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Justice Stevens and the Emerging Law of Sex Discrimination

JOHN P. WAGNER*

"[T]he law supposes that your wife acts under your direction."

"If the law supposes that," said Mr. Bumble . . . "the law is a ass—a idiot. If that's the eye of the law, the law's a bachelor; and the worst I wish the law is, that his eye may be opened by experience—by experience."1

INTRODUCTION

On November 29, 1975,2 President Ford nominated John Paul Stevens to serve as a Justice of the United States Supreme Court. At that time, Judge Stevens was generally viewed as having a reputation for competency and integrity.3 Various women's groups,

I gratefully thank the Honorable James E. Doyle for his initial guidance in this endeavor. I also gratefully thank Professor Gordon Baldwin, Robert Lindquist, Professor Kathryn Powers, and Thomas Wagner for their invaluable suggestions and criticism. These legal scholars do not by any means all share my views, and, of course, they are not responsible for my errors.
2. N.Y. Times, Nov. 29, 1975, § 1, at 1, col. 8.
3. Beytagh, Mr. Justice Stevens and the Burger Court's Uncertain Trumpet, 51 Notre Dame Law. 946, 946-47. See also Nomination of John Paul Stevens To Be A Justice of the Supreme Court: Hearings before the Senate Judiciary Committee, 94th Congress, 1st Sess. 5-4 (Dec. 8-10, 1975) (testimony of Edward Levi, Attorney
however, severely criticized Judge Stevens' nomination, and charged that he had consistently opposed women's rights while a member of the Court of Appeals for the Seventh Circuit. The critics claimed that his Seventh Circuit opinions had been based on personal philosophy rather than on the facts and laws involved in the cases before him.5

Now that Justice Stevens has served on the United States Supreme Court for over six terms, it is appropriate to examine his Supreme Court decisions in the area of sex discrimination in light of the criticisms leveled at his nomination. This article will begin by briefly examining Justice Stevens' Seventh Circuit decisions, which initially prompted the criticism from the women's movement. It will then sketch Supreme Court sex discrimination cases decided before Justice Stevens' arrival. Finally, it will examine Justice Stevens' Supreme Court decisions in sex discrimination cases, assessing his contribution to the emerging legal doctrine.

This article concludes that Justice Stevens' perspective on sex discrimination has changed, perhaps as a result of the opposition

General of the United States) [hereinafter cited as Stevens Hearings]; id. at 17-22 (testimony of Warren Christopher, Chairman, American Bar Association Standing Committee on the Federal Judiciary).

4. See generally Stevens Hearings, supra note 3, at 78-84 (testimony of Margaret Drachsler, National Organization for Women); id. at 226 (statement by Bella S. Abzug); id. at 227 (statement by Nan Aron, President, Women's Legal Defense Fund). See also id. at 15-17 and 33-34 (testimony of John Paul Stevens):

Senator Kennedy: . . . There are many Americans who feel that women, too, have been discriminated against. I was trying to get a statement or comment from you—which I must say has not been forthcoming to this point—that would at least show some sensitivity to this particular kind of a problem. If the answer that you are going to apply the law equally to every citizen is the way you want to leave it, then that is the way the record will stand. However, I believe it is not going to satisfy great numbers of people in this country who feel as I do that there has been a broad sector of our society that has been denied certain rights because there are statutes, ordinances, and regulations which discriminate on the basis of sex. If you want to leave the record just saying that you are going to apply every law equitably that is the way it will stand.

Judge Stevens: I'd be proud to have the record stand that way.

5. Stevens Hearings, supra note 3, at 83 (testimony of Margaret Drachsler). Judge Stevens was also criticized for knowing surprisingly little about the legal implications of the equal rights amendment. See id. at 226 (statement by Bella S. Abzug); id. at 227 (statement by Nan Aron).

6. Professor Ginsburg has suggested that,

[f]or impressionable minds, the word “sex” may conjure up improper images of issues like those that the Supreme Court has left to “contemporary community standards” . . . [and that] the denotation and connotations of the word gender make it more appropriate than the word “sex” for a discussion of problems relating to treatment of women.

Ginsburg, Gender In the Supreme Court: The 1973 and 1974 Terms, 1975 SUP. CT. REV. 1 n.1 (1975) (citation omitted). I assume that the readers of this article are not unduly impressionable and that “sex discrimination” is a clear and commonly accepted way of referring to discrimination on the basis of sex.
to his nomination. But his opinions reveal a curious inconsistency. At times, Justice Stevens has emerged as a strong and persuasive voice—indeed, in some cases the critical force—in helping the Court to recognize and eliminate sex discrimination. Yet at other times Justice Stevens has been unable to recognize blatant sex discrimination, and has acted to reduce the number of legal avenues available to redress sex discrimination.

Although Justice Stevens may not represent the critical "center" of the Court, his opinions may foreshadow the approach the Court could take in future sex discrimination cases. If this be true, then future cases may be decided on a pragmatic basis, focusing on how inequitable the discriminatory action appears rather than on a logical basis. For, in terms of the logic of recent decisions, as Yeats so eloquently said, "things [have fallen] apart; the center cannot hold."8

Both Justice Stevens and the Supreme Court have "come a long way" in their approaches toward sex discrimination. The opinions of Justice Stevens document the giant step that has been taken. It can now be said with certainty that any legislation which discriminates solely and specifically against women will be struck down. For both Justice Stevens and the Court, what a long strange trip it's been. Each step forward has been followed by hesitation and retrenchment. This pattern of bold advancement followed by uncertain timidity has become the Court's usual pattern.

Today, the Court confronts questions more subtle than discrimination specifically and solely against women. The Court has rejected a tradition of "romantic paternalism," in which women were subjugated to men, supposedly for the benefit and protection of women.9 Now, the Court confronts an emerging "prag-
matic paternalism," in which women plaintiffs claim they are subjugated to men, supposedly for the benefit and protection of employers and clients.\textsuperscript{10} Although the Court has clearly rejected laws which specifically disfavored women, the Court must also confront laws which may \textit{incidentally} disfavor women in the course of accomplishing other objectives. Although the Court has rejected laws based exclusively on limited role perceptions and negative stereotypes of women, the Court must now confront laws which subtly continue an effect of either confining women to the "private sphere" of home and family or of limiting their participation in the "public sphere" of work, government, and the shaping of social and economic policy.\textsuperscript{11}

These new issues before the Court will require new ways of thinking about policies of discrimination. Justice Stevens' opinions can provide insight as to how well the Court will meet these new challenges. First, Justice Stevens has shown an ability to adopt new approaches to problems. Second, although he appears taken at times with theoretical models, he will typically respond pragmatically to the unique factors of each situation; he probably will not attempt to take the lead in developing doctrinal paradigms. Third, Justice Stevens has become aware of the importance of negative stereotyping and role expectations. Where these factors can be proved to have played a significant part in legislation, he can be expected to reject that legislation. Fourth, he is well aware of the importance of Supreme Court decisions to lower courts. He can be expected to demand that the Court attempt to establish clear guidelines for those courts. Finally, Justice Stevens must be persuaded that various laws actually discriminate against women. Although he has become a sharp critic of obvious discrimination, he sometimes views subtle discrimination as non-discrimination. Sex discrimination plaintiffs will have to mount massive assaults at this threshold test. But, once Justice Stevens is persuaded that discrimination truly does exist, he can be relied on to strike it down.

I. \textbf{JUDGE STEVENS' SEVENTH CIRCUIT SEX DISCRIMINATION OPINIONS}

At the time of his elevation to the United States Supreme Court, Judge Stevens had written four\textsuperscript{12} decisions involving sex

\footnotesize{nalism In Sex-Based Employment Discrimination Cases, 26 WAYNE L. REV. 1281, 83 (1980).}
\footnotesize{10. \textit{Id}.}
\footnotesize{12. Judge Stevens decided one case involving the equal rights amendment}
discrimination issues. In three of those decisions, he found against the plaintiff charging discrimination. Although the mere existence of such a record does not per se show hostility to women's rights, an examination of his three negative decisions does reveal a rather shallow approach to the issues, if not actual opposition to the sex discrimination challenges.

A. Sprogis v. United Airlines

In his first sex discrimination case, Sprogis v. United Airlines, Judge Stevens, in a formalistic dissent, displayed a poor understanding of sex discrimination issues. In Sprogis, the majority of the three-judge panel held that a "no-marriage" rule which was applied to airline stewardesses but not stewards was sex discrimination within the meaning of Title VII of the Civil Rights Act of 1964. The majority found that the rule discriminated against female employees and was not justified as a bona fide occupational qualification.

Judge Stevens dissented because the job categories of "stewardess" and "steward" contained different job requirements. Thus, he reasoned, because the plaintiff was treated no differently than a male in the same precise job category would have been, (E.R.A.), Dyer v. Blair, 390 F. Supp. 1291 (7th Cir. 1975), but that case did not reach the merits of the amendment. Rather, it involved a challenge to a procedural change enacted in the Illinois Legislature, under which the amendment failed ratification. Judge Stevens found the rule change constitutional. Although this decision was criticized by feminists, see Stevens Hearings, supra note 3, at 81 (testimony of Margaret Drachsler); id. at 227 (statement of Nan Aron), such criticism is best seen as blaming the messenger for the bad news.

Judge Stevens was later criticized regarding the E.R.A. after giving testimony at his nomination hearings that he was not certain whether the E.R.A. would provide any protection beyond that offered by the equal protection clause of the fourteenth amendment. Id. at 15 (testimony of John Paul Stevens). Ms. Abzug stated that Judge Stevens' lack of knowledge about the unsuccessful attempts to protect women's rights under the fourteenth amendment was "shocking" and "out of step with the times." Id. at 226 (statement of Bella S. Abzug). Ms. Aron said that Judge Stevens' lack of knowledge of the legal implications of the E.R.A. was "surprising" in light of the opinion he wrote in Dyer. Id. at 227 (testimony of Nan Aron). The Dyer opinion, however, made no reference to the merits of the E.R.A. 390 F. Supp. at 1291-1309.

13. 444 F.2d 1194 (7th Cir. 1971), cert. denied, 404 U.S. 991 (1971).
15. 444 F.2d at 1199. The rule was applied only to females, not males, in flight attendant positions. The majority rejected the argument that since only females were hired for the position of "stewardess," technically there was no discrimination against males within the category of stewardess. Id.
her discharge was not based on sex. But even if the relevant classification had included all United Airlines employees, Judge Stevens would have found no discrimination because the plaintiff had not shown that, had she been a male, she would have had greater employment opportunities.

Judge Stevens’ dissent in *Sprogis* was sharply criticized by feminists as anachronistic. The first problem with the *Sprogis* dissent is a practical one. Judge Stevens’ reasoning would have allowed an employer to group all members of one sex into a single job category and then freely add additional job requirements. Second, he incorrectly reasoned that sex discrimination involved only “pure” discrimination of one sex and not “sex plus”

16. *Id.* at 1205 (Stevens, J., dissenting).
17. *Id.* Judge Stevens declared that a “but for” test was appropriate in sex discrimination cases, the test being “whether the evidence shows treatment of a person in a manner which but for that person’s sex would be different.” *Id.* Since sex discrimination could not be found under the “but for” test, he indicated that it was improper for the court to consider the question of whether singleness was a bona fide occupational qualification for two reasons. First, the Civil Rights Act did not offer guidelines for distinguishing between irrational stereotypes and reasonable requirements. Second, the Equal Opportunity Commission, which had declared the rule to be a violation of Title VII, did not have the statutory authority to make such a declaration. *Id.* at 1205-06.
18. After learning of his statement yesterday that he would decide these [sex discrimination] cases exactly the same way today, I am increasingly concerned over this hasty confirmation process . . . . I am especially disturbed about Judge Stevens’ dissent in the [Sprogis] case . . . . This opinion was anachronistic when written, but when it is examined again in 1975, with the hindsight of the progressive development of Title VII law in the intervening four years, I find it unbelievable that Judge Stevens would rule the same way.

See *Stevens Hearings*, supra note 3, at 226 (statement of Bella S. Abzug). See also *id.* at 81-82 (testimony of Margaret Drachsler); *id.* at 226 (statement of Bella S. Abzug); *id.* at 227 (statements of Nan Aron); Comment, *Opinions of the Honorable John Paul Stevens*, 3 WOMEN’S RTS. L. REP. 58, 58-60 (1976) [hereinafter cited as *Stevens’ Opinions*]. Contra Comment, Special Project, The One Hundred and First Justice: An Analysis of the Opinions of Justice John Paul Stevens, Sitting as Judge on The Seventh Circuit Court of Appeals, 29 VAND. L. REV. 125, 138-39 (1976) [hereinafter cited as *Special Project*] (Judge Stevens applied the “comon sense” meaning of the statute and refused to embellish the statute with speculation as to congressional intent).
19. The sex discrimination plaintiff would be forced to attack the initial category of classification. But she would fail in this attack because of Judge Stevens’ reasoning that females benefit from the creation of female-only jobs. Judge Stevens reasoned that the no-marriage rule benefited females because the abolition of that rule would increase the supply of eligible female applicants. Total demand for employees would not be changed, thus, the absence of the rule would depress the female wage level. 444 F.2d at 1205-06 n.21. Judge Stevens, however, only addressed this question in passing and did not specifically consider the question of whether the hypothetical danger of wage depression outweighed the restrictions of employment of married women. *But see Stevens Hearings*, supra note 3, at 82. (Judge Stevens appeared totally unaware of the dangers of female only jobs; the creation of “black-only” jobs characterized most of the worst cases of racial discrimination) (testimony of Margaret Drachsler).
discrimination, combining sex with another requirement. Finally, the Sprogis dissent was formalistic; it did not examine the actual nature of disparate treatment of flight attendants. Judge Stevens' reasoning seemed strained and disingenuous. The opinion was not consistent with his reputation as a pragmatist. The airlines apparently determined that the chances of reversal by the United States Supreme Court were poor and abandoned the no-marriage rule after Sprogis.

In addition to being his first sex discrimination case, the Sprogis dissent is an interesting case from which to trace Judge Stevens' views on sex discrimination because of his initial reaction to legislation based on sexual stereotyping. Although the majority did not rely on a "negative stereotype" argument, Judge Stevens characterized their argument as such. He then rejected that argument because the Civil Rights Act provided no guidelines for determining "irrational stereotypes." After ascending to the Supreme Court, Justice Stevens displayed a markedly changed attitude toward legislation based on negative stereotypes.

B. Rose v. Bridgeport Brass Co.

While Judge Stevens' Sprogis dissent was exceedingly formalistic and narrow, his dissent in Rose v. Bridgeport Brass Co. was quite broad in its dismissal of statistical evidence of sex discrimination. In Rose, the plaintiff held the job of blanking press operator, which required the ability to lift forty pounds. When she attempted to return to work after a leave of absence, she was told no jobs were available. The position of blanking press operator had been changed to require an ability to lift eighty pounds, a

20. In Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971), decided before Sprogis, the Supreme Court had declared the use of "sex-plus" qualifications to be sex discrimination and therefore illegal. See note 57 infra. Judge Stevens stated, however, that Phillips turned merely on the procedural point that a sex discrimination plaintiff should not be held to anticipate and disprove a speculative defense. Sprogis v. United Airlines, 444 F.2d at 1204.
21. Special Project, supra note 18, at 197.
22. Stevens' Opinions, supra note 18, at 60.
23. 444 F.2d at 1206 (Stevens, J., dissenting).
24. 487 F.2d at 804 (7th Cir. 1973).
25. See Stevens Hearings, supra note 3, at 82 (testimony of Margaret Drachsler).
26. 487 F.2d at 805.
27. Id.
standard she could not meet. In a Title VII suit, the plaintiff alleged that the job position had been reclassified in order to exclude women.

The majority of the Seventh Circuit panel reversed the lower court's grant of summary judgment for the defendant, holding that the plaintiff did not have the burden of proof on the defendant's motion for summary judgment. The majority held that the plaintiff's statistical evidence showing a drop in the percentage of women employed in her job category from fifty-five percent to ten percent clearly raised the possibility of sex discrimination.\(^2\)

Judge Stevens agreed with the majority that the district court had incorrectly placed the burden for the defendant's summary judgment motion on the plaintiff.\(^2\) Having agreed with the majority on that point, there was no reason to proceed beyond the procedural issues. Because of the district court's error as to the plaintiff's burden of proof, the case could have been decided on that ground alone. Nevertheless, Judge Stevens proceeded to analyze the substantive merits of the case. Virtually dismissing the plaintiff's statistical evidence, he dissented from a reversal because he concluded that the evidence had supported a finding for summary judgment under the proper standard. In going beyond the procedural issue, in ignoring the statistical evidence, and in accepting, without scrutiny, the defendant's argument that the job changes were economically justified,\(^3\) Judge Stevens displayed a strong hostility to the sex discrimination challenge.\(^3\) His breezy approach to the disputed facts was inconsistent with his prior reputation for always conducting an exhaustive inquiry into the facts of a case.\(^3\)

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28. *Id.* at 809.
29. *Id.* at 812-13.
30. The plaintiff had alleged that the job reclassifications had not been shown to be economically justified because they either created new inefficiencies or increased the risk of breakdown and accompanying downtime. *Id.* at 809. Judge Stevens summarily dealt with these arguments in a footnote and characterized the changes as merely indicating a management decision to achieve a significant cost reduction with a minimal increased risk of breakdown. *Id.* at 813 n.1. Thus, Judge Stevens would have held the plaintiff to a higher burden of persuasion regarding sex discrimination than would the majority.
31. *Rose* involved conflicting allegations of whether the employer's job reclassifications were made purely on the basis of business necessity. *Id.* at 809. Judge Stevens minimized the plaintiff's evidence that showed the changes were not made purely on the basis of business necessity. *Id.* at 813 n.1. In addition, he discounted the dramatic drop in the percentage of women in the relevant job classification from 55% to 10%. *Id.* at 809.
32. *See Special Project, supra* note 18, at 197.
C. Cohen v. Illinois Institute of Technology

While Judge Stevens' opinions in Sprogis and Rose were lone dissents, he wrote for the three-judge panel rejecting a sex discrimination claim in Cohen v. Illinois Institute of Technology.\(^{33}\) In Rose, he had required a high standard of evidence for a showing of sex discrimination. In Cohen, he placed a similar burden on the plaintiff by requiring a very high showing of state action.

Cohen involved a professor who had been denied tenure at the Illinois Institute of Technology, a private institution, and who alleged sex discrimination in violation of the equal protection clause.\(^{34}\) Judge Stevens rejected each of the plaintiff's four theories for finding state action.\(^{35}\) Further, Judge Stevens rejected the plaintiff's argument that the complaint should not be dismissed and that discovery should be allowed as it might reveal some nexus between the state and the defendant's wrongful conduct.\(^{36}\)

Although Judge Stevens' opinion in Cohen was criticized for requiring a very high standard of state action,\(^{37}\) the merit of that criticism is not clear-cut. Writing for a unanimous court, Judge Stevens was not out-of-step with his own court, or with other cir-

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\(^{33}\) 524 F.2d 818 (7th Cir. 1975), cert. denied, 425 U.S. 943 (1976).

\(^{34}\) The plaintiff had no remedy under Title VII of the Civil Rights Act because that Act, until 1972, exempted from coverage employees performing educational work for educational institutions. 42 U.S.C. § 2000e-1 (1964). The challenged activities occurred prior to 1972 and the removal of the exemption had been held not to apply retroactively. 524 F.2d at 822. Thus, the only claim available for the plaintiff was one alleging that the Institute's alleged violations amounted to "state action" which denied her equal protection of the laws. Id. at 822-23.

\(^{35}\) The first argument was that because the Institute was chartered by the state and used the word "Illinois" in its title, it acted under color of state law. Justice Stevens concluded that this use of the word "Illinois" did not establish any activities as being under the color of state law. 524 F.2d at 824. Second, the financial support received from the state was found neither large enough to consider the Institute as the equivalent of a public university, nor specific enough such that the funding directly furthered the sex discrimination policies alleged. Id. at 825-26. Third, even though the Institute was pervasively regulated by the state, that alone, Judge Stevens held, did not establish state action. No allegation had been made that the state affirmatively encouraged or approved faculty employment discrimination on the basis of sex. Id. at 826. Fourth, Justice Stevens rejected the argument that the omission of any affirmative prohibition against sex discrimination, even against the background of detailed state regulation of the Institute, was tantamount to state approval of the objectionable policy. Id.

\(^{36}\) Id. Judge Stevens rejected discovery because he found the plaintiff had not specifically alleged state support or approval of the discriminating conduct. Id.

\(^{37}\) See Stevens Hearings, supra note 3, at 81 (statement of Margaret Drach-sler); id. at 227 (statement of Nan Aron).
cuits. Although the decision showed a lack of receptivity to sex discrimination claims in that it required a stricter standard of state action than that required in some Supreme Court race discrimination cases, Judge Stevens was able to demonstrate precedent support for the higher requirement. Even though there was room in the developing law to allow him to use a more liberal standard, there was nothing in the law to compel the use of such a standard. The Cohen decision may have reflected a strong belief that the fifth and the fourteenth amendments prohibited sex discrimination only where specifically initiated or supported by the state. Additionally, perhaps Judge Stevens feared that a liberal state action rule would open the “floodgates” in which many private interferences would be made federal cases.

In another aspect of Cohen, Judge Stevens announced an interpretation of section 1985(3) that he would have occasion to amplify as a Justice. In rejecting Ms. Cohen’s equal protection challenge, Judge Stevens also rejected her allegation of a conspiracy to deprive her of a constitutional right in violation of section 1985(3) for two reasons. First, such an allegation would also require a showing of state action. Second, although conspiracies regarding racial discrimination could be reached under section 1985(3), Judge Stevens questioned whether conspiracies involving sexual discrimination could be similarly reached. Unlike other issues on which his opinions changed, his views on this issue have remained the same on the Supreme Court. In Great American Federal Savings and Loan Association v. Novotny, he reaffirmed his view that section 1985(3) does not cover sex discrimination.

D. Air Line Stewards & Stewardesses Association v. American Air Lines

Unlike the decisions in Sprogis, Rose, and Cohen, Judge Stevens’ decision in Air Line Stewards & Stewardesses Association v. American Air Lines was in favor of the plaintiff. In a case in-
volving important distinctions between competing groups of claimants, Judge Stevens demonstrated that he was not totally hostile to sex discrimination plaintiffs.

_Air Line Stewardesses_ involved a challenge to a settlement negotiated between the Air Line Stewards and Stewardesses Association and various airline companies regarding the airlines' rule requiring discharge of pregnant stewardesses. The settlement was challenged by formerly discharged stewardesses, who argued that the union improperly represented groups with competing interests: stewardesses who had been previously discharged under the rule as well as those stewardesses who, at the time of the settlement, potentially could be discharged under the rule. The latter group, it was argued, sought only an end to the rule. They resisted reinstatement and the awarding of full seniority rights because reinstatement could cause layoffs which would affect those with the least seniority. Judge Stevens found that the interests of the two groups were different, that the union could not be considered the exclusive agent of the previously discharged stewardesses with regard to questions of discrimination, and that the previously discharged stewardesses could opt out of the class action settlements.

_Air Line Stewardesses_ is important in understanding Judge Stevens' views on sex discrimination because it showed that he did not view the class of female stewardesses in a monolithic fashion. He recognized that the members' interests were not totally similar, and he carefully distinguished the competing claims of persons who had been actually discriminated against, as compared to those who suffered only potential discrimination.

### E. Summary

At the time of his nomination to the United States Supreme Court, Judge Stevens' "batting average" in sex discrimination ranged from bad to fair, depending on how the cases are characterized. In only one of four sex discrimination cases did he find for the plaintiff. In the three cases where he found against the plaintiff, a decision for the plaintiff would have been reasonable.

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46. In the settlement, the companies agreed to abandon the automatic discharge rule and to place discharged stewardesses on a preferential hiring list for new vacancies. Neither back pay nor reinstatement, however, were given; only limited seniority rights were proffered. _Id._ at 638.

47. _Id._ at 640-43.
and consistent with existing law. Thus, the criticisms of his Seventh Circuit decisions charging insensitivity, if not hostility, to sex discrimination claims are valid.

Whether any shift in Justice Stevens' approach to sex discrimination is evident since he was elevated to the United States Supreme Court is the critical question. Before that question can be addressed, however, it is necessary to first review the developments in the law of sex discrimination by the Supreme Court prior to his nomination.

II. THE EMERGING LAW OF SEX DISCRIMINATION

The area of sex discrimination law is one of recent development. Until recent years, the law was that women did not have the same rights as men. Any change with regard to those rights was assumed to be up to state, not federal, law. Since 1971, however, the Supreme Court has increasingly reviewed challenges against laws and policies which discriminate on the basis of sex and has often invalidated them. There are three primary areas of sex discrimination cases in which emerging doctrines can be seen: laws which disadvantage females, laws which ostensibly benefit females, and laws which discriminate on the basis of preg-

48. The two cases generally considered to be the first major sex discrimination victories were decided in 1971: Reed v. Reed, 404 U.S. 71 (1971) (dissimilar treatment of men and women competing for letters of administration held to be unreasonable classification) and Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (equal employment opportunities regardless of sex). Two famous earlier cases which had sex discrimination implications were Lochner v. New York, 198 U.S. 45 (1905) (all workers' protection statutes, including those protecting men and women alike, held unconstitutional) and Muller v. Oregon, 208 U.S. 412 (1908) (laws for the protection of female workers held constitutional because women were considered weaker than men, dependent on men and in need of special protection).


With some notable exceptions [judges] have failed to bring to sex discrimination cases those judicial virtues of detachment, reflection and critical analysis which have served them so well with respect to other sensitive social issues . . . . Judges have largely freed themselves from patterns of thought that can be stigmatized as "racist" . . . . [But] "[s]exism," the making of unjustified (or at least unsupported) assumptions about individual capabilities, interests, goals, and social roles solely on the basis of sex differences—is as easily discernable in contemporary judicial opinions as racism ever was.

Id. at 676.

50. This article will deal only with the narrow issue of sex discrimination and will not deal with cases involving such broader areas as reproductive and sexual freedoms, marriage and family roles, right to privacy, status of children, public assistance and other issues involving sex-based societal problems, expectations and roles.
nancy.\textsuperscript{51} It is helpful to trace the developing law as created by some of the major Supreme Court decisions in each of these areas.\textsuperscript{52}

\section*{A. Laws and Policies Which Disadvantage Females}

The Court has become increasingly aware of the harmful nature of sexually discriminatory laws and policies.\textsuperscript{53} These harms include not only the direct disadvantages created by the policies or statutes, but also the indirect effects of the negative stereotyping created by and reflected in discriminatory laws and policies.\textsuperscript{54} This combination of direct and indirect disadvantages creates re-

\textsuperscript{51} Laws regarding pregnancy need not necessarily constitute a unique conceptual area of analysis, but it will be seen that the Court has treated pregnancy issues differently than other sex discrimination issues.


\textsuperscript{54} For a thorough discussion of the harms of negative stereotyping regarding employment, see Taub, Keeping Women In Their Place: Stereotyping Per Se As A Form of Employment Discrimination, 21 B.C.L. REV. 345 (1980). See generally Karst, supra note 53, at 22-26.
strictions on the fundamental right of each citizen to full participation in society. The Court has been groping for principles and rationales by which to consider sex discrimination cases. Unable to determine such principles, its decisions have instead been reached by balancing tests which have attempted to ascertain whether the social and economic principles supporting the challenged laws and policies outweigh the harm these laws and policies have caused. In its initial applications of this balancing test, the Court gave broad deference to the legislature. But in 1971, the Court began to strike down laws which discriminated on the basis of sex.


56. In Goeaert v. Cleary, 335 U.S. 464 (1948), the Court rejected an equal protection challenge to a Michigan law barring women from being employed as bartenders (an exception was provided for women whose husbands or fathers owned the bar in which they would work). The Court held that a rational basis for the distinction could exist, despite the argument that the law served to protect the all male bartenders' union from competition. Id. at 467. Many commentators view Goeaert as based on the reasoning that the legislature could rationally have determined that there was a need for "protection" of women. See, e.g., Ginsburg, supra note 49, at 24. Professor Powers cites Goeaert as a paradigm of "romantic paternalism" embodying "the view of a woman as the unwitting seductress, [and] the assumption that the mere presence of women bartenders might incite men into violent and/or sexual behavior which women were too weak, both physically and morally, to control." Powers, supra note 9, at 1285-86 (citation omitted). But see Emerging Bifurcated Standard, supra note 53, at 168 n.31, suggesting the Court was protecting the morality of society as a whole and not merely of women bartenders, and, thus, the case should properly be considered "restrictive" rather than "protective." Another example of early deference to the legislature can be seen in Hoyt v. Florida, 368 U.S. 57 (1961), where the Court held that a statute that excluded females from jury selection, save for an exception allowing volunteers, did not violate equal protection or due process.

57. In Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (per curiam), the Court held that an employer could not, under Title VII (42 U.S.C. § 2000e-2 (1964)), refuse to hire women with pre-school age children while, at the same time, hiring men with such children. The type of discrimination practiced in Phillips was characterized by the circuit court of appeals (which did not find a violation of Title VII) as "two pronged": Ms. Phillips was denied employment because she was a woman and because she had pre-school age children. Phillips v. Martin Marietta Corp., 411 F.2d 1, 4 (5th Cir. 1969). Three arguments were made for reversal of the circuit court's decision. First, the combination of sex plus another factor (parentage of pre-school age children) had not been shown to be a bona fide occupational qualification as required under the Act and was therefore prohibited. Second, the combination had not been shown to be required as a business justification as required under the Act. Third, any "sex-plus" theory should have been rejected because sex cannot be even one factor of employment consideration under the Act. Id. at 20. The Supreme Court appeared to adopt the first position. 400 U.S. at 544.

Phillips initially seemed important in the development of sex discrimination law because it appeared to signal the rejection of "sex-plus" discrimination. See Boylan, Ida Phillips v. Martin Marietta Corporation, 1 WOMEN'S RTS. L. REP. 11, 12 (1972); Ginsburg, supra note 49, at 4. In actuality, however, the Court did not go so far. The Court left the door open by indicating that "sex plus parent of pre-school age child" might be the basis of a bona fide occupational qualification and, as such, might justify discriminatory hiring. 400 U.S. at 547. For this reason, Phillips was
1. **Reed v. Reed**

In 1971, more than a century and a half after the Supreme Court upheld a statute limiting the practice of law to men, the Supreme Court, in *Reed v. Reed*, handed down the decision that would become characterized as the “breakthrough” in sex discrimination cases. In a unanimous decision, the Court held that a statute which gave men mandatory preference over women with regard to appointment as administrators of estates violated the equal protection clause of the fourteenth amendment. The Court stated that it applied the “reasonable relationship” test to the classification of women and held that the mandatory preference for men was unreasonable and arbitrary. Because this arbitrariness was not outweighed by any possible goals of reducing the workload of courts, or reducing intrafamily controversy, the Court stated that the statutory preference for men bore no rational relationship to a legitimate state objective.

*Reed* is important not only because of its finding for a sex discrimination plaintiff, but also because of the test the Court actually used. Although the Court said it was using the rational relationship test, it must have actually used a stricter test because the challenged classification could have been found to achieve some efficacy. Thus, the *Reed* holding indicated that not uniformly regarded as a significant victory for women’s rights. See Boylan, *supra* this note, at 11.

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60.  See, e.g., Cook, *supra* note 52, at 47; Ginsburg, *Key Supreme Court Rulings, supra* note 49, at 26; Johnston, *Sex Discrimination and the Supreme Court—1971-1974, supra* note 52, at 622. But see Hodes, *A Disgruntled Look at Reed v. Reed From the Vantage Point of the Nineteenth Amendment, 1 WOMEN’S RTS. L. REP. 9* (1972) (arguing that not only was the *Reed* decision no improvement on the existing law, but also that it posed the danger of future use against sex discrimination plaintiffs).
61.  404 U.S. at 76-77.
62.  Id. at 75-76. The Court was asked to hold that laws discriminating against women should not be reviewed under the “rational relationship” standard but under strict scrutiny. See Ginsburg, *Comment on Reed v. Reed, 1 WOMEN’S RTS. L. REP. 7, 7* (1972). The Court did not address this argument but merely stated that the application of the rational relationship test led to its decision. 404 U.S. at 76. In a later case, Eisenstadt v. Baird, 405 U.S. 438 (1972), the Court noted that it had not reached the issue of whether the stricter standard should be used in *Reed* because the statute did not pass muster under the more lenient standard. Id. at 447 n.7.
63.  404 U.S. at 76-77.
64.  Gunther, *supra* note 53, at 34. Professor Gunther argues that the use of an
sex classifications would be held to a more rigorous standard of review than that of mere rational relationship. 65

2. Frontiero v. Richardson

In its next major sex discrimination case, Frontiero v. Richardson, 66 the Court appeared to be moving swiftly beyond the implied “strict reasonableness” concept in Reed toward the use of a strict scrutiny standard. 67 In Frontiero, the Court was confronted with a military benefits plan under which women were denied procedural as well as substantive benefits 68 solely for reasons of

“arbitrary” sex classification is plainly relevant to a state’s interest in avoiding administrative disputes and would not be prohibited under equal protection requiring merely a “rational relationship” or even a “significant relationship.” Because the classification was prohibited, Gunther argues the Court must have been implying some “special suspicion” of sex classifications. Id.

65. Id. See also Getman, Emerging Principle of Sexual Equality, supra note 52, at 164-65, Emerging Bifurcated Standard, supra note 53, at 171. But see Hodes, supra note 60, at 12 (suggesting that Reed was unimportant because it was virtually moot as the law had been repealed by the time of the Court’s opinion; it took no courage or change of doctrine for the Court to reach the Reed result).

Although Reed cast doubt on the use of a sex classification for the purpose of administrative convenience, the Court shortly thereafter allowed a sex classification for that purpose in a per curiam decision regarding a state rule requiring that a wife take and use her husband’s surname after marriage. Forbush v. Wallace, 405 U.S. 970 (1972). See Ginsburg, supra note 62, at 8. It has been suggested that some of the reasons for the Forbush decision were that the case was not pursued as effectively as other women’s rights cases, which had been viewed as being of paramount importance, and the plaintiff had not been assisted by amicus curiae briefs from national women’s rights and civil rights organizations. In addition there were other problems.

[T]he facts in the Forbush case were not developed at the trial court level in the form most favorable to the plaintiff. For example, the record was allowed to stand with the patent misrepresentation that the laws of all fifty states require married women to use their husbands’ surnames. In addition, no adequate record was even developed on the actual availability and cost of the name change procedure when the person seeking the change was a married woman wishing to regain her premarriage name. In the Supreme Court, appellants were thus reduced to noting that the name change procedure was discretionary and would not be “without cost”—hardly a persuasive statement. Similarly, the plaintiffs did not make an adequate record on the actual administrative cost of allowing married women to use their premarriage names on drivers licenses and other records.

BABCOCK, supra note 52, at 127 (footnote omitted).


68. 411 U.S. at 678-80. Spouses of male military members, on the one hand, were automatically considered “dependents” for the purposes of obtaining dependents’ benefits. Spouses of female military members, on the other hand, were not considered “dependents” unless they showed that they were, in fact, dependent on their spouse for more than one-half of their support.
administrative convenience. Four Justices concluded that any sex classifications would be considered inherently suspect and must be subjected to strict judicial scrutiny.

Frontiero was important for three reasons. First, it was the high water mark of the movement to have sex classifications declared inherently suspect and subject to strict scrutiny. Second, the remedy was positive for the sex discrimination victim in that it extended rather than invalidated the objectionable statute.

69. *Id.* at 681-82. The district court had reasoned that, because the military was then 99% male, differential treatment might lead to administrative savings.

70. Justice Brennan was joined by Justices Douglas, Marshall and White. *Id.* at 678.

71. *Id.* at 688. Justice Brennan suggested three criteria for a suspect class: (1) that the class suffer from an immutable characteristic determined solely by accident of birth and bear no relationship to the members' ability to contribute to society; (2) that the class have suffered a history of discrimination; and (3) that the class face continuing discrimination in societal institutions and lack power in the political area. *Id.* at 685-87. See generally Wilkinson, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Inequality*, 61 Va. L. Rev. 945, 980-81 (1975).

Justice Stewart, in a one sentence concurrence, stated that the statutes involved worked an "invidious discrimination in violation of the constitution." 411 U.S. at 691. See Ginsburg, *supra* note 67, at 3-4 (suggesting that perhaps Justice Stewart was implying that he would know sex discrimination when he saw it, just as he had stated that he knew hardcore pornography when he saw it in *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)).

Three other Justices agreed that in this case, the statute was an unconstitutional discrimination which violated due process, but they specifically declined to find that sex was a suspect classification for two reasons. First, the statute could be found to be unconstitutional under the *Reed* test. Second, the Justices were concerned that a judicial decision on this issue would be premature in light of the fact that the state legislatures where then actively debating the proposed equal rights amendment. 411 U.S. at 692 (Powell, J., concurring).

72. See Cook, *supra* note 52, at 47. See also Karst, *supra* note 53, at 22-26. Professor Karst argues that there are two primary lines of reasoning which determine the degree of scrutiny to be given a discriminatory classification: (1) solicitude for the victims of the discrimination and (2) the equal citizenship value of participation in society. *Frontiero* established a higher level of scrutiny because it involved major elements of both concerns: women were victimized by demeaning role-typing; women were also underrepresented in government. *Id.* at 24-25. Karst combined both factors to suggest that the degree of suspectness of a classification is determined by "the degree to which the classification interferes with the interest in being treated as a person who belongs to the society as a respected, responsible and participating member." *Id.*, at 26.

73. 411 U.S. at 691 n.25. The Court did not invalidate, as it could have, the provision of dependents' benefits to the spouses of male military members. Rather, it extended the same benefits to the spouses of female military members. *Id.* For a discussion of the issues involved in the extension of statutes which are invalid because they are underinclusive, see generally *Note, supra* note 67, at 135-36. See also Kanowitz, *supra* note 52, at 1412-29. Professor Kanowitz argues against "benign" laws which sexually discriminate against men. Citing *Frontiero* and other
Third, the Court began to realize the constraining effects of "romantic paternalism." But *Frontiero* may have been illusory as a sign of dramatic change because it may have been an easy case. The extension of benefits in issue presented little significant threat to the public fisc. Since relatively few women served in the military, since even fewer were married, and since fewer still were married to civilians, the extension of benefits would result in virtually no increase in budget requirements. Moreover, *Frontiero* was essentially an equal pay case. The type of compensation discrimination involved was clearly prohibited by the Equal Pay Act of 1963 and by Title VII. Although these statutes were not applicable to the military, the basic similarity of the *Frontiero* situation to the type of situations meant to be proscribed by federal law should not have rendered the finding of sex discrimination in this case difficult.

3. *Stanton v. Stanton*

While the Court had shown some dissatisfaction with sexually discriminatory laws in *Reed* and *Frontiero*, its 1975 decision in *Stanton v. Stanton*, showed an increased understanding of the problems of negative stereotyping. *Stanton*, however, did not change the situation, evidenced in *Frontiero*, that there were not five Justices willing to declare sex classificiations suspect.

In *Stanton*, the Court struck down on equal protection grounds a state statute which set different ages of majority for males and females. The Court held that the question of whether sex classifications were inherently suspect need not be reached because "under any test—compelling state interest, or rational basis, or something in between—[the statute] . . . does not survive an

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74. There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of "romantic paternalism" which, in practical effect, put women, not on a pedestal, but in a cage . . . .

75. Our statute books gradually became laden with gross, stereotyped distinctions between the sexes and, indeed, throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes.

76. See Ginsburg, supra note 49, at 29; Note, supra note 67, at 134-36.
78. Note, supra note 67, at 136.
82. Id. at 17-18.
equal protection attack."  

The Court found that the state had no rational reason to draw a sex-based distinction regarding age of majority.  

The Court specifically confronted and rejected arguments based on stereotypical "role typing": that the female is destined for the home, not the marketplace, and thus requires less education and a shorter period of protection, or that the female matures earlier than the male and therefore requires less support.  

The Court displayed a new sensitivity to the relationship of role typing in the creation of unequal stereotypes. In clearly rejecting statutes based on discriminatory stereotypes, the Stanton Court took a major step forward.  

B. Laws and Policies Ostensibly Benefiting Females  

The decisions in Reed, Frontiero, and Stanton may have reflected the Court's uncertainty regarding the proper standard of review for sexually discriminatory laws, but those decisions did not answer the question of whether a neutral policy may be justified on the basis of gender.  

83. *Id.* at 17.  
84. *Id.* at 14.  
85. No 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 . . . . Women's activities and responsibilities are increasing and expanding . . . . The presence of women in business, in the professions, in government and, indeed, in all walks of life where education is a desirable, if not always a necessary, antecedent is apparent and a proper subject of judicial notice. 421 U.S. at 14-15.  
86. *The* Supreme Court in its tenth *[sex discrimination]* opinion forthrightly declare[d] what it should have said in the first: Governmentally-imposed gender discrimination violates the guarantee of equal protection when its sole or primary justification is adherence to an outmoded sex-role stereotype. Reliance on such stereotypes does not satisfy even the rational relationship test of equal protection. Johnston, *Sex Discrimination and the Supreme Court—1975,* supra note 52, at 259. *See also* Cook, *supra* note 52, at 62 (suggesting that because Stanton considered the issue of socialization of children to sex roles, it was the most significant of the sex equality cases).  

The Court may have used the Stanton negative stereotype analysis in holding that a system of jury selection which excluded women was unconstitutional. Taylor v. Louisiana, 419 U.S. 522 (1975). The Taylor decision, however, was not based on an argument of sex discrimination per se, but on the argument that the defendant's all male jury in a criminal trial violated his sixth amendment right to a jury representative of the community. 419 U.S. at 537. Thus, because the sixth amendment only applies to criminal cases it remained unclear whether sex discrimination in juries for civil cases was unconstitutional. *See* Cook, *supra* note 52, at 65. *But see* Johnston, *Sex Discrimination and the Supreme Court—1975,* supra note 52, at 247.
not reflect any suggestion that the discrimination was actually laudable. In the following cases, however, supporters of discriminatory laws argued that sex discrimination should be allowed because it attempts, in some way, to recompense women for injuries suffered due to past discrimination. Such laws create a tension between concepts of pure equality and attempts to ameliorate past injuries.87

1. **Kahn v. Shevin**

The Court first directly confronted the problems raised by “reverse” or “benign” discrimination in the case of *Kahn v. Shevin*.88 As *Stanton* marked a step forward toward requiring genuine equality by the Court, *Kahn* marked a step backward. In *Kahn*, Justice Douglas, writing for the majority, held that a statute giving a tax exemption to widows but not widowers did not violate equal protection.89 His brief opinion implied that sex discrimination that benefited women in order to redress past discrimination could be rationally related to a legitimate state purpose.90

Justice Douglas first noted that because the statute involved a
tax classification, it was subject to a lower degree of scrutiny than other kinds of statutes. Second, he emphasized that the discrimination was not made solely for purposes of administrative convenience, as had been the discrimination in Frontiero. Rather, the purpose of the challenged classification, Justice Douglas found, was to ameliorate the disparities in the economic situations of widows as compared to widowers.

The Kahn decision was vigorously attacked in the dissenting opinions. Nevertheless, it created an important precedent allowing compensatory discrimination. The decision has been severely criticized as a "retrenchment" by the Court. In addition to problems of paternalism and negative stereotyping, a major

91. 416 U.S. at 355-56. See Babcock, supra note 52, at 124; Johnston, Sex Discrimination And the Supreme Court—1971-1974, supra note 52, at 672.
92. 416 U.S. at 355.
93. Id. at 354.
94. The majority opinion was challenged in two dissenting opinions. Justice Brennan would have held, first, that all sex classifications, including compensatory classifications, must be subjected to strict scrutiny. Id. at 357. Still, he would have found that under such scrutiny, compensatory sex discrimination statutes would meet a compelling state interest test. Id. at 359. See Babcock, supra note 52, at 24 (arguing that Justice Brennan's analysis purported to apply a strict scrutiny test but actually used a weaker version of the test than had been used in race cases. The authors suggest that the weakness of the Brennan test was due to a loose conception of what would constitute a compelling justification for a sex classification).
97. First, Justice Douglas seemed to adopt a paternalistic view toward women. Professor Johnston sharply assailed Justice Douglas' reasoning regarding "protection" of women, terming his departure from the equality principles of Frontiero and Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974), and his reliance on the protectionist opinions in Muller v. Oregon, 208 U.S. 412 (1908), as "simply astounding" and "amazing." Johnston, Sex Discrimination and the Supreme Court—1971-1974, supra note 52, at 689. Contra Babcock, supra note 52, at 124: "[a]lthough the rationality of the legislative classification upheld by Douglas . . . is certainly questionable, the quality of the majority's inquiry is not markedly lower than
problem with the *Kahn* decision was that the Court did not inquire into the actual, as opposed to hypothetical, legislative purposes of the statute.\(^8\) The failure to make such inquiry implied that laws that did not benefit females might be upheld so long as those laws could be "improved," as late as the time of argument before the Court, with hypothetical justifications, including pro-

many of the Court's previous decisions applying the test of rational relationship to non-sex-based classifications." *Id.*

Second, by relying on generalized statistical income data by sex and refusing to consider individual deviations, the Court appeared to be actually upholding the pattern of legislating by stereotype, which it had rejected in *Frontiero*. See Johnston, *Sex Discrimination and the Supreme Court—1971-1974*, *supra* note 52, at 670, 672. Professor Johnston argues that the problem with the Court's reliance on general gross statistical summaries is that such summaries reinforce sexual stereotypes. If the general statistics in *Kahn* were sufficient to uphold the statute, he argues, the statute in *Reed* could have been upheld on the basis of evidence tending to show that more wives are dependent on their husbands for support than vice-versa. *Id.* See also BACCOCK, *supra* note 52, at 124 (the authors direct a criticism against Justice Brennan's opinion which could, with equal or more force, be directed against Justice Douglas' opinion: they argue that the use of ameliorative classification by sex undermines the basic concept of individual treatment without regard to sex). Ginsburg, *supra* note 49, at 29 (suggesting the statute expressed the lawmakers' view that the death of a wife carried less significance for the family than the death of a husband).

The basic problem regarding the stereotypes involved in *Kahn* was that they created the possibility that a rationale for remedying past discrimination could be easily invented. Thus, a statute could discriminate against women under the guise of benefitting them. BACCOCK, *supra* note 52, at 124. A "benefiting" rationale could become the functional equivalent of "benign paternalism." See Johnston, *Sex Discrimination and the Supreme Court—1971-1974*, *supra* note 52, at 672. See also BACCOCK, *supra* note 52, at 125; Kanowitz, *supra* note 52, at 1380.

Third, the decision upheld a statute which was not truly remedial; the statute included women who did not have any financial problems but excluded many women who would be in financial need. Johnston, *Sex Discrimination and the Supreme Court—1971-1974*, *supra* note 52, at 671.

Fourth, the decision was criticized as retreating from the increased understanding of sex discrimination which the Court had seemed to be showing in prior cases. *Id.* at 673. Justice Douglas came under special attack because of the nature of his dissent in *De Funis v. Odegaard*, 416 U.S. 312 (1974), announced just the day before *Kahn* was released. In *De Funis*, Justice Douglas disapproved of compensatory racial discrimination in strong terms. "There is no constitutional right for any race to be preferred." *Id.* at 336. "Whatever his race, he had a constitutional right to have his application considered on its individual merits in a racially neutral manner." *Id.* at 337. "So far as race is concerned, any state-sponsored preference to one race over another . . . is in my view 'invidious' and violative of the Equal Protection Clause." *Id.* at 343-44. In *Kahn*, however, Justice Douglas suggested no reasons why reverse discrimination in sex cases should have a greater protection than reverse discrimination in race cases. Thus, Justice Douglas' opinion in *Kahn* seemed totally at odds with his opinion in *De Funis*. Johnston, *Sex Discrimination in the Supreme Court—1971-1974*, *supra* note 52, at 661. See also BACCOCK, *supra* note 52, at 124 (suggesting that the best way to understand the Douglas opinion is as a decision more about the state power to tax than about sex classifications); Ginsburg, *supra* note 49, at 42 n.78.

protection rationales, by their supporters. 99

2. Schlesinger v. Ballard

In Schlesinger v. Ballard,100 as in Kahn, the Court accepted a
hypothetical compensatory justification for a sexually discrimina-
tory statute. In Ballard, a male officer challenged, on equal pro-
tection grounds, the Navy's promotion system under which
women officers were given more time than men to "make the
grade" or face mandatory discharge for lack of promotion. The
Court applied the Kahn rationale,101 concluding that the disparity
in treatment was not merely for administrative or fiscal reasons,
as it had been in Reed and Frontiero, but stemmed from disad-
vantages caused by restrictions on female service in combat and
at sea.102 Because the longer waiting period was held to be com-

99. In two 1974 cases, the Court displayed conflicting attitudes toward protective rationales. In Corning v. Brennan, 417 U.S. 188 (1974), the Court struck down a practice of payment which allowed men to receive higher pay than women for night work. Id. at 204-05. Corning is significant for two reasons. First, for a long time, only men had been allowed to perform night work in the factory involved, id. at 204, and in many factories across the country, Cook, supra note 52, at 64. This exclusion had been based on the Muller doctrine that women were weaker and required protection. By requiring equality in pay, the Court's decision also implied that the grounds for inequality of hiring in the first place no longer existed. 417 U.S. at 208. Second, the company had instituted a night pay differential when the night work force was all male. Even though women were later hired for night work and were still later given a night pay differential, the Court held that the Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1) (1963), required that the mere existence of a differential was not enough; the differential had to be computed on the same basis as that used for men. 417 U.S. at 206-10.

While Corning emphasized equal treatment, Sea-Land Servs., Inc. v. Gaudet, 414 U.S. 573 (1974), although not a pure sex discrimination case, revealed that the Court had not given up protective concerns for women. In Gaudet, a maritime tort case, the Court allowed a widow to recover for loss of support, services and society, as well as funeral expenses, even though her husband, before his death, had recovered damages for wages, pain and suffering, and medical expenses. Id. at 591. Because maritime jobs are traditionally male, the effect of this decision could be to allow women increased protection of their interests through civil tort actions. Cook, supra note 52, at 65. The protective motive behind the Gaudet decision was criticized by Justice Powell, in his dissent, as creating an area of "sentimental" damages not traditionally allowed under admiralty law and as multiplying existing maritime wrongful death laws. 414 U.S. at 585 (Powell, J., concurring).

100. 419 U.S. 498 (1975).

101. Kahn was decided by a vote of 6-3 and Ballard, 5-4. The alignment of the Justices was the same in Ballard as in Kahn except for the addition of Justice Douglas, "who perhaps realized the error of his opinion in Kahn." Johnston, Sex Discrimination and the Supreme Court—1975, supra note 52, at 240.

102. 419 U.S. at 505-08. Justice Brennan dissented in Ballard on grounds similar to his dissent in Kahn. He concluded that there was no compelling state inter-
pensatory for those disadvantages, it was found rationally related to the state's goal of providing fair promotion programs for female officers.

The problem with the *Ballard* decision was that it failed to confront the real issue of the underlying sex-role stereotypes behind the Navy's dual-track promotion system. Even though the Navy plan ostensibly favored women, the decision upholding that plan was not actually beneficial to women. Instead, it reinforced the notion that women are unfit for combat and are physically inferior to men. *Ballard* was also confusing because it is unclear to what extent the Court was according its traditional deference to Congress in matters involving the armed forces.

3. *Weinberger v. Wiesenfeld*

In *Weinberger v. Wiesenfeld*, the Court reconsidered the wisdom of allowing hypothetical compensatory justifications of the type allowed in *Kahn* and *Ballard*. Writing for the Court, Justice Brennan struck down social security laws which provided benefits to a widowed mother but not to a widowed father. Justice Brennan departed from his previous insistence that all sex classifications were inherently suspect and required strict scrutiny. Presumably in an effort to maintain a majority, his decision papered over the conflict between the Justices regarding the

419 U.S. at 511-12 n.1 (Brennan, J., dissenting). Further, Justice Brennan argued that even if there had been a compelling state interest, the statutory means were unacceptable because women did not actually compete with men for promotions. *Id.* at 518. See also Ginsburg, *supra* note 49, at 30 (citing Two v. United States, 471 F.2d 287 (9th Cir. 1972), cert. denied, 412 U.S. 931 (1973)) (arguing that in the typical case, the Navy promotional plan worked to the advantage of men and to the disadvantage of women).

103. Professor Kanowitz argues that the dual-track promotion plan was not entirely beneficial to women for two reasons. First, women became ineligible for severance pay for a period longer than men. Second, the plan eased the pressure on superiors to promote women. Kanowitz, *supra* note 52, at 1407.


107. *Id.* at 653.
equal protection tests to be used,\textsuperscript{108} and he restricted his focus to an analysis of the "means" used by the statute.\textsuperscript{109}

The primary significance of \textit{Wiesenfeld} is that the Court refused to accept the hypothetical legislative purpose that the statute was intended to aid mothers.\textsuperscript{110} The Court required an examination of the \textit{actual} purpose. In making that examination, it found that the statute was intended to help neither males nor females, but rather parents.\textsuperscript{111} The Court implied that "true" compensatory legislation might be acceptable, but it failed to examine important problems with such legislation: that favorable treatment for women continued the practice of paternalism and that special assistance to one group of women (widows) actually harmed another group of women (deceased covered employees whose husbands would receive lower benefits).\textsuperscript{112}

Although the emerging doctrine was unclear, even after \textit{Wiesenfeld}-

\textsuperscript{108} Looking at the votes in \textit{Kahn} . . . and \textit{Ballard}, however, one could also predict that only two or at most three other justices would concur with Mr. Justice Brennan's reasoning. We can only surmise the degree of inner conflict that he must have experienced before committing himself to a position in \textit{Wiesenfeld} that a majority of his colleagues could support. Be that as it may, Mr. Justice Brennan abandoned his previous insistence on strict scrutiny analysis and tailored his opinion closely to the facts of the case and the legislative history of the challenged statute.\textit{Johnston, Sex Discrimination and the Supreme Court—1975, supra note 52, at 252-53 (footnote omitted). For an analysis of the equal protection issues in \textit{Wiesenfeld}, see G. Guntner, Constitutional Law 774 (9th ed. 1975) and Comment, supra note 98, at 510-11.}

\textsuperscript{109} See Comment, supra note 98, at 510-11.

\textsuperscript{110} 420 U.S. at 648 n.16.

\textsuperscript{111} The fact situation in \textit{Wiesenfeld} was especially appealing: Stephen Wiesenfeld, the widowed father, was denied social security a similarly situated widowed mother receives; Jason Paul Wiesenfeld, newborn child of a fully insured individual was denied the opportunity for the personal care of his sole surviving parent. And Paula Wiesenfeld, the deceased wage earner, did not secure through her employment the family protection that would be afforded the family of a male wage earner.\textit{Ginsburg, supra note 49, at 32-33. See also Johnston, Sex Discrimination and the Supreme Court—1975, supra note 52, at 254-57.}

Because the facts in \textit{Wiesenfeld} were very strong, there was no ground to argue that the statute actually was ameliorative or that the classification was not truly sex based. Thus, \textit{Kahn} and \textit{Ballard} provided little support for the defenders of the statute.\textit{See Johnston, Sex Discrimination and the Supreme Court—1975, supra note 52, at 256-57. Perhaps the statute could have been upheld on grounds of deference to legislative judgment regarding social welfare programs. That issue, however, was not dealt with in the majority opinion. Thus, \textit{Wiesenfeld} might be seen more as a response to an appealing fact situation than as a decision which provided progress toward clearing up the analytical confusions of sex discrimination into which the Court had fallen.}

\textsuperscript{112} See Kanowitz, \textit{supra} note 52, at 1409.
it appeared that the Court would review ostensibly compensatory classifications much more leniently than it would review classifications which discriminated against women. The Court held to this position despite attacks arguing that any unequal treatment was a continuation of negative, patronizing, and stereotypical views of women. The Court was concerned with the issues of federalism and legislative deference, concluding that legislators should have wide latitude to experiment with social programs.

Two aspects of the initial “compensatory” programs are important. First, the two cases in which the Court upheld hypothetically compensatory programs are analytically confusing because one was a tax case and the other was a military case; the areas of tax and military matters are areas in which the Court exhibits greater than usual deference to legislative judgements. Thus, it is unclear whether deference in those cases was greater because of the compensatory aspect or because of the nature of the regulation involved. Second, the Court recognized in Wiesenfeld that compensatory motives must be shown to be genuine. Otherwise, virtually any discrimination could be saved by creative argument.113

C. Laws and Policies Regarding Pregnancy

The Court has displayed an increased receptiveness to cases challenging discriminatory treatment on the basis of sex, both to those which disadvantage and to those which claim to benefit women. The Court has been unwilling, however, to display the same degree of receptiveness to challenges against policies relating to pregnancy.114

1. Cleveland Board of Education v. LaFleur

The difference in treatment of pregnancy cases from other sex discrimination cases was first illustrated in Cleveland Board of Education v. LaFleur.115 In LaFleur, the Court struck down a rule which required pregnant teachers to take an unpaid maternity leave at a fixed stage in pregnancy and which also barred re-

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113. It was not clear, however, whether actual compensatory motives need be shown regarding tax or military matters. Perhaps the great deference in these areas would allow the continued use of hypothetical motives.


employment prior to a fixed time after pregnancy. LaFleur is important in the development of sex discrimination law because it appeared to mark at least some shift in the Court's approach to women's roles in society. The LaFleur decision also signaled a different and more restrictive approach to pregnancy-based discrimination than to other types of sex discrimination.

The Court refused to analyze LaFleur in equal protection terms. Rather, the case was discussed in due process terms.

116. Id. at 651.

117. See generally BABCOCK, supra note 52, at 126-29; Cook, supra note 52, at 57; Johnston, Sex Discrimination and The Supreme Court—1971-1974, supra note 52, at 655-61; Karst, supra note 53, at 57.

Other commentators were divided as to whether the decision was actually an indication of a broader view of women's roles. Professor Cook read LaFleur as suggesting that the Court would not allow a woman to be reassigned from her career role to a family role, and that the choice to have a child and work at the same time belonged to the woman and not to societal institutions. Cook, supra note 53, at 57. Professor Karst saw LaFleur as a "woman's role" case in which the Court displayed a sensitivity to negative role-typing and struck down a law which imposed a dependent role upon women. Karst, supra note 53, at 57.

Contra, Johnston, Sex Discrimination and the Supreme Court—1971-1974, supra note 52, at 658-59. Professor Johnston, concluded that LaFleur typified the Court's "continued failure to recognize sex discrimination as a pervasive problem deriving from ancient preconceptions about the role of sex in determining a person's social function and status."

118. See BABCOCK, supra note 52, at 128-29. The authors suggest three theories to support sex discrimination cases: due process, equal protection-fundamental rights, and equal protection-sex discrimination. LaFleur is analyzed as an excellent example of the problems that result from the use of the due process theory. First, the Court treated pregnancy as a unique problem, rather than comparing rules relating to pregnancy to rules relating to other temporary disabilities. Second, a due process approach implies a balancing test rather than a more rigorous scrutiny, and, thus, discrimination may be upheld more easily than under equal protection analysis. Third, consideration of sex discrimination under either the due process or equal protection-fundamental rights theories, rather than an equal protection-sex discrimination basis, tends to increase the examination of the injustice of pervasive sex discrimination in the legal system and in the public institutions. Id. See also Johnston, Sex Discrimination and the Supreme Court—1971-1974, supra note 52, at 660 (suggesting the emphasis on due process in the majority opinion coupled with the rejection of due process theory in the concurring and dissenting opinions signaled a widening shift on the Court as to the application of due process or equal protection theories to sex based classifications); Comment, Pregnancy Based Discrimination—General Electric Co. v. Gilbert and Alternative State Remedies, 81 DICK. L. REV. 517, 518-19 (1977) (suggesting that the Court's refusal to adopt an equal protection analysis implied that it considered pregnancy cases sui generis and that it would treat pregnancy unfavorably). But see Karst, supra note 53, at 31 n.171, 57. Professor Karst argued that the considerations involved in due process and irrebuttable presumption analysis are readily adaptable to equal protection reasoning and suggests that LaFleur could just as easily have been grounded on equal protection theory.
with a primary emphasis on irrebuttable presumption analysis. The Court rejected arguments that rules requiring automatic leave at a fixed time were necessary either to ensure continuity of instruction or to ensure protection of the health of the teacher and the unborn child. Although the objectives of both continuity and protection were seen as legitimate, the mandatory leave requirement was held to be arbitrary and to have no rational relationship to the continuity interest. The requirement swept so broadly as to create a prohibited irrebuttable presumption with regard to the protective interest. Thus, although the discrimination in LaFleur was struck down, the decision was not a major step forward because of the very narrow grounds used.

2. Geduldig v. Aiello

While LaFleur signaled some uncertainty regarding pregnancy classifications, the Court, in its next pregnancy case, Geduldig v. Aiello, clearly announced that it would not automatically strike down such classifications. In Aiello, the Court upheld a state disability insurance plan, which excluded normal pregnancies from the disabilities covered by the plan, against an attack charging that the plan violated equal protection in that it constituted unlawful sex discrimination. The Aiello Court found that a classification concerning pregnancy was not sex-based and therefore implied that the statute needed only to pass the rational relationship test.

120. 414 U.S. at 641-43.
121. Id.
122. Id. at 644. The Court also struck down a mandatory waiting period before return to employment for similar reasons, id. at 650, but allowed a scheme which required both a medical certificate before return to work and guaranteed employment only at the beginning of the next school year following the medical eligibility determination. Id. The latter scheme was held to serve the interests of continuity and protection and, since it allowed for individualized determinations, was deemed not to create an irrebuttable presumption. Id.
125. 417 U.S. at 497.
126. Id. at 496-97. The first question was what standard of review should be applied. Although a majority had never concluded that any classification on the basis of sex was inherently suspect, it was evident from Reed, Frontiero and LaFleur that a “sex-based” statute would have to meet a test of review stronger than that
How can a classification regarding pregnancy not be sex-based? Because, the majority concluded, it divided persons into two classes: pregnant women and nonpregnant persons. The plan "does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities." Having determined that the insurance plan did not need to be reviewed under any standard stricter than that of rational relationship, the Court then concluded that the pregnancy exclusion was rationally related to a legitimate state goal of keeping the costs of the program at their present level.

The Aiello decision was sharply criticized in a vigorous dissent. It was also criticized by commentators on many grounds, including one view that the decision was a "constitutional sport" which embodied an "Alice-In-Wonderland view of pregnancy as a sex-neutral phenomenon." The formalistic Aiello decision indicated that the Court would treat pregnancy classifications as sui
generis. The Court did not appear to perceive the problems of

When I use a word, Humpty Dumpty said, in rather a scornful tone, it means just what I choose it to mean—neither more nor less.

The question is, said Alice, whether you can make words mean so many different things.

The question is said Humpty Dumpty, which is to be master—that's all. Id. (quoting L. CARROLL, THROUGH THE LOOKING GLASS 94 (Random House ed. 1946) (emphasis added)).

Other criticisms of Aiello were that, first, the decision reverted to a discredited pattern of blind deference to legislative judgments. See BABCOCK, supra note 52, at 319. See also Karst, supra note 53, at 54 (suggesting that Aiello is a textbook example of the effect of underrepresentation on “legislative insensitivity”). It has been suggested that the Court's deference to the concept of legislative experimentation for the solution of social problems was not appropriate to the pregnancy exclusion in Aiello. There, the legislature was not “taking one step at a time” nor was it “testing solutions to a complicated problem.” Rather, it had already taken steps to cover virtually every disability except normal pregnancy. Pregnancy and the Constitution, supra note 124, at 1553.

Second, the Court's holding that an exclusion of pregnancy was not discrimination on the basis of sex appeared to be strained.

As an exercise in medieval logic, the reasoning that exclusion of pregnancy from coverage is not sex discrimination is interesting, but it has absolutely no connection with reality . . . . The core argument presented by the attorneys for the appellees was as follows:

The individual who receives a benefit or suffers a detriment because of a physical characteristic unique to one sex benefits or suffers because he or she belongs to one or the other sex. Sex-unique physical characteristics are precisely what define a man or woman as a member of one class or the other. See Erickson, supra note 52, at 278 (quoting Brief for Appellees at 31-32, Geduldig v. Aiello, 417 U.S. 484 (1974)). See also Comment, Geduldig v. Aiello, supra note 124, at 461: Without . . . “sex-unique” differences, men would be indistinguishable from women, and the issue of sex discrimination would never have arisen in the first place. If the Court were being realistic instead of formalistic, it would have to recognize that sex-unique differences are in a real sense at the root and heart of sex discrimination.

Third, two major problems were created by the Court's conclusion that pregnancy, and presumably other single-sex trait classifications, would not be struck down unless the sex discrimination plaintiff could show that the challenged classifications are a “mere pretext designed to effect an invidious discrimination.” First, it implied an intent requirement not found in previous sex discrimination cases. See Geduldig v. Aiello, supra note 124, at 460. Second, the “mere pretext” requirement also placed a heavy burden on prospective plaintiffs. Solid proof of intent is often scarce. Id. See also Erickson, supra note 52, at 280-81.

Fourth, although the Court concluded that the pregnancy exclusion did pass constitutional muster under the rational relationship test, the decision did not provide clear support for that result. The purpose of the insurance program was to reduce suffering caused by unemployment resulting from disability. The Court, however, never explained how the exclusion of pregnancy was related to that purpose nor why pregnancy related disabilities, rather than various other disabilities, were excluded. See Erickson, supra note 52, at 279 (citing Brief for Appellant at 18-24, Geduldig v. Aiello, 417 U.S. 484 (1974)). See also Pregnancy and the Constitution, supra note 124, at 1561-63.

Fifth, the Aiello holding created the possibility that the “sex-plus” theory, which supposedly had been buried in Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971), see note 51 supra, might be resurrected. See also Erickson, supra note 52, at 281-82; Pregnancy and the Constitution, supra note 124, at 1555-58.

Finally, the Aiello decision created increased uncertainty regarding the law of
negative stereotyping and role-labeling created by such classifications.133

See Cook, supra note 52, at 57. Cook suggests that, after Aiello, the middle class pregnant woman is encouraged to perform her "natural" function of staying in the home. Yet, if she is neither poor enough for welfare nor from a monied family, and desires the independence of self protection, she does not have any constitutional right to the typical insurance plan which protects male disabilities. See also Erickson, supra note 52, at 279-81 (suggesting the only way to account for the Aiello decision is that the Court was simply unable to comprehend the totality of the sex discrimination problem because of the societal structure erected on the myth of "woman's place"); Powe, The Supreme Court and Sex Discrimination, 1 WOMEN L. REP. 1 (1974) (suggesting Aiello may have been decided the way it was because of lack of political support for a decision which might have the effect of raising taxes); Geduldig v. Aiello, supra note 124, at 461 ("about all the Supreme Court accomplishes by its semantic approach in Aiello is to suggest that it does not take sex discrimination very seriously").

The Court's failure to recognize the flimsy justifications for a law which disadvantages many women suggests that the Court itself is blinded by certain stereotypes about pregnancy. . . . The notion that pregnancy is different from other disabilities with respect to a state disability insurance program suggests the familiar set of stereotypes—that women belong in the home raising children, that once women leave work to have babies, they do not return to the labor force, that pregnancy, though it keeps women from working, is not a "disability" but a blessing which fulfills every woman's deepest wish, that women are and should be supported by their husbands, not themselves or the state. These stereotypes appear to be so deeply ingrained, so tied to fundamental beliefs about woman's place in the world as childbearer, that the Court apparently did not notice that they have nothing to do with the express purpose of the disability insurance program.

Pregnancy and The Constitution, supra note 124, at 1563-64.

133 In a per curiam decision, the Court, in Turner v. Dept. of Employment Security, 423 U.S. 44 (1975), struck down an unemployment compensation plan disqualifying pregnant women for a fixed period of time before and after childbirth. As in LaFleur, the Court refused to apply equal protection analysis but instead applied due process analysis. Id. at 45-46. The Court saw two distinctions between Turner and Aiello. First, the state's argument that the exclusion of pregnancy was not a presumption of inability as in LaFleur, but rather a limitation on coverage as in Aiello, came too late. The Court found that the state, in prior argument before its state supreme court, had characterized the period near pregnancy as one of inability to work. Id. at 45. Second, the Court found that the Aiello statute involved policy decisions regarding coverage limitations and insurance principles, but the Turner statute did not. Id.

Nevertheless, a state decision on whether to provide coverage under unemployment compensation seems to be one involving a legislative balance between policies of protection and desires to avoid spending increases. The Court really seized upon the weaknesses of the state's prior argument as a way of avoiding the state's new argument that the principles underlying Aiello also applied to Turner. This decision could have been an attempt to soften the harshness of Aiello.
D. Summary

As he settled into his new chambers, had Justice Stevens asked his colleagues what the status was of sex discrimination law, it is doubtful whether he could have received a clear answer. Most of the sex discrimination cases had revolved around equal protection concepts, but the justices were engaged in an ideological tug-of-war regarding the appropriate standard of scrutiny. The Court dodged the hard issues of sex discrimination when it could; when it could not, it frequently decided them on narrow, if not arcane, grounds.

The Court had developed, however, certain doctrines, and some patterns had emerged. First, it was clear that sex discrimination laws and policies would not be considered “suspect” and would not receive “strict scrutiny.” But on the other hand, the Court would not grant total deference to legislatures by applying a minimal rational relationship standard. The Court had rejected many concepts of “romantic paternalism.” To be sure, a “newer” equal protection utilizing an “intermediate” level of scrutiny had been created.

If the classification was seen as discriminating against women, the scrutiny given by the Court might not be “strict,” but it was relatively vigorous. If, however, the classification was seen as attempting to benefit women by recompensing them for past disparate treatment, the review would be much more lenient. The Court had begun to emphasize that the compensatory motive must be actual and not hypothetical. Finally, the Court did not appear willing to consider challenges against pregnancy classifications on grounds of sex discrimination.

III. The Supreme Court Sex Discrimination Opinions of Justice Stevens

When Justice Stevens assumed his position on the United States Supreme Court, he might not have appeared to be a jurist who would help the Supreme Court move forward in its understanding of sex discrimination issues. After all, several of his Seventh Circuit decisions relied on mechanical, formalistic reasoning; or, alternatively, on the brusque rejection of arguments in finding against sex discrimination plaintiffs.134 Challenged with criticisms of those decisions at his nomination hearings, Justice Stevens did not respond with any strong recognition of sex discrimination problems.135 Although he told the Senate Judici-

134. See discussion in Part I supra.
135. See note 4 supra.
ary Committee merely that he had an open mind on the question of whether sex-based classifications were inherently suspect and should be subjected to strict scrutiny, it soon became apparent that Justice Stevens would not become the Court's fifth vote categorizing sex classifications as inherently suspect.

Despite these unportentous signs, Justice Stevens was to emerge as a strong and creative, although strangely inconsistent, force on the Court advocating a more serious consideration of sex discrimination claims. Certainly, he is not the strongest supporter for using the law to strike down sexually discriminatory policies; that position is occupied jointly by Justices Brennan and Marshall. Justice Stevens, however, may have created a critical role within the dynamics of the ideological splits on the Court. He has acted as conciliator and reconciler in tying the Court's decisions to precedent, while at the same time acting as a catalyst in helping the Court move forward to develop more progressive policies. His opinions show a development from early attempts at developing specific "models" to later opinions stressing the importance of clear decisions that could be understood and applied by lower courts.

Justice Stevens is flexible and has focused on obtainable results. Although he has not espoused many vanguard positions, he has written carefully, but also boldly, leading a majority of the Court toward greater realization of sexual equality. The net effect of his opinions may have been to help the Court move forward more quickly than it otherwise would have, had he written more dogmatic, albeit ideologically "pure", decisions.

136. Judge STEVENS: . . . [Y]ou have pointed out where there is a classification problem in the racial discrimination cases, and I understand you to be asking me if I would find a rational basis, a sufficient basis, for a classification on racial grounds. Clearly I would not. I think the law is well-settled, and properly so, that a much heavier burden, perhaps almost as insurmountable burden, exists in order to justify any classification on any such factor.

And now you turn to the question of sex discrimination. I think you were asking me whether the heavy burden test should apply in sex discrimination cases.

Senator MATHIAS: Whether you have a similar approach to the racial?

Judge STEVENS: I am not sure, Senator. I am not sure whether the same test would apply or not. I don't think the court—the court has dodged and fenced a little bit on that question. They have made it clear . . . that the classification is one that is subject to the equal protection clause, but that the standard of review may or may not be the same as it is in racial discrimination areas.

*Stevens Hearings, supra* note 3, at 57 (testimony of John Paul Stevens).
This Part examines Justice Stevens' opinions in four areas of sex discrimination. His opinions in the three areas discussed earlier of policies which disadvantage women, policies which ostensibly benefit women, and policies regarding pregnancy will be considered, but in a different order than discussed above. Initially, however, it is useful to briefly examine Justice Stevens' opinions in two cases regarding access to the courts for sex discrimination plaintiffs.

A. Access to the Courts

1. Cannon v. University of Chicago

In Cannon v. University of Chicago,137 Justice Stevens seized the opportunity to declare that victims of sex discrimination in educational programs covered by Title IX of the Education Amendments of 1972138 must be entitled to access to the courts via private actions. Although it does not specifically discuss issues of sex discrimination, the Cannon decision is important because in the area of educational discrimination, it affords sex discrimination plaintiffs rights similar to those afforded race discrimination plaintiffs. Nevertheless, Justice Stevens' opinion in Cannon is flawed. Although the opinion was a reaction to poor enforcement of Title IX, it did not directly come to grips with the question of what judicial approach should be taken in the face of weak enforcement of such a statute. Further, the opinion's application of the test announced in Cort v. Ash139 is both off-handed and imprecise. Justice Stevens could have reached the same result by forthrightly critiquing and modifying the Cort test. Instead, he strained the application of Cort in a demonstration of judicial sleight-of-hand. While such approaches are certainly not unusual on the Supreme Court, or other courts, Justice Stevens eschewed the opportunity he had taken on other occasions to demand that the Court clearly announce the “real” reasons for its decision.140

137. 441 U.S. 677 (1979).
139. 422 U.S. 66 (1975).
140. See, e.g., Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981). In Hague, a choice-of-law case, the majority approved the application of the law of Minnesota, although Wisconsin had far more significant contacts with the parties and the occurrence. In a strained opinion, the majority attempted to show that Minnesota's contacts were more significant than Wisconsin's. Justice Stevens, concurring, refused to participate in the charade that Minnesota's contacts were more significant. Rather, he suggested that the Court announce its view that, although the result was unsound as a matter of conflicts law, it could be affirmed because, despite the Minnesota's lesser interest, the decision did not result in fundamental unfairness. Id. at 320-32 (Stevens, J., concurring).
Cannon raised the troublesome question of when a private cause of action should be inferred from a statute. Title IX specifically prohibited sex discrimination in educational programs receiving federal funds, but it did not explicitly provide for a private right of action to enforce that prohibition. The only statutory enforcement scheme provided for termination of federal funds by the Department of Health, Education & Welfare (HEW). Although the Court has taken varying and inconsistent approaches to the question of what criteria properly determines when a private right of action should be inferred, Justice Stevens did not refer to the history of those approaches. He began his analysis by assuming that the applicable test was that used in Cort.

The first of the four Cort criteria is whether the statute was enacted for the benefit of a special class of which the plaintiff is a member. Justice Stevens emphasized that Congress had not written Title IX in an active voice banning discriminatory conduct by federally funded educational institutions. He said, instead, that Congress had used a passive voice which referred to the prevention of harm against specific persons: "no person . . . shall, on the basis of sex . . . be subjected to discrimination . . ."145 Because this language is in contrast to the language used in criminal laws and other laws for the protection of the public at large, and because this language is similar to language in the Voting Rights Act of 1965, in which the Court had inferred a private cause of action, Justice Stevens found that Title IX explicitly conferred a benefit on a special class, namely, victims of sex discrimination, and that the plaintiff was a member of that class.

Turning to the second Cort criterion, legislative history, Justice

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142. 441 U.S. at 688.
143. Id. at 689.
144. Id. at 690-93.
148. 441 U.S. at 694. Petitioner Cannon had alleged that she was denied admission to federally assisted medical schools because she was a woman. Id. at 680-82 n.2.
Stevens found that the legislative history of Title IX plainly indicated a congressional intent to create a private cause of action.\textsuperscript{149} But if the intention were plain, Justice Stevens discerned it by a rather circuitous route. He began by comparing Title IX to Title VI. Both statutes used virtually identical language. Although neither statute expressly created a private cause of action, in 1967, a circuit court of appeals had held in \textit{Bossier Parish School Board v. Lemon},\textsuperscript{150} that Title VI did create a private cause of action. The legislative history of Title IX did not mention \textit{Bossier}. Since that legislative history did refer to Title VI, Justice Stevens presumed that Congress was aware of the \textit{Bossier} interpretation and intended for that interpretation to apply to Title IX.\textsuperscript{151}

\textit{Bossier} was a circuit court, not a Supreme Court, decision. Despite this, Justice Stevens emphasized that it had never been seriously questioned and that it had been cited with approval in numerous lower court decisions.\textsuperscript{152} Moreover, he emphasized that the Supreme Court had found an implied right of action in the Voting Rights Act,\textsuperscript{153} a statute with language similar to Title IX, and in statutes much less clear than Title IX.\textsuperscript{154} Thus, Justice Stevens concluded that the Court could presume that Congress was aware of prior Court decisions, that Congress would have concluded that the Supreme Court would infer a private right of action from Title IX, and that Congress' silence implied acquiescence in that interpretation.

Perhaps realizing the slender reed of his inferential legislative history analysis, Justice Stevens found that there was a more direct and persuasive reason for finding a private cause of action in Title IX. Congress included Title IX within the scope of the Civil Rights Attorneys Fees Award Act of 1976,\textsuperscript{155} which provides for court awards of attorneys' fees in cases under Title VI, Title IX, and other civil rights statutes.\textsuperscript{156} Certainly if attorneys' fees are allowed, he reasoned, the suits generating those fees must also be allowed.

The third \textit{Cort} criterion is whether a private cause of action is consistent with the underlying purposes of the legislative

\textsuperscript{149} \textit{Id.} at 694.
\textsuperscript{150} 370 F.2d 847, 852 (5th Cir. 1967). Justice Stevens emphasized the distinguished nature of the \textit{Bossier} panel: Judge John Minor Wisdom, who wrote the opinion; then-Judge Warren Burger, sitting by designation; and then-Judge, now Chief Judge, John Brown. 441 U.S. at 696 n.20.
\textsuperscript{151} 441 U.S. at 697-98.
\textsuperscript{152} \textit{Id.} at 696.
\textsuperscript{153} See note 146 \textit{supra} and accompanying text.
\textsuperscript{154} 441 U.S. at 698 n.23.
\textsuperscript{156} 441 U.S. at 699 & n.25.
scheme. In *Piper v. Chris-Craft Industries, Inc.*, the Court had implied that, to meet this test a remedy must be *necessary* to ensure the fulfillment of congressional purposes. Although dissenting on other grounds in *Piper*, Justice Stevens seemed to agree that the test should be whether a private remedy was necessary to achieve full compliance with the congressional purpose of a statute. In *Cannon*, Justice Stevens made a major change in the third *Cort* test. He had stated that a private cause of action should be “necessary or at least helpful to the accomplishment of the statutory purpose.” This language, combined with the manner in which Justice Stevens paraphrased the *Cort* test, indicates that perhaps Justice Stevens viewed effective enforcement, rather than an often ephemeral legislative intent, as the real key to the creation of a private cause of action.

Analyzing the issue of effective enforcement, Justice Stevens concluded that the statutory enforcement mechanism was limited. First, the only weapon against a discriminating educational facility was termination of federal funds. This severe weapon would be rarely used and would not be effective for remedying individual, and especially isolated, acts of discrimination. Second, the HEW had a poor record of Title IX enforcement and

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157. 422 U.S. at 78.
159. Id. at 41.
160. Id. at 61.
161. 441 U.S. at 703 (emphasis added). Justice Stevens did not refer to the *Piper* opinion.
162. The *Cort* Court stated the third test as follows: “[I]s it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?” 422 U.S. at 78. Justice Stevens phrased the test in a negative manner much more favorable for the plaintiffs.
163. See Note, How to Cure Your Sex Discrimination Ills: Take One Title IX Private Action and *Cannon v. University of Chicago, Then Sue Them in the Morning*, UTAH L. REV. 629, 645-46 (1980), for the argument that the question of effective enforcement is the critical question regarding creation of a private remedy. The student author recommended a three-tiered test embodying a strict necessity approach.
164. 441 U.S. at 704-05.
165. Since the *Cannon* opinion was written, the Department of Education was created. 20 U.S.C. § 3411 (1979).
had candidly admitted the need for additional enforcement via private causes of action.166

The fourth Cort criterion is whether finding a private cause of action would be inappropriate because the subject matter involves an area of traditional state concern.167 Justice Stevens paused at this criterion only briefly. The federal courts, he stated, have always served a "primary and powerful" role in protecting citizens against discrimination of any kind, including sex discrimination.168 Because Justice Stevens found that all four Cort criteria militated for allowing a private cause of action, however, he reserved for another day the question of how these criteria should be weighed when they are not resolved uniformly.169

Justice Rehnquist concurred, but in an odd way. His opinion strongly suggested that unless Congress explicitly created a private cause of action, the Court should not infer such a private right. Nevertheless, Justice Rehnquist reasoned that, because "[w]e do not write on an entirely clean slate," in that Congress had become accustomed to relying on the courts to determine whether private causes of action should be implied, the Cannon Court need not reject the private cause of action.170 He warned that in the future, however, the Court should not be as tolerant.

Dissenting, Justice White agreed with Justice Stevens that the Cort analysis was the proper approach to the issue, but disagreed with his version of the legislative history of Title VI and Title IX. Justice White concluded that Congress did not intend to add any private remedy beyond that available through section 1983.171

Justice Powell also dissented, although upon more fundamental grounds. He strongly rejected the Cort analysis for two reasons: first, it invited independent judicial lawmaking172 and second, it encouraged Congress to avoid taking the hard step of explicitly determining whether it wished to create a private cause of ac-

166. 441 U.S. at 707-08 & nn. 41 & 42. In the lower court, HEW had taken the position that a private cause of action under Title IX should not be granted. See Note, Title IX: No Longer An Empty Promise—Cannon v. University of Chicago, 29 DE PAUL L. REV. 263, 283-86 (1979) (suggesting that HEW's inconsistent position was just another sign of the agency's inadequate enforcement of Title IX).

167. 422 U.S. at 78.


169. 441 U.S. at 709.

170. Id. at 717-18 (Rehnquist, J., concurring). Justice Rhenquist also may have concurred in Cannon because of his recent concurrence in Justice Stevens' opinion in Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). Justice Stevens assumed arguendo that Mr. Bakke did have the right of a private cause of action under Title VI.

171. 441 U.S. at 719-24 (White, J., dissenting).

172. 441 U.S. at 740 (Powell, J., dissenting).
Adopting the canon of construction *expressio unius est exclusio alterius*, he emphasized that unless Congress explicitly created a private cause of action, it necessarily had rejected the creation of such a private action. For the Court to then create a private cause of action, he reasoned, was an improper extension of its jurisdiction and authority.

Justice Stevens' opinion in *Cannon* exemplifies many of his sex discrimination opinions. First, he accurately recognized the problem. In *Cannon*, the problem involved a plaintiff discriminated against by private universities. As he had demonstrated in his Seventh Circuit *Cohen* opinion, state action was a significant hurdle to a section 1983 action by such a plaintiff. Title IX was specifically aimed at the problem of sex discrimination in any educational facility, public or private, which received federal funds. If Title IX offered no additional remedy, however, the statute would not be able to achieve the very purpose for which it was enacted.

Second, Justice Stevens arrived at the proper result. Justice Powell's fears of judicial legislation were groundless. To find a private cause of action was to achieve the policy goal of the statute. Indeed, to refuse to find such a private cause would have amounted to a negative form of judicial legislation because it would have frustrated the policy goal.

In addition, Justice Stevens astutely recognized that effective enforcement was the key issue. The inference of a private cause of action in federal regulatory statutes is necessary when, without such a right, enforcement will suffer. As the Court stated in *Bell v. Hood*, "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."

Justice Stevens emphasized the importance of quality of enforcement. The significance of the quality of enforcement is the key contribution of his creative reinterpretation of the third Cort

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173. *Id.* at 743.
174. The vitality of this canon is still hotly debated. See Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 29 (1979) (White, J., dissenting) (Court's application of this canon inconsistent with rejection of the canon in *Cort*, 422 U.S. at 82-83 n.14). See also *Civil Rights and Private Wrongs*, supra note 141, at 494.
175. See notes 33-44 supra and accompanying text.
176. *See Note, supra* note 166, at 263-64 n.4.
177. 327 U.S. 678, 684 (1946).
He emphasized that a private cause of action should be granted even if it were not “necessary” to enforcement of a statute, so long as it would be “helpful” to enforcement. This point is critical because some enforcement, specifically, termination of federal funding, was available under Title IX. It is a rare statute indeed which does not provide at least some theoretical means of enforcement. But, when Congress creates a scheme of enforcement, it is not able to anticipate whether and where structural gaps in enforcement will appear. Therefore, the courts must be able to fulfill Congress’ purpose, eliminating sex discrimination in federally funded educational institutions, by creating a private cause of action. Otherwise, given the problems known to result from poor enforcement, the Court would sanction the very existence of the discrimination that Congress desired to eradicate.

Because enforcement is the key criterion in deciding whether a private right of action should be inferred, the other Cort criteria amounts to abstruse surplusage. For even if the other factors should be negative, a structurally inadequate enforcement scheme alone should be a sufficient reason to infer a private cause of action. Moreover, when enforcement is inadequate, provision of a private right of action is not an encroachment on the legislature’s area of power, because the judiciary is not usurping the legislature’s role of creating laws; it is staying within its authority by providing effective enforcement of the law which Congress has made.

Although the result Justice Stevens reached was pragmatically correct, the route he used to arrive at that result was less than a model of judicial artfulness. Unlike other opinions in which he would demonstrate creative persuasiveness, in Cannon, only two other justices squarely agreed with his opinion. In order to

178. See note 161 supra and accompanying text.
180. See Overview of Implied Right, supra note 141, at 1022-24 (courts should follow the rationale of effectuating congressional goals in the most beneficial manner, regardless of the existence of an explicit enforcement mechanism). But see Note, supra note 163, at 647 (the student author argues that even if private enforcement is shown to be necessary, a plaintiff should not be allowed a federal remedy if a state remedy exists). But such a view applied to race discrimination, for example, would gut effective enforcement.
181. Justices Brennan and Marshall were the only two justices in full agreement with Justice Stevens. Although Justices Rehnquist and Stewart technically joined the Stevens’ opinion, Justice Rehnquist wrote a concurring opinion, in which Justice Stewart joined, which clearly disagreed with Justice Stevens’ reasoning; it amounted to a concurrence “just this once” by announcing that, in the future, these justices would not find a private cause of action where not explicitly authorized. Justice Burger concurred separately without writing an opinion. Justice Blackman joined Justice White’s dissent.
reach a result granting Ms. Cannon a private cause of action, Justice Stevens had to make a difficult choice. He could either "stretch" the Cort analysis, or he could demand that the Cort test be modified or abandoned. He chose to stretch Cort and in so doing, he left some gaping analytical holes for future cases.

The first Cort criterion, whether the plaintiff is a member of the special class for whose benefit the statute was passed, unnecessarily duplicates the tests required for standing. Additionally, the conflicting evidence of congressional intent proferred by Justices Stevens and White shows the complexity, indeed the futility, of attempting to divine "the" congressional intent of a statute. Although the oldest canon of statutory interpretation may be the shibboleth that a statute should be construed with "the" overriding purpose of the legislature kept firmly in mind, the fact is that there are numerous conflicting statements in most legislative histories.

Certainly, courts should not ignore legislative history in all cases, as advocated at the turn of the century by Justice Peckham. Congress today is hardly a "lawyer's paradise... where men express their purposes not only with accuracy, but

182. Perhaps Justice Stevens had no practical choice, for if he abandoned the Cort approach, Justices Rehnquist and Stewart may have felt free to dissent outright, in which case the votes to deny a private cause of action would have become a majority. Thus, perhaps Justice Stevens' embodiment of Cort, fractured as it was, was necessary to secure an affirmative result.

183. See Note, supra note 163, at 637-38 (either the first Cort criterion goes too far, in that it duplicates the standing test, or it does not go far enough, in that it does not question the extent of protection Congress intended to give the protected class).

184. See In re Chicago, Milwaukee, St. Paul and Pacific Ry. Co., 641 F.2d 482, 487 (7th Cir. 1981) (suggesting "the" legislative intent). But the notion of "the" legislative intent is too narrow and does not accord with reality. As Lord Justice Farwell stated: "In the case of an Act dealing with a controversial subject ambiguous phrases are often used designedly, each side hoping to have thereby expressed its own view, and the belief of each that it has succeeded is more often due to the wish than to any effort of reason." King v. County Council of the W. Riding of Yorkshire, 2 K.B. 676 (1906) (Farwell, L.J.), quoted in Hurst, Statutes in Court 143 (1970). See also United States v. Fisher, 6 U.S. (2 Cranch) 358, 386 (1805) (Marshall, C.J.) ("When the mind labores to discover the design of the legislature, it seizes every thing from which aid can be derived. . ."). See also note 417 infra.

185. See United States v. Trans-Missouri Freight Assoc., 166 U.S. 290, 318 (1897) ("Looking simply at the history of the bill from the time it was introduced in the Senate until it was finally passed, it would be impossible to say what were the views of a majority of the members of each house in relation to the meaning of the act.").
with fullness." Justice Stevens' creative view of the "history" of Title IX, however, went beyond what was actually a part of the history of that Act and incorporated what, according to him, should have been a part of the history of that Act.

Moreover, Justice Stevens' "new" history, although relevant, was far from conclusive. Justice Stevens concluded that Congress must have intended to create a private cause of action for Title IX in a non-class action case because it must have been aware of the Bossier case. In finding without doubt that Congress had such an intent, Justice Stevens brushed aside the following: that Bossier was a circuit court of appeals case and that the Supreme Court often reverses the circuit courts and with no compunction; that the private cause of action language in Bossier may have been dictum because section 1983 was an alternative remedy; that Bossier was a class action suit, not an individual action; that there was no actual reference to Bossier in the legislative history; that the Bossier progeny in the lower courts were distinguishable; and that the attorneys' fees statute arguably applied only to section 1983 actions. Perhaps Justice Stevens may have overcome each of these objections had he specifically confronted them, but he failed to do so. Similarly, his finding that the fourth Cort criterion, interference in an area traditionally regulated by the state was met, was totally conclusory. With regard to three of the four Cort criteria, then, Justice Stevens did not confront head-on the hard objections to the Cort analysis.

As previously discussed, Justice Stevens did directly confront the critical third Cort criterion, enforcement. Indeed, he explicitly broadened the Cort standard to allow the inference of a private remedy when to do so would be helpful, even though not necessary, to effective enforcement. Interestingly, however, Justice Stevens neglected to consider the Court's role in demanding vigorous enforcement of the administrative mechanism which Congress had created.

Justice Stevens implied that a major reason for finding a private cause of action was HEW's ineffective enforcement of Title IX. Within its limitation, that argument is strong, but Justice Stevens said nothing in Cannon to demand more vigorous enforcement of Title IX. Just as the Court had ignored the underlying problem in Frontiero, unequal opportunities for desirable assignments, in

186. Wyzanski, Judge Learned Hand's Contribution to Public Law, 60 HARV. L. REV. 348 (1947).
187. 441 U.S. at 703.
188. See Note, supra note 163, at 639-41.
189. See note 167 supra and accompanying text.
190. See notes 66-80 supra and accompanying text.
approving a palliative remedy of a dual-track promotional system, so in Cannon Justice Stevens approved a palliative, although necessary, remedy while ignoring the underlying problem. Thus, the Cannon decision did not go far enough. It created the needed private cause of action but said nothing to demand vigorous enforcement from the appropriate administrative agency. In this sense, the Cannon result may serve as a "pressure valve" to deflect criticism from, and perhaps even to sanction inaction by, administrative agencies.1

In summary, Justice Stevens' opinion in Cannon was pragmatic, creative, and responsive to the serious problem of sex discrimination plaintiffs. The decision significantly advanced the law regarding the inference of a private cause of action if "helpful" to effective enforcement. Ultimately, however, Justice Stevens' opinion in Cannon was not persuasive. He reached the right result in granting sex discrimination plaintiffs needed access to the courts under Title IX. He even reached that result, to some extent, for the right reason, in that such access to court was helpful to effective enforcement. Yet, in the end, he did not write a fundamentally solid opinion.

2. Great American Federal Savings & Loan Association v. Novotny

In Cannon, Justice Stevens emphasized the pragmatic problems of enforcement in allowing sex discrimination plaintiffs to seek relief in federal courts. But in a concurring opinion in Great American Federal Savings and Loan Association v. Novotny,192 he demonstrated, as he had in his Seventh Circuit Cohen opinion,193 that he was willing to at least partially close the courtroom doors on sex discrimination plaintiffs.

Novotny involved a male bank officer who had been fired after he complained of sex discrimination by the bank against female employees. He sued the bank for sex discrimination under Title VII and for conspiracy to deprive him of equal protection and privileges under the laws under section 1985(3).194 Title VII does

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191. See Note, supra note 166, at 283-86, 285.
193. See notes 33-44 supra and accompanying text.
194. 42 U.S.C. § 1985(3) (1976) provides:
If two or more persons in any State or Territory conspire ... for the purpose of depriving, either directly or indirectly, any person or class of per-
not allow jury trials and limits awards to back pay and, in some cases, attorneys' fees.\textsuperscript{195} Section 1985(3), however, could allow jury trials and punitive as well as compensatory damages.\textsuperscript{196} The question before the Court was whether section 1985(3) could be used to vindicate deprivations of rights against sex discrimination.\textsuperscript{197}

Writing for the majority, Justice Stewart concluded that conspiracy to discriminate on the basis of sex did not come within the purview of section 1985(3). Justice Stewart reasoned that, in Title VII, Congress had created a comprehensive plan emphasizing nonadversary resolution of claims through voluntary cooperation.\textsuperscript{198} Citing \textit{Brown v. GSA},\textsuperscript{199} in which the Court held that Title VII was the exclusive remedy for discrimination against fed-

\begin{quote}
sons of the equal protection of the laws, or of equal privileges and immunities under the laws . . . the party so injured or deprived may have an action for the recovery of damage occasioned by such injury or deprivation, against any one or more of the conspirators.
\end{quote}

\textsuperscript{195.} 442 U.S. at 374-76.

\textsuperscript{196.} \textit{Id.}

\textsuperscript{197.} There was a serious question regarding whose sex discrimination rights Mr. Novotny was attempting to vindicate. The majority and concurring opinions assumed, without discussion, that Mr. Novotny was asserting only his right to be free from retaliation under § 704(a) of Title VII. Section 704(a) provides: “It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter . . . .” 42 U.S.C. § 2000e-3(a) (1976). As the dissent emphasized, however, Mr. Novotny was also attempting to vindicate the rights of women employees under section 703(a) of Title VII to be free from sexual discrimination. Section 703(a) provides:

\begin{quote}
It shall be an unlawful employment practice for an employer—
\begin{enumerate}
\item to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or
\item to limit, segregate, or classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.
\end{enumerate}
\end{quote}


The result in \textit{Novotny} was made easier for the majority and concurring opinions because they dodged this important issue regarding Mr. Novotny’s rights. First, Mr. Novotny could very well have been injured in the course of a conspiracy to deny § 703(a) rights to female employees. Second, the protection afforded Mr. Novotny under § 704(a) was somewhat fortuitous. Section 704(a) protects only employees and applicants. Others, such as customers, suppliers, or officers, are not specifically protected. Thus, if Mr. Novotny had been a bank director only, and not also an employee, and had been dismissed from his directorship for complaining about sex discrimination, he would not have had a claim under § 704(a). See 447 U.S. at 337-38 (White, J., dissenting). Because the existence of a § 704(a) claim at all was fortuitous, the dissent interpreted the majority’s holding to apply as if Mr. Novotny was seeking to vindicate § 703(a) rights of female employees.

\textsuperscript{198.} 442 U.S. at 372-73.

\textsuperscript{199.} 425 U.S. 820 (1976).
eral employees, Justice Stewart emphasized that allowing other than Title VII remedies would interfere with the “balance, completeness, and structural identity” of Title VII. Justice Stewart reasoned, because section 1985(3) had not created any rights. Section 1985(3) was merely a remedial statute, allowing a cause of action when some “otherwise defined” federal right was breached.

What rights, then, would section 1985(3) protect? The Court did not address this issue in the majority opinion, but both Justices Powell and Stevens did address the issue in their concurring opinions. Justice Powell, in his concurrence with the majority and with Justice Stevens, declared that section 1985(3) protected only “those fundamental rights derived from the Constitution.”

Justice Stevens, agreeing with both the majority and with Justice Powell, concurred separately in order to explain his views on the legislative history of the post-Civil War civil rights statutes. The predecessors of sections 1983 and 1985 referred to “rights, privileges, or immunities secured by the Constitution” and to “equal protection of the laws” and “equal privileges and immunities under the laws.” This language, Justice Stevens reasoned, suggested that these sections were merely vehicles to provide federal remedies for deprivation of rights under the Constitution, especially the newly ratified fourteenth amendment. Although some privileges and immunities of citizenship are protected against interference from private action, the right to equal protection of the laws refers only to protection against state action. Justice Stevens reasoned that section 1985(3) has an implied state action requirement. It only protects constitutional rights, and the constitutional right here at issue was under the fourteenth amendment, which also only protects against state action, not private discrimination. Thus, Justice Stevens concluded that sec-

200. 442 U.S. at 376 (quoting Brown v. GSA, 425 U.S. at 832).
201. 442 U.S. at 376. The assertion that § 1985 is not substantive but purely remedial is critical to the majority opinion. Justice Stewart, however, could provide no authority for that assertion.
202. Id. at 379 (Powell, J., concurring).
203. Id. at 382 (Stevens, J., concurring).
204. Id. at 383.
205. The right to engage in interstate travel and the right to be free of badges of slavery were those listed by Justice Stevens. Id.
206. Id. at 383-84.
207. Id.
tion 1985(3) does not cover private conspiracies to discriminate on the basis of sex.208

Justice White dissented, noting the practical harm created by the Court's decision: employers could now conspire with invidious discriminatory animus and escape the more severe liabilities of section 1985(3).209 He also emphasized that the majority and concurring opinions had begged the question regarding whose rights were at issue.210

In his dissent, Justice White agreed that, at a minimum, section 1985(3) protected rights guaranteed by other federal laws.211 He emphasized that section 1985(3) also does more. It provides a remedy for any person injured as a result of a deprivation of a substantive federal right. Thus, it creates a substantive right in cases where the persons injured are persons other than those to whom the underlying federal right extends.212 Novotny was just such a case. Mr. Novotny was seeking redress for an injury caused to him as a result of a denial of the female employees' Title VII rights. Justice White suggested that Mr. Novotny might not even have a Title VII remedy. Even if Mr. Novotny did have such a remedy, other 1985(3) plaintiffs might not be so fortuitous. Justice White reasoned that the majority's holding made no sense because such plaintiffs would then be left with no remedy—a result clearly contrary to congressional intent.213

Justice White further reasoned that persons who did have a right of action under Title VII also had a separate right of action under section 1985(3). He stated that simply because there was some overlap between section 1985(3) and Title VII, an implied repeal of section 1985(3) was not warranted.214 The statutes did not seriously overlap because they protected two distinct rights. Section 1985(3) protected the right not to be subject to an invidious conspiracy to deny other rights, and Title VII created the right to be free from discrimination in employment.

Moreover, even if section 1985(3) were purely remedial, Justice White emphasized the lack of precedent for an implied repeal of that statute. He reasoned that the majority's reliance on Brown was misplaced, because in Brown Congress clearly intended that federal employees have a right of action only under Title VII.215

208. Id. at 385.
209. See note 196 supra and accompanying text.
210. See note 197 supra.
211. 442 U.S. at 388 (White, J., dissenting). Justice White emphasized, however, that other federal law could be either the Constitution or statutory law.
212. Id. at 390.
213. Id. at 390-91.
214. Id. at 391.
215. Id. at 393.
That a statute created a remedy, and not a substantive right, had never been held sufficient for finding an implied repeal of that statute. Here, the remedial aspect of 1985(3) supplemented Title VII. Thus, there was no inconsistency between the statutes. Justice White concluded that even if the plaintiff could get some relief under Title VII, he should also be allowed to get the more complete relief available under section 1985(3).

Given the seriousness of the problems presented by the majority’s holding, identified by the dissent, and given the emphasis Justice Stevens placed in Cannon on ensuring access to federal courts for sex discrimination plaintiffs confronted with ineffective enforcement, Justice Stevens’ opinion in Novotny is hard to fathom. First, neither Justice Stevens nor the Court truly examined the putative inconsistency between section 1985(3) and Title VII. They merely asserted that the two conflicted and chose to favor the latter at the expense of the former. Yet under established principles of statutory interpretation, the dissent’s conclusion that a sex discrimination victim should have the remedies of both Title VII and section 1985(3) seems better reasoned.

Second, the use of precedent by both Justice Stevens and the majority was shaky. The majority’s opinion was flawed because it overemphasized Brown and virtually ignored a key line of cases suggesting that causes of action under both Title VII and the post-Civil War rights statutes should be allowed. Justice Stevens did not examine the Court’s failure to give weight to all of the relevant precedent.

216. Id. at 393-94.
217. Id. at 394-95.
220. See Sex Discrimination, supra note 218, at 932-33 n.29.
221. Johnson v. Railway Express Agency, 421 U.S. 454, 459 (1975); Alexander v. Gardner-Denver Co., 415 U.S. 36, 48 n.9 (1974); Griffin v. Breckenridge, 403 U.S. 88 (1971). The Griffin case is especially important because not only did the Court suggest that § 1985(3) might have substantive content, but also in a separate concurrence, Justice Harlan, not known for his expansive views on federal rights of access, strongly implied that he found § 1985(3) to supply a substantive right. See Employment Discrimination, supra note 218, at 117 n.20. See generally Sex Discrimination, supra note 218, at 931-33, 940-41.
Even more significantly, Justice Stevens had *dissented* from the *Brown* holding, that federal employees were limited to Title VII and could not use section 1981 which was relied on so strongly by the *Novotny* majority. In *Brown*, Justice Stevens concluded that the legislative history of the relevant section of Title VII did not show a clear intent to limit federal employees to Title VII.\(^{222}\) Moreover, Justice Stevens found that the logic of earlier cases allowing dual remedies\(^{223}\) applied with equal force to federal employees.\(^{224}\) Justice Stevens recognized the apparent inconsistency between his two opinions, but concluded that there was no real inconsistency because of his conclusion that section 1985(3) protected only constitutionally guaranteed rights and that protection against sex discrimination was not such a right.

Justice Stevens failed to confront the basic problem. He had concluded in *Brown* that Title VII and section 1981 were not mutually exclusive and that a race discrimination applicant could sue under both statutes. Yet in *Novotny*, he concluded that a sex discrimination plaintiff could not sue under section 1985(3), the conspiracy equivalent to section 1981. As Justice White pointed out, this view of section 1985 was extremely narrow and inconsistent with the Court's decision in *Griffin v. Breckenridge*.\(^{225}\) In *Griffin*, the Court held that section 1985(3) could be used where there was some "racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action."\(^{226}\) Sex discrimination should certainly qualify as an "otherwise class-based invidiously discriminatory animus." Thus, Justice White seemed to have the better argument. The Court's decision in *Novotny* and Justice Stevens' concurrence *did* impliedly repeal section 1985(3). Thus, *Novotny* has operated to virtually eliminate any practical utility to a sex discrimination plaintiff of section 1985(3).\(^{227}\)

Justice Stevens' two sex discrimination opinions dealing primarily with access to the courts are essentially, but not totally, inconsistent. In *Cannon*, he held that a sex discrimination plaintiff must have access when such access would be helpful—not even "necessary"—to full enforcement of the statutory scheme. Then, in *Novotny*, Justice Stevens wrote an opinion pragmatically, although not doctrinally, inconsistent with *Cannon*. In a crabbed

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\(^{222}\) 425 U.S. at 837 (Stevens, J., dissenting).
\(^{223}\) See note 221 supra.
\(^{224}\) 425 U.S. at 837 (Stevens, J., dissenting).
\(^{225}\) 403 U.S. 88 (1971).
\(^{226}\) Id. at 102.
\(^{227}\) See *Employment Discrimination*, supra note 218, at 126; *Sex Discrimination*, supra note 218, at 941.
In both cases, Justice Stevens showed an ability to marshall legislative history in support of his views. But in neither case did he acknowledge the limitations of the history he had relied on or the merits of the legislative history relied on by the brethren with whom he disagreed. For this reason, and because both opinions were exercises in conclusory rather than thoughtful reasoning, neither of his opinions regarding access are ultimately distinguished nor persuasive.

B. Laws Ostensibly Benefiting Women

1. Craig v. Boren

If Justice Stevens' reasoning was conclusory in Cannon and narrow in Novotny, it was downright muddled in his concurring opinion in Craig v. Boren.228 The plurality opinion in Craig was extremely important. But aside from adding a quotable cryptic, but irrelevant, sentence, it is doubtful that Justice Stevens' opinion added anything to the law.

In Craig, the Court struck down an Oklahoma statute prohibiting the sale of 3.2% beer to males under the age of twenty-one and to females under the age of eighteen as unconstitutional because it violated the equal protection clause.229 Craig is important because, in the plurality opinion, Justice Brennan explicitly announced a new constitutional test for sex based classifications. Such classifications would not be reviewed under either the rational relationship or strict scrutiny tests but, rather, under what became known as an "intermediate tier" of review.230 Sex-based classifications, Justice Brennan declared, "must serve important governmental objectives and must be substantially related to the achievement of those objectives."231

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228. 429 U.S. 190 (1976).
229. Id. at 210.
231. 429 U.S. at 197 (emphasis added). Justice Brennan previously had held to the position that sex classifications should be considered "suspect" and given the highest degree of scrutiny. Perhaps in Craig he decided to give ground on this po-
The new Craig equal protection test asked two questions regarding statutes which discriminate on the basis of sex. First, is the state’s purpose “important”? Under the rational relationship test, even when given “bite,” the purpose merely had to be “legitimate.” Second, are the means created by the statute “substantially” related to the objective, rather than merely being “rationally” related to that objective?232

In Craig, the defenders of the statute claimed its purpose was the enhancement of traffic safety.233 The Court accepted this, arguendo, as an “important” state purpose, although it did question whether traffic safety was truly the purpose of the statute.234 The Court found that the answer to the second question, whether the means were “substantially” related to the objective of traffic safety, was fatal to the statute. The statistical evidence presented on behalf of the statute was characterized as “weak.”235 Taken at

sition in order to garner a majority to move, albeit not as far as he would like, in the direction of scrutinizing sex classifications more rigorously. Cf. Fiss, Dombrowski, 86 YALE L.J. 1103, 1121, 1127, 1134-54, 1160-64 (1976-77). It will be recalled that in Weinberger v. Wiesenfeld, see notes 106-112 supra; involving social security benefits to mothers but not fathers, Justice Brennan apparently attempted to gain a majority by avoiding any explicit reference to the standard of review.

Justice Brennan succeeded in his attempt. Justices White, Marshall, and Blackmun agreed with him. 420 U.S. at 191. Justice Powell also accepted Justice Brennan’s approach, although he expressed some discomfort with the “middle-tier” approach. Id. at 210-11. Justice Stewart did not specifically indicate a position on the standard to be used but argued that Craig could have been decided under the rational relationship test. Chief Justice Burger and Justice Rehnquist dissented.

But see Comment, supra note 230, at 591 (“Apparently dissatisfied with the use of ‘suspect’ terminology in the sex discrimination area, the Court appears to agree with Chief Justice Burger’s proposition that the phrase ‘suspect classification’ has, in actuality, tended ‘to stop analysis while appearing to suggest an analytical process.’”) (quoting In re Griffiths, 413 U.S. 717, 730 (1973) (Burger, C.J., dissenting) (footnote omitted).

233. 429 U.S. at 199.
234. Id. at 199-200 n.7. The statement of purpose was provided to the Court by the attorney for Oklahoma. Although the Court accepted the traffic safety purpose for the Craig appeal, it raised two questions. First whether the purpose was the “true” purpose in light of the fact that the Oklahoma attorney acknowledged in oral argument that he could not assert that traffic safety was “indeed the reason” for the statute. Id. Second, whether any statement by the attorney defending the statute—as opposed to consideration of whatever legislative history might exist (or consideration of the fact that legislative history materials did not exist)—could be accepted as competent evidence for the determination of purpose. Id.

The plurality’s superficial acceptance of the purpose advanced in Craig suggested that the Court might not actually wrestle with the “purpose” question until it had considered the “means” question. Perhaps the Court will not proceed to a full examination of purpose until after the state has met its burden of showing a substantial relationship between the statute and the state objective. Thus, if the statute is defective in means, an important purpose cannot save it. By using this approach, the Court would economically use its deliberative resources. See Note, supra note 230, at 734.

235. 429 U.S. at 190. The inferences to be drawn from the Court’s discussion of
its best, that evidence tended to show that two percent of males in the eighteen to twenty-one year old age group compared to two-tenths of a percent of females in that age group had been arrested for drunken driving. "While such a disparity is not trivial in a statistical sense, it can hardly form the basis for employment of a gender line as a classifying device." Thus, the Court concluded that the relationship between the sex classification and traffic safety was not "substantial" and the statute therefore violated the right of eighteen to twenty year old males to equal protection of the laws.

Justice Stevens began his concurring opinion with the cryptic and frequently quoted sentence: "There is only one Equal Protection Clause." Presumably this meant that he rejected either a double or triple-tier method of analysis. It is not clear, however, to what extent he actually disagreed with the plurality. He did not state that the old two-tiered analysis or the new three-tiered analysis in Craig were in any way incorrect, but merely that they were only methods of explanation rather than methods of decision.

Rather than disagreeing on the merits of the plurality's holding, as he might have done, Justice Stevens wrote separately to make an important point about the process and style of judicial decision making. It is fruitless, he may have been suggesting, to attempt to articulate an all-encompassing theory and then squeeze decisions into that theory. Rather, he suggested that an inductive method might be most helpful in identifying "the" standard of review which the Court was using. What is needed, he stated, is "a

the statistics proffered differ. See Supreme Court, 1976 Term, supra note 230, at 177-78 (suggesting the Court displayed a highly skeptical attitude toward the use of statistics to validate broad social stereotypes). But see Note, supra note 230, at 734 (suggesting the Court is increasingly demanding empirical data supporting the relationship between the means and the end).

236. 429 U.S. at 201.
237. Id. at 204. In so finding, the Court also explicitly disapproved Goesaert v. Cleary, 335 U.S. 464 (1948), which upheld a state statute excluding women from employment as bartenders.
238. 429 U.S. at 211.
239. Justice Stevens stated:

[The Equal Protection Clause] does not direct the courts to apply one standard of review in some cases and a different standard in other cases. Whatever criticism may be leveled at a judicial opinion implying that there are at least three such standards applies with the same force to a double standard.

Id. at 211-12.

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careful explanation of the reasons motivating particular decisions.\textsuperscript{240}

Justice Stevens may have been emphasizing that the Court should eschew creation of abstract models and should focus specifically on the pragmatic issues of each case. The problem with his opinion was that the approach he used looked suspiciously similar to a "tiered" model. The standard of review he proposed asked two questions. First, was the classification "inoffensive,"\textsuperscript{241} "objectionable,"\textsuperscript{242} or "obnoxious"?\textsuperscript{243} Second, if the classification

\textsuperscript{240} Id. (emphasis added).
\textsuperscript{241} Id. at 212-13. Justice Stevens neither defined nor explained the meaning he attached to "inoffensive."
\textsuperscript{242} Justice Stevens did not define "objectionable" classifications. By example, they would include classifications: (1) based on accidents of birth, (2) which are "mere remnants of previous discrimination," and (3) which are "pervasive in that, presumably, their effects are contrary to the intended objectives." Id.
\textsuperscript{243} Justice Stevens did not define "obnoxious" but suggested that such classifications must be regarding individuals who have "been the victims of the kind of historic, pervasive discrimination that has disadvantaged other groups." Id. at 212 n.1. A significant question regarding sex discrimination is, of course, whether women are included among such other groups. Justice Stevens did not address that question. In 

Craig, Justice Stevens focused on males, presumably because the attack against the statute was that it discriminated against men. He found that men have not been the victims of historic, pervasive discrimination. The problem with this analysis was that it failed to consider the argument that discrimination that purportedly benefits a class can actually harm that class. This problem did not occur in 

Craig because it was not a compensatory case, but the lack of its consideration is a significant conceptual flaw in Justice Stevens' proposed method of analysis. For the argument that Justice Stevens' opinion in 

Craig signals the acknowledgement of past legal discrimination against males, see 

Kanowitz, supra note 52, at 1390-91.

Justice Stevens did not address the issue of the identity, if any, between a "suspect class" and a class which has been the victim of historic and pervasive discrimination such that a classification discriminating against them would be "obnoxious" within the meaning of his scheme. In 

Frontiero, Justice Brennan suggested three factors as being relevant toward the categorization of a "suspect class." The class must: (1) have an immutable characteristic determined solely by accident of birth, (2) have suffered historical vilification, and (3) lack effective political power and redress, due to the previous discrimination. 411 U.S. at 685, 686 n.17. See notes 66-80 supra and accompanying text. A fourth factor, the prerequisite that the class be a "discrete and insular minority," had been established in the legendary footnote four of United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938). For a discussion of these elements in sex discrimination cases, see 


Justice Stevens' plan failed to precisely address how it incorporated the 

Frontiero and Carolene Products criteria. Under Justice Stevens' plan, item one, immutable characteristic due solely to birth, is not considered "obnoxious," but
was "otherwise offensive,"244 "then"245 was the purpose put forward by the state "sufficient"246 to make the classification acceptable?247 In answering these questions, Justice Stevens first examined the statute's purpose248 and found that its legitimacy was questionable.249 Second, he examined whether the statute merely "objectionable," whatever that meant. Item two, historic vilification, appeared the key to the Stevens' category of "obnoxious." Justice Stevens, however, drew a "bright line" between historic vilification (which he found did not apply to males) and "a mere remnant of the now almost universally rejected tradition of discriminating against males in this age bracket," which made, in his view, the Craig discrimination "objectionable." 429 U.S. at 212. Justice Stevens did not refer to the element of lack of political power. Id.

244. Id. at 213.
245. Id. The use of the word "then" implied that first, offensiveness should be examined. If the classification is inoffensive, the use of the wording "otherwise offensive" implied there would be no need to go further.
246. Justice Stevens did not discuss the critical question of by what standard "sufficiency" should be judged. See Note, supra note 230, at 732-33 (suggesting that the greater the invidiousness of the classification, from inoffensiveness to objectionable to offensiveness, the greater the degree of sufficiency required to uphold the state's justification of purpose). This question is critical because of Justice Stevens' purported rejection of a three-tiered or double-tiered method of decisionmaking. If the method he proposed required a different showing for the sufficiency of the state's interest in a sexually discriminatory statute, based on the offensiveness of the classification, there is no actual difference between that method and double or triple-tier analysis. Although Justice Stevens did not state how "sufficiency" was to be determined, it was clear that he rejected a mere rational relationship test because, although he found the Craig classification "not totally irrational," he nevertheless rejected it. 429 U.S. at 213.
247. 429 U.S. at 213.
248. Justice Stevens' examination of purpose was more rigorous than the plurality's. The plurality would consider purpose only after the means had been accepted. See note 234 supra. But Justice Stevens, perhaps, would consider purpose in any event. The effect of this difference would place a higher burden on the challengers of a statute. Justice Stevens' method of analysis suggested that a successful defense of purpose could be made (although not made in Craig) on the basis of empirical evidence, even where the announced purposes of the statute had been found suspect. This "second chance" for purpose can be discerned from the following language. After Justice Stevens found that it was doubtful that the purpose of the statute was traffic safety, 429 U.S. at 213, he then stated, "moreover, the empirical data submitted by the state accentuated the unfairness of the statute." Id. at 213-14. It could be argued that if the purpose was illegitimate, the use of empirical data by the state should not save it. But by the use of the term "moreover," which means "in addition to what has been said before." Webster's Third New International Dictionary 1470 (1966), Justice Stevens suggested that even if the purpose is unacceptable, empirical evidence may somehow yet save the statute. Justice Stevens' method of analyzing purpose could enhance the ability of a sex-based statute to withstand equal protection attack by giving the defenders of the statute two bites at the apple.
249. 429 U.S. at 212. Justice Stevens doubted that traffic safety was the real purpose of the statute for two reasons. First, "I would not be surprised if [what actually motivated this discrimination] represented nothing more than the
actually accomplished its intended purpose and found that it did not. 250

Justice Stevens concluded that the classification was “objectionable.” 251 The state’s purpose was not sufficient to overcome that objection because the purpose was of questionable legitimacy. In addition, the statute did not even accomplish its purpose. Therefore, the classification violated the Equal Protection Clause. 252

Justice Stevens’ concurrence in Craig added little to the law. Although the reasoning of the opinion did not create problems, the style was internally inconsistent. He stated that he opposed two or three-tiered models of decision, but in fact, he must have used either a two or three-tiered model of some sort. 253 He stated that the Court should emphasize a “careful explanation of reasons,” 254 but his own statement of reasons was muddled and far from precise. 255 He did not indicate any specific area of disagreement with Justice Brennan’s new “substantial” relationship test, although he did seem willing to give the state more opportunities than would the plurality to demonstrate that a sex-based statute was somehow justified.

2. Califano v. Goldfarb

In the case of Califano v. Goldfarb, 256 both Justices Brennan and Stevens further articulated their respective positions of the equal protection analysis stated in Craig. Justice Stevens, concurring, departed significantly from the model of “purpose” analysis that he had suggested in Craig. In Goldfarb, he focused on pragmatic effects as the touchstone for equal protection examina-

250. Id. at 213-14. Justice Stevens characterized the state’s best argument as being that two percent of 18-20 year-old males probably had violated a liquor law. Id. at 214. He found two problems with this argument: (1) the statute would probably have little deterrent effect on the two percent, let alone the 98%, and (2) even if the law did have deterrent effect, it is “an insult to all young men of the State . . . [to] visit . . . the sins of the 2% on the 98%.” Id.

251. Id. at 212. It was “not as obnoxious as some the Court has condemned, nor as offensive as some the Court has accepted.” Id. (footnotes omitted). The classification was “objectionable” because: (1) it was based on an accident of birth; (2) it was a “mere remnant” of previous discrimination against males; and (3) it was perverse in that males are usually heavier than females and, thus, drinking would impair their driving less.

252. Id. at 212-13.

253. See note 246 supra.

254. 429 U.S. at 212.

255. See notes 241-52 supra and accompanying text.


368
tion of purpose and suggested two requirements for "compensatory" classifications. Writing for the plurality, Justice Brennan further explicated the new "substantial relationship" method of equal protection analysis announced in *Craig.*

*Goldfarb* involved a challenge to social security laws under which benefits were paid to the widow of a covered wage-earner automatically but were paid to the widower of a covered wage-earner only if the widower proved that he had actually received one-half of his support from his wife. The first question of Justice Brennan's analysis was whether the statute's purpose was "important." In order to answer that question, it was necessary to determine exactly what that purpose was.

The defenders of the statute had argued that the purpose was not mere administrative convenience, but that it was to rationally define different standards of eligibility based on differing needs of widows and widowers as classes. Justice Brennan examined the

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257. Although the specific *Craig* equal protection analysis used in *Goldfarb* was new, Judge Brennan cited precedent for the result. He found that the equal protection question of *Goldfarb* was "indistinguishable" from that presented by *Wiesenfeld,* which had involved the payment of benefits to mothers but not fathers of a dependent child. 430 U.S. at 204. The cases can be distinguished, however, in an important aspect. *Wiesenfeld* involved the denial of benefits, while *Goldfarb* involved required proof of dependency. See Comment, supra note 98, at 513-14.

In addition, Justice Brennan found that the decision in *Frontiero* also militated for affirmance. 430 U.S. at 204. But *Frontiero* also can be distinguished from *Goldfarb.* The *Frontiero* Court invalidated a law requiring males to prove dependence on female spouses in order to qualify for military dependents' benefits, where the only justification proffered for the classification was that of administrative convenience. Other justifications were put forward in *Goldfarb.* See Comment, supra note 98, at 513-14. Another important way in which the cases are distinguishable is that the cost implications in *Frontiero* were minor, while the cost implications of *Goldfarb* were staggering.

258. 430 U.S. at 201.

259. Two preliminary issues were raised. First, whether the analysis should focus just on discrimination against the widower or whether it should also focus on discrimination against the deceased female wage earner. Justice Brennan found that not looking at the discrimination against the wage-earner would be to denigrate the efforts of women, who, by working, sought to contribute earnings and protection to their families. 430 U.S. at 205-07.

Second, the state argued that because the legislation involved social welfare benefits, it should be given great deference and be reviewed with minimal scrutiny. The Court gave little consideration to this argument and did not deal, other than in cursory fashion, with the precedent cited by Justice Rehnquist. See Comment, supra note 98, at 513 n.61. "[T]he Court ignored the well established principle that Congress had traditionally been allowed broad discretion in making classifications in noncontractual social welfare benefit programs." Id. See also Note, *Gender-Based Legislative Classifications, Califano v. Goldfarb,* 57 Neb. L. Rev. 555, 573-79 (1978).
statute carefully, exhaustively inquired into the legislative record as required by Wiesenfeld,\textsuperscript{260} and rejected that argument. Justice Brennan found that there was no congressional intent to remedy the arguably greater needs of widows. Thus, the only possible justification was one of administrative convenience which, after Reed,\textsuperscript{261} was insufficient to justify a sex-based classification.\textsuperscript{262}

Although Goldfarb did apply the new intermediate “substantial relationship” test announced in Craig, it is important to identify the precise nature of the Goldfarb analysis. In Craig, the Court quickly passed over the “purpose” question concerning whether the statute’s purpose was “important”, and instead, exhaustively analyzed the “means” question of whether the means were “substantially related” to the purpose.\textsuperscript{263} In Goldfarb, however, the Court did not consider the “means” question because it could find no acceptable purpose for the statute.\textsuperscript{264} Thus, the Court closed the door left open after Craig. It now seemed to hold that means should not be examined if a purpose was insufficient.\textsuperscript{265}

Concurring, Justice Stevens departed from the method of analysis he had proposed in Craig. In Craig, he had suggested a two-step process. The first step considered how offensive the classification was, in terms of the continuum from “inoffensive” to “objectionable” to “obnoxious.” The second step involved whether the purpose of the classification was “sufficient” to overcome the degree of offensiveness. In Goldfarb, Justice Stevens focused

\begin{itemize}
\item \textsuperscript{260} See notes 106-12 supra.
\item \textsuperscript{261} See notes 59-65 supra.
\item \textsuperscript{262} 430 U.S. at 217.
\item \textsuperscript{263} See notes 233-34 supra and accompanying text.
\item \textsuperscript{264} Justice Brennan’s opinion never discussed whether the means were effective or even “substantially related” to the objectives; it never discussed means at all, although it did make frequent references to the “intention” and “justification” of the statute. “Intention” and “justification” seem closer to the meaning of “purpose” than to the meaning of “means.”
\end{itemize}

We conclude, therefore, that the differential treatment of nondependent widows and widowers results not . . . from a deliberate congressional intention to remedy [needs of widowers] but rather from an intention to aid dependent spouses of deceased wage earners, coupled with a presumption that wives are usually dependent . . . . The only conceivable justification for . . . the presumption . . . [is] that it would save the Government time, money and effort . . . . [S]uch assumptions do not suffice to justify a gender based discrimination . . . .

430 U.S. at 216-17 (footnotes omitted, emphasis added). Contra, Comment, Equal Protection, supra note 98, at 514 n.70. This Comment suggests the Goldfarb Court did not address the issue of whether administrative convenience was sufficiently important to justify a sex based classification. The student author argues that the Court invalidated the statute because it failed the “means” test but acknowledges authority to support the contrary conclusion that administrative convenience may never be sufficient to uphold a sex based classification.

\begin{itemize}
\item \textsuperscript{265} One practical effect of such a holding might be to reduce the emphasis on widespread use of statistical arguments purporting to measure a statute’s effects.
\end{itemize}
only briefly on the classification and did not use the 

_Craig_ terminology. He stated that the 

_Goldfarb_ classification was “not ‘invidious’”

but that it did “treat similarly situated persons differently solely because they are not of the same sex.”

Thus, even though Justice Stevens had announced his rejection of a two or three-tier model of equal protection analysis, once again he seemed to be advocating a two or three-tier model in which one tier was “invidious discrimination,” another tier was “different treatment solely because of sex,” and perhaps a third tier was “inoffensiveness.”

Having dropped one shoe, Justice Stevens enigmatically refused to drop the other. He moved on to the “purpose” question without indicating what results, if any, attached to the new “means” classifications that he had just set forth. He said that the 

_Goldfarb_ discrimination was not “invidious,” but it did treat people differently. To the question of what difference that distinction signified, he had no answer.

Proceeding to the question of whether the statute’s purpose could overcome the harms of the sex discrimination, Justice Stevens examined the question in a manner markedly different from that of Justice Brennan’s examination. Justice Brennan had rejected administrative convenience as an acceptable purpose without reaching the question of whether or not the statute was

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266. 430 U.S. at 218. Justice Stevens did not define “invidious,” but suggested that an “invidious” classification would “imply that males are inferior to females,” [sic] would “not condemn a large class on the basis of . . . an unrepresentative few,” and would “not add to the burdens of an already disadvantaged and discrete minority.” _Id._ Presumably, Justice Stevens was suggesting that a classification would be invidious if it implied either sex was superior to the other. Perhaps he used “invidious” to correspond with his previous classification of “obnoxious,” but the particular descriptive phrases used seem to be closer to the category of “objectionable.” _See_ notes 241-43 _supra_ and accompanying text.

267. 430 U.S. at 219. Justice Stevens clearly was not implying that “different” treatment of persons solely because of sex is “inoffensive.” Thus, under his _Craig_ terminology, it might be expected that this classification would be considered “objectionable.” But, if that is correct, what of the apparent similarity of the terms discussed in note 266 _supra_ to the category of “objectionable?”

268. In _Craig_, Justice Stevens examined the statute’s purposes to determine if they could outweigh the classification created. Although in _Goldfarb_ he did not specifically refer to the _Craig_ formulation, presumably the same method of analysis would apply: the justification for the statute must outweigh the harm created by the “different treatment” of similarly situated members of the sexes. Justice Stevens found that two “hypothetical justifications” existed for the statute: administrative convenience and amelioration of widows’ generally more severe economic plight. He found neither to be “wholly irrational” but, nevertheless, both were unacceptable. 430 U.S. at 219.
actually effective in achieving administrative convenience. Justice Stevens spent only one sentence on purpose per se and quickly moved to question whether the statute actually created administrative convenience.\textsuperscript{269} He concluded that because the rule created a "staggering" economic cost, administrative convenience could not have been the true reason for the discrimination.\textsuperscript{270}

The second proposed justification for the classification had been that it was intended to remedy previous discrimination against women. As did the plurality, Justice Stevens examined the legislative history and concluded that such compensation had not been intended. Justice Stevens' analysis of this issue was important because he suggested the compensatory classifications could not be based on negative stereotypes or traditional role-typing but

\textsuperscript{269} "Neither the 'administrative convenience' rationale . . . nor the [ameliorative rationale] can be described as wholly irrational." Id. That sentence could have serious implications. The term "rational relationship," in sex discrimination cases, seems to have become so hopelessly confused—with pre- and post-Reed rational relationship, rational relationship with "bite," and the myriad of other possibilities emerging from the cases—and bandied about that it no longer serves any communicative function. It conveys nothing about the nature of the relationship required except to indicate that it does not refer to designation of a suspect class. That Justice Stevens stated that administrative inconvenience is not "wholly irrational," however, indicates that he disagreed with the majority's finding that administrative inconvenience, without more, could not justify the classification. This proposition is bolstered by two other factors. One, Justice Stevens proceeded to find fault with the \textit{Goldfarb} administrative efficiency rationale because it did not truly lead to administrative efficiency. That analysis would have been unnecessary if administrative efficiency could not be sufficient as a justification. Two, Justice Stevens began the paragraph in which he discussed administrative efficiency with the introduction, "Mr. Justice Rehnquist correctly identifies two hypothetical justifications [administrative convenience and amelioration]." Id. Justice Rehnquist, in his dissent, argued that administrative convenience was an acceptable justification. Id. at 237. Justice Stevens' use of the word "correctly" implied agreement with Justice Rehnquist. Justice Stevens then stated that neither administrative convenience nor amelioration were "wholly irrational." It was not until the following sentence that, by the use of the word "nevertheless," he indicated any disagreement with Justice Rehnquist: "Nevertheless, I find both justifications unacceptable in this case." Id. Thus, Justice Stevens appeared to agree with Justice Rehnquist that administrative convenience could be an acceptable state purpose.

\textsuperscript{270} Id. at 220. Although the rule eliminated some paperwork in not requiring that widows prove dependency, it did so at the cost of an estimated $750 million per year in payments to widows who might not qualify as dependents. Id. Justice Stevens stated:

\begin{quote}
Congress simply assumed that all widows should be regarded as "dependents" . . . . It is fair to infer that habit, rather than analysis or actual reflection, made it seem acceptable to equate the terms "widow" and "dependent surviving spouse." That kind of automatic reflex is far different from either a legislative decision to favor females in order to compensate for past wrongs, or a legislative decision that the administrative savings exceed the cost of extending benefits to nondependent widows. \textit{Id.} at 222.
\end{quote}
must be aimed at remediation of specific injustices.\textsuperscript{271}

In \textit{Goldfarb}, Justice Stevens did not shed light on his \textit{method} of equal protection analysis in sex discrimination cases, but he did fill in some of the conceptual \textit{content} of that analysis. His position on “administrative convenience” suggested that he might uphold sexually discriminatory policies where such policies created genuine cost savings. Despite that indication of regression from previous cases, his opinion made a significant contribution to the law of sex discrimination by suggesting that two conditions must exist in order for “compensatory” discrimination to be upheld. First, as had been emphasized in \textit{Wiesenfeld}, the legislation must be carefully examined to ensure that it is truly compensatory. Second, Justice Stevens now added that the legislation must be \textit{specifically} focused on remediation of past injury and may not be based on negative stereotypes.

Justice Stevens’ opinion in \textit{Goldfarb} shows a clear recognition of the impediments that flow from stereotyped attitudes toward women.\textsuperscript{272} Thus, in his emerging jurisprudence, at least when the nature of the classification is questionable, he has demanded proof that the legislature actually intended the compensation to serve the specific interest claimed in argument before the Court.\textsuperscript{273} The Court adopted these two conditions more specifically in \textit{Califano v. Webster},\textsuperscript{274} a per curiam follow-up to \textit{Goldfarb}.

\textsuperscript{271} \textit{Id.} at 222. Justice Stevens then asked, if amelioration had not been truly intended in the social security legislation challenged in \textit{Goldfarb}, “what is to be said about \textit{Kahn},” which involved a property tax exemption law enacted in 1885. 430 U.S. at 223. In answering this question, Justice Stevens indicated firm agreement with the \textit{Wiesenfeld} holding that ostensibly compensatory discrimination must be truly ameliorative and not be justified by a “‘mere recitation of a benign, compensatory purpose.’” 430 U.S. at 224. (quoting \textit{Weinberger v. Wiesenfeld}, 420 U.S. 636 (1975)).

\textsuperscript{272} See Taub, supra note 54, at 410.

\textsuperscript{273} \textit{Id.} at 410 n.285.

\textsuperscript{274} 430 U.S. 313 (1977). In \textit{Webster}, the Court applied the substantial relationship test (or intermediate scrutiny standard of review) to a social security statute which allowed women, but not men, to eliminate certain low earning years from retirement pay calculations. The \textit{Webster} Court found there was specific intent to compensate female wage earners for past employment discrimination against women. \textit{Id.} at 318-21. In addition, the Court cited Justice Stevens’ dissent in \textit{Goldfarb} and emphasized that the sex classification in \textit{Webster} was “not the accidental byproduct of a traditional way of thinking about females.” \textit{Id.} at 320 (citing Califano v. Goldfarb, 430 U.S. at 223 (Stevens, J., concurring)). For a critical discussion of \textit{Webster}, see generally Ginsburg, supra note 49, at 34-35; \textit{Supreme Court, 1976 Term}, supra note 230, at 180; \textit{Note, Constitutional Law—Equal Protection—Standard Review Applicable in Sex Discrimination Cases}, 45 \textit{Tenn. L. Rev.} 514 (1978).
3. Michael M. v. Superior Court

In Goldfarb, Justice Stevens suggested that he might not place a heavy burden on the defenders of a statute which discriminated on the basis of sex. But he changed his mind on this issue in the recent case of Michael M. v. Superior Court.\textsuperscript{275} In his dissent in Michael M. he expressly emphasized that the defenders of a sex-based statute must surmount a very formidable burden. His opinion in Michael M. also clarified and expanded his reasoning, only obliquely suggested in Craig, that equal protection analysis involves something other than different “levels of scrutiny.”

At issue in Michael M. was the constitutionality of California's statutory rape law which penalized males for engaging in intercourse with females under the age of eighteen. The Court was unable to agree on the test to be used or the results of the application of the various tests. The statute was upheld by one vote, but the Court was deeply fractured. In addition to the plurality opinion, there were two concurring and two dissenting opinions.

Writing for the plurality, Justice Rehnquist began his analysis by skirting the critical issue of whether the Craig “intermediate” standard of review would apply. Although he cited Craig, he did so suggesting that Craig was merely one in a series of cases placing sex discrimination issues somewhere between the “rational relationship” and “strict scrutiny” tests.\textsuperscript{276} Given the consistent use of the Craig standard in sex discrimination cases, it would seem that the Court would have required, at the very least, significant analysis before the Craig equal protection analysis was abandoned.\textsuperscript{277} Justice Rehnquist provided no such analysis.

Justice Rehnquist first examined the statute's purpose. Under Craig, the state must show an “important” interest in the purpose. In Michael M., however, Justice Rehnquist held that the government need only have a “strong” interest in the statute’s purpose. The specific purpose of the California statute had been hotly disputed. Its supporters claimed that the purpose was to prevent teenage pregnancies, but its challengers argued that the purpose was to preserve the chastity of young women.\textsuperscript{278} Justice Rehnquist emphasized that it was futile to search for one single or even “primary” purpose because legislators may vote for a stat-

\textsuperscript{275} 450 U.S. 464 (1981).
\textsuperscript{276} Id. at 468.
\textsuperscript{277} See note 303 infra. In Michael M., it was undisputed that the statute discriminated on the basis of sex.
\textsuperscript{278} See 450 U.S. at 470 n.7 (Rehnquist, J., plurality op.); id. at 490, 494-95 & nn.9 & 10 (Brennan, J., dissenting).
ute for a variety of reasons. Justice Rehnquist utilized the familiar rule of statutory construction that the Court would not strike down legislation as long as one of its purposes was permissible. Thus, as long as prevention of pregnancy was at least "one" of the purposes of the statute, and Justice Rehnquist was satisfied that it was, the statute would not be struck down if the state had a "strong" interest in that purpose. Justice Rehnquist found that the state did have a strong interest in preventing teenage pregnancy, because of the significant social, economic, and medical consequences to the fetus, the mother, and the state.

Justice Rehnquist then turned to the "means" question. The Craig test requires that the means be "substantially" related to the purpose. But, stating that "[t]he question whether a statute is substantially related to its asserted goals is at best an opaque one." Justice Rehnquist completely begged the question. He found by conclusory reasoning that the means were "sufficiently" related to the purpose to pass constitutional muster. Although the term "sufficiently" can have no meaning except in relation to some standard, Justice Rehnquist refused to identify what standard he was using. Justice Rehnquist then stated that it was "hardly unreasonable" for the legislature to protect the female, who must face all of the negative consequences of teenage preg-
nancy, and to punish only the male. Thus, despite Justice Rehnquist's apparent acknowledgment that sex discrimination issues received a scrutiny more stringent than the rational relationship test, he actually used nothing more than the rational relationship test to uphold the statute. As will be discussed, Justice Rehnquist's opinion is a serious regression in sex discrimination law because it attempts to quietly abandon the use of the intermediate level of scrutiny.

Although Justice Rehnquist did not announce his standard of "sufficiency," he did explain the reasons by which he found the means sufficiently related to the purpose. Since all of the harmful consequences of pregnancy fell on the female, the legislature could rationally decide to protect her from punishment and to punish only the male. Justice Rehnquist also reasoned that the risk of pregnancy itself deterred unmarried teenage females from engaging in intercourse. Since males suffered no similar "natural sanction," the imposition of the criminal sanction solely on males served to "roughly 'equalize' the deterrents on the sexes."

Justice Rehnquist then discussed the burden on the state to show that a sex-neutral classification could not serve the same purposes. He simply found that the state had no such burden.

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285. Id.

286. His earlier apparent acknowledgment that sex discrimination required a scrutiny somewhere between "rational relationship" and "strict scrutiny" was carefully worded. His language at once gave the appearance of being consistent with past precedent requiring an "intermediate" scrutiny but also carefully avoided stating that any true increased level of scrutiny would be given.

[T]he Court has had some difficulty in agreeing upon the proper approach and analysis in cases involving challenges to gender-based classifications . . . . [W]e have not held that gender-based classifications are 'inherently suspect' and thus we do not apply so-called 'strict-scrutiny' to those classifications . . . . Our cases have held, however, that the traditional minimum rationality test takes on a somewhat 'sharper focus' when gender-based classifications are challenged . . . . [F]or example, the Court [has] stated that a gender-based classification will be upheld if it bears a 'fair and substantial relationship' to legitimate state ends . . . and has restated the test to require the classification to bear a 'substantial relationship' to 'important government objectives.'

Id. at 468-69 (citations omitted).

The tone of this language, including use of the phrase "restated the test," referring to Justice Brennan's Craig opinion, suggested that Justice Rehnquist was agreeing that, although the Court had used varying language, sex classifications were to be reviewed by Justice Brennan's Craig standards. Justice Rehnquist, however, actually agreed to no more than requiring a "sharper focus" on the minimum "rational relationship" test. Based on his later finding that the legislature's action was "not unreasonable," he may not have even placed that "sharper focus," whatever that meant, on the challenged statute.

287. Id. at 473.

288. Id. Justice Rehnquist offered no evidence for this proposition.

289. Id.
Citing Kahn, he stated that the Court did not need to review whether the statute was "drawn as precisely as it might have been," but merely needed to determine whether the statute was within constitutional limits. Justice Rehnquist's use of Kahn provided only weak support because the legislation in Kahn involved a property tax exemption to women based on past economic discrimination against them while the legislation in Michael M. concerned the application of the criminal sanction against males but not females with no finding of any history of past discrimination. Justice Rehnquist also concluded that a sex-neutral statute would not be as effective as the challenged statute. He reasoned that effective enforcement would be frustrated by a sex-neutral statute because females would be less likely to report violations if they were criminally liable.

Finally, Justice Rehnquist rejected the arguments that the statute was overbroad, because it also governed intercourse with pubescent females, and that, when applied to males under eighteen, always assumed that males were the aggressors. The overbroad argument failed, Justice Rehnquist reasoned, because very young females were particularly susceptible to injury during intercourse. Moreover, he concluded that it would be "ludicrous" to limit a rape statute to older teenagers and exclude younger girls. Finally, according to Justice Rehnquist, the statute did not presume that teenage males were always aggressors. Age was irrelevant. The statute merely placed an additional deterrent on males.

Justice Stewart concurred and appeared to endorse the use of a rational basis test. He began by downgrading the significance of sex-based classifications. He reasoned that discrimination is illegal when it classifies similarly situated people on the basis of immutable characteristics with which they were born. Racial

290. 416 U.S. at 356 n.10.
291. 450 U.S. at 473.
292. Id. at 473-74. The challengers to the statute conceded a fatal point. Justice Rehnquist cited their unconvincing argument that a sex-neutral statute would not hinder prosecution because the prosecutor could take into account the relative burdens on females and males and, generally, only prosecute males. As Justice Rehnquist stated: "But to concede this is to concede all. If the prosecutor, in exercising discretion, will virtually always prosecute just the man and not the woman, we do not see why it is impermissible for the legislature to enact a statute to the same effect." Id. at 1206 n.9.
293. Id. at 475.
294. Id.
discrimination, therefore, is always unconstitutional because people of different races are always considered similarly situated for constitutional purposes. He reasoned that although sex classifications are sometimes unconstitutional, they are not always so, as men and women are not always similarly situated. Justice Stewart found the statute constitutional because young males and females are not similarly situated with regard to the problems associated with intercourse and pregnancy.

Since females, but not males, confront the medical risks of pregnancy or abortion and the social, educational, and emotional consequences of pregnancy, Justice Stewart found it acceptable for a legislature to attempt to protect unmarried teenage females by prohibiting males from participating in intercourse. Agreeing with Justice Rehnquist that the risk of pregnancy is a natural deterrent to females, Justice Stewart stated that “[e]xperienced observation” confirmed that males did not view pregnancy as a deterrent. Justice Stewart also agreed with Justice Rehnquist that the state was not bound to draft a sex-neutral statute even if doing so would accomplish its purpose more precisely.

Citing Dandridge v. Williams and Williamson v. Lee Optical Co., Justice Stewart endorsed the one-step-at-a-time approach: “[T]he Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all.” The decisions in Dandridge and Williamson, however, involved applications of the rational relationship test. Indeed, the latter decision is infamous as an example of the laxity of review under that test. Justice Stewart made no effort to justify reliance on those cases.

Approaching the case in terms of privacy rights, Justice Blackmun also concurred. Referring to the Court’s abortion decisions, including H.L. v. Matheson, decided the same day as Michael M., Justice Blackmun stated he was “gratified” to see that the plurality recognized the increasing incidence and serious consequences of teenage pregnancy. He saw the basic social and pri-
vacy issues in abortion cases as similar to the issues related to this statutory rape case. He saw, however, a critical difference is the time of the state's interference with the individual. In abortion cases, the state was intervening after conception; it was interfering with a woman's effort to deal with the consequences of pregnancy. In the statutory rape law challenged in *Michael M.*, the state intervened before conception; indeed, it intervened in order to prevent conception. Thus, he found the interference with a woman’s privacy rights justified while he found interference regarding abortion less justifiable.

Justice Blackmun ducked the key question regarding the level of scrutiny to be used. He stated that he voted to uphold the California statute on the basis of the tests used in *Reed, Craig, Ballard, Weisenfeld*, and *Kahn*. Those cases, however, used different tests. Justice Blackmun did not cite the many post-*Craig* cases which consistently used the *Craig* test.

Justice Brennan sharply dissented. He criticized Justice Rehnquist’s attempt to erode the use of intermediate scrutiny. Justice Brennan emphasized that, although prior to *Craig* the Court was uncertain as to the proper test to be utilized in sex discrimination challenges, since *Craig* the Court had clearly settled on the *Craig* test. He strongly disagreed with Justice Rehnquist regarding the burden to be placed on the state. According to Justice Brennan, if a classification discriminates, the burden is on the state to show the “importance” of the objective and the “substantial” relationship between the classification and the objective. In order to meet that burden, he concluded, the state must show that a sex-neutral statute would be a less effective means of achieving the purpose.

Justice Brennan focused exclusively on the “means” question, to which, he stated, the plurality did not give enough emphasis. Even if the purpose of preventing teenage pregnancy were “important,” he reasoned, the state then had the burden to show that

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304. *450 U.S.* at 490-91.
a sex-based statute “substantially” furthered that goal in a manner different from that achieved by a sex-neutral statute.

The plurality had accepted the argument that sex discrimination was necessary because enforcement would suffer if the statute was sex-neutral. California's theory was that females would be less likely to report violations if they could be criminally liable. Justice Brennan emphasized that the state merely argued this point, however, it did not offer any evidence. The state was defending its statute only on paper pleadings.305

Not only had the state failed to meet its burden of showing a “substantial” relationship between the means and the purpose of the statute, but Justice Brennan also found two flaws in the enforcement argument. First, although thirty-seven states now have sex-neutral statutory rape laws, California had put forward no evidence that those states were hampered in enforcement because females were also subject to the criminal sanction. Also, the California legislature had recently revised other sex crime definitions to make them sex-neutral.306

Second, Justice Brennan correctly emphasized the key flaw in the enforcement argument. Even if the statute made enforcement more difficult, the state had not shown that those enforcement problems would make a sex-based statute less effective than a sex-neutral statute in deterring minor females from engaging in sexual intercourse.307 Justice Brennan seriously questioned whether the statute as enforced had any substantial deterrent effect.308 Further, he reasoned that if the criminal sanction were applied to females, whatever deterrent effect the law provided could only be increased for the simple reason that the same deterrent would then apply to twice as many people.309 Justice Brennan also questioned whether a sex-neutral statutory rape law could withstand an attack based on the constitutional right of privacy. He did not analyze this issue in detail because the Cali-

305. Justice Brennan stated: “[A] State's bare assertion that its gender-based statutory classification substantially furthers an important governmental interest is not enough to meet its burden of proof under Craig v. Boren. Rather, the State must produce evidence that will persuade the Court that its assertion is true.” Id. at 492.
306. Id. at 493.
307. Id.
308. Justice Brennan noted that in recent years there had been an average of 413 prosecutions for statutory rape per year in California. There are approximately one million females between ages 13-17 per year. While there was no evidence to indicate rate of sexual intercourse, there were approximately 50,000 teenage pregnancies during 1976. Thus, a male had a very low chance of being arrested for sexual intercourse with a minor. Id. at 493 n.8.
309. Id. at 494.
Fornia statute had not been challenged on privacy grounds.\footnote{310}{Id. at 491 n.5.}

Finally, Justice Brennan turned to the "purpose" question. Reviewing the historical development of the statutory rape law, he concluded that the prevention of pregnancy purpose had been created only recently. Tracing the California statute's origins to the Statutes of Westminster,\footnote{311}{3 Edw. 1, ch. 34 (1285); 3 Edw. 1, ch. 13 (1275).} enacted at the close of the thirteenth century, he demonstrated that the law was initially enacted on the premise that young females were legally incapable of consenting to sexual intercourse. Because their chastity was considered especially precious, they were given special legal protection. Justice Brennan concluded, in part because California's law had been "designed to further these outmoded sexual stereotypes, rather than to reduce the incidence of teenage pregnancies, that the State has been unable to demonstrate a substantial relationship between the classification and its newly asserted goal."\footnote{312}{450 U.S. at 496. Justice Brennan cited Justice Stevens' disapproval of newly created purposes for a statute in Califano v. Goldfarb, 430 U.S. at 223 (Stevens, J., concurring).}

Justice Stevens also vigorously dissented. Although doubting that any statutory rape law would have a deterrent effect,\footnote{313}{Id. (Stevens, J., dissenting). Justice Stevens cited his opinion in Carey v. Population Serv. Int'l, 431 U.S. 678, 714 (1977): Common sense indicates that many young people will engage in sexual activity regardless of what the New York Legislature does; and further, that the incidence of venereal disease and premarital pregnancy is affected by the availability or unavailability of contraception. Although young persons theoretically may avoid those harms by practicing total abstinence, inevitably many will not. Id.} he disputed Justice Brennan's conclusion that a sex-neutral statutory rape law might be unconstitutional. In Justice Stevens' view, the societal interests in reducing venereal disease and teenage pregnancy outweighed the intrusion into a teenager's privacy rights.\footnote{314}{450 U.S. at 497.} Thus, Justice Stevens reasoned that a total ban on premarital teenage sex could be constitutional. The constitutionality of a total ban, however, provided no support for a ban solely against males.

Justice Stevens then embarked upon a creative discussion of the equal protection analysis required for sex discrimination cases. Rather than saying that an equal protection analysis in-
volved different "levels of scrutiny," he reasoned that it was more precise for the Court to say that "the burden of sustaining an equal protection challenge is much heavier in some cases than in others."315 In racial classifications, the burden placed upon a challenger is very light because the state never has a legitimate reason to treat persons differently because of race. Challengers of economic classification face a high burden because such classifications must necessarily be made by a legislature and are presumptively valid. But sex-based classifications fall somewhere between the other categories. Sex differences, Justice Stevens stated, "are sometimes relevant and sometimes wholly irrelevant."316

To analyze sex-based classifications, Justice Stevens determined, the Court should focus on the degree of relevancy. If sexual differences were "obviously irrelevant" to the classification, then a challenger should have only a light burden, similar to that which must be sustained by challengers of racial classifications.317 If, however, there was an "apparent connection" between the discrimination and a physical difference between the sexes, then the classification should be presumed lawful. That presumption could be overcome by a showing that the apparent justification for the discrimination was "illusory or wholly inadequate." This explanation of imposing a heavier burden in some sex discrimination cases rather than others, Justice Stevens concluded, was more accurate than saying the Court applied a "mid-level" scrutiny to all sex discrimination cases.318 In the final analysis, Justice Stevens stated, quoting Professor Cox, "the Court is always deciding whether in its judgment the harm done to the disadvantaged class by the legislative classification is disproportionate to the public purposes the measure is likely to achieve."319

In Michael M., Justice Stevens found that there was an "apparent connection" between the sex classification and the fact that only females can become pregnant. The act of intercourse prohibited by the law created a greater risk of harm for the female than for the male.320 Therefore, the law was presumed lawful.

The question under Justice Stevens' analysis was whether the presumption of constitutionality could be overcome by a showing that the justification for the discriminatory classification was "illu-

315. Id. at 497-98 n.4.
316. Id. Justice Stevens did not explain to what the sex differences must be "relevant." Presumably, he meant to the purpose of the legislation.
317. Id.
318. Id.
319. Id. (quoting Cox, Book Review, 94 Harv. L. Rev. 700, 706 (1981)).
320. Id.
First, Justice Stevens rejected the plurality's argument that teenage females had a "natural" deterrent and that applying the criminal sanction to males merely equalized the situation. Not only was the risk of pregnancy a "fanciful" deterrent, but that females were especially vulnerable to the risk of pregnancy suggested that they needed coverage rather than exemption under the statute. If pregnancy or another special harm was suffered by one of the participants, that would be a proper mitigating factor concerning punishment. Justice Stevens regarded a total exemption for the more endangered class as "utterly irrational."

Second, Justice Stevens found that the legislation incorporated a presumption that the male was really "more guilty" than the female. He would find punishment of the "aggressor" acceptable if the statute either provided for the punishment of the "aggressor," regardless of sex, or if the statute was directed at males but required proof that the male on trial actually was the "aggressor" or at least "more responsible." Justice Stevens reasoned that the statute merely assumed that the male would always be the aggressor. The state had proffered no evidence for such an assumption. Thus, he concluded that the statute could have been based only on "traditional attitudes toward male-female relationships" and, as such, reflected nothing more than "an irrational prejudice."

Finally, Justice Stevens rejected the plurality's reasoning that a sex-based statute was required because otherwise, females would not report violations. If an "informant's exemption" was necessary, then the statute could allow such an exemption in sex-neutral terms. More importantly, Justice Stevens demanded that the

321. Id.
322. Id. at 498. Justice Stevens did not complete his analysis using the terms with which he began. The conclusion of his opinion presents a scattered list of reasons why the statute was unconstitutional. Presumably, the reasons demonstrated that the apparent justification for the sex discrimination was actually illusory, but Justice Stevens did not organize these reasons into the new conceptualization he proffered.
323. Id. at 499.
324. Id.
325. Justice Stevens asked: "Would a rational parent making rules for the conduct of twin children of opposite sex simultaneously forbid the son and authorize the daughter to engage in conduct that is especially harmful to the daughter? That is the effect of this statutory classification." Id.
326. Id. at 500.
327. Id.
Court view the totality of the enforcement issue. Even if there would be some loss in enforcement by making the statute sex-neutral, that loss would be outweighed by the "paramount interest in even-handed enforcement of the law." Thus, Justice Stevens concluded that the requirement that "the sovereign must govern impartially" was more important than some loss in reporting by females.

The Court's decision in *Michael M.* was a severe retrenchment. Until this decision, two aspects of sex discrimination law seemed clear. These were that the Court would apply the *Craig* "intermediate" scrutiny to sex based classifications and that the Court would judge a statute in terms of the legislature's actual intent, rather than in terms of later purposes hypothesized at argument. Justice Rehnquist's opinion, and the severe fragmentation recorded in five separate opinions retreated from each of these fundamental principles.

Justice Brennan's opinion thoroughly rebutted the plurality's reluctance to endorse the *Craig* standard. Justice Brennan documented Justice Rehnquist's sleight-of-hand. Certainly if *Craig* is to be overruled, at the very least it should be overruled openly. Neither Justices Brennan nor Stevens, however, pointed out the critical flaw in Justice Rehnquist's opinion. Justice Rehnquist found that the means used by the California statute was "sufficiently" related to the purpose, but he refused to say what standard of sufficiency was required. Thus, his opinion amounts to the very raw display of judicial power for which he, in other cases, has criticized his Brethren. In the final analysis, the California statute involved in *Michael M.* was sufficiently related to its purpose only because five Justices said it was.

Justice Rehnquist's *Michael M.* opinion did present a realistic view of legislative intent. All legislation results from a mixture of different motives; there is no such thing as one "primary" motive. But Justice Rehnquist did not carry his analysis far enough. That there may be no "primary" motive should not allow the state to "create" hypothetical motives at argument in order to defend a challenged statute. Yet both Justices Brennan and Stevens documented that prevention of pregnancy was not even one of the legislative purposes of the state.

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328. *Id.* at 502.


330. See note 184 *supra* and accompanying text; note 417 *infra* and accompanying text.

331. As Justice Brennan stated, "[i]t was only in deciding *Michael M.* that the California Supreme Court decided, for the first time in the 130-year history of the
In *Michael M.*, Justice Stevens attempted to focus on his concept of equal protection analysis, but he still remained unable to articulate a clear difference between his concept and the *Craig* standard. He began an interesting discussion of the difference between a “level of scrutiny” analysis and a “burden” analysis. That discussion, however, was consigned to a footnote, and it was no sooner begun than it ended. More previously, Justice Stevens did explicitly apply the model he had just propounded.

Contrary to Justice Stevens’ assertion, the “burden” the Court imposes on the challenger of a sex-based statute is the same as the level of scrutiny the Court applies. If the Court imposes “strict” scrutiny, the burden on a challenger is minimal. If the Court imposes “rational relationship” scrutiny, the burden on a challenger is virtually insurmountable. The key area, of course, lies somewhere in the middle.

In this middle area and as a result of *Michael M.*, Justice Stevens has now defined a new and more precise distinction. Until *Michael M.*, it was assumed that all sex discrimination received the intermediate test. Justice Stevens had not previously quarreled with this proposition, although he suggested that the *Craig* focus on levels of scrutiny was not the best way to define that intermediate standard. Justice Stevens has now refined his test within the area of sex discrimination.

Usually, all legislation is considered to carry with it the presumption of constitutionality. The practical effect of strict scrutiny, however, ensures that racial classifications are, in effect, presumptively unlawful. Justice Stevens has suggested that, for sex classifications where physical sex differences are “obviously irrelevant,” such legislation should also be considered presumptively unconstitutional. If the statute’s defenders can show an “apparent connection” between physical sex differences, then the legislation is accorded its normal presumption. That presumption can then be overcome by a showing that the justification for the classification is “illusory or wholly irrelevant.”

The *Craig* standard applies a heavy burden to defenders of all sex-based classifications. Justice Stevens would apply an even heavier burden to sex-based classifications “obviously irrelevant”—but perhaps would apply a lighter burden to other sex-

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statute, that pregnancy prevention had become one of the purposes of the statute.” *Id.* at 495 n.10 (Brennan, J., dissenting).
based classifications, such as those showing an apparent connection between sex differences and the purposes of the statute. Justice Stevens' new test is at once creative and precise. The new test is consistent with the Court's refusal to strike down all sex-based classifications, but it refuses to extend any protection to sex-based classifications not having an apparent relationship to physical differences.

Justice Stevens' new test is not dramatically different from the Craig test in terms of how the Craig test works. As noted earlier, Justice Stevens' reasoning leads to the use of a "tiered" approach quite similar to that specified in Craig. But Justice Stevens' new test is dramatically different from the Craig test in terms of where it is applied. All sex-based classifications, he reasons, are not the same. The Court should now apply a tiered approach within the area of sex-based classifications, he concluded. In doing so, it may give less protection to some classifications and more to others.

The problem with Justice Stevens' new test is that he did not discuss any standards and criteria for its use. What is to determine whether a statute is "obviously irrelevant" or "apparently connected" to sex differences? Moreover, Justice Stevens' opinion in Michael M. is not internally consistent. Although he announced a new method of equal protection analysis, it is doubtful that he actually applied that new method. He certainly did not apply it clearly.

Justice Stevens' new formulation of equal protection analysis may be the most important "breakthrough" in sex discrimination analysis since Reed. Although not outlawing all sex-based classifications, it might effectively outlaw all sex-based classifications not specifically related to physical sex differences. This test may bode favorably for many of the new sex discrimination challenges, because most issues now raised do not relate to specific physical differences. On the other hand, Justice Stevens' new test may allow the "rational relationship" test to be smuggled in. If so, Justice Rehnquist stands ready to do that smuggling. Justice Stevens, to avoid such a move backward, must now provide further conceptual spadework. Justice Stevens' next steps are to articulate his new test more precisely, to explain how it differs from the Craig test, and to apply it more clearly.

C. Laws and Policies Which Disadvantage Females

1. United Air Lines v. Evans

In his opinions regarding policies ostensibly benefiting women, Justice Stevens consistently found for the plaintiff claiming dis-
crimination. Although his reasoning in those cases was less than clear, Justice Stevens seemed to be genuinely striving for a principled method of deciding such cases. Writing for the majority in *United Air Lines v. Evans*, however, he found against the sex discrimination challenger in what must be described as a superficial opinion. The *Evans* opinion has become very important in lower court sex discrimination cases for its definition of the nature of a "continuing" violation of Title VII. Nevertheless, the *Evans* opinion is ultimately unsound.

Justice Stevens faced a familiar problem area in *Evans*. In the Seventh Circuit *Sprogis* case, he had dissented from the majority's holding that the airlines' no-marriage rule for stewardesses violated Title VII. On the Supreme Court, Justice Stevens was faced with a slightly different challenge to the effects of that rule. The *Evans* plaintiff had been forced to resign under the no-marriage rule. She had been rehired four years later, but was denied seniority for her prior service. She alleged that the airline's seniority system constituted a "present" and a "continuing" violation of Title VII.

A strong tension exists between the policies underlying protection of seniority systems and the policies underlying civil rights legislation. One attempt to mediate that tension in Title VII was at issue in *Evans*. Section 703(h) of Title VII allows employers to establish different terms of employment based on seniority systems provided that the systems are "bona fide" and that the

334. 431 U.S. at 557. The respondent argued that the seniority system created a present discrimination against her as compared to males who were hired after her termination but before her reinstatement because those males now had greater seniority than she did. Second, she argued that the seniority system was a continuing violation of Title VII because it perpetuated the effects of the no-marriage rule discrimination. *Id.*
differences are “not the result of an intention to discriminate.” The Evans plaintiff had not challenged the “bona fide” nature of United’s seniority system. Thus, the issue was whether the seniority system created a prohibited discrimination on the basis of sex. Writing for the majority, Justice Stevens found that the system had not constituted such discrimination, either “present” or “continuing.”

Justice Stevens found that the United plan had not created a “present” sex-based differential because, during the plaintiff’s period of non-employment, both males and females had been hired. Additionally, Justice Stevens rejected the plaintiff’s charge of a “continuing” violation of Title VII. He found the seniority system to be neutral for two reasons. It did not discriminate against female former employees; nor did it treat former employees who were discharged for a discriminatory reason any differently than former employees who were discharged, or who resigned, for a non-discriminatory reason.

If Justice Stevens’ opinion in Evans was “reasoned,” the reasoning was conclusory. Justice Stevens breezily rejected the argument that section 703(h) of Title VII only protected seniority systems from attacks based on acts prior to the effective date of Title VII in 1965. His rejection of this argument was effectively rebutted by Justice Brennan in the dissent. Justice Brennan, in Evans, relied on his joint concurring opinion with Justice Marshall in International Brotherhood of Teamsters v. United

336. 42 U.S.C. § 2000e-2(h) (1970) provides, in relevant part: “[I]t shall not be an unlawful employment practice for an employer to apply . . . different terms . . . of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, sex, or national origin.”

Justice Stevens did not consider the Gilbert question of the extent to which a showing of a violation of Title VII must be similar to a showing of a violation of equal protection. He began consideration of whether the challenged application of the seniority system was protected by Title VII by assuming, arguendo, that the no-marriage rule itself was a violation of Title VII. He then found that neither of the plaintiff’s allegations amounted to a violation of Title VII. 431 U.S. at 557.

337. Id. Thus, although the plaintiff may have been denied employment because of sex discrimination, Justice Stevens refused to see the seniority differential as “sex based.” Both males and females had acquired increased seniority rights over the plaintiff; in addition, both male and female employees who resigned or were discharged prior to the plaintiff, but who were later rehired, also had received no seniority credit for the previous service. Id.

338. Id. at 557-59. Justice Stevens disregarded the decision in Franks v. Bowman Transp. Co., 424 U.S. 747 (1976), which he characterized as holding that retroactive seniority was an appropriate remedy to be awarded under Title VII after an illegal act had been proved. He determined that Franks did not control in Evans because Franks was a “remedy” case while Evans was a “violation” case.

339. 431 U.S. at 560.
States decided the same day as Evans. In Teamsters, Justice Brennan had determined that both Franks v. Bowman Transportation Co. and the legislative history of section 703(h) limited the immunity provided by section 703(h) to pre-Act discrimination. Justice Stevens' only response to this strong argument was the mere assertion that such a reading of the statute was "too narrow."

Justice Stevens' Evans opinion created numerous difficulties for analysis. Teamsters and Evans, taken together, as Justice Brennan correctly charged in Teamsters, "bootstrapped" the proposition that section 703(h) protected seniority systems from attacks alleging post-Act discrimination. Justice Stevens' reasoning was circular. Evans relied either only on mere assertion or impliedly on Teamsters; but Teamsters relied on Evans. While

342. 431 U.S. at 381-84. In Teamsters, the major issue was whether § 703(h) provided immunity to pre-Act discrimination. A minor issue involving post-Act discrimination was handled in a footnote which stated that Evans held that post-Act discrimination came within § 703(h) protection. Id. at 348 n.30. Justice Brennan, in Teamsters, attacked footnote 30 as "sheer bootstrapping," and stated that the Evans Court only considered the issue of post-Act discrimination in a single paragraph which was devoid of any analysis of legislative history and which was simply conclusory. Id. at 383-84.

In Franks, the Court held that "constructive seniority" was the correct remedy for discrimination which had occurred prior to the effective date of the Civil Rights Act. 424 U.S. at 761. In Teamsters, the majority distinguished Franks by stating that the principle of retroactive seniority in Franks could apply to victims of post-Act discrimination. 431 U.S. at 347. In Evans, Justice Stevens distinguished Franks from Evans in that Franks was a remedy case while Evans was a violation case. But Justice Stevens did not cite Franks for the proposition that § 703(h) covered post-Act discrimination; indeed, Justice Stevens cited no authority for that proposition.

Moreover, Justice Stevens could not have cited Franks for the proposition that § 703(h) covered post-Act discrimination. Justice Brennan directly rebutted the Teamsters finding that Franks interpreted § 703(h) to protect post-Act discrimination by quoting directly from Franks:

As we stated just last Term, "it is apparent that the thrust of [§ 703(h)] is directed toward defining what is and what is not an illegal discriminatory practice in instances in which post-Act operation of a seniority system is challenged as perpetuating the effects of discrimination occurring prior to the effective date of the Act."

Id. at 384 (quoting Franks v. Bowman Transp. Co., 424 U.S. at 761 (emphasis added by Justice Brennan in Teamsters)). In his dissent in Evans, Justice Brennan incorporated by reference this portion of his concurring opinion in Teamsters. In Teamsters, Justice Brennan also produced numerous legislative history materials tending to show that § 703(h) was not intended to protect post-Act discrimination.

343. 431 U.S. at 560.
Justice Stevens dealt with precedent and legislative history, he did so only long enough to ride roughshod over them. Then, Justice Stevens did not examine the competing social policies or equities involved in the case. This failure may become important in subsequent cases as it may suggest rationales with which to distinguish and avoid Evans. In addition, the Evans rejection of "continuing violation" theories would henceforth place a very high burden on sex discrimination challengers.

345. See Supreme Court, 1976 Term, supra note 230, at 257-58.

All the legislative history, as well as the Court's decision in Franks, indicates that section 703(h) was enacted to maintain only those seniority rights existing in 1965, the effective date of Title VII. Moreover, it is difficult to imagine that Congress could have intended to protect any new seniority expectations of incumbent workers which were "dependent on whites benefiting from unlawful discrimination" after the Act.

Id. at 257 (quoting Int'l Brotherhood of Teamsters v. United States, 431 U.S. at 384 (footnote omitted)).

Justice Stevens did not suggest any principles regarding the use of legislative history. In Frontiero, the Court explicitly considered legislative history materials, 424 U.S. at 765 n.21; in Teamsters, the Court acknowledged that such materials existed but declined to give them "more than little, if any, weight," 431 U.S. at 345 n.39; and in Evans, Justice Stevens made no reference whatsoever to the voluminous legislative history. See 431 U.S. at 384-90 (Marshall, J., concurring in part and dissenting in part) for materials detailing legislative history prior to the passage of the Civil Rights Act. See also id. at 390-94 for materials subsequent to passage of the Act which referred specifically to § 703(h), but did not change it, and for cases collected by Justice Marshall suggesting that relevant subsequent legislative history is entitled to "great weight."

As was noted in Cannon and Novotny, legislative history materials may be far from conclusive, especially when adversaries on both sides can point to supportive history. Justice Stevens, however, did not even discuss any problems of the Teamsters-Franks-Evans legislative history. He merely ignored that history.

346. See Supreme Court, 1976 Term, supra note 230, at 264-65. For example, it might be argued that since United had abandoned its no-marriage rule, its interest in repose should outweigh the plaintiff's attack on the seniority system. This analysis would not, however, apply to the question of appropriate remedies that Justice Stevens explicitly declined to reach. 431 U.S. at 558.

347. See Supreme Court, 1976 Term, supra note 230, at 261-63, for a discussion of "continuation theory" as compared with "perpetuation theory." Continuation theory refers to challenges of actions not as discriminating per se but as perpetuating the effects of a previous violation. Continuation theory refers to challenges alleging that the discriminatory act itself continues. Id.

During the discussion of the perpetuation theory that "neutral" policies violated Title VII by perpetuating the original injuries. 431 U.S. at 558. But the concept of neutrality is critical to the perpetuation analysis. If a plaintiff can show that the policy perpetuating the discriminatory effects is not perfectly neutral, Evans might not stand as a bar. Supreme Court, 1976 Term, supra note 220, at 262-63. It has been suggested that the test for neutrality should be an examination of discriminatory effects. To the extent that present practices have discriminatory effects because they perpetuate prior acts of the defendant, a stronger test of effect should apply. To the extent that the practices perpetuate "pervasive historical patterns of discrimination within society," an easier showing for the plaintiff should be allowed. The student authors present three types of situations in which discriminatory practice may have been terminated but in which a continuing violation might nevertheless be found. They suggest that none of the types would be inconsistent with the denial of relief in Evans: (1) major policy change with notice to previ-
Finally, the reasoning in Evans seemed to be grounded only on the logic of *ipse dixit*. The opinion was unpersuasive. Justice Stevens made no reference to previous sex discrimination cases. Nor did he even refer to the Teamsters race discrimination case decided the same day, presumably relied on by him, and specifically referred to by the dissent. It may very well be that the Evans sex discrimination claim was properly rejected, but Justice Stevens did not write an opinion to support that conclusion.

2. *City of Los Angeles v. Manhart*

Justice Stevens' majority opinion in *City of Los Angeles v. Manhart* was an order of magnitude different from his conclusory Evans opinion. In a bold and strongly reasoned opinion, Justice Stevens helped the Court announce a more clearly articulated principle of sex discrimination analysis. The opinion was not revolutionary; it seemed to adopt a "go slow" attitude on the question of relief. It did, however, represent a major step forward by the Court.

The Manhart case involved a Title VII challenge to an employee pension plan in which females were required to contribute fifteen percent more per month than males, although both sexes received the same monthly benefit. The higher contribution was based on actuarial statistics and the employer's experience that women as a class lived longer than men and, therefore, would, over time, receive fifteen per cent more in total benefits.

Just as Evans had involved a clash between civil rights and protection of seniority rights, Manhart involved a unique clash between the competing social policies of anti-discrimination and protection of pensions. The clash of these policies is of enor-
mous importance. Fifty million people participate in retirement plans other than social security; the assets held in trust for those people were estimated to be over $500 billion by the end of 1978 and were increasing by approximately $50 billion per year.\textsuperscript{351}

Justice Stevens squarely faced this new\textsuperscript{352} issue. First, he found that the difference in payments to the pension fund did amount to sex discrimination within the meaning of section 703(a)(1) of Title VII.\textsuperscript{353} He reasoned that Title VII prohibited decisions based on stereotypes implying female inferiority.\textsuperscript{354} Of course, in \textit{Manhart}, the longevity generalization was true, at least on the basis of total class statistics.\textsuperscript{355} Justice Stevens declared, however, that it was equally true that on an individual basis the longevity generalization did not and \textit{could} not apply. Many women do not outlive the "average man" while many men do outlive the "average woman."\textsuperscript{356} Justice Stevens found that Title VII pro-
hibited not only the use of false generalizations, but also the use of true generalizations, if they did not allow for individual determinations.357

The second argument for the city was that the plan was actually based on longevity and not on sex.358 Justice Stevens correctly dismissed that argument as specious. Longevity, he stated, is based on a number of factors. The plan distinguished only imper-

357. 435 U.S. at 708. Justice Stevens essentially used overinclusive analysis to find that the application of the longevity generalization in the retirement plan provided no assurance that any individual woman would fit that generalization. The facial examination of Title VII did not, however, dispose of the initial question of whether the plan violated the statute. The question of fairness to males had to be considered. Id. at 708-09. The supporters of the plan had argued that women, as a class, would live longer and, therefore, receive more benefits. Since it was not possible to tell which women would live longer, it was necessary, they argued, to charge the class higher premiums. To do otherwise, they argued, would be unfair to males; equal payment would cause increased total payments by males in order to subsidize the increased benefits used by females. Id.

Justice Stevens concluded, first, that the balancing regarding fairness had already been done. Congress had decided that classifications based on sex were unlawful, regardless of any resulting unfairness. Id. at 709. Moreover, he stated, even if the statute were less clear and the Court had to be the primary determiner of fairness, the basic policy of the statute required a focus on fairness to individuals and not groups. The legislation sought to reduce the allowance of classification by classes because such classifications were based on and perpetuated negative stereotypes. To examine the question of fairness to males, as a group, he concluded, would be to fly in the face of the policy undergirding the statute. Id. at 709-10. Finally, Justice Stevens identified the basic flaw in the fairness-to-males argument: “when insurance risks are grouped, the better risks always subsidize the poorer risks.” Id. at 710. Justice Stevens then concluded that for women to be forced to make higher payments “simply because each of them is a woman, rather than a man, is in direct conflict with both the language and the policy of the Act.” Id. at 711.

358. Id. at 711 n.22. The city argued the classification was based on a factor “other than sex” within the meaning of the Bennett Amendment to Title VII and was, therefore, protected by the Equal Pay Act. The Bennett Amendment, part of § 703(h), Title VII, provides in relevant part:

It shall not be an unlawful employment practice under this Title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. § 206(d) [Equal Pay Act]).


No employer . . . shall discriminate . . . between employees on the basis of sex by paying wages . . . at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility . . . except where such payment is made pursuant to . . . a differential based on any other factor other than sex.

fectly between long and short-lived employees, but it distinguished precisely between males and females. Justice Stevens cited the Ninth Circuit’s Manhart opinion: “[O]ne cannot say that an actuarial distinction based entirely on sex is based on any other factor other than sex. Sex is exactly what it is based on.”

Justice Stevens also rejected the third argument of the plan’s supporters that the plan was encapsulated by the protections carved out in General Electric Co. v. Gilbert. Gilbert had allowed the exclusion of pregnancy benefits from disability policies because its classifications, pregnant women and nonpregnant persons, were found not to be sex-based. By contrast, the Manhart plan, involving classifications of males and females, was specifically and expressly sex-based.

Justice Stevens gave little weight to legislative history materials indicating that, during Senate debate on the Civil Rights Act, Senator Humphrey was of the opinion that the Act would not cover differences in retirement plans. He did not, however, state that the Court should refuse to examine such materials.

Actually, the Court will always look at legislative history materials. Only if the outcome of the examination is inconsistent with the holding desired by the Court, will the Court say that it should not consider the materials. See Justice Peckham’s opinion in United States v. Trans-Missouri Freight Ass’n, 166 U.S. 290, 317 (1897), where he “looked at” congressional debates before deciding the Court could not consider them. Justice Stevens ignored the legislative history of post-Act amendments in Evans. See notes 345-47 supra and accompanying text.

Justice Stevens concluded that Senator Humphrey’s comment, isolated and made on the floor during Senate debate, “cannot change the effect of the plain language of the statute itself.” 435 U.S. at 714. The same language by Senator Humphrey had been approvingly cited in Gilbert by Justice Rehnquist. 429 U.S. at 144-45. See also Note, supra note 352, at 231-32. Justice Stevens did not refer to the contradictory treatments of the same language.

Justice Stevens correctly stated the logic of the Court’s reasoning in Gilbert. Under his own reasoning, however, the Gilbert classifications were virtually all female and male respectively because they related to the risk of pregnancy. This difference of opinion is not critical to Manhart because, under either view, the city’s plan was discriminatory. There are, however, other arguments that Gilbert and Manhart are not consistent. See note 368 infra and accompanying text. Justice Stevens did not respond to those arguments.

In rejecting Gilbert as controlling, Justice Stevens also rejected an ingenuous “effects” argument. In the process, he cleared up a question created by Gilbert. In Gilbert, the Court had noted that the district court had found that female employees, on an average, received more benefits from the disability program than male employees. 429 U.S. at 131 n.9. In its discussion of whether there had been discriminatory intent, the Gilbert Court noted that benefit data tended to show that the plan did not discriminate against women. Id. at 137-38. In Manhart, the city apparently argued that since women received greater benefits, there was no discriminatory effect, and, therefore, the plan did not violate Title VII. 435 U.S. at 716. This argument was doomed, Justice Stevens found, because the Gilbert Court did not reach the question of discriminatory effect until it had determined that the exclusion there did not constitute discrimination per se. In Manhart, however, there was discrimination per se. That finding could not be defeated by a
Although concluding that the Los Angeles plan violated Title VII, Justice Stevens attempted to defuse any suggestion that the Court’s reading of Title VII would “revolutionize” the insurance industry. First, he allowed a wide escape route for employers. Employers, he reasoned, need not increase their own contributions to pension plans; they could merely set aside equal contributions and allow employees to secure their own money-purchase plans. The problem with this escape route, however, is that it could allow too much. The whole concept of pension plan investments based on pooled assets could be shattered by a system in which employees could purchase only individual pension plans.

Second, Justice Stevens emphasized that Manhart did not question the insurance practice of considering the class composition of a work force in determining cost estimates of a retirement or death benefit plan. Justice Stevens decreased the sting of the Manhart opinion in a third way, reversing the lower court’s award of retroactive relief to the plaintiff. He listed several reasons for this reversal, emphasizing that pension administrators may have believed that to require males to pay more might have been illegal, and that major changes in the pension plan and insurance industries that could jeopardize the benefits of millions of insured persons should not be made retroactively.

theory that there was no discriminatory effect. Id. In his discussion of this issue, Justice Stevens emphasized that the Gilbert finding of no discriminatory effect had not depended on the specific evidence submitted by General Electric to show that women received more benefits than men. Rather, he said, that finding had rested on the challenger’s failure to prove either racial discrimination or discriminatory effect. Id. at 716. Justice Stevens noted that this point was also made in Satty. Id. at 716 n.29.

Justice Stevens also rejected an alternative argument that a prima facie showing of discrimination per se could be rebutted by a demonstration of cost justification. No such defense was available under Title VII, he stated. 435 U.S. at 716-17.

364. Id. For a discussion of the impact of Manhart on money purchase plans and the broader economic ramifications of Manhart, written after the circuit court decision but before the Supreme Court decision, see Comment, Civil Rights—Title VII Ban on Sex Discrimination Extended to Use of Sex-Segregated Mortality Tables for Determining Employee Contributions to Pension Plan—Manhart v. City of Los Angeles, 12 Suffolk U.L. Rev. 156, 172-77 (1978). Such plans, however, could not avoid Title VII if they were "corporate shells." 435 U.S. at 718 n.33.
365. 435 U.S. at 718.
366. Id. at 723.
367. Id. at 719-23. Other reasons for the decision not to award retroactive relief included: (1) the difficulty of amending a major pension plan "overnight," (2) conflicting wage and hour regulations, and (3) the district court did not display "equitable sensitivity" in its order. Id. at 718-20. The district court had ordered that

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One doctrinal complexity in *Manhart* concerned Justice Stevens’ attempt to distinguish the *Manhart* pension plan from the *Gilbert* disability plan. Pragmatically, he succeeded in this attempt by garnering five other justices to agree that the pension plan did violate Title VII. In terms of the legal principles with which the two plans are viewed, however, some troubling aspects remained. Justice Blackmun concurred separately in order to express the problems he saw in the attempt to reconcile *Manhart* with *Gilbert*.368

plaintiffs receive the difference between what they paid and what males paid rather than the difference between what they paid and what they would have paid, had the payment rates been equalized. *Id.*

Justice Marshall, concurring, vigorously criticized all of Justice Stevens’ reasons for denial of retroactive relief. Justice Marshall reasoned that the city was put on notice as to the possible Title VII violations. He disagreed with Justice Stevens’ approach regarding economic impact. Justice Stevens had agreed that the amount of damages in *Manhart* would not threaten the program or the economy. *Id.* at 722 n.42. But Justice Stevens had voiced concern for the principle involved, fearing “[a] regime of discretion that produce[d] different results for breaches of duty in situations that cannot be differentiated in policy.” *Id.* (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975)). Justice Marshall suggested that, if there was no problem now, but merely fear of a future problem, the Court would have “ample opportunity” to modify or reject retroactive relief if required. 435 U.S. at 732.

Finally, Justice Marshall reasoned that the “central” purpose of Title VII was to make victims whole for previous injuries due to discrimination. Here, the plaintiff had clearly suffered discrimination and had clearly been injured. Respondents “actually earned the amount in question, but then had it taken from them in violation of Title VII.” *Id.* at 733 (quoting Manhart v. City of Los Angeles, 553 F.2d at 592). Thus, Justice Marshall would have affirmed the award of retroactive relief.

368. 435 U.S. at 723-25. Justice Blackmun began by noting some interesting “line-ups.” Justice Stewart wrote the Court’s opinion in *Aiello*, joined the Court’s opinion in *Gilbert*, and joined the Court’s opinion in *Manhart*. Justices White and Powell joined *Aiello, Gilbert* and *Manhart*. Justice Stevens dissented in *Gilbert* but wrote *Manhart*. Justice Marshall dissented in both *Aiello* and *Gilbert* but joined most of *Manhart*. Justice Blackmun noted his own discomfort with *Gilbert*, which caused him to concur separately there also. *Id.* at 723-24. In addition, Justice Rehnquist, who wrote *Gilbert*, dissented in *Manhart*, and the Chief Justice joined *Gilbert* but dissented in *Manhart*. Justice Blackmun suggested that the apparent agreement of Justices Stewart, White, and Powell, in joining *Aiello, Gilbert*, and *Manhart*, should have been a sign that there was no tension between those cases. *Id.* Instead, he stated, the votes of Justices Stevens and Marshall (and presumably those of Justice Rehnquist and Chief Justice Burger) indicated precisely the opposite. *Id.* Justice Blackmun reasoned that a narrow view of distinguishing *Gilbert* from *Manhart* because *Gilbert* permitted a class of nonpregnant persons, which included males, was “just too easy,” *id.* at 725, and he criticized Justice Stevens for defending the very distinction he had criticized in *Gilbert*. *Id.* at 725.

Justice Blackmun suggested that the principles of *Gilbert* could require affirming the *Manhart* plan for several reasons. First, the pension plan was based on life expectancy, a “nonstigmatizing” factor that happened to differentiate males from females but was not measurable on an individual basis. *Id.* at 724. Second, the plan was not arbitrary, irrational, or “discriminatory” because the difference in life expectancies was an objective and well recognized method of computing rates in retirement plans. *Id.* Third, the method of individual analysis used by Justice Stevens should not apply in an insurance context. “[T]here is simply no way to
Justice Blackmun found no principled way to square *Gilbert* and *Manhart*. He concluded that *Manhart* limited *Aiello* and *Gilbert*. "I do not say that this is necessarily bad. . . . I feel, however, that we should meet the posture of the earlier cases head on and not by thin rationalization that seeks to distinguish but fails in its quest."

Justice Blackmun's criticism is logically founded. As a practical matter, however, it may be that it is not realistic to expect the Court to meet its *Aiello* and *Gilbert* decisions head-on and to overturn those recent cases. But when Justice Stevens offered his Brethren the opportunity to ease away from those cases in order to increase the scope of protection against sex discrimination, even if by "thin rationalizations," the Court was willing to follow him.

The *Manhart* decision was notable in several respects. It dramatically indicated that Justice Stevens and the Court would respond to the problems of sex stereotyping. As Justice Blackmun implied, it would have been very easy for the Court to uphold the Los Angeles plan on the grounds that it was not discriminatory on the basis of sex but merely classification on the basis of longevity. Indeed, as Justice Blackmun and Chief Justice Burger reasoned, the life insurance and pension plan industries have always used sex-based mortality tables. However, Justice Stevens recognized the critical weakness of that argument; the particular stereotype had become so ingrained that it was no longer recognized as a negative stereotype. Thus, in *Manhart* the

determine in advance when a particular employee will die." *Id.* Justice Blackmun's final point was, perhaps, the most telling. To be sure, he stated, "[a] program such as the one challenged here does exacerbate gender consciousness. But the program under consideration in [*Gilbert*] did exactly the same thing and yet was upheld against challenge." *Id.* at 725.  

369. *Id.*  
370. *Id.* at 725-28 (Burger, C.J., dissenting).  
371. See, e.g., *id.* at 709-10. "Separate mortality tables are easily interpreted as reflecting innate differences between the sexes, but a significant part of the longevity differential may be explained by the social fact that men are heavier smokers than women." *Id.* (quoting R. Retherford, *The Changing Sex Differential in Mortality* 71-82 (1975)). Justice Stevens also remarked that "other social causes, such as drinking or eating habits—perhaps even the lingering effects of past employment discrimination—may also affect the mortality differential." *Id.* at 709 n.17.

Perhaps *Manhart* will stimulate the use of unisex actuarial tables by insurance and pension plan companies. For discussion of such tables and nonsex actuarial factors which can be used for risk classification, see the authorities collected in Comment, *supra* note 364, at 176-77.
Court took a forceful step toward recognizing and striking down one aspect of the use of sex stereotypes in insurance and pension plans.

As Justice Blackmun and Chief Justice Burger disapprovingly recognized, Manhart cut away from the formalistic and restrictive approach of Gilbert and Aiello. The decision appeared to imply that the Court would place more importance on sex discrimination claims involving broad-based policy decisions which were heretofore considered "givens" not subject to challenge. It must be remembered, however, that Aiello and Gilbert involved pregnancy while Manhart did not. Thus, Manhart did not imply that the Court was reconsidering its narrow approach providing little protection from disparate treatment based on or related to pregnancy.

Justice Stevens' opinion in Manhart was clearly reasoned and articulated. It was a bold decision which was made in the face of what must have been fierce resistance from the insurance and pension lobbies. To be sure, Justice Blackmun correctly identified the inconsistencies between Gilbert and Manhart. He missed the mark, however, in chiding Justice Stevens for that inconsistency. Justice Stevens demonstrated creativity and precision in allowing the Court to distinguish Gilbert and thereby move away from its restrictive approach.

Although Justice Stevens moved the Court forward, he was unwilling to do so quickly. Despite persuasive reasons set forth by Justice Marshall, Justice Stevens refused to order retroactive relief. Moreover, he left open the possibility of individual payments by employers, a step which could seriously reduce pension plan benefits for all employees.

Perhaps these aspects of Manhart are best understood in terms of pragmatic political reasons. Justice Stevens wrote this opinion at a time when the viability of the Social Security system was in serious dispute. He was concerned about both the stability of a vast insurance and pension plan industry and also the fate of over fifty million Americans who were depending on the plans established by that industry. An order of retroactive relief, he concluded, might encourage more challenges to pension plans, which could result in staggering losses. With regard to his suggestion

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372. But the precise decision in Manhart may have been relatively easy. While the Manhart action was pending in the lower courts, the City of Los Angeles, Department of Water and Power, in response to a new law enacted by the California Legislature (CAl. Gov'T. Code § 7500 (West Supp. 1978)) modified its pension plan in January, 1975. The new plan made no distinction in either contributions or benefits on the basis of sex. Thus, the Court acted with clear knowledge of legislative disapproval of the challenged plan.
that employers could make individual payments to employees, perhaps Justice Stevens was merely stating what appeared to be a logical rather than a practical alternative. Justice Stevens did not discuss the details of such a plan and may not have been seriously proposing it. If he had carefully considered the idea and was suggesting that it would be allowable, however, then his approach would amount to a serious retrenchment from the basic focus of \textit{Manhart}. Truly, this exception could swallow the \textit{Manhart} rule.

Finally, Justice Stevens' \textit{Manhart} opinion vividly represents his shift regarding the proper judicial attitude toward negative stereotypes. In his Seventh Circuit dissent in \textit{Sprogis},\textsuperscript{373} he had concluded that courts should not utilize a concept of irrational stereotypes because of the difficulty in developing judicially manageable standards. \textit{Manhart} represents his new conviction that practices which perpetuate sex-based stereotypes are always invalid when they overtly differentiate between the sexes. Just as certain social stereotypes, even if true, may not be the basis for racially discriminatory practices, Justice Stevens and the Court have now declared that sexual stereotypes, even if true, may not be the basis for sexually discriminatory practices.\textsuperscript{374}

\textsuperscript{373} 444 F.2d at 1205-06. \textit{See} notes 14-23 \textit{supra} and accompanying text.

\textsuperscript{374} \textit{See} Taub, \textit{supra} note 54, at 408 & n.287. The essential difference between sex and race discrimination is that "in no other kind of discrimination other than that based on sex . . . can the group that is alleged to be the beneficiary of such discrimination be so accurately described also as its direct victim." Kanowitz, \textit{supra} note 52, at 1395. Professor Kanowitz also argues that Justice Stevens concluded in \textit{Manhart} that there is a direct sex based discrimination against males in the workplace that results in their lower life expectancy. \textit{Id.} at 1395-96.

At least one insurance company has concluded that Justice Stevens' strong language is mere dicta. Aetna Life and Casualty has placed full-page advertisements in the \textit{Wall Street Journal} and other national media proclaiming "Our Case for Sex Discrimination." \textit{See}, e.g., \textit{Wall St. J.}, (Midwest ed.) July 1, 1981, at 8. The ads defend Aetna's practice of differential life insurance payments and benefits based on sex.

At first glance, the Aetna ad seems to fly directly in the face of the \textit{Manhart} decision. Aetna, however, argues that the no-sex-differential requirement of \textit{Manhart} does not apply to insurance companies:

\textit{Manhart} involved a very narrow set of facts. There was no independent insurance company involved in the determination of plan benefits or funding requirements. It was completely administered by the employer itself. The employer required all employees to contribute toward their future pension benefits. Based on the fact that it cost the employer more to provide a life annuity to female employees, it required females to contribute notably more to the plan than males.

The Supreme Court found that this practice by the employer violated [Title VII and the Equal Pay Act]. It did not rule on the issue of whether
3.  *Board of Trustees of Keene State College v. Sweeney*

In his next opinion in the area of policies discriminating against women, Justice Stevens did not face a strong social policy issue, but wrote on an important matter of judicial process. In a short dissent from the grant of certiorari in *Board of Trustees of Keene State College v. Sweeney*, Justice Stevens emphasized his concern for setting clear standards for lower courts. Describing circuit judges as “struggling desperately to keep afloat in the flood of federal litigation,” he concluded that the Court should look at the results of lower court action and forgive somewhat inconsistent language.

The problem in *Sweeney* was of the Court’s own making. *Sweeney* was an employment discrimination case under Title VII. The Court had allocated the burden of proof for a Title VII case in *McDonnell Douglas Corp. v. Green*. Under the *Green* test, the plaintiff must establish a prima facie case of discrimination. The burden then shifts back to the employer to “articulate” a legitimate, nondiscriminatory reason for its action. Finally, if the employer is able to articulate such a reason, the plaintiff must unequal benefits would similarly be violative of the law. It further specifically pointed out that its ruling was not intended to affect the insurance industry.


Aetna may be relying on distinctions without a difference. In declining to order retroactive relief, Justice Stevens emphasized that the *Manhart* decision would not affect pension and insurance plans already written. But the strong language of *Manhart* condemning sex classifications cannot logically be limited only to pension plans written by entities other than insurance companies. If pension plans which discriminate violate the law, insurance plans which discriminate must also violate the law. Second, providing unequal benefits for similar rates necessarily involves the same discrimination as the condemned *Manhart* practice of charging unequal rates for similar benefits.

The thorniest argument in favor of the sex discrimination practiced by Aetna and other insurance companies is that *Manhart* only applies to employers because Title VII and the Equal Pay Act only apply to employers. This argument is correct, as far as it goes. But, if a high percentage of pension plans are required or sponsored by employers, those plans are indeed covered by *Manhart*.

In any event, the Aetna ads certainly throw down the gauntlet to proponents of sexual equality. The Aetna ads must inflame feminists just as ads entitled, “Our Case for Race Discrimination” would have inflamed blacks, had such ads appeared after the *Brown* decision. Assuming the gauntlet will be quickly picked up, the legal fate of, and consumer reaction to Aetna’s campaign flaunting sex discrimination will be interesting to follow.

376.  *Id.* at 26 (Stevens, J., dissenting).
377. 411 U.S. 792 (1973). Although *Green* involved a Title VII action challenging a refusal to hire, its principles have also been applied to discharge cases. See, e.g., *Flowers v. Crouch-Walker Corp.*, 532 F.2d 1277, 1281 n.3 (7th Cir. 1977).
378. 411 U.S. at 802.
379.  *Id.*
then have a fair opportunity to show that the employer's stated reason is merely a pretext for invidious discrimination.\textsuperscript{380}

The issue for lower courts, as might be imagined, was the question of precisely what was required of an employer in "articulating" a nondiscriminatory reason. Could an employer merely state a reason? Or must it meet some burden to "prove" a reason? In \textit{Sweeney}, the court of appeals had made inconsistent statements. The court had stated that, after a plaintiff proves a prima facie case of discrimination "[t]he burden then shifts to the defendant to rebut the prima facie case by showing that a legitimate, nondiscriminatory reason accounted for its actions."\textsuperscript{381} The circuit court, however, had also said in referring to \textit{Green}, that "in requiring the defendant to prove absence of discriminatory motive, the Supreme Court placed the burden squarely on the party with the greater access to such evidence."\textsuperscript{382} The Supreme Court emphasized that there was a "significant difference" between "articulating" a nondiscriminatory reason and "proving" absence of discriminatory motive.\textsuperscript{383} The Court stated that it had recently held, in \textit{Furnco Construction Co. v. Waters},\textsuperscript{384} that mere "articulation" was sufficient. Thus, the Court remanded the \textit{Sweeney} case for reconsideration in light of the \textit{Furnco} standard.

The problem with the \textit{Furnco} opinion, as Justice Stevens pointed out in his dissent, was that it actually added to the confusion by using the words "prove" and "articulate" interchangeably.\textsuperscript{385} Justice Stevens emphasized that the \textit{Sweeney} court of appeals had, despite its inconsistent language, used the correct standard under both \textit{Green} and \textit{Furnco}; the burden of persuasion

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{380} \textit{Id.} at 804.
\item \textsuperscript{381} \textit{Sweeney v. Board of Trustees of Keene State College}, 569 F.2d 169, 177 (1st Cir. 1978).
\item \textsuperscript{382} \textit{Id.}
\item \textsuperscript{383} 439 U.S. at 25.
\item \textsuperscript{384} 438 U.S. 567 (1978).
\item \textsuperscript{385} Justice Rehnquist, writing for the majority, stated:
\begin{quote}
When the prima facie case is understood in light of the opinion in \textit{[Green]}, it is apparent that the burden which shifts to the employer is merely that of \textit{proving} that he based his employment decision on a legitimate consideration, and not an illegitimate one such as race . . . . To dispel the adverse inference from a prima facie showing under \textit{[Green]}, the employer need only "articulate" some legitimate, non-discriminating reason for the employee's rejection."
\end{quote}
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\end{footnotesize}
of discrimination remained at all times with the plaintiff. Justice Stevens implied that the circuit court may have used the inconsistent language precisely because the Supreme Court had done so; the circuit court's opinion virtually parroted the Supreme Court's statements in Green and Furnco.

Although Sweeney is not a major sex discrimination case, Justice Stevens' opinion emphasizes his concern for the Court's provision of clear guidelines to the lower courts. If the Court could not avoid apparently inconsistent language, he maintained, it should hardly criticize lower courts for valiantly attempting to follow its conflicting signals. Justice Stevens correctly criticized Furnco. The Furnco decision had merely added to the semantic problem.

Recently, in Texas Department of Community Affairs v. Burdine, the Court seemed to acknowledge that Justice Stevens' opinion in Sweeney was correct. Although initially referring to the Green language, the Burdine Court attempted to clearly set forth the proper standard in language which avoided the terms "prove" and "articulate" but which referred instead to the parties' respective burdens of production and persuasion. The Court emphasized that the ultimate burden of persuasion that the defendant intentionally discriminated remains with the plaintiff at all times. While the plaintiff must "establish" a prima facie case, the burden then shifts to the defendant to rebut the inference of discrimination created by the plaintiff's prima facie case. To accomplish this, the defendant need not "persuade" the court that it was actually motivated by discriminatory reasons. It must merely "raise a genuine issue of fact" by "clearly set[ting] forth" the reason for the employer's action. If the defendant meets this burden of production, the plaintiff retains the burden of persuasion. The plaintiff must be given an opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. Thus, the Burdine Court reaffirmed Justice Stevens' opinion in Sweeney that an employer satisfies its burden if it "simply 'explains what [it] has done' or 'produces' evidence of legitimate nondiscriminatory reasons.'"

386. 439 U.S. at 29.
387. Id. at 27 & n.1.
389. Id. at 253.
390. Id.
391. Id.
392. Id. at 254-55.
393. Id. at 256.
394. Id. (quoting Board of Trustees of Keene State College v. Sweeney, 439 U.S. at 25 n.2); id. at 28-29 (Stevens, J., dissenting).

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4. Personnel Administrator of Massachusetts v. Feeney

In Sweeney, Justice Stevens’ dissent emphasized the need to send clear guidelines to lower courts. In his next case concerning discrimination against women, Personnel Administrator of Massachusetts v. Feeney, Justice Stevens wrote a separate one paragraph opinion emphasizing that to be actionable, sex discrimination must penalize females and benefit virtually all males. Justice Stevens’ opinion, however, did not establish clear guidelines of his views of sex discrimination because it seemed inconsistent with his other more fully developed statements regarding the requirements for a finding of sex discrimination.

In Feeney, the Court upheld a state civil service scheme containing a lifetime absolute preference for veterans against an equal protection attack claiming that the preference discriminated against women. Even though ninety-eight percent of the veterans in Massachusetts were male, the Court held that the creation of two classes, veterans and non-veterans, did not discriminate on the basis of sex. Therefore, the Craig standard of “intermediate scrutiny” need not be used. Under the “rational relationship” standard, the statute easily passed constitutional muster. Stating that the equal protection clause was merely the guarantor of “equal laws, not equal results,” Justice Stewart, writing for the majority, held that a law would be discriminatory only if it were based upon sex, overtly or covertly, or if the adverse effects reflected “invidious gender-based discrimination.”

In Craig, the Court had held that sex based classifications must be reviewed by the intermediate standard. Craig had involved overt sex discrimination on the face of the statute. Unlike Craig, Feeney involved a statute that was not overtly sex based; all veterans, both the ninety-eight percent male and the two percent female, were given the absolute preference. The real question before the Court was whether it would apply the Craig standard to such a “neutral” law.

396. Id. at 270.
397. Id. at 273.
398. Id. at 274. As Justice Stevens pointed out, the majority’s two questions, creating three classifications, really amounted to one question. Id. at 281 (Stevens, J., concurring). If the statute was racially neutral, did it reflect covert, invidious discrimination?
399. See notes 228-52 supra and accompanying text.
The Court gave a mixed answer. It said it would apply the Craig standard if the alternative categories of "covert" sex discrimination or "invidious" sex discrimination could be met. But it set an extremely high standard for meeting these categories. The Court said that discriminatory impact could signal covert discrimination but held that such impact must show a disadvantage to virtually all of the female class and a benefit to virtually all of the male class. The statute did not benefit virtually all men since significant members of nonveterans were men.

The Court then discussed whether the plaintiffs could prove discriminatory intent by showing discriminatory effect. The plaintiffs had argued that the adverse effect of the absolute veteran's preference on women would be to freeze them out of state jobs sought by men, and that this effect demonstrated intent because it was the natural and foreseeable consequence of the legislature's action. In two earlier cases, Washington v. Davis and Arlington Heights v. Metropolitan Housing Development Corporation, the Court had emphasized that equal protection plaintiffs must show more than disproportionate results; they must show discriminatory intent. But the Court had also emphasized that intent could be inferred from the "totality of the relevant facts." Indeed, Justice Stevens wrote separately in Davis to emphasize that plaintiffs could properly use a foreseeability theory of intent. He stated that, "the actor is presumed to have intended the natural consequences of his deeds," particularly with regard to government action "which is frequently the product of compromise, of collective decision making, and of mixed motivation." The Court subsequently approved Justice Stevens' remarks in Arlington Heights.

404. 426 U.S. at 253 (Stevens, J., concurring). Justice Stevens prefaced the quoted language by stating, "[f]requently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor." Id.
405. The Court stated: 
Davis does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one.
429 U.S. at 265 (footnote omitted).
Thus, it would have seemed that the plaintiff's showing that the effect of the Massachusetts statute would be to exclude women from most nonclerical civil service jobs should have been strong evidence of discriminatory intent. But the Feeney Court sharply limited the use of the foreseeability test to show intent. Justice Stewart reasoned that it was not proper to infer discriminatory intent from foreseeability, because to have discriminatory intent a legislature must act "because of," not merely "in spite of" [a law's] adverse effects upon an identifiable group."\(^{406}\) There was no proof of any discriminatory intent, Justice Stewart concluded, because there was no proof that the legislature adopted the veteran's preference scheme because it would keep women in the lower echelons of the civil service.\(^{407}\) Thus, since the law was neutral on its face, and since there was no proof of discriminatory intent such that the law was covertly or invidiously sex-based, the law was found not to be sex-based.

Justice Marshall vigorously dissented. He attacked Justice Stewart's conclusion that the creation of an absolute preference for veterans, known to be overwhelmingly male, was not covertly or invidiously "based on" sex. He noted that the Court had clearly authorized judicial examination of objective factors, including foreseeability, to determine whether an illicit consideration, such as sex, was involved.\(^{408}\) More importantly, he emphasized that the Court had held that the illicit consideration did not have to be the primary motivation, but merely "a" motivating factor.\(^{409}\) Looking to the foreseeable consequences of the Massachusetts statute, Justice Marshall found the evidence overwhelming that the legislature must have known that the effect of the statute would be to freeze women in lower echelon clerical positions.\(^{410}\) Given this overwhelming evidence of the perpetuation of a negative stereotype, he concluded that the burden should shift to the state to show that the statute was not sex-based, especially since there were many less discriminatory alternatives available to the legislature to provide a preference for veterans.\(^{411}\)

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\(^{406}\) 442 U.S. at 279.

\(^{407}\) Id.

\(^{408}\) 442 U.S. at 282-83 (Marshall, J., dissenting).


\(^{410}\) Id. at 284-85.

\(^{411}\) Id. at 284-86. Justice Marshall suggested that the majority was "myopic"
Justice Marshall concluded that, if examined under the *Craig* intermediate scrutiny test, the *Feeney* statute would not pass constitutional muster. Although the purposes advanced for the statute were "legitimate," and perhaps important, there was not a substantial relationship between the means and the purposes.

In a brief concurring opinion, Justice Stevens stated that because the number of males disadvantaged by the law (1.9 million) was sufficiently close to the number of disadvantaged females (3.0 million), there was no sex discrimination. Given the numerous problems presented by the *Feeney* decision, Justice Stevens' concurrence seems unusual. Even more unusual is the superficial nature of his concurrence. Aside from correctly observing that the majority's distinction of covert discrimination versus invidious discrimination was clumsy, his one paragraph added nothing that was not covered by Justice Stewart. His opinion is remarkable for what it did not say.

Earlier, Justice Stevens had written separately in *Davis* in order to emphasize that discriminatory intent could properly be inferred from a foreseeability test. In *Feeney*, the majority downplayed the use of foreseeability in the face of the dissent's strenuous assertion that a foreseeability test should be used. Thus, even if Justice Stevens had been persuaded by the majority, it was necessary for him to explain his views.

Similarly, Justice Stevens had earlier insisted that there was no such thing as "one" legislative intent. This concept was a fight-

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412. Justice Marshall did not address this question.
413. The state advanced three purposes. Justice Marshall found the first, facilitating veterans' transition to civilian status, plainly overinclusive because a substantial number of the veterans receiving the benefits of the statute were not recently discharged and did not need adjustment assistance. 442 U.S. at 286-87. Justice Marshall doubted that the second purpose advanced, encouraging military enlistment, was an actual purpose and, even if it was, found it also overinclusive. *Id.* at 287. Justice Marshall declared that the third purpose, rewarding veterans, was not sufficient to outweigh the discrimination because the legislature could have used less discriminatory alternatives. *Id.* at 287-88.
414. *Id.* (Stevens, J., concurring).
415. See note 398 supra.
417. See note 184 supra and accompanying text. Justice Stevens had also quoted approvingly from *McGinnis v. Royster*, 410 U.S. 263, 276-77 (1973), as follows: "The search for legislative purpose is often elusive enough, Palmer v. Thompson, 403 U.S. 217 (1971), without a requirement that primacy be ascertained. Legislation is frequently multipurposed: the removal of even a 'subordinate' pur-
ing issue in *Sweeney*. The majority held that discriminatory intent did not make a statute "sex-based" unless it was "the" intent under a "but for" test; but for the discriminatory intent, the legislature would not have passed the statute. Given his past opinions, Judge Stevens would have been expected to agree with the dissent that a legislature has numerous "intents" when it passes a bill, and that so long as one of those "intents" is discriminatory, the measure is "sex-based." Perhaps Justice Stevens had developed reasons to join the majority; he failed, however, to articulate those reasons. Moreover, the "but for" test advanced by the majority has little support in prior case law, and it indicates a very narrow view of discriminatory purpose. This narrow view seems inconsistent with the Court’s and Justice Stevens’ prior insistence that invidious discrimination is likely to stem, not from a desire to harm women, but rather from “romantic paternalism.” In past years, the Court had emphasized that it would invalidate legislation which facially discriminated against women. In *Fee-ney*, though, where the statute appeared facially neutral, the Court virtually ignored the possibility that the statute was contaminated by negative stereotyping.

The *Fee-ney* decision also seemed inconsistent with Justice Powell’s prevailing opinion in *Regents of the University of California v. Bakke*. In *Bakke*, Justice Powell implied that race could be used as a "plus," but that it could not be used as an absolute dispositive factor. In *Fee-ney*, however, the Court rejected the dissent’s argument that, while some preference for veterans could be allowed, an absolute preference went too far. Although it has been clear since *Frontiero* that sex discrimination is not accorded the same constitutional solicitude as race discrimination, there seems to be no principled basis for allowing an absolute preference in the former area but not the latter.

The majority’s response to these criticisms was to reiterate that *Fee-ney* did not involve "sex" discrimination; it merely involved

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418. See note 375-93 supra and accompanying text.
419. See Note, supra note 400, at 1397-98.
420. See Powers, supra note 9, at 1283-86.
421. Id. at 1290-92.
423. Id. at 317.
“veteran” discrimination. The reasoning justifying this classification is remarkably similar to the Aiello Court's reasoning that differentiating on the basis of pregnancy was not "sex" discrimination but merely a classification of pregnant women versus non-pregnant persons.\textsuperscript{425} In General Electric Co. v. Gilbert,\textsuperscript{426} Justice Stevens pointed out the fallacy of the Aiello reasoning. In Gilbert, he rejected the formalistic reasoning similar to that in his Sprogis dissent. Nevertheless, in Feeney, Justice Stevens either failed to see or discounted the problem with the formalistic reasoning of the majority. The problem with the majority's reasoning was that although the preference did disadvantage many males, that fact did not contradict the inference that the legislature seemed to have intended both: (a) to keep the nonclerical civil service positions virtually all male, and (b) to disadvantage virtually all female applicants.\textsuperscript{427}

The Feeney situation poses a tough problem. On one hand, it is unquestioned that a state should be allowed to reward military service. On the other hand, it is equally unquestioned that an absolute veteran's preference on hiring for government jobs will have the effect of severely penalizing females for many years. The majority concluded that, since the discrimination was not overt, and since the statute was not passed specifically to harm women, the question should be reviewed only in the legislative arena.\textsuperscript{428} That answer seems too easy for such a difficult problem.

Perhaps the Feeney scheme should not have been invalidated because there was not a strong enough showing of discriminatory intent. After all, it has been hornbook law since Fletcher v. Peck\textsuperscript{429} that the presence of one improper motive will not necessarily invalidate a statute if there are also proper motives for the statute. As Justice Stevens stated in Davis, "[a] law conscripting clerics should not be invalidated because an atheist voted for it."\textsuperscript{430} Even if the statute could be upheld, it seems unsatisfactory to allow it to evade serious scrutiny. Rather than writing a principled opinion, using impact as a factor to discover intent, the majority wrote a conclusory opinion, reasoning backwards from its conclusion that there was no discriminatory intent.\textsuperscript{431} The language of the opinion was muddled; the analysis lacked rigor.

\textsuperscript{425} See notes 127-29 supra and accompanying text.
\textsuperscript{426} 426 U.S. 125, 161 (1977) (Stevens, J., dissenting).
\textsuperscript{428} 442 U.S. at 280-81.
\textsuperscript{429} 10 U.S. (6 Cranch) 87 (1810).
\textsuperscript{430} 426 U.S. at 253 (Stevens, J., concurring).
\textsuperscript{431} See Note, supra note 427, at 354.
Perhaps a hidden issue in *Feeney* was a concern that the intermediate level of scrutiny had “gone too far”, that it had become too close to “strict scrutiny.” If so, that issue should have been squarely addressed. Justice Stevens, moreover, should have been the one to address it. Whether he stood by his concurrence or whether he reconsidered and changed his views, Justice Stevens could have forced a much more thorough and significant opinion. For unknown reasons, he failed to do so. A more extensive analysis of “discriminatory intent” was needed, rather than the introduction of new terms and confusing models.* Feeney* was precisely the type of case where the Court should have more clearly explained its decision, as Justice Stevens demanded in *Craig*. In summarizing the area of laws and policies alleged to discriminate against women, Justice Stevens’ opinions are mixed. In *Evans* he wrote a conclusory opinion that begged the major questions in issue. In *Manhart*, however, he wrote a thorough opinion which, although bold and strong, was pragmatically tempered. *Sweeney* demonstrated Justice Stevens’ concern for sending clear guidelines to lower courts and his emphasis upon the overall analysis of a lower court opinion, rather than on seizing some semantic inconsistencies. As for *Feeney*, nothing can be said of Justice Stevens’ opinion except that it had nothing to say, when something to say was desperately needed.

D. Laws and Policies Regarding Pregnancy

1. *General Electric Co. v. Gilbert*

Part of the reason that Justice Stevens’ brief but vapid concurrence in *Feeney* seemed surprising, was that it seemed inconsistent with his brief but incisive dissent in *General Electric Co. v. Gilbert*. In *Gilbert*, decided shortly after he had been elevated to the Supreme Court, Justice Stevens clearly rejected formalistic reasoning of the kind evinced in his Seventh Circuit *Sprogis* dissent. In *Sprogis*, he had reasoned that unequal treatment of stewardesses, as compared to stewards, was not sex discrimina-

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433. *See* Note, supra note 400, at 1391.
434. *See* note 240 supra and accompanying text.
tion. His reasoning was based on the mere difference in job titles. The Gilbert majority extended the formalistic logic of Aiello, which held that discrimination on the basis of pregnancy was not discrimination on the basis of sex. Dissenting in Gilbert, Justice Stevens briefly but precisely identified and dissected the major flaw in the majority's analysis.

In Gilbert, the Court confronted a Title VII challenge to a private employer's disability benefits plan which excluded coverage for pregnancy. The question before the Court was whether Aiello, which had upheld a similar state plan against an equal protection challenge, should be extended to cover this statutory challenge.

The first and critical question was whether the showing needed to establish sex discrimination under Title VII was the same as the showing required under an equal protection challenge. If the standard was the same, Aiello would control, and the sex discrimination challenger would lose. If the standard was lower, the challenger might then be able to show a violation. Justice Rehnquist began the majority analysis by noting that Congress had not defined the term "discrimination." He suggested, without citing precedent, that the Court's decision interpreting the equal protection concepts would serve as a "useful starting point" in interpreting the standard in interpreting the standard to be applied. Since the challenged plan in Gilbert was strikingly similar to the Aiello plan, he concluded that the Aiello analysis should be used. Thus, exclusion of pregnancy from a disability benefits package was held not to be sex discrimination per se because of the lack of identity between the affected group and sex; the exclusion was held to merely create two groups, pregnant women and nonpregnant persons.

Justice Rehnquist bootstrapped the critical issue. He never departed from Aiello, the alleged "starting point." The precise question requiring resolution was whether equal protection analysis should be used in construction of the statute. To begin the argument with the proposition that equal protection analysis should

436. See notes 14-20 supra and accompanying text.
437. See notes 124-32 supra and accompanying text.
438. See notes 123-33 supra and accompanying text.
439. 429 U.S. at 133.
440. Section 703(a)(1) of the Civil Rights Act provides in relevant part that it shall be unlawful for an employer "to discriminate against any individual with respect to his compensation terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (1964).
441. 429 U.S. at 133-34.
442. Id. at 135 (citing Geduldig v. Aiello, 417 U.S. at 496-97 n.20).
be so used was to beg that question. Justice Rehnquist never explained why Aiello became controlling.

Although the General Electric plan was found not discriminatory per se, there were two other tests under which it could have been found to be discriminatory: if it was a "mere pretext" for invidious discrimination against women or if it had a discriminatory effect, even though facially neutral.443 Justice Rehnquist found that the exclusion was not a mere pretext for invidious discrimination because, even though pregnancy is limited to women, it differs in other respects from disabilities typically covered by such plans. First, it is not a disease. Second, pregnancy is "often a voluntarily undertaken and desired condition."444 Next, Justice Rehnquist found that the plan did not have discriminatory effects because it covered the same risks for both sexes, and there were no risks for which men were covered and women excluded or vice versa.445 Having concluded that the plan was not discriminatory,

443. Id. at 134-37. The opinion made an oblique reference to intent ("[e]ven assuming that it is not necessary in this case to prove intent to establish a prima facie violation . . .") but did not discuss it as an element to be proved. See Supreme Court, 1976 Term, supra note 230, at 243 n.12 (suggesting the Court had rejected any attempt to impose a "constitutional" requirement of intent in Title VII cases).

444. 429 U.S. at 136. See Comment, Pregnancy Based Discrimination—General Electric Co. v. Gilbert and Alternative State Remedies, 81 DICK. L. REV. 517, 527-28 (1977) (The author suggested that the reference to the "voluntary" nature of pregnancy was carefully phrased in an attempt to answer criticisms that other injuries arising from voluntary activities were included.) Even if injuries due to voluntary sports activities or elective cosmetic surgery could be considered voluntary, they would presumably not be "desired." Several problems are created, however, by this "voluntariness" rationale. First, many, if not most, pregnancies cannot truly be considered "voluntary." Second, problems of freedom of religion exist in the implied assertion that, if pregnancy is voluntary, a woman can choose to terminate the pregnancy. It can be argued that, for religious reasons, many women cannot voluntarily so choose.

445. 429 U.S. at 137-38. See The Supreme Court, 1976 Term, supra note 230, at 246-49. Three alternative ways were examined to measure risk in Gilbert: (1) the Percentage of Total Risk method, which compares percentage of all risks compensated for members of the protected class with the equivalent figure for members of the nonprotected class (in Gilbert, males were protected against all risks, but females were not); (2) the Dollar Value Received method, which compares the per capita value of benefits which will be paid to the protected and nonprotected classes (in Gilbert, although the parties had stipulated that women received greater per capita benefits than men, the Court did not rely on this fact in its decision. The Court appeared to endorse this method, at least partially, in that it viewed the cost to insure as extra compensation. The Court implied that if equality of compensation combined with no fringe benefits was acceptable, then equality of employer contributions could be acceptable, even if those contributions ended up as benefit packages in which the classes were covered differently); and
whether per se, as a "mere pretext" for invidious discrimination, or by effect, Justice Rehnquist also rejected the final argument asserted in favor of finding discrimination. He gave no weight to an Equal Employment Opportunity Commission guideline that held that disability benefits must cover pregnancy.446

Justice Brennan wrote the primary dissent in Gilbert and Justice Stevens filed a brief dissenting opinion. The dissenting Justices rebutted the majority's conclusion that the proof required to show a Title VII violation must be judged by the standard used to show denial of equal protection and that, therefore, Aiello controlled.447 The dissenting justices concluded that even if the policy was not considered facially discriminatory, it could properly be considered a mere pretext for invidious discrimination.448

(3) the Analagous Risk method, which compares the equality of the percentage of each type of risk covered (in Gilbert, this was the method primarily emphasized by the Court).

See also Comment, supra note 444, at 530. The author suggested two problems with the Dollar Value Received method. First, the "peace of mind" values, emphasized in insurance policies, were unequal because of the failure to cover pregnancy. Second, when total fringe benefits are compared, addition of pregnancy benefits would not necessarily result in a higher "compensation" to women because life insurance benefits, since they are typically keyed to earnings, and since men typically earn more than women, would be higher for men.

446. 429 U.S. at 142-43. The opinion noted that the guideline could receive some weight, but that it was not entitled to the deference which should be accorded to an administrative regulation. The Court also found that it was not contemporaneous, and that it conflicted with earlier guidelines promulgated by the EEOC. Id. It appeared to conflict with a Wage and Hour Administration guideline which indicated that either the employer's contribution or the fringe benefits actually received could be equal. See Comment, supra note 444, at 532 (discussing the conflict between the two guidelines and suggesting that the Wage and Hour guidelines could have been narrowly construed in a way which could have resolved the conflict).

447. Justices Brennan and Stevens found that the burden of proof regarding the level of discrimination required to establish a Title VII violation need not be as high as that needed to establish an equal protection violation. In Gilbert, Justice Brennan cited numerous cases which rejected the "coterminus" proposition, and both he and Justice Stevens cited Washington v. Davis, 427 U.S. 229, 239 (1976) which stated: "We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII and we decline to do so today." 429 U.S. at 154 n.6 (quoting Washington v. Davis, 426 U.S. 229, 239). See also id. at 160-61 (Stevens, J., dissenting).

448. The majority presented three explanations in support of the proposition that the plan was not a pretext. One, there was no risk for which men were covered and women were not or vice versa. Two, pregnancy was not a disease. Three, pregnancy was "often voluntarily undertaken and desired." 429 U.S. at 136. Justice Stevens' reply to the first explanation was that, in the narrow sense of "risk," men were protected from male disabilities (e.g., prostate operation) while women were not; in the broad sense of "risk," including unemployment caused by disability, men received total protection against that risk while women received only partial protection. Id. at 162 n.5. Thus, there was a difference in risks covered, and the policy could be considered a disguise for invidious discrimination. In addition, Justice Brennan documented a long history of General Electric practices which
They also concluded that the plan discriminatorily affected women. Finally, Justices Brennan and Stevens reasoned that the Equal Employment Opportunity Commission guideline prohib-

had undercut employment opportunities of women who became pregnant after employment. Id. at 149-50 n.1. That history further showed that the plan was a facade for a policy “which purposefully downgraded women’s role in the labor force.” Id. at 149.

As to the second aspect of the rejection of the pretext argument, that pregnancy was not a disease, Justice Brennan essentially replied, “so what.” The label of disease could not be determinative because the plan even excluded actual “diseases” when they were related to pregnancy. Id. at 151. Justice Brennan estimated that 10% of pregnancies ended in miscarriage, which was the functional equivalent of disease, and that 10% of pregnancies were complicated by disease. Thus, 20% of pregnancies had a true “disease” component but were not even partially covered. Id. In addition, the plan did not cover diseases totally unrelated to pregnancy if they occurred while a worker was on pregnancy leave. Id. Justice Brennan was particularly struck by the experience of one of the Gilbert plaintiffs who took a pregnancy leave and then suffered a stillbirth. Later, while still on leave, she was hospitalized for a blood clot in the lung, a condition unrelated to her pregnancy. She was not covered because she had been on pregnancy leave. Had she been away from work for any other reason, she would have been covered. Id. at 151-52 n.4.

Justice Brennan also found the third argument of voluntariness unpersuasive. Id. at 151. The proposition that pregnancy is voluntary is overbroad. Id. at 151 n.3. Justice Brennan implied, however, it might be appropriate for an employer to treat pregnancy as voluntary, even though many pregnancies were not, because of the impossibility of determining which pregnancies were voluntary, “except perhaps through obnoxious, intrusive means.” Id. Voluntariness, however, could not be the touchstone because the plan also covered other disabilities which could be characterized as voluntary. Id. at 151.

449. Id. at 155. Justice Brennan’s argument was that the plan covered all disabilities that affect both sexes. The plan covered all disabilities that are male related or have a predominant impact on males. On the other hand, the plan did not cover all female related disabilities or those which primarily had an impact upon females. The plan excluded the most prevalent female specific disability, pregnancy. Therefore, the plan had a discriminatory effect on women. Id.

Justice Stevens declined to reach the “effect” issue, having found that the plan was discriminatory on its face. Instead, Justice Stevens appeared to suggest a test for “effect” that could have grave implications:

[F]acially neutral criteria may be illegal if they have a discriminatory ef-
fect. An analysis of the effect of a company’s rules relating to absenteeism would be appropriate if those rules referred only to neutral criteria, such as whether an absence was voluntary or involuntary, or perhaps particularly costly. This case, however, does not involve rules of this kind. Id. at 161. The problem is that questions of voluntariness and cost are not truly neutral. See note 444 supra. The question of neutrality was not critical in Gilbert because Justice Stevens was not using the factors of voluntariness or cost to find against the sex discrimination plaintiff. Nevertheless, the “neutrality” concept remains as a possible “escape clause” for future sex discrimination cases. The supporters of the General Electric plan had persuaded the majority that the case primarily involved criteria of cost and, to a lesser extent, voluntariness. See id. at 138-39. Justice Stevens did not refer to the majority’s arguments nor to the counterarguments made by Justice Brennan. See id. at 148-53.
ing the exclusion of pregnancy should be given strong
degree.450

In his brief dissent, Justice Stevens drove directly to the heart
of the matter. The majority's primary argument had been that
pregnancy discrimination was not per se sex discrimination. Jus-
tice Stevens incisively exposed the flaw in the majority's conten-
tion that the plan merely divided persons into two groups:
pregnant women and nonpregnant persons. That characterization
was incorrect, Justice Stevens said, because disability programs
deal with future risks, not with past events. The correct classifica-
tion was between those persons who faced a risk of pregnancy
and those persons who did not.451 Thus, the rule, by definition
and on its face, "discriminates on account of sex; for it is the ca-
pacity to become pregnant which primarily differentiates the fe-
male from the male."452

Congress has subsequently acted to change the Gilbert and
Aiello results. Now, discrimination on the basis of pregnancy is
considered discrimination on the basis of sex.453 But an under-
standing of Gilbert and Aiello is important because the Court will
again face the pregnancy issue and because the rationales in Gil-
bert and Aiello demonstrate the Court's narrow view of sex
discrimination.

Two primary themes can be seen in Gilbert, Justice Stevens' 
first Supreme Court sex discrimination case. First, the negative
charges of the National Organization for Women and other femi-
nist organizations454 may have persuaded Justice Stevens to re-
consider his views on sex discrimination.455 A finding that
pregnancy exclusions in disability plans violated Title VII helped
to refute the charge of "consistent oppos[tion to] women's

450. Justice Brennan challenged the majority's conclusion that the guidelines
should be given little weight. He found that the guideline was "a particularly con-
scientious and reasonable product of EEOC deliberations and, therefore, merits
our 'great deference.'" Id. at 151. Justice Stevens did not reach this issue. He
had, however, given little deference to an EEOC guideline regarding the airlines'
"no-marriage" rule challenged in his Seventh Circuit Sprogis dissent. See notes
14-23 supra. Thus, it may be inferred that he would not have given the same
weight that Justice Brennan did to this EEOC guideline.

451. Id. at 161-62 n.51.

452. Id. at 162. In his dissent, Justice Brennan stated, "[s]urely it offends com-
mon sense to suggest . . . that a classification revolving around pregnancy is not,
at the minimum, strongly 'sex related.'" Id. at 149 (quoting Cleveland Bd. of

(1976)).

454. See note 4 supra.

455. See Comment, The Emerging Constitutional Jurisprudence of Justice Ste-
rights.\textsuperscript{456} Second, Justice Stevens demonstrated that his reputation as a pragmatist was correctly placed. He rejected the exceedingly formalistic approach of the majority\textsuperscript{457} in recognizing that the classifications relating to pregnancy regarded potential risk, not actual pregnant or nonpregnant status.

2. \textit{Nashville Gas Co. v. Satty}

Justice Stevens continued his pragmatic approach to pregnancy issues in a creative concurring opinion in \textit{Nashville Gas Co. v. Satty}.\textsuperscript{458} The question in \textit{Satty} was whether a Title VII plaintiff complaining of pregnancy discrimination was totally blocked by \textit{Gilbert} from obtaining relief. Justice Stevens created a path for relief which managed to evade the contours of \textit{Gilbert}.

In \textit{Satty}, the plaintiff alleged that her employer’s seniority and sick pay plans violated Title VII. The seniority plan deprived employees returning from pregnancy leave, but not from other leaves, of all accumulated seniority.\textsuperscript{459} The sick leave plan provided pay during leave for all disabilities except pregnancy.\textsuperscript{460} Writing for the majority, Justice Rehnquist found that loss of the accrued seniority did constitute a violation of Title VII,\textsuperscript{461} but he remanded the question of sick pay for a determination as to whether the sick pay policy constituted a “mere pretext” for invidious discrimination.\textsuperscript{462} Justice Stevens concurred but arrived at that result by a different “pragmatic” route.

Although \textit{Gilbert} might have appeared to be “a useful starting point,” Justice Rehnquist did not follow his \textit{Gilbert} analysis.\textsuperscript{463} While he cited the \textit{Gilbert} holding that discrimination on the basis of pregnancy was not discrimination on the basis of sex,\textsuperscript{464} his decision took pains to distinguish \textit{Satty} from \textit{Gilbert}. A key distinction was the specific section of Title VII to be applied. Section 703(a)(1) of Title VII was characterized by the \textit{Satty} Court as re-

\textsuperscript{456} \textit{Stevens Hearings, supra} note 4, at 83 (testimony of Margaret Drachsler).
\textsuperscript{457} \textit{Justice} Stevens had not necessarily become an advocate of total legal sexual equality, but it was now known that he would find for plaintiffs attacking sex discrimination policies at least in some cases.
\textsuperscript{458} \textit{See} \textit{Supreme Court, 1976 Term, supra} note 230, at 244.
\textsuperscript{459} \textit{Id.} at 137.
\textsuperscript{460} \textit{Id.}
\textsuperscript{461} \textit{Id.} at 142.
\textsuperscript{462} \textit{Id.} at 146.
\textsuperscript{463} \textit{See} notes 439-40 \textit{supra} and accompanying text.
\textsuperscript{464} 434 U.S. at 141.
lating to benefits provided or withdrawn by an employer. The *Gilbert* case had been brought under section 703(a)(1), although that decision had not emphasized the statutory subsection or the “benefits” concept. Section 703(a)(2) was characterized by the *Satty* Court as dealing with burdens imposed by an employer. *Satty* was brought under section 703(a)(2).

The majority opinion first examined the seniority plan and found it to be “facially neutral.” The Court then applied the “benefit-burden” analysis to find that the *Satty* plan, unlike the *Gilbert* plan, did have a discriminatory effect because the em-

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465. Id. at 142. Section 703(a)(1) provides, in relevant part, that it is an unlawful practice for an employer “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment, because of such individual’s . . . sex . . . .” 42 U.S.C. § 2000-2(a)(1) (1970).

466. 434 U.S. at 142. Section 703(a)(2) provides, in relevant part, that it is unlawful for an employer to “limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s . . . sex . . . .” 42 U.S.C. § 2000-2(a)(2) (1970).

467. The *Satty* plaintiff could not state a claim that she had been discriminated against regarding “terms of employment,” but she did claim that she had been discriminatorily “deprived of an employment opportunity.” 434 U.S. at 142.

468. 434 U.S. at 140. The first issue in *Gilbert* had been whether a showing of discrimination under Title VII was the same as that required under the Equal Protection Clause. See note 439 supra and accompanying text. The issue of constitutional versus statutory burdens of proof was not discussed in *Satty*. The next *Gilbert* question had been whether the pregnancy classification had been discriminatory per se. See note 442 supra and accompanying text. Although Justice Rehnquist did not use the *Gilbert* terminology, presumably he was addressing the “discriminatory per se” issue when he found the policy “facially neutral.” 434 U.S. at 140.

469. The Court distinguished *Gilbert* as follows. *Gilbert* was brought under § 703(a)(1), which forbids “discrimination” regarding the broad area of terms and benefits of employment. The *Gilbert* plan did not “discriminate”; it covered both classes equally. It merely failed to cover women against an additional risk; it failed to extend an additional benefit. *Satty* was brought under § 703(a)(2), which forbids deprivation or burden “on the basis of sex.” The *Satty* plan did “deprive or burden” the employee in that she no longer had a job. 434 U.S. at 140-42.

Although the Court distinguished the cases on the basis of benefits versus burdens, it did not distinguish them on the basis of discrimination. Justice Stevens noted that § 703(a)(1) uses the word “discriminate” while § 703(a)(2) does not. Id. at 154. He argued that this difference was meaningless because a violation of § 703(a)(2) can occur if a facially neutral policy has a discriminatory effect.

The majority’s emphasis on the different subsections is not persuasive because the key requirement to both statutes is one of unfavorable treatment, be it “discrimination” or treatment which “adversely affects,” on the basis of sex. The majority never dealt with the following critical question. If the employer’s action in *Gilbert* was not discrimination because it merely divided persons into classes, pregnant women and nonpregnant persons, why does not this analysis protect the employer’s action in *Satty*, regardless of whether the action was a burden or a refusal to extend a benefit?

In relation to this problem, perhaps a critical shift in language occurred between *Gilbert* and *Satty*: the substitution of the word “role” for the word “sex.” The *Satty* Court stated:
ployee had been deprived of her job. Finally, the Court stated in a footnote that its decision was consistent with an Equal Employment Opportunity Commission guideline.471

The majority turned to the sick leave policy and found that it was "legally indistinguishable" from the plan upheld in Gilbert: the exclusion of pay during time taken for pregnancy leave was not discriminatory per se.472 Thus, the sick leave plan was facially neutral.473 Justice Rehnquist found, however, that the

We held in Gilbert that § 703(a)(1) did not require that greater economic benefits be paid to one sex or the other "because of their differing roles in 'the scheme of human existence . . .'" But that holding does not allow us to read § 703(a)(2) to permit an employer to burden female employees in such a way as to deprive them of employment opportunities because of their different roles.

470. The Court found that it "was beyond dispute" that the employee was clearly "deprive[d] . . . of employment opportunities" and that her status was "adversely affect[ed]" as required by § 703(a)(2). She was deprived and adversely affected in two ways. First, because she had been stripped of seniority credits, she did not qualify for a permanent position she otherwise would have regained. Second, even if she had received a permanent position, she would have felt adverse effects in terms of assignment to less desirable and low paying positions throughout her entire career with Nashville Gas Company. 434 U.S. at 138-46. Id. at 142 n.4. The Court stated that the EEOC guideline in Satty was entitled to more weight than a similar EEOC guideline given little weight in Gilbert, see note 446 supra and accompanying text, because the Gilbert guideline had conflicted with earlier interpretations, while there was no consistency problem with the Satty guideline. 434 U.S. at 142 n.4. For a discussion of the Court's handling of the EEOC guideline, see Barkett, supra note 114, at 470 n.271 ("what does appear to be clear is that the Guideline played no part in the Court's analysis or conclusions").

472. 434 U.S. at 143-44.

473. Id. at 144. The Court implied that in some cases a showing of intent might be required to prove a violation of § 703(a)(1) but indicated that no showing was required under § 703(a)(2). Id.
plaintiff had not had the opportunity to show that the policy was a "mere pretext" for "invidious discrimination" and remanded that aspect of the case.\footnote{474}

Concurring, Justice Stevens attempted to reconcile \textit{Gilbert} and \textit{Satty} and thereby formulate a mode of analysis to resolve the confusion created by the majority opinions in those cases.\footnote{475} He proposed a "pragmatic" approach to the question of when policies "which attach a special burden to the risk of absenteeism are prohibited by Title VII."\footnote{476} First, he recognized that he would not be able to convince a majority of the Court that his \textit{Gilbert} dissent should be the law. Thus, he stated, it \textit{was} the law that not all rules attaching a burden to the risk of pregnancy would be held invalid.\footnote{477} He would live with and abide by that reality; he did not pursue his strong \textit{Gilbert} argument that discrimination on the basis of pregnancy did violate Title VII.

Justice Stevens identified the critical problem posed by the \textit{Gilbert} precedent; if discrimination against pregnancy is not sex-based discrimination, then presumably burdens attached to the risk of absenteeism would "never" constitute a violation of Title VII.\footnote{478} In \textit{Satty}, however, the Court did find a violation. There-
fore, the answer must be that policies which attach a special burden on the risk of absence caused by pregnancy would "sometimes" violate Title VII.\(^{479}\) Such policies could not be considered discriminatory per se because *Gilbert* clearly rejected that argument.\(^{480}\) But the policies could still violate Title VII if they had a discriminatory effect.\(^{481}\) The problem then became what constituted discriminatory effect.

Justice Stevens differed with the majority regarding the test by which discriminatory effect was to be identified.\(^{482}\) He rejected the majority's reliance on the statutory distinction between "benefits" and "burdens."\(^{483}\) He then set forth his "pragmatic" analysis of the way in which *Satty* could be distinguished from *Gilbert*. His distinction is worth quoting in full:

> Although the *Gilbert* Court was unwilling to hold that discrimination against pregnancy—as compared with other physical disabilities—is discrimination on account of sex, it may nevertheless be true that discrimination against pregnant or formerly pregnant employees as compared with other employees—does constitute sex discrimination. This distinction may be pragmatically expressed in terms of whether the employer has a policy which adversely affects a woman beyond the term of her pregnancy leave.\(^{484}\)

In this way, Justice Stevens struck the critical compromise. The employer's discriminatory treatment of pregnancy could occur only during the specific period of pregnancy leave. During that period, an employer could reduce, withdraw, or fail to give benefits. An employer's freedom to discriminate would be sharply limited, however, by two important provisos. None of the

\(^{479}\) Id. at 154.

\(^{480}\) Id.

\(^{481}\) Id.

\(^{482}\) Id. at 154-55 n.4. Justice Stevens misunderstood part of the majority's reasoning. He understood the majority to propose two tests: (1) the difference between a "benefit" and a "burden," and (2) the difference between § 703(a)(1) and § 703(a)(2). *Id.* The majority opinion, however, clearly *equated* the two tests in that the difference between the two statutes was the distinction between a "benefit" and a "burden." *Id.* at 142. But even though Justice Stevens rejected what he saw as both tests, this confusion did not detract from his criticism of the majority's rationale.

\(^{483}\) Id. at 154 n.4. Justice Stevens realized that the labels were subjective and conclusionary. He stated that, in benefit-burden analysis, "the favored class is always benefited and the disfavored class is equally burdened." *Id.* He argued that, even though § 703(a)(1) used the word "discrimination" while § 703(a)(2) did not, the difference in language played no analytical role because the primary issue to be decided was "discriminatory effect," which could be found under either subsection. Thus, he found the rationale suggested by the Court "illusionary." *Id.* at 154.

\(^{484}\) Id. at 155.
limits on benefits could adversely affect the employee after her return to work, and the employer's policy must be consistent with the determination that pregnancy is not an illness.

Justice Stevens' concurring opinion in Satty attempted to set the course for the Supreme Court, as well as for lower courts, with regard to pregnancy discrimination issues. In one stroke, he gave the Court a way to live with Gilbert as well as a way to move away from Gilbert. In addition, he developed a relatively simple and easily applied method of analysis to replace the abstruse formalisms found in Aiello, Gilbert, and the majority's Satty opinion. Justice Stevens did not address the time before pregnancy, as that period was not involved in Satty. But his opinion suggests that rules such as the airlines' "go when you know" rule will be struck down.

Justice Stevens' opinion may have been created partly as political compromise, and it is not completely consistent with the Gilbert rationale. No decision, however, could be entirely consistent with the Gilbert rationale unless it upheld all policies involving disparate treatment of pregnancy. Justice Stevens was unwilling to allow formalism such reign.

The Satty decision was a major step forward in the law of sex discrimination. The entire Court upheld the decision to declare

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485. *Id.* at 156. Thus, Gilbert could be rationalized because the plan did not discriminate against pregnant employees before or after their maternity leave; it just failed to provide benefits during that leave. *Id.* Justice Stevens admitted that the Court's sanction of the aspect of Gilbert which failed to provide benefits for a non-pregnancy related illness occurring while on pregnancy leave was difficult to reconcile with his theory. He did, however, make the attempt. "I suppose this aspect of Gilbert may be explained by the notion that any illness occurring at that time is treated as though it were attributable to pregnancy and, therefore, is embraced within the area of permissible discrimination." *Id.* at 155 n.5. That explanation, however, merely restated the proposition rather than explained it.

486. *Id.* at 156 n.7. Justice Stevens did not elaborate on the "not an illness" proviso, but he did state that the two limitations, policy limited to the period of pregnancy leave and policy consistent with the non-illness view of pregnancy, served to focus the disparate effect of the policy on pregnancy rather than on pregnant or formerly pregnant employees. *Id.* at 155 n.5. He recognized that policies which place a burden on pregnancy also burden pregnant women. He concluded, however, that these burdens must be allowed under Gilbert, "but only to the extent that the focus of the policy is . . . on the physical condition rather than the person." *Id.*

487. See Barkett, *supra* note 114, at 474 (suggesting Justice Stevens' opinion will receive the most attention in the lower courts because of his pragmatic approach).

488. The logical distinction Justice Stevens made between "treatment of pregnancy" and "treatment of pregnant persons" may become as hopelessly subjective and illusionary as the distinction between "burden" and "benefit". *See note 483 supra.* Justice Stevens appeared to recognize this but implied that, as a practical matter involving analysis of specific employer practices, the distinction could be maintained. *See note 484 supra* and accompanying text.
an employer's unpaid pregnancy leave plan invalid. Indeed, the majority opinion was written by Justice Rehnquist who, just one year earlier, had insisted in *Gilbert* that discrimination against pregnancy was not discrimination against sex and whose opinion may have been taken to infer that employer pregnancy policies might be immune from Title VII attack. Further, the Court showed an increasing willingness to reject policies based on role-typing and stereotypical ways of thinking.\(^{499}\)

Justice Stevens' concurrence allowed the *Satty* decision to provide relatively clear guidelines to lower courts facing pregnancy discrimination questions. Loss of income, failure to provide benefits for pregnancy, and other practices which immediately affected an employee only during pregnancy leave, would probably not violate Title VII. Even failure to provide benefits for nonpregnancy related illnesses otherwise covered and occurring during pregnancy leave would not be prohibited. Loss of seniority, failure to provide reemployment, or reduction in pay or benefits occurring after pregnancy, however, are no longer allowable.

The *Satty* decision was criticized because it did not incorporate the logic of *Gilbert*.\(^{490}\) As has been noted, *Satty* cannot be logically squared with *Gilbert*'s underlying principle. Criticism that the *Satty* claim should have been rejected, however, misses the mark. The *Gilbert* decision was harsh, restrictive, and poorly reasoned. It was the obstacle to avoid, not the answer to the future questions. The Court needed a way out, but was unwilling to overrule *Gilbert*. Justice Stevens' concurrence provided a creative solution.

The *Satty* decision can more properly be criticized because it did not go far enough. It left a major area of concern, the time period during pregnancy, unprotected. Such lack of protection is difficult, if not impossible, to reconcile with the dissents in *Gilbert*. In the final analysis, the *Satty* decision may best be viewed as achieving an accommodation between conflicting social forces and a truly "pragmatic" solution. In this sense, Justice Stevens' opinion is a bellweather of the Court's attitude toward pregnancy. The Court sees pregnancy issues more as political issues of distributive justice, to be addressed by the legislature, rather than as

\(^{489}\) See Barkett, supra note 114, at 475.

\(^{490}\) Id. at 474-75 n.285.
IV. Conclusion

The sex discrimination cases before the Court have involved four categories: access to the federal courts, law and policies ostensibly benefiting women, laws and policies discriminating against women, and pregnancy issues. In all of these categories, the Court's approach to sex discrimination cases has been a pattern of two steps forward followed by one step backward. Justice Stevens' opinions have also followed that pattern. Although inconsistent, he has accorded a generally positive reception to the challenges launched by sex discrimination plaintiffs. The inconsistency is exemplified in the area of access by plaintiffs to federal courts. In Cannon, he placed a strong value on access, but in Novotny, he was willing to require that sex discrimination plaintiffs remain under Title VII, even when other laws offered important benefits. The decisions are not totally irreconcilable. Novotny did not involve a complete denial of access, which perhaps Justice Stevens would not countenance.

In the area of policies ostensibly benefiting women, Justice Stevens has seemed somewhat preoccupied with models. In Craig, he attempted to clarify the standard of equal protection analysis to be used, but his opinion may have only added dirt to already muddied waters. In Goldfarb, Justice Stevens found for the sex discrimination plaintiff, but appeared to open a door for supporters of laws establishing unequal treatment. He implied that such laws might be upheld if they truly demonstrated administrative convenience, a proposition which had been considered dead after Frontiero. Subsequently, no case has materialized in which a statute's supporter has attempted to take advantage of Justice Stevens' questionable reasoning on this issue. In Michael M., Justice Stevens began an excellent discussion of equal protection analysis. Unfortunately, he allowed himself to get sidetracked and never fully completed his discussion or even applied his new model. It seems, though, that when he does completely develop his model, the model begun in Michael M., it will lead to a more precise analysis within the area of sex discrimination.

Perhaps the only clear pattern that may be drawn from Justice Stevens' opinions in the area of discrimination against women is that there is no pattern. His opinion in Evans was far from artful. He virtually ignored all of the points made by a vigorous dissent.

491. See Kirp and Robyn, supra note 114, at 948. Of course, in the final analysis, all sex discrimination issues are truly political questions of distributive justice. See generally Powers, supra note 11.
He may have concluded that all the major issues in *Evans* had previously been decided and that he had no need to aggressively defend those issues in his opinion.

With Justice Stevens' opinion in *Manhart*, the Court took a major step forward. The challenge to sex discrimination policies had now come to the broad arena of pension plans, and Justice Stevens did not hesitate in striking down policies requiring unequal contributions. He emphasized not only that the decision struck down unequal pension plan policies, but also that no programs based on stereotypes of a woman's limited role would be countenanced by the Court. He did not, however, follow his logic to its ultimate conclusion. He declined to order relief primarily because of a fear of "sliding slopes."\(^{492}\) Although relief was proper, Justice Stevens seemed to say that if courts allowed many cases like this, the insurance industry would be severely harmed. Additionally, he wrote puzzling and potentially dangerous dicta implying that employers could subvert pension plans by giving equal contributions to employees.

In *Sweeney*, as well as in *Satty*, Justice Stevens demonstrated his great concern for the lower courts. He emphasized that the Court should not "nit pick" at every use of inconsistent language, especially when the Court itself was unable to avoid the same inconsistency.\(^{493}\) More importantly, Justice Stevens has emphasized that Supreme Court decisions must be interpreted by the lower courts in thousands of differing factual situations. He has strived for analysis which is clear, understandable, and as simple as possible, in order to both help lower court judges and to develop clear, and at least potentially consistent precedent. When he has feared that the Court's opinion did not contain these qualities of analysis, he has not hesitated to write separately.\(^{494}\) Unfor-

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492. Alternatively, his fear may have been of allowing the camel's head into the tent or perhaps just the camel's nose.

493. On another occasion, Justice Stevens has reminded the Supreme Court of the many burdens upon lower appellate courts and admonished the Court to be tolerant of intemperate dicta from those courts. *Stanton v. Stanton*, 429 U.S. 501 (1976).

494. At his nomination hearings Justice Stevens told the Senate Judiciary Committee that it was his practice to dissent frequently.

I know that there is one school of thought that the appearance of unanimity tends to add stability and respect to the law. My own view is that it actually facilitates the fair adjudication process if everyone states his own conclusion as frankly as he can. I think it also serves the purpose to let
Fortunately, Justice Stevens has not always achieved the clear analyses for which he strives.

Justice Stevens' emphasis on clear guidelines is one reason why his timid concurrence in *Feeney* is so puzzling. *Feeney* conceptually may be the toughest sex discrimination case the Court has heard. The result the Court reached is certainly defensible. That Justice Stevens concurred in that result is not a problem. But the majority's language was sloppy and its reasoning was fuzzy. The majority said that it was using the *Davis* test, but it did not do so; it bootstrapped the fundamental proposition in issue. Justice Stevens had the opportunity, by writing separately, to supply the hard-headed analysis the case so desperately needed. Had he merely failed to write, that failure would not be worthy of comment. That he did write, but wrote of such inconsequence, is truly curious.

Aside from his *Manhart* opinion and the significant potential embodied in his *Michael E.* opinion, Justice Stevens' greatest contribution to the evolving law of sex discrimination has been in the area of pregnancy issues. He displayed an incisive and pragmatic approach to this area when he dissented from the *Gilbert* holding that discrimination on the basis of pregnancy was not discrimination on the basis of sex. It was sex discrimination, he reasoned, because the classification in fact discriminates on the basis of risk of pregnancy, not actual pregnancy at any given moment.

In *Satty*, Justice Stevens attempted to salvage from the formalistic reasoning of *Gilbert* some protection against pregnancy discrimination. In a creative opinion, he narrowed the implications of *Gilbert* and developed a workable test which could be used by the lower courts; did the disparate treatment continue after the pregnancy leave ended?

Despite the inconsistencies in his opinions, Justice Stevens has emerged as a strong, creative force on the Court. His performance on the Supreme Court regarding analyses of sex discrimination issues is far stronger than his performance on the Seventh Circuit bench would have indicated. Perhaps Justice Stevens was shaken by the strong criticisms of his nomination and reconsidered his views regarding sex discrimination.

At the same time, Justice Stevens has not been a blind supporter of sex discrimination plaintiffs merely because "the cause is right," as are, perhaps, Justices Brennan and Marshall. His emphasis on precision has sometimes led to the conclusion that the

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the litigants know that they have persuaded one or two judges, and I think they are entitled to know that.

*Stevens Hearings, supra* note 3, at 41 (testimony of John Paul Stevens).
cause was not right. But Justice Stevens himself has been distressingly imprecise at times, both when writing for and against a sex discrimination challenger.

Although Justice Stevens cannot be characterized as the "swing" vote in sex discrimination cases, he has played a unique, indeed a critical role in determining the outcome of those cases. Of the five "middle" justices, Justice Stevens may be the most effective in attempting to reconcile and compromise competing positions. Justice Stevens' opinions do not reflect a pattern of taking one position and repeating it through a series of cases. Rather, he appears to take great efforts to compare and reconcile the competing issues in each case. His differences have usually, but not always, deemphasized ideological skirmishes, and have focused on "pragmatic" methods of coming to grips with the difficult issues involved. Justice Stevens seems most effective not when advocating a position in and of itself, but when reacting to, or acting as, "negotiator" or "facilitator" between two competing positions. In this sense, Justice Stevens appears to be neither a legal realist nor a formalist. He does not endorse broad judicial discretion in order to achieve desirable policy changes, but neither will he tolerate excessively formalistic analysis in order to prevent social change.

The general "reading" given Justice Stevens when he joined the United States Supreme Court was that he was very pragmatic and that he would be hostile to sex discrimination challenges. That reading was only half true. Justice Stevens has shown himself to be a pragmatist. But also, he has taken an important and critical role in increasing the Court's rejection of sex-based laws and policies. While he is not yet a doctrinal "leader," he has the potential, the creativity, and the persuasiveness to become a major force in the emerging law of sex discrimination.

Neither the Court nor Justice Stevens has yet travelled far enough. Many serious sexual inequities still exist. This examination has reviewed specific decisions, but it must be emphasized that the Court avoids many controversial cases simply by not hearing them. Both the Court and Justice Stevens, however, have moved forward since Justice Stevens assumed the bench. Those strides forward seem connected: Justice Stevens has assumed a

495. Justices Rehnquist and Burger, on the one hand, and Brennan and Marshall, on the other, would comprise the respective "extremes."
flexible, progressive, yet pragmatic role; he has helped the law eliminate many sex-based laws and policies. Much legal doctrine remains to be developed. Justice Stevens will be a prime developer of that doctrine.

In the final analysis, Justice Stevens cannot be labelled. The one thing that is clear is that he will decide future cases on the basis of the particular facts involved, minimizing the importance of pre-existing dogma. Justice Stevens would likely endorse Learned Hand's statement that "[t]he truth really is that where the border shall be fixed is a question of degree, dependent upon the consequences in each case." 496