The Gender of Constitutional Jurisprudence

Edited by
BEVERLEY BAINES
Queen's University

RUTH RUBIO-MARIN
Universidad de Sevilla

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Gender and the United States Constitution

Equal Protection, Privacy, and Federalism

Reva B. Siegel

There are no doubt thousands of pathways, direct and indirect, by which constitutions work to enforce and to unsettle the institutions, practices, and understandings that regulate social status of men and women. In this chapter, I consider a few of the more prominent ways that the United States Constitution has served to legitimate and to dismantle social arrangements that sustain inequalities between the sexes.

The U.S. Constitution prohibits government from acting in ways that deny persons within its jurisdiction the equal protection of the laws.[1] This chapter begins with a brief account of how the Supreme Court came to read this clause of the Fourteenth Amendment as a guarantee of equal citizenship for women, over a century after it was first included in the Constitution. It surveys the basic contours of equal protection doctrine, and then considers in more detail how the United States Supreme Court has applied the Equal Protection Clause to questions of sex discrimination in a variety of different practical contexts. The remainder of the essay considers two other bodies of constitutional doctrine that play an especially prominent role in shaping women's lives: privacy doctrines that protect individual decision making about reproduction from state interference, and federalism doctrines that determine the circumstances in which the United States Congress can enact laws that affect family relations.

In general, my account emphasizes description, rather than critical evaluation, of American constitutional law. In a concluding section, however, I identify one practical framework in which we might assess the American constitutional tradition. In this concluding section, I consider some of the ways that American constitutional law has served to legitimate and to undermine traditional forms of gender inequality in the family.

[1] U.S. Const. amend. XIV.

THE EQUAL CITIZENSHIP GUARANTEE: HOW STRUGGLES OVER RACE EQUALITY HAVE SHAPED AMERICAN CONSTITUTIONAL LAW GOVERNING SEX EQUALITY

In the United States, social movements for women's emancipation have grown out of social movements for racial emancipation, first in the nineteenth century and then in the twentieth century. This relationship has in turn shaped constitutional law. If one considers how the body of constitutional law governing questions of equal citizenship for women emerged from the body of constitutional law governing equal citizenship for racial minorities, one can better appreciate its distinctive strengths, weaknesses, and confusions.

The United States Constitution did not contain an express commitment to the equality of its citizens until sectional conflict over slavery culminated in a civil war and major constitutional reform. As part of "Reconstruction" of the United States in the aftermath of the war, its constitution was amended (1) to prohibit slavery (the Thirteenth Amendment); (2) to guarantee that all persons born or naturalized in the United States would be citizens who were entitled "the equal protection of the laws" and who could not be denied life, liberty, or property without due process of law (the Fourteenth Amendment); and (3) to provide that the right to vote would not be denied on account of race or previous condition of servitude (the Fifteenth Amendment).[2]

In the decade after ratification of the Fourteenth Amendment, the Court repudiated the constitutional claims of woman suffragists in the abolitionist movement and ruled that the Fourteenth Amendment did not protect women's right to practice law, or to vote, on the same terms as men.[3] It took another half century of political agitation before the women's movement was able to secure a constitutional amendment guaranteeing women the franchise. The Nineteenth Amendment to the U.S. Constitution, ratified in 1920, provides that the right to suffrage cannot be denied on the basis of sex.[4] In this period, a group of suffrage activists attempted to secure a

[2] U.S. Const. amend. XIII, s.1: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. Const. amend. XIV, s.1: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XV, s.1: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

[3] See *Bradwell v. State of Illinois*, 16 Wall. 130 at 141, 21 L.Ed.2d 442 (1873), upholding gender restrictions on the practice of law; *Minor v. Happersett*, 21 Wall. 162 at 178, 22 L.Ed. 627 (1875), upholding gender restrictions on the franchise.

[4] U.S. Const. amend. XIX: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."

second, more wide-reaching constitutional amendment guaranteeing equal rights for women, but the campaign failed to secure broad-based support.[5]

A mass movement for women's rights did not coalesce again for another half century – once again arising out of a movement for racial equality. By the 1960s, the United States Congress had begun to enact legislation prohibiting race discrimination in various spheres of social life; Title VII of the *Civil Rights Act* of 1964 prohibited employment discrimination on the basis of *sex*, as well as race and national origin.[6] By some accounts, the prohibition on sex discrimination in employment was added to the federal civil rights statute to ensure its defeat, but instead the *Civil Rights Act* of 1964 was enacted with the sex discrimination provision included.[7]

The National Organization of Women (NOW) was founded during this period in order to pressure the federal government into enforcing the law against sex discrimination in employment that had been included in the *Civil Rights Act* of 1964.[8] At the same time, women organized to secure legislative protections against sex discrimination from Congress, and to seek an amendment to the federal Constitution securing women equal rights at law. The text of the constitutional amendment proposed by Congress in 1972 read: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."[9] The campaign for an Equal Rights Amendment (ERA) started with energy, but expired in the 1980s without obtaining the approval of the number of states needed for ratification.[10]

This campaign for constitutional reform nevertheless had major consequences. In 1971, the Supreme Court for the first time interpreted the Equal Protection Clause of the Fourteenth Amendment to invalidate a statute that discriminated on the basis of sex.[11] In justifying this new approach to interpreting the Equal Protection Clause, a plurality of the Court, led by Justice

[5] See Joan G. Zimmerman, "The Jurisprudence of Equality: The Women's Minimum Wage, the First Equal Rights Amendment, and Adkins v. Children's Hospital, 1905–1923" (1991) 78:1 *Journal of American History* 188.

[6] *Civil Rights Act of 1964*, tit. VII, 42 U.S.C. ss.2000e-2000e-17 (1994).

[7] See Jo Freeman, "How 'Sex' Got into Title VII: Persistent Opportunism as a Maker of Public Policy" (1991) 9 *Law & Inequality* 163 at 164; see also Serena Mayeri, "'A Common Fate of Discrimination': Race-Gender Analogies in Legal and Historical Perspective" (2001) 110 *Yale Law Journal* 1045 at 1063–6.

[8] On the founding and early development of NOW, see Jo Freeman, *The Politics of Women's Liberation* (New York: David McKay, 1975) at 71–102; Cynthia Harrison, *On Account of Sex: The Politics of Women's Issues, 1945–1968* (Berkeley: University of California Press, 1988) at 192–209.

[9] H.R.J. Res. 208, 92d Cong. s.1, 86 Stat. 1523 (1972).

[10] See Mary Frances Berry, *Why ERA Failed* (Bloomington: Indiana University Press, 1986); Jane J. Mansbridge, *Why We Lost the ERA* (Chicago: University of Chicago Press, 1986).

[11] See *Reed v. Reed*, 404 U.S. 71 (1971), striking down a state statute that preferred males over females in appointing the administrator of a deceased's estate.

Brennan, emphasized that sex discrimination resembled race discrimination and called for a similar judicial response.[12] Since that time, the Court has interpreted the Equal Protection Clause of the Fourteenth Amendment to prohibit many forms of state action that discriminate on the basis of sex.

In summary, then, today the only textual provision of the United States Constitution that expressly prohibits sex discrimination is the Nineteenth Amendment, and it is generally understood to concern voting only.[13] But the campaign for constitutional reform during the 1960s and 1970s did move the Court to change its interpretation of the Equal Protection Clause of the Fourteenth Amendment to afford rights against sex discrimination.[14] To understand these rights, it is necessary, first, to consider the basic framework of equal protection law elaborated in the Court's race discrimination cases, and then consider how this doctrine has been extended, via the race-gender analogy, to guarantee equal citizenship rights for women.

THE BASIC STRUCTURE OF MODERN EQUAL PROTECTION DOCTRINE UNDER THE FOURTEENTH AMENDMENT

The following discussion sets out the basic framework of equal protection doctrine in matters of race discrimination, and then examines in more detail the body of sex discrimination case law the Court has developed in this framework. It should be noted, at the outset of this discussion, that the Court has interpreted the Fourteenth Amendment's guarantee of "the equal protection of the laws" to protect persons against "state action" only.[15] While federal laws, such as the *Civil Rights Act* of 1964, protect persons against discrimination inflicted by "private" persons, plaintiffs advancing equal protection claims under the Constitution must show that they have suffered an injury inflicted by the state, or some person or entity formally connected to the state.[16]

[12] See *Frontiero v. Richardson*, 411 U.S. 677, 684, 686 & n.17 (1973) (plurality opinion), striking down a federal statute that allowed men, but not women, to claim their spouses as dependents without regard to whether the spouses were in fact dependent.

[13] For an account of the struggles that culminated in ratification of the Nineteenth Amendment that emphasizes the continuing relevance of this constitutional history for sex equality law today, see Reva B. Siegel, "She, the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family" (2002) 115 *Harvard Law Review* 947.

[14] On the interaction of the women's movement, Congress, and the Court in this period, see Robert C. Post and Reva B. Siegel, "Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act," 112 *Yale Law Journal* (2003) 1943, 1980–2020.

[15] *Civil Rights Cases*, 109 U.S. 3 (1883).

[16] See, e.g., *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961), enjoining a coffee shop from refusing to serve African Americans because the building was owned by a state agency. But see *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), holding that the acts of a privately owned, but heavily regulated, utility did not constitute state action; *Moose Lodge*

Equal Treatment Principle

The Equal Protection Clause protects persons against certain forms of discriminatory state action only. In a few discrete areas, the Court has ruled that the Clause protects certain fundamental rights that the state cannot burden.[17] But in general, the Court has not interpreted the Equal Protection Clause to guarantee minimal or "baseline" entitlements. Instead, plaintiffs can make equal protection claims on the state only insofar as they can prove that the state has treated them differently than other "similarly situated" persons.

As the Court sees it, legislatures should be free to discriminate amongst groups of citizens when fashioning social policy; that is the essence of legislative decision making in representative government. On this view, because the Court is an unelected or "countermajoritarian" institution, it should generally defer to the judgments of the legislative branches. But under modern interpretations of the Equal Protection Clause, beginning with the invalidation of racially segregated schooling in *Brown v. Board of Education*,[18] the Court reviews state action that discriminates on the basis of race differently, on the premise that courts should intervene in the political process in order to ensure that minority groups can fully and fairly participate. It calls the more rigorous standard of review that it applies to race-based state action "strict scrutiny."

Strict Scrutiny for Race-Based State Action

In the decades after World War II, as the Court moved to dismantle entrenched practices of racial apartheid, it ruled that that the state cannot regulate on the basis of race unless it can demonstrate that racially discriminatory state action is necessary to achieve a compelling governmental purpose.[19] The case law deems any form of openly race-based state action "suspect," and is hostile to almost any generalization about members of

No. 107 v. Irvis, 407 U.S. 163 (1972), holding that a state could grant a liquor license to a private club that refused to serve African Americans; and *United States v. Morrison*, 529 U.S. 528 (2000) (discussed below).

[17] There is one strand of equal protection jurisprudence that is less clearly comparative, the so-called fundamental rights strand. Regulation that burden rights the Court deems "fundamental," such as the right to travel (see *Shapiro v. Thompson*, 394 U.S. 618 [1969]), equal voting opportunities (see *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 670 [1966]), or sexual autonomy (see *Skinner v. Oklahoma* ex rel. *Williamson*, 316 U.S. 535 [1942]) may be closely scrutinized. See generally Laurence H. Tribe, *American Constitutional Law* s.s. 16–7 to – 12, 2nd ed., (Mineola, NY: Foundation Press, 1988) at 1454–65, describing the fundamental rights strand of equal protection law.

[18] 347 U.S. 483 (1954).

[19] See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967), striking down Virginia's antimiscegenation law.

racial groups that might justify such legislation. This commitment to "color blind" state action is central to modern equal protection law.

During the 1970s, the era that sex discrimination doctrine was born, the Court began to construe this commitment to colorblind state action restrictively, in ways that might preserve as well as undermine social arrangements supporting racial stratification. It was in this period that the Supreme Court began to interpret the commitment to "color blindness" as a constraint on so-called "benign discrimination": the use of group-conscious admissions criteria to integrate institutions that had once been openly segregated. As majority groups objected to "affirmative action" programs that considered race for the purpose of increasing minority representation in education or employment, the Supreme Court held that it would apply strict scrutiny to such programs, and impose substantial constitutional restrictions on their design and legitimate use.[20] (Lower courts have adopted a similar framework to determine the constitutionality of sex-based affirmative action programs.[21]) Thus, the Equal Protection Clause now constrains government when it employs group conscious measures designed to include minorities and women in activities from which they have historically been excluded and in which they are currently underrepresented.

Such affirmative action programs are, however, still permissible if implemented under tight constitutional constraints.[22] The governmental entity adopting the affirmative action program must demonstrate that it has a factual basis for believing that underrepresentation of women or minorities is likely the result of discrimination in its own prior decision-making processes or those of private actors with whom it is in close association.[23] In educational settings, the Court has adopted a somewhat more flexible framework. It allows affirmative action in admissions for the purposes of increasing the

[20] See *Adarand Constructors v. Pena*, 515 U.S. 200 (1995), striking down a federal program for affirmative action in highway construction; and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), striking down a city program for affirmative action in construction projects.

[21] Federal courts are split as to the level of scrutiny to apply to sex-based affirmative action programs. Compare *Engineering Contractors Ass'n v. Metropolitan Dade County*, 122 F.3d 895 at 908 (11th Cir. 1997), using intermediate scrutiny to strike down a sex-based affirmative action program for construction projects, and *Coral Construction Co. v. King County*, 941 F.2d 910, 931 (9th Cir. 1991), applying intermediate scrutiny to uphold a sex-based set-aside program for public contract awards, with *Brunet v. City of Columbus*, 1 F.3d 390 at 403–404 (6th Cir. 1993), applying strict scrutiny to strike down a sex-based hiring program in a fire department.

[22] See John Cocchi Day, "Retelling the Story of Affirmative Action: Reflections on a Decade of Federal Jurisprudence in the Public Workplace" (2001) 89 *California Law Review* 59, surveying the constitutional challenges of forty-nine remedial workplace affirmative action plans, finding over 40 percent (twenty-one) survived the application of strict scrutiny by the federal courts.

[23] See Ian Ayres and Fredrick E. Vars, "When Does Private Discrimination Justify Public Affirmative Action?" (1998) 98 *Columbia Law Review* 1577 at 1586–7.

"diversity" of the institution.[24] Yet it has emphasized that affirmative action in admissions may not function as a quota system.[25] Instead, educational institutions may consider race as a "plus" factor in making admissions decisions, so long as the institution has considered and deemed ineffective race-neutral alternatives. An institution may consider race in admissions only if it is only one of many enhancing factors the institution considers; and if the institution considers all candidates in an individualized and flexible assessment process.[26]

During this same period, the Court also adopted a quite restrictive interpretation of the constitutional prohibition against state action that discriminates on the basis of race. Although in 1971 the Court interpreted the employment discrimination provisions of the *Civil Rights Act* of 1964 to cover "facially neutral" practices that had a disparate impact on minorities or women,[27] it declined to apply a similar framework in interpreting the Constitution. Instead, in the 1976 case of *Washington v. Davis*,[28] the Court held that facially neutral state action that has a disparate impact on racial minorities does not violate the Equal Protection Clause unless the state acted for the purpose of discriminating against minorities. Constitutional standards for proof of race and sex discrimination are the same in this regard.

To prove discriminatory purpose, the Court has ruled, it is not enough to show that the adverse racial impact was foreseeable; something more is required. In some of its cases, the Court has held that the plaintiff must prove something like malice: that the challenged action was undertaken "at least in part 'because of,' rather than 'in spite of,' its adverse effects upon an identifiable group."[29] The Court adopted this definition of "discriminatory purpose" in a sex discrimination case in which the Court upheld a state law that gave military veterans a substantial preference in hiring for government positions, even though the foreseeable effect of the preference was to give most of the government jobs in question to men.

[24] This rationale was first articulated in an opinion by Justice Powell in *Regents of California v. Bakke*, 438 U.S. 265 at 311–5 (1978). It has since been affirmed in *Grutter v. Bollinger*, 123 S.Ct. 2325, 2338–41 (2003).

[25] In *Grutter v. Bollinger*, *supra* note 24 at 2342, the Court affirmed its language in *Regents of California v. Bakke*, *supra* note 24 at 315–6, asserting, "universities cannot establish quotas for members of certain racial groups or put members of those groups on separate admissions tracks. Nor can universities insulate applicants who belong to certain racial or ethnic groups from the competition for admission."

[26] *Grutter v. Bollinger*, *supra* note 24 at 2342–7. In *Gratz v. Bollinger*, 123 S.Ct. 2411 (2003), the Court struck down a policy that granted twenty points to all underrepresented minority applicants, an amount equal to one-fifth of the points necessary for admission.

[27] See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

[28] 426 U.S. 229 at 239 (1976).

[29] *Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979). The Court in fact applies the intent requirement in different ways in different contexts, see Daniel R. Ortiz, "The Myth of Intent in Equal Protection" (1989) 41 *Stanford Law Review* 1105.

SEX DISCRIMINATION DOCTRINE UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

"Intermediate" not "Strict" Scrutiny

The framework for analyzing sex discrimination claims under the Equal Protection Clause of the Fourteenth Amendment emerged in the 1970s as the women's movement renewed its campaign for equal-citizenship rights. A litigation campaign building on these developments persuaded a plurality of the Court to join an opinion that would have extended the strict scrutiny framework generally applied to race discrimination claims to sex discrimination claims as well.[30] Soon thereafter a majority of the Court embraced a somewhat different standard of review that is now generally referred to as "intermediate scrutiny."

In *Craig v. Boren*, the Court adopted this intermediate scrutiny framework when it held that the state cannot regulate on the basis of sex, unless it can show that its sexually discriminatory means are "substantially related" to an "important" government purpose.[31] (Modern equal protection doctrine holds that the state cannot regulate on the basis of race unless the state can show that its racially discriminatory means are "necessary" to achieve a "compelling" government purpose.") The more permissive standard the Court articulated in *Craig* gives government more latitude to consider sex than race in the ways it designs and administers social policy.

Two reasons are most commonly given for the difference in equal protection standards. First, the more permissive standard for sex discrimination expresses the understanding that concerns about sex discrimination are not central to the original purpose of the Fourteenth Amendment in the way that concerns about race discrimination are. Second, the more permissive standard is said to express the judgment that sex differentiation is not always invidious in the way that racial differentiation is generally assumed to be.

Comparing Equal Protection Cases Concerning Race and Sex Discrimination

Yet, since the 1970s, the Court, with some hesitation and some very important exceptions, has applied the Equal Protection Clause to sex-based state action in terms that often seem to approach the rigor of its race discrimination cases. The Court is suspicious of claims that the state should take the sex of citizens into account in fashioning social policy – whether such claims are rooted in empirical generalizations about differences between men and

[30] See *Frontiero v. Richardson supra* note 12.

[31] *Craig v. Boren*, 429 U.S. 190, 197 (1976), striking down a state law that established a drinking age of twenty-one for men and eighteen for women for low-alcohol beer.

women, or normative claims about appropriate roles for men and women. Since the 1970s, the Court's equal protection cases have rejected "'archaic and overbroad' generalizations" about differences between the sexes and "increasingly outdated misconceptions concerning the role of females in the home rather than in the 'marketplace and the world of ideas'... as loose-fitting characterizations incapable of supporting state statutory schemes that were premised on their accuracy."[32]

Modern equal protection law thus views sex distinctions in public law as presumptively unconstitutional. In numerous cases – many of them brought by *male* plaintiffs complaining of sex discrimination – the Court has invalidated a variety of laws that drew distinctions on the basis of sex. Many of these statutes employed sex-specific rules to regulate aspects of marriage and family life, including control over marital property,[33] duty to pay alimony,[34] the administration of estates,[35] the duration of a parent's obligation to support children,[36] as well as a variety of laws distributing welfare, pension, and survivor benefits.[37] The Court also has struck down sex-based restrictions on jury service,[38] employment,[39] and education. Note that, in all these cases, the Court required only that the state eliminate sex-distinctions from the law, leaving to the state's discretion all other aspects of the policy in question. Because of these constitutional rulings, most law regulating family relationships is now written in gender-neutral language[40] – with the exceedingly

[32] Ibid., at 198–9.

[33] See *Kirchberg v. Feenstra*, 450 U.S. 455 (1981), striking down a state statute that gave the husband, as "head and master" of marital property, the right to dispose of it unilaterally.

[34] See *Orr v. Orr*, 440 U.S. 268 (1979), invalidating a state statute that required husbands, but not wives, to pay alimony upon divorce.

[35] See *Reed v. Reed*, 404 U.S. 71 (1971), striking down a state statute that preferred males over females in appointing the administrator of a deceased's estate.

[36] See *Stanton v. Stanton*, 421 U.S. 7 (1975), striking down a state statute that defined the age of majority as twenty-one for males but eighteen for females.

[37] See, e.g., *Heckler v. Mathews*, 465 U.S. 728 (1984), upholding a federal law that allowed the beneficiaries of an invalidated sex-based retirement program to continue to receive benefits; *Califano v. Westcott*, 443 U.S. 76 (1979), striking down a federal law that provided welfare benefits to families with unemployed fathers, but not to those with unemployed mothers; and *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), striking down a federal law that allowed widows, but not widowers, to collect certain Social Security benefits.

[38] See *J.E.B. v. Alabama* ex rel. *T.B.*, 511 U.S. 127 (1994), holding that the state may not use its peremptory challenges to juror selections in a sexually discriminatory manner; and *Taylor v. Louisiana*, 419 U.S. 522 (1975), striking down a state statute that excluded women from jury service unless they filed a written declaration seeking to serve.

[39] See *Davis v. Passman*, 442 U.S. 228 (1979), holding that an administrative assistant to a federal official, fired because she was female, had a cause of action against her employer.

[40] See Reva B. Siegel, "'The Rule of Love': Wife Beating as Prerogative and Privacy" (1996) 105 *Yale Law Journal* 2117 at 2188–96, tracing this shift in the language of family law, with special attention to questions concerning the regulation of domestic violence; see also Herma Hill Kay, "From the Second Sex to the Joint Venture: An Overview of Rights and Family Law in the United States during the Twentieth Century" (2000) 88 *California Law*

important exception of laws defining marriage as a relation between a man and a woman.[41]

We might pause and consider the education cases for a moment, as they demonstrate similarities and differences in the Court's approach to matters of race and sex discrimination.

Modern equal protection doctrine originates in cases prohibiting racial segregation in public education, and the first equal protection cases striking down sex-based state action grew out of an analogy between race and sex discrimination. One would therefore assume that the Court would have prohibited sex segregation in education as it has prohibited racial segregation in education. But the Court has not dealt with the question in such straightforward terms.

In the 1970s, the Court affirmed without opinion a lower court decision that allowed a public high school, which prepared students for college, to operate on a sex segregated basis, so long as the two schools offered equal educational benefits and opportunities to girls and boys.[42] A dissenting judge questioned how "separate but equal" could be unconstitutional in matters of race, but constitutional in matters of sex.[43] While the *Vorcheimer* case has been questioned, it has never been overruled, and continues to provide some authority allowing the state to segregate the sexes in certain social settings so long as it provides equal resources to the segregated institutions. For

Review 2017, surveying legislative and constitutional reforms affecting family law during the twentieth century.

[41] To date, no federal court, at any level, has ruled that the Equal Protection Clause prohibits the state from taking sex into account in the way it defines the marriage relationship. However, a few state courts have edged toward recognizing a right to marry a partner of the same sex as a matter of state constitutional law, and Vermont law mandates recognition of same-sex civil unions. See William N. Eskridge, Jr., "Equality Practice: Liberal Reflections on the Jurisprudence of Civil Unions" (2001) 64 *Albany Law Review* 853 at 874, discussing Hawaii, Alaska, and Vermont rulings, and the forms of backlash they precipitated. Reacting to the possibility that a state court might declare, under its own state constitution, that the use of sex to define, and restrict access to, the marriage relation, was unconstitutional, the U.S. Congress recently adopted a law defining marriage as a union between a man and a woman for purposes of all federal laws and programs. See, e.g., *Defense of Marriage Act*, Pub. L. No. 104–199, 110 Stat. 2419 (codified as amended at 1 U.S.C. s. 7, 28 U.S.C. s. 1738C (1996)). Many states have now enacted similar laws.

For more information regarding gay civil rights in the marriage context, see Lambda Legal Defense Fund, *The Marriage Project*, online: Lambda Legal Defense Fund <lambdalegal.org/cgi-bin/iowa/issues/> (date accessed July 28, 2003), providing links to information on all state marriage initiatives, legislation, constitutional amendments, and pro-gay initiatives.

[42] See *Vorchheimer v. School District*, 532 F.2d 880 (3d Cir. 1976), *aff'd by an equally divided court*, 430 U.S. 703 (1977).

[43] Ibid., at 888–889 (Gibbons, J., dissenting). "Separate but equal" was the framework in which the Court upheld racial segregation under the Fourteenth Amendment's equal protection clause in the decades after the Civil War, until repudiating the doctrine in *Brown v. Board of Education*, *supra* note 18.

example, lower courts seem to have accepted application of the "separate but equal" principle to school sponsored sports,[44] – and, outside the educational setting, in certain contexts, such as the administration of prisons.[45]

But sex-segregated arrangements, even when there are parallel institutions with nominally equal resources, remain suspect for this Court. The Supreme Court has twice now declared sex-segregated admissions policies in public universities to be unconstitutional, most recently in 1996, in the case of *United States v. Virginia.*[46]

In *United States v. Virginia*, the Court required a state military academy that for several hundred years had only enrolled men to admit women. While a lower federal court had allowed the school to admit women to a new "sister" school that would have trained women for leadership in a style suited to women's distinctive needs and temperament, the Supreme Court ruled that this remedy was constitutionally inadequate. It held that state's offer to admit women to a separate military academy for women would deny women applicants equal access to the distinctive learning experience and alumni network of the state's premier military academy.[47] Instead, the Court ordered the state to make minor accommodations in the school's housing and physical training programs so that women could participate in the military academy on substantially the same terms as men.[48]

In the *Virginia* case, the Court thus rejected a separate-but-equal framework in a setting where it had been elaborated in terms that emphasized

[44] See, e.g., *O'Connor v. Board of Education*, 645 F.2d 578, 581 (7th Cir. 1981): "'Separate but equal' teams have received endorsement in many circuits, including this one." Federal civil rights law has extended the application of equality norms to private as well as public institutions through *Title IX of the Education Amendments of* 1972, 20 U.S.C. s. 1681 (1994), which requires gender equity in educational programs and activities that receive federal funding. Title IX, rather than equal protection law, has provided the major impetus for change in educational sports programming. See generally Deborah Brake, "The Struggle for Sex Equality in Sport and the Theory Behind Title IX" (2000–2001) 34 *University of Michigan Journal of Law Reform* 13 at 15–16.

[45] Courts have allowed sex segregation of prisons to persist under modern interpretations of the Equal Protection Clause, so long as the state provides prisoners substantially equivalent conditions and resources – a flexible standard that in fact allows for considerable variance in treatment. See, e.g., *Batton v. North Carolina*, 501 F. Supp. 1173, 1176 (E.D.N.C. 1980), discussing the "parity of treatment" standard that courts have applied to prisons and observing that it is difficult to reconcile with sex discrimination law in other constitutional contexts.

[46] 518 U.S. 515 (1996), holding that the state could not exclude women from its citizen-soldier program at the Virginia Military Institute; see also *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982), holding that the state could not exclude men from a nursing school.

[47] *United States v. Virginia*, supra note 46 at 547–1, finding the proposed sister school inferior in terms of faculty, course offerings, facilities, and prestige.

[48] Ibid., at 550: "Admitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements, and to adjust aspects of the physical training programs."

differences between men and women,[49] and instead endorsed the goal of integrating women into the formerly all-male institution, in terms that assumed that women would assimilate to the norms and practices of that institution, in most if not all respects.

The Court's opinion in the *Virginia* case is widely regarded as signaling the Court's commitment to a more rigorous standard of scrutiny in sex discrimination cases. The opinion was authored by Justice Ruth Bader Ginsburg, who was appointed to serve as the second woman on the United States Supreme Court after a career that included litigating the first constitutional sex discrimination cases.[50] But if the *Virginia* case approaches sex segregation with a deep, historically informed skepticism, it does not take the stance that all sex segregation in education is constitutionally impermissible.

Instead, in a remarkable passage, the *Virginia* opinion restates the framework for evaluating the constitutionality of sex-based state action: "Sex classifications may be used to compensate women 'for particular economic disabilities [they have] suffered,' to 'promote equal employment opportunity,' to advance full development of the talent and capacities of our Nation's people. But such classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women."[51] As *Virginia* explains the "intermediate scrutiny" standard (which allows the state to employ sex-based modes of regulation when the discrimination is "substantially related to an important governmental end"), the opinion is not merely interested in discrimination as a problem concerning means-ends rationality (are the state's discriminatory means sufficiently related to the achievement of some important governmental end?). Instead, this passage suggests that intermediate scrutiny is fundamentally concerned with questions of subordination: Sex-based state action offends the Equal Protection Clause in those circumstances where it perpetuates the status inferiority of women.

[49] In rejecting Virginia's proposal to create a separate school for women, the Court observed, ibid.: "Generalizations about 'the way women are,' estimates of what is appropriate for most women, no longer justify denying opportunity to women whose talent and capacity place them outside the average description. Notably, Virginia never asserted that VMI's method of education suits most men."

[50] The president with the advice and consent of the Senate appoints federal judges. At present, two of the nine Supreme Court Justices are women: Sandra Day O'Connor, the first appointee in 1981, and Ruth Bader Ginsburg appointed in 1993. Excluding the Supreme Court there are 1,612 Federal judges; 332 (20.6 percent) are women, up from 154 (9.5 percent) in 1997. For further detail, including race and ethnicity, see Gender Gap in Government, online: GenderGap.com<http://www.gendergap.com/governme.htm> (date accessed: July 28, 2003), citing Employee Relations Office, U.S. Courts, "The Judiciary Fair Employment Practices Report, Fiscal [*sic*] Year 1999 and the Federal Judicial Center, History Office, as of Feb. 24, 1997."

[51] "The Judiciary Fair Employment Practices Report," ibid., at 533–4.

This new expression of the intermediate scrutiny standard represents a potentially important shift of emphasis in the sex discrimination case law, although it by no means promises greater clarity in the standard's application. In education and many other social spheres, there is, of course, much disagreement about the kinds of institutions and practices that perpetuate the status inferiority of women. Presumably for this reason, the Court's opinion in *United States v. Virginia* postpones addressing in any detail the question of when sex segregation in education offends the Constitution. The opinion acknowledges that some forms of sex-segregated education might actually break down traditional forms of status inequality between the sexes.[52] And the opinion suggests that the Court might find such sex-specific educational programming constitutional, if it were offered on an equal basis to men and women.[53] To summarize, the Virginia Military Institute case does not repudiate sex segregation in public education, but expresses the understanding that the practice can only be constitutional if it does not perpetuate historic forms of status inequality between men and women, and if the program is designed in such a way as to provide equality of opportunity to members of both sexes.[54]

Cases Where the Court Allows Sex-Differentiated Regulation

The Court's most recent education decision thus offers a forceful expression of the view that the primary question for equal protection law is determining whether sex-based state action perpetuates historic forms of status inequality between the sexes. But it is unclear how far the Court's restatement of the intermediate scrutiny standard in *Virginia* will guide the application of equal protection doctrine outside the education context. I now consider several areas where the Court has protected sex-based regulation from constitutional reform in the last several decades.

Despite the Court's genuine skepticism about the rationality or fairness of openly sex-based rules in most areas of social life, there are certain domains where the Court simply reverts to the understanding that informed constitutional law before the 1970s. In matters concerning conscription for military service,[55] certain aspects of rape law,[56] and matters concerning pregnancy

[52] See *United States v. Virginia, supra* note 46 at 533–4, acknowledging that "it is the mission of some single-sex schools 'to dissipate,' rather than perpetuate, traditional gender classifications."

[53] Ibid.: "We do not question the State's prerogative evenhandedly to support diverse educational opportunities."

[54] See Tod Christopher Gurney, "Comment: The Aftermath of the Virginia Military Institute Decision: Will Single-Gender Education Survive?" (1998) 38 *Santa Clara Law Review* 1183.

[55] See *Rostker v. Goldberg*, 453 U.S. 57 (1981), upholding a federal statute that registered only men for the military draft.

[56] *Michael M. v. Superior Court*, 450 U.S. 464, 471 (1981).

and reproduction,[57] the Court continues to treat sex as a "real" and "relevant" difference that the state may constitutionally consider in making social policy.[58]

Military Service. Although the U.S. military has dramatically altered the ways in which it allows women to serve in the armed forces over the last several decades, constitutional law has played no direct role in bringing about these changes. In *Rostker v. Goldberg*,[59] decided in 1981, the Court allowed the U.S. Congress to require that only men must register for military draft or conscription purposes. The Court's decision assumed, without discussion, that women could be constitutionally excluded from serving in combat positions in the armed services, and then reasoned that Congress could limit conscription for military service to those who would be eligible to serve in combat.[60]

The U.S. military has not yet allowed women to serve in combat, but, since the time of the *Rostker* decision, it has opened up a vast array of positions to women which were once closed to them, and has spent considerable resources recruiting women to serve in a "volunteer" army. Beginning in the 1990s, Congress repealed several statutes that restricted women's service in the Air Force and Navy, and the Secretary of Defense modified the rules governing women's eligibility to serve in a variety of combat-related positions.[61] Given women's growing eligibility to serve in military roles in and outside of the zone of combat, the reasoning of the *Rostker* opinion no longer seems credible as a justification for restricting conscription for military service to men. At the same time, it is entirely unclear how the Court would handle questions concerning the constitutionality of sex distinctions in military policy today. The Court has thus far refused to take a leadership role in integrating the military, leaving it to the political branches to experiment with how far women's participation in the military might be integrated with men's. Nor is it clear that judicial intervention in this process would accelerate the rate of change.

Public acceptance of women's participation in military life has in fact changed greatly over the last decade, but these changes have emerged from a

[57] See *Geduldig v. Aiello*, 417 U.S. 484 (1974,) upholding a state insurance program that did not cover pregnancy.

[58] See generally Wendy W. Williams, "The Equality Crisis: Some Reflections on Culture, Courts, and Feminism" (1992) 14 *Women's Rights Law Reporter* 151.

[59] *Rostker v. Goldberg*, *supra* note 55.

[60] Ibid. at 79: "The fact that Congress and the Executive have decided that women should not serve in combat fully justifies Congress in not authorizing their registration, since the purpose of the registration is to develop a pool of potential combat troops."

[61] See Leslie Ann Rowley, "Comment: Gender Discrimination and the Military Selective Service Act: Would the MSSA Pass Constitutional Muster Today?" (1997) 36 *Duquesne Law Review* 171.

cautiously conducted public experiment in which women volunteers have undertaken roles formally restricted to men, allowing women who are averse – for all manner of reasons – to military service to avoid it. If the Court were to rule that Congress could no longer exempt women from a draft, a much larger group of women would potentially be obliged to serve in newly opened military positions, and public support for eliminating gender-restrictions on military service might potentially diminish. In recent decades, while the government allowed women to perform an increasing number of military roles, no one initiated litigation challenging the gendered terms of this public experiment – even though the recent changes in military policy have completely undermined the premises of the Court's original decision in *Rostker*. This changed in 2003, when a group of men and women filed suit challenging the constitutionality of a male-only registration requirement for a male-only draft.[62] (The government continues to require draft registration, even though the military is presently organized on an all-volunteer basis.)

Military policy is one area where the Supreme Court has openly tolerated sex-based regulation; matters concerning childbearing are another. Currently, equal protection law is riddled with contradictions in its approach to pregnancy.

State Regulation of Pregnancy. Early on, in the notorious case of *Geduldig v. Aiello*,[63] the Court simply declared that, for equal protection purposes, state action which distinguishes persons on the basis of pregnancy does not classify on the basis of sex. To justify this somewhat startling claim, the Court reasoned that laws regulating pregnancy divide the world into two groups: pregnant women and nonpregnant persons. Because the latter group includes women as well as men, the Court concluded that state policies regulating pregnancy are not sex-based and should not receive heightened scrutiny under the equal protection clause, however unequally such policies may distribute opportunities between women and men.[64] As a practical matter, *Geduldig* frees state regulation of the pregnant woman's conduct – in matters of abortion or maternity leave – from equal protection scrutiny. Although *Geduldig* was decided early in the development of constitutional sex discrimination doctrine, in 1993 the Court reaffirmed its reasoning in

[62] See 265 F. Supp. 2d 130 (2003).

[63] *Geduldig v. Aiello*, *supra* note 57.

[64] Ibid., at 496: "The lack of identity between the excluded disability [pregnancy] and gender as such under this insurance becomes clear upon the most cursory analysis. The program divides potential recipients into two groups – pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes."

the course of interpreting a civil rights statute that had been invoked in a dispute arising out of protests at an abortion clinic.[65]

It is worth noting, however, that Congress has rejected the Court's reasoning about pregnancy outside the context of constitutional law, in the federal statute governing employment discrimination. That statute applies the equal treatment model to pregnancy by treating pregnancy as a potential work disability. It provides that distinctions on the basis of pregnancy are distinctions on the basis of sex, and requires an employer to treat pregnant employees the same as the employer treats other employees who are similar in their ability or inability to work.[66] Under the federal employment discrimination statute employers cannot single out pregnant workers for adverse treatment, but they are generally not required to accommodate pregnant employees more than they accommodate other workers suffering temporary disabilities.[67]

Reproductive Difference as a Justification for Other Forms of Sex-Specific Regulation: the Case of Rape Law. As we have seen, the Court has refused to treat regulation directed at pregnant women as sex-based state action that should trigger heightened equal protection scrutiny. The Court can thus declare that women are protected against sex discrimination by the state while reasoning in a legal framework that does not constrain state action directed at women who are pregnant. The formal logic the Court has invoked to justify this restriction on antidiscrimination law is not terribly persuasive; but the restrictions do seem to conform with the widespread intuition that pregnancy is an important sex difference that can justify differential treatment of the sexes.

From time to time, the Court has openly voiced this view of the matter. While the Court has rejected most justifications for state policies that

[65] See *Bray v. Alexandria Women's Health*, 506 U.S. 263, 270–71 (1993), reaffirming *Geduldig*, and holding that abortion protesters obstructing access to a clinic were not targeting women as a class.

[66] See 42 U.S.C. s. 2000e(k) (1994):

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes ... as other persons not so affected but similar in their ability or inability to work....

[67] See *International Union, United Automobile Workers of Am. v. Johnson Controls*, 499 U.S. 187 (1991), prohibiting a company from excluding all potentially fertile women from jobs involving lead exposure; and *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987), holding that federal law does not prohibit the state from enacting *greater* protections for pregnant women than for other disabled workers. A more recent federal law allows some employees to take up to 12 weeks of unpaid leave to care for a newborn child, after adopting a child, or to care for an ill family member. See *Family and Medical Leave Act of 1993*, 29 U.S.C. s.s. 2601–2654 (1994).

distinguish between men and women, in several of its cases the Court has accepted the argument that the state can treat men and women (who are not pregnant) differently because the sexes are differently situated with respect to matters of reproduction. In a body of case law that rejects most justifications for openly sex-based modes of regulation, pregnancy still counts as a "real" difference between the sexes that can justify state action that openly discriminates between the sexes.

For example, during the 1980s, when the Court upheld a sex-based "statutory rape" law under the Equal Protection Clause, it reasoned that the state could punish men for engaging in sex with women who were under the legal age of consent, as a reasonable means of preventing teen pregnancy.[68] The pregnancy-prevention rationale seems to have been invented to supply a constitutional basis for upholding a sex-based criminal law that had long been justified in terms of conventional sexual morality (protecting female virginity). Lower courts have invoked the pregnancy-prevention rationale to uphold against equal protection challenge laws that define and criminalize rape on a sex-specific basis.[69]

More recently, the Court has invoked the fact of reproductive difference between the sexes to uphold against equal protection challenge laws that impose different rules for determining the citizenship status of children born abroad and out of wedlock to American men and women. The Court reasoned that the government could legitimately require children born abroad and out of wedlock to American men to go through more steps to establish citizenship than it imposed on children born abroad and out of wedlock to American women, on the grounds that "fathers and mothers are not similarly situated with regard to the proof of biological parenthood" or even awareness of the parental relationship.[70] Critics of the statutory scheme argued that the gender-differentiated rules for determining citizenship status reflected historically entrenched "double standards" in gender roles concerning parental responsibility for out of wedlock births.[71] But the Court insisted that the gender-differentiated standard reflected facts of nature that the government could legitimately take into account:

> To fail to acknowledge even our most basic biological differences – such as the fact that the mother must be present at birth but the father need not be – risks making the guarantee of equal protection superficial, and so disserving it. Mechanistic

[68] *Michael M. v. Superior Court*, *supra* note 56 at 471.

[69] See, e.g., *Liberta v. Kelly*, 839 F.2d 77 (2d Cir. 1988), upholding a state statute that provided that only men could be convicted of rape; and *Country v. Parratt*, 684 F.2d 588 (8th Cir. 1982) (same).

[70] *Tuan Ahn Nguyen v. Immigration and Naturalization Service*, 121 S.Ct. 2053, 2055 (2001).

[71] See Kristin Collins, "Note: When Fathers' Rights are Mothers' Duties: The Failure of Equal Protection in *Miller v. Albright*" (2000) 109 *Yale Law Journal* 1669, analysis of traditional gender understandings informing the differential treatment of children born out-of-wedlock, overseas, to American mothers and fathers.

classification of all our differences as stereotypes would operate to obscure those misconceptions and prejudices that are real. The distinction embodied in the statutory scheme here is not marked by misconception and prejudice, nor does it show disrespect for either class. The difference between men and women in relation to the birth process is a real one, and the principle of equal protection does not forbid Congress to address the problem at hand in a manner specific to each gender.[72]

There is a long tradition of invoking differences in male and female reproductive physiology to justify differential treatment of the sexes,[73] and we might simply read equal protection law as carrying forward this time-honored tradition. Yet, as the above-quoted passage suggests, if this mode of justification remains persuasive, it is also highly contested. The argument has proven persuasive in only a very few of the thirty sex discrimination cases the Court has decided under the Equal Protection Clause to date. Sometimes claims about reproductive difference are powerful enough to legitimate policies that treat the sexes differently – especially when such policies perpetuate time-honored gender conventions in matters involving the regulation of sexual relations. But more often such arguments falter before the weight of the presumption that the Constitution protects a sphere of citizenship in which men and women are entitled to face each other as equal in position and prerogative.

CONSTITUTIONAL PROTECTIONS FOR ABORTION AND CONTRACEPTION AS RIGHTS OF PRIVACY

Although the Court's equal protection cases impose no significant constraints on state regulation of pregnancy,[74] there is another body of constitutional case law that does protect women's right to make decisions concerning childbearing. Under the U.S. Constitution, women have a right to make decisions about contraception and abortion without undue state interference, and this right is protected as a right of privacy. The privacy right is often criticized, not only on familiar moral and religious grounds, but for jurisprudential reasons as well. As critics of the Court's privacy decisions have repeatedly emphasized, there is no constitutionally enumerated "right to privacy." (The Court rests the privacy right on the Fourteenth Amendment's guarantee that

[72] *Tuan Anh Nguyen v. Immigration and Naturalization Service*, *supra* note 70 at 2066. See *Miller v. Albright*, 523 U.S. 420, 433–34 (1998), (plurality opinion) justifying the sex distinctions in the federal immigration statute by linking them to the different male and female roles in reproduction.

[73] See Reva B. Siegel, "Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection" (1992) 44 *Stanford Law Review* 261.

[74] A small body of fundamental rights decisions under the equal protection clause provides some recognition of a right to sexual autonomy; see *Skinner v. Oklahoma* ex rel. *Williamson*, *supra* note 17.

no state shall "deprive any person of life, liberty, or property, without due process of law.")

The first of the modern privacy decisions that extended constitutional protection to decisions concerning reproduction is *Griswold v. Connecticut*,[75] a case in which the Court ruled that a state could not criminalize the use of contraceptive devices. The Court reasoned that while the United States Constitution did not expressly protect a right of privacy, "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance," and that "[v]arious guarantees create zones of privacy."[76] The Court viewed the law criminalizing the use of contraceptives as impermissibly invading the privacy of the marriage relationship.[77] As the Court saw it, this right of privacy was older than the Constitution, and foundational to it.[78] The Court has never restricted the constitutional right of privacy to married persons.[79] For nearly two decades it endeavored to limit the right so that it protected decisions concerning heterosexual sexual and reproductive activity, while excluding same-sex relations; but recently the Court has reversed itself and ruled that the privacy right extended to same-sex intimate relations as well.[80]

Roe and the Early Abortion Decisions

In *Roe v. Wade*,[81] the Court ruled that the right of privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[82] The Court specifically rejected the claim that "the fetus is a 'person' within the language and meaning of the Fourteenth Amendment."[83] And, after surveying the long-standing theological, philosophical, and scientific debates about the question of when life begins, and observing the law's historic tendency to regulate born persons, the Court ruled that states could

[75] 381 U.S. 479 (1965).
[76] Ibid., at 484.
[77] Ibid., at 485–6.
[78] Ibid., at 486.
[79] See *Eisenstadt v. Baird*, 405 U.S. 438 (1972).
[80] *Bowers v. Hardwick*, 478 U.S. 186 (1986), holding the right of privacy does not protect an individual against criminal prosecution for engaging in sodomy with a person of the same sex, was overruled in *Lawrence v. Texas*, 123 S.Ct. 2472 (2003), a case involving a statute that criminalized same-sex sodomy only. At 2484, the Court extended constitutional protection to "two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle," observing that "[t]he petitioners are entitled to respect for their private lives." The decision, while not rooted in the Equal Protection Clause of the Fourteenth Amendment, plainly drew on equality values, and was understood by many to bring the Court and the nation one step closer to confronting constitutional questions concerning same-sex marriage.
[81] 410 U.S. 113 (1973).
[82] Ibid., at 153.
[83] Ibid., at 156.

not adopt a theory of life that would "override the rights of the pregnant woman that are at stake."[84]

The Court did not, however, give women making decisions about abortion immunity from state regulation. Although the Court did extend "strict scrutiny" to state action interfering with abortion decisions, it designed the framework of review in a fashion that recognized both the pregnant woman's interest in making decisions about abortion free from state interference, and the state's interest in regulating her conduct. *Roe* balances these countervailing interests in a "trimester framework" that gives the state more freedom to regulate as the pregnancy progresses. The state is not allowed to restrict abortion in the interest of protecting "potential life" until the end of the second trimester, at the point at which the fetus is "viable" (capable of living outside the mother's womb).[85]

In the years after *Roe*, no doubt in part because of the controversy steadily gathering around *Roe*,[86] the Court ruled that government had no duty to fund abortions, even when it paid for the childbirth expenses of pregnant women.[87] As the Court saw it, if the state had not interposed the obstacle to an abortion, it was not constitutionally obliged to remove it.

By the 1980s, *Roe* was engulfed in legal and political controversy, and the decision appeared increasingly vulnerable to reversal. An administration openly hostile to *Roe* was elected, and announced its commitment to select Supreme Court justices from the growing body of jurists and scholars who questioned the constitutional basis of the privacy right on which *Roe* rested.[88] As jurisprudential criticism of the *Roe* decision mounted, legal academics began to explore alternative constitutional foundations for the abortion right. Drawing on a variety disciplinary and analytical frameworks, these scholars offered a range of reasons why the abortion right should be understood as resting on values of equality as well as privacy.[89] These impassioned arguments, for and against the *Roe* decision, left their impress on the Court.

Reframing the Abortion Right: *Casey*, Sex Equality, and Unborn Life

In 1992, in the case of *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[90] the Court reaffirmed, while significantly reformulating, constitutional protections for the abortion right. Justice Sandra Day O'Connor, the

[84] *Roe v. Wade*, *supra* note 81 at 162.

[85] Ibid., at 163–4.

[86] See David, J. Garrow, "Abortion before and after Roe v. Wade: An Historical Perspective" (1999) 62 *Albany Law Review* 833.

[87] See *Maher v. Roe*, 432 U.S. 464 (1977); and *Harris v. McRae*, 448 U.S. 297 (1980).

[88] See Laurence H. Tribe, *Abortion: The Clash of Absolutes* (New York: Norton, 1992), at 17–21.

[89] For an overview of these arguments, see Reva B. Siegel, "Abortion As a Sex Equality Right: Its Basis in Feminist Theory" in Martha Fineman and Isabel Karpin, eds., *Mothers in Law: Feminist Theory and the Legal Regulation of Motherhood* (New York: Columbia University Press, 1995); see also Reva B. Siegel, "Reasoning from the Body," *supra* note 73.

[90] 505 U.S. 833 (1992).

first woman ever appointed to the United States Supreme Court and a long time critic of the *Roe* decision, played a pivotal role in this reaffirmation and reformulation of the *Roe* framework.

The *Casey* decision restates the woman's privacy interest in making decisions about whether to terminate a pregnancy and the state's interest in deterring her from doing so, and, quite arguably, gives more respectful expression to each. In *Casey*, the Court identified constitutional reasons for protecting a woman's privacy right to make decisions about childbearing that were not discussed in *Roe*. The Court observed that the state was obliged to respect a pregnant woman's decisions about abortion because her "suffering is too intimate and personal for the State to insist... upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society."[91] The Court thus announced that laws prohibiting abortion offend the Constitution because they use the power of the state to impose traditional sex roles on women.

At the same time the Court gave greater weight and regulatory ambit to the state's interest in protecting unborn life. *Roe*'s trimester framework prohibited fetal-protective restrictions on abortion prior to the point of fetal viability; *Casey* explicitly repudiates the trimester framework. The Court announced that it would allow states to regulate abortion in furtherance of protecting unborn life throughout the pregnancy, so long as such regulation did not impose undue burdens on women's constitutional right to make decisions about terminating a pregnancy prior to the point of fetal viability. As the Court reasoned, regulation that would support "thoughtful and informed" deliberation about the abortion decision was consistent with exercise of the privacy right.[92]

In the place of the trimester framework, *Casey* adopted a new framework for reconciling a woman's privacy right in making decisions about abortion and the state's interest in deterring her. Only some forms of fetal-protective regulation directed at a pregnant woman in the period before viability were unconstitutional: "The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it. Only where state regulation imposes an undue burden on a

[91] Ibid., at 852.

[92] Ibid., at 872–3:

> Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term and that there are procedures and institutions to allow adoption of unwanted children as well as a certain degree of state assistance if the mother chooses to raise the child herself.

woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause."[93]

The tensions in this new "undue burden" framework were immediately apparent as *Casey* applied the standard to two different provisions of the Pennsylvania statute challenged in the case.

The Court upheld a provision of the statute that required pregnant women to wait twenty-four hours before proceeding with an abortion, on the theory that the delay was reasonably calculated to prompt deliberation about the decision. It so ruled, even in the face of evidence that the statutorily imposed delay could function as a huge practical impediment to certain women who had to travel long distances to reach an abortion provider.[94] At the same time, the Court struck down a provision of the Pennsylvania statute that required a married woman to notify her husband before obtaining an abortion. Here the Court seemed to give far more weight to concerns that the statutory requirement might interact with the practical exigencies of women's lives in such a way as to deter many from obtaining abortions. Specifically, the Court was concerned that, in conflict-ridden marriages where women were subject to domestic violence, forcing women to inform their husbands about an abortion might deter them from "procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases."[95] The Court ruled that the state lacked authority to constrain women's choices this way.

The Court's differential application of the undue burden standard in *Casey* seems best explained by concerns that the standard itself does not explicitly address. For the Court, the spousal notice provision presented sex equality concerns that the twenty-four-hour waiting period did not. As the Court expressed these concerns, the notice requirement "give[s] to a man the kind of dominion over his wife that parents exercise over their children"[96] and thus reflects a "common-law understanding of a woman's role within the family," harkening back to a time when "'a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state....'"[97] "These views," the Court observed, "are no longer consistent with our understanding of the family, the individual, or the Constitution."[98] These passages of the opinion echo *Casey*'s initial articulation of the privacy right as protecting women's choices about whether to assume the maternal role.

Justice Blackmun, who authored *Roe*, endorsed the gender-conscious reasoning of the *Casey* decision, and drew upon it to develop an alternative

[93] Ibid., at 874.
[94] Ibid., at 885–6.
[95] Ibid., at 894.
[96] Ibid., at 898.
[97] Ibid., at 897 (quoting *Bradwell v. Illinois*, *supra* note 3, Bradley, J., concurring).
[98] Ibid.

constitutional framework for the abortion right. In his concurring opinion, Justice Blackmun reasoned that restrictions on abortion offend constitutional guarantees of *equality* as well as privacy. Justice Blackmun's opinion argues that abortion restrictions are gender-biased in impetus and impact:

> The State does not compensate women for their services; instead, it assumes that they owe this duty as a matter of course. This assumption – that women can simply be forced to accept the "natural" status and incidents of motherhood – appears to rest upon a conception of women's role that has triggered the protection of the Equal Protection Clause. The joint opinion recognizes that these assumptions about women's place in society "are no longer consistent with our understanding of the family, the individual, or the Constitution."[99]

Restrictions on abortion do not stem solely from a desire to protect the unborn; they reflect, and enforce, judgments about women's roles. The community's decision to intervene in women's lives is no longer presumptively benign; its decision to compel motherhood is presumptively suspect, one more instance of the sex-role restrictions imposed on women throughout American history.

In sum, *Casey* goes beyond *Roe* in suggesting that women's right to make decisions about childbearing has roots in constitutional values of sex equality as well as privacy. At the same time, *Casey* provides less practical protections for exercise of the abortion right than did *Roe*. The opinion recognizes that the state has an interest in protecting unborn life that it may vindicate by attempting to dissuade a pregnant woman from exercising her right to obtain an abortion. State regulation before the period of fetal viability is permissible so long as it is calculated to inform the pregnant woman's decision-making process, rather than to impede her access to abortion.

CONCLUSION: REFLECTIONS ON HOW MODERN AMERICAN CONSTITUTIONAL LAW UNDERMINES AND PRESERVES GENDER INEQUALITY IN THE FAMILY

Evaluating the body of law I have just described is a major undertaking, beyond the scope of this brief presentation. Still, I would like to close by inviting consideration of some of the ways that modern interpretation of the U.S. Constitution has affected family law, in order to illustrate how this body of law works simultaneously to disturb and preserve traditional gender arrangements.

There is no doubt that the body of privacy doctrine the Court developed in the last half of the twentieth century altered the climate in which women make decisions about bearing children. Of course, the Court has only given women partial protection against the variety of pressures that are commonly

[99] Ibid., at 928–9.

brought to bear on the decision to use contraception or abortion, but the Court has nonetheless altered the environment in which women make such decisions, removing a variety of regulatory impediments and, at least in part, altering the social meaning of the decision to avoid motherhood.

What of women who by circumstance or choice, find themselves assuming the role of motherhood? How has modern constitutional law affected their lives? We can begin with the observation that modern equal protection law has forced states to eliminate overt sex-based classifications from the laws that define the rights and obligations of family life. The Constitution has thus required legislatures to make the rights and obligations of marriage symmetrical, if they had not already adopted such reforms of their own accord. There is a powerful symbolic message communicated by such reforms, insofar as they express aspirational norms of reciprocity, mutuality, and equality in marriage. There is another potentially more troubling message communicated by such reforms – that, by eliminating overtly sex-based rights and obligations, the state has in fact conferred equality on women in marriage.

Under pressure of equal protection law, state legislatures have made the rights and obligations of marriage formally gender neutral, but too often this change makes little practical difference in the ways the state structures marriage.[100] Because of entrenched patterns of socialization, there are dramatic differences in the numbers of men and women who engage in violent assault or retire from the market to engage in uncompensated caretaking labor. If equal protection law enabled plaintiffs to challenge "facially neutral" laws regulating gender-salient activities that have a disparate impact on women, equal protection doctrine might prompt a more genuine break with the gender-hierarchical traditions of the Anglo-American common law. Yet for all practical purposes doctrine immunizes family law from constitutional challenge, once sex distinctions in the law are removed.

Of course, changes of this sort need not come from constitutional adjudication alone. Legislative fora may well be better suited to exploring the kinds of reforms that would make family law less onerous for women – especially given the complexity of providing for the diverse social and economic circumstances in which women negotiate their family obligations. Yet, at present, American constitutional law does not encourage legislatures to reform family law in gender-egalitarian directions or to enact legislation that would help alleviate burdens on parents who engage in family caretaking.

Perhaps even more remarkably, the Supreme Court is now interpreting the Constitution to *restrict* the power of the federal government to enact legislation that supports more gender-egalitarian relationships in family life. The Court has imposed restrictions on Congress' power to enact civil rights

[100] See Reva B. Siegel, "'The Rule of Love'," *supra* note 40.

laws, especially in matters affecting family relations,[101] for two kinds of reasons. The Court seeks to enforce constitutional limits on the powers of the federal government (in order to preserve federalism values), and to protect the prerogative of the Court to determine the Constitution's meaning (in order to preserve "separation of powers" values). Thus, when Congress enacted a statute that would give persons a right to be free from gender-motivated violence, the Supreme Court ruled that Congress lacked power to enact the contested provision of the *Violence against Women Act*, either by exercise of its power to regulate commerce or its power to enact legislation enforcing the Fourteenth Amendment.[102] The commerce portions of the decision emphasize limits on Congress' power to regulate the family[103] and the Fourteenth Amendment holding emphasizes limits on Congress' power to regulate private actors.[104] What is perhaps most remarkable about *Morrison* is the unselfconscious manner in which the Court advances traditional privacy-based rationales for limiting government's power to protect women from domestic violence. Notwithstanding the Court's experience in adjudicating sex discrimination claims under the Equal Protection Clause for three decades now, the Court was oblivious to the way that traditional gendered assumptions shaped its federalism analysis in *Morrison*.[105]

More promising was the Court's recent decision in *Nevada Department of Human Resources v. Hibbs*,[106] holding that Congress was authorized to enact a statute alleviating work/family conflicts as an exercise of its power to enforce the Equal Protection Clause of the Fourteenth Amendment. The *Family and Medical Leave Act*[107] only provides a right to twelve weeks of unpaid leave for workers with medical or family-care needs; but it goes well beyond anything the Court's cases interpreting the Equal Protection Clause require. The Court minimized this discrepancy by treating the statute as a remedy for past, judicially cognizable constitutional violations: "By setting

[101] See, e.g., Kenneth R. Redden, *Federal Regulation of Family Law* (Charlottesville, VA: Michie, Co., 1982), surveying areas of federal law addressing families. The tenet of federalism in the American constitutional tradition that states retain the right to regulate family life is most likely to be invoked in circumstances where federal regulation disturbs gender-conventional modes of regulation. See, e.g., Jill Elaine Hasday, "Federalism and the Family Reconstructed" (1998) 45 *UCLA Law Review* 1297.

[102] *United States v. Morrison*, 529 U.S. 598 (2000).

[103] Ibid., at 613, 615–16.

[104] Ibid., at 621–5.

[105] See, e.g., Catharine A. MacKinnon, "Disputing Male Sovereignty: On *United States v. Morrison*" (2000) 114 *Harvard Law Review* 135, 145–8; Robert C. Post and Reva B. Siegel, "Equal Protection by Law: Federal Antidiscrimination Legislation after *Morrison* and *Kimel*" (2000) 110 *Yale Law Journal* 441, 525 and n. 344; Judith Resnik, "Categorical Federalism: Jurisdiction, Gender, and the Globe" (2001) 111 *Yale Law Journal* 619 at 630–5; Reva B. Siegel, "She, the People," *supra* note 13 at 1024–30 and 1035–9.

[106] 123 S.Ct. 1972 (2003).

[107] 29 U.S.C. §2612(a)(1)(C) (2000).

a minimum standard of family leave for *all* eligible employees, irrespective of gender, the FMLA attacks the formerly state-sanctioned stereotype that only women are responsible for family caregiving, thereby reducing employers' incentives to engage in discrimination by basing hiring and promotion decisions in stereotypes."[108] The *Hibbs* decision suggests how Congress might use its powers to enact legislation that significantly expands protections afforded by judicially enforceable constitutional rights, if the Court does not constrain it on separation-of-powers or federalism grounds.

For this Court, sex discrimination would seem to be a problem involving group-based distinctions or "classifications" only. Perhaps because the constitutional law of sex discrimination was derived from the constitutional law of race discrimination, judicially crafted equality doctrine does not recognize the family as an institution of special regulatory concern to women. But the *Hibbs* decision suggests that Congress, a more politically responsive body, might once again be able to lead the nation in grappling with questions of sex equality as Americans live them today, in the institutions, practices, and understandings that define everyday life. It remains an open question whether, and in what ways, this Court will allow the Congress to so lead. In the foreseeable future, the development of sex equality law in the United States would seem to depend on it.

Suggested Readings

Books

Katharine T. Bartlett and Angela P. Harris, *Gender and Law: Theory, Doctrine, Commentary*, 2nd ed. (New York: Aspen Law & Business, 2002).

Martha Chamallas, *Introduction to Feminist Legal Theory* (Gaithersburg, MD: Aspen Law & Business, 2003).

Catharine MacKinnon, *Sex Equality* (New York: Foundation Press, 2001).

Articles

Kimberlé Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics" (1989) *University of Chicago Legal Forum* 139.

David J. Garrow, "Abortion before and after Roe v. Wade: An Historical Perspective" (1999) 62 *Albany Law Review* 833.

Nan D. Hunter, "Panel VI: Fighting Gender and Sexual Orientation Harassment: The Sex Discrimination Argument in Gay Rights Cases" (2000) 9 *Journal of Law and Policy* 397.

Catharine Mackinnon, "Difference and Dominance: On Sex Discrimination" (1987) *Feminism Unmodified: Discourses on Life and Law* (Cambridge, MA: Harvard University Press, 1987) 32.

[108] *Nevada Department of Human Resources v. Hibbs, supra* note 106 at 1982–3.

Frances Olsen, "Statutory Rape: A Feminist Critique of Rights Analysis" (1984) 63 *Texas Law Review* 387.
Robert C. Post & Reva B. Siegel, "Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act" (2003) 112 *Yale Law Journal* 1943, 1980–2020.
Reva B. Siegel, "'The Rule of Love': Wife Beating as Prerogative and Privacy" (1996) 105 *Yale Law Journal* 2117.
Wendy W. Williams, "The Equality Crisis: Some Reflections on Culture, Courts, and Feminism" (1992) 14 *Women's Rights Law Reporter* 151.