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NGUYEN v. INS AND THE APPLICATION OF INTERMEDIATE SCRUTINY TO GENDER CLASSIFICATIONS: THEORY, PRACTICE, AND REALITY

Norman T. Deutsch*

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I. INTRODUCTION

Under the Fifth and Fourteenth Amendments, neither the federal government nor the states may deny any person equal protection of the laws.[1] There are two principal questions in equal protection cases. First, whether the ends the government seeks to achieve by the classification are constitutionally permissible;[2] and second, whether the means employed are closely related enough to the otherwise permissible ends to justify the distinction.[3] In answering these questions the Supreme Court has articulated three standards of review: rational basis, intermediate scrutiny, and strict scrutiny.[4] One area of this tri-level equal protection jurisprudence that continues to be troublesome is the application of intermediate scrutiny to gender classifications. In theory, there are considerable differences between intermediate scrutiny and either rationale basis review or strict scrutiny. However, in practice its application has been problematic. For example, in *United States v. Virginia*,[5] seven members of the Court, purporting to apply intermediate scrutiny, held that Virginia Military Institute's (VMI's)

1. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1; *see also* Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (finding an equal protection component in the Fifth Amendment Due Process Clause).

2. *See, e.g.*, Romer v. Evans, 517 U.S. 620 (1996). *But cf.* WILLIAM COHEN & JONATHAN D. VARAT, CONSTITUTIONAL LAW: CASES AND MATERIALS 679 (Foundation Press 11th ed. 2001) (pointing out that "[c]onstitutional law scholars are sharply divided on the question whether . . . courts should examine . . . both the means and the ends of legislation").

3. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976).

4. *But cf.* R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The "Base Plus Six" Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 225, 226 (2002) (arguing that the Court's cases "reflect" seven standards of review).

5. United States v. Virginia, 518 U.S. 515 (1996).

exclusion of women violated the Equal Protection Clause.[6] However, in a bitter dissent, Justice Scalia accused the Court of "a *de facto* abandonment of the intermediate scrutiny that has been . . . [the] standard for sex-based classifications for some two decades."[7] He maintained that the Court had, in effect, applied strict scrutiny.[8]

The shoe was on the other foot in the Court's most recent gender case, *Nguyen v. INS*.[9] In that case the underlying question was the constitutionality of a Congressional statute that placed greater requirements on unwed citizen fathers, than on unwed citizen mothers with respect to conferring United States citizenship on their offspring when the other parent is an alien.[10] All of the Justices agreed that the statute created a gender classification and intermediate scrutiny was the appropriate standard of review.[11] The five Justice majority upheld the classification, holding that it was substantially related to the achievement of important governmental interests.[12] The four dissenters, however, complained that the majority had "deviat[ed]"[13] from precedent and failed to apply the standard in a "rigorous"[14] and "vigilan[t]"[15] manner. They not so subtly implied that the majority had, in effect, not applied intermediate scrutiny, but rational basis review.[16]

The dispute over the proper application of the standard of review in *Nguyen* and *Virginia* is symptomatic of the fact that intermediate scrutiny is a "made up" rule[17] that has had little effect on the outcome of the decisions. In reality, intermediate scrutiny in gender cases is a form of rational basis review.[18] In effect, the issues in the gender cases have been whether the

6. *Id.* at 519.
7. *Id.* at 574 (Scalia, J., dissenting).
8. *See id.* at 571-76.
9. Nguyen v. INS, 533 U.S. 53 (2001).
10. *Id.* at 59-60.
11. *See id.* at 60-61, 74-75.
12. *Id.* at 60-61.
13. *Id.* at 97 (O'Connor, J., dissenting).
14. *Id.* at 79.
15. *Id.* at 97.
16. *See id.* at 74-78.
17. *See* United States v. Virginia, 518 U.S. 515, 567, 570 (1996) (Scalia, J., dissenting) (characterizing the Court's tri-level equal protection jurisprudence as "made-up tests" that "are no more scientific than their names suggest").
18. For an article reaching a similar conclusion, see George C. Hlavac, *Equal Protection: Interpretation of the Equal Protection Clause: A Constitutional Shell Game*, 61 GEO. WASH. L. REV. 1349, 1376 (1993) ("[A]ny special protection the intermediate-scrutiny test provides actually can be provided by the rational-basis test."). *See also* Michael M. v. Superior Court, 450 U.S. 464, 497 n.4 (1981) (Stevens, J., dissenting) (asserting that despite the articulation of different standards of

classifications at issue are based on legitimate differences between the genders, or whether they are based on stereotypical "overbroad generalizations about the different talents, capacities, or preferences of males and females";[19] and, even if the former, whether the means are reasonably and rationally related to the ends. However, since the answers to these questions are not always self-evident, they require reasoned analysis upon which reasonable minds can, and do, differ. Consequently, in the end, the results in the cases turn on how the Court and the individual Justices view the underlying facts and policies, rather than on the verbalization of the standard of review as intermediate scrutiny.[20]

II. THE THEORETICAL DIFFERENCES BETWEEN STRICT SCRUTINY, INTERMEDIATE SCRUTINY, AND RATIONAL BASIS REVIEW

In theory, there are considerable differences between rational basis review, strict scrutiny, and intermediate scrutiny. Rational basis review is a deferential standard.[21] It is the base line standard of review in equal protection cases.[22] It applies to all classifications not involving fundamental rights or suspect classes.[23] Under it, classifications are upheld if they bear a reasonable[24] or rational[25] relationship to a legitimate government purpose.[26] The rationale for rational basis review is that the Court is not a super-

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review, in reality "the ultimate standard . . . in all . . . equal protection cases . . . is essentially the same"); Craig v. Boren, 429 U.S. 190, 212 (1976) (Stevens, J., concurring) (arguing the Court's multi-tiered analysis:

> does not describe a completely logical method of deciding cases, but rather is a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion[;] [and] . . . a careful explanation of the reasons motivating particular decisions may contribute more to an identification of that standard than an attempt to articulate it in all-encompassing terms).

Chief Justice Burger may have also shared the view that there is only one standard of review in equal protection cases. Justice Souter has said that "Chief Justice Burger's noncategorical approach is probably best seen . . . as reflecting his conviction that the treble-tiered scrutiny structure merely embroidered on a single standard of reasonableness whenever an equal protection challenge required a balancing of justification against probable harm." Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 268 (1995) (Souter, J., dissenting).

19. *Virginia*, 518 U.S. at 533.

20. *But cf.* Miss. Univ. for Women v. Hogan, 458 U.S. 718 (1982). Justice O' Connor, writing for a five Justice majority, opined that "when a classification expressly discriminates on the basis of gender, the analysis and level of scrutiny . . . do[es] not vary simply because the objective appears acceptable to individual Members of the Court." *Id.* at 724 n.9.

21. Romer v. Evans, 517 U.S. 620, 632 (1996); Nordlinger v. Hahn, 505 U.S. 1, 11 (1992).

22. *See Romer*, 517 U.S. at 632; *Nordlinger*, 505 U.S. at 11.

23. *Nordlinger*, 505 U.S. at 10.

24. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911); Gulf, Colo. & Santa Fe R.R. Co. v. Ellis, 165 U.S. 150, 155 (1897).

25. *Romer*, 517 U.S. at 631.

26. *See id.*

legislature.[27] It is not the Court's role "to judge the wisdom, fairness, or logic of legislative choices."[28] It is for other governmental decision makers to decide what policies are needed.[29] In developing and implementing such policies, governments face practical problems.[30] This may require them to make "'rough accommodations'" that may seem "'illogical'" and "'unscientific.'"[31] Therefore, if a classification does not involve fundamental rights or suspect classes,[32] the scope of review should be narrow and deferential,[33] and the classification should be upheld as long as it is not arbitrary.[34]

Thus, under rational basis review, there is a strong presumption in favor of the validity of the classification.[35] Government decisions are "not subject to courtroom factfinding,"[36] and the rationality of the classification does not have to be supported with evidence in the record.[37] The government is not required to state any basis for it at all.[38] The Court may engage in "rational speculation"[39] to determine if there is "any reasonably conceivable state of facts"[40] that could justify it.[41] If there are "'plausible reasons'"[42] to support its rationality, the classification is upheld even if the supposed reasons did

27. New Orleans v. Dukes, 427 U.S. 297, 303 (1976).

28. FCC v. Beach Communications, Inc., 508 U.S. 307, 313 (1993).

29. *See Dukes*, 427 U.S. at 303 (noting that it is not the Court's job "to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines").

30. Heller v. Doe, 509 U.S. 312, 321 (1993).

31. *Id.* (quoting Metropolis Theatre Co. v. City of Chicago, 228 U.S. 61, 69-70 (1913)).

32. *Beach Communications, Inc.*, 508 U.S. at 313.

33. *See* Romer v. Evans, 517 U.S. 620, 632 (1996).

34. *See* Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 79-80 (1911).

35. *Beach Communications, Inc.*, 508 U.S. at 314.

36. *Id.* at 315.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 313.

41. *Id.*

42. *Id.* at 313-14 (quoting United States R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980)). On the current Court, only Justice Stevens quibbles with this proposition. In his view, "'the Constitution requires something more than merely a 'conceivable' or 'plausible' explanation.'" *Id.* at 323 n.3 (Stevens, J., concurring) (quoting *Fritz*, 449 U.S. at 180 (Stevens, J., concurring)). He asserts that the inquiry should be "whether the classification is rationally related to 'a legitimate purpose that we may reasonably presume to have motivated an impartial legislature.'" *Id.* (emphasis omitted) (quoting *Fritz*, 449 U.S. at 181 (Stevens, J., concurring)).

not in fact motivate the decision maker.[43] Indeed, the Government's actual purpose is said to be "irrelevant" for purposes of rational basis review.[44]

Furthermore, government may legislate "one step at a time"[45] and is not required to solve "all evils of the same genus . . . or none at all."[46] Government classifications do not have to be drawn perfectly.[47] A classification is not unconstitutional merely because it "'is not made with mathematical nicety or because in practice it results in some inequality.'"[48] It will only be struck down when it "'rests on grounds wholly irrelevant to the achievement of the State's objective.'"[49] Anyone challenging the classification has "the burden 'to negative every conceivable basis which might support it,'"[50] or otherwise "must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker."[51] Consequently, governmental "'line-drawing'"[52] is sometimes said to be "virtually unreviewable."[53]

Strict scrutiny and intermediate scrutiny are forms of heightened scrutiny.[54] Strict scrutiny is the antithesis of rational basis review. Whereas rational basis review is a "relatively relaxed standard"[55] of review, strict scrutiny, as its name implies, is a strict standard.[56] Rational basis is applied deferentially.[57] Under strict scrutiny, however, the Court takes a hard look to determine the constitutionality of the classification. In rational basis review the government's purpose must be only legitimate,[58] but in strict scrutiny the

43. *Id.* at 315.

44. *Id. But see infra* text accompanying notes 279-81.

45. Williamson v. Lee Optical, Inc., 348 U.S. 483, 489 (1955).

46. Ry. Express Agency v. New York, 336 U.S. 106, 110 (1949).

47. *See* Heller v. Doe, 509 U.S. 312, 321 (1993).

48. Dandridge v. Williams, 397 U.S. 471, 485 (1970) (quoting Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911)).

49. Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 71 (1978) (quoting McGowan v. Maryland, 366 U.S. 420, 425 (1961)).

50. FCC v. Beach Communications, Inc., 508 U.S. 307, 315 (1993) (quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973)).

51. Vance v. Bradley, 440 U.S. 93, 111 (1979).

52. *Beach Communications, Inc.*, 508 U.S. at 315 (quoting United States R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980)).

53. *Id.* at 316. Nonetheless, rational basis review does have some bite. *See infra* notes 273-329 and accompanying text.

54. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440-41 (1985).

55. Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 314 (1976).

56. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 224 (1995) (stating that strict scrutiny requires "the strictest judicial scrutiny").

57. Romer v. Evans, 577 U.S. 620, 632 (1996); Nordlinger v. Hahn, 505 U.S. 1, 11 (1992).

58. *Romer*, 517 U.S. at 631.

government's interests must be compelling.[59] In addition, under rational basis review the required fit between the means and the ends must be only reasonable[60] or rational;[61] however, in strict scrutiny the fit must be narrowly tailored.[62]

Intermediate scrutiny in gender cases also purports to be a form of heightened, "'hard look'"[63] scrutiny. Under the verbalization of the standard, classifications must be substantially related to important governmental objectives.[64] In intermediate scrutiny the Governmental purpose must be more than simply legitimate as in rational basis review; it must be important.[65] However, the purpose need not be compelling as in strict scrutiny.[66] Also, the fit between the means and the ends must be more than merely reasonable or rational as in rational basis review; it must be substantial.[67] A substantial relationship is required "to assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and woman."[68] However, the classification need not be as narrowly tailored as in strict scrutiny. Nonetheless, the justification for the classification must be "'exceedingly persuasive.'"[69] The burden of establishing an "exceedingly persuasive justification" is said to be "demanding[,] and it rests entirely on the State."[70] Furthermore, unlike rational basis review, the Court will not engage in rational speculation.[71] The rationale for the classification "must be genuine, not hypothesized or invented *post hoc* in response to litigation."[72] Also, "it

59. *See Adarand Constructors, Inc.*, 515 U.S. at 200.

60. *See* Lindsley v. Natural Carbonic Gas, Co., 220 U.S. 61, 78 (1911); Gulf, Colo. & Santa Fe R.R. Co. v. Ellis, 165 U.S. 150, 155 (1897).

61. *See Romer*, 517 U.S. at 631.

62. *Adarand Constructors, Inc.*, 515 U.S. at 227.

63. United States v. Virginia, 518 U.S. 515, 541 (1996).

64. *Id.* at 533.

65. *Id.*

66. *Cf. id.* at 532 n.6 ("The Court has thus far reserved most stringent judicial scrutiny for classifications based on race or national origin . . . .").

67. *Id.* at 533.

68. Miss. Univ. for Women v. Hogan, 458 U.S. 718, 725-26 (1982).

69. *Virginia*, 518 U.S. at 533.

70. *Id.*

71. Kirchberg v. Feenstra, 450 U.S. 455, 460, n.7 (1981).

72. *Virginia*, 518 U.S. at 533.

must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females."[73]

Of the Court's three levels of equal protection scrutiny, intermediate scrutiny as applied to gender classifications is the most disconnected from the intent and text of the Constitution. Strict scrutiny developed in the context of race based classifications.[74] It has its roots in the anti-slavery origins of the Fourteenth Amendment.[75] Although originally designed to protect the newly freed slaves,[76] the Court has held that it prohibits all discrimination based on race,[77] color, or national origin.[78] Such classifications are said to be inherently "suspect"[79] since they are "more likely to reflect racial prejudice than legitimate public concerns."[80] Furthermore, "'distinctions between citizens solely because of their ancestry'" are by their very nature "'odious to a free people whose institutions are founded upon the doctrine of equality.'"[81] Consequently, such classifications can only be upheld if they are "shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination."[82] Therefore, the Court must take a hard look at such classifications so as to "'smoke out' illegitimate uses of race."[83]

Admittedly, the Court has not always analyzed the cases consistently with this purpose.[84] In addition to extending strict scrutiny beyond classifications that discriminate against Negroes to include all classifications

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73. *Id.*

74. *See* Palmore v. Sidoti, 466 U.S. 429, 432 (1984) ("A core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race."); Loving v. Virginia, 388 U.S. 1, 10 (1967) ("The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States.").

75. *See* cases cited *supra* note 74.

76. Slaughter-House Cases, 83 U.S. 36, 81 (1872) ("We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of [equal protection].").

77. In *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995), a five to four majority of the Court held that strict scrutiny applies to all race based classifications, even those designed as affirmative action in favor of racial minorities, and regardless of whether they are created by federal, state, or local governments.

78. Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (stating that the provisions of the Fourteenth Amendment "are universal in their application, to all persons . . . , without regard to any differences of race, of color, or of nationality").

79. *Loving*, 388 U.S. at 11.

80. *See* Palmore v. Sidoti, 466 U.S. 429, 432 (1984).

81. *Loving*, 388 U.S. at 11 (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943)).

82. *Id.*

83. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion).

84. *See* Plessy v. Ferguson, 163 U.S. 537, 551-52 (1896) (stating that the Equal Protection Clause only prohibits racial discrimination with respect to political and civil rights, not discrimination with respect to social rights), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

based on race, color, nationality,"[85] and, in certain instances, aliens,[86] it has also applied equal protection principles against the federal government through the Due Process Clause of the Fifth Amendment,[87] even though that result seems inconsistent with the doctrine of original intent.[88] Nonetheless, strict scrutiny is consistent with the principle that the Constitution prohibits discrimination against certain classes of persons in the absence of some compelling interest. However, it seems quite certain that the drafters of the Fourteenth Amendment never intended strict scrutiny to serve as the standard of review for gender classifications.[89]

On the other hand, the Court recognized early on that the Equal Protection Clause was phrased in universal terms and hence was not limited to racial discrimination; on its face, it purports to protect all persons from a denial of equal protection.[90] However, the Court also recognized that not all governmental classifications are invidious.[91] Consequently, it developed the principles of deferential rational basis review. Thus, classifications not involving fundamental rights or suspect classes are presumed to be based on some rational basis[92] and are only struck down if shown to be arbitrary.[93]

By contrast, intermediate scrutiny in gender cases is, in the words of Justice Scalia, a "made-up"[94] rule that made its first appearance in Justice

85. *See* case cited *supra* note 78.

86. Strict scrutiny has also been applied to classifications by the states that discriminate against legal aliens with respect to economic interests. *See* Graham v. Richardson, 403 U.S. 365, 372 (1971) ("Classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a 'discrete and insular' minority for whom such heightened judicial solicitude is appropriate." (citation omitted)). *But cf.* Plyer v. Doe, 457 U.S. 202, 219 n.19 (1982) ("We reject the claim that 'illegal aliens' are a 'suspect class.'"); Cabell v. Chavez-Salido, 454 U.S. 432, 439 (1982) ("While not retreating from the position that restrictions on lawfully resident aliens that primarily affect economic interests are subject to heightened judicial scrutiny, we have concluded that strict scrutiny is out of place when the restriction primarily serves a political function." (citations omitted)); Matthews v. Diaz, 426 U.S. 67 (1976) (applying rational basis review to the exclusion of federal Medicare benefits to certain lawfully admitted aliens).

87. *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (finding an equal protection component in the Fifth Amendment Due Process Clause).

88. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA 83 (Touchstone Books 1997).

89. *Id.* at 328-31; Ruth Bader Ginsburg, *Sexual Equality Under the Fourteenth and Equal Rights Amendments*, 1979 WASH. U. L.Q. 161, 161-63.

90. *See* Barbier v. Connolly, 113 U.S. 27 (1885).

91. *See, e.g.*, FCC v. Beach Communications, Inc., 508 U.S. 307 (1993).

92. *Id.* at 314-15.

93. Lindsley v. National Carbonic Gas Co., 220 U.S. 61, 78-79 (1911).

94. *See* United States v. Virginia, 518 U.S. 515, 567, 570 (1996) (Scalia, J., dissenting) (characterizing the Court's tri-level equal protection jurisprudence as "made-up tests" that "are no more scientific than their names suggest").

Brennan's opinion for the Court in *Craig v. Boren*[95] in 1976. It emerged as an alternative standard after a majority of the Court rejected Justice Brennan's argument in *Frontiero v. Richardson*[96] that strict scrutiny should be the standard of review in gender cases. The argument in favor of strict scrutiny in such cases is that gender classifications can be, and have been, used invidiously.[97] The country "has had a long and unfortunate history of sex discrimination . . . [that] was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage."[98] Historically, women suffered from disabilities similar to slaves, being unable to "hold office, serve on juries, or bring suit in their own names."[99] Women have also suffered "discrimination in our educational institutions, in the job market[,] and . . . in the political arena."[100] This is despite the fact that gender "is an immutable characteristic [that] . . . frequently bears no relation to ability to perform or contribute to society."[101] Thus, gender classifications "carry the inherent risk of reinforcing the stereotypes about the 'proper place' of women and their need for special protection."[102]

However, a majority of the Court has never accepted the argument that gender classifications are necessarily inherently invidious,[103] and therefore should be subject to strict scrutiny.[104] Instead, they have taken the position that such classifications can sometimes be reasonable and legitimate.[105] This is based on the argument that, unlike race, "the sexes are not similarly situated in certain circumstances."[106] There are obvious differences between men and women, and the Equal Protection Clause does not require "'things which are different in fact . . . to be treated in law as though they were the same.'"[107] Having lost the strict scrutiny argument, Justice Brennan seems to

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95. Craig v. Boren, 429 U.S. 190, 197 (1976) ("[C]lassifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives.").

96. Frontiero v. Richardson, 411 U.S. 677, 682-88 (1973) (plurality opinion).

97. *See Virginia*, 518 U.S. at 531-32.

98. *Frontiero*, 411 U.S. at 684 (plurality opinion).

99. *Id.* at 685.

100. *Id.* at 686.

101. *Id.*

102. Orr v. Orr, 440 U.S. 268, 283 (1979).

103. *See* Rostker v. Goldberg, 453 U.S. 57, 79 (1981).

104. *See* United States v. Virginia, 518 U.S. 515, 532 n.6 (1996) ("The Court has thus far reserved most stringent judicial scrutiny for classifications based on race or national origin . . . ."); *see also Frontiero*, 411 U.S. at 691-92.

105. *See, e.g.*, Kahn v. Shevin, 416 U.S. 351 (1974) (affirmative action for women).

106. Michael M. v. Superior Court, 450 U.S. 464, 469 (1981) (plurality opinion).

107. Rinaldi v. Yeager, 384 U.S. 305, 309 (1966) (alteration in original) (quoting Tigner v. Texas, 310 U.S. 141, 147 (1940)).

have created intermediate scrutiny as a way of ensuring heightened scrutiny of gender classifications.[108]

A further indication of the made up quality of the rule is that, in theory, it applies to all gender classifications, even those that discriminate against males.[109] Clearly, there has been undeniable discrimination against females. However, it is hard to make the case that males are any sort of suspect class or, "because of past discrimination or peculiar disadvantages, are in need of the special solicitude of the courts."[110]

III. IN PRACTICE THE APPLICATION OF INTERMEDIATE SCRUTINY HAS BEEN PROBLEMATIC

A. Introduction

Perhaps, in part, because of its made up quality, the application of intermediate scrutiny in gender cases has proved problematic in practice. For one thing, it has only been grudgingly accepted as the articulated standard of review. Although the Court began to change its attitude towards gender classifications in 1971,[111] it was not until 1977 that a majority of the Court unequivocally accepted intermediate scrutiny as the articulated standard;[112] and, it is only since 1982 that it has been the consistent standard of a majority of the Court.[113] Furthermore, it was not until 2001 in *Nguyen*,

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108. *See also* Hlavac, *supra* note 18, at 1366 (arguing that, in *Craig v. Boren*, "Justice Brennan simply took the traditional 'rational-basis' test of *Reed* [*v. Reed*] and gave it a new set of teeth, creating a somewhat heightened standard of review without providing a rationale for adopting the standard").

109. *See* Nguyen v. INS, 533 U.S. 53 (2001); Miss. Univ. for Women v. Hogan, 458 U.S. 718 (1982); Caban v. Mohammed, 441 U.S. 380 (1979).

110. *Michael M.*, 450 U.S. at 476.

111. *See* Reed v. Reed, 404 U.S. 71 (1971).

112. The first gender case in which a majority of the Court unequivocally applied intermediate scrutiny was *Califano v. Webster*, 430 U.S. 313, 316-17 (1977). It has been suggested that the Court has applied intermediate scrutiny in gender classifications since 1976 in *Craig v. Boren*, 429 U.S. 190 (1976). *See, e.g.*, United States v. Virginia, 518 U.S. 515, 558 (1996) (Rehnquist, C.J., concurring). However, in *Craig*, only four Justices unequivocally applied that standard. *See Craig*, 429 U.S. at 197-98; *Id.* at 214 (Blackmun, J., concurring in pertinent part). Five members of the Court were still not ready to do so. *See Craig*, 429 U.S. at 210-11 (Powell, J., concurring); *Id.* at 211-14 (Stevens, J., concurring); *Id.* at 214-15 (Stewart, J., concurring); *Id.* at 215-17 (Burger, C.J., dissenting); *Id.* at 217-28 (Rehnquist, J., dissenting). *See also infra* notes 660-75 and accompanying text.

113. A majority of the Court did apply intermediate scrutiny in a number of cases between 1977 and 1981. *See* Kirchberg v. Feenstra, 450 U.S. 455, 460-61 (1981); Wengler v. Druggists Mut. Ins.

the Court's most recent gender case, that all nine Justices unequivocally purported to apply the standard.[114] In the interim, various Justices applied strict scrutiny,[115] intermediate scrutiny,[116] rational basis review,[117] or a "sufficiently related" standard[118] as the standard of review in gender cases; and sometimes some Justices failed to articulate any particular standard of review at all.[119]

Even when the Court, or at least a substantial majority, has applied intermediate scrutiny in gender cases, its application has sometimes been problematic. For example, in *United States v. Virginia*, Justice Ginsburg, writing for the majority,[120] seemed to de-emphasize the standard. She gave only lip service to the proposition that gender classifications must be substantially related to important government objectives.[121] Instead, she emphasized the notion that such classifications require heightened scrutiny and must have an exceedingly persuasive justification.[122] In a concurring

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Co., 446 U.S. 142, 150-53 (1980); Caban v. Mohammed, 441 U.S. 380, 388-94 (1979); Parham v. Hughes, 441 U.S. 347, 353-58 (1979); *cf.* Pers. Adm'r v. Feeney, 442 U.S. 256, 274 (1979) (stating in dictum that intermediate scrutiny is the standard of review in gender cases); Orr v. Orr, 440 U.S. 268, 279 (1979) (same). However, a majority failed to apply the standard in *Michael M. v. Superior Court*, 450 U.S. 464 (1981), and *Rostker v. Goldberg*, 453 U.S. 57 (1981). Nonetheless, a majority returned to the standard in 1982 in *Mississippi University for Women v. Hogan*, 458 U.S. 718, 723-33 (1982). A majority of the Court also applied intermediate scrutiny in *United States v. Virginia*, 518 U.S. 515, 531-34 (1996), and *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 146 (1994). *Cf.* Miller v. Albright, 523 U.S. 420 (1998).

114. *But cf.* United States v. Virginia, 518 U.S. 515 (1996); *infra* notes 120-29 and accompanying text. In *Hogan*, a majority purporting to apply intermediate scrutiny struck down a statute that excluded males from taking courses for credit at a state nursing school. *Hogan*, 458 U.S. at 719. Three dissenters thought that rational basis review was the appropriate standard. *Id.* at 742 (Powell, J., dissenting). However, they argued that the exclusion of males was constitutional even under intermediate scrutiny. *Id.* at 743-44 (Powell, J., dissenting). One dissenter did not clearly apply any particular standard. *Id.* at 733-35 (Blackmun, J., dissenting). In *Personnel Administrator v. Feeney*, Justice Stewart, writing for the majority, stated in dictum that the substantial interest test was the standard of review in gender cases, but he did not apply the standard. *Feeney*, 442 U.S. at 273. Instead, the holding in the case was that the challenger had failed to establish that the classification at issue had a "gender-based discriminatory purpose." *Id.* at 276-80. Justice Stevens, joined by Justice White, concurred "in the Court's opinion." *Id.* at 281 (Stevens, J., concurring). Only Justice Marshall, joined by Justice Brennan, dissenting, applied the standard. *Id.* at 286-88 (Marshall, J., dissenting).

115. *See infra* notes 399, 513-14, 521-22, 549 and accompanying text.

116. *See infra* notes 353-58, 365-69, 378, 422-23, 440-59, 494-96, 538, 541, 558-60, 603-05, 613-17, 627-31, 643-44, 660-63, 679-82, 723-27 and accompanying text.

117. *See infra* notes 343-52, 400, 411-21, 424, 489-93, 503-05, 515-20, 543-49, 610, 666-69, 713-14 and accompanying text; *see also infra* note 642.

118. *See infra* notes 472-73, 525-26 and accompanying text.

119. *See supra* note 114 and accompanying text; *infra* notes 358, 370, 469, 675; *infra* notes 425-26, 536-37, 690-92 and accompanying text.

120. United States v. Virginia, 518 U.S. 515, 519 (1996). Justice Thomas took no part in the case. *Id.* at 558.

121. *Id.* at 533.

122. *Id.* at 534, 545-46, 556.

opinion, Chief Justice Rehnquist expressed the view that the majority's emphasis on requiring the State to establish an exceedingly persuasive justification "introduce[d] an element of uncertainty respecting the appropriate test" in gender cases.[123] He noted that the "traditional, 'firmly established'"[124] test in gender cases is that the classification must be substantially related to important government objectives.[125] In his view, "the phrase 'exceedingly persuasive justification' . . . is best confined, as it was first used, as an observation on the difficulty of meeting the applicable test, not as a formulation of the test itself."[126] Justice Scalia, the lone dissenter, held that none of the Court's "made-up tests"[127] could "displace longstanding national traditions as the primary determinant of what the Constitution means,"[128] and that, in any event, the classification at issue was constitutional even under intermediate scrutiny "honestly" applied.[129]

B. Nguyen v. INS

Even in *Nguyen* the application of intermediate scrutiny was problematic. In that case, the Court, in a five to four decision, upheld a congressional statute that placed greater requirements on unwed citizen fathers than on unwed citizen mothers with respect to conferring United States citizenship on their offspring born outside the United States and its possessions when the other parent was an alien.[130] An unwed citizen mother could confer United States citizenship on such children simply by being a United States national at the time of birth and having been "'physically present in the United States or one of its outlying possessions for a continuous period of one year.'"[131] However, an unwed citizen father could only confer United States citizenship on such children if, in addition to the requirements for unwed citizen mothers:

> "a blood relationship between the person and the father [was] established by clear and convincing evidence, . . . the father (unless

123. *Id.* at 559 (Rehnquist, C.J., concurring).
124. *Id.*
125. *Id.*
126. *Id.* (quoting Pers. Adm'r v. Feeney, 442 U.S. 256, 273 (1979)).
127. *Id.* at 570 (Scalia, J., dissenting).
128. *Id.*
129. *Id.*
130. Nguyen v. INS, 533 U.S. 53, 59-60 (2001).
131. *Id.* at 60 (quoting 8 U.S.C. § 1409(c) (2001)).

> deceased) ha[d] agreed in writing to provide financial support for the person until the person reaches the age of 18 . . ., and . . . while the person [was] under the age of 18 years—(A) the person [was] legitimated under the law of the person's residence or domicile, (B) the father acknowledge[d] paternity of the person in writing under oath, or (C) the paternity of the person [was] established by adjudication of a competent court."[132]

The principal issue in the case was the constitutionality of the latter requirement that the father, but not the mother, take one of three actions prior to the child's eighteenth birthday.[133]

All of the Justices agreed that the statute created a gender classification and that intermediate scrutiny was the appropriate standard of review.[134] However, ostensibly they disagreed over the proper application of the standard to the facts of the case. Justice Kennedy, writing for the five Justice majority, held that the statute was constitutional.[135] He concluded that it was substantially related to important governmental objectives, and the justifications for it were "exceedingly persuasive."[136] Justice O'Connor, writing for the four dissenters, concluded that the classification was not substantially related to important governmental objectives and lacked "an exceedingly persuasive justification."[137]

1. The Issues That Divided the Court

The first issue that divided the Court was whether the statute's alleged purposes were in fact its actual purposes. Justice Kennedy concluded that Congress had two purposes in requiring unwed fathers, but not unwed mothers, to take certain steps prior to the child's eighteenth birthday in order to confer citizenship on the child. The first was "assuring that a biological parent-child relationship exists."[138] The second was:

> to ensure that the child and the citizen parent have some demonstrated opportunity or potential to develop not just a relationship that is recognized, as a formal matter, by the law, but

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132. *Id.* at 59 (quoting 8 U.S.C. § 1409(a) (2001)).
133. *Id.* at 60-62.
134. *Id.* at 60-61, 73-75.
135. *Id.* at 58-59.
136. *Id.* at 60-61, 70.
137. *Id.* at 74 (O'Connor, J., dissenting).
138. *Id.* at 62.

one that consists of the real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States.[139]

Justice O'Connor, writing for the dissenters, maintained that the majority did not "demonstrate" that either of these purposes were in fact "the actual purposes" of the statute.[140] As to the first articulated purpose, she noted that the Government did not appear to assert it as one of the statute's objectives,[141] and, as to the second, she asserted that it "appear[ed] to be the type of hypothesized rationale that is insufficient under heightened scrutiny."[142] Justice Kennedy responded that in determining "the objectives of Congress . . . [w]e ascertain the purpose of a statute by drawing logical conclusions from its text, structure, and operation."[143]

The Court was also divided as to whether the asserted purposes, even if the actual purposes, were important enough to justify the gender distinction. With respect to the first interest, Justice Kennedy seemed to assume that the Government had an important interest in awarding citizenship to an alien, who claims to be the child of an unwed United States citizen, only upon assurance that a biological relationship exist between them.[144] However, Justice O'Connor complained that the majority did not "elaborate" on why it was important to assure that a biological relationship exist between the alien

139. *Id.* at 64-65. Justice Kennedy reasoned that "[t]he mother knows that the child is in being and is hers and has an initial point of contact with him." *Id.* at 65. Consequently, "[t]here is at least an opportunity for mother and child to develop a real, meaningful relationship . . . [that] inheres in the very event of birth . . . ." *Id.* However, unlike the mother, the father may not be present at birth or even "know that a child was conceived." *Id.* at 64-65. This is "a realistic possibility" that "principles of equal protection do not require Congress to ignore," especially as to children born outside the United States "in light of the number of Americans who take short sojourns abroad," and the numbers of "military personnel . . . stationed in foreign countries." *Id.* at 65-66. Therefore, "there is no assurance that the father and his biological child will ever meet." *Id.* at 66. Consequently, "[w]ithout an initial point of contact with the child by a father who knows the child is his own, there is no opportunity for the father and child to begin a relationship." *Id.* Thus, the statutory requirement that the father take one of three actions ("legitimation; . . . paternity under oath . . . ; or a court order of paternity") prior to the child's eighteenth birthday, *id.* at 62, was an "unobjectionable," *id.* at 67, and "unremarkable" way of "ensuring that such an opportunity, inherent in the event of birth as to the mother-child relationship, exists between father and child before citizenship is conferred upon the latter." *Id.* at 66. Furthermore, Justice Kennedy argued that "[t]he importance of the governmental interest at issue here [was] too profound to be satisfied merely by conducting a DNA test" since "scientific proof of biological paternity does nothing, by itself, to ensure contact between father and child during the child's minority." *Id.* at 67.

140. *Id.* at 78-79, 84 (O'Connor, J., dissenting).

141. *Id.* at 79 (O'Connor, J., dissenting).

142. *Id.* at 84 (O'Connor, J., dissenting).

143. *Id.* at 67-68.

144. *See id.* at 62-64.

child and the unwed parent.[145] Nonetheless, she conceded that "the importance of this interest . . . presumably lies in preventing fraudulent conveyances of citizenship."[146]

Justice Kennedy also thought that the second asserted statutory purpose, "ensur[ing] that the child and the citizen parent have some demonstrated opportunity or potential to develop . . . a relationship . . . that consists of the real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States,"[147] was important given "[t]he ease of travel and the willingness of Americans to visit foreign countries"[148] and the fact that there are large numbers of "active duty military personnel" serving overseas.[149] He reasoned that under these circumstances:

> Congress is well within its authority in refusing, absent proof of at least the opportunity for the development of a relationship between citizen parent and child, to commit this country to embracing a child as citizen entitled as of birth to the full protection of the United States, to the absolute right to enter its borders, and to full participation in the political process.[150]

Justice O'Connor responded that even if "Congress was actually concerned about ensuring a 'demonstrated opportunity' for a relationship, it [was] questionable whether such an opportunity qualifies as an 'important' governmental interest apart from the existence of an actual relationship."[151] She argued that in this context what is important is existence of "an actual relationship . . . regardless of when and how the opportunity for that relationship arose," not the potential for a relationship.[152] As she saw it, a "child's never-realized 'opportunity' for a relationship with the citizen seems singularly irrelevant to the appropriateness of granting citizenship to that child."[153]

Justice Kennedy rejoined that "Congress would of course be entitled to advance the interest of ensuring an actual, meaningful relationship in every case before citizenship is conferred."[154] However, "[i]nstead, Congress enacted an easily administered scheme to promote the different but still

145. *Id.* at 79 (O'Connor, J., dissenting).
146. *Id.*
147. *Id.* at 65.
148. *Id.* at 66.
149. *Id.* at 65.
150. *Id.* at 67.
151. *Id.* at 84 (O'Connor, J., dissenting).
152. *Id.* at 85 (O'Connor, J., dissenting).
153. *Id.*
154. *Id.* at 69.

substantial interest of ensuring at least an opportunity for a parent-child relationship to develop," and, the statute "should not be invalidated because Congress elected to advance an interest that is less demanding to satisfy than some other alternative."[155]

The Court was also divided on the issue of whether the means were substantially related to the ends. As to the first objective, Justice Kennedy thought the means of putting a greater burden on unwed fathers than on unwed mothers was substantially related to the end of proving paternity because men and women "are not similarly situated with regard to the proof of biological parenthood."[156] The mother's relationship to the child "is verifiable from the birth itself" and can be "documented in most instances by the birth certificate or hospital records and the witnesses who attest to her having given birth."[157] On the other hand, the father might not attend the birth, and, even if he does, his presence alone does not establish paternity.[158] Thus, the additional requirement "for a father seeking to establish paternity - legitimation, paternity oath, . . . [or] court order of paternity - [was] designed to ensure an acceptable documentation of paternity."[159] Furthermore, even under a gender-neutral statute, fathers sometimes would have to take additional actions to prove paternity than mothers who, because they are the ones who give birth, can produce birth certificates, hospital records, and witnesses.[160] Consequently, Justice Kennedy thought that, given the "biological difference between the parents,"[161] the statutory scheme was "reasonable"[162] and "sensible . . . given the unique relationship of the mother to the event of birth"[163]

Justice O'Connor disagreed. She found that "the fit between [the statute's] discriminatory means and the asserted end" was "insufficien[t]."[164] Her basic point was that requiring men, but not women, to take one of three actions, "legitimation, . . . paternity . . . oath, or an adjudication of paternity," prior to the alien child's eighteenth birthday "accomplishes" nothing "in furtherance of 'assuring that a biological parent-child

155. *Id.*
156. *Id.* at 63.
157. *Id.* at 62.
158. *Id.*
159. *Id.* at 63.
160. *Id.* at 64.
161. *Id.*
162. *Id.* at 63.
163. *Id.* at 64.
164. *Id.* at 80 (O'Connor, J., dissenting).

relationship exists' that [the statute] does not achieve on its own."[165] She pointed out that the statute on its face also required proof of paternity "'by clear and convincing evidence.'"[166] She argued that such evidence could be supplied by DNA testing, which, "in addition to providing accuracy unmatched by other methods of establishing a biological link, essentially negates the evidentiary significance of the passage of time."[167] Consequently, she concluded the additional burdens placed on men did not "substantially further[] the assurance of a blood relationship."[168]

Justice Kennedy rejected this argument. He responded that the statute did not require DNA testing, and its "expense, reliability, and availability . . . in various parts of the world may have been of particular concern to Congress."[169] More fundamentally, he held that "[t]he Constitution . . . does not require that Congress elect one particular mechanism from among possible methods of establishing paternity, even if that mechanism arguably might be the most scientifically advanced method."[170] Justice O'Connor rejoined that the latter argument "would have much greater force" if the "rational basis" test was the appropriate standard of review.[171]

Justice Kennedy also thought that requiring fathers, but not mothers, to take certain steps prior to the child's eighteenth birthday was substantially related to the statute's second objective, "facilitation of a relationship between parent and child."[172] He held that "[i]n this difficult context of conferring citizenship on vast numbers of persons[,] . . . [t]he fit between the means and the important end is 'exceedingly persuasive.'"[173] Justice O'Connor disagreed. She argued that even if ensuring "'an opportunity for a parent-child relationship [to develop] during the formative years of the child's minority'" is an important interest, "it is difficult to see how the requirement that *proof* of such opportunity be obtained before the child turns 18 substantially furthers the asserted interest."[174] She noted that "it is entirely possible that a father and child will have the opportunity to develop a relationship and in fact will develop a relationship without obtaining the proof of the opportunity during the child's minority."[175] In addition, it is also

165. *Id.* (citation omitted).
166. *Id.* (quoting 8 U.S.C. § 1409(a)(1) (2001)).
167. *Id.*
168. *Id.*
169. *Id.* at 63.
170. *Id.*
171. *Id.* at 83 (O'Connor, J., dissenting).
172. *Id.* at 68.
173. *Id.* at 70.
174. *Id.* at 85 (O'Connor, J., dissenting) (quoting *Id.* at 68).
175. *Id.*

possible for a child to obtain "'an adjudication of paternity'" on his own, "'absent any affirmative act by the father, and perhaps even over his express objection.'"[176] Thus, she concluded that "[t]he fact that the means-end fit can break down so readily in theory, and not just in practice, is hardly characteristic of a 'substantial' means-end relationship."[177]

Justice Kennedy responded that "it should be unsurprising that," "[i]n furtherance of the desire to ensure some tie between this country and one who seeks citizenship," "Congress decided to require that an opportunity for a parent-child relationship occur during the formative years of the child's minority."[178] In addition, he asserted that the Court's gender cases did not require "that the statute under consideration must be capable of achieving its ultimate objective in every instance."[179] He also argued that, even if "one conceives" the congressional purpose to be to assure:

> the establishment of a real, practical relationship of considerable substance between parent and child in every case[,] . . . [i]t is almost axiomatic that a policy which seeks to foster the opportunity for meaningful parent-child bonds to develop has a close and substantial bearing on the governmental interest in the actual formation of that bond.[180]

Justice O'Connor rejoined that "the Court's reasoning hardly conforms to the tailoring requirement of heightened scrutiny."[181] She said that "[a] bare assertion of what is allegedly 'almost axiomatic' . . . is no substitute for the 'demanding' burden of justification borne by the defender of the classification."[182] She asserted that the "fact that a discriminatory policy embodies the good intention of 'seek[ing] to foster' the opportunity for something beneficial to happen is of little relevance in itself to whether the policy substantially furthers the desired occurrence."[183] In her view, "the classification's defender" must prove the point,[184] and "[t]he majority's

176. *Id.* (quoting Miller v. Albright, 523 U.S. 420, 486 (1998)).
177. *Id.*
178. *Id.* at 68.
179. *Id.* at 70.
180. *Id.*
181. *Id.* at 87 (O'Connor, J., dissenting).
182. *Id.* (quoting United States v. Virginia, 518 U.S. 515, 533 (1996)).
183. *Id.* (alteration in original).
184. *Id.*

sweeping claim is no surrogate for careful application of heightened scrutiny to a particular classification."[185]

The Court was also divided on whether the classification was based on a stereotype that could have been avoided by the use of gender-neutral alternatives and the extent to which the classification could be justified based on administrative convenience. Justice Kennedy began by arguing that "to require Congress to speak without reference to the gender of the parent with regard to its objective of ensuring a blood tie between parent and child would be to insist on a hollow neutrality."[186] As to the first objective, assuring that a biological parent-child relationship exists, he conceded that Congress could have created a gender-neutral statute that required both parents to prove paternity within a specified time after birth.[187] However, he pointed out that, even under such a statute, fathers sometimes would have to take additional actions to prove paternity than mothers who, because of their presence at birth, can produce documentation and witnesses.[188] As he saw it, "[t]he issue . . . [was] not the use of gender specific terms instead of neutral ones" since "[j]ust as neutral terms can mask discrimination that is unlawful, gender specific terms can mark a permissible distinction."[189] Instead, the issue was "whether the distinction [was] lawful."[190] He concluded that given the "biological difference between the parents" with respect to "the unique relationship of the mother to the event of birth," the use of "gender specific terms" was "sensible."[191]

As to the second objective, ensuring an opportunity for a relationship, Justice Kennedy seemed to concede that Congress could have created a gender-neutral scheme that would "excuse compliance with the formal requirements when an actual father-child relationship [was] prove[n]."[192] It did not, "perhaps because of the subjectivity, intrusiveness, and difficulties of proof that might attend an inquiry into any particular bond or tie."[193] Rather, it "enacted an easily administrated scheme to promote the different but still substantial interest of ensuring at least an opportunity for a parent-child relationship to develop;"[194] and the statute "should not be invalidated

185. *Id.* at 87-88.
186. *Id.* at 64.
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.* at 69.
193. *Id.*
194. *Id.*

because Congress elected to advance an interest that is less demanding to satisfy than some other alternative."[195]

Justice O'Connor argued that the majority had not given sufficient weight to the availability of "sex-neutral alternatives" with respect to both asserted objectives.[196] She maintained that "under heightened scrutiny, the availability of sex-neutral alternatives to a sex-based classification is often highly probative of the validity of the classification,"[197] and "[i]n . . . prior cases . . . has been a powerful reason to reject a sex-based classification."[198] She also asserted that the Court has "repeatedly rejected efforts to justify sex-based classifications on the ground of administrative convenience."[199]

As to the first objective, she pointed out that even the majority recognized that Congress could have required both parents to prove paternity within a specified time after birth.[200] In her view, such a gender-neutral provision would not be a "hollow" requirement.[201] She conceded that in many cases "it will likely be easier for mothers to satisfy a sex-neutral proof of parentage requirement,"[202] but argued that this may not always be the case.[203] She pointed out that "a mother will not always have formal legal documentation of birth because a birth certificate may not issue or may subsequently be lost . . . [while] a father's name may well appear on a birth certificate."[204] Furthermore, she argued that:

> "[w]hile it is doubtless true that a mother's blood relation to a child is uniquely "verifiable from the birth itself" to those present at birth, . . . the majority ha[d] not shown that a mother's birth relation is uniquely verifiable by the . . . [Government], much less that any

195. *Id.*

196. *Id.* at 82 (O'Connor, J., dissenting).

197. *Id.* at 78 (O'Connor, J., dissenting) (citing Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 151 (1980); Orr v. Orr, 440 U.S. 268, 281 (1979); Weinberger v. Wiesenfeld, 420 U.S. 636, 653 (1975)).

198. *Id.* at 82 (O'Connor, J., dissenting).

199. *Id.* at 88 (O'Connor, J., dissenting) (citing *Wengler*, 446 U.S. at 152; Frontiero v. Richardson, 411 U.S. 677, 690-91 (1973)).

200. *Id.* at 81 (O'Connor, J., dissenting).

201. *Id.* at 82 (O'Connor, J., dissenting).

202. *Id.*

203. *Id.* at 81-82 (O'Connor, J., dissenting).

204. *Id.* at 81 (O'Connor, J., dissenting).

greater verifiability warrants a sex-based, rather than a sex-neutral, statute."[205]

In addition, Justice O'Connor thought that there were "available sex-neutral alternatives" that could achieve the "asserted end"[206] of ensuring "'an opportunity for a parent-child relationship . . . [to develop during] the formative years of the child's minority.'"[207] These could include a "sex-neutral requirement of presence at birth, knowledge of birth, or contact between parent and child prior to a certain age,"[208] or proof thereof, "to be one way of demonstrating an opportunity for a relationship."[209] In her view:

> the idea that a mother's presence at birth supplies adequate assurance of an opportunity to develop a relationship while a father's presence at birth does not would appear to rest only on an overbroad sex-based generalization[210] . . . "that mothers are significantly more likely than fathers . . . to develop caring relationships with their children."[211]

She noted that "a mother may not have an opportunity for a relationship if the child is removed from his or her mother on account of alleged abuse or neglect, or if the child and mother are separated by tragedy, such as disaster or war . . . ."[212] Consequently, "[t]here is no reason, other than stereotype, to say that fathers who are present at birth lack an opportunity for a relationship on similar terms."[213] She also made the more macro point that the statutory scheme at issue was "paradigmatic of a historic regime that left women with responsibility, and freed men from responsibility, for nonmarital children."[214]

Justice Kennedy responded that the classification was not based on a stereotype, which he defined as "a frame of mind resulting from irrational or uncritical analysis."[215] He asserted that:

205. *Id.* at 81-82 (O'Connor, J., dissenting) (quoting *Id.* at 62).
206. *Id.* at 86 (O'Connor, J., dissenting).
207. *Id.* at 85 (O'Connor, J., dissenting) (quoting *Id.* at 68).
208. *Id.* at 88 (O'Connor, J., dissenting).
209. *Id.* at 86 (O'Connor, J., dissenting).
210. *Id.*
211. *Id.* at 89 (O'Connor, J., dissenting) (quoting Miller v. Albright, 523 U.S. 420, 482 (1998) (Breyer, J., dissenting)).
212. *Id.* at 86 (O'Connor, J., dissenting).
213. *Id.* at 87 (O'Connor, J., dissenting).
214. *Id.* at 92 (O'Connor, J., dissenting).
215. *Id.* at 68.

> [t]here is nothing irrational or improper in the recognition that at the moment of birth—a critical event in the statutory scheme and in the whole tradition of citizenship law—the mother's knowledge of the child and the fact of parenthood have been established in a way not guaranteed in the case of the unwed father.[216]

Justice O'Connor rejoined that a classification may be based on an unconstitutional stereotype even if it "may enjoy empirical support and thus be in a sense 'rational.'"[217] She noted that "in numerous cases where a measure of truth has inhered in the generalization, 'the Court has rejected official actions that classify unnecessarily and overbroadly by gender when more accurate and impartial functional lines can be drawn.'"[218] The question is not whether the classification "'show[s] disrespect' for a class" or is "insulting."[219] The question is "whether it 'relies upon the simplistic, outdated assumption that gender could be used as a 'proxy for other, more germane bases of classification.'"[220]

Justice Kennedy also pointed out that "[i]n analyzing . . . [the statute][,] [the majority was] mindful that the obligation it imposes with respect to the acquisition of citizenship by the child of a citizen father is minimal."[221] He said that "[t]his circumstance show[ed] that Congress has not erected inordinate and unnecessary hurdles to the conferral of citizenship on the children of citizen fathers in furthering its important objectives."[222] Justice O'Connor responded that "[e]ven assuming that the burden is minimal . . . , it is well settled that 'the "absence of an insurmountable barrier" will not redeem an otherwise unconstitutionally discriminatory law.'"[223]

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216. *Id.*

217. *Id.* at 89 (O'Connor, J., dissenting).

218. *Id.* at 90 (O'Connor, J., dissenting) (quoting Miller v. Albright, 523 U.S. 420, 460 (1998) (Ginsburg, J., dissenting)).

219. *Id.*

220. *Id.* at 90 (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 726 (1982)).

221. *Nguyen*, 533 U.S. at 70.

222. *Id.* at 70-71.

223. *Id.* at 93-94 (O'Connor, J., dissenting) (quoting Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981), in turn quoting Trimble v. Gordon, 430 U.S. 762, 774 (1977)). For articles essentially agreeing with the dissenters' criticisms of the majority opinion, see Rachel K. Alexander, Nguyen v. INS: *The Supreme Court Rationalizes Gender-Based Distinctions in Upholding an Equal Protection Challenge*, 35 CREIGHTON L. REV. 789 (2001); Lica Tomizuka, *The Supreme Court's Blind Pursuit of Outdated Definitions of Familial Relationships in Upholding the Constitutionality of* 8 U.S.C. § 1409 *in* Nguyen v. INS, 20 LAW & INEQ. 275 (2002).

2. Critique of Justice O'Connor's Dissenting Opinion

Justice O'Connor had two related overarching doctrinal criticisms of the majority opinion. The first was that the majority had "deviat[ed]"[224] from precedent by failing to apply intermediate scrutiny in the "rigorous"[225] and "vigilan[t]"[226] manner required in gender cases. The second was to the effect that the majority had not applied intermediate scrutiny at all, but rather had applied rational basis review.[227] Justice O'Connor's first criticism is misplaced. The fact is that, in many ways, the majority opinion is consistent with the precedents that have purported to apply intermediate scrutiny.

For example, Justice Kennedy found the statutory purpose "by drawing logical conclusions from its text, structure, and operation."[228] Justice O'Connor asserted that in this regard the majority had engaged in "the type of hypothesized rationale that is insufficient under heightened scrutiny."[229] However, it seems clear that in purporting to apply intermediate scrutiny, the Court may make its own independent inquiry into actual purposes. Under rational basis review, the Court can engage in rational speculation to determine the statutory purpose;[230] and, the classification can be upheld even if the supposed reasons did not in fact motivate the decision maker.[231] By contrast, in theory, under intermediate scrutiny, the burden is on the defender of the classification to establish the government's actual purpose.[232] In practice, this has meant the Court does not have to accept at face value the government's asserted purpose. Thus, in *Califano v. Goldfarb*, Justice Brennan, writing for the majority and purporting to apply intermediate scrutiny,[233] rejected the "government-proffered purposes after 'inquiry into the actual purposes.'"[234] He determined the statute's actual purpose by examining its "phrase[ology][,] . . . general scheme[,] . . . [and] legislative history."[235] Similarly, in *United States v. Virginia*, Justice Ginsburg, writing for the majority and purporting to apply intermediate scrutiny, also rejected one of the government's asserted objectives after a "'searching analysis.'"[236]

224. *Nguyen*, 533 U.S. at 97 (O'Connor, J., dissenting).
225. *Id.* at 79 (O'Connor, J., dissenting).
226. *Id.* at 97 (O'Connor, J., dissenting).
227. *See id.* at 74-78 (O'Connor, J., dissenting).
228. *Id.* at 67-68.
229. *Id.* at 84 (O'Connor, J., dissenting).
230. FCC v. Beach Communications, Inc., 508 U.S. 307, 315 (1993).
231. *Id.*
232. *See* United States v. Virginia, 518 U.S. 515, 533 (1996).
233. Califano v. Goldfarb, 430 U.S. 199, 210-11 (1977).
234. *Virginia*, 518 U.S. at 536 (quoting *Goldfarb*, 430 U.S. at 212).
235. *Goldfarb*, 430 U.S. at 213-14; *see also id.* at 216-17.
236. *Virginia*, 518 U.S. at 536 (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 727 (1982)).

She found that "[n]either recent nor distant history" supported the government's alleged justification.[237] The notion that, in gender cases, the Court may make "inquiry into the actual purposes underlying a statutory scheme" was first asserted in *Weinberger v. Wiesenfeld*.[238] Although that case appeared to apply the rational basis test,[239] the decision has been cited with approval in cases purporting to apply intermediate scrutiny.[240]

It is true that the majority hypothesized about why Congress did not adopt a different law. They speculated that Congress did not rely on DNA testing as proof of paternity because "the expense, reliability, and availability of such testing in various parts of the world may have been of particular concern."[241] They also speculated as to why Congress did not require the existence of "an actual, meaningful relationship in every case," but did choose not to "excuse . . . the formal requirements when an actual father-child relationship is proved."[242] The majority concluded that Congress "did neither here, perhaps because of the subjectivity, intrusiveness, and difficulties of proof that might attend an inquiry into any particular bond or tie."[243] However, there is a difference between hypothesizing about Congress' actual purpose and speculating as to why Congress did not do something it could have otherwise done. There is nothing in the precedents that is inconsistent with the Court in gender cases engaging in the latter.

Justice O'Connor's point that the Court has "repeatedly rejected efforts to justify sex-based classifications on the ground of administrative convenience"[244] was also not well taken. In the first place, the majority did not attempt to justify the classification based on administrative convenience. They simply pointed out that the scheme that Congress did adopt was one that was "easily administered."[245] Of course, as the majority said, a statute

237. *Id.*

238. Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975).

239. *See infra* notes 411-21, 567-75 and accompanying text.

240. *See Virginia*, 518 U.S. at 535-36; *Hogan*, 458 U.S. at 728; *Goldfarb*, 430 U.S. at 212-13; *see also* Michael M. v. Superior Court, 450 U.S. 464, 469-70 (1981) (plurality opinion) (accepting the asserted purpose, but pointing out that "the search for the 'actual' or 'primary' purpose of a statute is likely to be elusive").

241. Nguyen v. INS, 533 U.S. 53, 63 (2001).

242. *Id.* at 69.

243. *Id.*

244. *Id.* at 88 (O'Connor, J., dissenting) (citing Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 152 (1980); Frontiero v. Richardson, 411 U.S. 677, 690-91 (1973)).

245. *Id.* at 69.

"should not be invalidated because Congress elected to advance an interest that is less demanding to satisfy than some other alternative."[246]

Even if the majority had tried to justify the classification on the basis of administrative convenience, the precedents have not totally excluded it as a justification for gender classifications. In *Reed v. Reed*, a unanimous Court purporting to apply the rational basis test did hold that "[t]o give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, [was] to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause."[247] However, in *Frontiero v. Richardson*, only Justice Brennan's plurality opinion, purporting to apply strict scrutiny, explicitly rejected administrative convenience as a justification for the classification at issue.[248] Furthermore, in *Wengler* v. *Druggists Mutual Insurance Co.*, the majority, purporting to apply intermediate scrutiny, held that the "bare assertion" of administrative convenience "falls far short of justifying gender-based discrimination."[249] However, the majority went on to state that "[i]t may be that there are levels of administrative convenience that will justify discriminations that are subject to heightened scrutiny under the Equal Protection Clause . . . ."[250] In addition, a majority of the Court in *Califano v. Goldfarb* seemed to think that administrative convenience could justify a gender distinction, at least in affirmative action cases.[251] Perhaps in recognition of the fact that administrative convenience might be a legitimate rationale under some circumstances, Justice O'Connor, in *Nguyen*, went on to conclude that "[t]here [was] no reason to think that this [was] a case where administrative convenience concerns [were] so powerful that they would justify the sex-based discrimination . . . ."[252]

Furthermore, Justice O'Connor's assertion to the effect that the classification should have been struck down because of the existence of gender-neutral alternatives also seems misplaced. The cases she cited for the proposition that "the availability of sex-neutral alternatives to a sex-based classification is often highly probative of the validity of the classification,"[253] and, "[i]n . . . prior cases[,] . . . has been a powerful reason

246. *Id.*

247. Reed v. Reed, 404 U.S. 71, 76-77 (1971).

248. *Frontiero*, 411 U.S. at 690-91.

249. *Wengler*, 446 U.S. at 151.

250. *Id.* at 152.

251. *See* Califano v. Goldfarb, 430 U.S. 199, 219-20 (1977) (Stevens, J., concurring); *Id.* at 224-42 (Rehnquist, J., dissenting). The plurality, however, did reject administrative convenience as a rationale. *Id.* at 211 n.9.

252. Nguyen v. INS, 533 U.S. 53, 88 (2001) (O'Connor, J., dissenting).

253. *Id.* at 78 (O'Connor, J., dissenting) (citing *Wengler*, 446 U.S. at 151; Orr v. Orr, 440 U.S. 268, 281 (1979); Weinberger v. Wiesenfeld, 420 U.S. 636, 653 (1975).

to reject a sex-based classification"[254] are arguably distinguishable from *Nguyen*. In those cases, the Court did point out that gender-neutral means existed for the government to achieve its asserted interests. However, the issue in both *Wengler v. Druggists Mutual Insurance Co.* and *Weinberger v. Wiesenfeld* was the constitutionality of alleged gender discrimination with respect to the distribution of government benefits.[255] In effect, the basic rationale of those cases was that the classifications at issue were not even reasonable, rational, or legitimate because they were based on archaic stereotypes as to the financial dependency of women.[256] By contrast, as the majority saw it, the classification in *Nguyen* was based on a real difference between men and women, and, therefore, the use of "gender specific terms" was "sensible."[257] The issue in *Orr v. Orr* was the constitutionality of a statute which excluded wives from paying alimony as a way of "help[ing] . . . needy spouses" and "compensating women for past discrimination during marriage."[258] The Court held that the gender classification was unnecessary since "individualized hearings at which the parties' relative financial circumstances are considered *already* occur."[259] By contrast, the issue in *Nguyen* was the constitutionality of the existing procedures. [260]

In addition, Justice O'Connor's critique of the majority's definition of a gender stereotype is also not supported by the precedents. The majority defined a stereotype "as a frame of mind resulting from irrational or uncritical analysis."[261] They went on to conclude that the classification was not based on a stereotype because:

> [t]here is nothing irrational or improper in the recognition that at the moment of birth—a critical event in the statutory scheme and in the whole tradition of citizenship law—the mother's knowledge of the child and the fact of parenthood have been established in a way not guaranteed in the case of the unwed father.[262]

254. *Id.* at 82 (O'Connor, J., dissenting).
255. *See infra* notes 411, 440-41 and accompanying text.
256. *See infra* notes 411-21, 440-69 and accompanying text.
257. *See supra* notes 156-63, 186-91, 215-16 and accompanying text; *infra* notes 735-45 and accompanying text.
258. Orr v. Orr, 440 U.S. 268, 280 (1979).
259. *Id.* at 281.
260. Nguyen v. INS, 533 U.S. 53, 56-62 (2001).
261. *Id.* at 68.
262. *Id.*

Justice O'Connor responded that "[t]his Court has long recognized . . . that an impermissible stereotype may enjoy empirical support and thus be in a sense 'rational.'"[263] However, the cases she cited do not support her assertion that a stereotype may be rational if it has some empirical support. To the contrary, the precedents support the proposition that a stereotype may be irrational even if it has such support. Thus, in *J.E.B. v. Alabama*, which Justice O'Connor cited, Justice Blackmun, writing for the majority, said that "[e]ven if a measure of truth can be found in some of the gender stereotypes . . . that fact alone cannot support discrimination on the basis of gender."[264] He went on to say that "[w]e have made abundantly clear in past cases that gender classifications that rest on impermissible stereotypes violate the Equal Protection Clause, even when some statistical support can be conjured up for the generalization."[265] In making these assertions, Justice Blackmun relied on *Weinberger v. Wiesenfeld*.[266] In that case, the Court struck down a classification that was premised on the assumption "that male workers' earnings are vital to the support of their families, while the earnings of female wage earners do not significantly contribute to their families' support."[267] The Court found the classification to be "entirely irrational"[268] even though the "notion that men are more likely than women to be the primary supporters of their spouses and children [was] not entirely without empirical support."[269] Indeed, Justice O'Connor herself cited *Wiesenfeld*.[270] Clearly then, under the precedents, a stereotype may be irrational in the constitutional sense even if it has some empirical support.

Notwithstanding the foregoing, Justice O'Connor's second overarching criticism to the effect that the majority had not applied intermediate scrutiny at all, but instead had applied rational basis review,[271] is essentially correct. The apparent paradox between this assertion and the assertion that the majority opinion is consistent with the precedents that have applied intermediate scrutiny is resolved by the fact that, in reality, intermediate scrutiny, as applied in the gender cases, is a form of rational basis review.[272]

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263. *Id.* at 89 (O'Connor, J., dissenting).

264. J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 139 n.11 (1994).

265. *Id.*

266. *Id.*

267. Weinberger v. Wiesenfeld, 420 U.S. 636, 643 (1975).

268. *Id.* at 651.

269. *Id.* at 645.

270. Nguyen v. INS, 533 U.S. 53, 90 (2001) (O'Connor, J., dissenting). Justice O'Connor also cited *Craig v. Boren*, 429 U.S. 190 (1976). *Id.* However, as discussed below, this case too may be viewed has having applied the rational basis test. *See infra* notes 660-75 and accompanying text.

271. *See Nguyen*, 533 U.S. at 74-78, 82, 97 (O'Connor, J., dissenting).

272. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 452 (1984) (Stevens, J., concurring) (arguing that "[t]he rational-basis test, properly understood, adequately explains . . . the Equal Protection [cases]"). For a commentary on Justice Stevens' views, see Note, *Stevens' Equal*

IV. IN REALITY INTERMEDIATE SCRUTINY IS RATIONAL BASIS REVIEW IN INTERMEDIATE SCRUTINY CLOTHING

A. Rational Basis Review Revisited

The key to understanding that the gender cases are explainable on rational basis grounds is the fact that rational basis review "is still scrutiny."[273] Although Justice O'Connor pointed out the theoretical differences between intermediate scrutiny and rational basis review in the course of her dissent in *Nguyen*,[274] she failed to acknowledge this fact. It is true that rational basis review is a deferential standard,[275] but it is not "abdication"[276] and it is not "toothless."[277] A classification must nonetheless "find some footing in the realities of the subject addressed."[278] It is also true that, as a general matter, the state's actual purpose is "irrelevant" under rational basis review.[279] However, this assumes that the classification can be said to have some constitutionally permissible purpose. Even under rational basis review, the Court "insist[s] on knowing the relation between the classification adopted and the object to be attained."[280] Thus, under rational basis review the "Court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation."[281] Consequently, the Court

Protection Jurisprudence, 100 HARV. L. REV. 1146 (1987). *See also* Hlavac, *supra* note 18, at 1374-76 (arguing that rational basis is the "best standard" for gender cases and that "any special protection the intermediate-scrutiny test provides actually can be provided by the rational-basis test"); *cf.* John Marquez Lundin, *Making Equal Protection Analysis Make Sense*, 49 SYRACUSE L. REV. 1191, 1232 (1999) (proposing a "rational distinction test" "[i]n place of the current regime of equal protection analysis").

273. Nordlinger v. Hahn, 505 U.S. 1, 31 (1992) (Stevens, J., dissenting).

274. *Nguyen*, 533 U.S. at 74-79 (O'Connor, J., dissenting).

275. Romer v. Evans, 517 U.S. 620, 632 (1995); *Nordlinger*, 505 U.S. at 11.

276. *Nordlinger*, 505 U.S. at 31 (Stevens, J., dissenting).

277. Mathews v. Lucas, 427 U.S. 495, 510 (1976). *But see* Hlavac, *supra* note 18, at 1377 ("the existence of numerous intermediate levels of scrutiny has removed teeth from the bite of the rational-basis test").

278. Heller v. Doe, 509 U.S. 312, 321 (1993).

279. FCC v. Beach Communications, Inc., 508 U.S. 307, 315 (1993).

280. *Romer*, 517 U.S. at 632.

281. Weinberger v. Wiesenfeld, 420 U.S. 636, 648 n.16 (1975) (citing Jimenez v. Weinberger, 417 U.S. 628, 634 (1974); United States Dep't of Agric. v. Moreno, 413 U.S. 528, 536-37 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972)); *see also Romer*, 517 U.S. at 635 (majority found it impossible "to credit" the State's "rationale" for the classification at issue).

must still engage in a reasoned analysis of the underlying facts and policies to determine whether there are reasons, real or plausible, to support the classification, and whether they are rationally related to some legitimate government purpose. A classification will only be upheld if the government's purpose is, in fact, legitimate and if such reasons for it can be articulated.

For example, in *FCC v. Beach Communications, Inc.*, the question was the constitutionality of the FCC's interpretation and application of the Cable Communications Policy Act of 1984.[282] Under the Act, facilities that provided video programming to buildings that were separately owned and managed, or that used a public right-of-way, were subject to a franchise requirement.[283] However, facilities that served one or more buildings under common ownership or management and that did not use any public right-of-way were exempt from the requirement.[284] The FCC applied the distinction to satellite master antenna television (SMATV) facilities and held that they were subject to the franchise requirement unless they fell within the exemption.[285] SMATV operators appealed to the court of appeals, which, by a majority vote, held that there was no rational basis for the statutory distinction.[286]

The Court unanimously reversed. Justice Thomas, writing for eight members of the Court,[287] applied rational basis review. He noted that under this standard, legislative acts have "a strong presumption of validity,"[288] the constitutionality of legislation can be based on "rational speculation unsupported by evidence or empirical data,"[289] legislation should be upheld if there is "any reasonably conceivable state of facts"[290] to support it even if such facts did not motivate the legislature,[291] and legislative line drawing may be "virtually unreviewable."[292] Nonetheless, he did not decide the case simply on the ground that rational basis review is deferential. Rather, Justice Thomas proceeded to engage in a reasoned analysis of the underlying facts to determine whether there were, in fact, any "'plausible reasons'"[293] to support the distinction. He concluded that there were at least two

282. *Beach Communications, Inc.*, 508 U.S. at 310-13.
283. *Id.* at 309-10.
284. *Id.* at 310.
285. *Id.* at 311.
286. *Id.* at 312.
287. Justice Stevens concurred in the result. *Id.* at 320. *See infra* notes 295-97.
288. *Beach Communication's, Inc.*, 508 U.S. at 314.
289. *Id.* at 315.
290. *Id.* at 313.
291. *Id.* at 315.
292. *Id.* at 316.
293. *Id.* at 313 (quoting United States R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980)).

"conceivable"[294] justifications for the classification: "regulatory efficiency"[295] and the "potential for . . . monopoly power."[296] It was only after he was able to articulate such reasons for the classification that he upheld the constitutionality of the statute.[297]

On the other hand, a classification fails even rational basis review if there are no reasons, real or plausible, that can be articulated to support it.

294. *Id.* at 318-19.

295. *Id.* Justice Thomas reasoned that Congress could rationally conclude that the regulation of facilities that serve one or more buildings under common management without crossing a public right-of-way would not be worth the cost because of their limited size. *Id.* at 318. The SMATV operators argued that Congress did not intend the distinction to be based on size. *Id.* They pointed to the fact that prior to the Act, the FCC exempted from regulation cable systems with fewer than fifty subscribers, but Congress omitted this exemption from the Act. *Id.* In a concurring opinion, Justice Stevens agreed with this argument. *Id.* at 322 n.1 (Stevens, J., concurring). Justice Thomas responded, "[w]hether the posited reason for the challenged distinction actually motivated Congress is 'constitutionally irrelevant' and, in any event, the FCC's explanation indicate[d] that both common ownership and number of subscribers were considered indicia of 'very small' cable systems." *Id.* at 318 (citation omitted) (quoting *Fritz*, 449 U.S. at 179). Justice Thomas also concluded that the exemption could "plausibl[y]" be based on "subscriber influence." *Id.* He reasoned that the management of commonly owned or managed buildings could negotiate on behalf of their tenants and would have an incentive to protect their interests. *Id.* at 318-19. Therefore, there was "less need" to regulate facilities that serve such buildings. *Id.* at 319.

296. *Id.* at 320. Justice Thomas reasoned that where buildings were commonly owned or managed, the owner or manager could negotiate a competitive price for their tenants. *Id.* at 319. However, the first operator to serve separately owned or managed buildings could have a cost advantage which might result in "effective monopoly power." *Id.* at 319-20. After installing a satellite dish and associated transmission equipment on one building, "[h]e could connect additional buildings for the cost of a few feet of cable, whereas any competitor would have to recover the cost of his own satellite headend facility." *Id.* This possibility, he concluded, "might theoretically justify regulating the latter class of SMATV systems and not the former." *Id.* at 320. Justice Stevens was not "persuaded" by this reasoning. *Id.* at 322 (Stevens, J., concurring). For one thing, he thought that the monopoly theory "assume[d] a great deal about the nature of what [was] essentially a hypothetical market." *Id.* at 322 n.2. He also thought the theory failed to take into account that competition from traditional cable could act as a restraint "on an SMATV operator's capacity to extract monopoly rents from landlords." *Id.*

297. *Id.* at 320. Although "not fully persuaded" by the Court's rationale, Justice Stevens concurred in the judgment because he thought it was "reasonable to presume that Congress was motivated by an interest in allowing property owners to exercise freedom in the use of their own property." *Id.* at 322-23 (Stevens, J., concurring). He also disagreed with the Court's standard of review. He interpreted the Court's test to require upholding a classification "'if there is any reasonably conceivable state of facts that [justify it],'" and if plausible reasons exist for the classification, the Court's inquiry is at an end. *Id.* at 323 n.3 (quoting *Id.* at 313). For Justice Stevens, this statement of the standard of review was too broad. *Id.* He maintained that "'the Constitution requires something more than merely a "conceivable" or "plausible" explanation . . . .'" *Id.* (quoting *Fritz*, 449 U.S. at 180 (Stevens, J., concurring)). For him, a classification should only be upheld if it is "rationally related to 'a legitimate purpose that [the Court] may reasonably presume to have motivated an impartial legislature.'" *Id.* (Stevens, J., concurring) (emphasis omitted) (quoting *Fritz*, 449 U.S. at 181 (Stevens, J., concurring)).

Thus, for example, in *Allegheny Pittsburgh Coal Co. v. County Commission*,[298] the Court unanimously held unconstitutional, under the Equal Protection Clause, a tax assessor's method of reassessing property.[299] The Constitution and laws of the state required property to be taxed at a uniform rate based on its market value.[300] The assessor, however, reassessed property recently sold at its purchase price, while making only modest changes to property not recently sold.[301] As a consequence, over time, there were large disparities in the assessed value of comparable properties.[302] For example, over a five year period, the petitioners' property was assessed at eight to twenty times that of comparable property.[303]

The assessor argued that the acquisition value assessment scheme was "rationally related to its purpose of assessing properties at true current value . . . [because recent purchase price is] exceedingly accurate information about the market value of a property."[304] However, this argument was "nonsensical"[305] since the practice of assessing recently sold property based on acquisition value, while making only minor adjustments to other property, was "inherent[ly] inconsisten[t]" with the asserted purpose of assessing properties at true market value.[306] The reason was that under such a system, only recently sold properties were assessed at current market value. Thus, there were no reasons, real or conceivable, that could be articulated to support the classification.[307]

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298. Allegheny Pittsburgh Coal Co. v. County Comm'n, 488 U.S. 336 (1989).

299. *Id.* at 338-43. However, Justice Thomas, who was not a member of the Court at the time of *Allegheny Pittsburgh Coal Co.*, has expressed the view that the case was wrongly decided. *See* Nordlinger v. Hahn, 505 U.S. 1, 21-28 (1992) (Thomas, J., concurring).

300. *Allegheny Pittsburgh Coal Co.*, 488 U.S. at 345.

301. *Id.* at 338.

302. *Id.* at 341.

303. *Id.* The Court noted that this was not a case where the disparities existed for "a short period of time," *id.* at 343, as part of a "transitional delay," *id.* at 344, in achieving equal assessments.

304. *Id.* at 343.

305. Nordlinger v. Hahn, 505 U.S. 1, 15 n.6 (1992) (discussing *Allegheny Pittsburgh Coal Co.*).

306. *Id.*

307. *Id.* at 15-16. By contrast, in *Nordlinger*, the Court, by an eight to one majority, applying rational basis review, *id.* at 11, upheld against an equal protection attack a California property tax scheme that resulted in a disparity in taxation between comparable properties analogous to the scheme struck down in *Allegheny Pittsburgh Coal Co. Id.* at 3-18. Under the California scheme, real property was taxed at its full market value as of the 1975-76 tax year and was only reassessed thereafter "'when purchased, newly constructed, or a change of ownership . . . occurred.'" *Id.* at 5 (quoting CAL. CONST. art. XIIIA, § 2(a)). The majority held that this acquisition value scheme was a means that was reasonably and rationally related to the achievement of two legitimate ends. *Id.* at 12. First, "to discourage rapid turnover in ownership" of property so as to achieve "local neighborhood preservation, continuity, and stability"; and second, to protect the reliance interest of existing owners from higher taxes. *Id.* The Court distinguished *Allegheny Pittsburgh Coal Co.* on the ground that, in that case, there was "the absence of any indication . . . that the policies underlying an acquisition-value taxation scheme could conceivably have been the purpose for the . . . unequal assessment scheme." *Id.* at 15. This was so since, in that case, the assessor had argued that her acquisition value

Similarly, in *City of Cleburne v. Cleburne Living Center, Inc.*, the issue was the constitutionality of the denial of a special use permit for a group home for the mentally retarded.[308] Justice White, writing for the majority,[309] held that the denial of the permit was unconstitutional because "the record [did] not reveal any rational basis for believing that the . . . home would pose any special threat to the city's legitimate interests."[310] In reaching this conclusion, he examined the alleged justifications for the decision and reasoned that none of them were reasonable or rational. He held that the denial could not be justified based on "mere negative attitudes, or fear" because they were not "permissible bases" for the decision.[311] The denial could also not be justified because of the home's location, either because students in a nearby junior high school "might harass" the residents, or because the home was to be "located on 'a five hundred year flood plain.'"[312] As to the former, mentally retarded students attended the school, and "undifferentiated fears" was not a permissible basis for denying the

scheme was a rational means of achieving current value assessment. *Id.* As noted in the text, the Court found this argument "nonsensical," because under such a system only recently sold properties were assessed at current market value. *Id.* at 15 n.6. Thus, the Court concluded that "*Allegheny Pittsburgh* was the rare case where the facts precluded any plausible inference that the reason for the unequal assessment practice was to achieve the benefits of an acquisition-value tax scheme." *Id.* at 16.

308. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 435 (1985).

309. Justice Marshall, joined by Justices Brennan and Blackmun, concurred in the result. *Id.* at 455-78 (Marshall, J., concurring). However, he argued, *inter alia*, that the majority applied a "'more exacting standard' than ordinary rational-basis review." *Id.* at 456. Justice Stevens, joined by Chief Justice Burger, joined the Court's opinion, but also filed a concurring opinion. *Id.* at 451-55 (Stevens, J., concurring). He argued, in effect, that all of the Court's equal protection cases could be explained on rational basis grounds. *See id.*

310. *Id.* at 448. The fact that Justice White referred to the record seems to have indicated to some that the majority had applied something more than traditional rational basis review. *See supra* note 309. It is true that under rational basis review the government "has no obligation to produce evidence to sustain the rationally of a statutory classification," Heller v. Doe, 509 U.S. 312, 320 (1993), and that a classification may be upheld "whether or not . . . [it] has a foundation in the record." *Id.* at 320-21. However, there is nothing in the theory of rational basis review that prevents the Court from considering any reasons that the government chooses to offer to justify a classification that do appear in the record. This is precisely what the majority did in Cleburne. Furthermore, not only did the majority in Cleburne say that they were applying rational basis review, *Cleburne*, 473 U.S. at 441-42, but also in a subsequent case involving the mentally infirm, the Court unanimously agreed that the case had applied that standard. *Heller*, 509 U.S. at 321, 336-37. In any event, the result in Cleburne is perfectly consistent with rational basis review since the essence of the holding was that there was no conceivable or plausible justification for the denial of the permit other than irrational prejudice. *See infra* notes 311-22.

311. *Id.*

312. *Id.* at 449.

permit.[313] As to the latter, there was no reason to distinguish between the home for the mentally retarded and other homes that were permitted without a permit, such as "nursing homes, homes for convalescents or the aged, or sanitariums or hospitals."[314] For the same reason, the denial could not be based on concerns "about [the] legal responsibility" of the residents of the home,[315] "the size of the home and the number of people that would occupy it,"[316] "avoiding concentration of population and . . . lessening congestion,"[317] or "worry about fire hazards, the serenity of the neighborhood, and the avoidance of danger to other residents."[318] Justice White found that these reasons "fail[ed] rationally to justify singling out a home [for the mentally retarded] . . . for the special use permit, yet imposing no such restrictions on the many other uses freely permitted"[319] such as "fraternity and sorority houses, hospitals and the like."[320] Since he found it impossible to articulate any conceivable or plausible reason for the denial, other than "irrational prejudice against the mentally retarded,"[321] he concluded that the requirement of a special use permit was unconstitutional.[322]

As *Cleburne* suggests, a classification also fails rational basis review if the purpose the government seeks to achieve is illegitimate. A classification is illegitimate if its purpose is otherwise unconstitutional, such as penalizing the right to travel.[323] The Court has also held as illegitimate classifications those that seek to distinguish between state residents based on their past contributions.[324] A classification is also impermissible if its purpose is "to

313. *Id.*

314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.* at 450.

318. *Id.*

319. *Id.*

320. *Id.*

321. *Id.*

322. *Id.* at 448. For other cases where the classification at issue was held to fail rational basis review, see cases cited *supra* note 281. *See also* Zobel v. Williams, 457 U.S. 55 (1982).

323. Shapiro v. Thompson, 394 U.S. 618 (1969) (determining that a one year waiting period for new residents to receive full welfare benefits penalized the right to travel under equal protection); *cf.* Saenz v. Roe, 526 U.S. 489 (1999) (striking down a similar provision as in *Shapiro*, but without discussing equal protection).

324. *Zobel*, 457 U.S. at 63; *Shapiro*, 394 U.S. at 632; *cf. Saenz*, 526 U.S. at 507 (rejecting "any contributory rationale for the denial of benefits to new residents" without discussing equal protection). However, on the current Court, Chief Justice Rehnquist and Justices O'Connor and Stevens appear to believe that such a purpose is not necessarily illegitimate, at least as long as it does not infringe on the right to travel. In *Zobel*, both Justice O'Connor in her concurring opinion, *Zobel*, 457 U.S. at 71-81 (O'Connor, J., concurring), and Justice Rehnquist in his dissenting opinion, *id.* at 81-84 (Rehnquist, J., dissenting), expressed the view that classifications that distinguish between state residents based on their past contributions are not necessarily unconstitutional and that the

harm a politically unpopular group"[325] or is otherwise based on "anim[osity],"[326] "negative attitudes,"[327] or " irrational prejudice"[328] toward a particular class of persons. The Court may have also held that classifications that seek to provide affirmative action for women are constitutionally impermissible if they are unnecessary or merely gratuitous.[329]

Despite protestations to the contrary,[330] a detailed analysis of the cases reveals that the type of rational basis analysis illustrated by cases such as *Allegheny Pittsburgh Coal Co.*, *Beach Communications, Inc.*, and *Cleburne Living Center, Inc.* is at work, at least in effect, in the gender cases. The underlying questions have been whether the classification at issue is based on a legitimate difference between the genders resulting from the fact that they are not similarly situated, or whether it is based on stereotypical "outmoded notions of the relative capabilities of men and women"[331] in situations where they are similarly situated; and, even if the former, whether the fit between the means and the otherwise permissible ends are reasonable and rational enough to justify the distinction. However, the answers to these questions require reasoned analysis upon which reasonable Justices can differ.[332] Thus, in the end, the results in these cases inevitably turn on how

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Court had only held so in the context of cases which infringed the right to travel. Subsequently, in *Attorney General of New York v. Soto-Lopez*, Justice O'Connor, in her dissenting opinion in which Justices Rehnquist and Stevens joined, stated that she "continue[d] to believe that a State's desire to compensate its citizens for their prior contributions is 'neither inherently invidious nor irrational,' either under the Court's 'right to migrate' or under some undefined, substantive component of the Equal Protection Clause." Attorney Gen. for N.Y. v. Soto-Lopez, 476 U.S. 898, 920 (1986) (O'Connor, J., dissenting). Recently, in *Saenz*, Justice Stevens, writing for the majority that included Justice O'Connor, "reject[ed] any contributory rationale" to justify a California scheme that denied full welfare benefits to certain new residents for one year. *Saenz*, 526 U.S. at 507. However, *Saenz* is not inconsistent with the views expressed by Justices O'Connor, Rehnquist, and Stevens in *Zobel* and *Soto-Lopez* since the majority concluded that the California scheme penalized the right to travel. *Id.* at 500-07.

325. United States Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

326. Romer v. Evans, 517 U.S. 620, 632 (1996).

327. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 448 (1985).

328. *Id.* at 450.

329. *See infra* notes 576-81, 593-95 and accompanying text.

330. *See* Nguyen v. INS, 533 U.S. 53, 74-77 (2001) (O'Connor, J., dissenting); Miller v. Albright, 523 U.S. 420, 452 (1998) (O'Connor, J., concurring) (asserting that "[i]t is unlikely, in [her] opinion, that any gender classifications based on stereotypes can survive heightened scrutiny, but under rational scrutiny, a statute may be defended based on generalized classifications unsupported by empirical evidence."); *cf.* United States v. Virginia, 518 U.S. 515, 555 (1996) ("[D]eferential review . . . [is] a brand of review inconsistent with the more exacting standard our precedent requires.").

331. *Cleburne*, 473 U.S. at 441.

332. For non-gender cases where the Court was divided on whether a classification survived

the Court and the individual Justices view the underlying facts and policies rather than any particular verbalization of the standard of review.[333]

B. Pre-1971 Gender Cases

Until 1971, a majority of the Court's general attitude towards gender was based on a nineteenth century perception of the legitimate differences between men and women, both physically and with respect to their roles in society. Women's proper place was at the center of family life, not the market or politics; and, it was constitutional for states to try to protect them from the vicissitudes of life when they ventured outside the home.[334]

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rational basis review, see *Romer v. Evans*, 517 U.S. 620 (1995) (state constitutional amendment effecting rights of homosexuals); Heller v. Doe, 509 U.S. 312 (1993) (distinction between mental retardation and mental illness for purpose of civil commitment); Kadrmas v. Dickerson Pub. Sch., 487 U.S. 450 (1988) (distinction between reorganized and nonreorganized schools with respect to charging a fee for busing); Lyng v. Int'l Union, United Auto., Aerospace, & Agric. Implement Workers, 485 U.S. 360 (1988) (denial of food stamps to striking workers); Lyng v. Castillo, 477 U.S. 635 (1986) (distinction for purposes of food stamp distribution between parents, children, and siblings who lived together, and other groups of related or unrelated persons who lived together); Harris v. McRae, 448 U.S. 297, 917 (1980) (denial of Medicaid reimbursement for medically necessary abortions while paying for it for normal pregnancy); Jimenez v. Weinberger, 417 U.S. 628 (1974) (denial of certain benefits to illegitimate children); United States Dep't of Agric. v. Moreno, 413 U.S. 528 (1973) (regarding a distinction for food stamp purposes between households of related individuals and those where at least one person is not related to the others); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (school funding through property tax); Dandridge v. Williams, 397 U.S. 471 (1970) (distribution of welfare benefits).

333. *But cf.* Miss. Univ. for Women v. Hogan, 458 U.S. 718 (1982). In her majority opinion, Justice O'Connor opined that "when a classification expressly discriminates on the basis of gender, the analysis and level of scrutiny . . . do not vary simply because the objective appears acceptable to individual Members of the Court." *Id.* at 724 n.9.

334. *See* Hoyt v. Florida, 368 U.S. 57, 62-63 (1961) (upholding under Equal Protection Clause a state law that exempted women from jury duty on the ground that a "woman is still regarded as the center of home and family life" and the legislature could conclude that "it would not be administratively feasible to decide in each individual instance whether the family responsibilities of a prospective female juror was serious enough to warrant an exemption"); Goesaert v. Cleary, 335 U.S. 464, 464, 466 (1948) (upholding under Equal Protection Clause a state law that refused to license women as bartenders, unless they were the daughter or wife of a male owner, on the ground that "the Constitution does not require situations 'which are different in fact or opinion to be treated in law as though they were the same'" and "bartending by women may, in the allowable legislative judgment, give rise to moral and social problems against which it may devise preventive measures") (quoting Tigner v. Texas, 310 U.S. 141, 147 (1940)); Wing v. Kirkendall, 223 U.S. 59, 63 (1912) (upholding under the Equal Protection Clause a state law that imposed a license tax on hand laundries, but exempted those where not more than two women were employed on the ground that when a state "deems it advisable to put a lighter burden upon women than upon men with regard to an employment that our people commonly regard as more appropriate for the former, the Fourteenth Amendment does not interfere by creating a fictitious equality where there is a real difference"); Muller v. Oregon, 208 U.S. 412, 421 (1908) (upholding under the Due Process Clause a state law that limited the number of hours women could be employed in certain establishments on the grounds that there are real physical differences between the genders and it was "essential to vigorous offspring" to have "healthy mothers"); *Ex parte* Lockwood, 154 U.S. 116 (1894) (upholding under the Privileges and Immunities Clause a state law that prohibited women from practicing law);

Consequently, the Court, applying rational basis review, had little difficulty in upholding gender classifications that today are viewed as "archaic stereotypes"[335] of women and their abilities. The attitude of at least some members of the Court during this era may be summarized by Justice Bradley's infamous dictum that:

> [t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits 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.[336]

C. Post-1971 Gender Cases

Beginning in 1971 with *Reed v. Reed*,[337] the Court's attitude towards gender classifications began to change. What changed was the Court's view of what are legitimate differences between men and women and what are outmoded stereotypes. Perhaps mirroring the changes in society, the Court no longer viewed the role of women as simply that of wife and mother unfit for "the marketplace and the world of ideas."[338] As the Court's attitude towards gender changed so did the result in the cases. Significantly, this change was initially accomplished without changing the articulated standard of review. Gender classifications still only had to be reasonably or rationally related to a legitimate government objective. Although the verbalization of the standard of review eventually changed, the underlying analysis, in effect, has not. Where a majority of the Court views the classification as being reasonable, rational, and legitimate, they have upheld it; and where they view the classification to be irrational, unreasonable, or illegitimate, they have struck it down. Consequently, the new verbalization of the standard of review, as substantially related to important governmental objectives, has had little effect on the outcome of the cases.

Bradwell v. Illinois, 83 U.S. 130 (1872) (same); Minor v. Happersett, 88 U.S. 162 (1874) (upholding under the Privileges and Immunities Clause a state law that prohibited women from voting).

335. *Hogan*, 458 U.S. at 725.

336. *Bradwell*, 83 U.S. at 141 (Bradley, J., concurring).

337. Reed v. Reed, 404 U.S. 71 (1971); *see infra* notes 349-52 and accompanying text.

338. Stanton v. Stanton, 421 U.S. 7, 14-15 (1975).

1. Overbroad Generalizations

In a series of cases, the Court has struck down classifications as being based on stereotypical overbroad generalizations that a woman's place is in the home, women are less capable than men, and women are financially dependent on men. In some cases, the Court also found that the means were not even reasonably or rationally related to their ends. No form of heightened scrutiny is necessary to explain the results in these cases.[339] Even under rational basis review, a classification must have some constitutionally permissible purpose, and there must be some articulated reasonable or rational basis to support it. Thus, the results in these cases are to the effect that the classifications at issue were not reasonable, rational, or legitimate. Indeed, the initial decisions applied rational basis review.

a. A Woman's Place Is in the Home

Thus, in *Stanton v. Stanton*, the Court held as violative of equal protection a statute that required parents to support their sons until age twenty-one, but their daughters only until age eighteen.[340] A divorced father who stopped making support payments to his eighteen year-old daughter argued that the gender distinction was justified based on the different roles of men and women in society.[341] The argument was that "it is the man's primary responsibility to provide a home and that it is salutary for him to have education and training before he assumes that responsibility; that girls tend to mature earlier than boys; and that females tend to marry earlier than males."[342] The Court, eight to one,[343] rejected the argument that these "'old notions'"[344] provided a "rational"[345] basis for the distinction.[346] It noted that "[n]o longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas."[347] Consequently, the Court concluded that the statute was unconstitutional regardless of whether the standard of review was verbalized as "compelling state interest, or rational basis, or something in between."[348]

339. *See* Hlavac, *supra* note 18, at 1376 ("Any classification scheme that is founded on overbroad and stereotypic notions would fail under the rational-basis test because they cannot be 'reasonably related' to their purported objectives.").

340. *Stanton*, 421 U.S. at 9, 17.

341. *See id.* at 14-15.

342. *Id.* at 14.

343. Justice Rehnquist was the lone dissenter. *See id.* at 18-20 (Rehnquist, J., dissenting).

344. *Id.* at 14.

345. *Id.*

346. *Id.*

347. *Id.* at 14-15.

348. *Id.* at 17.

b. Women are Less Capable Than Men

Similarly, the Court has struck down statutes that prefer men to women on the apparent assumption that, as a class, men are more capable than women. In the initial case, *Reed v. Reed*, the Court, applying the rational basis test,[349] unanimously held that a statute which preferred males over females as administrators of intestate estates, where there were competing applications, violated equal protection.[350] The Court concluded that such a distinction, "merely to accomplish the elimination of hearings on the merits, [was] to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment."[351] As characterized in a later case, the problem with the statute in *Reed* was that it was based on an "archaic and overbroad [generalization] . . . that men would generally be better estate administrators than women."[352]

As the law evolved into intermediate scrutiny, the Court, in *Kirchberg v. Feenstra*, unanimously held that a state statute "that gave a husband, as 'head and master' of property jointly owned with his wife, the unilateral right to dispose of such property without his spouse's consent"[353] violated equal protection. Justice Marshall explicitly applied intermediate scrutiny.[354] He phrased the issue in terms of whether the statute "substantially further[ed] an important government interest."[355] He said that the Court would not "speculate about the existence of such a justification,"[356] and that the "burden remains on the party seeking to uphold a statute that expressly discriminates on the basis of sex to advance an 'exceedingly persuasive justification' for the challenged classification."[357] He held that the statute,

349. Reed v. Reed, 404 U.S. 71 (1971). Writing for the majority, Justice Burger noted that, under the Equal Protection Clause, "[a] classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'" *Id.* at 76 (quoting F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)). The "substantial relation" language in this quote seems to have been the origin of intermediate scrutiny applied in later cases. However, as Justice Burger stated it, the issue in the case was "whether a difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective that is sought to be advanced." *Id.*

350. *Id.* at 76-77.

351. *Id.* at 76.

352. Schlesinger v. Ballard, 419 U.S. 498, 507 (1975).

353. Kirchberg v. Feenstra, 450 U.S. 455, 456 (1981).

354. *Id.* at 461.

355. *Id.*

356. *Id.* at 460 n.7.

357. *Id.* at 461 (quoting Pers. Adm'r v. Feeney, 442 U.S. 256, 273 (1979)).

"[b]y granting the husband exclusive control over the disposition of community property, . . . clearly embodie[d] the type of express gender-based discrimination that we have found unconstitutional absent a showing that the classification is tailored to further an important governmental interest."[358] Although Justice Marshall analyzed the case in terms of intermediate scrutiny, that verbalization of the standard of review was not necessary to achieve the result. Factually the case was analogous to *Reed*. On its face, the statute was based on an arbitrary and overbroad generalization that "[t]he husband is the head and master" of community property.[359] Consequently, under *Reed*, the statute could not even survive the rational basis test.[360] Indeed, it is hard to imagine any articulative rational basis that could justify the distinction.[361]

A more controversial decision was *J.E.B. v. Alabama*,[362] in which the issue was the constitutionality of the State's use of gender based peremptory challenges. The State argued that peremptory challenges based on gender were constitutional because in certain cases, such as those involving paternity, there is a real difference between men and women "otherwise totally qualified to serve upon a jury" with respect to their "sympath[ies]" and "receptive[ness] to the arguments" made by the parties.[363] Men "'might be more sympathetic and receptive to the arguments of a man alleged in a paternity action to be the father of an out-of-wedlock child, while women . . . might be more sympathetic and receptive to the arguments of the complaining witness who bore the child.'"[364]

Justice Blackmun, writing for the majority, rejected this argument. He analyzed the case in terms of the rhetoric of intermediate scrutiny.[365] He said that gender classifications "must be more than merely rational."[366] Instead,

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358. *Id.* at 459-60. Justice Stewart, joined by Justice Rehnquist, concurred in the result. *Id.* at 463 (Stewart, J., concurring). Although he did not articulate any particular standard of review, he agreed that the statute "which allowed husbands but not wives to execute mortgages on jointly owned real estate without spousal consent . . . violated the Equal Protection Clause" "[s]ince men and women were similarly situated for all relevant purposes with respect to the management and disposition of community property." *Id.*

359. *Id.* at 457 n.1.

360. *See* Hlavac, *supra* note 18, at 1376 ("[I]ntermediate scrutiny is not essential to protect against discriminatory classifications based on gender. This protection can be afforded by the rational-basis test as the [C]ourt applied it in *Reed*.").

361. *Cf. Kirchberg*, 450 U.S. at 460 n.7 (arguing that, under the circumstances, the complaining party "would be hard pressed to show that the challenged provision substantially furthered an important governmental interest").

362. J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127 (1994).

363. *Id.* at 137-38.

364. *Id.* (quoting Brief for Respondents at 10, J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127 (1994)).

365. *See id.* at 136.

366. *Id.* at 141 n.12.

"gender-based classifications require 'an exceedingly persuasive justification' in order to survive constitutional scrutiny."[367] Thus, "the only question [was] whether discrimination on the basis of gender in jury selection substantially further[ed] the State's legitimate interest in achieving a fair and impartial trial."[368] He found that the State's argument was "far from . . . an exceptionally persuasive justification."[369] However, intermediate scrutiny had little to do with the outcome in the case. Justice Blackmun's ultimate conclusion was that the distinction was based on an overbroad generalization that "serve[d] only to perpetuate . . . 'outmoded notions of the relative capabilities of men and women.'"[370] On this view of the underlying

367. *Id.* at 136 (quoting Pers. Adm'r v. Feeney, 442 U.S. 256, 273 (1979)).

368. *Id.*

369. *Id.* at 137.

370. *Id.* at 139 n.11 (quoting Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 441 (1985)). Justice Blackmun said that "[w]e shall not accept as a defense . . . 'the very stereotype the law condemns.'" *Id.* 138 (quoting Powers v. Ohio, 499 U.S. 400, 410 (1991)). He found the State's argument to be similar to those that had been used to exclude women entirely from juries, and the State offered "virtually no support for the conclusion that gender alone is an accurate predictor of juror's attitudes." *Id.* at 138-39. He noted that while the State cited one study indicating that in "'rape cases . . . female jurors appear to be somewhat more conviction-prone than male jurors,' . . . [t]he majority of studies suggest that gender plays no identifiable role in jurors attitudes." *Id.* at 138 n.9 (quoting R. HASTIE ET AL., INSIDE THE JURY 140 (1983)). In any event, he asserted that "[e]ven if a measure of truth can be found in some of the gender stereotypes used to justify gender-based peremptory challenges, that fact alone cannot support discrimination on the basis of gender . . . even when some statistical support can be conjured up for the generalization." *Id.* at 139 n.11. In his view, "[t]he Equal Protection Clause . . . acknowledges that a shred of truth may be contained in some stereotypes, but requires that state actors look beyond the surface before making judgments about people that are likely to stigmatize as well as to perpetuate historical patterns of discrimination." *Id.* Justice Blackmun also thought that "[d]iscrimination in jury selection, whether based on race or on gender, causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process." *Id.* at 140. In his view "[t]he litigants are harmed by the risk that the prejudice that motivated the discriminatory selection of the jury will infect the entire proceedings," and "[t]he community is harmed by the State's participation in the perpetuation of invidious group stereotypes and the inevitable loss of confidence in our judicial system." *Id.* He thought that individual jurors are harmed because "[a]ll persons, when granted the opportunity to serve on a jury, have the right not to be excluded summarily because of discriminatory and stereotypical presumptions that reflect and reinforce patterns of historical discrimination." *Id.* at 141-42. Eliminating jurors "on the assumption that they hold particular views simply because of their gender is 'practically a brand upon them . . . an assertion of their inferiority[,]' [and] [i]t denigrates the dignity of the excluded juror, and, for a woman, reinvokes a history of exclusion from political participation." *Id.* at 142 (quoting Strauder v. West Virginia, 100 U.S. 303, 308 (1880)). It conveys a "message . . . to all those in the courtroom, and all those who may later learn of the discriminatory act, . . . that certain individuals, for no reason other than gender, are presumed unqualified by state actors to decide important questions upon which reasonable persons could disagree." *Id.* In addition, the State's use of gender based peremptory challenges would "ratify and reinforce prejudicial views of the relative abilities of men and women" and "'invite cynicism respecting the jury's neutrality'" especially in cases "where gender-related issues

facts and policies, the classification was not reasonable, rational, or legitimate. Consequently, it could not even pass the rational basis test as applied in *Reed*[371] and *Stanton.*

United States v. Virginia is yet another case in which the Court struck down a classification that was apparently based on the stereotypical

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are prominent, such as . . . rape, sexual harassment, or paternity." *Id.* at 140 (quoting *Powers*, 499 U.S. at 412). Also, they "may create the impression that the judicial system has acquiesced in suppressing full participation by one gender or that the 'deck has been stacked' in favor of one side." *Id.*

Interestingly, Justice O'Connor, who joined the majority opinion, also wrote a separate concurring opinion in which she disagreed with Justice Blackmun's assumption that gender-based peremptory challenges are based on stereotypes rather than real differences between the attitudes of men and women. She said that "one need not be a sexist to share the intuition that in certain cases" "for example . . . rape . . . sexual harassment, child custody, or spousal or child abuse, . . . a person's gender and resulting life experience will be relevant to his or her view of the case." *Id.* at 149 (O'Connor, J., concurring). Furthermore, she was concerned that the Court's decision "erode[d] the role of the peremptory challenge," *id.* at 147 (O'Connor, J., concurring), "[increasing] the possibility that biased jurors [would] be allowed onto the jury," *id.* at 148 (O'Connor, J., concurring), and "severely limit[ed] a litigant's ability to act on . . . intuition." *Id.* at 149 (O'Connor, J., concurring). Nonetheless, she agreed "that the Equal Protection Clause prohibits the government from excluding a person from jury service on account of that person's gender," *id.* at 146 (O'Connor, J., concurring), and that the State had failed to show an "exceedingly persuasive" justification for the exclusion. *Id.* Her rationale, however, had nothing to do with intermediate scrutiny as the verbalization of the standard. Instead, it was based on her view of the underlying policies. She thought that, like race, it was simply "'a special rule of relevance, a statement about what this Nation stands for, rather than a statement of fact'" that is designed "to eliminate the potential discriminatory use of the peremptory." *Id.* at 149 (O'Connor, J., concurring) (quoting Brown v. North Carolina, 479 U.S. 940, 941-42 (1986)). However, because of her "concerns" over the erosion of the peremptory challenges, she expressed the "hope" that the case would be "limited" to their use by the Government and would not apply to "private civil litigants and criminal defendants." *Id.* at 150-51 (O'Connor, J., concurring). In other words, in effect, Justice O'Connor also applied the rational basis test. She thought that the use of gender peremptory challenges were reasonable and legitimate in some circumstances but not in others.

Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, dissenting, did not clearly apply any particular standard of review. However, he did say that "[t]he parties [did] not contest that discrimination on the basis of sex is subject to what our cases call 'heightened scrutiny.'" *Id.* at 157 (Scalia, J., dissenting). Nonetheless he, too, in effect, thought that the use of gender peremptory challenges was reasonable and legitimate. He agreed with Justice O'Connor that jurors were not "fungible." *Id.* at 157-58 (Scalia, J., dissenting). Indeed, he noted that the majority's position to the contrary put "the Court in opposition to its earlier Sixth Amendment 'fair cross-section' cases" which "'have concluded that women bring to juries their own perspectives and values that influence both jury deliberation and result.'" *Id.* (quoting Taylor v. Louisiana, 419 U.S. 522, 532 (1975)). He also thought that the result in the case did "much damage . . . to the peremptory challenge system . . . [a]nd . . . to the entire justice system." *Id.* at 161-62 (Scalia, J., dissenting). He criticized the majority for "focusing unrealistically upon individual exercises of the peremptory challenge, and ignoring the totality of the practice." *Id.* at 159 (Scalia, J., dissenting). In addition, he argued that "[s]ince all groups are subject to the peremptory challenge (and will be made the object of it, depending upon the nature of the particular case) it is hard to see how any group is denied equal protection." *Id.* His main point was that historically "[w]omen were categorically excluded from juries because of doubt that they were competent; women are stricken from juries by peremptory challenge because of doubt that they are well disposed to the striking party's case." *Id.* at 160 (Scalia, J., dissenting). In his view, "[t]here is discrimination and dishonor in the former, and not in the latter." *Id.*

371. *See* source cited *supra* note 360.

assumption that women are less capable than men. In that case the State attempted to justify the exclusion of women from the Virginia Military Institute (VMI), and the creation of a separate program for them, *inter alia* on the ground that the VMI's adversative method of instruction was inappropriate for women.[372] The State argued that there are "'real'" "'important differences between men and women in learning and development needs.'"[373] These include the fact that "'males tend to need an atmosphere of adversativeness' while 'females tend to thrive in a cooperative atmosphere.'"[374] Consequently, the State argued, that "VMI's adversative method of training... [could not] be made available, unmodified to women" since "[a]lterations to accommodate women would necessarily be 'radical,' [and] so 'drastic,'... as to transform, indeed 'destroy,' VMI's program."[375] The Court seven to one rejected this argument and held the exclusion of women unconstitutional.[376]

Justice Ginsburg, writing for six members of the Court, purported to analyze the case in terms of intermediate scrutiny.[377] However, she paid only lip service to the requirement that the means be substantially related to important governmental objectives.[378] Nonetheless, she did assert that since *Reed,* courts are required "to take a 'hard look' at generalizations or 'tendencies' of the kind pressed by Virginia,"[379] and concluded that the State had failed to establish an "'exceedingly persuasive justification'" for the classification.[380] She characterized the case as involving the "categorical exclusion" of women "in total disregard of their individual merit."[381] She held that "[s]ate actors controlling gates to opportunity... may not exclude qualified individuals based on 'fixed notions concerning the roles and

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372. *See* United States v. Virginia, 518 U.S. 515, 540-46 (1996). The State also argued that the classification could be justified as a type of affirmative action for women. For a discussion of this aspect of the case, see *infra* text accompanying notes 643-59.

373. *Virginia*, 518 U.S. at 549 (quoting Brief for Respondents at 28, United States v. Virginia, 518 U.S. 515 (1996)).

374. *Id.* at 541 (quoting United States v. Virginia, 766 F. Supp. 1407, 1434 (W. D. Va. 1991), *vacated* 976 F.2d. 890 (4th Cir. 1992), *aff'd* 518 U.S. 515 (1996)).

375. *Id.* at 540 (quoting Brief for Cross-Petitioners at 34-36, United States v. Virginia, 518 U.S. 515 (1996)).

376. Justice Thomas did not participate in the case. *Id.* at 558.

377. *Id.* at 533.

378. *See id.* at 533, 532-57.

379. *Id.* at 541 (quoting Sandra Day O'Connor, Portia's Progress, Lecture at the James Madison Lecture on Constitutional Law at New York University School of Law (Oct. 29, 1991) *in* 66 N.Y.U. L. Rev. 1546, 1551 (1991)).

380. *Id.* at 546 (quoting Miss, Univ. for Women v. Hogan, 458 U.S. 718, 731 (1982).

381. *Id.*

abilities of males and females,'"[382] and that "generalizations about 'the way women are,' [and] estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description."[383]

Despite the broad dictum concerning intermediate scrutiny, the result in the case is explainable on rational basis grounds. In the first place, there was seemly no relationship, rational or otherwise, between the admission of women and the asserted objective of maintaining the adversative system. This is so since the case was brought on behalf of women who wanted to be subjected to that method of instruction.[384] Thus it was irrelevant, even if true, that the adversative method was not suited to most women. Furthermore, it was "never asserted that VMI's method of instruction method of education suit[ed] most *men,*" [385] and, in fact, "it is probable that 'many men would not want to be educated in such an environment.'"[386] Consequently, gender was irrelevant to the classification's asserted purpose.

In addition, as Justice Ginsburg pointed out, the type of argument made by the State was the same type of argument used historically to exclude

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382. *Id.* at 541 (quoting *Hogan*, 458 U.S. at 725).

383. *Id* at 550. Chief Justice Rehnquist concurred in the result. He agreed with the majority that VMI's exclusion of women could not be justified on ground that the adversative method of instruction was inappropriate for women. *Id.* at 564 (Rehnquist, C.J., concurring). However, his reasoning was different. In his view, "[a] State does not have a substantial interest in the adversative method unless it is pedagogically beneficial, . . . and . . . there . . . [was] no . . . evidence in the record that an adversative method is pedagogically beneficial or is any more likely to produce character traits than any other methodologies."*Id.* He also criticized the majority's emphasis on requiring the State to establish an exceedingly persuasive justification. *Id.* at 559 (Rehnquist, C.J., concurring). *See supra* notes 123-126 and accompanying text.

Justice Scalia was the lone dissenter. He began his dissent by criticizing the Court's tri-level equal protection jurisprudence in general. *See Virginia,* 518 U.S. at 567-70 (Scalia, J., dissenting). However, he thought that the exclusion of women was constitutional even under intermediate scrutiny "honestly" applied. *Id.* at 570 (Scalia, J., dissenting). For him the majority's "most fundamental error . . . [was] its reasoning that VMI's all male composition [was] unconstitutional because 'some women are capable of all of the individual activities required of VMI cadets,' . . . and would prefer military training on the adversative model." *Id.* at 579 (Scalia, J., dissenting) (quoting United States v. Virginia, 766 F. Supp. 1407, (W.D. Va. 1991) *vacated* 976 F.2d 890 (4th Cir. 1992) *aff'd.* 518 U.S. 515 (1996). He argued that "[i]ntermediate scrutiny has never required a least-restrictive-means analysis," *id.* at 573 (Scalia, J., dissenting), and "[t]here is simply no support in our cases for the notion that a sex-based classification is invalid unless it relates to characteristics that hold true in every instance." *Id.* at 574 (Scalia, J., dissenting).. He was convinced that the VMI's "single sex education" based on the adversative method was substantially related to the "important state interest in providing effective college education for its citizens." *Id.* at 576 (Scalia, J., dissenting). *See id.* 576-79 (Scalia, J., dissenting). Consequently, for him, it was "irrelevant" "that VMI would not have to change very much if it were to admit women," *id.* at 587-88, (Scalia, J., dissenting), and that "there are *some* women interested in attending VMI, capable of undertaking its activities, and able to meet its physical demands." *Id.* at 572 (Scalia, J., dissenting).

384. *See id.* at 542, 550.

385. *Id.* at 550

386. *Id.* at 542 (quoting United States v. Virginia, 52 F.3d 90, 93 (Motz, J., dissenting), *rev'd* , 518 U.S. 515 (1996)).

women from the legal and medical professions.[387] Furthermore, as Justice Ginsburg argued, while the admission of women to VMI "would require accommodations, primarily in arranging housing assignments and physical training,"[388] "VMI's mission . . . to produce 'citizen- soldiers' . . . [was] great enough to include women,"[389] and that women have successfully entered U.S. military academies.[390] Perhaps more importantly the lower courts had found that:

> VMI's 'implementing methodology' is not 'inherently unsuitable for women,'[391] . . . 'some women . . . do well under [the] adversative model,' [392] . . . 'some women, at least, would want to attend [VMI] if they had the opportunity,'[393] . . . 'some women are capable of all the individual activities required of VMI cadets,'[394] . . . and 'can meet the physical standards [VMI] now impose[s] on men."[395]

Under these circumstances, the argument that women, who otherwise met VMI's requirements, had to be excluded in order to maintain the adversative system was arbitrary.[396] Consequently, it could not have survived the rational basis test as applied in *Reed*.[397]

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387. *Id.* at 542-44.

388. *Id.* at 540.

389. *Id.* at 545.

390. *Id.* at 544-45.

391. *Id.* at 550 (quoting United States v. Virginia, 976 F.2d 890, 899 (4th Cir. 1992), *aff'd*, 518 U.S. 515 (1996)).

392. *Id.* (alterations in original) (quoting United States v. Virginia, 766 F. Supp 1407, 1434 (W. D. Va. 1991), *vacated*, 976 F.2d 890 (4th Cir. 1992), *aff'd*, 518 U.S. 515 (1996)).

393. *Id.* (alterations in original) (quoting *Virginia*, 766 F. Supp. at 1414).

394. *Id.* (quoting *Virginia*, 766 F. Supp. at 1412).

395. *Id.* (alterations in original) (quoting *Virginia*, 976 F.2d at 896).

396. *But see supra* note 383. The conclusion that the result in *Virginia* is explainable on rational basis grounds is not inconsistent with the mandatory retirement cases. In those cases, the Court, applying rational basis review, upheld mandatary retirement laws, as applied to judges, foreign service officers, and uniform police officers, even though they allegedly discriminated against individuals based on generalizations concerning the capabilities of the aged as a class. *See* Gregory v. Ashcroft, 501 U.S. 452 , 455, 470-73 (1991) (age seventy for most state judge), Vance v. Bradley, 440 U.S. 93, 95-112 (1979) (age sixty for participants in the Foreign Service retirement system), Massachusetts Board of Retirement Board v. Murgia, 427 U.S. 307, 308-17 (1976) (age fifty for uniformed state police officers). The result in those cases turned on the fact that the jobs at issue involved important public functions that required considerable physical or mental prowess, *see Gregory*, 501 U.S. at 472, *Vance*, 440 U.S. at 103-06, *Murgia*, 427 U.S. at 310-11, and "that aging - almost by definition - inevitably wears us all down." *Bradley*, 440 U.S. at 112. *See also Gregory* 501 U.S. at 472, *Murgia* 427 U.S. at 315. Consequently, the mandatory age requirements were rationally, if not perfectly, related to the object of the laws which was to ensure that the persons who hold those

c. Women are Financially Dependent on Men

The Court has also struck down classifications that treat the genders differently with respect to the distribution of government benefits based on the assumption that women, but not men, are economically dependent on their spouses. Again, the initial cases applied the rational basis test. Thus, in *Frontiero v. Richardson*, the Court held unconstitutional a federal statute that provided that a serviceman could claim his wife as a dependent, for purposes of increased quarters allowance, whether or not she was in fact dependent on him for support, whereas a servicewoman could not claim her husband as a dependent for such allowance unless he was in fact dependent on her for more than half of his support.[398] The Court divided on the issue of the standard of review. At this point in the evolution of the doctrine, Justice Brennan, writing for a four Justice plurality, insisted that gender classifications were inherently suspect and should be subject to strict scrutiny.[399] However, five members of the Court refused to apply strict scrutiny and instead applied rational basis review.[400] Nonetheless, the Court,

vital positions have the physical and mental capacity to carry out their functions. *See*, *Gregory* 501 U.S. at 470-73, *Vance*, 440 U.S. at 108-12, *Murgia* 427 U.S. at 315-17. By contrast the gender classification in *Virginia* did not involve any important governmental function. More importantly, unlike diminished capacity caused by age, it was not inevitable that the adversative method was unsuitable for women or that the it would have to change if women were admitted. Indeed, as noted in the text, *see supra* note 391 and accompanying text, the lower Courts had found that "VMI's 'implementing methodology' was not 'inherently unsuitable for women.'" *Virginia,* 518 U.S. at 550 (quoting United States v. Virginia, 976 F.2d 890, 899 (4th Cir. 1992), *aff'd*, 518 U.S. 515 (1996)). Thus, the exclusion of women was arbitrary in that it was not reasonably or rationally related to the purpose of maintaining VMI's adversative method of instruction.

Similarly, New York City Transit Authority v. Beazer, 440 U.S. 568 (1979), is also not inconsistent with the conclusion that the classification in Virginia was irrational. In that case a majority of the Court upheld, against an equal protection attack, a Transit Authority (TA) rule that prohibited the employment of methadone users. *Id.* at 570, 587-94. The District Court held that "employment in nonsensitive jobs could not be denied to methadone users who had progressed satisfactory with their treatment for one year, and who, when examined individually, satisfied TA's employment criteria." *Id.* at 589. The Court reversed. The majority found that there were "uncertainties associated with the rehabilitation of heroin addicts," and that "the 'no drugs' policy . . . enforced by TA is supported by the legitimate inference that as long as a treatment program (or other drug use) continues, a degree of uncertainty persists." *Id* at 591. Consequently "an employment policy that postpones eligibility until the treatment program has been completed, rather than accepting an intermediate point on an uncertain line, [was] rational." *Id.* at 591-92. The exclusion of methadone users, at least until their treatment was completed, certainly was reasonably and rationally related to the obvious public interest in having a drug free work place especially with respect to a public transit system. By contrast, as noted in the text, the permanent exclusion of women from VMI was not reasonably or rationally related to its asserted purpose. *See supra* notes 384-96 and accompanying text.

397. *Cf. supra* note 360. Although Justice Ginsburg characterized *Reed* as requiring "'hard look'" review, *see supra* note 379 and accompanying text, the actual holding in the case was that the classification at issue was arbitrary. *See supra* notes 351-52 and accompanying text.

398. Frontiero v. Richardson, 411 U.S. 677, 678 (1973).

399. *Id.* at 682.

400. Four members of the Court concluded that the statute was unconstitutional based on *Reed. Id.* at 691 (Stewart, J., concurring); *Id.* at 691-92 (Powell, J., joined by Burger, C.J. and Blackmun J.,

eight to one,[401] had little difficulty in holding that the statute denied servicewomen equal protection. As characterized in a later case, the principal problem with the statute was that it was based on an "archaic and overbroad generalization"[402] "that female spouses of servicemen would normally be dependent upon their husbands, while male spouses of servicewomen would not."[403]

Although Justice Brennan purported to apply strict scrutiny, he also found, at least in effect, the classification was not even reasonably or rationally related to its purported ends.[404] The government "concede[d]" that the classification "serve[d] no purpose other than mere 'administrative convenience.'"[405] Its argument was that since:

> as an empirical matter, wives in our society frequently are dependent upon their husbands, while husbands rarely are dependent upon their wives . . . [it is] both cheaper and easier simply conclusively to presume that wives of male members are financially dependent upon their husbands, while burdening female members with the task of establishing dependency in fact.[406]

Consistent with rational basis review, Justice Brennan engaged in a reasoned analysis of the underlying facts to determine if the only articulated reason was reasonable and rational. He cited statistics for the proposition that there was "substantial evidence that, if put to the test, many of the wives of male members would fail to qualify for benefits."[407] He also noted "that the dependency determination . . . is presently made solely on the basis of

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concurring). Justice Rehnquist dissented for the reasons stated by the majority in the district court. *Id.* at 691 (Rehnquist, J., dissenting). The district court held that overall the statute did not create a gender classification and that there was a rational basis for the distinction between men and women. Frontiero v. Laird, 341 F. Supp. 201, 209 (1972), *rev'd*, Frontiero v. Richardson, 411 U.S. 677 (1973).

401. Justice Rehnquist was the lone dissenter. *See* sources cited *supra* note 400.

402. Schlesinger v. Ballard, 419 U.S. 498, 508 (1975).

403. *Id.* at 507.

404. *Cf.* Hlavac, *supra* note 18, at 1376. In *Frontiero*:

> the Court did not need to apply strict scrutiny or intermediate scrutiny to strike down the . . . gender-classification . . . . It could have applied the rational basis test and concluded that the means chosen were not rationally related to the government objectives because the means themselves were based on archaic and overbroad generalizations.

Id.

405. *Frontiero*, 411 U.S. at 688.

406. *Id.* at 688-89.

407. *Id.*

affidavits, rather than through the more costly hearing process."[408] Consequently, he concluded that "the Government's explanation of the statutory scheme [was], to say the least, questionable."[409] In other words, Justice Brennan, in effect, held that the means of putting a burden on servicewomen, but not on servicemen, to prove spousal dependency was not reasonably or rationally related to the purported ends of administrative convenience because the statutory scheme would not necessarily result in any cost or time savings.[410]

Similarly, in *Weinberger v. Wiesenfeld*, the Court unanimously struck down a provision of the Social Security Act that provided that certain benefits were payable to the wife and children of a deceased male, but similar benefits were only payable to the children, but not the husband, of a deceased female.[411] In reaching this conclusion, the Court appeared to apply rational basis review. Justice Brennan, writing for a majority of the Court, concluded that the statute suffered from the same infirmity as the statute in *Frontiero*.[412] It was a "gender-based generalization"[413] concerning those who are determined to be the "primary supporters of their spouses and children."[414] It "operate[d] . . . to deprive women of protection for their families which men receive as a result of their employment," and to deprive them "of a portion of . . . [their] own earnings in order to contribute to the fund out of which benefits would be paid to others."[415] Such a generalization "[could not] suffice to justify the denigration of the efforts of women who do work and whose earnings contribute significantly to their families' support."[416] In other words, it was based on an archaic stereotype "that male workers' earnings are vital to the support of their families, while the earnings of female wage earners do not significantly contribute to their families' support."[417]

Justice Brennan also explicitly concluded that the gender classification was not even reasonably or rationally related to its purpose. As he saw it, the purpose of the benefits at issue were to "provide children deprived of one parent with the opportunity for the personal attention of the other"[418] by

408. *Id.* at 689-90.

409. *Id.* at 690.

410. *Id.* Justice Brennan also thought that under strict scrutiny any distinction based on gender "solely" for administrative convenience was "arbitrary." *Id.* at 690.

411. Weinberger v. Wiesenfeld, 420 U.S. 636, 637-39 (1975).

412. *Id.* at 642-43.

413. *Id.* at 645.

414. *Id.*

415. *Id.*

416. *Id.*

417. *Id.* at 643.

418. *Id.* at 648-49.

permitting "the surviving parent to remain at home to care for a child."[419] Consequently, the gender distinction was "entirely irrational"[420] since:

> [t]he fact that a man is working while there is a wife at home does not mean that he would, or should be required to, continue to work if his wife dies . . . [as] [i]t is no less important for a child to be cared for by its sole surviving parent when that parent is male rather than female.[421]

In a more closely divided case, the Court, in a five to four decision in *Califano v. Goldfarb*, also held unconstitutional provisions of the Social Security Act that provided certain benefits to widows, but provided similar benefits to widowers only if they were dependent on their deceased wives for at least one-half of their support.[422] However, once again, a majority of the Court did not apply intermediate scrutiny. Only Justice Brennan's plurality opinion purported to apply that standard.[423] The four dissenters appeared to apply rational basis review.[424] Justice Stevens, who agreed that the distinction was unconstitutional,[425] did not clearly apply any particular standard of review as such. His inquiry was whether there was a "'legitimate basis for presuming that the rule was actually intended to serve [the] interest' put forward by the Government as its justification."[426]

Despite the lack of consensus as to the appropriate standard of review, the result is explainable on rational basis grounds. As Justice Brennan saw it, the case was similar to *Frontiero* and "indistinguishable" from *Wiesenfeld*.[427] The distinction discriminated against working females.[428] It

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419. *Id.* at 651.

420. *Id.*

421. *Id.* at 651-52. Although not agreeing with all of Justice Brennan's reasoning, in a separate concurring opinion, Justice Rehnquist agreed that the classification "[did] not rationally serve any valid legislative purpose," *id.* at 655 (Rehnquist, J., concurring), and Justice Powell, joined by Chief Justice Burger, could "find no legitimate governmental interest that support[ed] . . . [the] classification." *Id.* at 655 (Powell, J., concurring). Justice Douglas took no part in the case. *Id.* at 653. Justice Brennan also held that the classification could not be justified as an affirmative action program for women. *See infra* notes 567-81 and accompanying text.

422. Califano v. Goldfarb, 430 U.S. 199, 201 (1977).

423. *Id.* at 210-11.

424. *Id.* at 235-36, 242 (Rehnquist, J., dissenting).

425. *Id.* at 217-24 (Stevens, J., concurring).

426. *Id.* at 223 (Stevens, J., concurring) (alterations in original) (quoting Hampton v. Mow Sun Wong, 426 U.S. 88, 103 (1976)).

427. *Id.* at 204.

"result[ed] in the efforts of female workers required to pay social security taxes producing less protection for their spouses than [was] produced by the efforts of men."[429] It was the product of an "'archaic and overbroad' generalization[]" that wives are dependent on their husbands,[430] and that, therefore, "it would save the Government time, money, and effort simply to pay benefits to all widows, rather than to require proof of dependency of both sexes."[431] On this view of the underlying facts and policies, the classification also failed the rational basis test because that was the standard applied by a majority of the Court in *Frontiero*,[432] and apparently unanimously in *Wiesenfeld*.[433]

Justice Stevens, who provided the fifth vote, concluded that the classification was unconstitutional because it was "merely the accidental byproduct of a traditional way of thinking about females,"[434] and "something more than accident is necessary to justify the disparate treatment of persons who have as strong a claim to equal treatment as do similarly situated surviving spouses."[435] In other words, he apparently agreed with Justice Brennan that the classification was based on an archaic stereotype. Justice Rehnquist, writing for the four dissenters, thought the classification was a type of affirmative action program designed to "ameliorate the characteristically depressed condition of aged widows"[436] by "mak[ing] it easier for . . . [them] to obtain benefits."[437] Such a classification was "rationally justifiable, given available empirical data on the basis of 'administrative convenience'"[438] since "widows, as a practical matter, are much more likely to be without adequate means of support than are widowers."[439] In other words, what Justices Brennan and Stevens saw as a classification based on an archaic stereotype that wives are dependent on their husbands, Justice Rehnquist saw as a classification based on a real difference between the economic conditions of widows and widowers.

Similarly, in *Wengler v. Druggists Mutual Insurance Co.*, the Court struck down a state statute that precluded widowers from receiving death benefits for the work related death of their wives unless they could prove

428. *See id.* at 204-07.
429. *Id.* at 206-07.
430. *Id.* (quoting Schlesinger v. Ballard, 419 U.S. 498, 508 (1975)).
431. *Id.* at 217.
432. *See supra* notes 398-402 and accompanying text.
433. *See supra* notes 411-21 and accompanying text.
434. *Goldfarb*, 430 U.S. at 223 (Stevens, J., concurring).
435. *Id.*
436. *Id.* at 242 (Rehnquist, J., dissenting).
437. *Id.* at 225.
438. *Id.* at 242.
439. *Id.* at 234.

that they were dependent on their earnings or were "mentally or physically incapacitated from wage earning[s]."[440] However, widows were entitled to benefits without having to prove dependence.[441] The Missouri Supreme Court had held that the classification was a type of affirmative action program designed "'to favor widows, not to disfavor them.'"[442] The theory was that since "most women are dependent on male wage earners,"[443] they are in greater need when their spouse dies.[444] The Court, eight to one, found the statute unconstitutional.[445]

By this time in the evolution of the doctrine, a majority of the Court was willing to apply intermediate scrutiny as the articulated standard of review in gender cases.[446] Justice White, writing for seven Justices, found that the statute "indisputably" created a gender classification[447] that "discriminate[d] against both men and women."[448] It discriminated against "women wage earners"[449] because their husbands were only entitled to benefits if they could prove dependency or that they were "mentally or physically incapacitated";[450] and, it discriminated against widowers because, unlike widows, they were only entitled to benefits if they could prove "incapacity or dependency."[451] Justice White found that:

> [t]he only justification offered . . . for not treating males and females alike . . . [was] the assertion that most women are dependent on male wage earners and that it is more efficient to presume dependency in the case of women than to engage in case-to-case determination, whereas individualized inquiries in the postulated few cases in which men might be dependent are not prohibitively costly.[452]

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440. Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 144-45 (1980).
441. *Id.* at 145-46.
442. *Id.* at 150 (quoting Wengler v. Druggists Mut. Ins. Co., 583 S.W.2d 162, 168 (Mo. 1979), *rev'd*, 446 U.S. 142 (1980)).
443. *Id.* at 151.
444. *Id.* at 150-51.
445. Justice Rehnqist was the lone dissenter. *See infra* note 469.
446. *Wengler*, 446 U.S. at 150.
447. *Id.* at 147.
448. *Id.*
449. *Id.* at 151.
450. *Id.* at 147.
451. *Id.* at 149.
452. *Id.* at 151.

Nonetheless, he accepted the proposition that "[p]roviding for needy spouses"[453] was "an important governmental objective."[454] However, he concluded that "those defending the discrimination"[455] failed to meet their "burden"[456] of demonstrating that "the discriminatory means employed"[457] were "substantially related to the achievement"[458] of the State's asserted important governmental objective.[459]

Although Justice White clearly analyzed the case in the framework of intermediate scrutiny, the result in the case did not depend on the application of that standard. For the most part, the result turned on the application of precedent. Justice White found that the gender discrimination at issue was the "kind of discrimination against working women" that the Court found "unjustified" in *Weinberger v. Wiesenfeld*, *Califano v. Goldfarb*, and *Frontiero v. Richardson*.[460] He also relied on *Frontiero*, *Reed v. Reed*, and Justice Stevens' concurring opinion in *Goldfarb*[461] for the proposition that the gender discrimination could not be justified "by the mere claim that it would be inconvenient to individualize determinations about widows as well as widowers."[462] Of course, in *Reed*, the Court unanimously applied rational basis review[463] and appeared to do the same in *Wiesenfeld*.[464] In *Frontiero*, a majority of the Court applied that standard,[465] and in *Goldfarb*, only a plurality of the Court, not including Justice Stevens, applied intermediate scrutiny.[466] The basic rationale of *Frontiero*, *Wiesenfeld*, and *Goldfarb* was that the gender discriminations at issue with respect to entitlement of benefits were based on archaic stereotypes as to the financial dependency of women on men;[467] and in *Reed* and *Frontiero*, the Court rejected the administrative convenience argument offered to justify the gender discrimination involved in those cases.[468] Given his reliance on these cases, Justice White, in effect, held that based on the underlying facts and policies, the classification was not reasonably or rationally related to its asserted

453. *Id.*
454. *Id.*
455. *Id.*
456. *Id.*
457. *Id.* at 150.
458. *Id.*
459. *Id.*
460. *Id.* at 147-49.
461. *Id.* at 152.
462. *Id.*
463. *See supra* notes 349-52 and accompanying text.
464. *See supra* notes 411-21 and accompanying text.
465. *See supra* notes 398-403 and accompanying text.
466. *See supra* notes 422-26 and accompanying text.
467. *See supra* notes 398-403, 411-35 and accompanying text.
468. *See supra* notes 349-52, 398-410 and accompanying text.

purpose. Indeed, in a footnote, he noted that "we accept the importance of the state goal of helping needy spouses, but . . . the . . . law in our view is not 'reasonably designed' to achieve this goal."[469]

2. Situations Where the Genders are not Similarly Situated

On the other hand, the Court has upheld gender classifications involving pregnancy and military affairs. The principal rationale of these cases has been that the genders were not similarly situated with respect to the classifications at issue. Here again, the verbalization of the standard of review as "substantially related to important governmental objectives" has had little or no effect on the outcome of the cases. Instead, these cases are also explainable on rational basis grounds.

a. Pregnancy

For example, in *Michael M. v. Superior Court*, the Court, five to four, upheld the constitutionality of a California statutory rape statute that made the male, but not the female, criminally liable for "'an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where the female [was] under the age of 18 years.'"[470] Despite the fact that, by this time in the evolution of the doctrine, a majority of the Court had accepted intermediate scrutiny as the verbalization of the standard of review in several prior gender cases,[471] only three members of the Court purported to apply that standard in this case. Justice Rehnquist's four Justice plurality opinion[472] held that the statute was "sufficiently related to the State's

469. Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 148 n.4 (1980) (citation omitted). In a concurring opinion, Justice Stevens argued that the statute discriminated against males, not females. *Id.* at 154 (Stevens, J., concurring). Nonetheless, without articulating any particular standard of review, he also found the statute unconstitutional on the grounds that the State "failed to justify the disparate treatment of persons who have as strong a claim to equal treatment as do similarly situated surviving spouses." *Id.* at 155. Justice Rehnquist dissented apparently based on his dissent in *Califano v. Goldfarb*, 430 U.S. 199, 253-54 (1977). *Id.* at 153-54 (Rehnquist, J., dissenting). *See supra* notes 436-39 and accompanying text.

470. Michael M. v. Superior Court, 450 U.S. 464, 466 (1981) (plurality opinion) (quoting CAL. PENAL CODE § 261.5 (West Supp. 1981)).

471. Prior to *Michael M.*, a majority of the Court applied intermediate scrutiny in *Kirchberg v. Feenstra*, 450 U.S. 455 (1981), *Wengler v. Druggists Mutual Insurance Co.*, 446 U.S. 142 (1980), and *Parham v. Hughes*, 441 U.S. 347 (1979).

472. The plurality consisted of Chief Justice Burger and Justices Rehnquist, Stewart and Powell. *Michael M.*, 450 U.S. at 465. Although he joined the plurality opinion, Justice Stewart also filed a concurring opinion in which he basically agreed with Justice Rehnquist's reasoning. *Id.* at 476-81

objectives to pass constitutional muster."[473] However, his analysis was consistent with reasoned decision-making under the rational basis test.[474]

Justice Rehnquist held that gender classifications are "not invidious"[475] if they are based on "the fact that the sexes are not similarly situated in certain circumstances."[476] In this case, he concluded that men and women were not "similarly situated"[477] as to pregnancy.[478] He noted that the Supreme Court of California had accepted the State's assertion that the purpose of the statute was "to prevent illegitimate teenage pregnancies."[479] He said that he was "satisfied" that this was "at least one of the 'purposes' of the statute."[480] Consequently, he found that the statutory classification was not based on a stereotype.[481] Instead, it was based on a real difference between men and women, as the genders "are not similarly situated with respect to the problems and the risks of sexual intercourse."[482] This is so since "[o]nly women may become pregnant, and they suffer disproportionately the profound physical, emotional, and psychological consequences of sexual activity."[483] He reasoned that since "virtually all of the significant harmful and inescapably identifiable consequences of teenage pregnancy fall on the young female, a legislature acts well within its authority when it elects to punish only the participant who, by nature, suffers few of the consequences of his conduct."[484] Furthermore, "the risk of pregnancy itself constitutes a substantial deterrence to young females[,] [but] . . . [n]o similar natural sanctions deter males."[485] As a result, "[a] criminal sanction imposed solely on males . . . serves to roughly 'equalize' the deterrents on the sexes."[486] Obviously, Justice Rehnquist thought the prevention of teenage pregnancy was a legitimate purpose and that punishing the male, but not the female, was reasonably and rationally

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(Stewart, J., concurring).

473. *Id.* at 473.

474. *See* Hlavac, *supra* note 18, at 1369 ("In *Michael M.* . . . Justice Rehnquist gave indirect lip service to the intermediate-scrutiny test but actually applied what amounted to the traditional rational-basis test.").

475. *Michael M.*, 450 U.S. at 469.

476. *Id.*

477. *Id.* at 471.

478. *See id.*

479. *Id.* at 470.

480. *Id.*

481. *Id.* at 476.

482. *Id.* at 471.

483. *Id.*

484. *Id.* at 473.

485. *Id.*

486. *Id.*

related to that objective.[487] Indeed, he specifically said that it was "hardly unreasonable for a legislature acting to protect minor females to exclude them from punishment."[488]

Justice Blackmun, who supplied the fifth vote, appeared to apply rational basis review.[489] He reasoned that the statute was "a sufficiently reasoned and constitutional effort to control the problem . . . of forced or unwanted conception . . . at its inception."[490] Justice Stevens, dissenting, also

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487. Justice Rehnquist also concluded that the classification did not discriminate against females. *Id.* at 475. Instead, it put a "burden on males . . . not shared by females." *Id.* at 476. However, he found nothing to suggest that men, because of past discrimination or particular disadvantage, are in need of the special solicitude of the courts. *Id.*

Justice Rehnquist also thought that it was appropriate to defer to the State on the question of whether preventing teenage pregnancies could be achieved by a gender-neutral statute that punished both the man and the woman. *Id.* He noted that "[t]he relevant inquiry . . . [was] not whether the statute [was] drawn as precisely as it might have been, but whether the line chosen . . . [was] within constitutional limitations." *Id.* at 473. He accepted the State's argument that such a "statute would frustrate its interest in effective enforcement" since "a female is surely less likely to report violations of the statute if she . . . [is] subject to criminal prosecution." *Id.* at 473-74. Furthermore, he thought that at least "[i]t [could] be plausibly argued that a gender-neutral statute would produce fewer prosecutions than the statute at issue here." *Id.* at 474 n.10. He said that "whether a statute is *substantially* related to its asserted goals is at best an opaque [question]." *Id.* Thus:

> [w]here such differing speculations as to the effect of a statute are plausible, . . . it [is] appropriate to defer to the decision of the [State] Supreme Court, "armed as it [is] with the knowledge of the facts and circumstances concerning the passage and potential impact of [the statute], and familiar with the milieu in which [the] provision [will] operate."

Id. (quoting Reitman v. Mulkey, 387 U.S. 369, 378-79 (1967)).

Justice Rehnquist also dismissed the assertion that the statute was "impermissibly overbroad" because it applied to "prepubescent females, who [were], by definition, incapable of becoming pregnant." *Id.* at 475. He noted that the statute "could well be justified on the grounds that very young females are particularly susceptible to physical injury from sexual intercourse[,]" but that, in any event, "it [was] ludicrous to suggest that the Constitution requires the . . . legislature to limit the scope of its rape statute to older teenagers and exclude young girls." *Id.* In addition, he rejected the argument that the statutory scheme was "flawed because it presume[d] that as between two persons under 18, the male [was] the culpable aggressor." *Id.* He held that the statute was not based on such an assumption; rather it was "an attempt by a legislature to prevent illegitimate teenage pregnancy by providing an additional deterrent for men" who, even if they [were] young, [could] cause "the harm sought to be prevented." *Id.*

488. *Id.* at 473.

489. Justice Blackmun said he was applying the test "exemplified" in *Craig v. Boren*, 429 U.S. 190, 197 (1976), *Schlesinger v. Ballard*, 419 U.S. 498 (1975), *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), *Kahn v. Shevin*, 416 U.S. 351 (1974), and *Reed v. Reed*, 404 U.S. 71, 76 (1971). *Id.* at 483 (Blackmun, J., concurring). In the latter four, at least a majority of the Court applied rational basis. *See supra* notes 349-52, 411-21 and accompanying text; *infra* notes 515-23, 543-57, 567-81 and accompanying text. Moreover, the former is explainable under rational basis review, and, in any event, a majority of the Court applied something less than intermediate scrutiny. *See infra* notes 660-75 and accompanying text.

490. *Michael M.*, 450 U.S. at 482 (Blackmun, J., concurring).

appeared to apply rational basis review. However, in his view, "from the point of view of society's interest in preventing the risk-creating conduct from occurring at all, it is irrational to exempt 50% of the potential violators."[491] He also thought that the classification would be unconstitutional if it were based on the assumption that the "decision to engage in the risk-creating conduct is always – or at least typically – a male decision"[492] because such an assumption might "reflect nothing more than an irrational prejudice."[493]

Only Justice Brennan, joined by Justices Marshall and White, applied intermediate scrutiny.[494] He concluded that the statutory classification was unconstitutional[495] because it was not "substantially related to the achievement of an important governmental objective."[496] In his view, the State had failed to prove that, as compared to a gender-based law, a gender-neutral law would be either more "difficult to enforce"[497] or a "less effective deterrent than a gender-based law."[498] Although Justice Brennan purported to apply intermediate scrutiny, he also found, in effect, that the classification failed rational basis review. His reading of the statute's history led him to the conclusion that its underlying purpose was not "to reduce the incidence of teenage pregnancies."[499] Rather, it was "initially designed to further . . . outmoded sexual stereotypes"[500] that women, but not men, need to preserve "their chastity."[501] In other words, what Justice Rehnquist saw as a classification based on a real difference, Justice Brennan saw as a classification based on a stereotype. On this view of the facts, the classification would be unconstitutional based on *Reed v. Reed* and its progeny.[502]

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491. *Id.* at 499 (Stevens, J., dissenting).

492. *Id.* at 501 (Stevens, J., dissenting).

493. *Id.* Justice Stevens also rejected the argument that the classification could be justified as a way "to encourage females to inform against their male partners," because he could see no basis for "defining the exempt class entirely by reference to sex rather than by reference to a more neutral criterion." *Id.* at 502 (Stevens, J., dissenting). He concluded that "[e]ven if . . . there actually [was] some speculative basis for treating equally guilty males and females differently . . . any such speculative justification would be outweighed by the paramount interest in evenhanded enforcement of the law." *Id.*

494. *See id.* at 488-90 (Brennan, J., dissenting).

495. *Id.* at 488 (Brennan, J., dissenting).

496. *Id.* at 489-90 (Brennan, J., dissenting).

497. *Id.* at 494 (Brennan, J., dissenting).

498. *Id.*

499. *Id.* at 496 (Brennan, J., dissenting).

500. *Id.*

501. *See id.* at 494-96 (Brennan, J., dissenting).

502. *See* source cited *supra* note 360.

The Court, six to three, also upheld a distinction between men and women based on pregnancy in *Geduldig v. Aiello*.[503] The issue in that case was the constitutionality of a state disability program that excluded benefits for normal pregnancy.[504] The majority applied rational basis review.[505] As they viewed the underlying facts, the case was not one "involving discrimination based upon gender as such"[506] since no one was excluded from benefits based on gender.[507] They reasoned that "[w]hile it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed*... and *Frontiero*. . . ."[508] In their view, "[n]ormal pregnancy is an objectively identifiable physical condition with unique characteristics."[509] Thus:

> [a]bsent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.[510]

Consequently, they held that the exclusion was "rationally"[511] related to the State's "legitimate interest" in cost saving.[512] Justice Brennan, writing for the three dissenters, saw the underlying facts differently. In his view, the case involved gender discrimination.[513] At this point in the evolution of the standard, he would have held the statute unconstitutional applying strict scrutiny.[514]

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503. Geduldig v. Aiello, 417 U.S. 484 (1974).
504. *Id.* at 494-97.
505. *See id.* at 495-96.
506. *Id.* at 496 n.20.
507. *Id.*
508. *Id.*
509. *Id.*
510. *Id.*
511. *See id.* at 495.
512. *Id.* at 496. The majority concluded that the exclusion of pregnancy served three legitimate state interests related to cost: "maintaining the self-supporting nature of its insurance program"; "distributing the available resources in such a way as to keep benefit payments at an adequate level for disabilities that [were] covered"; and "maintaining the contribution rate at a level that [would] not unduly burden participating employees, particularly low-income employees . . . ." *Id.*
513. *Id.* at 501 (Brennan, J., dissenting).
514. *Id.* at 502-05 (Brennan, J., dissenting).

b. Military Affairs

In *Schlesinger* v. *Ballard*, a five to four majority of the Court upheld federal statutes that gave certain female naval officers a longer period of time to obtain promotion or be discharged than was available to male officers.[515] Applying rational basis review,[516] Justice Stewart, writing for the majority, found the classification was based on "complete rationality."[517] In reaching this conclusion, he noted that the genders were not similarly situated with respect to promotion opportunities since, at the time, female officers were restricted with respect to "participation in combat and in most sea duty."[518] He hypothesized that "Congress may . . . quite rationally have believed that women line officers had less opportunity for promotion than did their male counterparts, and that a longer period of tenure . . . would . . . be consistent with the goal to provide women with 'fair and equitable career advancement programs.'"[519] He also noted that Congress has "broad constitutional power" and "responsibility" with respect to "the Armed Forces," whose "primary business" is "'to fight or be ready to fight wars.'"[520] Justice Brennan, joined by Justice Douglas, Justice Marshall, and Justice White "for the most part,"[521] dissented. Although, at this point in time, Justice Brennan was still insisting that strict scrutiny was the appropriate standard of review in gender cases,[522] he did not even think that the classification passed the rational basis test.[523]

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515. Schlesinger v. Ballard, 419 U.S. 498, 501-05 (1975).

516. *Id.* at 508-10.

517. *Id.* at 509.

518. *Id.* at 508. At the time of this case women could "'not be assigned to duty in aircraft that [were] engaged in combat missions nor . . . be assigned to duty on vessels of the Navy other than hospital ships and transports.'" *Id.* (quoting 10 U.S.C. § 6015 (1975)).

519. *Id.* (quoting H.R. REP. NO. 90-216, at 5 (1967)).

520. *Id.* at 510 (quoting United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 17 (1955)).

521. *Id.* 521 (White, J., dissenting).

522. *Id.* at 511 (Brennan, J., dissenting).

523. *Id.* at 511-12 (Brennan, J., dissenting). Apart from the standard of review, Justice Brennan disagreed with the majority concerning the underlying facts and policies. In his view, there was "nothing in the statutory scheme or the legislative history to support the supposition that Congress intended, by assuring women but not men line lieutenants in the Navy a 13-year tenure, to compensate women for other forms of disadvantage visited upon them by the Navy." *Id.* at 511 (Brennan, J., dissenting). He also noted that "women do not compete directly with men for promotion in the Navy." *Id.* at 518 (Brennan, J., dissenting). Instead, "selection boards for women are separately convened, . . . the number of women officers to be selected for promotion is separately determined, . . . promotion zones for women are separately designated, . . . and women's fitness for promotion is judged as compared to other women . . . ." *Id.* Thus, he found "it hard to see how women are disadvantaged in their opportunity for promotion by the fact that their duties in the Navy are limited, or how increasing their tenure before separation for nonpromotion is necessary to compensate for other disadvantages." *Id.* at 518-19 (Brennan, J., dissenting). Given his view of the underlying facts and policies, Justice Brennan thought that "the gender based classification . . . [was] not related, rationally or otherwise, to any legitimate legislative purpose fairly to be inferred from

Similarly, in *Rostker v. Goldberg*, a majority of the Court upheld a congressional statute that authorized the President to require registration for conscription into the armed forces for men between the ages of eighteen and twenty-six, but that did not authorize or provide funds for the registration of women.[524] In reaching this conclusion, Justice Rehnquist, writing for the six Justice majority, noted that the "interest in raising and supporting armies is an 'important governmental interest'" within meaning of intermediate scrutiny.[525] However, he did not purport to apply that standard. Instead, he held that Congress' failure to require the registration of women was constitutional because it was "not only sufficiently but also closely related to Congress' purpose in authorizing registration."[526] He based his conclusion on two main policy reasons that had nothing to do with the verbalization of the standard of review as "substantially related to important governmental objectives."Justice Rehnquist's first policy reason was that deference should be accorded to Congress' decision both because "Congress is a coequal branch of government whose Members take the same oath . . . to uphold the Constitution of the United States" as do members of the Court,[527] and because, in this case, Congress was acting within its explicit "authority over national defense and military affairs . . . under [Article I, Section 8, Clauses 12-14 of the Constitution]."[528]

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the statutory scheme or its history, and [could not] be sustained." *Id.* at 511-12 (Brennan, J., dissenting).

524. Rostker v. Goldberg, 453 U.S. 57, 59 (1981).

525. *Id.* at 70.

526. *Id.* at 79.

527. *Id.* at 64.

528. *Id.* at 64-65. Justice Rehnquist noted that "customary deference accorded the judgments of Congress is certainly appropriate when, as here, Congress specifically considered the question of the Act's constitutionality." *Id.* at 64. Furthermore, he pointed out that "[n]ot only is the scope of Congress' constitutional power in this area broad, but the lack of competence on the part of the courts is marked." *Id.* at 65. In addition, he also noted that Congress' decision to exempt women from registration was not the "'accidental by-product of a traditional way of thinking about females.'" *Id.* at 74 (quoting Califano v. Webster, 430 U.S. 313, 320 (1977)). The issue "not only received considerable national attention and was the subject of wide-ranging public debate, but was also extensively considered by Congress in hearings, floor debate, and in committee." *Id.* at 72. Furthermore, he noted that the legislative history indicated that:

> assuming that a small number of women could be drafted for noncombat roles, Congress simply did not consider it worth the added burdens of including women in draft and registration plans [;] . . . Congress also concluded that whatever the need for women for noncombat roles during mobilization . . . it could be met by volunteers[;] [and] . . . [m]ost significantly, Congress determined that staffing noncombat positions with women during a mobilization would be positively detrimental to the important goal of military flexibility.

Id. at 81-82.

However, the principal reason for his decision was "[t]he fact that Congress and the Executive have decided that women should not serve in combat,"[529] the constitutionality of which was not challenged in the case.[530] Thus, he reasoned that Congress was "fully justifie[d]"[531] in excluding women from "registration, since the purpose of registration is to develop a pool of potential combat troops."[532] Consequently, "'the gender classification [was] not invidious, but rather realistically reflect[ed] the fact that the sexes are not similarly situated'";[533] and, "[t]he Constitution requires that Congress treat similarly situated persons similarly, not that it engage in gestures of superficial equality."[534] Thus, he "conclude[d] that Congress acted well within its constitutional authority when it authorized the registration of men, and not women."[535] In other words, he found the classification to be reasonable, rational, and legitimate.

Justice White, joined by Justice Brennan, dissented. However, he did not apply any particular standard of review.[536] He simply had a different view of the underlying facts and policies. On his view of the record, he could "discern no adequate justification for . . . discrimination between men and women."[537] In other words, he apparently could not find any conceivable justification for the classification. On this view of the case, the classification was not even reasonable or rational. Only Justice Marshall, joined by Justice Brennan, dissenting, applied intermediate scrutiny.[538] However, he too basically just disagreed with the majority's analysis of the underlying facts and policies.[539]

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529. *Id.* at 79.

530. *Id.* at 83 (White, J., dissenting).

531. *Id.* at 79.

532. *Id.*

533. *Id.* (quoting Michael M. v. Superior Court, 450 U.S. 464, 469 (1981)).

534. *Id.*

535. *Id.* at 83.

536. *See id.* at 83-86 (White, J., dissenting).

537. *Id.* at 85-86 (White, J., dissenting).

538. *Id.* at 87-88 (Marshall, J., dissenting).

539. Justice Marshall's basic policy point was that the majority had put "its imprimatur on one of the most potent remaining public expressions of 'ancient canards about the proper role of women'" *Id.* at 86 (Marshall, J., dissenting) (quoting Phillips v. Martin Marietta Corporation., 400 U.S. 542, 545 (1971) (Marshall, J., concurring)). He also rejected the majority's analysis that women could be excluded from registration because "the purpose of the registration [was] to prepare for a draft of combat troops." *Id.* at 94 (Marshall, J., dissenting). In his view, there was no substantial relationship between the means of "excluding women from registration" and the end of "preparing for a draft of combat troops." *Id.* He noted that "registering women in no way obstructs the governmental interest in preparing for a draft of combat troops" since "the Government makes no claim that preparing for a draft of combat troops cannot be accomplished just as effectively by *registering* both men and women but *drafting* only men if only men turn out to be needed." *Id.* at 95 (Marshall, J., dissenting). Furthermore, as he read the legislative history, "conscripts would also be needed to staff a variety of support positions having no prerequisite of combat eligibility, and which therefore could be filled by

Also, in *Personnel Administrator v. Feeney* the issue was the constitutionality of a civil service veteran preference program that had the effect of favoring men over women since more men serve in the armed forces than do women.[540] In upholding the program, Justice Stewart, writing for the majority, stated that intermediate scrutiny was the proper standard of review in gender cases.[541] However, that standard of review had nothing to do with the result. The actual holding in the case was simply that the challenger had failed to establish that the program had a discriminatory purpose.[542]

3. Affirmative Action for Women

In another line of cases, the Court has considered the constitutionality of gender classifications that purport to be justified on the ground that they are a type of affirmative action program for women. These cases also are explainable on rational basis review. Again, the initial decisions resolved the issues based on that standard.

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women," and "[t]he Defense Department . . . concluded that there are no military reasons that would justify excluding women from registration." *Id.* at 98-99 (Marshall, J., dissenting). Consequently, Justice Marshall concluded that "combat restrictions [could not] by themselves supply the constitutionally required justification for the . . . gender-based classification . . . [s]ince the classification preclude[d] women from being drafted to fill positions for which they would be qualified and useful." *Id.* at 101 (Marshall, J., dissenting).

Justice Marshall also concluded that the exclusion of women from registration could not be justified on the ground that there was "no 'military need' to draft women," *id.* at 104 (Marshall, J., dissenting), since those needed for noncombat roles could be obtained through volunteers. *Id* at 105 (Marshall, J., dissenting). He argued that "since the purpose of registration [was] to protect against unanticipated shortages of volunteers, it [was] difficult to see how excluding women from registration [could] be justified by conjectures about the expected number of female volunteers." *Id.* He also found in the legislative record that "the Defense Department's best estimate [was] that in the event of a mobilization requiring reinstitution of the draft, there [would] not be enough women volunteers to fill the positions for which women would be eligible." *Id.* at 105-06 (Marshall, J., dissenting). In addition, Justice Marshall rejected the majority's assertion that "'Congress determined that staffing noncombat positions with women during a mobilization would be positively detrimental to the important goal of military flexibility.'" *Id.* at 106 (Marshall, J., dissenting) (quoting *Id.* at 81-82). As he read the legislative history, "it demonstrate[d] that drafting *very large numbers* of women would frustrate the achievement of a number of important governmental objectives that relate to the ultimate goal of maintaining 'an adequate armed strength . . . to insure the security of this Nation.'" *Id.* at 112 (Marshall, J., dissenting) (quoting 52 U.S.C. app. § 451(b) (1981)). However, in his view, this did "not enable the Government to carry its burden of demonstrating that *completely* excluding women from the draft by excluding them from registration substantially further[ed] important governmental objectives." *Id.*

540. Pers. Adm'r v. Feeney, 442 U.S. 256, 259, 269-70 (1979).

541. *Id.* at 273.

542. *Id.* at 276-80.

a. Compensatory Classifications

Thus, in *Kahn v. Shevin*, the issue was the constitutionality of a state statute that gave a five hundred dollar property tax exemption to widows, but not widowers.[543] Relying on *Reed v. Reed*, Justice Douglas, writing for a six to three majority, upheld the statute on the grounds that it was reasonable.[544] The underlying premise of his opinion was that men and women were not similarly situated with respect to the loss of a spouse. He reasoned that "the financial difficulties confronting the lone woman . . . exceed those facing the man,"[545] and that "[w]hether from overt discrimination or from the socialization process of a male-dominated culture, the job market is inhospitable to the woman seeking any but the lowest paid jobs."[546] Thus, "[w]hile the widower can usually continue in the occupation which preceded his spouse's death, in many cases the widow will find herself suddenly forced into a job market with which she is unfamiliar, and in which, because of her former economic dependency, she will have fewer skills to offer."[547] Consequently, he concluded that the statute was a reasonable tax law "designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden."[548] In other words, he thought that the classification was based not on a stereotype, but on a real difference between widows and widowers with respect to gender discrimination in the job market.[549]

543. Kahn v. Shevin, 416 U.S. 351, 352 n.2 (1974).

544. *Id.* at 355. Justice Douglas also noted "'that States have large leeway in making classifications'" with respect to taxation, *id.* (quoting Lehnhausen v. Lakeshore Auto Parts Co., 410 U.S. 356, 359 (1973)), and that "courts do not substitute their social and economic beliefs for the judgments of legislative bodies." *Id.* at 356 n.9 (quoting Ferguson v. Skrupa, 372 U.S. 726, 730 (1963)).

545. *Id.* at 353.

546. *Id.*

547. *Id.* at 354.

548. *Id.* at 355.

549. Justice Brennan, joined by Justice Marshall, dissented. At the time of this case these Justices were still arguing that strict scrutiny was the appropriate standard of review in gender cases. *Id.* at 357-60 (Brennan, J., dissenting). Justice Brennan, however, agreed that "the statute serve[d] a compelling governmental interest," *id.* at 358 (Brennan, J., dissenting), in addressing the "economic disparity between men and women." *Id.* at 359 (Brennan, J., dissenting). Nonetheless, he thought the statute was unconstitutional because it was not narrowly drawn. *Id.* at 358 (Brennan, J., dissenting). He reasoned that it was "plainly overinclusive" in that "the . . . exemption [could] be obtained by a financially independent heiress as well as by an unemployed widow with dependent children." *Id.* at 360 (Brennan, J., dissenting). He noted that a method of "narrowing the class of widow beneficiaries . . . [was] readily available." *Id.* The State could simply redraft the form necessary to obtain an exemption "to exclude widows who earn[ed] annual incomes, or possess[ed] assets, in excess of specified amounts." *Id.* Justice White also dissented. *Id.* at 360-62 (White, J., dissenting). He also applied strict scrutiny. *Id.* at 361 (White, J., dissenting). He thought that the statute was not only overinclusive as to widows, but also underinclusive as to needy men and single women. *Id.* Justice Douglas responded to the dissenters by characterizing their opinions as "us[ing] the Equal

Similarly, in *Schlesinger v. Ballard*, a five to four majority of the Court, applying rational basis review,[550] upheld federal statutes that in effect provided for mandatory discharge of male line naval officers who had been twice passed over for promotion, but provided for the mandatory discharge of female line naval officers only if they had been passed over for promotion after thirteen years.[551] The majority found that the classification was based on "complete rationality."[552] The underlying premise of the opinion was "that male and female line naval officers in the Navy [were] *not* similarly situated with respect to opportunities for professional service"[553] since, at the time of the case, female officers were restricted with respect to "participation in combat and in most sea duty."[554] Consequently, the classification was not based "on overbroad generalizations"[555] or "administrative convenience."[556] Instead, it was designed to compensate women by providing them with "'fair and equitable career advancement programs.'"[557]

Subsequently, in a per curiam opinion in *Califano v. Webster*, the Court upheld provisions of the Social Security Act that provided, for purposes of certain retirement benefits, that "a female wage earner could exclude from the computation of her 'average monthly wage' three more lower earning years than a similarly situated male wage earner could exclude."[558] Consequently, "[t]his would result in a slightly higher 'average monthly wage' and a correspondingly higher level of monthly old-age benefits for the retired female wage earner."[559] Although by this time in the evolution of the doctrine the Court purported to apply intermediate scrutiny to gender classifications,[560] the result in the case did not depend on that verbalization

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Protection Clause as a vehicle for reinstating notions of substantive due process . . . [by] substitut[ing] their social and economic beliefs for the judgment of legislative bodies." *Id.* at 356 n.10.

550. Schlesinger v. Ballard, 419 U.S. 498, 508-10 (1975).

551. *Id.* at 501-05.

552. *Id.* at 509.

553. *Id.* at 508.

554. *Id*; *see* source cited *supra* note 518.

555. *Ballard*, 419 U.S. at 507.

556. *Id.* at 510.

557. *Id.* at 511 (quoting H.R. REP. NO. 90-216, at 5 (1967)). Justice Brennan, joined by Justice Douglas, Justice Marshall, and Justice White "for the most part," dissented. *See supra* notes 521-23 and accompanying text.

558. Califano v. Webster, 430 U.S. 313, 315-16 (1977).

559. *Id.* at 316.

560. *Id.* at 316-17. This was the first case in which a majority of the Court unequivocally applied intermediate scrutiny to a gender classification. *See* sources cited *supra* note 112.

of the standard. Instead, the Court upheld the classification because it viewed it as being "analogous to those upheld in *Kahn* and *Ballard*,"[561] both of which applied rational basis review.[562] Consequently, the classification was viewed as being reasonable, rational, and legitimate. The Court reasoned that:

> [t]he more favorable treatment of the female wage earner enacted here was not a result of "archaic and overbroad generalizations" about women . . . or of "the role-typing society has long imposed" upon women, . . . such as casual assumptions that women are "the weaker sex" or are more likely to be child-rearers or dependents.[563]

Instead, the legislative history supported the conclusion that the congressional purpose[564] was "'the permissible one of redressing our society's longstanding disparate treatment of women'"[565] by "compensat[ing] women for past economic discrimination."[566]

b. Discriminatory Classifications

On the other hand, in *Weinberger v. Wiesenfeld*, the Court, apparently applying rational basis review, struck down a provision of the Social Security Act that provided that certain benefits were payable to the wife and children of a deceased male, but similar benefits were only payable to the children, but not the husband, of a deceased female.[567] The Appellant argued, in part, that the provision was constitutional because it was "reasonably designed to compensate women beneficiaries as a group for the economic difficulties which still confront women who seek to support themselves and their families."[568] In his majority opinion, Justice Brennan rejected this argument. Citing cases that had applied rational basis review, he asserted that the "Court need not in equal protection cases accept at face

561. *Webster*, 430 U.S. at 317.

562. *See supra* notes 543-57 and accompanying text.

563. *Webster*, 430 U.S. at 317 (quoting Schlesinger v. Ballard, 419 U.S. 498, 508 (1975); Stanton v. Stanton, 421 U.S. 7, 15 (1975)).

564. *Id.* at 318.

565. *Id.* at 317 (quoting Califano v. Goldfarb, 430 U.S. 199, 209 n.8 (1977)).

566. *Id.* at 318. The Court noted that the result in the case was not affected by the fact "[t]hat Congress changed its mind in 1972 and equalized the treatment of men and women." *Id.* at 320. Chief Justice Burger, joined by Justices Stewart, Blackmun, and Rehnquist, filed a concurring opinion. He was "happy to concur in the Court's judgement," but found it "somewhat difficult to distinguish the Social Security provision upheld here from that struck down . . . in *Califano v. Goldfarb*." *Id.* at 321 (Burger, C.J., concurring); *see also supra* notes 422-39 and accompanying text; *infra* notes 596-612 and accompanying text.

567. Weinberger v. Wiesenfeld, 420 U.S. 636, 637-38 (1975).

568. *Id.* at 648.

value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation."[569] Consequently, "the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes."[570] He engaged in a reasoned analysis and found that it was "apparent both from the statutory scheme itself and from the legislative history . . . that Congress' purpose in providing benefits to young widows with children was not to provide an income to women who were, because of economic discrimination, unable to provide for themselves."[571] Instead, the statute was "linked . . . directly to responsibility for minor children."[572] It was designed to "enabl[e] the surviving parent to remain at home to care for a child."[573] Given this purpose, the classification was "entirely irrational"[574] because even the "fact that a man is working while there is a wife at home does not mean that he would, or should be required to, continue to work if his wife dies."[575]

Justice Brennan also found that the classification was unnecessary. He noted that:

> to the extent that Congress legislated on the presumption that women as a group would choose to forgo work to care for children while men would not, the statutory structure, independent of the gender-based classification, would deny or reduce benefits to those men who conform to the presumed norm and are not hampered by their child-care responsibilities.[576]

Consequently, the distinction between husbands and wives was "gratuitous; without it, the statutory scheme would only provide benefits to those men

569. *Id.* at 648 n.16 (citing Jimenez v. Weinberger, 417 U.S. 628, 634 (1974); United States Dep't of Agric. v. Moreno, 413 U.S. 528, 536-37 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972)).

570. *Id.* at 648.

571. *Id.*

572. *Id.*

573. *Id.* at 651.

574. *Id.*

575. *Id.* at 651-52. Although not agreeing with all of Justice Brennan's reasoning, in separate concurring opinions, Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, agreed that the classification failed the rational basis test. *See supra* note 421.

576. *Wiesenfeld*, 420 U.S. at 652-53. Under the statutory scheme, women were entitled to benefits if they were not working; if working, the benefit amount was reduced. *Id.* at 640-41.

who [were] in fact similarly situated to the women the statute aid[ed]."[577] Since the statute could not "be explained as an attempt to provide for the special problems of women,"[578] it was unconstitutional because it suffered from the same infirmity as the statute in *Frontiero v. Richardson*.[579] It was a "gender-based generalization"[580] concerning those who are the "primary supporters of their spouses and children."[581]

Not only did Justice Brennan purport to apply rational basis review in *Wiesenfeld*, but also his analysis was consistent with that standard of review. Recall that under rational basis review, a classification is upheld if there are any conceivable or plausible reasons to support it.[582] However, there is nothing in the theory of rational basis review, or in the precedents, that requires the Court, in the words of Justice Brennan, to "accept at face value assertions of legislative purposes."[583] Indeed the precedents are to the contrary.[584] Even under rational basis review, the Court still "insist[s] on knowing the relation between the classification adopted and the object to be attained."[585] Consequently, it still must engage in a reasoned analysis of the underlying facts and policies to determine whether there are reasons, real or plausible, to support the classification, and whether they are rationally related to some legitimate government purpose.[586] A classification will only be upheld if the government's purpose is in fact legitimate and if such reasons for it can be articulated.[587] While it is certainly true, as a general matter, that the legislature's actual purpose is irrelevant for purposes of rational basis review,[588] the asserted purpose still must be conceivable or plausible.[589] It is certainly hard to see how an asserted purpose can be conceivable or plausible if, as Justice Brennan asserted, "an examination of the legislative scheme and its history demonstrates that . . . [it] could not have been a goal of the legislation."[590] Cases such as *FCC v. Beach Communications, Inc.* are not to the contrary. In that case, the challenger of a classification argued that Congress did not intend the purpose ascribed to it

577. *Id.* at 653.

578. *Id.*

579. *Id.* at 642-43.

580. *Id.* at 645.

581. *Id.* Justice Brennan also held that the classification was not reasonably or rationally related to its asserted ends. *See supra* text accompanying notes 411-21.

582. *See supra* notes 287-97 and accompanying text.

583. *See supra* note 569 and accompanying text.

584. *See* cases cited *supra* note 281.

585. Romer v. Evans, 517 U.S. 620, 632 (1995).

586. *See supra* notes 273-333 and accompanying text.

587. *See id.*

588. *See supra* note 279 and accompanying text.

589. *See supra* notes 282-322 and accompanying text.

590. Weinberger v. Wiesenfeld, 420 U.S. 636, 648 n.16 (1975).

by the Court.[591] The latter said that Congress' actual purpose was irrelevant.[592] However, in terms of plausibility, there is surely a difference between an assertion that the legislature *did not* intend a particular purpose, and the assertion that the legislature *could not* have intended that purpose.

Justice Brennan's additional assertion in *Wiesenfeld*, that the gender distinction could not be justified as an attempt to compensate women because it was gratuitous,[593] is also consistent with rational basis review. Even under rational basis review, a classification must be reasonably or rationally related to a constitutionally permissible purpose.[594] Justice Brennan can be understood as saying that gender classifications can only be justified as affirmative action programs if they are necessary "to provide for the special problems of women."[595] Such programs are not reasonable, rational, or constitutionally legitimate if they are unnecessary or merely gratuitous.

The subsequent cases that have refused to accept compensatory justifications for gender classifications have relied for the most part on Justice Brennan's analysis in *Wiesenfeld.* In *Califano v. Goldfarb*, the Court, in a five to four decision, held unconstitutional other provisions of the Social Security Act that provided certain benefits to widows, but provided similar benefits to widowers only if they were dependent on their deceased wives for at least one half of their support.[596] However, the Court was divided on the appropriate standard of review as well as on whether the statute was a permissible compensatory measure for females, or whether it involved invidious discrimination against them. Applying rational basis review,[597] Justice Rehnquist, writing for the four dissenters, found "implicit" in the classification a "legislative judgment . . . that widows, as a practical matter, are much more likely to be without adequate means of support than are widowers."[598] Consequently, he viewed the case as involving a type of affirmative action program designed to "ameliorate the characteristically depressed condition of aged widows"[599] by "mak[ing] it easier for . . . [them]

591. *See* FCC v. Beach Communications, Inc., 508 U.S. 307, 318 (1993).
592. *Id.*
593. *See Wiesenfeld*, 420 U.S. at 652-53.
594. *See supra* notes 308-29 and accompanying text.
595. *Wiesenfeld*, 420 U.S. at 653.
596. Califano v. Goldfarb, 430 U.S. 199, 201 (1977).
597. *See id.* at 235-36 (Rehnquist, J., dissenting).
598. *Id.* at 234 (Rehnquist, J., dissenting).
599. *Id.* at 242 (Rehnquist, J., dissenting).

to obtain benefits."[600] Such a classification was "rationally justifiable, given available empirical data, on the basis of 'administrative convenience'"[601] since "widows, as a practical matter, are much more likely to be without adequate means of support than are widowers."[602] In other words, Justice Rehnquist saw the classification as being based on a real difference between the economic conditions of widows and widowers.

Justice Brennan, writing for the four Justice plurality, rejected the argument that the gender distinction could be justified as a program to compensate needy widows. He explicitly applied intermediate scrutiny.[603] He said the classification could only be upheld if it was substantially related to important governmental objectives,[604] and that "justifications that suffice for non-gender-based classifications in the social welfare area do not necessarily justify gender discriminations."[605] Nonetheless, his analysis of the issue did not depend on the application of that standard. He applied the same type of reasoned analysis here as in *Wiesenfeld*, in which he appeared to apply rational basis review.[606] He examined the legislative history and concluded that the:

> only *conceivable* justification for writing the presumption of wives' dependency into the statute [was] the assumption, . . . based simply on "archaic and overbroad" generalizations, that it would save the Government time, money, and effort simply to pay benefits to all widows, rather than to require proof of dependency of both sexes.[607]

Consequently, the distinction was "precisely the situation faced in *Frontiero* and *Wiesenfeld*."[608] Being based on an "'archaic and overbroad' generalizatio[n]," the classification was unconstitutional.[609]

Justice Stevens, who provided the fifth vote for striking down the statute, appeared to apply the rational basis test.[610] In his view, the classification was "merely the accidental byproduct of a traditional way of

600. *Id.* at 225 (Rehnquist, J., dissenting).

601. *Id.* at 242 (Rehnquist, J., dissenting).

602. *Id.* at 234 (Rehnquist, J., dissenting).

603. *Id.* at 210-11.

604. *Id.*

605. *Id.* at 211 n.9.

606. *See supra* notes 411-21, 567-81 and accompanying text.

607. *Goldfarb*, 430 U.S. at 217 (emphasis added) (citation omitted) (quoting Schlesinger v. Ballard, 419 U.S. 498, 508 (1975)).

608. *Id.*

609. *See id.* (quoting *Ballard*, 419 U.S. at 508).

610. Justice Stevens' inquiry was whether there was a "'legitimate basis for presuming that the rule was actually intended to serve [the] interest' put forward by the Government as its justification." *Id.* at 223 (Stevens, J., concurring) (alteration in original) (quoting Hampton v. Mow Sun Wong, 426 U.S. 88, 103 (1976)).

thinking about females,"[611] and "something more than accident is necessary to justify the disparate treatment of persons who have as strong a claim to equal treatment as do similarly situated surviving spouses."[612] In other words, although he apparently applied a different standard of review, he seemed to agree with Justice Brennan that the classification was based on an archaic stereotype.

Similarly, in *Orr v. Orr*, a six to three majority of the Court[613] struck down a state's "alimony statutes which provide[d] that husbands, but not wives, may be required to pay alimony upon divorce."[614] Justice Brennan, writing for the majority, held that the gender classification could not be justified as a type of affirmative action program "'designed'" either as a way of "provid[ing] help for needy spouses, using sex as a proxy for need[,] . . . [or] compensating women for past discrimination during marriage, which assertedly has left them unprepared to fend for themselves."[615] In reaching this conclusion, he purported to apply intermediate scrutiny;[616] he said the issue was whether the classification was substantially related to the otherwise important objectives of "assisting needy spouses" and compensating women for the "disparity in economic condition" of the genders.[617]

Although Justice Brennan talked in terms of the rhetoric of intermediate scrutiny, his reasoning was to the effect that the classification was not even reasonable or rational. His ultimate conclusion was that the classification was unconstitutional because it was unnecessary and would "produce perverse results."[618] He noted that the statute already provided for "individualized hearings at which the parties' relative financial circumstances are considered."[619] As a result, there was "no reason . . . to use

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611. *Id.*

612. *Id.*

613. The three dissenters dissented on judiciability grounds rather than on the merits. *See* Orr v. Orr, 440 U.S. 268, 285-90 (1979) (Powell, J., dissenting); *Id.* at 290-300 (Rehnquist, J., dissenting).

614. *Id.* at 270.

615. *Id.* at 280. Justice Brennan also rejected the argument that the classification could be justified as a State "preference for an allocation of family responsibilities under which the wife play[ed] a dependent role." *Id.* at 279. He "held that the 'old notio[n]' that 'generally it is the man's primary responsibility to provide a home and its essentials,' [could] no longer justify a statute that discriminates on the basis of gender." *Id.* at 279-80 (quoting Stanton v. Stanton, 421 U.S. 7, 10 (1975)); *see supra* notes 340-48 and accompanying text.

616. *Orr*, 440 U.S. at 279.

617. *Id.* at 280.

618. *Id.* at 282.

619. *Id.* at 281.

sex as a proxy for need . . . [and] [n]eedy males could be helped along with needy females with little if any additional burden on the State."[620] Also, "since individualized hearings [could] determine which women were in fact discriminated against vis-à-vis their husbands, as well as which family units defied the stereotype and left the husband dependent on the wife, [the State's] alleged compensatory purpose [could have been] effectuated without placing burdens solely on husbands."[621] Thus, he found that the statutory classification suffered from the same infirmity as the one in *Wiesenfeld*.[622] It was "'gratuitous; without it, the statutory scheme would have only provide[d] benefits to those men who [were] in fact similarly situated to the women the statute aid[ed],' and the effort to help those women would not in any way [have been] compromised."[623] Consequently, it could not even pass the rational basis test since that was the standard the Court appeared to apply in *Wiesenfeld*.[624]

Justice Brennan also found that as compared to a gender neutral statute, the "gender classification actually produce[d] perverse results . . . [in that it] [gave] an advantage only to the financially secure wife whose husband [was] in need."[625] He concluded that "[a] gender-based classification which, as compared to a gender-neutral one, generates additional benefits only for those it has no reason to prefer cannot survive equal protection scrutiny."[626] Justice Brennan obviously thought that a classification that produced such results was not even reasonable or rational.

In addition, in *Mississippi University For Women v. Hogan*, the issue was the constitutionality of a female-only admissions policy that precluded men from enrolling for credit at a state supported nursing school.[627] The State defended the policy on the theory that "it compensate[d] for discrimination against women and, therefore, constitute[d] educational affirmative action."[628] Justice O'Connor, writing for the five Justice majority, purported to apply intermediate scrutiny.[629] She said the issue was whether the classification was substantially related to important governmental objectives,[630] and "a State can evoke a compensatory purpose to justify an otherwise discriminatory classification only if members of the

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620. *Id.*
621. *Id.* at 281-82.
622. *Id.* at 282.
623. *Id.* at 282 (citation omitted) (quoting Weinberger v. Wiesenfeld, 420 U.S. 636, 653 (1975)).
624. *See supra* notes 567-81 and accompanying text.
625. *Orr*, 440 U.S. at 282.
626. *Id.* at 282-83.
627. Miss. Univ. for Women v. Hogan, 458 U.S. 718, 719 (1982).
628. *Id.* at 727.
629. *See id.* at 723-31.
630. *Id.* at 724.

gender benefited by the classification actually suffer a disadvantage related to the classification."[631] She found that the State made "no showing that women lacked opportunities to obtain training in the field of nursing or to attain positions of leadership in that field when the . . . School of Nursing opened its door or that women currently are deprived of such opportunities."[632] Thus, she held that the classification was unconstitutional because "although the State recited a 'benign, compensatory purpose,' it failed to establish that the alleged objective [was] the actual purpose underlying the discriminatory classification,"[633] and had "fallen far short of establishing the 'exceedingly persuasive justification' needed to sustain the gender-based classification."[634]

Although Justice O'Connor purported to apply intermediate scrutiny, her opinion is perfectly consistent with rational basis review as applied in *Schlesinger v. Ballard*, *Weinberger v. Wiesenfeld*, *Frontiero v. Richardson*, and *Reed v. Reed*, all of which she in fact cited.[635] She did not "accept at face value assertions"[636] of a compensatory purpose; indeed, she cited *Wiesenfeld* for the proposition that "'the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes.'"[637] Consistent with *Wiesenfeld*, she engaged in a "searching analysis"[638] of the "'statutory scheme.'"[639] Citing United States government statistics, she found that "the year before the School of Nursing's first class enrolled, women earned 94 percent of the nursing baccalaureate degrees conferred in Mississippi and 98.6 percent of the degrees earned nationwide"[640] and that ten years later, "women received more than 94 percent of the baccalaureate degrees conferred nationwide."[641] Although she did not say it as such, Justice O'Connor obviously thought that, based on these statistics, it was not even conceivable or plausible that

631. *Id.* at 728.
632. *Id.* at 729.
633. *Id.* at 730.
634. *Id.* at 731.
635. *Id.* at 728 (citing Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Schlesinger v. Ballard, 419 U.S. 498 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971)).
636. *Wiesenfeld*, 420 U.S. at 648 n.16.
637. *Hogan*, 458 U.S. at 728 (quoting *Wiesenfeld*, 420 U.S. at 648).
638. *Id.* at 728.
639. *Id.* at 728 (quoting *Wiesenfeld*, 420 U.S. at 648).
640. *Id.* at 729.
641. *Id.* at 729 n.14.

the exclusion of men was designed to compensate women for discrimination in the field of nursing.[642]

Similarly, in *United States v. Virginia*, Justice Ginsburg, writing for six members of the Court, rejected the State's attempt to justify the exclusion of women from Virginia Military Institute, *inter alia*, on the theory that it was a benign classification designed to provide "'important educational benefits'" that "contribute[d] to 'diversity in educational approaches.'"[643] Although Justice Ginsburg purported to apply intermediate scrutiny to the case generally,[644] her holding on this part of the case is consistent with rational basis review. Like Justice O'Connor in *Hogan*,[645] Justice Ginsburg did not "accept at face value assertions"[646] of a compensatory purpose. She cited *Wiesenfeld*, which appeared to apply rational basis review,[647] and *Goldfarb*, which had relied on *Wiesenfeld*,[648] for the propositions that "'benign'

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642. Justice O'Connor also held that even if the exclusion of males had a compensatory purpose, the classification would still be unconstitutional because it was not "substantially and directly related to" that purpose. *Id.* at 730. However, here too, her conclusion did not depend on intermediate scrutiny as the verbalization of the standard of review. She noted that MUW permitted males to "audit [and] to participate fully in classes . . . and . . . take part in continuing education courses offered by the School of Nursing, in which regular nursing students also [could] enroll." *Id.* at 731. She also pointed out that "[t]he uncontroverted record reveal[ed] that admitting men to nursing classes [did] not affect teaching style, that the presence of men in the classroom would not affect the performance of the female nursing students, and that men in coeducational nursing schools [did] not dominate the classroom." *Id.* (citations omitted). Thus, "the record . . . [was] flatly inconsistent with the claim that excluding men from the School of Nursing [was] necessary to reach any of MUW's educational goals." *Id.* In effect, she concluded that exclusion of men was not even reasonably or rationally related to the School's goals. Justice O'Connor also found that "[r]ather than compensate for discriminatory barriers faced by women, MUW's policy . . . tend[ed] to perpetuate the stereotyped view of nursing as an exclusively woman's job." *Id.* at 729. It "lend[ed] credibility to the old view that women, not men, should become nurses, and [made] the assumption that nursing is a field for women a self-fulfilling prophecy." *Id.* at 730. On this view of the underlying facts, the classification would also be unconstitutional under the rational basis test as applied in cases such as *Stanton v. Stanton*, 421 U.S. 7 (1975), which Justice O'Connor in fact cited. *Id.* at 730. For a discussion of *Stanton*, see *supra* notes 340-48 and accompanying text.

Justice Powell, joined by Justice Rehnquist, explicitly applied the rational basis test. *See Hogan*, 458 U.S. at 742 (Powell, J., dissenting). However, he thought that the classification was constitutional even under intermediate scrutiny. *Id.* at 743 (Powell, J., dissenting). On the fit issue, he thought that the fact that men could audit classes did not mean that the statute's means were not "sufficiently related" to its ends. *Id.* at 744 n.17 (Powell, J., dissenting). He noted that "[o]n average . . . men [had] audited 14 courses a year . . . [out of] 913 courses offered." *Id.* In his view, "[t]his deviation from a perfect relationship between means and ends [was] insubstantial." *Id.* In separate opinions, Chief Justice Burger and Justice Blackmun agreed with much of Justice Powell's opinion. *Id.* at 733 (Burger, C.J., dissenting); *Id.* at 733-34 (Blackmun, J., dissenting).

643. United States v. Virginia, 518 U.S. 515, 535 (1996) (quoting Brief for Cross-Petitioners at 20, 25, United States v. Virginia, 518 U.S. 515 (1996)). For a discussion of the government's other argument in the case, *see supra* notes 372-97 and accompanying text.

644. *See id.* at 531-34.

645. *See supra* notes 636-37 and accompanying text.

646. Weinberger v. Wiesenfeld, 420 U.S. 636, 648 n.16 (1975).

647. *See supra* notes 567-81 and accompanying text.

648. *See supra* notes 596-612 and accompanying text.

justifications proffered in defense of categorical exclusions will not be accepted automatically; a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded,"[649] and that "'mere recitation of a benign [or] compensatory purpose' does not block 'inquiry into actual purposes' of government maintained gender-based classifications."[650] She then proceeded to engage in "an examination of the legislative scheme and its history."[651] She found that "[n]either recent nor distant history [bore] out Virginia's alleged pursuit of diversity through single-sex educational options"[652] or, otherwise, that "VMI was established, or has been maintained, with a view to diversifying, by its categorical exclusion of women, educational opportunities. . . ."[653] Obviously, Justice Ginsburg did not think that the State's assertion was even plausible.[654]

Furthermore, Justice Ginsburg emphasized that the case involved "an educational opportunity recognized . . . as 'unique.'"[655] She said that "[a] purpose genuinely to advance an array of educational options . . . [was] not served by VMI's historic and constant plan – a plan to 'affor[d] a unique educational benefit only to males.'"[656] She concluded that "[h]owever

649. *Virginia*, 518 U.S. at 535-36.

650. *Id.* at 536 (quoting *Wiesenfeld*, 420 U.S. at 648).

651. *Wiesenfeld*, 420 U.S. at 648 n.16.

652. *Virginia*, 518 U.S. at 536.

653. *Id.* at 535. She found that "the historical record indicate[d]" that "the current absence of public single-sex higher education for women . . . [was] deliberate . . . : First, protection of women against higher education; next, schools for women far from equal in resources and stature to schools for men; finally, conversion of the separate schools to coeducation." *Id.* at 538.

Furthermore, she noted that the court of appeals found only one "'explicit . . . [statement] . . . in which the Commonwealth [had] expressed itself with respect to gender distinctions.'" *Id.* at 539 (quoting United States v. Virginia, 976 F.2d 890, 899 (4th Cir. 1992), *aff'd*, 518 U.S. 515 (1996)). She also noted that after *Mississippi University for Women v. Hogan*, "VMI . . . reexamine[d] its male-only admission policy," but she could not "extract from that effort any . . . policy evenhandedly to advance diverse educational options." *Id.*

In a separate concurring opinion, Chief Justice Rehnquist agreed with the majority "that there [was] scant evidence in the record that . . . the real reason that Virginia decided to maintain VMI as men only" was the purpose of "diversity in education." *Id.* at 562 (Rehnquist, C.J., concurring). However, in this regard, he "would consider only evidence that postdate[d] [the Court's] decision in *Hogan*, and would draw no negative inferences from the Commonwealth's actions before that time."*Id.*

654. *But see id.* at 578 (Scalia, J., dissenting). "There [could] be no serious dispute that . . . single-sex education and a distinctive educational method 'represent[ed] legitimate contributions to diversity in the Virginia higher educational system.'" *Id.* (quoting United States v. Virginia, 766 F. Supp. 1407, 1413 (W. D. Va. 1991), *vacated*, 976 F.2d 890 (4th Cir. 1992), *aff'd*, 518 U.S. 515 (1996)).

655. *Id.* at 533 n.7.

656. *Id.* at 539-40 (alteration in original) (quoting *Virginia*, 976 F.2d at 899). Chief Justice Rehnquist agreed that "[e]ven if diversity in educational opportunity were the Commonwealth's

'liberally' this plan serve[d] the Commonwealth's sons, it [made] no provision whatever for her daughters. That is not *equal* protection."[657] This assertion has nothing to do with the verbalization of the standard of review as intermediate scrutiny. Since Justice Ginsburg thought that providing "'a unique educational benefit only to males'"[658] was "not *equal* protection," she presumably also thought it was not even constitutionally legitimate for purposes of rational basis review.[659]

4. Fit Between Means and Ends

Even if a classification has a constitutionally permissible purpose, the means still must be closely enough related to the ends so as to justify the distinction. However, even the gender cases in which the fit between the means and ends was at issue are explainable on rational basis grounds. For example, in *Craig v. Boren*,[660] the issue was the constitutionality of a state

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actual objective, the Commonwealth's position would still be problematic . . . [since] the diversity benefited only one sex; there was single-sex public education available for men at VMI, but no corresponding single-sex public education available for women." *Id.* at 562 (Rehnquist, C.J., concurring). However, he thought that the State "might well have avoided an equal protection violation" if it had "made a genuine effort to devote comparable public resources to a facility for women, and followed through on such a plan." *Id.* at 563 (Rehnquist, C.J., concurring). He pointed out that the State treated the four all female private schools that existed in the state "*exactly* as all other private schools [were] treated, which include[d] the provision of tuition-assistance grants to . . . residents." *Id.* at 564 (Rehnquist, C.J., concurring). He reasoned that "[h]ad the Commonwealth provided the kind of support for the private women's schools that it provide[d] for VMI, this may have been a very different case." *Id.*

657. *Id.* at 540. Justice Ginsburg also held that the creation of a state sponsored "parallel program" for women at a private liberal arts school for women was not an adequate remedy for "[t]he constitutional violation . . . [of] the categorical exclusion of women from an extraordinary educational opportunity afforded men." *Id.* at 547; *See also id.* at 548-51. She noted that "[a] remedial decree . . . must closely fit the constitutional violation; it must be shaped to place persons unconstitutionally denied an opportunity or advantage in 'the position they would have occupied in the absence of [discrimination].'" *Id.* at 547 (alteration in original) (quoting Milliken v. Bradley, 433 U.S. 267, 280 (1977)). The proposed parallel program failed this test because it was "different in kind from VMI and unequal in tangible and intangible facilities." *Id.*

Chief Justice Rehnquist thought that the constitutional violation was "not the 'exclusion of women' . . . but the maintenance of an all-men school without providing any – much less a comparable – institution for women." *Id.* at 565 (Rehnquist, C.J., concurring). Consequently, he thought that "[a]n adequate remedy . . . might be a demonstration by Virginia that its interest in educating men in a single-sex environment is matched by its interest in educating women in a single-sex institution." *Id.* In his view, "[i]t would [have been] a sufficient remedy . . . if the two institutions offered the same quality of education and were of the same overall caliber." *Id.* Nonetheless, he agreed that the proposed parallel program "fail[ed] as a remedy, because it [was] distinctly inferior to the existing men's institution and [would] continue to be for the foreseeable future." *Id.* at 566.

658. *Id.* at 540 (quoting *Virginia*, 976 F.2d at 899).

659. *Cf.* Romer v. Evans, 517 U.S. 620, 633 (1996) (applying rational basis review). ("A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.")

660. For other gender cases in which the fit between the means and ends was at issue, and that are

statutory scheme that prohibited the sale of 3.2% beer to males under the age of twenty-one, but only prohibited the sale of such beer to females under the age of eighteen.[661] The purported objective of the classification was traffic safety.[662] Justice Brennan, writing for the court, insisted that in order for gender classifications to be upheld they "must serve important governmental objectives and must be substantially related to achievement of those objectives."[663] Still, at this time in the evolution of the standard, five members of the Court were not yet ready to unequivocally endorse intermediate scrutiny as the standard.[664] Nonetheless, the Court, seven to two, had little trouble in finding that the classification amounted to unconstitutional gender discrimination.[665]

A majority of the Court either explicitly or implicitly found that the classification was not reasonable or rational.[666] Justice Stewart thought that

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explainable on rational basis grounds, *see Nguyen v. INS*, 533 U.S. 53 (2001) (discussed *supra* notes 156-85 and accompanying text, *infra* notes 729-62 and accompanying text); United States v. Virginia, 518 U.S. 515 (1996) (discussed *supra* notes 372-97 and accompanying text); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (discussed *supra* notes 362-71 and accompanying text); *Mississippi University for Women v. Hogan*, 458 U.S. 719 (1982) (discussed *supra* note 642); *Rostker v. Goldberg*, 453 U.S. 57 (1981) (discussed *supra* notes 524-39 and accompanying text); *Michael M. v. Superior Court*, 450 U.S. 467 (1981) (plurality opinion) (discussed *supra* notes 470-502 and accompanying text); *Kirchberg v. Feenstra*, 450 U.S. 455 (1981) (discussed *supra* notes 353-61 and accompanying text); *Wengler v. Druggist Mutual Insurance Co.*, 446 U.S. 142 (1980) (discussed *supra* notes 440-69 and accompanying text); *Caban v. Mohammed*, 441 U.S. 380 (1979) (discussed *infra* notes 679-704 and accompanying text); *Parham v. Hughes*, 441 U.S. 347 (1979) (discussed *infra* notes 705-28 and accompanying text); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (discussed *supra* notes 411-21 and accompanying text); and *Frontiero v. Richardson*, 411 U.S. 677 (1973) (discussed *supra* notes 398-417 and accompanying text).

661. Craig v. Boren, 429 U.S. 190, 191-92 (1976).

662. *Id.* at 199. Justice Brennan accepted this objective for purpose of analysis, "leaving for another day consideration of whether the statement of the State's Assistant Attorney General should suffice to inform this Court of the legislature's objectives, or whether the Court must determine if the litigant simply is selecting a convenient, but false, post hoc rationalization." *Id.* at 200 n.7 (emphasis omitted).

663. *Id.* at 197.

664. Two justices joined Justice Brennan's opinion but expressed reservations concerning the appropriate standard of review. *See id.* at 210-11 (Powell, J., concurring); *Id.* at 211-14 (Stevens, J., concurring). *See also infra* notes 668-69 and accompanying text, *infra* note 675. Three other justices applied rational basis review. *See id.* at 214-15 (Stewart, J., concurring); *Id.* at 215-17 (Burger, C.J., dissenting); *Id.* at 217-28 (Rehnquist, J., dissenting).

665. *Id.* at 210. *Id.* at 210-11 (Powell, J., concurring); *Id.* at 214 (Blackmun, J., concurring); *Id.* at 214-15 (Stewart, J., concurring).

666. *Cf.* Hlavac, *supra* note 18, at 1376 (asserting that, in *Craig*:

> the Court did not need to apply . . . intermediate scrutiny to strike down the respective gender-classification schemes. It could have applied the rational-basis test and concluded that the means chosen were not rationally related to the government objectives because the means themselves were based on archaic and overbroad generalizations).

the distinction evidenced "total irrationality."[667] Justice Powell, also apparently applying rational basis,[668] concluded that the distinction did "not bear a fair and substantial relation to the object of the legislation."[669] Even Justice Brennan, in effect held that the classification was not reasonable or rational.[670] His ultimate conclusion was that the government's statistical evidence offered to justify the gender distinction had an "unduly tenuous"[671] relationship to the objective of traffic safety.[672] Although it has been said that under rational basis review a classification "will be sustained . . . even if . . . the rationale for it seems tenuous,"[673] it has also been said that a classification will only be upheld under rational basis review if its "relationship . . . to its goal is not so attenuated as to render the distinction arbitrary or irrational."[674] Since Justice Brennan characterized the means-ends relationship as not only tenuous, but "unduly tenuous," he presumably thought that the case fell within the latter category rather than the former.[675]

But see Craig, 429 U.S. at 217 (Burger, C.J., dissenting) (asserting that eight members of the Court did not believe that the means were irrational).

667. *Craig*, 429 U.S. at 215 (Stewart, J., concurring).

668. Although Justice Powell joined the Court's opinion, he found it "unnecessary" to read *Reed v. Reed* "as broadly as some of the Court's language [might] imply." *Id.* at 210 (Powell, J., concurring) However, he noted that "the relatively deferential 'rational basis' standard of review normally applied takes on a sharper focus" when applied to gender classifications. *Id.* at 210-11 n.*.

669. *Id.* at 211 (Powell, J., concurring).

670. *See id.* at 200-04.

671. *Id.* at 202.

672. *Id.* 199-204.

673. Romer v. Evans, 517 U.S. 620, 632 (1996).

674. Nordlinger v. Hahn, 505 U.S. 1, 11 (1992).

675. *Craig*, 429 U.S. at 202. Justice Stevens filed a separate concurring opinion, but he did not clearly apply any particular standard of review. He said that he joined the Court's opinion, but he seemed to criticize the application of different standards of review in equal protection cases. *See id.* at 211-12 (Stevens, J., concurring). Nonetheless, he too found the classification "objectionable because it [was] based on an accident of birth, because it [was] a mere remnant of the . . . tradition of discriminating against males in this age bracket, and because, to the extent it reflect[ed] any physical difference between males and females, it [was] actually perverse." *Id.* at 212-13 (Stevens, J., concurring). As to the latter, he pointed out that since "males are generally heavier than females, they have a greater capacity to consume alcohol without impairing their driving ability." *Id.* at 213 n.4 (Stevens, J., concurring). Justice Stevens also found it "difficult to believe that the statute was actually intended to cope with the problem of traffic safety, since it ha[d] only a minimal effect on access to a not very intoxicating beverage and [did] not prohibit its consumption." *Id.* at 213 (Stevens, J., concurring). He concluded that while the statutory scheme was not "totally irrational," the Government's traffic safety rationale did not "make an otherwise offensive classification acceptable." *Id.* The two dissenters, Chief Justice Burger and Justice Rehnquist, applying rational basis review, concluded that the statutory distinction was constitutional. *Id.* at 215-17 (Burger, C.J., dissenting); *Id.* at 217-18, (Rehnquist, J., dissenting).

5. *Nguyen* Revisited: Are the Genders Similarly Situated with Respect to Nonmarital Children?

Nguyen is one of three cases in which the Court has been closely divided on the constitutionality of statutes that distinguish between the genders with respect to their nonmarital children.[676] Although a majority of the Court in each of these cases purported to apply intermediate scrutiny, the verbalization of that standard of review had little to do with the outcomes. For the most part, the underlying question in the cases was whether the genders were similarly situated with respect to the classification at issue. In each of the cases, the Justices engaged in a reasoned analysis of the underlying facts and policies. Those Justices who found the classifications to be based on "'overbroad generalizations'"[677] voted to strike them down; those who found them to be based on the fact that "men and women are not similarly situated"[678] voted to uphold them. Consequently, the results in the cases are perfectly consistent with rational basis review.

Thus, in *Caban v. Mohammed*, the issue was the constitutionality of a state statute that required the consent of the mother, but not the father, as a condition for the adoption of children born out of wedlock.[679] As a result, a mother could prevent the adoption of her out-of-wedlock child by refusing to consent.[680] However, a father could prevent the adoption of such a child "only by showing that the best interests of the child would not permit the child's adoption by the petitioning couple."[681] Explicitly applying intermediate scrutiny,[682] Justice Powell, writing for a five to four majority, found the statute unconstitutional.[683] However, his reasoning did not depend on the application of that standard. His basic policy concern was that the classification "discriminate[d] against unwed fathers even when their identity [was] known and they ha[d] manifested a significant paternal interest in the child."[684] It treated "unwed fathers as being invariably less qualified and entitled than mothers to exercise a concerned judgment as to

676. The other two cases are *Parham v. Hughes*, 441 U.S. 347 (1979), and *Caban v. Mohammed*, 441 U.S. 350 (1979).

677. *Caban*, 441 U.S. at 394 (quoting Califano v. Goldfarb, 430 U.S. 199, 211 (1977)).

678. *Parham*, 441 U.S. at 354.

679. *Caban*, 441 U.S. at 385.

680. *Id.* at 385-86.

681. *Id.* at 387.

682. *Id.* at 388.

683. *Id.* at 394.

684. *Id.*

the fate of their children."[685] It also "both exclude[d] some loving fathers from full participation in the decision whether their children [would] be adopted and, at the same time, enable[d] some alienated mothers arbitrarily to cut off the paternal rights of fathers."[686] His ultimate conclusion, citing *Califano v. Goldfarb* and *Stanton v. Stanton*, was that the statute was "another example of 'overbroad generalizations' in gender-based classifications."[687] Consequently, on this view of the underlying facts and policies, the classification was unconstitutional under the rational basis test.[688] Indeed, he expressly said, citing *Reed v. Reed*, that "under the relevant cases applying the Equal Protection Clause it must be shown that the distinction is structured reasonably to further . . . [its] ends."[689]

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685. *Id.*

686. *Id.*

687. *Id.* (quoting Califano v. Goldfarb, 430 U.S. 199, 211 (1977); Stanton v. Stanton, 421 U.S. 7, 14-15 (1975)). Justice Powell rejected the argument that the classification could be justified on the ground that "'a natural mother, absent special circumstances, bears a closer relationship with her child . . . than a father does.'" *Id.* at 388 (quoting Tr. of oral arg. at 41, Caban v. Mohammed, 441 U.S. 380 (1979)). In his view, "maternal and paternal roles are not invariably different in importance." *Id.* at 389. He reasoned that "[e]ven if unwed mothers as a class were closer than unwed fathers to their newborn infants, this generalization concerning parent-child relations would become less acceptable as a basis for legislative distinctions as the age of the child increased." *Id.* He noted that in the case, the unmarried mother and father lived together with their children "as a natural family for several years" and both "participated" in their "care and support." *Id.* Therefore, he found "no reason to believe that the . . . children – aged 4 and 6 at the time of the adoption proceedings – had a relationship with their mother unrivaled by the affection and concern of their father." *Id.* Consequently, he "reject[ed] . . . the claim that the broad, gender-based distinction . . . [was] required by any universal difference between maternal and paternal relations at every phase of a child's development." *Id.*

Justice Powell also rejected the argument "that the distinction between unwed fathers and unwed mothers . . . [was] substantially related to the State's interest in promoting the adoption of illegitimate children." *Id.* He conceded that "[t]he State's interest in providing for the well-being of illegitimate children [was] an important one," *id.* at 391, but he concluded that there had been "no showing" that the means were substantially related to this end. *Id.* at 393. His reasoning, however, was that there was no legitimate difference between the genders in this regard. He said that "[i]t may be that, given the opportunity, some unwed fathers would prevent the adoption of their illegitimate children." *Id.* at 391. However, "[t]his impediment to adoption [was] the result of a natural parental interest shared by both genders alike; it [was] not a manifestation of any profound difference between the affectation and concern of mothers and fathers for their children." *Id.* at 391-92. He also noted that "[n]either the State nor the appellees [had] argued that unwed fathers are more likely to object to the adoption of their children than are unwed mothers; nor [was] there any self-evident reason why as a class they would be." *Id.* at 392. He also thought that "[e]ven if the special difficulties attendant upon locating and identifying unwed fathers at birth would justify a legislative distinction between mothers and fathers of newborns, these difficulties need not persist past infancy." *Id.* For him, "[w]hen the adoption of an older child [was] sought, the State's interest in proceeding with adoption cases [could] be protected by means that [did] not draw such an inflexible gender-based distinction . . . ." *Id.* In his view, "where the father has established a substantial relationship with the child and has admitted his paternity, a State should have no difficulty in identifying the father even of children born out of wedlock." *Id.* at 393.

688. *See* source cited *supra* note 360.

689. *Caban*, 441 U.S. at 391.

Justice Stevens, joined by Chief Justice Burger and Justice Rehnquist, dissenting,[690] viewed the case differently. He did not purport to apply intermediate scrutiny or any other standard of review as such.[691] Instead, he asked the fundamental question of whether there were "differences between" the genders that would "provide a justification for treating them differently."[692] Unlike Justice Powell, he concluded that the statute was constitutional under the Equal Protection Clause because it was based on real differences between men and women[693] with respect to "its most frequent"[694] and "normal application,"[695] concerning the adoption of "infants or very young children."[696] He thought it was "perfectly obvious that at the time and immediately after a child is born out of wedlock, differences between men and women justify some differential treatment of the mother and father in the adoption process."[697] These differences include the fact that "the mother carries the child"[698] and "only the mother knows who sired the child, and it will often be within her power to withhold that fact, and even the fact of her pregnancy, from that person."[699] Furthermore, she could marry a different person and thus legitimatize the child without the father ever knowing of "his 'rights.'"[700] In addition, after birth, "the mother and child are together; the mother's identity is known with certainty."[701] However, the "father . . . may or may not be present; his identity may be unknown to the world and may even be uncertain to the mother."[702] Thus, it is "probable that the mother, and not the father or both parents, will have

690. *Id.* at 401-17 (Stevens, J., dissenting). Justice Stewart also filed a separate dissenting opinion, but he did not expressly apply intermediate scrutiny. *Id.* at 394-401 (Stewart, J., dissenting). He did note that "gender-based statutory classifications deserve careful constitutional examination because they may reflect or operate to perpetuate mythical or stereotyped assumptions about the proper roles and the relative capabilities of men and women that are unrelated to any inherent differences between the sexes." *Id.* at 398 (Stewart, J., dissenting). Nonetheless, "[f]or substantially the reasons expressed by . . . Justice Stevens" he concluded that the gender classification at issue did not violate equal protection. *Id.* at 400 (Stewart, J., dissenting).

691. *See id.* at 401-14 (Stevens, J., dissenting).

692. *Id.* at 403 (Stevens, J., dissenting).

693. *Id.* at 404 (Stevens, J., dissenting).

694. *Id.* at 410 (Stevens, J., dissenting).

695. *Id.* at 413 (Stevens, J., dissenting).

696. *Id.* at 404 (Stevens, J., dissenting).

697. *Id.* at 407 (Stevens, J., dissenting).

698. *Id.* at 404 (Stevens, J., dissenting).

699. *Id.* at 405 (Stevens, J., dissenting).

700. *Id.*

701. *Id.*

702. *Id.*

custody of the newborn infant."[703] Accordingly "these differences justify a rule that gives the mother of the newborn infant the exclusive right to consent to its adoption."[704] Obviously, Justice Stevens thought that the gender classification was reasonable, rational, and legitimate.

On the other hand, in *Parham v. Hughes*, a closely divided Court upheld a state statute that permitted the mother of an illegitimate child to bring an action for the wrongful death of the child, but that precluded the father from bringing such an action unless there was no mother and he had previously legitimated the child.[705] The statute was challenged by the father of an illegitimate child who, along with the mother, was killed in an automobile accident.[706] The father had not legitimated the child, as he could have easily done under state law.[707] However, he had signed the birth certificate and did contribute to the child's support.[708] In addition, he had visited the child regularly and the child had taken his name.[709] The state court held that the statute was constitutional.[710] A five to four majority of the Court affirmed.[711]

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703. *Id.*

704. *Id.* at 407 (Stevens, J., dissenting). Justice Stevens also argued that the statutory distinction should not necessarily be held unconstitutional, even if its application appeared to be arbitrary in the instant case involving a relatively rare "adoption of an *older* child against the wishes of a natural father who previously [had] participated in the rearing of the child and who admit[ed] paternity." *Id.* at 409 (Stevens, J., dissenting). He reasoned that:

> [t]he mere fact that an otherwise valid general classification appears arbitrary in an isolated case is not a sufficient reason for invalidating the entire rule . . . [n]or . . . is it a sufficient reason for concluding that the application of a valid rule in a hard case constitutes a violation of equal protection principles.

Id. at 411-12 (Stevens, J., dissenting). In such cases, the Court "should presume that the law is entirely valid and require the challenger to demonstrate that its unjust applications are sufficiently numerous and serious to render it invalid." *Id.* at 410 (Stevens, J., dissenting). This the father had failed to do. *Id.* On the other hand, the state "[c]ourt of [a]ppeals [had] previously concluded that the subclass [was] small and its disadvantage insignificant by comparison to the benefits of the rule." *Id.* However, he doubted that the statute was arbitrary even with respect to the "exceptional circumstances" of the instant case given the gender-neutral alternatives. *Id.* at 411 (Stevens, J., dissenting). He noted that "[i]f both [parents] [were] given a veto, as the Court require[d], neither [could] adopt and the children [would] remain illegitimate." *Id.* On the other hand, "[i]f, instead of a gender-based distinction, the veto were given to the parent having custody of the child, the mother would prevail just as she did in the state court." *Id.* In any event, his ultimate conclusion was that because "in the more common adoption situations, the mother will be the more, and often the only, responsible parent, and . . . a paternal consent requirement [would] constitute a hindrance to the adoption process," the statutory created gender distinction was justified even as applied to this case. *Id.* at 413 (Stevens, J., dissenting).

705. Parham v. Hughes, 441 U.S. 347, 348-49 (1979).

706. *Id.* at 349.

707. *Id.*

708. *Id.*

709. *Id.*

710. *Id.* at 350.

711. *Id.* at 359.

Although five members of the Court explicitly purported to apply intermediate scrutiny,[712] Justice Stewart, writing for a four Justice plurality, expressly applied the rational basis test.[713] He held that the classification was constitutional because it was based on the fact that the genders were "not similarly situated."[714] He noted that the Court had upheld classifications "[i]n cases where men and women [were] not similarly situated . . . and a statutory classification [was] realistically based upon the differences in their situations."[715] He thought that this was such a case since "[u]nlike the mother of an illegitimate child whose identity will rarely be in doubt, the identity of the father will frequently be unknown."[716] Thus, the statute did not "invidiously discriminate against the . . . [father] simply because he is of the male sex."[717] Rather, it "distinguishe[d] between fathers who have legitimated their children and those who have not."[718] In his view, "[s]uch a classification [was] quite unlike those condemned in . . . [gender] cases which were premised upon overbroad generalizations and excluded all members of one sex even though they were similarly situated with members of the other sex."[719] He was convinced that the classification was rationally related to the State's permissible "interest in avoiding fraudulent claims of paternity in order to maintain a fair and orderly system of . . . property disposition . . . in the context of actions for wrongful death."[720] He reasoned that "[i]f paternity has not been established before the commencement of a wrongful-death action, a defendant may be faced with the possibility of multiple lawsuits by individuals all claiming to be the father of the deceased child."[721] Consequently, "[s]uch uncertainty would make it difficult if not impossible for a defendant to settle a wrongful-death action in many cases, since there would always exist the risk of a subsequent suit by another person claiming to be the father."[722]

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712. *See infra* notes 723-28 and accompanying text.
713. *Parham*, 441 U.S. at 357.
714. *Id.* at 355.
715. *Id.* at 354.
716. *Id.* at 355.
717. *Id.*
718. *Id.* at 356.
719. *Id.* at 356-57.
720. *Id.* at 357.
721. *Id.*
722. *Id.* Furthermore, since the statute requiring the father to establish his paternity before the fact had a rational basis, it was "constitutionally irrelevant," *id.* at 358, that there was no doubt in the case that the appellant was the father. *See id.* at 358.

In a concurring opinion, Justice Powell, who provided the fifth vote for upholding the statute, purported to apply intermediate scrutiny.[723] However, his rationale was similar to that of Justice Stewart, who, of course, applied rational basis review. He thought that the statute was constitutional[724] because it was "substantially related to achievement of the important state objective of avoiding difficult problems in proving paternity after the death of an illegitimate child."[725] Justice White, writing for the four dissenters,[726] also purported to apply intermediate scrutiny.[727] Nonetheless, he seemed to think that the statutory means were not even reasonably or rationally related to any of their asserted ends.[728]

723. *Id.* at 359 (Powell, J., concurring).

724. *Id.* at 360-61 (Powell, J., concurring).

725. *Id.* at 359-60 (Powell, J., concurring). Justice Powell noted that according to the statutory scheme, "a father [could] legitimate his child simply by filing a petition in state court identifying the child and its mother and requesting an order of legitimation," which the mother [could] "either support or rebut." *Id.* at 360 (Powell, J., concurring). In his view, this "marginally greater burden placed on fathers" was justified "by the marked difference between proving paternity and proving maternity." *Id.*

726. *Id.* at 361-68 (White, J., dissenting).

727. *Id.* at 362 (White, J., dissenting).

728. Justice White rejected the argument made by the state supreme court that the classification was justified as a way of "'promoting a legitimate family unit' and 'setting a standard of morality.'" *Id.* (quoting Hughes v. Parham, 243 S.E.2d 867, 869-70 (Ga. 1978), *aff'd*, 441 U.S. 347 (1979)). He seemed to think that this argument was not even rational. He said "it [was] untenable to conclude that denying parents a right to recover when their illegitimate children die [would] further the asserted state interests." *Id.* at 363 (White, J., dissenting).

He also rejected another argument made by the state supreme court that the statutory classification could be justified on the ground that "'more often than not the father of an illegitimate child who has elected neither to marry the mother nor to legitimate the child pursuant to proper legal proceedings suffers no real loss from the child's wrongful death.'" *Id.* at 366 (White, J., dissenting) (quoting *Parham*, 243 S.E.2d at 70). He seemed to think that this argument too was irrational. He said that "such a legislative conception about fathers of illegitimate children [was] an unacceptable basis for a blanket discrimination against all such fathers." *Id.* This was especially true in this case where the father "signed his child's birth certificate, continuously contributed to the child's financial support, and maintained daily contact with him." *Id.* at 367 (White, J., dissenting). He concluded that a state "may not categorically eliminate on the basis of sex any recovery by those parents it deems uninjured or undeserving." *Id.* at 368 (White, J., dissenting).

Finally, Justice White also rejected the argument, accepted by the majority, that the classification was justified as a way of "'forestalling potential problems of proof of paternity.'" *Id.* at 364 (White, J., dissenting) (quoting *Parham*, 243 S.E.2d at 869). He seemed to think that this rationale also was neither reasonable nor legitimate. He said that "the State has no . . . interest in protecting a tortfeasor from having his liability litigated and determined in the usual way." *Id.* He noted that "[t]here is always the possibility of spurious claims in tort litigation, and the plaintiff will have the burden of proof if his parenthood is challenged." *Id.* at 364-65 (White, J., dissenting). Consequently, he concluded that:

> [i]t denigrates the judicial process, as well as the interest in foreclosing gender-based discriminations, to hold that the possibility of erroneous determinations of paternity in an unknown number of cases, likely to be few, is sufficient reason to forbid all natural, unmarried fathers who have not legitimated their children from seeking to prove their parenthood and recovering in damages for the tort that has been committed.

Nguyen also is perfectly consistent with rational basis review. Recall that, in that case, the Court, five to four, upheld a congressional statute that placed greater requirements on unwed citizen fathers than on unwed citizen mothers, with respect to conferring United States citizenship on their offspring born outside the United States and its possessions, when the other parent was an alien.[729] As noted earlier, all of the Justices purported to apply intermediate scrutiny, but disagreed as to its application.[730] They disagreed on such issues as whether the asserted purposes for the classification (assuring that a biological parent-child relationship exists and ensuring the opportunity for a parent-child relationship to develop) were the actual purposes;[731] even if they were the actual purposes, whether they were important enough to justify the distinction;[732] whether the means employed were substantially related to the ends;[733] and whether the classification was based on a stereotype that could have been avoided by the use of gender neutral alternatives, as well as the extent to which the classification could be justified based on administrative convenience.[734]

Although both the majority and the dissent argued the case in the framework of intermediate scrutiny, both opinions are explainable on rational basis grounds. What really was at issue was a dispute as to the underlying doctrines, facts, and policies. Both opinions engaged in a reasoned analysis, but reached different conclusions as to the constitutionality of the classification. As the majority saw it, the statutory classification requiring unwed fathers, but not unwed mothers, to take certain steps prior to the child's eighteenth birthday in order to confer citizenship on the child was not based on a stereotype.[735] It was "not marked by misconception and prejudice, nor [did] it show disrespect for either class."[736] Instead, it was based on "real . . . [biological] difference[s]

Id. at 365 (White, J., dissenting). He went on to assert that "[m]uch the same is true of the rather lame suggestion that keeping fathers such as this appellant out of court will protect wrongdoers and their insurance companies from multiple recoveries." *Id.* at 365-66 (White, J., dissenting). He thought that the "claimed danger [was] but one of many potential hazards in personal injury litigation, and it [was] very doubtful that it would be exacerbated if the . . . statute in this case were stricken down." *Id.* at 366 (White, J., dissenting).

729. Nguyen v. INS, 533 U.S. 53, 59-60 (2001).

730. *Id.* at 60-61, 74-75.

731. *See supra* notes 138-43 and accompanying text.

732. *See supra* notes 144-55 and accompanying text.

733. *See supra* notes 156-85 and accompanying text.

734. *See supra* notes 186-220 and accompanying text.

735. *Nguyen*, 533 U.S. at 68.

736. *Id.* at 73.

between men and women in relation to the birth process."[737] The "mother must be present at birth but the father need not be."[738] Consequently, the statutory requirements "substantially"[739] served the interests of assuring biological fatherhood, and assuring the father and the child "have some demonstrated opportunity or potential to develop . . . a relationship."[740] Thus, the majority thought that the classification was "reasonable,"[741] "sensible,"[742] "unobjectionable,"[743] "unremarkable,"[744] and "unsurprising."[745] Clearly, as Justice O'Connor suggested,[746] the majority thought that the statutory classification was reasonably and rationally related to legitimate governmental interests.

Furthermore, although she would no doubt vehemently deny it, even Justice O'Connor's opinion is consistent with rational basis review. With respect to the first asserted interest, assuring a biological relationship, she found "[t]he gravest defect . . . [to be] the insufficiency of the fit between . . . [the] discriminatory means and the asserted end."[747] However, her principal substantive objection to the classification was that it was unnecessary. She noted that the statute on its face required the father to establish paternity by "clear and convincing evidence."[748] Thus, she found it difficult to see what the additional requirements of "legitimation, an acknowledgment of paternity in writing under oath, or an adjudication of paternity before the child reaches the age of [eighteen] . . . accomplishe[d] . . . that [the requirement of clear and convincing evidence] [did] not achieve on its own."[749] This was so at least in part because DNA testing could provide "virtual certainty of a biological link that . . . [would] negate[] the evidentiary significance of the passage of time."[750]

On this view of the underlying facts and policies, the classification would be unconstitutional under *Weinberger v. Wiesenfeld.* In that case, the Court, apparently applying the rational basis test,[751] struck down the classification at issue in part on the ground that it was "gratuitous; without it,

737. *Id.*
738. *Id.*
739. *Id.* at 64.
740. *Id.* at 64-65.
741. *Id.* at 63, 66.
742. *Id.* at 64.
743. *Id.* at 67.
744. *Id.* at 66.
745. *Id.* at 68.
746. *See id.* at 74-78, 82 (O'Connor, J., dissenting).
747. *Id.* at 80 (O'Connor, J., dissenting).
748. *Id.*
749. *Id.*
750. *Id.*
751. *See supra* notes 567-81 and accompanying text.

the statutory scheme would only provide benefits to those men who [were] in fact similarly situated to the women the statute aid[ed]."[752] Similarly, from Justice O'Connor's perspective, the additional statutory requirements were gratuitous. Without them, only unwed fathers who could prove paternity by clear and convincing evidence could receive the same benefits as unwed mothers with respect to conferring citizenship on their alien offspring. Consequently, the classification could not survive rational basis review.

Justice O'Connor also found fault with the second asserted interest, ensuring the opportunity for a parent-child relationship to develop. She questioned whether that interest was Congress' actual purpose;[753] even if it was, whether it was important enough to qualify as an "'important' governmental interest apart from the existence of an actual relationship;"[754] and whether, in any event, the means were substantially related to the asserted ends.[755] However, after a reasoned analysis, she also found that "the idea that a mother's presence at birth supplies adequate assurance of an opportunity to develop a relationship while a father's presence at birth does not would appear to rest only on an overbroad sex-based generalization."[756] In her view, "[t]here is no reason, other than stereotype, to say that fathers who are present at birth lack an opportunity for a relationship on similar terms."[757] As she saw it, "the statute on its face accord[ed] different treatment to a mother who is by nature present at birth and a father who is by choice present at birth even though those two individuals are similarly situated with respect to the 'opportunity' for a relationship."[758] Hence, the classification found "support not in biological differences but instead in a stereotype – *i.e.*, 'the generalization that mothers are significantly more likely than fathers . . . to develop caring relationships with their children.'"[759] Furthermore, she found the classification to be "paradigmatic

752. Weinberger v. Wiesenfeld, 420 U.S. 636, 653 (1975).

753. *Nguyen*, 533 U.S. at 83-84 (O'Connor, J., dissenting).

754. *Id.* at 84 (O'Connor, J., dissenting).

755. *Id.* at 85-91 (O'Connor, J., dissenting).

756. *Id.* at 86 (O'Connor, J., dissenting). In engaging in an independent reasoned analysis, even Justice O'Connor seemed to ignore her own intermediate scrutiny dictum. She said that "the burden is [not] on the challenger of the classification to prove legislative reliance on such [overbroad] generalizations." *Id.* at 90 (O'Connor, J., dissenting). Instead, "[t]he burden of proving that the use of a sex-based classification substantially relates to the achievement of an important governmental interest remains unmistakably and entirely with the classification's defender." *Id.* at 91 (O'Connor, J., dissenting).

757. *Id.* at 87 (O'Connor, J., dissenting).

758. *Id.* at 86 (O'Connor, J., dissenting).

759. *Id.* at 89 (O'Connor, J., dissenting) (alterations in original) (quoting Miller v. Albright, 523

of a historic regime that left women with [the] responsibility, and freed men from [the] responsibility, for nonmarital children."[760] Thus, what the majority saw as a biological difference, the dissenters saw as an overbroad stereotypical gender based generalization. Given this view of the underlying facts and policies, the classification would not have survived even rational basis review under *Reed v. Reed* and its progeny.[761] Indeed, Justice O'Connor cited *Reed* for the proposition that since "[t]he different statutory treatment [was] solely on account of the sex of the similarly situated individuals," the classification was "patently inconsistent with the promise of equal protection of the laws."[762]

V. CONCLUSION

The application of intermediate scrutiny in gender cases has proved problematic in practice. *Nguyen* is the only gender case in which all nine Justices unequivocally applied the standard. Even in that case, the Court was closely divided as to its proper application. Despite theoretical differences between intermediate scrutiny and rational basis review, all of the gender cases are explainable on rational basis grounds. The reality is that intermediate scrutiny is nothing more than rational basis review masquerading in intermediate scrutiny clothing. Even under rational basis review, the Court is required to engage in a reasoned analysis to determine whether there are reasons, real or plausible, to support a classification, and whether they are reasonably or rationally related to some constitutionally legitimate purpose. The fundamental holding in the gender cases, either expressly or implicitly, is that classifications based on realistic differences between men and women are reasonable, rational, and constitutionally legitimate, and those that are based on stereotypes or are otherwise unnecessary and gratuitous are unreasonable, irrational, and constitutionally

U.S. 420, 482 (1998) (Breyer, J., dissenting)).

760. *Id.* at 92 (O'Connor, J., dissenting).

761. *See* Reed v. Reed, 404 U.S. 71 (1971) (striking down an overbroad gender-based generalization as being arbitrary). *See also* source cited *supra* note 360. However, in *Nguyen*, Justice O'Connor said that "an impermissible stereotype may enjoy empirical support and thus be in some sense 'rational.'" *Nguyen* 533 U.S. at 89. In addition, in Miller v. Albright, 523 U.S. 420 (1998), she stated that "[i]t is unlikely in [her] opinion that any gender classification based on stereotypes can survive heighten scrutiny, but under rational basis scrutiny a statute may be defended based on generalized classifications unsupported by empirical evidence." *Id.* at 452 (O'Connor, J., concurring). To the extent that these assertions were intended to say that gender based stereotypes can survive rational basis review, they are inconsistent with the precedents that have struck down gender based stereotypes applying the rational basis test. *See supra* notes 340-52, 398-421 and accompanying text. *See also supra* notes 263-70 and accompanying text. Thus, despite Justice O'Connor's assertions, there is ample authority to support the proposition that overbroad gender-based generalizations and stereotypes are not reasonable, rational, or legitimate.

762. *Nguyen*, 533 U.S. at 86 (O'Connor, J., dissenting). *Cf. supra* note 761.

illegitimate. Of course, whether a classification is based on a real difference, or a stereotype, or is otherwise gratuitous, depends on how the individual Justices view the underlying facts and policies. In this regard, the verbalization of the standard of review as "substantially related to important governmental objectives" has had little effect on the outcome of the cases.