from the Constitution of the United States is any provision for the equality of women, save only the Nineteenth Amendment. And while the Supreme Court could have read the Nineteenth Amendment back into the Equal Protection Clause of the Fourteenth Amendment synthetically to create a “direct” textual right to equality for women, it declined to do so. Instead, the constitutionalization of gender equality ultimately emerged as an interpretation of the Fourteenth Amendment itself, in part by analogy to the Amendment’s well-recognized antipathy to discrimination against African Americans and other racial minorities. The combination of this paucity of text and the derivative rationale underlying the protection of women is seen by some, including Dean Sullivan, as having produced an infirm regime of constitutional equality for women.<sup>1</sup>

Dean Sullivan offers us an elegant and concise history of the evolution of the constitutional rights of women, depicting the development of women’s rights as delayed and sputtering and the resulting jurisprudence as compromised and somewhat lame. Her article also leads us to an engaging thought experiment, asking how the remarkable trio of Ruth Ginsburg, Susan Anthony, and Elizabeth Stanton might have built a women’s constitution from scratch. While I agree with many of Dean Sullivan’s observations, her view of the present state of gender discrimination doctrine and her view of what a better Constitution would have looked like both bear a closer look.

## I

### THE PROBLEMS OF INTERMEDIATE SCRUTINY AND A RADICAL CURE

Dean Sullivan’s picture of the development of women’s constitutional rights as delayed and sputtering is all too accurate. Her view of the contemporary jurisprudence of women’s rights as compromised and lame,

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1. See Reva Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947 (2002).

however, is misdirected in ways that matter. If we start with the wrong diagnosis, we are less apt to realize a cure.

We should, perhaps, begin with the good news. From *Reed v. Reed* onwards,<sup>2</sup> courts have consistently found clear discrimination against the immediate and material interests of women to be unconstitutional.<sup>3</sup> As a matter of constitutional practice, such laws are axiomatically invalid. That important fact is easy to overlook because of distracting elements in the judicial rhetoric of gender discrimination doctrine.

### A. *The Expressive Pathology of Intermediate Scrutiny*

The most distracting element in the rhetoric of gender discrimination doctrine is the Court's nominal insistence that gender-based classifications are subject to "intermediate scrutiny." If the Court was serious about this—if it were really the case that laws treating women differently to their immediate and material disadvantage would be upheld upon the showing that they bore "a substantial relationship" to "important governmental objectives"—then the jurisprudence of gender discrimination would be very lame indeed.

But the Court has never actually used intermediate scrutiny to validate a law that discriminated against women in an immediate and material way. Intermediate scrutiny has only provided a rationale for validating laws that discriminate on the basis of gender in cases where it is men who are placed at an immediate and material disadvantage by the law in question. Thus, intermediate scrutiny figured prominently in *Rostker v. Goldberg*,<sup>4</sup> where the law required men, but not women, to register for the draft, and in *Michael M. v. Sonoma County Superior Court*,<sup>5</sup> where California's statutory rape laws treated men who engaged in sexual relationships with girls more harshly than it treated women who engaged in sexual relationships with boys. Much the same abstract profile was presented in *Mississippi University for Women v. Hogan*,<sup>6</sup> where women could choose between two state nursing colleges, only one of which admitted men; there, however, the Court found the disparity in treatment to be unconstitutional.

Women may well be the ultimate victims of laws such as these, which connect in uncomfortably direct ways to views of women as too precious for their own good. The Court, however, has not yet come to a clear view of how such cases should be treated. Rather than developing a sensible and consistent approach to the bearing of constitutional equality on these cases, the Court has allowed the looseness of intermediate scrutiny and rhetoric of

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2. 404 U.S. 71 (1971).

3. See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996); *Stanton v. Stanton*, 421 U.S. 7 (1975); *Frontiero v. Richardson*, 411 U.S. 677 (1973).

4. 453 U.S. 57 (1981).

5. 450 U.S. 464 (1981).

6. 458 U.S. 718 (1982).

compromise it embodies to keep the question hidden from view. A stranger to our gender discrimination jurisprudence who read only this small subset of cases would have a flawed understanding of that jurisprudence, in which the rights of women to equal treatment would appear far weaker than they actually are.

The good news, then, is that the Court does not mean what it says with regard to gender discrimination. But constitutional doctrine not only guides results; it also expresses norms of political justice. And the expressive valence of intermediate scrutiny in gender discrimination doctrine is deeply unfortunate. Taken at face value, intermediate scrutiny intimates that treating women as less than equals is bad, but not very bad. Accordingly, if we have reasonably good reasons for failing to live up to the requirements of equal regard, we should let the chips of gender injustice fall where they may. This is a strikingly poor way to think of constitutional injustice in general and of governmental acts which perpetuate the subordinate status of women in particular. Taken seriously, intermediate scrutiny treats an evil as though it were a mere inconvenience. Its rhetorical presence in extant doctrine obscures rather than reveals the extent to which we have set the Constitution against the denigration of women.

### *B. The Cure: Beyond Weights and Measures*

The hero of Dean Sullivan's historical narrative is Ruth Ginsburg. Justice Ginsburg has offered us a heroic cure to the problem of intermediate scrutiny and, as well, to other maladies from which we suffer but may have failed to recognize. The recipe for this cure appears in Justice Ginsburg's opinion for the Court in *United States v. Virginia*,<sup>7</sup> where the males-only admission policy of the Virginia Military Institute was declared unconstitutional. Ginsburg's surprisingly uncelebrated opinion in the VMI case is splendid. It carries, I believe, the seeds of radical and very important doctrinal change.

Well known, and a source of no small amount of heat among the Justices who did not join the VMI opinion, is Ginsburg's gloss on intermediate scrutiny. Drawing on language from *Mississippi University for Women v. Hogan*, Ginsburg insisted that official classifications based on gender require "an exceedingly persuasive justification."<sup>8</sup> Were this just a tweaking of the mechanical system of weights and measures suggested by the conventional tiers of scrutiny—to be read in effect as a move from "important reason" to "very important reason"—it would only be interesting as an instance of what the Justices who did not support the majority opinion thought it to be, namely, a sneaky ratcheting up of the bar over which gender-based classifications must pass. However, on my reading at

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7. 518 U.S. 515 (1996).

8. *Id.* at 533.

least, Justice Ginsburg appears to be pointing towards a more radical doctrinal change, a change intimated by the following important paragraph in her opinion:

"Inherent differences" between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity. Sex classifications may be used to compensate women "for particular economic disabilities [they have] suffered," to "promot[e] equal employment opportunity," to advance full development of the talent and capacities of our Nation's people. But such classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women.<sup>9</sup>

On this reading, requirement of an exceedingly persuasive justification calls for a hard judicial look of a special sort: it demands an explanation of why a particular law does not implicate the deep constitutional vices normally associated with such laws. At the heart of those deep constitutional vices is the tendency of such laws to "den[y] to women, simply because they are women, full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities."<sup>10</sup>

Think of the requirement of an exceedingly persuasive justification this way: I have five-year-old twin daughters. Imagine that I come home early one day some years from now, and find them watching television despite the family rule that homework must be done before any after-school recreation is undertaken. I tap my foot and say, "You better have an extremely persuasive justification, young ladies!" Now, what would count as such a justification would be an explanation of why the rule did not apply on that occasion: no homework had been assigned; the homework actually involved watching the television in question; the homework had been done with singular dispatch on this occasion; or so forth. What would almost certainly not count would be a reason offered as weighty enough to outweigh the fully applicable good reasons for the rule in the first place: this is a very special television program and everyone who is anyone will be talking about it tomorrow at school.

The point of this approach is that the vice of denying women the stature as full and equal members of our political community is not to be balanced or offset against other community interests of the moment. The VMI test is in that sense categorical. To prevail, a governmental entity that distinguishes between men and women must show why its classification is

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9. *Id.* at 533-34 (footnote & citations omitted).

10. *Id.* at 532.

consistent with the categorical prohibition against laws that impair the stature of women.

### C. *Applying the VMI Approach to Race Cases*

If Justice Ginsburg's approach takes hold, it will bring clarity to judicial analysis of laws that distinguish on the basis of gender. Beyond that, it will offer the Court a way out of the conceptual quagmire that besets tiers-of-scrutiny analysis of racial classifications. We have already seen how so-called intermediate scrutiny misleads anyone who takes the doctrinal command at face value by suggesting that the vice of gender discrimination is a comparatively minor constitutional offense, readily offset by reasonably strong public interests. A similar difficulty with common conceptual roots occurs at the level of strict scrutiny.

Consider the problem faced by Justice O'Connor and those of her colleagues who supported the heart of her opinion in *Adarand Constructors, Inc. v. Peña*.<sup>11</sup> There, Justice O'Connor committed herself (and possibly the Court) to the complex view that (a) all racial classifications, including congressional enactments favoring racial minorities, are to be subject to strict scrutiny; accordingly, they must be necessary to a compelling governmental interest in order to survive such scrutiny; but (b) the prevailing notion that such scrutiny is "strict in theory, but fatal in fact" is not apt since "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups... is an unfortunate reality, and government is not disqualified from acting in response to it."<sup>12</sup>

Now, a jurisprudence of a relaxed compelling state interest test could develop, pursuant to which the Court softens the requirement of necessity or evolves the measure of a compelling interest in ways that would make it possible for affirmative action to survive strict scrutiny. But what then of plain old garden-variety laws or practices that distinguish between persons on grounds of race to the detriment of racial minorities? Are they, too, to be measured by this kinder and gentler form of strict scrutiny? Or are there to be two tests, strict scrutiny alpha and strict scrutiny beta, which have the same name and purport to apply the same requirements, but which in fact are significantly different in practice? Justice O'Connor's problem, made much worse by the wooden options under prevailing equal protection doctrine, consists, on the one hand, of the failure to distinguish between a hard judicial look at a race-based law to determine whether the law suffers from the constitutional vices that motivate the Court to presumptively disfavor such laws and, on the other, of an extremely skeptical judicial inquiry into

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11. 515 U.S. 200 (1995).

12. *Id.* at 237.

the question of whether a law that suffers in full from those vices is nevertheless justified by extraordinary public necessity.

The common problem with intermediate scrutiny in gender cases and with Justice O'Connor's *Adarand* tangle is that the tiers-of-scrutiny structure of contemporary equal protection doctrine fails to distinguish between identifying a constitutional wrong in the first place and justifying<sup>13</sup> that wrong. The tiers-of-scrutiny formulation is too blunt to serve these two conceptual enterprises.

Justice Ginsburg's approach in *United States v. Virginia*, in contrast, foregrounds the question of whether a constitutional wrong has taken place and thus invites the development of a more intelligible and normatively attractive equal protection jurisprudence. The hard-judicial-look approach could and should become the norm in both racial and gender cases. We may thus see an inversion of the traditional dependency of gender discrimination adjudication on lessons from the analogy of race.

What is often described as an "anticaste" or "antisubordination" principle underlying race cases is entirely consistent with Justice Ginsburg's insistence on equal citizenship for women. In both instances, the underlying norm is that of equal membership or stature in our political community, and the normative command in both is absolute. The exceedingly persuasive justification standard would be a perfectly serviceable means for enforcing what is essentially the same categorical requirement in race cases.

Even if the doctrinal call were the same in both domains, in all likelihood there would continue to be differences in the constitutional treatment of gender distinctions and race distinctions. The cultural conditions of gender and race are different, and differences in treatment that would offend the principle of equal citizenship in one domain need not do so in the other. Consider the much-abused example of single-gender bathrooms, sometimes offered as grounds for thinking that gender discrimination is less deeply pernicious or less fully unjust than its racial counterpart. Now, it is certainly true that the cultural meaning of racial distinctions in bathroom access are unequivocally at odds with our commitment to equal citizenship while the meaning of gender distinctions is almost as unequivocally benign with regard to that commitment. Racial distinctions in this realm are redolent with hostility and judgments of inferiority; gender distinctions, in contrast, speak merely of a lingering sense of prudery reinforced by practical concerns about the vulnerability of women to sexual predators. But the point is not that the constitutional injustice of caste or subordination—or whatever we choose to call pernicious and chronic failures of equal citizenship—is more readily countenanced when women are the victims; the point

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13. Justice Ginsburg's call for an exceedingly persuasive justification is in this semantic respect unfortunate since "justification" seems more naturally to attach to the second of these enterprises.

is that what constitutes such injustice is different in the case of gender than in the case of race.

Before we leave what I have characterized as Dean Sullivan's too pessimistic reading of contemporary doctrine in the area of women's rights, we should note that while her complaints center on the compromised nature of intermediate scrutiny, she also has in mind other deficiencies in the Court's gender discrimination jurisprudence. Chief among these is the Court's unwillingness to characterize some laws that cut sharply to the disadvantage of women as discriminating against them. Two cases come to mind: *Geduldig v. Aiello*,<sup>14</sup> which held that disfavoring pregnancy was not the equivalent of disfavoring women; and *Personnel Administrator of Massachusetts v. Feeney*,<sup>15</sup> where the same is held of a law that favors military veterans in public employment. I have deferred discussion of these cases because they figure prominently in my comments about Dean Sullivan's thought experiment, to which I now turn.

## II

### THE PERILS OF TIME TRAVEL

Dean Sullivan's article invites us to set our imaginations to the scene of Ruth Ginsburg, Susan Anthony, and Elizabeth Stanton gathered to draft the Constitution and aiming, of course, to deal effectively with women's rights in the first place. The point of the exercise is to provoke reflections about constitutional design in general. It is here that the perils of making too free with time and moral sensibility enter the picture. If we start in our own moral place and time, and ask how our present, relatively fresh commitments to the rights of women would have been better or best served at the time of the founding—or more plausibly, at the time of the drafting of the Reconstruction Amendments—we are bound to get a distorted picture of constitutional design.

#### A. *Generality and Specificity*

Consider a prominent question posed by Dean Sullivan: how do we choose between general moral language, like that which predominates in the liberty- and equality-bearing provisions of our Constitution, and much more specific language? General constitutional language has the great advantage of accommodating and inspiring moral progress. Specific constitutional language, in contrast, has the virtue of securing the progress that already has been made. So it matters who you are, where you are in time, and how much confidence you have in the maturity of your moral judgment. Being in the now and thinking back to the then, specificity will

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14. 417 U.S. 484 (1974).

15. 442 U.S. 256 (1979).

inevitably seem desirable. The advantages of specificity are fully revealed in hindsight while the disadvantages are nearly as fully obscured.

To see just how easy it is to get things wrong, consider Dean Sullivan's example of a modern, very specific, seemingly exemplary provision protecting women: the United Nations Convention on the Elimination of All Forms of Discrimination Against Women.<sup>16</sup> The very title seems to say it all, but consider its formulation: the Convention bars "any distinction, exclusion, or restriction made on the basis of sex" that impairs the recognition or enjoyment of equal rights in virtually any domain of life.<sup>17</sup> This self-conscious, contemporary attempt at breadth of protection suffers from a conceptual vulnerability; only restrictions made on the basis of sex fall under the aegis of this provision. And that category is open in principle to an interpretation that would saddle the Convention with arguably the worst feature of our own contemporary gender discrimination doctrine. The Supreme Court declined to protect women in *Geduldig* from state insurance provisions that were categorically unfavorable to pregnant women and failed to protect women in *Feeney* from a state civil service veteran's preference precisely because the Court believed that the women-disfavoring provisions in each case were not distinctions made on the basis of sex.

My point is not merely that even heroic attempts at specificity by those who are confident of their moral or political agendas may fail to encompass all the relevant delicts, though that is surely true. There is very real danger that specific provisions will make matters worse. The United Nations Convention, for example, may have the perverse effect of writing *Geduldig* and *Feeney* into stone. And when we correct for the anachronistic distortions of Dean Sullivan's thought experiment, the problem passes beyond a theoretical possibility to something approaching a substantial likelihood. Suppose, for example, that the Fourteenth Amendment (which caused enough trouble as it was for women's rights by its invocation of "the male inhabitants"<sup>18</sup> of each state as the persons whose right to vote mattered) had been textually aimed—as is the Fifteenth Amendment—at the denial of rights "on account of race, color, or previous condition of servitude."<sup>19</sup> Women, when the time came to seriously consider their claims to constitutional equality, would have been considerably worse off. And suppose gender was added to the list. What then of the rights of gays and lesbians under the Amendment?

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16. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981).

17. *Id.* at 16 (art. 1).

18. U. S. CONST. amend. XIV, § 2.

19. U. S. CONST. amend. XV, § 1.



*B. Resolving the Tension*

One solution to the problem of time and moral sensibility and to the resulting tension between specificity and generality is to be specific with regard to the moral ground that is clear and insist on remaining general with regard to that which is not. But this have-it-both-ways strategy is not without its difficulties since there may be a tendency for hard constitutional text to drive out the soft provisos that accompany it. An extreme example of this phenomenon is the Ninth Amendment, on which constitutional light seldom shines; it is a victim, perhaps, of its own generality.<sup>20</sup>

Another response is to make the Constitution much more freely amendable. But this is a compromise that may have some of the worst features of both specificity and flexibility. If the Constitution is held in high regard and thought to be a document not lightly tampered with, then at least some fetters of specificity will remain. Meanwhile, controversial moral progress by the judiciary acting in the name of the Constitution can be rolled back by political majorities that do not take the long view.

Perhaps the best way to mediate the tension between generality and specificity is by a division of labor between the judicial and legislative branches. Dean Sullivan hints at this in her discussion of whether to constitutionalize private antidiscrimination principles or leave those principles for civil rights legislation.<sup>21</sup> The legislature on this account has the capacity to be far more specific and to reach far deeper into our social fabric, in part because its gaze extends less far into the future. Our own experience supports such a division of labor. Much of our progress with regard to gender equity has been driven by legislation—in particular, legislation barring employment-centered discrimination. While the judiciary has promoted the broad moral values of gender equity, we have depended on the legislature for the consummation of this constitutionally inspired moral impulse.

Troubling in this regard, of course, is the uncertain course of the current Supreme Court with regard to federalism-based restraints on Congress. Particularly relevant to Dean Sullivan's trio-in-time is the Court's decision in *United States v. Morrison*,<sup>22</sup> which invalidated the substantive provisions of the Violence Against Women Act. At the risk of appearing churlish, I cannot resist the observation that Justice O'Connor disappointed those of us who imagined that she would find in the discredited history of the legal treatment of women in our country a creative way to harmonize an endorsement of the Violence Against Women Act with her long-standing

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20. My understanding of the Ninth Amendment is set out in Lawrence G. Sager, *You Can Raise the First, Hide Behind the Fourth, and Plead the Fifth, But What on Earth Can You Do with the Ninth Amendment?*, 64 CHL-KENT L. REV. 239 (1988).

21. See Kathleen M. Sullivan, *Constitutionalizing Women's Equality*, 90 CALIF. L. REV. 735, 754-59 (2002).

22. 529 U.S. 598 (2000).

concerns about federal structure.<sup>23</sup> Perhaps we should resist the full import of the rhetorical question with which Dean Sullivan brings her remarks to a close. The world will undoubtedly look different and better when women in large numbers have ascended to seats of political power because that will be proof that we have shed historic inequities; that much we can readily grant Dean Sullivan. But our Constitution, like any good constitution, began with the recognition that men are not angels. By now, we should realize that the same truth about human nature applies in full to women.

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23. For my view of the way the Court should have proceeded in *Morrison*, see Lawrence G. Sager, *A Letter to the Supreme Court Regarding the Missing Argument in Brzonkala v. Morrison*, 75 N.Y.U. L. Rev. 150 (2000).