University of Baltimore Law Review

Volume 12
Issue 2 *Winter 1983*

Article 9

1983

Casenotes: Constitutional Law — the Rejection of an Otherwise Qualified Male Applicant to a State-Funded Nursing College Solely Because of Sex Constitutes a Violation of the Equal Protection Clause of the Fourteenth Amendment. Mississippi University for Women v. Hogan, 102 S. Ct. 3331 (1982)

Gerry E. Hoban
University of Baltimore School of Law

CONSTITUTIONAL LAW — THE REJECTION OF AN OTHERWISE QUALIFIED MALE APPLICANT TO A STATE-FUNDED NURSING COLLEGE SOLELY BECAUSE OF SEX CONSTITUTES A VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT. *Mississippi University for Women v. Hogan*, 102 S. Ct. 3331 (1982).

Hogan was a registered nurse and held a two-year associate degree in nursing.[1] Mississippi University for Women (MUW) had both baccalaureate and masters programs in the nursing field with enrollment restricted to females.[2] Hogan was rejected by MUW solely because he was a male applicant.[3] Hogan filed suit for injunctive, declaratory, and monetary relief in the United States District Court for the Northern District of Mississippi. The district court denied the injunction and entered a summary judgment for MUW.[4] The Fifth Circuit reversed, holding that MUW's restrictive admissions policy constituted gender-based discrimination.[5] In an opinion written by Justice O'Connor, the Supreme Court affirmed the Fifth Circuit. The Court held that the alleged objective of providing unique educational opportunities for women was improper because women predominated the nursing field.[6] In addition, the Court reasoned that MUW's restrictive policy did not bear a substantial relationship to the objective given the fact that males were already permitted to audit classes. Furthermore, the Court held that the restrictive policy perpetuated the stereotype of nursing as a predominantly female profession.[7]

Judicial involvement in gender-based discrimination can be traced to the 1872 decision of *Bradwell v. State.*[8] In *Bradwell,* the Supreme Court affirmed the state court's refusal to grant a female applicant a license to practice law. Bradwell alleged she had been denied her constitutional right to employment under the privileges and immunities clause of the fourteenth amendment.[9] Justice Bradley remarked, "The

1. Mississippi Univ. for Women v. Hogan, 102 S. Ct. 3331, 3334 (1982).
2. Male students were permitted to audit courses in the nursing school. *Id.* at n. 4. The nursing program was an entity of the Mississippi University for Women (MUW). MUW has always catered exclusively to the female student. The Mississippi state legislature statutorily created MUW's predecessor in 1884.
3. The parties stipulated that Hogan was academically qualified. 646 F.2d at 1117 (5th Cir. 1981), *aff'd,* 102 S. Ct. 3331 (1982).
4. The district court held that the single-sex policy for admission bore a "rational-relationship" to the state's interest of providing its female population with educational opportunities. The court further held that the admissions criterion were not arbitrary; therefore, no issue of fact existed. 102 S. Ct. at 3334-35.
5. The Fifth Circuit stated that the rational basis test applied by the district court was clearly erroneous. 646 F.2d at 1118 (5th Cir. 1981), *aff'd,* 102 S. Ct. 3331 (1982).
6. 102 S. Ct. at 3338-39.
7. *Id.* at 3339-40.
8. 83 U.S. (16 Wall.) 130 (1872).
9. *Id.* at 138. Early sex discrimination cases were brought pursuant to the privileges and immunities clause. These challenges were unsuccessful because of the narrow construction given to the clause by the Supreme Court. *See* Slaughter-House

paramount destiny and mission of women are to fulfil (sic) the noble and benign offices of wife and mother."[10] This line of reasoning[11] withstood challenge until the 1971 landmark decision, *Reed v. Reed.*[12] In *Reed,* both parents of a deceased minor applied for letters of administration. The probate court awarded the letters to the father. The father's appointment was mandated by a statutory gender preference for males, applicable when potential administrators were members of the same entitlement class. The Supreme Court invalidated the statutory male preference as repugnant to the equal protection clause of the fourteenth amendment. The Court opined that the gender-based classification did not bear a rational relationship[13] to the state's purported objectives of eliminating intra-family disputes or reducing the workload of the probate court.[14]

The next case of major import in this area was *Frontiero v. Richardson.*[15] In *Frontiero,* military personnel with dependent spouses were statutorily entitled to increased housing allowances and medical benefits. A man who claimed a dependent wife automatically qualified for increased benefits; however, a woman was required to prove that her husband was actually dependent upon her for over fifty percent of his support. The government alleged administrative convenience as a defense to the gender classification. Nonetheless, the government failed to make an affirmative showing of a cost saving premised upon the statutory presumption of dependency. Therefore, the statute consti-

---

Cases, 83 U.S. (16 Wall.) 36 (1872); J. NOWAK, HANDBOOK ON CONSTITUTIONAL LAW 608 (1978).

10. Bradwell v. State, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring).
11. *See, e.g.,* Goesaert v. Cleary, 335 U.S. 464 (1964) (state licensing law barring females, who were not married to or sired by the tavern owner, from tending bar held to be constitutional in light of social policy standards); Hoyt v. Florida, 368 U.S. 57 (1961) (state statute exempting females from jury duty held to be constitutional and reasonable in light of their many household obligations); West Coast Hotel v. Parrish, 300 U.S. 379 (1937) (state statute setting a minimum wage for females held to be constitutional because of the state's right to protect working women).
12. 404 U.S. 71 (1971).
13. The *Reed* Court purported to revive a test from a 1920 opinion which required classifications to be "reasonable, not arbitrary, and [further that classifications] must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). After quoting that test, the Court examined whether there was a "rational relationship" to the state's objective. Thus, the Court actually applied a low level scrutiny standard. *See* Reed v. Reed, 404 U.S. 71, 76 (1971); *see also* Gunther, *The Supreme Court, 1971 Term, Foreward: In Search of an Evolving Doctrine on a Changing Court: A Model For Newer Equal Protection,* 86 HARV. L. REV. 1 (1972). Gunther stated the new test was given "lip service" by the Court. *Id.* at 20-21. For a general review of equal protection tests, see Nowak, *Realigning the Standards of Review under the Equal Protection Guarantee — Prohibited, Neutral, and Permissive Classifications,* 62 GEO. L. J. 1071 (1974).
14. Reed v. Reed, 404 U.S. 71, 76 (1971).
15. 411 U.S. 677 (1973) (plurality opinion).

tuted a due process violation.[16] The Court, finding sex to be an "immutable characteristic," held that it was totally immaterial in the determination of a person's ability to perform in the workplace.[17] The *Frontiero* plurality examined past prejudices suffered by females as a result of gender classification; indeed, four Justices even went so far as to declare sex to be a "suspect classification" entitled to a stricter standard of review.[18]

While courts early on recognized the existence of gender-based discrimination against females, it was years before a suit initiated by a male met with success. *Kahn v. Shevin*[19] exemplifies the judicial reluctance to favorably decide a male's suit. The *Kahn* Court upheld a gender-based taxing statute which blatantly disfavored males. Widows were automatically granted a $500 tax exemption, but widowers were not afforded a similar exemption regardless of their economic position. The Court found that widows often comprised the lower echelon of the economic scale. Conversely, widowers generally continued in the same job, earning the same salary.[20] Therefore, the female preference was held to be fairly and substantially related to the state policy of negating adverse financial impact suffered by women following the death of their husbands.[21] Kahn's sex discrimination claim failed because of traditional economic forces which statistically favored men in the workplace. Consistent with this preferential treatment of women, a military statute which gave tenure preference to female officers was upheld in *Schlesinger v. Ballard.*[22] The Court rejected a male officer's discrimination claim based on the Navy's "up or out" policy. This policy required officers to reach a certain rank, within designated time limits, or be subjected to mandatory discharge. Female officers were granted a longer time period to achieve the required rank. The Court upheld the statutory female preference due to innate discrepancies within the system controlling promotional opportunities for male and female officers.[23] The Court reasoned that male and female officers were not similarly situated;[24] therefore, the female preference was ra-

16. *Id.* at 688-89. The Supreme Court analogized the equal protection of the fourteenth amendment and the due process protection of the fifth amendment in Bolling v. Sharpe, 347 U.S. 497 (1954).
17. Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (plurality opinion).
18. *Id.* at 688. The classification of sex as a suspect class has never been accepted as a majority position. J. NOWAK, HANDBOOK ON CONSTITUTIONAL LAW 614 (1978).
19. 416 U.S. 351 (1974).
20. *Id.* at 353-54.
21. *Id.* at 355. The Court in this case abandoned any trend toward establishing sex as a suspect classification, entitled to a stricter standard of review. *See* Hull, *Sex Discrimination and the Equal Protection Clause: An Analysis of Kahn v. Shevin and Orr v. Orr,* 30 SYRACUSE L. REV. 639, 660 (1979).
22. 419 U.S. 498 (1975).
23. *Id.* at 508.
24. *Id.* For example, female officers cannot be permanently assigned to sea or combat duty.

tional and permissible.[25]

Later that year, the Court handed down its first opinion which favored males.[26] However, the Court ironically managed to find the discrimination to be against the female, in her position as the insured party. In *Weinberger v. Wiesenfield,*[27] the Court invalidated a Social Security statutory qualification which provided survivor's benefits only to widows. Mrs. Wiesenfield, who had been her family's major means of support, died during childbirth and was survived by her infant son and husband. Although the infant was eligible for monthly benefits, Mr. Wiesenfield was denied survivor's benefits solely because of his status as a widower.[28] The Social Security statute was premised upon an economic presumption of female dependency, similar to the tax exemption upheld in *Kahn v. Shevin.*[29] However, the Court easily distinguished the two statutes. In *Kahn,* the Court accepted the compensatory purpose of a female preference. In *Weinberger,* the Social Security statute, which seemingly favored females, was recast as penalizing the female worker because she made the same monetary contributions as her male counterpart, but was not afforded the same protection for her family.[30] The Court, in passing, acknowledged the widower's role, stating that the statutory purpose of permitting the mother to remain at home was "entirely irrational" when a surviving father would be faced with identical child care problems.[31]

In a major departure from the female preference in the application of the equal protection clause, the Supreme Court struck down a statute which discriminated against male purchasers of beer in *Craig v. Boren.*[32] Females over the age of eighteen were permitted to purchase beer; however, males were denied this privilege until they reached the age of twenty-one.[33] The Court clearly enunciated and applied a two-

25. *Id.* at 509; *see also* Califano v. Webster, 430 U.S. 313 (1977) (Social Security statute which permitted females to eliminate three low earning years was upheld as being substantially related to governmental objective of compensating for past economic distresses suffered by women).

26. Weinberger v. Wiesenfield, 420 U.S. 636 (1975).

27. 420 U.S. 636 (1975).

28. *Id.* at 640-41. If Mr. Wiesenfield had been a female, he would have satisfied all eligibility requirements.

29. 416 U.S. 351 (1974).

30. Weinberger v. Wiesenfield, 420 U.S. 636, 645 (1975).

31. *Id.* at 651. The *Weinberger* Court relied primarily on Frontiero v. Richardson, 411 U.S. 677 (1973) (plurality opinion) and focused upon the discriminatory treatment of a servicewoman entitled to benefits for her dependent husband. Other courts have also picked up this theme of discrimination against the female-insured. *See* Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142 (1980) (Workmen's Compensation statute discriminated against working women because they received less security for their families); Califano v. Goldfarb, 430 U.S. 199 (1977) (Social Security statute discriminated against the female insured by unduly burdening her widower with proof of dependency).

32. 429 U.S. 190 (1976).

33. *Id.* at 191-92 n.1. Ironically, the plaintiff in *Craig* was a female tavern owner.

prong test that was initially set forth in *Reed v. Reed.*[34] The requirements are that gender classifications "must serve important governmental objectives and must be substantially related to achievement of those objectives."[35] In *Craig,* the governmental objective was to reduce alcohol related traffic accidents. The state defended its objective with accident statistics which allegedly indicated a higher incidence of male-driver accidents. The Court was not satisfied that the sex of the drinker was substantially related to the objective. Accordingly, the statute was found to be discriminatory against males.[36]

In *Orr v. Orr*[37] the Court again upheld an equal protection claim by a male in his role as an ex-husband. The *Orr* Court found Alabama's alimony statutes to be discriminatory because males could be forced to make alimony payments while females could not.[38] The Court recognized the validity of the state's objective to financially assist "needy spouses,"[39] but found that the employment of a gender-based classification was not substantially related to the objective's achievement.[40] The Court noted that divorce proceedings included a mandatory, individualized hearing and stated a party's actual economic need could be determined at that hearing.[41] In essence, the Court found no rationale for utilizing sex as a proxy for need.

In a sudden departure from an apparently equal application of the equal protection clause, the Supreme Court in *Rostker v. Goldberg*[42] refused to overturn the male-only draft registration. At issue in *Rostker* was whether the male-only draft was substantially related to the government's objective of raising and supporting armed forces.[43] The Court examined the statute's legislative history and found that the essential purpose of the government's stated objective was to prepare for the mobilization of combat troops, an area of military service which has historically excluded women.[44] The Court held that the armed services restriction against females in combat justified Congress's gen-

34. 404 U.S. 71 (1971). The *Craig* Court was the first to clearly define and apply the two-prong test. *See supra* note 13. *See generally* Weidner, *The Equal Protection Clause: The Continuing Search For Judicial Standards,* 57 U. DET. J. URB. L. 867 (1980).
35. Craig v. Boren, 429 U.S. 190, 197 (1976).
36. *Id.* at 204.
37. 440 U.S. 268 (1979).
38. The Court simply stated, "Mr. Orr bears a burden he would not bear were he female." *Id.* at 273.
39. *Id.* at 280.
40. The *Orr* Court employed the two-prong test delineated in Craig v. Boren, 429 U.S. 190 (1976) and later reiterated in Califano v. Webster, 430 U.S. 313 (1977).
41. Orr v. Orr, 440 U.S. 268, 281-82 (1979).
42. 453 U.S. 57 (1981).
43. *Id.* at 70.
44. *Id.* at 77. The Court did not find it necessary to examine any substantial relationship between the mobilization of combat troops and the stated objective of raising and supporting combat troops. In so doing, the Court underestimated the importance of noncombat positions to the armed forces. Additionally, the Court's

der classification, and thereby negated any equal protection violation. In *Rostker* the Court continued to recognize the traditional roles of the sexes, and hence did not evenhandedly apply the two-prong equal protection test.

In *Mississippi University for Women v. Hogan,*[45] the Supreme Court held that the discriminatory admissions policy, which precluded Hogan's acceptance, was contrary to the equal protection clause of the fourteenth amendment. The Court applied the two-prong test, which requires that gender classifications serve "important government objectives" and that they be "substantially related to the achievement of these objectives."[46] MUW defended its female-only admissions policy on the ground that it constituted educational affirmative action for females.[47] The Court recognized such a justification, but limited it to those circumstances of documented discrimination.[48] MUW failed to present evidence demonstrating a pattern of discrimination against females in the nursing field. Therefore, the state failed to meet the requisite "exceedingly persuasive justification for the classification."[49] The Court found that women have not been denied opportunities in the nursing field, but instead statistically dominate the profession by an overwhelming majority.[50]

The female preference proffered by the university was not responsive to historical female discrimination; therefore, the Court held that MUW had not proven an important governmental objective. Rather, the Court believed that the female preference was damaging to women. The male-exclusion policy perpetuated the "stereotyped view of nursing" as a female profession.[51] The Court speculated that an influx of male nurses could have a beneficial effect on the female-dominated field.[52]

---

assumption that physical strength is necessary for combat in a modern, hi-technology army is also unwarranted.

45. 102 S. Ct. 3331 (1982).

46. *Id.* at 3336 (citing Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 150 (1980)).

47. 102 S. Ct. at 3337-38.

48. *Id.* at 3338. The Court cited Schlesinger v. Ballard, 419 U.S. 498 (1975) as one of those limited circumstances. In that case, the limited opportunities available to female officers justified a longer period of tenure prior to mandatory discharge; *see also* Califano v. Webster, 430 U.S. 313 (1977) (discussed *supra* note 25).

49. 102 S. Ct. at 3336 (citing Kirchberg v. Feenstra, 450 U.S. 445, 461 (1981); Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, 273 (1979)).

50. 102 S. Ct. at 3336.

51. *Id.* The Court relied upon the language regarding the expanding role of women in Stanton v. Stanton, 421 U.S. 7 (1975). In *Stanton,* the Court invalidated a Utah statute requiring the financially responsible parent to support females to age eighteen, but males were entitled to child-support to age twenty-one. The Court stated an earlier end to a female's support served to curtail her educational possibilities, and thereby perpetuated old role models of the female at home. *Id.* at 14-15.

52. 102 S. Ct. at 3339 n.15. The Court cited a spokesperson for the American Nurses

MUW also failed to satisfy the second prong of the equal protection test requiring a substantial relation to the legitimate education objective.[53] The Court noted MUW's policy of permitting males to audit classes[54] and reasoned that this undermined MUW's contention that the presence of males would interfere with the educational environment of the all-female school. Representatives of the school testified that the presence of male students did not alter either their style of teaching or the in-class performance of the female students.[55]

In sum, MUW's admissions policy was held to be discriminatory against Hogan primarily because the state could not proffer a legitimate governmental objective. The Court's holding was, in turn, premised upon the fact that the female preference had a detrimental effect upon females by promoting the stereotype of the female nurse. Thus, the Court found the admissions policy to be an unacceptable violation of the equal protection clause.[56]

Historically, the Supreme Court has tended to rule most favorably upon those cases involving discrimination against females.[57] In fact, the Court has purposefully found the discrimination to be against a female, even when the brunt of adversity fell upon a male.[58] This theme initially arose in *Frontiero v. Richardson.*[59] In *Frontiero* the Court narrowly defined the issue as "*the right of the female member* of the uniformed services" to declare her husband as a dependent,[60] as opposed to the right of the husband to receive benefits. The Court has continued to employ this theme of impermissible discrimination against female-insureds and seemingly has ignored apparent discriminatory effects on male beneficiaries.[61] In essence, the Court recasts the object of the discrimination. Such recasting can also be seen in *Hogan.* There the male applicant was the object of the discriminatory admis-

---

Association who suggested the absence of males had served to keep wages low.

53. *Id.* at 3339.

54. Justice Powell, in his dissent, was quick to point out the number of males who actually participated in this program was minimal. *Id.* at 3347 n.17 (Powell, J., dissenting).

55. *Id.* at 3340.

56. *Id.* The Court also rejected a collateral legislative argument propounded by MUW. MUW alleged that the exemption for single-sex schools from 20 U.S.C. § 1681(a)(5) (1976), indicated an intent to exempt such schools from their constitutional obligations. Subsection 5 exempted undergraduate schools with a tradition of single-sex admissions from forfeiting federal monies. The Court found no such intent. Moreover, the Court held that Congress would not have the power to abrogate a constitutional guarantee. Mississippi Univ. for Women v. Hogan, 102 S.Ct. 3331, 3340-41 (1982).

57. *See supra* notes 19-25 and accompanying text.

58. *See supra* notes 26-31 and accompanying text.

59. 411 U.S. 677 (1973) (plurality opinion).

60. *Id.* at 678 (emphasis added).

61. *See supra* note 31 and accompanying text.

sions policy, yet the Court emphasized the effect upon women in the form of adverse stereotyping.

A result-oriented review of *Orr v. Orr*[62] and *Hogan* seems to indicate a judicial intent to analyze gender discrimination cases consistently, regardless of which sex the discrimination is against. Although the male litigants were successful in their causes of action, a close examination of the Court's reasoning reveals a judicial preoccupation with the societal status of women. In *Orr,* the Court held that statutes which bestow benefits on the basis of gender "run the risk of reinforcing stereotypes about the 'proper place' of women."[63] This fear was reiterated by Justice O'Connor in *Hogan.* Justice O'Connor surmised that the female-only admissions policy would prolong the existence of the stereotypical female nurse. Cases such as *Hogan,* which facially benefit the discriminated male are recast to benefit females. In *Hogan,* the Court took an additional step toward neutralizing age-old stereotypes of women.

The Court first explicitly acknowledged discrimination against males in *Craig v. Boren,*[64] and thus apparently abandoned its technique of recasting sex discrimination as against a female. At the time, *Craig* seemed to state that equal protection guarantees would be indentically and impartially applied to discriminated males and females. However, a close analysis of subsequent case law indicates that *Craig* stands alone in evenhandedly extending the scope of the equal protection clause.

Another line of cases has justified certain classifications which afford favorable treatment to females.[65] The first post-*Reed* example of this rationale appeared in *Kahn v. Shevin.*[66] In *Kahn,* the Court upheld a tax-break for females premised upon their traditionally lower financial position. Expanding on this theme of justifiable favoritism for females, the Court has reasoned that in some cases men and women are not similarly situated.[67]

Further support for the hypothesis that women and men are subjected to unequal judicial treatment in equal protection litigation is evident in the draft registration case, *Rostker v. Goldberg.*[68] In *Rostker,* the Court readily accepted the traditional exclusion of women from

62. 440 U.S. 268 (1979).
63. Orr. v. Orr, 440 U.S. 268, 283 (1979). *See* Hull, *Sex Discrimination and the Equal Protection Clause: An Analysis of Kahn v. Shevin and Orr v. Orr,* 30 SYRACUSE L. REV. 639, 644 (1979) (*Orr* decision was "significant because it may represent that timeworn stereotypes have outlived their usefulness, that in the year 1979, women are no longer presumptively homebound and dependent. . . .")
64. 429 U.S. 190 (1976).
65. *See supra* notes 19-25 and accompanying text.
66. 416 U.S. 351 (1974).
67. *Id.* at 354-55; *see* Schlesinger v. Ballard, 419 U.S. 498, 508 (1975); *see also supra* note 25 and accompanying text.
68. 453 U.S. 57 (1981).

combat duty by finding that the sole statutory purpose for the draft was to raise combat troops.[69] In a similarly protective fashion, the Court upheld, in *Michael M. v. Superior Court,*[70] a California rape statute which only punished males for sexual relations with a minor partner. The purported governmental objective of reducing teenage pregnancy was readily accepted by the majority.[71] The Court was willing to afford protection, in the form of a deterrent, to the minor females and specifically stated that males were not "in need of the special solicitude of the courts."[72] The Court has consistently applied the two-prong test to both male and female based discrimination since *Craig v. Boren.*[73] Yet, *Rostker v. Goldberg*[74] and *Michael M. v. Superior Court*[75] indicate that how honestly the test is applied may depend upon which sex is the object of the discrimination.[76]

In *Hogan* the Court seemingly looked past the educational discrimination suffered by Hogan and focused upon female stereotyping problems. The purported objective of affirmative action for females failed, in part, because of the possible detrimental effects to females.[77] Very possibly, the *Hogan* decision's true meaning is that women do not need judicial assistance in the nursing field. The result might be quite different if the educational area at issue is not dominated by females. In the future, the Court may approve of an all-female business or law school and thereby refuse to come to the aid of the discriminated male applicant.[78]

Gerry E. Hoban

69. *Id.* at 78-79. *But see id.* at 94-97 (Marshall, J., dissenting) (points out the misapplication of the two-prong test); *see also* Blattner, *The Supreme Court's "Intermediate" Equal Protection Decisions: Five Impressed Models of Constitutional Equality,* 8 HASTINGS CONST. L.Q. 777, 791-94 (1981).
70. 450 U.S. 464 (1981) (plurality opinion).
71. *Id.* at 472-73 (purported objective of reducing teenage pregnancy was held to be sufficiently related to the infliction of criminal liability on males only).
72. *Id.* at 476.
73. 429 U.S. 190 (1976).
74. 453 U.S. 57 (1981).
75. 450 U.S. 464 (1981) (plurality opinion).
76. *Cf.* Hull, *Sex Discrimination and the Equal Protection Clause: An Analysis of Kahn v. Shevin and Orr v. Orr,* 30 SYRACUSE L. REV. 639, 658-59 (1979) (observing that the Justices are willing "to apply a less stringent equal protection standard when . . . the gender-based classification was in fact ameliorative in purpose" as evidenced by Kahn v. Shevin, 416 U.S. 351 (1974)).
77. *See supra* notes 47-50.
78. *See* Mississippi Univ. for Women v. Hogan, 102 S. Ct. 3331, 3341 (1982) (Burger, C.J., dissenting).