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Herma Hill Kay

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MODELS OF EQUALITY†

Herma Hill Kay*

I. INTRODUCTION

The movement to secure equality under the law for women and men, despite failing to obtain ratification of the Equal Rights Amendment,1 has achieved many successes. Advocates of sexual equality woke the United States Supreme Court from nearly a century of insensitivity to women's capabilities outside the home,2 stimulated it to consider men's capacity for nurturance,3 and persuaded the Court to adopt a heightened scrutiny for laws drawing classifications based on sex. The Court now requires that sex-based classifications "must serve important governmental objectives and must be substantially related to achievement of those objectives."4 When the Court had difficulty linking classifications concerning pregnancy with discrimination based on sex,5 Congress made its intent explicit and, through a statutory amendment, instructed the Court that it intended the term sex to include "pregnancy."6

Despite Congress's explicit instruction, today a specific disagree-

† An abbreviated version of this article was delivered at the University of Illinois College of Law, September 17, 1984, as the second 1983-84 lecture of the David C. Baum Memorial Lectures on Civil Liberties and Civil Rights.

* Professor of Law, University of California at Berkeley. B.A. 1956, Southern Methodist University; J.D. 1959, University of Chicago. I am grateful to Katharine Bartlett, Jesse Choper, Ruth Bader Ginsburg, Patricia King, Jean Love, Robert Post, Deborah Rhode, Marjorie Shultz, Michael Smith, Steven Sugarman, Karen Tokarz, Stephanie Wildman, and Wendy Williams for reading this paper and offering suggestions for its improvement. The views expressed here are my own.


2. Compare Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873) (rejecting a woman's challenge to her sex-based exclusion from the legal profession) with Reed v. Reed, 404 U.S. 71 (1971) (upholding a woman's challenge to her sex-based exclusion from serving as an estate administrator).

3. See, e.g., Caban v. Mohammed, 441 U.S. 380 (1979) (invalidating a New York statute requiring the biological mother's, but not the father's, consent to an illegitimate child's adoption).

4. Craig v. Boren, 429 U.S. 125 (1976). Justice Sandra Day O'Connor's instructions for how this test is to be applied, formulated in Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724-25 (1982), have become part of the test, Heckler v. Mathews, 104 S. Ct. 1387, 1397-98 (1984), and, if heeded by her colleagues, may increase its stringency.


ment that raises basic questions about the meaning of equality between men and women centers on how the Pregnancy Discrimination Act applies to state laws creating pregnancy leaves for women only.7 In this article, I do not intend to discuss the specific dispute over statutory interpretation.8 Instead, I examine the broader theoretical framework in which the dispute occurs.

The participants in the pregnancy leave debate have invoked two models of equality to justify their competing views. One position identifies itself as the “equality model”9 because it wishes to minimize the significance of reproductive differences between men and women. I refer to this position as the “assimilationist view”10 because it implies that the law should treat women and men as if they were interchangeable. The alternative position is conceptualized as the “positive action approach,”11 or the “pluralist view,”12 because it acknowledges that the capacity to become pregnant is one of the few immutable sex differences that distinguish women from men. Moreover, this position seeks to build a model of equality that will accommodate women’s fertility and thereby neutralize it as a barrier to personal achievement.13


9. Williams, supra note 7, at 196 (contrasting the “equality approach” with “the special treatment model”).


11. See Krieger & Cooney, supra note 7, at 515. I prefer to call this approach the “equal opportunity” model. Although this terminology may have drawbacks when used to describe a general theory of equality, see Schaar, Equality of Opportunity, and Beyond, in NOMOS IX: EQUALITY 228, 236-41 (1967), it does capture the notion that competitors should be placed on the same footing so that each may have the same advantages. Id. at 243.

12. See Note, supra note 8, at 707-09.

13. I do not mean, by the use of the term neutralize in this context, to convey, as have others, e.g., S. FIRESTONE, THE DIALECTIC OF SEX 196-200 (1970), that pregnancy should be eliminated in favor of artificial technology. Rather, I mean to suggest that reliance on the employed woman’s reproductive capacities be eliminated as a source of job discrimination. See Scales, Towards a Femi-
The specific dispute about pregnancy cannot be isolated from the broader theoretical framework in which it occurs. The two models of equality called upon to justify the competing views—the assimilationist model and the pluralist model—are alternative ways of describing how groups of people with differences and similarities ought to view each other in a just society.\(^{14}\) Scholars have used these models to analyze the normative behavior in such a society of groups consisting of different races,\(^{15}\) religions,\(^{16}\) and sexes,\(^{17}\) as well as groups characterized by varying degrees of physical handicap.\(^{18}\)

In this article, I examine the usefulness of the assimilationist model as a way of thinking about legal equality between women and men.\(^{19}\) My thesis is that the model of equality that the assimilationist view presupposes is more appropriately applied in the context of another movement for legal equality: that between blacks\(^{20}\) and whites in America. I will show that, although the model of racial equality is a compelling and useful one for sexual equality in those many areas where sex differences are irrelevant, it is an inadequate model for those few situations where the law must confront immutable sexual reproductive differences. When those differences are encountered, another model of equality, based on a pluralist view, must be developed if we hope to end the discrimination between men and women. The task of this article is not to offer a fully developed alternative model, but rather to begin work toward that end by clarifying the shortcomings of the assimilationist model in dealing with immutable sex differences.

II. DEVELOPMENT OF THE ASSIMILATIONIST MODEL: RACE AS A "SUSPECT CLASSIFICATION"

A. Historical Background

Equality is a deeply-held yet elusive ideal in American legal and political theory. Our Declaration of Independence numbered among its self-evident truths that all men are created equal. Yet, even at the time

\(^{14}\) See Note, supra note 8, at 704-09.

\(^{15}\) See Wasserstrom, supra note 10, at 604.

\(^{16}\) Id. at 604-05.

\(^{17}\) E. WOLGAST, EQUALITY AND THE RIGHTS OF WOMEN 18-36 (1980); Wasserstrom, supra note 10, at 605-06.

\(^{18}\) See id.

\(^{19}\) See also Rutherglen, Sexual Equality in Fringe-Benefit Plans, 65 VA. L. REV. 199, 205-16 (1979).

\(^{20}\) My discussion of the legal significance of race is limited to blacks. The legal principles developed in the context of race discrimination against blacks may, of course, apply to members of other minority groups as well. See infra note 72. But as Justice Marshall observed in Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 400 (1978) (separate opinion of Justice Marshall), "[t]he experience of Negroes in America has been different in kind, not just in degree, from that of other ethnic groups." I therefore focus on the model of racial equality fashioned in the context of relations between blacks and whites in America.
those words were written, the nation's founders did not comprehend that the generic term *men* might also include women as full participating members of the body politic.\(^{21}\) Nor did "men" refer to blacks,\(^{22}\) for the African slave traders repudiated the idea that blacks could be legally persons rather than property.\(^{23}\) A civil war finally created the political conditions necessary to amend the United States Constitution to abolish slavery\(^{24}\) and to create the prerequisite for an assimilationist view of racial equality: that the newly-freed blacks were human beings entitled to the equal protection of the laws.\(^{25}\) But in the years following the Civil War, the pervasive practice of segregation allowed Americans to avoid treating the former slaves and their descendants as persons entitled to equal dignity and respect.\(^{26}\) Instead, the United States Supreme Court endorsed a formal equality based on the separation of the races and premised on the provision of physically equal accommodations.\(^{27}\)

The unsettling impact of another war—World War II—was a crucial factor in releasing the social and political forces that dismantled legal segregation by race in the United States.\(^{28}\) That war also enabled the Supreme Court to crystalize its views about the degree of judicial scrutiny appropriate for laws discriminating on the basis of race by confronting that issue in a context that involved Japanese-Americans rather than blacks.\(^{29}\) Upholding by a narrow majority the intentional exclusion of Japanese-Americans from their West Coast homes, Justice Black laid the foundation for the doctrine of strict scrutiny\(^{30}\) that later embodied the assimilationist ideal in cases challenging race discrimination against blacks.\(^{31}\) Thereafter, others who claimed to be disadvantaged in ways

23. Id. at 407-08.
27. See, e.g., Plessy v. Ferguson, 163 U.S. 537 (1896) (sustaining Louisiana's law requiring "separate but equal" passenger coach accommodations for blacks and whites on intrastate railroads).
28. See W. CHAFE, WOMEN AND EQUALITY 84-87 (1977); G. MYRDAL, supra note 26, at 997-1024.
30. Korematsu, 323 U.S. at 216 (the vote was 6 to 3). See J. BAER, supra note 24, at 112-13.
31. See infra text following note 109. The word *suspect* was first juxtaposed with a classification affecting blacks in Bolling v. Sharpe, 347 U.S. 497 (1954) (challenging segregation in the public schools of the District of Columbia). Bolling was a companion case to Brown v. Board of Educ., 347 U.S. 483 (1954). The Bolling Court said, "[c]lassifications based solely upon race must be scruti-
analogous to the deprivations suffered by blacks, sought the greater protection of a presumption against classifications based on traits arguably similar to the immutable characteristic of race, such as alienage, \textsuperscript{32} illegitimacy, \textsuperscript{33} or sex. \textsuperscript{34} Few claimants have successfully brought themselves within the ambit of strict judicial scrutiny, \textsuperscript{35} however, and distinctions based on race continue to provide the paradigm for suspect classifications. \textsuperscript{36}

Still, the legal victories that black litigants secured during their long struggle to implement the fourteenth amendment's promise of racial equality\textsuperscript{37} continue to inspire other disadvantaged groups. The hope that social, political, and economic gains will follow the legal victories lends an added human importance to the litigation strategy. That hope, too, has inspired others to turn to the courts to build the legal foundations of their visions of a just society.

The judicial response to these varied initiatives reflects and shapes the changing content of the concept of equality outside, as well as inside, the courtroom. Because the aspirations of so many people depend on the outcome and reasoning of these cases, the court opinions take on a moral dimension that transcends their technical significance as legal precedents. In this atmosphere, the law becomes the object of struggle as both sides of a particular controversy seek to have the rule of law reflect their own conception of justice. To study these cases, therefore, is to reflect upon a legal microcosm of the struggle for social justice.

\textsuperscript{32} E.g., Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948). See generally L. Tribe, \textit{American Constitutional Law} 1052-56 (1978) (concluding that although alienage is not an unalterable trait, it is properly treated as a suspect classification). See also J. Ely, \textit{Democracy and Distrust} 148-50 (1980) (pointing out some shortcomings in using the "immutability" concept as a test of suspect classifications).

\textsuperscript{33} E.g., Mathews v. Lucas, 427 U.S. 495 (1976) (rejecting the argument that classifications based on illegitimacy are suspect and require strict scrutiny). See infra note 35.

\textsuperscript{34} E.g., Frontiero v. Richardson, 411 U.S. 677 (1973) (only four members of the Court accepted the argument that classifications based on sex are suspect and require strict scrutiny). See generally L. Tribe, \textit{supra} note 32, at 1063-66. See infra note 35.

\textsuperscript{35} The Court has not extended strict scrutiny to classifications based on illegitimacy, see L. Tribe, \textit{supra} note 32, at 1057-60, or sex, \textit{id.} at 1063-66. See generally J. Ely, \textit{supra} note 32, at 145-70.


B. Theoretical Analysis and Approach

In this article, I treat a group of selected cases as social indicators\(^{38}\) of American progress towards a society in which racial and sexual equality is the legal norm. I first examine the case law produced by litigants attacking discrimination based on race from the perspective of its tendency to empower the disadvantaged group, thereby enabling group members to improve their economic, political, and social position. I then compare the race cases with the case law produced by litigants attacking discrimination based on sex. Despite the efforts of the sex discrimination claimants to use the race discrimination cases as a legal precedent, the emerging patterns of power exchange from the sex and race cases are sufficiently different to confirm an underlying divergence in the relative social and legal status of the two groups. This variance in distribution of power suggests that differentiation by sex is a phenomenon at once more accepted and more difficult to change than differentiation by race.

Drawing on this analysis, I argue that the concept of racial equality differs significantly from the concept of sexual equality. In a just society, the assimilationist view\(^{39}\) holds that racial differences—primarily skin color—ultimately can be dismissed as irrelevant. The assimilationist view, however, must be modified in the case of sexual equality, for dismissing sex differences as irrelevant would not lead to a just society. Instead, a just society needs to recognize and accommodate sex differences in order to neutralize them as barriers to equal opportunity for personal achievement.

I. The First Step

My argument proceeds as follows. First, I briefly review cases chal-

\(^{38}\) For a doctrinal analysis of the sex antidiscrimination and reverse discrimination cases brought on both constitutional and statutory grounds, as well as the statutory race cases, see H. Kay, Text, Cases and Materials on Sex-Based Discrimination (2d ed. 1981 & Supp. 1983). See also Freedman, Sex Equality, Sex Differences, and the Supreme Court, 92 Yale L.J. 913 (1983) (analyzing the antidiscrimination and reverse discrimination sex cases, primarily those brought on constitutional grounds). The race antidiscrimination and reverse discrimination cases brought on constitutional grounds are discussed in L. Tribe, supra note 32.

As a methodological tool, my use of Supreme Court cases as indicators of social patterns is subject to certain limitations. The Supreme Court controls the major portion of its docket through its discretionary power to grant or deny the writ of certiorari. My universe of data, therefore, is not only restricted but may also be biased by the Justices’ priorities in selecting cases for review. Half of the cases discussed in this article, however, came to the Court by way of appeal. And a contrast as striking as the one identified infra notes 42-43 and accompanying text, that appears even in this rarified universe—namely, the difference between the one-way pattern of desired access shown in the race cases and the two-way pattern exhibited in the sex cases—indicates a pervasive difference in social patterns of power distribution that transcends these methodological limitations.

\(^{39}\) See Wasserstrom, supra note 10, at 604; Jaggar, supra note 10, at 275 (both describing the assimilationist ideal). On the question whether skin color is always irrelevant, see Kaplan, Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment, 61 Nw. U.L. Rev. 363, 383 (1966) (discussing the constitutionality of a hypothetical state law defining as negligent a person whose skin is darker than a specified shade and who walks on a road at night without wearing some light-colored item of clothing).
lenging race and sex discrimination in the United States Supreme Court on both constitutional\textsuperscript{40} and statutory\textsuperscript{41} grounds. I distinguish two subsets of cases: antidiscrimination cases, and benign or reverse discrimination cases. \textit{Antidiscrimination} cases are brought by members of a group who perceive themselves to be disadvantaged. These litigants seek to remove racial or sexual barriers that prevent access by the disadvantaged group to rights or opportunities enjoyed by the privileged group. \textit{Reverse discrimination} describes cases brought by members of the advantaged group who seek to neutralize (in race cases) or extend (in sex cases) a preference thought to be benign that has been made available to the otherwise disadvantaged group.

Examined from this perspective, the race and sex cases present different models of legal change designed to secure social justice. The antidiscrimination race cases show a one-way model of desired access: black litigants asking to be treated like whites in specified circumstances.\textsuperscript{42} The antidiscrimination sex cases, however, show a two-way model of desired access: women asking to be treated like men in the public sphere and men asking to be treated like women, primarily in the private sphere.\textsuperscript{43} Thus, while empowerment in the successful race cases

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\item I discuss primarily those cases arising under the following constitutional provisions: the due process clause of the fifth amendment; the thirteenth amendment; the privileges and immunities, and equal protection clauses of the fourteenth amendment; and the fifteenth amendment.
\item The text focuses on cases in which blacks sought first to remove the legal barriers imposed by segregation, and, more recently, to overcome the continuing effects of segregation and past racial discrimination. In recent cases, whites and other minority group plaintiffs who work or study in black-dominated educational institutions have complained of racial discrimination against them by blacks. \textit{See, e.g.}, Dybczak v. Tuskegee Inst., 737 F.2d 1524 (11th Cir. 1984) (white male, formerly employed as Dean of Engineering at Tuskegee, fails to prove race discrimination in his non-reappointment); Williams v. Howard Univ., 528 F.2d 658, 660 (D.C. Cir. 1976) (white male student seeking readmission to Howard University Medical College fails to prove race discrimination); Turgeon v. Howard Univ., 571 F. Supp. 679, 686-87 (D.D.C. 1983) (white woman of French ancestry proves in Title VII suit that she was discharged from her position as a teacher of Romance languages at Howard University because of her race; reinstatement ordered); Sanford v. Howard Univ., 415 F. Supp. 23, 27-28 (D.D.C. 1976) (American Indian woman failed to prove that she was suspended from the Howard University School of Social Work because of her race). To the extent that these and other similar cases indicate the beginning of a two-way model in the race discrimination cases, they are a welcome indication that blacks have acquired power and privilege in American society that whites and other minority group members seek to share. But the cases do not refute the earlier and continuing contrast between the race and sex cases shown in the text, nor do they dispel the fact that blacks as a group are disadvantaged in our society when compared to whites as a group.
\item This alignment of the cases reflects the traditional separation of the sexes into different spheres of authority: women supposedly in control in the home, men in power in the external world. \textit{See, e.g.}, J. ELSTAIN, \textit{PUBLIC MAN, PRIVATE WOMAN} (1981); E. JANEWAY, \textit{MAN'S WORLD, WOMAN'S PLACE} (1971); Olsen, \textit{The Family and the Market: A Study of Ideology and Legal Reform}, 96 HARV. L. REV. 1497 (1983). I do not advocate continuing this traditional division. \textit{See infra} text accompanying notes 227-29. Nor do I wish to suggest that these cases imply that we are moving toward an androgynous society. The contrast between the one-way model of access characteristic of the race antidiscrimination cases and the two-way model that appears in the sex cases, however, seems to confirm the perception that many people in our society continue to value sex
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moves only from the privileged white group to the disadvantaged black one, in the successful sex cases empowerment flows in both directions: from women to men, primarily in the family context, as well as from men to women, primarily in the commercial setting.

The benign or reverse discrimination race cases also present a one-way model: white litigants seeking to eliminate a particular limited opportunity made available to blacks. Unlike the antidiscrimination cases, whites in the reverse discrimination cases do not merely claim that they are excluded because of their race, but rather that they are excluded because of a priority based on the race of the otherwise disadvantaged group. The white plaintiffs assert that if the preference for blacks were removed, the plaintiffs could obtain the opportunity they seek.

I find that the benign or reverse discrimination sex cases are strikingly different. Since 1971, in the sex cases that the Supreme Court has identified as examples of permissible benign discrimination, the plaintiffs are men who seek to preserve and extend to themselves the preference designed for women. Thus, the cases confirm the two-way pattern of desired access to power shown in the sex antidiscrimination cases. Only in those instances in which white males attack hiring or promotional preferences favoring women does the pattern of the race reverse discrimination cases appear. Preferences for blacks and other minority group members are frequently at issue there as well. I conclude, therefore, that the category of benign discrimination sex cases is ultimately not distinguishable from the larger group of sex antidiscrimination cases.

Moreover, commentators and judges have generally considered the use of benign preferential treatment in the race cases, if limited in scope and duration, beneficial to blacks as a group because the preference is designed to further their legal assimilation with whites. But the benign discrimination upheld for women was initially justified on the basis of the "different functions in life which they perform." Because physical childbearing cannot be exchanged between men and women and social childrearing functions traditionally have not been so exchanged, commentators have rejected as harmful to women as a group the preferences for roles, but not race roles. See Rutherford, supra note 19, at 205-12. The sex antidiscrimination cases brought by men are largely, but not exclusively, directed at the private sphere. See infra text accompanying notes 219-21.

44. See generally Wasserstrom, supra note 10, at 615-22; Edwards, Preferential Remedies and Affirmative Action in Employment in the Wake of Bakke, 1979 WASH. U.L.Q. 113, 122-36. The cost of such preferences for blacks has been identified by Bell, Bakke, Minority Admissions, and the Usual Price of Racial Remedies, 67 CALIF. L. REV. 3 (1979); and by Kaplan, supra note 39, at 369-80 (discussing a hypothetical governmental requirement that private employers grant employment preferences to blacks). For a recent summary of the arguments justifying affirmative action, see Segers, Justifying Affirmative Action, in ELUSIVE EQUALITY: LIBERALISM, AFFIRMATIVE ACTION, AND SOCIAL CHANGE IN AMERICA 75 (1982) [hereinafter cited as ELUSIVE EQUALITY].

45. Muller v. Oregon, 208 U.S. 412, 423 (1908) (upholding an Oregon statute prohibiting the employment of women "in any mechanical establishment, or factory, or laundry" for more than 10 hours per day). See generally J. Baer, CHAINS OF PROTECTION (1978).
granted to women on that basis.46

Based upon this analysis of the race and sex cases, I contend that the sex discrimination model is more firmly embedded in American law than the race discrimination model because the former both confers power and imposes disadvantages upon both groups of litigants rather than one. Therefore, the eradication of sex discrimination will require a more fundamental alteration of the existing legal and social order than the elimination of race discrimination has been thought to demand, because it requires the surrender of power by both groups rather than by one. But if both groups can perceive this mutual surrender as an exchange that will be mutually beneficial, some of the formidable psychological barriers to social restructuring along cross-sexual lines may be lessened. In that case, both sexes might discover a shared incentive for change that would help minimize the realization that men may be called upon initially to surrender gains that are more highly prized by a paternalistic society than those that women must relinquish.

2. The Second Step

After analyzing race and sex cases, I also examine a subgroup of the sex antidiscrimination cases in which the courts initially rejected the claim that sex discrimination had occurred. These cases all share a common trait: some members of one sex were treated differently than other members of that same sex according to whether they exhibited a particular feature, such as marital status, age, facial hair, weight, or pregnancy. But no members of the other sex were present for comparison, or, if present, were not available for direct comparison about the feature at issue. Under these circumstances, the judges held that the discrimination complained of was not based on sex, but on the distinguishing feature. I believe that these cases mark the limits of the capacity of the antidiscrimination strategy to achieve its goal of unrestricted access, for if there is no readily identifiable member of the opposite sex to use as the standard of comparison, the claim of discrimination fails.47

I also believe that these cases disclose a weakness in the analogy between the model of racial equality and the model of sexual equality. The ideal of racial equality is premised on a society’s ability to ignore race as a salient characteristic, but an adequate model of sexual equality will always confront sexual reproductive differences.48 An equality model designed to overcome the disadvantages that are the contemporary legacy of an irrational prejudice focusing on the superficial characteristic of skin color is an inadequate blueprint for a society that must


eliminate its stereotypical attitudes toward both sexes while accommodating their different physical functions.

III. APPLYING THE ASSIMILATIONIST MODEL IN RACE AND SEX LITIGATION

A. Race Discrimination

The claim that the race antidiscrimination cases display only a one-way model of desired access—that of disadvantaged blacks seeking admittance on equal terms to the rights and opportunities available to privileged whites—should not be a surprising one. Viewed as indicators of social progress toward equality rather than as sources of constitutional doctrine, the race discrimination cases amply confirm Richard Wasserstrom's judgment that "[t]o be black [in American society] is to be a member of what was a despised minority and what is still a disliked and oppressed one." What is surprising in historical context is that an assimilationist model has ultimately been applied as the legal basis for racial equality.

I. Antidiscrimination Litigation

At the close of the Civil War, the rights granted to the emancipated slaves were briefly protected during the Reconstruction period. The compromises surrounding Rutherford B. Hayes's selection as President in 1877, however, permitted the South to reestablish white supremacy. Conforming with the prevailing national mood, the United States Supreme Court invalidated or significantly narrowed federal laws which the Reconstruction Congress enacted to safeguard the freedmen from their former owners. By 1883, even if one could no longer say, following Chief Justice Taney's earlier dictum, that a black man "had no rights which the white man was bound to respect," one could conclude safely that blacks did not enjoy legal privileges denied to whites. On the

49. Wasserstrom, supra note 10, at 586.
50. See, e.g., E. BARRETT & W. COHEN, CASES AND MATERIALS ON CONSTITUTIONAL LAW 1005 (7th ed. 1985) (reporting that there were 1271 prosecutions under the criminal provisions of the Civil Rights Acts in the southern federal courts in the peak year of 1873, but that the number had dropped to 25 by 1878). See also G. MYRDAL, supra note 26, at 446-48. See generally 6 C. FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 89-117 (1971).
51. See generally C. WOODWARD, REUNION AND REACTION 221-34 (1956). The history of this period is recounted briefly by Justice Marshall's separate opinion in Bakke, 438 U.S. at 390-94.
52. E.g., Civil Rights Cases, 109 U.S. at 3 (invalidating public accommodations provisions of the Civil Rights Act of 1875); United States v. Harris, 106 U.S. 629 (1882) (invalidating the anti-lynching provisions of the Civil Rights Act of 1871); United States v. Reese, 92 U.S. 214 (1875) (invalidating voting rights provisions of the Civil Rights Act of 1870). See R. KLUGER, supra note 37, at 60.
53. E.g., United States v. Cruikshank, 92 U.S. 542 (1875) (indictment against members of a lynch mob accused of killing two blacks held not an offense under the Civil Rights Act of 1870). See R. KLUGER, supra note 37, at 60-61.
contrary, in a criminal case the Supreme Court already had laid the foundation for the later approval of a doctrine that secured for whites privileges denied to blacks in the name of equality.

a. Constitutional Cases

One might reasonably assume that the chief constitutional source for the assimilationist model of racial equality is the equal protection clause of the fourteenth amendment, which first placed those words in the Constitution. But the clause is not limited to race, and the concept of equality it embodies, like that included in the Declaration of Independence, owes more to natural law concepts of the inherent equality of all men than to a considered belief that blacks were equal to whites on any scale of measurement. Still, as the Supreme Court recognized in its initial discussion of the Civil War amendments, the intended benefi-

55. Pace v. Alabama, 106 U.S. 583, 585 (1882). The case involved prosecution for interracial sexual intercourse between a black man and a white woman. The Court reasoned that since "[t]he punishment of each offending person, whether black or white, is the same," there had been no denial of equal protection to the black defendant. The miscegenation cases are not inconsistent with the one-way pattern of access in the race cases. Interracial assimilation through sexual relations was publicly denounced as debasing the purity of the white race. Myrdal reports that although illicit sexual relations between white men and black women were condoned, "[a] white woman's relation with a Negro man is met by the full fury of anti-amalgamation sanctions." G. Myrdal, supra note 26, at 56. See also id. at 60 (reporting that the bar against intermarriage and sexual intercourse between black men and white women was given highest priority on the Southern white man's rank order of discrimination). A white woman who sought to marry a black man was not, therefore, seeking access to a position of power held by him. Rather, she was renouncing her own privileged position as a respected member of the white race.

56. The Supreme Court approved the so-called "separate but equal" doctrine that permitted racial segregation if the "separate" facilities and accommodations provided for blacks were "equal" to those available to whites in Plessy v. Ferguson, 163 U.S. 537 (1896) (upholding a Louisiana statute requiring separate but equal passenger accommodations on railroad trains). See also McCabe v. Atchison, Topeka & Santa Fe Ry. Co., 235 U.S. 151 (1914) (invalidating that portion of Oklahoma's Separate Coach Law which allowed the provision of sleeping cars, dining cars, and chair cars for the use of white passengers without providing similar accommodations for black travelers). The Jim Crow laws typically also provided for sex separation: women needed to have separate coaches so that they might be spared the company of men who wished to smoke, drink, or engage in other manly conduct. See Tindall, The Color Line, in The Origins of Segregation 6, 12-14 (J. Williamson ed. 1968). See also Civil Rights Cases, 109 U.S. at 5 (includes a complaint of a black man and his wife that she was excluded from the ladies' car); Bass v. Chicago Nw. Ry. Co., 36 Wis. 450 (1874) (complaint of man who was forcibly ejected from the ladies' car).

57. See L. Tribe, supra note 32, at 992. See also J. Baer, supra note 24, at 77-79 (tracing the origin of the phrase "equal protection").

58. J. Baer, supra note 24, at 87-94 (discussing debate in the Thirty-Ninth Congress over the application of the fourteenth amendment to Orientals and women).


60. See, e.g., J. Baer, supra note 24, at 44-46 (discussing the influence of John Locke); Foster, The Roots of American Notions About Equality, in Elusive Equality, supra note 44, at 11 (discussing the influence of John Locke and Thomas Hobbes).

61. J. Baer, supra note 24, at 80-87, 102.

62. Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1873). The Court said that: on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-
ciaries were the freed slaves. The Court repeated this observation and relied on the antidiscriminatory purpose of the fourteenth amendment to invalidate, under the equal protection clause, a statute discriminating on the basis of color in the selection of jurors. The Court later held, however, that private discrimination based on color was not prohibited by that clause. Far from embodying an assimilationist view of racial equality, the Supreme Court initially held the equal protection clause compatible with a society based on governmentally enforced racial separation.

Moreover, the Court's endorsement of the "separate but equal" doctrine of racial justice not only implicitly rejected the assimilationist model, which assumes that racial differences are irrelevant, but also enshrined in the Constitution the express judicial acceptance of the validity of racial differences. Because the Court perceived these racial differences as natural ones, a majority of the Justices thought the law was made freemen and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.

Id. at 71. See generally C. FAIRMAN, supra note 50, at 1301-88.

63. Strauder v. West Virginia, 100 U.S. 303 (1880). The Court said: The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race, the right to exemption from unfriendly legislation against them, distinctively as colored, exemption from legal discriminations, implying inferiority in civil society, lessening the security of their employment of the rights which others enjoy, and discriminations which are steps toward reducing them to the condition of a subject race.

Id. at 307-08.

64. Civil Rights Cases, 109 U.S. at 21-25 (denial of access because of color to public accommodations offered to whites by private businesses held not to violate the fourteenth amendment because no "state action" was involved). The litigation consolidated five cases. Mr. Stanley in Kansas and Mr. Nichols in Missouri were denied hotel accommodations; Mr. Ryan was refused a seat in the dress circle in Maguire's theater in San Francisco; Mr. Singleton was denied access to the Grand Opera House in New York, and Mrs. Robinson was not allowed to sit in the ladies' coach on the Memphis and Charleston Railroad.

Nor did this private conduct amount to the reimposition of slavery forbidden by the thirteenth amendment. Justice Bradley's opinion for the Court on the thirteenth amendment issue clearly disclosed that he preferred a social model of racial separation to an assimilationist ideal: There were thousands of free colored people in this country before the abolition of slavery, enjoying all the essential rights of life, liberty and property the same as white citizens; yet no one, at that time, thought that it was any invasion of his personal status as a freeman because he was not admitted to all the privileges enjoyed by white citizens, or because he was subjected to discriminations in the enjoyment of accommodations in inns, public conveyances and places of amusement. Mere discriminations on account of race or color were not regarded as badges of slavery.

Id. at 25.

65. Plessy v. Ferguson, 163 U.S. at 544, where the Court said: The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power.

66. See Wasserstrom, supra note 10, at 604.
powerless to alter them. Thus, American institutional racial segregation was built on the factual ground of perceived racial differences and on the legal bedrock of judicial denial that classifications based on those differences constituted prohibited discrimination. So rigid and pervasive did that institution become that, in 1942, Gunnar Myrdal was able to describe it as a caste system. He observed that the caste line "will remain fixed until it becomes possible for a person to pass legitimately from the lower caste to the higher caste without misrepresentation of his origin." That possibility, in turn, could not be realized until one could overcome the obstacles posed by the belief that racial differences were significant. Nothing short of an assimilationist model of racial justice could serve as an adequate legal strategy for attacking segregation. Paradoxically, the equal protection clause would prove to be the best constitutional source for that arduous task.

Although other racial minority groups availed themselves of the protections of the fourteenth amendment and significantly enlarged its interpretive scope, black litigants, and primarily the National Associa-

67. 163 U.S. at 551 ("Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation."). For a discussion of racial differences as perceived by American whites, see G. MYRDAL, supra note 26, at 113-53. Cf. Morgan v. Virginia, 328 U.S. 373 (1946) (invalidating under the commerce clause a Virginia statute requiring racial separation on interstate and intrastate motor buses for lack of a uniform standard by which to identify the race of passengers).

68. G. MYRDAL, supra note 26, at 667-69.

69. Id. at 668.

70. Recall Wasserstrom's telling point that in a culture in which race is an unimportant characteristic of individuals, "it would literally make no sense to say of a person that he or she was 'passing'." Wasserstrom, supra note 10, at 585. I speak here only of physical differences. I do not mean to suggest that there are not significant differences between the cultural heritages of blacks and whites in America. Indeed, white culture in the south prior to the Civil War was shaped in important ways by black culture. See J. WILLIAMSON, THE CRUCIBLE OF RACE: BLACK-WHITE RELATIONS IN THE AMERICAN SOUTH DURING EMANCIPATION 35-43 (1984).

71. The irony of this point was not lost upon Gunnar Myrdal:

[T]he legal adherence to the principle of equality gives the Southern liberal a vantage point in his work to improve the status of the Negroes and race relations. . . . it gives the Negro people a firm legal basis for their fight against social segregation and discrimination. Since the two are inseparable, the fight against inequality challenges the whole segregation system. The National Association for the Advancement of Colored People has had, from the very beginning, the constitutional provisions for equality as its sword and shield.

G. MYRDAL, supra note 26, at 581.

72. Orientals, whose claim to the protection of the fourteenth amendment had been debated by the Thirty-Ninth Congress, see J. BAER, supra note 24, at 89-90, were brought within its terms in Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886) (discriminatory application of a facially neutral ordinance to Chinese laundry owners violates equal protection). Although the curfew and location restrictions imposed on Americans of Japanese descent were upheld in HIRONAYASHI and Korematsu against claims that they violated the equal protection clause, the Court first enunciated its strict scrutiny standard for racial classifications in Korematsu, 323 U.S. at 216. See supra text accompanying note 29.

Mexican-Americans subsequently proved themselves to constitute "a distinct class . . . single[d] out . . . for different treatment not based on some reasonable classification" in Hernandez v. Texas, 347 U.S. 475, 478 (1954). The Court held that the exclusion of persons of Mexican descent from service as jury commissioners, and grand and petit jurors, denied equal protection to a Mexican-American defendant on trial for murder. The Court noted that "[t]he Fourteenth Amendment
tion for the Advancement of Colored People (NAACP), bore the chief legal offensive against segregation. From its inception, the NAACP waged an important part of its battle for equality in the courts. Given the widespread social separation of the black and white races, the very appearance of outstanding black lawyers who presented the cases in court was a powerful argument for the assimilationist view of racial equality.

Black litigants in the early antidiscrimination cases sought various specific objectives. One objective was to invalidate state-imposed restrictions on their exercise of the right to vote—such as grandfather clauses which, when used with literacy tests, effectively limited access to the ballots on their exercise of the right to vote. The further objective was to

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is not directed solely against discrimination due to a ‘two-class theory’—that is, based upon differences between white and Negro.” Id. at 478. See generally Delgado & Palacios, Mexican-Americans as a Legally Cognizable Class Under Rule 23 and the Equal Protection Clause, 50 NOTRE DAME LAW. 393 (1975).


74. See R. KLUGER, supra note 37, at 149-50 (Charles Houston), 186-92 (Thurgood Marshall).

The personal cost of serving as a de facto representative of one’s race may be quite high. See Matthews, In Black And White, N.Y. Times, Aug. 23, 1984, at 31-Y, col. 2.

75. E.g., Guinn v. United States, 238 U.S. 347 (1915) (invalidating Oklahoma’s literacy test for voters and its “grandfather” clause that exempted most white voters). Guinn was the first class-wide case taken on by the NAACP, which appeared as amicus curiae in the case at the Supreme Court level. See R. KLUGER, supra note 37, at 102-04. Oklahoma subsequently attempted to evade the Guinn holding by setting a registration period limited to two weeks for those voters (i.e., blacks) who were not registered to vote in the election of 1914. This evasive practice was challenged successfully under the fifteenth amendment in Lane v. Wilson, 307 U.S. 268 (1939). Justice Frankfurter observed for the Court that “[t]he Amendment nullifies sophisticated as well as simple-minded modes of discrimination.” Id. at 275.

76. The “white primary” was invalidated initially only when it resulted from state action. See Nixon v. Herndon, 273 U.S. 536 (1927) (holding that a Texas statute declaring “a negro” ineligible to vote in a Democratic primary party election violates the fourteenth amendment; unnecessary to consider application of fifteenth amendment); Nixon v. Condon, 286 U.S. 73 (1932) (striking down exclusion of black voter from Democratic party primary election by state executive committee whose powers were drawn not from the state Democratic convention, but from a delegation of power by the Texas legislature). The white primary was acceptable when the party was careful to limit its membership without relying on state power. See Grove v. Townsend, 295 U.S. 45 (1935) (holding that there was no state action or official involvement in a resolution of the state Democratic convention limiting party membership to white citizens of Texas eligible to vote). After the Court held in United States v. Classic, 313 U.S. 299 (1941) that the primary election was part of the general election, and, as such, controlled by the United States Constitution, Grove was overruled. See Smith v. Allwright, 321 U.S. 649 (1944) (resolution of state convention was state action which violated the fifteenth amendment). Accord Terry v. Adams, 345 U.S. 461 (1953) (exclusion of blacks from elections held by the Jaybird Democratic Association violated the fifteenth amendment). See L. TRIBE, supra note 32, at 787-90. See also G. MYRDAL, supra note 26, at 479-81.


78. Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966) (invalidating a poll tax on the grounds that basing voter qualification upon wealth constituted an invidious discrimination). Harper did not deal, however, with the use of the poll tax as a device to prevent blacks from voting. See G. MYRDAL, supra note 26, at 481-83. See also J. ELY, supra note 32, at 116-25 (discussing the propriety of judicial intervention to protect voting rights).
end the all-white jury by getting blacks on jury selection lists for both grand and petit juries. In addition, the litigants wanted to acquire and occupy residential property in locations of their choice.

Stimulated by a 1929 foundation grant, however, the NAACP chose segregation in the public schools as its primary legal target. The campaign began at a weak point in the fortress of separate but equal education—professional schools, in particular, law schools. A series of cases established that separate law schools for black applicants either did not exist or, where they were hastily thrown together under the pressure of litigation, were not equal. The defenders of separate but equal schooling in Oklahoma tried to minimize their defeat in the final case of the series: they grudgingly admitted a black applicant to the graduate division of the University of Oklahoma, only to segregate him from his classmates in the lecture hall, the library, and the classroom. Faced with this dogged and petty insistence on legal form, the Supreme Court acknowledged the underlying reality: classifications in graduate education based on skin color were not harmless to those whose skin color was black.

Five years later, the Court, speaking unanimously through Chief
Justice Warren in *Brown v. Board of Education*,\(^90\) applied its new insight to black students attending segregated grammar and high schools. They, too, were placed at risk of permanent psychological damage\(^91\) by their enforced separation from white students. The conclusion followed: "[S]eparate educational facilities are inherently unequal."\(^92\) The Court withdrew the legal support for racial separation, imposed in *Plessy v. Ferguson*\(^93\) in the context of accommodations for railroad travelers, in the schoolroom setting.\(^94\)

The legal significance of both decisions reached across the entire social fabric of America.\(^95\) In the wake of *Brown*, while resistance to its full implementation in the schools was beginning,\(^96\) the Court extended *Brown*'s mandate ending segregation to other public settings, including recreational facilities\(^97\) and transportation.\(^98\) Although some observers have questioned whether *Brown*’s implicit requirement of integrated schooling is always the best educational choice for black students,\(^99\)


\(^92\) *Brown*, 347 U.S. at 495. See generally Lawrence, "One More River to Cross"—Recognizing the Real Injury in *Brown*: A Prerequisite to Shaping New Remedies, in SHADES OF *BROWN*: NEW PERSPECTIVES ON SCHOOL DESSEGREGATION 49 (D. Bell ed. 1980) [hereinafter cited as SHADES OF *BROWN*] (pointing out that the Court’s emphasis on the effects of segregated schooling on black children allowed it to ignore the overriding purpose of American-style segregation to stigmatize blacks as inferior).

\(^93\) 163 U.S. 537 (1896).

\(^94\) *Brown*, 347 U.S. at 495; Bolling, 347 U.S. at 500.


Brown's abiding significance for improving race relations in America cannot be doubted. By rejecting racial separation as constitutionally tolerable, Brown affirmed the humanity of black Americans and cleared the way for the legal ascendancy of an assimilationist view of racial equality.

One of the most deeply-held beliefs of the proponents of racial separation in America was that amalgamation of the two races never should occur. The legal mandate that reflected this belief was the prohibition against miscegenation, which the Supreme Court had upheld in 1883 and had relied upon to support its 1896 holding in Plessy. Reexamined in the light of Brown, however, laws against miscegenation could not endure. In its opinions striking down criminal sanctions for interracial sexual intercourse in McLaughlin v. Florida in 1964 and intermarriage in Loving v. Virginia in 1967, the Court clearly applied strict judicial scrutiny to suspect racial classifications for the first time. Moreover, the Court also expressly embraced the assimilationist view that skin color was irrelevant in criminal cases. One year after Loving, under the leadership of Justice Stewart, the Court read its newly-formed view of racial equality into the moribund statutory descendant of the Civil Rights Act of 1866, thereby confounding legislative history in its

100. See G. Myrdal, supra note 26, at 53-67.
102. 163 U.S. at 545.
104. 388 U.S. 1 (1967).
105. The strict scrutiny doctrine was enunciated, but not applied, to strike down a racial classification, in Korematsu v. United States, 323 U.S. 214 (1944). The Court applied the doctrine in a school desegregation case in Bolling v. Sharpe, 347 U.S. 497 (1954). Combining these statements, the Court thus phrased the standard in McLaughlin:

[We] deal here with a classification based upon the race of the participants, which must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States. This strong policy renders racial classifications "constitutionally suspect," Bolling v. Sharpe, 347 U.S. 497, 499; and subject to the "most rigid scrutiny," Korematsu v. United States, 323 U.S. 214, 216; and "in most circumstances irrelevant" to any constitutionally acceptable legislative purpose, Hirabayashi v. United States, 320 U.S. 81, 100.

379 U.S. at 191-92. Compare the statement in Loving:

At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the "most rigid scrutiny," Korematsu v. United States, 323 U.S. 214, 216 (1944), and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate.

388 U.S. at 11.

106. In Loving, the majority opinion said: "Indeed, two members of this Court have already stated that they 'cannot conceive of a valid legislative purpose . . . which makes the color of a person's skin the test of whether his conduct is a criminal offense.' " 388 U.S. at 11 (quoting 379 U.S. at 198). In McLaughlin, 379 U.S. at 188, the Court had repudiated Pace: "Pace . . . represents a limited view of the Equal Protection Clause which has not withstood analysis in the subsequent decisions of this Court."

107. Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). The Court interpreted 42 U.S.C. § 1982 to bar "all racial discrimination, private as well as public, in the sale or rental of property." 392 U.S. at 413 (emphasis in original). It also held that the statute, as construed, is a valid exercise of congressional power under the thirteenth amendment: "And when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery." Id. at 442-43. Cf. General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375
understandable zeal "to rid the law of any tolerance of race discrimination." 109

One may view the maturation of the doctrine of strict judicial scrutiny of suspect racial classifications in the school desegregation and miscegenation cases as the judicial embodiment of an assimilationist view of racial equality. By creating a standard that presumes racial classifications are unconstitutional and puts the burden of showing their validity on the official seeking to have them upheld, the Court has declared race to be legally irrelevant for virtually all public purposes.

Indeed, the strict scrutiny doctrine has afforded black litigants considerable protection. As constitutional law scholars have pointed out, 110 after Korematsu v. United States, 111 no case applying that doctrine has upheld a challenged express racial classification. But the range of cases to which the Court will apply the doctrine is limited to those involving state action 112 where the race discrimination, if not overt, is shown to be intentional. 113 At a time when few classifications are drawn expressly on the basis of race, 114 the latter restriction has deflected constitutional argument in the antidiscrimination cases into an often fruitless search for official motivation. 115 The debate about the validity of classifications


108. See C. Fairman, supra note 50, at 1207-60. See also 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, 747-48 (1974) (arguing that the Court decided Jones on statutory grounds to avoid the question of whether the fourteenth amendment prohibited private discrimination in housing).

109. C. Fairman, supra note 50, at 1258.


112. See L. Tribe, supra note 32, at 1147-49.

113. In Washington v. Davis, 426 U.S. 229 (1976), the Court held that the use of an employment personnel test by the District of Columbia Metropolitan Police Department that excluded four times as many black applicants as white applicants did not involve unconstitutional racial discrimination in the absence of a showing of discriminatory purpose. "But our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact." Id. at 239 (emphasis in original). In General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375 (1982), the Court held intentional discrimination was necessary to violate 42 U.S.C. § 1981, the statutory successor to the Civil Rights Act of 1866, in the context of employment discrimination.

114. When such overt antidiscrimination cases turn up, of course, the Court has little difficulty in resolving them. See, e.g., Palmore v. Sidoti, 104 S. Ct. 1879 (1984) where the Court held that a change of custody of white child from mother to father because of mother's marriage to black man violates the fourteenth amendment: "[t]he effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody." Id. at 1882.

115. See, e.g., Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979) (challenge to preferential treatment of veterans on sex discrimination grounds); Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977) (challenge to refusal by village to grant a rezoning request that had a disproportionate impact on prospective black occupants of low and moderate income housing). Compare Rogers v. Lodge, 458 U.S. 613 (1982) (system of at-large elections in Burke County, Georgia, was maintained for invidious purpose of discriminating against black voters) with City of Mobile
MODELS OF EQUALITY

based on race now has shifted from the antidiscrimination cases to the reverse discrimination cases. Meanwhile, the on-going effort to secure access for blacks to the rights and opportunities available to whites is now being conducted primarily under federal statutes, in particular, the Civil Rights Act of 1964.

b. Statutory Litigation Under Title VII

Like the constitutional race antidiscrimination litigation, the statutory race antidiscrimination cases brought under Title VII also display a one-way model of blacks seeking access to employment opportunities previously available only to whites. Although the Supreme Court decided that the Constitution permits challenges only to express or intentional discrimination in the public sector, Title VII allows black litigants to confront job discrimination in the private as well as public sectors. These claims may be based on the effects of past discrimination as well as present, purposeful discrimination. Thus, in Griggs v. Duke Power Co., one of its first cases interpreting Title VII, the Supreme Court rejected lower court views that the statute was limited to cases where a discriminatory animus against blacks motivated the employment decision. Rather, the Court held that Title VII

v. Bolden, 446 U.S. 55 (1980) (at-large municipal elections in Mobile, Alabama, not shown to have been conceived or operated as a purposeful device to dilute the voting strength of blacks).

116. See infra text accompanying notes 141-60.


118. The statutory prohibition against discrimination based on race is not limited to blacks; indeed, it has been applied to protect whites who claimed they were discharged for misappropriating property from their employer under circumstances where a black employee similarly charged was not dismissed. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976). But I continue to adhere in this article to my primary focus on blacks, rather than other minority groups, as the paradigmatic victims of race discrimination. See supra note 20.

119. See supra notes 112-13 and accompanying text.

120. Title VII was enacted pursuant to the congressional power to regulate interstate commerce and § 5 of the fourteenth amendment. Congress intended Title VII to redress the economic disadvantage to blacks caused by discrimination against them in private employment. See, e.g., Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109, 1113-14 (1971) [hereinafter cited as Developments: Employment].


122. E.g., Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971) ("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."). See also infra text accompanying notes 124-26.

123. See Developments: Employment, supra note 120, at 1111.


125. The first Title VII case to reach the Supreme Court involved sex discrimination. See Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971).

was intended to prohibit "not only overt discrimination but also practices that are fair in form, but discriminatory in operation."\(^{127}\)

The \(Griggs\) holding, which some observers read as an expansion of Title VII,\(^{128}\) took on added significance as the "whites only need apply" signs started coming down, and outright refusal to hire blacks gave way to more subtle forms of discrimination.\(^{129}\) In \(McDonnell Douglas Corp. v. Green,\)\(^{130}\) decided one year after \(Griggs,\) the Court provided an alternative method of proceeding under Title VII when the employer's conduct towards the plaintiff may be open to varying interpretations. \(McDonnell Douglas\) created an evidentiary framework that permits the plaintiff to make out a prima facie case with relative ease, then shifts the burden of production to the employer, and finally affords the plaintiff a final opportunity to prove that the employer engaged in intentional discrimination.\(^{131}\)

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127. 401 U.S. at 431.
130. 411 U.S. 792 (1972).
131. The \(Griggs\) "disparate impact" method of proving employment discrimination is commonly contrasted with the "disparate treatment" mode associated with McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1972). See International Bhd. of Teamsters v. United States, 431 U.S. 324, 355 n.15 (1977). Whereas an employment discrimination plaintiff can make a prima facie case under the \(Griggs\) standard simply by showing that the challenged practice, although facially neutral, has a disproportionate impact on blacks, under the \(McDonnell Douglas\) test, a four-step procedure is mandated. The complainant must initially show:

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

411 U.S. at 802. The Court subsequently explained that a prima facie case under the \(McDonnell Douglas\) standard "raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978).

If plaintiff makes a prima facie case under either standard, the burden of production shifts to the employer. Under the \(Griggs\) standard, the employer meets that burden by showing that the challenged practice is job-related or justified by business necessity. 401 U.S. at 431. See generally Note, Business Necessity Under Title VII of the Civil Rights Act of 1964: A No-Alternative Approach, 84 Yale L.J. 98 (1974); Comment, The Business Necessity Defense to Disparate-Impact Liability Under Title VII, 46 U. Chi. L. Rev. 911 (1979). As the Court subsequently made clear, under the \(McDonnell Douglas\) test, "[t]he burden that shifts to the [employer] is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason." Texas Dep' t of Community Affairs v. Burdine, 450 U.S. 248, 254 (1980). Accord Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24, 25 n.2 (1978) ("the employer's burden is satisfied if he simply 'explains what he has done' or 'produce[e] evidence of legitimate nondiscriminatory reasons.'"); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 578 (1978) ("To dispel the adverse inference from a prima facie showing under \(McDonnell Douglas\), the employer need only 'articulate some legitimate, nondiscriminatory reason for the employee's rejection.'").

In proceeding under either \(Griggs\) or \(McDonnell Douglas,\) the plaintiff retains the ultimate burden of persuasion, but there is a significant difference in the content of that burden. The \(Griggs\) test does not require a showing of intentional discrimination; instead, it permits the plaintiff to reply to
Black litigants have used successfully both the disparate impact theory of discrimination announced in *Griggs* and the disparate treatment theory created in *McDonnell Douglas*. *Griggs* has been commonly used to challenge an employer's use of tests or credentials unrelated to the job that exclude disproportionate numbers of blacks. Statistical disparities between the racial composition of the employer's work force and the relevant labor pool suggest discrimination under either theory. Courts have found intentional discrimination, for instance, in the persistent failure of municipal police or fire departments to hire or promote blacks. Discrimination in higher-level jobs is more difficult to prove because of the discretionary nature of the selection process. Even in that context, however, black applicants have used Title VII to establish that they need not prove that their own qualifications were superior to those of other candidates in order to establish discrimination. Despite well-founded fears that the Supreme Court may be moving away

the defense of job-relatedness or business necessity by showing that an employment practice that imposes less disadvantage on blacks would also serve the employer's needs.

The *McDonnell Douglas* test, in contrast, requires the plaintiff to prove that the employer's articulated nondiscriminatory reason is a pretext for intentional discrimination. *Burdine*, 450 U.S. at 256. Despite fears that the Supreme Court might require plaintiffs in Title VII cases to show intentional discrimination as part of the prima facie case (see Bartholet, *Proof of Discriminatory Intent Under Title VII: United States Postal Service Board of Governors v. Aikens*, 70 CALIF. L. REV. 1201 (1982)), as yet no such obligation need be satisfied until the final stage of the litigation arguing pretext. United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711 (1983) (reaffirming *McDonnell Douglas* framework for proving Title VII case).

Both the *Griggs* and *McDonnell Douglas* standards apply to all groups covered by Title VII, not only to those alleging race discrimination. See, e.g., Dothard v. Rawlinson, 433 U.S. 321 (1977) (applying disparate impact theory in sex discrimination cases); Sweeney v. Board of Trustees of Keene State College, 604 F.2d 106 (1st Cir. 1979), cert. denied, 444 U.S. 1045 (1980) (applying disparate treatment theory in sex discrimination case).

132. See, e.g., Connecticut v. Teal, 457 U.S. 440 (1982). A written test used as part of the selection process for position of Welfare Eligibility Supervisor had a disproportionate impact on blacks. The Court rejected the employer's suggestion of a "bottom line" defense, i.e., an attempt to compensate for a discriminatory pass-fail barrier by hiring or promoting a sufficient number of black employees to reach a nondiscriminatory total. See also Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (general ability tests); *Griggs*, 401 U.S. 424 (standardized general intelligence test).

133. See, e.g., *Griggs*, 401 U.S. at 424 (high school diploma).


136. See, e.g., Association Against Discrimination in Employment, Inc. v. City of Bridgeport, 647 F.2d 256 (2d Cir. 1981), cert. denied, 455 U.S. 988 (1982) (distinguishing between "hiring goals" and "quotas" and upholding imposition of the former where defendant's discrimination against blacks and Hispanics had been found by the trial court to be clear-cut, long-continued, and egregious). See *Bartholet*, supra note 129. For an early proposal to integrate higher level jobs, see Galbraith, Kuh & Thurow, *The Galbraith Plan to Promote the Minorities*, N.Y. Times Mag., Aug. 22, 1971, at 9.

from *Griggs*, and amid warnings that plaintiffs would find it difficult to meet a potential intent requirement as part of the prima facie case under *McDonnell Douglas*, during the twenty years of its existence Title VII has proved an effective tool for removing racial barriers to employment opportunities.

2. **Benign or Reverse Discrimination Cases**

In many cases the mere removal of racial barriers has been ineffective in bringing blacks into employment settings from which they were previously excluded. When a court has found intentional exclusion, preferential hiring or promotion orders have been made part of the relief. Litigants have challenged the validity of such preferential remedies on statutory grounds and, where the employer is a public agency, on constitutional grounds as well. A Presidential order now requires employers who contract with the federal government to adopt affirmative action to ensure nondiscrimination in the work force regardless of whether the employers have discriminated in the past.

The appearance of voluntary, rather than court-ordered, preferential treatment for blacks stimulated the first so-called “reverse discrimination” suits by white litigants who sought to invalidate the preferences in order to secure the opportunities for themselves. These cases posed a sharp challenge to the assimilationist view of racial equality by suggesting that the color-blind ideal it embodies can be abandoned when the disadvantaged individuals are white. In this article, I do not intend to...
canvass the vast literature discussing preferential treatment.\footnote{148} For my purposes, the reverse discrimination race cases are relevant only because they confirm the one-way model of desired access established in the antidiscrimination race cases.\footnote{149}

The first race reverse discrimination cases appeared in the educational, rather than the employment, setting. The first such case that the United States Supreme Court decided on the merits,\footnote{150} *Regents of the University of California v. Bakke*,\footnote{151} raised both constitutional claims under the equal protection clause and statutory claims under Title VI of the Civil Rights Act.\footnote{152} Allan Bakke, a white male, applied for admission to the medical school at the University of California, Davis campus, in 1973 and 1974. The medical school rejected him both times. In both years, the school admitted other applicants, through a special admissions program for disadvantaged students, who had grade point averages, Medical College Admissions Test (MCAT) scores, and benchmark scores significantly lower than Bakke's. The trial court found that the special program operated as a racial quota because the school evaluated these minority applicants only against each other, not against applicants as a whole. Moreover, the school reserved sixteen places in the entering class of one hundred for these applicants.\footnote{153} Bakke argued that, but for the existence of the special program, he would have been admitted as a student. Bakke did not ask, in other words, that the racial preferences ac-
corded by the special program be extended to him. Instead, he asked that he not be barred, because of his race, from competing for any of the one hundred places in the class. Because the University of California was unable to demonstrate that Bakke would not have been admitted even in the absence of the special admissions program, a burden imposed by the California Supreme Court, the United States Supreme Court ordered the University to admit him.

One year after Bakke was decided, the Supreme Court considered a claim that Title VII forbade private employers and unions from voluntarily agreeing upon an affirmative action plan that accorded racial preferences to blacks to increase their entry into craftwork positions in the employer's plant. Like Allan Bakke, the plaintiff Brian Weber contended that in the absence of any racial preference the employer would have admitted him on the basis of seniority to a place in the in-plant craft training program. Because the plan did not involve state action, no constitutional claim was possible. Weber could, however, and did, claim that he had been discriminated against on the basis of his race in violation of Title VII. Unlike Bakke, Weber did not succeed, for a majority of the Supreme Court held that Congress did not intend to prohibit the private sector from undertaking voluntary, race-conscious affirmative action efforts.

The reverse discrimination race cases, then, do not identify a preserve of black power that whites seek to share. Rather, these cases constitute an effort by some whites to appeal to an ideal of color-blindness in order to secure for themselves—despite threatened black encroachment—the privileged positions held by other whites partly as the result of prior discrimination against blacks in education or employment.

154. Id. at 280-81.
156. Id. at 200.
157. Id. at 200-01.
158. Id. at 207. Chief Justice Burger and Justice Rehnquist dissented. Justice Rehnquist's dissenting opinion disputes the majority's account of the legislative history of Title VII on this point. See id. at 230-52. See also Fullilove v. Klutznick, 448 U.S. 448 (1980) (upholding a congressionally-mandated 10% set-aside for minority-owned or controlled business enterprises in projects funded under the Public Works Employment Act of 1977, 42 U.S.C. §§ 6701, 6705-08, 6710 (1982)).
159. See Blumrosen, The Duty of Fair Recruitment Under the Civil Rights Act of 1964, 22 RUTGERS L. REV. 465 (1968), pointing out that the use of recruitment procedures such as word-of-mouth solicitation by white employees and walk-in applications, when used after the enactment of Title VII by employers with virtually all-white labor forces prior to the effective date of the Act, had ensured a segregated work force. Id. at 476-79. On reverse discrimination claims, Blumrosen observes that: 
[the issue is, of course, a red herring designed to distract attention from the fact that the employer involved has been discriminating and that this discrimination has denied to the minority employment opportunities over substantial periods of time, which, in many cases have gone to members of the "white community" only. The "discrimination in reverse" argument, in effect, reflects a desire to maintain the privileged sanctuary for white employees which the employer has established by his past discriminatory practices.
Id. at 489. But see Scalia, The Disease as Cure, 1979 WASH. U.L.Q. 147, 152-54, arguing that the ethnic whites against whom reverse discrimination exists are not the same whites who gained their privileged position at the expense of blacks.
The model of desired access remains that of blacks seeking entry, this time with the help of special preferences, to opportunities traditionally available to whites. In that context, the arguments of the white litigants ignore the major difference between the stigmatizing impact of laws that once treated all blacks as inferior and the merely personal disadvantages imposed on some whites by the distribution of limited opportunities.\textsuperscript{160}

\section*{B. Sex Discrimination}

\subsection*{1. Antidiscrimination Litigation}

Reflection upon the sex discrimination cases that women have brought in the Supreme Court prompts the observation\textsuperscript{161} that to be female in American society is to be a member of what was an oppressed and silenced majority, and what still is an undervalued and exploited one. In contrast to black litigants, however, women seeking to rely on the newly-adopted fourteenth amendment could not claim that it was intended for their benefit.\textsuperscript{162} Nor could they easily adapt other constitutional provisions to fit their complaints.

a. Constitutional Cases

The Supreme Court, having announced its decision narrowly limiting the scope of the national privileges and immunities clause in the \textit{Slaughter-House Cases},\textsuperscript{163} was not ready a day later to expand that clause to encompass a woman's plea to gain admission to the Illinois bar as a lawyer.\textsuperscript{164} Instead, Justice Bradley's long-remembered concurring opinion in \textit{Bradwell v. Illinois}\textsuperscript{165} set the tone for judicial acceptance of sex as a natural, hence appropriate, basis for legislative classification. If the racial differences thought to exist between blacks and whites hindered the Court from conceiving of an assimilationist view of racial equality,\textsuperscript{166} the sex differences known to exist between men and women were so great as

\begin{itemize}
\item \textsuperscript{161} Cf. Wasserstrom, \textit{supra} note 10, at 586 (observation about blacks), quoted \textit{supra} text accompanying note 49.
\item \textsuperscript{163} 83 U.S. (16 Wall.) 36 (1873). See C. Fairman, \textit{supra} note 50, at 1364 n.166.
\item \textsuperscript{164} Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873). The equal protection clause was not invoked. Fairman notes that Myra Bradwell's "serious effort to win recognition as a lawyer was commonly treated [by Chicago lawyers] as somewhat whimsical." C. Fairman, \textit{supra} note 50, at 1365.
\item \textsuperscript{165} Bradwell, 83 U.S. (16 Wall.) at 139-42 ("the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman." \textit{Id.} at 141 (Bradley, J., concurring)).
\item \textsuperscript{166} \textit{See supra} text accompanying notes 66-70.
\end{itemize}
to stifle any intimation of an assimilationist view of sexual equality.\textsuperscript{167} For nearly a century after \textit{Bradwell},\textsuperscript{168} while black litigants were rescuing the equal protection clause from oblivion and shaping its words into a powerful constitutional weapon for achieving racial equality,\textsuperscript{169} the Supreme Court was content to uphold classifications based on sex with only the most minimal scrutiny.\textsuperscript{170}

The Court's heightened awareness of discrimination against women, which first became evident in 1971\textsuperscript{171} like its growing receptivity to the equal protection arguments of black litigants,\textsuperscript{172} did not happen spontaneously. The heightened awareness may have been ignited by an accident—the addition to Title VII of "sex"\textsuperscript{173} as a prohibited basis of employment discrimination along with race, color, religion, and national origin.\textsuperscript{174} Title VII forced a comparison between the treatment of women and men,\textsuperscript{175} as well as blacks and whites, in the employment setting, and implicitly suggested a parallel between the disadvantaged positions of blacks and women.\textsuperscript{176} The Supreme Court's first Title VII case involved sex discrimination.\textsuperscript{177} While the majority's brief \textit{per curiam} decision revealed its failure to appreciate the danger of stereotypical thinking about sex roles,\textsuperscript{178} Justice Marshall's concurring opinion\textsuperscript{179} identified the

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\item \textsuperscript{167} \textit{Bradwell}, 83 U.S. (16 Wall.) at 141-42. In a concurring opinion, Justice Bradley noted: It is true that many women are unmarried and not affected by any of the duties, complications, and incapacities arising out of the married state, but these are exceptions to the general rule. 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. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases. Id.
\item \textsuperscript{168} The Court decided the case identified as the turning point in the Court's attitude toward constitutional claims of sex discrimination in 1971. Reed v. Reed, 404 U.S. 71 (1971).
\item \textsuperscript{169} \textit{See supra} text accompanying notes 72-109.
\item \textsuperscript{170} \textit{See, e.g.}, Hoyt v. Florida, 368 U.S. 57 (1961) (upholding exemption from jury duty for women); Goesaert v. Clery, 335 U.S. 464 (1948) (upholding statute providing that no female may be licensed as a bartender unless she is the wife or daughter of a male owner); Quong Wing v. Kirkendall, 223 U.S. 59 (1912) (upholding statute imposing a license fee on all persons engaged in hand laundry except where no more than two women are so employed); \textit{In re} Lockwood, 154 U.S. 116 (1894) (letting stand Virginia's refusal to admit Belva Lockwood to practice law because of her sex); Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1874) (not a denial of privileges and immunities to limit the right to vote to men). \textit{Cf.} United States v. Dege, 364 U.S. 51 (1960) (rejecting doctrine that husband and wife cannot conspire in violation of 18 U.S.C. § 371); Muller v. Oregon, 208 U.S. 412 (1908) (upholding hours limitation for women employees only).
\item \textsuperscript{171} Reed v. Reed, 404 U.S. 71 (1971).
\item \textsuperscript{172} \textit{See supra} text accompanying notes 72-109.
\item \textsuperscript{173} \textit{See C. Bird, Born Female} 1-15 (1969), for an account of how the word "sex" was added to Title VII.
\item \textsuperscript{174} 42 U.S.C. § 2000e-2 (1964).
\item \textsuperscript{175} \textit{See Developments: Employment, supra note 120, at 1166-86.}
\item \textsuperscript{176} Murray & Eastwood, \textit{Jane Crow and the Law: Sex Discrimination and Title VII}, 34 Geo. Wash. L. Rev. 232, 233-35 (1965). The parallel was anticipated by Myrdal. \textit{See G. Myrdal, supra} note 26, at 1073-78 (discussing the "striking similarities" between the condition of women and blacks in America). \textit{See also} W. Chafe, \textit{supra} note 28, at 81-113 (comparing the processes of social change utilized by blacks and women in America).
\item \textsuperscript{177} Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971).
\item \textsuperscript{178} Although the case was tried on the theory that an employer's refusal to hire mothers of pre-school age children was a per se violation of the Act, see Chief Judge Brown's famous dissent
\end{itemize}
problem with precision and clarity.\textsuperscript{180} Ten months later,\textsuperscript{181} the Court decided \textit{Reed v. Reed},\textsuperscript{182} and took its first step toward a heightened level of scrutiny in constitutional sex antidiscrimination litigation.\textsuperscript{183}

While the legal campaign for sexual equality lacked the institutional control over strategy that the NAACP's leadership gave to the constitutional race antidiscrimination cases,\textsuperscript{184} the involvement of the Women's Rights Project of the American Civil Liberties Union\textsuperscript{185} provided a degree of coherence at the Supreme Court level. Under the initial guidance of Ruth Bader Ginsburg,\textsuperscript{186} the ACLU's original strategy was to argue for extension of race discrimination precedent to sex discrimination cases. The ACLU briefs urged the Court to accord women litigants the advantage won by black litigants of strict judicial scrutiny of racial classifications.\textsuperscript{187} Although the analogy comparing the disadvantaged position of American women to that of blacks was urged upon the Court in \textit{Frontiero v. Richardson},\textsuperscript{188} no more than four Justices ever accepted the analogy.\textsuperscript{189} Instead, in 1976, the Court settled upon an intermediate level of scrutiny for classifications drawn along sex lines.\textsuperscript{190} Commentators have

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\item [180] Phillips, 400 U.S. at 544-47 (Marshall, J., concurring).
\item [181] 404 U.S. 71 (1971).
\item [182] Professor Gunther was among the earliest observers to spot the new trend. See Gunther, supra note 110, at 34.
\item [183] See supra note 74.
\item [184] As a founder of the ACLU Women's Rights Project, Judge Ginsburg, then a Professor of Law, participated in the briefing and argument of the constitutional sex discrimination cases discussed in this section. For a perspective on Ginsburg's strategy, see Cole, \textit{Strategies of Difference: Litigating for Women's Rights in a Man's World}, 2 LAW & INEQUALITY 33, 53-85 (1984).
\item [185] See, e.g., Brief of ACLU as Amicus Curiae at 24-44, \textit{Frontiero v. Richardson}, 411 U.S. 677 (1973) [hereinafter cited as ACLU Brief].
\item [186] \textit{Craig v. Boren}, 429 U.S. 190, 197 (1976) ("To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.".).
\end{thebibliography}
criticized the Court's continued adherence to a less stringent standard of review for governmental actions affecting women than it accords to actions affecting blacks. Some commentators view the Court's distinction as an admission that sex discrimination is less important as a matter of public concern than race discrimination.

I recognize that three-tiered equal protection review has its critics, even among the present membership of the Supreme Court, and I agree that courts generally have been less sensitive in perceiving sex discrimination than they have been in identifying race discrimination. But, as I have tried to show in this article, the Court applied the strict scrutiny standard for racial classifications to the claims of black litigants during a period of growing awareness that such classifications did not reflect significant racial differences. Rather, the Court recognized that the classifications were intended to stigmatize a group identified primarily by the superficial difference of skin color. Because the tendency of racial classifications to stigmatize is so overwhelming, the insight captured by the most stringent standard—that such classifications are always suspect—is appropriate. Sex-based classifications, however, can be, even if they rarely have been, drawn to conform to physical reproductive sex differences and, if drawn in such a way as to expand, rather than to limit, women's and men's opportunities, need not be stigmatizing.

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192. The Court's use of the intermediate level of review in sex discrimination cases varies among the Justices and the type of case under consideration. For a comparison of the "Brennan-Marshall" approach and the "Rehnquist-Stewart" approach to cases involving "real" sex differences, see Freedman, supra note 38, at 922-60.
193. See supra text following note 109, and text accompanying notes 110-15.
194. See Wildman, supra note 47, at 286.
195. See, e.g., Craig, 429 U.S. at 210 (Powell, J., concurring); id. at 211-12 (Stevens, J., concurring). But see J. Ely, supra note 32, at 31 (arguing that "we need at least two standards under the Equal Protection Clause, maybe more").
197. See supra text accompanying notes 66-117. See also Stimpson, "Thy Neighbor's Wife, Thy Neighbor's Servants": Women's Liberation and Black Civil Rights, in WOMEN IN SEXIST SOCIETY 622 (V. Gornick & B. Moran eds. 1971).
198. See J. Ely, supra note 32, at 160-61. The point is developed more fully in Ely, supra note 160, at 730-36.
199. J. Ely, supra note 32, at 168-70. Justice Powell suggested a distinction in Bakke between the level of scrutiny applied to race and sex classification: "the perception of racial classifications as inherently odious stems from a lengthy and tragic history that gender-based classifications do not share. In sum, the Court has never viewed such classifications as inherently suspect or as comparable to racial or ethnic classifications for the purpose of equal-protection analysis." Bakke, 438 U.S. at 303.

Speaking for himself and Justices White, Marshall, and Blackmun, Justice Brennan proposed in Bakke that the intermediate standard of review developed in the sex discrimination cases be applied to test the constitutionality of racial classifications designed to further remedial purposes. See id. at 358-62. Justice Brennan stressed that both race and gender classifications have been used "to stereotype and stigmatize politically powerless segments of society." Id. at 360 (quoting the dissenting opinion in Kahn, 416 U.S. at 357 (Brennan, J., dissenting)).

More recently, Justice Brennan, speaking for the Court in Roberts v. United States Jaycees, 104 S. Ct. 3244, 3254 (1984), again noted "[t]hat stigmatizing injury, and the denial of equal opportuni-
By refusing to extend the strict scrutiny standard of review to constitutional sex antidiscrimination cases, then, the Supreme Court may be recognizing a difference in kind, rather than of degree, between race cases and sex cases.

In my view, a pattern as significant as the levels of judicial review has emerged from thirteen years of constitutional sex antidiscrimination litigation at the Supreme Court level: the sex antidiscrimination cases, in contrast to the race cases, display a two-way model of access in which power is exchanged between both sex groups. This model contrasts with a one-way model in which a disadvantaged racial group seeks to wrest power from a privileged and dominant racial group.

From its 1970 term through its 1983 term, the United States Supreme Court has handed down opinions in twenty-seven cases\(^{200}\) that I

\(^{1}\) My colleague, Justice Brennan, in his opinion for the Court in
\(^{2}\) Reed v. Reed, 404 U.S. 636 (1972), is surely felt as strongly by persons suffering discrimination on the basis of their sex as by those treated differently because of their race." Justice Brennan authored the plurality opinion in

\(^{3}\) Frontiero which accepted the argument that sex should be a suspect classification. See supra note 189.

Justice O'Connor did not join in the part of the Court's opinion in

\(^{4}\) Roberts v. United States Jaycees, 104 S. Ct. 3244 (1984);


HeinOnline -- 1985 U. Ill. L. Rev. 67 1985
classify as constitutional sex antidiscrimination cases. In thirteen of these cases, women sought to be treated like men in the public arena of business and finance. The cases involve women who sued to gain access to positions of authority in estate administration or property management, to obtain equal pay in military employment, to be relieved of forced unpaid or uninsured absence from the job when able to work, to be covered by insurance extended to other employees for disabilities requiring temporary absence from work, to be free of explicit rejection for employment or civic activities because of sex, to be eligible for public financial protection for their families in the event of unemployment, and to enjoy parental support for the same period as male siblings.

In which the Supreme Court affirmed the judgment by an equally divided vote, Vorchheimer v. School Dist., 400 F. Supp. 326 (E.D. Pa. 1975), rev'd, 532 F.2d 880 (3d Cir. 1976), aff'd by an equally divided court, 430 U.S. 703 (1977) (female high school student seeking admission to male-only academic high school). I also do not include another case that the Court remanded as moot, Struck v. Secretary of Defense, 460 F.2d 1372 (9th Cir.), vacated and remanded, 409 U.S. 1071 (1972) (challenge to Air Force practice requiring the discharge of pregnant officers). Three other groups of cases that were not litigated on an antidiscrimination theory are discussed infra note 291.

If, as I argue infra text accompanying notes 268-78, the four cases classified as benign discrimination cases are indistinguishable from these twenty-seven cases, the number of sex antidiscrimination cases decided by the Supreme Court during this period totals thirty-one.

201. The Court has classified four other cases decided during this period on constitutional grounds as "benign" or reverse discrimination rather than antidiscrimination because they involve male challenges to a preference accorded women ostensibly to overcome past discrimination. They are: Heckler v. Mathews, 104 S. Ct. 1387 (1984); Califano v. Webster, 430 U.S. 313 (1977); Schlesinger v. Ballard, 419 U.S. 498 (1975); and Kahn v. Shevin, 416 U.S. 351 (1974). Cf. Minnick v. California Dept' of Corrections, 452 U.S. 105 (1981) (dismissing writ of certiorari granted to review 95 Cal. App. 3d 506, 157 Cal. Rptr. 260 (1979)). My own conclusion is that, except for Minnick, the pattern of these cases is indistinguishable from that of the antidiscrimination cases. See infra text accompanying notes 268-78.


203. Kirchberg v. Feenstra, 450 U.S. 455 (1981); (management of community property); Reed v. Reed, 404 U.S. 71 (1971) (administration of decedents' estates).

204. Frontiero v. Richardson, 411 U.S. 677 (1973) (fringe benefits for spouses of military service personnel, including quarters allowance and medical and dental benefits).


Men brought eleven cases on their own behalf seeking to be treated like women; in all but four, the plaintiffs sought access to female power in the family setting. All but one of the seven family law cases consisted of male challenges to the sole parental control that women exercised over illegitimate children. The cases include instances in which men sued to be formally considered as possible custodians of their illegitimate children; to gain favorable immigrant status for their illegitimate children; to be allowed to object to the adoption of their illegitimate children; and to be permitted to sue for the wrongful death of a deceased illegitimate child. The seventh family law case challenged a law limiting the award of alimony only to women.

Four other cases arose outside the family setting. In two cases men sought to avoid public responsibilities not imposed on women; in a third case men sought access to educational opportunities available to women; and a fourth case involved consumer purchasing.

In the remaining three of the twenty-seven cases, men sought to secure benefits resulting from the employment of their deceased wives. They argued that their deceased wives had not been accorded the same treatment as male co-workers because the surviving husbands did not receive the financial protection that surviving wives of male workers received. Two of these cases involved death benefits for surviving


216. Lehr v. Robertson, 103 S. Ct. 2985 (1983) (notice of adoption not required for natural father who was not a putative father as defined by New York law); Caban v. Mohammed, 441 U.S. 380 (1979) (children who have lived in parent-child relationship with their natural father may not be adopted without his consent); Quilloin v. Walcott, 434 U.S. 246 (1978) (natural father who had never lived with his 11-year old son not entitled to object to son's adoption by step-father).


218. Orr v. Orr, 440 U.S. 268 (1979). Mr. Orr did not seek alimony for himself, but rather attempted to invalidate the statute allowing courts to order alimony only for wives.


220. Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) (nursing school open only to women students). Hogan also provides an example of a male seeking to prepare himself for employment in a traditionally female occupation. See infra text accompanying notes 259-61.


222. See supra note 200.
spouses, while the third involved mother’s benefits for the surviving parent of an infant. The first two cases illustrate a cooperative approach to power exchange characteristic of dual worker families. In the third case, however, the family life-style was a modification of traditional sex-roles in which the male is the chief breadwinner while the female is the homemaker.

The pattern that emerges from these twenty-seven cases reflects the traditional division of authority by sex that has allocated the public sphere of government and finance to men, the private sphere of home and family to women. Crippling as this division has been to women—and it has been crippling for many—it has imposed limitations on both sexes. Not surprisingly, men as well as women have taken advantage of the loosening of sex-role stereotypes to explore the domain formerly reserved to the other sex. Nor should it be surprising that women would resist the encroachment by men upon their authority in the family, just as men have defended their public territory against women.

That this social pattern of two-way power exchange is mirrored even

227. See supra note 43. Some commentators have argued that women hold no real power in the family apart from that which men permit them to exercise. See, e.g., Polatnick, Why Men Don’t Rear Children: A Power Analysis, in MOTHERING: ESSAYS IN FEMINIST THEORY 21, 30-33 (J. Trebilcot ed. 1984). But this analysis does not consider the legal priority of mothers as custodians of children when family breakup occurs, or the superior rights formerly granted to mothers over fathers of illegitimate children. See H. KAY, supra note 213, at 299-311 (custody), 371-74 (illegitimate children).

Men have recorded their disappointing experiences with child custody laws and decisions. E.g., M. ROMAN & W. HADDAD, THE DISPOSABLE PARENT: THE CASE FOR JOINT CUSTODY (1978). They also have been active in developing joint custody legislation. See, e.g., Cook, California’s Joint Custody Statute, in JOINT CUSTODY AND SHARED PARENTING 168 (J. Folberg ed. 1984). Women generally have resisted joint custody legislation. See, e.g., Schulmann & Pitt, Second Thoughts on Joint Child Custody: Analysis of Legislation and Its Implications for Women and Children, in JOINT CUSTODY AND SHARED PARENTING, supra, at 209-22. “The current joint custody trend is, in effect, an attack on women who have been and wish to continue to be, the primary caretakers of their children.” Id. at 222. See also Lemon, Joint Custody As a Statutory Presumption: California’s New Civil Code Sections 4600 and 4600.5, 11 GOLDEN GATE U.L. REV. 485, 527-31 (1981).

I do not mean to suggest that society values equally the respective spheres of power held by men and women. Indeed, there is reason to believe that women’s power in the family has been discounted by both sexes. Even so, that men have chosen to use legal means to force their entry into those aspects of the family sphere formerly denied to them is a social indicator of its value and importance to them.

231. See, e.g., M. CUNNINGHAM, POWERPLAY: WHAT REALLY HAPPENED AT BENDIX
MODELS OF EQUALITY

in Supreme Court cases confirms its pervasiveness. It also suggests that both sexes have a stake in eradicating some legal barriers to sexual equality while retaining others. For example, no women contested the limitation of military registration to men, and only recently have women thought it worthwhile to challenge the restrictions that eliminate them from military jobs designated as "combat" duty. Conversely, the refusal of male blue-collar workers to perform "women's jobs" on the night shift unless a hefty pay premium was provided was once so widespread that it gave rise to an equal pay suit brought on behalf of women who held the jobs on the day shift but could not command the men's premium.

These phenomena suggest that legal differentiation based on sex is more deeply embedded in our culture than differentiation based on race. As Myrdal noted, even at its height in the years before Brown, racial segregation was a one-sided institution: it operated to exclude blacks from white society, but blacks—who, by and large, did not at that time desire separation—did not seek to impose a similar bar against whites. Sexual dispersion in our society has a different pattern because our tendency to live in sexual pairs has served both to give women the private access to men that allowed a measure of interpersonal power, and to isolate women from each other in the home. Scholars are only beginning to rediscover the existence of female support systems formed


232. Rostker, 453 U.S. at 61-62; the National Organization for Women, and a collection of women's groups including the Women's Equity Action League and Business and Professional Women, however, filed amicus briefs urging affirmance. See Williams, supra note 7, at 189 & n.76. Karst notes in passing that "[n]o woman would have had standing to challenge the law excluding women from the draft..." Karst, Woman's Constitution, 1984 DUKE L.J. 447, 471, presumably because women can volunteer for military service. Id. at 470. But the compulsory registration law considered in Rostker excluded all women regardless of whether any male was drafted pursuant to its terms: the damage thus done to women's status as citizens would seemingly be susceptible to redress in court upon the petition of an aggrieved female.


235. Compare Rutherlgen, supra note 19, at 207-09.

236. G. MYRDAL, supra note 26, at 575-77.

237. But see id. at 746-50 (discussing the Garvey movement for a return to Africa, and subsequent efforts by Communist organizers to form a Black Belt in the United States). See also J. WILLIAMSON, supra note 70, at 249-58 (discussing the physical and cultural separation of the black and white races during the period when segregation legislation was at its height, roughly between 1890 and 1915). The attitudes of many black Americans changed during the 1960's, however, as the emergence of the black power movement put a premium on black culture and identity. See generally THE BLACK REVOLT: THE CIVIL RIGHTS MOVEMENT, GHETTO UPRISINGS AND SEPARATISM (J. Geschwender ed. 1971).


239. See, e.g., B. FRIEDAN, supra note 228. Only now are we beginning to learn of the dangers of this isolation for women in terms of its potential for spousal abuse. See generally Breines & Gordon, The New Scholarship on Family Violence, 8 SIGNS 490 (1983).
as a means of coping with this isolation.\textsuperscript{240} Both sexes, however, at times apparently have desired sexual separation. Such separation is still prized in some contexts so long as it is perceived to be freely chosen, rather than imposed by the other sex.\textsuperscript{241}

The continuation of these separate spheres is giving way under the pressure of cultural change as well as litigation\textsuperscript{242} and statutory enactment,\textsuperscript{243} but contemporary opposition to their elimination may be seen in the defeat of the Equal Rights Amendment (ERA) in 1982.\textsuperscript{244} To the extent that the public took the ERA to be the legal embodiment of an assimilationist view of sexual equality,\textsuperscript{245} the debate over its ratification disclosed the determined dissent of the more conservative sections of the nation\textsuperscript{246}—those in which traditional sex roles are highly prized.\textsuperscript{247} The two-way exchange of power between men and women in American society has not yet reached equilibrium, either in the culture or in the courtroom.

\textbf{b. Statutory Cases}

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment. As the pattern that emerges from the constitutional sex antidiscrimination cases suggests, women are the primary litigants who use Title VII to get access to job opportunities available to males.\textsuperscript{248} The Supreme Court's Title VII cases bear out this expectation: women workers brought fourteen of the fifteen cases\textsuperscript{249} alleging discrimination based

\begin{itemize}
  \item \textsuperscript{240} See, e.g., Smith-Rosenberg, \textit{The Female World of Love and Ritual: Relations Between Women in Nineteenth-Century America}, 1 SIGNS 1 (1975).
  \item \textsuperscript{241} See, e.g., Kaplan, \textit{Women's Education: The Case for the Single-Sex College}, in \textit{The Higher Education of Women: Essays in Honor of Rosemary Park} 53 (H. Austin & W. Hirsch eds. 1978). See also A. JAGGAR, \textit{Feminist Politics and Human Nature} 270-86 (1983) (discussing the desire of many radical feminists for a "womanspace" free from male intrusion, in which to create a "woman culture"). The desire for a measure of separation is not, of course, limited to women. See, e.g., L. TIGER, \textit{Men in Groups} (1969) (discussing male bonding); J. WILLIAMSON, \textit{supra} note 70, at 399-413 (discussing the thought of W.E.B. DuBois concerning racial separation). Tiger's version of exclusivity may, however, be perceived by women as exclusion.
  \item \textsuperscript{242} See, e.g., Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) (male seeking admission to nursing school).
  \item \textsuperscript{243} See, e.g., Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (1982).
  \item \textsuperscript{244} See also Freund, \textit{The Equal Rights Amendment is Not the Way}, 6 HARV. C.R.-C.L. L. REV. 234 (1971). See generally Rhode, \textit{supra} note 1.
  \item \textsuperscript{246} The states that did not ratify the ERA were primarily in the deep south (Alabama, Arkansas, Georgia, Florida, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia), the Mormon west (Arizona, Nevada, and Utah), and three geographically disparate states (Illinois, Missouri, and Oklahoma). See Rhode, \textit{supra} note 1, at 10 n.33.
  \item \textsuperscript{247} See, e.g., Browne, \textit{supra} note 199, at 689-98; MacKinnon, \textit{Excerpt From MacKinnon/Schlafley Debate}, 1 LAW & INEQUALITY 341 (1983); see also B. Smith, The Mormon Woman Looks at ERA (unpublished address delivered by Barbara B. Smith, General President, Relief Society, at Weber State Institute on Apr. 20, 1978) (copy on file in Professor Kay's office).
  \item \textsuperscript{248} See \textit{supra} text accompanying note 202.
  \item \textsuperscript{249} Sex antidiscrimination cases involving women are: Hislon v. King & Spaulding, 104 S. Ct. 2229 (1984); Shaw v. Delta Airlines, Inc., 103 S. Ct. 2890 (1983); Arizona Governing Comm'n v. Norris, 103 S. Ct. 3492 (1983); Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982); Ford Motor
on sex. These cases include a woman rejected for a job because she was the mother of a pre-school aged child; women seeking to obtain insurance extended to other employees for disabilities requiring temporary absence from work; women attempting to retain their seniority after having been away from work; women seeking pension coverage on the same basis as male workers; women desiring promotion to supervisory or professional positions; women seeking positions in non-traditional employment; women trying to prevent the intentional depression of their wages compared to those paid to men, and women


250. Not all of the 14 cases were decided on the merits; some established significant points about the burden of proof in Title VII litigation. E.g., Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Sweeney v. Board of Trustees of Keene State College, 439 U.S. 24 (1978). See supra note 131. One case, Shaw v. Delta Airlines, Inc., 103 S. Ct. 2890 (1983), did not include women as litigants, although the case dealt with the inclusion of pregnancy in temporary disability plans governed by New York's Human Rights Law.


254. Arizona Governing Comm'n v. Norris, 103 S. Ct. 3492 (1983) (women challenged employer's practice of requiring employees to choose among several pension plans, all of which paid a woman lower monthly benefits than a man when both had made the same contributions); City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978) (women challenged employer's practice of requiring women to pay more than men in order to receive the same monthly benefits under retirement plan).


asking for back pay to the date of their rejection as a remedy for intentional exclusion from certain job classifications.\textsuperscript{258} The single statutory sex discrimination case brought to the Supreme Court by men was a response to the Pregnancy Discrimination Act. That case held that the dependents of male employees were entitled to the same coverage for pregnancy available under the employer’s plan for female employees and their dependents.\textsuperscript{259}

The Title VII cases considered as a whole, however, support the two-way model of power exchange that emerged from the Supreme Court’s constitutional cases. Men have appeared more frequently as plaintiffs in Title VII sex antidiscrimination cases at lower court levels. These cases highlight the very few areas of the employment market where men have sought access to traditional “women’s” jobs.\textsuperscript{260} Thus, men have sued to work as airline flight attendants\textsuperscript{261} and as nurses.\textsuperscript{262} In an unsuccessful bid to broaden Title VII’s prohibition against sex discrimination to include discrimination based on sex stereotypes, men have sued to wear long hair on the job,\textsuperscript{263} and to be free of neckties at work.\textsuperscript{264} The litigants compared both claims with female grooming and attire.\textsuperscript{265} In individual cases, a man may complain of sex discrimination if an employer gives to a woman a job a man seeks.\textsuperscript{266} By and large, however, more women than men bring sex antidiscrimination litigation under Title VII,\textsuperscript{267} a legal datum that confirms women’s relative lack of power in

Title VII and the Equal Pay Act by interpreting the Bennett Amendment as incorporating only the affirmative defenses of the Act, not its equal work requirement, into Title VII).

\textsuperscript{258} Ford Motor Co. v. EEOC, 458 U.S. 219 (1982) (employer originally rejected plaintiffs because of their sex for the position of “picker-packers” in automobile parts warehouse, then offered plaintiffs positions without seniority retroactive to the date of rejection; the plaintiffs declined the offer and brought suit for back pay).


\textsuperscript{261} See, e.g., Diaz v. Pan Am. World Airways, 442 F.2d 385 (5th Cir.), cert. denied, 404 U.S. 950 (1971).


\textsuperscript{263} See, e.g., Willingham v. Macon Tel. Publishing Co., 507 F.2d 1084 (5th Cir. 1975) (male rejected for position of newspaper display or copy layout artist because of his long hair).

\textsuperscript{264} See, e.g., Fountain v. Safeway Stores, Inc., 555 F.2d 753 (9th Cir. 1977) (male challenging employer requirement that he wear a necktie).

\textsuperscript{265} Fountain, 555 F.2d at 755-56 (plaintiff also complained of the employer’s inconsistent enforcement of its grooming code, in that the employer had changed its rules to permit women to wear pants instead of skirts to work); Willingham, 507 F.2d at 1088.


\textsuperscript{267} A similar observation may be made of litigation under the Equal Pay Act of 1963, 29
employment.

2. Benign or Reverse Discrimination Cases

The preferential benign discrimination programs for blacks stimulated reverse discrimination suits by whites that began to appear on the Supreme Court's docket in 1974. In contrast, the so-called benign discrimination thought to favor women is a practice as old as America. The first male challenge to a female prerogative claimed the high Court's attention in 1937; the claim failed. During the past ten years, the Court handed down four more cases justifying a regulatory or statutory distinction ostensibly favoring women on grounds of benign discrimination.

The four modern sex benign-discrimination cases, unlike the race reverse-discrimination cases, do not differ from the previously discussed pattern of the sex antidiscrimination cases brought by men. In the race reverse-discrimination cases, the plaintiffs were whites who sought to eliminate a preference for blacks so that they could obtain the sought-for position. In the sex benign-discrimination cases, however, the plaintiffs sought to be treated like women and asked the Court to extend the preferential policy to men. Thus, widowers have sued to be treated like women.


268. See supra notes 150-51.

269. See supra note 21.

270. Breedlove v. Suttles, 302 U.S. 177 (1937). A white male over 21 challenged, on the grounds of sex discrimination, a Georgia statute imposing a poll tax on all male citizens between the ages of 21 and 60 eligible to vote, but exempting, among others, women who did not register to vote. The Court justified a hypothetical exemption for all women on the basis of their duties as mothers, which were presumably more important than civic responsibilities. It reasoned that "women may be exempted on the basis of special considerations to which they are naturally entitled. In view of burdens necessarily borne by them for the preservation of the race, the state reasonably may exempt them from poll taxes." Id. at 282 (citing, as an analogous case supporting this proposition, Muller v. Oregon, 208 U.S. 412 (1908), which upheld protective labor laws for women). The Court spurned as "fanciful" the appellant's suggestion "that the Georgia law is a mere disguise under which to deny or abridge the right of men to vote on account of their sex." Id. at 284. See generally Ginsburg, supra note 46.


The first of the modern "benign" discrimination cases, Kahn, was argued before the United States Supreme Court on the morning before the Court heard oral argument in DeFunis v. Odegaard, 416 U.S. 312 (1974). Judge Ginsburg, who participated in Kahn, has noted the implications arising from the juxtaposition of the two cases. See Ginsburg, supra note 46, at 817.

272. See supra text accompanying notes 210-21.
widows in claiming a tax advantage; a male Naval officer sought to gain the extended period of time available to female officers for promotion; male pensioners asked to drop the same number of low earning years as women from old age insurance benefit calculations; and nondependent husbands wanted to take advantage of a statutory phase-in period created for nondependent wives during the transition from one statutory pattern that treated the sexes differently with regard to dependency to another that treated them alike.

The factor commonly relied upon to distinguish these four cases from the other eleven sex antidiscrimination cases brought by men is the Supreme Court's holding that a policy of benign discrimination designed to help women overcome past disadvantages justified the differential treatment accorded male plaintiffs. Commentators have had mixed reactions to the Court's rationale. From this article's analytical perspective, however, the pattern of these four cases is indistinguishable from that of the other eleven cases brought by men. The four cases confirm the two-way model of desired access established by women and men plaintiffs, and they also exhibit men's desires to claim privileges granted to women in the family setting. In two of the four cases, the preferential tax or financial treatment applied to women as widows or as wives, not to women in general. If one adds these four cases to the list of twenty-seven constitutional sex antidiscrimination cases discussed earlier, the tally totals thirty-one cases. Women brought thirteen cases seeking to be treated like men, while men brought fifteen cases seeking to be treated like women. The remaining three cases consisted of husbands seeking to derive benefits from their wives' employment.

One can accurately characterize as a sex reverse-discrimination case *Minnick v. California Department of Corrections,* which reached the Supreme Court's docket only to be dismissed for lack of finality. As in the race reverse-discrimination cases, in *Minnick* white males challenged a preferential hiring order requiring a public agency to increase its em-

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274. Schlesinger v. Ballard, 419 U.S. 498 (1975) (upholding Navy practice applying "up or out" system to male naval officers passed over twice for promotion, while allowing female officers 13 years to attain promotion).
276. Heckler v. Mathews, 104 S. Ct. 1387 (1984) (nondependent wives, but not nondependent husbands, have three years prior to the effective date of statute amending social security survivor's benefits to eliminate an unconstitutional statutory scheme that distinguished between nondependent spouses on the basis of sex).
277. See Ginsburg, *supra* note 46, at 818 (criticizing Kahn and Ballard), and at 822-23 (approving Webster); Kanowitz, *supra* note 46, at 1380-81 (urging that the Court abandon the benign discrimination doctrine in sex bias cases).
ployment of women and blacks. As in the race cases, the relief sought was the elimination of the hiring preference.

C. Summary

An assimilationist model of racial equality, embodied in the presumption against racial classification that is at the core of the strict scrutiny doctrine, and in the statutory prohibition contained in Title VII, can be seen at work in the race antidiscrimination cases. The model's ultimate goal is eradicating the use of racial differences as the basis for all public and most private decisions. The case law developed with the help of this model shows a single tendency: black litigants seeking to be treated as equals put pressure on white-controlled institutions. The struggle is far from over, but its direction is clear. Although current efforts to limit preferential relief to identifiable victims of past discrimination may delay progress in race reverse discrimination cases, the moral strength of blacks' claims for justice is as compelling today as it was when Myrdal delineated it so clearly in 1942.

The assimilationist model works well, up to a point, to explain the two-way pattern that emerges from the sex antidiscrimination cases. There, an intermediate level of scrutiny reflects the Court's belief that some sex classifications are based on "real" sex differences and that these classifications must be examined in each case to determine whether they are inherently stigmatizing. The Court most often correctly decides that question in cases that present no factual differences in ability or capacity between women and men. The Court is least successful when immutable reproductive sex differences are involved.

The two-way exchange of power exhibited in the sex cases shows that men as well as women believe that traditional sex classifications have excluded them from desirable opportunities available to the other sex. When the legal barriers that deny or restrict access to these opportunities have been removed, the two-way tendency will encourage cross-sex assimilation to occur. But even when those opportunities have been fully redistributed without regard to sex—a task that may occupy several generations of feminists—so that the members of both sexes are free from

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282. See supra text accompanying notes 195-99. See also Freedman, supra note 38, at 943-49 (offering a critique of the concept of "real" sex differences as reflected in the opinions of Justices Rehnquist and Stewart).


and do not assert restrictive role demands on each other,\textsuperscript{285} there will still remain a small category of physical reproductive functions that cannot be shared. The Supreme Court has encountered its greatest analytical difficulty when it examines laws affecting reproductive functions. This difficulty is understandable, because the Court's chosen tool, the assimilationist model of equality, offers no guidance as to how either society or the law should view reproductive functions unique to one sex. To decide those questions, another model of equality must be developed that is capable of recognizing and accommodating immutable sex differences to ensure equal opportunity for both men and women.

IV. THE LIMITS OF THE ANTIDISCRIMINATION PRINCIPLE

The antidiscrimination and benign or reverse discrimination cases previously considered draw upon the antidiscrimination principle, defined in Paul Brest's words as "the general principle disfavoring classifications and other decisions and practices that depend on the race (or ethnic origin) of the parties affected."\textsuperscript{286} Brest went on to note that, while the principle "can be and has been extended to encompass a variety of other traits, including alienage, illegitimacy, and sex," he had not undertaken "the inquiries necessary to evaluate such extensions."\textsuperscript{287} Earlier in this article, I began such an inquiry by comparing the application of the antidiscrimination principle to race and sex cases. I concluded that the assimilationist model of equality developed for and applied in the race discrimination context could appropriately be extended to the sex discrimination context when no immutable sexual reproductive differences are involved. The assimilationist model fails, however, to recognize and account for physical reproductive differences between women and men.

I now continue the inquiry by examining more closely some of the sex discrimination cases in which the courts sustained the challenged classification.\textsuperscript{288} These cases suggest that the antidiscrimination principle embodied in the assimilationist view of equality cannot identify sex discrimination in the absence of comparable men and women whose treatment along a given dimension differs because of sex.\textsuperscript{289} This failure is a serious obstacle to the use of the antidiscrimination principle in sex discrimination cases. The existence of physical sexual reproductive differences and the pervasive social system of ascribed sexual characteristics

\textsuperscript{285} On the question whether sex roles are inherently oppressive, compare Wasserstrom, supra note 10, at 613-15 (probably yes), with Rutherglen, supra note 19, at 209-11 (probably not), and E. Wolgast, supra note 17, at 103-37 (no).


\textsuperscript{287} Id. at 5.

\textsuperscript{288} I am concerned only with those cases in which the court rejected the claim of sex discrimination for conceptual reasons, not with those in which plaintiff failed to meet the burden of proof.

\textsuperscript{289} See also Wildman, supra note 47, at 288; Note, Toward a Redefinition of Sexual Equality, 95 Harv. L. Rev. 487, 499-507 (1981).
derived from those differences frequently makes cross-sex comparisons impossible or inaccurate. The result has been that courts and litigants have distorted seriously some sex discrimination cases to bring them within the antidiscrimination principle, while entirely omitting other groups of cases.

The cases in which the antidiscrimination principle fails to identify sex discrimination because of the absence of a member of the other sex to use as a comparison fall into two categories. The first category appeared early in the interpretative development of Title VII, when some job classifications were still limited to members of one sex. Many of these cases arose in the context of the airline industry and involved restrictions concerning marital status, age, and weight imposed on women flight attendants. As long as the courts did not question that the job was limited to women, the antidiscrimination principle did not identify these cases imposing job restrictions on women as ones involving sex discrimination.

290. See, e.g., Browne, supra note 199.

291. The Supreme Court has not treated three groups of cases affecting women as raising issues of equality. The most significant group consists of abortion cases, which the Court decided on due process grounds of privacy. See Law, supra note 48, at 980-87, discussing Roe v. Wade, 410 U.S. 113 (1973) and Doe v. Bolton, 410 U.S. 179 (1973). The subsequent abortion funding cases did raise equal protection issues, but the classification complained of was indigency, not sex. See Harris v. McRae, 448 U.S. 297, 321-26 (1980); Maher v. Roe, 432 U.S. 464, 469-80 (1977).

292. See, e.g., Binder, Sex Discrimination in the Airline Industry: Title VII Flying High, 59 CALIF. L. REV. 1091, 1101-11 (1971) (discussing restrictions based on marital status and age); Gerdom v. Continental Airlines, Inc., 648 F.2d 1223 (9th Cir. 1981) (panel opinion holding that weight restrictions imposed on female flight attendants did not discriminate against them on the basis of sex), rev’d en banc, 692 F.2d 602 (9th Cir. 1982), cert. dismissed, 460 U.S. 1040 (1983) (discussed infra note 295).

293. See, e.g., Stroud v. Delta Air Lines, Inc., 544 F.2d 892, (5th Cir.), reh’g denied en banc, 548 F.2d 356, cert. denied, 434 U.S. 844 (1977) (upholding marriage restriction imposed on women only—"[a]s one of the all-female group of flight attendants employed by Delta, plaintiff suffered a discrimination, but it was based on marriage and not sex." 544 F.2d at 893); accord Cooper v. Delta Air Lines, Inc., 274 F. Supp. 781 (E.D. La. 1967).
As soon as a man successfully won the right to work as a flight attendant, however, a basis for comparison existed and the courts could easily apply the antidiscrimination principle to such restrictions. But even before that resolution of the problem had occurred, a few courts read Title VII expansively to eliminate job impediments for women based on sex stereotypes, such as that requiring flight attendants to be young, attractive, and unmarried women, without regard to whether a man would be similarly restricted. The courts did not fully develop this alternate analysis, however, because the entry of males into the job category, followed by the reintroduction of the more familiar antidiscrimination principle, made it unnecessary.

Two other groups of cases posed potential analytical difficulties for applying the antidiscrimination principle and ultimately were brought within that principle by redefining the nature of the respective claims. These cases included claims by men against employer practices requiring them to wear short hair at work and claims by women of sexual harassment on the job. In the hair length cases, the courts achieved equality of treatment by subjecting the members of both sexes to grooming codes that enforced different and sex-appropriate standards of appearance. In the sexual harassment cases, the courts finally recognized the activity complained of to be work-related, rather than purely personal, conduct and, however infrequent in practice, capable

295. See, e.g., Gerdom v. Continental Airlines, Inc., 692 F.2d 602 (9th Cir. 1982) (en banc), cert. dismissed, 460 U.S. 1040 (1983) (weight restrictions applied to female flight attendants but not to male in-flight directors of passenger service constituted sex discrimination under Title VII; panel decision relying on Stroud repudiated).
296. See, e.g., Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir.), cert. denied, 404 U.S. 991 (1971) (challenge by female flight attendants to the no-marriage rule). The Court said: "The scope of Section 703(a)(1) is not confined to explicit discriminations based 'solely' on sex. In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." The case is notable for a concurring opinion by Justice Stevens, then sitting as a circuit judge. He observed in part that:
[If, except for his sex, plaintiff's husband had precisely the same job qualifications as plaintiff, he would not have been eligible for employment as her replacement. United's requirements for employment as a flight cabin attendant simultaneously discriminated against Mr. Sprogis because of his sex and against Mrs. Sprogis because of her sex.
Since there are only two sexes, a reading of § 703(a)(1) of the Civil Rights Act of 1964 which leads to such an anomalous result cannot be correct.
Id. at 1202.
297. Such an analysis, however, was perceptively developed in Taub, Keeping Women in Their Place: Sex Stereotyping Per Se as a Form of Employment Discrimination, 21 B.C.L. REV. 345 (1980). See also C. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 174-92 (1979).
298. See, e.g., Willingham v. Macon Tel. Publishing Co., 507 F.2d 1084 (5th Cir. 1975) (en banc).
299. See, e.g., Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977); Taub, supra note 297, at 361-87.
301. See, e.g., Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Note, Sexual Harassment Claims of Abusive Work Environment Under Title VII, 97 HARV. L. REV. 1449 (1984); see generally C. MACKINNON, supra note 297.
ble of affecting men as well as women. This group of cases stimulated feminist scholars to develop alternative approaches that focus more directly on the harm done to women by stigmatizing and stereotypical classifications. These approaches continue to be refined to avoid the restrictions inherent in using the treatment of men as a basis for comparison.

The second category of cases is more intractable. It includes some, but not all, of the cases that Wendy Williams has described as "hard cases" because she believes that they test the limits of what our culture is willing to accept as appropriate behavior. Courts using the antidiscrimination principle in this group of cases have rejected the claims of both men and women. The claims include litigation involving immutable physical sex differences—primarily pregnancy in women and the capacity to commit forcible rape in men. These cases can never satisfy the comparability standard inherent in the antidiscrimination principle for, by definition, there are no similarly situated pregnant men or female rapists. Accordingly, courts using that analysis have denied that the exclusion of pregnancy from a temporary disability plan for all workers constitutes sex discrimination, and have upheld statutes

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304. See, e.g., Law, supra note 48, at 1007-13; Wildman, supra note 47, at 304-07.
305. See Williams, supra note 7, at 180 and n.36. I agree that the pregnancy cases are "hard" ones for any court using an antidiscrimination standard and attempting to apply the assimilationist model of racial equality to sex discrimination cases.
306. See, e.g., Rostker v. Goldberg, 453 U.S. 57 (1981), discussed in Williams, supra note 7, at 181-85. I believe that Rostker was wrongly decided, but I do not find it a "hard case." A successful challenge to the combat restriction will resolve any difficulty in applying the antidiscrimination principle to military litigation. See Kornblum, supra note 233, at 430-43.
307. Williams, supra note 7, at 180, 182-83, 190-91.
309. See Comment, Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard, 62 YALE L.J. 55, 55 n.2 (1952) (pointing out that no published cases were found in which a woman was convicted as a principal defendant in a rape case). But see People v. Liberta, 64 N.Y.2d 152, 485 N.Y.S. 207 (1984), holding invalid, as a sex-based discrimination against men, a forcible rape statute that defined rape, in part, as "sexual intercourse with a female [by] forcible compulsion" (N.Y. FEMAL LAW § 130.35 (McKinney 1975)), and defined sexual intercourse as "penetration, however slight" (id. § 130.00(1)). The Court reasoned that the degree of contact required could be achieved without a male being aroused and thus without his consent. Under this technical interpretation a woman may be guilty of the crime of rape, even though, I would argue, she cannot perform the physical act of rape in the same way as a man. Statutory definitions aside, there are still no female rapists in that realistic sense. Michael M. v. Superior Court, 450 U.S. 464 (1981), classed by Williams as a "hard case" (see Williams, supra note 7, at 180 n.36), seems to me wrongly decided and "hard" only because of the Court's willingness to accept California's argument that the statute was designed to prevent pregnancy in teenage females.
defining forcible rape as a crime that only men can commit.311

Efforts were undertaken to change the results in both sets of cases; in both situations, the chosen approach brought the problem within the antidiscrimination principle. In the context of forcible rape, feminists were joined by other groups interested in crime control and in codifying state criminal laws. These groups proposed sex-neutral sexual assault laws, rape victim shield laws, and the elimination or modification of the corroboration requirement.312 These evidentiary reforms are desirable, and the sex-neutral laws clarified that women as well as men can commit sexual assault. But changing the name of the offense has not altered the reality that, while men can rape other men313 and women, women are still the primary victims of forcible rape.314

The Supreme Court decided the pregnancy disability cases on both constitutional315 and statutory316 grounds. While only a change of attitude by the Supreme Court Justices could overturn the constitutional holding, the statutory interpretation could be and was reversed by congressional amendment of Title VII.317 The congressional approach, however, was not to prohibit employment discrimination based on pregnancy, but to define discrimination based on sex as including discrimination based on pregnancy.318 Under one reading of the pregnancy discrimination amendment, this legislative strategy brought the pregnancy disability cases under the antidiscrimination principle.319 This interpretation would require courts to compare the coverage afforded to men and women: if men are not protected against temporary disabilities at work, neither are pregnant women. Under another reading, however, the amendment does not prohibit, even if it does not require, practices designed to accommodate pregnant workers that have no counterpart for non-pregnant workers.320 Litigants have submitted these competing interpretations of the Pregnancy Discrimination Act to the courts for resolution.321

312. See generally Berger, Man’s Trial, Woman’s Tribulation: Rape Cases in the Courtroom, 77 COLUM. L. REV. 1 (1977).
313. See, e.g., Withers v. Levine, 615 F.2d 158 (4th Cir. 1980).
317. See supra note 6.
318. See Williams, supra note 7, at 193-94.
319. See Note, supra note 8, at 694-95; Williams, supra note 7, at 193. See also Chavkin, supra note 308, at 202-06 (arguing that the Pregnancy Discrimination Act, if interpreted to afford pregnant women only the same rights as those available to medically disabled men, does not adequately cover women for prenatal care, childbirth leave, and breastfeeding).
320. See Note, supra note 8, at 695-96; see also Brief of Equal Rights Advocates, Inc., supra note 8. Reference to sex-specific diseases in men, such as prostate gland disorders, does not solve the problem of comparison with pregnancy. The female analogue to the prostatectomy is the hysterectomy or the mastectomy. Pregnancy, however, is not a disease. Rather, it is a normal physical sexual reproductive function that has no male analogue.
321. The Supreme Court of Montana has upheld (against a claim of preemption under Title
Legal issues concerning pregnancy, of course, are not limited to temporary disability plans or reasonable maternity leaves. The existing cases include those in which pregnant airline flight attendants have been grounded at various stages of pregnancy;322 those in which pregnant—women are excluded from the work place to prevent exposure to toxic hazards that potentially affect both sexes;325 and those in which indigent women giving birth have been threatened with sterilization.326 Moreover, Congress recently enacted legislation requiring that specific warnings to pregnant women against the use of tobacco be printed on cigarette packages.327 Cases on the legal horizon include those in which judges may impose a diet or avoidance behavior on pregnant women to safeguard fetal development against maternal neglect.328 Pregnancy cases also include a woman's claim of access to abortion as a way of terminating a pregnancy.329

As an alternative to constructing a comparative framework between pregnancy and other conditions in order to bring these cases within the antidiscrimination model, a different approach should be considered.


327. N.Y. Times, Sept. 27, 1984, at 1-Y, col. 5. The text of the warning, which is one among four to be printed on a rotating basis on cigarette packages, reads: "SURGEON GENERAL'S WARNING: Smoking by Pregnant Women May Result in Fetal Injury, Premature Birth, and Low Birth Weight." Id. at 16-Y, col. 3.


Such an approach should recognize that the capacity to become pregnant is one of the few immutable sex differences between women and men, and should provide a legal structure to accommodate pregnancy without regard to the antidiscrimination principle and its limiting requirement of comparison to male standards.

Several writers have recently begun the task of designing such an alternative legal structure. Sylvia Law, for example, has proposed bringing laws regulating reproductive biology within the fourteenth amendment's guarantee of equal protection. Such laws would not be subjected to the antidiscrimination principle.\(^3\) A two-step test would first scrutinize a law to determine whether it has a significant impact in perpetuating either "the oppression of women or culturally imposed sex-role constraints on individual freedom."\(^3\) If so, the test would then use a strict scrutiny standard of review to determine whether the law serves a compelling state interest.\(^3\) Her proposed test is limited to laws governing reproductive biology: she would continue to apply the antidiscrimination principle to laws that make explicit sex classifications.\(^3\)

Professor Law's two-step test is a valuable suggestion that deserves serious consideration. The initial focus on women is perhaps explained by the test's overall limitation to laws regulating reproductive biology. One cannot easily imagine a law explicitly governing male reproductive biology, let alone one that has an oppressive impact on men.\(^3\) But the

\(\text{330. Id. at 1008-09.}\)
\(\text{331. Id.}\)
\(\text{332. Id. at 1010-11.}\)
\(\text{333. Id. at 1011-12.}\)
\(\text{334. Castration as a treatment for male sexual offenders may be an appropriate illustration. Castration is the removal of the testes. When used as a medical treatment for sex offenders, "[t]he goal is to decrease hormone production with a hoped-for concomitant lowering of the sexual drive and a resultant lessening of criminal, sexually assaultive tendencies." GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, PSYCHIATRY AND SEX PSYCHOPATH LEGISLATION: THE 30s TO THE 80s, at 903 (Pub. No. 98, Apr. 1977). Reports on the use of castration in Europe during the 1920's and 30's appear in the medical literature. See, e.g., M. GUTTMACHER, SEX OFFENSES: THE PROBLEM, CAUSES AND PREVENTION 105-07 (1951); Heim & Hursch, Castration for Sex Offenders: Treatment or Punishment? A Review and Critique of Recent European Literature, 8 ARCHIVES SEXUAL BEHAV. 281 (1979); Bowman, The Problem of Castration as a Treatment of Sex Criminals, in CAL. DEVIATION RESEARCH 123-27 (Dep't of Mental Hygiene, The Langley Porter Clinic, Jan. 1953). Castration has had its defenders in the United States as well. See M. GUTTMACHER, supra, at 108-09 (discussing the views of Dr. C.C. Hawke, Medical Director of the State School for Mental Defectives at Winfield, Kansas, and reporting that 330 persons had been castrated there between 1894 and 1951). More recent observers note, however, that "[t]he acceptance of castration for sexual offenders in the United States is quite low among both professionals and the general public." GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, supra, at 905-06. It is not difficult to see why this might be so. A major objection to the practice is that the voluntariness of the patient's consent to the procedure is questionable when the alternative is imprisonment. See id. at 906-07. See also Sadoff, Sex and the Law, in THE SEXUAL EXPERIENCE 567 (1976). Sadoff noted that, although many sex offenders would prefer to be castrated than to be locked up for the rest of their lives, . . . the American Civil Liberties Union and other civil rights groups have questioned whether it is appropriate for these men to have to make such a choice and whether their freedom to give informed consent to the procedure is abrogated by undue coercion by virtue of their indefinite or indeterminate sentence.}\)
black lung\textsuperscript{335} and agent orange\textsuperscript{336} cases dramatically illustrate work place hazards that indirectly affect children of workers in two occupations—mining and military service—traditionally dominated by men.\textsuperscript{337} For many feminists, the preferred solution to the problem of toxic hazards at work is to protect all workers against reproductive dangers.\textsuperscript{338} A new legal standard that focuses on reproductive biology should be able to identify laws oppressive to either sex without needing to compare the sexes as part of the inquiry. Nor is it clear why physical characteristics unique to men should be omitted from Law's test, although I can appreciate her reasons for wanting to construct her model as narrowly as possible.\textsuperscript{339} As the former infliction of the death penalty in rape cases shows,\textsuperscript{340} males, too, have been subjected to oppressive laws regulating conduct associated with their physical sex characteristics.\textsuperscript{341}

Stephanie Wildman has proposed discarding the comparison between men and women inherent in the antidiscrimination principle because she believes that it perpetuates sex discrimination.\textsuperscript{342} Noting that "[w]omen, not men, are the victims of sex discrimination, just as blacks and not whites are the victims of race discrimination,"\textsuperscript{343} she sets out a

\begin{footnotesize}
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\item[\textsuperscript{335}] Id. at 571. The Supreme Court of South Carolina has held that a criminal sentence allowing a rapist to choose between castration or 30 years in prison constitutes cruel and unusual punishment under the state constitution. Brown v. State, 36 Crim. L. Rep. 2463 (S.C. Feb. 13, 1985) (see also N.Y. Times, Feb. 14, 1985, at 8-Y, col. 6).
\item[\textsuperscript{337}] See, e.g., \textit{In re "Agent Orange" Prod. Liab. Litig.}, 635 F.2d 987 (2d Cir. 1980), cert. denied sub nom. Chapman v. Dow, 454 U.S. 1128 (1981) (holding that plaintiffs, several hundred Vietnam veterans from the United States, Australia, and New Zealand—as well as their spouses, parents, and children—who claimed to have suffered damages as a result of their or a family member's exposure to Agent Orange, failed to state a cause of action under federal common law). The case proceeded under diversity jurisdiction, (see \textit{In re "Agent Orange" Prod. Liab. Litig.}, 580 F. Supp. 690 (E.D.N.Y. 1984) (opinion on choice of law)), and was recently settled with the manufacturers' creation of a $180 million fund for the benefit of the plaintiffs. See N.Y. Times, Sept. 26, 1984, at 16-Y, col. 1.
\item[\textsuperscript{338}] Women constituted 1.9% of the United States armed services in 1972; 5% in 1976; and estimates projected that the figure would rise to 7% by 1982. See M. BINKIN & S. BACH, WOMEN AND THE MILITARY (1977). Women constituted 10% of the armed services in 1983. The \textit{World Almanac & Book of Facts}, 1985, at 334-38 (1984). Women constituted 6% of the total mine work force, including clerical workers, in 1968; but, under pressure from governmental agencies and private litigation, employers are now hiring women to work as miners in greater numbers. See Barnard & Clark, \textit{Clementine in the 1980's (EEO and the Woman Miner)}, 82 W. VA. L. REV. 899 (1980).
\item[\textsuperscript{339}] See Williams, \textit{supra} note 325.
\item[\textsuperscript{340}] See Law, \textit{supra} note 48, at 1011-13.
\item[\textsuperscript{341}] See Coker v. Georgia, 433 U.S. 584 (1977) (holding that the imposition of the death penalty for the rape of an adult woman constituted cruel and unusual punishment in violation of the eighth amendment). The American Civil Liberties Union, the Center for Constitutional Rights, the National Organization for Women Legal Defense and Education Fund, the Women's Law Project, and Equal Rights Advocates, Inc. jointly filed an \textit{amicus curiae} brief in support of this position. The rape laws were a common tool used by whites to keep black men under control. See, e.g., Wriggins, \textit{Rape, Racism, and the Law}, 6 HARV. WOMEN'S L.J. 103, 104-16 (1983); R. KLUGER, \textit{supra} note 37, at 144-54 (discussing the case of the Scottsboro boys and that of George Crawford).
\item[\textsuperscript{342}] See also \textit{supra} note 334.
\item[\textsuperscript{343}] Wildman, \textit{supra} note 47, at 306.
\item[\textsuperscript{344}] \textit{Id}. at 304. Wildman qualifies the statement quoted in the text by pointing out that "of"
"participatory perspective" to eliminate sex discrimination against women by ensuring full societal participation. I agree with Wildman that women are victims of sex discrimination, but, as I have shown in this article, so are men. The differences I have identified between the patterns that have emerged in the race antidiscrimination cases and the sex antidiscrimination cases show that men believe themselves to be victims of sex discrimination in a way that whites did not believe themselves to be victims of race discrimination before preferential programs for blacks. Feminists should not discount that male perception, for it is the shared realization that both sexes are limited by social or legal restrictions imposed on either which will permit men and women to join together to restructure a society that currently oppresses both sexes in different ways. If feminists fully accept Wildman's proposal, we might be required to abandon the equality model in sex discrimination cases, rather than simply to modify it to permit courts and legislators to recognize and accommodate sex differences.

Other writers have also proposed analytical models that would transcend the limits of the antidiscrimination principle in the context of sex discrimination. Feminists should explore all of these suggestions while seeking to create a jurisprudence more reflective of our own concerns.

In my view, however, we should not abandon either the ideal of equality as a model for sexual justice, or, in all cases, an antidiscrimination principle as the normal standard of measurement. The concept of equality, pared to its descriptive nub, measures different objects or qualities to determine whether they are alike or different. Without any comparison between women and men, descriptive statements about their similarities and differences are not possible. Peter Westen has asserted that statements about prescriptive equality—whether two persons ought to be treated as equals—are meaningless or tautological. This argument has a superficial appeal when considered in the context of sex discrimination, for it seemingly suggests that women and men could be released course, men may be discriminated against on the basis of sex. A man who wants a leave from work to raise children will be viewed as odd; a man who wants to work in a 'woman's job' like nursing will be looked at askance."  

343. Id. at 304-05. Wildman credits Professor Kathryn Powers with this expression. Id. at 269 n.14. See Powers, Sex Segregation and the Ambivalent Directions of Sex Discrimination Law, 1979 Wis. L. Rev. 55, 102.

344. Id. at 306-07. Wildman notes Professor Kathryn Powers with this expression. Id. at 269 n.14.  


from the limitations imposed by deriving individual rights from comparisons with those held by members of the opposite sex.

I take it that Wildman, Law, and I agree that the antidiscrimination principle currently used in sex discrimination analysis does not adequately solve the legal problems raised by reproductive differences, primarily because the comparison between men and women does not fit those cases. Law and I, but not Wildman, agree that the comparison inherent in the antidiscrimination principle can be retained in cases where reproductive sex differences are not at issue—where one can compare women and men without distortion. I am not convinced, however, that the concepts of oppression, stigma, and sex stereotyping that Law, Wildman, and others use in their own approaches eliminate the need for comparison. I do not see how we can conclude that a person is oppressed or stigmatized except by contrasting the treatment he or she receives with the more favorable treatment given to another person who is not oppressed or stigmatized. If the argument is that all women are oppressed or stigmatized, then an implicit comparison with men seems built into the standard. Nor does resort to the concept of sex stereotypes help the argument, for sex roles are, by definition, complementary for each sex. Comparison seems to be unavoidable, then, but its use need not limit either sex if the model we choose for sexual equality avoids the assimilationist view of minimizing sex differences.

Dworkin's well-known distinction between the right to equal treatment and the right to be treated as an equal is helpful here. We can insist that men and women be treated equally in those many areas where no sex differences are relevant, while demanding that they be treated as equals in those few cases directly involving immutable biological reproductive differences. In this way, we can retain the ideal of equality, which, as Westen's critics have shown, has independent substantive value, in structuring a just society for both sexes.

V. Conclusion

Women and men are alike in many ways, including the largely untested capacity to develop their own potential free of sex stereotypes. But they are different in a few immutable traits, chief among them reproductive capacity and function. The experience of all known human societies has demonstrated a universal tendency to define the life options of both men and women by reference to those differing reproductive traits. For the first time in the history of any human society, reliable scientific control of the reproductive process is now at hand. Yet, far from de-

350. See, e.g., Freedman, supra note 38, at 965-68; Note, supra note 289, at 499-507.
353. See M. Mead, Male and Female 7-8 (1949).
creasing the importance of sex differences, these scientific discoveries have intensified public debate over basic issues such as birth control, abortion, pregnancy, and the role of women in both public and private life. More muted, but present, is a questioning of values associated with the traditional role of men and an exploration of their newly-defined position in family life. Holding a crucial place in this discussion is the current dispute over how pregnancy fits within a model of sexual equality.

This article argues that continued adherence to the assimilationist model of racial equality and persistent efforts to draw from it an adequate model of sexual equality founder on the inescapable fact of sexual reproductive difference. We should desist from further fruitless attempts to deny that which cannot be changed and instead direct our energies to devising ways to accommodate and neutralize the impact of those differences on the lives of women and men.
