Case Notes

Equal Protection and the Status of Stereotypes

Miller v. Albright, 118 S. Ct. 1428 (1998).

Miller v. Albright[1] is a case of missed opportunities. *Miller* could have affirmed the Equal Protection Clause's prohibition against gender-based stereotypes, and it could have extended existing principles to bar stereotypes that harm other vulnerable groups. Instead, two of three opinions composing *Miller*'s majority weakened current case law disfavoring gendered stereotypes and dimmed hopes that similar doctrines might develop in the future.

I

Lorelyn Miller was born in the Philippines, the daughter of an unmarried American father and a Filipino mother. After living in her native country for twenty-two years, Miller moved to Texas, formally established her father's paternity, and applied for American citizenship. When the State Department denied her application, Miller filed an equal protection suit seeking to overturn that decision.[2]

The target of Miller's lawsuit, section 309 of the Immigration and Nationality Act,[3] prescribes citizenship standards for foreign-born children who have one unwed American parent. These standards vary depending on the American parent's sex. For their children to become citizens, unmarried American *fathers* must: (1) have resided in the United States for five years; (2) prove paternity by clear and convincing evidence; (3) promise in writing to support their offspring until they are eighteen; and (4) formally acknowledge paternity before their children reach majority.[4] Children of unwed American *mothers*, however, become citizens at birth if their

1. 118 S. Ct. 1428 (1998).
2. *See id.* at 1428, 1432-33 (opinion of Stevens, J.).
3. 8 U.S.C. § 1409 (1994).
4. *See id.* §§ 1401(g), 1409(a).

mothers have been U.S. residents for one year.[5] Miller was denied citizenship because her father acknowledged her only after she had reached adulthood, and she claimed that this "acknowledgment requirement" amounted to unconstitutional sex discrimination.[6]

Three pairs of Supreme Court Justices rejected Miller's claim, offering three very different reasons for doing so. Justice Stevens, joined by Chief Justice Rehnquist, granted Miller standing to challenge the sex discrimination against her father. But Justice Stevens denied Miller's claim on the merits, holding that the interests served by section 309 satisfied intermediate scrutiny and did not rest on gender-based stereotypes.[7] Justice O'Connor, joined by Justice Kennedy, recognized the gendered stereotypes underlying the government's asserted interests and noted that such interests could not satisfy intermediate scrutiny. Because Miller herself was not classified by any suspect criterion, however, Justice O'Connor upheld section 309 using rational basis scrutiny.[8] Justices Scalia and Thomas held that no court could ever constitutionally grant United States citizenship; thus, they rejected Miller's claims for lack of standing.[9]

II

Although the facts of *Miller* were too complex to raise any legal question cleanly, the case may have a lasting impact on equal protection's approach to governmental stereotyping.[10] Equal protection is well-known as a shield for minorities and fundamental rights and as a sword against suspect classifications and deliberate discrimination.[11] In sex discrimination

5. *See id.* § 1409(c).

6. Section 309's other requirements were not used to justify the Department's decision; thus, they were not challenged in *Miller*.

7. *See Miller*, 118 S. Ct. at 1436-42 (opinion of Stevens, J.).

8. *See id.* at 1442-46 (O'Connor, J., concurring in the judgment). According to Justice O'Connor, Miller's father was the only true victim of sex discrimination. His dismissal from Miller's lawsuit was not appealed. *See id.* at 1444 (O'Connor, J., concurring in the judgment).

9. *See id.* at 1446-49 (Scalia, J., concurring in the judgment). Because Justice Scalia's opinion did not reach the merits of Miller's claims, it will not be analyzed here.

10. The Supreme Court has never defined what constitutes a stereotype; nor has it explained how stereotypes differ from other, noninvidious generalizations. *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 161 (1994) (Scalia, J., dissenting) ("[W]e can expect to learn from the Court's [equal protection] jurisprudence in the future which stereotypes the Constitution frowns upon and which it does not."). In the absence of such definitions, this Case Note will analyze stereotypes as they have been described by the Court itself. For the most complete discussions of stereotypes in equal protection jurisprudence, see *Miller*, 118 S. Ct. at 1449-55 (Ginsburg, J., dissenting); and *United States v. Virginia*, 518 U.S. 515, 541-46 (1996). *See also, e.g.*, Georgia v. McCollum, 505 U.S. 42, 57, 59 (1992) (forbidding reliance on racial stereotypes in composing a criminal jury).

11. *Compare* San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 30-34 (1973) (discussing "fundamental rights" equal protection), *and* Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 147-70 (1976) (expounding a group-based vision of equal protection), *with* Adarand Constructors v. Pena, 515 U.S. 200, 235 (1995) (applying strict scrutiny to racial classifications per se), *and* Washington v. Davis, 426 U.S. 232, 245 (1976) (requiring some showing of discriminatory intent to state an equal protection claim).

cases, however, equal protection serves a third function as well: It discredits government interests that rely on sex-based stereotypes and excises these interests and stereotypes from equal protection decisionmaking altogether.

This "anti-stereotype" function of equal protection has not attracted much academic commentary,[12] but it has been a theme in cases of sex discrimination, including the landmark decision, *United States v. Virginia*.[13] In *Virginia*, the Virginia Military Institute ("VMI") argued that admitting women would destroy its "adversative" method of instruction. Without directly disputing the State's empirical evidence, the Court noted that similar testimony had been used in bygone eras to exclude women from public medical schools, law schools, and military academies.[14] By casting VMI's interest as one more "scientific" story of female fragility and weakness, the Court rejected the argument out of hand, holding interests based on gendered stereotypes inadequate as a matter of constitutional principle.[15]

This doctrinal strategy—which I will call the "anti-stereotype rule"—marks an important, subtle departure from orthodox constitutional analysis. Under modern case law, a discriminatory policy should be constitutionally upheld if any government interest is sufficiently "compelling" and "tailored" to satisfy appropriate judicial scrutiny.[16] The anti-stereotype rule,

12. For a general discussion of "forbidden interest rules" in equal protection jurisprudence, see Roger Craig Green, Note, *Interest Definition in Equal Protection: A Study of Judicial Technique*, 108 YALE L.J. 439, 469-72 (1998).

13. 518 U.S. 515 (1996); *see also* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982) ("[I]f the statutory objective is to exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate."); Califano v. Goldfarb, 430 U.S. 199, 211 (1976) (plurality opinion) ("Such classifications, however, have frequently been revealed on analysis to rest only upon 'old notions' and 'archaic and overbroad' generalizations, and so have been found to offend the prohibitions against denial of equal protection of the law." (citations omitted)); Weinberger v. Wiesenfeld, 420 U.S. 636, 645 (1975) ("Obviously, the notion that men are more likely than women to be the primary supporters of their spouses and children is not entirely without empirical support. But such a gender-based generalization cannot suffice to justify the denigration of the efforts of women who do work . . . .").

14. *See* United States v. Virginia, 518 U.S. at 542-45.

15. *See id.* at 541 ("State actors controlling gates to opportunity . . . may not exclude qualified individuals based on 'fixed notions concerning the roles and abilities of males and females.'" (quoting *Mississippi Univ. for Women*, 458 U.S. at 725)); *id.* at 541-42 ("[E]qual protection principles . . . mean [that] state actors may not rely on 'overbroad' generalizations to make 'judgments about people that . . . perpetuate historical patterns of discrimination.'" (quoting *J.E.B.*, 511 U.S. at 139 n.11)). The word "overbroad" here should not be confused with standard intermediate scrutiny. The stereotype at issue in *Virginia* would be "overbroad" under orthodox equal protection only if a non-sex-discriminatory policy could serve the asserted interest. By contrast, the anti-stereotype rule applies even in the absence of such alternative policies. *Cf. id.* at 585-89 (Scalia, J., dissenting) (supporting the trial court's finding that any nondiscriminatory policy would destroy students' "core experience" at VMI: life in common barracks).

16. *See, e.g.*, *Adarand*, 515 U.S. at 235 (defining strict scrutiny to require a compelling interest that is narrowly tailored to the challenged policy); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439-41 (1985) (defining rational basis scrutiny to require a legitimate, rationally related interest and intermediate scrutiny to require an important, substantially related interest).

however, allows plaintiffs to defeat otherwise satisfactory government interests without contesting their importance or relatedness. The Court's scattered statements on the subject suggest that the government cannot rely on interests—even compelling, narrowly tailored ones—that depend upon gender-based stereotypes.[17]

The doctrinal power to reject gender-stereotyped interests outright, without applying any tier of scrutiny, enables courts to debunk invidious sexual generalizations without disputing their empirical validity. The reality of gender-based stereotypes is that, like most stereotypes, they are occasionally true. But pre-*Miller* case law implies that unconstitutional stereotypes should be overthrown *in all circumstances*, independent of their truth or falsehood in particular contexts.

Doctrines like the anti-stereotype rule are especially important given the modern Court's preoccupation with formally equal treatment for men and women.[18] Reva Siegel has argued that current judicial rules that enforce colorblindness and genderblindness fail to disturb, and may actually reinforce, more subtle forms of oppression.[19] An aggressive anti-stereotype rule could help remedy this shortcoming. Given that socially dominant stereotypes disproportionately harm weaker groups, a rule barring *all* gender-based stereotypes would allow norms that disempower women to be successfully attacked without violating principles of formal gender equality.

No Supreme Court decision has ever explicitly justified the anti-stereotype rule or prescribed its limits. But Justice Stevens's and Justice O'Connor's *Miller* opinions suggest that the rule's dynamic potential and even its doctrinal survival may now be seriously at risk.

III

Justice Stevens—one of the anti-stereotype rule's earliest proponents—implicitly undercut the rule's vitality by failing to apply it to the government's interests in *Miller*: (1) establishing proof of parenthood; (2)

17. *See* United States v. Virginia, 518 U.S. at 541 ("The United States does not challenge any expert witness estimation on average capacities or preferences of men and women. Instead, the United States emphasizes that time and again since this Court's turning point decision in *Reed v. Reed*, we have cautioned reviewing courts to take a 'hard look' at generalizations or 'tendencies' of the kind pressed by Virginia . . . ." (citations omitted)); *id.* at 542-43 (equating VMI's argument with other self-fulfilling prophecies used to deny women opportunities, thereby intimating that this "hard look" is fatal); *J.E.B.*, 511 U.S. at 139 n.11 ("[G]ender classifications that rest on impermissible stereotypes violate the Equal Protection Clause, even when some statistical support can be conjured up for the generalization."); *id.* at 148 (noting that the majority's logic implies an absolute prohibition against stereotyping) (Scalia, J., dissenting); *cf.* Craig v. Boren, 429 U.S. 190, 201 (1976) (holding that while gendered disparity in drunk driving rates "is not trivial in a statistical sense, it hardly can form the basis for [using] a gender line as a classifying device").

18. *See, e.g.*, *Mississippi Univ. for Women*, 458 U.S. at 723.

19. *See* Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997).

promoting relationships between parents and children; and (3) fostering cultural ties to the United States.[20] Although these are certainly legitimate interests for immigration laws in general, in the context of section 309, each interest incorporates a stereotyped presumption that females have closer personal and emotional contact with their children than males do.[21]

For example, Justice Stevens found "no doubt that ensuring reliable proof of a biological relationship between the potential citizen and its citizen parent is an important governmental objective."[22] But do bloodlines need to be more carefully proven for children with American fathers than for those with American mothers? In response, Justice Stevens resorted to stereotypes, asserting that mother-child relationships are "immediately obvious" because mothers "typically" complete birth records responsibly and truthfully, while fathers "often" do not.[23]

Similarly, with respect to the proffered interests in "encouraging . . . a healthy relationship between the citizen parent and the child" and "fostering ties between the foreign-born child and the United States," Justice Stevens assumed that citizen mothers "typically" have custody of their children after birth while an unmarried father "may not even know that his child exists."[24] Implicitly interpreting section 309 as an "incentive" for parents and children to bond, Justice Stevens held that such incentives are important for citizen fathers, who feel little natural connection to their foreign-born offspring, but are "normally . . . superfluous" for citizen mothers, who presumably establish such bonds immediately post partum.[25]

In recent decades, bombarded by images of deadbeat dads and struggling single mothers,[26] Justice Stevens's gendered assumptions about parenthood appeal to a maternal mythology that underlies many common intuitions: Women give birth; thus, it is only *natural* that they feel a greater connection to their children.[27] Whether grounded in biology, psychology, or culture, this claim implicitly assumes that mothers are caregivers who bond with their children automatically, while fathers become committed parents voluntarily and contingently, if at all. And even if this

20. *Compare* Califano v. Goldfarb, 430 U.S. 199, 217 (1976) (Stevens, J., concurring in the judgment), *with Miller*, 118 S. Ct. at 1437-40 (opinion of Stevens, J.).

21. *See Miller*, 118 S. Ct. at 1461 (Breyer, J., dissenting).

22. *Id.* at 1438 (opinion of Stevens, J.).

23. *Id.* Beyond attacking these generalizations' empirical truth, Justice Breyer argued that reliable DNA testing and section 309's "clear and convincing evidence" requirement have rendered the acknowledgment requirement superfluous. *See id.* at 1461-62 (Breyer, J., dissenting).

24. *Id.* at 1439 (opinion of Stevens, J.).

25. *Id.*

26. *See generally* Harry D. Krause, *Child Support Reassessed: Limits of Private Responsibility and the Public Interest*, *in* DIVORCE REFORM AT THE CROSSROADS 166, 169 (Herma H. Kay & Stephen D. Sugarman eds., 1990) (noting that recent child support legislation reveals a general vindictiveness against unwed fathers).

27. This stereotype was also used in *Lehr v. Robertson*, 463 U.S. 248, 265-68 (1983) (Stevens, J.), to justify discriminatory failure to notify unwed fathers of their children's adoption.

generalization is plausible, the dispositive question is not whether government interests rest on plausible assumptions, but whether they rest on stereotyped ones.[28] Justice Stevens paid lip service to the anti-stereotype rule, but his *Miller* opinion leaves one to wonder which stereotypes *would* be illegitimate, if those supporting section 309 are acceptable.

IV

Although Justice O'Connor had endorsed the anti-stereotype rule in *Mississippi University for Women v. Hogan*,[29] she declined to apply it to the *Miller* case. She acknowledged section 309's implicit stereotypes, but nonetheless she held that such stereotypes are acceptable when they support a non-sex-based classification.[30] By limiting the anti-stereotype rule to cases involving intermediate scrutiny, Justice O'Connor undercut the rule's theoretical basis, and she forestalled its potential to prohibit stereotypes concerning other marginalized groups, such as homosexuals.[31]

By denying Miller standing to raise her father's sex-discrimination claim, Justice O'Connor confronted a novel legal question. Every anti-stereotype case before *Miller* had combined gender-based stereotypes with a sex-based classification, the latter requiring intermediate scrutiny. Thus, no court had explicitly decided whether interests incorporating gendered stereotypes could pass muster under lower levels of scrutiny.[32] Justice O'Connor decided the issue in three terse sentences, citing *Heller v. Doe* for the proposition that "under rational scrutiny, a statute may be defended based on generaliz[ations] unsupported by empirical evidence."[33] This cursory disposition is especially curious since the *Heller* Court had

28. *See* Weinberger v. Wiesenfeld, 420 U.S. 636, 645 (1975).

29. 458 U.S. 718, 725 (1982).

30. *See Miller*, 118 S. Ct. at 1445-46 (O'Connor, J., concurring in the judgment).

31. The link between gender-based stereotypes and stereotypes about other groups first arose in *Craig v. Boren*, where evidence that men commit more drunk driving offenses than women was disregarded, *see* Craig v. Boren, 429 U.S. 190, 204 (1976), because such generalizations would be unacceptable as to the drinking tendencies of other "aggregate groups," *id.* at 209; *see also id.* at 208-09 n.22 (listing alcoholism rates for Jews, Italian Catholics, and Native Americans).

32. That said, the anti-stereotype rule's application to cases involving rational basis scrutiny is indirectly supported by *Califano v. Goldfarb*, 430 U.S. 199, 211 (1976) (plurality opinion), and *United States v. Virginia*, 518 U.S. 515, 541-42 (1996). Both of these cases cite decisions that were decided before sex classifications were accorded intermediate scrutiny and that disfavored gender-based stereotypes despite applying rational basis scrutiny. Furthermore, there is substantial evidence that the modern application of intermediate scrutiny to sex classifications *emerged from* disapproval of gender-based stereotypes. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 198-99 (1976); Stanton v. Stanton, 421 U.S. 7, 14-15 (1975); Frontiero v. Richardson, 411 U.S. 677, 684-85 (1973); Alexander v. Louisiana, 405 U.S. 625, 641-42 (1972) (Douglas, J., concurring). Given this history, it seems strange for Justice O'Connor now to reject gendered stereotypes only when they are accompanied by sex-based classifications.

33. *Miller*, 118 S. Ct. at 1446 (O'Connor, J., concurring in the judgment) (citing Heller v. Doe, 509 U.S. 312, 320 (1993)). *Heller* concerned involuntary commitment procedures that applied different burdens of proof to mentally ill and mentally retarded persons.

unanimously agreed that that case did not involve stereotypes of any kind.[34]

Justice O'Connor's *Miller* opinion implicitly cabined the anti-stereotype rule, applying it only to cases that involve both gender-based stereotypes *and* gender-based classifications.[35] But as a matter of principle, the anti-stereotype rule invalidates gendered stereotypes wholesale. Such stereotypes should not be constitutionally acceptable just because they support classifications that do not receive heightened scrutiny. For example, a hypothetical ordinance barring high school students from college campuses would receive rational basis scrutiny as a classification based on age.[36] If the only interest supporting this policy were protecting immature high school females from collegiate men, however, then the state's action would incorporate gender-based stereotypes without using any sex-based classification.[37]

The Court's *Virginia* decision implies that such a policy, like section 309, would violate the Equal Protection Clause because it used gendered stereotypes to justify government action. As the Court held in a related context: "The Constitution cannot control . . . prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."[38] By upholding section 309 with government interests that rely on gender-based stereotypes, Justice O'Connor implicitly sanctioned any gendered stereotype, so long as it is embodied in a formally gender-neutral policy.

Justice O'Connor's *Miller* opinion, however, does not merely weaken the anti-stereotype rule's application to gendered stereotypes. It also precludes the rule's extension to stereotypes that damage groups currently receiving rational basis review. Before *Miller*, gay rights advocates might have combined arguments from *Virginia* and *Romer v. Evans*,[39] drawing a parallel between invidious anti-homosexual "animus" and invidious anti-homosexual stereotyping.[40] Imagine, for example, that a state defended its same-sex marriage ban by asserting that gay relationships do not embody the same level of fidelity as heterosexual marriages. Standard equal protection analysis would require a complex, empirical comparison of heterosexual marriages and homosexual partnerships, with substantial

34. *See Heller*, 509 U.S. at 321-30; *id.* at 346 n.7 (Souter, J., dissenting).

35. Alternatively, Justice O'Connor might have conflated government stereotyping with a simple absence of empirical support. But that move would strip the anti-stereotype rule of all significance, since stereotyped interests would be judged on their merits just like any other interest. Furthermore, such a conflation would contradict language in *United States v. Virginia*, 518 U.S. at 541-42, and *Mississippi University for Women v. Hogan*, 458 U.S. 718, 725 (1982).

36. *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314 (1976) (per curiam).

37. The point here is not that the policy should be held invalid, but rather that the government interest tainted by stereotypes should be formally rejected. The narrow wrong lies in the government's advancing and a court's accepting a stereotype as constitutionally valid.

38. Palmore v. Sidoti, 466 U.S. 429, 433 (1984).

39. 517 U.S. 620 (1996).

40. For further discussion of this litigation strategy, see Green, *supra* note 12, at 475-76.

deference given to any legislative findings of fact. If the anti-stereotype rule extended to stereotypes against gays, however, such an argument would be rejected on its face for stereotyping homosexuals as morally suspect and romantically irresponsible. Such a strategy could provide constitutional relief without having to raise the general level of scrutiny applied to sexual orientation discrimination.

If the anti-stereotype rule were applied beyond the bounds of intermediate scrutiny, it might eventually remove a variety of harmful stereotypes from constitutional decisionmaking, regardless of the tier of judicial scrutiny applied. Justice O'Connor's failure to appreciate this possibility undermined the anti-stereotype rule's basic rationale, and it curtailed the rule's development in new doctrinal directions.

V

The anti-stereotype rule has always operated in an unstable periphery of equal protection jurisprudence, but its status after *Miller* is more uncertain than ever. Future cases may ignore stereotypes, citing Justice Stevens; they may accept stereotypes in cases of nonsuspect classifications, citing Justice O'Connor; or they may do both, limiting the field of cognizable stereotypes and the operational impact of cognizing them. Since no *Miller* opinion collected even a plurality of Justices,[41] however, hope remains that future case law will not discard the anti-stereotype rule so carelessly.

As tiered scrutiny becomes increasingly rigid, courts need alternative tools to close normative gaps left open.[42] Because oppressed social groups are wronged not only by distinctions based on suspect classifications, but also by governmental use of stereotypes, the anti-stereotype rule serves a critical constitutional role. The *Miller* Court missed one opportunity to excise stereotypes from equal protection jurisprudence, but future courts should not and need not repeat this mistake.

—Roger Craig Green

41. A Court majority rejected Justice Stevens's interpretation of the anti-stereotype rule, *see Miller*, 118 S. Ct. at 1445-46 (O'Connor, J., concurring in the judgment); *id.* at 1450 (Ginsburg, J., dissenting), and a similar fate may befall Justice O'Connor's approach. Although three dissenters cited Justice O'Connor's opinion approvingly, *see id.* at 1450 (Ginsburg, J., dissenting), they—like Justice O'Connor herself—may have been uniquely unwilling to overthrow stereotypes in the peculiar context of immigration policy, "an area where Congress frequently must base its decisions on generalizations about groups of people," *id.* at 1446 (O'Connor, J., concurring in the judgment).

42. *See supra* notes 18-19 and accompanying text.