CASE COMMENTS

STATE UNIVERSITY ADMISSION POLICY BARRING MALES FROM NURSING SCHOOL VIOLATES EQUAL PROTECTION CLAUSE

Mississippi University for Women v. Hogan, 102 S. Ct. 3331 (1982)

In *Mississippi University for Women v. Hogan*,[1] the United States Supreme Court narrowed the scope of permissible,[2] benign,[3] gender-based classifications[4] by holding that an all-women's state university[5]

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1. 102 S. Ct. 3331 (1982).

2. Statutory and administrative classifications that are alleged to violate the equal protection clause are reviewed under one of three judicially created standards of scrutiny: the rational relationship test, which requires only that the classification be rationally related to a legitimate governmental objective, *see infra* note 23; the intermediate or heightened standard of review, reserved for gender-based classifications, under which a classification will be found constitutional if it bears a substantial relationship to an important governmental objective, *see infra* note 64 and accompanying text; and the strict scrutiny test, which requires that the classification be necessary to fulfill a compelling governmental purpose, *see infra* note 23.

3. For a discussion of the Supreme Court's acknowledgement of the history of societal discrimination against women, see *infra* note 43 and accompanying text.

The terms "benign," "remedial," or "compensatory" refer to policies allegedly designed to provide some form of redress for women for past discrimination. The Court has yet to find that men as a class have been subject to discrimination because of their sex. *See* Craig v. Boren, 429 U.S. 190, 212 n.1 (1976) (Stevens, J., concurring) ("[m]en as a class have not been the victims of the kind of historic, pervasive discrimination that has disadvantaged other groups."); *id.* at 219 (Rehnquist, J., dissenting) ("[t]here is no suggestion in the Court's opinion that males in this age group are in any way peculiarly disadvantaged, subject to systematic discriminatory treatment, or otherwise in need of special solicitude from the courts."); Kahn v. Shevin, 416 U.S. 351, 360 (1974) (Brennan, J., dissenting) ("[w]hile doubtless some widowers are in financial need, no one suggests that such need resulted from sex discrimination as in the case of widows"). *Cf.* Frontiero v. Richardson, 411 U.S. 677, 684-86 (1973) (discussing the "long and unfortunate" history of discrimination against women). *But see* Kanowitz, *"Benign" Sex Discrimination: Its Troubles and Their Cure,* 31 HASTINGS L.J. 1379, 1388 (1980) ("[t]he Justices' most serious error has been their failure to appreciate the extent of the societal and legal discrimination that males have suffered because of their sex . . . .").

This does not mean, of course, that men cannot be the subjects of unlawful discrimination. *See, e.g.,* Orr v. Orr, 440 U.S. 268, 279 (1979) (state statute imposing alimony obligations on husband but not wife violates the equal protection clause); Craig v. Boren, 429 U.S. 190, 212 (1976) (Stevens, J., concurring) (classification establishing a higher drinking age for men than women "is objectionable because it is based on an accident of birth, because it is a mere remnant of the now almost universally rejected tradition of discriminating against males in this age bracket . . . .").

4. For a discussion of the Court's analysis of gender-neutral classifications that have a disproportionate impact on women, see *infra* note 94.

5. *See infra* note 8. In 1971 there were 347 single-sex schools in the United States, accounting for approximately .3% of the number of students enrolled in higher education. Sixteen of these were public, eleven of which were all-male. In the private sector, 143 schools were all-male

which excluded qualified males from its nursing school solely on the basis of sex violated the equal protection clause of the fourteenth amendment.[6]

Respondent, a male registered nurse, sought admission[7] to the Mis-

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and 188 were all-female. In 1976, the number of single-sex colleges decreased to 249, representing nine percent of all higher education facilities. Of this total, only nine were public: seven were all-male; two were all-female. Four of these nine were federal military academies which soon thereafter began admitting women. V. GRANT & C. LIND, DIGEST OF EDUCATIONAL STATISTICS, 1977-1978, at 102-03 (1978). *See also* Moody, *The Constitution and the One Sex College,* 20 CLEV. ST. L. REV. 465, 467 n.14 (1971).

At the time the present case was before the Court, there were only two remaining single-sex public colleges; one of them, presumably, was Mississippi University for Women (MUW). OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUCATION, DATA OF EARNED DEGREES CONFERRED BY INSTITUTIONS OF HIGHER EDUCATION BY RACE, ETHNICITY AND SEX, ACADEMIC YEAR 1976-77, at 36, 72 (1980).

6. U.S. CONST. amend. XIV, § 1. The fourteenth amendment states in pertinent part: "[N]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." *See infra* note 23 and accompanying text.

The equal protection clause of the fourteenth amendment prohibits only that discrimination for which a state may be said to be responsible. Blum v. Yaretsky, 102 S. Ct. 2777, 2786 (1982); Shelly v. Kraemer, 334 U.S. 1, 13 (1948). The concept of state action was initially given a narrow construction by the Supreme Court. *See, e.g.,* Civil Rights Cases, 109 U.S. 3 (1883); United States v. Harris, 106 U.S. 629 (1882); Virginia v. Rives, 100 U.S. 313 (1879); United States v. Cruickshank, 92 U.S. 542 (1875). It is now well established that private action may constitute state action if there is "significant" overt or covert public involvement or encouragement, state coercion, or the exercise of powers traditionally the exclusive prerogative of the state. Blum v. Yaretsky, 102 S. Ct. at 2786; Flagg Bros. v. Brooks, 436 U.S. 149, 157-61 (1978); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 353, 357 (1974). The mere fact that an entity is subject to state regulation does not by itself convert private action to state action, *id.* at 350, nor does mere approval or acquiescence in the initiative of a private party. Flagg Bros. v. Brooks, 436 U.S. at 164-65. *See also* Rendell-Baker v. Kahn, 102 S. Ct. 2764 (1982). *See generally* G. GUNTHER, TEXT AND MATERIALS ON CONSTITUTIONAL LAW 206-15, 978-1028 (1980 & Supp. 1982).

The Mississippi University for Women is a "public" school because it is an educational institution operated by the state. *See* Comment, *Plessy Revived: The Separate But Equal Doctrine and Sex-Segregated Education,* 12 HARV. C.R.-C.L. L. REV. 585, 586 n.8 (1977). Therefore, the actions of the University fall within the state action concept.

For an analysis of the state action concept as it relates to gender and racial discrimination claims, see Ginsburg, *Women as Full Members of the Club: An Evolving American Ideal,* 6 HUM. RTS. 2, 6-14 (1976). For an extensive analysis of the impact of the fourteenth amendment and numerous federal laws on private universities and colleges, see O'Neil, *Private Universities and Public Law,* 19 BUFFALO L. REV. 155 (1969-70).

7. The present case grew out of Hogan's second attempt for admission to MUW. In August 1976, he telephoned the University to inquire about enrollment in the nursing school but was advised that his application would be rejected because of his sex. Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, Mississippi Univ. for Women v. Hogan, 102 S. Ct. 3331 (1982) (available February 1, 1982, on LEXIS, Genfed library, Briefs file) [hereinafter cited as Petition for Writ of Certiorari]; *see infra* note 12.

sissippi University for Women[8] (MUW) baccalaureate program in nursing.[9] He chose not to apply to nursing programs at two less conve-

8. MUW is the only single-sex state-supported college or university in Mississippi. 102 S. Ct. at 3334 n.1. There are 7 other state-supported universities and 16 public junior colleges within the state, all coeducational. *Id.* at 3342 (Powell, J., dissenting).

MUW was originally incorporated by the state in 1884 as the Mississippi Industrial Institute and College for the Education of White Girls of the State of Mississippi. 1884 MISS. LAWS ch. XXX, § 1. The name was changed to the Mississippi State College for Women, 1920 MISS. LAWS ch. 256, and finally to its current name, Mississippi University for Women, 1974 MISS. LAWS ch. 367 § 2 (codified as amended at MISS. CODE ANN. § 37-117-1 (Supp. 1981)). MUW is the oldest state-supported all-women's college in the United States and has admitted only women since its establishment. 102 S. Ct. at 3334.

The charter of MUW currently in force provides:

> The purpose and aim of the Mississippi State College for Women is the moral and intellectual advancement of the girls of the state by the maintenance of a first-class institution for their education in the arts and sciences, for their training in normal school methods and kindergarten, for their instruction in bookkeeping, photography, stenography, telegraphy, and typewriting, and in designing, drawing, engraving, and painting, and their industrial application, and for their instruction in fancy, general, and practical needlework, and in such other industrial branches as experience, from time to time, shall suggest as necessary or proper to fit them for the practical affairs of life.

MISS. CODE ANN. § 37-117-3 (1972). The wording of the charter has changed very little since the University's inception. The last part of the charter originally read:

> and, also, a knowledge of bookkeeping, with such other practical industries as, from time to time, to them may be suggested by experience, or tend to promote the general object of said Institute and College, to wit: fitting and preparing such girls for the practical industries of the age.

1884 MISS. LAWS ch. XXX § 6. *Cf.* 102 S. Ct. at 3341 (Blackmun, J., dissenting) ("One only states the obvious when he observes that the University long ago should have replaced its original statement of purpose and brought its corporate papers into the 20th century.").

Justice O'Connor, briefly reviewing the history of women's education in Mississippi, concluded that MUW was founded to provide white women some form of higher education, but not one superior or even equivalent to that provided white men, and to some degree, black men and women. 102 S. Ct. at 3338 n.13.

9. Although respondent already was a registered nurse, he claimed that with a baccalaureate degree he would be able to earn a higher salary and would be eligible for more advanced training. 102 S. Ct. at 3334 n.3. *See infra* note 10.

MUW's School of Nursing was established in 1971 and initially offered only a two-year associate degree. 102 S. Ct. at 3334. In 1974 MUW began offering a four-year baccalaureate program in nursing. *Id. See supra* note 7; *infra* note 12 and accompanying text. The School of Nursing maintains its own faculty and administration apart from the rest of MUW, and establishes its own admissions criteria. 102 S. Ct. at 3334 (citing 1980-1981 BULLETIN OF MISSISSIPPI UNIVERSITY FOR WOMEN 31-34, 212-229).

Although MUW prohibited males from enrolling in degree-granting programs, it permitted men to audit day or evening classes and participate fully in class. 102 S. Ct. at 3334 n.4, 3340. Additionally, both men and women could enroll in continuing education courses offered by the School of Nursing. *Id.* at 3340. Based upon information available in the record, Justice Powell found that men had audited 138 courses over the last 10 years. *Id.* at 3347 n.17 (Powell, J., dissenting).

niently located state-supported coeducational institutions.[10] Although otherwise fully qualified,[11] respondent was denied admission to the program solely on the basis of his sex.[12] He subsequently brought suit against the university seeking injunctive relief[13] and a judgment declaring that the admissions policy excluding males[14] violated the equal protection clause of the fourteenth amendment.[15] The district court,

10. Nursing programs leading to a bachelor's degree are offered at the University of Southern Mississippi in Hattiesburg, which is 178 miles from Columbus, where respondent lives and MUW is located, and at the University of Mississippi in Jackson, 147 miles from Columbus. 102 S. Ct. at 3342 n.1 (Powell, J., dissenting). Hogan alleged that attending either of these coeducational facilities would require him to abandon his current employment and move his family, resulting in extreme financial and personal hardship. Petition for Writ of Certiorari, *supra* note 7. In an amicus brief filed in the case, it was also pointed out that women in Hogan's position, employed in the nursing profession and seeking to attend school contemporaneously, would be at a distinct advantage: By attending MUW while working, they would gain experience, seniority, and a higher wage which Hogan would have to forego by attending one of the coeducational nursing programs. Brief Amicii Curiae, National Woman's Law Center, NOW Legal Defense and Education Fund, Woman's Equity Action League, and Women's Legal Defense Fund, Mississippi Univ. for Women v. Hogan, 102 S. Ct. 3331 (1982) (available February 1, 1982, on LEXIS, Genfed Library, Briefs file).

Justice Powell's dissent focused solely on the inconvenience respondent would suffer by being required to travel to either coeducational facility. 102 S. Ct. 3345 & n.11 (Powell, J., dissenting). *But see id.* at 3336 n.8.

11. 102 S. Ct. at 3334. The parties stipulated that respondent was qualified for admission. Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, Mississippi Univ. for Women v. Hogan, 102 S. Ct. 3331 (1982) (available August 28, 1982 on LEXIS, Genfed library, Briefs file) [hereinafter cited as Brief in Opposition to Petition for Writ].

Respondent's qualifications included a Licensed Practical Nurse Certificate (LPN), an Associate of Applied Science Degree (RN), and nine years of work experience in the nursing profession. *See* Petition for Writ of Certiorari, *supra* note 7.

12. 102 S. Ct. at 3334. Respondent was notified by letter on September 19, 1979, six days after he applied, that he had been denied admission because MUW restricts its enrollment to females. *See* Petition for Writ of Certiorari, *supra* note 7.

13. The preliminary injunction would have compelled Hogan's admission for the Spring 1981 semester. Hogan's complaint also requested compensatory damages of $25,000 and attorney's fees. *See* Petition for Writ of Certiorari, *supra* note 7.

14. *See supra* note 9.

15. *See supra* note 6; *infra* note 23 and accompanying text. Respondent's complaint also alleged a violation of Title IX of the Educational Amendments of 1972 § 901(a), 20 U.S.C. § 1681(a) (1976 & Supp. IV 1980). Section 901(a) states, in part: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . ." Section 901(a) is limited to "institutions of vocational education, professional education and graduate higher education, and to public institutions of undergraduate higher education." 20 U.S.C. § 1681(a)(1) (1976 & Supp. IV 1980).

For a general discussion of the scope of the education amendments and legislative history, see Buek & Orleans, *Sex Discrimination—A Bar to Democratic Education: An Overview of Title IX of*

employing the rational relationship test,[16] entered summary judgment in favor of the state.[17] The Court of Appeals for the Fifth Circuit, employing an intermediate standard of scrutiny, found the university's policy unconstitutional,[18] and reversed.[19] The United States Supreme

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the Education Amendments 1972, 6 CONN. L. REV. 1 (1973); Todd, *Title IX of the 1972 Education Amendments: Preventing Sex Discrimination in Public Schools,* 53 TEX. L. REV. 103 (1974).

Respondent abandoned his claim for relief under Title IX prior to the district court hearing on the preliminary injunction. Hogan v. Mississippi Univ. for Women, No. EC 80-169-LS-P (N.D. Miss. Dec. 23, 1980) (available August 28, 1982 on LEXIS, Genfed library, Briefs file); amended to Petition for Writ of Certiorari, *supra* note 7.

MUW relied on subsequent provisions of Title IX to support the validity of the single-sex admissions policy. *See infra* notes 18 & 171-79 and accompanying text.

16. Hogan v. Mississippi Univ. for Women, No. EC 80-169-LS-P (N.D. Miss. Dec. 23, 1980). The rational relationship test invokes the minimum degree of scrutiny under equal protection analysis; it requires only that the means employed by the state be rationally related to a legitimate objective. *See supra* note 2; *infra* note 23 and accompanying text.

The district court stated the test as follows:

> The Equal Protection Clause of the Fourteenth Amendment does not require "identity of treatment" for all citizens, or preclude a state, by legislation, from making classifications and creating differences in the rights of different groups. It is only when the discriminatory treatment and varying standards, as created by the legislature or administrative classification are *arbitrary and wanting in any rational justification* that they offend the Equal Protection Clause.

Id. (emphasis added).

Relying heavily on the Third Circuit's reasoning in Vorchheimer v. School Dist., 532 F.2d 880 (3d Cir. 1976) (maintenance by the state of a limited number of separate but equal single-sex public high schools in which enrollment is voluntary does not violate the equal protection clause of the fourteenth amendment), *aff'd mem.,* 430 U.S. 703 (1977), and Williams v. McNair, 316 F. Supp. 134 (D.S.C. 1970) (state-supported all-women's college does not violate equal protection clause where state-supported all-men's college and a wide range of state-supported coeducational institutions exist), *aff'd mem.,* 401 U.S. 951 (1971), the district court found that the state's objective of providing "the greatest practical range of educational learning to females" was not arbitrary. Hogan v. Mississippi Univ. for Women, No. EC 80-169-LS-P (N.D. Miss. Dec. 23, 1980).

Plaintiff-respondent first appealed the order granting summary judgment, and subsequently appealed the order denying a preliminary injunction. The appeals were consolidated by the court of appeals, which also granted MUW's motion for an expedited appeal. Brief for Respondent, Mississippi Univ. for Women v. Hogan, 102 S. Ct. 3331 (1982) (available February 1, 1982, on LEXIS, Genfed library, Briefs file).

17. The defendants included the members of the Mississippi Board of Trustees of State Institutions of Higher Learning, who were responsible for establishing policy at all institutions in the state system of higher education; the President of MUW, who had general supervision over admissions policies; and the Director of Admissions for MUW, who was charged with administration of admissions policies. Petition for Writ of Certiorari, *supra* note 7.

18. 646 F.2d 1116, 1119 (5th Cir. 1981), *aff'd,* 102 S. Ct. 3331 (1982). The Fifth Circuit, relying on Kirchberg v. Feenstra, 450 U.S. 455 (1981), applied the standard developed in Craig v. Boren, 429 U.S. 190 (1976), which requires that gender-based classifications be substantially related to important governmental interests. 646 F.2d at 1117-18. *See infra* notes 61-67 and accompanying text. Although the state interest in providing women with educational opportunities was important, if not compelling, the Fifth Circuit stated that "[the] interest does not stop with female citizens." 646 F.2d at 1118. Given the importance of education, the court held that "providing a

Court granted certiorari,[20] affirmed the judgment of the Fifth Circuit, and *held*: A state university's admissions policy that excludes males from a nursing program[21] that leads to opportunities from which women historically have not been barred violates the equal protection clause of the fourteenth amendment.[22]

The equal protection clause of the fourteenth amendment[23] has been

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unique educational opportunity for females but not for males . . . does not bear a substantial relationship to this important objective." *Id.* at 1119.

The Fifth Circuit vacated the summary judgment dismissing Hogan's declaratory and compensatory relief and remanded the case to the district court for further proceedings. *Id.* at 1120.

MUW also contended, on rehearing, that § 901(a)(5) of Title IX of the Educational Amendment Acts of 1972, 20 U.S.C. § 1681(a)(5) (1976), provided a specific exception to the Title's general prohibition against sex discrimination in institutions of higher education. Section 901(a)(5) states:

> (5) in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex . . .

Id. See supra note 15.

The Fifth Circuit, without reference to precedent, held that section 5 of the fourteenth amendment, under which Title IX of the Educational Amendments of 1972 was passed, does not authorize Congress to allow states to maintain programs that violate other constitutional provisions. Hogan v. Mississippi Univ. for Women, 653 F.2d 222, 223 (5th Cir. 1981) (per curiam), *aff'd,* 102 S. Ct. 3331 (1982). *See infra* text accompanying notes 121-27 for the Supreme Court's treatment of this question.

19. 646 F.2d 1116 (5th Cir. 1981), *aff'd,* 102 S. Ct. 3331 (1982).

20. 102 S. Ct. 501 (1981).

21. For a discussion of an application of this holding to programs other than nursing, see *infra* note 128 and accompanying text.

22. The Court also held that § 5 of the fourteenth amendment did not authorize the maintenance of MUW's exclusionary admissions policy. *See infra* notes 121-27 and accompanying text.

The federal government is similarly barred by the equal protection component of the fifth amendment from adopting exclusionary policies. *See* Rostker v. Goldberg, 101 S. Ct. 2646, 2650 n.3 (1981); Weinberger v. Weisenfeld, 420 U.S. 636, 638 n.2 (1975); Schlesinger v. Ballard, 419 U.S. 498, 500 n.3 (1975); Bolling v. Sharpe, 347 U.S. 497, 499 (1954). *See generally* Karst, *The Fifth Amendment's Guarantee of Equal Protection,* 55 N.C.L. REV. 541 (1977).

23. The fourteenth amendment, ratified in 1868, and its companion post-Civil War amendments were originally intended to protect the newly freed slaves from anticipated racial discrimination. *See* Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1873); Frank & Munro, *The Original Understanding of "Equal Protection of the Laws",* 1972 WASH. U.L.Q. 421. Until the 1960s, equal protection played a very modest role in constitutional litigation. *See* Buck v. Bell, 274 U.S. 200, 208 (1927) (referring to equal protection as "the usual last resort of constitutional arguments"). With the exception of gender-based classifications, which are now examined under an intermediate degree of scrutiny, *see infra* notes 61-67 and accompanying text, equal protection analysis today is divided into two sharply differing "tiers" of analysis. The bottom tier, the "old" or traditional equal protection tier, focuses solely on legislative means, not on legislative objectives. It merely requires that the statutory classification be "rationally related" to the legislative purpose, and is traditionally invoked to challenge social and economic legislation. *See, e.g.,* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981) (state law banning retail sale of milk in plastic

held to prohibit states from adopting any classification that unlawfully

nonreturnable, nonrefillable containers rationally related to state's asserted statutory purposes of encouraging the use of environmentally superior containers, reducing economic dislocation, conserving energy and easing solid waste problems); United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980) (federal law providing for system of retirement and disability benefits that gives windfall to persons who qualify for social security retirement benefits not a patently arbitrary or irrational way to achieve governmental interest in fiscal integrity of system); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (statute mandating retirement at age 50 for all uniformed state police officers rationally related to the state's objective of protecting the public by assuring the physical preparedness of uniformed officers); Jefferson v. Hackney, 406 U.S. 535 (1972) (state decision to provide lower welfare benefits to AFDC recipients than to the aged or infirm not invidious or arbitrary); Dandridge v. Williams, 397 U.S. 471 (1970) (state regulation imposing a ceiling on welfare benefits to AFDC families regardless of size or need rationally supportable and furthers the legitimate state interest in encouraging employment and maintaining equity between welfare and poor working families); McGowan v. Maryland, 366 U.S. 420 (1961) (state laws prohibiting or restricting time, place, and manner of Sunday sale of specific items not without rational and substantial relation to the objects of the legislation); Railway Express Agency v. New York, 336 U.S. 106 (1949) (city ordinance prohibiting use of advertisement on all except business delivery vehicles related to intended purpose).

For a brief discussion of the myriad formulations of the minimal scrutiny test and the judicial deference to legislative determination they reflect, see *infra* note 30. For a classic analysis of the requisite relationship between means and ends required by the traditional equal protection standard, see Tussman & tenBroek, *The Equal Protection of the Laws,* 37 CALIF. L. REV. 341 (1949).

At the other end of the equal protection spectrum is the "strict scrutiny" standard, which focuses on ends as well as means. It requires that the classification be necessary to achieve a compelling governmental interest. This strict scrutiny applies in two situations: where the law or practice classifies on the basis of a suspect class, such as race, McLaughlin v. Florida, 379 U.S. 184 (1964); Bolling v. Sharpe, 347 U.S. 497 (1954), national origin, *In re* Griffiths, 413 U.S. 717 (1973); Oyama v. California, 332 U.S. 633 (1948); Korematsu v. United States, 323 U.S. 214 (1944), or alienage, Graham v. Richardson, 403 U.S. 365 (1971), and where a fundamental right explicitly or implicitly found in the Constitution is implicated, such as voting, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966), travel, Shapiro v. Thompson, 394 U.S. 618 (1969), appellate review, Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956), reproductive freedom, Roe v. Wade, 410 U.S. 113 (1973), or access to state civil courts, Boddie v. Connecticut, 401 U.S. 371 (1971).

To date the Court has declined to apply strict scrutiny in a number of contexts. *See, e.g.,* Mills v. Habluetzel, 102 S. Ct. 1549 (1982) (continuing to apply a standard of review greater than rationality to classifications based on illegitimacy); Schweiker v. Wilson, 450 U.S. 221 (1981) (mental illness); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (age); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (education recognized by the Court as "important," but not fundamental); Lindsey v. Normet, 405 U.S. 56 (1972) (housing); Dandridge v. Williams, 397 U.S. 471 (1970) ("necessities").

A plurality of the Court concluded sex should be a suspect class in Frontiero v. Richardson, 411 U.S. 677 (1973). *See infra* notes 38-42 and accompanying text. A majority of the Court has never adopted this position. *See, e.g.,* Stanton v. Stanton, 421 U.S. 7, 13 (1975) (unnecessary to decide if gender is suspect class as classification fails to meet standard set down in Reed v. Reed, 404 U.S. 71 (1971)). *See generally* J. ELY, DEMOCRACY AND DISTRUST (1980); G. GUNTHER, *supra* note 4, at 745-64, 908-68; Baker, *Neutrality, Process and Rationality: Flawed Interpretations of Equal Protection,* 58 TEX. L. REV. 1029 (1980); Gunther, *The Supreme Court, 1972 Term—Foreword: In*

discriminates among persons[24] on the basis of sex.[25] The constitutional standard for evaluating the legality of a gender-based classification, however, has been subject to unclear and inconsistent application by the Supreme Court.[26]

Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 HARV. L. REV. 1 (1972); Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment,* 91 HARV. L. REV. 1 (1977); Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral and Permissive Classification,* 62 GEO. L.J. 1071 (1974); Shaman, *The Rule of Reasonableness in Constitutional Adjudication: Toward the End of Irresponsible Judicial Review and the Establishment of a Viable Theory of the Equal Protection Clause,* 2 HASTINGS CONST. L.Q. 153 (1975); Wilkinson, *The Supreme Court, The Equal Protection Clause, and the Three Faces of Constitutional Equality,* 61 VA. L. REV. 945 (1975).

Despite the apparent clarity of such an analytical scheme, the two-tiered analysis has produced considerable confusion. As one commentator wrote, "[d]espite a continuing stream of court opinions and academic commentary, equal protection doctrine remains in a state of disarray. Justices bemoan that the most contested judicial rubrics are not guides to decision, but uninformative labels, used sometimes to state conclusions but never to aid analysis." Baker, *supra,* at 1029. *See* Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 188 (1979) (Blackmun, J., concurring) (observing "the unrelieved discomfort with what seems to be a continuing tendency in this Court to use as tests such easy phrases as 'compelling state interest' and 'least drastic [or restrictive] means.' "); Craig v. Boren, 429 U.S. 190, 210 n.* (1976) (Powell, J., concurring) ("There are valid reasons for dissatisfaction with the two-tier approach that has been prominent in the Court's decisions in the decade"). This dissatisfaction has driven a number of Justices to search for new articulations of an equal protection standard. *See* Craig v. Boren, 429 U.S. 190, 212-13 (1976) (Stevens, J., concurring) ("[t]here is only one Equal Protection Clause. . . . It does not direct the courts to apply one standard of review in some cases and a different standard in other cases."); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting) (classifications alleged to violate the equal protection clause are scrutinized under a "spectrum of standards," depending on the character of the classification in question, the relative importance to class members of the benefits denied and the asserted state interests); Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164, 172-73 (1972) (blurring the distinctions between strict and minimal scrutiny precedents by postulating an "overreaching" approach to all equal protection cases). *See also* Gunther, *supra,* at 17-20.

24. The equal protection clause by its terms applies to all "persons." U.S. CONST. amend. XIV, § 1. *See supra* note 6. The Court has construed persons to include aliens and corporations, in addition to citizens. *See, e.g.,* Graham v. Richardson, 403 U.S. 365 (1971) (aliens); Santa Clara County v. Southern Pac. R.R. Co., 118 U.S. 394 (1886) (corporations).

25. "Gender has never been rejected as an impermissible classification in all instances." Kahn v. Shevin, 416 U.S. 351, 356 n.10 (1974). *See, e.g.,* Michael M. v. Superior Court, 450 U.S. 464 (1981) (upholding California's statutory rape law penalizing only men); Parham v. Hughes, 441 U.S. 347 (1979) (rejecting challenge to state law denying father the right to sue for death of his illegitimate child); Califano v. Webster, 430 U.S. 312 (1977) (upholding provision of Social Security Act providing advantage for women in computation of benefits). *Cf.* General Elec. Co. v. Gilbert, 429 U.S. 125 (1976) (exclusion of pregnancy related disabilities in private disability plan does not violate Title VII of the Civil Rights Act of 1964); Geduldig v. Aiello, 417 U.S. 484 (1974) (exclusion of pregnancy disabilities from state insurance system not unconstitutional discrimination between pregnant women and nonpregnant persons).

26. *See* Michael M. v. Superior Court, 450 U.S. 464, 468 (1981) ("[a]s is evident from our opinions, the Court has had some difficulty in agreeing upon the proper approach and analysis in

Prior to 1971[27] the Supreme Court rejected nearly all equal protection challenges to statutory schemes alleged to discriminate on the basis of sex[28] by applying the traditional minimal scrutiny standard normally reserved for social and economic legislation.[29] Under this deferential

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cases involving challenges to gender-based classifications."); Rostker v. Goldberg, 448 U.S. 1306, 1309 (1980) (Brennan, Circuit Justice) ("[i]n the past, the standard of review to be applied in gender-based discrimination cases has been a subject of considerable debate"); Craig v. Boren, 429 U.S. 190, 210 n.* (1976) (Powell, J., concurring) ("[a]s is evident from our opinions, the Court has had difficulty in agreeing upon a standard of equal protection analysis that can be applied consistently to the wide variety of legislative classifications"); Vorcheimer v. School Dist., 400 F. Supp. 326, 340-41 (E.D. Pa. 1975) ("[a] lower court faced with this line of cases has an uncomfortable feeling, somewhat similar to a man playing a shell game who is not absolutely sure there is a pea").

See generally Blattner, *The Supreme Court's "Intermediate" Equal Protection Decisions: Five Imperfect Models of Constitutional Equality,* 8 HASTINGS CONST. L.Q. 777 (1981); Cassen, *Equal Protection—Equal Status: A Summary of Sex Discrimination Cases Since* Frontiero, 11 LINCOLN L. REV. 167 (1980); Ginsburg, *From No Rights, to Half Rights, to Confusing Rights,* 7 HUM. RTS. 12 (1978); Ginsburg, *Gender in the Supreme Court: The 1973 and 1974 Terms,* 1975 SUP. CT. REV. 1; Goldstein, *The Constitutional Status of Women: The Burger Court and the Sexual Revolution in American Law,* 3 LAW & POL'Y Q. 5 (1981); Note, *The Search for a Standard of Review in Sex Discrimination Questions,* 14 HOUS. L. REV. 721 (1977).

27. *See* Reed v. Reed, 404 U.S. 71 (1971). *See also infra* notes 31-37 and accompanying text.

28. *See, e.g.,* Hoyt v. Florida, 368 U.S. 57 (1961) (state law automatically exempting women from jury service upheld); Goesart v. Cleary, 335 U.S. 464 (1948) (state statute permitting women to serve as bartenders only if their husband or father owned the bar upheld); West Coast Hotel v. Parrish, 300 U.S. 379 (1937) (statute providing minimum wage for women upheld); Radice v. New York, 264 U.S. 292 (1924) (statute limiting the hours of night work for women in restaurants in cities with particular populations upheld); Bosley v. McLaughlin, 236 U.S. 385 (1915) (state statute limiting the hours of women nurses and pharmacists upheld); Riley v. Massachusetts, 232 U.S. 691 (1914) (statute limiting the number of hours women could work upheld); Mueller v. Oregon, 208 U.S. 412 (1908) (statute limiting hours a woman could be employed in factories upheld); Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1874) (denial of right to vote to women before nineteenth amendment upheld); Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873) (upholding state law denying women the right to practice law). *But cf.* Adkins v. Children's Hospital, 231 U.S. 525 (1923) (law prescribing minimum wage for women struck down as interference with fifth amendment liberty of contract).

See generally L. GOLDSTEIN, THE CONSTITUTIONAL RIGHTS OF WOMEN 6-77 (1979); H. KAY, SEX BASED DISCRIMINATION 2-11 (1981 ed.); L. KANOWITZ, *supra* note 3, at 150-54; Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights,* 80 YALE L.J. 871, 876-82 (1971); Erickson, *Women and the Supreme Court: Anatomy is Destiny,* 41 BROOKLYN L. REV. 209, 214-21 (1974); Ginsburg, *Sexual Equality Under the Fourteenth and Equal Rights Amendments,* 1979 WASH. U.L.Q. 161, 161-64; Ginsburg, *Gender and the Constitution,* 44 U. CIN. L. REV. 1, 2-8 (1975); Goldstein, *supra* note 26, at 6-8; Note, *Regulations of Conditions of Employment of Women: A Critique of* Muller v. Oregon, 13 B.U.L. REV. 276, 276-80 (1933); Note, *Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?,* 84 HARV. L. REV. 1499, 1502-04 (1971); Comment, *Sexual Equality: Not for Women Only,* 29 CATH. U.L. REV. 427, 428-30 (1980).

29. *See infra* note 30 and accompanying text.

standard, an allegedly discriminatory statute is presumptively constitutional and will be struck down only upon a showing that the classification bears no "rational relationship" to a legitimate government interest.[30]

Reed v. Reed,[31] however, marked a significant shift in the Court's attitude toward gender-based classifications.[32] In *Reed*, a unanimous Court[33] struck down an Idaho statute imposing a mandatory preference for men over similarly situated women as administrators of intestate

30. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 463 (1981). *See supra* note 23. The Court has formulated the minimum scrutiny test in different ways in order to reflect varying degrees of deference to be accorded the legislative branch. *See, e.g.,* Hodel v. Indiana, 452 U.S. 314, 331 (1981) ("[s]ocial and economic legislation . . . must be upheld against equal protection attack when the legislative means are rationally related to a legitimate governmental purpose."); United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 177 (1980) ("[t]he only . . . question is whether Congress achieved its purpose in a patently arbitrary or irrational way"); McDonald v. Board of Election, 394 U.S. 802, 809 (1969) ("[t]he distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside . . . only if based on reasons totally unrelated to the pursuit of that goal"); McGowan v. Maryland, 366 U.S. 420, 425-26 (1961) ("[t]he constitutional safeguard is only offended if the classification rests on grounds wholly irrelevant to the achievement of the state's objective."); Railway Express Agency v. New York, 336 U.S. 106, 112 (1949) (Jackson, J., concurring) ("some reasonable differentiation fairly related to the object of regulation"); Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) ("[the means selected shall have a] fair and substantial relation to the object of the legislation"); Lindsley v. National Carbonic Gas Co., 220 U.S. 61, 78 (1911) ("the 14th Amendment avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary").

In addition to disagreement over the degree of deference afforded the legislature in suiting means to ends, the members of the Court hold divergent views on the clarity with which the legislative purpose must appear. G. GUNTHER, *supra* note 4, at 101 n.1 (Supp. 1982). *Compare* Western & S. Life Ins. Co. v. Board of Equalization, 451 U.S. 648, 668 (1981) (Brennan, J.) (the Court will assume the objectives articulated by the legislature are the actual purposes of the statute unless proven otherwise) *and* Minnesota v. Clover Leaf Creamery, 449 U.S. 456, 463 n.7 (1981) (same) *with* United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 179 (1980) (Rehnquist, J.) (Court does not require the legislature to articulate the reasons underlying the enactment of a statute; the reasons are "constitutionally irrelevant").

In reviewing classifications that discriminate on the basis of sex, the Court requires the objectives articulated by the legislature to be the actual purposes underlying the statute. *See infra* note 58 and accompanying text.

See generally G. GUNTHER, *supra* note 4, at 670-723 & Supp. at 102-03; Wilkinson, *supra* note 23.

31. 404 U.S. 71 (1971).

32. Although subsequent decisions produced more pronounced shifts of lasting consequence, *see, e.g.,* Craig v. Boren, 429 U.S. 190 (1976); Frontiero v. Richardson, 411 U.S. 677 (1973), *Reed* was the first decision in which it was apparent that the Court had begun to accept gender as a unique, or at least different, factor in equal protection analysis. *See* Gunther, *supra* note 23, at 24.

33. The Court has been unanimous in *judgment* only five times in approximately 20 sex discrimination cases. *See* Kirchberg v. Feenstra, 450 U.S. 455 (1981); Califano v. Westcott, 443 U.S. 76 (1979); Califano v. Webster, 430 U.S. 313 (1977); Weinberger v. Wiesenfeld, 420 U.S. 636

estates.[34] Although the Court purported to apply the rational basis standard[35] and expressly found the state's interest in eliminating intrafamily disputes legitimate,[36] the ultimate rejection of the statutory scheme indicated that a more exacting form of scrutiny had been employed.[37]

(1975); Reed v. Reed, 404 U.S. 71 (1971). In those 20 cases, the Justices have submitted 56 separate opinions.

The Court in *Westcott* was unanimous in finding that the statute violated the equal protection clause, but split five-four on the question of extending benefits as a remedial order to cure the constitutional defect. Federal courts invalidating federal legislation for underinclusiveness have the choice of either rendering the statute unenforceable or extending it to cover those classes improperly excluded. *See* Kanowitz, *supra* note 3, at 1413-23 (urging the use of judicial extension of benign classifications to excluded men). *See generally* Ginsberg, *Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation,* 28 CLEV. ST. L. REV. 301 (1979).

34. IDAHO CODE § 15-313 (1932) (current version at IDAHO CODE § 15-3-203 (1979)). This section declared that "[o]f several persons claiming and equally entitled to administer, males must be preferred to females. . . ."

35. 404 U.S. 71, 76 (1971). The Court viewed the issue as "whether a difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective that is sought to be advanced by the operation" of the statutory classification. *Id.*

The test the Court applied, however, was adopted from Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) ("fair and substantial relation to the object of the legislation"). 404 U.S. at 76.

36. The Court acknowledged that the statutory preference for males advanced the legitimate state interest of reducing the workload of the probate courts by eliminating disputes between the surviving parents, one class of particularly time-consuming issues. 404 U.S. at 76. Moreover, the Court never challenged the State's premise that men are generally more knowledgeable about business affairs than women. In light of these conclusions, the classification met the minimum rationality test. *See* Goldstein, *supra* note 26, at 8; Gunther, *supra* note 23, at 34; Comment, *Single-Sex Public Schools: The Last Bastion of "Separate But Equal?,"* 1977 DUKE L.J. 259, 261 nn.15-16.

37. The court struck down the statute as "the very kind of arbitrary legislative choice forbidden by the Equal Protection clause." 404 U.S. at 76. Thus, as Professor Gunther suggested, it appeared that the presence of a sex-based classification prompted the *Reed* court to employ a heightened level of scrutiny:

> It is difficult to understand [the] result without an assumption that some special sensitivity to sex as a classifying factor entered into the analysis. Clear priority classifications are plainly relevant to the State's interest in reducing administrative disputes. Even if the requirement be that the means bear a "significant relationship" to the state's purpose . . . the test would seem to have been met in *Reed*. Only by importing some special suspicion of sex-related means from the new equal protection area can the result be made entirely persuasive.

Gunther, *supra* note 23, at 34. Gunther labelled this ambiguous heightened standard, disguised by the Court as minimal scrutiny, as "rationality with bite." *Id.* Reaction to the *Reed* decision in some circles was less than positive: "there is a real danger in the future that *Reed* will be used to *deny* the claims of women plaintiffs. . . . *Reed* reaffirms the heavy burden of proof that the plaintiff must meet, and may well demonstrate that only in the most blatant cases will relief be granted." Hodes, *A Disgruntled Look at* Reed v. Reed, 1 WOMEN'S RTS. L. RPTR. 9 (Spring 1972).

Most lower courts recognized that *Reed* was evidence of a developing shift by the Court. *See, e.g.,* Brennan v. Independent School Dist., 477 F.2d 1292, 1296 (8th Cir. 1973) (no longer to be

The Court's departure from the minimal scrutiny standard for gender-based classifications was explicitly effected in *Frontiero v. Richardson*,[38] in which four Justices treated sex as a "suspect class" entitled to strict scrutiny.[39] Four other Justices concurred in the judgment of the Court,[40] thereby striking down a federal statute requiring ser-

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doubted that sex-based classifications are subject to scrutiny); Eslinger v. Thomas, 476 F.2d 225, 231 (4th Cir. 1973) (*Reed* represents some intermediate approach between rational basis and compelling interest); Green v. Waterford Bd. of Educ., 473 F.2d 629, 636 (2d Cir. 1973) (*Reed* calls for a more vigorous review than the rational relationship test). *But see* Robinson v. Board of Regents, 475 F.2d 707, 711 (6th Cir. 1973) (*Reed* used traditional rational basis test).

38. 411 U.S. 677 (1973). The complaint alleged that the classification violated the equal protection component of the due process clause of the fifth amendment. *Id.* at 680. *See supra* note 22.

39. 411 U.S. at 688. Justice Brennan wrote the plurality opinion joined by Justices Douglas, White and Marshall.

Justice Brennan rested his conclusion primarily on two factors, equally applicable to race—the highly visible nature of the sex characteristic, and the fact that sex is an immutable characteristic fixed at birth, yet unrelated to one's ability to perform or contribute to society. *Id.* at 685-87.

In addition, the plurality, citing numerous examples of federal legislation aimed at elimination of sex discrimination, argued that "Congress itself has concluded that classifications based on sex are inherently invidious." *Id.* at 687. The plurality also noted that women, like blacks, have experienced notorious discrimination and that both have been excluded from the political process. *Id.* at 685-86. *But see* University of Cal. Regents v. Bakke, 438 U.S. 265, 303 (1978) ("the perception of racial classification as inherently odious stems from a lengthy and tragic history that gender-based classifications do not share."). For a brief discussion of the history of sex discrimination and the Court's varying recognition of that legacy, see *infra* note 43.

A number of commentators have argued that sex shares the same essential characteristics as race and should be accepted as a suspect class. *See* Gertner, Bakke *on Affirmative Action for Women: Pedestal or Cage?,* 14 HARV. C.R.-C.L. L. REV. 173 (1979); Johnston & Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective,* 46 N.Y.U.L. REV. 675 (1971); Lombard, *Sex: A Classification in Search of Strict Scrutiny,* 21 WAYNE L. REV. 1355 (1975); Shaman, *College Admissions Policies Based on Sex and the Equal Protection Clause,* 20 BUFFALO L. REV. 609 (1971); Wasserstrom, *Racisim, Sexism and Preferential Treatment: An Approach to the Topics,* 24 U.C.L.A. L. REV. 581 (1977); Note, *The Emerging Bifurcated Standard for Classifications Based on Sex,* 1975 DUKE L.J. 163; Note, *supra* note 28; Note, *Sex Discrimination and Equal Protection: The Question of a Suspect Classification,* 5 N.Y.U. REV. L. & SOC. CHANGE 1 (1977); Comment, *Waiting for Mr. Justice Powell: The Supreme Court and Sex Based Discrimination,* 5 CAP. U.L. REV. 227 (1976); Comment, *supra* note 4. *But see* Rutherglen, *Sexual Equality in Fringe Benefit Programs,* 65 VA. L. REV. 199, 205-11 (1979) (arguing that any analogy between race and sex for constitutional purposes should be abandoned).

A few courts, prior to *Frontiero*, held sex to be a suspect class or advocated such an approach. *See, e.g.,* Lamb v. Brown, 456 F.2d 18 (10th Cir. 1972); United States *ex rel.* Robinson v. York, 281 F. Supp. 8 (D. Conn. 1968). *Accord* Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971) (sex found to be a suspect class under the California Constitution by the same reasoning as used in *Frontiero*). *Cf.* Maxwell v. Department of Social & Health Servs., 30 Wash. App. 591, 636 P.2d 1102 (1981) (gender-based classifications suspect under the Washington State constitution and subject to strict scrutiny).

40. Justice Stewart concurred on the basis of *Reed*, arguing that the statute worked invidious

vicewomen, but not servicemen, to meet procedural and substantive requirements to obtain dependents' benefits.[41] The concurring Justices disapproved, however, of the plurality's treatment of sex as a suspect class.[42] The confusion resulting from the Court's use of conflicting standards in *Reed* and *Frontiero* increased with its initial encounters with benign[43] sex discrimination in *Kahn v. Shevin*[44] and *Schlesinger v.*

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discrimination. 411 U.S. at 691. Justice Powell, joined by Chief Justice Burger and Justice Blackmun, argued that it was unnecessary to decide if sex was a suspect classification, because *Reed* was determinative. In addition, Justice Powell argued that finding sex to be a suspect class would render the Equal Rights Amendment superfluous at a time when it was before the populace; deference to the democratic process was, therefore, necessary. *Id.* at 692 (Powell, J., concurring).

41. 37 U.S.C. § 401 (1972), *amended by* 10 U.S.C. § 1072(2)(c) (1976), *repealed by* Defense Officer Personnel Management Act, 95 Stat. 2835, 3877 (1980). The statute permitted a member of the uniformed services—defined as the Army, Navy, Air Force, Marines, Coast Guard, Environmental Science Service Administration and Public Health Service, 37 U.S.C. § 401(3); 10 U.S.C. § 1072(1) (1976), *amended by* Pub. L. 96-513 § 516(1)(A), 94 Stat. 2835—to obtain larger quarters and greater medical benefits by claiming his wife as a dependent, without regard to whether she was actually dependent on him for support.

A servicewoman, however, could only obtain similar benefits if her husband was in fact dependent on her for over one-half of his support, 37 U.S.C. § 401(1) (1972); 10 U.S.C. § 1071(C) (1972). 411 U.S. at 178-79.

The plurality rejected the government's proferred justification of administrative convenience and expense. 411 U.S. at 690. In addition to the fact that there was no "concrete" evidence that the different treatment would save the government money, the plurality noted that the statute was based on an impermissible conclusive presumption of dependence: "[T]hese statutes seize upon a group—women—who have historically suffered discrimination in employment, and rely on the effects of this past discrimination as a justification for heaping additional economic disadvantages." *Id.* at 689 n.22. The government's interest in "speed and efficiency" was therefore inappropriate under both strict scrutiny and the standard applied in *Reed*. *Id.* at 690. Justice Rehnquist, dissenting, agreed with the district court that the classification satisfied the *Reed* standard by rationally promoting the legitimate purpose of administrative convenience. *Id.* at 691 (Rehnquist, J., dissenting). *See* Frontiero v. Laird, 341 F. Supp. 201 (M.D. Ala. 1972).

42. Classifications that involve a suspect class or impinge on a fundamental right are subject to the strict scrutiny test, which requires that the scheme be necessary to achieve a compelling governmental interest. *See supra* note 23.

One commentator has described the application of this test as "strict in theory, fatal in fact." Gunther, *supra* note 23, at 21. *See also* University of Cal. Regents v. Bakke, 438 U.S. 265, 362 (1978) (Brennan, J., concurring in the judgment in part and dissenting).

43. The term "benign" denotes that the asserted purpose of the legislation is to compensate for past discrimination. *See supra* note 3; *see also* Califano v. Webster, 430 U.S. 313 (1977). *Cf.* University of Cal. Regents v. Bakke, 438 U.S. 265 (1978) ("benign" used in context of racial discrimination). For an analysis of the Court's differing treatment of benign racial and sexual classifications, see Gertner, *supra* note 39, at 179-95.

The Court has acknowledged the legacy of sexual discrimination with varying degrees of sympathy. *See, e.g.,* Califano v. Webster, 430 U.S. 313, 317 (1977) (per curiam) ("[r]eduction in the disparity in economic condition between men and women caused by the long history of discrimination against women has been recognized as . . . an important governmental objective); Stanton v. Stanton, 421 U.S. 7, 14-15 (1975) ("[n]o longer is the female destined solely for the home and

Ballard.[45]

In *Kahn*, the Court rejected a challenge to a Florida statute granting a property tax exemption to all widows but not to widowers.[46] Finding that the financial difficulties confronting a widow greatly exceeded those faced by a widower,[47] the Court concluded that the unequal treatment of the gender-based classes satisfied the "rationality with

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the rearing of the family, and only the male for the marketplace and world of ideas"); Kahn v. Shevin, 416 U.S. 351, 353 (1974) ("[w]hether from overt discrimination or from the socialization process of a male dominated culture, the job market is inhospitable to the woman seeking any but the lowest paid jobs"); Frontiero v. Richardson, 411 U.S. 677, 684 (1973) ("[t]here can be no doubt that our Nation has had a long and unfortunate history of sex discrimination").

Discrimination against women has been, and to some degree still is, pervasive in our society. *See generally* L. KANOWITZ, WOMEN AND THE LAW: THE UNFINISHED REVOLUTION 1-6 (1969). Our common-law heritage viewed a woman's relationship to her husband as "something better than a dog, a little dearer than his horse." A. TENNYSON, LOCKLEY HALL (1842), *quoted in* Cavanagh, *"A Little Dearer than His Horse:" Legal Stereotypes and the Feminine Personality,* 6 HARV. C.R.-C.L. L. REV. 260, 260 (1971). For a summary of economic, political, social, and legal disadvantages suffered by women in American society, see generally B. BROWN, A. FREEDMAN, H. KATZ & A. PRICE, *supra* note 28; E. FLEXNOR, CENTURY OF STRUGGLE (1959); L. GOLDSTEIN, THE CONSTITUTIONAL RIGHTS OF WOMEN (1979); L. KANOWITZ, *supra*, at 5-62; H. KAY, *supra* note 12, at 1-12; THE PRESIDENT'S TASK FORCES ON WOMEN'S RIGHTS AND RESPONSIBILITIES, REPORT: A MATTER OF SIMPLE JUSTICE (1970); Ginsburg, *supra* note 28, at 161-64; Johnston & Knapp, *supra* note 39, at 731-37; Comment, *supra* note 4, at 603 n.93.

The discriminatory aspects of education have been subject to particular criticism:

> The education system is at least in part responsible for limiting opportunities for women. Everyday, female students in elementary and secondary schools are victimized by being exposed to various degrees of subtle sex stereotyping as well as overt discrimination. The continued use of sexually based textbooks, the practice of counseling young women students to take traditionally "acceptable" courses within the regular academic and occupational preparation curricula and similarly restrictive administrative policies which limit female participation and involvement in extracurricular activities effectively serve to limit women's perceptions of themselves.

14 CLEARINGHOUSE REVIEW 1048 (1981). *See generally* L. BAKER, I'M RADCLIFFE! FLY ME! THE SEVEN SISTERS AND THE FAILURES OF WOMEN'S EDUCATION (1976); 2 T. WOODY, A HISTORY OF WOMEN'S EDUCATION IN THE UNITED STATES (1929); Comment, *supra* note 4, at 600-07.

44. 416 U.S. 351 (1974).

45. 419 U.S. 498 (1975).

Between *Kahn* and *Schlesinger*, the Court decided Geduldig v. Aiello, 417 U.S. 484 (1974). In *Geduldig,* the Court rejected an equal protection challenge to a state disability insurance plan that excluded pregnancy from its coverage. The majority found the statutory scheme constitutional under the rational basis test, arguing that there was no gender-based discrimination because the act differentiated between pregnant women and nonpregnant *persons*. *Id.* at 496 n.20. Justices Brennan, Douglas and Marshall, in dissent, argued that the classification was inherently sex-based and therefore subject to the strict scrutiny test. *Id.* at 501, 503-04. *See also* Nashville Gas Co. v. Satty, 434 U.S. 136 (1977); General Elec. Co. v. Gilbert, 429 U.S. 125 (1976).

46. 416 U.S. at 353.

47. *Id.* The Court relied extensively on statistics that demonstrated that women's median earnings were substantially lower than men's earnings.

bite" standard of *Reed*.[48]

In *Schlesinger*, the Court upheld a federal statute which mandated the discharge of female naval officers who had twice failed to be promoted after thirteen years, while requiring the discharge of similarly situated male officers after only nine years.[49] Finding that men and women line officers were not similarly situated with respect to career opportunities,[50] the Court held that the additional time granted women in the "up or out" scheme was rationally related to the legitimate governmental objective of achieving fair and equitable career advancement programs.[51]

Although the Court in both *Kahn* and *Schlesinger* purported to employ the calculus for sex-discrimination developed in *Reed* and *Frontiero*, the majority in each case adopted a more deferential attitude because remedial statutes were involved.[52] The Court, therefore, applied a less rigorous equal protection standard when evaluating the validity of benign gender-based classifications that disadvantage men.[53]

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48. *Id.* at 355. Justice Douglas, writing for the majority in *Kahn*, found that the legislation was reasonably designed to further the state policy of cushioning the financial impact of spousal loss "upon the sex for which that loss imposes a disproportionately heavy burden." *Id.* at 355.

The majority opinion impliedly rejected the argument that the property-tax exemption was unrelated to any area in which women suffered discrimination, such as education, housing, financing, and public accommodations. Reply Brief for Appellant at 3-4, Kahn v. Shevin, 416 U.S. 351 (1974). This argument now commands a Court majority. *See* Orr v. Orr, 440 U.S. 268, 284 (1979) (Blackman, J., concurring).

The majority opinion in *Kahn* also evinces a great deference to taxing legislation. 416 U.S. at 355. Justice Brennan, in dissent, agreed that the ameliorative legislative purpose served a compelling governmental interest, but focused on the overbreadth of the statute, which granted an exemption to widows who had no need for financial support from the state. The majority refused to address this argument. *Id.* at 360. Justice White, also in dissent, applied the strict scrutiny test and concluded that the statute served no compelling interest. *Id.* at 361.

49. 10 U.S.C. §§ 6382, 6401 (1970). As in *Frontiero*, the complainant asserted the action under the equal protection component of the fifth amendment. *See supra* note 22.

50. 419 U.S. at 508. The restrictions on women officers' participation in certain areas which allegedly were the cause of diminished opportunities were not challenged. *Id.* at 508. *But see* Owens v. Brown, 455 F. Supp. 291 (D.D.C. 1978) (restrictions against women serving in Navy at sea unconstitutional). *See generally* Erickson, *supra* note 28; Roberts, *Gender-Based Draft Registration, Congressional Policy and Equal Protection: A Proposal for a Deferential Middle-Tier Review,* 27 WAYNE L. REV. 35 (1980); 59 WASH. U.L.Q. 1371 (1982).

51. Justices Brennan, Marshall and Douglas dissented. They argued that the majority had "conjured up" a legislative purpose that might conceivably have been Congress' intention but which was nowhere reflected in the legislative history. 419 U.S. at 511. Such an objective, they argued, fell far short of the compelling interest needed to satisfy the strict scrutiny test. *Id.* at 520.

52. *See supra* notes 47-48 & 50-51 and accompanying text. *See also infra* note 57.

53. *See generally* Erickson, Kahn, Ballard & Wiesenfield: *A New Equal Protection Test in "Reverse" Sex Discrimination Cases?,* 42 BROOKLYN L. REV. 1 (1975); Ginsburg, *Women, Equality*

In *Weinberger v. Weisenfeld*,[54] however, the Court began a retreat from a dual standard and appeared to move towards a single standard of heightened scrutiny for all sex discrimination cases. In *Weinberger*, the Court invalidated a provision of the Social Security Act that provided benefits to the wife and children of a deceased male, but provided similar benefits only to the children, and not the husband, of a deceased female.[55] The Court found that the Act discriminated against women, and focused on the discriminatory impact on covered female wage-earners rather than the palpably discriminatory effects on surviving male spouses.[56] More importantly, after a detailed inquiry into the legislative history, the Court rejected the Government's assertion that the statute was originally designed to compensate women for past economic discrimination.[57] This rejection reflected the Court's growing insistence that any compensatory justification for discrimination be

and the Bakke *Case,* 4 CIV. LIB. REV. 8 (1977); Ginsburg, *supra* note 41; Johnston, *Sex Discrimination and the Supreme Court, 1971-1974*, 49 N.Y.U. L. REV. 617 (1974); Note, *supra* note 39; Note, *Preferential Economic Treatment of Women: Some Constitutional and Practical Implications of* Kahn v. Shevin, 28 VAND. L. REV. 843 (1975). For a forceful argument that benign classifications foster continued discrimination against men and should be an impermissible justification for sex discrimination, see Kanowitz, *supra* note 3.

54. 420 U.S. 636 (1975). Between *Schlesinger* and *Weinberger*, the Court held that a state statute providing an automatic exclusion for women from jury rosters violated the sixth amendment, Taylor v. Louisiana, 419 U.S. 522 (1975), which effectively overruled Hoyt v. Florida, 368 U.S. 57 (1961). *See supra* note 28.

55. *See* 42 U.S.C. § 402(g) (1970 & Supp. 1972).

56. 420 U.S. at 645. *See infra* note 73. This is one of the few sex discrimination cases in which the judgment of the Court was unanimous. *See supra* note 33.

The majority found the scheme essentially indistinguishable from that invalidated in *Frontiero*. 420 U.S. at 645. Both classifications were premised on "virtually identical 'archaic and overbroad' generalizations . . . 'not tolerated under the Constitution.'" *Id.* at 643 (quoting Schlesinger v. Ballard, 419 U.S. 498, 507 (1975)). In *Frontiero*, the Court claimed, the impermissible assumption underlying the statute was that female spouses of servicemen were normally dependent upon their husbands while the reverse was not true. 420 U.S. at 643. Here, the impermissible assumption underlying the Social Security Act provision was that the earnings of a covered male worker were vital to the support of the families, but the earnings of a covered female wage-earner did not comprise a substantial contribution to the families' support. *Id.* at 643. The Court concluded that the statute therefore operated to "deprive women of protection for their families which men receive as a result of their employment." *Id.* at 645. Justice Powell, joined by Chief Justice Burger, concurred, but viewed the classification as impermissibly discriminating against the female worker because it provided her *family* with less protection. *Id.* at 654 (Powell, J., concurring).

57. 420 U.S. at 653. The Court found that the provision itself and the legislative history indicated that the true purpose of the statute was to permit women with minor children to elect not to work in order to care for the children. *Id.* at 648. The statute was therefore completely irrational because a surviving father, no less than a surviving mother, could perform that function. *Id.* at 649-52. *See also* Stanley v. Illinois, 405 U.S. 645 (1972) (father has a constitutionally protected right to custody and management of children he sires and raises). Justice Rehnquist con-

"genuinely rooted" in the actual legislative purpose,[58] thereby limiting the circumstances under which a remedial governmental purpose could justify gender discrimination.[59]

An intermediate standard of scrutiny in equal protection analysis[60] was finally confirmed in *Craig v. Boren*,[61] in which the Court acknowledged that gender-based classifications were subject to a standard of review more exacting than the rational basis test but less rigorous than strict scrutiny.[62] Although the majority did not explicitly recognize a new standard of scrutiny, the Court, insisting that the case was controlled by *Reed*,[63] announced that "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[64] Applying this standard to an Oklahoma statute[65] which set a higher age for men than women for the

curred in the result solely on this ground, finding it unnecessary to determine if the statute violated the equal protection component of the fifth amendment. *Id.* at 655. *See supra* note 22.

58. G. GUNTHER, *supra* note 4, at 791 n.2. *See, e.g.*, Michael M. v. Superior Court, 450 U.S. 464, 470 (1981); Califano v. Westcott, 443 U.S. 76, 86 (1979); Califano v. Webster, 430 U.S. 313, 317 (1977); Califano v. Goldfarb, 430 U.S. 199, 212-13 (1977). *See also* Schlesinger v. Ballard, 419 U.S. 498, 512-20 (Brennan, J., dissenting) (arguing that the Court must restrict its analysis to the purposes that can be gleaned from the legislative history and not conjure up others).

59. *See* Baker, *supra* note 23, at 1089; Erickson, *supra* note 53, at 36; Note, *The Supreme Court, 1976 Term,* 91 HARV. L. REV. 72, 179 (1977).

60. *See supra* notes 2 & 23 and accompanying text. *See also* Stanton v. Stanton, 421 U.S. 7 (1975), in which the Court, relying on *Reed*, struck down a Utah statute that set different ages of majority for men and women. Finding that the classification was based on outmoded notions and stereotypes, *id.* at 14-15, the Court concluded that the classification was unconstitutional under strict scrutiny, the *Reed* formulation of minimal scrutiny, or "something in between." *Id.* at 17.

61. 429 U.S. 190 (1976). Although *Craig* set forth a new standard, the Justices wrote seven opinions.

62. *See supra* note 23 and accompanying text.

63. Throughout the majority opinion, Justice Brennan reiterated the Court's reliance on *Reed*. 429 U.S. at 197, 198, 199, 200.

64. *Id.* at 197. Other members of the Court and commentators recognized this formulation as a new standard. *See id.* at 210 n.* (Powell, J., concurring) ("our decision today will be viewed by some as a 'middle-tier' approach"). *See also* Blattner, *supra* note 26, at 792; Ginsburg, *supra* note 28, at 168; Karst, *The Supreme Court, 1976 Term,* 91 HARV. L. REV. 1, 54 (1977); Note, *Sexual Equality: Not for Women Only,* 29 CATH. U.L. REV. 427, 441 (1980); Note, *The Supreme Court, 1980 Term,* 95 HARV. L. REV. 91, 161-62 (1981); Note, *Supreme Court Review: 1978-1979 Term,* 7 HASTINGS CONST. L.Q. 315, 443 (1980); Note, *Broadening Access to the Courts and Clarifying Judicial Standards: Sex Discrimination Cases in the 1978-1979 Supreme Court Term,* 14 U. RICH. L. REV. 515, 565-66 (1980). *See generally* G. GUNTHER, *supra* note 4, at 764-84.

65. OKLA. STAT. tit. 37, §§ 241, 245 (1958 & Supp. 1976). This statute permitted women to purchase 3.2% beer at the age of 18, but set the age of sale to men at 21.

This was the first time the Court struck down a gender-based law discriminating against men under the equal protection clause. *See also* Caban v. Mohammed, 441 U.S. 380 (1979) (New York law permitting unwed mother but not unwed father to prevent adoption of child violates equal

purchase and consumption of 3.2% beer,[66] the Court found that the classification was not substantially related to the governmental interest in protecting the public safety.[67]

In the context of benign discriminatory classifications, the Court adhered to the *Craig* standard in *Califano v. Goldfarb*[68] and *Califano v. Webster*,[69] companion cases involving equal protection challenges to provisions of the Social Security Act.[70] In *Goldfarb*, the Court set aside a provision[71] granting survivor benefits to women, but not to men without an additional showing of financial dependency on the deceased wife.[72] As in *Weinberger*,[73] the plurality[74] focused on the Act's discriminatory impact on women and found that the statute did not substantially further any important governmental purpose.[75] Justice Stevens

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protection clause); Orr v. Orr, 440 U.S. 268 (1979) (Alabama law providing that husbands but not wives may be required to pay alimony on divorce violates equal protection clause).

66. 429 U.S. at 202-04. The Court also conducted a rigorous analysis of the statistical evidence adduced by the State as justification for the statute, and concluded that it was methodologically suspect. *Id.* at 204. The state's statistical evidence indicated that 2% of males and .18% of females of the relevant age group were arrested for driving while intoxicated. *Id.* at 201. The Court rejected these statistics as providing "an unduly tenuous" basis on which to support a classification based on sex. *Id.* at 202. Moreover, the Court expressed a general reluctance to rely on statistics in these cases: "this merely illustrates that proving broad sociological propositions by statistics is a dubious business, and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause." *Id.* at 204.

67. *Id.* at 204. Although the Court accepted the state's asserted governmental purpose, it noted that such a purpose was not apparent on the face of the statute nor in the scarce legislative materials. *Id.* at 199 n.7.

68. 430 U.S. 199 (1977). One commentator refered to this five-four decision as the "second step in a litigation campaign aimed at advancing the *Frontiero* judgment and containing the *Kahn* decision." *See* Ginsburg, *Some Thoughts on Benign Classification in the Context of Sex,* 10 CONN. L. REV. 813, 819 (1978).

69. 430 U.S. 313 (1977) (per curiam).

70. *See infra* notes 71 & 79 and accompanying text.

71. 42 U.S.C. § 402(f)(1)(D) (1976).

72. 430 U.S. at 217.

73. *Id.* at 203-06. The plurality in *Goldfarb* explicitly rejected the argument glossed over in *Weinberger,* that the proper judicial focus should be the discriminatory impact on the male beneficiary. The Court argued that the social security system is a form of insurance for the wage earner, and the proper focus was thus on the individual denied the protection to which they had contributed, even though the entire family benefited from the system. *Id.* at 208-09.

74. Justice Brennan wrote for the plurality, joined by Justices White, Marshall and Powell.

75. *Id.* at 212-17. Relying again on *Weinberger*, the Court found that the asserted governmental objective of providing independent widows with benefits to compensate for past job discrimination against women was reflected neither on the face of the statute nor in the legislative history. *Id.* at 212-15. The Court then held, following *Frontiero* and *Weinberger*, that the presumption which served as the basis of the statute, that wives were dependent on their husband,

argued that the provision actually discriminated against men,[76] but concurred in the judgment because the provision was merely the "accidental by-product of a traditional way of thinking about females," and was therefore insufficient justification for the discrimination.[77] Three weeks later, however, the Court in *Califano v. Webster*[78] upheld the Act's use of a formula that granted women an advantage over men in computing old-age benefits.[79] In contrast to *Goldfarb*, the Court found that the important governmental objective of compensating women for past economic discrimination was amply reflected in the legislative history as the deliberate purpose of the provision.[80]

In two recent equal protection cases, the Court appeared to attenuate the degree of scrutiny imposed under the *Craig* test.[81] In *Michael M. v. Superior Court*,[82] the Court upheld California's gender-based statutory rape law[83] under the *Craig* test,[84] described by the plurality as a somewhat "sharper focus[ed]" minimum scrutiny standard.[85] Justice Rehnquist, writing for the plurality,[86] argued that the statute justifiably discriminated against men because the sexes were not similarly situated

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was based on "archaic and overbroad" generalizations, and could not serve as a legitimate state interest. *Id.* at 217.

76. *Id.* at 218. Justice Stevens also concurred in *Craig* on the grounds that the statute discriminated against males. 429 U.S. at 212 (Stevens, J., concurring). *See supra* notes 61-67 and accompanying text.

77. 430 U.S. at 221-223. Justice Stevens also concluded that the decision in *Weinberger* effectively overruled *Kahn* because it was unlikely that the state in *Kahn* could prove that a benign purpose of the classification could be found in the legislative history. *Id.* at 223-24. *See supra* notes 46-48 and accompanying text.

78. 430 U.S. 313 (1977) (per curiam).

79. Social Security Act § 215(b), 42 U.S.C. § 4115(b) (1976 & Supp. IV 1980).

80. 430 U.S. at 317. The Court concluded that the statutory scheme was therefore more analogous to those upheld in *Kahn* and *Ballard* than to those invalidated in *Weinberger* and *Goldfarb*. *Id.* at 317. *But cf. supra* note 77. The Court also held that the provision "directly" compensated women for past economic discrimination because retirement benefits paid to covered workers were based on past earnings. *Id.* at 318.

81. *See* G. GUNTHER, *supra* note 4, at 126-27 (Supp. 1982); Cassen, *Equal Protection—Equal Status: A Summary of Sex Discrimination Cases Since Frontiero,* 11 LINCOLN L. REV. 167, 168 (1980); Dubnoff, *Sex Discrimination and the Burger Court: A Retreat in Progress?,* 50 FORDHAM L. REV. 369, 410-14 (1981).

82. 450 U.S. 464 (1981).

83. CAL. PENAL CODE § 261.5 (West Supp. 1981). This statute penalizes only males for engaging in sexual intercourse with a female who is under the age of 18 and who is not the wife of the male.

84. *See supra* notes 61-67 and accompanying text.

85. *See supra* notes 31-37 and accompanying text.

86. Chief Justice Burger and Justices Stewart and Powell joined Justice Rehnquist.

with respect to the state's objective of preventing teenage pregnancies.[87]

In *Rostker v. Goldberg*,[88] the Court, upholding the male-only draft registration requirements of the Military Selective Service Act,[89] carved out an exception to the heightened scrutiny mandated by *Craig* in the exercise of Congress' military powers.[90] Arguing for the majority that the degree and scope of judicial scrutiny was altered by the deference traditionally paid Congress in military affairs,[91] Justice Rehnquist applied a standard less strict than the *Craig* standard but more exacting

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87.

> We need not be medical doctors to discern that young men and young women are not similarly situated with respect to the problems and the risks of sexual intercourse. Only women may become pregnant, and they suffer disproportionately the profound physical, emotional, and psychological consequences of sexual activity. The statute at issue here protects women from sexual intercourse at an age when those consequences are particularly severe.

450 U.S. at 471-72. Justice Rehnquist admitted that there was some question regarding the actual intent behind the statute. *Id.* at 469-70. He argued, however, that the state's asserted purpose was entitled to deference, and that under *Weinberger*, the Court could reject professed justification only if it "*could not* have been the goal of the legislation." 450 U.S. at 470 (quoting Weinberger v. Weisenfeld, 420 U.S. 636, 648 n.16) (emphasis added). Justice Rehnquist also argued that even if the actual motive were the preservation of female chastity, an impermissible justification resting on archaic stereotypes, 450 U.S. at 472 n.7, the statute would still be constitutional because "[i]t is a familiar practice of constitutional law that this court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *Id.* (quoting United States v. O'Brien, 391 U.S. 367, 383 (1968)).

The dissenters argued that the plurality and concurring Justices, in their rush to find the state's asserted interest important, had misapplied the second half of the *Craig* test, which requires that the means be substantially related to the ends. 450 U.S. at 488-89 (Brennan, J., dissenting). Justice Rehnquist, in response, noted that "[t]he question whether a statute is *substantially* related to its asserted goals is at best an opaque one." *Id.* at 474 n.10 (emphasis in original).

88. 453 U.S. 57 (1981).

89. 50 U.S.C. app. §§ 451-473 (1976) (repealed in part §§ 452, 457). The specific section challenged in *Rostker* provided for the registration of every male citizen between the ages of 18 and 26. 50 U.S.C. app. § 453 (1976).

90. 453 U.S. 57, 69-70 (1981). Justice Rehnquist argued that a military-powers exception already existed in some measure. *Id.* at 67-72 (citing Schlesinger v. Ballard, 419 U.S. 498 (1975) (sex discrimination in military programs); Frontiero v. Richardson, 411 U.S. 677 (1973) (same)). *See also* United States v. Reiser, 532 F.2d 673 (9th Cir.) (rejecting equal protection challenge to male-only draft registration using rational relation test), *rev'g* United States v. Reiser, 394 F. Supp. 1060 (D. Mont. 1975) (holding all-male draft registration unconstitutional by application of the strict scrutiny test), *cert. denied*, 429 U.S. 838 (1976); Owens v. Brown, 455 F. Supp. 291 (D.D.C. 1978) (invalidating, on equal protection grounds, military policy banning assignment of women to sea duty and rejecting assertion that Congress is owed great deference in all areas of military affairs). *See generally supra* notes 47-50 and accompanying text.

91. 453 U.S. at 64-67. *See generally* Roberts, *Gender Based Draft Registration, Congressional Policy and Equal Protection: A Proposal for Deferential Middle-Tier Review*, 27 WAYNE L. REV. 35 (1980); Note, *Women and the Draft: The Constitutionality of All-Male Registration*, 94 HARV. L. REV. 406 (1980); Comment, *supra* note 50.

than the minimum rationality test urged by the Government.[92] With the exceptions of *Michael M.* and *Rostker*,[93] however, the Court has consistently applied the *Craig* standard to gender-based classifications that discriminate against women or men for an allegedly compensatory purpose.[94]

The Supreme Court has not given plenary consideration to the constitutional issue engendered by sex-based discriminatory admissions policies at public educational facilities;[95] the Court has limited its prec-

92. 453 U.S. at 69. Justice Rehnquist sidestepped an explicit statement of a standard of review, arguing that "any further 'refinement' in the applicable tests" would prove to be of little value. *Id.* at 69. He further argued that the equal protection analysis, with its "labels," "may all too readily become facile abstractions used to justify a result." *Id.* at 70.

93. *See supra* note 81 and accompanying text.

94. *See, e.g.*, Kirchberg v. Feenstra, 450 U.S. 455 (1981) (Louisiana statute giving husband exclusive right to dispose of jointly owned property unconstitutional absent important governmental interest); Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142 (1980) (Missouri worker's compensation statute denying widower benefits on wife's work-related death unless physically or mentally incapacitated or capable of proving dependence on wife's earnings, but granting widow death benefits without proof of dependence discriminates against men and women alike and does not serve important governmental objective of administrative convenience); Califano v. Westcott, 443 U.S. 76 (1979) (Social Security Act provision providing AFDC benefits to families with dependent children who have been deprived of parental support because of father's unemployment, but not providing benefits if mother is unemployed, not substantially related to achieving important governmental objectives of providing aid to needy children and reducing incentive for fathers to desert to make families eligible for assistance); Caban v. Mohammed, 441 U.S. 380 (1979) (New York statute permitting unwed mother but not unwed father from preventing adoption of child by withholding consent is not substantially related to any important governmental interest); Orr v. Orr, 440 U.S. 268 (1979) (Alabama statute imposing alimony obligations on husbands but not wives not substantially related to the governmental objective of compensating women for past discrimination in marriage). *But see* Parham v. Hughes, 441 U.S. 347 (1979) (Georgia statute permitting mother of an illegitimate child, but not father, to sue for wrongful death of child is not individually discriminatory and is therefore subject to the rational relation standard, which it meets). *See also* Personnel Adm'r v. Feeney, 442 U.S. 256 (1979) (Massachusetts statute granting absolute lifetime civil service preference to veterans is not evaluated under gender-based discrimination standards despite the fact that the overwhelming number of veterans are male).

Gender-neutral classifications that have a disproportionately adverse impact on women must reflect purposeful gender-based discrimination to be subject to "heightened scrutiny" under the equal protection clause of the fourteenth amendment. *Id. See* Rogers v. Lodge, 102 S. Ct. 3272 (1982); Mobile v. Bolden, 446 U.S. 55 (1980); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976). *See generally* Brest, *Reflections on Motive Review*, 15 SAN DIEGO L. REV. 1141 (1978).

95. Admissions as well as other educational policies at public educational facilities are governed in large part by federal statutes. Title IX of the Educational Amendments of 1972, 20 U.S.C. §§ 1681-1686 (1976 & Supp. IV 1980), prohibits, with certain exceptions, gender-based discriminatory policies in undergraduate, graduate, professional, and vocation schools. *See supra* note 15. The Equal Education Opportunity Act of 1974, 20 U.S.C. §§ 1701-1758 (1976 & Supp. IV 1980) may bar sex discrimination in public secondary and primary schools on the basis of sex.

edential contribution to the summary affirmance of two federal court decisions.[96] A number of federal and state courts, however, have confronted equal protection challenges to single-sex admissions policies. These courts have consistently validated sexually segregated schools when the state, on a system-wide basis, has provided equal educational opportunities to members of the other sex in a similarly segregated facility.[97]

See United States v. Hinds County School Bd., 560 F.2d 619 (5th Cir. 1977) (permanent policy assigning students on basis of sex violates Act). *But see* Vorchheimer v. School Dist., 532 F.2d 880 (3d Cir. 1976), *aff'd mem. by an equally divided Court,* 430 U.S. 703 (1977) (Act does not apply where record does not disclose inequality in opportunity between the sexes).

96. *See supra* note 95; Williams v. McNair, 316 F. Supp. 134 (D. S.C. 1970), *aff'd,* 401 U.S. 951 (1971). *See infra* note 98 and accompanying text. "[V]otes to affirm summarily, and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case. . . ." Ohio *ex rel.* Easton v. Price, 360 U.S. 246, 247 (1959), *quoted in* Hicks v. Miranda, 422 U.S. 322, 344 (1974). *See generally* C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 495 (2d ed. 1970).

97. In Vorchheimer v. School Dist., 532 F.2d 880 (3d Cir. 1976), *aff'd mem. by an equally divided Court,* 430 U.S. 703 (1977), the Third Circuit held that an all-male public high school violated neither the equal protection clause of the fourteenth amendment nor the provisions of the Equal Education Opportunity Act of 1974 if the female complainant had the opportunity to attend a comparable all-female public high school. The court relied heavily on the Supreme Court's summary affirmance of Williams v. McNair, 316 F. Supp. 134 (D.S.C. 1970), *aff'd,* 401 U.S. 951 (1971), which presented a very similar fact situation, and found that the sex-segregated admissions policy satisfied either the minimal scrutiny or the substantial relationship test. 532 F.2d at 888. The court concluded that the plaintiff's only real complaint, the personal inconvenience of being unable to attend a specific school, was outweighed by the need for innovative methods and techniques in education. *Id.*

In *Williams v. McNair*, a three-judge district court, relying on the Supreme Court's sex discrimination cases decided before *Reed*, rejected an equal protection attack on a statute that limited admission to a state college to women. The district court concluded that an all-women's college and an all-male college, maintained as part of a state system offering a variety of comparable coeducational facilities, were not without rational educational and legal justification. 316 F. Supp. at 137-38.

In Kirstein v. Rector of Univ. of Va., 309 F. Supp. 184 (E.D. Va. 1970), however, the court found that the single-sex admission policy at the University of Virginia main campus violated the fourteenth amendment's due process clause because there was no "equal" facility. Finding the facility's resources and educational opportunities substantially superior to those offered at any other state-supported facility, the district court concluded that the exclusionary policy was not rational.

In Allred v. Heaton, 336 S.W.2d 251 (Tex. Civ. App. writ ref'd n.r.e.), *cert. denied,* 364 U.S. 517 (1960), and in Heaton v. Bristol, 317 S.W.2d 86 (Tex. Civ. App. 1958), *cert. denied,* 359 U.S. 230 (1959), a state appellate court upheld the right of the state to maintain a separate all-male college within a state-wide system that included an all-women's college and a variety of coeducational facilities. In *Bristol*, which served as the basis for the subsequent decision in *Allred*, the court characterized the nature of the plaintiff's injury as one of convenience. This, the court held, was no different from the burden incurred by students who reside in towns miles distant from schools. 317 S.W.2d at 99. "The location of any such institution must necessarily inure to the benefit of

In *Mississippi University for Women v. Hogan*,[98] the Supreme Court held that a state statute denying an otherwise qualified male the right to enroll in a state-supported nursing program violates the equal protection clause of the fourteenth amendment.[99] Justice O'Connor, writing for the majority,[100] began[101] by noting that "without question" the State's admissions policy expressly discriminated on the basis of gender because it imposed on Hogan "a burden he would not have to bear were he female."[102] Therefore, the state bears the burden of proving an "exceedingly persuasive justification"[103] for the sex-based classification that can be met only by satisfying the heightened standard of scrutiny established in *Craig*.[104] This heightened level of scrutiny, she emphasized, applies with equal force to classifications that discriminate

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some and to the detriment of others, depending on the distance the affected individuals reside from the institution." *Id.* at 99. The court held that the system offered ample and substantially equal provisions for the education of both sexes without exalting either sex at the expense of the other. *Id.* at 99-100.

But see Berkelman v. San Francisco Unified School Dist., 501 F.2d 1264 (9th Cir. 1974), in which the court of appeals struck down a school district's policy setting different standards for admitting men and women to a high school. Using the strict scrutiny test of *Frontiero*, the court rejected the school district's justification that the standards were set in order to maintain an equal male/female ratio, finding that the evidence justifying such an educational policy was insubstantial and proved nothing. *Id.* at 1268-70.

Criticism of these "separate but equal" decisions rests on the argument that in education, sexually separate facilities, as with race, are inherently unequal. *See generally* H. KAY, *supra* note 28, at 808; Freund, *The Equal Rights Amendment Is Not the Way,* 6 HARV. C.R.-C.L. L. REV. 234, 240 (1971); Hasgenski & Wechessee, *The Case for Strictly Scrutinizing Gender Based Separate But Equal Classification Schemes,* 52 TEMP. L.Q. 439, 444-57 (1979); Johnston & Knapp, *supra* note 39, at 721-23; Sharman, *supra* note 39, at 611-18; Note, *Toward a Redefinition of Sexual Equality,* 95 HARV. L. REV. 487, 504-06 (1981); Comment, *supra* note 4, at 620-25.

98. 102 S. Ct. 3331 (1982) (5-4 decision).

99. *Id.* at 3340. *See supra* notes 6 & 23.

100. Justices Brennan, White, Marshall, and Stevens joined Justice O'Connor.

101. At the beginning of her opinion, Justice O'Connor indicated that Mississippi maintains no other single-sex public institution of higher education. 102 S. Ct. at 3334 n.1. She concluded, therefore, that the Court was not faced with the question of "separate but equal" public institutions for men and women. *Id. See supra* note 97 and accompanying text.

102. *Id.* at 3336 n.8 (quoting Orr v. Orr, 440 U.S. 268, 273 (1979)). *See supra* note 10; *infra* note 145 and accompanying text. *Cf.* Kirstein v. Rector of Univ. of Va., 309 F. Supp. 184 (E.D. Va. 1970) (state policy excluding women from University of Virginia unreasonably forced plaintiff, married to male student, to choose between an educational opportunity and family values).

103. 102 S. Ct. at 3336.

104. Justice O'Connor responded to the criticism of the dissenters that the use of heightened scrutiny in this case was "rigid" and "productive of needless conformity" by arguing that the Court's precedents clearly establish that the intermediate standard of scrutiny is invoked whenever an express, gender-based classification is involved, regardless of the gender allegedly suffering the discrimination. *Id.* at 3336 n.9.

against men as well as those that discriminate against women.[105] Additionally, Justice O'Connor cautioned that the important statutory objective required by the *Craig* test must be free from any archaic notions or inaccurate assumptions about the proper roles of men and women in society.[106]

Under this analysis, the Court held the statutory policy unconstitutional. Justice O'Connor rejected the state's assertion that the statute's benign purpose to compensate women for past discrimination[107] was an important governmental function.[108] She admitted that benign classifi-

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105. *Id.* at 3336. *See supra* note 104.

106. Justice O'Connor stated that the important statutory objective requirement invalidates those objectives reflecting a paternalistic or protective attitude, based on the presumption that one gender suffers from "an inherent handicap" or is "innately inferior." 102 S. Ct. at 3336. She cited, as examples of statutes reflecting such archaic and stereotypic notions, the legislation involved in Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873) and Goesart v. Cleary, 335 U.S. 464 (1948). *See supra* note 28.

The *Craig* requirement that the means be directly and substantially related to the important statutory objective embodies a similar requirement. "The purpose of requiring that close relationship is 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." 102 S. Ct. at 3337. An example of such an invalid relationship, Justice O'Connor argued, was Stanton v. Stanton, 421 U.S. 7 (1975). Although the *Stanton* Court invalidated a state statute which set the age of majority for men higher than for women, it did not question the legitimacy or importance of the state interest in defining parent's obligations to support minor children. 102 S. Ct. at 3332 n.11. The Court found, however, that the relationship between the objective and the classification was based on outdated and archaic stereotypes about men's and women's roles in society. *Id.*

107. The Court frankly admitted that the purpose was educational affirmative action for women. 102 S. Ct. at 3337-38.

108. *Id.* at 3338-39. Citing *Schlesinger* as an example, Justice O'Connor conceded that "[i]n limited circumstances, a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened." *Id.* at 3338. The requirement that the aid must be deliberate is derived from Weinberger v. Weisenfeld, 420 U.S. 636 (1975), *see supra* note 58 and accompanying text; the requirement that it be direct is derived from Califano v. Webster, 430 U.S. 313 (1977), *see supra* note 80 and accompanying text.

The State had originally argued that MUW's purpose was "to provide opportunities for women which were not available to men." 102 S. Ct. at 3338 n.13. Drawing on a brief history of MUW and women's education, Justice O'Connor claimed that "the impetus for founding MUW came not from a desire to provide women with advantages superior to those offered men, but rather a desire to provide white women in Mississippi access to state-supported higher learning." *Id.* at 3338 n.13.

Justice O'Connor summarily dismissed a second objective, suggested by Justice Powell in dissent, of providing women with a choice of educational environments. *Id.* at 3340 n.17. *See id.* at 3345-47. She stated:

> Since any gender-based classification provides one class a benefit or choice not available to the other class, however, that argument begs the question. The issue is not whether the benefited class profits from the classification, but whether the State's decision to con-

cations could serve important statutory objectives, but the state must show that the classification was adopted intentionally to further a compensatory purpose.[109] In addition, the classification must benefit those members of the sex which actually suffer a disadvantage related to the classification.[110]

The Court found that neither criterion was satisfied. Justice O'Connor argued that the state failed to show that women faced discriminatory barriers or lacked opportunities in the field of nursing;[111] in fact, women have traditionally dominated the profession.[112] Therefore, the benign statutory objective tended to "perpetuate the stereotyp[ic] view of nursing as an exclusively women's job."[113]

The majority also rejected the assertion, raised in Justice Powell's dissent, that the state policy served important governmental objectives by giving women an additional choice of educational environments.[114] This argument, Justice O'Connor countered, simply "begs the question" because all gender-based classifications provide one sex additional benefits or opportunities.[115] The crucial question was whether

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fer a benefit only upon one class by means of a discriminatory classification is substantially related to achieving a legitimate and substantial goal.

Id. at 3340 n.17.

109. The compensatory-purpose requirement was first articulated by the Court in *Weinberger*. *See supra* notes 54-58 and accompanying text. Justice O'Connor added that this "same searching analysis" is used regardless of whether the statutory objective is that raised in *Reed* (to eliminate family disputes), or in *Frontiero* (administrative efficiency), or where the purpose is benign. 102 S. Ct. at 3338. She therefore implied that the *Weinberger* doctrine will be applied to all cases of sex discrimination, regardless of asserted purpose.

110. This requirement was expressed in Califano v. Webster, 430 U.S. 313 (1977). *See supra* notes 78-80 and accompanying text. Examples of classifications which met this requirement were those involved in *Webster* and *Schlesinger*. *See supra* notes 49-51 & 78-80 and accompanying text.

111. 102 S. Ct. at 3339.

112. *Id.* Statistics cited by the Court attested to the dominance of women in the field of nursing at the time MUW's nursing program was founded and at the present time.

Justice O'Connor pointed out that some nursing officials believe that the absence of men in the field had artificially depressed wages. *Id.* at 3339 n.15. To the extent this is true, she concluded, the exclusionary admissions policy actually penalized the class it sought to benefit. *Id.* Classifications in *Weinberger*, *Goldfarb* and *Wengler* were struck down by the Court for that reason. *See supra* notes 71-77 & 94.

113. 102 S. Ct. at 3339. Justice O'Connor argued that even if women had been subject to past discrimination in nursing, the state failed to show that educational affirmative action was the purpose behind the policy. *Id.* at 3339 n.16. Justice O'Connor adverted to MUW's charter as evidence of a contrary legislative purpose. *Id.*

114. *Id.* at 3340 n.17.

115. *Id.*

that goal was "legitimate and substantial."[116]

The majority buttressed its conclusion by finding that the classification was not directly and substantially related to the alleged objective.[117] The university policy permitting men to audit nursing school classes,[118] in addition to testimony by university personnel that the presence of men did not adversely affect women students,[119] convinced the Court that the exclusionary admissions policy was not necessary to achieve any educational goal.[120]

Finally, the majority addressed the state's contention that the single-sex program was specifically authorized by section 901(a)(5) of Title IX of the Educational Amendments of 1972, which exempts traditionally single-sex institutions from Title IX's general proscription against discrimination in educational institutions.[121] Putting aside strong doubts that Congress intended to exempt MUW from any constitutional provision,[122] the Court stated that "[e]ven if Congress envisioned a constitutional exemption, the state's argument would fail."[123] The Court acknowledged that section 5 of the fourteenth amendment,[124] under which Title IX was enacted, gave Congress broad powers to enforce the guarantees and rights enumerated in the other provisions of that amendment.[125] The majority concluded, however, that congressional

116. *Id.* Justice Powell responded this was *not* the issue because the respondent, Hogan, was not complaining about any benefit conferred on women not similarly conferred on men—namely, the right to attend a state nursing school or the right to attend an all-male college. All Hogan desired, he argued, was to attend a *specific* state college, which presented only a claim of personal convenience. *Id.* at 3342 (Powell, J., dissenting).

117. *Id.* at 3339.

118. *See supra* note 9.

119. 102 S. Ct. at 3340.

120. *Id.* at 3339.

121. Title IX of the Education Amendments of 1972, § 901(a)(5), 20 U.S.C. § 1681(a)(5) (1976 & Supp. IV 1980), states that "in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex." *See supra* note 18.

The House version would have extended the prohibition to all educational institutions, including primary and secondary schools. 118 CONG. REC. 5804 (1972) (remarks of Sen. Bayh). The Senate version excluded primary and secondary schools because no statistics were available to indicate the number of single-sex elementary and secondary schools. *Id.*

122. "Rather, Congress apparently intended, at most, to exempt MUW from the requirements of Title IX." 102 S. Ct. at 3340.

123. *Id.*

124. U.S. CONST. art. XIV, § 5: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

125. 102 S. Ct. at 3340.

power under section 5 is restricted to measures that enforce the guarantees of the amendment;[126] it grants neither Congress nor the states the power "to validate a law that denies the rights guaranteed by the Fourteenth Amendment."[127]

Chief Justice Burger, in dissent, argued that the majority's decision was limited to a professional nursing school, and suggested that the court might sanction all-women's programs in areas where women have not statistically dominated.[128]

Justice Blackmun, also dissenting, argued that the majority had inappropriately applied the *Craig* test[129] because it was not simply Hogan's maleness which prevented him from obtaining the additional education and degree sought.[130] Moreover, Justice Blackmun doubted that the Court's ruling could be narrowly restricted[131] and suggested that its reasoning would inexorably condemn any state-supported educational institution which was wholly or partially sexually segregated.[132]

Justice Powell's dissent advanced these themes in greater detail. He argued that the Court misapplied the heightened standard of scrutiny, developed for cases "of genuine sexual stereotyping,"[133] to a narrow classification that provided women with an additional choice[134] "that

126. An example of one such measure, the Court noted, is "to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion." *Id.* at 3340 (quoting *Ex parte* Virginia, 100 U.S. 339, 346 (1879)).

127. 102 S. Ct. at 3340-41. "§ 5 grants Congress no power to restrict, abrogate or dilute these guarantees." *Id.* at 3340 (quoting Katzenbach v. Morgan, 384 U.S. 641, 651 n.10 (1966)). *See also* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976); Oregon v. Mitchell, 400 U.S. 100 (1970).

128. The Chief Justice suggested that a state might be justified in maintaining an all-woman's business school or liberal arts program. 102 S. Ct. at 3341 (Burger, C.J., dissenting). *See infra* note 180.

129. I have come to suspect that it is easy to go too far with rigid rules in this area of claimed sex discrimination, and to lose—indeed destroy—values that mean much to some people by forbidding the State from offering them a choice while not depriving others of an alternate choice.

Id. at 3341 (Blackmun, J., dissenting).

130. *Id.* (Blackmun, J., dissenting). "Mississippi . . . has not closed the doors of its educational system to males like Hogan. Assuming that he is qualified . . . those doors are open and his maleness alone does not prevent his gaining the additional education he professes to seek." *Id. See infra* note 144.

131. Justice Blackmun projected an "inevitable spillover" from the Court's ruling. *Id.* (Blackmun, J., dissenting).

132. *Id.* at 3341-42 (Blackmun, J., dissenting).

133. *Id.* at 3342 (Powell, J., dissenting).

134. "In no previous case have we applied [the intermediate equal protection standard] to invalidate state efforts to *expand* women's choices. Nor are there prior sex discrimination decisions by this Court in which a male plaintiff, as in this case, had the choice of an equal benefit."

discriminates invidiously against no one."[135] Because the petitioner did not present a "serious equal protection claim of sex discrimination,"[136] the lowest tier of scrutiny was appropriate.[137]

Justice Powell argued, alternatively, that even if the *Craig* standard was appropriate, the exclusionary admissions policy was constitutional.[138] Acknowledging that there were differing views on the merits of single-sex education,[139] Justice Powell urged that the state's interest in providing women with a voluntary, traditional educational choice[140] was "legitimate and substantial."[141] He also found the policy substan-

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Id. at 3344 (Powell, J., dissenting) (emphasis in original). Justice Powell perceived the additional choice as the option of attending an all-woman's school. *See infra* notes 140-41.

135. 102 S. Ct. at 3346 (Powell, J., dissenting). Justice Powell argued that providing a choice between coeducational and single-sex systems "exalts neither sex at the expense of the other, but to the contrary recognizes the equal rights of both sexes to the benefit of the best, most varied system of higher education that the State can supply." *Id.* at n.12 (quoting Heaton v. Bristol, 317 S.W.2d 86, 100 (Tex. Civ. App. 1958), *cert. denied,* 359 U.S. 230 (1959), *quoted in* Williams v. McNair, 316 F. Supp. 134, 138 n.15 (D. S.C. 1970)).

136. 102 S. Ct. at 3345-46 (Powell, J., dissenting). Justice Powell emphasized that the only injury Hogan suffered was one of inconvenience. "His constitutional complaint is based upon a single asserted harm: that he must travel to attend the state-supported nursing schools that concededly are available to him." *Id.* at 3342 (Powell, J., dissenting).

Justice Powell pointed out that the Court had come to regard women as the victims of this admissions policy because of the stereotyped perception it fostered and maintained in society. *Id.* at 3345 (Powell, J., dissenting). Yet, he argued, not one woman complained; in fact, the only complainant was one man who advanced no claim on behalf of anyone other than himself. *Id.* Treating this as a case of sex discrimination and applying heightened scrutiny "frustrates the liberating spirit of the Equal Protection Clause." *Id. But cf.* Califano v. Goldfarb, 430 U.S. 199 (1977) (act imposing procedural and substantive requirements on surviving male spouse to obtain death benefits, not similarly imposed on surviving female spouse, deprives female spouse of equal protection); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (act providing death benefits to surviving female spouse and dependent child but only to dependent child and not surviving male spouse unjustifiably discriminates against female covered wage earners). *See supra* notes 57 & 75 and accompanying text.

137. 102 S. Ct. at 3346 (Powell, J., dissenting).

138. *Id.* at 3346 (Powell, J., dissenting).

139. *Id.* at 3343 (Powell, J., dissenting). Justice Powell went only so far as to say that single-sex education has "arguable" benefits.

For a discussion of the benefits and detriments of single-sex schools, see generally A. ASTIN, FOUR CRITICAL YEARS (1977); B. BABCOCK, A. FRIEDMAN, E. NORTON & S. ROSS, SEX DISCRIMINATION AND THE LAW (1975); THE CARNEGIE COMMISSION ON HIGHER EDUCATION, OPPORTUNITIES FOR WOMEN IN HIGHER EDUCATION (1973).

140. "The sexual segregation of students has been a reflection of, rather than an imposition upon, the preference of those subject to the policy." 102 S. Ct. at 3343 (Powell, J., dissenting).

141. Justice Powell argued that although single-sex education is not the favored form today, it is not legally illegitimate, and the state's interest in providing that choice can be substantial. *Id.* at 3346 (Powell, J., dissenting). "[T]he Constitution does not require that a classification keep abreast of the latest in educational opinion, especially when there remains a respectable opinion to

tially related to "long-respected" state objectives and dismissed the small number of men who had audited nursing school courses over the years as an "insubstantial" deviation from a perfect means-end relationship.[142]

The decision in *Mississippi University for Women v. Hogan*[143] reveals that the members of the Court are still in serious disagreement over some basic issues. The Court was clearly correct in finding that the state admissions policy discriminated among applicants on the basis of sex,[144] because it imposed a disadvantage on Hogan he would not have suffered were he a similarly situated female.[145] Although Justice Powell correctly observed that this scheme simply provided women with an additional benefit,[146] the policy nevertheless discriminated against men by providing women with a more valuable opportunity than it provided men.[147]

Justice Powell argued against the application of heightened scrutiny

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the contrary. . . . Any other rule would mean that courts and not legislatures would determine all matters of public policy. Williams v. McNair, 316 F. Supp. 134, 137 (D.S.C. 1970), *aff'd mem.*, 401 U.S. 951 (1971)." 102 S. Ct. at 3344 n.6 (Powell, J., dissenting).

Justice Powell also disagreed with the Court's assertion that MUW's admissions policy perpetrated a stereotypic view of women. *See id.* at 3339. He reasoned that because the nursing program was instituted almost a century after MUW was founded, and almost a decade after a coeducational state nursing program was founded, it was not logical to link the single-sex admission policy with a stereotypic view of nursing as a women's profession. *Id.* at 3346 (Powell, J., dissenting). *Id.* at 3347 (Powell, J., dissenting).

142. 102 S. Ct. at 3347 (Powell, J., dissenting). Justice Powell claimed that it was "understandable" that the University might believe that the presence of auditing men would not materially affect the educational environment. *Id.* at 3347 n.17.

143. *Id.* at 3331.

144. *Id.* at 3336. Justice Powell is correct that travel is a factor that enters into the discriminatory calculus. Males located near one of the coeducational nursing programs will not face the unenviable choice Hogan did. That, however, does not adequately explain why, or when, a classification that discriminates on the basis of gender as well as other non-"suspect" factors should or should not be reviewed under a heightened standard of scrutiny.

145. 102 S. Ct. at 3336 n.8.

146. *Id.* at 3342 (Powell, J., dissenting).

147. To deny that a policy is discriminatory when it provides one group with an opportunity not available to another is disingenuous; to insist that not every policy which entails some form of gender discrimination should be subjected to a stricter form of scrutiny is to continue the debate begun in *Reed v. Reed*. *See infra* note 151.

To provide for the general case, it is more accurate to say that the policy provides women with an opportunity that *could be* of value. Depending on the factual circumstances—presumably, the most important factor would be the distance a person was from the sexually segregated facility and a coeducational facility—the opportunity could be of considerable value, as it would be to a male in Hogan's position, or of no more value than that inherent in an additional opportunity itself.

because "the only complainant is a man who advances no claims on behalf of anyone else,"[148] and further, because Hogan was not denied any substantive right, but suffered only an inconvenience.[149] This argument suggests either that Hogan does not deserve protection under the fourteenth amendment because his claim of sex discrimination was individual,[150] or that the de minimus injury he suffered did not seriously infringe any right.[151]

Having found discrimination on the basis of sex, the Court correctly applied the *Craig* test as it had applied the test to classifications discriminating between men and women prior to *Michael M.* and *Rostker*.[152] The Court's straight-forward—almost wooden—application of the *Craig* test,[153] without regard to which sex was suffering discrimination,[154] should belie concerns raised by the decisions in *Michael M.* and *Rostker*, and add a welcome degree of certainty to this area of constitutional law.[155] The Court may have done more than simply reaffirm the vitality of the *Craig* test, however; it appears to have elevated the intermediate standard of review for gender-based classifications closer to the level of strict scrutiny. This conclusion is manifested by the Court's rejection of the two proferred state objectives,—educational affirmative action[156] and educational choice for women[157]—further re-

148. *Id.* at 3345. *See also id.* at 3342 ("case instituted by one man, who represents no class").

149. *Id. See also id.* at 3342 ("primary concern is personal convenience"); *id.* at 3342 ("[a] constitutional case is held to exist solely because one man found it inconvenient to travel to any of the other institutions made available to him by the State of Mississippi").

150. *But cf.* Justice Powell's opinion in Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 289-90 (1978) (strict scrutiny appropriate for review of claims by white male of race discrimination because "[i]t is settled beyond question that the 'rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. . . . The rights established are personal rights.' ").

151. *See supra* notes 130 & 133-35 and accompanying text. *Cf.* Appleton, *Beyond the Limits of Reproductive Choice: The Contributions of the Abortion-Funding Cases to Fundamental-Rights Analysis and to the Welfare Thesis,* 81 COLUM. L. REV. 721, 746-53 (1981) (arguing that within the context of fundamental due process cases, the Court has begun to treat "impingement," which it once viewed merely as a synonym for state action, as a "discrete substantive requirement" to be satisfied before strict judicial scrutiny will be invoked).

152. *See supra* notes 93-94. *See also supra* notes 82-87 & 88-92.

153. 102 S. Ct. at 3337.

154. *Id.*

155. *See supra* notes 81-94 and accompanying text. At least one court has cited *Mississippi University for Women* as employing the proper intermediate standard of review for gender-based classifications. *See* O'Connor v. Board of Educ., 545 F. Supp. 376, 378 (N.D. Ill. 1982).

156. 102 S. Ct. at 3337-38. *See supra* notes 107-13 and accompanying text.

157. 102 S. Ct. at 3340 n.17. *See supra* notes 114-16 and accompanying text.

stricting the range of remedial and nonremedial governmental objectives that are sufficiently "important" to meet the *Craig* test.

The Court's rejection of the state's contention that the admissions policy served a remedial purpose reflects more than an increased insistence on narrowly defined benign objectives: it's reasoning would appear to require that the benign purpose be advanced by the *narrowest* classification practicable.[158] The Court, therefore, rejected as overly broad the state's asserted interest in providing educational affirmative action for women in the form of an all-women's university; instead, the Court required that the state's interest be advanced by the narrower class of women pursuing a professional degree in nursing school.[159] Because women have never suffered discrimination in the field of nursing, the classification served no compensatory interest.[160]

The Court also implicitly rejected the state's second objective, providing women with the opportunity to attend a single-sex institution, as an important, nonremedial governmental purpose.[161] This conclusion is a further indication that only unique nonremedial objectives satisfy the importance requirement under the *Craig* test.[162] The Court, therefore, appears to be transforming the *Craig* test into one that is "[intermediate] in scrutiny, fatal in fact."[163]

The most important aspect of this decision may be the Court's disposition of MUW's contention that the admissions policy was sanctioned by Title IX, pursuant to the congressional enforcement power under section 5 of the fourteenth amendment. In *Katzenbach v. Morgan*,[164]

158. 102 S. Ct. at 3338-39. *See supra* notes 110 & 112. The Court also requires that the classification compensate a class that, on the basis of statistical evidence, has actually suffered a disadvantage. *Id.* Benign, compensatory objectives must now pass an initial test similar to the converse of the least-restrictive alternative doctrine. *See* Shelton v. Tucker, 364 U.S. 479, 488 (1960).

159. 102 S. Ct. at 3337-38. "The State's primary justification for maintaining the single-sex admissions policy of MUW's School of Nursing is that it compensates for discrimination against women and, therefore, constitutes educational affirmative action. . . . *As applied to the School of Nursing*, we find the State's argument unpersuasive." *Id.* (emphasis added).

160. *Id.* at 3339. *See supra* notes 111-12 and accompanying text.

161. *Id.* at 3340 n.17. *See supra* notes 114-16 and accompanying text.

162. Since the *Craig* decision, the Court has upheld only two legislative classifications that did not have benign rationales. *See* Michael M. v. Superior Court, 450 U.S. 464 (1980); Rostker v. Goldberg, 458 U.S. 57 (1981). *See supra* notes 93-94 and accompanying text. Both cases involved legislative purposes that can be fairly called unique: the prevention of teenage pregnancy in *Michael M.* and military preparedness in *Rostker*. Neither case was cited by any opinion in *Mississippi University for Women*.

163. Gunther, *supra* note 23, at 8. *See supra* note 23.

164. 384 U.S. 641 (1966). In *Morgan*, the Court upheld section 4(e) of the Voting Rights Act

the Court suggested that Congress, under section 5, possesses some power to define the substantive content of fourteenth amendment rights.[165] Justice Brennan, responding to concerns that this power could be used to restrict, as well as expand, constitutional guarantees,[166] stated that section 5 empowered Congress only to "enforce" the amendment's guarantees.[167] Measures that dilute or derogate constitutional guarantees were therefore not permissible.[168] Laws that extend fourteenth amendment rights beyond the constitutional scope defined by the Court were, nevertheless, a valid exercise of legislative power.[169]

The Court's argument that Congress could only "rachet up" constitutional rights has provoked considerable commentary which has cast doubt on the theory's continued validity.[170] In *Mississippi University for*

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of 1965, 42 U.S.C. § 1973b(e) (1976), which prohibited the states from using an English literacy requirement to deny the right to vote to persons educated in American schools in which the primary language spoken was other than English. 384 U.S. 641, 643 n.1 (1966). The statute primarily benefited Spanish-speaking New York residents educated in Puerto Rico. *Id.* at 652.

The Court in *Morgan* concluded that Congress' power under section 5 was not dependent on a judicial determination that a statute violated the fourteenth amendment because such dependence "would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment." *Id.* at 648. The Court posited two rationales for section 4(e), either of which it indicated was sufficient to support congressional action. The Court first noted that section 4(e) might rest on a congressional determination that the invalidation of the state law was necessary to inhibit conduct that the Court had declared in violation of the fourteenth amendment. *Id.* at 652. Second, the Court hypothesized a congressional finding that the state law requiring literacy qualifications itself violated the equal protection clause. *Id.* at 654-56. The Court thus indicated that Congress had some independent power to interpret the Constitution, to which the Court would defer if it "perceived a basis." This deference was based on the Court's recognition of Congress' special institutional competence to investigate, determine and weigh legislative facts. *See* Note, *Congressional Power to Enforce Due Process Rights,* 80 COLUM. L. REV. 1265, 1268-71 (1980); 25 STAN. L. REV. 885, 889-91 (1973).

165. 384 U.S. at 651, 653; *id.* at 668 (Harlan, J., dissenting). *See* G. GUNTHER, *supra* note 4, at 1059-60; Note, *supra* note 164, at 1272. *See also* Oregon v. Mitchell, 400 U.S. 112, 205 (1970) (Harlan, J., concurring in part and dissenting in part).

166. *See* Katzenbach v. Morgan, 384 U.S. 641, 668 (1966) (Harlan, J., dissenting).

167. *Id.* at 651 n.10.

168. *Id. See* Note, *supra* note 164, at 1275.

169. G. GUNTHER, *supra* note 4, at 1060; Note, *supra* note 164, at 1268, 1276. *See also* Cohen, *Congressional Power to Interpret Due Process and Equal Protection,* 27 STAN. L. REV. 603, 606-07 (1975); 25 STAN. L. REV., *supra* note 164, at 885.

170. Commentators have argued that the deference paid to Congress because of its institutional factfinding capacity does not square with the uni-directional limitation of the ratchet theory. If congressional findings are virtually conclusive to support an expansive application of the fourteenth amendment, they should be given equal weight when they restrict rights which the Court has held to be protected. Note, *supra* note 164, at 1276. Other commentators have argued that permitting Congress to define the scope of constitutional rights based upon superior factfinding ability drastically alters the principles governing the relationship between the legislature and

Women, however, a majority of the Court explicitly relied on the ratchet theory in dismissing the state's defense under Title IX.[171] The Court concluded that "[a]lthough we give deference to congressional decisions and classifications, neither Congress nor a State can validate a law that denies the rights guaranteed by the Fourteenth Amendment."[172] Although the Court appears to have settled a constitutional controversy by placing definitive limits on congressional power, its summary treatment of this issue is troubling. First, given the degree of controversy this question has spawned, the Court's abbreviated treatment of the issues involved is startling.[173] Second, the dissenters did not address this segment of the Court's decision, a significant fact because a number of those Justices have previously expressed disagreement with the doctrine that section 5 of the fourteenth amendment gives Congress any "substantive" power to expand or contract constitutional rights.[174] It is possible that the dissenters, contending that the admissions policy did not violate the equal protection clause, found it unnecessary to reach this issue, thereby attempting to limit the precedential value of this aspect of the Court's decision by ignoring it.

It is likely, as the dissenting opinions forcefully illustrate, that the decision in *Mississippi University for Women* cannot easily be contained, despite the protestations of the majority.[175] Given the Court's assumption that sex-based classifications can escape heightened scrutiny only by achieving exact parity between the sexes,[176] and in light of

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the judiciary articulated in Marbury v. Madison, 5 U.S. (1 Cranch.) 737 (1803). *See* G. GUNTHER, *supra* note 4, at 1086; Burt, *Miranda and Title II: A Morganatic Marriage,* 1969 SUP. CT. REV. 81, 84. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-14 (1978); Burt, *supra* at 105-08; Cohen, *supra* note 6, at 613-17; Cox, *Supreme Court—1965 Term—Foreward: Constitutional Adjudication and the Promotion of Human Rights,* 80 HARV. L. REV. 91, 118 (1966); Gordon, *The Nature and Uses of Congressional Power Under Section Five of the Fourteenth Amendment to Overcome Decisions of the Supreme Court,* 72 NW. U.L. REV. 656, 671-72 (1977); Sager, *Fair Measure: The Legal Status of Under-enforced Constitutional Norms,* 91 HARV. L. REV. 1212, 1231-32 (1978); Note, *supra* note 164, at 1275-77.

171. 102 S. Ct. at 3340. *See supra* notes 126-27 and accompanying text.

172. 102 S. Ct. at 3340.

173. The circuit court dismissed the argument with greater dispatch than that managed by the Supreme Court, finding it unnecessary to cite even one case. 653 F.2d 222, 223 (5th Cir. 1981). *See supra* note 18.

174. *See* Oregon v. Mitchell, 400 U.S. 112, 296 (1970) (Stewart, J., concurring in part and dissenting in part). Justice Stewart, who joined Justice Harlan's dissent in *Morgan*, was joined in *Mitchell* by Chief Justice Burger and Justice Blackmun.

175. 102 S. Ct. at 3341-42 (Blackmun, J., dissenting); *id.* at 3347 n.18 (Powell, J., dissenting).

176. The requirement of exact parity of opportunity, benefit, or burden is the crux of the debate between Justice Powell and the majority. To Justice Powell, the determinative question is

the Court's rejection of single-sex education as an important governmental objective,[177] at least where no separate but equal facility exists, all public single-sex schools are likely to be constitutionally prohibited. Arguably, the decision condemns even "separate but equal"[178] facilities because some students will always be burdened by being forced to travel to a school reserved for their sex when an equal facility for the opposite sex is closer.

The immediate implication for public single-sex education is clear; men must be admitted to programs traditionally dominated by women.[179] MUW, however, has already surrendered to the Court's implicit condemnation of all single-sex programs; in September 1982, the University admitted sixty-five men to its freshman class.[180]

The decision in *Mississippi University for Women* is significant because the Court directly addressed two important constitutional concerns: the vitality and strength of the *Craig* test and the limits of congressional power under section 5 of the fourteenth amendment. The decision, however, also highlights the need for a definition of sexual equality to guide the courts in applying constitutional standards to sex-based classifications.[181] The reaffirmance of the *Craig* test and the

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not whether a disparity exists, reflecting some sort of burden on an individual, but whether that burden is of sufficient significance to trigger a heightened standard of scrutiny. *See supra* notes 146-51 and accompanying text.

177. 102 S. Ct. at 3340 n.17.

178. *See supra* notes 95-97 & 101 and accompanying text.

179. *See supra* notes 111-13 and accompanying text.

180. Over 130 men have enrolled at MUW for the Fall 1982 semester in the following undergraduate programs: 11 in the Division of Nursing; 9 in the Division of Human Behavioral Sciences (Psychology, Social Work); 2 in the Division of Humanities (English, Foreign Languages, History, Philosophy, Religion); 40 in the Division of Business and Economics; 0 in the Division of Home Economics; 5 in the Division of Sciences and Mathematics; 6 in the Division of Fine and Peforming Arts; 0 in the Division of Health, Physical Education and Recreation; 5 in the Division of Communications; 3 in the Division of Education; 41 undeclared. Three men are also enrolled in graduate programs in the College of Arts and Sciences. Telephone interview with Cynthia Shakleford, Assistant Director of Public Information at Mississippi University for Women (October 15, 1982).

181. Although the Court articulated a standard of review in [*Craig*]—the disputed statutory classification must have a substantial relationship to an important governmental objective—its application of this standard has been rudderless. Whether a relationship is "substantial" or an objective "important" within the meaning of the equal protection clause depends on the ultimate goal of that inquiry, yet the Court has never clearly enunciated this goal.

Comment, *The Supreme Court, 1980 Term,* 95 HARV. L. REV. 1, 173 (1981). *See generally* Baker, *supra* note 23; Westen, *The Empty Idea of Equality,* 95 HARV. L. REV. 537 (1982); Note, *Toward a Redefinition of Sexuality,* 95 HARV. L. REV. 487 (1981).

apparent effort to induce a stricter intermediate scrutiny may serve to bring about less qualitative inequality between the sexes. The Court, however, still does not tell us what equality between the sexes means in a constitutional system that permits some distinctions on the basis of sex. Without a clear definition, the Court is forced to adhere to a facile phrase that merely states a conclusion, but does little to aid analysis. Significant and continued division in the Court remains in all but the most straightforward cases.[182]

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182. Baker, *supra* note 23, at 1029. *See supra* note 23.