THE CONSTITUTION OF WOMEN

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It has been nearly a quarter of a century since the United States Supreme Court began in earnest to address discrimination on the basis of gender. Armed with the Equal Protection Clause of the Fourteenth Amendment, but also with statutes such as Title VII of the Civil Rights Act of 1964, the Court has decided cases in contexts ranging from dependents' benefits to educational access. Faced with this large and increasingly diverse body of cases, it seems useful to try to characterize the Court's approach to gender discrimination and to assess the impact that jurisprudence has had on the condition of women.

I. THE PRESCRIPTIVE AND CONSTITUTIVE FUNCTIONS OF LEGAL DECISIONMAKING

In this analysis, I will identify two distinct functions of legal decisionmaking, only one of which has been the focus of conventional legal analysis. This more familiar function might be de-
scribed as the "prescriptive" function of legal decisionmaking: courts specify what governmental actors, or private citizens, can or cannot do. In the case of gender discrimination, legal decisions prescribe the kinds of treatment to which women can and cannot be subject. But there is also a second, less familiar, function, which I will refer to as the "constructive" or "constitutive" function of legal decisionmaking. The law, in the course of fulfilling its prescriptive function, projects images of the groups appearing before the Court. These images then shape the way such groups are viewed by the larger society. Law in this sense performs a function analogous to that of political rhetoric or the imagery of popular culture: it characterizes groups in ways that ultimately filter into popular understandings and counteract, or reinforce, the assumptions and stereotypes that already exist. With respect to women, this second or constitutive function is at least as important as the prescriptive function, because by shaping perceptions of women, it fuels or hinders women's equality in contexts that have not yet been addressed by the Court.

A simple illustration of these two functions of law may be found in the nineteenth century gender case of Bradwell v. Illinois. In that case, the United States Supreme Court rejected

5. Although I am not aware of earlier work in which such a distinction has been made in precisely this way, other legal scholars have focused on or referred to nondecisional attributes or effects of law. See, e.g., Cass R. Sunstein, Social Norms and Social Roles, 96 COLUM. L. REV. 903, 910 (1996) (referring to "law's expressive function ... the function of law in expressing social values with the particular goal of shifting social norms"). Although this view acknowledges the way in which law may constitute our values, it describes this as the result of purposeful action the government. My point is that law is always and everywhere shaping our values, through the same decisions and often the very same language through which it resolves cases, whether government intends it or intervenes to achieve it or not.

6. One reason that this constitutive function of law is less frequently acknowledged or discussed is that it is premised on a vision of the social constructedness of group-based identities that is at odds with the liberal premises of constitutional law, premises which do not embrace an assumption of deep social embeddedness. Works exposing and critiquing the liberal basis of contemporary American law abound within feminist legal theory, critical race theory, and critical legal studies. See, e.g., Kimberlé Williams Crenshaw, Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 HARV. L. REV. 1331 (1988). See generally Jay M. Feinman & Peter Gabel, Contract Law and Ideology, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 373 (David Kairys ed., rev. ed. 1990); Robert W. Gordon, New Developments in Legal Theory, in THE POLITICS OF LAW, supra; CATHARINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989).

7. 83 U.S. 130 (1872).
Myra Bradwell's constitutional challenge to her exclusion from the Illinois bar. Justice Bradley concurred, finding that there was no constitutional violation because women were not suited to the practice of law. Specifically, Justice Bradley said:

The natural and proper timidity and delicacy which belongs to the female sex evidently unfit it for many of the occupations of civil life.

... 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.

When the Bradwell Court said that the state was authorized to deny women admission to the bar, it was performing the prescriptive function. But when Justice Bradley described women as being characterized by "proper timidity and delicacy" and being destined to "fulfill the noble and benign offices of wife and mother," he was performing the constructive or constitutive function by projecting an image of women that, in this case, both reflected and reinforced the "separate spheres" ideology that was prevalent in late nineteenth century American society.

However, the prescriptive and constitutive functions of the law do not always operate consistently, or press in the same social direction. A more recent example, from the nonconstitutional area of battered women's self-defense, illustrates this point. Courts have recently permitted advocates for battered women accused of killing their batterers to offer expert testimony on "battered women's syndrome." This testimony is intended to buttress the "reasonableness" of battered women's self-defense, by explaining why violence—as opposed to other

8. See Bradwell, 83 U.S. at 139.
9. See id. at 140-42 (Bradley, J., concurring).
10. Id. at 141 (Bradley, J., concurring).
strategies such as leaving the household of the batterer—may have been perceived as the only option by some battered women. If one looks exclusively at the law's "prescriptive" function, admitting this evidence has been a great boon to battered women. It has helped factfinders to become more familiar with the dynamics of battering relationships and the way that these dynamics can affect a woman's capacity for self-direction and her sense of the options realistically available to her. Understanding these dynamics has made it easier for judges and juries to accept claims of self-defense. If one looks at the law's "constructive" or "constitutive" function, however, the impact of this evidence has been painfully mixed. While this evidence may combat images of accused women as masochists or cold-blooded killers, it has also fueled a view of battered women as pathologically passive and starkly unable to provide for either themselves or their children. Particularly when this evidence is filtered through popular beliefs that hold passivity to be a recurrent characteristic failing of women and find in it one reason for their disadvantage, expert testimony has sometimes hindered or pathologized the very women it is intended to help.

II. THE SUPREME COURT'S JURISPRUDENCE OF GENDER: BRIGHT LINES AND UNITARY VISIONS

Before one can assess either the prescriptive or constitutive effects of the Supreme Court's jurisprudence of gender, however, it is necessary to offer some synthetic vision of what the Court

13. See Kelly, 478 A.2d at 377; Schneider, supra note 12, at 216.
14. See Martha R. Mahoney, Legal Images of Battered Women: Redefining the Issue of Separation, 90 Mich. L. Rev. 1, 37-49 (1991) (noting that the testimony in battered woman syndrome and learned helplessness can perpetuate existing aggressive stereotypes of battered women); Schneider, supra note 12, at 216-18, 233-35 (noting that battered woman syndrome can be heard as reinforcing negative stereotypes of women as powerless and victimized).
15. Mahoney argues that it is not always the testimony per se but the way that it is processed through a framework reflecting these stereotypes that creates the problems. See Mahoney, supra note 14, at 37 ("[J]udges and jurors will inevitably hear this testimony filtered through cultural stereotypes which are of necessity enforced by the claim of exceptionality, of incomprehensibility, required by the requirement [for expert testimony] that the issue be 'beyond the layman's ken.' The result may often tend to perpetuate stereotypes . . . ").
has done. How has the Supreme Court characterized discrimination against women and what kinds of images of women have its opinions advanced? In characterizing the Court's approach, I will draw assistance from an unlikely source: the constitutional approach expounded by Justice Hugo Black. This approach may seem unlikely because, given the timing of his tenure on the Court, Justice Black participated in few major cases involving gender discrimination. Yet he had a distinct, almost paradigmatic approach to constitutional interpretation, that has instructive parallels to the path the Court has taken in the area of gender.

A. The Jurisprudence of Justice Black

Justice Black believed that judges did best when enforcing bright-line rules. Approaches involving balancing, or related forms of contextualization, subjected the freedoms of individuals to the ungrounded discretion of the courts. Justice Black believed, moreover, that the Constitution, particularly the Bill of Rights, provided this kind of clear direction: the Constitution represented a balance struck by the framers between the government and the individual that the Court was charged with protecting. In other words, Black contended that while the Bill of Rights might need reinterpretation in response to changes

16. Justice Black retired from the Court in 1971. Reed v. Reed, 404 U.S. 71 (1971), which is generally considered to be the first of the modern equal protection cases vindicating gender equality, was decided in 1971. The Court did decide the case of Goesaert v. Cleary, 335 U.S. 464 (1948), while Justice Black was on the bench. In that case the Court (with Justice Black in the majority) upheld as reasonable a Michigan statute prohibiting any woman from being licensed as a bartender "unless she be 'the wife or daughter of the male owner' of a licensed liquor establishment." See Goesaert, 335 U.S. at 465, 467. The Court concluded in its opinion that the state would also be authorized, if it so chose, to deny all women opportunities for bartending. See id. at 466.


19. See id. at 148-50.
or enlargements of governmental power, its stern prohibitions generally meant what they said. Thus, the task of constitutional interpretation, for Justice Black, was the task of defining and defending clear meanings in our founding document. "I read 'no law ... abridging' to mean no law abridging," as he was given to saying about the First Amendment. He also took the approach that the Fourteenth Amendment incorporates the Bill of Rights—inclusively not selectively—as against the states. Issues whose resolution was unclear or ambiguous under the Constitution or other laws were not matters for the courts, but should be left to be clarified or balanced by the legislature.

B. Unitary Approaches to Questions of Gender

Over the past twenty-five years, the legal advocacy for, and legal opinions vindicating, women's equality have employed a number of different theories to characterize gender discrimination and to provide portraits of women as a group. Virtually all of these theories have a singularity and a clarity that would have pleased Justice Black. The images of women they project, in a similar vein, have had a simple, unitary character that permits observers to glimpse the essence of women's condition in a phrase or two—as we do, for example, when reading the

20. See id. at 150.

21. See Smith v. California, 361 U.S. 147, 157 (1959) (Black, J., concurring). As Black noted more generally in his James Madison Lecture at the New York University School of Law, "[i]t is my belief that there are 'absolutes' in our Bill of Rights, and that they were put there on purpose by men who knew what words meant, and meant their prohibitions to be 'absolutes.'" See ONE MAN'S STAND FOR FREEDOM, supra note 17, at 33. One prominent example of his use of this "no law abridging" language occurred when he was queried publicly by Professor Edmund Cahn about his Bill of Rights speech. See Interview by Professor Edmond Cahn, New York University School of Law, with Justice Hugo L. Black (Apr. 14, 1962), in Justice Black and First Amendment "Absolutes": A Public Interview, 37 N.Y.U. L. REV. 549, 552-54 (1962), reprinted in ONE MAN'S STAND FOR FREEDOM, supra, at 467, 471-73; see also Stephen Parks Strickland, Black on Balance, in HUGO BLACK AND THE SUPREME COURT: A SYMPOSIUM 245, 247 (Stephen Parks Strickland ed., 1967).


Bradwell opinion.\textsuperscript{24} I would argue, however, that these singular, unitary theories and images have not always worked well for women. Like the expert testimony on "battered women's syndrome," they have facilitated some important legal victories.\textsuperscript{25} But as a prescriptive matter, they have left unexplained and unremedied instances of exclusion or devaluation that fall outside a particular framework, and as a constitutive matter, they have rendered women's reality easily assimilable to limiting stereotypes.

Women's equality would be better served by a jurisprudential approach that lies at the opposite end of the spectrum from Justice Black's. This approach would emphasize contextualization (the need to adapt rules or theories to respond to variation in context), rather than bright-line rules, and would describe women in a way that highlights their variety and the ambiguities in their condition, rather than advancing singular or simplified descriptions of them. A brief tour of the theories and images that have shaped the legal struggle for gender equality will help to explain my conviction that another kind of legal approach is necessary.

1. \textit{Equality Theory}.—The first legal theory advanced to address women's inequality was "equality theory" or "liberal feminism."\textsuperscript{26} This theory is grounded in the notions that women are functionally indistinguishable from men and that actionable discrimination arises when institutional actors, as a result of ignorance or prejudice, treat women as if they were different.\textsuperscript{27} This theory was propounded by legal advocates like Justice Ruth Bader Ginsburg\textsuperscript{28} and legal scholars like Wendy Williams.\textsuperscript{29} It

\textsuperscript{24} See Bradwell, 83 U.S. at 141 (stating that "the domestic sphere . . . properly belongs to the domain and functions of womanhood").

\textsuperscript{25} See, e.g., Reed v. Reed, 404 U.S. 71 (1971) (using the sameness or equality used to strike down a statute preferring males to females in the administration of estates); Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986) (utilizing the dominance theory in shaping a claim of hostile work environment sexual harassment under Title VII).

\textsuperscript{26} See Nancy Levit, Feminism for Men: Legal Ideology and the Construction of Maleness, 43 UCLA L. REV. 1037, 1042 (1996).

\textsuperscript{27} See, e.g., id. at 1042-43.

\textsuperscript{28} See William J. Turnier et al., Redistributing Justice and Cultural Feminism, 45 AM. U. L. REV. 1275, 1286 (1996). See generally David Cole, Strategies of Differ-
has been the theory most frequently used by the Court to give content to the Equal Protection Clause as it applies to gender. These advocates and scholars attacked classifications that treated women differently from men, by arguing that they rested on long-standing stereotypes rather than on a full understanding of women's nature. This approach secured for women more equal opportunity in many professional settings. It also advanced a notion—a notion still treated as synonymous with the term "feminist"—that women are pervasively similar to men.

The problem, of course, is that this theory, and this image, did not begin to address the complex nature of women's reality and the range of practices through which women are relegated to second class citizenship. The limitations of this understanding became clear when women entering the workforce in increasing numbers became pregnant yet wanted to continue in their jobs. This was an unblinkable, physical difference that required a


29. See Turnier et al., supra note 28, at 1295. See generally Wendy W. Williams, The Equality Crisis: Some Reflections on Culture, Courts, and Feminism, 7 WOMEN'S RTS. L. REP. 175 (1982) (exploring a crisis point in the evaluation of equality theory, as courts begin to deal with these more complex issues).

30. See, e.g., Stanton v. Stanton, 421 U.S. 7 (1975) (invalidating statute requiring child support through age 21 for male children but only through age 18 for female children); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (invalidating provision of social security laws authorizing benefits for widows but not widowers of wage-earners with minor children); Frontiero v. Richardson, 411 U.S. 677 (1971) (invalidating statute permitting servicemen to claim wives as a "dependent" without proof of dependence, while requiring proof of dependence where servicewomen seek to claim husbands as a "dependent").

31. See, e.g., Levit, supra note 26, at 1044.

32. See Turnier et al., supra note 28, at 1294. The legal basis for the courts' decisions in cases involving employment opportunity was Title VII of the Civil Rights Act, yet the courts' reasoning in these cases was often grounded in the kind of equality feminism elaborated above. See, e.g., Price-Waterhouse v. Hopkins, 490 U.S. 228 (1986) (holding that an unsuccessful female candidate for partnership had suffered stereotype-based decisionmaking, illegal under Title VII, when she was penalized for aggressive behavior that would have been valued in a male candidate); Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (7th Cir. 1971) (invalidating under Title VII a policy requiring that female flight attendants, but not analogous male employees, must be unmarried); Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969) (rejecting under Title VII company argument that maleness was a bona fide occupational qualification for employment as switchman because of "strenuousness" of job).

33. See Levit, supra note 26, at 1041.
different theoretical and legal response. But biological difference was not the only source of difficulty for equality theory. Insisting on women's similarity to men as a means of gaining access to previously male dominated workplaces meant that women were obliged to conform to institutions that were not designed with them in mind. The eighty-hour work week might fit poorly with women's disproportionate child care obligations. Notions of "merit" based on male attributes might impede women as a group and pose special barriers to women of color and poorer women. But equality theory gave women no analytical tools with which to raise these objections. Women were frequently obliged to squeeze themselves into ill-fitting roles in androcentric institutions, rather than using their growing numbers and sometimes distinct perspectives to transform those institutions.

2. Difference Theory.—These difficulties led feminists like Leslie Bender, Carrie Menkel-Meadow and Chris Littleton to conclude that legal theory must highlight and

34. See, e.g., Herma Hill Kay, Equality and Difference: The Case of Pregnancy, 1 BERKELEY WOMEN'S L.J. 1 (1985) (discussing whether pregnancy may be treated differently in the workplace and offering a new analytical approach to the legal significance of biological reproductive conduct); Wendy W. Williams, Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1984-85) (providing an analysis of the pregnancy dilemma within the context of an "equal treatment" approach).

35. See Christine A. Littleton, Equality and Feminist Legal Theory, 48 U. PITT. L. REV. 1043, 1051 (1987) (noting that the "notion of equality has provided access for some women into formerly male bastions, like the practice of law, but has not permitted challenges to the structure of law firm practice").

36. See generally Leslie Bender, From Gender Difference to Feminist Solidarity: Using Carol Gilligan and an Ethic of Care in Law, 16 VT. L. REV. 1 (1990) (asserting that gender difference theory can provide a starting point to transform the current state of the law as it impacts women).

37. See generally Carrie Menkel-Meadow, Portia in a Different Voice: Speculations on a Women's Lawyering Process, 1 BERKELEY WOMEN'S L.J. 39 (1985) (considering the difference theory in an analysis of the presence of women in the legal profession).

38. See generally Littleton, supra note 35 (discussing equality through the acceptance of difference). Littleton's position is perhaps best characterized as combining elements of difference and dominance feminism, for while she argued for the accommodation of women's distinctive patterns and characteristics, she also described those characteristics as having emerged from a social context of starkly unequal power between men and women. See e.g., id. at 1066,1068.
demand accommodation of women's distinctive patterns and characteristics. Littleton argued, for example, that equal protection law should require institutions to create equality across sex differences: in other words, to respond to women's differences in such a way that women ended up as well off as their male counterparts. Although this approach, known as "difference feminism," did not make great headway under the equal protection clause, it led to the creation of laws like the Pregnancy Discrimination Act and to state statutes granting maternity leaves.

But difference feminism was not sufficient to capture the whole of women's experience either. The institutional accommodation effected under "difference" approaches proved to be superficial, with employers flagrantly devaluing the "mommy tracks" they had created, as well as the women on them. Moreover, the image of women as having distinct patterns of decisionmaking or being more concerned with the nurturance of children began to produce a revival of the "separate spheres"

39. See id. at 1052-59.
41. See, e.g., CONN. GEN. STAT. ANN. § 46a-60(a)(7) (West 1995) (making the termination and unfair treatment of a woman based on her pregnancy a discriminatory practice); MASS. GEN. LAWS ANN. ch. 149, § 105D (West 1996) (dictating that a female employee, having completed a probationary work period, is entitled to be restored to her previous position after taking an eight week period following childbirth or the adoption of a child); TENN. CODE ANN. § 4-21-408(a) (1991) (allowing four months of maternity leave to any female employee employed for twelve consecutive months by the same employer); E.E.O.C. v. Joelyn Mfg. & Supply Co., 706 F.2d 1469, 1478 (7th Cir. 1983) (detailing the legislative history of the Pregnancy Discrimination Act); Felts v. Radio Distributing Co., 637 F. Supp. 229 (N.D. Ind. 1985) (analyzing the Pregnancy Discrimination Act after an employer failed to reinstate a woman wanting to return from maternity leave). It is worth noting, however, that when gender-specific leave policies were challenged as giving women greater, and therefore unequal benefits in violation of the Pregnancy Discrimination Act, these policies were defended with argumentation grounded in equality theory. See, e.g., California Federal Savings & Loan Ass'n v. Guerra, 479 U.S. 272 (1987) (holding that Title VII, as amended by the PDA, does not preempt a state law granting pregnant women disability leave days because the state statute was consistent with federal law in furthering equal employment opportunity for women).
42. For a discussion of this problem, see Kathryn Abrams, Gender Discrimination and the Transformation of Workplace Norms, 42 VAND. L. REV. 1183 (1989) (discussing the inadequacy of and limited institutional support for accommodations of working mothers and parents).
43. See, e.g., SARA RUDDICK, MATERNAL THINKING 127-39 (1989) (discussing the
ideology that Ginsburg and others had worked against. 44

Feminists like Littleton began to comment on this reassertion of confining, stigmatizing norms. 45 They wondered whether the assumption, common to equality and difference feminists, that gender discrimination was based on irrationality or cognitive error was in fact wrong. They suggest, instead, that problems might really be one of power: a deliberate or reflexive male commitment to keeping men and their norms at the center of culture and institutional design. 46 At the same time as this questioning about the role of power in gender discrimination began to emerge, other feminists began to argue that debates over treatment in the workplace neglected many other harms that women had suffered on the basis of gender. 47 The “take back the night” movement of the late 1970s and early 1980s, for example, had raised consciousness about rape and pornography. 48 Feminists were skeptical that these instances of violence against women could readily be addressed under either the difference or equality frameworks. 49

3. Dominance Theory.—Legal feminist Catharine MacKinnon captured many of these currents in feminism with her “dominance theory” of women’s oppression. 50 MacKinnon

maternal thinking theory from a feminist standpoint). See generally CAROL GILLIGAN, IN A DIFFERENT VOICE (1982) (asserting that women speak in a different voice defined by relationships and contextual method of thought).

44. See, e.g., Katha Pollitt, Marooned on Gilligan’s Island: Are Women Morally Superior to Men?, THE NATION, Dec. 28, 1992, at 799 (critiquing work of Carol Gilligan and Sara Ruddick); Joan Williams, supra note 11 (critiquing work of Carol Gilligan and its application in law).

45. See Littleton, supra note 35, at 1043-44 (noting current problems that women face in society).

46. See id. at 1050-62 (noting that gender discrimination may in fact go beyond the ideas of equality and difference theorists).


49. See Catharine A. MacKinnon, Difference and Dominance: On Sex Discrimination, in FEMINISM UNMODIFIED 32, 40-41 (1987) (noting that many of these injuries, which she refers to as women’s deepest injuries, are not remediable under an equality/difference framework).

50. See id. at 40-45 (presenting MacKinnon’s “dominance theory”).
argued that the equality theory and the difference theory were really two sides of the same coin.\textsuperscript{51} Both described women by reference to men and proceeded as if women's inequality could be traced to something inherent in them—rather than something that had been done to them.\textsuperscript{52} MacKinnon wanted to talk explicitly about the role of male power: power used first, to keep male norms, patterns, and values at the cultural and institutional center; and second, to keep women subordinated through sexualized coercion.\textsuperscript{53} MacKinnon took up growing concern with rape, pornography, and sexual harassment by describing the sexual coercion of women not as an occasional pathological excess but as paradigmatic of the relationship between men and women in this society.\textsuperscript{54} This domination affected women more profoundly than the barriers described under equality or difference theories: women often internalized the coercive treatment and began to see themselves as men saw them.\textsuperscript{55} This devalutative way of viewing women also affected the courts, whose legal decisions in areas like rape often reflected the dominant male view of women.\textsuperscript{56}

The goal, in MacKinnon's mind, was to retool the law to make it an instrument of women's liberation rather than their oppression.\textsuperscript{57} This was achieved by deconstructing ostensibly neutral doctrines that actually expressed male perspectives\textsuperscript{58} and by enacting new laws that would penalize coercive behavior and would be informed by a woman's, or victim's, perspective.\textsuperscript{59}

\begin{itemize}
\item\textsuperscript{51} See \textit{id.} at 33-34.
\item\textsuperscript{52} See \textit{id.} at 36.
\item\textsuperscript{53} See \textit{id.} at 40-41.
\item\textsuperscript{54} See, e.g., Catharine A. MacKinnon, \textit{Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence}, 8 \textit{SIGNS} 635, 644-58 (1983) (discussing sexual coercion as paradigmatic and legal perspective on women's sexual victimization as male).
\item\textsuperscript{55} \textit{See Catharine A. MacKinnon, Toward a Feminist Theory of the State} 147-50 (1989).
\item\textsuperscript{56} \textit{See MacKinnon, supra} note 54, at 646-50 (asserting that rape laws are developed from a male perspective).
\item\textsuperscript{57} \textit{See} \textit{MacKinnon, supra} note 55, at 240.
\item\textsuperscript{58} MacKinnon deconstructs, with particular incisiveness, both First Amendment doctrine and Fourteenth Amendment privacy doctrine. \textit{See} \textit{MacKinnon, supra} note 55, at 189-94; Catharine A. MacKinnon, \textit{The Sexual Politics of the First Amendment in Feminism Unmodified}, \textit{supra} note 49, at 206, 206-13.
\item\textsuperscript{59} \textit{See MacKinnon, supra} note 54, at 649-55.
\end{itemize}
While MacKinnon's approach has more often critiqued constitutional law than informed it, her analysis has been central to the recognition and litigation of a claim for sexual harassment under Title VII and has influenced date rape education programs on university campuses. 60

However, dominance theory has had its own drawbacks. Some feminist critics have observed that dominance theory, like equality and difference theories before it, understates the differences among women. 61 Women are extremely diverse as a group but each of these images characterized them in a simple, monolithic way: similar to men, different from men, sexually dominated by men. 62 Perhaps more importantly, most of these singular images were ultimately based on the position of one subgroup of women—usually the most powerful, white, middle class, straight women. Black feminists argued, for example, that dominance feminism's account of sexual coercion as paradigmatic did not take into account the distinctive character of black women's experiences of sexualized coercion: that such coercion is inflected with race oppression; that it occurs in distinctive contexts, such as that of paid domestic labor; and that black female victims were for many years formally excluded from rather than simply devalued in the court system. 63

A second group of critics objected to dominance feminism's depiction of women as being systematically coerced, to the point of internalizing some of their devaluation and constraint. Some argued that this characterization obscured the lives of women who had been able to assert themselves 64 or who were con-

60. For an examination of the relationship between dominance feminism and date rape programs, see Kathryn Abrams, Songs of Innocence and Experience: Domi-

inance Feminism in the University, 103 YALE L.J. 1533 (1994).

61. See Angela Harris, Race and Essentialism in Feminist Legal Theory, 42

62. See Kathryn Abrams, Title VII and The Complex Female Subject, 92 MICH.

63. See, e.g., Harris, supra note 61, at 595; Kimberlé Williams Crenshaw,
LEGAL F. 139, 154.

64. See PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY (2d ed. Carole Vance ed., 1992) (containing essays arguing that dominance feminism as reflected in the antipornography movement obscures women's experiences of sexual agency and desire).
strained but not wholly compromised by instances of coercive treatment. Others argued that these images would have negative effects on women who might perceive themselves, or be perceived by others, as hopeless victims.

C. Complex Visions of Gender and Gender Discrimination

These last two groups of critics, those who stress women's diversity and those who see prevailing images of women as being too unitary or too wholly compromised, pose a different kind of challenge to legal feminism—a challenge with which I strongly identify. The goal should not be to find yet another theory that describes gender discrimination by reference to some single pattern, but rather to generate a multi-faceted theory which clarifies that discrimination against women differs in different contexts and which affects distinct subgroups of women in varying ways. The goal is not to formulate a new image of women that better captures their essence, but to propagate images of women that are plural and acknowledge the ambiguities in their experience.

Two types of questions arise in response to this new formulation of a feminist legal project. First, is it possible as a descriptive matter, to advance a more complex theory in law? Can we describe women as being united by some threads of experience, while divided by others? Can we characterize them as being subject to different kinds of discrimination, and yet still have an account that coheres? Can we promulgate images that acknowledge the ambiguities in women's experience—their constraint and their continuing capacity for self-direction—and still argue effectively that they are entitled to a legal remedy? And second, assuming we can do this descriptively, is it something we should undertake normatively? More precisely, are there drawbacks to having a body of law, particularly constitutional law, that reflects so much variation according to context, and which embod-

ies such complexity and ambiguity?

III. ASSESSING COMPLEXITY IN THE JURISPRUDENCE OF GENDER

A. Is Depicting Complexity Possible in Law?

The answer to the first question, regarding the possibility of representing such complexity in law, is a somewhat tentative “yes.” It is true that many kinds of complexity continue to baffle the courts. Women whose identities are complex—those who suffer intersectional forms of discrimination, or suffer singular forms of discrimination, yet fit ambivalently into a particular protected category—have often been required to simplify these identities in order to secure relief from the courts. But in other contexts, advocates have succeeded in depicting, and courts in accepting, images of women that reflect contingency and subgroup-based variation. Interestingly, this has been true even in the field of constitutional law and even in the decisions of the Supreme Court. Three cases epitomize this effort: one achieves mixed results, and two are far more successful in advancing complex theories of discrimination and multi-dimensional images of women. After examining these cases, I will consider the normative advisability of such approaches—a question which is much more difficult to answer.

1. J.E.B. v. Alabama.—The first, and the least successful, of these cases, is J.E.B. v. Alabama. This case, which held that the Equal Protection Clause forbids peremptory challenges

67. See Abrams, supra note 62, at 2481 ("Many courts have been unwilling to accommodate these understandings within Title VII doctrine, requiring that claimants disaggregate and choose among the elements of their identities; while others have awarded relief to complex claimants but failed to give an account of the discrimination they face that would help integrate such claims into the mainstream . . . ").
68. See id.
based on gender, was predominantly about the images of women that the legal system projects.\textsuperscript{72} It is of very little moment to any given woman whether she sits on a jury in a particular case. But it may be of great moment to the community what kind of vision the legal system projects about women when it decides who may be removed from juries. Justice Blackmun, writing for the majority, recognized this when he noted that the community may be "harmed by the State's participation in the perpetuation of invidious group stereotypes."\textsuperscript{73}

\textit{J.E.B.} was framed by Justice Blackmun as a case about the exclusion of potential jurors because of their gender.\textsuperscript{74} In a potentially controversial move, Justice Blackmun connected the use of peremptory challenges to remove women from a jury with the long-standing legal rules excluding women from juries altogether.\textsuperscript{75} Finding comparability where others might have hesitated,\textsuperscript{76} he was able to resolve the case using an "equality" or "sameness" theory of feminism.\textsuperscript{77} "Striking individual jurors on the assumption that they hold particular views simply because of their gender," Justice Blackmun concluded "is 'practically a brand upon them, affixed by the law, an assertion of their inferiority.'"\textsuperscript{78} Responding to the state's claim that men and women may, as an empirical matter, have different attitudes about certain issues, Justice Blackmun sternly stated, "We shall not accept as a defense to gender-based peremptory challenges 'the very stereotype the law condemns.'"\textsuperscript{79} Yet this conclusion that

\begin{itemize}
  \item \textsuperscript{72} See \textit{J.E.B.}, 511 U.S. at 129, 146.
  \item \textsuperscript{73} \textit{Id.} at 140.
  \item \textsuperscript{74} See \textit{id.} at 129.
  \item \textsuperscript{75} See \textit{id.} at 131-33.
  \item \textsuperscript{76} A state's exclusion of women from juries altogether would seem to rest upon a judgment of unfitness or inferiority. A lawyer's removal of women from a jury through the use of peremptory challenges may rest on a similar judgment—and the historical force of this assumption should encourage us to examine such removal carefully—but it need not rest upon that ground. It could also rest upon the perception, or indeed the concern or suspicion, that women's judgments may be divergent upon a particular issue or point that is of importance to the lawyer's client. This divergence, as Justice O'Connor points out in her concurrence, could arise from gender-specific experiences rather than some innate tendency and could reflect a concern that these experiences will be detrimental to the client, rather than a perception that women are inferior. See \textit{id.} at 149 (O'Connor, J., concurring).
  \item \textsuperscript{77} See \textit{J.E.B.}, 511 U.S. at 146.
  \item \textsuperscript{78} \textit{Id.} at 142 (quoting Strauder v. West Virginia, 100 U.S. 303, 308 (1879)).
  \item \textsuperscript{79} \textit{Id.} at 138 (quoting Powers v. Ohio, 499 U.S. 400, 410 (1991)).
\end{itemize}
men and women are indistinguishable as jurors and that any recognition of difference rests on stereotypes branding women as inferior sits uneasily with other portions of the opinion and with things many of us believe we know about men and women. In one portion of his historical account, Blackmun quoted from *Ballard v. United States,* which held that women’s exclusion made a federal jury less cross-sectional:

“[I]t is not enough to say that women when sitting as jurors neither act nor tend to act as a class. . . . The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both.81”

A different and more fully elaborated rationale for predicting differences between the sexes in jury decisionmaking comes from the concurrence of Justice O’Connor.82 Focusing on the unacknowledged costs of the Court’s decision, she stated:

We know that like race, gender matters. A plethora of studies make clear that in rape cases, for example, female jurors are somewhat more likely to vote to convict than male jurors. . . . One need not be a sexist to share the intuition that in certain cases a person’s gender and resulting life experience will be relevant to his or her view of the case. “Jurors are not expected to come to the jury box and leave behind all that their human experience has taught them.” Individuals are not expected to ignore as jurors what they know as men—or women.83

When one traces differences of opinion not to biology but group-related life experience and when one views those differences not as monolithic but as specific to certain subjects, the expectation of gender-related differences sounds less like an invidious stereotype and more like a socially-nuanced description.

When I teach this case in Constitutional Law, many students like this opinion. They believe that the major theme of women’s similarity to men, punctuated by small asides that acknowledged women’s differences, makes the opinion reflective

82. See *id.* at 148 (O’Connor, J., concurring).
of reality. However, I think that this combination makes the opinion seem inconsistent—an objection that goes not to the outcome, but to the Court’s manner of defending it. There are ways Justice Blackmun might successfully have connected the different portions of his opinion: he might, for example, have noted that some experientially-based, gender-specific differences exist, but concluded that acknowledging them through peremptory challenges carried too great a risk of rehabilitating hostile stereotypes. But projecting a unitary image of women’s similarity and allowing unreconciled slips or counterarguments to supply the nuance seems a less than optimal way of creating a complex portrait of women.

2. Harris v. Forklift Systems.—A more successful effort at projecting complex images of women comes from the area of sexual harassment. The case of Harris v. Forklift Systems, Inc., takes us outside the constitutional context, a departure that seems appropriate as many important cases defining gender discrimination arise under Title VII. Harris concerned a plucky woman manager who was harassed by the president of her company. This harassment was varied and not particularly subtle: the employer called the plaintiff a “dumb ass woman,” suggested they go to the Holiday Inn to negotiate her raise, and demanded that she fish coins out of his front pants pocket. Increasingly disturbed by two years of this conduct, Harris confronted her boss and told him that the behavior must stop or she would quit her job. His response was predictable, but not wholly inappropriate: he claimed he was joking, apologized, and said he would stop. However, only a few weeks later, in front of other employees, he suggested she had negotiated a deal by promising the client sex the following Saturday night. Harris made good on her ultimatum: she quit and brought an action for sexual harassment. The question before the Court was whether a plain-

86. Harris, 510 U.S. at 19.
tiff in a sexual harassment suit must demonstrate that her psychological well-being had been seriously affected in order to prevail in the suit. The district court had expressed skepticism that Harris, who socialized easily with male employees and felt bold enough to confront her employer about his conduct, had met this requirement. Writing for a unanimous Court, Justice O'Connor rejected the requirement. She wrote:

Title VII comes into play before the harassing conduct leads to a nervous breakdown. A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers.

In affirming the claim for sexual harassment without the psychological injury restriction, the Court acknowledged that among the modes of women's oppression is an intrusive, sometimes coercive sexualization. This coercive and sexualizing tendency can poison relations in the workplace as well as in more intimate contexts. In affirming as injured a woman who had retained the courage and self-respect to confront the president of her company, the Court projected a nuanced image of what it means to be a victim of sexual harassment. One need not be wholly debilitated or compromised to be a legitimate victim, contrary to what sometimes seems to be suggested by dominance feminists. One can be angered, humiliated, and thwarted in one's professional progress but still retain enough capacity for resistance and self-direction to confront the boss. This subtle, ambivalent image of sexual victimization—as involving only

88. See Harris, 510 U.S. at 20.
89. See Harris, 1991 WL 487444, at *7-*8.
90. See Harris, 510 U.S. at 23.
91. Id. at 22.
92. See id. at 23.
93. Dominance feminism often focuses on the most thorough-going abuses or finds within less dramatic instances of abuse the same dynamics that characterize more devastating examples. See generally Tracy E. Higgins, "By Reason of Their Sex": Feminist Theory, Postmodernism, and Justice, 80 CORNELL L. REV. 1536, 1566-67 (1995) (discussing the dominance views of Catharine MacKinnon); Nancy Levit, Feminism for Men: Legal Ideology and the Construction of Maleness, 43 UCLA L. REV. 1037, 1048 (1996) (stating that the dominance theory views the victimization of women as ranging from subordination to torture).
partial constraint of a woman’s self-direction or agency—is a sound response to the excesses of dominance theory. It is one of the great legacies of the Harris case.

3. United States v. Virginia.—An equally successful effort to capture the complexities of women’s situation may be found in the Court’s most recent case on gender, United States v. Virginia. This case concerned the constitutionality of the exclusion of women from the Virginia Military Institute (VMI). Because this case, like J.E.B., concerned the exclusion of women from a public institution, it permitted the Court to revisit the ground covered by Justice Blackmun. However, in my view, the opinion, authored by Justice Ginsburg, does a more satisfactory job of reflecting complexity in its depiction of gender discrimination and of women. Like Justice Blackmun in J.E.B., Justice Ginsburg uses history to paint a broad-brush picture of discrimination against women as a group. She traces the exclusion of women from Virginia educational institutions of all kinds, and from VMI in particular. Yet she stops short of saying, as Blackmun seems to in much of J.E.B., that women are indistinguishable from men, or that any efforts to distinguish them are based on stereotypes.

Justice Ginsburg does not argue as she frequently did in the early gender cases, that the average woman is as well suited to avail herself of this educational opportunity as the average man. In fact, she moves away from gender-based comparisons and discussions of group averages altogether. She notes that

generalizations about ‘the way women are,’ estimates of what is appropriate for most women, no longer justify denying opportunity to women whose talent and capacity place them outside the

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95. See Virginia, 116 S. Ct. at 2269.
96. See id.; see also J.E.B., 511 U.S. at 128-46.
97. See Virginia, 116 S. Ct. at 2274-76; see also J.E.B. at 131-35.
98. See Virginia, 116 S. Ct. at 2277-79.
100. See Virginia, 116 S. Ct. at 2283-84. In fact, she does not argue with a VMI Task Force’s finding that the adversative method of education employed by VMI “would not be effective for women as a group.” Id. at 2283 (quoting United States v. Virginia, 44 F.3d 1223, 1233 (4th Cir. 1995)).
average description. Notably, Virginia never asserted that VMI's method of education suits most men.¹⁰¹

Justice Ginsburg's departure from the long-standing strategy of intergroup comparisons rests in part on the atypicality of this opportunity: this punishing, intrusive, highly adversarial method of education would not be effective for men as a group either.¹⁰² But she also makes the further suggestion that generalizations about what is appropriate to women as a group run the risk of stereotyping.¹⁰³ A better question is whether there is some group of women who are able to take advantage of a particular opportunity who are unable to do so because of discrimination against women as a group.¹⁰⁴ The women who seek to enter VMI may be different in some ways from their sisters: they may be in better physical shape, for example, or have a greater than average taste for military-style discipline.¹⁰⁵ But like those women who have sought to enter other less usual professions, they have been denied an opportunity because of antagonisms against or misconceptions about the circumstances and abilities of women.¹⁰⁶ It is this denial of opportunity configured to a particular context, but imposed on the basis of gender, that violates the Constitution's command.¹⁰⁷

Between the lines of this argument is a description of women with considerable nuance, which avoids many of the drawbacks of preceding accounts. Women's similarity to men is not at the heart of the discussion—a shift that might please dominance feminists who see that as too often the alpha and omega of equal protection analysis.¹⁰⁸ Some groups of women are similar to any given group of men, others are not. Neither group is characterized as being unified or monolithic—a conclusion that might satisfy critics of the unitary character of equality, difference, and dominance feminism. But what women as a group share is a

¹⁰¹. Id. at 2284 (disputing Virginia's actions based on the task force's findings).
¹⁰². See id.
¹⁰³. See id.
¹⁰⁴. See id.
¹⁰⁵. See Virgina, 116 S. Ct. at 2280, 2284.
¹⁰⁶. See id. at 2284.
¹⁰⁷. See id. at 2287.
continuing history of being subject to exclusion and devaluation, a history that affects different women in different ways. Some women may be affected in ways that are general to women as a group—such as those women who are excluded from juries. Others may be affected in ways that are specific to subgroups: women managers may be impeded in their progress by harassing employers who suggest their success is attributable to sexual favors; women who seek military careers may be thwarted by the belief of military officers that they are unfit to sustain an adversative style of education. None of these complexities, however, makes it impossible to say which actions violate the law. An official decision that denies a particular woman, or group of women, an opportunity of which they are capable of availing themselves simply because they are women is gender discrimination in violation of the Fourteenth Amendment.

B. Is Depicting Complexity Normatively Advisable?

But if such an approach to characterizing women and gender discrimination is possible, is it also advisable? This may be a fitting question with which to close because it is, in the end, Justice Black's question. There are many different dimensions of this question, but I will only consider two. First, rules handed down by courts are more than ad hoc resolutions of particular cases; they should provide predictable principles by which people can guide their behavior. The more contextual variation that opinions reflect, in articulating theories of discrimination or images of women's condition, the less clear guidance they offer to those who would regulate their own behavior in accordance with law. Second, the United States Constitution, as the supreme law of the land, might be expected to be interpreted at a higher level of generality, making problematic the acknowledgment of so much complexity, contingency, and ambiguity.109

Prospective guidance is indeed a function—and an imperative—of legal decisionmaking. But it must be reconciled with other goals, including the accurate characterization of controversies, and the just resolution of particularized cases. In respond-

109. Charles Reich offers of prototype of this argument. See Reich, supra note 18, at 144.
According to this range of goals, contextuality has been the great, if sometimes hidden, subtext of Anglo-American law. The common law acknowledged substantial contextual variation in describing, for example, the relationship between contracting parties. Antidiscrimination law, perhaps because of its constitutional or statutory basis, or perhaps because of inadequate understanding of the variable character of discrimination, has often proved the exception to this rule. Now may be the time to instill in such law more of the specificity and fact-sensitivity of its common law counterpart.

As to the generality appropriate to the supreme law of the land: generality is one of the features that permits a constitution to be applicable to the range of controversies governed by a nation's highest law, but flexibility has long been acknowledged as another. The first Justice Marshall acknowledged that goal himself as early as McCullough v. Maryland. The practice of contextuality—of creating a doctrine whose terms will be sensitive to factual variation—may permit the Constitution to adapt to changing circumstances. Moreover, even modes of interpretation that are styled as general, or abstract, often involve more contextualization than members of the Court have been willing to admit. In a fascinating analysis of Justice Black's jurisprudence, Charles Reich argues, for example, that Justice Black's doctrine of "absolutes"—his insistence, for example, that "no law" means no law, was really an instrument for preserving


111. The failure of important bodies of antidiscrimination law to acknowledge the ways in which discrimination can vary where claimants are members of two or more "protected" categories (and therefore suffer "intersectional" discrimination) is one example of this deviation. See Abrams, supra note 62, at 2481.

112. 17 U.S. (4 Wheat.) 316, 407 (1819). In acknowledging Congress' power to be flexible in selecting necessary means under the "necessary and proper" clause, Marshall was also asserting the Court's power to be flexible in assessing the consistency of governmental action with the constitution's command. See id.

113. Justice Black and First Amendment "Absolutes": A Public Interview, reprinted in One Man's Stand for Freedom, supra note 21, at 472; see also Smith v. California, 361 U.S. 147, 157 (1959) (Black, J., concurring).
the framers' balance between the government and the individu-
al, under the changed circumstances of contemporary life.\textsuperscript{114} This task involved considerable contextualization, indeed. It may be that a complex and contextualized theory of gender discrimi-
nation is less of a constitutional departure than we suspect.

\section*{IV. Conclusion}

The first quarter-century of the Supreme Court's focus on gender discrimination has been shaped by unitary theories, both of discrimination itself and of the women who are its targets. Though each of these theories has shed light on salient elements of women's circumstances, and produced some important legal victories for women, each has ultimately proved too rigid or reductive an instrument for analyzing or systematically remedying gender inequality. These theories should be replaced by more complex, contingent accounts of gender discrimination and of women as subjects, such as have emerged in embryonic form in several recent Supreme Court opinions.\textsuperscript{115}

It may be difficult to foresee, and therefore difficult to defend in advance of the effort, how more complex contextualized theories of gender discrimination might be implemented by the courts. But to develop and explore the means of implementing such theories is an appropriate response, both to the failings of more unitary approaches to gender discrimination and to the variety and complexity of women's lives.

\begin{footnotesize}
\textsuperscript{114} See Reich, \textit{supra} note 18, at 148-57.
\textsuperscript{115} See \textit{supra} Part III.A.1-3.
\end{footnotesize}