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Sex Equality, Sex Differences, and the Supreme Court

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Despite the valiant efforts of feminists, the position of women in the United States and elsewhere in the industrial world is still characterized by significant inequality and oppression.¹ Women are segregated into low-paying, low-status jobs;² under-represented in political institutions and

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1. The following works survey the position of women in various countries and find in most instances that women's position is generally less favorable in other industrialized countries than it is in the United States: *EQUAL EMPLOYMENT POLICY FOR WOMEN* (R. Ratner ed. 1980) (data on Austria, Canada, Federal Republic of Germany, France, Sweden, United Kingdom, United States); *WOMEN: ROLES AND STATUS IN EIGHT COUNTRIES* (J. Giele & A. Smock eds. 1977) (surveying both industrialized and non-industrialized countries: Egypt, Bangladesh, Mexico, Ghana, Japan, France, United States, Poland). *See also* *FAMILY POLICY: GOVERNMENT AND FAMILIES IN FOURTEEN COUNTRIES* (S. Kamerman & A. Kahn eds. 1978) (discussing policies concerning equality between the sexes and data about women's situations in the context of family policy in Sweden, Norway, Hungary, Czechoslovakia, France, Austria, Federal Republic of Germany, Poland, Finland, Denmark, United Kingdom, Canada, Israel, United States). Sex discrimination, sex segregation, and sex-based hierarchy are even more extensive in most non-industrial countries than in the industrial world. *See, e.g.*, *WOMEN: ROLES AND STATUS IN EIGHT COUNTRIES*, *supra*; E. BOSERUP, *WOMAN'S ROLE IN ECONOMIC DEVELOPMENT* (1970).

2. A. SIMMONS, A. FREEDMAN, M. DUNKLE & F. BLAU, *EXPLOITATION FROM 9 TO 5*, at 43-63 (1975) In fact, the proportion of occupations with a high female concentration (70% to 90%), as well as of those with a high male concentration, has steadily increased over the last 30 years. Laws, *Psychological Dimensions of Labor Force Participation of Women*, in *EQUAL EMPLOYMENT OPPORTUNITY AND THE AT&T CASE* 125, 126-27 (P. Wallace ed. 1976). More than one-quarter of all women in the labor force work in jobs that are 95% or more female, and over three-fifths of all women work in jobs that are at least 75% female. U.S. DEP'T OF LABOR, *1975 HANDBOOK ON WOMEN WORKERS* 89-91. In 1973, nearly two-fifths of all women workers were employed as secretaries, retail trade salesworkers, bookkeepers, private household workers, elementary school teachers, waitresses, typists,

processes;³ saddled with large amounts of unpaid and often tedious work in the home;⁴ and subjected to crippling stereotyping and channeling from early infancy through adulthood.⁵ The impact of these patterns on rela-

cashiers, seamstresses and stitchers, and registered nurses. *Id.* at 91. In 1978, the United States Commission on Civil Rights concluded that at least one-third of the minority males and two-thirds to three-fourths of the majority females would have to change occupations in order for their groups to have occupational distributions similar to the majority males. U.S. COMM'N ON CIVIL RIGHTS, SOCIAL INDICATORS OF EQUALITY FOR MINORITIES AND WOMEN 45-46 (1978). The fact that women occupy lower status jobs is reflected in the small number of women administrators and managers. In 1973, only 5% of all working women held such jobs, and women comprised only 18% of this occupational group, although by 1974 women were 39% of the urban labor force. In addition, 20% of women administrators and managers were self-employed or unpaid family workers. U.S. DEPT OF LABOR, *supra*, at 11, 96. Moreover, within individual occupations, women are still clustered in lower job levels. Barrett, *Women in the Job Market: Occupations, Earnings, and Career Opportunities*, in THE SUBTLE REVOLUTION 31, 38-40 (R. Smith ed. 1979). In 1956, the median earnings of women employed full-time, year-round were 63.3% of the median earnings of full-time, year-round male workers. By 1975, the situation had worsened slightly: Women's median earnings were only 58.8% of the men's median. *Id.* at 34.

3. In 1981, there were two women in the U.S. Senate (2% of that body), 18 women in the U.S. House of Representatives (4.1%), 46 women on the federal bench (6.9%), 908 women state senators and representatives (12.1%), and 34 women holding statewide elective office (11.5%). Over the past 25 years, notwithstanding occupational and educational gains made by women, only six women have served in the Cabinet. These statistics were provided by the National Information Bank on Women in Public Office, a project of the Center for the American Woman and Politics, Eagleton Institute, Rutgers University, New Brunswick, N.J., on October 15, 1982. In 1979, only 3% of state trial and appellate judgeships were held by women; moreover, in 17 states no women held these positions. Brief for Amicus Curiae National Organization for Women at 24 n.22, *Rostker v. Goldberg*, 453 U.S. 57 (1981).

4. Recent studies show that the wife performs about 70% of the housework in an average household, with the husband and children each providing about 15%. Included in the wife's weekly share of domestic work are eight hours generated specifically by the husband's needs. The time devoted to housework increases dramatically when there are young children in the home and decreases when both parents work outside the home. One reason why the women's share of housework is so large is that the wife is largely responsible for child care. In families with very young or very many children, the wife takes on the extra burden; the husband's contribution to housework remains about the same regardless of family size or the age of the youngest child. It is thus the wife who, with respect to housework at least, does virtually all of the adjusting to the family life cycle. Moreover, the woman who also works for wages finds that her husband spends about as little time on housework on average as the husband whose wife is not a wage earner. As a result, full-time women wage earners continue to spend a minimum of 30 hours per week maintaining the house and husband, compared to a minimum of 40 hours per week for women who do not work for wages. Finally, on the basis of the limited data available concerning socioeconomic status and race, it appears that time spent on housework by wives is not very sensitive to differences in class, race, and ethnicity. Hartmann, *The Family as the Locus of Gender, Class, and Political Struggle: The Example of Housework*, 6 SIGNS: J. WOMEN IN CULTURE & SOC'Y 366, 377-86 (1981); see Vanek, *Household Work, Wage Work, and Sexual Equality*, in WOMEN AND HOUSEHOLD LABOR 275, 276-80 (S. Berk ed. 1980). Note that these discussions do not include the housework of single parents, the vast majority of whom are women.

For discussions of the negative aspects of housework and child care as presently organized, see J. BERNARD, *THE FUTURE OF MARRIAGE* 26-53 (1972); A. OAKLEY, *WOMEN'S WORK: THE HOUSEWIFE, PAST AND PRESENT* 91-104 (Vintage ed. 1976); A. OAKLEY, *THE SOCIOLOGY OF HOUSEWORK* 79-99, 182-84 (1974). But see H. LOPATA, *OCCUPATION: HOUSEWIFE* 362-76 (1971) (arguing that during late 1960's and early 1970's middle-class housewives were frequently using their role as basis for satisfying, creative, multi-faceted lives).

5. The literature on the existence and harmful effects of sex stereotyping and sex-based channeling into social roles and occupations is voluminous. See, e.g., E. BELOTTI, *LITTLE GIRLS* (1975); J. BROOKS-GUNN & W. MATTHEWS, *HE & SHE: HOW CHILDREN DEVELOP THEIR SEX-ROLE IDENTITY* (1979); C. EPSTEIN, *WOMAN'S PLACE* 50-85 (1970); N. ROMER, *THE SEX-ROLE CYCLE: SOCIALIZATION FROM INFANCY TO OLD AGE* (1980); Broverman, Vogel, Broverman, Clarkson & Rosen-

tions between men and women, on family life, and on political and economic institutions is profound.

The subordination of women has traditionally been justified by arguments drawn from biology or nature, in turn often equated with divine command.⁶ The details of women's oppression—such as denial of the vote or exclusion from the legal profession—have been said to flow directly and unanswerably from biology itself.⁷ Such arguments deny both the desirability and possibility of change. Change is not desirable because social arrangements based on nature are seen as consistent with ultimate standards of legitimacy, such as divine intent or objective science.⁸ Moreover, attempts to change arrangements dictated by nature are by definition doomed to failure.

Since its reemergence in the 1960's, the American women's movement has challenged both the social practice of subordinating women and the naturalistic arguments that attempt to sustain this practice.⁹ Given the

krantz, *Sex-Role Stereotypes: A Current Appraisal*, J. SOC. ISSUES, 1972 no. 2, at 59; Morgan, *Female and Male Attitudes Toward Life: Implications for Theories of Mental Health*, 6 SEX ROLES 367 (1980).

6. See, e.g., *Muller v. Oregon*, 208 U.S. 412, 421-23 (1908); *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring); Declaration of Sentiments—Adopted by the First Women's Rights Convention, Seneca Falls, N.Y., July 19, 1848, reprinted in B. BABCOCK, A. FREEDMAN, E. NORTON & S. ROSS, *SEX DISCRIMINATION AND THE LAW: CAUSES AND REMEDIES* 1-2 (1975).

7. See, e.g., *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1873) (legal profession); E. DUBOIS, *FEMINISM AND SUFFRAGE* 45-46 (1978) (women's natural dependence on men as precluding extension of franchise to women or their entrance into professions); E. EHRENREICH & D. ENGLISH, *FOR HER OWN GOOD* 91-126 (1978) (reliance on biology to explain frailty and sickness of women and to justify their subordination); S. ROTHMAN, *WOMAN'S PROPER PLACE* 23-26 (1978) (limitations thought to result from women's biological characteristics and physical frailty).

8. See, e.g., ARISTOTLE, *POLITICS* bk. 1, ch. 5 (natural superiority of men and inferiority of women makes male rule necessary); 2 A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 208-13, 221-24 (rev. ed. 1889), excerpted in *ROOT OF BITTERNESS* 122-25 (N. Cott ed. 1972) (Americans recognize wide differences in physical and moral constitution and therefore carefully distinguish between duties of men and women); A. GRAVES, *WOMAN IN AMERICA* 143-49, 152-64 (1841), excerpted in *ROOT OF BITTERNESS*, *supra*, at 141-47 (home is by divine injunction and design, as well as by dictates of enlightened human reason, woman's appropriate and appointed sphere of action); L. TIGER, *MEN IN GROUPS* (1969) (biological origins and social utility of formation of all-male and all-female groups within society); E. ERIKSON, *Womanhood and the Inner Space*, in *IDENTITY: YOUTH AND CRISIS* 261 (1968) (awareness of having "inner productive space" plays important role in shaping women's identities). Sigmund Freud's writings have often been cited as examples of biological determinism, see, e.g., *MASCULINE/FEMININE* 19 (B. Roszak & T. Roszak eds. 1969); K. MILLETT, *SEXUAL POLITICS* 176-203 (1970), but this may oversimplify Freud's position, particularly as it evolved over time, see J. MITCHELL, *PSYCHOANALYSIS AND FEMINISM* 5-131 (1974).

For a discussion of other sociological and psychological writings between 1930 and 1960 about the natural bases of sex differences and proper sex roles, see J. MITCHELL, *supra*, at 203-33. For a list of references arguing for and against a biological basis for sex differences and sex roles, see "FEMININITY," "MASCULINITY," AND "ANDROGYNY": A MODERN PHILOSOPHICAL DISCUSSION 301-20 (M. Vetterling-Braggin ed. 1982).

9. For a description of the resurgence of the women's movement in the 1960's, see J. HOLE & E. LEVINE, *REBIRTH OF FEMINISM* (1971); J. MITCHELL, *WOMAN'S ESTATE* 11-96 (1971). The major ideas of the movement, particularly critiques of the "biological differences" argument and analyses of the sex-role system that maintains women's subordination, are discussed in M. CARDEN, *THE NEW*

unusual importance of litigation and legal argument in modern American reform politics, it is not surprising that the movement has emphasized a legal theory of equal rights—the right of each individual to equal treatment based on equal performance.¹⁰ This theory challenges biological determinism by asserting that there is substantial overlap between women and men as to most characteristics relevant to social roles and career options. Therefore, the argument continues, individuals should be free to choose among social roles and careers on the basis of their individual inclinations and talents, rather than be channeled into particular roles and careers on the basis of rigid and inaccurate notions about female and male capacities. From this perspective, biology cannot justify excluding women from (for example) the legal profession. Particular women are well qualified to be attorneys; and women, like men, should be free to choose the careers in which to express their abilities.

Between the early 1960's and the late 1970's, equal rights principles of this sort were incorporated to a greater or lesser extent into federal and state legislation¹¹ and judicial doctrine, and were used successfully to challenge many forms of sex discrimination.¹² For a time, it seemed possible

FEMINIST MOVEMENT 9-15 (1974); J. HOLE & E. LEVINE, *supra*, at 169-225.

10. The women's movement of the late 1960's and early 1970's spanned a wide political spectrum, including organizations defining themselves as radical feminists, those focusing on women's liberation, those describing themselves as socialist feminists or Marxist-feminists, and those focusing on a liberal program of women's rights reforms. These groups agreed on some issues (for example, reproductive freedom, equal employment opportunity) but disagreed on others (for example, the political and personal desirability of heterosexuality, and separatism as a strategy or a goal). See M. CARDEN, *supra* note 9, at 9-16, 47-56 (overview of feminist ideology and radical feminist subgroups); J. HOLE & E. LEVINE, *supra* note 9, at 17-107 (discussing history and current status of several national women's rights organizations).

The liberal theory of women's rights has been more widely accepted among women than have other more radical views. In particular, such views have played a major role in the politics of the National Organization for Women (NOW), which is the largest and best known women's movement organization in the United States. For a critical description and evaluation of the emphasis placed by the mainstream of the women's movement on a liberal theory of individual rights, see Z. EISENSTEIN, *THE RADICAL FUTURE OF LIBERAL FEMINISM* 4-11, 177-200, especially at 192-97 (1981) (positions of NOW).

11. Federal anti-discrimination laws include the Equal Pay Act, 29 U.S.C. § 206(d) (1982); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. V 1981); Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1686 (1982); the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f (1982); the Fair Housing Act, 42 U.S.C. § 3604 (1976), and the National Housing Act, 12 U.S.C. § 1735f-5 (1982). For a discussion of state anti-discrimination laws, state equal rights amendments, and state law reform to eliminate sex discrimination, see B. BROWN, A. FREEDMAN, H. KATZ & A. PRICE, *WOMEN'S RIGHTS AND THE LAW: THE IMPACT OF THE ERA ON STATE LAWS* (1977).

12. Successful challenges have been mounted in such diverse areas as high school and college athletics, *Darrin v. Gould*, 85 Wash. 2d 859, 540 P.2d 882 (1975); sex-based insurance rates, *Hartford Accident & Indem. Co. v. Insurance Comm'r*, 65 Pa. Commw. 249, 442 A.2d 382 (1982), *leave to appeal granted*, No. 55 E.D. App. Docket 1982 (Pa. Aug. 24, 1982); government social insurance programs, e.g., *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142 (1980); *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); and sex discrimination in many types of employment, e.g., *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971) (airline flight attendants); *Cheatwood v. South Cent. Bell Tel. & Tel.*

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that either through judicial interpretation of the equal protection clause, or through ratification of the Equal Rights Amendment, sex-based laws would be generally struck down.¹³ To date, however, equal rights principles have not prevailed in the constitutional amendment process, and have not been embraced wholeheartedly by the Supreme Court.

Although many women benefited from the relatively modest social and legal reforms of the 1970's, the great majority of women remain trapped in traditional patterns of sex segregation and sex-based hierarchy. Some of the explanation for this phenomenon lies in continued resistance to the ideal of equal treatment regardless of sex. The ideal as traditionally understood, however, itself challenges only some forms of sexual hierarchy while validating others. Understanding the limitations and ambiguities of the traditional ideal is thus a necessary first step toward the development of the new analytic tools required for the achievement of sex equality.

This Article examines the struggle over the meaning of equal rights theory in one of its more influential contexts: the sex discrimination decisions of the Supreme Court. Of course, questions about the meaning of equal rights theory are not the monopoly of the Supreme Court; rather, they are continuously (if not always consciously) debated in all branches and at all levels of government, and in society at large. Nonetheless, American courts (in contrast to courts in many other countries) function as a major forum in which equal rights theory is debated and articulated, and legal concepts of equality continue to have a significant influence on broader movements for social reform.

The struggle within the Court over the meaning of sexual equality can be framed in terms of three questions. First, are sex differences and their social consequences natural (and thus inevitable) or cultural (and hence subject to change)?¹⁴ Second, if particular sex differences or their social consequences are cultural in origin, are they desirable or harmful?¹⁵ Third, assuming that harms exist, are they sufficiently important to justify major social investment to reduce both the extent and the consequences of various types of sex differences?¹⁶

Co., 303 F. Supp. 754 (M.D. Ala. 1969) (telephone coin box collectors); Pa. Op. Att'y Gen. No. 41 (1973) (boxers and wrestlers); Pa. Op. Att'y Gen. No. 71 (1971) (teenage newspaper carriers).

13. The high water mark of the effort to obtain strict scrutiny of sex classifications was *Frontiero v. Richardson*, 411 U.S. 677 (1973) (plurality opinion). For a discussion of the standard contemplated by the proposed Equal Rights Amendment, see Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 888-909 (1971).

14. Compare *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (Stewart, J.), discussed *infra* pp. 936-37 with *id.* at 341, 345-46 (Marshall, J., dissenting in pertinent part), discussed *infra* pp. 935-37.

15. Compare *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (O'Connor, J.), discussed *infra* pp. 957-60 with *id.* at 735 (Powell, J., dissenting), discussed *infra* pp. 959-60.

16. Compare *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (Stewart, J.), discussed *infra* pp. 935-37 with *id.* at 341, 345-46 (Marshall, J., dissenting in pertinent part), discussed *infra* notes 122, 226.

After briefly summarizing pre-1970 judicial doctrine, this Article presents an analysis and critique of the two major approaches to these questions and to the underlying problem of sex discrimination that emerge from the Supreme Court's recent equal protection and employment discrimination decisions. One approach is articulated primarily by Justices Rehnquist and Stewart,¹⁷ the other by Justices Brennan and Marshall. The critique of the Rehnquist-Stewart approach focuses on two of its features: first, its broad conception of "natural" or "real" differences between women and men; and second, its lack of concern about most rules not explicitly based on sex, even those that disproportionately burden women and contribute significantly to their subordination. In taking these positions, the Rehnquist-Stewart approach denies that significant harms flow from sex-based laws and disproportionately burdensome neutral rules; it holds that the "real" differences between the sexes have necessary—and not undesirable—social consequences. The critique argues that cultural and political choices, rather than biology, determine the extent of equality between the sexes in any given society, and that a recognition of this fact is a precondition to any serious effort to promote sex equality.

The Brennan-Marshall approach presents a more complex picture. Justices Brennan and Marshall have, with two exceptions,¹⁸ voted to strike down every sex-based classification, pregnancy classification, and disproportionately burdensome neutral rule that the Court has fully considered. Their votes and their opinions reflect a recognition of the cultural origins of sex differentiation, the harms caused by sex discrimination, and the importance and feasibility of remedies. At the same time, their opinions place far more emphasis on the irrationality of particular rules as means to the government's asserted goals than on the relationship of the rules to sexism. The resulting messages about sex discrimination and equal rights theory are therefore ambiguous. Sexism is deeply embedded in the basic social, economic, and political structures of contemporary society. Significant change will require a far more searching critique than the Brennan-Marshall approach has yet articulated. The Article concludes with a discussion of the elements of such a critique, and a plea for more probing judicial analysis of sexism and its social context.

I. Pre-1970 Equal Protection Doctrine

Until recently, many governmental rules reflected and reinforced traditional sex roles. Some rules prohibited women from entering male do-

17. Justice Stewart retired from the Supreme Court effective July 3, 1981; his seat was filled by the Court's first woman member, Justice Sandra Day O'Connor, on September 25, 1981.

18. *Heckler v. Mathews*, 104 S. Ct. 1387 (1984); *Califano v. Webster*, 430 U.S. 313 (1977) (per curiam), *discussed infra* note 194.

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mains such as the military¹⁹ or, in the nineteenth century, the professions.²⁰ Other rules, or the absence of rules, tolerated employer and union exclusion of women from many desirable occupations and trades²¹ and the segregation of women workers into low-paying, low-status jobs.²² Married women were consigned by law to a separate and inferior status, both within their families and in public life.²³ Many laws and programs encouraged adherence to sex-based norms by allocating benefits to those whose life choices followed traditional patterns and by penalizing those who made non-traditional choices. For example, divorce laws provided alimony only to women, thereby penalizing economically dependent husbands.²⁴ Conversely, male workers were rewarded and female workers punished by the assumption, embodied in wage rates²⁵ and fringe benefit

19. Prior to World War II, women were, with rare exceptions, completely excluded from military service. See *Personnel Adm'r v. Feeney*, 442 U.S. 256, 269 n.21 (1979). Even after the creation of the Women's Army Corps in 1943, women's participation in the military was strictly limited by statute and regulation until the mid-1970's to no more than 2% of total enlisted strength. *Id.* at 270 n.21. In addition, "enlistment and appointment requirements have been more stringent for females than males with respect to age, mental and physical aptitude, parental consent, and educational attainment." *Id.* at 284 n.1 (Marshall, J., dissenting). Women remain excluded from the military draft, see *Rostker v. Goldberg*, 453 U.S. 57 (1981), discussed *infra* pp. 953-54, and from combat duty, see *id.* at 76-77, with consequent disadvantage for promotion opportunities, see *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975), discussed *infra* p. 939; Note, *The Equal Rights Amendment and the Military*, 82 YALE L.J. 1533 (1973); Brown, Emerson, Falk & Freedman, *supra* note 13, at 967-79.

20. See *supra* notes 6, 7. The first woman to be regularly admitted to practice law in the United States was Arabella Mansfield of Iowa, who was admitted in 1869. 2 NOTABLE AMERICAN WOMEN 1607-1950, at 492 (E. James ed. 1971). The first woman in modern times to graduate in medicine was Elizabeth Blackwell, who received her medical degree from Geneva College in 1849. 1 *id.* at 162-63.

21. See B. BABCOCK, A. FREEDMAN, E. NORTON & S. ROSS, *supra* note 6, at 19-53.

22. See, e.g., *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974) (continuing impact of explicit employer and union policies of sex segregation and sex-based wage differentials found to violate Equal Pay Act); *International Union of Elec., Radio & Mach. Workers v. Westinghouse Elec. Corp.*, 631 F.2d 1094 (3d Cir. 1980) (involving claim that present pay scheme carried forward disparities resulting from earlier scheme under which women's wages (but not men's wages) were intentionally set at less than employer job evaluation would warrant), *cert. denied*, 452 U.S. 967 (1981); *Shultz v. Wheaton Glass Co.*, 421 F.2d 259 (3d Cir.) (sex-based wage disparities and sex segregation found not to be justified by asserted differences between jobs in question), *cert. denied*, 398 U.S. 905 (1970). See generally cases collected in M. ZIMMER, C. SULLIVAN & R. RICHARDS, *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION* 541-664 (1982).

23. Nineteenth- and twentieth-century law concerning married women is reviewed in B. BABCOCK, A. FREEDMAN, E. NORTON & S. ROSS, *supra* note 6, at 561-66.

24. Traditionally, alimony was only available to wives because it was understood as a continuation of the husband's marital duty to support his wife. Since the wife had no duty to support the husband, he could not receive alimony. For a discussion of this tradition and a summary of the historical background of alimony in England and the United States, see H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 420-22, 448 (1968). By 1976, only 15 states limited alimony or maintenance upon divorce to wives. B. BROWN, A. FREEDMAN, H. KATZ & A. PRICE, *supra* note 11, at 130-34. In *Orr v. Orr*, 440 U.S. 268 (1979), the Supreme Court invalidated Alabama's sex-based alimony law on equal protection grounds.

25. For discussions of the so-called "family wage" that was supposed to provide a man with enough money to allow the woman to stay home, raise children, and maintain the family, see N. SOKOLOFF, *BETWEEN MONEY AND LOVE: THE DIALECTICS OF WOMEN'S HOME AND MARKET WORK* 167-77, 214, 228-33, 238 (1980) and works cited therein; Hartmann, *The Unhappy Marriage of Marxism and Feminism: Towards a More Progressive Union*, in *WOMEN AND REVOLUTION* 1, 21-27

programs,²⁶ that men—but not women—provided economic support for their families. Finally, a number of laws effectively excluded women from traditionally male jobs by limiting their hours and time of work, and by regulating other conditions of employment, in the name of “protecting” them from supposedly sex-specific harms.²⁷

Prior to 1971, the Supreme Court almost invariably concluded that such rules were consistent with the basic principles of equality embodied in the Constitution, primarily in the equal protection and due process clauses of the Fourteenth Amendment.²⁸ The Court’s first major consideration of sex-based rules under the equal protection clause²⁹ occurred in the 1908 case of *Muller v. Oregon*,³⁰ which involved an employer’s challenge to a state law limiting women’s employment in factories and laundries to ten hours per day. In rejecting the employer’s argument that this law interfered with constitutional rights of liberty of contract previously established for men,³¹ the Court asserted that even if a woman were placed on “an absolutely equal plane” with a man as far as political and legal status is concerned,

it would still be true that she is so constituted that she will rest upon and look to him for protection; that her physical structure and a proper discharge of her maternal functions—having in view not

(L. Sargent ed. 1981).

26. See, e.g., *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 143-46 (1980) (statute denied widower benefits on his wife’s work-related death unless he was mentally or physically handicapped or dependent on her earnings, but granted widow benefits without proof of her dependence on her husband’s earnings); *Califano v. Goldfarb*, 430 U.S. 199, 201 (1977) (survivor’s benefits payable to widow in any event, but to widower only if he had been receiving at least one-half of his support from deceased wife); *Frontiero v. Richardson*, 411 U.S. 677, 678 (1973) (plurality opinion) (spouses of male members of uniformed services deemed dependents for purposes of obtaining increased quarters allowance and medical benefits but spouses of female members not deemed dependents unless in fact dependent for one-half of their support).

27. As late as 1968, 38 states limited women’s hours of work per day and prohibited overtime work at desirable premium pay; 18 states prohibited or regulated night work for women; 10 states excluded women from work requiring lifting more than a given weight, ranging from 15 to 50 pounds; 26 states excluded women from certain occupations, primarily mining and bartending; and varying numbers required special conditions of employment for women such as a meal period, a rest period, a day of rest, and chairs. See Brown, Emerson, Falk & Freedman, *supra* note 13, at 924. The historical and legal background of protective labor legislation for women is discussed in B. BABCOCK, A. FREEDMAN, E. NORTON & S. ROSS, *supra* note 6, at 26-53; B. BROWN, A. FREEDMAN, H. KATZ & A. PRICE, *supra* note 11, at 209-19.

28. The Court’s pre-1970 opinions are excerpted and extensively discussed in B. BABCOCK, A. FREEDMAN, E. NORTON & S. ROSS, *supra* note 6, at 4-58, 71-108. Justice Brennan articulated a critical view of the pre-1970 opinions in *Frontiero v. Richardson*, 411 U.S. 677, 684-85 (1973) (plurality opinion).

29. *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1873), holding that a statute excluding women from the legal profession did not violate the Fourteenth Amendment, placed primary emphasis on the Court’s restrictive interpretation of the privileges and immunities clause in the *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873). Justice Bradley’s famous concurring opinion is quoted *infra* note 278.

30. 208 U.S. 412 (1908).

31. See *Lochner v. New York*, 198 U.S. 45 (1905).

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merely her own health, but the well-being of the race—justify legislation to protect her from the greed as well as the passion of man.³²

Women were thus “inherently”³³ different from men, and this difference justified disparate legal treatment. Later cases typically cited *Muller*, and summarily referred to the futility of requiring legal equality where there is “a real difference.”³⁴

Differential treatment was also justified by reference to the legislative goal of promoting certain sex-based roles. For example, in 1961 the Supreme Court upheld Florida’s blanket exemption of women from compulsory jury service³⁵ on the ground that a “woman is still regarded as the center of home and family life,” and therefore could be excused because of her “special responsibilities.”³⁶ The Court did not take into account the fact that the asserted differences applied only to some women, that many male occupational activities were equally inconsistent with jury service, or that the jury exemption might interfere with the right to a trial by a jury drawn from a cross-section of the community.

The reemergence of the women’s movement³⁷ and the complex social changes of the 1960’s³⁸ made possible a new series of challenges to sex discrimination. A major feminist goal was to gain access for women to opportunities previously reserved to men, and to obtain equal rewards for women once they achieved such access.³⁹ Largely as a result of feminists’

32. 208 U.S. at 422.

33. *Id.* at 423.

34. See, e.g., *Quong Wing v. Kirkendall*, 223 U.S. 59, 62-63 (1912); cf. *Goesaert v. Cleary*, 335 U.S. 464, 466 (1948) (constitutional propriety of “sharp line between the sexes” asserted without further justification). But see *Adkins v. Children’s Hosp.*, 261 U.S. 525 (1923) (invalidating minimum wage law for women only on grounds that such restrictions, unlike maximum hours laws, were not related to physical differences between women and men and were inconsistent with recent changes in women’s contractual, political, and cultural status that placed women on equal legal plane with men). On the impact of *Muller*, see B. BABCOCK, A. FREEDMAN, E. NORTON & S. ROSS, *supra* note 6, at 33-35; Brown, Emerson, Falk & Freedman, *supra* note 13, at 877 n.11.

35. See *Hoyt v. Florida*, 368 U.S. 57, 58 (1961). The Florida law permitted women to volunteer for jury service, but at the time of Gwendolyn Hoyt’s trial, only 220 women out of approximately 46,000 registered female voters had done so, and only 10 women were actually included in the list of 10,000 prospective jurors, *id.* at 64-65. For analysis of the arguments in *Hoyt*, see B. BABCOCK, A. FREEDMAN, E. NORTON & S. ROSS, *supra* note 6, at 101-03.

36. *Hoyt*, 368 U.S. at 62.

37. See sources cited *supra* note 9.

38. W. CHAFE, *WOMEN AND EQUALITY* 117-42 (1977) (importance of changed female work patterns, decline in birth rate during 1960’s and 1970’s, and changes in sexual mores, in combination with feminist ideology); J. MITCHELL, *supra* note 9, at 11-42 (expansion of access to higher education, development of consumer capitalism, reactions to gap between liberal and radical ideology and practice in 1960’s); S. ROTHMAN, *supra* note 7, at 229-33 (impact of increases during the late 1950’s and 1960’s in employment of married women and influence of the civil rights movement); Evans, *Tomorrow’s Yesterday: Feminist Consciousness and the Future of Women*, in *WOMEN OF AMERICA: A HISTORY* 389, 390-406 (C. Berkin & M. Norton eds. 1979) (increasing numbers of women professionals and of women’s activities in civil rights movement).

39. See sources cited *supra* note 10.

efforts, the federal Equal Pay Act,⁴⁰ requiring equal pay for equal work without regard to sex, was passed in 1963. The following year, Congress enacted Title VII of the Civil Rights Act of 1964,⁴¹ prohibiting discrimination in employment on the basis of sex, as well as on the basis of race, religion, and national origin.⁴² The new congressional commitment to sex equality in employment was one of the many developments that set the stage for judicial reexamination of the traditional assumption that legal distinctions based on sex were invariably justified.

II. Contemporary Equal Protection and Title VII Doctrine

Starting in 1971, the Supreme Court began to reconsider its strong approval of all sex-based laws and of the traditional sex roles they reflected.⁴³ But after more than a decade of searching for a new approach under the equal protection clause and Title VII, the Court has been unable to reach a consensus about how to review sex-based rules, neutral rules that disproportionately burden one sex, and pregnancy classifications. Most members of the Court agree that maintenance of traditional sex roles is no longer permissible as an explicit governmental or business goal.⁴⁴ But whenever a government or employer has asserted a different goal, the Court has split into warring factions. It has been unable to agree on the nature of sex differences, their relationship to legitimate goals, and the correct standards for deciding cases involving these issues.

Before analyzing the positions taken by various Justices, it is useful to clarify some basic concepts. It is evident that, considered as distinct groups, women and men differ in many statistically measurable ways. Most of these differences can be termed average differences, characteristic

40. 29 U.S.C. § 206(d) (1982).

41. 42 U.S.C. §§ 2000e-1 to 2000e-17 (1976 & Supp. V 1981).

42. *Id.* § 2000e-2 (1976).

43. See *Reed v. Reed*, 404 U.S. 71 (1971) (administrative convenience does not justify statutory preference for male relatives as administrators of intestate estates). For a discussion of the new standard used in the case, see Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV L. REV. 1, 18-19 (1972).

44. See *Stanton v. Stanton*, 421 U.S. 7 (1975); see also *Orr v. Orr*, 440 U.S. 268, 279-80 (1979) (striking down Alabama statute imposing alimony obligations on husbands but not wives). In *Stanton*, the Utah Supreme Court had upheld a lower age of majority for young women on the grounds that young men needed more parental support for education in order to fulfill the traditional male role as breadwinner. See 421 U.S. at 10. Justice Blackmun, writing for a majority of eight Justices, rejected this statutory goal as both empirically false and, by strong implication, morally unjust. "No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas," *id.* at 14-15, and legislation based on that premise, by encouraging parents to withhold educational support from young women, created the very "role-typing society has long imposed," *id.* Justice Rehnquist dissented on the grounds that in this case, involving a divorced father's refusal to pay child support for his daughter after her eighteenth birthday, the parties' divorce agreement—rather than the state law establishing a lower age of majority for women—might have been the basis of the father's refusal to pay. *Id.* at 19-20 (Rehnquist, J., dissenting).

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of women and men as groups, but as to which there is some degree of overlap between the sexes. For example, men on the average are taller, heavier, more proficient in mathematics, more aggressive, and have shorter lifespans than women. Individual women, however, often are taller, heavier, more proficient in mathematics, more aggressive, or have shorter lifespans than individual men. While some average differences are caused in part by biological factors, most have a significant cultural component.⁴⁵

In contrast to average differences, a few biological differences between women and men might be termed "definitional." By definition, to be female is to possess certain physiological characteristics associated with sexuality and reproduction that males lack, and vice versa. Although there are many women and men who lack one or more of the definitional characteristics of their sex, there is little or no overlap between the sexes as to these characteristics.⁴⁶

Until recently, individuals in positions of authority—almost exclusively male—did not distinguish between average and definitional differences, and emphasized the biological rather than the cultural origins of the sex differences they identified. To put it another way, they perceived stronger correlations between many characteristics and sex than most people now do, and saw biology rather than culture as the primary cause of differences between women and men. For example, they assumed that there were natural and fundamental differences between women and men with respect to reasoning capacity, physical stamina, and moral or spiritual nature.⁴⁷

45. For a discussion of the cultural causes of sex differences in mathematics proficiency among elementary and secondary school students, see J. BROOKS-GUNN & W. MATTHEWS, *supra* note 5, at 175-76, 246. On the causes of average sex differences in aggression, see *infra* note 172. For a discussion of cultural factors that contribute to average differences between the sexes in longevity, see Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 709-10 (1978). Data on the decreasing gap between female and male athletic performance as a result of increased societal support for female athletics also demonstrate the interaction between biological characteristics and cultural factors. For discussions of physiological sex differences, cultural factors, and the impact of both on athletic performance and potential, see Costill & Higdon, *Women Runners: As "Human" as Men Despite Differences*, SCI. DIG., Mar. 1980, at 74; Wood, *Sex Differences in Sports*, N.Y. Times, May 18, 1980, § 6 (Magazine), at 30.

46. Since 1966, when the Johns Hopkins University Hospital and the University of Minnesota started providing sex reassignment surgery previously unavailable in the United States, there have been increasing numbers of persons born with the reproductive physiology of one sex who have acquired through hormonal and surgical means some of the physiological characteristics of the opposite sex. For a discussion of this phenomenon and legal responses to it, see Gould, *Sex, Gender and the Need for Legal Clarity: The Case of Transsexualism*, 13 VAL. U.L. REV. 423 (1979); see also Dunlap, *The Constitutional Rights of Sexual Minorities: A Crisis of the Male/Female Dichotomy*, 30 HASTINGS L.J. 1131 (1979) (arguing against notion that government should recognize two distinct sex categories).

47. See *supra* p. 915. As additional examples of scholarly, political, and philosophical arguments to this effect, see 2 C. DARWIN, *THE DESCENT OF MAN AND SELECTION IN RELATION TO SEX* 310-14 (1871) (men have greater mental powers and physical strength as result of natural selection, which involves competition among males for sexual access to females; women have greater tenderness and

By now, generalized biological determinism is largely discredited, although it retains an uncanny political and social appeal.⁴⁸ Popular and educated opinion, however, remains divided about the nature and significance of definitional differences—such as pregnancy—and of differences—such as the exclusion of women from combat, and the primary responsibility of mothers for the care of infants—that might be termed “quasi-definitional” because of their close historical and cultural connection to definitional differences.⁴⁹ Therefore, although there seems to be a broad consensus that many characteristics relevant to achievement—such as intelligence and strength—can be found in both sexes, and that individuals should be evaluated directly on the basis of these characteristics, many sex-based rules are still widely perceived as appropriate. In addition, people continue to disagree about the extent to which the many important average differences between the sexes in careers, social roles, and life patterns should be seen as both natural and morally neutral (or indeed desirable), and to what extent they should be seen as evidence of continued sex discrimination.

The general social debate about the continuing importance of biological differences between the sexes has been mirrored in the Supreme Court by disagreements about the meaning of equal rights in the context of the equal protection clause and Title VII. Since the mid-1970's, the Court has oscillated between two different approaches to legislative sex classifications, reflecting opposing views about the nature and significance of sex differences. Both approaches recognize that sex classifications are sometimes used as inaccurate proxies for other characteristics with which challenged legislation is properly concerned,⁵⁰ and both reject laws based

less selfishness than men as a result of their maternal function); see also E. FIGES, *PATRIARCHAL ATTITUDES* 113-20 (1970) (analyzing Darwin's views as part of historical account of attitudes toward women since biblical times).

48. See G. GILDER, *WEALTH AND POVERTY* 69, 70-71, 135-37 (1981) (arguing that men are naturally irresponsible, hedonistic, and unproductive, and that women's biological mission is to civilize men and provide incentives for them to become productive members of society); G. GILDER, *SEXUAL SUICIDE* 14-25, 132-33, 194-204 (1973) (same).

49. Continuing social division about the extent to which social roles for women and men should remain distinct, the desirability of drafting women on an equal basis with men, and the desirability of equal roles for both parents in the care of young children was evident in the recent state legislative debates concerning the proposed Equal Rights Amendment to the U.S. Constitution. See Stencel, *Equal Rights Fight*, in EDITORIAL RESEARCH REPORTS, *THE WOMEN'S MOVEMENT: AGENDA FOR THE EIGHTIES* 177, 180-83 (1981). The amendment obtained 32 ratifications in the first two years after it was approved by Congress, then obtained only three more ratifications between 1974 and 1977, see *id.* at 179, and none between 1977 and 1982, when its congressional mandate expired. On the issue of child care roles, a national survey of American parents conducted in 1976 found that over 70% of American parents of both sexes believed that women with small children should not work outside the home unless the money is really needed. See *id.* at 180.

50. See *Caban v. Mohammed*, 441 U.S. 380, 398 (1979) (Stewart, J., dissenting); *Orr v. Orr*, 440 U.S. 268, 280-81 (1979) (Brennan, J.).

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“upon archaic assumptions about the proper roles of the sexes.”⁵¹ The two approaches differ, however, with respect to the amount of deference given to legislative sex classifications that are in some sense “accurate,” either because they reflect average differences that in fact do distinguish the sexes as groups, or because they are thought to involve definitional or quasi-definitional differences.

One position, articulated by Justice Brennan in the 1976 case of *Craig v. Boren*,⁵² shared by Justice Marshall,⁵³ usually supported by Justice White,⁵⁴ and recently joined by Justice O'Connor,⁵⁵ requires a party defending a sex-based classification to prove with clear evidence that the classification is substantially related to an important government goal.⁵⁶ This standard is often referred to as an “intermediate” level of scrutiny, to distinguish it from the most deferential standard requiring only “minimal rationality,” and from true “strict scrutiny,” requiring a showing that the

51. See *Michael M. v. Superior Court*, 450 U.S. 464, 478 (1981) (Stewart, J., concurring.)

52. 429 U.S. 190 (1976). Justice Brennan has further elaborated this approach in *Orr v. Orr*, 440 U.S. 268, 279-81 (1979); *Califano v. Goldfarb*, 430 U.S. 199, 210-11 (1977) (plurality opinion); *Michael M. v. Superior Court*, 450 U.S. 464, 488 (1981) (Brennan, J., dissenting); *Geduldig v. Aiello*, 417 U.S. 484, 497, 502 (1974) (Brennan, J., dissenting).

53. Justice Marshall has joined all of Justice Brennan's sex discrimination opinions, including *Frontiero v. Richardson*, 411 U.S. 677 (1973) (plurality opinion), and *Craig, Orr, Goldfarb*, and *Michael M.* In addition, Justice Marshall has written several important sex discrimination opinions in which Justice Brennan has joined. See *Rostker v. Goldberg*, 453 U.S. 57, 86 (1981) (Marshall, J., dissenting); *Personnel Adm'r v. Feeney*, 442 U.S. 256, 281 (1979) (Marshall, J., dissenting); *Dothard v. Rawlinson*, 433 U.S. 321, 340 (1977) (Marshall, J., concurring in part and dissenting in part). Brennan, however, did not join Marshall's opinion in *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (Marshall, J., concurring).

54. When laws explicitly based on sex have been at issue, Justice White has always voted the same way as Justices Brennan and Marshall, and has usually joined their opinions, see, e.g., *Craig, Orr, Goldfarb*, and *Michael M.*, or has written opinions that they have joined, see *Wengler v. Drug-Gists Mut. Ins. Co.*, 446 U.S. 142 (1980); *Parham v. Hughes*, 441 U.S. 347, 361 (1979) (White, J., dissenting). In a few cases about sex classifications, however—notably those in which the government has strongly argued a remedial justification—Justice White has taken care to indicate at least some differences with Brennan and Marshall. See *Schlesinger v. Ballard*, 419 U.S. 498, 521 (1975) (White, J., dissenting); *Kahn v. Shevin*, 416 U.S. 351, 360 (1974) (White, J., dissenting). Sharp differences exist between Justice White on the one hand, and Justices Brennan and Marshall on the other, with respect to disproportionately burdensome neutral rules and pregnancy classifications: Justice White generally votes to uphold such rules, and Justices Brennan and Marshall vote to invalidate them. These differences are evident both in equal protection cases, see *Personnel Adm'r v. Feeney*, 442 U.S. 256 (1979) (upholding veterans preference rule); *Geduldig v. Aiello*, 417 U.S. 484 (1974) (upholding rule not including pregnancy-related disability among covered disabilities in temporary state disability program), and in Title VII cases, see *Dothard v. Rawlinson*, 433 U.S. 321, 347 (1977) (White, J., dissenting) (height and weight requirements for prison guards invalidated); *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976) (upholding rule excluding pregnancy-related disability from otherwise comprehensive employer disability insurance plan).

55. Since her appointment, Justice O'Connor has voted (and written) in only one constitutional case involving a sex classification, *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982), in which she wrote a majority opinion applying the *Craig* standard. See *infra* pp. 957-58. O'Connor also joined in part an opinion by Justice Marshall finding sex-based employee pension benefits prohibited under Title VII. *Arizona Governing Comm. v. Norris*, 103 S. Ct. 3492, 3510-11 (1983) (O'Connor, J., concurring).

56. *Craig*, 429 U.S. at 197-99.

challenged law is "necessary" to further a "compelling" government interest.⁵⁷ Justices Brennan, Marshall and White appear to be particularly concerned to guard both against the use of sex-based averages to justify sex classifications when sex-neutral alternatives are available,⁵⁸ and against exaggerating the importance of definitional differences.⁵⁹ To avoid these dangers, defendants in sex discrimination cases have been required to show that (1) the asserted goal is the rule's "actual" goal,⁶⁰ (2) this goal is important,⁶¹ (3) the challenged sex classification is a highly accurate proxy for the characteristic said to distinguish women and men—such as economic need⁶²—and (4) a sex-neutral rule based directly on that

57. During the 1960's, the Court followed a "two-tier" model of equal protection doctrine. Classifications based on race and national origin, and those impinging on "fundamental interests" such as interstate travel, voting, and access to criminal appeals, were subjected to "strict scrutiny," which required the government to show that the classification was "necessary" to a "compelling" state interest. See *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969). As applied by the Court, this level of review was, in Professor Gunther's well-known phrase, "'strict' in theory and fatal in fact." Gunther, *supra* note 43, at 8. Legislation not subjected to strict scrutiny was required only to be "rationally related" to some legitimate government interest, yielding "minimal scrutiny in theory and virtually none in fact." *Id.* In the early 1970's, the Court began developing an "intermediate" or "middle tier" approach that used the traditionally deferential vocabulary of rational relationship between means and ends with greater "bite" or strictness. See *id.* at 20-37.

Laws imposing burdens on the basis of race are "immediately suspect," subject to "the most rigid scrutiny," and can be justified only by "[p]ressing public necessity." *Korematsu v. United States*, 323 U.S. 214, 216 (1944); see also *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964) (racial classifications will be upheld only if "necessary, and not merely rationally related, to the accomplishment of a permissible state policy"). In contrast to the requirement that racial classifications be "necessary" to the accomplishment of a "permissible" or "pressing" public goal, the *Craig* standard requires sex classifications to be "substantially related" to an "important" government interest, 429 U.S. at 197; see also *Michael M. v. Superior Court*, 450 U.S. 464, 468 (1981) (Rehnquist, J.) (explicitly contrasting "strict scrutiny" applicable to racial classifications with "sharper focus" rationality test applicable to sex classifications); *Craig*, 429 U.S. at 210-11 (Powell, J., concurring) (describing *Craig* standard as "middle-tier" approach).

58. *Rostker v. Goldberg*, 453 U.S. 57, 94 (1981) (Marshall, J., dissenting); *Michael M. v. Superior Court*, 450 U.S. 464, 490 n.2 (1981) (Brennan, J., dissenting); *Orr v. Orr*, 440 U.S. 268, 282-83 (1979) (Brennan, J.).

59. *Parham v. Hughes*, 441 U.S. 347, 365 (1979) (White, J., dissenting). Brennan and Marshall also would treat laws based directly on definitional differences as sex classifications, and have argued that such differences should not be exaggerated. See *Geduldig v. Aiello*, 417 U.S. 484, 497, 501 (1974) (Brennan, J., dissenting). In addition, the views of Justices Brennan and Marshall in the Title VII context parallel those they have expressed in equal protection decisions. *Dothard v. Rawlinson*, 433 U.S. 321, 345-46 (1977) (Marshall, J., concurring in part and dissenting in part) (advocating rejection of employer's claim that women's attractiveness as targets for sexual assault by male prison inmates satisfies Title VII's bona-fide occupational qualification exception). Where classifications are based directly on definitional differences or are analyzed in the context of Title VII, Justice White's views are more similar to those of Justice Rehnquist and Justice Stewart. Thus, White joined the majority opinion upholding the challenged pregnancy exclusion in *Geduldig* and wrote a separate opinion in *Dothard* that was no more favorable to the plaintiff in its treatment of the challenged sex classification than the majority opinion of Justice Stewart. See *Dothard*, 433 U.S. at 347 (White, J., dissenting).

60. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 730 n.16 (1982) (O'Connor, J.) (citing *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975)).

61. *Id.* at 725 (citing *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980)).

62. *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150-52 (1980); *Califano v. Goldfarb*, 430 U.S. 199, 217 (1977); *Kahn v. Shevin*, 416 U.S. 351, 357, 360 (1974) (Brennan, J., dissenting); *id.* at 360, 361-62 (White, J., dissenting); *Frontiero v. Richardson*, 411 U.S. 677, 688-89 (1973) (plurality

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characteristic would be less effective in achieving the government's goal.⁶³

The second position, advocated by Justice Rehnquist⁶⁴ and, before his retirement, by Justice Stewart,⁶⁵ and supported by Chief Justice Burger,⁶⁶ requires a defendant to show only that a sex-based rule does not make "overbroad generalizations based on sex which are entirely unrelated to any differences between men and women or which demean the ability or social status of the affected class."⁶⁷ For Justices Rehnquist and Stewart, the key question is whether women and men are "'different in fact'"⁶⁸ in the context of the law at issue. As Professor Earl Maltz has carefully demonstrated, the reasons articulated by Justices Rehnquist and Stewart for adopting this standard are somewhat different, and occasionally led them to support different results.⁶⁹ Justice Rehnquist takes the position that laws he perceives as burdening men need only satisfy the minimal rationality standard, because men have suffered from no history of discrimination or disadvantage.⁷⁰ Any showing that women and men are

opinion).

63. *Michael M. v. Superior Court*, 450 U.S. 464, 488 (1981) (Brennan, J., dissenting); *id.* at 490 (Stevens, J., dissenting); *Rostker v. Goldberg*, 453 U.S. 57, 94 (1981) (Marshall, J., dissenting); *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 151-52 (1980); *Orr v. Orr*, 440 U.S. 268, 281, 283 (1979); *Kahn v. Shevin*, 416 U.S. 351, 357-58 (1974) (Brennan, J., dissenting).

64. Justice Rehnquist has elaborated his position in *Rostker v. Goldberg*, 453 U.S. 57 (1981); *Michael M. v. Superior Court*, 450 U.S. 464 (1981) (plurality opinion); *Dothard v. Rawlinson*, 433 U.S. 321, 337 (1977) (Rehnquist, J., concurring in the result) (decided under Title VII); *Califano v. Goldfarb*, 430 U.S. 199, 224 (1977) (Rehnquist, J., dissenting); *Craig v. Boren*, 429 U.S. 190, 217 (1976) (Rehnquist, J., dissenting). His opinions applying Title VII to pregnancy classifications articulate a similar analysis. See *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977); *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976).

65. Justice Stewart joined Justice Rehnquist's sex-classification opinions in *Rostker*, *Michael M.* (in which he also filed a concurring opinion, 450 U.S. at 476), and *Goldfarb*, as well as his pregnancy classification opinions in *Gilbert* and *Satty*. In addition, Justice Stewart wrote major opinions on sex classifications, *Caban v. Mohammed*, 441 U.S. 380, 394 (1979) (Stewart, J., dissenting); pregnancy classifications, *Parham v. Hughes*, 441 U.S. 347 (1979); *Geduldig v. Aiello*, 417 U.S. 484 (1974); and disproportionately burdensome neutral rules, *Personnel Adm'r v. Feeney*, 442 U.S. 256 (1979); *Dothard v. Rawlinson*, 433 U.S. 321 (1977).

66. After his somewhat opaque opinion for the Court in *Reed v. Reed*, 404 U.S. 71 (1971), striking down Idaho's statutory preference for men over women as administrators of estates, Chief Justice Burger has written little concerning sex discrimination. He has frequently joined the opinions of Justice Rehnquist, e.g., *Rostker*, *Michael M.*, *Goldfarb*, *Gilbert*, *Satty*, and *Dothard*, and of Justice Stewart, e.g., *Geduldig* and *Feeney*.

67. *Michael M. v. Superior Court*, 450 U.S. 464, 469 (1981) (plurality opinion of Rehnquist, J.) (quoting *Parham v. Hughes*, 441 U.S. 347, 354 (1979) (plurality opinion of Stewart, J.)).

68. *Id.* at 469 (quoting *Tigner v. Texas*, 310 U.S. 141, 147 (1940)). Interestingly, Justice Frankfurter's opinion upholding Michigan's exclusion of women from the occupation of bartending quoted the same phrase from *Tigner*. See *Goesart v. Cleary*, 335 U.S. 464, 466 (1948). *Goesart* itself has been explicitly disapproved by a majority of the Court. See *Craig v. Boren*, 429 U.S. 190, 210 n.23 (1976).

69. Maltz, *The Concept of the Doctrine of the Court in Constitutional Law*, 16 GA. L. REV. 357, 379, 383-87 (1982). Compare *Craig*, 429 U.S. at 214 (Stewart, J., concurring in the judgment) (rule permitting sale of 3.2% beer to females but not males ages 18-20 invalid because state has not proven relevant differences between sexes) with *id.* at 217 (Rehnquist, J., dissenting) (challenged rule satisfies rational basis test appropriate to rules discriminating against men).

70. *Craig*, 429 U.S. at 218-19 (Rehnquist, J., dissenting); see Maltz, *supra* note 69, at 379.

"different in fact" in relation to some legislative goal would then satisfy this deferential standard of review. In adopting this position, Justice Rehnquist explicitly rejects the argument that "all discriminations between the sexes ultimately redound to the detriment of females, because they tend to reinforce 'old notions' restricting the roles and opportunities of women."⁷¹ Justice Stewart, in contrast, was occasionally willing to invalidate laws whose primary or immediate burden fell on men, if the laws' lack of any relationship to "real" differences between women and men suggested that they were actually based on traditional concepts of appropriate sex roles.⁷² Despite these (and other) differences between Rehnquist and Stewart,⁷³ however, the two Justices were usually in agreement about the meaning and application of the "real differences" standard. As Justice Stewart explained, laws that burden people on the basis of race

always violate the Constitution, for the simple reason that, so far as the Constitution is concerned, people of different races are always similarly situated. . . . By contrast, . . . detrimental gender classifications . . . do not always [violate the Constitution], for the reason that there are differences between males and females that the Constitution necessarily recognizes.⁷⁴

Compared to the Brennan-Marshall approach, the Rehnquist-Stewart approach is much more willing to accept the purpose asserted by the gov-

Justice Rehnquist apparently believes that the minimal rationality standard is applicable to laws burdening women as well as to those burdening men. Rehnquist's general position appears to be that, given the original intent of the Framers of the Fourteenth Amendment, heightened judicial scrutiny should apply only to "classifications based on race or on national origin, the first cousin of race." *Trimble v. Gordon*, 430 U.S. 762, 777 (1977) (Rehnquist, J., dissenting). From this perspective, other classifications, including those based on sex, should be reviewed under the deferential "minimal rationality" standard. Although Justice Rehnquist has not explained why this is the appropriate standard to apply to laws burdening women, his separate opinions in fact apply a minimal rationality standard. See *Weinberger v. Wiesenfeld*, 420 U.S. 636, 655 (1975) (Rehnquist, J., concurring in the result) (arguing that Social Security Act's restriction of benefits to surviving mothers "does not rationally serve any valid legislative purpose"); *Frontiero v. Richardson*, 411 U.S. 677, 691 (1973) (Rehnquist, J., dissenting) (adopting reasoning of lower court opinion, *Frontiero v. Laird*, 341 F. Supp. 201, 207 (M.D. Ala. 1972), which in turn applied the "rational basis" standard).

71. *Craig*, 459 U.S. at 220 n.2 (Rehnquist, J., dissenting).

72. See *id.* at 214 (Stewart, J., concurring in the judgment) (invalidating Oklahoma law prohibiting sale of 3.2% beer to males under age 21); *Orr v. Orr*, 440 U.S. 268 (1979) (Stewart, J., joining opinion of the Court by Brennan, J.); Maltz, *supra* note 69, at 383-87.

73. Compare *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (Stewart, J.), discussed *infra* p. 934 with *id.* at 339 (Rehnquist, J., concurring in the result).

74. *Michael M. v. Superior Court*, 450 U.S. 464, 478 (1981) (Stewart, J., concurring) (citations omitted). Justice Stewart was perhaps moved to offer this explanation because in 1964, in a case challenging criminal punishment for interracial sexual relations, he had stressed that he could not "conceive of a valid legislative purpose . . . which makes the color of a person's skin the test of whether his conduct is a criminal offense." *McLaughlin v. Florida*, 379 U.S. 184, 198 (Stewart, J., concurring), cited in *Michael M.*, 450 U.S. at 478 (Stewart, J., concurring).

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ernment,⁷⁵ and much less prone to inquire into the relationship of the perceived sex difference to the asserted legislative goal.⁷⁶ Moreover, the Rehnquist-Stewart approach does not engage in the multifaceted consideration of the validity of the factual premises underlying a challenged rule, which characterizes the Brennan-Marshall approach. Instead, it emphasizes a single issue: whether the asserted difference between the sexes is “real.”⁷⁷

The decision about which of these approaches to adopt in a given case rests effectively with the “swing” Justices—Blackmun, Powell, and Stevens—who have not solidly committed themselves to either position, and who bring their own perspectives to bear on the issues. Thus, Justice Blackmun tends to accept government claims that the purpose of a sex-based statute is to benefit women, and to discount both the symbolic costs of such “benefits” to women and their burdensome impact on men.⁷⁸ Justice Stevens often focuses on whether the sex classification resulted from a careful consideration by the decisionmaker, as opposed to being an “accidental by-product of a traditional way of thinking” about women.⁷⁹ In a manner somewhat similar to that of Rehnquist and Stewart, Stevens also believes that legislation based on “natural” or biological sex differences is less likely to be the product of traditional ways of thinking, and therefore

75. Compare *Rostker v. Goldberg*, 453 U.S. 57, 72-83 (1981) (Rehnquist, J.) (accepting government's assertions that Congress found that, given women's ineligibility for combat, military considerations reduced need for both draft and registration of women) with *id.* at 83 (White, J., dissenting) (Congress did not make findings asserted by government) and *id.* at 102-11 (Marshall, J., dissenting) (Congress' findings concerned draft and registration of large numbers of women); *Michael M.*, 450 U.S. at 469-72 (plurality opinion of Rehnquist, J.) (accepting California's assertion that purpose of statutory rape law was prevention of teenage pregnancy) with *id.* at 494-96 (Brennan, J., dissenting) (historical evidence shows protection of chastity of young females to be real statutory purpose). But see *Weinberger v. Weisenfeld*, 420 U.S. 636, 655 (1975) (Rehnquist, J., concurring in the result) (rare example of Justice Rehnquist finding government's asserted purpose unpersuasive).

76. Compare *Rostker v. Goldberg*, 453 U.S. 57, 72-79 (1981) (Rehnquist, J.) (exclusion of women from draft and draft registration justified by women's combat ineligibility) with *id.* at 93-95 (Marshall, J., dissenting) (evidence before Congress showed that despite combat ineligibility, women could be registered on an equal basis with men and drafted as needed). The contrasting approaches in *Parham v. Hughes*, 441 U.S. 347 (1979) are discussed *infra* p. 938.

77. See, e.g., *Rostker*, 453 U.S. at 78-79 (Rehnquist, J.); *Michael M. v. Superior Court*, 450 U.S. 464, 469, 471-73 (1981) (plurality opinion of Rehnquist, J.); *id.* at 478-79 (Stewart, J., concurring); *Parham*, 441 U.S. at 354-56 (plurality opinion of Stewart, J.).

78. See *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 733 (1982) (Blackmun, J., dissenting); *Michael M. v. Superior Court*, 450 U.S. 404, 482-83 (1981) (Blackmun, J., concurring in the judgment); *Califano v. Webster*, 430 U.S. 313, 321 (1977) (Blackmun, J., joining Burger, C.J., concurring in the judgment); *Califano v. Goldfarb*, 430 U.S. 199, 224 (1977) (Blackmun, J., joining Rehnquist, J., dissenting); Maltz, *supra* note 69, at 393-95.

79. *Califano v. Goldfarb*, 430 U.S. 199, 223 (1977) (Stevens, J., concurring in the judgment); see also *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 154 (1980) (Stevens, J., concurring in the judgment) (holding provision of Missouri workers compensation law violative of equal protection clause because it discriminated against widowers); *Rostker v. Goldberg*, 453 U.S. 57, 74 (1981) (Rehnquist, J.) (relying on Stevens' concurrence in *Goldfarb*) (upholding constitutionality of Selective Service Act, which authorizes registration of men but not women); Maltz, *supra* note 69, at 387-90.

should be subjected to less stringent judicial review.⁸⁰ Justice Powell apparently applies to sex classifications something more than a minimum rationality standard, but something less than Brennan and Marshall's version of the *Craig* test.⁸¹ This has led him to a series of ad hoc judgments about the importance of governmental goals justifying sex classifications.⁸² In a number of constitutional cases involving sex classifications,⁸³ as well as one involving a neutral rule with a disparate impact on one sex⁸⁴ and one involving a pregnancy classification,⁸⁵ at least two of these Justices voted with Rehnquist, Stewart, and Burger to uphold the challenged rules.

The Justices' disagreements about employment discrimination law under Title VII have generally paralleled their conflicts over equal protection doctrine. Title VII prohibits employment discrimination "because of" an individual's sex,⁸⁶ but permits employers to take sex into account when sex is a "bona fide occupational qualification [bfoq] reasonably necessary to the normal operation" of the enterprise.⁸⁷ In the Supreme Court's two opinions dealing with sex-based bfoqs—one written by Justice Stewart—the majority took the position that broadly defined differences between women and men were or might be relevant to job performance,⁸⁸ while Justices Brennan and Marshall insisted on the need for careful scrutiny of sex classifications in a manner analogous to their ap-

80. *Michael M. v. Superior Court*, 450 U.S. 464, 497-98 n.4 (1981) (Stevens, J., dissenting); Maltz, *supra* note 69, at 387-90.

81. Justice Powell declined to join Justice Brennan's attempt to designate sex as a suspect classification. See *Frontiero v. Richardson*, 411 U.S. 677, 691 (1973) (Powell, J., concurring in the judgment). He expressed "general agreement" with Justice Brennan's majority opinion in *Craig v. Boren*, 429 U.S. 190, 210 (1976) (Powell, J., concurring), but then proceeded to interpret the *Craig* standard somewhat differently than Justice Brennan, emphasizing whether the classification bears a "fair and substantial relation" to a legitimate governmental objective, *id.* at 211, rather than whether it is "substantially related" to an "important" governmental objective, *id.* at 197.

82. See, e.g., *Caban v. Mohammed*, 441 U.S. 380, 388-94 (1979) (Powell, J.); *Parham v. Hughes*, 441 U.S. 347, 359-61 (1979) (Powell, J., concurring in the judgment); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 735 (1982) (Powell, J., dissenting); see also Maltz, *supra* note 69, at 390-93 (arguing that in cases not involving governmental benefit programs, Justice Powell finds discrimination against men acceptable "so long as men are provided a means to remove any disability under which they are placed," *id.* at 393).

83. See *Rostker v. Goldberg*, 453 U.S. 57 (1981); *Michael M. v. Superior Court*, 450 U.S. 464 (1981); *Parham v. Hughes*, 441 U.S. 347 (1979); *Schlesinger v. Ballard*, 419 U.S. 498 (1975); *Kahn v. Shevin*, 416 U.S. 351 (1974). The one exception was *Califano v. Webster*, 430 U.S. 313 (1979) (*per curiam*), in which Justice Blackmun was the only swing Justice to associate himself with Burger's concurrence, *id.* at 321 (Burger, C.J., concurring in the judgment). See *infra* note 194.

84. *Personnel Adm'r v. Feeney*, 442 U.S. 256 (1979).

85. *Geduldig v. Aiello*, 417 U.S. 484 (1974).

86. 42 U.S.C. § 2000e-2(a) (1976).

87. *Id.* § 2000e-2(e).

88. *Dothard v. Rawlinson*, 433 U.S. 321, 336 (1977) (Stewart, J.) (female prison guard's "very womanhood" would undermine her capacity to provide security—the essence of correctional counselor's responsibility); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (existence of conflicting family obligations may be more relevant to woman's job performance than to man's).

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proach under the *Craig* standard.⁸⁹ Similar divisions have split the Court in Title VII cases involving pregnancy classifications⁹⁰ and disproportionately burdensome neutral rules.⁹¹

III. The Rehnquist-Stewart Approach and the Concept of “Real” Sex Differences

The concept of “real” sex differences is central to the Rehnquist-Stewart approach. Under this approach, the legal problem of sex discrimination is generally conceived as the use of sex classifications when no “real” differences between women and men are involved. “Real” differences are defined broadly to include definitional differences, legally created differences, and differences that result from past discrimination against women. In cases involving “real” differences, review of the relationship between the classification and the goal is deferential. This approach is also associated with a high degree of tolerance for facially sex-neutral rules that have a disparate impact on one sex.

A. Definitional Differences

For Justices Rehnquist and Stewart, the clearest examples of “real” differences between the sexes are those termed “definitional,” that is, those involving the distinctive reproductive and sexual characteristics that define membership in a given sex. But in what sense, or for what reasons, do Rehnquist and Stewart take these differences to be “real?”

Consider, for example, Justice Rehnquist’s plurality opinion in *Michael M. v. Superior Court*.⁹² In this case, a seventeen year old boy had sexual intercourse with a sixteen year old girl, and was prosecuted under California’s statutory rape law, which penalizes males for sexual intercourse with females under eighteen.⁹³ Rehnquist accepted the state’s dubious characterization of the statute’s purpose as the prevention of teenage pregnancy.⁹⁴ Under Rehnquist’s approach, the key question then be-

89. *Dothard*, 433 U.S. at 343-46 (Marshall, J., concurring in part and dissenting in part) (accepting majority’s ruling concerning neutral rules with disparate impact on women, but rejecting conclusion that sex was bfoq for contact guard positions in Alabama’s male maximum security prisons). *Phillips* was a per curiam decision in which Justice Marshall alone wrote a separate opinion rejecting the majority’s apparently broad interpretation of the bfoq exception to Title VII’s ban on sex discrimination. 400 U.S. at 545-47 (Marshall, J., concurring).

90. Compare *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976) (Rehnquist, J.) (upholding rule excluding pregnancy-related disabilities from otherwise comprehensive employer disability plan) with *id.* at 146-62 (Brennan, J., dissenting) (exclusion discriminatorily motivated; also invalid as classification with discriminatory effect).

91. See *infra* p. 934.

92. 450 U.S. 464 (1981) (plurality opinion).

93. *Id.* at 466.

94. *Id.* at 469-73. On the lack of evidence that prevention of pregnancy was in fact that statute’s purpose, see *id.* at 494-96 (Brennan, J. dissenting); *Michael M. v. Superior Court*, 25 Cal. 3d 608,

came whether women and men were "different in fact" or "similarly situated" with respect to this purpose.⁹⁵ In finding that young women were not "similarly situated" to young men "with respect to the problems and the risks of sexual intercourse,"⁹⁶ Rehnquist focused on two issues: the biological or natural origins of definitional differences, and the extent of overlap between the sexes with respect to these differences. He found that it is a "natural"⁹⁷ or "physiological"⁹⁸ fact that only women can become pregnant, and that, as a result, there is no overlap between the sexes as to this characteristic.⁹⁹

He then applied a deferential standard of review. He argued that since the threat of pregnancy was a "natural" deterrent to sexual intercourse for young women, it was reasonable for the legislature to impose criminal penalties only on men, and thereby "equalize" the deterrent for both sexes.¹⁰⁰ As Justices Brennan and Stevens forcefully pointed out in separate dissents, this reasoning involved little review of the relationship between the classification and the goal.¹⁰¹ The state presented no evidence to show that the threat of pregnancy in fact deterred young women's sexual activity, and indeed the available evidence suggested that it did not have this effect.¹⁰² A much more plausible explanation for the state's choice to penalize only males for sexual intercourse involving teenage girls was the assumption that when such conduct occurs, males are the aggressors and females are their victims.¹⁰³ This explanation of the statute is supported not only by historical evidence about the origins of the law in the nineteenth century¹⁰⁴ but also by contemporary evidence about the kinds of

617-621, 601 P.2d 572, 578-80, 159 Cal. Rptr. 340, 346-48 (1979) (Mosk, J., dissenting), *aff'd*, 450 U.S. 464 (1981) (plurality opinion). See generally Williams, *The Equality Crisis: Some Reflections on Culture, Courts and Feminism*, 7 WOMEN'S RTS. L. REP. 175, 179-88 (1982) (analyzing statutory rape laws in general and Rehnquist's opinion in particular).

95. *Michael M.*, 450 U.S. at 469 (plurality opinion).

96. *Id.* at 471.

97. *Id.* at 473.

98. *Id.* at 467.

99. *Id.* at 471.

100. *Id.* at 473.

101. *Id.* at 496 (Stevens, J., dissenting); *id.* at 488 (Brennan, J., dissenting).

102. *Id.* at 496-98 (Stevens, J., dissenting).

103. See Williams, *supra* note 94.

104. As Justice Brennan suggested, 450 U.S. at 494-96 & nn. 9-10, the statute appears originally to have been premised on the legal incapacity of females below a certain age to give valid consent, with the result that all intercourse with females below that age was presumed to be nonconsensual. Before *Michael M.* was litigated, the California courts consistently stated the law's purpose in terms of protecting the virtue of young and unsophisticated girls either from "violation" by young men or from the young women's own poor judgment; see also *Michael M.*, 25 Cal. 3d 608, 612, 601 P.2d 572, 575, 159 Cal. Rptr. 340, 343 (1979) (males "are the *only* persons who may physiologically cause the result which the law properly seeks to avoid"), *aff'd*, 450 U.S. 464 (1981) (plurality opinion). This statement was quoted both by the plurality in the Supreme Court, 450 U.S. at 467, and by Justice Stevens in dissent, 450 U.S. at 500 n.7.

situations in which the law is enforced.¹⁰⁵ By substituting conclusory notions of “common sense” about biological differences between the sexes for factual analysis of the challenged classification and the rationale for its use, Justice Rehnquist was able to disregard the overbroad stereotype about the sexes reflected in California’s statutory rape law.

The Rehnquist-Stewart conception of real sex differences also played a central role in three cases involving explicit pregnancy classifications. As in *Michael M.*, in these three cases Rehnquist and Stewart took the position that sex discrimination can occur only when women and men are similarly situated, that is, when they share a characteristic that is implicated in the challenged rule.¹⁰⁶ The absence of overlap between the sexes, particularly with respect to a biological characteristic, establishes the existence of a “real” sex difference that easily justifies differential treatment. This reasoning led Rehnquist and Stewart to conclude that pregnancy classifications are not sex classifications at all, but simply “neutral rules” concerning an “objectively identifiable physical condition with unique characteristics” that happens to be limited to one sex.¹⁰⁷ Thus, defendants need only show a minimally rational relationship between the rule and its asserted goal.¹⁰⁸ Under this standard, the Court approved state and employer temporary disability plans that excluded benefits for pregnancy, even though the plans provided benefits for other disabilities that were comparable to pregnancy because they were unrelated to disease, sometimes voluntarily assumed, costly to insure against, and limited to one sex.¹⁰⁹

105. The state of California argued that the statute was “commonly employed in situations involving force, prostitution, pornography or coercion due to status relationships.” *Michael M.*, 450 U.S. at 501 (Stevens, J., dissenting).

106. *Nashville Gas Co. v. Satty*, 434 U.S. 136, 140 (1977); *General Elec. Co. v. Gilbert*, 429 U.S. 125, 135 (1976); *Geduldig v. Aiello*, 417 U.S. 484, 496-97 (1974).

107. *Nashville Gas Co.*, 434 U.S. at 141-43; *Gilbert*, 429 U.S. at 134; *Geduldig*, 417 U.S. at 496 n.20.

108. *Geduldig*, 417 U.S. at 495-96. In *Gilbert*, Rehnquist found that the pregnancy exclusion was neither a facial sex classification nor a neutral rule with a disparate impact. Since it was thus entirely outside the scope of Title VII’s coverage, no employer justification was required. *Gilbert*, 429 U.S. at 135-40. *But see Nashville Gas Co.*, 434 U.S. at 140-43 (seniority system that allowed both male and female employees to retain accumulated seniority while on leave for non-occupational disabilities other than pregnancy but divested seniority if an employee took leave for any other reason, including pregnancy, invalid as unjustified by business necessity; though facially sex neutral, challenged rule had disparate impact on women in that denial of accumulated seniority imposed on women substantial burden that men need not suffer).

109. *See Gilbert*, 429 U.S. at 152 & n.5, 155, 160 (Brennan, J., dissenting); *Geduldig*, 417 U.S. at 501 (Brennan, J., dissenting). The fact that pregnancy is not a disease and is often voluntarily undertaken and desired was mentioned by Justice Rehnquist in *Gilbert*, 429 U.S. at 136, after he quoted Justice Stewart’s characterization of pregnancy as an objectively identifiable physical condition with unique characteristics, *id.* at 134 (quoting *Geduldig*, 417 U.S. at 496 n.20). Both Justice Stewart in *Geduldig*, 417 U.S. at 493-94, 496 n.20, and Justice Rehnquist in *Gilbert*, 429 U.S. at 131, 136, noted that pregnancy was unique to women, and that it was expensive to insure against.

The Title VII case of *Dothard v. Rawlinson*¹¹⁰ suggests how the Rehnquist-Stewart concept of real sex differences can be extended beyond differences that are clearly definitional to include more controversial claims about human behavior. Justice Stewart's majority opinion in *Dothard* also illustrates the Court's tendency to give more deferential review to rules based on what it perceives to be definitional sex differences than to rules based on characteristics shared by both sexes. The *Dothard* case involved challenges to two Alabama rules that restricted women's employment as prison guards. The first rule did not explicitly exclude women but established minimum height and weight requirements that rendered a disproportionate number of women ineligible for employment.¹¹¹ Under the established interpretation of Title VII, such an exclusionary effect is considered discrimination "because of" sex unless the employer can show that the rule has "a manifest relationship" to job performance.¹¹² The state argued that the height and weight standards were necessary to ensure that guards would be strong enough to maintain prison security.¹¹³ Justice Stewart held, however, that to prevail this argument had to be documented in two ways. First, the state would have to demonstrate that a particular level of strength was needed to maintain prison security, and that the height and weight standards were accurately correlated with that degree of strength.¹¹⁴ Second, the state would have to show that a less discriminatory (and more functional) selection method that measured strength directly was not feasible.¹¹⁵ Since the state had offered no evidence as to either of these matters, the height and weight standards were found to be prohibited sex discrimination.

The second rule at issue in *Dothard*, adopted by the state during the course of litigation against the height and weight standards, explicitly excluded women from all guard positions that required contact with inmates in men's maximum security prisons.¹¹⁶ The state argued that sex was a "bona fide occupational qualification" because of the danger that male inmates might sexually assault female guards.¹¹⁷ Although the established Title VII standard for validating such claims is at least as strict as the standard applicable to disproportionately burdensome neutral rules,¹¹⁸

110. 433 U.S. 321 (1977).

111. *Id.* at 329-30.

112. *Id.* at 329 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971)).

113. *Id.* at 331. Defendants actually referred to job performance in general, but it is apparent from the context of their argument that maintaining prison security was the relevant aspect of the job. *Id.* at 339 (Rehnquist, J., concurring in the result and concurring in part).

114. *Id.* at 331 (majority opinion).

115. *Id.* at 332.

116. *Id.* at 325 n.6 (quoting Regulation 204).

117. *Id.* at 334-35.

118. Justice Stewart quoted with apparent approval two lower court formulations of the "bona

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Justice Stewart applied it in a much more lenient fashion.

In contrast to his approach to the state's claim about the height and weight rules, Justice Stewart readily accepted the state's assertion that the use of women guards would increase prison security problems.¹¹⁹ In particular, he did not require the state to show that in the "barbaric and inhumane"¹²⁰ conditions prevailing in the Alabama prisons, in which male guards were frequently attacked, women guards would be assaulted because they were women, rather than because they were guards.¹²¹ Most

fide occupational qualification" (bfoq) exception: that articulated in *Diaz v. Pan Am. World Airways*, 442 F.2d 385, 388 (5th Cir. 1971) ("discrimination based on sex is valid only when the *essence* of the business operation would be undermined by not hiring members of one sex exclusively") and that articulated by the same court in *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 235 (5th Cir. 1969) (employer can rely on bfoq exception only by proving "that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved"). *Dothard*, 433 U.S. at 333. Stewart also referred to the Court's own prior decision in *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971), and cited a series of lower court opinions for the proposition that "the federal courts have agreed that it is impermissible under Title VII to refuse to hire an individual woman or man on the basis of stereotyped characterizations of the sexes." *Dothard*, 433 U.S. at 333 (footnote omitted). He went on to say that the majority was persuaded "by the restrictive language of § 703(e), the relevant legislative history, and the consistent interpretation of the Equal Employment Opportunity Commission—that the bfoq exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex." *Id.* at 334 (footnotes omitted). On the basis of this discussion, it seems that the bfoq exception shares with the *Craig* test a rejection of stereotyped characterizations of the sexes and a requirement that sex classifications be justified on the basis of factually demonstrable differences between the sexes in relation to important employment functions. The view that the standard of review under the bfoq exception is at least as strong as the equal protection standard is reinforced by a somewhat puzzling footnote to Stewart's opinion in *Dothard*, which notes that since a state employer is involved, the bfoq exception must be interpreted "at the very least so as to conform to the Equal Protection Clause. . . ." *Id.* at 334 n.20. Because none of the parties suggested that the equal protection clause requires more rigorous scrutiny than Title VII, Stewart concluded that there was "thus no occasion to give independent consideration to the District Court's ruling that Regulation 204 violates the Fourteenth Amendment as well as Title VII." *Id.* at 334 n.20.

119. 433 U.S. at 335-36. As Justice Marshall noted, "the record shows that the presence of women guards has not led to a single incident amounting to a serious breach of security in any Alabama institution." *Id.* at 344 (Marshall, J., concurring in part and dissenting in part). The two incidents involving potentially dangerous assaults on women in prisons on which the majority and the state of Alabama relied did not involve corrections officers, but rather a clerical worker and a student visiting on a tour. *Id.* at 344 n.3.

120. See *id.* at 342.

121. As Justice Marshall pointed out:

The particular severity of discipline problems in the Alabama maximum-security prisons is also no justification for the discrimination sanctioned by the Court. The District Court found in *Pugh v. Locke* that guards "must spend all their time attempting to maintain control or to protect themselves." If male guards face an impossible situation, it is difficult to see how women could make the problem worse, unless one relies on precisely the type of generalized bias against women that the Court agrees Title VII was intended to outlaw

The Court points to no evidence in the record to support the asserted "likelihood that inmates would assault a woman because she was a woman." Perhaps the Court relies upon common sense, or "innate recognition." But the danger in this emotionally laden context is that common sense will be used to mask the "romantic paternalism" and persisting discriminatory attitudes that the Court properly eschews. To me, the only matter of innate recognition is that the incidence of sexually motivated attacks on guards will be minute compared to the "likelihood that inmates will assault" a *guard* because he or she is a *guard*.

Id. at 343, 345-46 (citations omitted).

importantly, the record was clear that the state had a less discriminatory way of reducing the risk of assaults on all guards, including sexual assaults, than by refusing to hire women. It could staff and administer its prisons in accordance with minimum professional (and constitutional) standards.¹²² Indeed, Alabama was under federal court order to do exactly that, and was planning to hire large numbers of additional guards as well as to make other changes in prison conditions. By upholding the males-only hiring rule, the Court ironically perpetuated the state's policy at the very moment that this policy was about to lose its asserted justification, and thereby excluded women from substantial employment opportunities.¹²³

The reason for the application of different standards of review to the two challenged rules appears to be the belief, expressed in Justice Stewart's opinion, that male preference for women as the targets for sexual assault reflects a "real" difference between the sexes. Thus, the argument goes, unlike average differences in height, weight, and strength, as to which there is substantial overlap between the sexes, there is no overlap between the sexes as to the characteristics involved in sexual assault. Instead, Justice Stewart described the relevant characteristic—sexual attractiveness to men—as inherent in womanhood,¹²⁴ and saw that characteristic as one possessed by all women and no men. Thus, individual evaluation was irrelevant, and a sex-based rule was appropriate.

Justice Stewart's way of thinking about the causes of male sexual assault on women seems reasonable at first glance. People commonly think of sexual assaults as different from other kinds of assaults, and as caused in part by the very existence of biological sex differences. The apparent plausibility of this way of thinking, however, obscures three important questions. The first is whether male sexual assaults on female guards should be viewed primarily as a biological or a cultural phenomenon. Justice Stewart chose to emphasize biology, and did so without acknowledging the likely importance of cultural factors. But whatever the role of biology as a source of sexual attraction between women and men, the extent of male sexual assault on women is determined by culture.¹²⁵ Indeed, the

122. The majority's acceptance of the unconstitutional conditions existing in the Alabama prisons as a justification for the exclusion of women conflicted with the language of the bfoq exception, which requires that the sex classification be "reasonably necessary to the normal operation" of the enterprise. As Justice Marshall pointed out, by ruling that being male was a bfoq for the jobs at issue, the majority was in effect holding that the unconstitutional conditions were part of the normal operation of the prison. *Id.* at 342.

123. *Id.* at 345 n.4.

124. *Id.* at 336 (Stewart, J.).

125. See M. MEAD, *MALE AND FEMALE* 201-07 (1949) (cultural variations among different societies in patterns of sexual interaction, including frequency of rape; rape as a form of deviance that may develop under a variety of special social conditions); cf. Weisstein, *Tired of Arguing About Bio-*

record in the *Dothard* case itself demonstrated that competently administered and staffed prisons in other states had employed female guards in contact positions in men's prisons without difficulty.¹²⁶ If male sexual assault on female guards were a matter of "nature," such a change would have been impossible, or at least much more difficult to achieve. Stewart's apparent dismissal of this evidence suggests that, for him, unreflective "common sense" ideas about "real" differences between women and men outweigh actual evidence about the possibility of changing traditional sex roles and their associated behavior patterns.

A second question raised by *Dothard* is whether there are good reasons to treat sexual assaults and non-sexual assaults as two separate problems. In analyzing this question, one should consider that both types of assault present serious problems for prison security and that both are methods for inmates to express hostility toward guards. In addition, the physical and emotional harms of non-sexual and sexual assaults are not wholly distinct. Finally, the incidence of both types of assault can be reduced by improvements in prison security. The fact that some sexual assaults involve definitional differences between the sexes in their reproductive anatomy has no necessary relevance either to the problems such assaults present or to the measures necessary to discourage and punish such acts of aggression. Because of his focus on "real" differences, Justice Stewart failed to ask whether the state had adequately justified its decision to single out for remedy the one type of assault that affected women only.¹²⁷

A third, related question raised by *Dothard* is the following: Even if female guards are uniquely subject to sexual assaults, should this problem be remedied by improving prison conditions or by excluding women from employment? For Justice Stewart and a majority of the Court, once the allegedly biological basis of the problem of sexual assaults was identified,

logical inferiority?: The Truth About Sociobiology, MS., Nov. 1982, at 41, 45 (recent scholarship about non-human primates reveals wide variations in patterns of male-female interaction between and within species; rape is virtually unknown except among young orangutans).

126. See *Dothard v. Rawlinson*, 433 U.S. 321, 341 (1977) (Marshall, J., concurring in part and dissenting in part) (noting amicus briefs filed by states of California and Washington). The district court noted that Alabama was already employing women in contact positions at other all-male institutions. See *Mieth v. Dothard*, 418 F. Supp. 1169, 1184 (M.D. Ala. 1976) (three-judge panel) (per curiam), *aff'd in part and rev'd in part*, 433 U.S. 321 (1977).

127. If sexual and other physical assaults were grouped together for purposes of analysis, it seems likely that women would experience a greater average frequency of assaults than men. It also seems likely, however, that there would be substantial overlap between the sexes in assault rates, and that factors other than sex—skills in interpersonal relationships and knowledge of self-defense techniques, for example—would also be shown to be correlated with individual differentials. Once assaults of both types were considered as a single problem, it would be the state's burden to justify using an overbroad and under-inclusive sex classification, rather than using sex-neutral factors, to exclude particularly vulnerable individuals from guard positions requiring contact with inmates. It seems unlikely that average differences between the sexes would be so great that the state could meet this burden. See *supra* p. 934 (discussing challenge to height and weight rule).

the question of how to resolve the problem became a matter for the prison administrators to decide. To put it another way, the finding that the challenged rule involved "real" differences between the sexes eliminated the possibility that the state engaged in sex discrimination when it decided to exclude women guards rather than eliminate the unconstitutional conditions in the prison.

B. *Legally Created Differences*

Other cases suggest that the concept of "real" differences espoused by Justices Rehnquist and Stewart includes not only differences perceived as definitional, but some legally and socially created differences as well. In *Parham v. Hughes*,¹²⁸ the Court, in a plurality opinion written by Justice Stewart,¹²⁹ upheld a Georgia law that precluded an unwed father from suing for the wrongful death of his child unless he had previously legitimated that child. Stewart accepted the state's argument that this sex classification was justified as a means of encouraging unwed fathers to legitimate their children—under state law, only fathers had this power¹³⁰—and as a means of avoiding multiple lawsuits by men falsely claiming to be the fathers of deceased children born out of wedlock.¹³¹ The majority gave a great deal of deference to the unsubstantiated judgments of the Georgia legislature. Indeed, the state of Georgia presented no evidence to support most of the factual propositions underlying its legal arguments. For example, the state did not show that there was a high percentage of cases in which the identity of the father of a child born out of wedlock was in fact difficult to ascertain,¹³² that the denial of wrongful death recovery encouraged fathers who had not legitimated their children to do so,¹³³ that legitimation was strongly related to the assumption of paternal responsibilities,¹³⁴ or that multiple wrongful death actions were a significant problem.¹³⁵

128. 441 U.S. 347 (1979).

129. Justice Powell concurred in the judgment, on the grounds that the gender-based distinction in wrongful death recovery was "substantially related to achievement of the important state objective of avoiding difficult problems in proving paternity after the death of an illegitimate child." *Id.* at 359-60 (Powell, J., concurring). In reaching this conclusion he relied on the facts that it was entirely within the father's power to remove the disability, that the procedure was simple and convenient, and that the requirement of action before the child's death made it more likely that both the mother and the child would be available to provide evidence. *Id.* at 360 ("The marginally greater burden placed upon fathers is no more severe than is required by the marked difference between proving paternity and proving maternity—a difference we have recognized repeatedly.").

130. *Id.* at 353 (Stewart, J.).

131. *Id.* at 357.

132. *Id.* at 364-65 (White, J., dissenting).

133. *Id.* at 362-63.

134. *Id.* at 366-68.

135. *Id.* at 365-66.

Two other cases, *Schlesinger v. Ballard*¹³⁶ and *Rostker v. Goldberg*,¹³⁷ share with *Parham* the notion that one sex-based law can create real differences between women and men on which the same legislature can rely to justify a second sex-based statute. Both involved challenges by men to sex-based laws that the government claimed were justified by the statutory exclusion of women from military combat positions. In *Ballard*, Justice Stewart, writing for a five Justice majority, upheld a rule that gave female naval officers who were passed over for promotion the opportunity to remain in the service for a longer period than similarly situated male officers on the grounds that this rule compensated women for the lesser promotion opportunities that resulted from their statutory exclusion from both combat and sea duty.¹³⁸ In *Rostker*, Justice Rehnquist, on behalf of a six Justice majority, upheld the exemption of women from draft registration on the grounds that women and men were differently situated because women were excluded from combat.¹³⁹ Rehnquist then deferred to Congress' determination that, because of the combat exclusion, registering women was undesirable.¹⁴⁰

The majority's acceptance, in these three cases, of legally created differences as a basis for other sex-based laws seems inconsistent with any serious commitment to eliminating sex discrimination. If legislatures can create "real" sex differences at will by passing sex-based laws, the equal protection clause can easily be circumvented. One alternative is to seek other explanations for the majority's holdings. It is arguable that all three cases are examples of sex-based laws thought to be related in some relatively imprecise way to definitional differences. *Parham* is most easily accounted for in this way. Indeed, there are indications in other cases that some Justices believe that average differences between unwed mothers and unwed fathers in their willingness to assume parental responsibilities toward their natural children derive from women's direct involvement in pregnancy and childbirth, and not from sex-based cultural patterns.¹⁴¹ It is also possible that the combat exclusion is thought to be in some way related to biological, or at least fundamental, differences between women and men, perhaps having to do with motherhood or with men's "natural" aggressiveness.¹⁴² Seen in this light, all three cases are examples of lax

136. 419 U.S. 498 (1975).

137. 453 U.S. 57 (1981).

138. *Ballard*, 419 U.S. at 508.

139. *Rostker*, 453 U.S. at 78.

140. *Id.* at 79.

141. See *Caban v. Mohammed*, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting); *id.* at 404-07 (Stevens, J., dissenting).

142. See *Registration of Women: Hearings on H.R. 6569 Before the Military Personnel Subcomm. of the House Comm. on Armed Services*, 96th Cong., 2d Sess. 126 (1980) (Rep. Richard White) ("No capability exists to determine which women could meet the physical demands of the

judicial review of assertions that challenged sex classifications are justified because of definitional or biological differences between women and men. It is striking, however, that the opinions themselves place primary emphasis on the "real" legally-created differences between women's and men's situations, and refer only secondarily to possible justifications for the legislatures' creation of those differences.¹⁴³ Thus, all three decisions significantly dilute the concept of "real" differences.

C. Remedial Classifications

The final category consists of cases that uphold sex classifications as remedies for prior discrimination against women.¹⁴⁴ In the first and most striking of these decisions, *Kahn v. Shevin*,¹⁴⁵ Justice Douglas, writing for a six Justice majority,¹⁴⁶ upheld an 1885 Florida law granting widows a limited exemption from property taxes. Both the wording of the statute and the historical period in which it was enacted¹⁴⁷ suggest that the Florida legislature assumed that all widows, regardless of their actual wealth, had been economically dependent on their husbands and deserved special protection from tax liability. The state defended the law, however, as "an affirmative step toward alleviating the effects of past economic discrimination against women."¹⁴⁸ Justice Douglas accepted this argument in sweeping terms, explaining: "Whether from overt discrimination or from the socialization process of a male-dominated culture, the job market is inhospitable to women."

combat environment . . . [Women in combat] could seriously affect our national security."; *id.* at 3 (statement of Alabama housewife endorsed by Rep. Marjorie Holt) ("I think the majority of American girls . . . are unfit both physically and emotionally to serve in the Armed Forces . . . [T]he use of females, even in some of the positions they already fill, will greatly weaken the effectiveness of any combat unit."). Other witnesses before the subcommittee also made statements about the incompatibility of military service and women's nature or mission in life. For example, Phyllis Schlafly, of the Coalition Against Drafting Women, stated,

[M]embers of the armed forces are taught to kill and to be brutal and victorious in combat with potential enemies . . . Women's mission is to participate in the creation of life, not in destroying it. We expect our servicemen to be tough enough to defend us against any enemy—and we want our women to be feminine and human enough to transform our servicemen into good husbands, fathers, and citizens upon their return from battle.

Id. at 106.

143. *Rostker*, 453 U.S. at 76-81; *Parham*, 441 U.S. at 357-358; *Ballard*, 419 U.S. at 508-510.

144. The Court has upheld sex-based laws on remedial grounds on three occasions: *Kahn v. Shevin*, 416 U.S. 351 (1974); *Schlesinger v. Ballard*, 419 U.S. 498 (1975), *discussed supra* p. 939; and *Califano v. Webster*, 430 U.S. 313 (1977) (per curiam), *discussed infra* note 194. *Webster* is the only case in which both the Rehnquist-Stewart and the Brennan-Marshall approaches led to the upholding of a sex-based law on remedial grounds, albeit on the basis of different reasoning. *See* 430 U.S. at 313 (per curiam); *id.* at 321 (Burger, C.J., joined by Stewart, Blackmun & Rehnquist, JJ., concurring in the judgment).

145. 416 U.S. 351 (1974).

146. He was joined by Burger, C.J., and Stewart, Blackmun, Powell, and Rehnquist, JJ.

147. *See Kahn*, 416 U.S. at 352 & n.2.

148. *Id.* at 358 (Brennan, J., dissenting).

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pitable to the woman seeking any but the lowest paid jobs.”¹⁴⁹ Douglas then cited data showing that the median income of working women was less than sixty percent of the male median,¹⁵⁰ and commented:

The disparity is likely to be exacerbated for the widow. While the widower can usually continue in the occupation which preceded his spouse's death, in many cases the widow will find herself suddenly forced into a job market with which she is unfamiliar, and in which, because of her former economic dependency, she will have fewer skills to offer.¹⁵¹

Justice Douglas' recognition that socialization patterns and pervasive discrimination impose economic disadvantages on many women was not incorrect. What is interesting is why this perception justified the creation of a broadly framed, permanent, and separate legal status for all widows regardless of their actual experiences with sex discrimination.¹⁵² There seem to be two related explanations for Douglas' willingness to see the law as remedial rather than as a reflection of archaic stereotypes about women. One is that he was less concerned with discrimination against men, such as that resulting from the statute involved in *Kahn*, than with discrimination against women. Indeed, several Justices have suggested that sex-based classifications that adversely affect men should be subjected to more deferential review than those that affect women.¹⁵³ Subsequent cases in which remedial justifications were rejected are consistent with this analysis, since these cases arguably involved discrimination against women wage earners as well as against their male dependents.¹⁵⁴

A second explanation is that Justice Douglas saw the asserted difference between most widows and widowers as “real” in the sense that sex discrimination in employment is a problem that affects women because they are women. Under this analysis, legislative classifications based on prior discrimination against women differ from legislative classifications based on average differences between the sexes in two ways. First, prior experience of discrimination based on being female is a characteristic possessed only by women. In contrast, average differences involve characteristics possessed by members of both sexes. Second, the characteristic in

149. *Id.* at 353 (Douglas, J.).

150. *Id.*

151. *Id.* at 354.

152. See Williams, *supra* note 94, at 180 n.35.

153. See Craig v. Boren, 429 U.S. 190, 217, 219 (1976) (Rehnquist, J., dissenting); cf. Califano v. Goldfarb, 430 U.S. 199, 239, 242 (1977) (Rehnquist, J., joined by Burger, C.J., and Stewart & Blackmun, JJ., dissenting) (urging rejection of challenge by man to Social Security Act provision perceived as benefiting women).

154. See Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142 (1980); Califano v. Goldfarb, 430 U.S. 199 (1977); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).

question—being a victim of sex discrimination—is a characteristic one acquires solely as a result of one's sex. Under this view, Douglas' use of a deferential standard of review to evaluate the statutory means-ends relationship in *Kahn* was justified because the sex classification was based on a "real" difference between women and men—something that happens only to women, and happens to them solely because of their sex.¹⁵⁵

Douglas' opinion thus turns an important insight about the unfairness and pervasiveness of sex classifications into a justification for their continued use. As with the other cases in which a majority of the Justices have been persuaded that there are "real" differences between women and men, the search for ways in which women and men are not similarly situated becomes a substitute for a careful analysis of the challenged legislation and obscures a number of troubling issues.¹⁵⁶

D. *Neutral Rules with a Disparate Impact on One Sex*

In general, the manner in which Justices Rehnquist and Stewart analyze neutral rules that have a disparate impact on one sex is consistent with their limited notion of sex discrimination. They generally emphasize the appropriateness of judicial deference to legislative determinations that a particular characteristic is relevant to the legislature's purpose.¹⁵⁷ In their view, the problem of sex discrimination arises only when a legislature uses sex as a proxy for a characteristic shared by both sexes.¹⁵⁸ Rules based directly on a characteristic other than sex, by definition, do not present this problem, because rather than using an inaccurate sex classification, they classify directly on the basis of the characteristic thought to be relevant by the legislature. Therefore, such rules carry the presumption of validity that attaches to most legislative classifications. In order to overcome this presumption, a challenger carries a heavy burden of proof, and must show that the decisionmaker actively desired the disproportionate

155. See *Goldfarb*, 430 U.S. at 242 (Rehnquist, J., dissenting) (interpreting *Kahn* in this manner).

156. These issues include the morality of giving a benefit to all individuals based on a characteristic that only some of them share; the symbolic and practical implications of permitting any broadly-framed, permanent differential treatment based on sex, particularly in light of the long history of confusion between protection of women (or other sex-based benefits) and discrimination against them; and the patent irrationality of the challenged statute as a means to the asserted legislative goal.

157. See, e.g., *Michael M. v. Superior Court*, 450 U.S. 464 (1981) (plurality opinion of Rehnquist, J.) (accepting state contention that female capacity to become pregnant is related to state's asserted purpose of deterring teenage pregnancy by punishing sexual intercourse with females under age 18); *Rostker v. Goldberg*, 453 U.S. 57, 81-82 (1981) (Rehnquist, J.) (accepting government's assertion that women's ineligibility for combat is related to administrative difficulties and loss of military flexibility that would result if even small numbers of women were drafted).

158. See, e.g., *Michael M.*, 450 U.S. at 471; *Parham v. Hughes*, 441 U.S. 347, 354-55 (1979) (plurality opinion of Stewart, J.); *Geduldig v. Aiello*, 417 U.S. 484, 496-97 (1974) (Stewart, J.).

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impact of the rule.¹⁵⁹

For example, in *Personnel Administrator v. Feeney*,¹⁶⁰ women were effectively excluded from desirable state employment because of an absolute veterans' preference rule that favored veterans with minimally passing scores on the state civil service examination over higher-scoring non-veterans.¹⁶¹ The lack of women veterans was in turn caused by the virtual exclusion of women from the military as a matter of federal law,¹⁶² as well as by strong cultural beliefs about appropriate sex roles, which discouraged women from volunteering for military service.¹⁶³ Moreover, the rule directly reinforced traditional sex-based hierarchy by reserving managerial positions for men, while permitting women to fill traditionally female subordinate positions.¹⁶⁴ Nonetheless, the majority concluded that the foreseeability of these results was not sufficient to establish discriminatory intent. In the absence of proof that the Massachusetts legislature desired to disadvantage women,¹⁶⁵ the veterans' preference was upheld as a rational means to the legitimate end of encouraging military service, a means that just "happened" to burden women disproportionately.¹⁶⁶

IV. A Critique of the Concept of "Real" Sex Differences

The attempt by Justices Rehnquist and Stewart to construct a jurisprudence of sex discrimination around the concept of "real" sex differences represents a small concession to the modern women's movement and the significant social changes of which it is a part. The concession offered by the Rehnquist-Stewart position is that sex-based legislation is no longer conclusively presumed to be valid. A challenger may now argue, with at least a small likelihood of success, that asserted sex differences are not actually correlated with sex, and hence cannot justify a sex-based classification. As a practical matter, Justice Rehnquist has been persuaded by

159. See *supra* p. 934 (describing Title VII standard for review of disproportionately burdensome neutral rules, which is considerably more favorable to challengers).

160. 442 U.S. 256 (1979) (Stewart, J.).

161. *Id.* at 271.

162. *Id.* at 269-70.

163. Helen Feeney, the state employee who brought suit against Massachusetts' absolute veterans' preference rule, apparently considered joining the military in the early years of World War II:

I was informed by the recruiters that programs for women were very limited and that there were more rigorous physical requirements for females as opposed to males. . . . I was over 18 years of age at the time, but I was also informed that, since I was a female, I had to obtain parental consent. My mother (my father was deceased) refused to give me the required permission, stating to me that the general reputation of the type of female who joined the military was not good.

App. at 180, *Personnel Adm'r v. Feeney*, 442 U.S. 256 (1979); see *supra* note 142.

164. *Feeney*, 442 U.S. at 270-71.

165. *Id.* at 270-71, 276, 278-80.

166. *Id.* at 279 n.25 (impact on women "is essentially an unavoidable consequence of a legislative policy that has in itself always been deemed to be legitimate").

this argument only when the government or employer made virtually no effort to defend a sex classification in terms of legitimate goals,¹⁶⁷ and Justice Stewart was only slightly more willing to invalidate challenged sex-based rules.¹⁶⁸ To this small extent, the Rehnquist-Stewart position represents an advance over the Court's pre-1970 acceptance of traditional sex-based legislation.

Nevertheless, this approach is subject to three major criticisms. The first concerns the broad way it defines the concept of "real" sex differences. The second is that the concept of "real" sex differences, even if limited to definitional differences between the sexes, embodies important misconceptions about the relationship between biological sex differences and cultural arrangements. The third is that the approach minimizes the extent to which disproportionately burdensome neutral rules promote social patterns that support the continued subordination of women.

As to the first of these criticisms, Justices Rehnquist and Stewart have stretched the concept of "real" sex differences beyond its breaking point. Although the language of their opinions often suggests that "real" differences are those of "natural" or "biological" origin,¹⁶⁹ it is clear from the cases discussed above, notably *Rostker*, *Parham*, and *Dothard*, that they are willing to include cultural behavior patterns and even legislation as sources of "real" differences.¹⁷⁰ Defined as broadly as it is, the concept provides no coherent basis for distinguishing between the differences it describes as "real" and those it excludes from this category. Indeed, the paradoxical—although hardly surprising—result of the Rehnquist-Stew-

167. Justice Rehnquist has voted to strike down two sex-based rules: a Louisiana law permitting a husband to dispose of jointly owned marital property without his wife's consent, *Kirchberg v. Feenstra*, 450 U.S. 455, 463 (1981) (Rehnquist, J., joining Stewart, J., concurring in the result), and a Social Security Act provision granting survivor's benefits to mothers but not fathers caring for children of deceased wage-earners, *Weinberger v. Wiesenfeld*, 420 U.S. 636, 655 (1975) (Rehnquist, J., concurring in the result). In *Kirchberg*, the state itself declined to appeal an adverse ruling by the Court of Appeals, thereby "apparently abandon[ing] any claim that an important government objective was served by the statute." 450 U.S. at 461 (Marshall, J.). In *Wiesenfeld*, the Secretary of Health, Education and Welfare did attempt to defend the statute as a measure designed to compensate women "for the economic difficulties which still confront women who seek to support themselves and their families." 420 U.S. at 648 (majority opinion). This argument, however, was inconsistent with the structure of the statute and its legislative history, which established the provision's purpose as enabling women "to elect not to work and to devote themselves to the care of children." *Id.* Since the government's asserted purpose was "so totally at odds with the content and history" of the statute, Justice Rehnquist reasoned that "it cannot serve as a basis for judging whether the statutory distinction between men and women rationally serves a valid legislative objective." *Id.* at 655 (Rehnquist, J., concurring in the result); see also *Dothard v. Rawlinson*, 433 U.S. 321, 337 (1977) (Rehnquist, J., concurring in pertinent part) (affirming district court judgment that requirements for prison guards violated Title VII on grounds of "the peculiarly limited factual and legal justifications" offered by the state).

168. See *supra* pp. 927-28.

169. See, e.g., *Michael M. v. Superior Court*, 450 U.S. 464, 478 (1981) (Stewart, J., concurring); *Caban v. Mohammed*, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting).

170. See *supra* pp. 938-42.

art position has been to uphold those views about sex differences that are most entrenched in cultural beliefs and legislation, which in turn pose the greatest dangers of stereotyping and subordination of women.¹⁷¹

The second, more fundamental, criticism of the Rehnquist-Stewart approach attacks not only the excessively broad notion of real sex differences, but also the very concept of "real" sex differences. The adjective "real" implies not only that these differences are caused by nature or biology, but also that the impact of sex differences on people's lives is natural and inevitable, rather than culturally determined. By stressing the allegedly biological basis of certain sex differences, and by refusing to examine closely the ways in which governments and employers give those differences significance, the Rehnquist-Stewart approach repeatedly conveys the message that the particular meanings attached to sex differences in law are independent of social determination.

Whatever the origins of particular sex-related characteristics,¹⁷² it is social arrangements and not biology that gives these characteristics meaning. To put it another way, particular human characteristics have no inherent social significance, and no social arrangements concerning sex differences are "natural" rather than culturally determined.¹⁷³ When confronted with sex-related characteristics with an apparently strong biological component—whether average differences such as height and weight (and perhaps longevity),¹⁷⁴ or definitional differences such as menstruation, gestation, and lactation¹⁷⁵—people have a tendency to think it is obvious that

171. See *supra* pp. 931-33 (discussing *Michael M.*); *infra* pp. 953-55 (discussing *Rostker*).

172. There is increasing evidence that cultural forces play a large role in causing human beings to exhibit particular behavior patterns and personality characteristics. For example, one personality and behavioral characteristic for which a biological basis has often been suggested is male aggressiveness. See E. MACCOBY & C. JACKLIN, *THE PSYCHOLOGY OF SEX DIFFERENCES* 360-66 (1974); Maccoby & Jacklin, *Sex Differences in Aggression: A Rejoinder and Reprise*, 51 *CHILD DEV.* 964 (1980). This conclusion has been subjected to powerful criticisms. See, e.g., E. LEACOCK, *MYTHS OF MALE DOMINANCE: COLLECTED ARTICLES ON WOMEN CROSS-CULTURALLY* (1981); Grim, *Sex and Social Roles: How to Deal with the Data*, in "FEMININITY," "MASCULINITY," AND "ANDROGYNY," *supra* note 8, at 128; Tieger, *On the Biological Basis of Sex Differences in Aggression*, 51 *CHILD DEV.* 943 (1980). Moreover, some who argue strongly for a biological basis for aggression believe nonetheless that cultural forces can override most biologically-generated differences. E. WILSON, *ON HUMAN NATURE* 128-29 (1978); Maccoby & Jacklin, *supra*, at 977.

173. The wide variations among human social arrangements across cultures provides support for this view. See, e.g., M. MEAD, *supra* note 125, at 75-77; *SEXUAL STRATIFICATION: A CROSS-CULTURAL VIEW* (A. Schlegel ed. 1977).

174. Height-weight correlations and other physical characteristics, such as proportion of body weight that is fat or muscle, are also influenced by cultural factors. See Wood, *supra* note 45, at 46; *supra* note 45 (discussing longevity).

175. Moreover, sex classifications justified on the basis of definitional differences will frequently be over-inclusive, and sometimes substantially so because many members of each sex lack one or more of the reproductive characteristics that define their sex. For example, a rule excluding all women from a particular occupation because of reproductive hazards would be over-inclusive to the extent that it affected women who were infertile, whether because they had passed the age of menopause or for other reasons. Moreover, recent scientific findings suggest that many environmental factors that affect women's reproductive capacity also affect male reproductive capacity. Thus, a two-pronged inquiry is

such differences will affect daily life in important ways. People may also think, as Justices Rehnquist and Stewart do, that existing social arrangements that give those differences a particular significance do not involve sex discrimination, but merely reflect the biological differences to which they are related. When these propositions are examined more carefully, however, their deficiencies become apparent. Whatever the differences between women and men, it is possible to have arrangements that minimize the significance of such differences.

For example, the practical impact of the differences between biological motherhood and fatherhood that result from *in utero* pregnancy, the experience of childbirth, and the option of breast feeding is determined by social arrangements. Cultural patterns strongly influence how much time mothers and fathers devote to parenting and how parenthood will affect the employment potential of both parents. Thus, society chooses whether to encourage men as well as women to assume significant responsibility for day to day housework and childcare,¹⁷⁶ decides how much to support group childcare arrangements,¹⁷⁷ and determines how most people's jobs are structured, in terms of such issues as availability of leave, lengths of work weeks and work days, flexibility of work schedules, and locations of work places.¹⁷⁸ Since existing cultural patterns of mother-dominated childrearing are so powerful,¹⁷⁹ and are reinforced by the complementary male role of primary breadwinner,¹⁸⁰ changing to more equal parenting would require a long time and a significant collective commitment to the

needed: first, what proportion of women have the definitional characteristic; and second, is the relationship of the definitional characteristic to the challenged rule's purpose sufficiently distinctive that a sex-based rule (or one based directly on the definitional characteristic) is appropriate? See *supra* p. 934.

176. See Hartmann, *supra* note 4, at 388-93. Hartmann suggests that the prospects for shifting a significant share of domestic work to men are not promising, and that the conflict between the dynamics of patriarchy and those of capitalism may ultimately eliminate our present system of decentralized home production of domestic services. *Id.*

177. See J. GIELE, *WOMEN AND THE FUTURE* 194-200 (1978).

178. See, e.g., *id.* at 111-17; Ratner, *Equal Employment for Women: Summary of Themes and Issues*, in *EQUAL EMPLOYMENT POLICY FOR WOMEN*, *supra* note 1, at 419, 427-28, 433-35.

179. See N. CHODOROW, *THE REPRODUCTION OF MOTHERING* 191-209, 211-19 (1978); *supra* note 4.

180. This role is maintained by a wide variety of social and economic pressures, including differential socialization of female and male children, see sources cited *supra* note 5; discrimination against women in employment, see sources cited *supra* note 2; the economic advantages of specialization in marriage, see Vickery, *Women's Economic Contribution to the Family*, in *THE SUBTLE REVOLUTION*, *supra* note 2, at 159, 160-64; and the inhospitability of the labor market to the flexible work schedules and part-time work options necessary for equal sharing of roles between parents, see M.J. Frug, *Securing Job Equality for Women: Labor Market Hostility to Working Mothers*, 59 B.U. L. REV. 55 (1979). Conversely, women's performance of domestic work impairs their ability to compete equally in the labor market. See L. THURLOW, *GENERATING INEQUALITY* 177-80 (1975). It should be noted, however, that although women's rates of employment are negatively correlated with their husbands' income levels except at high socioeconomic levels, see U.S. DEP'T OF LABOR, *supra* note 2, at 24-25, husbands' contributions to housework and childcare are not greatly influenced by their wives' employment, see *supra* note 4.

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new ideal. Nonetheless, given such a commitment, it seems likely that over time, male and female family and work roles would become more similar, although biological motherhood and fatherhood would remain different in important ways.¹⁸¹

The central and inevitable role of culture in determining the existence of most sex differences reveals the hollowness of the search for "real" differences as the basis of sex discrimination law. Sex differences are widespread and important because of human social arrangements. The central issues are not which differences are "real" but rather what degree of sex differentiation and inequality is desirable, and what significance existing sex differences should have as determinants of individual life experiences and collective social structure.

The third criticism of Rehnquist's and Stewart's sex discrimination jurisprudence, and one that is closely related to the second, concerns their analysis of neutral rules that have a disproportionate impact on one sex. In their view, there are two categories of neutral rules: a small group of neutral rules adopted with a conscious discriminatory purpose (and therefore equivalent to hostile facial classifications), and a much larger category of neutral rules and practices that harm significant numbers of women but are not intentionally discriminatory.¹⁸² Except under Title VII, rules in the latter category are effectively excluded from the ambit of sex discrimination jurisprudence.¹⁸³ And even under Title VII, such rules are accepted if the employer can show that they are an efficient means toward a legitimate business goal.¹⁸⁴ This approach to neutral rules has defects similar to those of the Rehnquist-Stewart approach to sex-based classifications allegedly justified by "real" differences between the sexes. The assumption of both approaches is that rules that accurately reflect contemporary reality are not discriminatory. Neither approach acknowledges the role of culture both in generating sex differences and in giving them significance.

In a society characterized by a high degree of sex differentiation, sex

181. For a discussion of the possibilities for change to a new "shared-role pattern," see J. BERNARD, *supra* note 4, at 248-66; N. CHODOROW, *supra* note 179, at 211-19; Goode, *Why Men Resist*, in *RETHINKING THE FAMILY* 131 (B. Thorne & M. Yalom eds. 1982); Vickery, *supra* note 180, at 198-200.

182. See *supra* p. 973 (discussing *Feeney*).

183. See *Personnel Adm'r v. Feeney*, 442 U.S. 256, 272 (1979) (laws that disproportionately burden racial minorities or women violate equal protection clause "only if that impact can be traced to a discriminatory purpose").

184. The employer's actual burden in demonstrating a "relationship" between a rule or selection procedure and job performance varies considerably according to context. Compare *Guardians Ass'n v. Civil Service Comm'n*, 630 F.2d 79 (2d Cir. 1980), *cert. denied*, 452 U.S. 940 (1981) (applying rigorous standards to and invalidating multiple-choice examination for police department) with *Yuhas v. Libbey-Owens-Ford Co.*, 562 F.2d 496 (7th Cir. 1977), *cert. denied*, 435 U.S. 934 (1978) (applying lenient standards to and upholding no-spouse hiring rule).

segregation, and sex-based hierarchy, most facially sex-neutral rules will have a disparate impact on one sex because of the large average differences between women and men that the system generates and reinforces, and around which social life is organized. Moreover, facially sex-neutral rules often contribute significantly to the maintenance of the existing system of sex differentiation, by making particular average differences between women and men important. For example, as a result of current social arrangements, women typically alter their work patterns during the years when they have young children, whereas men's work patterns are typically more consistent throughout their lives.¹⁸⁵ Neutral rules such as seniority systems, tenure, employer preferences for workers with uninterrupted work histories, and hiring patterns that favor younger over older workers give these sex-related differences in employment patterns their practical significance.¹⁸⁶

In most instances, existing neutral rules are efficient in terms of current social arrangements,¹⁸⁷ and many were not adopted with conscious discriminatory intent.¹⁸⁸ Instead, such rules often reflect existing patterns of sex segregation, in which the norms that are developed reflect the characteristics of the majority of workers in a particular job. Moreover, as long as existing social arrangements are built on traditional assumptions about female and male roles, average differences between the sexes will continue to be reinforced, and most neutral rules will continue to have disparate effects on women and men.¹⁸⁹ In fact, most of public life has been designed on the assumption that the majority—historically, all—of the participants in that life will be male.¹⁹⁰ The characteristics, expectations,

185. Barrett, *supra* note 2, at 80-84.

186. On the long term consequences to all women workers, whether or not they personally conform to the general pattern, of the fact that women as a group more frequently interrupt their work lives, see L. THUROW, *supra* note 180, at 177-80. On ways a variety of employer policies render employment incompatible with childrearing, see M.J. Frug, *supra* note 180, at 55-61.

187. Examples of common disproportionately burdensome neutral rules that are probably efficient under current social arrangements include the open-ended weekly time commitment required of many attorneys, see M.J. Frug, *supra* note 180, at 70-74, and the preference of employers in occupations with high training costs for workers who are statistically more likely to remain with that employer for an extended period, see L. THUROW, *supra* note 180, at 177-80.

188. Rules not adopted with conscious discriminatory intent may, however, be retained for discriminatory reasons. See, e.g., *Personnel Adm'r v. Feeney*, 442 U.S. 256, 285 (1979) (Marshall, J., dissenting) (retention and modification of state veterans' preference statute originally adopted without discriminatory intent reflected state's actual knowledge of disparate impact and "collateral goal of keeping women in a stereotypic and predefined place" in state's civil service, quoting *id.* at 279 (majority opinion)).

189. For example, existing social arrangements encourage mothers rather than fathers to take primary responsibility for child care. See *supra* p. 946. As long as it is usually mothers rather than fathers who raise children, children will grow up likely to replicate this pattern in their own lives. This in turn will maintain all of the social and economic consequences that flow from mother-dominated childrearing.

190. See Note, *Toward a Redefinition of Sexual Equality*, 95 HARV. L. REV. 487, 499-500, 502 (1981).

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life patterns, and priorities of the typical woman have been treated as exceptions or deviations from the male norm.¹⁹¹ Thus, legal standards that uphold neutral rules as long as they can be shown to be efficient or functional in terms of current social arrangements fail to take account of the cultural dynamics of sexism.

Rather than acknowledging the importance of cultural factors, the sex discrimination jurisprudence of Justices Rehnquist and Stewart, and the Justices who have frequently joined their opinions, adopts an extremely limited definition of inequality between women and men. This approach obscures our collective responsibility for making the choices that will determine whether pervasive inequalities between the sexes will remain or be eliminated.

V. The Brennan-Marshall Approach: Sex Discrimination and Means-Ends Rationality

Justices Brennan and Marshall, usually joined by Justice White, and recently by Justice O'Connor, analyze sex discrimination cases very differently than do Justices Rehnquist and Stewart. Under the Brennan-Marshall approach, the alleged "reality" or "naturalness" of sex differences does not in itself justify sex classifications. All rules based on sex, whether or not the underlying difference between women and men can be characterized as biological,¹⁹² must be tested against the same standard of social justification: Is the sex-based classification "substantially related" to an "important" governmental goal?¹⁹³ As applied by Justices Brennan and Marshall, only two sex-based classifications, and no pregnancy rules or disproportionately burdensome neutral rules, have satisfied this standard.¹⁹⁴ The consistent effort by Brennan and Marshall to invalidate most

191. *Id.*

192. *See supra* p. 926.

193. *Craig v. Boren*, 429 U.S. 190, 197 (1976).

194. In *Califano v. Webster*, 430 U.S. 313 (1977) (per curiam), Justices Brennan and Marshall joined a per curiam opinion upholding a provision in the Social Security Act (since repealed) permitting women to receive slightly higher retirement benefits than similarly situated male workers. Professor Maltz argues that this case presented, from Brennan's and Marshall's perspective, "unusually favorable" factors supporting affirmance: an asserted purpose to compensate women for economic discrimination; the lack of an administratively feasible method of determining which women had suffered discrimination (in contrast to *Orr v. Orr*, 440 U.S. 268 (1979), where individual hearings in all divorce cases were already being held); and little or no burden on men. *See Maltz, supra* note 69, at 381-82. *But cf. Williams, supra* note 94, at 180 n.35 (suggesting that actual legislative purpose was not to compensate women for economic discrimination, but to permit women to retire at an earlier age than men in order to enable women married to older men to retire at the same time as their husbands).

In *Heckler v. Mathews*, 104 S. Ct. 1387 (1984), Justice Brennan, writing for a unanimous Court, upheld a provision of the Social Security Act that exempted women who became eligible for spousal benefits between 1977 and 1982 from a "pension offset" provision. The origins of this provision lay in the Court's decision in *Califano v. Goldfarb*, 430 U.S. 199 (1977), which struck down the Social

sex-based rules, and the reasons given for their judgments, are rooted in their perception of sex discrimination as a pervasive and morally troubling phenomenon. Writing for the plurality in *Frontiero v. Richardson*,¹⁹⁵ Justice Brennan acknowledged the existence of "a long and unfortunate history of sex discrimination," and the continuation of "pervasive, although at times . . . subtle, discrimination against women in our educational institutions, in the job market, and perhaps most conspicuously, in the political arena."¹⁹⁶ Because of this past and continuing discrimination, laws distributing benefits and burdens on the basis of sex—even when the most obvious burden falls on men—"carry the inherent risk of reinforcing stereotypes about the 'proper place' of women and their need for special protection,"¹⁹⁷ and therefore must be "carefully tailored" to achieve their goals.¹⁹⁸ Justice O'Connor, the Supreme Court's first woman member, presented a similar analysis in *Mississippi University for Women v. Hogan*,¹⁹⁹ writing that a "substantial relationship" between a sex-based means and a legislative end is required "to assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women."²⁰⁰

At the same time that they express what might be termed a moral or substantive critique of sex discrimination, Justices Brennan, Marshall, White, and O'Connor also use a mode of reasoning that emphasizes value-neutral analysis of means-ends relationships. Indeed, the moral critique rarely serves as the explicit justification for their decisions; for example, opinions explaining votes to invalidate challenged rules rarely refer to the particular harms caused by the sex classifications at issue.²⁰¹

Security Act's requirement that men, but not women, prove economic dependency on their spouses in order to become eligible for spousal benefits. In response to *Goldfarb*, Congress eliminated the sex-based dependency requirements, but also enacted the pension offset provision, which reduced spousal benefits by the amount of certain federal or state government pensions received by the Social Security applicant. *Heckler v. Mathews*, 104 S. Ct. at 1391. In order to protect the expectations of persons who had planned their retirement on the basis of the pre-1977 law, Congress exempted from the pension offset provision until December 1982 persons who would have qualified for unreduced spousal benefits under the pre-*Goldfarb* rules (that is, women and economically dependent men). *Id.* Although this exemption was not on its face based upon sex, its clear intent and effect was to extend a sex-based system of calculating benefits. *Id.* at 1396. Justice Brennan concluded that the temporary protection of reasonable reliance interests was an important governmental interest, and that the sex-based means adopted by Congress was both substantially related to that objective and chosen through "reasoned analysis" rather than mechanical application of sex-role stereotypes. *Id.* at 1398-1401.

195. 411 U.S. 677 (1973) (plurality opinion).

196. *Id.* at 684, 686 (footnote omitted); see *Orr v. Orr*, 440 U.S. 268, 278-80 (1979); *Craig v. Boren*, 429 U.S. 190, 197-99 (1976).

197. *Orr*, 440 U.S. at 278-80, 283.

198. *Id.* at 283.

199. 458 U.S. 718 (1982).

200. *Id.* at 725-26.

201. But see *infra* pp. 957-60 (discussing *Hogan*).

Rather, the moral critique serves two preliminary functions: to reject the encouragement of traditional sex roles as a legitimate governmental goal, and to create a presumption against the validity of all sex classifications.²⁰²

Having established such a presumption, the Brennan-Marshall approach then uses a two-step analysis of means-ends relationships to determine whether the government has met its burden of overcoming the negative presumption. The first step is to determine the classification's actual purpose, and whether that purpose is an "important" one.²⁰³ This inquiry can be a powerful tool of judicial intervention by permitting the Court to disregard asserted purposes as not the "actual" ones, or to discount them as insufficiently "important." For example, in *Hogan*, Justice O'Connor concluded that compensating women for past discrimination could not be the actual purpose of an admissions policy that excluded men from a state nursing school, because women had not been discriminated against within the profession of nursing.²⁰⁴

More typically, however, the Brennan-Marshall approach accepts the government's asserted purpose as an actual and important one,²⁰⁵ at least for the sake of argument, and focuses on the second step of the analysis: whether the classification, considered as a "means," is "substantially related" to the asserted end. Two questions are said to be particularly relevant to this inquiry: whether sex is an "accurate proxy" for the characteristics related to the end, such as economic need or subjection to prior discrimination,²⁰⁶ and whether a sex-neutral rule would be equally effective in achieving the government's goal.²⁰⁷ A paradigm case is *Orr v. Orr*,²⁰⁸ in which Justice Brennan analyzed the permissible goals of an Alabama law imposing alimony obligations only on husbands. Such a law, he reasoned, could be deemed to provide financial assistance to needy spouses (with sex serving as a "proxy" for economic need), or to compensate women for "discrimination" during marriage that left them unable to support themselves upon divorce.²⁰⁹ While conceding that these were le-

202. See *Craig v. Boren*, 429 U.S. 190, 197-99 (1976).

203. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 723-25 (1982).

204. *Id.* at 729-30. Justice O'Connor also relied on two other grounds in rejecting the state's asserted compensatory goal: (1) that the sex-based admissions rule reinforced sex stereotypes about nursing as a women's profession and contributed to the low level of nurses' wages, see *infra* pp. 958-59, and (2) that even if women had suffered discrimination within the nursing profession, the state had failed to show that the legislature actually intended the sex-based admissions rule to have a compensatory purpose. 458 U.S. at 730 n.16.

205. The only purpose that the Court has clearly found to be insufficiently "important" is "administrative convenience." See *Craig v. Boren*, 429 U.S. 190, 197-98 (1976).

206. See *Orr v. Orr*, 440 U.S. 268, 280-81 (1979).

207. See *id.* at 281, 283.

208. 440 U.S. 268 (1979).

209. *Id.* at 280.

gitimate and important governmental goals,²¹⁰ Brennan reasoned that the rule making only husbands liable for alimony was not substantially related to achieving these goals, because state law already provided for individual hearings in all divorces; at such hearings, a sex-neutral inquiry could be made about relative financial need and the impact of any "discrimination." The rule barring husbands from seeking alimony was thus "gratuitous," because it would cost the state nothing to provide benefits for needy husbands as well as needy wives, and because making such benefits available to husbands would "not in any way" compromise benefits for needy wives.²¹¹ The emphasis in Brennan's opinion was thus not on the moral or substantive harms caused by a law requiring only husbands to pay alimony, but rather on the "irrationality" of such a law in achieving the state's "own" asserted goals.

The Brennan-Marshall approach contributes in important ways to the ongoing debate about the meaning and desirability of equality between the sexes. Unlike the Rehnquist-Stewart approach, which is largely premised on an unreflective biological determinism, the Brennan-Marshall approach imposes the same requirements of justification on all sex-based rules, whether or not the sex difference asserted has a biological component. It also presumes that all sex classifications are harmful and could be replaced with sex-neutral rules, and imposes on the government the burden of proving that these presumptions are incorrect. By subjecting the government's argument to careful analysis, this approach often demonstrates the feasibility of sex-neutral alternatives, and the stereotyped thinking about the sexes that underlies the challenged rules.

At the same time, the description of the harms caused by sex discrimination is often truncated, so that the analysis of means-ends rationality becomes the dominant element in the opinions. As a result, the most powerful message the opinions convey is that sex discrimination is irrational as a means to promote the legislature's own goals.²¹² By implication, the

210. *Id.*

211. *Id.* at 282.

212. The theme of means-ends rationality is closely connected to perceptions of similarity and difference between the groups affected by a law. If two groups (for example, women and men) are in fact identically situated in relation to the legislature's goal, then it is arbitrary and irrational for the legislature to distinguish between them. See C. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 101-02 (1979) (analyzing one approach to sex discrimination law as prohibition of irrational differentiation between women and men). A similar emphasis on means-ends rationality has developed in judicial doctrine regarding racial discrimination. See Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 108-11 (1976); Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1058-59, 1061-64 (1978). Alternatively, when challenged legislation appears to be "irrational" in terms of the government's articulated goal, courts may become suspicious that the legislature's actual goal was an illegitimate one, such as a desire to harm or subordinate the burdened group. See J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 145-46 (1980).

Court's role is to correct a legislative "mistake" of failing to recognize that with a small expenditure (or perhaps no expenditure) of administrative resources—for example, by substituting a functional rule for a sex-based classification, or by providing individualized hearings—sex equality and other social ends could be pursued at the same time. The opinions acknowledge that this legislative "mistake" may have been caused by outmoded views about sex differences, and even that the legislation may have been premised on the illegitimate goal of maintaining traditional sex roles.²¹³ The central theme, however, is that sex classifications are fundamentally irrational.

In situations such as *Orr*, where there is wide consensus on the Court that the challenged statute is based on an "outmoded" sex stereotype, this method of analysis seems to work smoothly enough. The Brennan-Marshall emphasis on means-ends rationality runs into difficulty, though, in what Professor Wendy Williams has appropriately termed the "hard" sex discrimination cases: those in which the Court, and society more generally, is seriously split over whether perceived sex differences are indeed based on "outmoded" sex stereotypes, or whether the stereotypes are accurate and desirable.²¹⁴ Both the advantages and difficulties of focusing on means-ends analysis are apparent in three recent cases of this sort, involving the exclusion of women from registration for the military draft (*Rostker*), the imposition of criminal penalties for statutory rape only on males (*Michael M.*), and the refusal to admit men to an all-women's state nursing school (*Hogan*).

Rostker involved the controversial question of whether women should be required to register for the military draft. As part of his 1980 proposal to reactivate draft registration, President Carter recommended that Congress amend the Military Selective Service Act to permit the registration and conscription of women as well as men.²¹⁵ After a fairly extensive consideration of this question, Congress rejected the President's recommendation and authorized funds only for the registration of men.²¹⁶ In upholding Congress' action against an equal protection challenge by men, Justice Rehnquist's majority opinion focused on the asserted technical or administrative reasons for Congress' decision: that because women were excluded from combat positions in the Armed Forces, drafting even small numbers of women would cause administrative and military difficulties. If drafting women to fill non-combat roles was not feasible, as the congressional com-

213. See, e.g., *Orr*, 440 U.S. at 279-83; *Michael M. v. Superior Court*, 450 U.S. 464, 491-96 (1981) (Brennan, J. dissenting).

214. See Williams, *supra* note 94, at 180 & *passim*.

215. See *Rostker v. Goldberg*, 453 U.S. 57, 60 (1981).

216. *Id.* at 61, 72-74.

mittee reports asserted, it followed that excluding women from draft registration was a rational policy based on a "real" difference between women and men with respect to eligibility for combat duty.²¹⁷

Justice Marshall's dissenting opinion in *Rostker*, despite occasional references to larger themes,²¹⁸ accepted Justice Rehnquist's narrow characterization of the issues. Like the male plaintiffs challenging the registration law, Justice Marshall did not question the validity of excluding women from combat,²¹⁹ nor refer to Congress' assumptions about male and female roles on which the exclusion from both combat and registration was based.²²⁰ Rather, he argued that Justice Rehnquist's opinion misrepresented Congress' analysis of the administrative difficulties, and that Congress itself had failed to support its decision not to register women.²²¹ As Marshall viewed the legislative record, there was no reason

217. *Id.* at 78-79, 82-83.

218. *See id.* at 86 (Marshall, J., dissenting) (criticizing majority opinion for placing Court's "imprimatur on one of the most potent remaining public expressions of 'ancient canards about the proper role of women'" (citation omitted)).

219. *See id.* at 87 n.2, 93. Justice Marshall did not explicitly deal with the exclusion of women from combat. He noted that the plaintiffs, while not conceding the constitutionality of the exclusion, had chosen not to challenge it, arguing that its validity was "irrelevant" to this case.

220. The most authoritative legislative expression of Congress' reasoning about male-only registration, *see id.* at 73-74 (majority opinion), is contained in S. REP. NO. 826, 96th Cong., 2d Sess., reprinted in 1980 U.S. CODE CONG. & AD. NEWS 2612. In addition to expressing concern about violating the "fundamental" principle that women should not "intentionally and routinely engage in combat," *id.* at 157, 1980 U.S. CODE CONG. & AD. NEWS at 2647, and doubts about the "performance of sexually mixed units," *id.*, the Senate Report found that

there are important societal reasons for not changing our present male-only system of registration and induction. The question of who should be required to fight for the Nation and how best to accomplish that end is a social issue of the highest order, with sweeping implications for our society. In addition to the military reasons, which the committee finds compelling, witnesses representing a variety of groups testified before the subcommittee that drafting women would place unprecedented strains on family life, whether in peacetime or in time of emergency. If such a draft occurred at a time of emergency, unpredictable reactions to the fact of female conscription would result. A decision which would result in a young mother being drafted and a young father remaining home with the family in a time of national emergency cannot be taken lightly, nor its broader implications ignored. The committee is strongly of the view that such a result, which would occur if women were registered and inducted under the administration plan, is unwise and unacceptable to a large majority of our people.

Id. at 159, 1980 U.S. CODE CONG. & AD. NEWS at 2649. Remarkably, none of the opinions in *Rostker* quoted or discussed this reasoning, although it embodies the kind of beliefs about sex roles that has been disapproved by the Court in other cases.

221. Marshall's dissent in *Rostker* noted that Congress had not found—as Rehnquist stated—that drafting *small numbers* of women would cause administrative and military problems. 453 U.S. at 107-11 (Marshall, J., dissenting). Rather, the key Senate Report had argued that *registering* women and men in equal numbers would inevitably lead to *drafting* women and men in equal numbers, with consequent burdens on the training and administrative systems. *Id.* at 109-10. The Report's reasoning on this point—that the current draft law did not authorize sex distinctions among draftees, and that the courts might invalidate such distinctions—was unpersuasive. *See id.* at 109 (quoting S. REP. NO. 826, *supra* note 220, at 158-59, 1980 U.S. CODE CONG. & AD. NEWS at 2648). A Congress that could treat women and men differently for registration purposes could certainly amend the draft law in a similar fashion. As Marshall noted, the combat exclusion and related administrative considerations would provide far stronger constitutional support for a sex-differentiated draft than for male-only registration. *Id.* at 111.

why Congress could not require all women and men to register, draft only the number of women needed for non-combat positions, and thereby avoid the administrative difficulties that were anticipated if large numbers of women were drafted.²²² Since, from this perspective, the male-only registration had no relationship to any government objective, it was invalid under the substantial relationship standard.

Justice Marshall's contention that Congress could register women and men on an equal basis and later use sex classifications in the draft itself makes an important point about the desirability of replacing sex classifications with sex-neutral rules whenever possible. In particular, the symbolic significance of imposing on both young women and young men the obligation to be available for military service should not be underestimated.²²³ At the same time, Marshall's opinion studiously de-emphasizes the actual assumptions underlying Congress' action. Congress was obviously aware that the Defense Department believed that 80,000 women draftees could be used without administrative problems in a total draft of 650,000 persons,²²⁴ and it is difficult to believe that Congress saw the asserted legal problems involved in drafting fewer women than men as dispositive. Rather, as Rehnquist, Marshall, and everyone else knew, Congress did not *want* to draft or register any women, primarily because of cultural beliefs and values about the proper roles and capabilities of the sexes.²²⁵ Congress' decision was not, as Justice Marshall's dissent suggests, "irrational" in terms of functional criteria that everyone agreed on; rather, it was "rational" in terms of the traditional cultural beliefs articulated in the congressional hearings. Although Marshall's opinion implicitly challenged these views, his failure to expose these beliefs and values undercut the force of his challenge.

Justice Brennan's dissent in *Michael M.* did refer explicitly to the cultural beliefs and values underlying California's statutory rape law.²²⁶ The

222. *Id.*

223. See Brief for Amicus Curiae National Organization for Women at 21-25, *Rostker v. Goldberg*, 453 U.S. 57 (1981) (women psychologically and politically harmed by not being compelled to participate in activity that is perceived as entitling people to leadership positions in society; exclusion relegates women to second-class citizenship).

224. See *Rostker v. Goldberg*, 453 U.S. 57, 82 (1981) (Rehnquist, J.); *id.* at 100 (Marshall, J., dissenting).

225. See *supra* note 220.

226. Brennan does comment that the statutory rape law is based on outmoded sexual stereotypes, *Michael M. v. Superior Court*, 450 U.S. 464, 496 (1981) (Brennan, J. dissenting), but makes no stronger comment about the state's choice to use a sex classification in this situation. In contrast, Justice Stevens' dissenting opinion closes by stating: "A rule that authorizes punishment of only one of two equally guilty wrongdoers violates the essence of the constitutional requirement that the sovereign must govern impartially." *Id.* at 502 (Stevens, J., dissenting).

Another weakness of the Brennan-Marshall approach's criticism of sex discrimination results from its emphasis on the availability of effective gender-neutral alternatives to the challenged policies. In *Michael M.*, one wonders what Brennan's position would have been if no jurisdiction had adopted

core point in the opinion, however, was that the sex classification was irrational in terms of the state's own asserted goal, which was the deterrence of teenage pregnancy by prohibiting males of all ages from engaging in non-marital intercourse with minor females. Brennan noted that thirty-seven other states already had gender-neutral statutory rape laws, and apparently had not experienced any unusual enforcement problems.²²⁷ California's argument that a gender-neutral law would be harder to enforce (because young women would not complain and subject themselves to the risk of criminal liability), was thus in Brennan's view simply mistaken.²²⁸ In addition, Brennan observed that the small number of arrests for statutory rape compared to the large amount of sexual intercourse involving teenage females cast great doubt on the law's effectiveness as a deterrent.²²⁹

As with *Rostker*, Justice Brennan's insistence on the feasibility of writing and enforcing a sex-neutral statutory rape law raises important points. Sex-neutral statutes of this sort recognize the essential similarity of the harms to young people of each sex that can result from premature sexual activity. The process of revising a sex-based law may also stimulate a needed recognition that the old sex-based statute was inconsistent with contemporary reality, in that it criminalized certain conduct—non-forcible sexual relations between two teenagers—that most people would agree should not be subject to criminal penalties. Legislatures engaged in the revision process have often made the new statute more specific, so that the harms with which the legislature was in fact most concerned were distinguished from other less harmful conduct.²³⁰ For example, they have often redrafted the statutes to penalize intercourse with adolescents between the ages of fourteen and eighteen only when there is a significant age gap

such laws covering the relevant age group. (This is a realistic possibility, since only three jurisdictions have sex-neutral statutory rape laws without either lowering the age of the protected group, or limiting prosecution to situations where one party is several years older than the other party. 450 U.S. at 492 (Brennan, J., dissenting).) In *Dothard v. Rawlinson*, 433 U.S. 321, 341 (1977) (Marshall, J., concurring in part and dissenting in part), Justice Marshall discusses the successful use of women prison guards in other states; emphasizes the absence of evidence that the claimed problem of sexual assaults would materialize, *id.* at 345-46; and notes that Alabama was under court order to hire new personnel and otherwise to improve prison conditions, changes that would "substantially alleviate" the problems "that the Court perceives with women guards," *id.* at 345 n.4. *See supra* p. 936. To pose a realistic hypothetical, suppose that Alabama had experimented with women prison guards and had problems with sexual as well as physical assaults, and that the state was not under court order to improve the prisons in ways that would reduce the risks of all types of inmate assaults on guards. Would Marshall take the position that Alabama should spend more money to make its prisons safe rather than excluding women from guard positions?

227. *See* *Michael M. v. Superior Court*, 450 U.S. 464, 492-93 (1981) (Brennan, J., dissenting).

228. *See id.*

229. *Id.* at 493 n.8.

230. For a detailed analysis of pre-1977 state reforms of rape laws, including statutory rape, with examples of particular provisions, see B. BROWN, A. FREEDMAN, H. KATZ & A. PRICE, *supra* note 11, at 45-66.

between the two participants, or when there is evidence of improper influence or coercion by one participant.²³¹ Had Brennan's approach been adopted by the Court, this process, which was already underway in a significant number of states, would have been encouraged.

At the same time, Justice Brennan did not himself discuss the importance of the revision process, or the harms caused by sex-based statutory rape laws. As noted earlier, it is extremely unlikely that the purpose of California's statutory rape law was to deter teenage pregnancy.²³² Instead, there is substantial reason to believe that the California legislature singled out males for punishment because of the prevalent notion of males as sexual aggressors and young females as their victims, even when the sexual relationships involved are technically consensual ones.²³³ Yet Brennan's dissent mentions the relationship of this statute to traditional ideas about female and male sexuality and sex roles only in passing, and places no weight on this issue as an independent reason for the invalidation of the statute.²³⁴ And while it seems likely that Brennan believes that it is morally offensive to make one's sex determinative of the criminality of one's conduct,²³⁵ there is nothing in his dissent in *Michael M.* that directly expresses that position. By analyzing the statute in relationship to the implausible purpose of deterring teenage pregnancy, Brennan was able to demonstrate its irrationality. But in doing so, he lost an opportunity to expose the stereotypes underlying the statute's more plausible justification.

The California legislature's choice to retain a sex-based statutory rape law reflects an unwillingness to develop an approach that might be construed as condoning sexual activity among teenagers. California's decision to retain an archaic sex-based law, and leave the mitigation of its overbreadth to prosecutorial discretion, was not irrational; it was unprincipled and unjust. Justice Brennan's dissent does not clearly address these underlying issues.

Justice O'Connor's opinion for the Court in *Mississippi University for Women v. Hogan*²³⁶ reflects both continuity with the Brennan-Marshall emphasis on means-ends rationality, and at least the possibility of movement toward a more substantive approach to sex discrimination. Hogan, a male registered nurse seeking to obtain a baccalaureate degree in nursing,

231. See *id.* at 56 & n.12 (describing New Mexico statute that limits prosecutions for statutory rape of persons aged 13-16 to incidents involving perpetrators in a relationship of authority to the victim); *id.* at 58 & n.18 (state statutes requiring age differentials if younger participant is 13 or older); *id.* at 61-66 (model statute based on Michigan and California laws).

232. See *supra* pp. 931-33.

233. See *id.*

234. See *Michael M. v. Superior Court*, 450 U.S. 464, 494-96 (1981) (Brennan, J., dissenting).

235. See, e.g., *Orr v. Orr*, 440 U.S. 268, 278-80 (1979); *Craig v. Boren*, 429 U.S. 190, 197-99 (1976).

236. 458 U.S. 718 (1982).

challenged the exclusion of men from the baccalaureate program in the School of Nursing at the Mississippi University for Women.²³⁷ The state defended its policy of sex segregation as a method of compensating for discrimination against women, and thus as educational affirmative action.²³⁸ Justice O'Connor concluded on two different grounds that the state's asserted compensatory purpose was not the "actual" purpose of the rule.²³⁹ First, the compensatory purpose was not credible because the state could not show any discrimination against women within the field of nursing for which compensation was needed.²⁴⁰ Second, the asserted compensatory purpose was undercut by specific harms caused by the sex-based classification.²⁴¹

The first reason offered by Justice O'Connor is closely analogous to the Brennan-Marshall emphasis on means-ends rationality. Whether framed in the vocabulary of "actual purpose" (as in *Hogan*), or of "substantial relationship" (as in *Orr*), the state's failure to show that a sex-based classification is needed for any legitimate goal means that the classification is "gratuitous" or "irrational."²⁴² O'Connor's second point regarding "actual purpose," however, focused more explicitly on substantive harms caused by excluding men from the nursing school. From this perspective, the exclusionary rule is invalid because it tends "to perpetuate the stereotyped view of nursing as an exclusively woman's job," and makes that view "a self-fulfilling prophecy" by reserving more nursing school places for women than for men.²⁴³ Moreover, O'Connor noted that by encouraging sex segregation of the nursing profession, the policy helped maintain the relatively low level of nurses' wages.²⁴⁴

Both branches of Justice O'Connor's "actual purpose" analysis illuminate the cultural dynamics of sexism. Her insistence on carefully testing the state's asserted compensatory rationale highlights the importance of distinguishing between affirmative action and traditional paternalism toward women. By articulating the relationship between sex-segregated nursing schools and the sex segregation of the nursing profession, she emphasizes the need to consider the broad social costs of special treatment for

237. *Id.* at 720-21. Two baccalaureate nursing programs were open to both women and men at two other state universities, both located more than 140 miles from where Hogan lived and worked. *Id.* at 735 n.1 (Powell, J., dissenting). Justice O'Connor found this "considerable distance" to be a "disadvantage" imposed on Hogan because of his sex, especially considering that many nursing students hold full-time jobs. *Id.* at 723 n.8 (O'Connor, J.).

238. *Id.* at 727.

239. *Id.* at 729-30.

240. *Id.* at 729.

241. *Id.* at 729-30.

242. *Orr v. Orr*, 440 U.S. 268, 283 (1979).

243. *Hogan*, 458 U.S. at 729-30 (footnote omitted).

244. *Id.* at 729 n.15.

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women as well as the specific benefits that treatment is supposed to produce.

But ultimately, Justice O'Connor's argument is a narrow one. To her credit, she did not limit her analysis to lack of discrimination against women within a "woman's" profession, but went on to make the point that maintenance of a sex-segregated woman's profession is itself an important form of discrimination against women, as well as against the men excluded from it.²⁴⁵ Her opinion, however, offers little guidance for the many situations in which women have suffered some discrimination or disadvantage compared with male workers in the same or closely analogous fields. Also, as Chief Justice Burger points out,²⁴⁶ O'Connor's opinion sheds little light on the fate of sex-segregated state educational programs (such as liberal arts programs) that are not directly linked to traditionally female professions.²⁴⁷

Justice O'Connor's choice to avoid some of these broader questions is, of course, consistent with the traditional legal principle that judicial decisions should be framed in the narrowest possible terms.²⁴⁸ On the other hand, this choice, similar to that made in Justice Marshall's dissent in *Rostker* and Justice Brennan's dissent in *Michael M.*, precluded a direct debate in the Supreme Court over more fundamental issues raised by the case and argued by the dissenting Justices. To many Americans, including many women, sex-segregated education for women (whether public or private) is neither irrational nor discriminatory.²⁴⁹ The dissenting Justices in *Hogan*—Powell, Rehnquist, Blackmun, and Burger—probably spoke for a significant number of citizens when they argued that the value of "diversity" justified the availability of sex-segregated education as an option, at least if equivalent coeducational programs were "available."²⁵⁰

245. *Id.* at 729-30 & n.15.

246. In a brief dissenting opinion, Chief Justice Burger argued that the narrowness of O'Connor's opinion "suggests that a State might well be justified in maintaining, for example, the option of an all-women's business school or liberal arts program." *Id.* at 733 (Burger, C.J., dissenting).

247. In addition to ruling that the state had no actual compensatory purpose, Justice O'Connor held that excluding men was not "substantially related" to such a purpose. *Id.* at 730-31. O'Connor pointed out that the state already permitted men to audit classes and to participate in continuing education programs, with full rights of class participation. *Id.* Moreover, uncontroverted testimony by nursing school faculty established that the presence of men in nursing school classes had no impact on teaching styles or on the participation of female students. *Id.* at 730.

248. See Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principles and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 25 (1964) (referring to Court's "obligation not to decide the broad constitutional question if narrower grounds of decision are available").

249. Justice Powell pointed out in his *Hogan* dissent that "[t]he only groups with any personal acquaintance with MUW to file *amicus* briefs are female students and alumnae of MUW. And they have emphatically rejected [Hogan's] arguments, urging that the State of Mississippi be allowed to continue offering the choice from which they have benefited." *Hogan*, 458 U.S. at 736 (Powell, J., dissenting).

250. See *id.* at 734-35 (Blackmun, J., dissenting) (emphasizing that coeducational nursing programs were "open to males" and suggesting that majority opinion required "needless conformity"); *id.*

Justice O'Connor's brief response to this argument avoided any explicit analysis of the relationship of sex-segregated education to broader issues of sex discrimination against women, and merely stated that providing educational "benefits" to women only—and hence discriminating against men—had to be justified by a showing of substantial relationship to a "legitimate and substantial goal."²⁵¹ Not surprisingly, the dissenters had difficulty seeing why the state's maintenance of one nursing school for women, while providing other, coeducational nursing programs, imposed any substantial burden on men.²⁵² There are answers to this point, but as in *Rostker* and *Michael M.*, they require a substantive analysis of the impact of sex-based rules on *both* women and men. In a society in which women and men are channeled from childhood into different social roles, personality types, and patterns of behavior, educational sex segregation encourages similarity among individuals of each sex—in the form of conformity to traditional sex roles—and "diversity" only between the sexes. Moreover, it supports the idea that there are fundamental differences between the sexes that make sex segregation appropriate. The Brennan-Marshall approach's emphasis on means-ends rationality discourages examination of these issues.

VI. Toward a More Compelling Sex Discrimination Jurisprudence

The "hard" cases reveal how the Rehnquist-Stewart and Brennan-Marshall approaches simultaneously acknowledge and deny the need for significant changes in sex roles and sex-based hierarchy. The Rehnquist-Stewart approach claims to reject traditional ideas about proper sex roles, yet adopts in a modified form the very beliefs about natural differences between women and men that it at first appears to challenge. Moreover, the approach's focus on "real" differences obscures what is in fact a moral choice to tolerate a high level of culturally generated sex inequality. In contrast, the Brennan-Marshall approach's emphasis on the irrationality of challenged sex classifications incorporates moral judgments about the harms of sexism, at least as a preliminary matter, but also implies that only irrational sex classifications are harmful or necessary to change. As a result, the approach fails to address situations in which the pursuit of sex equality is difficult or costly and in which the use of sex classifications is

at 735, 742 (Powell, J., dissenting) (citing value of "diversity" and arguing that Hogan suffered *only* inconvenience). Whether coeducational programs 178 and 147 miles from Hogan's residence were "available" to him was, of course, a matter of dispute. See *id.* at 723 n.8 (O'Connor, J.); *supra* note 237.

251. *Id.* at 731 n.17.

252. See *id.* at 734 (Blackmun, J., dissenting); *id.* at 735, 742 (Powell, J., dissenting); *supra* note 250.

therefore arguably rational. The choice to pursue sex equality rather than other social goals in these situations can be justified only on the basis of an explicitly normative theory of sex equality that identifies with some particularity the dynamics and harmful consequences of sexism. Despite an apparently strong commitment to sex equality, the Brennan-Marshall approach largely avoids articulating a theory of this sort. The following sections argue that such a theory is consistent with our traditions of constitutional jurisprudence, describe such a theory's essential elements, and contend that judicial adoption of the approach advocated would make a significant contribution to contemporary struggles for sex equality.

A. *Adopting an Explicitly Normative Approach to Constitutional Law*

A first step toward the formulation of a more compelling sex discrimination jurisprudence is a recognition that constitutional law need not avoid making its moral choices explicit, and that explicitly normative traditions are as consistent with our constitutional history as traditions that attempt to be value neutral.

It is true, of course, that one tradition of constitutional law holds that explicit judicial value-choice is constitutionally unjustified and politically risky. This view has its roots in Chief Justice Marshall's historic opinion in *Marbury v. Madison*,²⁵³ which grounded judicial review on the claim that the Constitution is a type of "law" to be interpreted and applied like the more familiar forms of statute and judicial precedent.²⁵⁴ Central to this claim is a distinction between law and politics, that is, between "applying" law to particular cases and "making" law.²⁵⁵ Under this view, judicial interpretation of the Constitution should not be a matter of normative choice, but rather the discovery, through a distinctive legal method, of authoritative principles and rules established in some politically legitimate manner, followed by the "application" of those principles and rules to reach results in particular cases.²⁵⁶

253. 5 U.S. (1 Cranch) 137 (1803).

254. *Id.* at 178-80.

255. *Id.* at 165-71; see also Nedelsky, Book Review, 96 HARV. L. REV. 340, 350-60 (1982) (discussing importance of distinction between law and politics to Federalist party and Marshall Court). The law-politics distinction is not, of course, peculiar to constitutional law, and pervades the Anglo-American and Western European legal traditions. See R. UNGER, KNOWLEDGE & POLITICS 88-90 & *passim* (1975); R. UNGER, LAW IN MODERN SOCIETY 52-53, 177-81 (1976); cf. Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351 (1973) (arguing that distinction, though fundamental to liberal thought, is incoherent within its premises).

256. A modern classic statement advocating an approach to constitutional law said to be distinctively legal is Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). For arguments about why Wechsler's approach is not distinctively legal, see Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169, 183 (1968). For general criticisms of "neutral principles," see Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 469-71 (1981); Tushnet, *Following the Rules Laid*

Since the ideal of distinctively "legal" constitutional jurisprudence was first advanced by Chief Justice Marshall, however, it has co-existed with a more explicitly normative theory justifying judicial review in terms of important substantive values. As the breadth of Marshall's own arguments in *Marbury* suggests,²⁵⁷ the Court then (and since) has not functioned simply as "an ultimate tribunal for resolving disputes,"²⁵⁸ but also, in Professor Robert Cover's words, as "the political philosopher, or if one prefers a more pejorative connotation, the ideologue of the American democracy."²⁵⁹ From this perspective, constitutional "law" is "the line at which the plane of political ideas meets that of political action . . . and represents an enormous series of statements as to what are or are not the implications of the central principles of our politics."²⁶⁰ In asserting the validity of political and philosophical inquiry as part of constitutional adjudication, this tradition emphasizes a broad definition of politics. It is not partisan politics or crude pragmatics that are celebrated, but rather normative inquiry, involving the continuing reconstruction of general constitutional principles in light of our traditions and present situation.²⁶¹ Indeed, most of the great decisions of modern constitutional law—those concerning freedom of speech, race and sex discrimination, and voting, for example—are normative in this sense.²⁶²

In the years since the birth of Legal Realism in the 1920's, the elusiveness of the distinction between legal and non-legal decisionmaking has been repeatedly recognized. Supporters of the distinction have made numerous attempts to articulate "neutral," and "principled" bases of judicial

Down: A Critique of Interpretivism and Neutral Principles, 96 HARV. L. REV. 781 (1983).

257. Chief Justice Marshall's arguments about the Constitution as a form of "law" followed, and were inextricably intertwined with, arguments that legal remedies for violations of "vested legal rights" are "the very essence of civil liberty," and flow from the premise that the American political system must be "a government of laws, and not of men." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 162 (1803).

258. Cover, *The Left, The Right and the First Amendment: 1918-1928*, 40 MD. L. REV. 349, 349 (1981).

259. *Id.*

260. *Id.* at 350; see Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 9, 29-30 (1979).

261. Tushnet, *supra* note 256, at 798-804. Various approaches to normative jurisprudence are articulated in Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 4-11 (1983) (describing general relationship of law and social norms); Fiss, *supra* note 260 (defending privileged position of judges as articulators of "public" or fundamental values); Michelman, *Constancy to an Ideal Object*, 56 N.Y.U. L. REV. 406, 414-15 (1981) (arguing that new constitutional claims to adequate subsistence might be justified not on basis of the Framers' original intent, but on basis of "the cumulation of principles" reflected in prior constitutional decisions); Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 579-80 (1983) (describing process of "mutual correction of abstract ideals and their institutional realizations").

262. See M. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* 61-92 (1982) (arguing that little of modern constitutional law is supported by original intent of Framers); Tushnet, *supra* note 256, at 798-804.

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review.²⁶³ Critics have persuasively responded with careful demonstrations of how the articulated neutral concepts are both internally inconsistent²⁶⁴ and themselves value-laden.²⁶⁵ The critics are persuasive because they recognize that both the text of the Constitution and its related social theories generate multiple interpretations, and that in order to choose among them judges must in turn choose among competing principles of political morality that cannot be “derived” in a determinate way from the text of the Constitution and the intent of its Framers.²⁶⁶

If text and intent do not require adoption of either the anti-normative or normative traditions of legal thought, on what basis should judges choose their perspective? The most common type of argument is entirely pragmatic: Whatever the intellectual strength of either tradition, the “political capital” of the courts, and particularly of the United States Supreme Court, is said to rest entirely on the anti-normative or legalistic tradition. Public belief—however unjustified—that the Court is simply “applying law” made by the constitutional framers is thought to be essential if the Court’s power is to be politically acceptable to Congress, the President, and the people at large.²⁶⁷

Although this tactical view of legal reasoning is common, it is difficult to test its validity.²⁶⁸ Do the American people or significant sub-groups currently believe that Supreme Court decisions flow directly from the Constitution’s text and Framers’ intent? It is true that in confirmation

263. See, e.g., A. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962); A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1970); J. ELY, *supra* note 212; Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1 (1971); Wechsler, *supra* note 256.

264. See, e.g., Tushnet, *supra* note 256, at 785 & *passim*; Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 *YALE L.J.* 1037 (1980).

265. See, e.g., Baker, *Neutrality, Process, and Rationality: Flawed Interpretations of Equal Protection*, 58 *TEX. L. REV.* 1029, 1055-59 (1980); Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 *YALE L.J.* 1063 (1981); Parker, *The Past of Constitutional Theory—And Its Future*, 42 *OHIO STATE L.J.* 223, 235-39 (1981).

266. See Brest, *supra* note 265; Brest, *Interpretation and Interest*, 34 *STAN. L. REV.* 765 (1982); Brest, *The Misconceived Quest for the Original Understanding*, 60 *B.U. L. REV.* 204 (1980) [hereinafter cited as Brest, *Original Understanding*]; Michelman, *supra* note 261, at 409; Tushnet, *supra* note 256; Unger, *supra* note 261, at 567-576.

267. M. PERRY, *supra* note 262, at 139-140; M. SHAPIRO, *LAW AND POLITICS IN THE SUPREME COURT* 27 (1964).

268. The difficulties stem from several sources. First, most writing on public attitudes toward the Supreme Court has been “based more on impressions of what the public thinks than on systematically collected data.” Casey, *The Supreme Court and Myth: An Empirical Investigation*, 8 *LAW & SOC’Y REV.* 385, 386 (1974). Second, the most common finding of public opinion analysts is that many citizens are largely unaware of the Supreme Court’s decisions, and have no clear criteria for evaluating its performance. *Id.* at 403, 405, 409. Since many people have little knowledge of what the Supreme Court does and no basis for assessing its legitimacy, it is difficult to test how they would respond to decisions explicitly justified in normative terms. Third, even those persons who are aware of and adhere to anti-normative concepts of judicial legitimacy as a general matter might evaluate particular decisions in substantive terms. See Tushnet, *supra* note 256, at 807; *infra* note 272 (discussing survey findings).

hearings, nominees to the Supreme Court usually profess adherence to this tradition²⁶⁹ and anti-normative principles are frequently invoked by critics of Court decisions.²⁷⁰ On the other hand, the anti-normative ideals have been strongly criticized for many years in both legal scholarship and the popular media as unrealized and unrealizable.²⁷¹ The most influential audiences for the Court's opinions—Congress, the executive branch, the legal profession, the lower courts, and the media—must by now be aware of the controversial nature of claims of distinctively legal and value-neutral decisionmaking.²⁷² Moreover, even if it could be shown that some portions of the public believe in the possibility and desirability of value-free constitutional decisionmaking, and further, believe that means-ends rationality analysis is an appropriate way to accomplish that function, it is not clear that the courts should pursue this ideal. As argued above, the kind of judging demanded by the anti-normative ideal is in fact unattainable. Systematic concealment of the role of normative considerations in constitutional decisionmaking is thus, in Professor Paul Brest's phrase, "anti-democratic,"²⁷³ in that citizens are denied the opportunity for meaningful criticism of the allocation of decisionmaking authority between judges and legislators or of the values judges in fact employ. Finally, people may want an anti-normative jurisprudence largely because the courts have told them it is possible to have one.²⁷⁴ Thus, judicial opinions may shape, as well as be shaped by, popular conceptions of appropriate judicial roles, leaving open the possibility of change on both sides.

269. Tushnet, *supra* note 256, at 781-82.

270. See, e.g., R. BERGER, *GOVERNMENT BY JUDICIARY* 417-18 & *passim* (1977); Bork, *supra* note 263, at 3-4 & *passim*.

271. See M. PERRY, *supra* note 262, at 140-41; Brest, *Original Understanding*, *supra* note 266, at 235.

272. But see Tushnet, *supra* note 256, at 807 (acknowledging that "influential publicists" may believe in the desirability and possibility of neutral principles). A number of studies by social scientists appear to support the proposition that people who are more knowledgeable about Supreme Court decisions are also more likely to accept the distinction between law and politics and other aspects of "the myth" of Supreme Court decisionmaking. Casey, *supra* note 268, at 408-410; Sarat, *Studying American Legal Culture: An Assessment of Survey Evidence*, 11 *LAW & SOC'Y REV.* 427, 440-41 (1977). This proposition may not effectively contradict the statement in the text. First, the studies involved did not focus on the most influential audiences for the Court's opinions—other judges, government officials, and the media. Second, they did not carefully define "the myth" about Supreme Court decisionmaking, thereby undercutting the nature and significance of the survey results. Third, the surveys date from the late 1950's to the late 1960's and may not accurately reflect current attitudes.

273. Brest, *Original Understanding*, *supra* note 266, at 234.

274. See *id.*

B. *Recognizing the True Costs of Sex Discrimination and Exploring Sex-Equal Alternatives*

In addition to adopting a normative view of constitutional law, an approach to sex discrimination that attempts to promote equality between the sexes must describe in concrete terms the harmful consequences of sexism and must also consider what alternative social arrangements are desirable. The subordination of women is so deeply embedded in contemporary social, economic, and political structures that the achievement of equality will be both difficult and costly. Moreover, sex differences have been built into people's sense of themselves and into their relations with others from their earliest moments.²⁷⁵ Reexamining sex differentiation throughout the society is thus extremely threatening to most people. Only a broad critique of sexist practices and patterns and a compelling vision of a new social order will provide the impetus needed for change of this magnitude and difficulty. Feminists both inside and outside the legal profession are currently devoting considerable effort to developing such critical and constructive visions.²⁷⁶ Without attempting to provide a comprehensive account, this section delineates some of the premises and essential features of the feminist critical enterprise.

The most important premise is that women have distinctive perspectives that must play an important role in social transformation.²⁷⁷ Sexism has always rested most profoundly on a denial that women are conscious

275. For a powerful explanation of the interaction between sense of self and sense of gender that characterizes personality development among individuals raised predominantly by women, see N. CHODOROW, *supra* note 179, at 173-209. For a similar analysis in more sociological terms, see D. DINNERSTEIN, *THE MERMAID AND THE MINOTAUR: SEXUAL ARRANGEMENTS AND HUMAN MALAISE* 26-197 (1976). For a discussion of the extent to which advertisements reflect the powerful social forces that shape people's sense of themselves as female and male, see E. GOFFMAN, *GENDER ADVERTISEMENTS* (1979).

276. Feminist legal writings of this sort include C. MACKINNON, *supra* note 212; M.J. Frug, *supra* note 180; Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983); Taub, *Keeping Women in Their Place: Sex Stereotyping Per Se as a Form of Employment Discrimination*, 21 B.C. L. REV. 345 (1980); Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 U.C.L.A. L. REV. 581 (1977); Williams, *supra* note 94, at 190. Non-legal writings are far more numerous. Examples from different disciplines include N. CHODOROW, *supra* note 179 (psychology and sociology); D. DINNERSTEIN, *supra* note 275 (same); and the works of Heidi Hartmann, *see supra* notes 4, 25 (Marxist economic analysis). Additional examples can be found in the periodicals *Signs: Journal of Women in Culture and Society* and *Feminist Studies*, which are major forums for feminist scholarly work.

277. As the following discussion makes clear, it is cultural factors that cause the difference in women's perspectives. On the philosophical problems posed by the simultaneous assertion that men dominate culture and that distinctive female perspectives are possible, see MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS: J. WOMEN IN CULTURE & SOC'Y, 515, 542-44 (1982) [hereinafter cited as MacKinnon, *Agenda*]; MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS: J. WOMEN IN CULTURE & SOC'Y, 635, 635-39 (1983) [hereinafter cited as MacKinnon, *Feminist Jurisprudence*]. For a description of and call for critical feminist theory that makes female self-understanding central, see J. ELSHTAIN, *PUBLIC MAN, PRIVATE WOMAN: WOMEN IN SOCIAL AND POLITICAL THOUGHT* 302-06 (1981).

human "subjects" whose perspectives are worthy of respect by males.²⁷⁸ The repudiation of this tradition requires the opposite conclusion: that the perspectives of the primary victims of discrimination must play a major role both in defining the problem of discrimination and in constructing responses to it.²⁷⁹

The incorporation of women's perspectives has several key elements. One is the identification and analysis of the mechanisms by which the harms associated with sexism are imposed and maintained. Some of these mechanisms—such as stereotypes about the proper roles and differential capacities of women and men—have been identified and condemned by the courts, but have not been attacked as comprehensively as the problem of sexism demands.²⁸⁰ Other major mechanisms of sex-based hierarchy that must be analyzed include sex segregation, especially in employment,²⁸¹ and the practice of conceiving of the "public" realm of employment and politics and the "private" realm of the family and intimate relationships as separate and dichotomous spheres.²⁸² Judicial and legislative efforts to grapple with these patterns have barely begun. Still other concepts buttressing sexism—such as "real" differences and the equation of sex discrimination with irrationality—are embedded in current Supreme Court doctrine. In most instances, women's contributions to the analytic process are vital. Without their insights, the harms of many practices

278. The clearest expression of this position in American constitutional law can be found in Justice Bradley's opinion in *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 139 (1873) (Bradley, J., concurring). Justice Bradley, affirming the decision of the Illinois Supreme Court to exclude women from the legal profession, reasoned that

[t]he harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. So firmly fixed was this sentiment . . . that it became a maxim of [the common law] . . . that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state

Id. at 141. The denial of women's conscious subjectivity characterizes not only nineteenth century patriarchy, but much of Western theory and practice. See, e.g., S. DE BEAUVOIR, *THE SECOND SEX*, at xx-xxi (H. Parshley trans. 1971); LeClerc, *Woman's Word*, in *NEW FRENCH FEMINISMS: AN ANTHOLOGY* 79 (E. Marks & I. de Courtivron eds. 1980); Kristeva, *Oscillation Between Power and Denial*, in *id.* at 165; MacKinnon, *Agenda*, *supra* note 277, at 528-44. An analogous denial of conscious subjectivity has been traditionally imposed on blacks by whites. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 404-05 (1857); MacKinnon, *Agenda*, *supra* note 277, at 537 n.54.

279. See, e.g., MacKinnon, *Agenda*, *supra* note 277, at 536-44; MacKinnon, *Feminist Jurisprudence*, *supra* note 277, at 644-45; Williams, *supra* note 94, at 175, 200. An analogous point has been powerfully advanced on behalf of blacks by Lawrence, "One More River to Cross"—*Recognizing the Real Injury in Brown: A Prerequisite to Shaping New Remedies*, in *SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION* 49 (D. Bell ed. 1980); see Bell, *A Model Alternative Desegregation Plan*, in *id.* at 125; Freeman, *supra* note 212, at 1052-57.

280. See Taub, *supra* note 276, at 362, 387-90, 402.

281. See *supra* note 2; pp. 946-48.

282. S. OKIN, *WOMEN IN WESTERN POLITICAL THOUGHT* 273-304 (1979); Olsen, *supra* note 276, at 1559-78; Taub & Schneider, *Perspectives on Women's Subordination and the Role of Law*, in *THE POLITICS OF LAW* 117, 117-27 (D. Kairys ed. 1982). For a contrasting view of the required reconceptualization of public and private, see J. ELSHTAIN, *supra* note 277, at 317-53.

would go unrecognized or be misunderstood. In addition, to identify some of the most profound mechanisms one must virtually step outside of the culture. Both because of their frequently marginal positions and their greater personal stake in change, women are much more likely than men to consider iconoclastic analytic approaches to the study of sexism.²⁸³

Another component of a new sex discrimination jurisprudence must be an awareness that assimilation into existing predominantly male social structures is an inadequate definition of equality between the sexes and one that robs equality of much of its transformative potential.²⁸⁴ The principle that only women whose life patterns, skills, and experiences are virtually identical to those typical of men will be accorded high status and rewards will, as a practical matter, doom most women to continued subordination. Moreover, the common practice of focusing primarily on fair access to previously male positions and privileges is based in large part on androcentric value systems that maintain the hierarchy of male over female activities. Since women's value systems are often quite different from those of men, the full participation of women in the process of change may both depend on and encourage a re-ordering of social priorities.²⁸⁵

The integration of women's perspectives will also stimulate a wide-ranging debate about which are the most desirable of the many different ways in which sex equality can be pursued. For example, the life patterns of female and male workers can be made more similar by providing collective child care and expecting all workers to work full time, or, in a very different way, by restructuring employment to permit both parents to share major responsibility for daily care of their young children.²⁸⁶ In male-dominated public discourse, these and similar possibilities are debated only rarely and in oversimplified terms because they concern human activities that have been relegated to women and devalued. In addition, the diversity of women's perspectives has been obscured by the practice of grouping women into a few stereotyped categories defined largely from male viewpoints. If women's views and experiences are made part of the

283. See Ehrenreich & Piven, *The Feminization of Poverty*, 31 DISSENT 162, 169-70 (1984); MacKinnon, *Agenda*, *supra* note 277, at 532-38; MacKinnon, *Feminist Jurisprudence*, *supra* note 277, at 636-37; Shields, *The Variability Hypothesis: The History of a Biological Model of Sex Differences in Intelligence*, 7 SIGNS: J. WOMEN IN CULTURE & SOC'Y 769, 794 (1982).

284. See *supra* pp. 947-49; C. MACKINNON, *supra* note 212, at 118-27; Note, *supra* note 190, at 487-99.

285. See C. GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 5-23, 167-74 (1982).

286. See *supra* p. 946 (discussing various possible changes and their consequences). If the option of restructuring employment were chosen, relatives and friends could assist the parents in the care of their children—and also assist in the care of dependent adults—a task that now falls primarily on daughters, mothers, and wives.

public debate, their diversity will further broaden both the terms and subjects of that debate.

C. *The Influence of Judging on the Process of Social Change*

By shaping the terms in which conflicts are defined and public debate is conducted, judging influences popular and political consciousness in a way that transcends the resolution of particular disputes. Thus, the impact of judicial action consists not only of its immediate practical consequences, but also of the influence of judges' thinking on people's understanding of the underlying issues. From this perspective, judicial decisions should be evaluated based not only on their conclusions but also on the clarity and persuasiveness of their analysis of the broader issues that a given case presents.

An increased emphasis in judicial decisions on explicit debate about the values at stake in sex discrimination cases and the harms caused by sex discrimination would contribute significantly to the struggle for equality between the sexes. The process of social transformation necessary to obtain major improvements in the situation of women will, for the most part, take place in other forums. Nonetheless, the fact that judges often participate in the struggle against sexism through the influence of their ideas, as well as through the concrete impact of their decisions, argues for opinions that are more, rather than less, explicit about the substantive analyses underlying their legal conclusions. Moreover, open discussion of the issues at the core of the struggle for sex equality is particularly important because challenges to sex differentiation are so threatening to most people.

In brief, judges cannot determine the outcome of the struggle about sex equality, but they can create opportunities for action by others and they can influence the ideological climate in which the struggle occurs. By exposing the limits of the equal rights theory that emerges from the Supreme Court's current treatment of sex discrimination cases, this Article hopes to broaden the scope of future debate.

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