Volume 23 | Issue 1 Article 3

1977

Primary and Secondary Characteristics in Discrimination Cases

Richard Marshall Abrams

Follow this and additional works at: https://digitalcommons.law.villanova.edu/vlr

 Part of the Civil Rights and Discrimination Commons, Constitutional Law Commons, Labor and Employment Law Commons, and the Religion Law Commons

Recommended Citation

Richard M. Abrams, *Primary and Secondary Characteristics in Discrimination Cases*, 23 Vill. L. Rev. 35 (1977).
Available at: https://digitalcommons.law.villanova.edu/vlr/vol23/iss1/3

This Article is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.

1977-1978]

PRIMARY AND SECONDARY CHARACTERISTICS IN DISCRIMINATION CASES

RICHARD MARSHALL ABRAMS‡

I. INTRODUCTION

THE AMERICAN LEGAL SYSTEM has frequently recognized in recent years that discrimination that is based purely upon such immutable characteristics as sex or race should be held to a standard of judicial scrutiny which is stricter than usual.[1] These types of traits may be referred to as "primary characteristics." As legal analysis has become more sophisticated, however, questions have arisen concerning classifications based upon traits which may be related yet imperfectly linked to these primary characteristics.[2] These linked traits, such as pregnancy or poverty, shall be called "secondary characteristics." The differences between primary and secondary characteristics arise largely from the imperfect linkage between the two: for example, not all nonpregnant people are men, and not all poor people are black.

Occasionally a law or an employment practice which is based on a secondary characteristic may appear to be nondiscriminatory *on its face* with respect to any primary characteristic, but is nonetheless discriminatory *as applied.* For example, a rule based on pregnancy or hair length, which by its express terms applies to everyone, in effect may be discriminatory with respect to sex.[3] If an employer or a government deliberately discriminates on the basis of sex, the primary characteristic, such action is illegal on its face.[4] If

---

‡ B.S.B.A., Bucknell University, 1969; J.D., Harvard University, 1972. Member of the Pennsylvania Bar.

1. *E.g.,* Frontiero v. Richardson, 411 U.S. 677, 683 (1973); Reed v. Reed, 404 U.S. 71, 76-77 (1971); Loving v. Virginia, 388 U.S. 1, 11 (1967); Korematsu v. United States, 323 U.S. 214, 216 (1944), *rehearing denied,* 324 U.S. 885 (1945); N.J. STAT. ANN. §§ 10:5-1 to -17 (West 1976); Comment, Geduldig v. Aiello: *Pregnancy Classifications and the Definition of Sex Discrimination,* 75 COLUM. L. REV. 441, 451 (1975).

In most cases where such immutable characteristics are not present the usual standard of judicial scrutiny involves an examination of whether state action or a statutory scheme "rationally furthers some legitimate, articulated state purpose." San Antonio School Dist. v. Rodriquez, 411 U.S. 1, 17 (1973). If it does, there is generally no equal protection violation. *Id.*

2. *See, e.g.,* General Elec. Co. v. Gilbert, 429 U.S. 125 (1976) (pregnancy); Dripps v. United Parcel Serv. of Pa., 381 F. Supp. 421 (W.D. Pa. 1974) (beards); Mercer v. North Forest Independent School Dist., 538 S.W.2d 201 (Tex. Civ. App. 1976) (hair length). *See also* Kaplan, *Equal Justice in an Unequal World: Equality for the Negro — The Problem of Special Treatment,* 61 NW. U. L. REV. 363, 383 (1966-67).

3. *See* text accompanying notes 14-25 & 33-49 *infra.*

4. *See* text accompanying notes 6-11 *infra.*

Published by Villanova University Charles Widger School of Law Digital Repository, 1977

purposeful discrimination with respect to sex is not found, the question then becomes whether or not the distinction based on pregnancy or hair length, the secondary characteristic, is illegal as applied.[5]

Recent decisions of the United States Supreme Court[6] implicity have suggested to the author an analytical framework for examining allegations of "discrimination." First, it must be determined whether the discrimination objected to is based on a primary or a secondary characteristic. If based on a primary characteristic, under Title VII of the Civil Rights Act of 1964 (Title VII)[7] it is prima facie invalid,[8] while under a constitutional theory the Supreme Court tends to scrutinize the discrimination carefully.[9] Second, if the discrimination

---

5. *See* text accompanying notes 6-11 *infra.*

6. *E.g.,* Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252 (1977); General Elec. Co. v. Gilbert, 429 U.S. 125 (1976); Washington v. Davis, 426 U.S. 229 (1976); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Griggs v. Duke Power Co., 401 U.S. 429 (1971).

7. 42 U.S.C. §§ 2000e to 2000e-17 (1970 & Supp. V 1975).

8. Section 703(a)(1) of Title VII provides:

> It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

Id. § 2000e-2(a)(1) (1970).

In McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the Supreme Court outlined the steps which must be followed to establish a prima facie case of racial discrimination under Title VII. The plaintiff must show:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Id. at 802 (footnote omitted).

9. *See, e.g.,* Frontiero v. Richardson, 411 U.S. 677, 683 (1973); Reed v. Reed, 404 U.S. 71, 76-77 (1971); Korematsu v. United States, 323 U.S. 214, 216 (1944), *rehearing denied,* 324 U.S. 885 (1945). In *Frontiero,* the plurality opinion explained its rationale for utilizing a higher level of scrutiny when reviewing discrimination that is based on a primary characteristic:

> [S]ince sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility . . . ." And what differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members. . . .
>
> With these considerations in mind, we can only conclude that classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny.

411 U.S. at 687-88 (plurality), *quoting* Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1975) (footnotes omitted). *See also* United States v. Hinds County School Bd.,

is based upon a secondary characteristic, it is necessary to discern whether a discriminatory *effect* exists with respect to the primary characteristic. If such an effect is found to exist, under Title VII the discrimination is prima facie unlawful.[10] Under a constitutional theory on the other hand, the Supreme Court now requires the plaintiff to plead and prove that the defendant has manifested a discriminatory *purpose* with respect to the primary characteristic.[11] Third, in either case involving a primary or secondary characteristic, where the discrimination is found to be prima facie unlawful under Title VII or subject to careful scrutiny under the United States Constitution, the invalidity may be rebutted by an appropriate defense. Such defenses include a bona fide occupational qualification within the meaning of section 703(e)(1) of Title VII[12] or a compelling state interest under the United States Constitution.[13]

---

560 F.2d 619 (5th Cir. 1977) (Equal Educational Opportunity Act of 1974 prohibits county from maintaining sex-segregated student assignment plan). *But see, e.g.,* Vorschheimer v. School Dist. of Philadelphia, 532 F.2d 880, 886-88 (3d Cir. 1976) *aff'd per curiam,* 97 S. Ct. 1671 (1977) (sex classification not subject to strict scrutiny). For a discussion of the *Vorschheimer* case, *see* notes 183-188 and accompanying text *infra.*

10. *E.g.,* General Elec. Co. v. Gilbert, 429 U.S. 125, 137-40 (1976). Under Title VII, discrimination on its face is alleged to be "disparate treatment," whereas discrimination as applied is alleged as "disparate impact." International Bhd. of Teamsters v. United States, 431 U.S. 324, 336 n.15 (1977).

11. Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 268-71 (1977); Washington v. Davis, 426 U.S. 229, 238-48 (1976).

12. 42 U.S.C. § 2000e-2(e)(1) (1970). This subsection provides:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs, to admit or employ any individual in any such program on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. . . .

Id.

13. *See, e.g.,* Frontiero v. Richardson, 411 U.S. 677, 688-92 (1973); Reed v. Reed, 404 U.S. 71, 76-78 (1971); Korematsu v. United States, 323 U.S. 214, 217-19 (1944), *rehearing denied,* 324 U.S. 885 (1945). In *Korematsu,* the Court held that a federal order issued during World War II, prohibiting the petitioner and all others of Japanese ancestry from leaving a specified area, although subject to a rigorous standard of scrutiny because based upon a racial classification, was not unconstitutional. 323 U.S. at 223-24. The Court stated:

> To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders — as

This article will examine the application of this framework to discrimination cases, with special focus on discrimination based upon sex and race, although other types of discrimination also will be considered. Particular emphasis will be placed on the issues arising under the first step of this analytical framework, involving the distinctions between primary and secondary characteristics, because their resolution tends to depend on general legal principles, whereas the resolution of the issues presented in the second and third steps tends to depend more on the particular facts of the case.

II. SEX DISCRIMINATION

A. *Pregnancy as a Sex-Linked Characteristic*

In recent cases involving discrimination based upon sex it appears that the United States Supreme Court usually has taken care to distinguish between primary and secondary characteristics in achieving its results. The Supreme Court, in *General Electric Co. v. Gilbert,*[14] held that an employer could exclude pregnancy related disabilities from its disability income protection plan[15] without violating the sex discrimination provision of Title VII.[16] The Court relied heavily on its prior decision in *Geduldig v. Aiello,*[17] in which a similar disability program was held not to violate the Equal Protection Clause of the fourteenth amendment.[18]

The *General Electric* Court utilized an analysis which was essentially similar to the first two steps of the implicit analytic

---

inevitably it must — determined that they should have the power to do just this. There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short. We cannot — by availing ourselves of the calm perspective of hindsight — now say that at that time these actions were unjustified.

Id.

14. 429 U.S. 125 (1976).

15. *Id.* at 136-40.

16. *Id. See* 42 U.S.C. § 2000e-2(a)(1) (1970). For the text of this subsection, *see* note 8 *supra.*

17. 429 U.S. at 133-40. 417 U.S. 484 (1974).

18. 417 U.S. at 494. The *Geduldig* Court had noted:

There is no evidence in the record that the selection of the risks insured by the program worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program. There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.

Id. at 496-97 (footnotes omitted). *See* Mitchell v. Board of Trustees, 46 U.S.L.W. 2112, 2113 (D.S.C. July 27, 1977) (school board's refusal to renew pregnant teacher's contract, based on foreseeable period of absence, violated neither Title VII nor fourteenth amendment). *See also* Yuhas v. Libbey-Owens-Ford Co., 562 F.2d 496, 496 (7th Cir. 1977) (employer's no-spouse rule held valid under Title VII); Women in City Gov't United v. City of New York, 46 U.S.L.W. 2200, 2200 (2d Cir. Sept. 28, 1977) (proof of disparate impact resulting from employer's exclusion of pregnancy related disabilities from disability plan did not violate Title VII).

framework set forth above.[19] Under the first step, it determined that the discrimination in disability benefits was not based on sex, but on pregnancy.[20] Moreover, it stated that a division between women and men was not congruent with a division between pregnant women and nonpregnant persons.[21] In other words, the Court concluded that the discrimination was not based on sex, but on a sex-linked, or secondary,[22] characteristic.[23] Proceeding to the second step, the Court held that the distinction did not have a discriminatory effect:

> The "package" going to relevant identifiable groups we are presently concerned with — General Electric's male and female employees — covers exactly the same categories of risk, and is facially nondiscriminatory in the sense that "[t]here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not."[24]

However, there are really two aspects of equality — equality of inclusion and equality of exclusion. The above quotation indicates that there is equality of inclusion in the plan. That is, the plan *covers* precisely the same risks for both men and women. There is not equality of exclusion, however — women are subject to an uncovered risk which men are not — pregnancy disability. In other

---

19. *See* text accompanying notes 6-11 *supra.*

20. 429 U.S. at 136.

21. *Id.* at 135-36. The Court's distinction between the two types of classifications was as follows:

> "The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups — pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes."

Id. at 135, *quoting* Geduldig v. Aiello, 417 U.S. 484, 496-97 n.20 (1974).

22. *See* text accompanying notes 1-2 *supra.*

23. 429 U.S. at 135-36; *see* Mitchell v. Board of Trustees, 415 F. Supp. 512 (D.S.C. 1977); United States v. City of Philadelphia, No. 74-400 (E.D. Pa. April 11, 1977). Many state courts faced with a similar issue have overlooked this distinction. *See* Board of Educ. v. State Div. of Human Rights, 35 N.Y.2d 675, 319 N.E.2d 203, 360 N.Y.S.2d 887, *aff'g,* 42 App. Div. 2d 854, 854-55, 346 N.T.S.2d 843, 844 (1974) (denial of sick and sabbatical leave for pregnancy held unlawful); Board of Educ. of Union Free School Dist. No. 2 v. New York State Div. of Human Rights, 35 N.Y.2d 673, 319 N.E.2d 202, 360 N.Y.S.2d 887 (1974), *aff'g* 42 App. Div. 2d 49, 53, 345 N.Y.S.2d 93, 98 (1973) (mandatory maternity leave invalidated); Union Free School Dist. No. 6 v. New York State Human Rights Appeal Bd., 35 N.Y.2d 371, 378-79, 320 N.E.2d 859, 862, 362 N.Y.S.2d 139, 143-44 (1974) (program providing special treatment for pregnant persons in determining date for return to employment disallowed); Cerra v. East Stroudsburg Area School Dist., 450 Pa. 207, 213, 299 A.2d 277, 280 (1973) (school board regulation for mandatory maternity leave invalidated as sexually discriminatory); Hanson v. Hutt, 83 Wash. 2d 195, 198-99, 517 P.2d 599, 602 (1974) (denial of unemployment compensation to pregnant women overturned).

24. 429 U.S. at 138, *quoting* Geduldig v. Aiello, 417 U.S. 484, 496-97 (1974).

words, the plan is underinclusive. The Court resolved this problem by stating:

> As there is no proof that the package is in fact worth more to men than to women, it is impossible to find any gender-based discriminatory effect in this scheme simply because women disabled as a result of pregnancy do not receive benefits; that is to say, gender-based discrimination does not result simply because an employer's disability benefits plan is less than all inclusive. For all that appears, pregnancy-related disabilities constitute an *additional* risk, unique to women, and the failure to compensate them for this risk does not destroy the presumed parity of the benefits, accruing to men and women alike, which results from the facially evenhanded *inclusion* of risks. To hold otherwise would endanger the commonsense notion that an employer who has no disability benefits program at all does not violate Title VII even though the "underinclusion" of risks, impacts, as a result of pregnancy-related disabilities, more heavily upon one gender than upon the other. Just as there is no facial gender-based discrimination in that case, so, too, there is none here.[25]

Thus, the Court's reasoning can be summarized in terms of the analytical framework as follows: 1) the program is sexually neutral on its face because it discriminates on the basis of pregnancy, not sex; 2) the program is sexually neutral as applied because of the evenhanded inclusion of risks for both men and women; and 3) the Court did not need to reach the third step in order to hold the program valid because the program did not achieve a discriminatory effect with respect to sex.

B. *Hair as a Sex-Linked Characteristic*

Pregnancy is not the only sex-linked characteristic to provide the basis for disparate treatment. Facial hair was considered recently in two cases by the United States District Court for the Western District of Pennsylvania. In *Dripps v. United Parcel Service of Pennsylvania, Inc.*,[26] an employer's rule prohibiting welders from wearing beards was upheld in the face of a Title VII challenge.[27] The court observed:

> [P]laintiff was not subject to any sex discrimination by virtue of being required to shave his beard. Indeed the defendant's rule

25. 429 U.S. at 138-40 (footnotes omitted) (emphasis in original).
26. 381 F. Supp. 421 (W.D. Pa. 1974), *aff'd*, 515 F.2d 506 (3d Cir. 1975).
27. 381 F. Supp. at 421-22.

> forbidding welders from wearing beards is a sound, bona fide occupational qualification based on reasonable concern for safety. The Court discerns neither an intent to discriminate nor discrimination in fact. *While it is true that only men can grow beards, it does not follow that a rule prohibiting beards amounts to sex discrimination.*[28]

Similarly, in *Lovelace v. Leechburg Area School District,*[29] a suit brought under section 1983 of the Civil Rights Act of 1871,[30] the district court used particularly colorful language in upholding a school regulation prohibiting male students from wearing beards or moustaches.[31] The court held, however, that the regulation did not apply to the plaintiff since his moustache was *de minimis.*[32]

Obviously, just as pregnancy can occur only among women, so too a non-*de minimis* growth of facial hair can occur only among men. Nevertheless, discrimination based on these traits is not discrimination based on sex, but on sex-linked physical characteristics. Accordingly, the facial hair cases are consistent with the pregnancy cases.

Both of these types of cases, however, are in conflict with those involving long head hair on men largely because there is no attempt to distinguish between primary and secondary characteristics in the latter cases. One such case, decided by the Texas Court of Civil Appeals, was *Mercer v. Board of Trustees.*[33] The suit was brought challenging the constitutionality of a public school hair length regulation which applied only to male students.[34] *Mercer* is unique because it was brought under what is commonly termed the Equal

---

28. *Id.* at 421, *citing* Rafford v. Randle E. Ambulance Serv., Inc., 348 F. Supp. 316 (S.D. Fla. 1972) (emphasis added).

29. 310 F. Supp. 579 (W.D. Pa. 1970).

30. 42 U.S.C. § 1983 (1970). This section provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id.

31. 310 F. Supp. at 584-88. The court's analysis in *Lovelace* lacked any discussion of sex discrimination; it focused upon first amendment rights of freedom of expression. *Id.* The absence of a consideration of the sex classification appears to indicate that although the class of persons affected by the regulation consisted entirely of male persons, this fact in and of itself did not constitute sex discrimination.

32. *Id.* at 588. The court stated: "His mustache is *de minimis* and practically imperceptible. It is merely a natural growth, not a cultivated adornment. We do not believe that plaintiff has violated the code. To exclude him from school for such a non-violation is arbitrary, and a violation of due process." *Id.* (citations omitted).

33. 538 S.W.2d 201 (Tex. Civ. App. 1976).

34. *Id.* at 202.

Rights Amendment (ERA) contained in the Constitution of the State of Texas,[35] and seems to be the only suit in any jurisdiction in which hair length regulations were challenged under an ERA. As the court observed:

> [T]he present claim is based on a provision of the Texas Constitution that is not contained in the United States Constitution. Federal courts have dealt with hair-length claims based on the first amendment, ninth amendment, equal protection and due process clauses of the fourteenth amendment, and the right of privacy, but we have found no such claim, federal or state, that has ever been based on an ERA. Therefore, appellants' claim must stand or fall on an interpretation of the ERA contained in the constitution of the State of Texas.[36]

The court then decided that, under the State ERA, sex is a "suspect classification."[37] Accordingly, the court stated:

> Any such classification must fall unless the party defending it can show that it is required by (1) physical characteristics, (2) other constitutionally protected rights such as the right of privacy, or (3) other "compelling reasons." With respect to "physical characteristics" we are simply recognizing the facts of life. For us to adjudicate that women are men would be as futile as it would be absurd. Neither the ERA nor the rights established by it require us to construe it so as to deny sexual or reproductive differences between the sexes.[38]

Based on this analysis, and on the fact that "[l]iving by rules, sometimes seemingly arbitrary ones, is the lot of children,"[39] the court sustained the hair length regulation.[40]

It is clear, however, that long hair is not one of the "physical characteristics" which differentiates men and women. Both men and women can and sometimes do have long hair. It is certainly not a sex-linked *physical* characteristic, like pregnancy or non-*de minimis* facial hair, which can only occur in one sex. Rather it is a sex-linked *social* characteristic. Some would argue that it is exactly this type of social stereotyping that should be invalidated, and it appears that

---

35. TEX. CONST. art. I, § 3a. Section 3a provides: "Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin. This amendment is self-operative." *Id.*

36. 538 S.W.2d at 203 (footnote omitted).

37. *Id.* at 206.

38. *Id.*

39. *Id.*

40. *Id.* at 206-07.

this was the viewpoint of a United States district court in Florida. In *Rafford v. Randle Eastern Ambulance Service, Inc.*,[41] a Title VII case, a Florida district court had before it a suit involving male employees who alleged that they were discharged wrongfully from work, because of their beards and moustaches on the one hand, and because of their refusal to cut their hair on the other.[42] Although the complaints involving only beards and moustaches were dismissed as not involving unlawful sex discrimination,[43] those alleging employment discharges based on hair length were sustained.[44] The court held:

> The recent set of opinions concerning school hair length regulations illustrate the difficulty of the determination involved in a constitutional right context. . . . No such difficulty exists here, since the dismissal of long haired males can obviously be equated to "refusing to hire an individual based on stereotyped characterizations of the sexes." A preference for short-haired male employees is such a stereotyped characterization. . . . Therefore the complaint states a valid claim for violation of Title VII by alleging discharge based on hair length.[45]

Although the *Mercer* case[46] is similar to the facial hair[47] and pregnancy cases,[48] in that it upheld the challenged regulations, the *Mercer* case incorrectly upheld discrimination *based on sex,* but allegedly justified its holding by basing it on physical characteristics. The facial hair and pregnancy cases correctly upheld discrimination *based on physical characteristics* directly, utilizing a similar type of reasoning to that employed in *Rafford:*

> The discharge of pregnant women or bearded men does not violate the Civil Rights Act of 1964 simply because only women become pregnant and only men grow beards. In neither instance are similarly situated persons of the opposite sex favored. These cases are perhaps more properly considered under the rubric . . . that discrimination between different categories of the same sex is not unlawful discrimination by sex. This is a case of

41. 348 F. Supp. 316 (S.D. Fla. 1972).
42. *Id.* at 318.
43. *Id.* at 320.
44. *Id.* at 319.
45. *Id.*, *quoting* Phillips v. Martin Marietta Corp., 400 U.S. 542, 545 (1971) (Marshall, J., concurring). *See generally* Annot., 27 A.L.R. FED. 274 (1976).
46. *See* notes 33-40 and accompanying text *supra.*
47. *See* notes 26-32 and accompanying text *supra.*
48. *See* notes 14-25 and accompanying text *supra.*

discrimination in favor of men who shave off their beards and moustaches. It does not involve proscribed sex discrimination.[49]

C. *Other Sex-Linked Characteristics*

Other areas involving some aspect of sex distinctions may be appropriately handled with the same kind of neutrality as the courts used in *General Electric*[50] and *Rafford*.[51] For example, abortion laws are not sexually discriminatory, although they may infringe other rights which are not pertinent to the present discussion.[52] Similarly, laws regarding prostitution or rape can be put into a sexually neutral form, such as one who sells sexual services to another, or one who has forcible sexual intercourse with another.[53] Therefore, laws along these lines are also sexually nondiscriminatory. Under the same reasoning, discrimination based on marital status is not discrimination based on sex.[54] The distinction drawn here in reality is between married persons and single or divorced persons, not between men and women, and thus is permissible.[55]

The distinction between maternity and paternity presents a more difficult problem. If the distinction is based solely on biology,

---

49. 348 F. Supp. at 320 (citation omitted). *See* notes 19–25 & 28 and accompanying text *supra*. *See also* note 31 *supra*.

50. For a discussion of *General Electric*, *see* notes 14–25 and accompanying text *supra*.

51. For a discussion of *Rafford*, *see* notes 41–45 and accompanying text *supra*.

52. *See, e.g.*, Doe v. Bolton, 410 U.S. 179 (1973); Roe v. Wade, 410 U.S. 113 (1973). *See also* Poelker v. Doe, 97 S. Ct. 2391 (1977); Maher v. Roe, 97 S. Ct. 2376 (1977); Beal v. Doe, 97 S. Ct. 2366 (1977). Analogously, the same may be said with regard to pregnancy regulations. *See, e.g.*, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

53. Two Pennsylvania statutes, for example, utilize this approach. In PA. STAT. ANN., tit. 18, § 5902(a) (Purdon 1973), a sexually neutral phraseology is used: "A *person* is guilty of prostitution . . . if *he* or *she* . . . ." *Id.* (emphasis added). Similarly, the Pennsylvania Statutory Rules of Construction state the "[w]ords used in the masculine gender shall include the feminine and neuter." 1 PA. CONS. STAT. ANN. § 1902 (Purdon Cum. Supp. 1976).

54. *See* Mathews v. DeCastro, 429 U.S. 181, 189 (1976) (statutory scheme upheld whereby married woman whose husband retires or becomes disabled is entitled to Social Security benefits but a divorced woman whose former husband retires or becomes disabled is not entitled to those benefits); Stroud v. Delta Air Lines, Inc., 544 F.2d 892, 893–94 (5th Cir.), *rehearing denied*, 548 F.2d 356 (1977) (employer's rule prohibiting flight attendants from marrying during employment held not to be sex discrimination in spite of the fact that all flight attendants were female). *See also* United Airlines, Inc. v. Evans, 431 U.S. 553 (1977).

55. In Stroud v. Delta Airlines, Inc., 544 F.2d 892 (5th Cir.), *rehearing denied*, 548 F.2d 356 (1977), the court explained the distinction:

> [P]laintiff is not a member of one of the relevant, identifiable classes which has been discountenanced in favor of another such class. Rather, certain women — stewardesses who are unmarried — are favored over certain other women. As one of the all-female group of flight attendants employed by Delta, plaintiff suffered a discrimination, but it was based on marriage and not sex. Men were not favored over women . . . .

544 F.2d at 893. *See* United Airlines, Inc. v. Evans, 431 U.S. 553, 558 (1977).

then, conceptually, it should be treated no differently than one based on pregnancy. It is not based on sex, but rather on physical sex-linked, or secondary characteristics. Thus, inheritance statutes which treat an illegitimate child as the child of the mother but not of the father[56] are presumably based on biology and how it affects the ability to prove lineage.[57] Theoretically, therefore, they are not examples of sex discrimination.[58] If, however, the distinction is not based on biology, but rather on preconceived roles of childrearing, then it is an impermissible discrimination, which the Supreme Court has held to be unlawful. In *Phillips v. Martin Marietta Corp.*,[59] a woman was informed by a corporation with which she sought employment that her application would not be accepted because she was the mother of preschool age children.[60] Despite this attitude, the corporation did employ men with such children.[61] In this Title VII suit brought by the woman, the Supreme Court reversed the summary judgment granted in favor of the corporation and suggested that on remand the possible existence of a justification for the distinction under the bona fide occupational qualification section of Title VII[62] be considered.[63] Justice Marshall in his concurrence responded:

> I fear that . . . the Court has fallen into the trap of assuming that the Act [Title VII] permits ancient canards about the proper role of women to be a basis for discrimination. Congress, however, sought just the opposite result.
>
> By adding the prohibition against job discrimination based on sex to the 1964 Civil Rights Act Congress intended to prevent employers from refusing "to hire an individual based on

---

56. *See, e.g.*, 20 PA. CONS. STAT. ANN. § 2107(a) (Purdon Cum. Supp. 1976). That subsection provides: "For purposes of descent by, from and through a person born out of wedlock, he shall be considered the child of his mother but not of his father." *Id.*

57. The justification for this type of inheritance statute was expressly recognized by the Supreme Court recently in Trimble v. Gordon, 430 U.S. 762 (1977), but the statute was held violative of the fourteenth amendment because, *inter alia*, it excluded categories of illegitimate children whose inheritance rights could be recognized without jeopardizing the orderly method of property disposition — that is, where paternity was readily determinable. *Id.* at 772, 776. *See* note 56 *supra.*

58. It should be noted, however, that cases involving inheritance statutes of this nature do not focus on the rights of the parents but rather on those of the illegitimate children. *See* Trimble v. Gordon, 430 U.S. 762 (1977); Labine v. Vincent, 401 U.S. 532 (1971), *noted in* Petrillo, *Illegitimacy, Inheritance and the 14th Amendment*, 75 DICK. L. REV. 377 (1971).

59. 400 U.S. 542 (1971).

60. *Id.* at 543.

61. *Id.*

62. *See* note 12 *supra.*

63. 400 U.S. at 544.

stereotyped characterizations of the sexes." Even characterizations of the proper domestic roles of the sexes were not to serve as predicates for restricting employment opportunity.[64]

D. *Discussion of Sex-Linked Characteristics*

It should be repeated at this point that the present focus is on the first step of the implicit analytic framework — whether or not the practice in question is sexually neutral on its face[65] — not with the second — whether or not the practice is sexually neutral as applied.[66] That is, we are not dealing with the question of whether a nonsexual discrimination has a sexually discriminatory effect, because such a question usually turns on the facts of a particular case rather than on general legal principles.

The analysis in step one may be understood more easily by eliminating sexual references altogether. For example, the pregnancy cases can be interpreted as allowing behavior which draws distinctions between pregnant *people* and nonpregnant *people.* Similarly, the facial hair cases can be seen as allowing prohibitions against any *person* wearing facial hair. However, the long hair cases cannot be analyzed within this framework, since the prohibitions there are not against any *person* wearing long hair, but only against *men* wearing long hair.[67] Accordingly, it is submitted that these cases improperly allow discrimination based on sex. Similarly, use of characteristics such as height and weight are inherently sexually neutral *on their face,* but may have a sexually discriminatory *effect* or may be a subterfuge for sexual discrimination.[68] The same also may be true of suits involving life expectancy.[69] In all such cases,

---

64. *Id.* at 545 (Marshall, J., concurring) (footnotes omitted), *quoting* 29 C.F.R. § 1604.1(a)(1)(ii) (1970). For the current version of the regulations cited by Mr. Justice Marshall, *see* 29 C.F.R. § 1604.2(a)(1)(ii) (1976).

65. *See* text accompanying notes 7-9 *supra.*

66. *See* text accompanying notes 10-11 *supra.*

67. *See* notes 38 & 45 and accompanying text *supra.*

68. *See, e.g.,* Dothard v. Rawlinson, 97 S. Ct. 2720, 2727 (1977) (height and weight requirements for prison guards established prima facie violation of Title VII); Smith v. Troyan, 520 F.2d 492, 497 (6th Cir. 1975) (minimum weight requirement for police officers held sexually discriminatory); Meadows v. Ford Motor Co., 62 F.R.D. 98, 100 (W.D. Kan. 1973) (minimum weight requirement for production line workers held discriminatory in practice). *See generally* 15 AM. JUR. 2d *Civil Rights* § 170 (1976).

69. *See* Manhart v. City of Los Angeles, 553 F.2d 581, 585 (9th Cir. 1976), *rehearing denied,* 553 F.2d 592 (9th Cir. 197), *cert. granted,* 46 U.S.L.W. 3184 (Oct. 3, 1977) (employer's requirement that female employees contribute 15% more to retirement plan than males because of longer life expectancy violates Title VII); Reilly v. Robertson, 360 N.E.2d 171, 177-79 (Ind. 1977) (separate actuarial tables for male and female retired teachers for computation of benefits paid violates equal protection clause). *But see* EEOC v. Colby College, 46 U.S.L.W. 2253 (D. Maine Oct. 27, 1977) (pension plan requiring employees to contribute equally but paying different benefits to male and female does not violate Title VII).

any classification should be made by the particular characteristic at issue and not by sex. This approach would provide uniform treatment not only for those characteristics which are unique to one sex, such as pregnancy and facial hair, but also for those characteristics which are average to only one sex but possessed by both, such as greater height, weight, strength, or life expectancy. Sex per se should not be the issue in any of these cases. As was stated in *Commonwealth v. Pennsylvania Interscholastic Athletic Association (P.I.A.A.),*[70] a case involving interscholastic athletic competition under the Pennsylvania ERA:[71]

> The notion that girls as a whole are weaker and thus more injury-prone, if they compete with boys, especially in contact sports, cannot justify the By-Law in light of the ERA. Nor can we consider the argument that boys are generally more skilled. *The existence of certain characteristics to a greater degree in one sex does not justify classification by sex rather than by the particular characteristic.*[72]

The relationship between discrimination on the basis of such physical characteristics and sex discrimination was considered in a *Yale Law Journal* article[73] on the proposed federal ERA.[74] That article stated:

> The fundamental legal principle underlying the Equal Rights Amendment, then, is that the law must deal with particular attributes of individuals, not with a classification based on the broad and impermissible attribute of sex. This principle, however, does not preclude legislation (or other official action) which regulates, takes into account, or otherwise deals with a physical characteristic unique to one sex. In this situation it might be said that, in a certain sense, the individual obtains a benefit or is subject to a restriction because he or she belongs to one or the other sex. Thus a law relating to wet nurses would cover only women, and a law regulating the donation of sperm

---

70. 18 Pa. Commw. Ct. 45, 334 A.2d 839 (1975).

71. PA. CONST. art. I, § 28.

72. 18 Pa. Commw. Ct. at 52, 334 A.2d at 843 (emphasis added). *Accord,* Brenden v. Independent School Dist. 742, 342 F. Supp. 1224, 1233 (D. Minn. 1972), *aff'd* 477 F.2d 1292 (8th Cir. 1973) (school athletic teams). *Contra,* United States v. Yingling, 368 F. Supp. 379, 386 (W.D. Pa. 1973) (in selective service context, greater average strength of males held a "distinguishing and distinctive physical characteristic"). *See also* Annot., 23 A.L.R. FED. 664 (1975); Comment, *Sex Discrimination in Athletics,* 21 VILL. L. REV. 876 (1976).

73. Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women,* 80 YALE L.J. 871 (1971) [hereinafter cited as Brown].

74. 86 Stat. 1523 (1972) (presently before the states for ratification).

> would restrict only men. Legislation of this kind does not, however, deny equal rights to the other sex. So long as the law deals only with a characteristic found in all (or some) women but *no* men, or in all (or some) men but *no* women, it does not ignore individual characteristics found in both sexes in favor of an average based on one sex. Hence such legislation does not, without more, violate the basic principle of the Equal Rights Amendment.
>
> This subsidiary principle is limited to *physical* characteristics and does not extend to psychological, social or other characteristics of the sexes. The reason is that, so far as appears, it is only physical characteristics which can be said with any assurance to be unique to one sex.[75]

As previously discussed, distinctions on the basis of traits which are unique to one sex are permissible.[76] Moreover, even those based on physical characteristics that are not unique to one sex may be permitted under certain circumstances, such as on the basis of bona fide occupational qualifications within the meaning of section 703(e)(1) of Title VII.[77] Yet the point of the above-quoted passage from the *Yale* article, as well as that made by the Florida district court in *Rafford,*[78] take this concept even further: only women can become pregnant and only men can grow beards, but not all women can become pregnant and not all men can grow beards; therefore, discrimination based on these traits is not discrimination based on sex.

This viewpoint, however, is not necessarily the most popular one to hold. One comment writer[79] has noted that the *Yale* article has been widely discussed in congressional debates concerning the federal ERA.[80] That author observed that the *Yale* article has been particularly advanced as support for the proposition that classifications based upon characteristics unique to one sex would not, even under the ERA, raise an issue of sex discrimination.[81] In the comment author's view, such an interpretation seemed to evidence congressional support for the Supreme Court's definition of sex

---

75. Brown, *supra* note 73 at 893 (emphasis in original).
76. *See* notes 14-32 and accompanying text *supra.*
77. 42 U.S.C. § 2000e-2(e)(1) (1970). For the text of this subsection, *see* note 12 *supra.*
78. *See* text accompanying note 49 *supra.*
79. Comment, *supra* note 1.
80. *Id.* at 473, *citing* S. REP. No. 689, 92d Cong., 2d Sess. 12 (1972).
81. Comment, *supra* note 1, at 473, *citing* S. REP. No. 689, 92d Cong., 2d Sess. 12 (1972).

discrimination in *Geduldig v. Aiello*.[82] She criticized this proposition and the *Yale* article's support of it in the following language:

> Opponents [of the ERA] were not entirely convinced that legislation providing special benefits to one sex on account of a unique sex trait would survive. . . .
>
> . . . In the first place, the matter of *unfavorable* treatment of a socially beneficial function like childbearing was not before Congress. . . . Because its attention was focused on preserving beneficial legislation, there is no evidence that Congress really considered the negative implications of excluding single-sex characteristics from its equal rights formulation. In fact, the Senate report on the E.R.A. dismissed the entire subject in a single cursory sentence: "the Amendment will not invalidate laws which punish rape, for such laws are designed to protect women in a way that they are uniformly distinct from men." Since the E.R.A. was clearly remedial, it is unlikely that Congress would intentionally approve a rationale that could then be utilized to achieve exactly what the E.R.A. was designed to end: distinctions harmful to a protected class.[83]

It is clear that this comment writer has little desire to achieve true equality. In using such language as "special benefits to one sex", "beneficial legislation", "protect women", and "protected class", she makes it clear that she only desires equality to the extent that it does not conflict with women's existing vested benefits and protections. This concept is reiminiscent of the famous quote from George Orwell's *Animal Farm*:[84] "All animals are equal, but some animals are more equal than others."[85] The comment writer manifestly wishes to have women maintain their protected, pedestal status under the law, while at the same time achieve independence where desired or convenient.

Indeed, there is even some judicial support for this type of one-way equality. In *Kahn v. Shevin*,[86] the Supreme Court sustained a Florida law[87] which gives widows, but not widowers, an annual $500

---

82. 417 U.S. 484 (1974). *See* Comment, *supra* note 1, at 473. For a discussion of *Geduldig*, and the Supreme Court's reliance on that case in *General Electric*, *see* notes 17-18 and accompanying text *supra*.

83. Comment, *supra* note 1, 473-74, *quoting* S. REP. No. 689, 92d Cong., 2d Sess. 16 (1972) (footnotes omitted) (emphasis in original).

84. G. ORWELL, ANIMAL FARM (New Am. Lib. 1946).

85. *Id.* at 123.

86. 416 U.S. 351 (1974).

87. *Id.* at 355-56. *See* FLA. STAT. ANN. § 196.202 (West Supp. 1974-75).

property tax exemption.[88] Similarly, in *Schlesinger v. Ballard*,[89] the Court upheld a system of military promotion[90] which provides for mandatory discharge of male naval officers who fail to be promoted after nine years of active service, while the same rule is applied to female officers only after thirteen years.[91] In spite of the fact that *Kahn* and *Ballard* apparently upheld distinctions based purely on sex, the above Comment writer, in discussing the two cases, referred to "[t]he Court's acceptance of these inequitable means of achieving undeniably admirable goals of compensation" as "not entirely satisfactory."[92] Her mild criticism of these cases sanctioning sex discrimination *in favor of women* is in sharp contrast to her relentless attack of cases which she feels condone sex discrimination *against* women.[93] Although this disparity is consistent with her notions of the desirability of "special benefits to one sex" and

---

88. 416 U.S. at 355-56. After noting the existence of "overt discrimination or . . . the socialization process of a male-dominated culture" so that "the job market is inhospitable to the woman seeking any but the lowest paid jobs," *id.* at 353, the Court stated:

> We deal here with a state tax law reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden. We have long held that "[w]here taxation is concerned and no specific federal right, apart from equal protection, is imperiled, the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation."

Id. at 355, *quoting* Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 359 (1972).

89. 419 U.S. 498 (1975).

90. *Id.* at 510. *See* 10 U.S.C. §§ 6382(a) & 6401(a) (1970).

91. 419 U.S. at 510. In expressing its rationale, the Court remarked:

> [T]he different treatment of men and women naval officers under §§ 6382 and 6401 . . . reflects, not archaic and overbroad generalizations, but, instead, the demonstrable fact that male and female line officers in the Navy are *not* similarly situated with respect to opportunities for professional service. Appellee has not challenged the current restrictions on women officers' participation in combat and in most sea duty. Specifically, "women may not be assigned to duty in aircraft that are engaged in combat missions nor may they be assigned to duty on vessels of the Navy other than hospital ships and transports." . . . Thus in competing for promotion, female lieutenants will not generally have compiled records of seagoing service comparable to those of male lieutenants. In enacting and retaining § 6401, Congress may thus quite rationally have believed that women line officers had less opportunity for promotion than did their male counterparts, and that a longer period of tenure for women officers would, therefore, be consistent with the goal to provide women officers with "fair and equitable career advancement programs."

Id. at 508, *quoting* 10 U.S.C. § 6015 (1970) (emphasis in original).

92. Comment, *supra* note 1, at 452.

93. Two cases which the comment writer strongly criticized in her article were *Geduldig* and *General Electric*. *Id.* at 476-78. For example, she stated:

> It is . . . stereotyped thinking that produced the [*Geduldig v.*] *Aiello* decision and its casual ignoring of the ties which society has fashioned out of biology to bind women to their "proper place." Yet, ironically, it is the Supreme Court which has become in the recent decades of this century the organ of American government most sensitive to those stereotypes which penalize citizens for characteristics — like birthplace, skin color, or indeed, gender — which they can neither choose nor change. Both the tradition of the Court and the dictates of

treating women as a "protected class",[94] it is precisely this kind of hypocrisy which discredits the movement toward true equality of the sexes.

Accordingly, it would seem that the *Yale* article[95] and the Pennsylvania court in *P.I.A.A.*[96] were correct to discard the criterion of sex altogether and instead to rely on individual physical criteria directly. As stated previously in this article, sexual references can and should be eliminated, so that distinctions are drawn between "persons" in one category and "persons" in another.[97] Thus, the *General Electric* case was decided properly, in that it drew a distinction between pregnant persons and nonpregnant persons.[98] Although these formulations may appear to be somewhat artificial in some instances, they tend to ensure that the final result is sexually neutral on its face.

Notwithstanding where a court may actually draw lines in a given situation, it seems clear at this point that it has been recognized that characteristics such as pregnancy, facial hair, height, weight, strength, life expectancy, and marital status are correlated only imperfectly with sex; and therefore, certain distinctions based on these traits may be logically permitted. Distinctions based on these characteristics are based on secondary characteristics, not on primary characteristics.[99] The United States Supreme Court has made this important point the first step of its analysis in its recent decisions in the field of sex discrimination. However, it has not always done so when dealing with cases involving race discrimination.

III. RACE DISCRIMINATION

A. *Poverty as a Race-Linked Characteristic*

Analogous to the dichotomy between sex and sex-linked characteristics is the distinction between race and race-linked

---

empirical observation, therefore, plead strongly for a reexamination of the assumptions which underlie [*Geduldig v.*] *Aiello.*

. . . .

The experience of the [*General Electric*] plaintiff is extreme, but it is not unique. And even where a woman is not entirely reliant on her own income, there is still no reason to deny her full benefits for her disabilities when full coverage is offered to men. To disqualify her from benefits because she can "plan" for this necessary unemployment time, presumably by relying on her husband's income, assumes that most women are not primarily "breadwinners" and reinforces the stereotype of female dependency.

Id. *See* text accompanying note 83 *supra.*

94. Comment, *supra* note 1, at 476-78.

95. *See* text accompanying notes 73-78 *supra.*

96. *See* text accompanying notes 70-72 *supra.*

97. *See* text accompanying note 67 *supra.*

98. *See* General Elec. Co. v. Gilbert, 429 U.S. 125, 135 (1976). For a discussion of this point in *General Electric, see* text accompanying notes 21-23 *supra.*

99. *See* text accompanying notes 1-5 *supra.*

characteristics. One commonly litigated trait that is race-linked is poverty.[100] Courts in their analysis in this area generally have held that, under the Constitution, discrimination based on economics is not discrimination based on race and thus may be allowed. For example, in *James v. Valtierra,*[101] the Supreme Court considered a challenge to an amendment to the California Constitution which provides that no low-rent housing project be constructed or acquired by a state public body until that project is approved by a majority of the voters of the community.[102] Plaintiffs, who were eligible for low-cost housing, challenged this referendum requirement on equal protection grounds,[103] and the Court upheld the amendment.[104]

Two lower court Title VII cases, however, *Wallace v. Debron Corp.*[105] and *Johnson v. Pike Corp. of America,*[106] illustrate the manner in which the proposed analytical framework can be used in the context of Title VII to reach the opposite conclusion in the area of economic discrimination, while maintaining a well-reasoned approach. Both cases involved black employees who were discharged from their jobs because their wages were garnished more frequently than permitted by the employers' rules.[107] Relying on the Supreme Court's holding in *Griggs v. Duke Power Co.,*[108] these cases held that the rules were discriminatory against blacks,[109] utilizing what, upon

---

100. *See* S. MASTERS, BLACK-WHITE INCOME DIFFERENTIALS (1975); L. THUROW, POVERTY AND DISCRIMINATION (1969).

101. 402 U.S. 137 (1971).

102. *Id.* at 139-40 & n.2, *quoting* CAL. CONST. art. XXXIV, § 1.

103. 402 U.S. at 139.

104. *Id.* at 143-44. In sustaining the procedure, the Court stated:

> [A] lawmaking procedure that "disadvantages" a particular group does not always deny equal protection. Under any such holding, presumably a state would not be able to require referendums on any subject unless referendums were required on all, because they would always disadvantage some group . . . .
>
> Furthermore, an examination of California law reveals that persons advocating low-income housing have not been singled out for mandatory referendums while no other group must face that obstacle.

Id. at 143. *Accord, e.g.,* Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 270-71 (1977); Robinson v. City of Dallas, 514 F.2d 1271, 1274 (5th Cir. 1975); Boyd v. Lefrak Org., 509 F.2d 1110, 1114 (2d Cir.), *rehearing denied,* 517 F.2d 918 (2d Cir.), *cert. denied,* 423 U.S. 896 (1975), *noted in* 88 HARV. L. REV. 1631 (1975). *See also* McLellan v. Mississippi Power & Light Co., 545 F.2d 919, 928-29 (5th Cir. 1977). For a discussion of *Arlington Heights, see* notes 125-30 and accompanying text *infra.*

105. 494 F.2d 674 (8th Cir. 1974).

106. 332 F. Supp. 490 (C.D. Cal. 1971), *noted in* 85 HARV. L. REV. 1482 (1972).

107. 494 F.2d at 674-75; 332 F. Supp. at 492.

108. 401 U.S. 424 (1971). *See* 494 F.2d at 675-76; 332 F. Supp. at 493-95. In *Griggs,* black employees asserted that requiring that certain job applicants possess a high school diploma and pass an intelligence test constituted a Title VII violation. 401 U.S. at 426-28. In holding that the requirements were unlawful under Title VII, the Court remarked: "If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." *Id.* at 431.

109. 494 F.2d at 677; 332 F. Supp. at 494.

close observation, appears to be an analysis in line with the three-step framework posited herein.

As a first step, it was recognized that the employers' rules did not constitute discrimination based on race[110] — that is, that the employer's policy was not based on a primary characteristic. Proceeding to the second stage of analysis, the courts observed that the rules did have a discriminatory effect with respect to race.[111] In the words of the *Johnson* court:

> A survey of the available information on wage garnishment reveals that minority group members suffer wage garnishments substantially more often than others, *i.e.,* the proportion of racial minorities among the group of people who have had their wages garnisheed [sic] is significantly higher than the proportion of racial minorities in the general population.
>
> The fact that blacks and other racial minorities are so often subject to garnishment action is related to the fact that they are to a disproportionate extent from the lower social and economic segments of our society. Approximately three times the proportion of blacks as compared to whites are in the lower end of the economic scale, due in large measure to racial discrimination.[112]

The third step in terms of the framework was the rejection by both courts of the defenses that the rules were justified by a showing of "business necessity."[113]

More recently, the Supreme Court handed down holdings in *Washington v. Davis*[114] and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*[115] which clearly differentiated between claims of racial discrimination under the United States Constitution against governments[116] and those under Title

110. 494 F.2d at 675; 332 F. Supp. at 494. The *Johnson* court noted that "plaintiff does not contend that defendant adopted the rule for the purpose of discriminating against employees on the basis of race, or that the rule was applied in a racially discriminatory manner." *Id.* at 494.

111. 494 F.2d at 676; 332 F. Supp. at 494.

112. 332 F. Supp. at 494 (citations omitted). *But see* Robinson v. City of Dallas, 514 F.2d 1271, 1274 (5th Cir. 1975).

113. 494 F.2d at 677; 332 F. Supp. at 495. Commenting on the business necessity defense, the *Johnson* court stated that:

> The exact boundaries and contours of the phrase "business necessity" are still uncertain. The court, in Local 189, United Papermakers and Paperworkers v. United States, . . . stated that the policy or practice must be "essential to the safe and efficient operation" of the business. In *Griggs,* the Court stated that a permissible practice must be one which can be shown to be "related to job performance" or "measuring job capability."

Id. at 495, *quoting* Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980, 989 (5th Cir. 1969).

114. 426 U.S. 229 (1976).

115. 429 U.S. 252 (1977).

116. Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 264-65 (1977); Washington v. Davis, 426 U.S. 229, 238-48 (1976).

VII against private employers.[117] The Court held that constitutional claims, but not Title VII cases, required proof of discriminatory purpose.[118]

Washington v. Davis involved a constitutional challenge to a qualifying examination which tested the written and oral communication skills of candidates for the Washington, D.C. Police Force.[119] Under the first step of its analysis, the Court determined that the examination did not discriminate by race, but by literacy.[120] Under the second step, it was held that even if the test did have a "differential racial effect,"[121] the facts as presented did not "warrant the conclusion that it is a *purposeful* device to discriminate against Negroes and hence an infringement of the constitutional rights of respondents as well as other black applicants."[122] Accordingly, the qualification examination was upheld.[123]

Arlington Heights, involving a zoning ordinance which prohibited multiple-family housing,[124] was more directly an economic discrimination case. A refusal of the local planning commission to rezone the area in question in order to allow construction of low-income housing was challenged as unconstitutional.[125] After observing that the refusal was not racially discriminatory on its face,[126] the Court concluded that it did have a racially discriminatory impact on blacks.[127] Nevertheless, a racially discriminatory purpose, required for liability in its prior *Washington v. Davis*

---

117. *See* Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 268-71 (1977); Washington v. Davis, 426 U.S. 229, 246-48 (1976).

118. 426 U.S. at 246-48.

119. *Id.* at 234-35.

120. *Id.* at 245-46. The Court stated that "the relationship of the test to the training program negated any inference that the Department discriminated on the basis of race or that 'a police officer qualifies on the color of his skin rather than ability.'" *Id.* at 246, *quoting* Davis v. Washington, 348 F. Supp. 15, 18 (D.D.C. 1972).

121. 426 U.S. at 246.

122. *Id.* (emphasis added).

123. *Id.* at 248. Of course, because the Court found the test to be constitutional, there was no need to reach the third step of the analytical framework.

124. *See* 429 U.S. at 257.

125. *Id.* at 254-57. The refusal to rezone was also asserted to be a violation of the Fair Housing Act, 42 U.S.C. §§ 3601-3631 (1970 & Supp. V 1975). 429 U.S. at 254.

126. 429 U.S. at 269.

127. *Id.* The Court noted the importance of a discriminatory effect when it stated:

> The impact of the official action — whether it "bears more heavily on one race than another" — may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. The evidentiary inquiry is then relatively easy. But such cases are rare . . . . [I]mpact alone is not determinative . . . .

Id. (footnotes and citations omitted), *quoting* Washington v. Davis, 426 U.S. 229, 242 (1976).

holding,[128] was found to be lacking,[129] and the refusal to rezone the property was held valid under the Constitution.[130]

Both *Washington v. Davis* and *Arlington Heights* demonstrate the distinction that must be made under the analytical framework between cases brought under Title VII and those under the Constitution — that a discriminatory purpose with respect to the primary characteristic must be shown under the latter, but not under the former. As was noted in *Washington v. Davis:*

> Under Title VII, Congress provided that when hiring and promotion practices disqualifying substantially disproportionate numbers of blacks are challenged, discriminatory purpose need not be proved, and that it is an insufficient response to demonstrate some rational basis for the challenged practices. . . . However this process proceeds, it involves a more probing judicial review of, and less deference to, the seemingly responsible acts of administrators and executives than is appropriate under the Constitution where special racial impact, without discriminatory purpose, is claimed. We are not disposed to adopt this more rigorous standard for the purposes of applying the Fifth and Fourteenth Amendments in cases such as this.[131]

This differentiation between constitutional claims and those under Title VII did not have to be made by the *General Electric* Court because that case involved only allegations of Title VII violations.[132] Moreover, the Court did not pass the second step of the framework because it found that no discriminatory effect was present.[133] When the Court determined that discrimination based on the secondary characteristic, pregnancy, had no discriminatory effect with respect to sex, the analysis needed to proceed no further.

B. *Other Race-Linked Characteristics*

In most instances, skin color is treated as a primary characteristic, so that distinctions made on that basis are likely to be held unlawful.[134] However, it is also possible to view color as a secondary

---

128. *See* text accompanying note 122 *supra.*
129. 429 U.S. at 270.
130. *Id.* at 271.
131. 426 U.S. at 247-48.
132. 429 U.S. at 127-28. *See* notes 14-25 and accompanying text *supra.*
133. *See* text accompanying note 25 *supra.*
134. *See, e.g.,* 42 U.S.C. § 2000e-2(a)(1) (1970). For the text of this subsection, *see* note 8 *supra.*

characteristic, in light of the fact that not all persons who possess a dark complexion belong to the Negro race, nor vice versa.[135] As was stated by one commentator:

> True, it is not obvious that all racial classifications are constitutionally improper. Though the principle that the Constitution is color-blind is an easily stated and applied one, it may be that the broader terms of the equal protection clause allow a color line to be drawn by the state under certain circumstances. For instance, a state might well be permitted to provide that anyone whose skin is darker than a certain shade (either attached as an exhibit or defined in terms of albedo or reflecting power) is negligent for walking on a road at night without wearing some light-colored item of clothing. This, however, is a very different type of classification from that contemplated in preference (or segregation) laws. Not only will some whom we define as non-Negro be included in the dark-skinned category and some Negroes excluded, but even more important, the classification appears to be made for a reasonable purpose to which color — as distinguished from race — is directly relevant. So, too, it is conceivable that some future scientific discovery may show that in certain genes attached to what we consider Negroid characteristics are associated with specific diseases. Perhaps then a vaccination could be required of all those who appeared to have the relevant characteristics. Whether the state could then require a vaccination of all Negroes — on the theory that this social fact is an easily adminsterable and roughly accurate guide to the need for the medical treatment is another question indeed.[136]

Another race-linked characteristic which is treated as a primary characteristic under Title VII[137] is ethnicity or national origin. Thus, discrimination based on national origin is not discrimination based on race. According to the recent district court case of *Budinsky v. Corning Glass Works,*[138] a complaint brought under section 1981 of

---

135. *See* Kaplan, *Equal Justice in an Unequal World: Equality for the Negro — The Problem of Special Treatment,* 61 NW. U. L. REV. 363 (1966).

136. *Id.* at 383 (footnotes omitted). *See* Smith v. Olin Chemical Corp., 555 F.2d 1283, 1284 (5th Cir. 1977) (employer's requirement that employees have strong backs did not violate Title VII even where employee's discharge was due to bone degeneration from sickle cell anemia, a disease only occurring in blacks).

137. 42 U.S.C. § 2000e-2(a)(1) (1970). For the text of this subsection, *see* note 8 *supra.* It should be noted that § 703(a)(1) of Title VII specifically prohibits discrimination on the basis of national origin; whereas an express prohibition of classifications on the basis of pregnancy or poverty is not provided. *See* note 8 *supra.*

138. 425 F. Supp. 786 (W.D. Pa. 1977).

the Civil Rights Act of 1870[139] may not lie for a claim alleging employment discrimination based entirely on national origin.[140] While recognizing that some groups emanating from certain general geographic areas may be the victims of group discrimination, which for section 1981 purposes may be termed "racial discrimination",[141] the court distinguished the suit before it:

> The same cannot be said with regard to persons of Slavic or Italian or Jewish origin. These groups are not so commonly identified as "races" nor so frequently subject to that "racial" discrimination which is the specific and exclusive target of § 1981. Members of these groups . . . do not properly fall within the coverage of the statute.[142]

Similarly, in *United States v. Antelope,*[143] the Supreme Court held that a federal criminal statute[144] which applies solely to members of a certain Indian tribe did not amount to unconstitutional discrimination against members of the Indian *race;* rather, it constituted a permissible classification of an Indian *tribe.*[145] Relying upon an historical analysis,[146] the Court noted than an Indian tribe is a separate ethnic group with its own political institutions, and that special treatment based on these factors does not constitute racial

---

139. 42 U.S.C. § 1981 (1970). Section 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Id.

140. 425 F. Supp. at 788-89. The plaintiff alleged that, based solely on his Slavic national origin, he was not promoted or given an increase in salary in a manner comparable to his fellow employees, he was required to accept unreasonable duties, and he was finally discharged from his job. *Id.* at 786.

141. *Id.* at 788. The court made particular reference to such groups as Hispanic persons and Indians. *Id.* On the issue of discrimination against Indians, *see contra,* notes 143-47 and accompanying text *infra.*

142. 425 F. Supp. at 788.

143. 430 U.S. 641 (1977).

144. Major Crimes Act of 1948, § 1153, 18 U.S.C. § 1153 (1970).

145. 430 U.S. at 646-47.

146. *Id.* at 645. The Court stated:

> The decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based on impermissible racial classifications. Quite the contrary, classifications expressly singling out Indian tribes as subject of legislation are expressly provided for in the Constitution and supported by the ensuing history of the Federal Government's relations with Indians.

Id. (footnote omitted), *citing* U.S. CONST. art. I, § 8. It is interesting to note the different attitude expressed in the dictum of the district court in *Budinsky,* wherein Indians were expressly referred to as one of those groups which could be subject to racial discrimination for purposes of a § 1981 suit. *See* note 141 *supra.*

discrimination.[147] Thus, both *Budinsky* and *Antelope* appear to have distinguished between racial discrimination and distinctions predicated upon the secondary characteristic of national origin or ethnicity. Because of this difference, the decisions rationally concluded that the alleged behavior was lawful.

Locality of residence is another race-linked characteristic.[148] While there is a general tendency for certain races to live in certain areas, they do not invariably do so. Therefore, discrimination based on locality is not necessarily discrimination based on race. Geographical discrimination occurs in the practice of "redlining," which is the denial of home loans or financial assistance on the basis of the locality of the home.[149]

In *Laufman v. Oakley Building & Loan Co.*,[150] an Ohio federal district court, in a suit brought under various sections of the Civil Rights Acts of 1964[151] and 1968[152] for alleged redlining on the basis of race,[153] denied the defendant-lender's motion for summary judgment.[154] In its discussion of the various statutory arguments, the court interpreted each section of the statutes in issue to prohibit redlining if it is based on the racial composition of the communities involved, rather than on the actual economic conditions.[155]

Although the court did not do so, this case may be examined in terms of the three-step analytical framework. The first step is to note that redlining is not discrimination based on race, but on a race-linked characteristic — locality. The second step is to determine whether or not there is a discriminatory impact with respect to race, as was alleged in *Laufman*.[156] If a discriminatory effect is found, the

147. 430 U.S. at 646-47.

148. *See generally* Ryan, *Banking Law — Redlining*, 1977 ANN. SURVEY AMER. L. 57.

149. *Id.* at 57-58. One commentator has observed:

> Simply defined, the term "redlining" denotes the decision by mortgage lenders to deny loans on all properties located in specific geographical areas that are presumably outlined in red on the lenders' maps . . . . The outright denial of mortgage money to particular sections of a city is no longer the common practice. Today mortgage lenders make loans in redlined neighborhoods, but often only at terms substantially less favorable than those in other areas. Although more subtle than outright denial, this imposition of stricter terms leads to a similar result.

Id. (footnotes omitted).

150. 408 F. Supp. 489 (S.D. Ohio 1976).

151. 42 U.S.C. § 2000d (1970). *See* 408 F. Supp. at 491.

152. 42 U.S.C. §§ 3604, 3605 (1970) (amended 1974); *id.* § 3617 (1970). *See* 408 F. Supp. at 491.

153. 408 F. Supp. at 491.

154. *Id.* at 501.

155. *Id.* at 493, 498-99.

156. *Id.* at 499. The court noted that: "Plaintiffs complain that the conduct of defendants 'excluded [plaintiffs] from participation in' and 'denied [plaintiffs] the benefits of . . . [a] program or activity receiving Federal financial assistance,' . . . ." *Id.*

third step is to determine whether or not there is a special justification for the redlining.

The defendants in *Laufman* argued that such a justification existed in the form of a federal regulation[157] which authorizes that the Federal Home Loan Bank Board, prior to insuring a lender, conduct an appraisal of real estate pledged as security for bank loans.[158] The defendants maintained that the statement in Paragraph (g) of this regulation that one of the purposes of the appraisal is to determine whether the neighborhood is declining[159] actually meant: "[W]atch out about loaning in neighborhoods where the neighborhood is declining, where the area, the homes are declining."[160] The court rejected defendants' justification and concluded that the regulation meant that the lender might refuse to grant a loan where the neighborhood is *in fact* declining, in the exercise of sound business judgment.[161] However, according to the court, the regulation did *not* mean that lenders could consider the racial composition of the neighborhood as determinative of whether the neighborhood was actually deteriorating.[162] In other words, a lender may decide to grant a loan, or not, based on the economics of the neighborhood, but not the race.

This dictum in *Laufman* is interesting to consider in light of the economic discrimination cases, such as *Arlington Heights*.[163] The holding in *Arlington Heights* would appear to allow a lender to discriminate on the basis of economics, so long as there is no indication that there is any intent to discriminate on the basis of race.[164] Moreover, even if a discriminatory effect on those of a certain race is shown, no constitutional violation will be found unless the impact is so substantial as to compel an inevitable

---

157. 12 C.F.R. § 571.1(a)(1) (1977).

158. 408 F. Supp. at 500, *citing* 12 C.F.R. § 571.1 (1977). The Federal Savings and Loan Insurance Corporation, under the direction of the Federal Home Loan Bank Board, insures the accounts of all federal savings and loan associations, as well as the accounts of other building and loan, savings and loan, and homestead associations which are eligible for insurance. *See* 12 C.F.R. § 500.4 (1977).

159. 12 C.F.R. § 571.1(g) (1977). The paragraph provides in pertinent part:

> The Chief Examiner may obtain the services of a professional appraiser to make actual, physical appraisal of specific properties, . . . or to make a preliminary appraisal or survey. The latter procedure is to estimate the highest and best use of the property, to select the approach which, in his opinion, will develop the most rational value indication, to ascertain whether the neighborhood is improving, stabilizing or declining, to determine the condition of the property, etc.

Id.

160. 408 F. Supp. at 500, *quoting* Transcript of Oral Argument at 16-17.

161. 408 F. Supp. at 501, *quoting* Transcript of Oral Argument at 28-30.

162. 408 F. Supp. at 501, *quoting* Transcript of Oral Argument at 28-30.

163. *See* notes 125-130 *supra*.

164. *See* 429 U.S. at 270-71.

inference of purpose.[165] Thus, *Laufman* appears to be consistent with the constitutional economic discrimination cases in this respect.

Unfortunately, not all cases fit as neatly into the proposed analytical framework as *Laufman.* There is often some confusion between discrimination based on race and discrimination based on race-linked characteristics, which creates difficulty in applying steps one and two of the framework. This confusion, in turn, may cause errors in analyzing claims of discrimination which would culminate in unsatisfactory precedent. This was precisely what occurred in the landmark case of *Loving v. Virginia,*[166] where laws forbidding miscegenation were struck down under an equal protection and due process analysis.[167]

It appears that the *Loving* Court reached the right result for the wrong reason. In *Loving,* a black woman and a white man pled guilty to a charge of violating Virginia's statutory ban on interracial marriages.[168] Subsequently, they instituted a suit against the state to have the antimiscegenation statutes declared unconstitutional and to enjoin enforcement of their convictions.[169] The state primarily argued that there was no equal protection violation because the statutes were applied equally to white and blacks — an "equal application" theory.[170] Without adequate explanation, the Court rejected this theory on the ground that "[t]here can be no question but that Virginia's miscegenation statutes rest solely upon distinctions according to race."[171]

It appears that the Court, in terms of the analytical framework, confused the first two steps of the analysis. In fact, there was no racial discrimination, for the statute necessarily applied to both races equally. There was, on the other hand, a discriminatory effect with respect to race, mandating a finding of unconstitutionality if a discriminatory purpose could be inferred from the extensive effect.[172] Moreover, even if the effect were not sufficient to support an inference of purpose, the Court could have used an analysis involving freedom of association and marriage, as well as the right of privacy, as has been utilized in other decisions,[173] to invalidate statutes.

165. *See* text accompanying note 122 *supra.*
166. 388 U.S. 1 (1967).
167. *Id.* at 12.
168. *Id.* at 3.
169. *Id.*
170. *Id.* at 8, 10.
171. *Id.* at 11.
172. *See* text accompanying note 122 *supra. See also* text accompanying notes 129 & 130 *supra.*
173. *See, e.g.,* Doe v. Bolton, 410 U.S. 179 (1973); Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965).

Under the Court's analysis, however, the precedent provided by this decision could lead to some interesting problems. As previously stated, discrimination based on marital status is not discrimination based on sex.[174] It was suggested during the Senate Judiciary Committee hearings on the federal ERA in September, 1970[175] that, "[i]f the law must be as undiscriminating concerning sex as it is toward race, it would follow that laws outlawing wedlock between members of the same sex would be as invalid as laws forbidding miscegenation."[176] If the ERA is ratified by the states, it seems that the analysis of *Loving* would mandate the invalidity of statutes outlawing wedlock between members of the same sex. However, the application of the analytical framework set forth in this article would not require this result. Rather, the Court would be able to consider the issue in terms of right to privacy and freedom of association,[177] and, in analyzing society's overall needs, might find such statutes to be valid.

Similar problems arise with the "separate but equal" doctrine.[178] Although for a number of years it was considered legally viable, the doctrine was finally held to be unconstitutional in *Brown v. Board of Education.*[179] However, because the Court did not utilize an analysis in *Brown* which differentiated between racial discrimination and a discriminatory effect with respect to race — steps one and two of the proposed framework, respectively — the decision tends to confuse the area. Like *Loving, Brown* did not concern, strictly speaking, discrimination based on race, since both races were separately equal.[180] It did, however, concern a doctrine which had a discriminatory effect with respect to race. As the Court stated:

> To separate them [children in elementary and high schools] from others of similar age and qualifications solely because of their

174. *See* notes 54 & 55 and accompanying text *supra.*

175. *Hearings Before the Committee on the Judiciary of the United States Senate on S.J. Res. 61 and S.J. Res. 231, Proposing an Amendment to the Constitution of the United States Relative to Equal Rights for Men and Women,* 91st Cong., 2d Sess. 74-75 (1970) (statement of Paul A. Freund) (Sup. Doc. No. Y4.J89/z: Eq 2/6/9 70-2).

176. *Id.* at 74-75. *But see* M.T. v. J.T., 140 N.J. Super. 77, 83, 355 A.2d 204, 207-08 (1976) (lawful marriage must be between persons of opposite sex).

177. A freedon of association analysis would seem to be as appropriate in this area as in the *Loving* type of situation, because it involves sexual preference rather than sex, just as *Loving* involved racial preference, rather than race. *See* note 197 and accompanying text *infra.*

178. *See* Plessy v. Ferguson, 163 U.S. 537, 548 (1896).

179. 347 U.S. 483, 495 (1954).

180. *Id.* at 492. The Court stated that "there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other 'tangible' factors." *Id.*

> race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone . . . .
>
> "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group."[181]

It would seem that a finding of discriminatory purpose could easily be inferred from the finding of the tremendous impact noted in the above quote; therefore, even under *Washington v. Davis* and *Arlington Heights,*[182] the same result could have been reached through the use of the analytical framework.

However, since the *Brown* court failed to distinguish between racial discrimination and a discriminatory effect, the recent decision of *Vorchheimer v. School District of Philadelphia*[183] may arguably be inconsistent with the logic of *Brown.* Theoretically, if *Brown* is to serve as precedent for the proposition that the "separate but equal" doctrine violates the equal protection clause because it constitutes *racial* discrimination, then there should also be a finding of *sex* discrimination when single-sex schools are under scrutiny. In *Vorchheimer,* however, the Third Circuit upheld the constitutionality of single-sex schools in Philadelphia.[184] The court reasoned that the female plaintiff's desire to attend an all male school was not rooted in the *Brown* "feeling of inferiority,"[185] but rather upon "her desire to have an expanded freedom of choice."[186] That is, there was no discriminatory effect with respect to sex.[187] The holding also may be explained on the ground that sex is not a suspect classification like race, although the court did state that something stronger than the rational relationship test was to be used — the "'fair and substantial relationship'" test.[188] If this type of analysis were applied consist-

---

181. *Id.* at 494, *quoting* Brown v. Board of Educ., 98 F. Supp. 797 (D. Kan. 1953) (district court finding).

182. *See* notes 114-31 and accompanying text *supra.*

183. 532 F.2d 880 (3d Cir. 1976), *aff'd per curiam by an equally divided court,* 430 U.S. 703 (1977).

184. 532 F.2d at 888.

185. *See* text accompanying note 181 *supra.*

186. 532 F.2d at 888. *Contra,* United States v. Hinds County School Bd., 560 F.2d 619 (5th Cir. 1977).

187. The court noted a trial court finding that: "[t]he court's factual finding that Girls [school] and Central [the male school] are academically and functionally equivalent establishes that the plaintiff's desire to attend Central is based on personal preference rather than being founded on an objective evaluation." *Id.* at 882. *See* Vorchheimer v. School Dist. of Philadelphia, 400 F. Supp. 326, 329 (E.D. Pa. 1975).

188. 532 F.2d at 886.

ently, the fears that equality of the sexes would prohibit separate lavatory facilities clearly would be totally unfounded.[189] "Separate but equal" is not discrimination per se; the question is whether it has a discriminatory *effect.*

Thus, to avoid the type of confusion exhibited in older cases like *Loving* and *Brown,* it is important that the Supreme Court continue to follow a three step analysis. This analytical framework distinguishes between discrimination based on race and discrimination based on race-linked characteristics — such as poverty or literacy — which has a discriminatory effect with respect to race. This approach, in turn, would lead to more persuasive, logical results.

IV. OTHER TYPES OF DISCRIMINATION

A. *Religion*

As have been demonstrated, discrimination based on certain primary and secondary characteristics can be analyzed in terms of the three-step framework presented in this article. However, the analysis does not lend itself to use in certain other types of cases, such as those involving discrimination based on religion.

Clearly there is a difference between *discrimination* based on religion under the establishment clause of the first amendment[190] and the *right to religious freedom* under the free exercise clause of that amendment.[191] It initially appears that, conceptually, the former is more analogous to the analysis used in cases involving violations of the fifth and fourteenth amendment rights to due process and equal protection than it is to the latter, which deals with the right to religious liberty. As Mr. Justice Harlan observed in *Welsh v. United States,*[192] certain kinds of religious discrimination require an "equal protection" mode of analysis.[193]

Actually, however, religious discrimination is not usually analyzed in terms of due process or equal protection, but in terms of the establishment clause of the first amendment.[194] Any kind of discrimination creates two classes — a disadvantaged group and an

---

189. *See* 15 AM. JUR. 2d *Civil Rights* § 168 (1976).

190. U.S. CONST. amend. I. The establishment clause provides: "Congress shall make no law respecting an establishment of religion . . . ." *Id.*

191. *Id.* The free exercise clause states: "Congress shall make no law . . . prohibiting the free exercise [of religion] . . . ." *Id.*

192. 398 U.S. 333 (1970).

193. *Id.* at 356-58 (Harlan, J., concurring).

194. *See, e.g.,* Levitt v. Committee for Pub. Educ. and Religious Liberty, 413 U.S. 825 (1973); Tilton v. Richardson, 403 U.S. 672 (1971); Lemon v. Kurtzman, 403 U.S. 602 (1971). *See generally* Comment, *Establishment Clause Analysis of Legislative and Administrative Aid to Religion,* 74 COLUM. L. REV. 1175 (1974).

advantaged one. Religious discrimination not only violates the disadvantaged class's right to equal protection, but also prefers the advantaged class in violation of the establishment clause. It is actually only the latter violation which is emphasized. For example, the Supreme Court, in *Fowler v. Rhode Island,*[195] set aside the conviction of a group of Jehovah's Witnesses for using a park that was open to all other religious faiths, stating: "[A] religious service of Jehovah's Witnesses is treated differently than a religious service of other sects. That amounts to the state preferring some religious groups over this one."[196]

This focus upon the establishment clause is very possibly attributable to the fact that religion does not fit neatly into a primary or secondary characteristic category because it is not a characteristic at all; rather, it is a persuasion, a practice of beliefs, a type of conduct. Religion is more like creed and politics than like race, more like sexual preference than sex.[197] Therefore, it is not merely historical accident that there are special provisions for religious freedom placed together with the other rights protected by the first amendment; such freedom is conceptually intertwined with other freedoms of expression and association. As the Supreme Court once stated: "All are interwoven there together."[198]

Attempts to treat religion as a characteristic rather than a persuasion tend to lead to confusion and conflict. For example, section 703 of Title VII[199] prohibits discrimination based on religion.[200] However, subsection 2(7) of the Equal Employment Opportunity Act of 1972[201] amended section 701 of Title VII by inserting a definition of the term "religion,"[202] which apparently

195. 345 U.S. 67 (1953).

196. *Id.* at 69.

197. *See, e.g.,* Boy Scouts of America v. Teal, 374 F. Supp. 1276, 1281 (E.D. Pa. 1974) ("Bluntly, blackness and homosexuality are not the same phenomenon."). Of course, there are certain mixed categories which are combinations of both a characteristic and a persuasion. For example, the Black Muslims are members of both a race — characteristic — and a religion — persuasion. Similarly, Jews are actually an ethnic group — characteristic — as well as members of a religion — persuasion. When such mixed categories occur, and the "characteristic" half of the category is a primary characteristic, then the "persuasion" half of the category may be treated as a secondary characteristic for purposes of preventing discrimination.

198. Prince v. Massachusetts, 321 U.S. 158, 164 (1944).

199. 42 U.S.C. § 2000e-2 (1970 & Supp. V 1975).

200. *Id.* For the pertinent portion of the text of § 703, *see* note 8 *supra. See generally* Annot., 22 A.L.R. FED. 580 (1975).

201. Pub. L. No. 92-261, § 2(7), 86 Stat. 103 (codified at 42 U.S.C. § 2000e(j) (Supp. V 1975)).

202. 42 U.S.C. § 2000e(j) (Supp. V 1975). This subsection provides: "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." *Id.*

requires employers to "reasonably accommodate" their employees' religious practices.[203] Since section 2(7) is a law affecting the establishment of religion and is not totally neutral, the federal courts are split over whether or not this amendment violates the establishment clause of the first amendment.[204]

Although it is clear that discrimination based upon sex,[205] race,[206] or age[207] can properly be proscribed by the legal requirement that employers reasonably accommodate their practices to their employees, it is not so clear that this accommodation requirement may lawfully be applied to discrimination based on religion. The reason for this conceptual dichotomy lies in the fact that the first type of accommodation would result in the same treatment for everyone, whereas religious accommodation necessarily creates different treatment for persons of different religious beliefs. Nevertheless, some courts have gone so far as to hold that the uniform application of certain work rules and practices places impermissibly unequal burdens on employees of different religions, mandating accommodation for the unevenness.[208] This result may be justified, however, through the observation that sex, race, and age are *characteristics,* which should not be considered by an employer, whereas religion is a *practice of beliefs,* which should be considered.

B. *Political Beliefs*

Discrimination based on political persuasion is closely allied to the religion analysis since it is also governed by the first

203. *See, e.g.,* Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977) (airline not required to accommodate employee whose religious beliefs did not permit Saturday labor); Ward v. Allegheny Ludlum Steel Corp., 397 F. Supp. 375, 377 (W.D. Pa. 1975) (employer did not reasonably accommodate employee whose religion prevented work on Saturday, where employee had offered to work on Sundays and holidays at regular pay).

204. *Compare* Yott v. North Am. Rockwell Corp., 428 F. Supp. 763, 765-66 (C.D. Cal. 1977) (subsection 2(7) violates Establishment Clause) *with* Cummins v. Parker Seal Co., 516 F.2d 544, 554 (6th Cir. 1975), *aff'd by an equally divided Court,* 429 U.S. 65 (1976) (subsection 2(7) does not violate Establishment Clause).

205. *See, e.g.,* [1973] EEOC DEC. (CCH) ¶ 6137 (Case No. YAT9-409, February 19, 1970) (employer violated Title VII where only excuse for refusal to hire females was that he would have to undergo expenses to build separate comfort facilities); 15 AM. JUR. 2d *Civil Rights* § 168 (1976).

206. *See, e.g.,* [1973] EEOC DEC. (CCH) ¶ 6039 (Case No. YME9-068, May 28, 1969) (removal of racial designations from restrooms insufficient to comply with Title VII; employer had to take appropriate steps to prevent whites from harassing blacks who attempted to use previously white restrooms); 15 AM. JUR. 2d *Civil Rights* § 145 (1976).

207. *See* Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1970 & Supp. V 1975). *See generally* 15 AM. JUR. 2d *Civil Rights* §§ 226-242 (1976).

208. *See, e.g.,* Riley v. Bendix Corp., 464 F.2d 1113, 1117-18 (5th Cir. 1972); Reid v. Memphis Publishing Co., 369 F. Supp. 684, 689-90 (W.D. Tenn. 1973), *aff'd in pertinent part,* 521 F.2d 512 (6th Cir.), *rehearing denied,* 525 F.2d 986 (6th Cir. 1975). *See generally* Annot., 22 A.L.R. FED. 580, 608 (1975); 15 AM. JUR. 2d *Civil Rights* § 197 (1976).

amendment. However, unlike religion, political belief is not covered by Title VII nor by any other federal statute, therefore, purely private political discrimination is not proscribed by federal law.[209]

The 1976 Supreme Court case of *Elrod v. Burns*[210] involved a challenge by non-civil service employees of the Cook County, Illinois Sheriff's Office to their dismissal.[211] The employees alleged that the sole reason for the discharges was that they were not members of the same political party as the newly elected sheriff.[212] In holding that the employees stated a valid claim for relief,[213] the Court utilized a freedom of political association approach,[214] balancing the first amendment rights involved against the various justifications for political patronage proposed by the government.[215] The Court found the balance to favor the employees' first amendment interests.[216]

In *Bellamy v. Mason's Stores, Inc., (Richmond),*[217] where a private, nongovernmental employer was involved,[218] the Fourth Circuit reached a different result.[219] The plaintiff asserted that he had been dismissed from his job solely because of his membership in the Ku Klux Klan.[220] The court declined to hear plaintiff's case, however, noting the absence of any form of state action on the part of the defendant-employer, which the court asserted was necessary to raise a first amendment challenge.[221] Despite the unavailability of a federal constitutional remedy, some courts have held that state statutes prohibiting political discrimination may be validly applied to prohibit this type of conduct.[222]

---

209. *See* notes 217-21 and accompanying text *infra.*
210. 427 U.S. 347 (1976).
211. *Id.* at 350.
212. *Id.* at 351.
213. *Id.* at 373.
214. *Id.* at 355-60.
215. *Id.* at 360-73.
216. *Id.*
217. 508 F.2d 504 (4th Cir. 1974).
218. *Id.* at 505.
219. *Id.* at 505, 507.
220. *Id.* at 505.
221. *Id.* at 506-07. *See* Annot., 51 A.L.R.2d 742 (1957). *See generally* 15 AM. JUR. 2d *Civil Rights* §§ 243-44 (1976).
222. *See* Santiago v. People of Puerto Rico, 154 F.2d 811, 813 (1st Cir. 1946) (conviction of employer under Puerto Rican statute prohibiting employer from discrimination against employees upheld where employer had discharged employee because of political affiliation); Lockheed Aircraft Corp. v. Superior Court of Los Angeles County, 28 Cal. 2d 481, 484-87, 171 P.2d 21, 24-25 (1946) (statute prohibiting employer from engaging in political discrimination against employees upheld); Vulcan Last Co. v. State, 194 Wis. 636, 639, 217 N.W. 412, 413-414 (1928) (statute applied to prohibit employers' attempts to influence employees' votes by threatening wage reduction); 15 AM. JUR. 2d *Civil Rights* § 245 (1976).

V. CONCLUSION •

Regardless of the legality in any particular situation of discrimination by religion, political affiliation, or sexual preference,[223] it is clear that these types of discrimination are based on what people *do*. This type of "behavior" discrimination is conceptually quite different from discrimination by sex, race, or age, which is based on what people *are*. Herein lies the distinction between the two. The analytical framework proposed by this article is intended to apply only to characteristics, not practices of beliefs, because various policy and morality judgments come into play when there is an element of choice in an individual's course of action which constitutes his "behavior." These policy considerations make uniform rules of application very difficult, if not impossible, to formulate.

However, there is no element of choice with immutable characteristics such as sex, race, or national origin. Accordingly, in cases involving discrimination based on such primary characteristics, or on the secondary characteristics related to them, an analytical framework such as the one proposed is not only possible; it is imperative if Supreme Court decisions are to be based upon any sort of logical, unbiased reasoning. With the use of a unified analysis, perhaps lower courts in their numerous attempts to wrestle with cases involving discrimination will have a more coherent approach to follow. The Supreme Court appears to have followed the proposed three-step analytical framework in its recent cases involving sex and race discrimination and hopefully not only will continue to do so, but will expand its application to claims of discrimination based on other primary characteristics as well.

---

223. *See* notes 166-177, 190-208 & 209-222 and accompanying text *supra*. *See also* Ancafora v. Board of Educ., 491 F.2d 498 (4th Cir. 1974); Smith v. Liberty Mutual Ins. Co., 395 F. Supp. 1098 (N.D. Ga. 1975); 15 AM. JUR. 2d *Civil Rights* § 246 (1976).