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Reinforcement of Middle Level Review Regarding Gender Classifications: Mississippi University for Women v. Hogan

In Mississippi University for Women v. Hogan, the United States Supreme Court was presented with an equal protection challenge initiated by a male who was denied admission to a state-supported all-female school of nursing. After a review of relevant decisions in this area, the author examines the Supreme Court's intermediate level of scrutiny analysis and argues that application of a higher level of scrutiny to gender-based classifications is a prerequisite to true equality between the sexes.

I. INTRODUCTION

The United States Supreme Court struck down its first gender-based classification in 1971 on equal protection grounds. Since that time, the Court has struggled with gender challenges, applying a variety of standards of review with minimal consistency.

In certain areas, the Court employs a permissive review, the rational basis test, which requires only that the challenged statute bear some rational relation to a legitimate state goal. This stan-

1. Prior to 1971, the Supreme Court traditionally applied only a minimum rationality test. See infra notes 2-4, 37-40 and accompanying text. In Reed v. Reed, 404 U.S. 71 (1971), the Court finally departed from its posture of utmost deference to political judgments respecting the role of women. In Reed, the Court unanimously invalidated an Idaho statute requiring, as between persons "equally entitled" to administer a decedent's estate, that "males must be preferred to females." Id. at 73; see infra notes 41-44 and accompanying text.

2. The rational basis standard was clarified in Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911), as follows:
   1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.
   Id. at 78-79.

3. See L. Tribe, THE CONSTITUTIONAL PROTECTION OF INDIVIDUAL RIGHTS 996
dard is extremely deferential to the legislature and usually results in the upholding of the challenged statute. On the other hand, the Court has engaged in a more active review, requiring that the statute be directly designed to achieve compelling state interests. Unfortunately, the Court has generally refused to apply the strict test to gender-based classifications, thereby necessitating the emergence of a middle-level review. Accordingly,

(1978) (noting the leniency and deference which the courts give to the state in recognizing "legitimate" state objectives).

4. Until the early 1970's, which saw the emergence of intermediate scrutiny, the Supreme Court upheld sexually discriminatory laws whenever they could be rationally related to government purposes, thereby reflecting the traditional views of the "proper" relationship between men and women in American society.

Justice Stevens, dissenting in Mathews v. Lucas, 427 U.S. 495 (1976), said it concisely:

Habit, rather than analysis, makes it seem acceptable and natural to distinguish between male and female . . . for too much of our history there was the same inertia in distinguishing between black and white. But that sort of stereotyped reaction may have no rational relationship—other than pure prejudicial discrimination—to the stated purpose for which the classification is being made.

Id. at 520-21 (footnote omitted).

Mathews v. Lucas involved an attack on a provision in the Social Security Act which required illegitimate children claiming survivors' benefits from a deceased parent to prove their dependency on that parent. There was no similar requirement for legitimate children. Gender-based and legitimacy-based classifications typically received the same level of judicial scrutiny. The statute was held to be constitutionally valid.

5. This is called "strict scrutiny." It acknowledges that other political choices—those burdening fundamental rights or suggesting a classification based on race or other classifications of minority groups—must be subjected to close analysis in order to preserve substantial values of equality and liberty. See Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (striking down a statute requiring forced sterilization for habitual criminals because the statute excluded certain offenses that were similar to others not excluded). See generally Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065, 1076-1132 (1969) (providing discussion of both the minimum and strict standards of review) [hereinafter cited as Developments].

6. "[S]uspect classifications can be sustained only when the State bears the burden of demonstrating that the challenged legislation serves overriding or compelling interests that cannot be achieved either by a more carefully tailored legislative classification or by the use of feasible, less drastic means." Kahn v. Shevin, 416 U.S. 351, 357-58 (1974) (Brennan, J., dissenting).

7. With only one exception (Frontiero v. Richardson, 411 U.S. 677 (1973) (plurality holding)), the Supreme Court has consistently failed to recognize sex as a suspect class, thereby immunizing sexual classifications from strict scrutiny analysis. The pendency of the Equal Rights Amendment (ERA) must be considered as one key factor in the Court's reluctance to apply such a test. As Justice Powell's concurring opinion in Frontiero indicates, the Court should defer such a decision to consider gender-based classifications as "suspect" until the "will of the people" is established. 441 U.S. at 691-92 (Powell, J., concurring). For further discussion of the ERA and suspect classifications, see infra notes 128-32 and accompanying text.

8. Intermediate level scrutiny was introduced in Craig v. Boren, 429 U.S. 190 (1976), where the Court struck down a statute restricting the purchase of beverages containing a certain percentage of alcohol by males under age 21, but did not prohibit their consumption. Females of ages 18 to 21 could not only consume the
this "in-between" test has recently been applied by the Court in numerous cases, placing the burden on the state to show that the statute bears a substantial relation to important government purposes.9

Although the middle-level standard appears on its face to be clearly defined, actual application to gender-based challenges has continually fluctuated. This is due, in part, to disagreements as to the roles and abilities of males and females, coupled with a desire, by at least some members of the Court, to continue its role as benevolent protector.10

Mississippi University for Women v. Hogan11 presented the Court with an equal protection challenge initiated by a man who was denied admission to a state-supported all-women's school of nursing. The Hogan Court utilized a rigorous application of middle-level review,12 symbolizing the current status of benign gender-based challenges and acknowledging middle-level review as the norm. The decision was not, however, without strong dis- sents13 reflecting paternalistic and traditional attitudes towards sex discrimination.14

This note will analyze how constitutional and statutory challenges to gender-based discrimination have created differing

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9. See generally infra notes 64-77 and accompanying text.
10. See infra note 14.
13. See infra note 22.
14. This oft-quoted passage from Justice Bradley's concurrence in Bradwell v. State, 83 U.S. (16 Wall.) 130 (1872) (denying female's right to practice law), exemplifies the concept of "romantic paternalism":

Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfit it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say the identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. ... 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.

Id. at 141 (Bradley, J., concurring).
equal protection standards. Additionally, it will explore the development of the middle-level standard of equal protection review used by the Court in *Hogan* and the importance of its objective application, free from preconceived notions of traditional stereotypes. Such application is essential to reinforce the Court’s commitment to eradicate invidious sexual discrimination. The movement towards sexual equality is dependent, at present, on strengthened intermediate scrutiny because the Supreme Court has refused to treat gender as a suspect class, and because of the fate of the long-awaited Equal Rights Amendment.

II. FACTUAL BACKGROUND

The Mississippi University for Women (MUW) was created by the Mississippi Legislature in 1884 and, until 1982, was the oldest state-supported all-female college in the United States. In 1971, MUW established a School of Nursing in Columbus which presently offers both a four-year baccalaureate program and a graduate program in nursing. In 1979, Joe Hogan, a registered male nurse employed in a Columbus medical center, applied for admission to the MUW School of Nursing baccalaureate program in order to receive training as a nurse-anesthetist. He was denied admission solely on the basis of gender. Hogan filed an action in federal court claiming that MUW’s single-sex admission policy violated the equal protection clause of the fourteenth amendment. The district court dismissed the complaint on the ground that the single-sex policy was rationally related to the state’s legitimate interest in providing “the greatest practical range of educational opportunities for its female student population.” The Court of Appeals for the Fifth Circuit reversed, holding that an intermediate level of review was required in all gender-based classifications and that the state had failed to show a “substantial relationship” to an important gov-

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15. See infra note 132 and accompanying text.
16. 1884 Miss. Laws, ch. XXX, § 6. The school was originally established as the Mississippi Industrial Institute and College for the Education of White Girls of the State of Mississippi.
17. 458 U.S. at 720.
18. Id.
19. Petition for Certiorari at A3, Hogan, 458 U.S. at 718. In dismissing the complaint, the district court applied the “rational relationship” test (minimum level of scrutiny).

“While at times in our history the impact of the Equal Protection Clause on gender-based discrimination was less than clear, that is not so today. . . . Gender-based classifications must be substantially related to important governmental objectives in order to withstand constitutional challenge.” Id. at 1117-18.

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In a five to four opinion by Justice O'Connor, the Supreme Court affirmed the judgment of the court of appeals ordering MUW to enroll Hogan in the School of Nursing. Since MUW's admissions policy expressly discriminated on the basis of gender, it necessitated a showing that the classification served "important governmental objectives and that the discriminatory means employed" were "substantially related to the achievement of those objectives." The Court found that the state's primary justification of compensating women for past discrimination did not constitute an important government objective. In addition, a substantial relationship was not found between the admissions policy and the proposed objective. The Court also rejected the state's argument that the language of the Education Amendments of 1972

21. Id. at 1119. The purported state interest was to provide the "greatest practical range of educational opportunities for its female student population." Id. at 1118.

While the district court concluded this to be a legitimate state interest, the court of appeals held that Mississippi could not advance a justification for gender-based discrimination. The appellate court noted that the important state purpose was to provide education for all its citizens, and providing a unique opportunity for females did not substantially relate to this important objective. Id. at 1119.


23. 458 U.S. at 723.

24. Id. at 723 (quoting Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 150 (1980)).

25. See supra note 21; see infra notes 87-94 and accompanying text. The Court noted that the nursing profession was not a field where women had been denied access in the past. Quite the opposite, the facts demonstrated that women dominated the profession. 458 U.S. at 730.

26. See supra note 21; see infra notes 95-97 and accompanying text. The Court found that the discriminatory policy did not help women, but rather, it tended "to perpetuate the stereotyped view of nursing as an exclusively woman's job." 458 U.S. at 729.

27. 20 U.S.C. § 1681(a)(5) (1976). Section 1681(a) states:

No person in the United States shall, on the basis of sex, be excluded from participating in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

(5) in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex.
permits an institution which has traditionally and continually admitted only one sex to exist as it has in the past.28

III. BACKGROUND—CHALLENGES TO GENDER CLASSIFICATIONS

Within the last fifteen years, courts have been faced with an increasing number of equal protection challenges to gender-based classifications. The equal protection clause of the fourteenth amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."29 Until 1976, the United States Supreme Court applied one of two tests to determine whether a challenged classification was unconstitutional:30 the rational basis test or the compelling state interest test.

The rational basis test provides that the court apply minimum scrutiny when determining the constitutionality of a classification. The only requirement of this test is that the classification be "rationally related" to a legitimate state interest.31 In contrast, the compelling state interest test provides for strict scrutiny. This test requires the state to prove a "compelling" interest that is achieved only through the challenged classification.32 Generally, the strict scrutiny approach is applied to suspect classifications33 and classifications impinging on fundamental rights.34 Few classifications will withstand constitutional challenge when the strict scrutiny analysis is employed.35 Since the adoption of the minimum rationality test, however, all gender-based classifications are capable of resisting constitutional attack.36

The Court's application of minimum scrutiny reflected the pre-
vailing attitude “inherited” from the common law that a woman had no distinct legal identity.\textsuperscript{37} Early sex discrimination cases applying the rational basis test denied women the right to practice law,\textsuperscript{38} prevented women's name from being placed on a jury list,\textsuperscript{39} and forbade women from tending bar unless their father or husband owned the tavern.\textsuperscript{40}

Not until 1971, in \textit{Reed v. Reed},\textsuperscript{41} did the Supreme Court finally strike down a statute which gave preference to males over females. The Idaho statute involved ordered the selection of a male candidate for administrator of an estate whenever two candidates—one male, one female—were equally qualified for the position. The state objective asserted in defense of the statute was one of administrative convenience—to reduce the workload of probate courts by eliminating one class of contestants. The majority rejected this argument, deciding that such an arbitrary legislative choice resulted in dissimilar treatment for men and women who were similarly situated.\textsuperscript{42} Although the Court purported to apply a minimum scrutiny test, \textit{Reed} has been considered to have marked the emergence of an intermediate form of scrutiny.\textsuperscript{43}

Two years after \textit{Reed}, the Supreme Court, in a plurality opinion, shifted its analysis in gender discrimination cases by apply-

\textsuperscript{37} See Muller v. Oregon, 208 U.S. 412, 421 (1908) (“Still again, history discloses the fact that woman has always been dependent upon man”). \textit{See also supra} note 14.

\textsuperscript{38} See Bradwell v. State, 83 U.S. (16 Wall.) 130 (1872), discussed \textit{supra} note 14; \textit{In re Lockwood}, 154 U.S. 116 (1894).

\textsuperscript{39} Hoyt v. Florida, 368 U.S. 57 (1961). Notwithstanding the “enlightened emancipation of women,” the Court found the classification reasonable in light of the fact that the “woman is still regarded as the center of home and family life.” \textit{Id.} at 61-62.

\textsuperscript{40} Goesaert v. Cleary, 335 U.S. 464 (1948), \textit{disapproved}, Craig v. Boren, 429 U.S. at 210 n.23.

\textsuperscript{41} 404 U.S. 71 (1971). \textit{Reed} is one of only two unanimous gender discrimination decisions.

\textsuperscript{42} \textit{Id.} at 77.

\textsuperscript{43} The Court stated 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 [equal protection].” \textit{Id.} at 76. \textit{See Tribe, \textit{supra} note 3, at 1063-64; Comment, Sex Discrimination in the 1970's: The Supreme Court Decisions, 6 \textit{Texas Tech L. Rev.} 149, 153 (1974); Gunther, The Supreme Court 1971 Term - Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 \textit{Harvard L. Rev.} 1, 34 (1972) (evidencing “some special sensitivity to sex as a classifying factor”).
ing strict scrutiny. In *Frontiero v. Richardson*, 44 the Court struck down an Air Force regulation providing that a female servicewoman must prove her husband's dependency to obtain housing and medical benefits for him, whereas no such requirement was imposed on males. 45 A plurality of the Court characterized sex as a suspect trait, 46 thereby subjecting the classification to strict scrutiny. However, this standard of review has never been adopted by a majority of the Court. 47

The hope for a strict scrutiny analysis in sex discrimination cases all but vanished in *Kahn v. Shevin*, 48 where the Court returned to an application of the rational basis test to uphold a benign gender-based classification. Kahn, a widower, was the first male to challenge a Florida statute entitling only widows to a property tax exemption. 50 In upholding the statute, 51 the Court justified the gender discrimination as compensatory discrimination 52 designed to recompense women for economic discriminat-

44. 411 U.S. 677 (1973).
46. Justices Douglas, White, and Marshall joined in the plurality opinion written by Justice Brennan. The plurality noted:

[S]ince sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility..." And what differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members.

47. The Supreme Court's failure to treat gender as a suspect class may be explained in part by its reluctance to overstep what it conceives to be the bounds between constitutional interpretation and a proposed constitutional amendment, e.g., the ERA. See infra note 132.
49. Benign gender classifications evidence a remedial, protective purpose to compensate women for past discrimination and may be in the nature of affirmative action programs.
50. FLA. STAT. § 196.202 (Supp. 1983). The Florida statute states: "Property to the value of five hundred dollars ($500) of every widow, blind person, or totally and permanently disabled person who is a bona fide resident of this state shall be exempt from taxation." 416 U.S. at 355 (emphasis added).
51. In upholding the constitutionality of the Florida statute, the majority applied the Reed analysis claiming that "Florida's differing treatment of widows and widowers 'rest[s] upon some ground of difference having a fair and substantial relation to the object of the legislation.'" 416 U.S. at 355 (quoting Reed v. Reed, 404 U.S. at 76) (emphasis added).
52. The state's purpose in enacting the statute was to diminish the financial impact of spousal loss for the member of the sexual class suffering the greatest
tion in the marketplace. In actuality, the Court’s concept of discriminatory compensation has been considered a step backwards in achieving equality due to the resulting reinforcements of traditional perceptions of men and women. Similarly, in *Schlesinger v. Ballard*, the rational basis test was again applied to uphold a federal military discharge statute which compensated women for economic discrimination. However, the Court based the differing treatment of male and female officers on the notion that the genders were not similarly situated, thereby providing some justification for upholding the disparate treatment under a minimum scrutiny analysis.

The opinions of *Kahn* and *Schlesinger* suggested a tendency by the Court to defer to legislative classifications with benign objectives. However, in *Weinberger v. Wiesenfeld*, the Court struck down a social security provision that gave benefits to the widow and minor children of a deceased male wage earner, but only to the minor children of a deceased female wage earner. The hardship. The Court noted that women had traditionally been economically disadvantaged, being denied all but the lowest paid jobs. 416 U.S. at 353.

53. Id. at 354-56.
55. 419 U.S. 498 (1974). In *Ballard*, a male lieutenant in the United States Navy challenged a statute which mandated his discharge after a second attempt and failure to obtain a promotion.
57. Women had substantially less opportunity for promotion when Congress specifically declared that “women may not be assigned to duty in aircraft that are engaged in combat missions nor may they be assigned to duty on vessels of the Navy other than hospital ships or transports.” 419 U.S. at 508 (quoting 10 U.S.C. § 6015 (1976)).
58. 419 U.S. at 508. See also supra note 57. The Court distinguished *Ballard* from *Reed* and *Frontiero* in which the challenged statutes were based on “archaic and overbroad generalizations.” In *Reed*, the Idaho statute assumed that men would be better estate administrators than women, while in *Frontiero*, it was assumed that women, not men, were dependents. Id. at 506.
59. The dissent disagreed with the majority’s decision to uphold the statute as compensation for past discrimination. They noted that there could be no discrimination since “women do not compete directly with men for promotion in the Navy.” Id. at 518 (Brennan, J., dissenting).
60. 420 U.S. 636 (1975).
61. The purpose of the Act was to give children an opportunity to enjoy the personal attention of the remaining parent. The Court held, however, that there
Court gave little weight to the compensatory discrimination argument advanced in Kahn and Schlesinger by stating that "the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." The Court noted that, in reality, the statute would not benefit certain classes of women. Those without children and those whose children had grown to a certain age would lose their benefits. The legislation, therefore, did not justify these exceptions, given the statutory purpose.

In 1976, the Court attempted to clear the confusion surrounding invidious discrimination by introducing a middle-tier level of review. In Craig v. Boren, the Court established the "substantial relationship" test requiring that "classifications by gender must serve important government objectives and must be substantially related to achievement of those objectives." As in the case of strict scrutiny analysis, the proponent of the classification has the burden of rebutting a presumed unconstitutionality.

Califano v. Webster provided the first opportunity for the Court to apply the new substantial relationship test to benign classifications. In Califano, the Court upheld a social security statute giving women benefits at 62 years of age while requiring men to reach the age of 65 for similar benefits. The main objection to the statute was that it permitted women to exclude three years of salary from the calculation of their earnings average.

was no rational relationship between the classification and the purpose of the statute. Id. at 651-53.
62. Id. at 648 (footnote omitted).
63. Id. at 649-51.
64. 429 U.S. 190 (1976). In Craig, an Oklahoma statute prohibiting the sale of 3.2% beer to males under 21 years of age while permitting females over 18 to purchase it was held unconstitutional. The state offered a variety of statistical surveys intended to demonstrate a close relationship between gender and alcohol-related traffic accidents in defense of the the discriminatory classification. The Court rejected the evidence as establishing "an unduly tenuous 'fit.'" Id. at 202. The Court further noted that "[t]he very social stereotypes that find reflection in age differential laws . . . are likely substantially to distort the accuracy of these comparative statistics. Hence 'reckless' young men who drink and drive are transformed into arrest statistics, whereas their female counterparts are chivalrously escorted home." Id. at 202 n.14 (citation omitted).
65. Id. at 197 (emphasis added). Applying the new standard, the Court found the state's showing inadequate to prove that "sex represents a legitimate, accurate proxy for the regulation of drinking and driving." Id. at 204.
66. Id. at 199-200. The substantial relationship test struck a compromise for those favoring a recognition of sex as a suspect classification. However, the middle-level test would produce fewer fatalities in gender challenges than the strict scrutiny required of suspect classifications since an important governmental purpose may be easier to establish than a compelling governmental purpose. Additionally, the government need only prove that the means used were substantially related instead of necessary to achieve the government objectives.
This permitted them to ignore three additional years of lower income than could be excluded for a male. "[A]llowing women, who as such have been unfairly hindered from earning as much as men, to eliminate additional low-earning years from the calculation of their retirement benefits works directly to remedy some of the effect of past discrimination." Therefore, the Court concluded that when legislation directly addresses discrimination and attempts to remedy it, disparate treatment of the sexes for such a limited basis is constitutional. The Court in Califano distinguished between two types of compensatory discrimination. The first type was adopted by the legislature for remedial reasons and the second type was based on traditional stereotypes. The Court held only the former tolerable.

The distinction made in Califano regarding compensatory discrimination was a significant factor in the Court's declaration that gender-based alimony statutes are unconstitutional in Orr v. Orr. In Orr, a divorced man successfully challenged an Alabama statute requiring husbands, but not wives, to pay alimony. Because the statute failed to address and remedy specific discrimination, it was held unconstitutional, thereby invalidating a form of compensatory discrimination based on traditional stereotypes and reinforcing the Califano rationale. Furthermore,

68. Id. at 318. The important governmental purpose articulated was a direct reduction in the "disparity in economic condition between men and women." Id. at 317.


70. See Ginsburg, Some Thoughts on Benign Classifications in the Context of Sex, 10 Conn. L. Rev. 813, 823 (1978), for a summary of the court decisions in this area.

71. See supra text accompanying notes 68-69.


74. 440 U.S. at 278-79. In applying the substantial relationship test articulated in Craig (supra notes 64-65 and accompanying text), the Court found that the statute failed to serve an important state objective. The asserted purpose of helping needy spouses and compensating for past discrimination against women was rejected since women had not been significantly discriminated against in the sphere to which the statute applied. Id.

Women have been given preferential treatment under alimony laws premised on stereotypes and the assumption of their dependency. See generally Podell, Peck & First, Custody — To Which Parent?, 56 Marq. L. Rev. 51, 52 (1972).

75. The Court recognized that benign gender-based classifications "carry the inherent risk of reinforcing stereotypes about the 'proper place' of women and
where "the State's compensatory and ameliorative purposes are as well served by a gender-neutral classification as one that gender classifies and therefore carries with it the baggage of sexual stereotypes, the State cannot be permitted to classify on the basis of sex."\textsuperscript{77}

While the Court during the 1970's consistently recognized the distinction between invalid classifications that reflect traditional stereotypes\textsuperscript{78} and those which provide a legitimate preferential treatment as a remedy for specific past discrimination,\textsuperscript{79} the Justices have rarely been in agreement as to which classification is present. This has resulted in a sharply divided Court in past discrimination cases.\textsuperscript{80} Although the majority has regularly applied middle-level review to gender classifications since 1976, the close vote in \textit{Mississippi University for Women v. Hogan}\textsuperscript{81} demonstrates a delicate allegiance to the heightened scrutiny in benign gender-based discrimination cases.

\section*{IV. The Hogan Case}

The majority in \textit{Hogan} adhered to the standards and rationales promulgated in its prior holdings of the late 1970's and early 1980's. In an opinion by Justice O'Connor, the majority quickly classified the equal protection challenge as one involving a gender-based classification.\textsuperscript{82} In doing so, the Court applied the corresponding intermediate level of review originally set forth in \textit{Craig v. Boren}\textsuperscript{83} and re-emphasized in \textit{Wengler v. Druggists Mutual}...
Uniquely confronted with a discriminatory challenge by a male rather than a female, the Court maintained that this difference "does not exempt [the statute] from scrutiny or reduce the standard of review." Thus, the majority predicated its decision-making process on the concept of total equality for both men and women. The Court subsequently applied the middle-level two-part test.

A. Part 1 — Identifying Important Government Objectives

Mississippi justified its single-sex admissions policy as affirmative action which compensated for past discrimination against women by providing them a greater range of educational opportunities. But because the nursing profession has historically been dominated by women, the Court held that the state could not show a need for remedial compensation. "It is readily apparent that a State can evoke a compensatory purpose to justify an otherwise discriminatory classification only if members of the gender benefited by the classification actually suffer a disadvantage related to the classification." Thus, the purported purpose could only have been "the mere recitation of a benign, compensatory purpose" rejected previously.

The Court distinguished the facts in Hogan from Califano and

84. 446 U.S. 142, 150 (1980) (holding that the classification must serve important governmental objectives and that the discriminatory means employed be substantially related to the achievement of those objectives).

85. 458 U.S. at 723-24 (citing Caban v. Mohammed, 441 U.S. 380, 394 (1979); Orr v. Orr, 440 U.S. 268, 279 (1979)). In Caban v. Mohammed, the Court invalidated a New York statute that did not permit the natural father of an illegitimate child to block the adoption of that child. The same statute would permit the natural mother to do so. In Orr, the Court invalidated a statute that required males to pay alimony but imposed no similar requirement on females.

86. See infra notes 87-97 and accompanying text; see supra text accompanying note 65.


88. The Court noted that in 1970, women earned 94 percent of the nursing baccalaureate degrees awarded in Mississippi and 98.6 percent of the degrees earned nationwide. Id. at 729 (citing U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, EARNED DEGREES CONFERRED: 1969-1970 388 (1972)).

89. 458 U.S. at 728 (emphasis added).

90. See Weinberger, 420 U.S. 636, 648 (1975). In that case, the Court ruled that it need not accept the asserted legislative purpose when the legislative history and scheme indicate that the purpose asserted could not have been the goal of the legislation. Id. at n.16.

91. See supra notes 67-70 and accompanying text.
Schlesinger\textsuperscript{92} which involved constitutional statutes that remedied an actual disadvantage suffered by women. Not only did Mississippi fail to establish any such prior disadvantage but, as Justice O'Connor explained, "MUW's policy of excluding males from admission to the School of Nursing tends to perpetuate the stereotyped view of nursing as an exclusively woman's job."\textsuperscript{93} Furthermore, it was noted that the American Nurses Association claimed that the exclusion of men from the profession actually served to depress nurses' wages.\textsuperscript{94} Therefore, the Court found no important government objective for the gender-based admissions policy.

**B. Part 2 — The Means Must be Substantially Related to the End**

In holding the gender-based policy invalid, the majority ruled that the state failed to show a substantial relationship between the classification of an all-female admissions policy and its asserted objective of compensating women for past discrimination.\textsuperscript{95} The argument that prohibiting men from enrolling at MUW would benefit women by providing an "all-female" environment was discredited by the school's practice of allowing men to audit classes. Justice O'Connor reasoned that MUW's practice of allowing men to audit classes "fatally undermines its claim that women, at least those in the School of Nursing, are adversely affected by the presence of men."\textsuperscript{96} While the force of this holding may be lost due to the seemingly insignificant number of male auditors,\textsuperscript{97} the allowance of men in class contradicts the asserted rationale of providing an "all-female" choice for women. The result would seem to merely preclude men from actually earning a degree, thereby eliminating male competition in the work force.

**C. The Title IX Exception**

In response to widespread gender-based discrimination in education, Congress enacted Title IX\textsuperscript{98} which prohibits discrimination on the basis of sex in any educational program or activity receiving federal financial assistance. Mississippi contended that its single-sex admissions policy was exempt from an equal protec-

\textsuperscript{92.} See supra notes 55-59 and accompanying text.
\textsuperscript{93.} 458 U.S. at 719 (footnotes omitted).
\textsuperscript{94.} Id. at 729-30 n.15.
\textsuperscript{95.} Id. at 730.
\textsuperscript{96.} Id. 138 courses had been audited by men in the past decade while there were 938 courses offered each year.
\textsuperscript{97.} Id. at 744 n.17 (Powell, J., dissenting).
tion challenge pursuant to section 901(a)(5) of Title IX\(^9\) which excludes certain public institutions from coverage under the act if they had remained exclusive to one sex from their inception. Justice O'Connor rejected any such exemption because of Congress' limited power under section five of the fourteenth amendment.\(^{100}\)

"Congress' power under section five, however, 'is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees.' "\(^{101}\) Citing Marbury v. Madison\(^{102}\) and Younger v. Harris,\(^{103}\) the majority emphasized the supremacy of the United States Constitution and recognized the need to invalidate any conflicting statutes.\(^{104}\)

D. Analysis of Hogan

Hogan presented the Court with a statute prohibiting males from entering a state educational institution. Because the statute was discriminatory on its face, the case provided an opportunity for a natural and almost mechanical application of middle-level scrutiny. The Supreme Court once again found itself divided over which test to apply when examining a gender-based classification statute.\(^{105}\) Four Justices avoided what should have been a unanimous determination that the classification was unconstitu-

\(^{9}\) 20 U.S.C. § 1681(a)(5) (1976). Section 1681(a) provides:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

(5) in regards to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex.

\(^{100}\) Section five of the fourteenth amendment gives Congress broad power to enforce the amendment and "to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against state denial or invasion." Ex parte Virginia, 100 U.S. 339, 346 (1879).

\(^{101}\) 458 U.S. at 732 (quoting Katzenbach v. Morgan, 384 U.S. 641, 651 n.10 (1966)).

\(^{102}\) 5 US. (1 Cranch) 137 (1803).

\(^{103}\) 401 U.S. 37 (1971). "[A] statute apparently governing a dispute cannot be applied by judges, consistently with their obligations, when such an application of the statute would conflict with the Constitution." Id. at 52.

\(^{104}\) 458 U.S. at 733.

\(^{105}\) See supra note 80.
tional. Similarly, in prior cases involving gender-based challenges, these same Justices have clung to a theory favoring benign discrimination, stretching the compensatory rationale to its utmost limits, in finding that women are not similarly situated, or in misplacing emphasis when applying the substantial relationship test. The facts in *Hogan* differed, however, thus stripping the dissent of any possible rational justification. Still, those Justices elected to deliver emotional arguments rather than vote alongside a long-time opposition.

In his dissent, Justice Powell first contended that heightened scrutiny for gender-based discrimination was “designed to free women from ‘archaic and overbroad generalizations’” and thus was inappropriate in this case. His reasoning focused on the need to protect the expansion of women’s choices. “In no previous case have we applied [intermediate scrutiny] to invalidate state efforts to expand women’s choices.” But the dissent ignored the fact that men’s choices were thereby limited, preferring instead to rely on the ability of males to obtain the same education at other state-run schools. The dissent was more concerned with notions of diversity and tradition than providing for true equality.

106. As stated in the court of appeals decision, “the policy of admitting only females to MUW is an express gender-based discrimination.” 646 F.2d at 1118.

107. *See*, e.g., *Califano v. Webster*, 430 U.S. 313 (1977), in which the Court upheld a statute which compensated women for past economic disparity by allowing them to eliminate more low-earning years than men for purposes of computing Social Security benefits. *See supra* notes 67-70 and accompanying text.

108. *See*, e.g., *Rostker v. Goldberg*, 453 U.S. 57 (1981), which upheld a statute excluding women from military draft. In the majority opinion, Justice Rehnquist wrote: “Men and women, because of the combat restrictions on women, are simply not similarly situated for purposes of a draft or registration for a draft.” *Id.* at 78.

109. *See*, e.g., *Michael M. v. Superior Court*, 450 U.S. 464 (1981). The majority, including Chief Justice Burger and Justices Rehnquist, Stewart, Powell, and Blackmun, upheld the constitutionality of a California statutory rape law. In a dissent joined by Justices White and Marshall, Justice Brennan expressed fear that the majority had placed too much emphasis on the desirability of achieving the state’s asserted statutory goal of preventing unwanted pregnancies instead of analyzing whether the sex-based discriminatory statute was substantially related to achieving that goal. The dissenters opted for a gender-neutral classification. *Id.* at 488.


112. 458 U.S. at 740.

113. *Id.* at 740-41. The majority pointed out that *Hogan* could have enrolled in another state-supported coeducational program, but would have had to drive a considerable distance from his Columbia residence, thereby sacrificing his employment opportunities. *Id.* at 741 n.8.

114. “In sum, the practice of voluntarily chosen single-sex education is an honored tradition in our country, even if it now rarely exists in state colleges and universities. . . . A distinctive feature of America’s tradition has been respect for
As Justice O'Connor noted, a similarly situated female would not have been placed in the precarious position of choosing between foregoing school credit or traveling to another school.\footnote{115} "The policy of denying males the right to obtain credit toward a baccalaureate degree thus imposed upon Hogan 'a burden he would not bear were he female.'\footnote{116} Therein lies the distinction between the majority and the dissent: Justice Powell suggesting that the Court should not demand strict equality at the cost of reducing freedom of choice, and Justice O'Connor deciding that any unequal treatment of the sexes is invalid, absent substantial justification.\footnote{117}

The dissent's rationale of upholding a statute based on tradition and diversity is both historically unsound and illogical. By providing one sex with more opportunities at the expense of the other, Justice Powell's approach would effectively deteriorate any inroads of progress advanced by the modern equal protection analysis.

Justice Powell's dissent also criticizes the majority for invalidating a statute on behalf of one man who does not represent an indentifiable class and whose primary concern is simply personal convenience.\footnote{118} These arguments are tenuous, to say the least. Hogan challenged a provision which discriminated against \textit{all men}, and the fourteenth amendment sets no limitations on "who" can challenge the statute.\footnote{119} Furthermore, regardless of personal convenience, the fact remains that Hogan and others similarly situated were denied an opportunity afforded to women without existence of a qualifying or legitimate reason.\footnote{120} Carrying out tradition as a governmental purpose has never held much weight in the courts; otherwise, women would still be barred from, among other things, practicing law, tending bar, and serving on juries.\footnote{121} Additionally, equal protection does not bar private organizations

\begin{footnotes}
\footnote{115} Id. at 723-24 n.8.
\footnote{116} Id. (quoting Orr v. Orr, 440 U.S. 268, 273 (1979)).
\footnote{117} Id. at 731 n.17.
\footnote{118} Id. at 741-42 (Powell, J., dissenting).
\footnote{119} "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1 (emphasis added).
\footnote{120} The majority in \textit{Hogan} held that the statute failed both parts of the substantial relationship (middle-level) test. See supra notes 87-97 and accompanying text for the Court's application of the test.
\footnote{121} See supra notes 38-40 and accompanying text.
\end{footnotes}
and institutions from adhering to traditions and offering diversity in educational opportunities for a single sex.\textsuperscript{122}

V. IMPACT

Although the majority in \textit{Hogan} confined its holding to the nursing school challenge,\textsuperscript{123} the decision has considerable significance for future benign, gender-discrimination cases. The \textit{Hogan} Court maintained that a strict application of intermediate scrutiny is necessary for all discriminatory classifications regardless of any alleged motivations. A gender-based classification that \textit{addresses} and \textit{remedies} forms of \textit{specific} discrimination remains constitutionally valid. The \textit{Hogan} decision further clarifies the distinction between redressing a past wrong and invalidly attempting to reinforce traditional stereotypes by the recitation of a benign purpose.\textsuperscript{124}

\textit{Hogan} pushes the Court toward an equal status treatment and away from a protective, compensatory rationale. This trend is of utmost importance because it is clear that the use of a middle-level analysis is only marginally effective as long as the Court may continually resort to compensatory discrimination as a justification for gender classifications. Additionally, the intermediate standard has been applied differently in previous cases when women were harmed\textsuperscript{125} and when they were benefited.\textsuperscript{126} As Justice Stewart commented, "[t]he female of the species has the best of both worlds. She can attack laws that unreasonably discriminate against her while preserving those that favor her."\textsuperscript{127}

\footnotesize
\begin{itemize}
  \item \textsuperscript{122} Congress excluded preschool, secondary, and private undergraduate schools from Title IX's admissions coverage. See 20 U.S.C. § 1681(a)(1) (1976). Congress based its decision on the importance of educational variety and freedom of choice. It believed Title IX would unnecessarily restrict the right of private schools to control their character. 117 CONG. REC. 39, 248-49 (1971) (remarks of Rep. Ledenborn); id. at 39, 453-54 (remarks of Rep. Conte).
  \item \textsuperscript{123} 458 U.S. at 733. The Court's holding was narrowly tailored: "Because we conclude that the State's policy of excluding males from MUW's School of Nursing violates the Equal Protection Clause. . . ." Id.
  \item \textsuperscript{124} See supra notes 88-93 and accompanying text.
  \item \textsuperscript{125} See, e.g., Kirchberg v. Feenstra, 450 U.S. 455 (1981) (statute giving husband exclusive right to transfer or encumber community property held invalid); Califano v. Westcott, 443 U.S. 76 (1979) (social security statute that provides assistance to a family when the father is unemployed violates the due process clause when it makes no similar provision for the unemployed mother).
  \item \textsuperscript{126} See, e.g., Caban v. Mohammed, 441 U.S. 380 (natural mother could consent to adoption of illegitimate child but natural father could not intervene); Orr v. Orr, 440 U.S. 268 (men required to pay alimony despite finding that the wife was the party at fault, and the failure to include a provision for the wife's payment of alimony under any circumstances).
\end{itemize}
Hogan also points out the necessity of the Equal Rights Amendment (ERA)\textsuperscript{128} to establish genuine equality for both men and women. The ERA would constitutionally classify gender-based classifications as inherently suspect, thereby effectively precluding any discrimination regardless of state motivations or objectives.\textsuperscript{129} While opponents\textsuperscript{130} of the ERA argue that the same or even superior results may be achieved through the equal protection clause of the fourteenth amendment, the adoption of a judicial classification of gender-based treatment as a suspect category would give equality to men and women, yet leave a back door open for discrimination which serves a compelling state interest.\textsuperscript{131} However, the Supreme Court has demonstrated a definite unwillingness to treat gender as a suspect class, at least for the present.\textsuperscript{132} The continual split opinion, with Chief Justice Burger and Justice Rehnquist opposing Justices Brennan and Marshall in over fifteen gender-based decisions, has occurred once again in Hogan, this time without justification or reason. When four members of the Court struggle in applying even middle-level scrutiny, the urgency of the ERA as an alternative becomes apparent. Pending its adoption, however, it is crucial that

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  \item 128. The Equal Rights Amendment, which the states recently failed to ratify, provided: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." H.R.J. Res. 208, 92d Cong., 2d Sess. (1972).
  \item 129. For arguments in support of this proposition, see Brown, Emerson, Falk, & Freedman, The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women, 80 YALE L.J. 871, 880-81 (1971). But see Mendelson, ERA, The Supreme Court, and Allegations of Gender Bias, 44 MO. L. REV. 1 (1979) (contending that the ERA would provide no more protection against gender discrimination than is already available under the fourteenth amendment).
  \item 130. Some opponents of the ERA fear a far-reaching effect on private lives. See, Freund, The Equal Rights Amendment is Not the Way, 6 HARV. C.R.-C.L. L. REV. 234, 234-38 (1971). However, where purely private action is involved, the ERA would be inapplicable as it prohibits only governmental discrimination on the basis of sex. See supra note 128.
  \item 131. Suspect classifications may be upheld when the state demonstrates an overriding or compelling interest which cannot be achieved by a more carefully tailored legislative classification. See Developments, supra note 5.
  \item 132. In a concurring opinion in Frontiero, Justice Powell pointed out the inappropriateness of making gender a suspect class during the pendency of the Equal Rights Amendment's ratification. Powell warned that "democratic institutions are weakened, and confidence in the restraint of the Court is impaired, when we appear unnecessarily to decide sensitive issues of broad social and political importance at the very time they are under consideration within the prescribed constitutional processes." Frontiero v. Richardson, 411 U.S. at 692 (Powell, J., concurring).
\end{itemize}
at least a majority of the Court combine to strengthen and reinforce an objective application of intermediate scrutiny. Such an application occurred in Hogan.

It is appropriate that Justice O'Connor's first authored opinion should be one which strikes out at role stereotyping and archaic views of the proper relationship for men and women in American society. While it may be difficult to ascertain the impact of the first woman justice on this case,\textsuperscript{133} it is unmistakably evident that her position on the Supreme Court epitomizes the vast changes in the social and legal position of women. Hopefully, her presence will shed new light on freely chosen role-changes and role-combinations in a Court where sexual prejudice has been expressed as frequently through benevolent blindness as through an exaggerated awareness of the differences between men and women.

VI. Conclusion

While the "middle-tier" equal protection analysis, as opposed to the traditional minimum scrutiny test, is a step forward for sexual equality, it has still fostered uncertainty in the law and allowed considerable latitude in the disparate treatment of the sexes. With the floundering ratification of the ERA and the refusal of the Court to treat gender as a suspect category, further advancements for sexual equality are dependent on consistent and rigorous applications of middle-level scrutiny. Hogan exemplified such an approach, applied in a manner free from the traditional stereotypes that stand as a barrier to equality between men and women. This unequivocal method of gender-discrimination review is essential to meet this generation's challenge to help bring about true equality in our laws.

\textsc{Mary Ellen Shull}

\textsuperscript{133} See generally Kelso, \textit{supra} note 80, at 263-64 for a discussion of Justice O'Connor's possible impact in this area.