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Retreat from Intermediate Scrutiny in Gender-Based Discrimination Cases

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RETREAT FROM INTERMEDIATE SCRUTINY IN GENDER-BASED DISCRIMINATION CASES

In two recently decided cases, the U.S. Supreme Court appears to have altered its standard of review of classifications based on gender. During the mid-1970's, such classifications were reviewed under an "intermediate scrutiny" test. While sex was not declared a suspect classification, the Court examined gender-based classifications more closely than was permissible under a "rational basis" test. This Note traces the development of the "intermediate scrutiny" test and its elements. The 1981 cases of Michael M. v. Superior Court of Sonoma County *and* Rostker v. Goldberg, *are examined. Though the Court claimed to have used an "intermediate scrutiny" test, the Note concludes that the cases were decided under the more lenient "rational basis" test. The Note argues that the effective result of* Michael M. *and* Rostker *will be tacit judicial approval of virtually all gender-based discrimination under rational basis review.*

INTRODUCTION

GENDER-BASED[1] discrimination waned during the 1970's, despite the rejection of the equal rights amendment and the refusal by the Supreme Court to declare sex-based classifications as "suspect."[2] Opponents of such classifications were able to gain significant advances through the courts under the equal protection clause of the fourteenth amendment.[3] Prior forms of gender-based discrimination were struck down in such diverse areas as unequal Social Security benefits,[4] the legal drinking age,[5] and the right to administer an intestate's estate.[6] By the end of the 1970's,

1. One definition for "gender" is, simply, "sex," WEBSTER'S INTERNATIONAL DICTIONARY 944 (2d ed. 1934), and that synonymity suffices here. "Sex" is defined as "[t]he sum of the peculiarities of structure and function that distinguish a male from a female organism; the character of being male or female." BLACK'S LAW DICTIONARY 1233 (5th ed. 1979). "Discrimination" is defined as "[a] failure to treat all persons equally where no reasonable distinction can be found between those favored and those not favored." *Id.* at 420. "Gender-based discrimination" is therefore defined throughout this Note as a failure to treat all persons equally where no substantial distinction can be found between the sex favored and the sex not favored. See *infra* notes 119–51 and accompanying text for the discussion which argues that the distinction must be substantial to be legitimate.

2. *See infra* notes 60–67 and accompanying text.

3. Gender-based discrimination suits are brought against the federal government under the due process clause of the fifth amendment. The Supreme Court applies the same standard of review for such suits as those involving the fourteenth amendment equal protection clause. Weinberger v. Weisenfeld, 420 U.S. 636, 638 n.2 (1975).

4. Califano v. Goldfarb, 430 U.S. 199 (1977).

5. Craig v. Boren, 429 U.S. 190 (1976).

6. Reed v. Reed, 404 U.S. 71 (1971).

the Supreme Court of the United States had subjected gender-based classifications in those areas to a closer scrutiny than that of the rational basis test.[7] The Court placed the burden of proving the constitutionality of the classification on the party seeking to uphold [8] it—a departure from the rational basis test, where the opponents of the classification have the burden of proving that it denies equal protection of the law.[9]

In two 1981 opinions the Court retreated from this stricter standard, and placed the burden of proving the unconstitutionality of the classification on those opposing it.[10] In *Michael M. v. Superior Court of Sonoma County*,[11] the Court upheld a California statute making statutory rape a crime for men only.[12] In *Rostker v. Goldberg*,[13] decided a few months later, the Court upheld the exclusion of women from draft registration.[14] Both opinions stressed the need for a higher level of deference to the legislature,[15] and eschewed the standard of review established in the mid-to-late 1970's.

This Note asserts that these two cases mark a retreat by the Court in gender-based discrimination cases. The Note analyzes earlier cases, which used a stricter standard of review than that of the rational basis test,[16] in light of their precedential impact in *Michael M.*[17] and *Rostker*.[18] This Note concludes that the Court's method of analysis[19] demonstrates a visible retreat from the heightened scrutiny given to prior gender-based discrimination cases. The result: diminution of constitutional equal protection in gender-based discrimination cases.[20]

I. STANDARDS OF REVIEW IN GENDER-BASED DISCRIMINATION CASES: PAST AND PRESENT

Gender-based discrimination cases brought under the equal

7. *See infra* notes 68–73 and accompanying text.
8. *See infra* notes 106–18 & 128–51 and accompanying text.
9. *See infra* notes 23–32 and accompanying text.
10. *See infra* note 221 and accompanying text.
11. 450 U.S. 464 (1981).
12. *Id.* at 467.
13. 453 U.S. 57 (1981).
14. *Id.* at 83.
15. 450 U.S. at 470; 453 U.S. at 64.
16. *See infra* notes 106–59 and accompanying text.
17. *See infra* notes 198–245 and accompanying text.
18. *See infra* notes 288–324 and accompanying text.
19. *See infra* notes 325–47 & 367–74 and accompanying text.
20. *See infra* notes 348–66 and accompanying text.

protection clause[21] historically were reviewed under the rational basis test,[22] but the Supreme Court in 1971 began to use a higher level of scrutiny.[23] The Court never formally adopted the strict scrutiny test which is required for the review of suspect classifications.[24] Rather, the Court has recognized what is characterized as a "mid-level" scrutiny, under which the gender-based classification must be shown to be substantially related to an important governmental objective.[25]

Analysis of case precedent in this section is divided into two parts. The first section describes the evolution of the present standard of review, from the rational basis test to the mid-level scrutiny test.[26] The second section focuses on the development and articulation of the present standard, and attempts to define "important governmental objective"[27] and "substantial relationship to such an objective."[28]

A. *Evolution of the General Rule*

1. *Pre-1970's: Deferential Review*

Gender-based classification cases before 1971 were treated under the same rational basis test as those cases questioning the constitutionality of economic regulations.[29] Judicial deference to legislative decisions lies at the heart of this test,[30] as the following rules demonstrate:

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21. The fourteenth amendment equal protection clause states: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

22. *See infra* notes 29–39 and accompanying text.

23. *See infra* notes 40–59 and accompanying text.

24. *See infra* notes 60–67 and accompanying text. Although no majority opinion has ever offered a justification for using intermediate scrutiny in reviewing gender-based classifications, Justice Stewart, concurring in *Michael M.*, advanced an interesting rationale:

> The Constitution is violated when government, state or federal, invidiously classifies similarly situated people on the basis of immutable characteristics with which they were born. Thus, detrimental racial classifications by government always violate the Constitution, for the simple reason that, so far as the Constitution is concerned, people of different races are always similarly situated. By contrast, while detrimental gender classifications by government often violate the Constitution, they do not always do so, for the reason that there are differences between males and females that the Constitution necessarily recognizes.

450 U.S. at 477–78 (Stewart, J., concurring) (citations omitted).

25. *See infra* notes 68–73 and accompanying text.

26. *See infra* notes 29–73 and accompanying text.

27. *See infra* notes 78–118 and accompanying text.

28. *See infra* notes 119–51 and accompanying text.

29. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 608 (1978).

30. *Id.*

> 1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.[31]

Gender-based classifications are upheld under the rational basis test "whenever they [are] rationally related to government purposes reflecting the traditional views of the 'proper' relationship between men and women in American society."[32] In *Hoyt v. Florida*,[33] the Court upheld a law which required males to file for an exemption from jury duty but which automatically exempted women unless they waived the statutory exemption.[34] Justice Harlan, writing for the Court, said that women are "still regarded as the center of home and family life," and therefore that it was permissible for the state to statutorily exclude women from certain civic duties unless each woman herself determined that she was able to perform them.[35] The state, in *Hoyt*, presented no evidence which showed that the intent of the law was to either help housewives or to excuse women from jury duty to perform their more "traditional" duties.

In unsuccessfully urging the Court to strike down the statute, the appellant initially argued that the statute was overinclusive, and thus unconstitutional on its face. That is, all women were

31. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78–79 (1911) (citations omitted).

32. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-24, at 1060 (1978).

33. 368 U.S. 57 (1961).

34. The suit was brought by a woman who was convicted by an all-male jury of killing her husband. The claim was based on the equal protection clause and not on the sixth amendment right to an impartial jury, since the sixth amendment had not yet been applied to the states through the fourteenth amendment's due process clause. (The right to an impartial jury was incorporated by the Supreme Court seven years later in Duncan v. Louisiana, 391 U.S. 145 (1968)). When a later suit challenged a similar statute on a sixth amendment claim, the statute was struck down. Taylor v. Louisiana, 419 U.S. 522 (1975).

35. 368 U.S. at 62.

exempted, not just those with family responsibilities.[36] The statute also was alleged to be unconstitutional in its application since the exemption in effect excluded women from jury service; relatively few women ever waived the exemption.[37] The Court held that it was administratively convenient for the state to avoid individual determinations concerning family responsibilities.[38] The Court further reasoned that the lack of women on jury duty over a particular time period was the result of mere chance, not discriminatory purpose.[39] Thus, the statute was upheld under the rational basis test.

2. *1971: Departure From the Rational Basis Test*

The traditional deferential standard of review was modified in 1971, when the Court in *Reed v. Reed*[40] unanimously struck down an Idaho statute which favored males over females in the administration of an intestate's estate.[41] The statute established degrees of entitlement by classifying persons based upon their relationship to the intestate.[42] Males were favored over females within each class of entitlement.[43]

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36. *Id.* at 59.

37. *Id.* at 65.

38. *Id.* at 63.

39. *Id.* at 68–69.

40. 404 U.S. 71 (1971).

41. *Id.* at 77.

42. Before adoption of the Uniform Probate Code in 1971, IDAHO CODE § 15-312 (1948) stated:

> Administration of the estate of a person dying intestate must be granted to some one or more of the persons hereinafter mentioned, and they are respectively entitled thereto in the following order:
>
> 1. The surviving husband or wife or some competent person whom he or she may request to have appointed.
> 2. The children.
> 3. The father or mother.
> 4. The brothers.
> 5. The sisters.
> 6. The grandchildren.
> 7. The next of kin entitled to share in the distribution of the estate.
> 8. Any of the kindred.
> 9. The public administrator.
> 10. The creditors of such person at the time of death.
> 11. Any person legally competent.
>
> If the decedent was a member of a partnership at the time of his decease, the surviving partner must in no case be appointed administrator of his estate.

Id., quoted in 404 U.S. at 72 n.2. The parties were the adoptive parents of a minor who died intestate. They had separated prior to the child's death. 404 U.S. at 71.

43. IDAHO CODE § 15-314 (1948) provided that "[o]f several persons claiming and equally entitled [under § 15-312] to administer, males must be preferred to females . . . ." *Id., quoted in* 404 U.S. at 73.

Chief Justice Burger, writing for the Court, identified two issues: "whether a difference in the sex[es] . . . bears a rational relationship to a state objective that is sought to be advanced," and "whether [the statute] advances that objective in a manner consistent with the command of the Equal Protection Clause."[44] The first issue was decided in the state's favor. The purpose of the statute was to reduce the probate court's workload by reducing intrafamily disputes—an objective which the Court deemed to be "not without some legitimacy."[45] The second, more important[46] requirement was not satisfied. Purporting to apply the rational basis test,[47] the Court noted that persons in each class were equally entitled under the Idaho probate statutes to administer an estate, and that the preference was merely a "modifying appendage."[48] Greater entitlement based merely on sex, therefore, was an arbitrary distinction unrelated to a determination of entitlement based upon relationship to the intestate. Thus, the statute violated the equal protection clause notwithstanding its objective of avoiding probate disputes.[49]

Although the Court in *Reed* had intended to apply the rational basis test,[50] the Idaho statute actually was examined under a stricter standard.[51] A classification is deemed constitutional under a rational basis test "if any state of facts [which] reasonably can be conceived [by the court] that would sustain it."[52] The rational basis test would not require the state to justify the classification, nor demonstrate that the classification is rationally related to any purpose stated in the statute or reasonably obvious from reading the statute.[53] Application of the rational basis test would require judicial deference to the Idaho legislature's preference for male administrators.[54] Here the Court held that the statutory intent was

44. 404 U.S. at 76.

45. *Id.*

46. *Id.*

47. *Id.* (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)). The Court held that "a classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relationship to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."

48. *Id.* at 77.

49. *Id.* at 76–77.

50. *See supra* notes 44–47 and accompanying text.

51. J. NOWAK, *supra* note 29, at 613; L. TRIBE, *supra* note 32, § 16-25, at 1063; and Gunther, *The Supreme Court 1971 Term*, Foreword: *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 33–34 (1972).

52. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911).

53. *Id.*

54. *See supra* notes 29–31 and accompanying text.

to award the administration of the estate to that person most closely related to the intestate.[55] A preference based on sex is not rationally related to this purpose since a female is no less related to the intestate than a male of the same class. The Court held the statute to be arbitrary, therefore, because the classification was unrelated to an objective determined by the Court—not because the classification was unrelated to any reasonably conceived objective.

If the Court had hypothesized some unstated purpose for the unequal treatment, the statute should have been upheld. The preference could be based on the assumption that men are better qualified to administer an estate than women. Using the *Hoyt* rationale regarding the proper relationship of the sexes, the preference for males would be arguably related to the statute's purpose.[56] Traditionally, most women had performed household duties while men handled complex financial matters; therefore, the legislature could have reasonably concluded that with all other matters equal, a male is more qualified to administer an estate than a female.

The use of a rational basis test shields the preference from attack. If the preference is challenged as underinclusive (since not all females are given less preference), the response is that the legislature has determined that closeness to the intestate, rather than sex, should be the primary factor in choosing an administrator. If the statute is challenged as overinclusive (since many females are in fact well qualified to handle such matters), the response is that a general rule favoring males is administratively convenient.

But the Court did not attempt to hypothesize a constitutional basis for the statutory preference grounded on the traditionally "proper" relationship between the sexes—a theory that had often been used in the past to uphold other gender-based classifications.[57] Instead, the Court determined the "true" purpose of the probate statute and found the preference of males over females to be unrelated to that purpose.[58] *Reed* may be interpreted, there-

55. The Court noted:

> The objective of § 15-312 clearly is to establish degrees of entitlement of various classes of persons in accordance with their varying degrees and kinds of relationship to the intestate. Regardless of their sex, persons within any one of the enumerated classes of that section are similarly situated with respect to that objective.

404 U.S. at 77. This same purpose had been asserted by the Idaho Supreme Court. 93 Idaho 511, 514, 465 P.2d 635, 638 (1970).

56. *See supra* notes 33–39 and accompanying text.

57. *See supra* notes 29–30 and accompanying text.

58. *See supra* notes 48–55 and accompanying text.

fore, as the first case to require greater, though yet undefined, scrutiny in reviewing gender-based classifications.[59]

3. *Mid-1970's: Approaching the Strict Scrutiny Test*

Frontiero v. Richardson[60] nearly declared sex a suspect classification. In *Frontiero*, the Court struck down a federal law which prevented a female military officer from claiming her husband as a "dependent" unless she proved that the husband was actually dependent upon her for over one-half of his support. The law did allow, however, a male officer to claim his wife as a dependent irrespective of her actual financial dependence upon him.[61] This denial prevented a female officer from obtaining increased housing and medical allowances.[62] A four-judge plurality found implicit support from *Reed* for the proposition that gender-based classifications are not to be reviewed under the rational basis test.[63] The Court held that "[C]lassifications based on sex . . . are inherently suspect, and must therefore be subjected to strict judicial scrutiny."[64] *Frontiero* is the only case which has hinted that gender-based classifications are to be subjected to a strict scrutiny standard of review. That, and the lack of majority support,[65]

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59. *See* Gunther, *supra* note 51, at 33–34.

60. 411 U.S. 677 (1973).

61. *Id.* at 679.

62. *Id.* at 680. Increased living quarter allowances are allowed under 37 U.S.C. §§ 403, 410 (1976), and increased medical and dental benefits are allowed under 10 U.S.C. §§ 1072, 1076 (1976). When *Frontiero* was decided in 1973, 10 U.S.C. § 1072(2) read thus:

> 'Dependent' with respect to a member . . . of a uniformed service, means—
>
> (A) the wife;
>
> . . . .
>
> (C) the husband, *if he is in fact dependent on the member . . . for over one-half of his support*. . . .

and 37 U.S.C. § 401 read as:

> In this chapter, 'dependent,' with respect to a member of a uniformed service, means—
>
> (1) his spouse;
>
> . . . .
>
> However, a person is not a dependent of a female member unless he is in fact dependent on her for over one-half of his support . . . .

411 U.S. at 679 n.2 (emphasis added).

63. [The contention] that classifications based upon sex . . . are inherently suspect and must therefore be subjected to close judicial scrutiny. . . . find[s] at least implicit support . . . in our unanimous decision . . . in *Reed v. Reed*. . . . [I]n reaching [its holding], the Court *implicitly rejected [the state's] apparently rational explanation* of the statutory scheme . . . . This departure from 'traditional' rational-basis analysis with respect to sex-based classifications is clearly justified.

411 U.S. at 682–84 (emphasis added).

64. *Id.* at 688.

65. *Compare Reed with* Weisenfeld v. Secretary of HEW, 367 F. Supp. 981 (D.N.J.

makes the precedential value of *Frontiero* questionable.[66]

4. *Present Rule: Intermediate Scrutiny*

The Court developed the present standard of mid-level review gradually.[67] This mid-level standard of review was first articulated in *Craig v. Boren*,[68] where the Court struck down an Oklahoma law which allowed women to drink 3.2% beer at age 18, but prohibited males from such activity until age 21.[69] The Court, using the *Reed* standard,[70] held that "[t]o withstand constitutional challenge . . . classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives."[71] *Craig v. Boren* was a clear retreat from the strict scrutiny standard advanced in *Frontiero*,[72] but it did require a greater level of scrutiny than that of the rational basis test.[73]

B. *Elements of the Intermediate Scrutiny Standard*

Cases decided after *Craig v. Boren* articulated the specific requirements for satisfying the mid-level standard of scrutiny. These cases consistently hold that the courts will not use the rational basis test when reviewing gender-based classifications.[74] Gender-based classifications which arguably serve legitimate governmental interests have been struck down when those interests

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1973), *aff'd on other grounds*, 420 U.S. 636 (1975) (The district court refused to apply the strict scrutiny standard of *Frontiero* to a gender-based classification).

66. Justice Powell, joined by Chief Justice Burger and Justice Blackmun, agreed that the federal statute violated the standard in *Reed*, but argued that declaring sex a suspect classification was inappropriate because the equal rights amendment had been submitted to the states for ratification. *Frontiero*, 411 U.S. at 692 (Powell, J., concurring). Justice Stewart filed a concurrence which held that the statute "work[ed] an invidious discrimination in violation of the Constitution." *Id.* at 691 (Stewart, J., concurring). Justice Stewart's concurring statement has been viewed by popular writers with some skepticism. *See* R. WOODWARD & S. ARMSTRONG, THE BRETHREN 253–55 (1979).

67. *See infra* notes 74–126 and accompanying text.

68. 429 U.S. 190 (1976).

69. *Id.* at 191–92.

70. *Id.* at 197.

71. The Court held that "[i]n *Reed*, the objectives of 'reducing the workload on probate courts,' and 'avoiding intrafamily controversy' were deemed of *insufficient importance* to sustain the use of an overt gender criterion in the appointment of administrators of intestate decedents' estates." *Id.* at 197–98 (citations omitted) (emphasis added).

72. *See supra* note 63 and accompanying text.

73. *See infra* notes 86–151 and accompanying text.

74. *See infra* notes 106–18 & 127–51 and accompanying text.

are deemed to be unimportant.[75] Other gender-based classifications which arguably bear a rational relationship to an important governmental objective similarly have been struck down when a substantial relationship did not exist.[76]

The distinction is that under the intermediate scrutiny test, proponents of the classification bear the burden of proving that the classification is constitutional.[77] This burden of proof is not satisfied by a bare assertion that the classification serves an important governmental interest or that this interest is substantially related to the gender-based classification.[78] Rather, specific evidence must be presented to substantiate the assertions of constitutionality.[79] The Court will not review such evidence at its face value, but will conduct an independent judicial analysis.[80] If such analysis reveals that the burden of proof has not been met, the Court will declare the gender-based classification unconstitutional.[81]

Although the Court has consistently followed the intermediate *Craig* standards since 1976, one area of uncertainty remains. That is, the Court has never expressly overruled the pre-1976 cases decided under the rational basis test.[82] Arguably, these cases still stand as good law.[83] Continued reliance by the Court on these rational basis cases in their later decisions has resulted in confusing analysis and inconsistent results.[84] This Note will examine those cases, and contrast them with later, intermediate stan-

75. *See, e.g.*, Califano v. Goldfarb, 430 U.S. 199 (1977) (administrative convenience and certainty of result are not constitutional justifications for gender-based discrimination).

76. *See, e.g.*, Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142 (1980) (bare assertion is not proof of a relationship between unequal workers' compensation benefits and an important governmental interest in helping needy spouses whose husband or wife has died).

77. *See infra* notes 106–18 & 127–51 and accompanying text.

78. *See infra* notes 110–11 & 134–40 and accompanying text.

79. *See infra* notes 111 & 134–47 and accompanying text.

80. *See infra* notes 110 & 148–51 and accompanying text.

81. *E.g.*, Weinberger v. Weisenfeld, 420 U.S. 636 (1975); Craig v. Boren, 429 U.S. 190 (1976).

82. Since *Frontiero* contained no majority opinion, the case cannot be cited as precedent. Therefore, one must go back to *Reed* for a working standard before *Craig*. While *Reed* may constitute a departure from the rational basis test, *see supra* notes 50–59 and accompanying text, the opinion nevertheless asserts that the case was decided under the rational basis test. For precedential purposes, therefore, *Reed* should be viewed as decided under the rational basis test.

83. Attempts to overrule prior inconsistent standards have been made by individual Justices. One example is Justice Stevens' concurrence in Califano v. Goldfarb, 430 U.S. 199, 224 (1977), but none of these pre-1976 cases has been overruled.

84. *See infra* notes 182–83 and accompanying text.

dard cases.[85]

1. *Proving the Existence of an Important Governmental Objective*[86]

A gender-based classification must serve an important governmental objective to be constitutional.[87] The standard from the cases decided after the mid-1970's requires the classification's supporters (the state) to present evidence of an important governmental objective served by the challenged statutory classification and to prove that this objective is the actual legislative purpose underlying the use of the gender-based classification.[88] Earlier cases, however, indicate a more deferential approach.

a. *Pre-1976: Judicial Deference. Kahn v. Shevin*[89] is an example of judicial deference extended to unsupported state claims of furthered governmental objectives through gender-based classifications. In *Kahn*, a Florida law gave a property tax exemption to widows but not widowers.[90] The state's claim that the statute was designed to provide aid to women who are less able to support themselves in later life because of past employment discrimination practices[91] was sufficient evidence to uphold the law.[92] The statute presented evidence that women had been victims of past employment discrimination practices,[93] but there was no indication that the exemption was specifically designed to ameliorate that past employment discrimination. Nevertheless, the Court simply accepted the state's evidence that discrimination had in fact existed and assumed that the purpose of the exemption was to remedy this problem.[94] This assumption is ill-founded: the exemption was first enacted in 1885,[95] and it is unlikely that the legislature

85. *See infra* notes 89–118 & 122–51 and accompanying text.

86. This discussion does not address the question of when a governmental objective is constitutionally important, since the Supreme Court has always made such a determination on a case-by-case basis without a working guideline or definition.

87. *See infra* notes 106–18 and accompanying text.

88. *See infra* note 110 and accompanying text.

89. 416 U.S. 351 (1974).

90. *Id.* at 352. The Florida statute which granted the exception read as follows: "The following property shall be exempt from taxation: . . . . (7) Property to the value of five hundred dollars to every widow . . . who is a bona fide resident of the state . . . ." FLA. STAT. ANN. § 196.191 (West 1971).

91. 416 U.S. at 352.

92. *Id.* at 356.

93. *Id.* at 353–54 nn.5 & 6.

94. *Id.* at 353–54; *Id.* at 358–60 (Brennan, J., dissenting).

95. *Id.* at 352. FLA. CONST. art. IX, § 9 (1885) provided that: "There shall be exempt

intended in 1885 to remedy past discrimination against females in the job market.[96]

Schlesinger v. Ballard[97] used a similar analysis. The Navy's mandatory discharge requirements allowed female officers at least 13 years of commissioned service before mandatory discharge for want of promotion.[98] Male officers, however, were discharged if they were passed over twice for promotion regardless of tenure.[99] These requirements were upheld when it was alleged that without such favorable treatment, female officers would be discharged sooner than male officers[100] because they were statutorily barred from combat duty.[101] Female officers thus did not have the same

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from taxation property to the value of two hundred dollars to every widow that has a family dependent on her for support . . . ." *Id.* at 352, n.1.

96. Any thought that the tax exemption was originally intended as a sympathatic gesture toward women who were qualified for an occupation, but were discriminated against, will be dispelled upon reading the 19th century's leading Supreme Court opinion on gender-based discrimination in employment. The Court stated:

> [T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. . . .
>
> . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. That is the law of the Creator.

Bradwell v. State, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring).

97. 419 U.S. 498 (1975).

98. 10 U.S.C. § 6401(a) (1967) (repealed 1980) provided that:

> Each woman officer on the active list . . . appointed under section 5590 of this title [officers in the Regular Navy], who holds a permanent appointment in the grade of lieutenant . . . shall be honorably discharged on June 30 of the fiscal year in which—
>
> (1) she is not on a promotion list; and
>
> (2) she *has completed 13 years of active commissioned service* in the Navy . . . .

419 U.S. at 500 n.2 (emphasis added).

99. 10 U.S.C. § 6382 (1967) (repealed 1980) provided that:

> (a) Each officer on the active list of the Navy serving in the grade of lieutenant . . . shall be honorably discharged on June 30 of the fiscal year in which he is considered as having failed of selection for promotion to the grade of lieutenant commander . . . for the second time. . . .
>
> (d) This section *does not apply to woman officers* appointed under section 5590 of this title . . . .

419 U.S. at 499 n.1 (emphasis added).

100. Appellant was a lieutenant in the Navy who had been discharged after nine years of active service for failing to be promoted for the second time. *Id.* at 499.

101. 10 U.S.C. § 6015 (1967) provided that: "[W]omen may not be assigned to duty in aircraft that are engaged in combat missions nor may they be assigned to duty on vessels of

opportunity as male officers to compile favorable service records and receive promotions.[102] This inherent disadvantage, however, does not prove that the statutory discharge scheme was designed to remedy the discriminatory effect upon women. The Court appears to have conceived the objective itself,[103] using a traditional rational basis test.[104] The legislative history, however, contradicts the objective hypothesized by the Court. Mandatory discharge procedures were retained in 1967, but compensation for disparate treatment of female officers was rejected as a reason for such retention.[105]

In sum, both *Kahn* and *Ballard* were decided under a deferential standard of review. In each case, the classification's supporters presented evidence showing the existence of a serious problem in need of a remedy. The classification's supporters, however, failed to introduce any evidence that the gender-based classification was created as a remedy to that particular problem. The Court, despite this lack of evidence, reasoned that the legislative objective was to remedy the problem demonstrated by the proponent. Finally, the Court failed to weigh the legislative history behind either classification. A reasonable analysis would have demonstrated that the Court's assumptions were unwarranted.

b. *The Present Requirements*. More recent cases require the party defending the classification to prove that an important governmental objective exists.[106] This requirement was developed initially in *Weinberger v. Weisenfeld*[107]—a case decided one term after *Kahn* and only two months after *Ballard*. The *Weisenfeld* Court held that it was unconstitutional to grant Social Security survivor's benefits to a widow and her minor children, but to limit

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the Navy other than hospital ships and transports." 419 U.S. at 508. The statute was amended in 1978 to allow temporary assignment of women to vessels not expected to be assigned combat missions. Pub. L. No. 95-485, 92 Stat. 1623 (1978).

102. The disparate treatment only applied to officers in the Regular Navy. Officers in the Medical, Dental, Judge Advocate General's and Medical Services Corps were discharged under gender-neutral rules. *Id.* at 509 (citing 10 U.S.C. §§ 5574, 5578, 5578a & 5579 (1967)).

103. The dissent made the same argument. 419 U.S. at 511 (Brennan, J., dissenting).

104. *See supra* notes 29–31 and accompanying text.

105. 419 U.S. at 515–17 (Brennan, J., dissenting) (citing S. REP. No. 676, 90th Cong., lst Sess., 10 (1967) *reprinted in* 1967 U.S. CODE CONG. & AD. NEWS, 1839, 1839–42).

106. This requirement was reaffirmed in Kirchberg v. Feenstra, 450 U.S. 455 (1981), decided the same day as Michael M. v. Superior Court of Sonoma County, 450 U.S. 465 (1981). The *Kirchberg* Court held: "[t]he burden remains on the party seeking to uphold a statute that expressly discriminates on the basis of sex to advance an 'exceedingly persuasive justification' for the challenged classification." *Id.* at 461.

107. 420 U.S. 636 (1975).

the same benefits only to the minor children of widowers.[108] As in *Kahn* and *Ballard*, the government attempted to "characterize the classification . . . as one reasonably designed to compensate women beneficiaries as a group for the economic difficulties which still confront women who seek to support themselves and their families."[109] Justice Brennan, writing for the Court, departed from the deferential analysis evident in *Kahn* and *Ballard*, stating that:

> [T]he mere recitation of a benign, compensatory purpose is not an automatic shield which protects against inquiry into the actual purposes underlying a statutory scheme . . . . This Court need not in equal protection cases accept at face value assertions of legislative purposes when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation.[110]

Thus, the Court struck down the statute when an independent investigation of the statutory scheme and the legislative history revealed that the statute was intended to obviate the need for young widowed mothers to work, but it was "in no way premised upon any special disadvantages of women."[111]

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108. *Id.* at 637–39 (citing 42 U.S.C. § 402(g) (1967)). Title 42 U.S.C. § 402(g)(1967) provides:

> (1) The widow and every surviving divorced mother . . . of an individual who died a fully or currently insured individual, if such a widow or surviving divorced mother—
>
> (A) is not married,
>
> (B) is not entitled to a widow's insurance benefit,
>
> (C) is not entitled to old-age insurance benefits, or is entitled to old-age insurance benefits each of which is less than three-fourths of the primary insurance amount of such individual,
>
> (D) has filed applications for mother's insurance benefits . . . ,
>
> (E) at the time of filing such application has in her care a child of such individual entitled to a child's insurance benefit . . .
>
> shall . . . be entitled to a mother's insurance benefit for each month . . . in which she becomes so entitled to such insurance benefits and ending with the month preceding the first month in which any of the following occurs: no child of such deceased individual is entitled to a child's insurance benefit, such widow or surviving divorced mother become entitled to an old-age insurance benefit equal to or exceeding three-fourths of the primary insurance amount of such deceased individual, she becomes entitled to a widow's insurance benefit, she remarries, or she dies . . . .

Id. Appellant was a widower who had depended on his wife for over half of the family income, 420 U.S. at 639 n.4. Subsequent to his wife's death, appellant was unemployed for a period of time. After obtaining employment, appellant was discharged, in part because he was unable to find suitable housekeeping services for his infant son. *Id.* at 641 n.7.

109. 420 U.S. at 648.

110. *Id.* at 648 n.16.

111. *Id.* The Court gave the following reasons for its holding: 1) the Advisory Council on Social Security created the survivor's benefits in 1939 "with the purpose of enabling the widow to remain at home and care for the children;" 2) when suggestions were made in

Justice Stevens, concurring in *Califano v. Goldfarb*,[112] persuasively argued that the requirement of an independent judicial investigation conflicted with the earlier holding in *Kahn*.[113] Justice Stevens further stated that since *Kahn* was overruled sub silentio[114] the *Weisenfeld* analysis should be followed.[115] It is unlikely that the statute in *Kahn* would be upheld under the present rule. The state failed to produce any evidence in support of its claimed objective,[116] and that in itself is enough to warrant a different result.[117] Furthermore, an analysis of the legislative history raises a question of whether the statute was actually intended to remedy discrimination against women.[118] *Kahn*, therefore, does not provide precedential support for the assertion that the burden of proof is on the classification's opponents. Thus, the *Weisenfeld*

1971 to eliminate the gender-based distinction, the Advisory Council upheld the scheme for the same reasons; 3) the benefits were not given to all widows—only those who had minor children; 4) when all the children are no longer eligible for benefits, the widow's benefits ceased until the widow reached the age of 60. *Id.* at 649–50.

112. 430 U.S. 199, 217 (1976) (Stevens, J., concurring).

113. *See supra* notes 89–96 and accompanying text.

114. The rule of law in *Kahn*, that sex classifications made to ameliorate past sex-based discrimination are not arbitrary, is arguably good law. It is only the implication that the state is not required to prove the existence of this objective that Justice Stevens claims is reversed.

115. 430 U.S. at 223–24 (Stevens, J., concurring).

116. *See supra* notes 83–96 and accompanying text.

117. That the Court has reviewed congressional power to remedy past discrimination under a rational basis test is not a problem. *See* Fullilove v. Klutznick, 448 U.S. 448 (1980); South Carolina v. Katzenbach, 383 U.S. 301 (1966). Even under a rational basis test it is doubtful that the statute challenged in *Weisenfeld* would have been upheld if the claims of remedial legislative purpose were taken at face value. In fact, the Court held that the gender-based distinction was "entirely irrational." 420 U.S. at 651. This assertion is supported in Justice Rehnquist's concurring opinion, which stated that the classification is unconstitutional under a rational basis analysis. *Id.* at 655 (Rehnquist, J., concurring). Though *Kahn* represents a different factual situation, the statute challenged in *Kahn* would probably not survive the standard of review under *Katzenbach* or *Fullilove*. In both *Katzenbach*, which upheld the Voting Rights Act of 1965, Pub. L. No. 89–110, 79 Stat. 437 (1965) (codified as amended 42 U.S.C. §§ 1971, 1973–1973bb–4 (1976)) and *Fullilove*, which upheld the ten percent set-aside for minority business enterprises in the Public Works Employment Act of 1977, Pub. L. No. 95–28, 91 Stat. 116 (1977), the remedial purpose of the legislation was clear from the face of the statute itself and its legislative history. *Katzenbach*, 383 U.S. at 308–17; *Fullilove*, 448 U.S. at 456–67 (opinion of Burger, C.J.). In other words, the important governmental interests test of the intermediate scrutiny standard had been met. The only judicial deference, therefore, involved the relationship between the remedial purpose of the statute and the discriminatory classification. Since the statute challenged in *Kahn* did not even meet the important governmental interests test, *Kahn* is distinguishable.

118. *See supra* notes 95–96 and accompanying text. One could also logically argue that the outcome in *Schlesinger v. Ballard* would be different because here the existence of the objective lacked empirical support.

analysis, which places the burden of proof on the proponents of the classification, should be followed.

2. *The Determination of a Substantial Relationship*

In addition to the burden of showing that an important governmental objective was actually intended by the legislature, the classification's supporters also bear the burden of proving the existence of a substantial relationship between the governmental objective and the gender-based classification. Some pre-1976 cases assume the existence of the relationship between the classification and the stated objective.[119] Other cases have upheld classifications whose relationship with the state's asserted goal was tenuous.[120] Though these earlier cases were never expressly overruled, recent cases have uniformly required the demonstration of a much closer relationship,[121] and thus should be followed.

a. *Pre-1976 Cases*. Earlier cases, like *Kahn v. Shevin*,[122] presumed the existence of some relationship between the classification and the statute's objective.[123] The statute in *Kahn* was arguably overinclusive since the exception was not limited to widows who deserved its alleged benefits.[124] In *Schlesinger v. Ballard*,[125] the Navy's mandatory officer discharge policy was upheld despite Congress' acknowledgement in 1967 that the exception would probably overcompensate in favor of female officers for past gender-based discrimination.[126]

b. *The Present Rule*. More recent cases require a much closer relationship between the stated objective and the classification. The burden is on the classification's supporters to present evidence establishing a *substantial* relationship.[127] Furthermore, such evidence is given little, if any, deferential treatment.[128]

A gender-based classification will not be considered substantially related to a statutory objective if a gender-neutral statute is

119. *See, e.g., infra* notes 122–24 and accompanying text.

120. *See, e.g., infra* notes 125–26 and accompanying text.

121. *See infra* notes 127–51 and accompanying text.

122. 416 U.S. 351 (1974).

123. *Id.* at 360 (Brennan, J., dissenting).

124. *Id.*

125. 419 U.S. 498 (1975).

126. Congress predicted that male officers would probably be discharged about two years before female officers. *Id.* at 505 n. 11. The appellant was a perfect example of this overcompensation. He was discharged after nine years of service as an officer, *id.* at 499, four years before the thirteen year limit for female officers.

127. *See infra* notes 134–46 and accompanying text.

128. *See infra* notes 147–51 and accompanying text.

equally effective in achieving the stated objective. In *Orr v. Orr*[129] an Alabama statute requiring husbands but not wives to pay alimony upon divorce was struck down.[130] The state claimed that the alimony statute was designed to help needy spouses, and that such disparate treatment was premised on the fact that the wife was typically the needier spouse.[131] Justice Brennan, writing for the Court, acknowledged that "assisting needy spouses is a legitimate and important governmental objective,"[132] but maintained that the gender-based presumption was unnecessary since a hearing on each spouse's financial situation was already required for all divorce proceedings.[133]

Should the classification's supporters establish that a gender-neutral statute is not effective in achieving the governmental objective, they must additionally present empirical evidence to show that the gender-based classification substantially furthers the asserted objective. Recent cases indicate that the Court's standard of acceptable evidence is difficult to meet.

A bare assertion that such a relationship exists was found unacceptable by the Court in *Wengler v. Druggists Mutual Insurance Co*.[134] There the Court struck down a Missouri workers' compensation law which denied benefits to widowers unless dependent upon the deceased spouse's earnings but granted benefits to a widow without proof of dependency upon her husband's earnings.[135] The Missouri Supreme Court held that the state's objec-

129. 440 U.S. 268 (1979).

130. *Id.* at 271. The applicable statute provided that:

> If the wife has no separate estate or if it be insufficient for her maintenance, the judge, upon granting a divorce, at his discretion, may order to the wife an allowance out of the estate of the husband, taking into consideration the value thereof and the condition of his family.
>
> If the divorce is in favor of the wife for the misconduct of the husband, the judge trying the case shall have the right to make an allowance to the wife out of the husband's estate, or not to make her an allowance as the circumstances of the case may justify, and if the allowance is made, it must be as liberal as the estate of the husband will permit, regard being had to the condition of his family and to all the circumstances of the case.
>
> If the divorce is in favor of the husband for the misconduct of the wife and if the judge in his discretion deems the wife entitled to an allowance, the allowance must be regulated by the ability of the husband and the nature of misconduct of the wife.

ALA. CODE §§ 30-2-51, 52, 53 (1975). The Alabama Supreme Court held that a husband is not entitled to alimony upon divorce. Davis v. Davis, 279 Ala. 643, 189 So. 2d 158 (1966).

131. 440 U.S. at 280.

132. *Id.*

133. *Id.* at 281-82.

134. 446 U.S. 142 (1980).

135. *Id.* at 143-47. The statute provided:

tive was to provide benefits to needy spouses.[136] This goal was furthered by the workers' compensation law since widows are typically in need of immediate payment of death benefits and are less able financially, vis-a-vis widowers, to weather the long dependency proceedings.[137] Citing *Orr v. Orr*,[138] the U.S. Supreme Court agreed that "[p]roviding for needy spouses is surely an important governmental objective," and that "[i]t may be that there is empirical support for the proposition" offered by the Missouri Supreme Court.[139] The Court, however, struck down the statute because "the bare assertion of this argument falls far short of justifying gender-based classification . . . ."[140]

The Court additionally refuses to find a substantial relationship between the gender-based classification and the governmental objective when the classification is based on "archaic and

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If the injury causes death, either with or without disability, the compensation therefor shall be as provided in this section:

(2) *The employer shall . . . pay to* the total *dependents of the employee a death benefit* on the basis of sixty-six and two-thirds percent of the employee's average weekly earnings during the year immediately preceding the injury . . . .

(4) *The word "dependent" as used in this chapter shall be construed to mean a relative by blood or marriage of a deceased employee, who is actually dependent for support, in whole or in part, upon his wages at the time of the injury. The following persons shall be conclusively presumed to be totally dependent for support upon a deceased employee and any death benefit shall be payable to them to the exclusion of other total dependents:*

(a) A wife upon a husband legally liable for her support, and a husband mentally or physically incapacitated from wage earning upon a wife . . . .

Id. at 143–44 n.1 (citing MO. REV. STAT. § 287.240 (Supp. 1979)) (emphasis added).

136. The Missouri Supreme Court held that "[t]he governmental objective was to require employers to alleviate the economic hardship resulting from a working spouse's death." 583 S.W.2d 162, 168 (Mo. 1979).

137. The Missouri Supreme Court held:

> The *data available to the general assembly at that time no doubt supported* the concept that a widow was more in need of prompt payment of death benefits upon her husband's death without drawn-out proceedings to determine the amount of dependency than was a widower. It seems reasonably certain that during the 1920's and 1930's [the statute was passed in 1925], it was more difficult than now for a woman to obtain employment with substantial pay and very difficult for her when, upon her husband's death, she was suddenly thrust into the job market. It *seems rather obvious* therefore that the purpose of the conclusive presumption of dependency was to satisfy a perceived need widows generally had, which need was not common to men whose wives might be killed while working.

Id. (emphasis added). This passage supports the proposition that the Missouri Supreme Court was using a rational basis test rather than an intermediate scrutiny standard. The opinion implies that the legislature *may have* thought that widows were in greater need of support, not that they actually thought so. Moreover, the "data available to the general assembly" supporting the unequal treatment cannot be found in the opinion—suggesting that data may not have been presented by the state.

138. 440 U.S. 268 (1979). *See also supra* text accompanying notes 129–33.

139. 446 U.S. at 151.

140. *Id.*

overbroad generalizations" based on the traditional role of the sexes in society.[141] In *Weinberger v. Weisenfeld*,[142] the unequal distribution of Social Security survivors' benefits, based on the concept that a male worker's earnings are vital to the support of his family, while the female's earnings are not, was held unconstitutional.[143] The Court held that the assumed value of the female spouse's earnings was archaic and overbroad. The Court cited sources which indicated that females constitute a large percentage of the work force and do make significant contributions to the family income.[144] The effect of this holding is to impliedly overrule *Hoyt v. Florida*,[145] which assumed that women would be too busy raising a family to serve on a jury[146]—an equally archaic assumption in light of the large number of women in today's work force.[147] The inconsistencies between *Hoyt* and *Weisenfeld* indicate that the Court no longer will use the rational basis test when reviewing gender-based classifications, nor will it attribute a characteristic commonly found in one gender to that entire gender. If the government wishes to legislate regarding that characteristic, it

141. Weinberger v. Weisenfeld, 420 U.S. 636 (1975).

142. *Id.*

143. *Id.* at 642–53.

144. *Id.* at 643 n.11.

145. 368 U.S. 57 (1961).

146. *See supra* notes 33–39 and accompanying text.

147. *Weisenfeld* actually dealt the final blow to *Hoyt*. Most of the damage, however, had been inflicted two months earlier in Taylor v. Louisiana, 419 U.S. 522 (1975). The Court held that Louisiana's exemption of females from jury duty, which was similar to Florida's, violated the sixth amendment. The State of Louisiana defended the exemption by presenting the same argument that had prevailed in *Hoyt*. *Id.* at 534, n.15. The Court, however, started its attack on *Hoyt* by holding that Florida's exemption system was upheld "on merely rational grounds," *id.* at 534, thus drawing the case into conflict with the intermediate scrutiny test now used to analyze gender-based classification. The Court, focusing on Louisiana's lack of support for the exemption, stated that "[i]t is untenable to suggest these days that it would be a special hardship for each and every woman to perform jury service or that society cannot spare *any* women from their present duties." *Id.* at 534–35 (emphasis in original). Moreover, the Court cited evidence which showed the substantial number of wives and mothers in the work force and claimed that "[t]hese statistics . . . certainly put to rest the suggestion that all women should be exempt from jury service based solely on their sex and the presumed role in the home." *Id.* at 535 n.17. The Court concluded its analysis by stating that "[i]f it was ever the case that women were unqualified to sit on juries or were so situated that none of them should be required to perform jury service, that time has long since passed." *Id.* at 537. The Court in *Taylor*, therefore, held that *Hoyt* had been decided under a now unacceptable standard of review in gender-based discrimination cases and that the exemption would not have survived even if the intermediate scrutiny test had been used. All that was left for the Court in *Weisenfeld* to do was restate the obvious—that assumptions about the role of the sexes in society will not be upheld if the evidence leads to a contrary conclusion.

must draft a narrow statute that affects only those persons who possess that particular characteristic.

Even if the classification's supporters are able to overcome the first two obstacles, the Court may not be convinced that the evidence shows a substantial relationship between the gender-based classification and the governmental objective. When reviewing the evidence presented by the classification's supporters, the Court will make an independent evaluation of the substantiality of the relationship. The Court in this situation grants little deference to the legislature's determination. The State of Oklahoma, in *Craig v. Boren*,[148] presented a great deal of statistical evidence to support the state's position that an eighteen-year-old drinking age for females and a twenty-one-year-old drinking age for males is substantially related to the goal of enhancing traffic safety.[149] Rather than accepting the evidence at face value, however, the Court independently analyzed and refuted each piece of evidence,[150] and concluded that "[Oklahoma's] statistics in our view cannot support the conclusion that the gender-based distinction closely serves to achieve that objective and therefore the distinction cannot . . . withstand equal protection challenge."[151]

D. *Conclusion*

The Court has, since 1971, consistently subjected discriminatory gender-based legislation to greater scrutiny than the rational basis test would permit.[152] A gender-based classification now must be substantially related to an important governmental objective.[153] The party defending the classification must now bear the burden of proving the substantial relationship between the governmental relationship and the challenged legislation.[154] To prove the existence of an important governmental objective, the government must show from the statute and from the legislative history that the claimed objective was the actual purpose for the classification.[155] Furthermore, to prove the substantial relationship between the governmental objective and the gender-based classification, the government must first prove that a gender-neu-

148. 429 U.S. 190 (1976).
149. *Id.* at 199–201.
150. *Id.* at 210–14.
151. *Id.* at 200.
152. *See supra* notes 40–73 and accompanying text.
153. *See supra* notes 74–151 and accompanying text.
154. *See supra* notes 74–85 and accompanying text.
155. *See supra* notes 106–18 and accompanying text.

tral statute will not be equally effective in achieving the desired goal.[156] To meet the burden of proof the government must show that the gender-based classification is supported by more than bare assertions[157] or "archaic and overbroad generalizations" about the traditional role of sexes in society.[158] Any empirical evidence presented by the government must withstand an independent judicial evaluation.[159]

II. THE 1981 CASES: QUESTIONABLE INTERMEDIATE SCRUTINY ANALYSIS

A. Michael M. v. Superior Court[160]

The petitioner in *Michael M.*, a seventeen-and-one-half-year-old male, had engaged in sexual intercourse with a consenting[161] sixteen-and-one-half-year-old female and was subsequently charged with violating California's statutory rape law.[162] The statute outlaws sexual intercourse with any female under the age of eighteen, but contains no such prohibition against sexual contact with a male of similar age.[163] At trial petitioner moved for dismissal, claiming the law violated the equal protection clause of the fourteenth amendment. Petitioner's motion was denied by both the trial and appellate courts.[164] The California Supreme Court, using a strict scrutiny test, affirmed, holding that the state's claimed objective for the statutory rape law, prevention of teenage pregnancies, constituted a compelling state interest.[165] The court held that because only women are capable of incurring pregnancy, the classification was a justifiable means to separate offender from

156. *See supra* notes 129–33 and accompanying text.

157. *See supra* notes 134–40 and accompanying text.

158. *See supra* notes 141–47 and accompanying text.

159. *See supra* notes 147–51 and accompanying text.

160. 450 U.S. 464 (1981).

161. The plurality implied that the incident was forceful by mentioning that the petitioner had initially hit his female victim. *Id.* at 467. The trial record, however, clearly showed that she willingly consented to sexual intercourse. *Id.* at 483-88 (Blackmun, J., concurring).

162. *Id.* at 466.

163. The California statutory rape law reads: "Unlawful sexual intercourse is an act of sexual intercourse accomplished with a female not the wife of the perpetrator where the female is under the age of 18 years." CAL. PENAL CODE ANN. § 261.5 (West Supp. 1980). The rape laws were amended in 1970, making them gender-neutral with the exception of sexual intercourse with a minor female. CAL. PENAL CODE ANN. § 261 (West Supp. 1980).

164. 450 U.S. at 467.

165. *Id.*

victim.[166]

On appeal to the Supreme Court of the United States the petitioner argued that the statute was unconstitutional for four reasons. First, the state had failed to prove that controlling teenage pregnancies was the important governmental interest served by the statute. The petitioner claimed that the original purpose of the statute was to regulate morality by protecting a young woman's chastity, and not to control teenage pregnancies.[167] Since the state law only protected the chastity of women in furthering the goal of morality regulation, the statute was based on archaic generalizations about societal sex roles.[168] Second, petitioner argued that a gender-neutral statute would have been equally effective in furthering the state's asserted objective.[169] Since a gender-neutral statute was equally effective, the state could not show a substantial relationship between the discriminatory statute and the important governmental objective. Therefore, the statute was unconstitutional notwithstanding any evidence presented by the state which shows that holding only males liable, under the statute, is substantially related to controlling teenage pregancies.[170]

Third, petitioner argued that the statute was overinclusive, because the statute also applied to females who are too young to become pregnant.[171] This overinclusiveness arguably casts doubt on the assertion that the statute's purpose is to control teenage pregnancies. Petitioner's final argument was that since he was under eighteen, the statute was unconstitutional as applied. By not punishing females for having sexual intercourse with a minor male, it improperly assumed that males are the aggressors in a sexual relationship.[172] The Court rejected all of petitioner's arguments and affirmed, 5–4. Justice Rehnquist's plurality opinion held that the law passed the constitutional test articulated in *Craig v. Boren*.[173]

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166. *Id.*

167. *Id.* at 472 n.7. *See also id.* at 495 n.9 (Brennan, J., dissenting) (quoting Code Commissioners' note, subd. 1, following CAL. PENAL CODE § 261, p. 111 (1st ed. 1872)).

168. *Id.* at 472 n.7. *See supra* notes 141–47 and accompanying text.

169. 450 U.S. at 473.

170. *See generally supra* notes 129–33 and accompanying text (a discriminatory statute is unconstitutional if a nondiscriminatory statute will accomplish the same purpose).

171. *Id.* at 475.

172. *Id.*

173. *Id.* at 469. *See supra* notes 68–73 and accompanying text.

1. *The Court's Reasoning: Intermediate Scrutiny?*

In response to the petitioner's first argument, Justice Rehnquist held that the state had adequately shown the existence of an important governmental objective. Citing evidence of the growing problem of illegitimate teenage pregnancies and abortions,[174] Justice Rehnquist stated that "the State has a strong interest in preventing [illegitimate pregnancies]."[175] It was uncertain whether this goal was the "actual" or "primary" purpose of the statute,[176] but the Court gave great deference[177] to the finding of the California Supreme Court that "the prevention of illegitimate pregnancy is at least one of the 'purposes' of the statute."[178] The argument that the statute was originally enacted to protect the virtue and chastity of young women, and was therefore invalid, was dismissed in a footnote,[179] in which the Court stated that the original motive for the statute was irrelevant when examining its constitutionality under the equal protection clause.[180] Thus the Court would "not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."[181]

The Court rejected the claim that a gender-neutral statute would have been equally effective for two reasons. *Kahn v. Shevin*[182] was cited for the proposition that it is not the Court's function to determine the most effective method, provided the method in question is within constitutional limitations.[183] In other words, if the state can show a substantial relationship between the statute and the governmental objective, the statute is constitutional regardless of the effectiveness of a gender-neutral alternative. Furthermore, "the State persuasively contends that a gender-neutral statute would frustrate [the State's] interest in effective enforcement . . . [because] a female is surely less likely to report violations of the statute if she herself would be subject to criminal prosecution."[184] Since the effects of a change from a gen-

174. 450 U.S. at 470–71 nn.3–5.
175. *Id.* at 470.
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.* at 472 n.7.
180. *Id.*
181. *Id.* (quoting United States v. O'Brien, 391 U.S. 367, 383 (1968)).
182. 416 U.S. 351 (1974). *See supra* notes 89–96 and accompanying text for a discussion on the method of analysis used in *Kahn*.
183. 450 U.S. at 473.
184. *Id.* at 473–74.

der-based to a gender-neutral statute were speculative, it was proper to defer to the judgment of the state and its courts, who are "armed . . . with the knowledge of the facts and circumstances concerning the passage and potential impact of [the statute], and familiar with the milieu in which that provision would operate."[185]

The Court quickly dismissed petitioner's two remaining arguments, that the statute was overinclusive, and that it was unconstitutional as applied. That the statute also included prepubescent females was considered constitutionally insignificant because "it is ludicrous to suggest that the Constitution requires the California Legislature to limit the scope of its rape statute to older teenagers and exclude young girls."[186] In any event, the inclusion of young females "could well be justified on the grounds that very young females are particularly susceptible to physical injury from sexual intercourse."[187] Moreover, the statute did not presume that males are the aggressors in a sexual relationship. It was merely an attempt to prevent teenage pregnancies by providing an additional deterrent for men.[188]

At the end of his opinion, Justice Rehnquist seemed to distinguish *Michael M.* from past cases which had struck down gender-based classifications. In *Michael M.* the person alleging the statute to be discriminatory was male. Justice Rehnquist claimed that the statute simply imposed a greater burden on males and, therefore, did not invidiously discriminate against females.[189] He further stated that the special constitutional protection afforded females should not be extended to males, since males have suffered no historical disadvantages.[190] Finally, Justice Rehnquist argued that the sexes are not similarly situated in this instance because only women become pregnant and suffer the physical and emotional damages resulting from pregnancy. Thus, by holding only males liable the statute attempts to equalize the suffering.[191]

Justice Brennan, in a heated dissent, rebuked the plurality's application of the *Craig v. Boren* standard.[192] Justice Brennan argued that the plurality had placed too much emphasis on whether

185. *Id.* at 474 n.10 (citing Reitman v. Mulkey, 387 U.S. 369, 378–79 (1967)).
186. *Id.* at 475.
187. *Id.* (citing Rundlett v. Oliver, 607 F.2d 495 (1st Cir. 1979)).
188. *Id.*
189. *Id.* at 475–76.
190. *Id.* at 476.
191. *See id.* at 471, 476.
192. *See supra* notes 68–73 and accompanying text.

the goal of preventing teenage pregnancies is constitutionally important.[193] In his view, the state must also prove that the asserted objective is the actual purpose for the statute and that the statute substantially relates to that objective.[194] Justice Brennan found no evidence in the statute or legislative history to show that the purpose was to control teenage pregnancies.[195] Furthermore, the state had failed to show that a gender-neutral statute would not be as effective as the current gender-based one.[196] Finally, Justice Brennan found that the statute had little, if any, actual impact upon the teenage pregnancy problem.[197]

2. *Analysis of the Court's Reasoning: Intermediate Scrutiny in Name But Not in Fact*

Justice Brennan's analysis in *Michael M.* is in accord with precedent. The only aspect of the intermediate scrutiny test applied correctly by the plurality was the determination that the frequency of teenage pregnancies is a serious problem in need of a solution. The balance of the plurality analysis does not follow prior precedent.

An examination of the statute and its legislative and judicial history clearly demonstrates that the statutory rape law was enacted to regulate morality by protecting the chastity of teenage females.[198] The State of California failed to present any evidence in either the Supreme Court of the United States or the California Supreme Court that a gender-neutral statute would be less effective in controlling teenage pregnancies.[199] Furthermore, the state legislature failed to draft a narrow statute covering only those females who are physically able to become pregnant.[200] The statute's presumption that males are the aggressors during sexual activity is an archaic generalization about the role of the sexes in society, and is unconstitutional.[201] Finally, the evidence cited by both the plurality and the dissent shows that the statute has had little impact on the problem of teenage pregnancies.[202]

193. 450 U.S. at 488–89 (Brennan, J., dissenting).
194. *Id.* at 489 n.2.
195. *Id.* at 494–96.
196. *Id.* at 491–94.
197. *Id.* at 493 n.8.
198. *See infra* notes 206–21 and accompanying text.
199. *See infra* notes 222–28 and accompanying text.
200. *See infra* text accompanying notes 231–32.
201. *See infra* text accompanying note 233.
202. *See infra* notes 234–35 and accompanying text.

a. *Important Governmental Objectives Analysis.* The state bears the burden of proving that a statute serves an important governmental objective.[203] In *Michael M.*, however, California failed to carry the burden of proof that the statute was designed to control teenage pregnancies. That objective is found in neither the statute nor the legislative and judicial history. Moreover, the evidence which the plurality asserts as dispositive of petitioner's argument[204] only demonstrates that a large number of teenage pregnancies and abortions occur.[205]

No evidence of a purpose to control teenage pregnancies is found on the statute's face. Section 261.5 of the California Penal Code simply states: "Unlawful sexual intercourse is an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where the female is under the age of 18 years."[206] The statute does not mention teenage pregnancies or the control thereof. Moreover, prior to 1970, section 261.5 was a part of the general definition of rape under section 261.[207] That section lists the activity described in section 261.5 plus five other circumstances which constitute rape.[208] The five other circumstances all involve one element—a female victim who is unable to consent to, or who has resisted, the sexual activity. Logically, therefore, sexual activity with a female under the age of eighteen was prohibited because the state legislature thought such a female incapable of giving her consent. In other words, the purpose of the original section 261, including what is now section 261.5, was to protect

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203. *See supra* notes 106–18 and accompanying text.

204. 450 U.S. at 472 n.7.

205. *Id.* at 470–71 nn.3–5.

206. CAL. PENAL CODE ANN. § 261.5 (West Supp. 1980).

207. CAL. PENAL CODE ANN. § 261 (West 1970).

208. The statute read as follows:

> Rape is an act of sexual intercourse, accomplished with a female not the wife of the perpetrator, under either of the following circumstances:
>
> 1. *Where the female is under the age of eighteen years*;
>
> 2. Where she is *incapable*, through *lunacy or other unsoundness of mind*, whether temporary or permanent, *of giving legal consent*;
>
> 3. Where she *resists*, but her resistance *is overcome* by force or violence;
>
> 4. Where she is *prevented from resisting by threats* of great and immediate bodily harm, accompanied by apparent power of execution, or *by any intoxicating narcotic*, or anaesthetic substance, administered by or with the privity of the accused;
>
> 5. Where she is at the time *unconscious to the nature of the act*, and this is known to the accused;
>
> 6. Where she *submits under the belief* that the person committing the act is her husband, and this belief is induced by the artifice, pretense, or concealment practiced by the accused, with intent to induce such belief.

Id. (Emphasis added).

women who did not grant consent to the sexual activity, and not to control teenage pregnancies.

The California legislature's inconsistent attitude toward minor males and females was evident in 1970, when it amended section 261 by substituting a gender-neutral definition of rape. At that time, sexual activity with a female under the age of eighteen was the only circumstance listed in the old section 261 that was not reclassified in gender-neutral terms.[209] That type of sexual activity, instead, was removed from section 261 and shifted into a separate section, section 261.5.[210] That shift suggests that the legislature determined that only females were incapable of consenting to sexual activity, thus needing the state's protection.

An analysis of the statute's legislative history does not refute this conclusion or indicate that the control of teenage pregnancy is the statute's actual purpose. California's first statutory rape law was passed in 1850, well before teenage pregnancy was recognized as a problem.[211] The present statute was enacted in 1913, well before the frequency of teenage pregnancies became significant.[212] Furthermore, the original statute only prohibited sexual intercourse with females under the age of ten years, thus applying only to women who were physically incapable of pregnancy.[213]

Additionally, the only written legislative history on the statute indicates that it was based on a legislative determination that females below a certain age were incapable of consent.[214] There is no evidence in the written history to show that control of teenage pregnancies was also an objective.[215] Thus, the legislature when

209. *Compare* CAL. PENAL CODE ANN. § 261 (West 1970) *with* CAL. PENAL CODE ANN. § 261 (West Supp. 1980).

210. CAL. PENAL CODE ANN. § 261.5 (West Supp. 1980).

211. 450 U.S. at 469 n.2 (Brennan, J., dissenting).

212. *Id.* at 495 n.9.

213. *Id.*

214. *Id.*

215. *Id.* Even if the statute had been passed to control teenage pregnancies, it is still not certain that the statute would be constitutional. It is possible, as Justice Brennan's dissent indicated, that the statute would be struck down on substantive due process grounds. *Id.* at 491 n.5. The use of contraceptives is a fundamental right protected by the Constitution. Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965). A woman also has a right to choose an abortion. Roe v. Wade, 410 U.S. 113 (1973). These rights have been subsequently extended to minors. *See* Carey v. Population Services Int'l, 431 U.S. 678 (1977) (prohibition on sale or distribution of contraceptives to minors under 16 was struck down); Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (provision requiring unmarried woman under 18 to obtain either parental consent or consent from a person in loco parentis to obtain an abortion was struck down). If a minor female has a fundamental right not to become pregnant by using contraceptives, and has a

considering this legislation did not regard the control of teenage pregnancy as an objective.

Judicial interpretation of the statute is also of little aid to the state's argument. As Justice Brennan's dissent points out, the California Supreme Court had never, before *Michael M.*, interpreted the statute as a legislative attempt to control teenage pregnancies.[216] For the previous 130 years the statute had been consistently interpreted to be a legislative attempt at protecting females considered incapable of intelligently consenting to sexual intercourse.[217]

Statutory and historical analysis illustrates that the statute was intended to protect only females deemed legally incapable of consenting to sexual activities because of age, and not to control teenage pregnancies.[218] Extending legislative protection to females assumes that males of the same age are capable of consenting and, therefore, are not in need of the state's "protection." This objective is based on the notion that protection of a young woman's chastity is more important than the protection of a young man's, since a young woman is incapable of realizing the consequences of her sexual activities while a similarly situated male can.[219] The

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corresponding right, by obtaining an abortion, not to bear a child once becoming pregnant, then it seems logical that this same minor has a right to perform the very activity which gives rise to the use of contraceptives and subsequently abortion—the right to engage in sexual activity. By imposing criminal sanctions on any male who participates with a minor female in sexual activities, the state is attempting to effectively deny the minor female her rights by deterring males from engaging in sexual activity with her. While a minor's rights can be subjected to greater restrictions by the state than can those of adults, the plurality incorrectly implies that these rights may be completely denied. 450 U.S. at 472–73 n.8. The determination of whether a minor is mature and capable of asserting those rights must be done on a case-by-case basis, not by legislative generalizations. *See* Bellotti v. Baird, 443 U.S. 622, 649 (1979).

216. *Id.* at 496 n.10 (Brennan, J., dissenting).

217. *See id.* at 495–96 n.10 (quoting People v. Verdegreen, 106 Cal. 211, 214–15, 39 P. 607, 608–09 (1895) (" 'The obvious purpose of [the statutory rape law] is the protection of society by protecting from violation the virtue of young and unsophisticated girls.' ")); People v. Hernandez, 61 Cal. 2d 529, 531, 393 P.2d 673, 674, 39 Cal. Rptr. 361, 362 (1964) ("The under-age female 'is presumed too innocent and naive to understand the implications and nature of her act.' ").

218. *See supra* notes 206–17 and accompanying text.

219. As Justice Brennan's dissent noted, the California Supreme Court has aggravated the situation by elevating the notion of incapability of females and the capability of males into an irrebutable presumption:

> [E]ven in circumstances where a girl's actual comprehension contradicts the law's presumption [that a minor female is too innocent and naive to understand the implications and nature of her act], the male is deemed criminally responsible for the act, although himself young and naive and responding to advances which may have been made to him.

fact that sexual mores have changed since 1850, or even 1913, requires no explanation.

The plurality's decision to accord the legislature deference in ascertaining the statute's objective creates serious difficulties. The burden of proof in prior cases had fallen upon the state, but by according deference to the legislature the plurality, by implication, shifts the burden to the statute's opponents. Moreover, the plurality's support[220] is questionable as the majority of the cases cited for the judicial deference shown to legislative determinations were decided prior to the present rule's formulation.[221] Since the present rule does not allow such deference, the value of the cases cited by the plurality is questionable.

b. *The Substantial Relationship Test*. Even assuming that the purpose of the statute is to control teenage pregnancies, the state still had the burden of showing a substantial relationship between the statute and the objective. The evidence cited in Justice Brennan's dissent indicates that this relationship did not exist.

The state had the burden of proof in demonstrating that a gender-neutral classification would not be equally effective in achieving the statute's objective.[222] California asserted that a gender-neutral statute was not as effective; however, it failed to substantiate those assertions with supporting evidence.[223] The "knowledge of the facts and circumstances concerning the passage and potential impact of [a gender-based versus gender-neutral statute]"[224] which the plurality opinion asserts that the California Supreme

450 U.S. at 488 n.1 (quoting People v. Hernandez, 61 Cal. 2d 529, 531, 393 P.2d 673, 674, 39 Cal. Rptr. 361, 362 (1964) (footnote omitted)).

220. 450 U.S. at 469–70.

221. *Id.* at 469–70. Those cases cited by the plurality appear to have been incorrectly applied. Palmer v. Thompson, 403 U.S. 217 (1970), held that courts should avoid inquiries into the congressional motives. *Id.* at 224. That case, however, involved a legislative act whose passage was allegedly motivated by discrimination but whose effect was nondiscriminatory. The discriminatory effect in *Michael M.* is obvious: males are prosecuted and females are not. Another case, Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252 (1977), did state that determining legislative purposes is difficult, *id.* at 265 n.11 (quoting McGinnis v. Royster, 410 U.S. 263, 276–77 (1973)), but the Court inquired into legislative "purpose" only to determine whether the legislature *intended* to discriminate in passing a statute. The Court was not concerned with any important, or even legitimate reasons for the statute. Moreover, *Arlington Heights* involved the determination of the discriminatory intent of a statute which was not discriminatory on its face. The statute in *Michael M.*, however, is facially discriminatory; therefore, the plurality's "difficult inquiry" into legislative purposes is unnecessary, because the problem does not exist.

222. *See supra* notes 129–33 and accompanying text.

223. *See supra* notes 134–51 and accompanying text.

224. 450 U.S. at 474 n.10 (quoting Reitman v. Mulkey, 387 U.S. 369, 378–79 (1967)).

Court possessed, does not appear in either opinion.[225] In fact, the evidence tends to refute the state's assertion, since gender-neutral statutory rape laws exist in thirty-seven states—with three states also prosecuting minors of both sexes.[226] California never presented any enforcement problems with gender-neutral laws to the Court.[227] Furthermore, it is doubtful that minor females would be any more willing to report violations under a gender-neutral statute since the activity is usually consensual, not forceful.[228]

The plurality opinion asserts that the Court should not involve itself in a "choice of means" analysis but need only determine whether the statute itself is constitutional.[229] As discussed above, it is doubtful that such an aspect of *Kahn*, the Court's support for the above proposition, possesses any force as precedent.[230]

The plurality also incorrectly asserted that the statute was not overinclusive. If California wishes to base its statutory rape law on a characteristic peculiar or common to one sex, it should draft the statute narrowly enough to affect only those who possess that characteristic.[231] California should have drafted its statutory rape law to apply only to females who were physically capable of pregnancy, if the objective of the statute was to control pregnancies. The plurality may be correct in asserting that prepubescent females should be included under the statute to protect them from serious physical injury,[232] but no such purpose is found in the statute, and the California Supreme Court failed to advance this objective in its opinion. Since no evidence of this objective is advanced, the protection of prepubescent females fails the intermediate scrutiny test.

The plurality's conclusion, that the statute does not assume

225. A reading of the California Supreme Court's opinion indicates that the legislature never made such a determination when it enacted the statute, and the Court was merely hypothesizing that such a result would occur:

> [T]he Legislature *may well have believed* that the criminal prosecution of a minor female equally with a male would, as a practical matter, effectively eliminate any possibility whatever of prosecution under the statute. A potential prosecutrix, or her family, would be unlikely ever to complain if she would herself be subject to a prosecution on identical charges.

25 Cal. 3d 608, 614, 601 P.2d 572, 576, 159 Cal. Rptr. 340, 344 (1979)(emphasis added).

226. 450 U.S. at 492 (Brennan, J., dissenting).

227. *Id.* at 492–93.

228. *Id.* at 493 n.7.

229. 450 U.S. at 473.

230. *See supra* notes 122–28 and accompanying text.

231. *See supra* notes 141–51 and accompanying text.

232. 450 U.S. at 475.

that males are aggressors, but is merely a device to deter males from engaging in sexual activities, is questionable. If the imposition of criminal sanctions is intended to deter sexual activity, and thus pregnancies, holding only one of the two consenting partners criminally liable implies that one party is somehow more blameworthy than the other. Prosecuting the male makes him the statutory "aggressor," and the female the statutory "victim."[233]

Given the evidence found in both the plurality opinion and the dissent, the statute bears little relationship to controlling teenage pregnancies, since the effect on the problem appears to be virtually nonexistent. Over 50,000 teenage pregnancies, and a like number of teenage abortions, occurred in California in 1978.[234] In that same year, however, only 400 males were arrested for statutory violations.[235] Based on these figures the statute appears to be an ineffective deterrent to teenage sexual activity.

c. *Gender-Based Discrimination Against Males*. The plurality's distinction between *Michael M.* and past gender-based discrimination cases because the discrimination is directed against males is erroneous. To say that the standard of review in cases involving discrimination against males is different from the standard of review in cases involving discrimination against females is a blatant disregard of precedent. This assertion expresses the proposition that a rational basis test is permissible in male discrimination cases. Support for this proposition, however, is not found in the plurality opinion.[236] On the contrary, the Court has frequently applied the same standard to both males and females.[237] *Craig v. Boren*,[238] the decision which established the present intermediate scrutiny standard for gender-based discrimination cases, applied the same standard to males and females. *Craig* involved a male who claimed his equal protection rights had been violated.[239] Thus, the plurality cannot review male and female discrimination

233. *See supra* text accompanying note 219.

234. 450 U.S. at 471 n.5

235. *See id.* at 493 n.8 (Brennan, J., dissenting).

236. *Id.* at 476.

237. *See, e.g.*, Caban v. Mohammed, 441 U.S. 380 (1979) (mothers, but not fathers, of illegitimate children granted right to block adoption by withholding consent); Orr v. Orr, 440 U.S. 268 (1979) (alimony obligations on husband but not on wife); Stanley v. Illinois, 405 U.S. 645 (1972) (separation of an illegitimate child from surviving father but not from surviving mother without a showing of parental unfitness).

238. 429 U.S. 190 (1976).

239. *Id.* at 192.

cases differently, unless it reverses *Craig* and other inconsistent cases.

That only females can become pregnant does not, as the plurality claims, necessarily make the sexes dissimilarly situated. *Reed v. Reed*[240] enunciated the standard that gender-based classifications would be unconstitutional if the sexes are "similarly situated *with respect to [the statute]*."[241] This rule implies that different characteristics between males and females alone do not automatically validate a discriminatory statute. The statute itself must affect the sexes differently. When the objective of the statute is to curb teenage pregnancies, then the sexes probably are similarly situated with respect to it. The activities of both the male and female participants can be deterred equally under the statute, since usually both participants willingly consent to the activity.[242] Moreover, that only females can become pregnant should not be dispositive since this difference can be easily removed through the exercise of the constitutional right of contraceptive use.[243] In this situation, both sexes are similarly situated and the statute, therefore, unconstitutionally discriminates against males.

d. *Conclusion*. *Michael M.* was incorrectly decided when analyzed in the light of existing case precedent. The state did not demonstrate that a substantial relationship to an important governmental objective existed; little, if any, evidence was offered.[244] Moreover, by holding that great deference to legislative judgments is required, the plurality opinion utilizes a rational basis test.[245] The cases cited as support for this proposition were decided prior to the present standard's adoption and are, thus, arguably inapplicable unless the Court intends to signal a retreat back to the rational basis test.

B. Rostker v. Goldberg[246]

The Military Selective Service Act[247] (MSSA) empowers the President to require every male between the ages of eighteen and twenty-six years to register for the draft.[248] Registration was not

240. 404 U.S. 71 (1971).
241. *Id.* at 77 (emphasis added).
242. *See Michael M.*, 450 U.S. at 493 n.7 (Brennan, J., dissenting).
243. *See supra* note 226.
244. *See supra* notes 213–19 & 222–28 and accompanying text.
245. *See supra* note 227 and accompanying text.
246. 453 U.S. 57 (1981).
247. 50 U.S.C. app. §§ 451–473 (1976 & Supp. III 1979).
248. Section 3 of the MSAA reads:

required between 1975 and 1980 until President Carter requested the MSSA's reinstatment.[249] President Carter asked that the MSSA be amended to include women, but Congress appropriated monies sufficient only for male registration.[250] Resumption of the draft registration reactivated a 1971 lawsuit challenging the constitutionality of all-male draft registration.[251] On July 18, 1980, a three-judge district court unanimously held that the all-male registration violated the due process clause of the fifth amendment.[252] Rostker, the Director of the Selective Service System, appealed directly to the Supreme Court.[253] The Supreme Court reversed the district court, 6–3.[254]

1. *The Court's Reasoning: Intermediate Scrutiny with Deference to Congress*

Citing a number of cases, the majority asserted that the doctrine of separation of powers requires the Court to extend great deference to congressional decisions, especially when the constitutionality of the MSSA had already been considered by Congress.[255] The majority reasoned that the Court must afford even greater deference to congressional decisions when reviewing legislation passed under Congress' article I, section 8 war and military powers.[256] This assertion is based on the belief that Congress is more competent than the Court to render decisions in this area.[257] Moreover, the majority also referred to cases that support the proposition that such deference has been extended where Congress' military powers conflicted with an individual's constitu-

> [I]t shall be the duty of every male citizen of the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder.

50 U.S.C. app. § 453 (1976), *cited in* 453 U.S. at 59.

249. *Rostker*, 453 U.S. at 60.

250. *Id.* at 60–61.

251. *Id.* at 61.

252. *Id.* at 63.

253. *Id.* at 64. A party may appeal directly to the Supreme Court from the decision of a three-judge district court. 28 U.S.C. § 1253 (1976).

254. *Rostker*, *id.* at 83.

255. *See, e.g.*, *id.* at 64 (citing Columbia Broadcasting System v. Democratic Nat'l Comm., 412 U.S. 94, 102 (1973); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 164 (1951); Blodgett v. Holden, 275 U.S. 142, 148 (1927)). See *infra* note 295 and accompanying text for a discussion of these particular cases.

256. 453 U.S. at 64–65.

257. 453 U.S. at 64-65 (citing Gilligan v. Morgan, 413 U.S. 1, 10 (1973)). See *infra* notes 296–97 and accompanying text for a discussion of *Gilligan*.

tional rights.[258] Furthermore, the majority cautioned that "[i]n deciding the question before us we must be particularly careful *not to substitute our judgment* of what is desirable for that of Congress, or our own evaluation of evidence for a reasonable evaluation by the Legislative Branch," although claiming to utilize the *Craig v. Boren* standard of review.[259]

In its determination of whether all-male draft registration serves an important governmental purpose, the majority stated that a review of the statute's legislative history was not limited to the first enactment of the MSSA in 1948.[260] Rather, this review would also include congressional discussions held when the statute was reactivated in 1980.[261] The 1980 congressional hearings and debates contained extensive discussion on the military consequences of an all-male registration.[262] This, the majority concluded, distinguished the MSSA from statutes based on the "accidental by-product of a traditional way of thinking about females."[263]

The majority then held that registration furthered an important governmental purpose—the enlistment of combat troops.[264] They reasoned that the logical extension of draft registration would be a draft itself.[265] The Court held, drawing from the legislative history of the MSSA reactivation, that Congress intended to use any future draft to fill the need for *combat troops*.[266] The majority concluded that "Congress' determination that the need would be for combat troops if a draft took place was sufficiently supported by testimony adduced at hearings so that the courts are not free to make their own judgment on the question."[267] Moreover, in response to the district court's use of evidence from Senate

258. 453 U.S. at 66–67 (citing Brown v. Glines, 444 U.S. 348 (1980); Greer v. Spock, 424 U.S. 828, 837–38 (1976); Schlesinger v. Ballard, 419 U.S. 498 (1975); and Parker v. Levy, 417 U.S. 733, 756 (1974)). See *infra* note 295 and accompanying text for a discussion of these cases.

259. 453 U.S. at 68 (emphasis added).

260. *Id.* at 74.

261. *Id.* at 74–75.

262. *Id.* at 72.

263. *Id.* at 74 (quoting Califano v. Webster, 430 U.S. 313, 320 (1977)).

264. *Id.* at 77.

265. "Any assessment of the congressional purpose and its chosen means must . . . consider the registration scheme as a prelude to a draft in a time of national emergency. Any other approach would not be testing the Act in light of the purposes Congress sought to achieve." *Id.* at 75.

266. *Id.* at 76–77 (citing S. REP. No. 826, 96th Cong., 2d Sess. at 160 (1980), *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 2612, 2650).

267. *Id.* at 76 (emphasis added).

hearings—which indicated that not all draftees would serve combat duty[268]—the majority asserted that "the District Court . . . palpably *exceeded its authority when it ignored Congress'* considered response to this line of reasoning."[269] The majority concluded, therefore, that "[t]he purpose of registration . . . was to prepare for a draft of *combat troops*."[270]

After determining the governmental objective for draft registration, the Court stated that a draft which exempts women "is not only sufficiently, but closely related to Congress' purpose in authorizing registration."[271] Since women are limited by statute and established military policy[272] to noncombat positions, the Court reasoned that they should not be included in the pool of potential combat troops. Thus, the sexes are not similarly situated with regard to either draft registration or the draft itself.[273] Gender-based discrimination in this context is therefore plainly constitutional.[274]

The argument that a gender-neutral registration requirement is as effective as the male-only registration requirement was dismissed. The Court held that the purpose of the registration was to draft combat troops; therefore, a gender-neutral statute would never be as effective because women are precluded from service in combat.[275] Furthermore, any military necessity for female registration is nonexistent because any noncombat positions needed could be filled by either male draftees or female volunteers.[276] The majority held that any inclusion of women in the system, therefore, was merely based upon "consideration of equity"—a factor which need not be considered by Congress when exercising its article I, section 8 war and military powers.[277] Finally, even if all noncombat positions could not be filled by female volunteers, the Court refused to require Congress to fill those positions by drafting women. The Court reasoned that to do so would prescribe a rigid division of the military into two groups—permanent

268. Goldberg v. Rostker, 509 F. Supp. 586, 600 (E.D. Pa. 1980), *rev'd*, 453 U.S. 57 (1981).

269. 453 U.S. at 81 (emphasis added).

270. *Id.* at 76.

271. *Id.* at 79.

272. *Id.* at 76.

273. *Id.* at 78.

274. *See supra* notes 37–47 and accompanying text.

275. 453 U.S. at 78.

276. *Id.* at 81 (citing S. REP. NO. 826, *supra* note 266, at 158, *reprinted in* 1980, U.S. CODE CONG. & AD. NEWS at 2648).

277. *Id.* at 79–80 (citing S. REP. NO. 826, *supra* note 266, at 158, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS at 2648).

combat and permanent support.[278] This division would occur as female draftees are statutorily barred from combat.[279]

Like *Michael M.*, the *Rostker* holding provoked heated dissents. Justice White argued that Congress did not indicate its desire to fill every position in the military with combat-ready men, by pointing to the large numbers of female volunteers.[280] Existing volunteers could not possibly staff all noncombat positions during a mobilization and thus the use of women in these positions would not threaten either military flexibility or combat readiness.[281]

Justice Marshall agreed that raising and supporting an army is an important governmental objective.[282] He disagreed, however, that in a military context the standard of review should be different.[283] The Court, not Congress, determines the governmental objective's relationship to the statute, and here it is insufficient to support the exclusion of women.[284] The government never contended that the exclusion of women from draft registration is related to military effectiveness. Indeed, military experts agree that women have made significant contributions to the Armed Services.[285] Moreover, if exclusion of women from combat is desirable and constitutional, such exclusion has already been achieved.[286] It is not necessary, therefore, to utilize the registration statute as part of the overall exclusion plan.[287]

2. *Analysis of the Majority's Reasoning: Misapplication of the Intermediate Scrutiny Test*

Although the majority purported to follow the *Craig v. Boren* standard of review, it misapplied that test. *Rostker* was not a situation[288] where the Court should have accorded deference to legislative determinations.[289] If the majority had independently reviewed the evidence, it would have concluded that the purpose of registration was not limited to raising exclusively combat

278. *Id.* at 82 (citing S. REP. No. 826, *supra* note 266, at 158, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS at 2648).
279. *Id.*
280. *Id.* at 83 (White, J., dissenting).
281. *Id.* at 84–86.
282. *Id.* at 88 (Marshall, J., dissenting)
283. *Id.* at 89–90.
284. *Id.* at 90.
285. *Id.* at 90–91.
286. *Id.* at 93.
287. *Id.*
288. *See infra* notes 297–301 and accompanying text.
289. *See infra* notes 296–98 and accompanying text.

troops,[290] and that an all-male registration is not substantially related to the actual purpose of draft registration.[291]

a. *Deference to Congress*. The Court again acknowledged, as it had in *Michael M.*, that it owes great deference to congressional decisions.[292] The Court warned against substituting its independent evaluation of the evidence for that of Congress.[293] By so doing, the Court implicitly approved a rational basis standard. Under the existing standard of review, the district court was required to independently evaluate the evidence.[294] Furthermore, the Court's support for the asserted deference is questionable. Those cases cited were either decided prior to the present rule expressed in *Craig* or are factually distinguishable from the cases cited in *Rostker*.[295]

Arguably, care should be exercised whenever the Court re-

290. *See infra* notes 302–05 and accompanying text.

291. *See infra* notes 306–21 and accompanying text.

292. 453 U.S. at 64.

293. *See supra* notes 29–31 and accompanying text.

294. In *Craig v. Boren*, for example, the state presented a great deal of evidence to prove that teenage males were more likely to become involved in automobile accidents than teenage females. The majority in that case simply did not believe the evidence was substantial. 429 U.S. at 200–04.

295. *See* 453 U.S. at 64–67. Blodgett v. Holden, 275 U.S. 142 (1927) involved the constitutionality of taxing inter vivos gifts. Columbia Broadcasting System v. Democratic Nat'l Comm., 412 U.S. 94 (1973) involved alleged first amendment violations arising from a television network's refusal to sell broadcast time to air certain political views. This dispute never directly involved congressional legislation. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951) concerned constitutional violations in designating certain organizations as Communist without notice or hearing.

Most of the cases cited as support for the argument that deference must be accorded decisions made pursuant to Congress' war and military powers did not involve gender-based discrimination. Parker v. Levy, 417 U.S. 733 (1974) rejected the claim of an insubordinate soldier that the Uniform Code of Military Justice was unconstitutionally vague and overbroad. Such a rejection appears reasonable in light of "[t]he fundamental necessity for obedience, and the consequent necessity for imposition of discipline" required in the military. *Id.* at 758. Both Greer v. Spock, 424 U.S. 828 (1976) and Brown v. Glines, 444 U.S. 348 (1980) upheld restrictions on political speeches made by civilians on a military base and the right of military personnel to petition for redress of grievances, respectively. These restrictions were justified by the Court because of the potential "danger to the loyalty, discipline, or morale of troops" which results from such actions. 424 U.S. at 840. *Rostker* does not present the same type of threats or substantial disruptions in military effectiveness. The presence of females in the military is an established fact and their positive impact in the military is well documented. Only Schlesinger v. Ballard, 419 U.S. 498 (1975) involved sex discrimination in a military context. In this case the Court upheld discriminatory mandatory discharge procedures because the statutuory proscription of women from combat made the sexes not similarly situated for promotions. *See supra* notes 93–98 and accompanying text. *Ballard* may be distinguishable from the present case, however, because the sexes arguably are similarly situated under draft registration. *See infra* notes 309–21 and accompanying text.

views military matters. Forcing the government to bear a heavy burden, as an alternative to facially discriminatory action, could seriously threaten national security. For this reason the Court reiterated that[296]

> [i]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches.[297]

This case, however, involves neither an undesirable burden on the government, nor an area of judicial incompetence. Although the legislative branch expressed opposition to universal registration, the executive branch—that part of the government responsible under the MSSA for administering the system—obviously did not feel burdened by including women in the system.[298] Moreover, the evidence considered by the district court in striking down the all-male system, was not discovered through independent investigation. Rather, the evidence came from testimony given by members of the executive branch[299]—the competent "civilian controllers" making professional military judgments.[300] Any potential danger to national security which justifies a deferential review, therefore, arguably does not exist.[301]

b. *Important Governmental Interests Test*. The Court found that the purpose of the all-male registration system is to raise only combat troops.[302] The majority did not feel free to engage in an independent evaluation of the evidence. Such an investigation, which was performed by the district court, revealed that not all draftees would be placed in combat or combat-ready positions.

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296. 453 U.S. at 65–66 (citing Gilligan v. Morgan, 413 U.S. 1 (1973)).

297. *Gilligan*, 413 U.S. at 10 (emphasis in original).

298. It was President Carter who first advanced the proposition regarding a gender-neutral registration.

299. *See generally* 453 U.S. at 76–82.

300. *Gilligan*, 413 U.S. at 10.

301. Furthermore, to strike the all-male system does not violate Chief Justice Marshall's fundamental command in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819):

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

Id. at 421. *Rostker* does not involve a judicial determination that the particular constitutional means are unwise and that more effective means could have been chosen. Rather, the all-male system violates an express constitutional provision and, therefore, is not a "means . . . consistent with the letter and spirit of the constitution."

302. 453 U.S. at 76.

Evidence before the district court demonstrated that during the first six months of military mobilization, the government would have a minimum of 80,000 *noncombat* positions which could be advantageously filled by female inductees.[303] These figures were not computed by the district court but by the Department of Defense.[304] The actual purpose of draft registration, therefore, is not limited to raising combat troops. The MSSA itself states that "[A]n adequate armed strength must be achieved and maintained to ensure the security of this Nation."[305] Any evidence which attempts to show a substantial relationship between excluding females and furthering the goals of draft registration—the security of the nation—must be viewed with that objective in mind.

c. *Substantial Relationship Test*. The government was required to prove that the exclusion of women from registration was substantially related to the maintenance of a strong military.[306] Moreover, a gender-neutral registration system has to be proven less effective than male-only registration[307] and proven by specific evidence.[308] The government failed to meet this burden.

In finding any gender-neutral registration system less effective than the existing all-male system,[309] the Court incorrectly assumed that all draftees would be placed in combat-ready positions.[310] The Department of Defense claimed that 80,000 jobs could be filled by female draftees.[311] In fact, one reason the administration supported female registration is that women can best

303. 509 F. Supp. at 600.

304. *Id.*

305. 50 U.S.C.App. § 451(b) (1976).

306. *See supra* notes 127–51 and accompanying text.

307. *See supra* notes 129–33 and accompanying text.

308. *See supra* notes 134–40 and accompanying text.

309. 453 U.S. at 77.

310. *See supra* notes 302–05 and accompanying text. Not all Congressmen agree that the purpose of draft registration is to raise only combat troops, as the majority apparently believed:

> In time of mobilization . . . it may be necessary to significantly expand the size of our forces in a very short period of time. The requirements for combat soldiers will be high, but so will the requirements for the large numbers of military personnel who fill noncombat roles . . . .
>
> The subcommittee's findings are fatally flawed because they erroneously focus on the assignment of women to combat and fail to address approved plans for the use of women to meet "noncombat mobilization requirements." The assignment of women to combat roles is an issue that unnecessarily clouds the *central issue of how the nation can best meet its personnel requirements in time of mobilization.*

S. REP. NO. 826 *supra* note 266, at 241, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS at 2664–65 (statement of Sen. Cohen) (emphasis added).

311. 453 U.S. at 81.

fill some specific positions.[312] Women could be drafted to fill those positions, thereby freeing the males to do those jobs for which they are best suited. Thus, universal conscription is not merely as effective as the male-only system, it is arguably more effective.

The Court further reasoned that since all positions could be filled by male draftees or female volunteers, only notions of equity would be served by universal registration.[313] This assertion, however, is rebutted on three points. The "notions of equity" discussed by the majority are founded on the idea that there are military jobs which women perform as well as men.[314] Requiring similarly situated persons to bear equally the burden of performing these jobs is precisely what equal protection demands. Furthermore, it is immaterial whether all of these positions could be filled by men. Opponents of a discriminatory classification need not show that universal registration is more effective than male-only registration; instead, the burden is on the government to show the opposite.[315] Finally, the fact that volunteers would adequately fill those positions for which women are qualified is not dispositive. The purpose of registration is to operate as a hedge if such positions are not filled through volunteers.[316] Regardless of whether a draft would be needed to fill these positions, draft registration should be a necessary contingency. In fact, the Defense Department had already acknowledged that such a need is a distinct possibility.[317]

312. 453 U.S. at 98 (Marshall, J., dissenting) (quoting *National Service Legislation: Hearings on H.R. 6569 Before the Subcommittee on Military Personnel of the House Committee on Armed Services*, 96th Cong., 2d Sess. J.A. 218 (1980) (Testimony of Asst. Sec'y of Defense Pirie)).

313. 453 U.S. at 80.

314. 453 U.S. at 102–03 (Marshall, J., dissenting).

315. *See supra* notes 127–50 and accompanying text.

316. 453 U.S. at 105–06 (Marshall, J., dissenting).

317. *Id.* at 105–06 (Marshall, J., dissenting) (citing *Department of Defense Authorization for Appropriations for Fiscal Year 1981: Hearings on S. 2294 Before the Senate Committee on Armed Services*, 96th Cong., 2d Sess., at 1688 (1980) (Testimony of Asst. Sec'y of Defense Danzig). Such an expectation is fully justified by history. Just before the Korean War, the Government had unsuccessfully attempted to recruit 100,000 female volunteers to meet rapidly expanding needs. *Id.* at 105 n.18 (Marshall, J., dissenting); 509 F. Supp. at 600 n.21 (citing U.S. DEP'T OF DEFENSE, BACKGROUND STUDY—USE OF WOMEN IN THE MILITARY at 3, 5 (2d ed. 1978)). Moreover, the recruitment of 80,000 female positions would be *in addition to* the Government's present attempt to increase the number of women in the military from 150,000 to 250,000 by 1985. *Id.* at 90 (citing *Women in the Military: Hearings Before the Military Personnel Subcomm. of the House Comm. on Armed Services*, 96th Cong., 1st and 2d Sess., 13–23 (1979 and 1980) (testimony of Asst. Sec'y of Defense Pirie)).

The majority accepted the congressional determination that the inclusion of women would be detrimental to military flexibility.[318] A mere assertion by the government, however, is insufficient.[319] Moreover, that finding was premised on the assumption that large numbers of women would be drafted.[320] No determination was established regarding the effects on flexibility in the event only a limited number of women were drafted.[321] No evidence exists, therefore, to indicate that drafting a limited number of women to fill noncombat positions hinders military flexibility.

d. *Conclusion*. In light of recent precedent,[322] the deferential standard of review used by the Court was inappropriate. The majority incorrectly relied on congressional assertions that draft registration only served the purpose of raising combat troops and not to provide a strong military.[323] Furthermore, the government did not demonstrate that drafting a limited number of women would hinder its objectives. Universal registration arguably achieves that objective to an extent greater than the present system.[324] Thus, under the foregoing analysis the present law is unconstitutional.

IV. CRITIQUE: IMPROPER RATIONAL BASIS ANALYSIS IN GENDER-BASED DISCRIMINATION CASES

A. *The Retreat to the Rational Basis Test*

The pattern of decisions handed down in gender-based discrimination cases over the last ten years is confusing. Some cases appear to employ the deferential standard of the rational basis test.[325] Others use a standard requiring greater scrutiny than the rational basis test but less than the strict scrutiny test.[326] The cases decided in the last five years, however, have established a consis-

318. *Id.* at 107.

319. *See supra* notes 134–40 and accompanying text.

320. "If the law required women to be drafted *in equal numbers* with men, mobilization would be severely impaired because of strains on training facilities and administrative systems." S. REP. No. 826, *supra* note 266, at 160, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS at 2650 (emphasis added).

321. *See* 453 U.S. at 107 (Marshall, J., dissenting).

322. *See e.g.*, Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142 (1980); Craig v. Boren, 429 U.S. 190 (1976); Weinberger v. Weisenfeld, 420 U.S. 636 (1975).

323. *See supra* notes 302–05 and accompanying text.

324. *See supra* notes 306–21 and accompanying text.

325. *See supra* notes 89–105 & 122–26 and accompanying text.

326. *See supra* notes 106–18 & 127–51 and accompanying text.

tent approach which does not utilize the rational basis test.[327] The Court has not deviated from this recent pattern, despite assertions to the contrary.[328]

The standard of review established in *Craig v. Boren* and its progeny does not permit deference to legislative judgments; however, both *Michael M.* and *Rostker* hold that such deference should be extended.[329] To prove that an important governmental interest exists requires a statute or its legislative history to show that the claimed objective was originally intended.[330] An analysis of the statutory rape statute in *Michael M.* and the MSSA in *Rostker* shows just the opposite.[331] For the Court to find that a gender-based classification is substantially related to the government's objective, an independent determination of the existence of that relationship and a demonstration that a gender-neutral classification is not equally effective is required.[332]

Both *Michael M.* and *Rostker* uphold gender-based statutes simply because a gender-neutral alternative is not more effective.[333] *Rostker* specifically states that the Court should not substitute its own judgment for the legislature's evaluation of the evidence.[334] A test which defers to a governmental decision-making body,[335] accepts unsupported assertions notwithstanding a legislative history which shows otherwise,[336] upholds gender-based classifications when gender-neutral statutes are equally effective,[337] and fails to independently evaluate the evidence is a rational basis test notwithstanding the Court's assertions.[338]

This conclusion is reached in Justice Brennan's dissents in *Michael M.*[339] and *Rostker*.[340] These particular dissents are significant in light of Justice Brennan's notable contributions to intermediate scrutiny analysis in gender-based discrimination cases.

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327. *Id.*
328. *See supra* notes 186–202 & 288–91 and accompanying text.
329. *See supra* notes 174–81, 255–63 & 267–69 and accompanying text.
330. *See supra* notes 106–18 and accompanying text.
331. *See supra* notes 203–21 & 302–05 and accompanying text.
332. *See supra* notes 129–51 and accompanying text.
333. *See supra* notes 222–30 & 306–24 and accompanying text.
334. *See supra* note 269 and accompanying text.
335. *See supra* note 31 and accompanying text.
336. *Id.*
337. *Id.*
338. *Id.*
339. 450 U.S. at 488–96 (Brennan, J., dissenting).
340. 453 U.S. at 85–86 (joining White, J., dissenting); and 453 U.S. at 86–113 (joining Marshall, J., dissenting).

Justice Brennan authored the majority opinion in *Craig v. Boren*,[341] the basis of the present standard of review.[342] He has also dissented in other gender-based classification cases where the Court apparently applied a rational basis test.[343] Thus, his refusal to join the majority in either *Michael M.* or *Rostker* casts doubt on whether the intermediate scrutiny test was actually applied.

These two cases, therefore, create the same inconsistency in the present test that *Kahn v. Shevin* and *Schlesinger v. Ballard* created in the past.[344] Each case claims to follow precedent, yet neither does so. Each serves as precedent in future cases which uphold gender-based classifications through judicial deference to legislative determinations, and lowers the standard of review.[345] Eventually, the Court could declare that the present doctrine has been overruled sub silentio. This was the procedure utilized by the *Frontiero* and *Craig* Courts.[346]

Under the present standard of review, the Court should not use *Michael M.* and *Rostker* as precedent. Their apparent use of the rational basis test cannot be reconciled with the previously established standard, which requires a higher degree of scrutiny. Adoption of the *Michael M./Rostker* analysis indicates that the Court has abandoned the *Craig v. Boren* rule, and retreated to the deferential approach of the rational basis test.[347]

B. *Gender-Based Discrimination and the Rational Basis Test: The End of Equal Protection?*

Any future Supreme Court application of the rational basis test to gender-based discrimination cases would effectively eliminate constitutional equal protection of the sexes. This possibility is apparent from past gender-based discrimination cases decided under the rational basis standard. The Supreme Court failed to

341. 429 U.S. at 190 (1976).

342. *See supra* notes 68–73 and accompanying text. For other cases utilizing the *Craig v. Boren* standard of review, see Orr v. Orr, 440 U.S. at 270–84 (1980); Califano v. Goldfarb, 430 U.S. at 201–17 (1977) (Brennan plurality); Weinberger v. Weisenfeld, 420 U.S. at 637–53 (1975).

343. Schlesinger v. Ballard, 419 U.S. at 511–12 (1975) (Brennan, J., dissenting); Kahn v. Shevin, 416 U.S. at 357–60 (1974) (Brennan, J., dissenting).

344. *See supra* notes 89–105 & 122–26 and accompanying text.

345. *Id.*

346. Though *Reed v. Reed* claimed to use the rational basis test, the plurality in *Frontiero* looked to the *Reed* court for support and cited it as support for the claim that the standard of review had changed. 411 U.S. at 683–84 (Brennan plurality). The same analysis can be found in *Craig*, 429 U.S. at 203–04.

347. *See supra* notes 32–39 and accompanying text.

strike down a single statute involving gender-based discrimination until 1971.[348] Moreover, if *Reed* did in fact utilize a test requiring greater scrutiny than the rational basis test,[349] then no case has ever struck down a gender-based classification under a rational basis analysis.

This is a threat to equal protection for the sexes. Under a rational basis review nearly every one of the numerous cases decided under an intermediate review would suffer the same fate.[350] The decision in *Craig v. Boren*[351] was based on an independent judicial determination, after evaluating the state's evidence.[352] Under rational basis review the state is not required to prove the statute's validity. The burden of proof is placed on the statute's opponents,[353] who must overcome a presumption that the statute is constitutional. Thus, "any state of facts [that] reasonably can be conceived [to] sustain [the statute] . . . at the time the law was enacted must be assumed."[354] Furthermore, under a rational basis test the state need not show a substantial relationship between statute and objective since it may not be struck down unless it is "without any reasonable basis and is therefore arbitrary."[355] Such a reasonable basis did exist in *Craig v. Boren*. Evidence showed that substantially more teenage males than females were arrested for drunkenness and driving under the influence,[356] because males were more inclined to drink and drive than females.[357] Since the statute's claimed objective was to enhance traffic safety,[358] it was reasonably related to that objective by seeking to reduce drunk driving. The fact that the statute did not significantly further the state's objective[359] is irrelevant under a rational basis test.[360] The

348. *See* Reed v. Reed, 404 U.S. 71 (1971). *See also* Hull, *Sex Discrimination and the Equal Protection Clause*, 30 SYRACUSE L. REV. 639, 645 (1979).

349. *See supra* notes 50–59 and accompanying text.

350. Weinberger v. Weisenfeld, 420 U.S. 636 (1975), a unanimous decision, would probably have been upheld since those Justices that did not join the majority's intermediate scrutiny analysis held that the statute failed rational basis scrutiny. *Id.* at 654–55 (Powell, J., with Burger, C.J., concurring) ("I find no legitimate governmental interest . . . ."); *Id.* at 655 (Rehnquist, J., concurring) ("[I]t is irrational to distinguish . . . .").

351. 429 U.S. 190 (1976).

352. *See supra* notes 148–51 and accompanying text.

353. *See supra* text accompanying note 31.

354. *Id.*

355. *Id.*

356. 429 U.S. at 200 n.8.

357. *Id.* at 203 n.16.

358. *Id.* at 199.

359. *See id.* at 200–04.

360. *See supra* text accompanying note 31.

Court in *Craig*, therefore, would have upheld the statute under rational basis review.

The statutes challenged in *Orr v. Orr*[361] and *Wengler v. Druggists Mutual Insurance Co.*[362] would also have been upheld under rational basis analysis. The statute in *Orr* was invalidated because a gender-neutral statute would have equally furthered the state's objective in providing for needy spouses.[363] The *Wengler* decision held that mere assertions by the state of a substantial relationship between objective and statute were insufficient to justify gender-based discrimination.[364] The rational basis test affords the state a "wide scope of discretion" in the exercise of its powers.[365] Therefore, any determinations made by the legislature would be entitled to great deference.[366] Thus, the existence of gender-neutral alternatives in *Orr* would be irrelevant, and the bare assertions made in *Wengler* would be entitled to great deference.

The above analysis leads to but one conclusion. There is no equal protection under a rational basis test because discriminatory statutes are rarely invalidated.

C. *The Need for Heightened Scrutiny*

Future rational basis analysis of gender-based classifications by the Supreme Court would be ill-advised. Women as a group have suffered a long history of agonizing discrimination.[367] This disparate treatment is typically related not to ability, but to immutable characteristics of gender, "determined solely by the accident of birth."[368] In short, most instances of gender-based discrimination simply cannot be justified. Rational basis review, however, serves only to perpetuate the gross disparities between the sexes, as demonstrated by the automatic validation of discriminatory statutes under this standard.

The need for heightened scrutiny, however, goes beyond those instances where the unfavorable treatment of women is direct and facially obvious, such as lower-paying, lower-prestige jobs. Heightened scrunity should also extend to those instances of gen-

361. 440 U.S. 268 (1979).
362. 446 U.S. 142 (1980).
363. *See supra* notes 129–33 and accompanying text.
364. *See supra* notes 134–40 and accompanying text.
365. *See supra* text accompanying note 31.
366. *See supra* note 30 and accompanying text.
367. *See* Frontiero v. Richardson, 411 U.S. 677, 684–86 (1973) (Brennan plurality).
368. *Frontiero*, 411 U.S. at 686.

der-based discrimination which confer tangible benefits on women but are not intended to ameliorate past discriminatory practices. Such "benefits" subtly discriminate against women since they are premised on archaic sex-role stereotypes which demean and imply inferiority. Female minors benefit under *Michael M.*, at the cost of upholding sexual stereotypes regarding female virtue and their ability to make rational decisions with respect to sexual activities.[369] The older drinking age for males in *Craig v. Boren* rested on the stereotype of the "active boy—adventurous, daring, even reckless [and] the passive girl—docile, settled, submissive."[370] The Social Security benefits to widows in *Weinberger v. Weisenfeld* were allocated under the assumption that females would stay home and raise families.[371] The subtleness of these cases makes the discrimination more insidious than more blatant instances of discrimination towards women. It is this subtleness which mandates a heightened standard of review. The present intermediate scrutiny test allows the Court to determine independently the actual purpose of a discriminatory statute,[372] and to strike it down if based upon an archaic stereotype.[373] This result is not possible under rational basis review as the Court is obligated to find some conceivable basis with which to uphold the statute.[374] Once such a basis is found, the statute, with all of its stereotypes, is upheld.

CONCLUSION

The present standard of review in gender-based discrimination cases requires the classification's supporters to prove empirically that the classification is substantially related to an important governmental objective.[375] Such evidence is then independently evaluated by the Court.[376] Notwithstanding what the Court claims, *Michael M.* and *Rostker* do not utilize this standard of review. Instead, the deferential stance taken in these cases implies the use of a rational basis test.[377] The implicit message of these cases is that the Court will no longer use the intermediate scrutiny test

369. 450 U.S. 464, 494–96 (1981) (Brennan, J., dissenting).
370. Ginsburg, *Sex Equality and the Constitution*, 52 TUL. L. REV. 451, 469 (1978).
371. *See supra* notes 141–44 and accompanying text.
372. *See supra* notes 148–51 and accompanying text.
373. *See supra* notes 141–47 and accompanying text.
374. *See supra* text accompanying note 31.
375. *See supra* notes 75–151 and accompanying text.
376. *See supra* notes 106–18 & 148–51 and accompanying text.
377. *See supra* notes 325–46 and accompanying text.

when reviewing gender-based discrimination cases.[378] The use of a rational basis standard in this context is improper because it will effectively preserve invidious discrimination against women.[379] Rational basis review in gender-based discrimination cases is unwise and unwarranted. For the sake of judicial clarity and the furtherance of equal treatment of the sexes, the Court should return to an intermediate scrutiny standard.

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378. *See supra* text accompanying note 347.
379. *See supra* notes 348–74 and accompanying text.