Buffalo Law Review

Volume 36 | Number 3 Article 3

10-1-1987

The Failure of Gender Equality: An Essay in Constitutional Dissonance

Judith Olans Brown
Northeastern University Law School

Wendy E. Parmet
Northeastern University Law School

Phyllis Tropper Baumann
Northeastern University Law School

The Failure of Gender Equality: An Essay in Constitutional Dissonance

JUDITH OLANS BROWN*
WENDY E. PARMET**
PHYLLIS TROPPER BAUMANN***

TABLE OF CONTENTS

* Professor, Northeastern University Law School; A.B. Mount Holyoke College, 1962; LL.B. Boston College Law School, 1965.

** Associate Professor, Northeastern University Law School; A.B. Cornell University, 1979; J.D. Harvard Law School, 1982.

*** Lecturer-in-Law, Northeastern University Law School; A.B. Brandeis University, 1967; J.D. Boston University Law School, 1970.

We wish to thank our friends and colleagues, David Abramowitz, Dan Givelber, Mary O'Connell, Elizabeth Spahn, Steve Surbin and the Femcrits of Cambridge, Massachusetts, who thoughtfully criticized earlier drafts of this paper and who were always available with helpful suggestions. In addition, we wish to acknowledge the very able research assistance of our students, Janice Bergmann, Mary Bonauto, Nereyda Garcia, Karen Rosenberg and Maria Tobia.

I. INTRODUCTION

FEMINISTS agree that gender[1] equality remains elusive; they disagree about why. A critical question is whether gender equality can be accomplished by treating men and women interchangeably. Stated another way, the debate[2] has been between those who deny that women need "special treatment" in order to achieve equality, and those who argue that "real" equality demands that the legal system recognize the unique role which women play in society. Each side of this similar treatment/special treatment debate has assumed that the correct doctrinal formulation of equality will lead to some form of "true equality."

This premise is misplaced. The debate has been about the wrong question, because neither approach is capable of redressing the problems women face. The values underlying any meaningful notion of gender equality are incompatible with the basic limitations in the law's concept of rights. The law's vision of discrimination, and indeed, of rights themselves, provides little support for the eradication of sexism.[3] An understanding of these limitations supports a critique of basic constitutional norms, and the recognition that commonly accepted views of equality foster an inherently unequal society.

This article will examine and critique the ways in which legal notions of discrimination and rights make demands for gender equality appear dissonant and even unjust. We begin by reviewing the similar treatment/different treatment debate, and the caselaw that has influenced

1. In this essay we use the words "sex" and "gender" interchangeably, for the reasons cited by Professor MacKinnon. *See* C. MACKINNON, FEMINISM UNMODIFIED (1987); MacKinnon, *Not a Moral Issue*, 2 YALE L. & POL'Y REV. 321, 322 n.5 (1984).

2. Some of the works in the debate include Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118 (1986); Krieger & Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality*, 13 GOLDEN GATE U. L. REV. 513 (1983); Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984); Littleton, *Equality and Feminist Legal Theory*, 48 U. PITT. L. REV. 1043 (1987); Scales, *Towards a Feminist Jurisprudence*, 56 IND. L.J. 375 (1981); Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1984-85).

3. Many of the same limitations impede the law's ability to eradicate racism, classism and other forms of discrimination. An extended discussion of these problems, however, is beyond the scope of this Article. Instead, we use gender in this essay to illustrate the law's inability to redress the grievances of the powerless.

it. After briefly discussing some of the values underlying true gender equality, we examine how discrimination law fails to provide a means for achieving such equality. In so doing, we explore the innate limitations of discrimination law, and then observe those same limitations operating at a more basic level in the very notion of constitutional rights. We conclude by discussing how current forms of legal reasoning prevent equality, and how a change in methodology holds forth some promise for reducing gender inequality.

A. *The Caselaw Background*

The first judicial response to constitutional claims of sex discrimination was Victorian. In the infamous case of *Bradwell v. Illinois*[4], the Supreme Court affirmed the denial of Myra Bradwell's license to practice law due to her sex. In his oft-cited concurring opinion, Justice Bradley relied on the natural roles of the sexes to justify the decision:

> [T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of men and women. . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.[5]

The law of the Creator, however, soon gave way to the social changes forged by industrialization and urbanization.[6] In a sense, the modern debate about similar or different treatment began with the reformist goal of improving conditions in the workplace. Reformers often attempted to achieve such goals by first improving the working conditions of women and children.[7] In *Muller v. Oregon,*[8] the Supreme Court upheld a maximum hours statute which applied only to women on the grounds that women needed special protection to ensure their health and that of future generations.[9]

Muller was authority for treating women differently from men. As time passed, however, such protective legislation became disabling rather than protective because it limited the number of hours women could work, the type of work they could do, and the conditions under which

4. 83 U.S. (16 Wall.) 130 (1872).

5. *Id.* at 141 (Bradley, J., concurring).

6. *See* A. KESSLER-HARRIS, OUT TO WORK: A HISTORY OF WAGE EARNING WOMEN IN THE UNITED STATES 45-72 (1983 ed.).

7. *Id.* at 180-95.

8. 208 U.S. 412 (1908).

9. *Id.* at 421-23. The Supreme Court upheld the statute despite the fact that Lochner v. New York, 198 U.S. 45 (1905), struck down a maximum hours statute which applied to all workers as violative of the due process clause and freedom of contract.

they could labor.[10] Protective legislation thus combined with other factors to perpetuate barriers to the employment of women.[11]

In the last twenty years, the women's movement has challenged both protective legislation and discriminatory employment practices.[12] In an important early case, the Supreme Court discredited the notion that men and women could be treated differently due to stereotypical assumptions about their place in the world. *Frontiero v. Richardson*[13] involved the constitutionality of providing spousal benefits to all wives of men in the military, but requiring husbands of military personnel to prove their dependency. The Secretary of Defense had defended the scheme as efficient because wives are frequently dependent on their husbands, while husbands are rarely dependent on their wives.[14] The Court rejected this argument as based on "gross, stereotyped distinctions" which placed women in a subordinate position.[15]

Other cases followed *Frontiero* in rejecting classifications based on outdated stereotyes.[16] The Court's approach to differential treatment between the sexes, however, was inconsistent. For example, in *Kahn v. Shevin*,[17] the Court upheld a Florida statute which granted a property tax exemption to widows, but not widowers, based on the "financial difficulties confronting the lone woman."[18] If a statute was seen as an attempt to rectify the effects of past gender discrimination, the Court was

10. *See* J. BAER, THE CHAINS OF PROTECTION (1978); W.H. CHAFE, THE AMERICAN WOMAN: HER CHANGING SOCIAL, ECONOMIC AND POLITICAL ROLES, 1920-1970, 124-28 (1975 ed.); A. KESSLER-HARRIS, *supra* note 6, at 180-214.

11. *See* J. BAER, *supra* note 10, at 19-23; A. KESSLER-HARRIS, *supra* note 6, at 181.

12. *See* J. BAER, *supra* note 10, at 136-74; W.H. CHAFE, *supra* note 10, at 233-34; A. KESSLER-HARRIS, *supra* note 6, at 300-19; *see also* Rosenfeld v. Southern Pacific Co., 444 F.2d 1219, 1223 (9th Cir. 1971) (state protective labor legislation conflicts with Title VII's policy of non-discrimination); BABCOCK, FREEDMAN, NORTON & ROSS, SEX DISCRIMINATION AND THE LAW 229-439 (1975 ed.) (collecting cases).

13. 411 U.S. 677 (1973). Notwithstanding the conclusion of the plurality opinion in *Frontiero*, a majority of the Supreme Court has never denominated sex as a suspect classification for purposes of equal protection clause analysis.

14. *Id.* at 688-89.

15. *Id.* at 685.

16. *See, e.g.*, Miss. Univ. for Women v. Hogan, 458 U.S. 718 (1982) (exclusion of men from state nursing school tends to perpetuate stereotypes that nursing is a woman's job); Orr v. Orr, 440 U.S. 268 (1979) (invalidating Alabama alimony statute permitting alimony only to women and not to men); Califano v. Goldfarb, 430 U.S. 199 (1977) (striking down a similar provision of the Social Security Act); Stanton v. Stanton, 421 U.S. 7 (1975) (invalidating statute providing longer age of majority for female children than for male children for purposes of child support); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (denial of OASDI survivor benefits to widowers with children while providing benefits to widows with children is unconstitutional).

17. 416 U.S. 351 (1974).

18. *Id.* at 353.

willing to uphold it as compensatory.[19]

While there is much to be said in favor of compensatory statutes,[20] the Court failed to delineate a jurisprudence of gender bias. The cases demonstrated a preoccupation with labeling, and offered only a limited analysis of circumstances which might justify differential treatment.[21] The Court was unable, or unwilling, to pierce through stereotypes and examine those social assumptions about the sexes that are worthy of legal recognition, and those that are not. Thus it should not be surprising that the Court lacked any sustainable analytical approach when confronted with cases that concerned differences between the sexes that were linked to biology. Such differences, which arise primarily in the area of reproduction, seem more "real" and enduring than those faced in cases such as *Frontiero*. And they have caused the Court, and feminists, far more trouble.

The critical case was *Geduldig v. Aiello*,[22] which involved a challenge to the constitutionality of a California disability insurance system that specifically excluded pregnancy benefits. In an astonishing feat of judicial legerdemain, the Court found that the system did not violate the equal protection clause because there was: "no evidence in the record that the selection of the risks insured by the program worked to discriminate against any definable group or class. . . . 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."[23]

In the now infamous footnote 20, the Court explained that there was no discrimination because the California program

> merely removes one physical condition—pregnancy—from the list of compensable disabilities. . . . Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts . . . lawmakers are constitutionally free to include or exclude pregnancy from the coverage of

19. *See id.* at 355; *see also* Califano v. Webster, 430 U.S. 313 (1977) (upholding as compensatory social security retirement benefits calculation that favored women); Schlesinger v. Ballard, 419 U.S. 498 (1975) (upholding rule providing women naval officers with longer period in which to receive promotion prior to discharge due to fewer opportunities for promotion available to women).

20. *See infra* text accompanying notes 225-37.

21. *See infra* text accompanying notes 201-12 for a further discussion of this issue.

22. 417 U.S. 484 (1974). Another important case dealing with what the Court sees as real sex differences is Michael M. v. Sonoma County, 450 U.S. 464 (1981). *Michael M.* upheld California's statutory rape law, on the ground that "realistically . . . the sexes are not similarly situated," and "only women may become pregnant." *Id.* at 469, 471. For a powerful feminist analysis of *Michael M.*, see Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387 (1984).

23. Geduldig v. Aiello, 417 U.S. at 496-97 (footnotes omitted).

legislation such as this on any reasonable basis.[24]

Geduldig's distinction between discrimination against pregnancy and discrimination on the basis of sex was extended to Title VII in *General Electric Co. v. Gilbert.*[25] The reaction to both cases was heated. Congress responded by enacting the Pregnancy Disability Act of 1978 ("PDA"), which amended Title VII of the Civil Rights Act of 1964[26] and provides in pertinent part:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability to work. . .[27]

The issues raised by *Geduldig* have not disappeared with the passage of the PDA. The PDA made it clear that pregnant women could not be denied disability leaves where such leaves were generally available. But did that mean that pregnancy leaves were required? Or was it discriminatory against men to provide women with pregnancy leaves, where men were not offered disability leaves? This question was raised in *California Federal Savings and Loan Corp. v. Guerra*,[28] (hereinafter *Cal. Fed.*) which held that the PDA did not prohibit states from mandating pregnancy leaves.[29]

Cal. Fed., however, did not resolve the fundamental issue: what does discrimination against women mean? Does it mean that women must be afforded benefits to ease the burdens imposed by pregnancy, or that they must be treated similarly to men? And how can women be treated similarly to men, who cannot become pregnant? Does it mean, as *Geduldig* implied, that there is no such thing as discrimination on the basis of pregnancy? Or do we need to reconsider our views about the meaning of dis-

---

24. *Id.* at 496, n.20.

25. 429 U.S. 125 (1976). On the other hand, in Nashville Gas v. Satty, 434 U.S. 136 (1977), the Court found that a policy which stripped workers of their seniority when they took disability leaves on account of pregnancy violated Title VII. The major distinction noted by the Court was that the employer in *Nashville* placed a burden on pregnant employees, while the employer in *Gilbert* merely failed to provide a benefit. *Id.* at 142. This distinction is disingenuous at best, and demonstrates the poverty of the analysis begun in *Geduldig*.

26. 42 U.S.C. § 2000(e)-(k) (1982).

27. *Id.* For a discussion of the legislative history of the PDA, see Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669 (1983).

28. 479 U.S. 272 (1987); *see* Miller-Wohl Co. v. Comm'r of Labor and Industry of Mont., 692 P.2d 1243 (Mont. 1984), *vacated and remanded*, 479 U.S. 1050 (1987).

29. For a detailed discussion of *Cal.Fed.*, see *infra* text accompanying notes 175-81.

crimination and equality? And what about the many other ways in which men and women are dissimilarly situated for reasons other than biology, such as childrearing? Is a recognition of such differences a return to *Bradwell*, or is there more to equality than the eradication of outdated stereotypes?

B. *The Feminist Debate*

These issues have become the focus of a heated debate among feminist scholars. A brief review of that debate is critical to understanding the problems that issues of sex discrimination present to equality theory.

On one side of that debate are the advocates of the "similar treatment" approach.[30] These scholars argue that the best or even the only way to end discrimination against women is to require similar treatment to that afforded men. They believe that pregnancy should be treated as a disability—no more, no less.[31] Any special recognition of the uniqueness of pregnancy, or of any other distinction between the sexes, will raise the specter of protective legislation and result in a perpetuation of stereotypes and second class status for women.

Professor Williams has written the most comprehensive exposition of this approach.[32] According to Williams, the approach is preferable partially for strategic reasons. Given the law's traditional assumption that equality means the equal treatment of those similarly situated,[33] any approach that recognizes the differences between the sexes, or advocates any non-gender neutral approach, is susceptible to the charge that women are seeking "special" treatment, and is doomed to judicial dismissal.[34]

Although Williams accepts that discrimination doctrine has a limited vision of equality,[35] she argues that her approach can have a significant impact for two reasons. First, she believes that many of the needs of

30. *See* Taub, *From Parenting Leaves to Nurturing Leaves*, 13 N.Y.U. REV. L. & SOC. CHANGE 381 (1984-85); Taub & Williams, *Will Equality Require More Than Assimilation, Accommodation or Separation from the Existing Social Structure?*, 37 RUTGERS L. REV. 37 RUTGERS L. REV./CIV. RTS. DEVS. 825 (1985); Wasserstrom, *Racism, Sexism and Preferential Treatment: An Approach to the Topics*, 24 U.C.L.A. L. REV. 581 (1977); Williams, *supra* note 2.

31. *See, e.g.*, Williams, *supra* note 2, at 327.

32. *See id.* at 325-80.

33. *See infra* text accompanying notes 112-14.

34. Williams, *supra* note 2, at 346.

35. While other theorists have presented a more critical vision of equality (*see infra* text accompanying notes 39-49), few can deny Williams' analysis of how the Court tends to see the issues. Even the recent *Cal.Fed.* decision does not change the basic soundness of this observation. See *infra* text accompanying notes 175-85.

women can be satisfied through gender neutral legislation.[36] Second, in a somewhat contradictory fashion, she claims that disparate impact theory can be used "to squeeze the male tilt out of purportedly neutral legal structure. . . ."[37] What she fails to see is that disparate impact theory is just as limited as the underlying equality doctrine which compels her to use gender neutrality in the first place.[38]

More importantly, the requirement that the sexes be treated similarly, or in gender neutral terms, begs the question: "similar to whom?" What is the model against which similar treatment shall be measured? To critics of the similar treatment approach, that model is a male model, based on the conditions and norms typically found among middle class, white men.[39] Being judged against that model, women inevitably come up short.

Building on that observation, one group of scholars believes that where men and women are biologically different, they should be treated differently by the law.[40] Because reproduction is one area where there are clear biological differences, they believe that pregnancy and childbirth should be carved out from the general rule of similar treatment. According to Professor Law:

> [P]regnancy, abortion, reproduction and creation of another human being *are* special—very special. Women have these experiences. Men do not. An equality doctrine that ignores the unique quality of these experiences implicitly says that women can claim equality only insofar as they are like men. Such a doctrine demands that women deny an important aspect of who they are.[41]

---

36. Williams, *supra* note 2, at 374-75.

37. *Id.* at 331. This is contradictory because if disparate impact theory was as powerful as Williams believes, it could pierce through gender neutral statutes, such as parenting leaves, that tend to benefit women more than men. *See infra* text accompanying notes 167-73.

38. *See infra* text accompanying notes 150-66.

39. *See* Finley, *supra* note 2; Freedman, *Sex Equality, Sex Differences, and the Supreme Court*, 92 YALE L.J. 913 (1983); Krieger & Cooney, *supra* note 2; Powers, *Sex Segregation and the Ambivalent Directions of Sex Discrimination Law*, 1979 WIS. L. REV. 55. Professor Taub's similar treatment approach is especially susceptible to this criticism. Concerned about the impact of stereotypical assumptions, she believes that women should prevail on discrimination claims where they can show that "the adverse employment decision was based on an expectation that women should conform to a certain pattern of behavior." Taub, *Keeping Women in Their Place: Stereotyping Per Se as a Form of Employment Discrimination*, 21 B.C.L. REV. 345, 418 (1980). However, Taub's definition of discrimination entitles women to no "special treatment" when women actually do conform to stereotypical behavior, for example, when performing childrearing functions. *See id.* at 390-96.

40. *See* Dowd, *Maternity Leave: Taking Sex Differences into Account*, 54 FORDHAM L. REV. 699, 762 (1986); Kay, *Models of Equality*, 1985 U. ILL. L. REV. 39, 47; Law, *supra* note 2, *passim*; Scales, *supra* note 2, at 431.

41. Law, *supra* note 2, at 1007 (emphasis in the original).

The biological differences approach has much to recommend it. It recognizes that the problem with *Geduldig* was the Court's inability to understand that reproduction is sex-linked. Moreover, tying pregnancy leaves to disability policies means that they will only be offered when they fit into timetables set to accommodate illnesses, and only in cases where women are entitled to disability benefits.[42] Since women are often in low paying, non-unionized jobs, they are likely to receive little help from such a policy.[43] Further, the approach recognizes that as long as reproductive policies are tied to experiences which men face, such policies cannot adequately resolve the pressing issues confronting women.

The central lesson of the biological differences approach is that formal equality cannot assure true equality when individuals are not, in fact, similarly situated. This insight, however, suggests a broader attack on the similar treatment position.

Reproduction is not the only area in which women and men are biologically different. On average, men and women differ in such matters as height, weight, and life span. Law states that such differences should not justify differential treatment because they are only average differences[44]— but so, too, are reproductive differences. For example, not all women can bear children. Thus, biology, alone, offers no clear guide to determining what differences should be taken into account. More fundamentally, men and women are differently situated with respect to numerous economic, political, and social circumstances. If women cannot achieve equality when they are not similarly situated to men with respect to biology, how can they achieve equality in any of these other areas?[45]

42. This approach distinguishes pregnancy leaves, which are limited to the time necessary for recovering from childbirth, from childbearing leaves, which are not biologically linked, and therefore, according to biological differences scholars, should be subject to a gender neutral approach. *See* Dowd, *supra* note 40, at 720.

43. Finley, *supra* note 2, at 1125-26; COMM. ON WOMEN'S EMPLOYMENT AND RELATED SOCIAL ISSUES, COMM'N. ON BEHAVIORAL AND SOC. SCI. AND EDUC., NAT'L RESEARCH COUNCIL, WOMEN'S WORK, MEN'S WORK: SEX SEGREGATION ON THE JOB, 13-15 (B. Reskin & H. Hartman ed. 1986) [hereinafter WOMEN'S WORK, MEN'S WORK]

44. Law, *supra* note 2, at 1004.

45. Proponents of the biological differences approach argue against a broader attack on the similar treatment doctrine because they are afraid that to do so would perpetuate sexual stereotyping. *See* Law, *supra* note 2, at 1008; Scales, *supra* note 2, at 433; Krieger & Cooney, *supra* note 2, at 567. What they fail to see is that biology cannot provide a clear, apolitical vehicle for determining which differences should count. For example, the very need for pregnancy leave arises not only because pregnancy is biologically linked, but because of the social configuration of the workplace, and social conditions which lead women to need or choose to work there. Social factors intermix with a variety of biologically linked factors to determine differences in the experiences and needs of men and women. Biology alone cannot tell us how to value those experiences.

Such observations have led many feminist legal scholars to advocate a far fuller recognition of the differences between the sexes, and an expansive vision of equality that can accomodate those differences.[46] Although these scholars vary in their approach, they share a common belief that the similar treatment paradigm, as reflected in cases from *Frontiero* to *Geduldig*, has been of limited benefit to most women.[47] The cases grant women equality only when their experiences parallel those of men, which often does not occur. Moreover, the goal of assimilation, which underlies the similar treatment approach, is problematical because we cannot assume that the differences between the sexes are trivial, or that women should or could strive to act as men.

Underlying this critique is an assessment that not all of the differences between the sexes are bad stereotypes; indeed, many have positive social value. Influenced by the work of Professor Gilligan,[48] some scholars believe that women tend to have different values and moral perspectives than do most men.[49] To these authors, women are more likely to hold values of interdependence, nurturance and altruism, in contrast to competitive and individualistic values.[50] The positive values associated with women would be lost by adoption of the similar treatment approach.

We share the criticisms of the similar treatment approach raised by

---

46. Such scholars include E. WOLGAST, EQUALITY AND THE RIGHTS OF WOMEN (1980); Finley, *supra* note 2; Frug, *Securing Job Equality for Women: Labor Market Hostility to Working Mothers*, 59 B.U.L. REV. 55 (1979); Littleton, *supra* note 2, *passim*; Minow, *"Forming Underneath Everything that Grows": Toward A History of Family Law*, 1985 WIS. L. REV. 819 (1985); Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983); Note, *Toward a Redefinition of Sexual Equality*, 95 HARV. L. REV. 487 (1981).

47. Professor Finley contends that she is not an advocate of the difference approach, but her definition of that approach is far narrower than our own. She sees the difference approach as one which stresses how women are different from men, forcing the comparison between the sexes. Instead, she strives to transcend the debate and stress how recognition of the needs of childbearing and childrearing affect both sexes. We classify her as a difference scholar because of her recognition of the positive ways in which women differ from men, and her criticism of the ways in which courts assume that male life experiences are the only life experiences.

48. C. GILLIGAN, IN A DIFFERENT VOICE (1982).

49. None of these observations applies to all women, or all men. The claim is rather that women as a class tend to differ from men in these respects. *See The 1984 James McCormick Mitchell Lecture: Feminist Discourse, Moral Values, and the Law-A Conversation*, 34 BUFFALO L. REV. 11, 46-47 (1985) [hereinafter *Feminist Discourse*] (Gilligan speaking). In her book, Gilligan is also careful to note that such differences need not be due to biology, but to social and cultural factors. Gilligan, *supra* note 48, at 2, 16-23.

50. GILLIGAN, *supra* note 48, at 16-23; Gould, *Private Rights and Public Virtues: Women, the Family, and Democracy*, in BEYOND DOMINATION: NEW PERSPECTIVES ON WOMEN AND PHILOSOPHY 17 (C. Gould ed. 1984); Finley, *supra* note 2, at 1119; Olsen, *supra* note 46, at 1499-1501.

the difference scholars.[51] We also share their belief that many of the differences between men and women are valuable to society as a whole, and cannot and should not be obliterated or ignored in the name of "equal treatment." Indeed, we begin with their premises. However, we beleive that the goals they seek are incompatible with existing constitutional analysis.[52] Feminist legal scholars have provided an expanded vision of equality, and have shown how equality doctrine, as now formulated, relies on norms which disadvantage women.[53] The purpose of this Article is to build upon this scholarship by exploring how the concepts of discrimination, legal rights, and legal reasoning themselves operate to thwart the achievement of feminist goals.[54] Both discrimination law and the traditional constitutional discourse operate in a similar fashion to limit the law's ability to respond to the claims of women.

II. THE SUBORDINATION OF WOMEN

In order to understand why existing legal doctrines cannot achieve feminist goals, it is necessary to see what meaningful equality for women involves.[55] Although legal theorists disagree over what equality does and

51. MacKinnon criticizes both the equal treatment and difference approaches. C. MACKINNON, FEMINISM UNMODIFIED 32-40 (1987). She suggests a "dominance" approach to change gender "from a distinction that is presumptively valid to a detriment that is presumptively suspect." *Id.* at 44. She argues that viewing sex equality as a question of "reasonable or unreasonable classification is part of the way male dominance is expressed in law." *Id.* at 44. To MacKinnon, sex inequalities are matters of "naked power." *Id.* at 43.

52. Some difference scholars assume that the law can easily accommodate different values. Professor Wolgast, for example, relies heavily on the case of the handicapped to assert that the law recognizes "special rights" in some instances, and should therefore recognize those rights with respect to women. WOLGAST, *supra* note 46, at 47-49. The problem with her analysis is that it does not address how very limited those special rights are, even in the case of the handicapped. Bowen v. American Hosp. Ass'n, 476 U.S. 610 (1986); Minow, *When Difference Has Its Home: Group Homes for the Mentally Retarded, Equal Protection and Legal Treatment of Difference*, 22 HARV. C.R.-C.L. L. REV. 111 (1987); Parmet, *AIDS and the Limits of Discrimination Law*, 15 LAW, MED. AND HEALTH CARE 61 (1987). More importantly, it does not consider that the statutory rights afforded the handicapped are of a very different character than the constitutional rights to equality which women seek. *See infra* text accompanying notes 325-51.

53. Finley recognizes the powerful force of the underlying male model, Finley, *supra* note 2, at 1118-21, but she is unable to explain how those values interact with equality theory or the notion of legal rights. Moreover, her presumption that true equality will emerge when the underlying value system changes, *id.* at 1167-68, lacks a full assessment of just how difficult it would be to realize such a change, given the nature of legal rights.

54. Professor Scales has similarly argued that the process of legal reasoning must be changed to provide equal rights for women. *See* Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373, 1386-88, 1399-1403 (1986). Her approach to the issue, however, is far different from our own.

55. We do not attempt to respond to all critics of the feminist view of equality. Nor, for that

should mean,[56] to feminists, gender equality has a very concrete meaning:[57] It is the eradication of the subordination women experience.[58] As we discuss below, any theory of equality that is not grounded in the real world experiences of women is not responsive to their needs, and is thus not a meaningful view of equality.

An important characteristic of women's subordination is the economic insecurity of most women.[59] Under the present legal regime, there are three sources of financial support for women: paid labor; the wages and job benefits of other family members; and governmental benefits programs. Despite statutes purportedly guaranteeing women's equal participation in the labor market,[60] women remain in an economically tenuous position. The median earnings for women working full time are 69 per-

matter, do we engage in the debate over the proper reading of the equal protection clause. We merely describe the feminist view and briefly demonstrate why it is critical to women and society as a predicate for our discussion of the law's limitations.

56. For example, some see equality as involving equal access to the political process. *See* J. Ely, DEMOCRACY AND DISTRUST 74 (1980). Others see it as having specific substantive goals. *See, e.g.*, L. TRIBE, CONSTITUTIONAL CHOICES 10-20 (1985). Some, such as Professor Westen believe it has no meaning whatsoever. Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

57. Finley, *Choice and Freedom: Elusive Issues in the Search for Gender Justice* (Book Review), 96 YALE L.J. 914 (1987); Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589, 601-04 (1986). Of course, not everyone writing about gender issues agrees. For example, D. KIRP, M. YUDOF & M. FRANKS, GENDER JUSTICE 87 (1986)[hereinafter GENDER JUSTICE], argue that gender equality means an abstract right to autonomy and choice.

58. This is not to say that improving the lives of women is or should be a legal rule. We are only saying that the eradication of the subordination of women is an underlying moral and normative principle, tied to both the generally accredited interpretation of the fourteenth amendment and our nation's ideology. Brest, *The Supreme Court, 1975 Term — Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 5 (1976). Translating these often obtuse principles and norms into workable legal doctrines is quite another matter; the difficulties associated with that task form the heart of this Article. Kirp, Yudof, and Franks disagree with our view of equality. To them, historically women have received better treatment than men. *See* GENDER JUSTICE, *supra* note 57, at 87. Although it seems clear that the law's recognition of sex-role differences did disadvantage men in a few ways (*i.e.*, minimum hours laws could not be applied to men), this analysis is unconvincing. Historical evidence about the relative conditions of men and women gives little reason to believe that women were advantaged by the law's treatment of them. J. BAER, *supra* note 10, at 19-23; B WERTHEIMER, WE WERE THERE: THE STORY OF WORKING WOMEN IN AMERICA, *passim* (1977); Minow, *supra* note 46, at 827-36. Moreover, the fact that some men either believed or merely stated that women's legal disabilities were "for their own good" appears in retrospect to be ultimately irrelevant. Slaveowners also proclaimed that the legal regime of slavery benefitted the slaves. *See, e.g.*, A Southern Clergyman, "A Defense of Southern Slavery Against The Attacks of Henry Clay and Alex'r Campbell" in A Defense of Southern Slavery and Other Pamphlets 24 (Negro Universities ed. 1969). The justifications given for legal disabilities are often self-serving and ultimately specious, whether or not they are made in good faith.

59. This is not to deny that many men are also economically insecure.

60. *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1982), and the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1982).

cent of what men earn.[61] Women remain segregated in low paying jobs.[62] Fewer women work in jobs with pension and retirement benefits.[63]

Historically this inferior position in the labor market was legitimated by the assumption that a woman would be economically supported by her family.[64] Such economic dependency on men has often left women vulnerable to violence and abuse.[65] Moreover, more and more families find that two incomes are necessary to sustain what the Bureau of Labor Statistics calls "a modest but adequate" life style.[66] Compounding this harsh economic reality is the fact that fewer women can rely on being part of a two-income family.[67] The dramatic increase in divorce has been accompanied by a substantial decline in the number of women who receive alimony.[68] Professor Lenore Weitzman has found that in the first year after divorce, women in California experience a 73 percent decline in their living standards.[69] In addition, there is an increase in the number of women who have never been married who are raising children.[70] Forty-eight percent of poor families are headed by wo-

61. United States Department of Labor, Bureau of Labor Statistics, *Weekly Earnings of Wage and Salary Workers: First Quarter 1987,* April 28, 1987.

62. WOMEN'S WORK, MEN'S WORK, *supra* note 43, at 5-13. In 1985, women comprised 54.5 percent of the work force. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1987, 376 (107th ed. 1986) [hereinafter STATISTICAL ABSTRACT: 1987]. They were overwhelmingly employed in the clerical (29 percent of all women workers) and service (18.5 percent of all women workers) areas. *Id.* at 385-86. Yet women constituted less than 7 percent of engineers, 7 percent of dentists, 18 percent of physicians, 19 percent of attorneys, and 36 percent of all executives, administrators, and managers. *Id.* at 385.

63. L. WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA 114 (1985) (discusses pensions as potentially the most valuable asset in marriages).

64. A. KESSLER-HARRIS, *supra* note 6, at 300-10.

65. S. SCHECHTER, WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT 224-26 (1982); MacKinnon, *Feminism, Marxism, Method and the State: Toward a Feminist Jurisprudence,* 8 SIGNS 635, 657 (1983). From 1981 to 1985, an average of 82,300 rapes were reported each year. STATISTICAL ABSTRACT: 1987, *supra* note 62, at 155. A recent national survey of college-age women found that 27.5 percent reported having been raped at some point since age 14. N.Y. Times, April 21, 1987, at 1, col. 5.

66. A. KESSLER-HARRIS, *supra* note 6, at 302; M. GLENDON, THE NEW FAMILY AND THE NEW PROPERTY 89-91 (1981).

67. D. MOYNIHAN, FAMILY AND NATION 147 (1986); R. SIDEL, WOMEN AND CHILDREN LAST: THE PLIGHT OF POOR WOMEN IN AFFLUENT AMERICA 15-18 (1986); L. WEITZMAN, *supra* note 63, at xvii.

68. L. Weitzman, *supra* note 63, at 32. As of 1978, only one-sixth of divorced women received alimony. *Id.* at 33.

69. *Id.* at 36. In contrast, former husbands experience a 42 percent increase in their standard of living. *Id.* at xii. *See also* Bowen v. Gillard, 483 U.S. 587 (1987) (Brennan, J., dissenting) (divorce causes decline in women's income).

70. D. MOYNIHAN, *supra* note 67, at 146-47.

men.[71] Today we witness the "feminization of poverty."[72]

For poor women, governmental assistance programs are often the only means of support. Women with children often find themselves eligible only for Aid for Families with Dependent Children ("AFDC"),[73] in which benefits are not tied to the cost of living.[74] In 1984 AFDC provided, on the average, $325 per month per family, an amount which varied widely by state.[75] The price for these meager benefits is often stigmatization, dependency and powerlessness.[76]

The consequences of women's economic plight include not only material deprivation but also second-class citizenship.[77] Political theorists have long recognized that a certain level of financial independence is critical to being a full participant in a republic.[78] Without economic security, individuals are both marginalized by the social structure and dependent on the politically powerful.[79] Further, in very practical terms, the poor simply lack the resources necessary for political participation.[80] Thus there is an unavoidable correlation between economic status and political

71. R. SIDEL, *supra* note 67, at xvi.

72. Pearce, *The Feminization of Poverty: Women, Work and Welfare,* URB. & SOC. CHANGE REV. (Nos. 1 & 2 1978).

73. Older women may be eligible for social security benefits, the payments of which are higher than the subsistence levels of AFDC. Law, *Women, Work, Welfare, and the Preservation of Patriarchy,* 131 U. PA. L. REV. 1249, 1325-36 (1983).

74. D. MOYNIHAN, *supra* note 67, at 15; R. SIDEL, *supra* note 67, at 84-88. Law, *supra* note 73, at 1326-28.

75. STATISTICAL ABSTRACT: 1987, *supra* note 62, at 365, chart no. 622. Mississippi has the lowest amount, $91 per month per family; Alaska has the highest at $501 per month per family. *Id. See* R. SIDEL, *supra* note 67, at 84-89.

76. F. FOX PIVEN and R. CLOWARD, REGULATING THE POOR THE FUNCTIONS OF PUBLIC WELFARE 166-74 (1971); Law, *supra* note 73, at 1281-82.

77. In 1984, women comprised 52.7% of the voting age population. Statistical Abstract: 1987, *supra* note 62, at 244. However, that year, only twenty-two women were elected to the House of Representatives (or 4.1 percent), and only two women were elected to the Senate (2 percent). *Id.* at 237. Further, in 1986 no women held statewide elective office in twenty-one states, and women comprised only 14.8 percent of state legislators. *Id.* at 241.

78. J.LOCKE, TWO TREATISES OF GOVERNMENT: A CRITICAL EDITION WITH AN INTRODUCTION AND AN APPARATUS CRITICUS 116-17, 366, 428, 441-42 (Laslett ed. 1960); J. S. MILL, THREE ESSAYS: ON LIBERTY, REPRESENTATIVE GOVERNMENT, AND THE SUBJECTION OF WOMEN 280-81 (1975 ed.); MONTESQUIEU, THE SPIRIT OF THE LAWS 96 (T. Nugent trans. 1949); *see also* C. WRIGHT MILLS, THE POWER ELITE 248 (1956) (Congressmen are those who have been "successful in entrepreneurial and professional endeavors. . . are at least solid, upper-middle class in income and status.").

79. Reich, *The New Property,* 73 YALE L.J. 733, 785-86 (1964).

80. *See, e.g.,* Harper v. Virginia Bd. of Elections, 383 U.S. 663, 666 (1966), discussed *infra* in text accompanying notes 291-97; First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) (ability to spend money on referendum questions as political freedom).

influence.[81] The continued subordination of women into an economic underclass inevitably disables women from full and meaningful citizenship.

Moreover, the feminization of poverty does not affect women alone. Nearly one-fourth of all children today are being raised in poverty.[82] The consequences for these children, and for the society they will inherit, will be severe. A society stratified by a rigid and deep class structure, with a poor and unskilled underclass, is in jeopardy for both its political stability and its economic prosperity.[83]

In the past, many of the issues confronting women, such as childrearing, sexual harassment, spousal abuse and child support have been dismissed as issues of personal choice and purely private concern.[84] This dismissal has been legitimated by the ideology of separate spheres.[85] That ideology is a powerful and pervasive belief system which sees social life as divided between two spheres, one public and male, the other private and female. According to this ideology, the private sphere is the locus of the home, the family, and care-giving. The values and norms associated with it are relational, non-hierarchical, and altruistic.[86] With the rise of industrialization and urbanization these functions became segregated from the "public" world of commerce, the market and politics. While women were expected to fulfill familial functions in the private sphere, men were expected to operate primarily in public life.[87]

This ideological construct sees the public sphere as embodying the values of competition, individualism, economic rationalism, and hierarchy.[88] Given the dominance of the public sphere, it is not surprising that the attributes associated with it became and remain the predominant

81. V.O. Key, Public Opinion and American Democracy 196 (1961); P. KLEPPNER, WHO VOTED? THE DYNAMICS OF ELECTORAL TURNOUT, 1870-1980 at 154 (1982).

82. D. MOYNIHAN, *supra* note 67, at 51; R. SIDEL, *supra* note 67, at 3.

83. J. LOCKE, *supra* note 78, at 441-42; K. Marx, *The Coming Upheaval*, in the MARX-ENGELS READER 218-19 (R. Tucker ed. 1978); D. MOYNIHAN, *supra* note 67, at 23-29; R. SIDEL, *supra* note 67, at 189-93; REPORT OF THE NATIONAL ADVISORY COMMITTEE ON CIVIL DISORDERS 203-206 (1968).

84. Olsen, *supra* note 46, at 1505-09 (collecting cases).

85. Finley, *supra* note 2, at 1118-19; MacKinnon, *supra* note 65, at 644, 657-58; Minow, *supra* note 46, at 832; Olsen, *supra* note 46, at 1498; *cf.* Plessy v. Ferguson, 163 U.S. 537 (1896); Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873).

86. C. GILLIGAN, *supra* note 48, at 16-17; Gould, *supra* note 50, at 7. Of course, this is an association, not an identity.

87. S. FIRESTONE, THE DIALECTIC OF SEX 25-31 (1970); J. MITCHELL, WOMAN'S ESTATE *passim* (1973 ed.); Minow, *supra* note 46, at 835; Olsen, *supra* note 46, at 1500. For a lengthy analysis of the historical evolution of this development see L. STONE, THE FAMILY, SEX AND MARRIAGE IN ENGLAND 1500-1800, *passim* (1977).

88. Finley, *supra* note 2, at 1118; Olsen, *supra* note 46, at 1500.

value structure.[89] Women, often denied access to that sphere, find their subordination legitimated by their inability to "compete" and to embrace the norms of the public sphere.

The ideology of the separate spheres is a social construct; there are no natural fixed spheres. Nevertheless, ideology can both reflect and influence reality. Thus, despite some changes in recent years, women to a large degree live lives that are more touched by the attributes the ideology consigns to the private sphere. Women are primarily responsible for childrearing,[90] for care of the sick, elderly, and disabled,[91] and for maintaining a functioning household.[92] In addition, women have been responsible for maintaining the home as a refuge from the alienation and stress of the workplace.[93]

Despite the increased participation of women in the labor market, the demands that the private sphere imposes on their lives have not diminished.[94] Moreover, it is not surprising that women, having been raised and acculturated to perform these familial roles, have developed values and perspectives the ideology associates with the private sphere.[95] According to Professor Minow, women have developed an "ethos of care"[96] in contrast to the ethos of rights characterizing the male dominated public sphere.[97]

The functions and norms associated with the private sphere have been undervalued. Despite the national rhetoric lauding motherhood and family, the reality of women's experience makes the denigration of women's experience readily apparent. For example, most women receive no

89. Finley, *supra* note 2, at 1120; MacKinnon, *supra* note 65, at 644, 657-58; Minow, *supra* note 46, at 835; Olsen, *supra* note 46, at 1500.

90. Dowd, *supra* note 40, at 699; Note, *Title IX, Disparate Impact and Child Care: Can a Refusal to Cooperate in the Provision of Child Care Constitute Sex Discrimination Under Title IX?*, 52 U. COLO. L. REV. 271, 273 (1981).

91. Taub, *supra* note 30, at 385-90.

92. L. POGREBIN, FAMILY POLITICS LOVE AND POWER ON AN INTIMATE FRONTIER 145 (1983); Rowe, *Childcare for the 1980s: Traditional Sex Roles or Androgyny?* in WOMEN INTO WIVES 169-71 (1977).

93. S. ROWBOTHAM, WOMAN'S CONSCIOUSNESS, MAN'S WORLD 49-50 (1973); Olsen, *supra* note 46, at 1524.

94. S. KAMMERMAN, A. KAHN, P. KINGSTON, MATERNITY POLICIES AND WORKING WOMEN 5 (1983) (85% of working women are likely to become pregnant during their working lives, and many of these women will continue to work after giving birth) [hereinafter MATERNITY POLICIES]; L. POGREBIN, *supra* note 92, at 145 (working women spend just under five hours per day on house and family work).

95. Minow, *supra* note 46, at 838; *Feminist Discourse*, *supra* note 49, at 44 (Gilligan speaking); *id.* at 19 (Dunlap speaking).

96. Minow, *supra* note 46, at 884.

97. C. GILLIGAN, *supra* note 48, at 164.

income for childrearing or housework. Upon divorce or separation women who have not been part of the paid labor force find themselves in severe financial distress.[98] Lacking "marketable" skills, accrued seniority, and all of the benefits attached to paid labor,[99] these women find themselves "displaced homemakers" without any economic security or recognition for the work they have performed. The abolition of alimony, the inadequacy of equitable distribution, and the infrequency and unenforceability of child support orders both exacerbate this problem and demonstrate the devaluation of women by the legal regime.[100] And those women who work outside the home find the workplace inhospitable to familial responsibilities which "working women" nevertheless continue to fulfill.[101] Given the burdens placed upon them, women often are unable to achieve the economic rewards available to men.

In addition, women who work outside of the home are often relegated by a sex segregated workplace to lower paying "women's work."[102] Many of these jobs (such as nursing and teaching) require women to perform functions similar to those they perform at home. The low wages paid for these jobs further evidence the lack of worth assigned to such functions and the values associated with them.

The undeniable importance of both nursing care and education sug-

98. L. WEITZMAN, *supra* note 63, at 344.

99. Professor Glendon has demonstrated that benefits attaching to paid labor have taken the place of familial property and assets in modern industrial societies. M. GLENDON, THE NEW FAMILY AND THE NEW PROPERTY 45-46, 91 (1981).

100. Hunter, *Child Support Law and Policy: The Systematic Imposition of Costs on Women*, 6 HARV. WOMEN'S L.J. 1, 13-14 (1983).

101. Finley, *supra* note 2, at 1120; Dowd, *supra* note 40, at 715. This inhospitability is multifaceted. Married women or women with young children have always had greater difficulty in finding work outside the home. *See* authorities collected in Finley, *supra* note 2, at 1123 n.17. The notion that married women and women with children work less intensely because of their family responsibilities is often used to justify paying them lower wages. Osterman, *Sex Discrimination in Professorial Employment: A Case Study*, 32 INDUS. & LAB. REL. REV. 451, 457-61 (1978). For a criticism of the human capital theorists who accept this justification see Brown, Baumann & Melnick, *Equal Pay for Jobs of Comparable Worth: An Analysis of the Rhetoric*, 21 HARV. C.R.-C.L. L. REV. 127, 135-37 (1986) [hereinafter *Equal Pay*]. Most employers do not provide anywhere near adequate maternity or childbearing leaves. In addition, the lack of "desirable" part-time work, Chamallas, *Women And Part-Time Work: The Case for Pay Equity and Equal Access*, 64 N.C.L. REV. 709 (1986), combined with the lack of adequate day care severely impede women's ability to participate in the labor market. Note, *supra* note 90, at 273-74. Moreover, the prevalence of both sexual harassment (see C. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN, 51 (1979); Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986)) and pay inequity (see WOMEN'S WORK, MEN'S WORK, *supra* note 43, at 10-13) further constrain women's advancement in the workforce. These factors as well as the unavailability of day care also restrict participation in the labor market. R. SIDEL, *supra* note 67, at 120-32.

102. WOMEN'S WORK, MEN'S WORK, *supra* note 43, at 120-31.

gests, however, society's critical need for these activities.[103] Equally important are childrearing, caring for the elderly or infirm, and maintaining a home.[104] The fact that such work is vital to society as a whole is often overlooked. Yet, a world that ignores the work and values associated with the private sphere would be both unpleasant and less productive. And, indeed, much of the criticism of contemporary American society stresses the lack of altruism, compassion, and a communal perspective.[105]

Further, a view of equality that devalues women's experiences[106] and fails to assign importance to the norms associated with the private sphere subordinates women, and prevents them from leading lives of full dignity and political power—in other words, from being full citizens.[107] To redress this failing and ensure women true citizenship, equality must recognize the values and realities of women's lives. Unfortunately, current discrimination law is incapable of achieving this.

III. THE LIMITATIONS OF DISCRIMINATION LAW

Beginning with *Brown v. Board of Education*,[108] some courts became sensitive to social and racial inequalities.[109] In *Frontiero v. Richardson*[110]

103. The current shortage of nurses illustrates this point. Ninety-seven percent of nurses are women. Student enrollments in nursing school have dropped from 233,511 in 1974 to 175,043 in 1985. Between 1985 and 1986, the vacancy rate for registered nurses in hospitals increased from 6.3 percent to 13.6 percent. Sege,*Medicine Overtakes Nursing as a Career Lure to Women*, Boston Globe, June 1, 1987 at 41-42. This decrease in the number of nurses has occurred despite the potential increase in demand for nursing support services for home care and care of the elderly. *Id.* at 41-42.

104. If women were to behave rationally in the economic sense, they would neither marry nor have children.

105. R. BELLAH, W. SULLIVAN, A. SWIDLER, S. TIPTON, HABITS OF THE HEART VII-VIII, 177-79 (1986) [hereinafter HABITS OF THE HEART]; C. LASCH, THE CULTURE OF NARCISSISM 25-27 (1979); Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 670-73 (1983). The recent Securities and Exchange Commission investigations into insider trading on Wall Street illustrate the potential results from untempered competition. *See Big Trader to Pay U.S. $100 Million for Insider Abuses*, N.Y. Times, Nov. 15, 1986, at 1, col. 6; *Insider Pleads Guilty in $12.6 Million Stock Case*, N.Y. Times, June 6, 1986, at 1, col. 1.

106. Nothing we say is intended to or would limit the freedom of men to assume such traditionally female functions as child care. But the fact remains that few men have actually done this, and Taub points out that men are not likely to do so as long as child care "is neither paid nor easily coordinated with paid work in the market." Taub, *supra* note 30, at 383; *see also* Williams, *supra* note 2, at 378 n.213 (even where parenting leave is available on a gender neutral basis, women "still use leaves more often and for longer periods than do men.").

107. For this reason, abstracted rights of access are of little help to most women. *See infra* text accompanying notes 416-22.

108. 347 U.S. 483 (1954).

109. *See, e.g.*, Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108, 114 (2d Cir. 1970); Southern Alameda Spanish Speaking Org. v. City of Union City, 424 F.2d 291, 295-96 (9th Cir. 1970); Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920, 926-32 (2d Cir.

such sensitivity seemed to include women.[111] That understanding of inequality was inevitably hampered by the underlying ideology of the legal regime. Formed by that ideology, discrimination law is inherently limited.

In order to analyze the limitations in discrimination law, in this section we discuss its methodology and fundamental structure. We do so by examining major Supreme Court cases affecting women, not to demonstrate that they were wrongly decided, but rather as examples of the deep-rooted limitations thwarting the achievement of equality.

A. *Substituting Culpability for Equality*

The most basic tenet of discrimination law is that similarly situated people be treated similarly.[112] This seemingly straightforward formalistic approach is in reality impossible to apply. No two individuals are ever identically situated. The important inquiries, then, are who is similar to

---

1968). These cases were overruled in Washington v. Davis, 426 U.S. 229 (1976), "to the extent that those cases rested on or expressed the view that proof of discriminatory racial purpose is unnecessary in making out an equal protection violation." *Id.*, at 245. *See* Fiss, *The Fate of an Idea Whose Time Has Come: Antidiscrimination Law in the Second Decade after* Brown v. Board of Education, 41 U. CHI. L. REV. 742, 748-56, 768-69 (1974).

110. 411 U.S. 677 (1973).

111. It is not our purpose to compare sex discrimination cases and race discrimination cases or to address whether race and sex should be treated identically by the courts. *See*, Kay, *supra* note 40, *passim*; Wasserstrom, *supra* note 30, 584-85. The courts sometimes view race and sex discrimination as comparable. "[T]hroughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes." *Frontiero v. Richardson*, 411 U.S. at 685. Yet every court which has considered the matter has refused to find that sex discrimination claims are cognizable under 42 U.S.C. § 1981, the statute passed primarily to confer citizenship rights on the newly freed slaves. *See, e.g.*, Runyon v. McCrary, 427 U.S. 160, 167 (1976); Bobo v. ITT, Continental Baking Co., 662 F.2d 340, 342-43 (5th Cir. 1981); Raether v. Phillips, 401 F. Supp. 1393,1396 (W.D. Va. 1975); *cf.* St. Francis College v. Al-Khazraji, 481 U.S. 604 (1987) (delineating coverage of § 1981) and Shaare Tefila Congregation v. Cobb, 481 U.S. 615 (1987) (coverage of § 1982 is the same as § 1981). A particularly disingenuous statement on the relationship between race and sex discrimination appears in Justice Powell's opinion in Regents of the University of California v. Bakke, 438 U.S. 266, 303 (1978). Powell concludes that gender classifications are more "manageable" and present simpler problems than race classifications because while there are many different minority groups, there are only two sexes.

112. Tussman and tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 344 (1949). According to Aristotle, this principle is the foundation of distributive justice. NICOMACHEAN ETHICS, BOOK V at 1131a (W.D. Ross trans. 1925). The principle is applicable whether the source of the equality mandate is constitutional or statutory. Feminists have correctly observed that the Tussman and tenBroek approach follows the methodology of the male model. *See, e.g.*, Wildman, *The Legitimation of Sex Discrimination: A Critical Response to Supreme Court Jurisprudence*, 63 OR. L. REV. 265, 267, 270-72 (1984).

whom and in what ways; in other words, what differences count?[113]

The resolution of these questions is necessarily value laden. Discrimination law incorporates values rooted in a society where men are breadwinners and women are at home raising children and managing the household.

The inadequacy of the premise that similarly situated people deserve similar treatment is exposed when women are unable or unwilling to situate themselves similarly to men.[114] Current discrimination doctrine requires women either to accept subordination and dependency or assume the male role in its entirety, thus abandoning the functions and values which are central to most women's lives.

For example, in *Geduldig*, the Court allowed the defendant to ignore the biological reality of the relationship between pregnancy and gender because the defendant did not "cause" the injury to the plaintiff. Implicit in the Court's decision is the assumption that the plaintiff's "voluntary" pregnancy was the underlying cause of her inequality. The necessity of pregnancy for the continuation of human existence, a fact that earlier jurists understood all too well,[115] was ignored. A woman could avoid any inequity simply by not bearing children.[116] In other words, in the absence of a malevolently motivated defendant legally responsible for the pregnancy, sex discrimination, as defined by the *Geduldig* Court, has not occurred.[117]

Certainly, where the Court faced overt gender classifications, it frequently struck them down, often acknowledging the error of historical stereotypes.[118] But when confronted with pregnancy, which the Court

113. Brest, *supra* note 58, at 6-8; Finley, *supra* note 2, at 1139-42, 1149-50, 1167-70; Westen, *supra* note 56, at 539-48.

114. Dothard v. Rawlinson, 433 U.S. 321, 335-36 (1977) (employee's "very womanhood" would "undermine her capacity" to perform job as correctional counsellor); General Elec. Co. v. Gilbert, 429 U.S. at 136, 138-40; Geduldig v. Aiello, 417 U.S. 484, 500-01 (1974) (Brennan, J., dissenting). In early cases where women merely sought privileges which men enjoyed, this caused a lesser problem. *See, e.g.*, Stanton v. Stanton, 421 U.S. 7, 13-16, (1975) (invalidating state law limiting child support obligation for female children); Reed v. Reed, 404 U.S. 71, 75-77 (1971) (invalidating statute which codified a preference for men as administrators of estates); Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Cir. 1971) (state law limitations on number of hours women may work are contrary to Title VII).

115. Muller v. Oregon, 208 U.S. at 421-23; Bradwell v. Illinois, 83 U.S. (16 Wall.) at 141-42 (Bradley, J., concurring).

116. The significant difference between pregnancy and diseases or disabilities affecting only men is that pregnancy is "voluntary". *Gilbert*, 429 U.S. at 136, 151 (Brennan, J., dissenting).

117. *Id.* at 136; Nashville Gas Co. v. Satty, 434 U.S. 136, 140-42 (1977).

118. *See, e.g.*, Orr v. Orr, 440 U.S. 268, 283 (1979) (gender classifications "carry the inherent risk of reinforcing stereotypes"); Stanton v. Stanton, 421 U.S. 7, 15 (1975) (condemning the "role-

presumed was a voluntary condition, the Court shifted its attention from sex stereotyping to the defendant's culpability. The focus was on what the defendant did and not on the implications of pregnancy either for women or for society. Individual women could avoid any adverse impact by simply acting as men and refraining from pregnancy.

In *Washington v. Davis*,[119] the Court institutionalized the anti-equality philosophy of *Geduldig*. *Washington v. Davis*, while affirming the use of a facially neutral employment examination, held that proof of disproportionate impact was insufficient and that plaintiffs must prove defendant's racially discriminatory motivation to establish an equal protection violation.[120] Requiring proof of intent shifts the focus from inequality of result and the ability of the defendant to rectify that inequality to the nature of defendant's activities and the defendant's subjective state of mind. This approach separates results from motive. But as Justice Stevens recognized in his concurring opinion, this division is neither easily accomplished nor readily apparent:

> It is unrealistic, on the one hand, to require the victim of alleged discrimination to uncover the actual subjective intent of the decisionmaker, or conversely, to invalidate otherwise legitimate action simply because an improper motive affected the deliberation of a participant in the decisional process. . .My point in making this observation is to suggest that the line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the Court's opinion might assume.[121]

Washington v. Davis assumes the existence of a nondiscriminatory society. In that world, most defendants act in rational and nondiscriminatory ways and the burden of proving otherwise is justifiably on the plaintiff.[122] The only ways that plaintiff can meet this burden is by showing invidious intent. Thus a "neutral" reason for a government policy,

---

typing society has long imposed" on women); Weinberger v. Wiesenfeld, 420 U.S. 636, 645 (1975) (notion that men are more likely than women to be breadwinners cannot justify the "denigration" of working women).

119. 426 U.S. 229 (1976).

120. *Id.* at 239. The Court declined to follow the rule of Griggs v. Duke Power Co., 401 U.S. 424, 431-32 (1971), which had permitted disparate impact claims under Title VII. 426 U.S. at 238-39.

121. 426 U.S. at 253-54.

122. For arguments supporting reference to motivation as central to equal protection and fundamental rights analysis, see Clark, *Legislative Motivation and Fundamental Rights in Constitutional Law*, 15 SAN DIEGO L. REV. 953 (1978) and Simon, *Racially Prejudiced Governmental Actions: A Motivation Theory of the Constitutional Ban Against Racial Discrimination*, 15 SAN DIEGO L. REV. 1041 (1978); *cf.* Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970) (proof of discriminatory intent is not applicable to entire spectrum of equal protection analysis); Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudica-*

notwithstanding its disproportionate racial impact, is sufficient to protect that policy from challenge.[123]

Looked at solely in terms of a litigation model, *Washington v. Davis* simply added an element to plaintiff's prima facie case: a showing of defendant's subjective intent to discriminate.[124] After *Washington v. Davis* and its progeny,[125] a plaintiff cannot survive a motion for a directed verdict without this proof. But even when viewed only in a technical or evidentiary sense, this requirement is critical. It makes it very difficult for plaintiffs to prevail;[126] proof of defendant's state of mind is an enormously heavy, indeed often insurmountable burden for plaintiffs.[127]

The effect on women has been harsh since the inequities that women confront now are most often embodied in facially gender neutral practices. Feminist scholars have taught that most ostensibly gender neutral rules incorporate the experiences of white, middle-class men and are thus not neutral at all.[128] Workplace rules that ignore the familial obligations of employees prevent women from fully participating in the public sphere. While lack of accommodations for child care is ostensibly gender neutral, in actuality it is not, given the reality of women's responsibility for child care.[129] Similarly, requirements that employees spend forty

---

tion, 52 N.Y.U. L. REV. (1977) (equal protection violations can be found when uneven discriminatory impact is accompanied by factors more susceptible to proof than intentional discrimination).

123. The Court pointed to the disruption that would result from the invalidation of neutral rules with disproportionate impact:

> A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and the average blacks than to the more affluent whites.

426 U.S. at 248.

124. *Id.* at 238-41.

125. *See, e.g.*, McCleskey v. Kemp, 107 S. Ct. 3199 (1987); Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 265 (1977).

126. Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 COLUM. L. REV. 292, 321-23 (1982); Eisenberg, *supra* note 122, at 36-48; Karst, *The Costs of Motive-Centered Inquiry*, 15 SAN DIEGO L. REV. 1163, 1165 (1978); Note, *Discriminatory Purpose and Mens Rea: The Tortured Argument of Invidious Intent*, 93 YALE L. J. 111, 124-25, 126 n. 89 (1983); Note, *Making the Violation Fit the Remedy: The Intent Standard and Equal Protection Law*, 92 YALE L. J. 328, 336 (1982).

127. The cases where plaintiffs have met this burden are rare. *See, e.g.*, Hunter v. Underwood, 471 U.S. 222 (1985); Castaneda v. Partida, 430 U.S. 482 (1977). For a recent criticism of the difficulties of proving intent see Thornburg v. Gingles, 476 U.S. 30 (1986). And unless the gender classification is overt, no amount of adverse impact on women will suffice to establish intent. Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 278 (1979). *See infra* text accompanying notes 140-43.

128. Finley, *supra* note 2, at 1142, 1148, 1152-59; Krieger & Cooney, *supra* note 2, at 515, 544-47.

129. Frug, *supra* note 46, at 56-61; Taub, *supra* note 30, at 383.

hours or more per week "on the job"[130] and that their careers be uninterrupted are not in reality gender neutral.[131] A society that defines an ideal worker as one who can always place work life before private obligations forces women to choose between the world of business and politics and the world of home and family.[132] Although such a dilemma thwarts the achievement of equality, discrimination law permits it. For example, the Supreme Court finds no discrimination in a workplace structure that does not accommodate child care responsibilities.[133]

In many jobs, the criteria for success, although couched in gender neutral terms, reflect male experiences.[134] For example, women are often penalized for failing to act as aggressively as men.[135] The validity of this criteria is not considered to be within the proper purview of discrimination law.[136] The inquiry in employment discrimination cases is limited to plaintiff's qualifications for the job; it does not extend to whether the job can also be performed by a plaintiff with different qualifications. This approach denies the diversity which a meaningful vision of equality requires.

At first blush, it appears that the use of more subjective criteria in employment decisions might alleviate this homogeneity. But because women are seldom in positions of power, subjective criteria often reflect male biases and values.[137] Thus women's attributes and contributions

130. Chamallas, *supra* note 101, at 722, 725-26; Frug, *supra* note 46, at 56-61.

131. U.S. COMM'N ON CIV. RTS., COMPARABLE WORTH: AN ANALYSIS AND RECOMMENDATIONS 70 (1985) (blaming the male-female wage gap on women who choose to work intermittently). Human capital theorists use the same approach. *See Equal Pay*, *supra* note 101, at 135-37.

132. For an example of the lengths women are advised to go to conform to the roles played by men, see S. STAUTBERG, PREGNANCY NINE TO FIVE: THE CAREER WOMAN'S GUIDE TO PREGNANCY AND MOTHERHOOD 133-34 (1985). The book describes one woman, in particular, as worthy of emulation because while she was bedridden due to pregnancy complications, she "renegotiated a $2.5 million health insurance program and interviewed about twenty job applicants — shoeless and sitting up in her rented hospital bed, but otherwise looking extremely professional in a tailored navy blue suit, pantyhose and makeup."

133. *Cf.* Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (indicating that an employer can refuse to hire individuals burdened by child care). In *Martin Marietta* the Court went further and suggested that an employer can maintain a non-gender neutral rule, overtly discriminating against women, if the employer can demonstrate that women have greater child care burdens which interfere with their job performance. *Id.* at 544.

134. For an analysis of the male orientation of the language we use, see D. SPENDER, MAN MADE LANGUAGE 64-67, 138-144 (1980).

135. *See, e.g.*, EEOC v. Sears, Roebuck & Co., 628 F. Supp. 1264, 1307-1315 (N.D. Ill. 1986). Ironically, in one case a plaintiff was criticized by employers for acting too agressively and not being sufficiently "feminine". Hopkins v. Price Waterhouse, 825 F.2d 458 (D.C. Cir. 1987).

136. Furnco Construction Corp. v. Waters, 438 U.S. 567, 577-78 (1978); McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 800-01, 806 (1973).

137. Tenure decisions usually involve the application of subjective criteria. Although in Watson

continue to be denigrated.

Indeed, often ostensibly gender neutral rules serve to benefit men. But the gender bias of our culture is so deeply entrenched that these practices are viewed as either benefitting the entire society or simply reflecting the natural order. For example, military leave—which primarily benefits men—is defined as critical to the public interest,[138] but pregnancy leave is characterized as special treatment for women.[139]

The intent requirement of discrimination law shields the bias inherent in such facially gender neutral practices. For example, in *Personnel Administrator of Massachusetts v. Feeney*,[140] the Court chastised the plaintiff for failing to prove that the purpose of the Massachusetts veterans preference statute was to discriminate against women. At issue in *Feeney* was an absolute life time civil service preference for veterans. The District Court had found that this preference impacted so inevitably and severely on women that its disciminatory effect could not be unintended:

> The decision to grant a preference to veterans was of course 'intentional'. So, necessarily, did an adverse impact upon nonveterans follow from that decision. And it cannot seriously be argued that the legislature of Massa-

---

v. Fort Worth Bank and Trust, 108 S. Ct. 2777 (1988), the Supreme Court permitted a plaintiff to use Title VII to attack subjective employment criteria, women generally have been unsuccessful in their challenges to allegedly biased tenure decisions. *See, e.g.*, Zahorik v. Cornell University, 729 F.2d 85, 89-90 (2d Cir. 1984) (where female plaintiff was denied tenure, a faculty member who abstained from tenure vote described her as "too 'feminine' in that she was too 'unassuming, unaggressive, unassertive and not highly motivated for vigorous interpersonal competition.' "); Laborde v. Regents of Univ. of Cal., 686 F.2d 715, 718-19 (9th Cir. 1982) (although female plaintiff has published "four books of scholarly criticism . . ., two books of poetry, and numerous articles and book reviews, and had read several papers at academic conventions . . . her scholarship did not meet the University's high standards of academic excellence. . . ."); Faro v. N. Y. Univ., 502 F.2d 1229, 1231 (2d Cir. 1974) ("the proof clearly shows that the experience possessed by such male professors as have been hired is not comparable to the limited teaching and research [experience of the female plaintiff]"). *But see* Sweeny v. Board of Trustees of Keene State College, 569 F.2d 169 (1st Cir. 1978). For an interesting discussion of the relationship between subjective employment criteria and discrimination, see Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 947 (1982).

138. Employers are required to provide leave for military service. 5 U.S.C. § 6323 (1976). Several states provide similar protection for those leaving work to participate in military service. *See* CAL. MIL. & VET. CODE § 394.5 (West 1955 & Supp. 1986); FLA. STAT. ANN. § 115.01 (West 1982); ILL. ANN. STAT. ch. 129, § 501 (Smith-Hurd 1953 & Supp. 1986); MASS. ANN. LAWS ch. 149, § 52A (Law Co-Op. 1982); N.J. STAT. ANN. § 38A:44 (West 1968); N.Y. MILITARY LAW § 243 (McKinney 1953 & Supp. 1986); OHIO REV. CODE ANN. § 5903.02) (Page 1977 & Supp. 1985); 51 PA. CONS. STAT. ANN. § 7302 (Purdon 1969); 65 PA. CONS. STAT. ANN. § 114 (Purdon 1959 & Supp. 1985); TEX. REV. CIV. STAT. ANN. art. 6252-4a (Vernon 1970 & Supp. 1986). *But see* White v. Associated Indus. of Ala., Inc., 373 So. 2d 616 (Ala. 1979) (Alabama military leave statute violates due process and impairment of contracts provisions of Alabama Constitution).

139. Wimberly v. Labor and Indus. Relations Comm'n of Mo., 479 U.S. 511 (1987); California Fed. Sav. and Loan Ass'n v. Guerre, 479 U.S. 272 (1987).

140. 442 U.S. 256 (1979).

> chusetts could have been unaware that most veterans are men. It would thus be disingenuous to say that the adverse consequences of this legislation for women were unintended, in the sense that they were not volitional or in the sense that they were not foreseeable.[141]

While conceding that the foreseeability of the consequences has some "bearing" upon the existence of discriminatory intent,[142] the Supreme Court held that plaintiffs failed to prove intent. It seems that nothing short of an overt and complete exclusion of women on the face of the statute would have established the requisite state of mind.

Clearly, the Court was unable or unwilling to perceive the bias inherent in a regime which offered veterans' benefits while denying mothers' benefits. The status quo was sanctioned as the norm; and women were entitled to relief only in the rare instance where they could prove a particular malevolent intent.[143]

The pregnancy cases similarly demonstrate the Court's blindness to the disparate effect of seemingly gender neutral rules.[144] Policies which do not provide pregnancy benefits are based on a model where the lack of pregnancy is the norm. Pregnancy is seen as a voluntary deviation from that model. Assuming as the Court does, that pregnancy is merely a matter of private choice,[145] however, echoes the simplistic notion that statutes which regulated the workplace interfered with workers' absolute voluntary freedom of contract.[146] The characterization of pregnancy—and childcare—as voluntary is a similar attempt to deny benefits to women under the guise of protecting their freedom. The *Lochner* court has been justifiably criticized for perpetuating class bias under the banner of freedom.[147] The *Geduldig* insistence that pregnancy is voluntary[148] per-

---

141. *Id.* at 278.

142. *Id.* at 279, n. 25. The Supreme Court noted that the District Court found that the absolute preference had "a devastating impact upon the employment opportunities of women," and that a "more modest preference formula would readily accommodate the State's interest in aiding veterans. . . ." *Id.* at 260.

143. Ironically, the intent requirement may well protect legislation that benefits women from fourteenth amendment attack. For example, legislation requiring employers to provide maternity leave for female workers who choose to leave work for childbirth may well withstand a fourteenth amendment challenge by male workers who would be unable to prove the requisite subjective intent. *See infra* text accompanying notes 174-85.

144. Wimberly v. Labor and Indus. Relations Comm'n of Mo., 479 U.S. 511 (1987); General Elec. Co. v. Gilbert, 429 U.S. 125 (1976); Geduldig v. Aiello, 417 U.S. 484 (1974).

145. *See supra* note 116.

146. Lochner v. New York, 198 U.S. 45, 53 (1905).

147. *See, e.g.*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW 436-55 (1978).

148. Pregnancy is hardly voluntary. It is essential to the continuation of the species. Moreover, many women are unable to choose not to bear a child. *See infra* text accompanying notes 332-49.

petuates gender bias within the rubric of freedom of choice. Thus by relying on the supposed voluntariness of pregnancy, the Court is able to frame the issue as one of individual culpability. This individualistic perspective isolates women plaintiffs from the context of their reality, and thereby seems to delegitimize their claims.

B. *Title VII Doctrine*

The insulation of seemingly neutral practices harmful to women extends not only to equal protection law, but also to doctrine developed under the antidiscrimination statutes. To be sure, the first Supreme Court interpretation of Title VII of the Civil Rights Act of 1964,[149] *Griggs v. Duke Power Co.*,[150] embraced the "effects only" approach. The Court understood that requiring proof of discriminatory intent was inconsistent with the language and purpose of Title VII.[151]

Griggs notwithstanding, in *McDonnell Douglas Corp. v. Green*,[152] the Court retreated from this position, formulating a second version of the Title VII prima facie case, which requires that plaintiff prove defendant's improper motivation.[153] There are thus two judicially created models for the Title VII prima facie case: disparate impact (*Griggs*) and disparate treatment (*McDonnell Douglas*). Although neither the statutory language nor the legislative history of Title VII supports this bifurcation,[154] the Court has consistently adhered to these constructs.[155] By reading a subjective intent requirement into disparate treatment cases under Title VII[156] and by placing the burden of proving it on the plain-

149. 42 U.S.C. §§ 2000e (1982).

150. 401 U.S. 424 (1971).

151. The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.

Id. at 429-30.

152. 411 U.S. 792 (1973).

153. *Accord* United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981); *See* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1313-22 (1983) (collecting cases). For a good discussion of how the Court has used the element of pretext, see Bartholet, *Proof of Discriminatory Intent Under Title VII: United States Postal Service Board v. Aikens*, 70 CALIF. L. REV. 1201, 1206 (1982).

154. For a particularly thoughtful discussion see Brodin, *supra* note 126, at 294-99.

155. For a good overview, see International Brotherhood of Teamsters v. United States, 431 U.S. 324, 358-61 (1977).

156. *Green* is thus a breach of the Court's promise in Washington v. Davis, that proof of intent would be limited to fourteenth amendment cases. Moreover, the Court has extended the intent re-

tiff, the Court has dramatically departed from the definition of discrimination endorsed in *Griggs*. In *Griggs*, the Court saw its task as eliminating the impact of "built-in headwinds"[157] and other societal impediments to equality. In the disparate treatment cases, the Court limits its task to ensuring that defendant articulates an ostensibly neutral reason for its behavior.[158]

The Court has further undercut the thrust of *Griggs* by blurring the distinction between the two models. It has applied the disparate treatment model—and its requirement that plaintiffs prove intent—to paradigmatic *Griggs* cases.[159] The choice of model is often outcome determinative.

The comparable worth cases illustrate this.[160] Generally, in these cases, female plaintiffs challenge the lower wages paid to workers in female dominated jobs which are demonstrably similar in job content, responsibility, or training, to higher paid male dominated jobs. The courts have forced comparable worth claimants to follow the disparate treatment model and prove defendant's specific intent to pay women less.[161] Defendants typically argue that they are merely using neutral market rates to set wages. Plaintiffs contend that market rates are discriminatory

---

quirement to other antidiscrimination statutes. *See* Guardians Ass'n v. Civil Service Comm'n of New York, 463 U.S. 582, 584 (1983) (proof of discriminatory intent required to receive compensatory relief for Title VI violation); General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 388-89 (1982) (discriminatory intent required to show a violation of 42 U.S.C. § 1981). No case raising this issue with respect to Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601-3619, has yet reached the Supreme Court but the circuit courts are engaged in a lively debate about whether proof of intent is required for Title VIII violations. *See, e.g.*, Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978) (evidence of intent a critical factor); Hanson v. Veterans' Administration, 800 F.2d 1381, 1386 (5th Cir. 1986) (Title VIII requires either proof of intent or showing of significant discriminatory effect; therefore, intent need not be a factor in establishing Title VIII violations).

157. 401 U.S. 424, 432 (1971).

158. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981). Compare with Watson v. Fort Worth Bank and Trust, 108 S. Ct. 2777, 2790 (1988), where Justice O'Connor suggests this approach to defendants in disparate *impact* cases. In a separate opinion, Justice Blackmun strongly criticizes this "blind eye to the crucial distinctions" between disparate impact and disparate treatment. *Id.* at 2793.

159. . In Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978), the Court applied the *McDonnell Douglas* model to a situation which clearly involved the racially disparate impact of a neutral hiring practice equally applicable to black and white applicants. The *Furnco* opinion did not even consider disparate impact analysis, which would have compelled a different result.

160. *See Equal Pay, supra* note 101. *But see* Weiler, *The Wages of Sex: The Uses and Limits of Comparable Worth*, 99 HARV. L. REV. 1728 (1986).

161. Spaulding v. Univ. of Wash., 740 F.2d 686, 703 (9th Cir. 1984), *cert. denied*, 469 U.S. 1036 (1984).

because they incorporate gender biased wage rates.[162] Market rates are indeed facially neutral rules that adversely affect women—precisely the situation which should trigger disparate impact analysis. Yet, the courts have not only rejected[163] impact analysis but also have been unwilling to infer intent from the defendants' reliance on market disparities in wages and statistical evidence of male/female wage differentials.[164] As now Justice, then Judge, Kennedy wrote for the Ninth Circuit in AFSCME v. Washington:

> The inference of discriminatory motive which AFSCME seeks to draw from the State's participation in the market system fails, as the State did not create the market disparity and has not been shown to have been motivated by impermissible sex based consideration in setting salaries.[165]

This approach, of course, maintains the status quo.[166]

Williams argues that disparate effects analysis is the "doctrinal tool. . .to squeeze the male tilt out of a purportedly neutral legal structure."[167] What Williams does not see is that the disparate effects test offers little to women.[168] Her analysis requires the Court to recognize that facially neutral rules adversely affect women and discriminate on the

---

162. *See, e.g.*, American Fed'n of State, County, and Mun. Employees v. Washington, 770 F.2d 1401 (9th Cir. 1985); Spaulding v. Univ. of Wash., 740 F.2d 686. *But see* Corning Glass Works v. Brennan, 417 U.S. 188 (1974) (Equal Pay Act passed to rectify gender biased market).

163. For a criticism of the reason given by the courts for rejecting disparate impact analysis, see *Equal Pay, supra* note 101, at 151-56.

164. American Fed'n of State, County, and Mun. Employees v. Washington, 770 F.2d 1401; Wilkens v. Univ. of Houston, 654 F.2d 388 (9th Cir. 1981), *vacated and remanded*, 459 U.S. 809 (1982), *on remand* 695 F.2d 134 (5th Cir. 1983). *But see*, Lanegan-Grimm v. Library Ass'n of Portland, 560 F.Supp. 486 (D. Or. 1983) ; Briggs v. City of Madison, 536 F.Supp. 435 (W.D. Wis. 1982); Taylor v. Charley Brothers, 25 F.E.P. Cases (BNA) 602 (W.D. Pa. 1981); Gerlach v. Michigan Bell Tel. Co., 448 F.Supp. 1168 (E.D. Mich. 1978).

165. American Fed'n of State, County, and Mun. Employees, 770 F.2d at 1406.

166. The court's concern with remedies in these cases reflects a similar interest. *See, e.g.*, Spaulding v. Univ. of Wash., 740 F.2d 686, 706, n.11 ("Courts are not competent to engage in sweeping revision of market wage rates"); Lemons v. City & County of Denver, 17 F.E.P. Cases 906, 906-07 (D. Colo. 1978), *aff'd.*, 620 F.2d 228 (10th Cir. 1980), *cert. denied*, 449 U.S. 888 (1980) (plaintiff's claim is "pregnant with the possibility of disrupting the entire economic system").

167. Williams, *supra* note 2, at 331, 333-51, 364. Williams sets forth the general proposition that "perpetrators of rules with a disparate effect must justify them" as the doctrinal tool for attacking neutral structures. *Id.* at 331. Her analysis, however, is actually limited to Title VII. As a general proposition applicable to constitutional as well as Title VII claims, Williams' statement is seriously flawed because of the difficulty of proving defendant's discriminatory intent in the constitutional context.

168. Indeed, although Williams maintains that disparate effects is the key doctrinal tool for women, she herself enumerates many of its limitations. *See, e.g., id.* at 374, n.195 (availability of business necessity defense and the inapplicability of the doctrine where there is no rule to challenge but only the failure to have a policy); *id.* at 373 n.190 (difficulty of proving Title VII violations).

basis of gender.[169] But the abstract individualism of discrimination theory, and its reliance on male experiences, prevents this recognition.

In *Gilbert* the Court upheld the exclusion of pregnancy benefits because it was a neutral rule, without considering its disparate effect on women.[170] There is little reason to believe that the Court will be more sympathetic when considering the disparate effects of nonpregnancy related neutral rules.[171] For example, a gender neutral rule prohibiting employment of parents with primary child care responsibilities is likely to withstand a Title VII challenge. The Court is apt to view this rule as one that affects merely those with child care responsibility—both men and women—notwithstanding the fact that it is usually women who assume the primary role regarding child care, and that such a rule typifies the "male tilt"[172] of the workplace. What is clear from *Gilbert*, is that gender neutral rules whose disparate effect results from the "voluntary" assumption of traditionally female functions are not now susceptible to a successful Title VII challenge.[173] Thus even when applying antidiscrimination statutes, the Court is unable to see beyond the experiences of men and unable to validate the claims raised by women left alone to face the demands of family life.

C. *Cal. Fed. and Wimberly: Geduldig Redux*

Gender equality necessarily requires conditions that support women's familial responsibilities. Under discrimination doctrine these are susceptible to challenges alleging that men are adversely affected and women unfairly advantaged. Several states have enacted statutes that provide disability leaves to pregnant workers without requiring similar benefits for disabled male workers.[174] These statutes are examples of the kinds of accommodation equality demands, yet they are challenged as discrimination against men because they require "special treatment" for women.

In *Cal. Fed.* the Court held that the California pregnancy leave stat-

169. *Id.* at 331-32, 345.

170. 429 U.S. at 136-37.

171. *See, e.g.*, Wimberly v. Labor and Indus. Relations Comm'n of Mo., 479 U.S. 511 (1987).

172. Williams, *supra* note 2, at 331.

173. Frug, *supra* note 46, at 61-62.

174. The statutes and similar state regulations are compiled in Dowd, *supra* note 40, at 722-23 nn.101-02. However, Minnesota, Connecticut and Oregon have recently enacted statutes offering parental leave to both the father and the mother of a newborn or newly adopted child. At least twenty-eight other states are currently considering parental leave legislation. N.Y. Times, June 18, 1987, at A20, col. 4.

ute was not preempted by the PDA. In so holding, Justice Marshall focused on congressional intent[175] and found that in enacting the PDA Congress intended to prohibit discrimination against women—that is, to overrule *Gilbert*,[176] and not to prohibit state pregnancy leave statutes.[177]

The focus of concern was pregnancy, not childcare.[178] Indeed, parts of Marshall's opinion indicate that he interpreted the PDA as adopting the biological differences approach.[179] Thus, while Marshall suggests that Congress wished to protect pregnant women against discrimination, he also suggests that mandatory maternity leaves not closely tailored to the physical disabilities of pregnancy would violate Title VII.[180] Therefore, the opinion offers little support for providing the broad range of accommodations necessary for women's equality.

Moreover, the Court's opinion was schizophrenic about the preferential treatment issue. Although Marshall at times appeared to support accommodation for pregnant women, he also suggested, without deciding, that states may have to provide parallel benefits to men.[181] Thus, Marshall was careful not to depart completely from the "similar treatment" paradigm.

The "similar treatment" approach was reaffirmed emphatically in *Wimberly v. Labor and Industrial Relations Commission of Missouri*.[182] *Wimberly* involved a Missouri statute which denied unemployment compensation to those who left work "voluntarily without good cause attributable to his [sic] work or to his [sic] employer."[183] Petitioner, who was on pregnancy leave pursuant to a policy that she would be rehired only if there was a position available when she was ready to return to work, filed a claim for unemployment benefits when her employer informed her that there were no positions open. The state denied her benefits, claiming that under the terms of the state statute, she had voluntarily left without good

175. "In determinig whether a state statute is preempted by federal law. . .our sole task is to ascertain the intent of Congress." 479 U.S. 272, 280 (1987).

176. *Id.* at 285.

177. *Id.* Indeed, Justice Marshall noted that Congress was not only aware of such laws when it passed the PDA "but apparently did not consider them inconsistent with" that statute. *Id.* at 287.

178. *Id.* at 292. Justice Stevens, concurring in part, characterized Justice Marshall's interpretation of the PDA as one which "allows some preferential treatment of pregnancy." *Id.* at 292.

179. *Id.* at 290.

180. *Id.*

181. *Id.* at 291.

182. 479 U.S. 511 (1987).For an interesting and somewhat different interpretation of *Cal. Fed.* and *Wimberly* see Minow, *The Supreme Court, 1986 Term-Foreward: Justice Endangered*, 101 HARV. L. REV. 10, 17-25 (1987).

183. 479 U.S. at 513.

cause. At issue was whether the state statute as construed violated a provision of the Federal Unemployment Tax Act ("FUTA") which forbade the denial of compensation under state law "solely on the basis of pregnancy or termination of pregnancy."[184]

The Court held that the Missouri statute was consistent with the federal statute because FUTA did not mandate preferential treatment for women but only prohibited states from singling out pregnancy for unfavorable treatment. The Court characterized the Missouri statute as a "neutral rule that incidentally disqualified pregnant or formerly pregnant claimants."[185]

In its unwillingness to recognize the obvious gender bias of characterizing rules about pregnancy as neutral, *Wimberly* echoed the discredited reasoning of *Geduldig* and *Gilbert*. Although the Court recognized that Congress intended to eliminate "discriminatory disqualifications because of pregnancy,"[186] the Court was unable to see the clear discriminatory effect of the application of the Missouri statute in this case. The opinion is further flawed by its restrictive interpretation of FUTA. Under the opinion, FUTA prohibits a state statute that specifically enumerates pregnancy as a disqualification. But where the state applies a general (or "neutral") requirement that is interpreted to include pregnancy, FUTA is not violated. The Court relied on the word "solely" as a justification for this excessively formalistic approach.[187]

Read together, *Cal. Fed.* and *Wimberly* are anomalous. There are two congressional enactments speaking to a single goal: the prohibition of discrimination based on pregnancy. In *Cal. Fed.* the Court simply avoided the issue of the disparate effect of the statute but recognized a congressional intent to prohibit penalizing women for pregnancy. In *Wimberly*, however, the Court allowed pregnant women to be penalized by returning to notions of discrimination which ignore the social context and effects of certain policies.

Indeed, in *Wimberly*, the Court abandoned the analysis of congressional intent that determined the outcome of *Cal. Fed.* Instead, the Court disregarded the broader purposes of the FUTA prohibition against disqualifying pregnant women and interpreted the word "solely" to submerge any obvious overall congressional intent to protect pregnant

184. 26 U.S.C. § 3304 (a) (12) (1975).

185. 479 U.S. at 517.

186. *Id.* at 520. (Citing H.R. Rep. No. 94-755, at 50) (emphasis added by Court).

187. *Id.* at 516, 517, 522.

women. This judicial tunnel vision is yet another aspect of the limitations of discrimination law.

In *Washington v. Davis*, *Feeney*, *Geduldig*, and *Wimberly*, the Court was unable to see beyond linguistic neutrality to the institutional inequality resulting from state policy. These cases disavow any judicial responsibility to undo or dismantle racial or gender inequality. Instead they limit culpability to particular defendants who engage in overt, nonneutral, specific race or gender motivated acts or language. Without a specific culpable defendant there can be no violation.[188]

The jurisprudence of *Geduldig*, *Washington v. Davis* and *Wimberly* defines discrimination as aberrant, asocial, atomized behavior. This view not only denigrates women's claims by suggesting that the circumstances leading to a claim are the woman's own fault, but also severely limits the law's ability to achieve gender equality.

D. *Denying History and Social Context*

By viewing discrimination as isolated, privatized malfeasance, discrimination law ignores both the social and historical context in which it occurs.[189] The irrelevance of social context is a pervasive theme of both the race discrimination[190] and sex discrimination cases. For example, if pregnancy is voluntary, as the Court frequently assumes, it follows that any disadvantage resulting from pregnancy is solely the responsibility of the woman because she has chosen the pregnancy. This is the clear import of *Wimberly*. Suggesting that pregnancy is always voluntary, however, denies reality. Rape persists, contraception is not foolproof, and neither it nor abortion is free.[191] Women's financial dependency on men limits their freedom to choose not to bear children.

The Court's view of pregnancy also perpetuates the ideology of separate public and private spheres. If traditionally private (and female) functions are "voluntary" and serve no public purpose, discrimination claims

188. The same ideology is reflected in the pregnancy cases. Since the court is unable to find a perpetrator other than nature, it is not considered discriminatory when women are penalized for bearing children.

189. *See* Eisenberg, *supra* note 122, at 45-50; Schnapper, *Perpetuation of Past Discrimination*, 96 HARV. L. REV. 828, 838-39 (1983).

190. The clear message of Brown v. Board of Education, 347 U.S. 483 (1954), was that the existence of a segregated society could never satisfy the Fourteenth Amendment's mandate of equality. This is tantamount to taking judicial notice of the long history of institutionalized racism. Subsequent cases clearly depart from this approach. *See, e.g.*, Regents of the University of California v. Bakke, 438 U.S. 265, 289 (1978); Dayton Board of Education v. Brinkman, 433 U.S. 406, 419 (1977).

191. *See infra* text accompanying notes 332-51.

that involve these areas will fail. Yet, obviously, society as a whole demands certain functions which women have historically performed.[192]

Consider this example: If the critical factor is whether one's action is voluntary (or based on a private decision), then veterans' benefits to enlistees should also be considered special treatment. After all, the enlistee chose to serve. Granting the enlistee such benefits is therefore the sort of preferential treatment that pregnant women have been criticized for demanding. Yet society views benefits for all veterans—both draftees *and* volunteers—as serving a non-discriminatory public purpose. It is the public purpose behind pregnancy which discrimination law ignores.

Veterans' preference is another example of the judicial discounting of history.[193] In upholding the constitutionality of the Massachusetts absolute veterans' preference statute, the Court recognized the various federal statutes, regulations and policies which restrict the number of women who can pursue a military career.[194] The Court also noted that women have never been subjected to a military draft.[195] Moreover, the Court admitted that the impact of the veterans' preference law upon job opportunities for women has been "severe."[196] Yet having recited this history the Court refused to acknowledge its relevance to veterans' preference.[197]

The comparable worth cases[198] which allow the use of the market rate defense also exemplify the isolation of specific culpable acts from historical reality. Courts have refused to view reliance on the market as a

192. For an exhaustive list of wifely tasks see Syfers, *I Want a Wife: A Feminist Classic from the Early '70s*, Ms., Dec. 1979, at 144.

193. The Title VII bona fide seniority system cases are similarly ahistoric when they reject the argument that any seniority system which perpetuates past discrimination can never be bona fide. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 353 (1977); American Tobacco Co. v. Patterson, 456 U.S. 63, 75-76 (1982). These cases undercut the thrust of Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (acknowledging relevance of past discrimination). Compare the various opinions in Bazemore v. Friday, 478 U.S. 385 (1986), discussing the relevance of pre-Title VII discriminatory behavior to post-Title VII discriminatory consequences.

194. Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 269-70 (1979).

195. *Id.*

196. *Id.* at 271.

197. *See also* Rostker v. Goldberg, 453 U.S. 57, 71-72 (1981). This ostrich-like approach is particularly ironic given the pre-*Feeney* cases striking down military policies based on sexist assumptions. *E.g.*, Schlesinger v. Ballard, 419 U.S. 498 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973).

198. American Fed'n of State, County, and Mun. Employees v. Washington, 770 F.2d 1401 (9th Cir. 1985); Spaulding v. Univ. of Wash., 740 F.2d 686 (9th Cir. 1984); Lemons v. City and County of Denver, 620 F.2d 228 (10th Cir. 1980);Christensen v. Iowa, 563 F.2d 353 (8th Cir. 1977); Gerlach v. Michigan Bell Tel. Co. 501 F.Supp. 1300 (E.D. Mich. 1980).

culpable act even though the market is gender-biased,[199] and Congress has passed legislation to rectify that situation.[200]

To be sure, there is a line of Supreme Court opinions which appears to recognize the relevance of history or social context. These cases typically involve social welfare programs which distribute benefits according to stereotypical perceptions about the economic roles of men and women; they involve overt gender classifications rather than the discriminatory effect of facially gender neutral rules. When the Court disagrees with the stereotype, the gender classification is struck down as "archaic and overbroad."[201] This rubric covers those cases where the stereotype is based on the "outdated" assumption that women are economically dependent.[202] On the other hand, equally archaic and overbroad stereotypes have been upheld when the Court finds that they have been designed to rectify past discrimination against women. These stereotypes are characterized as "benign" or compensatory and are thus allowed to stand.[203]

The stereotype cases, however, are not really about social context at all. Indeed, the only stereotypes which the Court has labelled "archaic" are those of which the Court no longer approves. Although the Court condemns some stereotypes because they are based on "old notions"[204] about the role and abilities of women, it has upheld equally old stereotypes of which it approves. In fact, most of the stereotypes which the Court condemns as outdated can just as easily be viewed as compensatory.[205] Moreover, the Court has endorsed classifications which perpetuate the most blatant sex role stereotypes.[206] For example, in *Rostker v.*

199. Corning Glass Works v. Brennan, 417 U.S. 188, 205 (1974).

200. Equal Pay Act, 29 U.S.C. § 206(d) (1982).

201. Schlesinger v. Ballard, 419 U.S. 498, 508 (1975). That case, however, upheld a gender based classification because it was compensatory and not based on an invalid classification.

202. *See, e.g.*, Califano v. Westcott, 443 U.S. 76 (1979) (rejecting benefit availability in cases of father's but not mother's unemployment); Stanton v. Stanton 421 U.S. 7 (1975) (invalidating longer child support period for males than females); Weinberger v. Wiesenfeld, 420 U.S. 636 (1974) (striking down survivor benefits available to widows with children but not similarly situated widowers).

203. For example, in Kahn v. Shevin, 416 U.S. 351 (1974), the Court upheld a property tax exemption available to widows because they are faced with more financial difficulties and a more "inhospitable" job market than widowers. *Id.* at 355. A similar scheme was upheld in Califano v. Webster, 430 U.S. 313 (1977), where the Court allowed a different calculation of earning years for women than men because to do so helped to reduce the economic disparity caused by the long history of sex discrimination against women.

204. Stanton v. Stanton, 421 U.S. at 14.

205. Gertner, *Bakke on Affirmative Action for Women: Pedestal or Cage*, 14 HARV. C.R.-C.L. L. REV. 173, 183 (1979).

206. *See* Dothard v. Rawlinson, 433 U.S. 321 (1977), upholding a gender assignment rule for prison guards on the grounds that the guard's "very womanhood" would undermine her ability to do the job. *Id.* at 335-36.

Goldberg[207] the Court upheld the constitutionality of a draft registration law which expressly excluded women. The Court took comfort in the fact that the decision to exclude women from registration was not an "accidental by-product"[208] of traditional stereotypes but a reasonable policy given the fact that women were excluded from combat.[209] But the Court was oblivious to the underlying sexist assumptions in a law which excludes women from combat. Moreover, the Court ignored the impact its decision would have on women as citizens. Given the importance of military service in our society, exempting women from the draft denigrates their status as citizens.[210] This disparity in citizenship echoes the discredited perspective of the *Slaughterhouse Cases*,[211] which diluted the concept of national citizenship.

Thus, although the Court occasionally recites the relevance of history, it lacks a full understanding of the context in which discrimination occurs. Rather than providing a means for understanding how women have been systematically victimized by society, discrimination law abstracts women from their history, and blames them for their status as victims.[212] It cannot distinguish which differential classifications perpetuate that victimization, and which ones alleviate it.

E. *Special Treatment of "Innocent Victims"*

The Court's recent fascination with the rights of "innocent victims"[213] is another manifestation of how discrimination law rejects the relevance of the "long and unfortunate history of sex discrimination."[214] The school desegregation cases were a harbinger of this trend. In *Brown*, the victims were the black school children who were forced to attend

207. 453 U.S. at 57 (1981).

208. *Id.* at 74.

209. *Id.* at 76-78.

210. Karst, *supra* note 126, at 55.

211. 83 U.S. (16 Wall.) 36 (1872).

212. This formulation is derived from W. RYAN, BLAMING THE VICTIM, 28-29 (1971). The court is not alone in this approach. *See* R. LESTER, ANTIBIAS REGULATION OF UNIVERSITIES, (1974) ("Much of what is loosely called sex discrimination in employment is, at least partly, the consequences of choices made by women . . . ."). *Id.* at 34. *Accord*, Sowell, *Affirmative Action Reconsidered*, 42 THE PUBLIC INTEREST 47, 63 (1976).

213. *See, e.g.*, International Bhd. of Teamsters v. United States, 431 U.S. 324, 353 (1977) ("Title VII should not outlaw the use of existing seniority and thereby destroy or water down the vested seniority rights of employees simply because their employer had engaged in discrimination prior to passage of the Act."); University of Cal. Regents v. Bakke, 438 U.S. 265, 298 (1978) (Court refers to nonminority applicants as "innocent persons"). *See* Sullivan, *Comment: Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, *passim* (1986).

214. Frontiero v. Richardson, 411 U.S. 677, 685 (1973).

racially segregated schools. Later cases postulated new victims: the white school children who suffer by being bussed to integrated schools.[215] Discrimination law's focus on individual culpability apart from the social context in which subordination occurs compels the conclusion that defendants or third parties who lack invidious intent are the true innocent victims. Thus, women bringing discrimination suits find their claims being overshadowed by the concern for the plight of the "innocent" victim. The bona fide seniority system cases exemplify the degree to which the law sympathizes with those who have benefitted from admittedly racist and/or sexist seniority systems.[216] Although the Court has labelled the reconciliation of the interests of these victims with the victims of discrimination as a "delicate" task,[217] that adjustment is usually made against women and minorities.[218]

For example, in *Ford Motor Co. v. EEOC*,[219] the Court held that an employer could toll the accrual of back pay liability to three successful female plaintiffs by offering the jobs previously denied them, albeit without retroactive seniority. The Court pointed out that requiring the employer to offer retroactive seniority would place a "particularly onerous burden"[220] on the innocent employees who had accrued seniority while the case was being litigated. This holding ignored the compelling reality of the desire for job security. The plaintiffs testified that they rejected Ford's initial reinstatement offer of a job without seniority because of concern that they might be laid off.[221] Requiring women who have already proved sex discrimination to accept either a smaller back pay award or a job without security in order to protect an "innocent" male employee's job security is a ludicrous application of the antidiscrimina-

215. *See, e.g.*, Milliken v. Bradley, 449 U.S. 870 (1980); Keyes v. School District No. 1, 413 U.S. 189, 247-50 (1973) (Powell, J., concurring); *cf.*, Cisneros v. Corpus Christi Indep. School District, 467 F.2d 142, 148 (5th Cir. 1972), *cert. denied* 413 U.S. 920 (1973) (focusing on the interests of the children who are victims of segregation).

216. *See* International Bhd. of Teamsters v. United States, 431 U.S. at 332-35, 372 (1977); American Tobacco Co. v. Patterson, 456 U.S. 63, 75-76 (1982).

217. International Bhd. of Teamsters v. United States, 431 U.S. at 372.

218. For example, in *Teamsters*, the Court held that Congress specifically intended that Title VII not "destroy or water down the vested seniority rights of employees simply because their employer had engaged in discrimination prior to the passage of the Act." 431 U.S. at 353. Any other result would, according to the Court, subordinate those vested rights to the claims of "pre-Act discriminatees without seniority." *Id.* at 354.

219. 458 U.S. 219 (1982).

220. *Id.* at 239. The dissent aptly characterizes this holding as the Court's "repeated invocation of and preoccupation with the rights of innocent third parties." *Id.* at 254 (Blackmun, J., dissenting).

221. *Id.* at 256-57 (Blackmun, J., dissenting).

tion principle.[222]

United Air Lines v. Evans[223] reflects the same philosophy. In that case a woman flight attendant was fired pursuant to a no-marriage rule, which was invalidated in subsequent litigation to which she was not a party.[224] When she sought reinstatement, the airline hired her as a new employee but denied her all of the seniority accrued during her prior service with United. The Supreme Court upheld the denial of seniority even though male employees (hired after her subsequently illegal termination and prior to her reinstatement) received more seniority than she did. The import of *Evans* is clear: victims of discriminatory practices have only limited rights, while the beneficiaries of racism and gender bias have vested rights not to be victimized by an antidiscrimination remedy. This perpetuation of institutionalized racism and sexism in favor of the rights of third parties is perhaps the ultimate perversion of antidiscrimination law.

F. *Affirmative Action*

At first blush, it seems that affirmative action may offer more to women.[225] Affirmative action comes closest to predicating a remedy upon the underlying social problem of discrimination without requiring proof of individually-caused, perniciously-motivated conduct. Upon closer examination, however, it becomes clear that affirmative action is permissible only in very limited circumstances.

The underlying assumption of affirmative action is that remedial,

222. The doctrine of victim specific relief also illustrates the Court's transformation of the victims of discrimination from those burdened by discrimination to those who might be burdened by anti-discrimination remedies. Franks v. Bowman, 424 U.S. 747, 750 (1976), limited retroactive seniority to those identifiable applicants who were seeking relief from post-Act hiring discrimination. Similarly, in International Bhd. of Teamsters v. United States, 431 U.S. 363-72 (1977), the Court limited relief to actual specific victims of the post-Act discrimination. Mere membership in a certified plaintiff class was not enough: In order to be awarded retroactive seniority each individual must prove that the discrimination had a specific impact on him or her. Firefighters Local No. 1784 v. Stotts, 467 U.S. 561, 578-79 (1984).

223. 431 U.S. 553 (1977).

224. Sprogis v. United Air Lines, 444 F.2d 1194 (7th Cir. 1971), *cert. denied*, 404 U.S. 991 (1971).

225. It is not our purpose to review (or even to cite) the scholarly debate about either the legality or the wisdom of affirmative action. That literature is extensive and explores a wide range of positions. *See, e.g.*, N. GLAZER, AFFIRMATIVE DISCRIMINATION: ETHNIC INEQUALITY AND PUBLIC POLICY (1975); Bell, *Bakke, Minority Admissions, and the Usual Price of Racial Remedies*, 67 CAL. L. REV. 3 (1979); Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974); Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. CHI. L. REV. 653 (1975); Sullivan, *supra* note 213.

short-term efforts will help rectify historical discrimination. However, if one assumes that familial obligations will remain a characteristic of American society, something more than a short-term remedial program is necessary. Affirmative action is aimed at allowing everyone access to the paid labor market,[226] but it requires everyone to enter that realm on the terms in which it is currently structured. That is the antithesis of true equality.

Although the defendant's motivation is not directly at issue in the affirmative action cases, particularized fault is as critical as in the discrimination cases.[227] Many affirmative action cases hold that race or gender conscious relief is not available unless there has been a preexisting violation of discrimination law.[228] "Societal discrimination, without more, is too amorphous a basis"[229] upon which to predicate a remedy.[230]

To be sure, some cases have upheld carefully tailored affirmative action plans even in the absence of a showing of prior discrimination.[231]

---

226. As Professor Kay has shown, there are fundamental empirical differences between affirmative action in race discrimination cases and sex discrimination cases. Kay, *supra* note 40, at 60-77. In race reverse discrimination cases whites never seek the position formerly held by blacks; in gender bias cases, on the other hand, men may want the rights or privileges formerly held by women. For example, men may want disability leave comparable to maternity disability leave, or they may want parenting leave.

227. And as we have seen, the requirement of proof of impermissible motivation before any defendant can be found liable for discrimination in the post-*Washington v. Davis* era is really another way of defining the perpetrator's fault.

228. Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) *reh'g. denied*, 478 U.S. 1014 (1986); University of Cal. Regents v. Bakke, 438 U.S. 265, 294-98, 307-310 (1978). This was made even clearer by a case decided as this article was going to press. In City of Richmond v. Croson, 57 U.S.L.W. (U.S. Jan. 23, 1989), the Supreme Court struck down a local ordinance setting aside for minority owned businesses thirty percent of city construction contracts. After *Richmond*, it is clear that any state or local affirmative action efforts must be predicated on detailed findings of specifically identified violations and that the remedies therefor must be narrowly tailored to the findings of prior discrimination. ("Proper findings in this regard are necessary to define both the scope of the injury and the extent of the remedy. . . ." *Id.* at 4143).

229. Wygant v. Jackson Bd. of Educ., 476 U.S. at 276. *Wygant* is an example of the absurd lengths to which the Court is willing to go in its search for specificity. Despite the extensive litigation in that case, the Court refused to find sufficient evidence to support a finding of prior discrimination by the defendent.

230. *Cf.* Fullilove v. Klutznick, 448 U.S. 448, 477-78, 484-85 (1980) (upholding the constitutionality of a provision of the Public Works Employment Act of 1977 setting aside certain monies for projects which purchased services and/or supplies from minority owned businesses because Congress does not need the kind of "record" that judges and administrators need.) University of Cal. Regents v. Bakke, 438 U. S. at 306 n.43. The *Richmond* Court distinguished *Fullilove* on the rather surprising theory that under § 5 of the Fourteenth Amendment, Congress has greater authority to implement race conscious remedies than the states have under § 1. ("That Congress may identify and redress the effects of society-wide discrimination does not mean that . . . the states . . . are free to decide that such remedies are appropriate." 57 U.S.L.W. at 4138).

231. Johnson v. Transportation Agy., 480 U.S. 616 (1987); Steelworkers v. Weber, 443 U.S. 193,

For example, in *Johnson v. Transportation Agency*, the Court approved a voluntary affirmative action plan to "remedy the effects of past practices and to permit attainment of an equitable representation of minorities, women and handicapped persons."[232] Such cases suggest that affirmative action can be an effective tool for the woman who is seeking a job in a category from which women have been traditionally excluded. But even where an affirmative action plan serves the narrow goal of integrating previously segregated job classifications, it must be limited. Not only must there be a "manifest imbalance" relating to a "traditionally segregated job category," but the plan's goals must be based on the number of women who are qualified rather than the number of women in the labor market.[233] Moreover, the plan can only require consideration of "qualified" women; "blind" hiring to rectify numerical imbalances is not permitted.[234]

The efficacy of affirmative action remedies has been further eroded by the excessive judicial concern for the rights of the potential "innocent victims" of that remedy, a concern that often overwhelms the rights of the plaintiffs.[235] The test seems to be the remedy's impact upon the "innocent victim." Hiring goals are often permitted because their burden "is diffused to a considerable extent among society generally."[236] Layoffs, on the other hand, "impose the entire burden of achieving. . .equality on particular individuals." The key is therefore not the social necessity for an antidiscrimination remedy but rather a weighing of the injury to the plaintiffs against a theoretical injury to an undefined class of potential

202-04 (1979). Such voluntary plans must "eliminate manifest racial imbalance in traditionally segregated job categories." *Id.* at 197. The validity of these holdings is questionable after City of Richmond v. Croson, 57 U.S.L.W. 4132.

232. Johnson v. Transportation Agy., 480 U.S. 616, 620 (1987).

233. *Id.*, at 621.

234. *Id.* at 622. An affirmative action plan can only "attain" a balanced workforce, but may not "maintain" one. *Id.*

235. "[T]here is a measure of inequity in forcing innocent persons in respondent's position to bear the burdens of redressing grievances not of their making." University of Cal. Regents v. Bakke, 438 U.S. 265, 298 (1978). In our view, the disagreement between the various opinions in *Bakke* about the level of scrutiny to be applied to racial classifications which potentially victimize members of the majority race is really a disagreement about how much protection the judiciary owes to white nonperpetrators. Alan Bakke "bear[s] no responsibility for whatever harm the beneficiaries of the [California] special admissions program are thought to have suffered." *Id.* at 310.

236. Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986), *reh'g denied*, 478 U.S. 1014 (1986); Steelworker's v. Weber, 443 U.S. 193, 208 (1979) (plan reserving 50% of openings in a training program does not "unnecessarily trammel the interests of white employees"). *But see* University of Cal. Regents v. Bakke, 438 U.S. at 319 (rejecting a plan reserving openings in medical school class).

innocent victims. This balancing process consumes the judicial attention and, indeed, seems to end the inquiry.

At bottom, the affirmative action cases teach once again that a woman's claim is her purely individual problem. The law sees the woman plaintiff in a bipolar, adversarial posture with the "innocent" male victim. Viewed apart from the larger group of women subject to discrimination[237] and the social context in which it arises, the woman's claim is hers alone. The full force of the public interest does not stand behind it. The law does not recognize that so-called private sphere activities are not merely private or voluntary but serve society as a whole. To the Court, any "special" treatment to alleviate this burden is not justified. Therefore, protection of the "innocent victim" becomes paramount.

G. *The Metaphysics of Process*

An emphasis on process rather than result is common to both the affirmative action cases and the post *Geduldig/Washington v. Davis* line of discrimination cases. The process used to reach a decision is considered significantly more important than the result or impact of that decision. In other words, what is critical is not whether the defendant's behavior had a discriminatory impact on women or minorities, but rather whether the process itself was free of subjectively motivated bias. The question becomes whether the process was applied equally to blacks and whites, to women and men. If the process was free of intentional racism or gender bias, the outcome is immune from scrutiny.[238]

Viewed most favorably, these cases are more concerned with decisionmaking free from overt racial or gender considerations than whether the decision has furthered or hindered racial or gender equality. The

237. *Cf.* Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 *passim* (1976); Lynd, *Communal Rights*, 62 TEX. L. REV. 1417 *passim* (1984) (the Constitution protects group rights). Moreover, this view is reinforced by the Court's denial of societal responsibility for institutionalized racism and its requirements that affirmative action be narrowly tailored in City of Richmond v. Croson, 57 U.S.L.W. 4132.

238. Our criticism does not imply that process is not a critical factor in our jurisprudence in general or in equality theory in particular. There is a venerable history in Anglo-American jurisprudence of protecting rights not only by guaranteeing the existence of these rights but by guaranteeing that the process used to deprive rights must be fair. *See, e.g.*, Fuentes v. Shevin, 407 U.S. 67 (1972); Bell v. Burson, 402 U.S. 535 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969); Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1270-75 (1975). But the emphasis on process in discrimination law is a far cry from traditional notions of procedural due process. *See* Law, *supra* note 2, at 987-88, 1016-28, for a criticism of the application of procedural due process to abortion cases. The process-based inquiry of the discrimination cases concentrates on the methodology of decision-making at the expense of any consideration of its result.

plaintiff's perspective does not inform the process; instead, the discrimination cases examine the process from the perspective of the defendant[239] or of the "innocent victim."[240] In other words, process is not scrutinized for the purpose of protecting plaintiff's rights but rather for the purpose of limiting defendant's liability and protecting the rights of potential innocent victims of the remedy. Such an approach stands the concepts of equality and due process on their heads. For example, in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*[241] the Court refused to infer that a town might have been motivated by "opposition to minority groups,"[242] despite extensive evidence of segregation in the area and the town's exploitation of that segregation.[243] The Court limited its examination to the process used by the municipality in denying plaintiff's rezoning request. The Court seemed to assume that as long as the town did business as ususal, there could be no discrimination. The only process due to plaintiffs was the same treatment offered to other developers before the zoning board, thus ignoring the fact that the plaintiffs were in a very different position from other developers.[244] The Court not only sacrificed the result to the purity of the process, but it also refused to look at the process in context.

Elevation of process over result has hurt women and has severely damaged their quest for equality.[245] For example, one of the aims of the reformers advocating no-fault divorce was the abolition of non-neutral assumptions underlying divorce law, such as women's financial dependency and male support obligations.[246] These reformers created facially gender neutral rules for no-fault divorce. In this they succeeded.[247] No-fault divorce created a process treating men and women as similar at the

239. *See supra* text accompanying notes 119-23.

240. *See supra* text accompanying notes 213-24.

241. 429 U.S. 252 (1977).

242. *Id.* at 269.

243. *But see* Clark v. Universal Builders, Inc. 501 F.2d 324, 330-32 (7th Cir. 1974) *cert. denied*, 419 U.S. 1970 (1974) (upholding the so-called "exploitation theory"). *Cf.* Clark v. Universal Builders, Inc., 706 F.2d 204, 210-12, 212 n.8 (7th Cir. 1983) (casting doubt on the viability of the exploitation theory). For an analysis of the exploitation theory, see Brown, Givelber and Subrin, *Treating Blacks As If They Were White: Problems of Definition and Proof in Section 1982 Cases*, 124 U. PA. L. REV. 1, 11-14, 18-20 (1975).

244. Treating low-income housing developers in the same manner as other developers is analogous to the equal treatment approach to sex discrimination. It permits defendants to ignore both the historical and social contexts and resulting inequity to low income blacks and women.

245. *See* Karst, *Woman's Constitution*, 1984 DUKE L.J. 447, 466-71 (use of standing to impede women's access to group having equal citizenship rights).

246. L. WEITZMAN, *supra* note 63, at 31-32.

247. *Id.* at 31-37, 41-45.

time of the divorce. But this ignores what Weitzman refers to as the "structural inequality" between men and women; in fact their economic situations are radically different.[248] The result has been that "while most divorced men find that their standard of living improves after divorce, most divorced women and the minor children in their households find that their standard of living plummets."[249] Thus, the illusory promise of the gender neutral process is belied by the harsh reality of the result.[250]

The reluctance of the judiciary to review faculty tenure decisions is another example of deference to established facially neutral processes. Although there are other factors inhibiting judicial examination of those decisions,[251] the cases exemplify a willingness to accept the validity of process notwithstanding discriminatory results. In the tenure cases, defendant universities typically cite plaintiff's failure to meet high standards for scholarship as a nondiscriminatory reason for denial of tenure. Plaintiffs have difficulty in showing that the subjective evaluation of scholarly work was motivated by gender bias.[252] As long as the same procedural steps are applied to male and female candidates, the courts are unwilling to question the results of the procedure. Indeed, the courts have enshrined the tenure process and have virtually immunized it from discrimination claims. Thus once again, discrimination law ignores the context in which inequality occurs.

---

248. *Id.* at 35. She is, of course, referring to the fact that women are more likely than men to be victimized by discrimination in the labor market and that women are more likely to be restricted by child care responsibilities. Weitzman also notes that typically women's career prospects have been diminished by marriage and the different sex roles filled by husbands and wives during that marriage. *Id.* at 36.

249. *Id.* at 323.

250. Another example of overdeference to process is the Court's unwillingness to look behind the Congressional decision to exclude women from draft registration because this decision was not an "accidental by-product" of traditional sex role stereotypes but rather a "studied choice." Rostker v. Goldberg 453 U.S. 57, 72, 74 (1981); *See also* Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 274-80 (1979).

251. Bartholet, *supra* note 137, at 983-98.

252. *See, e.g.*, Zahorik v. Cornell Univ., 729 F.2d 85 (2nd Cir. 1984) (tenure selection criteria legitimately related to job notwithstanding claim of subjectivity); Laborde v. Regents of the Univ. of California, 686 F.2d 715, 718-19 (9th Cir. 1982), *cert. denied*, 459 U.S. 1173 (1983) (plaintiff unable to show pretext notwithstanding her publication of four books of scholarly criticism, two volumes of poetry and numerous articles and reviews). *But see* Kunda v. Muhlenberg College, 621 F.2d 532 (3rd Cir. 1980) (upholding close judicial supervision of remedy in tenure case); Sweeney v. Board of Trustees of Keene State College, 604 F.2d 106, 112-13 (1st Cir. 1979) *cert. denied*, 444 U.S. 1045 (1980) (evidence showed that women faculty "were evaluated by a stricter standard than their male colleagues and that the institution generally was unresponsive to the concerns of its female faculty."); *see* Taub, *supra* note 39, at 349-61 for an interesting discussion of the effect of attitudinal factors concerning gender on employment decisions.

H. *Affirmative Duty*

The approach to institutionalized prejudice reflected in *Geduldig*, *Feeney*, and *Washington v. Davis* illustrates the severe constrictions of discrimination law. A woman's right to equality is no more than a right to compete with men, and the rules of this competition are male.

This limited focus puts to rest any notion that there is an affirmative duty on government to eliminate institutional sexism and racism. The strongest support for the existence of such a duty appears in *Green v. County School Board*.[253] Under *Green*, merely refraining from futher discriminatory acts is tantamount to acquiescing in segregated schools and this acquiescence, without more, violates the fourteenth amendment.[254] *Green* imposed a duty on government to take affirmative steps to rectify inequality and to achieve equality.[255] Yet, although *Green* has never been overruled (and is still occasionally cited with approval),[256] it is clear that its precedential value is very limited.[257]

The various opinions in *Bazemore v. Friday*[258] reflect the Justices' disagreement about the existence of an affirmative duty. *Bazemore* involved several issues arising out of alleged race discrimination by the North Carolina Educational Extension Service. Justice White, concurring, opined that *Green* had no application beyond school desegregation.[259] Justice Brennan, dissenting in part, criticized White for "winking" at the constitutional requirement that states have an obligation to eliminate the last vestiges of segregation.[260] According to Brennan, defendants have an affirmative duty to eliminate the effects of de jure segregation that is not predicated upon evidence of specific acts of discrimination. Nor is this duty satisfied simply by refraining from further segregation and declaring a neutral policy for future activities. Fulfillment of the duty requires active and not passive measures.[261]

253. 391 U.S. 430 (1968). *Cf.* Shannon v. U.S. Dept. of Hous. and Urban Dev., 436 F.2d 809, 820-21 (3d Cir. 1970).

254. Green v. County School Board, 391 U.S. at 437-38.

255. *Id.*

256. Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 458-59 (1979).

257. *See* Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 419-21 (1977) (defendant's duty limited to refraining from incremental segregative effects of its behavior); Milliken v. Bradley, 413 U.S. 717, 745-46 (1973) (no duty to achieve equality in the absence of proof that school district boundaries "were established for the purpose of creating, maintaining or perpetuating segregation of races.") *Id.* at 748.

258. 476 U.S. 385 (1986).

259. *Id.* at 408.

260. *Id.* at 409.

261. *Id.* at 414-20.

The majority's rejection of Brennan's position is hardly surprising.[262] The concepts of intent and affirmative duty are intimately connected.[263] Restricting constitutional violations to behavior involving specific malevolent intent limits governmental responsibility to refraining from those specific acts which constitute purposeful discrimination. Predicating constitutional violations upon a breach of an affirmative duty requires that defendants take positive acts to achieve equality.

The absence of an affirmative duty to rectify gender inequality limits both the definition of sex discrimination and the remedies available for it. A defendant has no duty to modify conditions to enable women to participate equally with men. For example, in upholding draft registration for men only, the Court effectively held that the government has no affirmative duty to promote gender equality in the armed services.[264] Similarly, the pregnancy cases clarify that there is no affirmative duty to provide benefits to pregnant women.[265]

Nor does Title VII impose any affirmative duty to achieve equality. The Supreme Court cases clearly limit its scope to equality of access and do not extend it to equality of achievement.[266] In other words, the Title VII defendant has no affirmative duty beyond refraining from discrete, perniciously motivated acts of gender bias. In *Phillips v. Martin Marietta Corp.*,[267] the Court implied that an employer could refuse to hire women with pre-school age children if the record demonstrated that some women have family responsibilities that interfere with job performance. An employer has no duty to provide day care, or flexible hours, or make any accommodation to the needs of working parents.[268] Similarly, in *Dothard*

262. In Crawford v. Board of Educ. of the City of Los Angeles, 458 U.S. 527, 535 (1982), the Supreme Court recognized that under a state constitution a school board might have a greater duty than under the federal constitution.

263. In *Washington v. Davis*, the Court overruled several lower court opinions which had suggested that it was not necessary to prove discriminatory purpose. Many of these cases recognized an affirmative duty on the part of government to correct inequality and to administer programs in a way that affirmatively addresses the needs of minorities. *See* Washington v. Davis, 426 U.S. 229, 244-45 n.12 (1976).

264. Rostker v. Goldberg, 453 U.S. 57, 80 (1981).

265. *See supra* text accompanying notes 115, 174-87 and *infra* text accompanying notes 335-37.

266. Texas Dep't. of Community Affairs v. Burdine, 450 U.S. 248, 259 (1981) (Title VII does not obligate an employer to select a woman or member of a minority group from among equally well-qualified applicants); Furnco Construction Corp. v. Waters, 438 U.S. 567, 577-78 (1978) (Title VII does not obligate an employer to maximize the number of women and minority employees).

267. 400 U.S. 542 (1971).

268. Frug, *supra* note 46, at 56, 94. Thus, as Littleton states, the Court in *Martin Marietta* "presupposes the legitimacy of the employment structure itself." Littleton, *supra* note 2, at 1053.

v. Rawlinson,[269] the Court allowed the Alabama prison system to refuse to hire women guards because of the "barbaric and inhumane" conditions in the Alabama prisons.[270] Despite Alabama's duty to operate the prison system in accordance with the Eighth Amendment,[271] it did not have a duty to correct prison conditions to facilitate employment of women.[272]

Although the Supreme Court recognized in *Meritor Savings Bank v. Vinson*[273] that sexual harassment violated Title VII,[274] it is clear that the employer has no affirmative duty to provide a workplace free from sexual harassment. Although Justice Rehnquist specifically declined to rule on the appropriate standard for employer liability, he noted that there are "some limits" on the scope of this liability and that the Court of Appeals was incorrect in ruling that employers are always "automatically liable" for sexual harassment by supervisors whether or not the employer knew or should have known of that misconduct.[275]

The existence of an affirmative duty depends upon an ideology assigning to society the responsibility for curing institutionalized discrimination. But discrimination law is predicated upon an ideology absolving society of this responsibility. Therefore, the only duty which any defendant has is to stop committing those violations which he or she actually intended to cause actionable injuries. This individualistic perspective

269. 433 U.S. 321 (1977).

270. *Id.* at 342 (Marshall, J., concurring).

271. *Id.* Other states have successfully employed women guards. *Id.* at 341. Some courts have required that prisons accommodate or even enhance the employment rights of women guards. *See, e.g.*, Grummett v. Rushen, 779 F.2d 491, 496 (9th Cir. 1985); Madyun v. Franzen, 704 F.2d 954, 960 (7th Cir. 1983).

272. Nor is there an affirmative duty to maintain a safe workplace in industries where workers are exposed to hazardous substances known to cause or suspected of causing adverse reproductive health effects. Employers have typically responded to workplace hazards by developing policies excluding pregnant or fertile women from the workplace rather than by providing a safe workplace. Male employees also affected by the chemicals are usually not excluded. Many courts have found that these single-sex exclusionary policies violate Title VII. *See, e.g.*, Hayes v. Shelby Memorial Hospital, 726 F.2d 1543 (11th Cir. 1984); Wright v. Olin Corp., 697 F.2d 1172 (4th Cir. 1982); Zuniga v. Kleberg County Hospital, 692 F.2d 986 (5th Cir. 1982). Other employers have forced women to choose between sterility and employment. Oil, Chemical & Atomic Workers v. American Cyanamid Co., 741 F.2d 444 (D.C. Cir. 1984). *See* Furnish, *Prenatal Exposure to Fetally Toxic Work Environments: The Dilemma of the 1978 Pregnancy Amendments to Title VII of the Civil Rights Act of 1964*, 676 IOWA L. REV. 63 (1980); Williams, *Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection with Employment Opportunity Goals under Title VII*, 69 GEO. L.J. 641 (1981).

273. 477 U.S. 57 (1986).

274. *Id.* at 62.

275. *Id.* at 64. *Cf.* College-Town v. Massachusetts. Comm'n Against Discrimination, 400 Mass. 156, 165-67, 508 N.E.2d 587, 592-94 (1987).

leaves women with no meaningful remedies: the law effectively sanctions the disparities extant in society.

IV. THE LIMITATIONS OF CONSTITUTIONAL RIGHTS ANALYSIS

Discrimination law is unable to provide meaningful gender equality. The doctrine that has evolved relies on an ostensibly neutral, formalistic analysis, making it incapable of recognizing or responding to the needs of women.

The implications of the law's blindness are profound. Discrimination law's insistence on similar treatment for those similarly situated prevents it from responding to the claims of women who are differently situated from men.[276] Thus, discrimination law cannot value the diversity which is so crucial to women's equality. Women suffer as a result, but so does society as a whole, which loses the enrichment of a more varied and multifaceted set of norms.[277] Similarly, the ahistorical, abstract nature of discrimination law, and its reliance on a fault-based principle,[278] effectively prevents the recognition of society's role in creating and perpetuating women's economic dependence.[279] More fundamentally, discrimination doctrine fails to recognize the interdependence of women and society.

The limitations of discrimination law should not be surprising. They merely reflect the more general failure of constitutional jurisprudence to achieve a vision of equal citizenship.

A. *The Negative Constitution*

The claim for equality is in essence a claim for an entitlement to resources and respect. It is a claim for a right to economic security (at least at some minimal level), and the economic and legal means to maintain certain values and engage in certain previously undervalued activities, such as caregiving and childrearing. Ultimately, these claims are not made against particular defendants who have committed malfeasance, but against the community as a whole. But, as long as the obligation is

276. *See supra* text accompanying notes 112-19.

277. *See, e.g.*, Karst, *supra* note 245, at 486-96 (adding women's perspective will broaden the constitutional horizon); Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 580-93 (1986) (women have a different perspective that can reinfuse a classical perspective into our jurisprudence). Scales emphasizes the importance of a different perspective, but stresses that women's values cannot be simply "incorporated onto" the dominant approach. *See* Scales, *supra* note 54, at 1382, 1391.

278. *See supra* text accompanying notes 119-48.

279. *See supra* text accompanying notes 59-83.

limited to particular wrongdoers, the scope of equality becomes trivialized, and the critical connection between the condition of women, and of society at large, becomes lost.

The recognition that gender equality entails, indeed requires, certain obligations from the community, provides a clue as to why discrimination doctrine cannot remedy problems of gender inequality. To redress gender inequality, society must be willing to restructure its baseline norms and expectations to accept and make room for the life experiences of women. Yet because of the very fact that women's experiences are devalued by the predominant ideology of the public sphere, this claim is seen as a request for some special protection, or affirmative assistance, from the state. As such, it is seen as inconsistent with the dominant vision of constitutional law.

Prevailing constitutional jurisprudence holds that the Constitution incorporates a liberal, individualistic theory of government.[280] Under this view, the founders were influenced by English liberal theorists such as John Locke and Thomas Hobbes,[281] and conceived of the individual as existing prior to, and as the primary constituent of the state.[282] The most important function of government is to preserve the peace and protect property.[283] However, a potential danger exists that government will exceed its limited role and trample upon the prior, natural rights of the individual. Thus the essential freedom that was preserved by the Constitution, the Bill of Rights, and later the Fourteenth Amendment,[284] was freedom from governmental impingement on the rights of individuals.[285] This freedom is believed to be in sharp opposition to the "positive" right to governmental assistance.

In recent years, there has been considerable scholarly debate over whether the framers actually adopted a liberal, individualistic political theory or were in fact deeply influenced by a contrasting republican vi-

280. *See* Black, *Further Reflections on the Constitutional Justice of Livelihood*, 86 COLUM. L. REV. 1103, 1112 (1986); Karst, *supra* note 245, at 486-87.

281. LIFE, LIBERTY AND PROPERTY: ESSAYS ON LOCKE'S POLITICAL IDEAS 1 (Schochet ed. 1971); L. HARTZ, THE LIBERAL TRADITION IN AMERICA 78-86 (1955).

282. THE FEDERALIST No. 37, at 227 (J. Madison) (Modern Library ed.); *id.* at 145 (A. Hamilton); THE FEDERALIST No. 2, at 8 (J. Jay) (Modern Library ed.).

283. J. LOCKE *supra* note 78, at 428; T. HOBBES, LEVIATHAN 314-15 (MacPherson ed. 1968).

284. This view was most clearly evident in cases such as Lochner v. New York, 198 U.S. 45, 56-57 (1905), and Coppage v. Kansas, 236 U.S. 1, 11 (1915), which viewed the Fourteenth Amendment as a protector of freedom of contract and property.

285. Maher v. Roe, 432 U.S. 464, 471 (1977). *See also* Appleton, *Beyond the Limits of Reproductive Choice: The Contributions of the Abortion-Funding Cases to Fundamental-Rights Analysis and to the Welfare-Rights Thesis*, 81 COLUM. L. REV. 721 (1981).

sion emphasizing civic values and the public good over individualism.[286] Recently, legal theorists have attempted to incorporate a republican strand into constitutional jurisprudence.[287] However, regardless of the proper resolution of the debate, it is clear that the belief that the framers were influenced by the liberal tradition has had a profound effect on constitutional jurisprudence.[288] This can be seen most vividly in the laissez-faire ideology animating the *Lochner* era court.[289] The demise of *Lochner* hardly expunged that view.

At first blush, the question is whether the Constitution mandates only rights against coercion by the government, which have been called negative rights, or whether it recognizes affirmative entitlements against society, that is, so-called positive rights.[290] This question has arisen most recently in the fundamental rights branch of fourteenth amendment law. In the 1960s and early 1970s, the Supreme Court decided a series of cases

---

286. *See, e.g.*, B. BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967); J.G.A. POPCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION, 506-52 (1975); Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 39-45 (1985). Even if the framers were unreconstructed Lockeans, the more critical question for purposes of equal protection jurisprudence is the vision held by the 39th Congress that drafted the Fourteenth Amendment. Clearly, the Congress that enhanced federal power in order to implement the abolition of slavery did not endorse a pure libertarian state. *See* Karst, *The Supreme Court, 1976 Term-Forward: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 17 (1977); *see also* Shelley v. Kraemer, 334 U.S. 1, 23 (1948) (Fourteenth Amendment embodies a principle of equal citizenship). Nevertheless, the Court treats the Fourteenth Amendment as if it embodies the individualistic philosphy that the Court attributes to the original framers. *See, e.g.*, Harris v. McRae, 448 U.S. 287, 316 (1980); Malloy v. Hogan, 378 U.S. 1, 10-11 (1964).

287. *E.g.*, Michelman, *The Supreme Court, 1985 Term Foreward-Traces of Self Government*, 100 HARV. L. REV. 4 *passim* (1986); Sherry, *supra* note 277, *passim*; Sunstein, *supra* note 286, at 68-75. Interestingly, both Michelman and Sherry see a close relationship between republican values and those values long associated with women. Michelman, *Traces of Self Government*, *supra* at 17 n.68; Sherry, *supra* note 277, *passim*.

288. Sherry, *supra* note 277 at 543. *See* MacKinnon, *supra* note 65, at 644 (1983) ("The state is male in the feminine sense.").

289. *See* Lochner v. New York, 198 U.S. 45 (1905). Even in the Lochner era, the Court never adopted a purely individualistic jurisprudence. *See, e.g.*, Jacobson v. Massachusetts, 197 U.S. 11 (1905) (upholding police power restrictions on liberty). Moreover the Court approved restrictions on contract predicated on stereotypical views about the roles of the sexes. *See* Muller v. Oregon, 208 U.S. 412, 421-22 (1908).

290. Professor Fried, borrowing from the Kantian tradition, has developed a theory of positive and negative rights in which negative rights are founded on absolute categorical imperatives. C. FRIED, RIGHT AND WRONG 110-63 (1978). Positive rights, in contrast, are less absolute and require balancing the rights of individuals. Fried's definition is very different than our own. Nevertheless, his insight that positive rights require balancing is exemplified by the generally held belief that positive rights are somehow more difficult to define and manage. *See infra* text accompanying notes 304-09.

which suggested that perhaps the state has an affirmative obligation to provide certain minimal benefits.

Harper v. Virginia Board of Elections[291] is a good example. In *Harper* the question was the constitutionality of Virginia's poll tax for state elections. The Court found that the tax violated the equal protection clause. The Court stated that although the right to vote in state elections is not expressly mentioned in the Constitution, it is a "fundamental political right" because it is preservative of other rights.[292] In addition, the Court found the poll tax to be an invidious classification because it predicated suffrage on the basis of wealth.[293] Finally, the Court noted that "notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change."[294]

The Court's reasons evoked an expansive vision of equality and substantive entitlements. The declaration that suffrage was a fundamental right suggested that there were certain entitlements which were so basic that their allocation could not be left to legislative discretion. Doctrinally, this evolved into a mandate that states demonstrate a compelling interest when they infringe on such rights.[295] Theoretically, it suggested that the Court was adopting a notion of welfare rights which could potentially presage a recognition of individual entitlements to social resources.[296] In addition, the Court's statements about the inappropriateness of wealth as a classification hinted that poverty might be a suspect classification. This would have had dramatic implications for issues of economic security. And, the majority's insistence that equal protection law reflect changing values suggested a flexible approach to the Constitution that protected contemporary egalitarian values.[297]

Cases such as *Shapiro v. Thompson*[298] and *Memorial Hospital v. Maricopa*,[299] seemed to advance the recognition of welfare rights. In both

291. 383 U.S. 663 (1966).

292. *Id.* at 667, *quoting* Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

293. *Id.* at 668.

294. *Id.* at 669.

295. Shapiro v. Thompson, 394 U.S. 618 (1969).

296. *See* Karst, *supra* note 286, at 26-33; Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U.L.Q. 659, 679-80 (1979) [hereinafter *Welfare Rights*]; Michelman, *The Supreme Court, 1968 Term-Foreward: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 19-33 (1968) [hereinafter *Protecting the Poor*].

297. Much of the legal literature discussing the incorporation of egalitarian norms into equal protection jurisprudence was influenced by the work of J. RAWLS, A THEORY OF JUSTICE (1971). *See, e.g.*, Karst, *supra* note 286, at 6; Michelman, *Welfare Rights*, *supra* note 296, at 670; Michelman, *Protecting the Poor*, *supra* note 296, at 15.

298. 394 U.S. 618 (1969).

299. 415 U.S. 250 (1974).

cases, the Court found that durational residency requirements for government benefits unduly burdened the "fundamental" right of interstate travel. As in *Harper*, the Court was unwilling to permit legislative classifications that adversely affected the poor's ability to exercise certain unwritten rights. These cases[300] could be read to say that once the government created welfare programs, it lost at least some of its ability to exercise discretion over the administration of benefits.[301] In essence, welfare programs, once legislated, became positive entitlements.[302]

The potential for the achievement of welfare rights was always limited. First, echoing the specter of *Lochner*, it raised problems of judicial legitimacy. As Justice Harlan stated in his dissent in *Shapiro*, "I know of nothing which entitles this Court to pick out particular human activities, characterize them as 'fundamental,' and give them added protection under an unusually stringent equal protection test."[303] By determinig that certain nontextual rights were fundamental, the Court was vulnerable to the charge of using equal protection analysis to construe governmental activities in light of the Court's own substantive values. This is what the Court had refused to do through due process analysis.[304]

Moreover, the recognition of welfare rights raised issues of judicial competence. In *Maricopa*, for example, the Court held that a one year residency requirement for free non-emergency medical care infringed upon the right to travel. While infringement on travel was remote at best, the law did deny indigents health care.[305] Therefore, *Maricopa* could be read as a recognition of a right to medical care,[306] which raises exceedingly complex questions.[307] What is medical need? What needs must be

300. For a listing of similar cases, see Michelman, *Welfare Rights*, *supra* note 296, Appendix A, at 686-93.

301. *Id.* at 663.

302. Cases recognizing that statutory benefit programs created a property interest triggering procedural due process protections further bolstered this view. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970).

303. 394 U.S. at 662, (Harlan, J., dissenting).

304. *See, e.g.*, Ferguson v. Skrupa, 372 U.S. 726, 728-31 (1963); Williamson v. Lee Optical Co., 348 U.S. 483, 486-88 (1955).

305. *See* Memorial Hosp. v. Maricopa County, 415 U.S. 250, 270-71 (1974) (Douglas, J., concurring) (stressing the issues of medical care raised by the case).

306. This is particularly true when *Maricopa* is considered alongside other cases that upheld durational residency requirements. Sosna v. Iowa, 419 U.S. 393 (1975) (durational residency requirements for divorce); Starns v. Malkerson, 401 U.S. 985 (1971), *aff'g mem.*, 326 F.Supp. 234 (D. Minn. 1970) (durational residency requirement for reduced tuition to state schools). The distinction in *Maricopa* and Shapiro v. Thompson, 394 U.S. 618 (1969), therefore, appears to be the importance of the "plus" factor, the welfare benefit at stake. *See* Michelman, *supra* note 296, at 662-63.

307. PRESIDENT'S COMM'N FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH, SECURING ACCESS TO HEALTH CARE: A REPORT ON

satisfied? How shall the right be financed? To many, these questions appear particularly ill-suited for judicial, as opposed to legislative, resolution.[308] Thus any recognition of welfare rights threatened to involve the judiciary in difficult policy issues which, no doubt, seemed all the greater during the years of inflation and recession in the 1970s.[309]

Ultimately, however, the acknowledgment of welfare rights was limited by the apparent inconsistency between substantive entitlements and deeply held political philosophies.[310] The creation of substantive entitlements appeared to clash with the liberal, individualistic ideology predominant in constitutional jurisprudence. It was therefore not surprising that, with the change of the Court's composition, other cases signaled a rejection of welfare entitlements.[311]

In *Dandridge v. Williams*,[312] for example, plaintiffs challenged a Maryland policy that set a maximum cap on AFDC payments regardless of family size. The Court held that the cap need only be scrutinized by the rational basis test, because the issue was one of social and economic regulation.[313] Undoubtedly influenced by issues of judicial competence and legitimacy, the Court said that the intractable economic, social, and philosophical problems posed by public welfare were political, not consititutional questions. This reasoning implied that there is no right to minimal sustenance. Thus to Justice Marshall, in dissent, the majority

---

THE ETHICAL IMPLICATIONS OF DIFFERENCES IN THE AVAILABILITY OF HEALTH SERVICES 18-47 (1983). The literature on the subject of whether there can or should be a right to health care is voluminous. *See, e.g.*, N. DANIELS, JUST HEALTH CARE 4-9 (1985); V. FUCHS, WHO SHALL LIVE? HEALTH, ECONOMICS AND SOCIAL CHOICE 132-42 (1974).

308. *See* Michelman, *Welfare Rights*, *supra* note 296, at 663; Black, *supra* note 280, at 1113. Michelman argues that because of the problems of judicial competence, the Court must predicate the recognition of positive rights on the existence of legislatively created entitlement programs. The role of the Court is to constrain congressional and adminstrative discretion and validate substantive entitlements with respect to legislatively created programs. *Id.*, *supra* note 296, at 674. Professor Black points out that many constitutional rights cannot be competently executed by the judiciary. Nevertheless, he argues such rights continue as constitutional rights. Black, *supra* note 280, at 1113-14. The problem with both Michelman's and Black's theses is a variation on the old "right without a remedy" problem: once you concede that rights are dependent on legislative enactments and are not otherwise enforceable by the judiciary, they are not really constitutional rights.

309. *See, e.g.*, L. THUROW, THE ZERO-SUM SOCIETY: DISTRIBUTION AND THE POSSIBILITIES FOR ECONOMIC CHANGE 155-58 (1980).

310. *See* Michelman, *Welfare Rights*, *supra* note 296, at 683.

311. The Court has not overruled the precedent and continues to adhere to the view that the impingement of a fundamental right triggers strict scrutiny. *See, e.g.*, City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985); Plyer v. Doe, 457 U.S. 202, 216-17, 217 n.15 (1982). The fundamental rights doctrine, however, has not been allowed to develop into a full and clear recognition of substantive entitlements. *See infra* notes 318-24 and accompanying text.

312. 397 U.S. 471 (1970).

313. *Id.* at 484-85.

"emasculated" the equal protection clause, by failing to recognize the poverty and powerlessness of the plaintiffs.[314]

Other cases reaffirmed the lack of substantive constitutional entitlements and indicated that the Constitution was in fact limited to protecting individuals against government coercion.[315] While upholding parts of Oregon's summary eviction proceeding in *Lindsey v. Normet*,[316] for example, the Court stated:

> We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality, or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease . . . .[317]

San Antonio Independent School District v. Rodriguez,[318] shows most clearly the Court's rejection of welfare rights and its adoption of a narrow, negative view of the Constitution. Plaintiffs claimed that Texas' reliance on property taxes to finance education violated the equal protection clause because it created a wealth-based classification that infringed on the fundamental right to an education. *Rodriguez* involved both a wealth classification[319] and an important benefit, education. Despite this similarity to *Shapiro*, the Court rejected *Shapiro's* approach. First, it held that wealth classifications alone never trigger strict scrutiny.[320] Only

314. *Id.* at 508, 529 (Marshall, J., dissenting). Justice Marshall's use of the term "emasculate" is interesting because it reveals his own blindness to the underlying issues of gender inherent in the case.

315. A recent example is Lyng v. Int'l Union United Auto Acreos. & Agric. Implement Workers of Am., 108 S. Ct. 1184 (1988). The Court has not been totally consistent. Cases such as United States Dep't of Agric. v. Murray, 413 U.S. 508 (1973) (§ 5(b) of the Food Stamp Act creates an unconstitutional irrebutable presumption) and United States Dep't of Agric. v. Moreno, 413 U.S. 528 (1973) (§ 3(e) of the Food Stamp Act lacks a rational basis) continued to evidence support for finding substantive welfare rights. More recently, Plyer v. Doe, 457 U.S. 202 (1982), demonstrated the Court's occasional willingness to use fundamental rights doctrine flexibly to invalidate classifications denying important govermental benefits, such as public education. *Id.* at 221-22.

316. 405 U.S. 56 (1972).

317. *Id.* at 74. Some state courts have found that their constitutions require the provision of housing, shelter, and/or education. *See, e.g.*, Burlington County Nat'l Ass'n for the Advancement of Colored People v. Mt. Laurel Township., 92 N.J. 158, 456 A.2d 390 (1983) (obligations to provide realistic opportunity for low and moderate income housing); Callahan v. Carey, NYJL Dec. 11, 1979, at 10 col.4 (N.Y. Sup. Ct., 1979) (state constitution requires shelter for the homeless); Serranno v. Priest, 5 Cal.3d 584, 487 P.2d 1241 (1971) (obligation to provide education).

318. 411 U.S. 1 (1973).

319. The Court actually denied that there was any wealth-based classification on the theory that districts with low property values could not be assumed to be districts with poor individuals. *Id.* at 23.

320. *Id.* at 24.

where wealth is used absolutely to deny any access to a benefit was strict judicial review mandated.[321] Second, the Court stated that despite the undeniable link between education and economic and political power, education was not a fundamental right, because it was not implicitly or explicitly granted by the Constitution.[322] Except where the Constitution or precedent otherwise commanded, the Constitution would not be read to require rights to the provision of resources or the means to achieve full citizenship. Thus, the Court saw a clear distinction between positive and negative rights, and held that only negative rights were constitutionally mandated. The Court thus refused to construe the equal protection clause to give special protection to important substantive needs. In essence, the Court failed to uphold claims based on the interdependency of individuals. Although in some later cases such as *Maricopa*[323] the Court occasionally appeared to uphold a welfare right, since *Rodriguez* the Court generally has read the Constitution as essentially a guarantor of what the Court deems to be negative rights.[324]

B. *The Impact of the Negative Rights Thesis on Gender Equality*

The view that the Constitution does not create rights against the community has major implications for women's equality.[325] The most obvious connection is economic. Because women as a group are economically disadvantaged,[326] the view that the government need not provide

321. *Id.* at 25 n.60.

322. *Id.* at 35.

323. Memorial Hosp. v. Maricopa Co., 415 U.S 250 (1974). The impact of San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973), was also limited somewhat by Plyer v. Doe, 457 U.S. 202 (1982), which held that although education was not a fundamental right, *id.* at 223, the state could not deny it completely to undocumented aliens. Stressing the importance of education, *id.* at 222, the Court struck down the Texas statute using a "rational relationship" test far stricter than the one typically employed. *Id.* at 223-30. Although *Plyer* shares much in common with the earlier welfare rights cases, and with Brown v. Board. of Educ., 347 U.S. 483 (1954), which it cited at length, *Plyer* did not signal a return toward a recognition of positive rights. Indeed, *Plyer* is in many ways as much about discrimination against a particular class — undocumented aliens — as it is about the government's obligation to provide education. 457 U.S. at 218-20. Thus *Plyer* may be seen as merely a simple application of the anti-discrimination principle to illegal aliens, and not as a major shift in the Court's jurisprudence of rights. Moreover, to the extent that *Plyer* was based on a positive right to an education, it was implicitly narrowed by Martinez v. Bynum, 461 U.S. 321 (1983), which upheld a bona fide residency requirement for public education. *See also* Kadrmas v. Dickinson Pub. Schools, 108 S. Ct. 2481 (1988) (school bus fee is not unconstitutional).

324. *See, e.g.*, Bowen v. Gilliard, 483 U.S. 587 (1987) (review of welfare cases is deferential).

325. Similar implications exist for issues of racial equality. A discussion of those issues is beyond the scope of this Article. It should be noted, however, that cases involving welfare rights often involve underlying issues of both sexism and racism.

326. *See supra* notes 59-83 and accompanying text.

welfare benefits, disparately impacts upon women.

Dandridge is a clear example. Since at the time of the decision, AFDC was available only to single custodial parents (who are usually mothers), and their dependent children, and in some states, families with unemployed fathers,[327] most recipients were single women and their children. Given the structure of AFDC, the Court's opinion becomes especially telling. The state's decision to place a per family cap on payments was accepted by the Court as a rational method of encouraging employment.[328] But limiting per family rather than per capita grants is more tailored to restricting family size than to encouraging employment. As Professor Sunstein has noted, "[q]uite possibly, the statute reflected stereotypical conceptions about the poor in general and poor women in particular; that their poverty is a product of sloth, and they breed children to increase their welfare payments."[329] *Dandridge* reflected an insensitivity to the gender bias of the state's policy.[330]

Of equal importance, however, is *Dandridge's* message that women and not the state are responsible for problems of poverty and family size. Poor women with children have no claims of entitlement against the state.[331] Indeed, just as discrimination law teaches that pregnant women are not entitled to "special treatment," so, too, *Dandridge* teaches that impoverished women with large families are not entitled to additional benefits. In both *Dandridge* and the pregnancy cases, the Court sees the benefits which women need because of their childbearing and childrearing roles as a matter of legislative grace, not constitutional entitlement.

The judicial inability to recognize the societal responsibility for women's economic condition is even more striking in the Supreme Court's

327. *See* Law, *supra* note 73, at 1255-56. The blatant sex-bias of the unemployed fathers program, which assumed that only male incomes are critical to a family, was remediable under standard discrimination theory. The unemployed father program was held unconstitutional in Califano v. Wescott, 443 U.S. 76 (1979). In some sense, the structure of AFDC can be seen as benefitting women because it denies coverage to single men. On the other hand, this is a reflection of the assumption made in the 1930s about the inability of single women to support their children. While these assumptions may have been, and still are, rooted in economic reality, the structuring of the program that separates AFDC from other benefit programs, such as social security, reinforces the stigmatization and marginalization of poor women. For an excellent discussion of the patriarchical foundations of AFDC, see Law, *supra* note 73, at 1249.

328. Dandridge v. Williams, 397 U.S. 471, 486 (1971).

329. Sunstein, *supra* note 286, at 73.

330. Undoubtedly the Maryland statute was also influenced by racial stereotypes. *See also* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973), in which the Court was blind to the race discrimination issues underlying the state's policy.

331. *See supra* notes 312-14 and accompanying text.

abortion funding cases.[332] After the Supreme Court decided *Roe v. Wade*,[333] many states covered the cost of elective abortions under the Medicaid program.[334] As opposition to *Roe* intensified, several states discontinued coverage of elective abortions. In *Maher v. Roe*[335] the Court upheld that practice.

Maher stands as a polemic on the individualistic, liberal presuppositions of constitutional jurisprudence. It also demonstrates the limits of that jurisprudence for gender discrimination. The Court began its analysis by emphasizing that the Constitution does not create substantive entitlements. "The Constitution imposes no obligation on the states to pay the pregnancy-related medical expenses of indigent women, or indeed to pay any of the medical expenses of indigents."[336] Nevertheless, the Court conceded, constitutional limitations must be observed with respect to the lines drawn by the state in dispensing benefits it has chosen to give.[337] The question was whether the state drew the lines in a permissible fashion.

First, the Court relied on *Dandridge* and *Rodriguez* to find that although the Medicaid limitation affects only indigent women, it is not constitutionally suspect.[338] Second, it found that although *Roe v. Wade* declared the right to an abortion to be fundamental, it was a purely negative right not to have the state unduly burden women's ability to have an abortion.[339] This right was not impinged by the state's action because:

> [A]n indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth (but not abor-

332. *See* Williams v. Zbaraz, 448 U.S. 358 (1980); Harris v. McRae, 448 U.S. 297 (1980); Poelker v. Doe, 432 U.S. 519 (1977) (per curiam); Maher v. Roe, 432 U.S. 464 (1977); Beal v. Doe, 432 U.S. 438 (1977); Singleton v. Wulff, 428 U.S. 106 (1976).

333. 410 U.S. 113 (1973). As this article was going to press, the Supreme Court granted certiorari in a case which raises the question whether Roe v. Wade was correctly decided. Webster v. Reproductive Health Services, 851 F.2d 1071 (8th Cir. 1988), *cert. granted*, 57 U.S.L.W. 3441, 3442 (Jan. 9, 1989). Any narrowing or overruling of *Roe* would only reinforce the arguments made herein.

334. Title XIX of the Social Security Act, Pub. L. No. 89-97, 79 Stat. 343, 343-53 (1965) (current version at 42 U.S.C. § 1396-1396p (1982), did not require the states to fund nontherapeutic abortions through the Medicaid program. Beal v. Doe, 432 U.S. at 447.

335. 432 U.S. at 464. In *Beal v. Doe*, 432 U.S. at 430, decided the same day, the Court held that Title XIX of the Social Security Act, 79 Stat. 343-353, as amended, 42 U.S.C. §§ 1396-1396p (1982), did not require states to fund nontherapeutic abortions through the Medicaid program. 432 U.S. at 447.

336. Maher v. Roe, 432 U.S. at 469.

337. *Id.* at 469-70.

338. *Id.* at 470-71.

339. *Id.* at 473-74. For a good discussion of the Court's emphasis on the negative nature of the right enunciated in Maher v. Roe, see Appleton, *supra* note 285, at 730.

> tion). . . . The indigency that may make it difficult — and in some cases, perhaps impossible — for some women to have abortions is neither created nor in any way affected by the Connecticut regulation.[340]

As a result, the state regulation need only be scrutinized under the rational basis test, which it passed as a "rational means of encouraging childbirth."[341]

In *Harris v. McRae*,[342] the Court reaffirmed and expanded its holding in *Maher*. *McRae* involved the federal Hyde amendment,[343] which prohibited the federal government from paying for Medicaid abortions except where the life of the woman would be endangered by carrying the fetus to term, or in cases of rape or incest that had been reported to a law enforcement or public health agency.[344]

The issues in *McRae* were even more difficult than those in *Maher*, because the Court was faced with the question whether *medically necessary* abortions could be excluded from the Medicaid program, which usually pays for medical services. With the issue thus framed, the government's action came perilously close to penalizing a woman for the exercise of a constitutionally protected choice,[345] an act proscribed by a considerable body of precedent.[346] Nevertheless, the Court upheld the Hyde amendment,[347] because the government placed no obstacle in the woman's path, but merely encouraged childbirth, in lieu of abortion.[348] In addition, the Court stated that even if *Roe* was concerned with a woman's health:

---

340. Maher v. Roe, 432 U.S. 464, 474 (1977). Justice Brennan, in a dissent joined by Justices Marshall and Blackmun, chided the majority for insensitivity to the plight of the indigent. *Id.* at 483 (Brennan, J., dissenting).

341. *Id.* at 479.

342. 448 U.S. 297 (1980).

343. The Hyde amendment was attached annually to fiscal appropriations. The version before the Court in *McRae* appeared Act of Nov. 20, 1979, Pub. L. No. 96-123, § 109, 93 Stat. 923, 926 (1979).

344. 448 U.S. 297, 302 (1980). In Williams v. Zbaraz, 448 U.S. 358, 369 (1980), the Court ruled that states need not pay under Medicaid for abortions which were not reimbursed by the federal government.

345. *See* Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1375-76 (1984).

346. *E.g.*, Shapiro v. Thompson, 394 U.S. 618, 634 (1968); Sherbert v. Verner, 374 U.S. 398, 403-06 (1963).

347. Justices Brennan, Marshall, Blackmun and Stevens dissented. Only Justice Stevens voted with the majority in *Maher v. Roe*, 432 U.S. 464 (1977), and dissented in *McRae*. His ground for distinction was that the nontherapeutic abortions at stake in *Maher* by definition were outside the scope of Medicaid, while medically necessary abortions were within the scope of the statute. 448 U.S. at 349-50 (Stevens, J., dissenting).

348. Harris v. McRae, 448 U.S. at 315.

> [I]t simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices. Although government may not place obstacles in the path of a woman's exercise of freedom of choice, it need not remove those not of its own creation. Indigency falls in the latter category.[349]

McRae is a prime example of the view that the Constitution does not create substantive entitlements. In finding that the Hyde amendment did not violate the due process clause, the majority stated that any other holding "would mark a drastic change in our understanding of the Constitution."[350] The Constitution, the Court said, sets limits on governmental power; it does not require affirmative subsidies for the indigent.[351]

Thus, after *Maher* and *McRae*, the right to an abortion is a purely negative right to be left alone.[352] Government is under no obligation to make the right accessible or meaningful. Indeed, government can even draw classifications in such a way as to "tilt" the choice, by making childbirth more affordable than abortion.[353]

Maher and *McRae* reflect an almost primitive liberal view of the relationship between the individual and the state.[354] Both assert that the

---

349. *Id.* at 316. The Court also held that the Hyde amendment did not violate the equal protection clause of the fifth amendment. *Id.* at 322. Relying on *Maher*, the Court found that the amendment did not impinge on a suspect class, *id.* at 323, and that it served the rational basis of protecting potential life, *id.* at 324. In addition, the Court held that the amendment did not violate the religion clauses of the first amendment. *Id.* at 319-21.

350. *Id.* at 318.

351. *Id.*

352. MacKinnon argues that this limited view follows directly from Roe v. Wade, 410 U.S. 113 (1973), and its view that abortion is a private, voluntary matter. *See* C. MACKINNON, *supra* note 1, at 93-102. The future of even this limited view of abortion rights now appears questionable. *See supra* note 333.

353. Although the *McRae* Court was untroubled by the effect of a government policy encroaching on the right to abortion, in Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) the Court established a more exacting standard for determining the validity of a state's exercise of police powers that might infringe on property rights. In *Nollan* the Court held that a public access easement to private beachfront property, imposed as a condition to a rebuilding permit, amounted to a taking under the fifth amendment. The Court did not discuss whether the easement significantly diminished the value of the property and was unconvinced that the partial or indirect nature of the access rights amounted to less than a violation of the owner's rights under the fifth amendment.

354. The abortion funding cases have been subject to considerable scholarly criticism. *See, e.g.*, Goldstein, *A Critique of the Abortion Funding Decisions: On Private Rights in the Public Sector*, 1981 HASTINGS CONST. L.Q. 313 (1981) (discussing the anti-choice implications of the abortion funding cases); Perry, *Why the Supreme Court Was Plainly Wrong in the Hyde Amendment Case: A Brief Comment on Harris v. McRae*, 32 STAN. L. REV. 1113 (1980) (criticizing court's decision as constitutionaly inconsistent with decision in Roe v. Wade); Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmive Duties, and the Dilemna of Dependence*, 99 HARV. L. REV. 330, 335-40 (1985) (discussing notions of liberty and privacy in abortion cases). Appleton, *supra* note 285, is in

woman's indigency is not the result of any state action.[355] Yet, at least since the Legal Realists, it has been clear that the distribution of resources is partially a function of the legal allocation of property rights.[356] This is especially true in the case of abortion. To say that women's indigency is prior to the state is to ignore the state's role in supporting discriminatory practices which have kept women from participating fully in the labor market.[357] Indeed, it ignores the very lessons of those cases which recognized that centuries of discrimination have led to disparities in economic opportunites between men and women.[358] Further, the Court is blind to the many subtle ways that the law interacts with the structure of the workplace to make women economically dependent.[359] Indeed, what is so ironic about *McRae* and *Maher* is their failure to see that the inaccessibility of free abortions, combined with a legal system which does not require employers to grant maternity leaves, child-care leaves, or a flexible work schedule, creates the very indigency which prevents women from exercising the choice to have an abortion.[360] As Justice Marshall has noted, the restrictions on Medicaid abortions may well force a women either to risk an illegal abortion, or to give up all hope of escaping the cycle of poverty.[361] Indeed, after *McRae* a woman must face

---

accord with our thesis that the positive/negative rights distinction is critical to understanding these cases. However, she is less critical of the Court's distinction. *Id.* at 730-31. State courts have also been highly critical of Maher v. Roe, 432 U.S. 464 (1977) and Harris v. McRae, 448 U.S. 297 (1980). *See infra* note 397.

355. Harris v. McRae, 448 U.S. at 316-17; Maher v. Roe, 432 U.S. at 474. Even Justice Brennan's dissent in *McRae* seemed to accept the validity of that assertion. 448 U.S. at 334 (Brennan, J., dissenting) (characterizing medicaid benefits as "governmental largesse" and "governmental favors").

356. *See, e.g.*, Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 13-14, 21-26 (1927) (discussing the role of law in protecting property and regulating property acquisition); Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603, 605-06, 625-28 (1943)(describing the acquisition of property rights through market relationships).

357. *See, e.g.*, WOMEN'S WORK, MEN'S WORK, *supra* note 43, at 41-46, *passim* (documenting institutional and legal factors supporting employment discrimination); Law, *supra* note 73, at 1286-1305 (describing how the welfare system and U.S. Department of Labor contribute to sex discrimination).

358. *See, e.g.*, Johnson v. Transp. Agency, 480 U.S. 1442 (1987); Frontiero v. Richardson, 411 U.S. 677, 684-86 (1972).

359. *See supra* notes 97-103 and accompanying text.

360. This is especially true in the case of women seeking Medicaid abortions. Other than dependent minors, most women seeking Medicaid abortions are single mothers. *See* Law, *supra* note 73, at 1256, 1279. Indeed, the eligibility of single mothers for AFDC represents some recognition by the legal system that this group is economically disadvantaged precisely because it is comprised of single mothers. *See* Law, *supra* note 73, at 1253-56, 1258-59, 1281.

361. Beal v. Doe, 432 U.S. 438, 458 (1977) (Marshall, J., dissenting). Justice Marshall also pointed to the important racial implications of the decision. *Id.* at 459-60.

that dilemma even when the pregnancy will not only impose an economic liability, but also a risk to her health, further jeopardizing her earning capacity.

The Court's inability to perceive the context of women's financial dependence recalls the sex discrimination cases. Although the doctrines are technically distinguishable, both the sex discrimination and abortion funding cases rely on an abstracted, ahistorical vision. Discrimination law follows a fault model in order to determine when plaintiffs may be treated differently. This inquiry centers upon the invidiousness of the defendant's motives.[362] Similarly, the abortion funding and other fundamental rights cases rely heavily on the supposed "motives" and coerciveness of the legislature. Thus, in *Dandridge* the Court found the AFDC cap constitutional because the state could articulate a legitimate motive.[363] And in *McRae*, the Court exonerated the legislature because it did not "cause" the underlying problem.[364] All of these cases reflect the decontexualized nature of the inquiry, which sees neither individual defendants, nor the government, as having any responsibility to ensure that individuals achieve full equality and citizenship.

Other parallels between the fundamental rights and discrimination doctrines are equally striking. The Court's willingness to view the Hyde amendment as a decision not to fund abortions, rather than as a penalty imposed on women who have abortions,[365] is premised on the assumption that abortions are somehow "different" from other medical services and can therefore be considered separately for funding purposes. Thus, *McRae* echoes *Geduldig*. Both presume that pregnancy is a "special" physical condition, and that benefits generally available need not be provided for pregnancy related conditions.[366] The crucial assumptions are that pregnancy is a voluntary condition and that the norm is male — nonpregnancy. Thus, the same biases and limitations that appear in discrimination law inform fundamental rights analysis.

C. *The Negative Rights Thesis and the Limits of Discrimination Law*

The negative rights thesis suggests the limits of discrimination law

362. *See supra* notes 119-27 and accompanying text.

363. Dandridge v. Williams, 397 U.S. 471, 486 (1970). This is comparable to the Court's approach in Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977). *See supra* notes 241-44 and accompanying text.

364. Harris v. McRae, 448 U.S. 297, 316-17 (1980).

365. *See id.* at 317, n.19.

366. *See* Appleton, *supra* note 285, at 749.

to redress issues of gender inequality.[367] Without a recognition that women's needs arise in the context of discrimination and interdependency, women will always be subject to the accusation that since their problems are of their own making, any solutions constitute special or preferential treatment. As a result, many essential claims of women will remain unfulfilled.

Any broad attempt to scrutinize the differential allocation of rights and benefits would thus recognize interdependency and society's obligations to ensure that women have the means for achieving full citizenship. This would not only run counter to the Court's denial of social responsibility for class and gender subordination, but it would make society an active provider of individual rights. The very nature of the relationship between the individual and the state would change.

Neither the similar treatment nor the different treatment theories can transcend this fundamental problem. The similar treatment approach is deficient in two essential ways. First, as the difference scholars point out, it cannot claim rights where women are not perceived to be situated similarly to men. Second, it cannot achieve its goal—gender-neutral solutions—because in so doing it runs up against the wall of individualism and the belief in negative rights. Thus, proponents of the similar treatment approach, who believe that the solution to the maternity leave conundrum is universal parenting leave are short-sighted. Equally short-sighted are the biological difference scholars who argue that courts should recognize the gender differences between the sexes and accommodate those differences by establishing maternity leaves.

The fundamental rights cases teach that the legal regime is not about to establish a constitutional right to either maternity leaves for women or parenting leaves for both sexes. Current jurisprudence dictates that in either case there is no constitutionally explicit or implicit right at stake.[368] Of course, the legislature may provide such a right, but it is not

367. Professor Fox-Genovese argues that individualistic ideology represents a major stumbling block for the women's movement. *See* Fox-Genovese, *Women's Rights, Affirmative Action and the Myth of Individualism*, 54 GEO. WASH. L. REV. 338 *passim* (1986). Others have argued even more broadly that legal rights themselves can never advance equality. *See, e.g.*, Olsen, *supra* note 22 (discussing incoherencies that arise from application of rights theory to sexuality); Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1364-94 (1984) (discussing inherent instability of right of reproductive choice). For a feminist response arguing that rights dialectically interact with political movements, see Schneider, *The Dialectic of Rights and Politics: Perspectives From the Women's Movement*, 61 N.Y.U. L. REV. 589 (1986). In this Article, we do not engage in the debate over the nature or efficacy of rights in the abstract. We primarily examine the limitations in the current interpretation of rights *i.e.*, as negative rights.

368. *See* 410 U.S. at 33.

required to do so.[369] After all, the burdens faced by those who cannot afford the consequences of either losing a job or paying for childcare are not the government's "fault."[370] The government did not force the individual to have a child; nor is it responsible for the lack of parental resources to hire a caregiver.[371] Thus, the failure to provide parenting leaves does not "impinge" on any rights.[372] After all, "the Constitution does not provide judicial remedies for every social and economic ill."[373]

Of course, most feminists do not claim a constitutional right to maternity or parenting leaves. What they advocate are legislative programs. But even if enacted, such programs are vulnerable both judicially and politically to the force of the negative rights thesis. Indeed, the thesis is so powerful in constitutional law precisely because it resonates with deeply held political visions and intuitions that extend beyond constitutional interpretation.[374]

This is not to say that there are no social welfare programs. Rather, it is to say that women seeking programs to accommodate their needs are vulnerable to the charge of being a "special interest group," whether or not the program advocated is couched in gender neutral terms.[375] Our society does not recognize the deep interrelationships between its own structure and the needs of women seeking substantive rights. Thus, the history of social welfare legislation primarily affecting women (such as AFDC), is the history of political vulnerability and increased marginalization.[376] Like pregnancy, these programs are not seen as fulfilling the public interest.[377]

---

369. *See* Cal. Fed. 479 U.S. 272 (1987). But, as in that case, such programs may be attacked as preferential treatment. *See infra* notes 421-22 and accompanying text.

370. "The financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather her indigency." Harris v. McRae, 448 U.S. 297, 316 (1979).

371. *Id.* at 314.

372. The identical analysis could be used to establish that an employer is not discriminating through the failure to provide any such rights.

373. Lindsey v. Normet, 405 U.S. 56, 74 (1971).

374. *See* Fox-Genovese, *supra* note 367, *passim*; Michelman, *Welfare Rights*, *supra* note 296, at 659-64. For a study of the individualistic ethos in contemporary America, see R. BELLAH, HABITS OF THE HEART (1985).

375. For example, Ronald Reagan in 1984 was able successfully to characterize Mondale's advocacy of women's rights as mere catering to special interests. N.Y. Times, Jan. 27, 1984, at A1 col. 1.

376. Law discusses how this has been particularly true for women on AFDC. Law, *supra* note 73, at 1325-28. It is the rare program such as social security old age benefits which can escape that process. D. MOYNIHAN, *supra* note 67, at 112-13.

377. Compare veterans' benefits which are considered to promote the public interest. *See supra* notes 192-97 and accompanying text.

The vulnerability of such legislation is exacerbated by a jurisprudence which considers social welfare classifications to be matters of legislative discretion, and upholds them if they are minimally rational.[378] Thus, while there is good reason and a strong need for feminists to pursue the political process and seek legislative redress for their claims, they need to recognize that the deep, underlying negative view of government's role that hampers their success in the courtroom will also affect their success in the legislative arena.

D. *The Gender Bias of the Negative Rights Thesis*

Thus far we demonstrated how the Court has relied upon a highly individualistic, abstracted view of rights in both discrimination and welfare rights cases. This narrow, negative vision of women's legal rights fails to see the social context in which women's claims arise and consequently devalues their experiences. The result is that women's entitlements against society are dismissed as demands for special treatment.

Notwithstanding the Court's limited view of the Constitution in these areas, the Court in other areas is far more expansive. Indeed, in many cases the Court has effectively recognized the type of right it rejected in *Rodriguez* and *McRae*. In the next two sections we show how the demarcation between the claims the Court accepts or rejects as positive or negative rights is a contingent one, and how the determination reached is itself influenced by non-sex neutral norms.

A comparison between *Sherbert v. Verner*[379] and *Wimberly* is illustrative. Both involved unemployment compensation claims by individuals unable to work because of the structure of the workplace. In *Sherbert* the plaintiff was a Seventh Day Adventist who was unable to secure employment because of her unwillingness to violate her faith by working on Saturday. As a result, she was deemed "able to work and. . . available for work" and thus ineligible for unemployment compensation under state law.[380]

The *Sherbert* Court saw that the denial of unemployment benefits burdened the exercise of religion.[381] The fact that the statute did not expressly discriminate against religion, and that technically plaintiff was denied benefits because of her inability to work, did not lessen the coer-

378. *E.g.*, Dandridge v. Williams, 397 U.S. 471, 485-86 (1969).

379. 374 U.S. 398 (1963).

380. *Id.* at 400-01.

381. *Id.* at 404. This holding was recently reaffirmed in Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987).

cion on religious liberty.[382] Nor did the fact that the state had no duty to provide anyone with unemployment compensation absolve the state of its obligation to draw lines in a noncoercive manner.[383]

The *Sherbert* Court did not hold that the plaintiff was entitled to special treatment,[384] which could arguably be viewed as a violation of the establishment clause. Rather, the Court held that the government could not penalize the plaintiff. In *Wimberly*, however, despite FUTA's clear prohibition against discrimination due to pregnancy, which can be seen as paralleling the Constitution's explicit protection of the free exercise of religion, the Court failed to see the coercion inherent in the state scheme or how the state program adversly impacted on pregnancy. Instead, the Court charged the plaintiff with seeking a special exception for women.[385] Thus, the special treatment (or establishment) question which was downplayed in *Sherbert* became dispositive in *Wimberly*. What treatment is "special" depends on how you look at it.

Clearly, *Wimberly* was influenced once again by the primacy of the public sphere ideology and its assumption that women who are pregnant are unique and can be treated differently. In contrast, religious observance is not a "peculiarly female" activity. Some accommodations for religion, particularly those religions which do not deviate much from the majoritarian faiths,[386] are not viewed as extraordinary but necessary. What *Wimberly* and *Sherbert* together show is that what appears as "special treatment" and therefore a violation of the negative rights thesis, is predicated on deeply held assumptions and values, which are not sex-neutral.[387]

The abortion funding cases provide an even more telling example of

382. Sherbert v. Verner, 374 U.S. at 404.

383. *Id.*

384. Justice Stewart in a concurring opinion saw the holding as requiring special treatment, and approved of it on that account. He stated "[I] think our Constitution commands the positive protection by government of religious freedom. . ." 374 U.S. at 416 (Stewart, J., concurring).

385. 479 U.S. at 518.

386. Compare and contrast Wisconsin v. Yoder, 406 U.S. 205 (1972) (free exercise clause protects rights of Amish parents to keep children out of school) with Goldman v. Weinberger, 475 U.S. 503 (1986) (free exercise clause does not protect right of a Jewish military officer to wear a yarmulke).

387. This is not to say that "sexism " explains *Sherbert*. Rather, it is to say that the importance and value of religion and religious tolerance is widely recognized and valued, albeit not in all court cases, *e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 224 (1972); Abington School Dist. v. Schempp, 374 U.S. 203, 240 (1963) (Brennan, J., concurring); Zorach v. Clauson, 343 U.S. 306, 313 (1952). These activities are traditionally associated with the male or public sphere. Pregnancy and child-rearing are associated with the private sphere. Accommodations for them in the public sphere are seen as preferential treatment, rather than the lack of coercion.

the impact of the gender bias behind the Court's categorization of rights as positive or negative. In *Maher* and *McRae* the Court saw the issue as whether or not a governmental obligation existed to finance abortions. So framed, the answer clearly was 'no.' There are, however, other ways to state the issue.

Professor Tribe, for example, sees the right to an abortion as a relational right of women as a group against the subordination that follows when any woman lacks control over her reproductive destiny.[388] Under this vision, Tribe is able to argue that abortion rights are inalienable because they concern the place of women in society. Therefore abortion rights, like suffrage, cannot be predicated on financial resources.[389] Although few jurists have gone as far as Tribe in portraying the right to an abortion in non-individualistic terms,[390] many have found the Hyde amendment or similar state laws to infringe on the negative right to an abortion.[391]

For Justice Brennan, Congress' decision to fund one potential outcome of pregnancy—childbirth—while not funding another potential outcome, abortion, is critical.[392] By not treating the two outcomes equally, Brennan argues, the state has effectively coerced the indigent woman into choosing childbirth[393] and has made "an offer that the indi-

388. *See* Tribe, *supra* note 354, at 335-36.

389. *Id.* at 334-38.

390. *Cf.* Fox-Genovese, *supra* note 367, at 372 (feminists have espoused the right to an abortion in radically individualistic terms, which is in contradiction to feminists' calls for affirmative action and comparable worth).

391. *E.g.*, Harris v. McRae, 448 U.S. 297, 329 (1980) (Brennan, J., dissenting) (opinion joined by Justices Marshall and Blackmun); *id.* at 337 (Marshall, J., dissenting); *id.* at 348 (Blackmun, J., dissenting). Since Maher v. Roe, 432 U.S. 464 (1977), and *McRae* were decided, most state courts that have faced the issue have held that state laws denying Medicaid abortions when medically necessary violate various provisions of their state constitutions. *See* Doe v. Maher, 40 Conn. 394, 515 A.2d 134 (Conn. Super. Ct. 1986); Right to Choose v. Byrne, 91 N.J. 287, 450 A.2d 925 (1982); Committee to Defend Reproductive Rights v. Myers, 29 Cal.3d 252, 625 P. 2d 779 (1981), 172 Cal. Rptr. 866; Moe v. Secretary of Admin., 382 Mass. 629, 417 N.E.2d 387 (1981); Planned Parenthood Ass'n. v. Dep't. of Human Resources, 63 Or. App. 41, 663 P.2d 1247 (1983). *But see* Fischer v. Dep't. of Pub. Welfare, 502 A.2d 114 (Pa. 1985) (state restriction on abortion funding does not violate constitution).

392. Harris v. McRae 448 U.S. at 332-33 (Brennan, J., dissenting).

393. *Id.* at 333-34. The problem with Brennan's analysis is his acceptance of the proposition that the state has no prior obligation to fund either abortion or childbirth. *Id.* at 330. Were the state to take that position, indigent women would certainly be worse off than they are under the Hyde amendment. This is not to say that the majority was correct in its formalistic assertion that the greater power implies the lesser. Rather, it demonstrates the relational and contextual nature of the problem, and the fact that the need for abortion funding cannot be severed from the overarching need for economic support for childbearing activities. *See* Tribe, *supra* note 354, at 341-43.

gent woman cannot afford to refuse."[394] Thus, to Brennan, the Hyde amendment is both coercive and discriminatory as between childbirth and abortion.[395] As a result, the amendment violates the right of privacy because it impinges the exercise of free choice.[396] Many state courts have followed Brennan's approach in analyzing abortion funding restrictions under their own state constitutions.[397]

This approach demonstrates the malleability of the Court's approach. Once one recognizes that government can impinge upon individual liberty by withholding valuable benefits, the distinction between negative rights against governmental coercion and positive rights to benefits becomes manipulable. The principle that liberal government has no prior obligations to its citizens[398] loses much of its force once we recognize that benefit programs do exist, and must comply with constitutionally sound distinctions.[399] The world we live in is not purely libertarian and laissez-faire (indeed, there could be no such world), but rather one in which there is an active government and more than a semblance of a welfare state. Thus, most cases claiming that benefit programs are not structured in an equal fashion, or that institutions are constituted in an unequal way, can be subject to the type of analysis used by Justice Brennan in his *McRae* dissent.[400] Similarly, the fluidity of the positive/negative distinction is apparent in *Dandridge*,[401] which the Court viewed as involving a claim for positive welfare rights. This claim can of course be viewed equally as a claim for negative privacy rights, that is, a claim

394. Harris v. McRae, 448 U.S. at 333-34 (Brennan, J., dissenting).

395. *Id.*

396. *Id.* at 334-35. Many other governmental actions that condition benefits on the exercise of certain choices have been found unconstitutional. *E.g.*, Sherbert v. Verner, 374 U.S. 398, 410 (1963). For a general discussion of the doctrine of unconstitutional conditions, and how it was misapplied in *McRae*, see Kreimer, *supra* note 345, at 1340-77.

397. *E.g.*, Committee to Defend Reproductive Rights v. Myers, 29 Cal. 3d 252, 625 P.2d 779, 781, 786-98, 172 Cal. Rptr. 886 (1981); Doe v. Maher, 40 Conn. 344, 515 A.2d 134, 155-62 (Conn. Super. Ct. 1986); Right to Choose v. Byrne, 91 N.J. 287, 450 A.2d 925, 934-37 (1982). In his separate opinion in Right to Choose v. Byrne, Justice Pashman went so far as to argue that there was a fundamental right to health care violated by the denial of medicaid abortions. 450 A.2d at 941 n.1.

398. *E.g.*, Lindsey v. Normet, 405 U.S. 56, 74 (1972). Some state courts have explicitly rejected this premise as in conflict with their state constitutions. *See, e.g.*, Tucker v. Toia, 43 N.Y.2d 1, 7 (1977) (assistance to the needy is mandated by Article XVII, § I of New York State Constitution).

399. *E.g.*, Memorial Hosp. v. Maricopa County, 415 U.S. 250, 252-53; United States Dep't. of Agric. v. Moreno, 413 U.S. 528, 528-38 (1973).

400. *See supra* notes 395-99. This is similar to the analysis used in Shapiro v. Thompson, 394 U.S. 618 (1969), and Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966). *See supra* text and accompanying notes 291-304. In addition, of course, classifications drawn by welfare agencies remain subject to attack as a violation of authorizing statutes.

401. Dandridge v. Williams, 397 U.S. 471 (1970).

against governmental interference with decisions about family size. The interesting question is why the Court chooses to exercise its power to denominate rights as negative in some cases and not in others.

There is no fully satisfactory answer. Some of the inconsistencies in the caselaw are no doubt due in large part to the changing composition of the Court, the changing political climate in the nation, and the fears of judicial illegitimacy and manageability. In addition, the choices the Court makes coincide, to a large degree, with deep-seated intuitive beliefs about baseline norms of society. And these norms, in turn, reflect the underlying public sphere ideology of the nature of rights and obligations. Thus the universality of this ideology causes difficulties not only for discrimination law, but also for a fuller vision of rights.

For example, the issues at stake in a decision to abort are seldom purely individualistic. Rather, a woman is often faced with concerns not only for herself, but for her other children and family.[402] But the Court's individualistic stance blinds it to the relationships involved in the decision. Moreover, the Court fails to see that the control over procreation affects the status and citizenship of all women.[403] Unless all women have that power, their subordination and dependency is perpetuated.[404] In addition, the problems faced by pregnant poor women stem in large part from the legal and institutional structures which have kept women financially dependent. Thus, the Court's analysis derives from its inability to see the interdependency between indigent women and society.

The hidden assumptions in the abortion funding cases reflect more than a mere insensitivity to the problems faced by poor women. Like *Geduldig* and *Wimberly*, they are evidence that the baseline assumptions the Court (and, to a large degree, society) make about the obligations among individuals reflect a model predicated on the images of white, middle-class males.[405] The image of the individual as autonomous, and as wielding procreative rights only against the state, is an image reflecting the male experience. For most women, for whom sexuality itself has tra-

402. This issue is particularly significant in Harris v. McRae, 448 U.S. 297 (1980) which concerned medically necessary abortions for women on medicaid, many of whom will have had children prior to the pregnancy at issue. If the woman's health is jeopardized by the pregnancy, that may well affect her ability to care for her other children.

403. *See* Law, *supra* note 2, at 981; Tribe, *supra* note 354, at 335-40.

404. This is not to say that the decision is therefore primarily a collectivistic one, in conflict with the privacy right decreed in Roe v. Wade, 410 U.S. 113 (1973). *See* Fox-Genovese, *supra* note 367, at 370.

405. *See* Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 503 (1987) ("The debate over 'positive' and 'negative' rights also depends on the choice of baselines"); *see also infra* text accompanying note 412.

ditionally been an experience of dependency,[406] the notion of a self-sufficient individual independently exercising her right to an abortion is terribly incomplete. The interrelationship among reproduction, economic dependence, morality, and private sphere values is far more complex than the Court comprehends. Yet, the decision about an affirmative right or, indeed, any right to an abortion, has been based on the underlying notion that individuals are self-sufficient and autonomous in that regard.

Many feminists, perhaps for strategic reasons, have made the same error as the Court and have asserted that the right to an abortion is a private, negative right.[407] On the other hand, opponents of abortion take what at first glance appears to be a relational approach, emphasizing the woman's responsibility to the fetus and the primacy of public morality.[408] Both sides fail to recognize the critical point; women and society are not in an adversarial relationship. Women's right to abortion is hollow without a recognition of society's obligation to provide for both procreational control and childrearing. More generally, women cannot be fully equal citizens unless their interdependency with the rest of society is recognized. At the same time, society and its children are impoverished by the disempowerment of women. Thus, equality requires both the independence and the interdependence of women and society. As the abortion cases show, however, reliance on the ideology of the public sphere and its distorted emphasis on independence makes equality for women impossible.

E. *The Rights of the Public Sphere*

The influence of this ideology explains the lack of positive entitlements to private sphere needs such as medical care,[409] housing,[410] and personal income.[411] These are the "goods" that are most central to women's concerns. Yet, under public sphere ideology, despite their undeniable necessity, society feels no obligation to provide for these needs. Whatever is offered is mere privilege.

406. C. MACKINNON, *supra* note 1 at 36; Olsen, *supra* note 46, at 1574-75.

407. *See, e.g.*, G. STEINEM, OUTRAGEOUS ACTS AND EVERYDAY REBELLIONS 308 (1983); B. FRIEDAN, THE SECOND STAGE 326 (1981). Law and Fox-Genovese make the same criticism. Fox-Genovese, *supra* note 367, at 372-73; Law, *supra* note 2, at 1018-19.

408. *See, e.g.*, S. KRASON, ABORTION, POLITICS, MORALITY AND THE CONSTITUTION 457-63 (1984); Rue, *The Familial Context of Induced Abortion*, in RESTORING THE RIGHT TO LIFE 108-09 (1984).

409. Harris v. McRae, 448 U.S. 297 (1980).

410. Lindsey v. Normet, 405 U.S. 56 (1972).

411. Maher v. Roe, 432 U.S. 464, 470-71 (1977); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 29 (1973); Dandridge v. Williams, 397 U.S. 471, 484-87 (1970).

On the other hand, as *Sherbert* illustrates, the law does sometimes recognize a broader vision of rights, in which society is obligated to accommodate the needs of individuals. Rights of access to the legal system are a prime example. In several cases, the Court has found a substantive entitlement to at least minimal access to the courts.[412] In part this reflects the centrality of the legal process itself in our system. Access to suffrage is another example.[413] The question arises, why are these rights recognized by a legal system which often rejects claims for social entitlements?

The Court justifies its decisions on the theory that voting and legal representation are preservative of other rights.[414] But, of course, as dissenters have pointed out, there are other goods which are necessary to preserving freedom.[415] What distinguishes voting and legal access from these goods is their connection to the public sphere. Access to them, therefore, is access to the world of men.

In addition, both rights to the court system and to suffrage are process rights. They do not require taking diversity or "special" needs into account. Nor do they threaten the apparent distinctions between the public and private spheres. They are consistent with formalistic notions of equality.

As in the case of discrimination law, the Court is elevating concerns for process over substantive result.[416] Process rights are seen as critical

412. *E.g.*, Boddie v. Connecticut, 401 U.S. 371 (1971) (requirements for payments of court fees and costs to obtain a divorce are unconstitutional); Gideon v. Wainwright, 372 U.S. 335 (1963) (indigent criminal defendants must be provided with counsel); Griffin v. Illinois, 351 U.S. 12 (1956) (indigent criminal appellants must be provided with free trial transcript). *Cf.* Lassiter v. Dep't. of Social Services, 452 U.S. 18 (1981) (failure to appoint counsel for indigent parents in proceeding for termination of parental status not a due process violation).

413. *See* Kramer v. Union Free School Dist., 395 U.S. 621 (1969); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966). *But see* Ball v. James, 451 U.S. 355 (1981) and Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973) (upholding state laws imposing property requirements for eligibility to vote for directors of water district).

414. Harper v. Virginia Bd. of Elections, 383 U.S. at 667; *see also* Boddie v. Connecticut, 401 U.S. 371, 375-76 (1971).

415. *See, e.g.*, San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. at 63 (Brennan, J., dissenting). Education is a good that certainly falls in that category. The Court has effectively made education a quasi-positive right. *Rodriguez* held that it was not a fundamental right, but suggested that the state was required to provide a minimal amount of education. *Id.* at 24. Plyer v. Doe, 457 U.S. 202 (1982), repeated that education was not a fundamental right, but nevertheless held that it was a right entitled to greater judicial protection than other social welfare programs. *Id.* at 221. Thus in *Plyer*, the Court scrutinized the state statute denying illegal aliens public education with more rigor than usual under the rational basis test. *Id.* at 226-28.

416. *See supra* text accompanying notes 238-52.

because they ensure a "level playing field,"[417] and thus give each citizen the "equal opportunity" to compete in the public sphere. The equal opportunity that is achieved, however, exists—if at all—only in the abstract. The emphasis on process therefore is formalistic and decontextual. It reflects the individualistic, competitive, rights-based ethos associated with the public sphere ideology. It stands in stark contrast to the relational, interdependent and highly contextualized world associated with the private sphere. Thus the rights we recognize are due in part to a non-gender neutral value system.

Rights that coincide with individualistic notions of equal access and fair procedures are not perceived as special rights, but as rights necessary to prevent coercion or unfair advantage. While such rights also apply to women, they do not address the burdens and disadvantages of women's lives. Yet, other rights are denied to women because their claims are seen as affording preferential treatment for private concerns, and thereby expanding the role of government into the private realm. Thus we have no access rights to childcare, medical or nursing care. Finding such rights sounds constitutionally dissonant and therefore judicially illegitimate. Indeed, such rights seem so foreign that their recognition appears to be unmanageable. The result is that we see such rights as demands for substantive entitlements contrary to a liberal society.

Thus the dilemma: discrimination law cannot achieve gender equality because to do so violates the negative rights thesis, but the negative rights thesis is itself a product of non-sex neutral norms. Thus the issues and problems under both discrimination law and fundamental rights law are the same. Each strand of constitutional discourse reinforces the perception that what women claim is beyond the reach of the law. Thus, feminist claims are dissonant, and somehow beyond the scope of our jurisprudence.

V. CONCLUSION

The way out of the conundrum impeding gender equality is difficult to locate. We can postulate clever doctrinal models to establish a right to this or that to benefit women, but all such arguments will have little impact. All will appear to demand some special, substantive entitlement from government, to which no one is entitled.

As we have shown, discrimination law fails to provide any but the

417. This is one of the assumptions that underlies Ely's representation—reinforcing theory of judicial review. J. ELY, DEMOCRACY & DISTRUST (1980), *passim.*

most narrow and interstitial of remedies. It cannot address the structual inequities of the labor market that make rights of equal access hollow for women struggling to fulfill familial obligations. Nor can it provide the broadened vision of social entitlements or affirmative obligations necessary for achieving gender equality.

Moreover, the same shortcomings impede constitutional jurisprudence, which perceives a distinction between positive and negative rights, and dismisses the social, particularly economic, entitlements necessary for gender equality as improper claims for positive rights. Thus, neither doctrine can recognize the interdependency of public and private life that is critical for gender equality.

Ultimately, the problem lies not so much with any single legal doctrine, but with the ways in which legal doctrine itself is formulated.[418] In discrimination law, it is the abstraction and denial of the historical and social context of cases that blinds the Court to the sex-biased results that derive from supposedly sex-neutral rules. The same method of reasoning is employed to the same end in the fundamental rights cases. The manipulation of both doctrines obscures the Court's inability to recognize the non-sex neutral baseline assumptions behind the Court's analysis. In both doctrines, the concern for process, for formal rules, and for clearly delineated rights takes precedence over an understanding of the real-world context in which cases arise.[419]

The indictment is more than a charge of excessive formalism. It is, instead, a criticism of doctrines that view equality and the need to decide similar cases similarly from far too limited a perspective. Some scholars have argued that a feminist perspective would broaden and expand these narrow horizons.[420] It would infuse into the Court's vision an appreciation of the relational, non-individualistic aspects of legal problems.[421] Such an additional perspective would certainly have changed the Court's analysis in the pregnancy and abortion funding cases.

---

418. Others have also made the charge that legal doctrine cannot be neutral. *See, e.g.*, D. Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1740-62, 1776-78 (1976).

419. *See* Finley, Book Review, *supra* note 57, at 914-23; Scales, *supra* note 54, at 1380.

420. *See* Karst, *supra* note 245, at 486-96; Sherry, *supra* note 277, at 615. Our approach is influenced by Professor Scales who argues that merely "incorporating" the feminist or feminine perspective into our current notion of rights is inadequate. Scales, *supra* note 54, at 1382. She argues that feminism reveals the need radically to alter our jurisprudential priorities and stress facts over rules. *Id.* at 1388. She sees a feminist jurisprudence as emphasizing differentiation. *Id.* at 1387. We depart from her, however, when she turns to a psychoanalytically-based model. *See* Minow, *The Supreme Court, 1986 Term-Foreword: Justice Engendered,* 101 HARV. L. REV. 10 *passim* (1987).

421. *See* Karst, *supra* note 245, at 494-95; Sherry, *supra* note 277, at 581-82.

But meaningful equality requires more than an appreciation of the ways in which individual lives are intertwined. Ultimately, the very process of assuming that the starting point is level, and that the goal is neutral rules, guarantees unequal results. The process of abstraction ensures that individuals will be measured against a single norm, and that those whose life circumstances vary from that norm will be judged harshly.[422] Moreover, because that very process of abstraction is influenced by the ideology of the public sphere, women are likely to find their claims unmet both by the norms underlying the process and by the very methodology itself. Thus, if gender equality is ever to be realized, if women are ever to achieve status and respect as citizens who are valued for what they are, we must recognize that the task of deciding where there is discrimination, and when society owes substantive rights, is far more complex, and far less susceptible to easy formulations than the doctrine has heretofore allowed. The law must begin to see that individuals stand before courts and legislatures in different circumstances which cannot be ignored if equality is to result.[423] In essence, the courts must be open to the social context in which cases arise.

An understanding of the context in which cases arise would move doctrine away from its focus on abstraction, and individualized fault, and toward a recognition of interdependency and interrelatedness. Courts would begin to see that equality and full citizenship for women involve far more than mere rights of access to the public realms from which they were once excluded. It involves a recognition of and remedy for their economic vulnerability and, more fundamentally, a validation of the experiences and values that arise from the role of nurturer.[424] So, too, it must reject stereotyping and recognize the many differences among women.

The call for an equality that is grounded in social context and a respect for the fact that women lead different lives than men is not a prescription for a single blueprint for reform. Indeed, the formulation of any simple model would perpetuate the very processes of reasoning which now impede meaningful equality. Any model that attempted to be overreaching would necessarily obscure the many differences among women, and thereby threaten a return to stereotyping. Indeed, such a model would inevitably rely on abstractions (albeit a different system of abstractions from that now in place), thus creating a new hierarchy of values

422. Finley, *supra* note 2, at 1153.

423. Finley, *supra* note 57, at 943.

424. *See supra* text accompanying notes 55-107.

and rights. Again, the context would disappear and we would lose sight of how to achieve equality for real individuals, facing experiences and dilemmas both unique to them and interconnected with society.

The result of a more multifaceted or contextual approach to equality may at first glance appear to be discordant with traditional ideals of justice. After all, it would not attempt to develop rules that cross-cut factual contexts. Nor would it provide outcome determinative formulas. It would instead attempt to recognize the context in which claims arise, and in such a setting strive as best as possible to promote goals such as independence, interdependence, and diversity, which are crucial to ensuring full citizenship for all individuals and an end to subordination.

The charge against such an approach is that it invites excessive judicial discretion and bias. The charge is not specious, but must itself be taken in context for the regime we now have is not one of neutral rules.[425] On the contrary, it is a regime of rules that support male values and perpetuate institutional arrangements which have subordinated women. Thus, a move to a more contextualized understanding will not add to the power or function of the courts. It will only change the nature of the inquiry, hopefully to one which, by its actual process, does not discount the very real social and biological lives experienced by over one half of the human race.

425. This is a central teaching of both the legal realists and the critical legal studies scholars. *See* R. Gordon, *New Developments in Legal Theory*, in THE POLITICS OF LAW 281 (D. Kairys ed. 1982).