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SEX DISCRIMINATION AND
THE BURGER COURT:
A RETREAT IN PROGRESS?

Caren Dubnoff*

INTRODUCTION

A decade has passed since the Supreme Court in Reed v. Reed1 signaled a new sensitivity to the possibility that sex-based government action constitutes invidious discrimination. This departure from Warren Court doctrine was in the direction of increased judicial scrutiny and was often used as evidence that the Burger Court, although perceived as less activist and concerned for individual rights than its predecessor, had actually expanded upon these rights rather than abandoned them.2

It took five more years for the Court to acknowledge that it had embarked on a new course. Two decisions issued in the mid-1970's, Craig v. Boren3 and Califano v. Webster,4 led many observers to conclude that sex was a disfavored classification, allowed only in narrowly remedial contexts.5 At the same time, some commentators

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1. 404 U.S. 71 (1971). In Reed, appellant challenged a provision requiring automatic preference of men over women as estate administrators. The Court held the statutory preference unconstitutional because it provided "dissimilar treatment for men and women who are . . . similarly situated." Id. at 77. See generally Gunther, The Supreme Court 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 34 (1972).

2. See L. Goldstein, Sex and the Burger Court, in Race, Sex, and Policy Problems 105-08 (M. Palley & M. Preston eds. 1979).


4. 430 U.S. 313 (1977) (per curiam). The Califano Court sustained a gender based classification that used a more favorable formula in computing benefits for women than for men. In applying intermediate scrutiny, the Court made an "'inquiry into the actual purposes'" of the discrimination. Id. at 317 (quoting Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975)). In upholding the statute the Califano Court concluded that it "operated directly to compensate women for past economic discrimination." 430 U.S. at 318.

criticized the Court for inadequate articulation and inconsistent application of the principles that guided its new course. Although they recognized a pattern in the Court's decisions requiring equal treatment of men and women, the commentators feared that the standard being applied was too indefinite. They argued that, absent a fixed rule making sex a suspect classification, the newly won protections against sex discrimination rested on a precarious balance. Too much leeway remained for the Justices to retreat in response to perceived shifts in the political climate or to make erroneous judgments due to their own unconsciously held biases. The Court's two most recent decisions, Michael M. v. Superior Court and Rostker v. Goldberg, indicate that this fear was indeed prescient.

During the 1980 term, the Court issued three opinions involving explicit gender-based laws. Sex distinctions were upheld in Michael M. and Rostker and invalidated in Kirchberg v. Feenstra. In Kirchberg, the Court determined that the equal protection clause did not allow the state to give a husband the unilateral right to dispose of jointly held property without his wife's consent. On the same day, the Court decided Michael M. v. Superior Court, upholding a California law that made it a crime for a male to engage in sexual intercourse with a female under the age of 18 who is not his wife, but did not make the female's participation criminal. The Court held that the statute did not involve unconstitutional gender discrimination.

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13. Id. at 1198-99.
15. Id. at 1207-08.
In *Rostker v. Goldberg*, the Court validated the Military Selective Service Act, which authorized a presidential proclamation requiring men, but not women, between the ages of 18 and 26 to register for the draft. It is not immediately evident that the Court has veered from precedential principles this term because gender classifications are assessed under a standard that is by its very nature indefinite. Ostensibly, the Court subjects gender classifications to an intermediate level of review. According to this standard, the government must demonstrate an important interest and a substantial relationship of the classification to that interest. Intermediate scrutiny leaves open the question of how important the interest or how accurate the fit must be between the interest and the classification. Although intermediate scrutiny has been regularly invoked in gender classification cases since 1976, the standard has been applied differently when women were harmed and when they were benefited.

This bifurcated approach conforms to a respected conception of equal protection. In *Michael M.*, however, the Court assessed the impact of the law in such a way as to raise questions about the Court’s ability to judge the burden placed on women. Because a correct evaluation of burden is critical to an effective constitutional analysis, the Court’s failure to make such an evaluation threatens the very core of the newly acquired protection afforded women by the equal protection clause. Beyond that, the reliance on the “real difference”

17. Id. at 2660.
18. This vagueness in the Court’s standard for gender classification has resulted in confusion in the lower courts. Compare *Meloon v. Helgemoe*, 564 F.2d 602, 608-09 (1st Cir. 1977) (intermediate scrutiny applied to hold statutory rape law unconstitutional), *cert. denied*, 436 U.S. 950 (1978) with *Rundlett v. Oliver*, 607 F.2d 495, 502 (1st Cir. 1979) (intermediate scrutiny applied to hold similar statutory rape law constitutional).
20. Id.
22. *See supra* notes 9-11 and accompanying text.
rationale reflected in *Michael M.* in the opinions of Justices Rehnquist\(^2\) and Stewart\(^2\) produces a disquieting echo of pre-1971 gender classification cases.\(^8\) Justice Rehnquist's acceptance of a state interest in protecting women\(^2\) adds another troubling element.

The concern increases when *Michael M.* is read in conjunction with *Rostker*. In *Rostker*, for the first time in a decade, the Court approved a gender-based classification without determining that it did not disadvantage women.\(^9\) The "real difference" rationale as a defense for sex-based action was reaffirmed and expanded.\(^10\) In allowing a disadvantageous classification to stand, the *Rostker* Court re-opened the possibility that conscious discrimination will be approved whenever linked to differences between males and females that a majority of Justices consider valid.

*Michael M.* is an attempt at consistency. *Rostker* presents the more drastic break with the cases of the preceding decade. Taken together, *Rostker* and *Michael M.* indicate either an inadequate understanding of what constitutes sex discrimination or a tacit retreat from the protection recently afforded women by the Court's interpretation of the equal protection clause. These two cases leave sex discrimination law in a state of confusion—a confusion which is not lessened by *Kirchberg*. The latter decision, however, does provide some comfort that a return to total judicial abdication is not in the making.

This Article demonstrates that *Michael M.* and *Rostker* are flawed decisions that are largely the product of stereotypical thinking about women. In both cases, the Court affirmed a limitation on women's right to assume responsibility in society and in so doing hindered their achievement of equal citizenship. These opinions are inconsistent with precedent and with the goals of equal protection.

Part I evaluates the facts and reasoning of *Michael M.* in light of the precedent in this area and examines the basis for distinguishing between classifications that harm women and those that do not. Part II provides an examination of the decision in *Rostker*. The analysis focuses on the Court's treatment of government policies and laws that expressly distinguish between males and females.

In Part III, the implications of these cases and *Kirchberg* are examined. The cases can and should be narrowly read, and there is hope in

\(^{26}\) 101 S. Ct. 1200, 1205 (1981) ("young men and young women are not similarly situated with respect to the problems and the risks of sexual intercourse").

\(^{27}\) Id. at 1209 (Stewart, J., concurring) ("there are differences between males and females that the Constitution necessarily recognizes").

\(^{28}\) See infra notes 33-39 and accompanying text.

\(^{29}\) 101 S. Ct. at 1206 ("It is hardly unreasonable for a [state] legislature . . . to protect minor females . . . .").

\(^{30}\) 101 S. Ct. 2646, 2655-59 (1981).

\(^{31}\) Id. at 2658 ("Men and women, because of the combat restrictions on women, are simply not similarly situated . . . .").
both the language of these cases and in the general attitudes of the Justices manifest in case precedent that they will be. Finally, this Article suggests a set of principles that could provide for both equality and consistency. Strict scrutiny should govern when the burden of the statute falls on women. Intermediate scrutiny should be applied to legislation that prefers women and a rational relationship standard should be applied to legislation with a neutral impact.

I. AN EVALUATION OF BURDEN IN GENDER-BASED STATUTES: Michael M. RECONSIDERED

Historically, the constitutional validity of sex-based classifications was never seriously doubted by the Court.\textsuperscript{32} In the early years after the passage of the fourteenth amendment, such classifications were not only accepted,\textsuperscript{33} they were endorsed.\textsuperscript{34} For example, in 1872, in \textit{Bradwell v. State},\textsuperscript{35} the Supreme Court validated an Illinois law that prevented married women from practicing law. The holding was accompanied by a strong statement approving such differential treatment.\textsuperscript{36} The view that women were weaker than men was behind many of the Court's decisions, especially those validating regulations that controlled women in business.\textsuperscript{37}

\textsuperscript{32} Ginsburg III, \textit{supra} note 21, at 451 (Court's willingness to overturn gender-based classifications is a very recent development).

\textsuperscript{33} See, e.g., Hoyt v. Florida, 368 U.S. 57, 59-63 (1961) (Court upheld statute exempting women from jury duty, deferring to state's desire to relieve women from this duty); \textit{Goesaert v. Cleary}, 335 U.S. 464, 465-67 (1948) (Court upheld statute forbidding women to work as bartenders unless related to bar owner, accepting state's rationale that statute protects women from moral and social hazards), \textit{overruled}, \textit{Craig v. Boren}, 429 U.S. 190, 210 (1976); \textit{Minor v. Happersett}, 88 U.S. (21 Wall.) 162, 177-78 (1874) (Court upheld a statute granting only men the right to vote, accepting argument that neither the Constitution, nor the fourteenth amendment, made all citizens voters).

\textsuperscript{34} The position of women in this country at its inception is reflected in the view expressed by Thomas Jefferson that women should be neither seen nor heard in society's decision-making councils. See M. Gruberg, Women in American Politics 4 (1968).

\textsuperscript{35} 83 U.S. (16 Wall.) 130 (1872).

\textsuperscript{36} Justice Bradley wrote, "Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfit it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband . . . . The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator." 83 U.S. at 141.

\textsuperscript{37} See, e.g., \textit{Radice v. New York}, 264 U.S. 292, 294-95 (1924) (statute restricting the working hours of women in city restaurants upheld); \textit{Bosley v. McLaughlin},
Until 1971, all gender-based government action, with one exception, was upheld under the rational relationship standard. The turning point was Reed v. Reed. While purporting to apply the traditional rationality test, the Court actually subjected the statute to stricter scrutiny. In Reed, an Idaho state law required that men be preferred over women in the selection of estate administrators. The state argued that the classification limited the workload of the probate courts and was based on the assumption that "in general men are better qualified to act as an administrator than are women." Under the rational relationship standard, almost any plausible justification suffices to validate a statute. Yet, the Supreme Court invalidated

236 U.S. 385, 393-94 (1915) (statute setting maximum hours for female hospital employees upheld); Miller v. Wilson, 236 U.S. 373, 377-78 (1915) (statute establishing maximum hours for women working in hotels upheld); Riley v. Massachusetts, 232 U.S. 671, 880-81 (1914) (statute establishing maximum hours for female factory workers upheld); Muller v. Oregon, 208 U.S. 412, 421-23 (1908) (statute establishing maximum hours for female laundry workers upheld). In Muller, the Court stated, "[t]hat woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. . . . Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men and could not be sustained." Id. at 421-22. See generally J. Baer, The Chains of Protection: The Judicial Response to Women's Labor Legislation 29-39 (1978) (history of economic legislation protecting women); Ginsburg, Some Thoughts on Benign Classifications in the Context of Sex, 10 Conn. L. Rev. 813, 814-15 (1978) [hereinafter cited as Ginsburg IV] (historical tendency of legislators to regard all gender based legislation as designed to benefit or protect women).


41. Id. at 74-76. The Court said that a classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation." Id. at 76 (quoting F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)); see Ginsburg III, supra note 21, at 468-70; Gunther, supra note 1, at 33-34.


the law on the grounds that the classification was impossibly arbitrary even though the state's justification was arguably logical.\textsuperscript{44} Had the Supreme Court applied the traditional rationality test, it surely would have upheld Idaho's law.

The rejection in \textit{Reed} of the standard of minimum rationality did not immediately lead to the adoption of a clear substitute. Heightened scrutiny remained unacknowledged and undefined until \textit{Craig v. Boren}.\textsuperscript{45} In \textit{Craig}, a majority of the Justices explicitly agreed that gender invoked something more than mere rationality, yet something less than strict scrutiny.\textsuperscript{46} In the words of Justice Powell, "candor compels the recognition that the relatively deferential 'rational basis' standard of review normally applied takes on a sharper focus when we address a gender-based classification."\textsuperscript{47} Justice Brennan established the requisite standard, stating that "[t]o withstand constitutional challenge, . . . classifications [based on] gender must serve important governmental objectives and must be substantially related to achievement of those objectives."\textsuperscript{48} This standard was a compromise, a standard of scrutiny that fell between the exacting requirements of suspect classification/strict scrutiny and the traditional, deferential analysis of the rational basis test. Because this new standard was

\begin{itemize}
\item \textsuperscript{44} 404 U.S. at 76.
\item \textsuperscript{45} 429 U.S. 190 (1976). In Frontiero v. Richardson, 411 U.S. 677, 682 (1973), sex was declared a suspect class by a plurality of four Justices, but no specific standard for analysis was announced until \textit{Craig}. The \textit{Frontiero} plurality was never able to marshal a majority of the court. Justice Brennan wrote the opinion, joined by Justices Douglas, White and Marshall. Justice Stewart wrote a separate concurring opinion, finding that the statutes constituted an "invidious discrimination." 411 U.S. at 691 (Stewart, J., concurring). Justice Powell, joined by Chief Justice Burger and Justice Blackmun, also wrote a separate concurrence, finding it unnecessary to decide whether sex was a suspect classification. 411 U.S. at 691-92 (Powell, J., concurring).
\item \textsuperscript{46} 429 U.S. 190, 197 (1976). In \textit{Craig}, the Court invalided an Oklahoma statute barring the sale of 3.2% beer to males, but not females, under the age of twenty-one. The \textit{Craig} majority indicated that this intermediate standard was "establish[ed]" by "previous cases" such as Reed v. Reed, 404 U.S. 71 (1971). 429 U.S. at 197-98; see Stanton v. Stanton, 421 U.S. 7 (1975); Lombard, \textit{Sex: A Classification in Search of Strict Scrutiny}, 21 Wayne L.J. 1355, 1369-70 (1975). In \textit{Stanton} the Court found that gender-based classifications must have a "fair and substantial relation to the object of the legislation." 421 U.S. at 14 (citations omitted). As in \textit{Reed}, the Court hinted at a standard stricter than mere rationality. The standard of strict scrutiny is applied to statutes that infringe upon fundamental rights or classifications that are deemed suspect. To be sustained, legislation under this standard must be based upon compelling governmental objectives and necessary to their accomplishment. Tribe, supra note 39, § 16-6, at 1002. Suspect classifications include race, Loving v. Virginia, 388 U.S. 1 (1967) and national origin, Korematsu v. United States, 323 U.S. 214 (1944). Fundamental rights include the right to travel, Shapiro v. Thompson, 394 U.S. 618 (1969), the right to privacy, Griswold v. Connecticut, 381 U.S. 479 (1965), and the rights expressly guaranteed by the Constitution. The strict scrutiny test has been described as "'strict' in theory and fatal in fact." Gunther, supra note 1, at 8.
\item \textsuperscript{47} 429 U.S. at 210-11 (Powell, J., concurring).
\item \textsuperscript{48} Id. at 197.
\end{itemize}
established in a case in which males were disadvantaged, the *Craig* decision suggested that any gender-based classification—male or female—would be disfavored.\[49\]

In the years between the decision in *Reed* and the 1980 Term, the Court invalidated gender-based classifications on equal protection grounds in more than a dozen cases.\[50\] The Justices had almost all given credence to the standard of intermediate scrutiny.\[51\] They remained divided, however, over the actual requirements of that standard, and they applied the intermediate standard differently when men were burdened than when women were burdened.\[52\]

Nonetheless, the Court has emphasized that gender-based distinctions should not be part of the "baggage of sexual stereotypes,"\[53\] packed with "archaic and overbroad generalizations"\[54\] that arise from the "role-typing society has long imposed."\[55\] The Court has consistently refused to sustain legislation disfavoring women regardless of the accuracy of the generalizations advanced for its support.\[56\] The Court's rationale in rejecting such justifications was that generalizations may be accurate only because of a history of sex discrimination.\[57\] Consequently, to uphold gender-based classifications because of the validity of generalizations would be tantamount to perpetuating a disadvantage against women. For example, in overturning a state law which allowed fathers to discontinue child support for fe-

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51. In Califano v. Goldfarb, 430 U.S. 199 (1977), Justices White, Marshall and Powell joined the Brennan opinion. Justice Stevens did not dispute the standard but stressed that it should be applicable regardless of which sex is disadvantaged. *Id.* at 218-19 (Stevens, J., concurring). In Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142 (1980), Justice White reiterated the validity of the intermediate standard, *id.* at 150, and only Justice Rehnquist dissented. *Id.* at 153-54 (Rehnquist, J., dissenting); *see infra* notes 299-309 and accompanying text.

52. *See infra* pt. I(D).


56. Weinberger v. Wiesenfeld, 420 U.S. 636, 645 (1975); Stanton v. Stanton, 421 U.S. 7, 14 (1975). "Sex-based classifications are in many settings invidious because they relegate a person to the place set aside for the group on the basis of an attribute that the person cannot change. Such laws cannot be defended . . . on the ground that the generalizations they reflect may be true of the majority of members of the class, for a gender-based classification need not ring false to work a discrimination that in the individual case might be invidious." Caban v. Mohammed, 441 U.S. 380, 398 (1979) (Stewart, J., dissenting) (citations omitted).

male offspring at a younger age than for male offspring, the Court accepted that men have traditionally required a higher level of education than women in order to be able to support their families.\textsuperscript{58} Nevertheless, "[t]o distinguish between the two on educational grounds is to be self-serving: If the female is not to be supported so long as the male, she hardly can be expected to attend school as long as he does, and bringing her education to an end earlier coincides with the role-typing society has long imposed."\textsuperscript{59}

Generalizations about the economic dependency of women provide another example. The Court has acknowledged that there is empirical support for the generalization that wives are more likely to be dependent on their husbands, than husbands are on their wives.\textsuperscript{60} While the situation of women is changing, these generalizations are still largely true. Although forty-nine percent of the women who have children under the age of eighteen work outside of the home,\textsuperscript{61} there remains significant dependency as a result of lower paying employment opportunities.\textsuperscript{62} Thus, it is arguably rational for the government to allocate employment benefits according to assumptions of female dependency to accommodate administrative convenience.\textsuperscript{63} Nonetheless, these classifications penalize female workers whose families receive less than those of similarly situated male workers, and the Court has consistently disallowed administrative convenience as a rationale to justify such distinctions.\textsuperscript{64}

\textbf{A. Michael M. v. Superior Court}

In \textit{Michael M.}, the Court broke with tradition and upheld a statute based primarily on generalizations about women. The Court recognized and reiterated that "'a State is not free to make overbroad generalizations based on sex which are entirely unrelated to any differences between men and women or which demean the ability or
social status of the protected class.’ ” 65 Further, the Court acknowledged that “[g]ender-based classifications may not be based upon administrative convenience, or upon archaic assumptions about the proper roles of the sexes.” 66 Nevertheless, the Court upheld as constitutional a California statutory rape law 67 that subjected only males to criminal prosecution, even though the statute reinforced paternalistic attitudes towards women 68 and was justified by arguments of administrative convenience. 69

The starting point of the Court's analysis was a determination of the standard of review for evaluating the sex-based distinction. 70 Although it is now generally accepted that a standard of intermediate scrutiny applies in cases of sex differentiation, 71 there are in fact two different formulations of this test. One formulation lies close to strict scrutiny while the other is akin to the rational basis test.

As formulated by Justice Brennan, the intermediate standard requires the government to demonstrate not only an important interest, but also that the relationship of the classification to the interest is substantial. 72 As refined by Justice Stewart, the test is much more lenient. 73 Stewart would apply the Brennan test in situations where the classification demeans “the ability or social status of the affected


66. 101 S. Ct. at 1209 (Stewart, J., concurring) (citations omitted).


68. 101 S. Ct. at 1217-18 (Brennan, J., dissenting); see Statutory Rape Laws, supra note 67, at 766-70 “[S]tatutory rape laws invoke the benevolent parens patriae power of the state to 'protect' young females and punish male ravishers. These protective measures reflect sex-role stereotypes that are unfavorable to both males and females.” Id. at 766-67 (footnotes omitted).

69. See 101 S. Ct. at 1206-07. The majority accepted the state's argument that a gender-neutral statute would frustrate effective enforcement because a female subject to criminal sanction would never report the incident. As the dissent points out, thirty-seven states now have gender-neutral statutory rape statutes and no evidence established that the law enforcement efforts of those states have been handicapped. Additionally, California currently has gender-neutral statutes regulating other sexual behavior and the state did not establish that it had any problem with their enforcement. Id. at 1216 (Brennan, J., dissenting). See also 59 Wash. U. L.Q. 310, 311 nn. 9 & 10 (1981) (lists the 39 jurisdictions with gender-neutral statutory rape provisions and the 17 that retain gender-based statutes).

70. 101 S. Ct. at 1200, 1203-04.

71. See supra notes 46-55 and accompanying text.


73. Parham v. Hughes, 441 U.S. 347, 354 (1979) (The legislature may not "make overbroad generalizations based on sex which are entirely unrelated to any differences between men and women or which demean the ability or social status of the affected class.").
When no such burden is imposed, under Stewart’s test, the classification is sustained as long as it is not “entirely unrelated to any differences between men and women,” provided that the classification is rational. Unlike the Brennan formulation, which applies whenever a semi-suspect classification is employed, the Stewart analysis raises two questions. First, is the use of the classification burdensome? Second, is there any basis for the classification? The assessment of impact is therefore critical. If the classification is deemed burdensome, the requirements of the Brennan formulation apply. If, on the other hand, the classification is seen as benign, the less stringent rationality test is sufficient. This test differs from the traditional rationality test in that it requires an inquiry into the effect of the classification before determining that a reasonable basis defense is acceptable.

Justice Rehnquist adopted the Stewart approach as the appropriate basis for analysis in *Michael M.*, thereby requiring a preliminary judgment concerning the invidiousness of the classification. In Justice Rehnquist’s view, the criminal liability imposed solely on males did not harm women. Essentially he reasoned that the classification was nondiscriminatory because it merely equalized the position of males and females. Without the statute, only females would bear the cost of intercourse through pregnancy. By imposing a criminal penalty on males, the statute made both sexes responsible for the consequences of their behavior. Justice Rehnquist posited that the law was not based on stereotypical thinking about sex roles and behavior, but instead on the objective fact that only females are capable of becoming pregnant. Moreover, it did not “ ‘demean the ability or social status of the affected class,’ ”—that is, males. Therefore, once the Court concluded that there was no malign classification, only the most limited scrutiny was required under the Stewart test.

74. Id.
75. Id.
76. 101 S. Ct. at 1204.
77. Id. at 1205-07.
78. Id. at 1206.
79. Id.
80. Id. at 1204 (quoting Parham v. Hughes, 441 U.S. 347, 354 (1979)). Justice Rehnquist argued that “the statute does not rest on the assumption that males are generally the aggressors. It is instead an attempt by a legislature to prevent illegitimate teenage pregnancy by providing an additional deterrent for men.” Id. at 1207. Justice Stevens rejected this analysis on the grounds that applying the statute only to the male “may reflect a legislative judgment that in the typical case the male is actually the more guilty party . . . . [T]he possibility that such an habitual attitude may reflect nothing more than an irrational prejudice makes it an insufficient justification for discriminatory treatment that is otherwise blatantly unfair.” Id. at 1220 (Stevens, J., dissenting).
81. Id. at 1204. A number of lower courts have refused to apply Justice Brennan’s intermediate scrutiny test, reasoning that there is no gender-based discrimination in
Justice Rehnquist then turned to a means/end inquiry. He recognized that the legislature sought to discourage sexual intercourse by enacting the statute but acknowledged that “[p]recisely why the legislature desired that result is . . . somewhat less clear.” He then articulated why “the individual legislators may have voted for the statute” and declared that at least one of the reasons was to prevent illegitimate teenage pregnancies. Justice Rehnquist thus did two things contrary to Supreme Court precedent: He deferred to the state court’s assessment of the legislative goal, which in turn rested on the untested assertions of the state prosecutor; and he essentially supplied the state’s statutory justification by constructing the arguments to support the gender-based classification.

While the Supreme Court accords deference to state court findings, the Court must undertake an independent inquiry into statutory purposes when constitutional rights are implicated. Moreover, the Court has established that it will not infer a legislative purpose sua sponte to sustain gender-based classifications. “The burden . . . is on those defending the discrimination to make out the claimed justification . . . .” In Kirchberg v. Feenstra, the Court’s most recent statement regarding the requisite burden of proof, Justice Marshall wrote that the Court would not speculate about the existence of justification for the gender-based statute at issue. Yet, Justice Rehnquist in Michael M. did not conduct an independent inquiry into the legislative history or require the state to support the legislative goal by a showing of empirical evidence.

In fact, the history of the statutory rape law in California suggests that pregnancy prevention was not among the state’s goals in enacting the statute. Furthermore, the state’s assertion that the statute’s

purpose and effect was to curtail teenage pregnancies was unsupported. The only data presented were statistics confirming the increasing problem of teenage pregnancy. Because the statute has long been in existence, and yet teenage pregnancy has increased, one might wonder why the Court still believed that the criminal penalty would deter anyone's behavior. As Justice Stevens said,

[I]ocal custom and belief—rather than statutory laws of venerable but doubtful ancestry—will determine the volume of sexual activity among unmarried teenagers. The empirical evidence cited by the plurality demonstrates the futility of the notion that a statutory prohibition will significantly affect the volume of that activity or provide a meaningful solution to the problems created by it.

There is considerable doubt then as to whether the law had the constitutionally requisite substantial effect on the stated problem, however important that objective may have been.

As Justice Rehnquist analyzed the situation, illegitimate pregnancies would be reduced if sexual intercourse is statutorily inhibited. The higher the costs of sexual intercourse, the less likely that it would occur. Justice Rehnquist posited that there is a natural cost already imposed on women, because only women can become pregnant. There is no such natural sanction for males, but fear of a criminal

statutory rape law is to prevent an "unwise disposition" of an underage female's sexual favors. *Id.* at 331, 393 P.2d at 674, 39 Cal. Rptr. at 362. In *People v. Mackey*, 46 Cal. App. 3d 755, 120 Cal. Rptr. 157, *cert. denied*, 423 U.S. 951 (1975), the court defended the statute's sexual distinction by asserting that young girls are more likely than young boys to be "the objects of the desires and designs of older people of the opposite sex who are on the prowl." 46 Cal. App. 3d at 760, 120 Cal. Rptr. at 160. In *People v. Verdegreen*, 106 Cal. 211, 39 P. 607 (1895), the court found that "the obvious purpose of [the statute] is the protection of society by protecting from violation the virtue of young and unsophisticated girls." 109 Cal. at 214, 39 P. at 608.

92. 101 S. Ct. at 1205 n.3.
93. *Id.* at 1218 (Stevens, J., dissenting) (footnotes omitted).
95. Justice Rehnquist assumes that all the consequences of pregnancy fall on the female. This is not true; the father of an illegitimate child may be subject to bastardy proceedings by the mother to compel financial support. 10 Am. Jur. 2d *Bastards* § 74 (1963 & Supp. 1981). *But see Zepeda v. Zepeda*, 41 Ill. App. 2d 240, 190 N.E.2d 849, *cert. denied*, 379 U.S. 945 (1964) (child has no cause of action against father for causing him to be born a bastard). Additionally, the father may suffer the same emotional traumas faced by the young mother.
penalty would provide the missing deterrent. Justice Rehnquist further posited that the gender-specific provision provides a better deterrent than would a gender-neutral statute. A gender-neutral approach would impair enforcement of the statute by deterring report of the offense, because the accusing party would also be subject to the penalty.96

Finally, Justice Rehnquist dismissed the argument advanced by the petitioner that the statute was overbroad because it made unlawful intercourse with very young females, some of whom do not have the potential to become pregnant.97 Justice Rehnquist said that "it is ludicrous to suggest that the Constitution requires the California Legislature to limit the scope of its rape statute to older teenagers and exclude young girls."98 The statute is facially overbroad, however, if its avowed purpose is to prevent teenage pregnancies. Justice Rehnquist argued away this inconsistency by alleging that the protection of young females from physical injury due to sexual intercourse is also a justifiable statutory purpose.99

In this last argument, Justice Rehnquist suggests that the protection of females is an appropriate goal for the state.100 This characterization of the female, however, as a victim in need of protection from the male aggressor serves to perpetuate sexual stereotyping and does a disservice to both sexes.101 The Supreme Court has recently invalidated legislation that embodied other aspects of sex-role stereotyping,102 and should not now regress into justifying legislation that reflects such a double standard.

Justice Rehnquist's analysis is in sharp contrast to a true intermediate scrutiny analysis. Under Justice Brennan's test, the burden is on the government to prove both the importance of its asserted objective and the substantial relationship between the classification and the objective.103 In Michael M, the state was not required to offer any evidence that the gender classification was effective in assisting en-

96. 101 S. Ct. at 1206-07; see Statutory Rape Laws, supra note 67, at 786; supra note 69 and accompanying text.
97. 101 S. Ct. at 1207.
98. Id.
100. 101 S. Ct. at 1206-07. Justice Rehnquist explicitly states that "[i]t is hardly unreasonable for a legislature . . . to protect minor females." Id. at 1206.
Moreover, analysis was confined to the question of statutory enforcement, and no attempt was made to measure the effects of the statute on deterring pregnancy. The discussion of the availability of less drastic means for achieving this goal is sketchy. As Justice Rehnquist correctly notes, there is no basis for judging whether a statute that punishes all participants without regard to sex would be more or less effective in discouraging the behavior. He did not mention that there are other, probably more effective, methods of preventing pregnancy.

The Court's argument was defective in a number of ways. First, the application of minimum scrutiny to this gender classification undermines the Supreme Court's determination that sex is a disfavored classification and ignores the judicial responsibility to apply impartially the appropriate level of scrutiny to gender-based classifications. The court also failed to comprehend the way in which the classification reinforced stereotypical thinking about men and women. Finally, and most seriously, the Court failed to recognize the burden that the statute placed on women. The application of the Stewart standard in *Michael M.* represents an error by the Court in assessing burden. The underpinnings of the concept that such an assessment must be accurately made before a standard of review can be applied are to be found in both equal protection theory and in recent precedent.

**B. Equal Protection Theory and the Relevance of Burden**

The equal protection clause is commonly defined as requiring like treatment for those who are similarly situated. It follows that the

104. 101 S. Ct. at 1215-17 (Brennan, J., dissenting).
105. *Id.* at 1214-17. "[T]he State must show that because its statutory rape law punishes only males, and not females, it more effectively deter[s] minor females from having sexual intercourse." *Id.* at 1215 (Marshall, J., dissenting) (footnote omitted).
106. *Id.* at 1206.
108. See Reed v. Reed, 404 U.S. 71, 76-77 (1971); *supra* notes 40-49 and accompanying text.
government is allowed to treat differently those who are differently situated. If persons are not similarly situated, then a law that treats them in the same manner may actually result in unequal protection. For example, the requirement that rich and poor alike pay a poll tax in order to vote meant that many poor people could not vote, or had to pay a relatively higher price for so doing. As Professor Laurance Tribe has written,

[f]irst, equality can be denied when government classifies so as to distinguish, in its rules or programs, between persons who should be regarded as similarly situated in terms of the relevant equal protection principles. . . .

Second, equality can be denied when government fails to classify, with the result that its rules or programs do not distinguish between persons who, for equal protection purposes, should be regarded as differently situated.

Males and females are not always similarly situated. This is particularly true with respect to past discrimination. Just as the "need for effective social policies promoting racial justice in a society beset by deep-rooted racial inequities" may necessitate race-specific action, past discrimination against women may require present preferences.

There are arguably several grounds for justifying a heightened scrutiny for all gender classifications. It is undisputed that women constitute an identifiable group defined by "an immutable characteristic determined solely by the accident of birth." They have been subjected to discriminatory laws and social practices, some of which continue and others of which persist in their effects. Women are obviously underrepresented in the decision-making bodies of government. In short, in terms of the factors Justice Stone identified in

114. L. Tribe, supra note 39, § 16-1, at 993 (emphasis in original).
119. Id. at 684-88.
120. Id. at 686 n.17. In the 97th Congress, there are only two women in the Senate and 10 women in the House of Representatives. Over the past 25 years, only six women have served on the Cabinet. Only five percent of Federal judges are
United States v. Carolene Products Company as increasing the likelihood that government action would be based on prejudice, women should qualify for special concern. Only their numbers set them apart from other insular groups.

Establishing sex as a suspect classification, however, presents definite problems, and there is justification for allowing some distinction between scrutiny of those classifications which harm women and those which do not. Public choices that disadvantage males are not as closely scrutinized under equal protection theory as those directed against females. "Men as a general class have not been the victims of the kind of historic, pervasive discrimination that has disadvantaged other groups." In addition, as one commentator has observed, "[w]hen the group that controls the decision making process classifies so as to advantage a minority and disadvantage itself, the reasons for being unusually suspicious, and, consequently, employing a stringent brand of review, are lacking." Nonetheless, total abdication of review is not warranted. There is an inherent unfairness in any distribution of government benefits that is unrelated to individual responsibility or choice, and thus the Stewart standard of review is unsatisfactory. Further, there is always a risk that there will be social costs, through the reinforcement of stereotypes or the perception of unfairness, to a classification that gives women an advantage.

Several recent interpretations of the equal protection clause require a structure that subjects classifications based on disfavored traits to varying scrutinies depending on their purpose and effect. One commentator suggested that "[t]he substantive core of the [fourteenth] amendment, and of the equal protection clause in particular, is a principle of equal citizenship, which presumptively guarantees to each individual the right to be treated by the organized society as a respected, responsible, and participating member."

Heightened judicial scrutiny is triggered by classifications that limit participation...
in society," or that stigmatize, because "each individual's basic humanity is the primary value in the principle of equal citizenship." In this analysis, heightened scrutiny is thus generated by circumstances quite similar to those under the antidiscrimination principle. Proceeding from the premise that the legal right guaranteed by the equal protection clause is equal citizenship, the guarantee is not at all incompatible with benign gender-conscious classifications. The analysis continues:

When government acts to promote the equal citizenship values of respect and participation, quite a different equal protection issue is presented. Preferential minority admissions to state universities, racial preferences in government hiring, racial preferences aimed at integrating government housing projects—all these differ in the most dramatic way from the purposeful infliction of stigmatic harm. . . . These racial preferences are aimed at making us one class of citizens by integrating various important phases of our community life.

Similarly, the legal right to "equal concern and respect from the legislature," considered to be the core of the equal protection guarantee by a second commentator, would also be compatible with benign classifications. The clause does not require that the government provide individuals with equal benefits. "Just because people are handicapped, treating them as equals may require giving them a larger share of the public wealth. At the very least, sympathy that helps us understand the special circumstances of the handicapped is not barred."

A quite different approach has been suggested by a third commentator. He would direct equal protection analysis away from the claims of individuals and toward those of groups. To be avoided is

129. Karst, supra note 126, at 8.
130. See Fiss, Groups and the Equal Protection Clause, 5 Phil. & Pub. Aff. 107 (1976); Tussman & tenBroek, supra note 111. Fiss uses the term "antidiscrimination principle," Fiss, supra, at 117, to describe the structure formulated by Tussman & tenBroek, originally called the "reasonable classification" principle. Tussman & tenBroek, supra note 111, at 344. The antidiscrimination principle sees the equal protection clause as prohibiting arbitrary distinctions, Fiss, supra, at 109, and identifies certain characteristics likely to lead to such arbitrariness. Id. Fiss sees this principle as inadequate for classifications that benefit minorities. Id. at 129. But see Brest, Foreword: In Defense of the Antidiscrimination Principle, 90 Harv. L. Rev. 1, 15-22 (1976) (all classifications that burden minorities are absolutely prohibited).
133. Id. at 42.
134. Fiss, supra note 130.
government action that harms social groups that are politically, economically and socially disadvantaged.135 This reformulation of the constitutional principle mediating the equal protection clause is even more supportive of race-conscious efforts to redress past discrimination. From this perspective, “[t]he appropriate standard for viewing a policy that appears to the court to benefit a specially disadvantaged group should be a rational-basis standard.”136 Even the antidiscrimination principle, properly viewed as a methodology for assuring equal treatment, allows for some flexibility. “[W]here the objective and immediate effect are to benefit minority persons, it seems inappropriate to subject the practice to the demanding criteria of the suspect classification standard.”137

C. Guidelines for the Assessment of Burden

Line-drawing between burdensome and non-burdensome classifications is, of course, premised on the view that an assessment of burden is possible. Such judgments are often easier in the abstract, however, than in reality. Some manifestations of burden are obvious. If sex-based action is undertaken with an intent to keep women in a subservient position, it is clearly burdensome. One problem is that invidious intent is rarely made manifest because few laws purport to hurt women. They are instead defended as protective, compensatory, or reflective of real differences between the sexes.138 For example, the denial of an economic benefit creates a burden. It is not always

135. Id. at 147-50.
136. Id. at 161.
137. Brest, supra note 130, at 19; see L. Tribe, supra note 39, § 16-1, at 993, § 16-6, at 1000-02. Some constitutional theorists have contended that preferential policies can meet a strict scrutiny review. E.g., Perry, Modern Equal Protection: A Conceptualization and Appraisal, 79 Colum. L. Rev. 1023, 1045 (1979). Traditional strict scrutiny, however, requires both a showing of a compelling state interest and a showing that the proposed means are necessary to the achievement of that interest. Although the elimination of social inequalities caused by discrimination might be seen as compelling, it would be difficult to prove that a race-conscious program is essential to achieving that goal. At the same time, there is nothing in preferential treatment that inherently conflicts with the principle that Perry has identified as the core value protected by the equal protection clause—the moral equality of the races. "The question thus becomes: Does preferential treatment deny the principle of the moral equality of the races; is it predicated on the view that those disadvantaged by preferential treatment, white persons, are by virtue of race morally inferior to the preferred nonwhites? The conspicuous answer to that question is 'No'.” Id. at 1043. Rather, Perry's concern is that preferential treatment may indirectly operate to disadvantage nonwhites. The problems he notes are real and pertain equally to gender classifications. For an extensive discussion of reverse discrimination, see Henkin, DeFunis: An Introduction, 75 Colum. L. Rev. 483 (1975).
obvious, however, that women have been placed at an economic disadvantage, particularly if the denial occurs indirectly. In the early years of this century, several state statutes were enacted which set minimum working conditions for women. When such legislation was directed at all workers, it was generally invalidated.\footnote{139} When limited to women, such legislation withstood constitutional challenge because the Court viewed women as weaker than men, with a different role in society, and therefore the proper object of state protection.\footnote{140} If the intent and effect of such legislation was that the treatment accorded women in the marketplace improved conditions, then the legislation could be seen as favorable. Intentions aside, however, it is now recognized that these restrictions were in fact burdensome because they limited the opportunities available to women by making competition with men more difficult.\footnote{141}

Restriction of privileges, limitation of rights, or imposition of harsher punishments for wrong-doing would surely be recognized as burdensome. It is more difficult, however, to characterize the effect of excusing a group from a responsibility. The disabling effects of such a reduction in responsibility are not immediately clear. Many, if given the option, would choose to avoid responsibility. For example, there are many people who prefer not to serve on juries. One must ask, however, whether the legislation that allowed women to avoid jury duty was harmful to women or merely freed them to pursue other goals. The Court invalidated this legislation on due process grounds;\footnote{142} however, there may also have been equal protection difficulties with the legislation.

As a general rule, actions that excuse a group from responsibility should be considered burdensome. First, the special treatment is usually justified by reference to the special role or capabilities of the group involved. For example, the exemptions from jury duty were based on the special role of women as mothers.\footnote{143} This is the kind of stereotype that is likely to perpetuate traditional thinking about women and their capabilities, making entry into non-traditional roles more difficult.


\footnote{141} Gertner, \textit{supra} note 8, at 182-83; Ginsburg IV, \textit{supra} note 37, at 827; Johnston & Knapp, \textit{supra} note 138, at 700.


Second, the avoidance of duty in one context legitimates differential treatment in other areas. Duties and privileges are inextricably linked. One commentator accurately described the issue as follows:

A citizen is a participant, a member of a moral community who counts for something in the community's decision making processes. No less importantly, a citizen is a responsible member of the society, one who owes obligations to his fellow members. Both these values contribute to self-respect, but they also have independent significance.  

There is no dispute that classifications which stigmatize are harmful, but there is considerable disagreement concerning the determination of when a stigma is present. If a classification labels a group as inferior, the group is injured. If a classification perpetuates stereotypical thinking about a group’s capabilities or its appropriate place in society, it is harmful because it is likely to affect the opportunities of the members of the group. It has been claimed that when any special treatment for women is involved, the classification stigmatizes because it makes men think that women lack the capacity to succeed without the preference. There are, however, classifications that do not really seem to burden women. Some gender distinctions may be neutral in their effects, such as the establishment of single-sex rest rooms. Allowing women to buy alcoholic beverages at an earlier age than men, the classification at issue in Craig v. Boren, was not injurious to women, although it was constitutionally improper. The difficulty is distinguishing between those classifications which typecast women and those which do not.

It is possible to distinguish the injurious from the benign. Gender classifications that place women at an economic disadvantage, that are premised on stereotypical thinking about women's capabilities or appropriate place in society, that force men to adhere to traditional roles, or that restrict choice or responsibility should be adjudged burdensome. In contrast, gender distinctions that compensate women

144. Karst, supra note 126, at 8.
146. See Ginsburg, The Fear of the ERA, Wash. Post, Apr. 7, 1975, at A2, col. 3 (separate facilities for sleeping, dressing and bodily functions are protected by constitutional privacy principles).
147. 429 U.S. 190 (1976). But see Ginsburg II, supra note 7, at 112-16. Even this classification was not neutral for women because it reinforced the stereotype of “the active boy, aggressive and assertive; the passive girl, docile and submissive.” Id. at 144. It could also be argued that if any stereotype was perpetuated it was that women are more responsible than men.
148. See Gertner, supra note 8, at 214.
for either direct or societal discrimination, that increase options allowed women or that help women to overcome obstacles to achievement, and that have no demonstrable negative effect, may properly be seen as benign. This is not to say that the line between classifications that are injurious and those that are not is always clear, but only that a basis for judgment exists.

D. The Benign/Malign Distinction

There is considerable evidence that the Court in recent years has struggled with the proposition that scrutiny should vary according to the burdened group, and that it has implicitly accepted this concept. The existence of burden in sex-classification cases, however, is not always readily apparent, nor is its relevance often understood. Intermediate scrutiny was first announced in Craig v. Boren, a case in which males were disadvantaged. The Craig decision suggested that any gender-based classification was to be disfavored. Following Craig, intermediate scrutiny was applied in Califano v. Webster, a case upholding a classification designed to compensate women for past discrimination. This case raised the question of whether Kahn v. Shevin and Schlesinger v. Ballard were still good law, because they upheld laws benefiting women under a less exacting standard than the intermediate scrutiny standard announced in Craig. Only on closer inspection is it clear that a majority of Justices have applied a lower level of scrutiny when the classification does not harm women. The question remains whether the distinctions made by the Court with respect to burden have been accurate.

1. Invalidation of Burdensome Classifications

The classifications invalidated in Reed v. Reed, Frontiero v. Richardson, Stanton v. Stanton, Weinberger v. Wiesenfeld, California v. Goldfarb, and the line of cases that have followed had substantial costs for women. In Frontiero, the question presented was

150. 429 U.S. 190, 197 (1976).
151. 430 U.S. 313, 316-17 (1977) (per curiam).
154. See L. Tribe, supra note 39, § 16-26, at 1068-70; Gertner, supra note 8, at 212-14, Ginsburg IV, supra note 37, at 822-24.
whether the government could automatically provide dependency allowances to the spouse of a male member of the armed services regardless of whether she was actually dependent, but require the husband of a female member of the military to demonstrate dependency. Women were blatantly disadvantaged because they received fewer fringe benefits than men similarly situated and were subtly disadvantaged because of the paternalistic attitude the statute manifested.160

The statute at issue in Stanton designated different ages of majority for males and females, twenty-one and eighteen respectively.161 As a result, appellee had terminated support of his daughter when she attained the age of eighteen. The immediate injury caused to female children was obvious—they did not receive the same level of support as did male children, which in turn adversely affected their educational opportunities. The secondary effect of the statute was a perpetuation of the role-typing traditional in society.162

Both men and women were burdened by the statute challenged in Weinberger v. Wiesenfeld.163 It provided that the widows and minor children of deceased workers receive payment based on the earnings of the deceased husband and father but provided no payment to the husbands of deceased women workers.164 Three identifiable groups could have been regarded as the object of discrimination: widowers, the children of deceased female workers, and insured women whose spouses received fewer benefits than the spouses of male workers. An almost identical harm was created by the classification in Califano v. Goldfarb.165 The Social Security Act granted survivors benefits to all widows but only to those widowers who could demonstrate dependency.166 Women workers thus received less protection for their spouses than did male workers, even though the required contributions of both men and women were identical.

The penalty imposed on women was very similar in Califano v. Westcott167 and in Wengler v. Druggists Mutual Insurance Co.168 In Westcott, a unanimous court held that the Aid to Families With Dependent Children Act violated the requirements of equal protection.169 The Act granted benefits to children who had lost support because of their father’s unemployment, but denied benefits when the

160. 411 U.S. at 688.
161. 421 U.S. at 9.
162. Id. at 14-15.
164. Id. at 643-44.
166. Id. at 204.
168. 446 U.S. 142 (1980).
169. 443 U.S. at 80.
loss of support was due to the mother's unemployment. In Wengler, the Court used the same formulation to invalidate a Missouri law that granted death benefits to widows without a proof of dependency, but to widowers only upon such a demonstration.170

In Orr v. Orr,171 the Court invalidated a law that required the payment of alimony solely to females. The injury to women resulting from this classification is not apparent unless one considers the likely effect on the determination of roles within the family. A man is not likely to agree to stay at home while his wife works if he knows that he could be cut off from future support. Although the classification was invalidated, it is unclear whether the Justices considered the distinction injurious to women.

Only one malign classification was not overturned by the Court. In Vorcheimer v. School District of Philadelphia,172 the plaintiff challenged single-sex education. Two aspects of Philadelphia's practice of segregating its academic high schools by sex seemed to require a finding that women were injured. It was admitted that the girls' school lacked equivalent facilities.173 Furthermore, the segregation was effectively compelled because the system provided no co-educational academic high schools, although there certainly were co-educational general high schools.174 Nonetheless, the Philadelphia system was upheld by the Third Circuit175 and affirmed by an equally divided Supreme Court.176

2. Validations of Benign Classifications

In Kahn v. Shevin,177 the Court upheld a Florida law which granted widows, but not widowers, a property tax exemption.178 Many commentators have argued that the classification in Kahn was not benign.179 Underlying much of the criticism directed at Kahn is the view that all gender classifications perpetuate stereotypical thinking, thereby harming women. This view is hard to disprove. It is, however, at least arguable that the classification in Kahn was not

172. 430 U.S. 703 (1977) (per curiam).
173. 532 F.2d 880, 889 (3d Cir. 1976) (Gibbons, J., dissenting), aff'd by an equally divided Court, 430 U.S. 703 (1977) (per curiam).
174. Id.
175. 532 F.2d 880 (3d Cir. 1976), aff'd, 430 U.S. 703 (1977) (per curiam).
176. 430 U.S. 703 (1977) (per curiam) (Justice Rehnquist did not participate in the decision).
178. Id. at 352.
179. See Baer, supra note 6, at 480-84; Frug, supra note 5, at 76-81; Gertner, supra note 8, at 184-88. But see Note, Single-sex Public Schools: The Last Bastion of "Separate but Equal?", 1977 Duke L. Rev. 259, 262.
injurious to women. Furthermore, the generalization at issue here was not one that would be likely to have a deleterious effect; it did not type-cast women. Instead it asserted that women had a greater likelihood of being economically disadvantaged as a result of spousal loss. It is unlikely that such a statement would adversely affect role choice between men and women.

The Court upheld another benign classification in Schlesinger v. Ballard. In that case, a federal statute required the discharge of servicemen who had nine years of active service and were twice passed over for promotion. Servicewomen were allowed to remain in the service for thirteen years, even when they were twice passed over for promotion. The Court upheld the statute, calling it compensatory. Justice Stewart posited that Congress “may... quite rationally” have intended to compensate women for the demonstrable fact that they were not accorded equal professional opportunities in the Navy. The classification compensated women for inequities in the employment practices of the services and provided them with “the same promotion and career tenure opportunities as male officers in similar circumstances.”

Although the classification in Ballard did not deny women an economic benefit or restrict their activities, it has been argued that the classification indirectly had that effect because it allowed the Armed Forces to continue discriminatory recruitment and promotion policies. This argument is mistaken; all compensatory schemes assume a prior and continuing discrimination. The Navy’s promotion practices were indeed discriminatory and should have been directly attacked. In reality, however, they would not be overcome until sufficient numbers of women were promoted to higher ranks or were proven effective in roles currently dominated by males. Interim attempts to achieve such a goal and to overcome the effects of such practices, however, are distinct. They do not relieve the government

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180. The financial impact of the statute in Kahn is not entirely clear. The statute appears to involve an indirect cost to working married women who predecease their spouses in that they would have to purchase more insurance to provide security for their families than would similarly situated male workers who could count on their spouses receiving the exemption. However, women workers made no direct contribution to the exemption provided by the statute. Likewise, the exemption could hardly be seen as a direct fringe benefit of employment. In any event, the money was so small that the injury to working women was minimal. 416 U.S. 351, 352-54 (1974).


183. Id. at 508-09.

184. Id. at 508.


186. Ginsburg IV, supra note 37, at 818.
of the need to eliminate discriminatory practices but work toward that end. The classification was thus correctly perceived as non-burdensome to women.

There is less controversy surrounding the designation of the classification in *Califano v. Webster* as benign. In this case, the Court sustained a section of the Social Security Act that allowed women to exclude three more earning years than men in computing their social security benefit allotment on the grounds that the law was explicitly intended to compensate women for the past discrimination they faced in the job market. The Court cited the legislative history to indicate that Congress’ action was deliberate. The analysis here was very different from that in *Kahn* and *Schlesinger*. Not only was actual evidence of past discrimination required, but the Court seemed to rest its decision on the fact that the statute was limited in duration and carefully tailored to achieve its remedial purpose.

Benign gender-based classifications are also manifest in laws which regulate the position of children born out of wedlock. The Supreme Court has upheld a number of these laws. *Parham v. Hughes* provides an example of a decision in which the Supreme Court approved a distinction which conferred a benefit on natural mothers. The case involved a challenge by an unwed father to a statute that denied him recovery for the wrongful death of his child, a child he had acknowledged and had helped to support. On its face, the statute also distinguished between married men and women by providing that married fathers could sue for wrongful death of their children only if their spouses were not living. Not only unmarried but also married fathers were thus treated less favorably than unmarried mothers.

In Justice Stewart’s view, the statute presented no invidious discrimination because the different treatment accorded men was rational. First, paternity is difficult to establish, and second, unmarried fathers have the option of legitimating their children.

187. 430 U.S. 313 (1977) (per curiam); see Gertner, supra note 8, at 187.
188. 430 U.S. at 314-17.
189. Id. at 318-21.
190. Id. at 320.
191. Lalli v. Lalli, 439 U.S. 259 (1978) (statute required court order of affiliation before an illegitimate child could inherit intestate from its father but did not require such an order regarding the mother); Quilllown v. Walcott, 434 U.S. 246 (1977) (upheld law allowing adoption of an illegitimate child upon mother's consent alone and did not give father veto power unless he had legitimated the child); Fiallo v. Bell, 430 U.S. 787 (1977) (gender-based classification in immigration law regarding illegitimates upheld).
193. Id. at 362 n.4 (White, J., dissenting).
194. Id. at 357-58.
Accordingly, men and women were not similarly situated with respect to children born out of wedlock.\textsuperscript{195}

3. Benign Classifications Are Subjected to a Less Exacting Standard of Review

It is clear that Justice Stewart's opinion for a closely divided Court in \textit{Parham} did not apply the middle-tier analysis of intermediate scrutiny. Instead he presented a reformulated standard in which a classification that does not demean is to be upheld unless "entirely unrelated" to real differences between the sexes. Citing \textit{Frontiero} and \textit{Craig}, he wrote, "[u]nderlying these decisions is the principle that a State is not free to make overbroad generalizations based on sex which are \textit{entirely unrelated} to any differences between men and women or which demean the ability or social status of the affected class."\textsuperscript{196} It is obvious that entirely unrelated to real differences and substantially unrelated to an important state interest\textsuperscript{197} are not equivalent tests. Moreover, the language of the Stewart standard is not the only aspect of Justice Stewart's analysis that suggests less concern when men are the disfavored group. His willingness in \textit{Parham} to confine the examination to only one aspect of the discrimination—that which allowed suit for wrongful death by unmarried fathers who had legitimated their children, but not by those unmarried fathers who had not—also allowed for a lower standard of scrutiny.\textsuperscript{198} He ignored the argument that the Georgia statute was overbroad in that it precluded even married fathers from recovering damages if the mother were alive.\textsuperscript{199} By framing the questions as he did, Justice Stewart effectively dismissed the sex discrimination in requiring fathers but not mothers to legitimate their children in order to sue for the child's wrongful death.\textsuperscript{200}

Having thus narrowed the issue, the Stewart opinion distinguished the situation presented in \textit{Parham} from those in earlier decisions that had invalidated gender classifications, on the grounds that Georgia granted fathers the opportunity to legitimate their children and thus to eliminate the imposed burden.\textsuperscript{201} This, then, was not a situation in which an individual was penalized for a characteristic over which he had no control. Furthermore, the statute did not stigmatize fathers; the classification reflected the reality that natural mothers are easier

\textsuperscript{195} \textit{Id.} at 354-56.
\textsuperscript{196} \textit{Id.} at 354 (emphasis added).
\textsuperscript{198} 441 U.S. at 356.
\textsuperscript{199} \textit{Id.} at 362 n.4 (White, J., dissenting).
\textsuperscript{200} \textit{Id.} at 361 (White, J., dissenting). \textit{But see id.} at 355 n.6 (the constitutionality of the legitimation statute was not at issue in this case).
\textsuperscript{201} \textit{Id.} at 353.
to identify than natural fathers.\textsuperscript{202} Justice Stewart found that the state's position was further supported by the real differences reflected in the positions of males and females under the statute, in that only fathers could legitimize their children.\textsuperscript{203} Justice Stewart's assessment, therefore, did not turn on the degree of deprivation imposed on the allegedly disadvantaged group. He did not conduct a burden analysis because he found that the burden could be eliminated. The use of Justice Stewart's standard of analysis is consequently inappropriate in cases where the discrimination is genuinely gender-based.

"Gender, like race, is a highly visible and immutable characteristic that has historically been the touchstone for pervasive but often subtle discrimination."\textsuperscript{204} There is nothing that an individual can do or change to bring himself within the scope of a gender-based statute.

E. Michael M.: A Further Assessment

The use of a different analysis for classifications that are disadvantageous to women from that used for classifications which are not is consistent with the principles underlying the equal protection clause as long as the determination of burden is accurately made.\textsuperscript{205} The minimal scrutiny of the rational relationship test is not appropriate, however, unless the classification has no harmful effects on either males or females. The foregoing discussion suggests, then, that one problem with Justice Rehnquist's analysis in \textit{Michael M.} was his virtual abdication of review once he established that the classification did not burden women. A second and far more serious difficulty was Rehnquist's failure to recognize that the classification in fact demeaned women.\textsuperscript{206} Justice Rehnquist apparently considered the question of harm to women trivial. He directed his analysis of burden to whether the classification was either demeaning to or placed an unfair burden on men and dismissed without explanation the possibility that women were harmed. "In upholding the California statute we also recognize that this is not a case where a statute is being challenged on the grounds that it 'invidiously discriminates' against females. To the contrary, the statute places a burden on males which is not shared by females."\textsuperscript{207}

That males are burdened does not, however, foreclose the possibility that females might also be harmed; nor does it mean that a law is gender neutral if both groups are harmed. The statutory provision at issue in \textit{Michael M.} provides a perfect example of these points. There

\begin{flushleft}
\textsuperscript{202} Id. at 355 n.7.\hfill \\
\textsuperscript{203} Id.\hfill \\
\textsuperscript{204} Caban v. Mohammed, 441 U.S. 380, 398 (1979) (Stewart, J., dissenting).\hfill \\
\textsuperscript{205} Baer, \textit{supra} note 6, at 489-91.\hfill \\
\textsuperscript{206} See infra notes 215-18 and accompanying text.\hfill \\
\textsuperscript{207} Michael M. v. Super. Ct., 101 S. Ct. 1200, 1207 (1981).\hfill \\
\end{flushleft}
SEX DISCRIMINATION

is no dispute that the statute places a burden on males. The contention that the classification is not demeaning to males is less certain and turns on the value placed on dominance. If the decision to have intercourse is consensual, a female who agrees has done so despite the risk of pregnancy. The only way one can justify placing a burden solely on males is if one assumes that females are in some sense coerced by males. As Justice Stevens noted in dissent, the male-only penalty is premised on the judgment "that the decision to engage in the risk-creating conduct is always—or at least typically—a male decision." If males and females are equally responsible, or if females seduce males, the penalty placed on males is unjustified.

It is important to point out, however, that beliefs about differences in sex roles not only affect behavior in mating practices, but also affect the views of appropriate roles for males and females in the larger society. A statute that assigns greater responsibility for sexual intercourse to males than to females surely reinforces stereotypical thinking about male and female roles. Males are seen as dominant and forceful, if somewhat irresponsible, while females are weak and submissive. Such generalizations involve little more than prejudice, although they unfortunately reflect traditional beliefs. Moreover, these generalizations disadvantage members of both groups who do not fit or wish to conform to the stereotype.

The statute also unfairly burdens males who are seduced. Females have the opportunity to reduce the risk of pregnancy to a point where the fear of becoming pregnant provides little deterrence to sexual activity. Moreover, there is some evidence that pregnancy can even be an incentive for sexual activity. Males are likely to resent being placed in unfair jeopardy for identical conduct or for conduct instigated by a party freed from liability. By punishing only

208. By definition, statutory rape has always embodied the element of consent by the female. Her consent, however, is not a defense because she is "conclusively presumed to be incapable of understanding the nature and consequences of sexual intercourse." Statutory Rape Laws, supra note 67, at 757.
209. 101 S. Ct. at 1220 (Stevens, J., dissenting); see Statutory Rape Laws, supra note 67, at 772-73.
212. Statutory Rape Laws, supra note 67, at 769-77.
213. If the female uses birth control methods to decrease the risk of pregnancy, the deterrents are no longer equal. In effect, Justice Rehnquist equated the deterrent value of a speculative physical condition with a criminal penalty.
214. See Castleman, HEW and the 'Sexual Revolution': Why Teenagers Get Pregnant, 225 Nation 549 (1977). A "frequently overlooked reason why teens allow themselves to get pregnant is that they want children." Id. at 551.
males, the statute generates a feeling of unfairness that, in turn, ultimately harms women without providing them any real benefit.

The harm to females is subtle. The earlier discussion suggested several factors that are likely to create a burden.215 Measured by these criteria, the disadvantage to women becomes clear. The California statutory rape law is based on, and perpetuates, stereotypical thinking about women,216 and limits the responsibility women are to assume for their own actions. Moreover, “[c]ultural stereotypes of male aggression and female passivity tend to be self-fulfilling prophecies. The stereotype of females as victims is especially pervasive and damaging.”217 Thus, Justice Rehnquist’s analysis in Michael M. fails to apply the correct standard of inquiry, because even under the Stewart approach, stricter scrutiny is required when discrimination on the basis of sex is demeaning.218

II. Rostker: A Standard Misapplied

In Rostker v. Goldberg,219 the impropriety of Justice Stewart’s modification of the intermediate scrutiny standard is manifest. The Rostker Court ruled that equal protection requires only that a gender classification reflect real differences between males and females.220 Although this argument has been consistently invoked as a justification for gender-based distinctions in the context of classifications that have benefited women,221 the situation in Rostker is not such a beneficial classification.

In Rostker, the Supreme Court was asked to decide the constitutionality of the Military Selective Service Act (MSSA),222 which empowered the President to require the registration of males, but not females, for military service.223 Initiated in 1971 by several men

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215. These include classifications that place women at an economic disadvantage, that are based on stereotypical thinking about women, that force men and women to adhere to traditional roles or that restrict choice or responsibility. See supra notes 148-49 and accompanying text.

216. See Statutory Rape Laws, supra note 67, at 769 (“Furthermore, by presuming that underage females, unlike underage males, are incapable of understanding the nature and consequences of sexual intercourse, statutory rape laws embody a stereotype of girls as intellectually deficient and incompetent in a way in which boys are not.”).

217. Id. at 770 (footnote omitted); see Karst, supra note 126, at 7-8.


220. Id. at 2658-59.


subject to its provisions, the lawsuit remained dormant for several years because registration for the draft had been discontinued in 1975.224 With the reinstatement of registration by President Carter in July, 1980, the issue was revived. The plaintiffs sought to have the legislation declared invalid on the grounds that it violated their constitutional right to equal protection. Although the initial plaintiffs were males subject to the registration, women's groups recognized that the right of women to equal protection was implicated and filed amicus briefs in support of the plaintiffs.225

The goal of the MSSA is to register a pool of individuals who can be inducted into military service in the event of a national emergency.226 The MSSA neither requires, nor permits, any woman to be registered.227 The constitutional issue presented by the male-only registration requirement is whether the exclusion of all women violates the equal protection clause. The Rostker case does not raise the issues of female eligibility for induction, the assignment of personnel after induction, or the utilization of women in combat positions. Yet, Justice Rehnquist's presentation of the questions for the Court distorted the analysis and left the central issue unresolved.

For example, the Court's initial inquiry was whether Congress has the power to raise and support armies.228 That power is indisputable.229 Justice Rehnquist then framed the issue as whether the Court has the competence to assess the validity of military decisions concerning the composition, training, equipping and controlling of the military.230 The answer is obvious; it does not. If the issue were posed instead as whether the Court can determine when such decisions infringe on rights created by the Constitution, the answer is not so clear. Although the Supreme Court cannot determine the number of combat troops that might be needed, it can determine that a decision to send only blacks into combat would be unconstitutional.

Another example of an analysis based on the wrong question is the Court's discussion of whether military needs could be satisfied without registering women.231 This might be true, but it is an irrelevant issue.

227. Id. § 453.
228. 101 S. Ct. at 2651.
230. 101 S. Ct. at 2651-53.
"That it is not ‘necessary’ to include a group of individuals does not prove that excluding the group is constitutionally justified." 232

Finally, the Court essentially premised its decision on the validity of the policy that women should not go into combat. 233 Justice Rehnquist's syllogism was that the purpose of registration is to establish a pool of potential nonvolunteer combat personnel; women are not available for combat positions; therefore, women are not required to register. 234 Inductees chosen from the registration pool, however, fill both noncombat and combat positions. 235 Registration serves to assess the country's overall military strength. 236 A judicial decree on the constitutionality of completely excluding women from draft registration did not require the Court to determine precisely how women should be utilized in the military. Regardless of the validity or constitutionality of excluding women from combat positions, the Court was not required to address the issue. 237 The preclusion of women from combat has been effectively achieved by direct legislative and military regulations 238 that were not in issue before the Court. These statutes essentially render unnecessary any question of whether registration of women would require their use in combat. The Court's syllogism is therefore a meaningless argument.

In view of this distorted analysis, what the Court did not say in Rostker may be more significant than what it did say. In contrast to its extensive treatment of the issue of deference to Congress on questions of military policy, the Court summarily dismissed the issue of the

the position that women are of great assistance to the country's military preparedness); Note, Women and the Draft: The Constitutionality of All-Male Registration, 94 Harv. L. Rev. 406, 411-17 (1980) (same) [hereinafter cited as Women and the Draft].


233. 101 S. Ct. at 2656-59.

234. Id.

235. Id. at 2671-72 (Marshall, J., dissenting); Steele, supra note 231, at 303-09.

236. The Army Chief of Staff said in Senate hearings, "women should be required to register . . . in order for us to have an inventory of what the available strength is within the military qualified pool in this country." Senate Comm. on Armed Services, Requiring Reinstatement of Registration for Certain Persons Under the Military Selective Service Act, and for other Purposes, S. Rep. No. 226, 96th Cong., 1st Sess. 14 (1979) [hereinafter cited as 1979 Senate Report]; see 101 S. Ct. at 2669 (Marshall, J., dissenting).

237. 101 S. Ct. at 2657-58. Whether women should engage in military combat was not an issue before the Court. As the district court repeatedly emphasized below, "[t]he issue before us is the constitutionality of the total exclusion of women from the [registration], not the extent to which the military services must utilize women." Goldberg v. Rostker, 509 F. Supp. 586, 596 (E.D. Pa. 1980), rev'd, 101 S. Ct. 2646 (1981). Initially, Justice Rehnquist also phrased the issue as whether requiring the registration of males and not females was violative of equal protection. 101 S. Ct. at 2646. He then went on to consider the role of women in combat as the case's dispositive issue.

238. 101 S. Ct. at 2657-58.
requisite level of scrutiny. In fact, Justice Rehnquist failed to delineate the equal protection test he was employing and suggested that such questions merely confuse analysis: "We do not think that the substantive guarantee of due process or certainty in the law will be advanced by any further 'refinement' in the applicable tests as suggested by the Government." Significantly, the standard applied resembles the reasonableness test.

Although Justice Rehnquist dealt summarily with the importance of the standard of scrutiny for questions involving gender classifications, the standard of review employed sets the acceptable level of justification. There are profound differences between rational connections, substantial connections and necessary connections. Dismissal of the issue of the standard of scrutiny suggests that the Court has established a single level of scrutiny for classifications other than race and national origin. Assuming that all gender classifications are subject to the same lower level of analysis would make all earlier gender-classification decisions equally valid for comparison. This position, long advocated by Justice Rehnquist, is simply inconsistent with past precedent because there has been a distinction made according to the burden imposed. Prior to Rostker, a majority of the Justices had agreed that classifications disadvantageous to women required a heavier burden of justification than advantageous ones and justifications that sufficed for the latter were unacceptable when used elsewhere. It is crucial that these distinctions be maintained.

However cursory the treatment of the appropriate standard of review, the Court, by mentioning it, at least acknowledged that it is important. The Court completely ignored the critical issue of burden. Justice Rehnquist did not claim the classification was benign for women. He did not discuss the question at all. Yet, one cannot underestimate or ignore the sociological impact of an official endorsement by the highest legislative, military and judicial bodies of the inevitability of sex roles. The non-registration of women supports sex-role stereotyping and locks women into the status quo. As Justice Marshall said in dissent, by the Rostker decision, "[t]he Court ... place[d] its imprimatur on one of the most potent remaining public expressions of 'ancient canards about the proper role of women.'"
Justice Rehnquist justified his analysis by emphasizing the Court's duty to defer to Congress as a co-equal branch.\(^{245}\) In Rehnquist's view, because Congress made a conscious classification, after long debate about the propriety of registering women, the Court should defer to deliberate congressional intention.\(^{246}\) This reasoning is a distortion of the argument that an inadvertent gender classification carries a presumption of invalidity.\(^{247}\) It does not follow that Congressional deliberation ensures a non-discriminatory result. For example, the families of female workers taxed for social security would have been just as unprotected if Congress had consciously debated the issue as they were when Congress provided female workers with less coverage inadvertently.\(^{248}\) In another context, the Court has made purposeful discrimination a key ingredient in determining that a law is not constitutional.\(^{249}\)

Justice Rehnquist also argued that congressional power "to raise and support armies" requires great deference because it is an enumerated power exclusive to Congress.\(^{250}\) Although the Court's deference to Congress in military matters is strong, this still does not justify the decision. While the protections of the Bill of Rights do not apply with the same force to those in active military service,\(^{251}\) the power of the military is not unlimited. Deference to Congress regarding military affairs flows not only from the constitutional grant of power, but also from the perceived lack of judicial competence to evaluate defense policy.\(^{252}\) Where the Court is able to decide constitutional issues without infringing on issues of military policy, the need for deference lessens.

Moreover, the Court has an obligation to evaluate the constitutionality of congressional decisions regarding the military.\(^{253}\) No branch

\(^{245}\) 101 S. Ct. at 2651-52.
\(^{246}\) Id. at 2655-56.
\(^{249}\) Facialy neutral laws are subjected to the traditional rationality test unless it can be demonstrated that the legislature intended to discriminate. In the latter circumstance, the much more stringent strict scrutiny test is applied. Washington v. Davis, 426 U.S. 229, 246 (1976).
\(^{250}\) 101 S. Ct. at 2651-52.
\(^{251}\) B. Schwartz, supra note 25, § 5.17, at 194-96.
\(^{252}\) 101 S. Ct. at 2652; Gilligan v. Morgan, 413 U.S. 1, 5, 6 (1973).
\(^{253}\) "The war power of the United States, like its other powers . . ., is subject to applicable constitutional limitations." Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U.S. 146, 156 (1919); see Korematsu v. United States, 323 U.S. 214, 225 (1944) (Frankfurter, J., concurring). Justice Rehnquist, however, deferred to Congress without analyzing the statute in Rostker, stating that "[i]t is not for this Court to dismiss such problems as insignificant in the context of military preparedness and the exigencies of a future mobilization." 101 S. Ct. at 2660. In the past, the
of government can hold itself above the Constitution. As the Supreme Court warned during the Vietnam war, "the phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit. 'Even the war power does not remove constitutional limitations safeguarding essential liberties.' " The Supreme Court and lower federal courts have consequently reviewed a broad array of military policies, including the reach of military jurisdiction, the military's right to encroach on civilian life, the allocation of military benefits, in-service conscientious objector claims, the exclusion of women from Navy ships and promotion policies within the Navy.

Thus, Justice Rehnquist's mere assertion that "[c]ongressional judgments concerning registration and the draft are based on judgments concerning military operations and needs" should not shield these Court has not been so eager to accept the government's evaluative assertions regarding gender-based legislation. "This Court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation." Weinberger v. Wiesenfeld, 420 U.S. 636, 648 n.16 (1975). Justice Marshall, dissenting in Rostker, stated "that even in the area of military affairs, deference to congressional judgments cannot be allowed to shade into an abdication of this Court's ultimate responsibility to decide constitutional questions." 101 S. Ct. at 2663-64.

254. "The respective spheres of action of military authorities and of judges are of course very different. But within their sphere, military authorities are no more outside the bounds of obedience to the Constitution than are judges within theirs." Korematsu v. United States, 323 U.S. 214, 225 (1944) (Frankfurter, J., concurring).


257. See Reid v. Covert, 354 U.S. 1, 19-20 (1957) (the military does not have jurisdiction over the wives of servicemen who accompany them abroad); United States ex rel. Toth v. Quarles, 350 U.S. 11, 21-23 (1955) (only persons presently in the military are subject to court martial); see also O'Callahan v. Parker, 395 U.S. 258, 272-73 (1969) (crime must be service connected); Kinsella v. United States ex rel. Singleton, 361 U.S. 234, 248-49 (1960) (no jurisdiction over civilian dependent for noncapital offense).


262. 101 S. Ct. at 2653.
judgments from constitutional scrutiny. Moreover, the Rostker case does not involve the Court in a decision regarding military policy. It merely involves the pool of personnel from which assignments are to be made. One wonders whether the Court would defer to the judgment of Congress if it chose to re-segregate the Armed Forces alleging that racial harmony contributed to combat readiness.263

A. The Rostker Court Fails to Comply with the Requirements of Intermediate Scrutiny

While Justice Rehnquist said, "[w]e of course do not abdicate our ultimate responsibility to decide the constitutional question, but simply recognize that the Constitution itself requires such deference to congressional choice,"264 he did abandon his judicial responsibility by applying only a rational relationship test to the equal protection issue at hand. Although Justice Rehnquist implies that he was using the Craig v. Boren standard of intermediate scrutiny,265 in fact he did not.

The legislative history of the MSSA reveals that Congress intended to achieve five specific objectives by excluding women from registration: Preventing female participation in combat, avoiding the unnecessary registration of women, enhancing military flexibility, precluding the division of the military into two separate groups and assuring that the draft is administratively convenient.266 If Justice Rehnquist had applied the intermediate scrutiny standard, he would have evaluated the importance of these objectives as government interests and would have required a showing that the non-registration of women bears a substantial relationship to the achievement of those goals. Instead, Rehnquist emphasized that the exemption of women from registration reflects the fact that men and women are "not similarly situated for purposes of the draft or registration for a draft"267 because women are ineligible for combat positions. Yet, after making combat qualification a critical part of his argument, Justice Rehnquist did not scrutinize the proposition that women are not fit for combat. The justification was merely that the majority of Americans support it and Congress supports it.268 The evidence presented then does not satisfy anything but a loose rationality test, one that requires only a showing of a possible connection between a classification and a government end.269

264. 101 S. Ct. at 2653.
265. Id. at 2654.
266. 1979 Senate Report, supra note 236, at 8-9.
267. 101 S. Ct. at 2658.
268. Id. at 2657-58.
269. See supra notes 39-43 and accompanying text.
Even if the combat restriction is acceptable, the draft restriction is still not closely related to the important goal of having a pool of potential combat troops available. There are many noncombat positions within the armed services. If women are allowed to fill these, more men will be available for combat, and military flexibility will be enhanced. Troops need not be interchangeable as regards combat ability. If this were so, the services under present policy could not use any women. If women registered, the pool of eligible combat troops would thus be enlarged, as would the pool of eligible noncombatants, upgrading the overall quality of the draftees. Separate noncombat and combat positions are not novel to the military. Lawyers accepted into the Judge Advocate's corps do not fight, and there has long been a separate medical draft. While doctors are sent to hostile zones, they do not directly engage in combat. Moreover, female nurses have not been excluded from such zones. In short, even if one accepts arguendo that the combat restriction on women is valid, there was no showing that exclusion of women from registration enhances combat capabilities. As Justice White said,

on the record before us, the number of women who could be used in the military without sacrificing combat-readiness is not at all small or insubstantial, and administrative convenience has not been sufficient justification for the kind of outright gender-based discrimination involved in registering and conscripting men but no women at all.

The application of minimal scrutiny in Rostker was thus inconsistent with the doctrine established by the Court during the past decade.

B. The Rostker Decision Burdens Women

The gender-based action in Rostker cannot plausibly be considered non-burdensome. While it is true that service in the Armed Forces is a responsibility many try to avoid, it does not follow that the classification is therefore benign for women. Military service is a particularly public form of employment, and the gender classification established by Congress has the potential to powerfully reinforce traditional sex-roles in all other endeavors.

First, the refusal to draft women is based in part on the belief that women lack the capability to go into combat. The generalizations upon which the exclusion of women are based are precisely the type

270. See Women and the Draft, supra note 231, at 413-15.
271. See id. at 415-16 (use of women in the military would enhance military flexibility).
272. 101 S. Ct. at 2662 (White, J., dissenting).
273. See Steele, supra note 225, at 303-06.
that are likely to perpetuate inequality.\textsuperscript{274} Women are viewed as too weak, insufficiently brave, and too emotionally volatile. These negative generalizations ignore the fact that women are clearly qualified for a full range of noncombat positions.\textsuperscript{275} Yet, the decision to register all males, regardless of mental, emotional and physical health, and to register no females, regardless of ability to serve, clearly stigmatizes women as different and, ultimately, as inferior in the military context. This label of inferiority inevitably influences the perception of women throughout society. Similar generalizations about the capabilities of women have excluded them from many professions in the past.\textsuperscript{276} The stereotype that women lack the physical and mental capacity to be effective combat soldiers has resulted not only in Congress' refusal to register women but has served as the basis for offering female volunteers different opportunities within the service.\textsuperscript{277} Courts have acknowledged such differential treatment in earlier cases.\textsuperscript{278}

Notwithstanding the prevalent attitudes, the experience with women who serve in noncombat positions has generally been positive.\textsuperscript{279} They have been of benefit to the military and have in turn benefited by their service. The lack of opportunity for advancement, and the current negative attitude manifested by the decision not to register women, however, have no doubt encouraged women to seek alternative careers.\textsuperscript{280} This is a particularly invidious discrimination because the military is a significant source of vocational training from which women are effectively excluded.\textsuperscript{281} This in turn results in fewer job opportunities in civilian life. More directly, many benefits, such as mortgage money at lower rates and preference in government

\textsuperscript{274} Many of the same reasons were offered to support discrimination against blacks in the Armed Forces up to and including World War II. Nat'l NOW Times, May, 1981, at 1, col. 3, at 6, col. 1.


\textsuperscript{276} Legislation that is the by-product of "traditional way[s] of thinking about females" has been condemned by the Court. Califano v. Goldfarb, 430 U.S. 199, 223 (1977) (Stevens, J., concurring in the judgment).


\textsuperscript{280} The Army's Chief of Staff indicated in Senate hearings that the Army was experiencing a 25% shortage of female volunteers. Reinstitution of Procedures for Registration Under the Military Selective Service Act: Hearings on S. 109 and S. 226 Before the Subcomm. on Manpower and Personnel of the Senate Comm. on Armed Services, 96th Cong., 1st Sess. 14 (1979) (testimony of General Bernard W. Rogers).

\textsuperscript{281} NOW Amicus brief, supra note 120, at 27.
employment, are tied to former military service.\textsuperscript{282} Just two years ago, the Supreme Court upheld Massachusetts' Veterans Preference Act.\textsuperscript{283} No gender classification was recognized. In view of that decision, it is clear that the classification creating different treatment with respect to the draft inflicts a burden on women.

Permitting women to volunteer, and alleging that there is no need to register women because female volunteers can fill requirements, is an insufficient argument and response to the problem.\textsuperscript{284} Because a major purpose of registration is to protect against the unanticipated shortage of volunteers, non-registration cannot be justified by conjecture about the anticipated availability of volunteers. Additionally, as volunteers, women are still an exception in the military, a highly visible, token minority. Women volunteers are stigmatized as doing something unusual for a female. If all women were required to register, their presence would merely be representative of their responsibility as citizens. That the ability to volunteer is open to women does not cure the constitutional defect of their non-registration.

Finally, and most importantly, the \textit{Rostker} decision deprives women of one of the hallmarks of citizenship, equal responsibility for national defense.\textsuperscript{285} By allowing all males but no females to register, Congress and the Supreme Court tell all women that they will not be called upon to serve and defend their country, solely because of their gender. Because the allocation of legal rights is directly related to the allocation of responsibilities, men and women will not be equal until they share equally both the rights and obligations of citizenship.\textsuperscript{286}

Psychologically, the denial of responsibilities provides justification for those who would discriminate in the allocation of benefits. Advo-

\textsuperscript{282} For a review of benefits tied to former military service, see Goodman, \textit{Women, War and Equality: An Examination of Sex Discrimination in the Military}, 5 Women's Rts. L. Rep. 243, 245 n.19 (1979), and statutes cited therein.
\textsuperscript{283} Personnel Adm'r v. Feeney, 442 U.S. 256 (1979).
\textsuperscript{284} NOW Amicus brief, \textit{supra} note 120, at 25-28.
\textsuperscript{285} Service in the military is "one of the highest duties of the citizen." Scott v. Sandford, 60 U.S. (19 How.) 393, 415 (1857); \textit{accord} Trop v. Dulles, 356 U.S. 86, 112 (1958) (Brennan, J., concurring) ("'ultimate duty of American citizenship'").
\textsuperscript{286} In the \textit{Dred Scott} case, the Court posed the question, "why are the African race, born in the State, not permitted to [serve in the military]. The answer is obvious; [they are] not, by the institutions and laws of the State, numbered among its people. [They form] no part of the sovereignty of the State, and [are] not therefore called on to uphold and defend it." Scott v. Sandford, 60 U.S. (19 How.) 393, 415 (1857). Women are accorded the same sort of second-class citizenship by the MSSA. In addition, it is true that stereotypes concerning women's weaknesses affect both men's perceptions of and behavior toward women and women's own self-perceptions and reactions. B. Brown, A. Freedman, H. Katz & A. Price, \textit{Women's Rights and the Law} 12 (1977); L. Kanowitz, \textit{Women and the Law} 198-99 (1969); Karst, \textit{supra} note 126, at 7-8.
cates of the Equal Rights Amendment have often been confronted with, "let me hear about equal rights when you have equal responsibilities . . . [and] when you serve as we [men] do." While the MSSA proclaims that the "obligations and privileges of serving [are to] be shared generally, in accordance with a system of selection which is fair and just," the statute's exclusion of women is itself a statement that the denial of women's participation in society, solely because of gender, is "fair and just." This is a proposition that must not be permitted to stand. The Supreme Court has recognized that

[i]mplicit in the term "national defense" is the notion of defending those values and ideals that set this Nation apart. For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in its Constitution. . . . It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile.

It is indeed ironic that the democratic principle of equal rights has been subverted by the Supreme Court in the name of deference to congressional military decisions.

It is too soon to know whether Rostker is a turning point in the Court's treatment of gender classifications. It is not clear whether the promise of equal protection for women has been compromised or whether Rostker is an aberration that can be explained by the military context within which it occurred. The hope remains that the Court will confine its willingness to uphold gender discrimination to military matters. Clearly, however, the Court has departed from prevailing practice by requiring a showing of mere rationality in the face of a disadvantageous classification.

III. BEYOND Michael M. AND Rostker

Before one can assess the implications of Michael M. and Rostker, it is necessary to examine the Court's treatment of the sex-based classification in Kirchberg v. Feenstra. Harold Feenstra, charged by his wife with molesting their minor daughter, had secured the legal services of Karl Kirchberg by promising to mortgage the home he and his wife jointly owned, without informing her of the agreement. Lousiana law provided that a husband had the unilateral right to

290. This was the first time since 1971 that such a classification had been upheld in a full opinion. But cf. Vorcheimer v. School Dist., 430 U.S. 703 (1977) (gender-classification upheld in a per curiam opinion).
dispose of community property unless his wife had taken action to declare an objection.\textsuperscript{292} Mrs. Feenstra challenged the constitutionality of this law, and the Court unanimously found in her favor. Invoking the intermediate scrutiny standard, Justice Marshall said that gender classifications were barred unless there was a showing that “the classification is tailored to further an important governmental interest.”\textsuperscript{293} Ultimately, there was no need to assess the justification for the classification because no important interest was offered. In addition, the Court specifically stated that it would not infer a viable legislative purpose to support the statute.\textsuperscript{294}

Moreover, doubt existed as to whether there was even any rational basis for the classification. The only support advanced for the statute’s constitutionality was that Mrs. Feenstra could have taken steps to avoid the impact of the provision.\textsuperscript{295} The existence of a remedy, however, does not negate discrimination. The Court has long recognized that affirmative requirements can provide barriers to the exercise of rights as effectively as can a direct denial of those rights.\textsuperscript{296}

In spite of the \textit{Kirchberg} decision, the Court’s opinions this term may signal a general retreat from attention to laws that discriminate on the basis of sex but are not clearly arbitrary. If the standard of review employed in \textit{Rostker} and \textit{Michael M.} is extended elsewhere, the future looks bleak for equal rights advocates. The level of scrutiny in both was much lower than that accorded other burdensome classifications. If the Court persists in the position that sex is a valid basis for discrimination as long as it is consciously employed and is not entirely unrelated to differences between the sexes, discrimination will prevail.

It is beyond dispute that men and women are not identical with respect to past history and physical characteristics, and that they may also face different working conditions, positions in the economy and assigned roles. Many of these differences, however, are the result of past discrimination. If such factors serve as a basis for future distinctions, sex discrimination will be perpetuated. While it is true that the standard applied in \textit{Michael M.} and \textit{Rostker} will invalidate laws that are completely arbitrary, the standard provides women with little more in the way of protection from discrimination than they were accorded prior to 1971.

\begin{itemize}
\item \textsuperscript{292} \textit{Id.} at 1199.
\item \textsuperscript{293} \textit{Id.} at 1198.
\item \textsuperscript{294} \textit{Id.} at 1198 n.7.
\item \textsuperscript{295} \textit{Id.} at 1199.
\end{itemize}
There are several possible explanations, however, for the Court's holdings in *Michael M.* and *Rostker*. *Michael M.* may indicate that the Court lacks adequate criteria for judging discrimination against women. *Rostker* may indicate that the Court made a political judgment to avoid confrontation with Congress on the question of military policy. These explanations are probably accurate because case precedent indicates that a retreat from heightened scrutiny is unlikely. There has been consistently strong majority support for both the application of intermediate scrutiny and the invalidation of sex-based actions that, in the Court's view, disadvantage women.297 This consensus disappears when there are Justices who characterize the action as neutral or beneficial to women.298

From 1971 to 1981, the Court invalidated on equal protection grounds eleven statutes that employed gender classifications.299 The number of gender-based classifications disallowed increases to thirteen, if *Taylor v. Louisiana*300 and *Duren v. Missouri*301 are included, decisions closely akin to the equal protection cases although the statutes were invalidated on due process grounds.

A survey of the opinions in these thirteen cases indicates that all of the Justices, even those reluctant to state that the Court was going beyond traditional rational relationship analysis, have agreed that some sex-based legislation violates equal protection. Four of these decisions were unanimous,302 five had only one dissent,303 one was


298. Compare Califano v. Goldfarb, 430 U.S. 199 (1977) (there was disagreement over the effect of the classification and the Justices split in their decision 4-1-4) with Califano v. Webster, 430 U.S. 313 (1977) (per curiam) (the statute benefited women and the Justices exhibited a consensus).


301. 439 U.S. 357 (1979). In *Taylor* and *Duren*, the Court invalidated exemptions of women from jury duty on the grounds that such exemptions were contrary to the fair cross section requirement of the sixth amendment. The Court's focus on the defendant's due process rights should not mask the fact that explicit gender classifications were involved.


seven-two,\textsuperscript{304} one was six-three,\textsuperscript{305} and two produced a five-four split.\textsuperscript{306} Significantly, in the nine cases in which the result was supported by at least eight Justices, there was general agreement that women were the burdened group. By contrast, in cases in which some of the Justices believed that the regulations had no detrimental effect on women, there were wide divisions in the Court. For example, there were seven opinions expressed in Craig \textit{v.} Boren.\textsuperscript{307} The Court split four-one-four in Califano \textit{v.} Goldfarb,\textsuperscript{308} a case in which one of the questions at issue was the effect of the classification. Three opinions were submitted in Orr \textit{v.} Orr,\textsuperscript{309} making the real division five-one-three. Thus, it seems unlikely that Rostker represents a complete reversal in light of this line of precedent and the judicial support for the intermediate scrutiny standard.

More probably, two related considerations influenced the Court in Rostker. First, this Court has taken an increasingly restrictive view of its role in the political system, deferring to the decisions of Congress, the President and the states where possible.\textsuperscript{310} This self-imposed judicial restraint has resulted in an unusual amount of issue avoidance during the 1980 term.\textsuperscript{311} The emphasis on deference to Congress in Rostker reflects a view that has been expressed in other cases both in and outside the area of national security.\textsuperscript{312} This is, of course, an

\textsuperscript{304} Craig \textit{v.} Boren, 429 U.S. 190, 215, 217 (1976) (dissenting were Justices Burger and Rehnquist).

\textsuperscript{305} Orr \textit{v.} Orr, 440 U.S. 268, 285, 290 (1979) (dissenting were Justices Burger, Powell and Rehnquist).

\textsuperscript{306} Caban \textit{v.} Mohammed, 441 U.S. 380 (1979) (dissenting were Justices Stewart, Burger, Rehnquist and Stevens); Califano \textit{v.} Goldfarb, 430 U.S. 199 (1977) (dissenting were Justices Burger, Blackmun, Stewart and Rehnquist).

\textsuperscript{307} 429 U.S. 190 (1976) (Brennan, J., delivered the opinion of the Court; concurring were Justices Powell and Stevens; Justice Stewart concurred in the judgment and Justice Blackmun concurred in part; dissenting were Justices Burger and Rehnquist).

\textsuperscript{308} 430 U.S. 199 (1977) (Justice Stevens concurred; dissenting were Justices Stewart, Blackmun and Rehnquist).

\textsuperscript{309} 440 U.S. 268 (1979) (concurring were Justices Blackmun and Stevens; dissenting were Justices Burger, Powell and Rehnquist).


\textsuperscript{311} See, \textit{e.g.}, Kissinger \textit{v.} Halperin, 101 S. Ct. 3132 (1981) (dismissed in part and returned to lower court in part for further consideration as to whether the President may be sued for damages for violating constitutional rights while within the scope of his official duties); University of Texas \textit{v.} Camenisch, 101 S. Ct. 1830 (1981) (remanded to determine whether the Rehabilitation Act requires that a university pay for a sign language interpreter for a deaf student).

approach to constitutional interpretation that has a long history.\textsuperscript{313} The view that the Court lacks competence to form a coherent policy is one of the reasons often offered in support of this position.\textsuperscript{314} The deference argument, therefore, cannot be dismissed as a mere subterfuge masking a policy judgment.

Secondly, the Court’s perception that it must show restraint is bolstered by the belief that the Court is politically vulnerable.\textsuperscript{315} It is conceivable that a majority of the Justices did not question the exclusion of women from combat. In light of this, they probably saw no reason to engage in a confrontation with Congress over what may have appeared to be the trivial issue of registration, which, if invalidated, would result in attention to larger questions. This is admittedly speculative, but it is well known that clashes between the Court and Congress have in the past led to retreats on the part of the Court.\textsuperscript{316}

From the same perspective, however, there is little reason for the Court to retreat further on the question of explicit gender-based classifications. Support for the equal treatment of males and females on most questions is in fact quite strong. The most recent polls indicate that support for women’s equality has increased. “From the early to the late 1970’s, the number of people who supported women’s liberation grew from 49\% to 60\%—from less than majority to majority proportions.”\textsuperscript{317} The Equal Rights Amendment is widely supported, although it is unlikely to be ratified, given a strong, organized opposition. The Court must continue to apply a stringent review to sex-based classifications and can do so without incurring popular or congressional opposition.

The time is ripe for a reevaluation of the Court’s approach to explicit gender-based classifications. First, there is little basis for affording women less protection than racial minorities are given under the equal protection clause. Most of the factors relevant in according racial minorities special protection apply equally when women are the focus of state action. In fact, many of the same justifications for

\begin{itemize}
\item \textsuperscript{313} See, e.g., CBS, Inc. v. Democratic Nat’l Comm., 412 U.S. 94 (1973); Coleman v. Miller, 307 U.S. 433 (1939); Field v. Clark, 143 U.S. 649 (1892).
\item \textsuperscript{314} C. Ducat, Modes of Constitutional Interpretation 135 (1978); D. Horowitz, The Courts and Social Policy 18 (1977).
\item \textsuperscript{315} Taylor, Attorney General Outlines Campaign to Rein in Courts, N.Y. Times, Oct. 30, 1981, at 1, col. 1 (Attorney General accused courts of “intrusions upon the legislative domain” and announced that the Administration would seek greater judicial restraint).
\item \textsuperscript{317} D. Barron & D. Yankelovich, Today’s American Woman: How the Public Sees Her 2 (Sept. 1980) (report by the Public Agenda Foundation, New York, N.Y., prepared for the President’s Advisory Comm. for Women).
\end{itemize}
varying the review of racial classifications apply equally when gender is used to classify people. There are some sound reasons for making sex a suspect classification.\textsuperscript{318} Vacillation by the Court would be avoided. Such a rule would create an absolute principle, limiting Court activism. There would be no danger of perpetuating stereotypes. Such a rule, however, would be an inadequate response to the problem of gender equality. First, against a background of past discrimination, gender blindness would make the achievement of equality far more difficult. It would limit efforts designed to redress past discrimination and to facilitate women’s assumption of new social roles.\textsuperscript{319}

Second, when the danger of burden is joined to the immutability of gender, the need to assess carefully all gender classifications becomes apparent. As a result, strict scrutiny should govern hostile classifications, intermediate scrutiny should govern those that prefer women and traditional scrutiny should govern those that have a neutral impact.\textsuperscript{320} Thus, the first task of the Court would be to assess burden. If the burden is found to fall on women, the strict scrutiny standard should prevail. Such a classification should be allowed only if there is a compelling state interest and if the law is narrowly tailored to the achievement of that interest. In those situations in which women are benefited, the scrutiny should turn on the degree of burden to men. If the government action involves a distribution of scarce resources, the Court should apply the intermediate standard as formulated by Justice Brennan. As the government action moves away from allocating a scarce resource, the degree of judicial scrutiny should diminish.\textsuperscript{321} Whenever a burden is placed on men which is unrelated to an attempt to redress women for past disadvantages, intermediate scrutiny is appropriate. For example, such scrutiny should be applied when the state distinguishes between natural mothers and fathers of children born out of wedlock. Only if there is a determination that the gender classification is harmless should minimum scrutiny apply.

**Conclusion**

The adoption of the approach suggested in this Article to sex discrimination will not resolve all issues raised by the recent cases. Although *Michael M.* and *Rostker* might have been harder to defend under a stricter standard, the *Rostker* Court might still have elected to

\begin{itemize}
\item \textsuperscript{318} Brown, Emerson, Falk & Freedman, *supra* note 117, at 888-909.
\item \textsuperscript{319} Gertner, *supra* note 8, at 214 (courts should test the benignness of a classification by looking at its ability to facilitate new roles).
\item \textsuperscript{320} See Baer, *supra* note 6, at 489-91.
\item \textsuperscript{321} See Griswold, *The Bakke Problem-Allocation of Scarce Resources in Education and Other Areas*, 1979 Wash. U. L.Q. 55 (a discussion of the problems of preferential treatment in the context of the allocation of scarce resources).
\end{itemize}
defer to Congress in military matters. More fundamentally, the focus of this Article has been limited to the Court's treatment of classifications that directly distinguish between males and females. Women's rights involve much more than explicit gender classifications. Even beyond the question of abortion, many other issues, involving tax, welfare and public service statutes, affect the position of women.

If sex is to become irrelevant to one's role in society, major social changes need to occur. Many of these depend on alterations in affirmative laws. The Court cannot, consistent with its role in a democratic polity, force the government to adopt policies that will end discrimination. The Court can, and should, however, guard against governmental actions that unfairly discriminate. The Court has recognized that it stands "oath-bound to defend the Constitution . . . bearing in mind both the broad scope of legislative discretion and the ultimate responsibility of constitutional adjudication."322 The Court has further acknowledged that "[t]he provisions of the Constitution are not time-worn adages or hollow shibboleths. They are vital, living principles that authorize and limit governmental powers . . . ."323 Consistent with the living principles of the Constitution, the Court must recognize the emerging equality of women in this country and, in response to this reality, evaluate governmental actions by a standard that fosters equal protection under the Constitution.

323. Id. at 103.