

Equality for Whom? The Curious Case of RBG's Equality and Morales-Santana's Nationality

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Tracy A. Thomas, *Leveling Down Gender Equality*, 42 **Harv. Women's L.J.** 177 (2019).

[Sessions v. Morales-Santana](#) is a curious case of gender equality, simultaneously celebrated for refining the Supreme Court's view on sex-classification while condemned for providing the plaintiff "the mean remedy."¹ Striking down a gender-based distinction in the Immigration and Nationality Act ("INA") by arguing against legislating based on gender stereotypes, it is a landmark success for Justice Ruth Bader Ginsburg and the liberal feminist brand of equality jurisprudence. Refusing to grant the plaintiff citizenship by offering a leveling-down remedy, it is a cruel blow to the plaintiff, whose win in the nation's equality law is a loss in his unequal life. Tracy A. Thomas' [Leveling Down Gender Equality](#) provides a deliberate critique that details the Court's decision in the historical context of immigration laws and gender equality review, sheds light on the dark sides of celebrity Justice Ginsburg's gender equality jurisprudence, and proposes a way forward: "leveling up" as the presumption. It is a must-read for anyone who wonders what has happened to Ginsburg's gender equality jurisprudence and what to do about the Court's mean remedy.

Morales-Santana was decided in the second year of the Trump administration and in the wake of its anti-immigration policy. Born in 1962 in the Dominican Republic to an unwed American citizen father of Puerto Rican origin and a Dominican Republic citizen mother, the plaintiff Luis Morales-Santana had lived in the United States since he was thirteen. The INA's requirement of derivative citizenship for children born overseas to one American citizen parent in effect at Morales-Santana's birth adopted a gender- and marital-status-based distinction by setting a longer physical presence requirement for citizen fathers and shorter physical presence requirement for unwed citizen mothers. Morales-Santana was not qualified for citizenship because his father had failed to meet the INA's physical presence requirement for unwed fathers by a matter of days, and was to be deported as a non-citizen with several convictions. His father, however, would have satisfied, if female, the lesser stringent requirement for unwed citizen mothers to transfer derivative citizenship. Morales-Santana claimed that the INA's gender-based distinction was a violation of gender equality, and requested that the rule for unwed citizen mothers be applied to him and that he be granted American citizenship.

The Court had previously reviewed and upheld the INA's gender- and marital-status based distinctions that imposed more rigorous requirements for unwed citizen fathers to convey citizenship to their overseas-born children in [Miller v. Albright](#) and [Tuan Anh Nguyen v. INS](#). Ginsburg— then a junior member of the Court— was one of the dissenters in both cases. *Morales-Santana* marks her success in converting her prior dissent into a majority opinion. Writing for the majority as a senior member of the Court, she repudiated the statutory gender stereotype assumption that unwed fathers cared little about their children whereas "the mother was regarded as the child's natural and sole guardian" (*Morales-Santana*) for its failure to meet her favored heightened scrutiny's "exceedingly persuasive justification" requirement in [United States v. Virginia](#), the very first gender equality case that Ginsburg wrote and read for the majority.²

Ginsburg's notable success in striking down gender-based citizenship laws, however, did not activate Morales-Santana's nationality. The Court refused to grant Morales-Santana's requested remedy and instead applied the more rigorous rule for unwed fathers to everyone — that is, treating mothers like fathers — by arguing that it would have been Congress's legislative decision. However, the Court did require that Congress's future decision be gender-neutral and impose the same treatment for wed and unwed parents. One cannot help but wonder *to whom* and *for whom* the Court delivered equality.

The core mission of *Leveling Down Gender Equality* is to rebut the Court's remedy presumption that leveling-up (extension) and leveling-down (nullification) are equally valid remedies for a violation of equality and to argue for the presumption of leveling up to protect the right to a meaningful remedy. From Thomas' point of view, the answer to the curious case of Ginsburg's equality and Morales-Santana's nationality lies in the Court's *choice of remedy*, rather than in its *choice of equality review* (anti-classification or anti-subordination). She began her adventure by first explaining the Court's mean remedy and alternative remedies considered but not adopted in detail (Part I), then argued for the presumption of leveling up (Part II) and reasoned why leveling down should be treated as a rare exception (Part III).

The highlights of Part I lie in its success in locating the mean remedy in the context of Ginsburg's gender equality jurisprudence and judicial philosophy. Thomas refuted the convenient guess that the mean remedy was a pragmatic strategy to achieve majority, and argued instead that Ginsburg's choice of eliminating preference for women "fits within her bigger concern about stereotypes, backlash, and denial stemming from protectionism" (P. 190) and was guided by her "deeper jurisprudential concerns about systematic gender norms" (P. 191) and preference for judicial constraint. Comparing what "then-professor Ginsburg" had said to what "Justice Ginsburg" did in *Morales-Santana*, Thomas showed how Justice Ginsburg, while maintaining then-professor Ginsburg's preference for the "legislative-like role of the court" in remedial decisions, failed to employ then-professor Ginsburg's proposed guidelines, which would have supported leveling up. She forcefully demonstrated that Justice Ginsburg "had the precedents for leveling up on her side, yet she adopted the countervailing view in the name of judicial restraint" (P. 193), and criticized Ginsburg's omission, misreading and non-engagement with gender equality precedents which would have required stronger evidence of legislative intent and evaluations of equitable considerations as well as their implications that extension, rather than nullification, had been a generally preferred choice.

Should Justice Ginsburg have followed then-professor Ginsburg's proposed guidelines and the gender equality precedents, she would have been able to reconcile her objections to laws based on gender stereotypes and preference for judicial constraint. She would have reached a different conclusion regarding remedy. "The lack of clear, established legislative intent, the influence of racism and nativism on the formation of the ten year rule, equitable considerations of harms to children, and the strong judicial preference for extension," Thomas argued, "all supported leveling up." (P. 196.) While Thomas was unable to explain Ginsburg's "mistakes" and inconsistency and her consequent willingness to level down, her discussion has proved how and why Ginsburg could have acted otherwise.

The second step of Thomas' mission is to establish the presumption of leveling up and leveling down as the rare exception. Relying on the familiar feminist critique that equality means more than mere formal equal treatment, Thomas argued for equality as equal concern. She contended that leveling down for gender equality is normatively inconsistent with constitutional requirement, because "denying a benefit in order to rectify inequality . . . fails to honor or effectuate the ultimate meaning of the operative constitutional right." (P. 200.) She cited [Palmer v. Thompson](#) as an example to show how closing down all pools to remedy racially segregated swimming pools serves to perpetuate and reinforce, rather than abolish, racial inequality. On top of leaving inequality intact, she argued, leveling down will also discourage legal actions for justice and compromise citizens' ability to "act as private attorney generals to help enforce the public laws of gender equality." (P. 201.)

In her arguments against leveling down as a meaningful remedy for plaintiffs, Thomas invoked Ginsburg's own judicial record to demonstrate how Justice Ginsburg has deviated from her professional past. In *United States v. Virginia*, Ginsburg made clear that the plaintiff's rightful position was the targeted goal of equal protection remedy, which demanded to eliminate both the ongoing discrimination and the discriminatory effects of the past. Writing for the majority, Ginsburg rejected the defendant's choice of remedy to provide a separate military education for women, and emphasized that the key question for the Court was the plaintiff's denied benefit. Again, should Ginsburg have done what Ginsburg did in *Virginia*, an extension would have been the remedy for Morales-Santana. Besides, Ginsburg's decision does not survive the test of valuing equitable concerns relevant to overcoming leveling up (cost or economic impact, harms to third parties, and broader national policy concerns). The legislative history of intent to discriminate against Mexican and Asian people should have been taken into account.

The Court's records in gender equality cases, which evaluated the defendant's interests and concerns to perform a remedial calculus to avoid inequality by the remedy itself, should have been taken seriously. The Court would have therefore considered the harms to children and U.S. mothers to balance away from leveling down. All in all, the mean remedy is not the right remedy. Thomas' criticism that "stopping gender stereotypes from operating in the future to third parties may seem satisfactory to Justice Ginsburg, but it is not an individualized remedy adequately providing meaningful, tangible redress for the specific harms suffered by the individual plaintiff" (Pp. 207-08) suggests that Ginsburg's idea of gender equality is purchased at the price of Morales-Santana's nationality and equality and that Ginsburg's judicial philosophy offers no justification for her choice of remedy.

At the end of the article, Thomas delivered her final blow to the case and concluded that "such a case does not leave a promising legacy for gender equality jurisprudence, but instead takes one giant constitutional step backwards." (P. 218.) I cannot agree more with this conclusion. However, I would like to see more critical engagement with the issue of illegitimacy discrimination, as well as with the issue of the standard of equality scrutiny: will an anti-subordination review hinder the remedial choice of leveling down? Does a move "away from a formalistic parallelism and into a substantive inquiry" (P. 217) require not only changing remedial choice but also changing the standard of equality review? Is the idea of equality as "equal concern" (a Dworkinian concept) equivalent to substantive equality, which centers on the hierarchy of power?

A final note. As a precedent, *Morales-Santana* now lies as "an open wound." (P. 217.) The wound should serve as a reminder of America's past in its local and global context. I was drawn to the curious case of *Morales-Santana* due to my interest in the Court's gender equality jurisprudence and my identity as a Taiwanese feminist. Taiwan is one of the global south countries where American troops left behind children whom they fathered with local women through buying, raping, or dating them during the Cold War. Lorelyn Miller was born in the Philippines, in 1970, to unwed parents, an American soldier father and a Filipino national mother. Tuan Anh Nguyen was born in Vietnam, in 1968, to an unwed pair, an American citizen father and a Vietnamese mother.

Morales-Santana's parents have a different story: Morales-Santana's father is from Puerto Rico – a so-called unincorporated territory that, in the words of the Supreme Court of the United States in a series of decisions known as "the Insular Cases," "belongs to, but is not a part of, the United States"³—, and he was born in a Caribbean country to a Dominican mother. While Lorelyn Miller never lived in the United States at least until after her 21st birthday, Tuan Anh Nguyen and Morales-Santana share a commonality of being non-white children born overseas to unwed American fathers and local mothers and having migrated to the United States. *Morales-Santana*'s reach extends beyond American borders. Its potential victims include children and mothers who reside outside the United States and who might have no or little knowledge about the case or their (dis)qualification for American citizenship under the INA. Legislative and judicial efforts are required to redress their harms.

1. Thomas credits Ian Samuel for dubbing the Court's nullification remedy "the mean remedy." (P. 181.)
2. Not only did Ginsburg refer to *Virginia*, she also cited cases which she participated or litigated: [Reed v. Reed](#), [Frontiero v. Richardson](#), and [Weinberger v. Wiesenfeld](#). The "exceedingly persuasive justification" requirement was first established in [Mississippi University for Women v. Hogan](#), in which Justice Sandra Day O'Connor wrote for the majority.
3. Isn't this a definition equivalent to that of a "colony"?

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