The Failure of Gender Equality: An Essay in Constitutional Dissonance

JUDITH OLANS BROWN*
WENDY E. PARMET**
PHYLLIS TROPPER BAUMANN***

TABLE OF CONTENTS

I. INTRODUCTION .................................................. 574
   A. The Caselaw Background .................................. 575
   B. The Feminist Debate ....................................... 579
II. THE SUBORDINATION OF WOMEN .......................... 583
III. THE LIMITATIONS OF DISCRIMINATION LAW ........... 590
    A. Substituting Culpability for Equality ............... 591
    B. Title VII Doctrine ...................................... 598
    D. Denying History and Social Context ................. 604
    E. Special Treatment of “Innocent Victims” .......... 607
    F. Affirmative Action ..................................... 609
    G. The Metaphysics of Process ............................ 612
    H. Affirmative Duty ....................................... 615
IV. THE LIMITATIONS OF CONSTITUTIONAL RIGHTS ANALYSIS 618
    A. The Negative Constitution ............................. 618
    B. The Impact of the Negative Rights Thesis on Gender Equality ........................................... 625

* Professor, Northeastern University Law School; A.B. Mount Holyoke College, 1962; LL.B. Boston College Law School, 1965.
** Associate Professor, Northeastern University Law School; A.B. Cornell University, 1979; J.D. Harvard Law School, 1982.

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573
I. INTRODUCTION

FEMINISTS agree that gender equality remains elusive; they disagree about why. A critical question is whether gender equality can be accomplished by treating men and women interchangeably. Stated another way, the debate has been between those who deny that women need “special treatment” in order to achieve equality, and those who argue that “real” equality demands that the legal system recognize the unique role which women play in society. Each side of this similar treatment/special treatment debate has assumed that the correct doctrinal formulation of equality will lead to some form of “true equality.”

This premise is misplaced. The debate has been about the wrong question, because neither approach is capable of redressing the problems women face. The values underlying any meaningful notion of gender equality are incompatible with the basic limitations in the law’s concept of rights. The law’s vision of discrimination, and indeed, of rights themselves, provides little support for the eradication of sexism. An understanding of these limitations supports a critique of basic constitutional norms, and the recognition that commonly accepted views of equality foster an inherently unequal society.

This article will examine and critique the ways in which legal notions of discrimination and rights make demands for gender equality appear dissonant and even unjust. We begin by reviewing the similar treatment/different treatment debate, and the caselaw that has influenced it. After briefly discussing some of the values underlying true gender equality, we examine how discrimination law fails to provide a means for achieving such equality. In so doing, we explore the innate limitations of discrimination law, and then observe those same limitations operating at a more basic level in the very notion of constitutional rights. We conclude by discussing how current forms of legal reasoning prevent equality, and how a change in methodology holds forth some promise for reducing gender inequality.

A. The Caselaw Background

The first judicial response to constitutional claims of sex discrimination was Victorian. In the infamous case of Bradwell v. Illinois, the Supreme Court affirmed the denial of Myra Bradwell’s license to practice law due to her sex. In his oft-cited concurring opinion, Justice Bradley relied on the natural roles of the sexes to justify the decision:

[The civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of men and women. . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.]

The law of the Creator, however, soon gave way to the social changes forced by industrialization and urbanization. In a sense, the modern debate about similar or different treatment began with the reformist goal of improving conditions in the workplace. Reformers often attempted to achieve such goals by first improving the working conditions of women and children. In Muller v. Oregon, the Supreme Court upheld a maximum hours statute which applied only to women on the grounds that women needed special protection to ensure their health and that of future generations.

Muller was authority for treating women differently from men. As time passed, however, such protective legislation became disabling rather than protective because it limited the number of hours women could work, the type of work they could do, and the conditions under which

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1. In this essay we use the words “sex” and “gender” interchangeably, for the reasons cited by Professor MacKinnon. See C. MACKINNON, FEMINISM UNMODIFIED (1987); MacKinnon, Not a Moral Issue, 2 YALE L. & POL’Y REV. 321, 322 n.5 (1984).


3. Many of the same limitations impede the law’s ability to eradicate racism, classism and other forms of discrimination. An extended discussion of these problems, however, is beyond the scope of this Article. Instead, we use gender in this essay to illustrate the law’s inability to redress the grievances of the powerless.

4. 83 U.S. (16 Wall.) 130 (1872).

5. Id. at 141 (Bradley, J., concurring).


7. Id. at 180-95.

8. 208 U.S. 412 (1908).

9. Id. at 421-23. The Supreme Court upheld the statute despite the fact that Lochner v. New York, 198 U.S. 45 (1905), struck down a maximum hours statute which applied to all workers as violative of the due process clause and freedom of contract.
they could labor. Protectivc legislation thus combined with other factors to perpetuate barriers to the employment of women.11

In the last twenty years, the women's movement has challenged both protective legislation and discriminatory employment practices.12 In an important early case, the Supreme Court discredited the notion that men and women could be treated differently due to stereotypical assumptions about their place in the world. Frontiero v. Richardson13 involved the constitutionality of providing spousal benefits to all wives of men in the military, but requiring husbands of military personnel to prove their dependency. The Secretary of Defense had defended the scheme as efficient because wives are frequently dependent on their husbands, while husbands are rarely dependent on their wives.14 The Court rejected this argument as based on "gross, stereotyped distinctions" which placed women in a subordinate position.15

Other cases followed Frontiero in rejecting classifications based on outdated stereotypes.16 The Court's approach to differential treatment between the sexes, however, was inconsistent. For example, in Kahn v. Shevin,17 the Court upheld a Florida statute which granted a property tax exemption to widows, but not widowers, based on the "financial difficulties confronting the lone woman."18 If a statute was seen as an attempt to rectify the effects of past gender discrimination, the Court was willing to uphold it as compensatory.19

While there is much to be said in favor of compensatory statutes,20 the Court failed to delineate a jurisprudence of gender bias. The cases demonstrated a preoccupation with labeling, and offered only a limited analysis of circumstances which might justify differential treatment.21 The Court was unable, or unwilling, to pierce through stereotypes and examine those social assumptions about the sexes that are worthy of legal recognition, and those that are not. Thus it should not be surprising that the Court lacked any sustainable analytical approach when confronted with cases that concerned differences between the sexes that were linked to biology. Such differences, which arise primarily in the area of reproduction, seem more "real" and enduring than those faced in cases such as Frontiero. And they have caused the Court, and feminists, far more trouble.

The critical case was Geduldig v. Aiello,22 which involved a challenge to the constitutionality of a California disability insurance system that specifically excluded pregnancy benefits. In an astonishing feat of judicial legerdemain, the Court found that the system did not violate the equal protection clause because there was: "no evidence in the record that the selection of the risks insured by the program worked to discriminate against any definable group or class. . . . There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not."23

In the now infamous footnote 20, the Court explained that there was no discrimination because the California program merely removes one physical condition—pregnancy—from the list of compensable disabilities. . . . Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts . . . lawmakers are constitutionally free to include or exclude pregnancy from the coverage of

11. See J. BAER, supra note 10, at 19-23; A. KESSLER-HARRIS, supra note 6, at 181.
12. See J. BAER, supra note 10, at 136-74; W.H. CHAFE, supra note 10, at 233-34; A. KESSLER-HARRIS, supra note 6, at 300-19; see also Rosenfeld v. Southern Pacific Co., 444 F.2d 1219, 1223 (9th Cir. 1971) (state protective labor legislation conflicts with Title VII's policy of non-discrimination); BARCOCK, FREEDMAN, NORTON & ROSS, SEX DISCRIMINATION AND THE LAW 229-439 (1975 ed.) (collecting cases).
13. 411 U.S. 677 (1973). Notwithstanding the conclusion of the plurality opinion in Frontiero, a majority of the Supreme Court has never denominated sex as a suspect classification for purposes of equal protection clause analysis.
14. Id. at 688-89.
15. Id. at 685.
18. Id. at 353.
19. See id. at 355; see also Califano v. Webster, 430 U.S. 313 (1977) (upholding as compensatory social security retirement benefits calculation that favored women); Schlesinger v. Ballard, 419 U.S. 498 (1975) (upholding rule providing women naval officers with longer period in which to receive promotion prior to discharge due to fewer opportunities for promotion available to women).
20. See infra text accompanying notes 225-37.
21. See infra text accompanying notes 201-12 for a further discussion of this issue.
22. 417 U.S. 484 (1974). Another important case dealing with what the Court sees as real sex differences is Michael M. v. Sonoma County, 450 U.S. 464 (1981). Michael M. upheld California's statutory rape law, on the ground that "realistically . . . the sexes are not similarly situated," and "only women may become pregnant." Id. at 469, 471. For a powerful feminist analysis of Michael M., see Olsen, Statutory Rape: A Feminist Critique of Rights Analysis, 63 Tex. L. Rev. 387 (1984).
legislation such as this on any reasonable basis.24

Geduldig’s distinction between discrimination against pregnancy and discrimination on the basis of sex was extended to Title VII in General Electric Co. v. Gilbert.25 The reaction to both cases was heated. Congress responded by enacting the Pregnancy Disability Act of 1978 ("PDA"), which amended Title VII of the Civil Rights Act of 196426 and provides in pertinent part:

The terms “because of sex” or “on the basis of sex” include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability to work. 27

The issues raised by Geduldig have not disappeared with the passage of the PDA. The PDA made it clear that pregnant women could not be denied disability leaves where such leaves were generally available. But did that mean that pregnancy leaves were required? Or was it discriminatory against men to provide women with pregnancy leaves, where men were not offered disability leaves? This question was raised in California Federal Savings and Loan Corp. v. Guerra,28 (hereinafter Cal. Fed.) which held that the PDA did not prohibit states from mandating pregnancy leaves.29

Cal. Fed., however, did not resolve the fundamental issue: what does discrimination against women mean? Does it mean that women must be afforded benefits to ease the burdens imposed by pregnancy, or that they must be treated similarly to men? And how can women be treated similarly to men, who cannot become pregnant? Does it mean, as Geduldig implied, that there is no such thing as discrimination on the basis of pregnancy? Or do we need to reconsider our views about the meaning of discrimination and equality? And what about the many other ways in which men and women are dissimilarly situated for reasons other than biology, such as childrearing? Is a recognition of such differences a return to Bradwell, or is there more to equality than the eradication of outdated stereotypes?

B. The Feminist Debate

These issues have become the focus of a heated debate among feminist scholars. A brief review of that debate is critical to understanding the problems that issues of sex discrimination present to equality theory.

On one side of that debate are the advocates of the “similar treatment” approach.30 These scholars argue that the best or even the only way to end discrimination against women is to require similar treatment to that afforded men. They believe that pregnancy should be treated as a disability—no more, no less.31 Any special recognition of the uniqueness of pregnancy, or of any other distinction between the sexes, will raise the specter of protective legislation and result in a perpetuation of stereotypes and second-class status for women.

Professor Williams has written the most comprehensive exposition of this approach.32 According to Williams, the approach is preferable partially for strategic reasons. Given the law’s traditional assumption that equality means the equal treatment of those similarly situated,33 any approach that recognizes the differences between the sexes, or advocates any non-gender neutral approach, is susceptible to the charge that women are seeking “special” treatment, and is doomed to judicial dismissal.34

Although Williams accepts that discrimination doctrine has a limited vision of equality,35 she argues that her approach can have a significant impact for two reasons. First, she believes that many of the needs of

24. Id. at 496, n.20.
25. 429 U.S. 125 (1976). On the other hand, in Nashville Gas v. Satty, 434 U.S. 136 (1977), the Court found that a policy which stripped workers of their seniority when they took disability leaves on account of pregnancy violated Title VII. The major distinction noted by the Court was that the employer in Nashville placed a burden on pregnant employees, while the employer in Gilbert merely failed to provide a benefit. Id. at 142. This distinction is disregarded at best, and demonstrates the poverty of the analysis begun in Geduldig.
27. Id. For a discussion of the legislative history of the PDA, see Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669 (1983).
31. See, e.g., Williams, supra note 2, at 327.
32. See id. at 325-80.
33. See infra text accompanying notes 112-14.
34. Williams, supra note 2, at 346.
35. While other theorists have presented a more critical vision of equality (see infra text accompanying notes 39-49), few can deny Williams’ analysis of how the Court tends to see the issues. Even the recent Cal. Fed. decision does not change the basic soundness of this observation. See infra text accompanying notes 175-85.
women can be satisfied through gender neutral legislation. Second, in a somewhat contradictory fashion, she claims that disparate impact theory can be used "to squeeze the male out of a purportedly neutral legal structure,..." What she fails to see is that disparate impact theory is just as limited as the underlying equality doctrine which compels her to use gender neutrality in the first place.

More importantly, the requirement that the sexes be treated similarly, or in gender neutral terms, begs the question: "similar to whom?" What is the model against which similar treatment should be measured? To critics of the similar treatment approach, that model is a male model, based on the conditions and norms typically found among middle class, white men. Being judged against that model, women inevitably come up short.

Building on that observation, one group of scholars believes that where men and women are biologically different, they should be treated differently by the law. Because reproduction is one area where there are clear biological differences, they believe that pregnancy and childbirth should be carved out from the general rule of similar treatment. According to Professor Law:

[Pl]regnancy, abortion, reproduction and creation of another human being are special—very special. Women have these experiences. Men do not. An equality doctrine that ignores the unique quality of these experiences impossibly says that women can claim equality only insofar as they are like men. Such a doctrine demands that women deny an important aspect of who they are.  

36. Williams, supra note 2, at 174-75.
37. Id. at 331. This is contradictory because if disparate impact theory was as powerful as Williams believes, it could pierce through gender neutral statutes, such as parenting leaves, that tend to benefit women more than men. See infra text accompanying notes 167-73.
38. See infra text accompanying notes 150-66.
39. See Finley, supra note 2; Friedman, Sex Equality, Sex Differences, and the Supreme Court, 92 Yale L.J. 913 (1983); Krieger & Cooney, supra note 2; Powers, Sex Segregation and the Ambivalent Directions of Sex Discrimination Law, 1979 Wis. L. Rev. 55. Professor Taub's similar treatment approach is especially susceptible to this criticism. Concerned about the impact of stereotypical assumptions, she believes that women should prevail on discrimination claims where they can show that "the adverse employment decision was based on an expectation that women should conform to a certain pattern of behavior." Taub, Keeping Women in Their Place: Stereotyping Per Se as a Form of Employment Discrimination, 21 B.C.L. Rev. 345, 418 (1980). However, Taub's definition of discrimination entitles women to no "special treatment" when women actually do conform to stereotypical behavior, for example, when performing childrearing functions. See id. at 390-96.
40. See Dowd, Maternity Leaves: Taking Sex Differences into Account, 54 Fordham L. Rev. 699, 762 (1986); Kay, Models of Equality, 1985 U. Ill. L. Rev. 39, 47; Law, supra note 2, passim; Scales, supra note 2, at 431.
41. Law, supra note 2, at 1007 (emphasis in the original).

The biological differences approach has much to recommend it. It recognizes that the problem with Geduldig was the Court's inability to understand that reproduction is sex-linked. Moreover, tying pregnancy leaves to disability policies means that they will only be offered when they fit into timetables set to accommodate illnesses, and only in cases where women are entitled to disability benefits. Since women are often in low paying, non-unionized jobs, they are likely to receive little help from such a policy. Further, the approach recognizes that as long as reproductive policies are tied to experiences which men face, such policies cannot adequately resolve the pressing issues confronting women.

The central lesson of the biological differences approach is that formal equality cannot assure true equality when individuals are not, in fact, similarly situated. This insight, however, suggests a broader attack on the similar treatment position.

Reproduction is not the only area in which women and men are biologically different. On average, men and women differ in such matters as height, weight, and life span. Law states that such differences should not justify differential treatment because they are only average differences—but so, too, are reproductive differences. For example, not all women can bear children. Thus, biology, alone, offers no clear guide to determining what differences should be taken into account. More fundamentally, men and women are differently situated with respect to numerous economic, political, and social circumstances. If women cannot achieve equality when they are not similarly situated to men with respect to biology, how can they achieve equality in any of these other areas?

42. This approach distinguishes pregnancy leaves, which are limited to the time necessary for recovering from childbirth, from childbearing leaves, which are not biologically linked, and therefore, according to biological differences scholars, should be subject to a gender neutral approach. See Dowd, supra note 40, at 720.
44. Law, supra note 2, at 1004.
45. Proponents of the biological differences approach argue against a broader attack on the similar treatment doctrine because they are afraid that to do so would perpetuate sexual stereotyping. See Law, supra note 2, at 1008; Scales, supra note 2, at 433; Krieger & Cooney, supra note 2, at 567. What they fail to see is that biology cannot provide a clear, apolitical vehicle for determining which differences should count. For example, the very need for pregnancy leave arises not only because pregnancy is biologically linked, but because of the social configuration of the workplace, and social conditions which lead women to seek or choose to work there. Social factors intermix with a variety of biologically linked factors to determine differences in the experiences and needs of men and women. Biology alone cannot tell us how to value those experiences.
Such observations have led many feminist legal scholars to advocate a far fuller recognition of the differences between the sexes, and an expansive vision of equality that can accommodate those differences.46 Although these scholars vary in their approach, they share a common belief that the similar treatment paradigm, as reflected in cases from *Frontiero v. Goddard*, has been of limited benefit to most women.47 The cases grant women equality only when their experiences parallel those of men, which often does not occur. Moreover, the goal of assimilation, which underlies the similar treatment approach, is problematical because we cannot assume that the differences between the sexes are trivial, or that women should or could strive to act as men.

Underlying this critique is an assessment that not all of the differences between the sexes are bad stereotypes; indeed, many have positive social value. Influenced by the work of Professor Gilligan,48 some scholars believe that women tend to have different values and moral perspectives than do most men.49 To these authors, women are more likely to hold values of interdependence, nurturance and altruism, in contrast to competitive and individualistic values.50 The positive values associated with women would be lost by adoption of the similar treatment approach.

We share the criticisms of the similar treatment approach raised by

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47. Professor Finley contends that she is not an advocate of the difference approach, but her definition of that approach is far narrower than our own. She sees the difference approach as one which stresses how women are different from men, forcing the comparison between the sexes. Instead, she strives to transcend the debate and stress how recognition of the needs of childbearing and childcare affect both sexes. We classify her as a difference scholar because of her recognition of the positive ways in which women differ from men, and her criticism of the ways in which courts assume that male life experiences are the only life experiences.

48. C. GILLIGAN, IN A DIFFERENT VOICE (1982).

49. None of these observations applies to all women, or all men. The claim is rather that women as a class tend to differ from men in these respects. See Tho 1984 James McCormick Mitchell Lecture: Feminist Discourse, Moral Values, and the Law At A Conversation, 34 BUFFALO L. REV. 11, 46-47 (1985) [hereinafter Feminist Discourse] (Gilligan speaking). In her book, Gilligan is also careful to note that such differences need not be due to biology, but to social and cultural factors. Gilligan, supra note 48, at 2, 16-23.


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the different scholars.51 We also share their belief that many of the differences between men and women are valuable to society as a whole, and cannot and should not be obliterated or ignored in the name of "equal treatment." Indeed, we begin with their premises. However, we believe that the goals they seek are incompatible with existing constitutional analysis.52 Feminist legal scholars have provided an expanded vision of equality, and have shown how equality doctrine, as now formulated, relies on norms which disadvantage women.53 The purpose of this Article is to build upon this scholarship by exploring how the concepts of discrimination, legal rights, and legal reasoning themselves operate to thwart the achievement of feminist goals.54 Both discrimination law and the traditional constitutional discourse operate in a similar fashion to limit the law's ability to respond to the claims of women.

II. THE SUBORDINATION OF WOMEN

In order to understand why existing legal doctrines cannot achieve feminist goals, it is necessary to see what meaningful equality for women involves.55 Although legal theorists disagree over what equality does and
should mean, to feminists, gender equality has a very concrete meaning. It is the eradication of the subordination of women experience. As we discuss below, any theory of equality that is not grounded in the real world experiences of women is not responsive to their needs, and is thus not a meaningful view of equality.

An important characteristic of women's subordination is the economic insecurity of most women. Under the present legal regime, there are three sources of financial support for women: paid labor; the wages and job benefits of other family members; and governmental benefits programs. Despite statutes purportedly guaranteeing women's equal participation in the labor market, women remain in an economically tenuous position. The median earnings for women working full time are 69 percent of the male.

For example, see some see equality as involving equal access to the political process. See J. Ely, DEMOCRACY AND DISTRUST 74 (1988). Others see it as having specific substantive goals. See, e.g., L. TRIBE, CONSTITUTIONAL CHOICES 10-20 (1985). Some, such as Professor Westen believe it has no meaning whatsoever. Westen, The Empty Idea of Equality, 95 HARB. L. REV. 537 (1982).


This is not to say that improving the lives of women is or should be a legal rule. We are only saying that the eradication of the subordination of women is an underlying moral and normative principle, tied to both the generally accepted interpretation of the fourteenth amendment and our nation's history. Brest, The Supreme Court, 1975 Term — Foreword: In Defense of the Antidiscrimination Principle, 90 HARV. L. REV. 1, 5 (1976). Translating these often obscure principles and norms into workable legal doctrines is quite another matter; the difficulties associated with that task form the heart of this Article. Kirp, Yudof, and Franks disagree with our view of equality. To them, although it seems clear that the law's recognition of sex-role differences did disadvantage men in a few ways (i.e., minimum hours laws could not be applied to men), this is unconvincing. Historical evidence about the relative conditions of men and women gives little reason to believe that women were disadvantaged by the law's treatment of them. J. BAER, supra note 10, at 19-23; B. WERTHEIM, WE WERE THERE: THE STORY OF WORKING WOMEN IN AMERICA, passim (1977); M. MILLER, supra note 46, at 827-36. Moreover, the fact that some men either believed or merely stated that women's legal disabilities were "for their own good" appears in retrospect to be ultimately irrelevant. Slaveowners also proclaimed that the legal regime of slavery benefited the slaves. See, e.g., A. CLERQAN, A Defense of Southern Slavery Against The Attacks of Henry Clay and Alex's Campbell in A Defense of Southern Slavery and Other Pamphlets 24 (Negro University ed. 1969). The justifications given for legal disabilities are often self-serving and ultimately specious, whether or not they are made in good faith.

This is not to deny that many men are also economically insecure.


1987] THE FAILURE OF GENDER EQUALITY 585


Historically this inferior position in the labor market was legitimated by the assumption that a woman would be economically supported by her family. Such economic dependency on men has often left women vulnerable to violence and abuse. Moreover, more and more families find that two incomes are necessary to sustain what the Bureau of Labor Statistics calls "a modest but adequate" life style. Compounding this harsh economic reality is the fact that fewer women can rely on being part of a two-income family. The dramatic increase in divorce has been accompanied by a substantial decline in the number of women who receive alimony. Professor Lenore Weitzman has found that in the first year after divorce, women in California experience a 73 percent decline in their living standards. In addition, there is an increase in the number of women who have never been married who are raising children. Forty-eight percent of poor families are headed by wo-


62. WOMEN'S WORK, supra note 43, at 5-13. In 1985, women comprised 54.5 percent of the work force. BUREAU OF THE CENSUS, U.S. DEP'T. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1987, at 376 (107th ed. 1986) [hereinafter STATISTICAL ABSTRACT: 1987]. They were overwhelmingly employed in the clerical (29 percent of all women workers) and service (18 percent of all women workers) areas. Id. at 385-86. Yet women constituted less than 7 percent of engineers, 7 percent of dentists, 18 percent of physicians, 19 percent of attorneys, and 36 percent of all executives, administrators, and managers. Id. at 385.


64. A. KESSLER-HARRIS, supra note 6, at 300-10.

65. S. SCHWEITZER, WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT 224-26 (1982); M. KIMMEL, Feminism, Marxism, Method and the State: Toward a Feminist Jurisprudence, 8 SIGNS 635, 657 (1983). From 1981 to 1985, an average of 82,300 rapes were reported each year. STATISTICAL ABSTRACT: 1987, supra note 62, at 155. A recent national survey of college-age women found that 27.5 percent reported having been raped at some point since age 14. N.Y. Times, April 21, 1987, at 1, col. 5.


67. D. MOYNIHAN, FAMILY AND NATION 147 (1986); R. SIDEL, WOMEN AND CHILDREN LAST: THE PLIGHT OF POOR WOMEN IN AFFLUENT AMERICA 15-18 (1986); L. WEITZMAN, supra note 63, at viii.

68. L. Weitzman, supra note 63, at 32. As of 1978, only one-sixth of divorced women received alimony. Id. at 33.

69. Id. at 36. In contrast, former husbands experience a 42 percent increase in their standard of living. Id. at 32, n. 25. See also Bowen v. Gillard, 483 U.S. 587 (1987) (Brennan, J., dissenting) (divorce causes decline in women's income).

70. D. MOYNIHAN, supra note 67, at 146-47.
men. Today we witness the "feminization of poverty." For poor women, governmental assistance programs are often the only means of support. Women with children often find themselves eligible only for Aid for Families with Dependent Children ("AFDC"), in which benefits are not tied to the cost of living. In 1984 AFDC provided, on the average, $325 per month per family, an amount which varied widely by state. The price for these meager benefits is often stigmatization, dependency and powerlessness.

The consequences of women's economic plight include not only material deprivation but also second-class citizenship. Political theorists have long recognized that a certain level of financial independence is critical to being a full participant in a republic. Without economic security, individuals are both marginalized by the social structure and dependent on the politically powerful. Further, in very practical terms, the poor simply lack the resources necessary for political participation. Thus there is an unavoidable correlation between economic status and political influence.

The continued subordination of women into an economic underclass inevitably disables women from full and meaningful citizenship.

Moreover, the feminization of poverty does not affect women alone. Nearly one-fourth of all children today are being raised in poverty. The consequences for these children, and for the society they will inherit, will be severe. A society stratified by a rigid and deep class structure, with a poor and unskilled underclass, is in jeopardy for both its political stability and its economic prosperity.

In the past, many of the issues confronting women, such as childrearing, sexual harassment, spousal abuse and child support have been dismissed as issues of personal choice and purely private concern. This dismissal has been legitimated by the ideology of separate spheres. That ideology is a powerful and pervasive belief system which sees social life as divided between two spheres, one public and male, the other private and female. According to this ideology, the private sphere is the locus of the home, the family, and care-giving. The values and norms associated with it are relational, non-hierarchical, and altruistic. With the rise of industrialization and urbanization these functions became segregated from the "public" world of commerce, the market and politics. While women were expected to fulfill familial functions in the private sphere, men were expected to operate primarily in public life.

This ideological construct sees the public sphere as embodying the values of competition, individualism, economic rationalism, and hierarchy. Given the dominance of the public sphere, it is not surprising that the attributes associated with it became and remain the predominant

71. R. Sidel, supra note 67, at xvi.
73. Older women may be eligible for social security benefits, the payments of which are higher than the subsistence levels of AFDC. Law, Women, Work, Welfare, and the Preservation of Patriarchy, 131 U. PA. L. REV. 1249, 1325-36 (1983).
75. STATISTICAL ABSTRACT: 1987, supra note 62, at 365, chart no. 622. Mississippi has the lowest amount, $501 per month per family; Alaska has the highest at $501 per month per family. Id. See R. Sidel, supra note 67, at 84-89.
76. F. Fox Piven and R. Cloward, REGULATING THE POOR THE FUNCTIONS OF PUBLIC WELFARE 166-74 (1971); Law, supra note 73, at 1281-82.
77. In 1964, women comprised 52.7% of the voting age population. Statistical Abstract: 1987, supra note 62, at 244. However, that year, only twenty-two women were elected to the House of Representatives (or 4.1 percent), and only two women were elected to the Senate (2 percent). Id. at 237. Further, in 1986 no women held statewide elective office in twenty-one states, and women comprised only 14.8 percent of state legislators. Id. at 241.
78. J. Locke, TWO TREATISES OF GOVERNMENT: A CRITICAL EDITION WITH AN INTRODUCTION AND AN APPARATUS CRITICUS 116-17, 366, 428, 441-42 (Laslett ed. 1960); J. S. Mill, THREE ESSAYS: ON LIBERTY, REPRESENTATIVE GOVERNMENT, AND THE SUBJECTION OF WOMEN 280-81 (1975 ed.); MONTESQUIEU, THE SPIRIT OF THE LAWS 96 (T. Nugent trans. 1940); see also C. Wright Mills, The Power Elite 248 (1956) (Congressmen are those who have been "successful in entrepreneurial and professional endeavors. . . . are at least solid, upper-middle class in income and status.").
82. D. Moynihan, supra note 67, at 51; R. Sidel, supra note 67, at 3.
84. Olsen, supra note 46, at 1503-09 (collecting cases).
85. Finley, supra note 2, at 1118-19; MacKinnon, supra note 65, at 644, 657-58; Minow, supra note 46, at 832; Olsen, supra note 46, at 1498; cf. Plyer v. Ferguson, 163 U.S. 377 (1896); Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873).
86. C. Gilligan, supra note 48, at 16-17; Gould, supra note 50, at 7. Of course, this is an association, not an identity.
88. Finley, supra note 2, at 1118; Olsen, supra note 46, at 1500.
value structure. Women, often denied access to that sphere, find their subordination legitimated by their inability to "compete" and to embrace the norms of the public sphere.

The ideology of the separate spheres is a social construct; there are no natural fixed spheres. Nevertheless, ideology can both reflect and influence reality. Thus, despite some changes in recent years, women to a large degree live lives that are more touched by the attributes the ideology consigns to the private sphere. Women are primarily responsible for childcare, care of the sick, elderly, and disabled, and for maintaining a functioning household. In addition, women have been responsible for maintaining the home as a refuge from the alienation and stress of the workplace.

Despite the increased participation of women in the labor market, the demands that the private sphere imposes on their lives have not diminished. Moreover, it is not surprising that women, having been raised and acculturated to perform these familial roles, have developed values and perspectives the ideology associates with the private sphere. According to Professor Minow, women have developed an " ethos of care" in contrast to the ethos of rights characterizing the male dominated public sphere.

The functions and norms associated with the private sphere have been undervalued. Despite the national rhetoric lauding motherhood and family, the reality of women's experience makes the denigration of women's experience readily apparent. For example, most women receive no

98. L. WEITZMAN, supra note 63, at 344.
99. Professor Glendon has demonstrated that benefits attaching to paid labor have taken the place of familial property and assets in modern industrial societies. M. GLENDON, THE NEW FAMILY AND THE NEW PROPERTY 45-46, 91 (1981).
101. Finley, supra note 2, at 1120; Dowd, supra note 40, at 715. This inospitality is multifaceted. Married women or women with young children have always had greater difficulty in finding work outside the home. See authorities collected in Finley, supra note 2, at 1123 n.17. The notion that married women and women with children work less intensely because of their family responsibilities is often used to justify paying them lower wages. Osterman, Sex Discrimination in Professional Employment: A Case Study, 32 INDUS. & LAB. REL. REV. 451, 457-61 (1978). For a criticism of the human capital theorists who accept this justification see Brown, Baumann & Melnick, Equal Pay for Jobs of Comparable Worth: An Analysis of the Rhetoric, 21 HARV. C.R.-C.L. L. REV. 127, 135-37 (1986) [hereinafter Equal Pay]. Most employers do not provide anywhere near adequate maternity or childbearing leaves. In addition, the lack of "desirable" part-time work, Chamallas, Women And Part-Time Work: The Case for Pay Equity and Equal Access, 64 N.C.L. REV. 709 (1986), combined with the lack of adequate day care severely impedes women's ability to participate in the labor market.

The undeniable importance of both nursing care and education sug-
gests, however, society’s critical need for these activities. Equally important are childrearing, caring for the elderly or infirm, and maintaining a home. The fact that such work is vital to society as a whole is often overlooked. Yet, a world that ignores the work and values associated with the private sphere would be both unpleasant and less productive. And, indeed, much of the criticism of contemporary American society stresses the lack of altruism, compassion, and a communal perspective.

Further, a view of equality that devalues women’s experiences and fails to assign importance to the norms associated with the private sphere subordinates women, and prevents from leading lives of full dignity and political power—in other words, from being full citizens. To redress this failing and ensure women true citizenship, equality must recognize the values and realities of women’s lives. Unfortunately, current discrimination law is incapable of achieving this.

III. THE LIMITATIONS OF DISCRIMINATION LAW

Beginning with Brown v. Board of Education, some courts became sensitive to social and racial inequalities. In Frontier v. Richardson, the current shortage of nurses illustrates this point. Ninety-seven percent of nurses are women. Student enrollments in nursing school have dropped from 233,511 in 1974 to 175,043 in 1985. Between 1985 and 1986, the vacancy rate for registered nurses in hospitals increased from 6.3 percent to 13.6 percent. See Medicine Overstake抽象 as a Career Lane to Women, Boston Globe, June 1, 1987 at A1-42. This decrease in the number of nurses has occurred despite the potential increase in demand for nursing support services for home care and care of the elderly. Id. at A1-42.

If women were to behave rationally in the economic sense, they would neither marry nor have children.


104. Nothing we say is intended to or would limit the freedom of men to assume such traditionally female functions as child care. But the fact remains that few men have actually done this, and Taub points out that men are not likely to do so as long as child care “is neither paid nor easily coordinated with paid work in the market.” Taub, supra note 30, at 383; see also Williams, supra note 2, at 738 n.213 (even where parenting leave is available on a gender neutral basis, women “still use leave more often and for longer periods than do men.”)

105. For this reason, abstract rights of access are of little help to most women. See infra text accompanying notes 416-22.

106. 347 U.S. 483 (1934).

whom and in what ways; in other words, what differences count.\footnote{592}  

The resolution of these questions is necessarily value laden. Discrimination law incorporates values rooted in a society where men are breadwinners and women are at home raising children and managing the household.

The inadequacy of the premise that similarly situated people deserve similar treatment is exposed when women are unable or unwilling to situate themselves similarly to men.\footnote{593} Current discrimination doctrine requires women either to accept subordination and dependency or assume the male role in its entirety, thus abandoning the functions and values which are central to most women's lives.

For example, in Geduldig, the Court allowed the defendant to ignore the biological reality of the relationship between pregnancy and gender because the defendant did not "cause" the injury to the plaintiff. Implicit in the Court's decision is the assumption that the plaintiff's "voluntary" pregnancy was the underlying cause of her inequality. The necessity of pregnancy for the continuation of human existence, a fact that earlier jurists understood all too well,\footnote{594} was ignored. A woman could avoid any inequity simply by not bearing children.\footnote{595} In other words, in the absence of a malevolently motivated defendant legally responsible for the pregnancy, sex discrimination, as defined by the Geduldig Court, has not occurred.\footnote{596}

Certainly, where the Court faced overt gender classifications, it frequently struck them down, often acknowledging the error of historical stereotypes.\footnote{597} But when confronted with pregnancy, which the Court presumed was a voluntary condition, the Court shifted its attention from sex stereotyping to the defendant's culpability. The focus was on what the defendant did and not on the implications of pregnancy either for women or for society. Individual women could avoid any adverse impact by simply acting as men and refraining from pregnancy.

In Washington v. Davis,\footnote{598} the Court institutionalized the anti-equality philosophy of Geduldig. Washington v. Davis, while affirming the use of a facially neutral employment examination, held that proof of disproportionate impact was insufficient and that plaintiffs must prove defendant's racially discriminatory motivation to establish an equal protection violation.\footnote{599} Requiring proof of intent shifts the focus from inequality of result and the ability of the defendant to rectify that inequality to the nature of defendant's activities and the defendant's subjective state of mind. This approach separates results from motive. But as Justice Stevens recognized in his concurring opinion, this division is neither easily accomplished nor readily apparent:

It is unrealistic, on the one hand, to require the victim of alleged discrimination to uncover the actual subjective intent of the decisionmaker, or conversely, to invalidate otherwise legitimate action simply because an improper motive affected the deliberation of a participant in the decisional process. My point in making this observation is to suggest that the line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the Court's opinion might assume.\footnote{600}

Washington v. Davis assumes the existence of a nondiscriminatory society. In that world, most defendants act in rational and nondiscriminatory ways and the burden of proving otherwise is justifiably on the plaintiff.\footnote{601} The only ways that plaintiff can meet this burden is by showing invidious intent. Thus a "neutral" reason for a government policy,
notwithstanding its disproportionate racial impact, is sufficient to protect that policy from challenge.123

Looked at solely in terms of a litigation model, Washington v. Davis simply added an element to plaintiff's prima facie case: a showing of defendant's subjective intent to discriminate.124 After Washington v. Davis and its progeny,125 a plaintiff cannot survive a motion for a directed verdict without this proof. But even when viewed only in a technical or evidentiary sense, this requirement is critical. It makes it very difficult for plaintiffs to prevail;126 proof of defendant's state of mind is an enormously heavy, indeed often insurmountable burden for plaintiffs.127

The effect on women has been harsh since the inequities that women confront now are most often embodied in facially gender neutral practices. Feminist scholars have taught that most ostensibly gender neutral rules incorporate the experiences of white, middle-class men and are thus not neutral at all.128 Workplace rules that ignore the familial obligations of employees prevent women from fully participating in the public sphere. While lack of accommodations for child care is ostensibly gender neutral, in actuality it is not, given the reality of women's responsibility for child care.129 Similarly, requirements that employees spend forty

123. The Court pointed to the disruption that would result from the invalidation of neutral rules with disproportionate impact: A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and the average blacks than to the more affluent whites. 426 U.S. at 248.

124. Id. at 238-40.


128. Finley, supra note 2, at 144, 148, 152-59; Krieger & Cooney, supra note 2, at 515, 544-47.

129. Frug, supra note 46, at 56-61; Taub, supra note 30, at 383.

130. Chamallas, supra note 101, at 722, 725-26; Frug, supra note 46, at 56-61.


132. For an example of the lengths women are advised to go to conform to the roles played by men, see S. STAUBERG, PREGNANCY NINE TO FIVE: THE CAREER WOMAN'S GUIDE TO PREGNANCY AND MOTHERHOOD 133-34 (1985). The book describes one woman, in particular, as worthy of emulation because while she was bedridden due to pregnancy complications, she "renegotiated a $25,000 health insurance program and interviewed about twenty job applicants — shoeless and sitting up in her rented hospital bed, but otherwise looking extremely professional in a tailored navy blue suit, pantyhose and makeup."

133. Cf. Phillips v. Martin Marietta Corp., 400 U.S. 542 (1977) (indicating that an employer can refuse to hire individuals burdened by child care). In Martin Marietta the Court went further and suggested that an employer can maintain a non-gender neutral rule, overtly discriminating against women, if the employer can demonstrate that women have greater child care burdens which interfere with their job performance. Id. at 544.

134. For an analysis of the male orientation of the language we use, see D. SPENDER, MAN MADE LANGUAGE 64-67, 138-44 (1980).


137. Tenure decisions usually involve the application of subjective criteria. Although in Watson
continue to be denigrated.

Indeed, often ostensibly gender-neutral rules serve to benefit men. But the gender bias of our culture is so deeply entrenched that these practices are viewed as either benefiting the entire society or simply reflecting the natural order. For example, military leave—which primarily benefits men—is defined as critical to the public interest, but pregnancy leave is characterized as special treatment for women.139

The intent requirement of discrimination law shields the bias inherent in such facially gender-neutral practices. For example, in Personnel Administrator of Massachusetts v. Feeney,140 the Court chastised the plaintiff for failing to prove that the purpose of the Massachusetts professionals' preference statute was to discriminate against women. At issue in Feeney was an absolute life time civil service preference for veterans. The District Court had found that this preference impacted so inevitably and severely on women that its discriminatory effect could not be unintended:

"The decision to grant a preference to veterans was of course 'intentional'. So, necessarily, did an adverse impact upon nonveterans follow from that decision. And it cannot seriously be argued that the legislature of Massa-

v. Fort Worth Bank and Trust, 108 S. Ct. 2777 (1988), the Supreme Court permitted a plaintiff to use Title VII to attack subjective employment criteria, women generally have been unsuccessful in their challenges to allegedly biased tenure decisions. See, e.g., Zahorki v. Cornell University, 729 F.2d 85, 89-90 (2d Cir. 1984) (where female plaintiff was denied tenure, a faculty member who abstained from tenure vote described her as "too feminite" in that she was too "unassuming, unaggressive, unsuasive and not highly motivated for vigorous interpersonal competition."). Laborde v. Regents of Univ. of Cal., 686 F.2d 715, 718-19 (9th Cir. 1982) (although female plaintiff has published reviews, and had read several papers at academic conventions... her scholarship did not meet the University's high standards of academic excellence...). Farn v. Univ. of N. Y., 502 F.2d 1292, 1231 (2d Cir. 1974) ("the proof clearly shows that the experience possessed by such male professors as plaintiff"). But see Sweatt v. Board of Trustees of Keene State College, 569 F.2d 169 (1st Cir. 1978).

For an interesting discussion of the relationship between subjective employment criteria and discrimination, see Barron et al., Application of Title VII to Jobs in High Places, 95 Harv. L. Rev. 947 (1982).


While concealing that the foreseeable consequences has some "bearing" upon the existence of discriminatory intent, the Supreme Court held that plaintiffs failed to prove intent. It seems that nothing short of an overt and complete exclusion of women on the face of the statute would have established the requisite state of mind.

Clearly, the Court was unable or unwilling to perceive the bias inherent in a regime which offered veterans' benefits while denying mothers' benefits. The status quo was sanctioned as the norm; and women were entitled to relief only in the rare instance where they could prove a particular malevolent intent.143

The pregnancy cases similarly demonstrate the Court's blindness to the disparate effect of seemingly gender-neutral rules.144 Policies which do not provide pregnancy benefits are based on a model where the lack of pregnancy is the norm. Pregnancy is seen as a voluntary deviation from that model. Assuming as the Court does, that pregnancy is merely a matter of private choice, however, echoes the simplistic notion that statutes which regulated the workplace interfered with workers' absolute voluntary freedom of contract.145 The characterization of pregnancy— and child-care—as voluntary is a similar attempt to deny benefits to women under the guise of protecting their freedom. The Lochner court has been justifiably criticized for perpetuating class bias under the banner of freedom.147 The Geduldig insistence that pregnancy is voluntary148 per-
petuates gender bias within the rubric of freedom of choice. Thus by relying on the supposed voluntariness of pregnancy, the Court is able to frame the issue as one of individual culpability. This individualistic perspective isolates women plaintiffs from the context of their reality, and thereby seems to delegitimize their claims.

B. Title VII Doctrine

The insulation of seemingly neutral practices harmful to women extends not only to equal protection law, but also to doctrine developed under the antidiscrimination statutes. To be sure, the first Supreme Court interpretation of Title VII of the Civil Rights Act of 1964,\textsuperscript{149} \textit{Griggs v. Duke Power Co.},\textsuperscript{150} embraced the “effects only” approach. The Court understood that requiring proof of discriminatory intent was inconsistent with the language and purpose of Title VII.\textsuperscript{151}

\textit{Griggs} notwithstanding, in \textit{McDonnell Douglas Corp. v. Green},\textsuperscript{152} the Court retreated from this position, formulating a second version of the Title VII prima facie case, which requires that plaintiff prove defendant’s improper motivation.\textsuperscript{153} There are thus two judicially created models for the Title VII prima facie case: disparate impact (\textit{Griggs}) and disparate treatment (\textit{McDonnell Douglas}). Although neither the statutory language nor the legislative history of Title VII supports this bifurcation,\textsuperscript{154} the Court has consistently adhered to these constructs.\textsuperscript{155} By reading a subjective intent requirement into disparate treatment cases under Title VII\textsuperscript{156} and by placing the burden of proving it on the plain-

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151. The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to “freeze” the status quo of prior discriminatory employment practices. Id. at 429-30.
154. For a particularly thoughtful discussion see Brodin, supra note 126, at 294-99.
156. \textit{Green} is thus a breach of the Court’s promise in \textit{Washington v. Davis}, that proof of intent would be limited to fourteenth amendment cases. Moreover, the Court has extended the intent re-
because they incorporate gender biased wage rates. Market rates are indeed facially neutral rules that adversely affect women—precisely the situation which should trigger disparate impact analysis. Yet, the courts have not only rejected impact analysis but also have been unwilling to infer intent from the defendants' reliance on market disparities in wages and statistical evidence of male/female wage differentials. As now Justice, then Judge, Kennedy wrote for the Ninth Circuit in AFSCME v. Washington:

The inference of discriminatory motive which AFSCME seeks to draw from the State's participation in the market system fails, as the State did not create the market disparity and has not been shown to have been motivated by impermissible sex based consideration in setting salaries.

This approach, of course, maintains the status quo. Williams argues that disparate effects analysis is the "doctrinal tool...to squeeze the male tilt out of a purportedly neutral legal structure." What Williams does not see is that the disparate effects test offers little to women. Her analysis requires the Court to recognize that facially neutral rules adversely affect women and discriminate on the basis of gender. But the abstract individualism of discrimination theory, and its reliance on male experiences, prevents this recognition.

In Gilbert the Court upheld the exclusion of pregnancy benefits because it was a neutral rule, without considering its disparate effect on women. There is little reason to believe that the Court will be more sympathetic when considering the disparate effects of nonpregnancy-related neutral rules. For example, a gender neutral rule prohibiting employment of parents with primary child care responsibilities is likely to withstand a Title VII challenge. The Court is apt to view this rule as one that affects merely those with child care responsibility—both men and women—notwithstanding the fact that it is usually women who assume the primary role regarding child care, and that such a rule typifies the "male tilt" of the workplace. What is clear from Gilbert, is that gender neutral rules whose disparate effect results from the "voluntary" assumption of traditionally female functions are not now susceptible to a successful Title VII challenge. Thus even when applying antidiscrimination statutes, the Court is unable to see beyond the experiences of men and unable to validate the claims raised by women left alone to face the demands of family life.

C. Cal. Fed. and Wimerby: Geduldig Redux

Gender equality necessarily requires conditions that support women's familial responsibilities. Under discrimination doctrine these are susceptible to challenges alleging that men are adversely affected and women unfairly advantaged. Several states have enacted statutes that provide disability leaves to pregnant workers without requiring similar benefits for disabled male workers. These statutes are examples of the kinds of accommodation equality demands, they are challenged as discrimination against men because they require "special treatment" for women.

In Cal. Fed. the Court held that the California pregnancy leave stat-
ute was not preempted by the PDA. In so holding, Justice Marshall focused on congressional intent\(^\text{175}\) and found that in enacting the PDA Congress intended to prohibit discrimination against women—that is, to overrule Gilbert,\(^\text{176}\) and not to prohibit state pregnancy leave statutes.\(^\text{177}\)

The focus of concern was pregnancy, not child care.\(^\text{178}\) Indeed, parts of Marshall's opinion indicate that he interpreted the PDA as adopting the biological differences approach.\(^\text{179}\) Thus, while Marshall suggests that Congress wished to protect pregnant women against discrimination, he also suggests that mandatory maternity leaves not closely tailored to the physical disabilities of pregnancy would violate Title VII.\(^\text{180}\) Therefore, the opinion offers little support for the broad range of accommodations necessary for women's equality.

Moreover, the Court's opinion was schizophrenic about the preferential treatment issue. Although Marshall at times appeared to support accommodation for pregnant women, he also suggested, without deciding, that states may have to provide parallel benefits to men.\(^\text{181}\) Thus, Marshall was careful not to depart completely from the "similar treatment" paradigm.

The "similar treatment" approach was reaffirmed emphatically in \textit{Wimberly v. Labor and Industrial Relations Commission of Missouri},\(^\text{182}\) \textit{Wimberly} involved a Missouri statute which denied unemployment compensation to those who left work "voluntarily without good cause attributable to his [sic] work or to his [sic] employer."\(^\text{183}\) Petitioner, who was on pregnancy leave pursuant to a policy that she would be rehired only if there was a position available when she was ready to return to work, filed a claim for unemployment benefits when her employer informed her that there were no positions open. The state denied her benefits, claiming that under the terms of the state statute, she had voluntarily left without good cause. At issue was whether the state statute as construed violated a provision of the Federal Unemployment Tax Act ("FUTA") which forbade the denial of compensation under state law "solely on the basis of pregnancy or termination of pregnancy."\(^\text{184}\)

The Court held that the Missouri statute was consistent with the federal statute because FUTA did not mandate preferential treatment for women but only prohibited states from singling out pregnancy for unfavorable treatment. The Court characterized the Missouri statute as a "neutral rule that incidentally disqualified pregnant or formerly pregnant claimants."\(^\text{185}\)

In its unwillingness to recognize the obvious gender bias of characterizing rules about pregnancy as neutral, \textit{Wimberly} echoed the discredited reasoning of \textit{Geduldig} and \textit{Gilbert}. Although the Court recognized that Congress intended to eliminate "discriminatory disqualifications because of pregnancy,"\(^\text{186}\) the Court was unable to see the clear discriminatory effect of the application of the Missouri statute in this case. The opinion is further flawed by its restrictive interpretation of FUTA. Under the opinion, FUTA prohibits a state statute that specifically enumerates pregnancy as a disqualification. But where the state applies a general (or "neutral") requirement that is interpreted to include pregnancy, FUTA is not violated. The Court relied on the word "solely" as a justification for this excessively formalistic approach.\(^\text{187}\)

Read together, \textit{Cal. Fed.} and \textit{Wimberly} are anomalous. There are two congressional enactments speaking to a single goal: the prohibition of discrimination based on pregnancy. In \textit{Cal. Fed.} the Court simply avoided the issue of the disparate effect of the statute but recognized a congressional intent to prohibit penalizing women for pregnancy. In \textit{Wimberly}, however, the Court allowed pregnant women to be penalized by returning to notions of discrimination which ignore the social context and effects of certain policies.

Indeed, in \textit{Wimberly}, the Court abandoned the analysis of congressional intent that determined the outcome of \textit{Cal. Fed.} Instead, the Court disregarded the broader purposes of the FUTA prohibition against disqualifying pregnant women and interpreted the word "solely" to submerge any obvious overall congressional intent to protect pregnant women.

\(^{175}\) "In determining whether a state statute is preempted by federal law... our sole task is to ascertain the intent of Congress." 479 U.S. 272, 280 (1987).

\(^{176}\) Id. at 285.

\(^{177}\) Id. Indeed, Justice Marshall noted that Congress was not only aware of such laws when it passed the PDA "but apparently did not consider them inconsistent with" that statute. Id. at 287.

\(^{178}\) Id. at 292. Justice Stevens, concurring in part, characterized Justice Marshall's interpretation of the PDA as one which "allows some preferential treatment of pregnancy." Id. at 292.

\(^{179}\) Id. at 290.

\(^{180}\) Id.

\(^{181}\) Id. at 291.


\(^{183}\) 479 U.S. at 513.


\(^{185}\) 479 U.S. at 517.

\(^{186}\) Id. at 520. (Citing H.R. Rep. No. 94-755, at 50) (emphasis added by Court).

\(^{187}\) Id. at 516, 517, 522.
women. This judicial tunnel vision is yet another aspect of the limitations of discrimination law.

In Washington v. Davis, Feeney, Geduldig, and Wimberly, the Court was unable to see beyond linguistic neutrality to the institutional inequality resulting from state policy. These cases disavow any judicial responsibility to undo or dismantle racial or gender inequality. Instead they limit culpability to particular defendants who engage in overt, nonneutral, specific race or gender motivated acts or language. Without a specific culpable defendant there can be no violation.188

The jurisprudence of Geduldig, Washington v. Davis and Wimberly defines discrimination as aberrant, asocial, atomized behavior. This view not only denigrates women's claims by suggesting that the circumstances leading to a claim are the woman's own fault, but also severely limits the law's ability to achieve gender equality.

D. Denying History and Social Context

By viewing discrimination as isolated, privatized malfeasance, discrimination law ignores both the social and historical context in which it occurs.189 The irrelevance of social context is a pervasive theme of both the race discrimination190 and sex discrimination cases. For example, if pregnancy is voluntary, as the Court frequently assumes, it follows that any disadvantage resulting from pregnancy is solely the responsibility of the woman because she has chosen the pregnancy. This is the clear import of Wimberly. Suggesting that pregnancy is always voluntary, however, denies reality. Rape persists, contraception is not foolproof, and neither it nor abortion is free.191 Women's financial dependency on men limits their freedom to choose not to bear children.

The Court's view of pregnancy also perpetuates the ideology of separate public and private spheres. If traditionally private (and female) functions are "voluntary" and serve no public purpose, discrimination claims that involve these areas will fail. Yet, obviously, society as a whole demands certain functions which women have historically performed.192

Consider this example: If the critical factor is whether one's action is voluntary (or based on a private decision), then veterans' benefits to enlistees should also be considered special treatment. After all, the enlistee chose to serve. Granting the enlistee such benefits is therefore the sort of preferential treatment that pregnant women have been criticized for demanding. Yet society views benefits for all veterans—both draftees and volunteers—as serving a non-discriminatory public purpose. It is the public purpose behind pregnancy which discrimination law ignores.

Veterans' preference is another example of the judicial discounting of history.193 In upholding the constitutionality of the Massachusetts absolute veterans' preference statute, the Court recognized the various federal statutes, regulations and policies which restrict the number of women who can pursue a military career.194 The Court also noted that women have never been subjected to a military draft.195 Moreover, the Court admitted that the impact of the veterans' preference law upon job opportunities for women has been "severe."196 Yet having recited this history the Court refused to acknowledge its relevance to veterans' preference.197

The comparable worth cases198 which allow the use of the market rate defense also exemplify the isolation of specific culpable acts from historical reality. Courts have refused to view reliance on the market as a

188. The same ideology is reflected in the pregnancy cases. Since the court is unable to find a perpetrator other than nature, it is not considered discriminatory when women are penalized for bearing children.
191. See infra text accompanying notes 332-51.
192. For an exhaustive list of welfie tasks see Syfets, I Want a Wife: A Feminist Classic from the Early '70s, Ms., Dec. 1979, at 144.
195. Id.
196. Id. at 271.
198. American Fed'n of State, County, and Mun. Employees v. Washington, 770 F.2d 1401 (9th Cir. 1985); Spaulding v. Univ. of Wash., 740 F.2d 686 (9th Cir. 1984); Lemon v. City and County of Denver, 620 F.2d 228 (10th Cir. 1980); Christensen v. Iowa, 563 F.2d 353 (8th Cir. 1977); Gerlach v. Michigan Bell Tel. Co. 501 F.Supp. 1300 (E.D. Mich. 1980).
culpable act even though the market is gender-biased, and Congress has passed legislation to rectify that situation.

To be sure, there is a line of Supreme Court opinions which appears to recognize the relevance of history or social context. These cases typically involve social welfare programs which distribute benefits according to stereotypical perceptions about the economic roles of men and women; they involve overt gender classifications rather than the discriminatory effect of facially gender neutral rules. When the Court disagrees with the stereotype, the gender classification is struck down as "arbitrary and overbroad." This rubric covers those cases where the stereotype is based on the "outdated" assumption that women are economically dependent. On the other hand, equally archaic and overbroad stereotypes have been upheld when the Court finds that they have been designed to rectify past discrimination against women. These stereotypes are characterized as "benign" or compensatory and are thus allowed to stand.

The stereotype cases, however, are not really about social context at all. Indeed, the only stereotypes which the Court has labelled "arbitrary" are those of which the Court no longer approves. Although the Court condemns some stereotypes because they are based on "old notions" about the role and abilities of women, it has upheld equally old stereotypes of which it approves. In fact, most of the stereotypes which the Court condemns as outdated can just as easily be viewed as compensatory. Moreover, the Court has endorsed classifications which perpetuate the most blatant sex role stereotypes.

For example, in Rostker v. 

201. Schlesinger v. Ballard, 419 U.S. 498, 508 (1975). That case, however, upheld a gender based classification because it was compensatory and not based on an invalid classification.
203. For example, in Kahn v. Shevin, 416 U.S. 351 (1974), the Court upheld a property tax exemption available to widows because they are faced with more financial difficulties and a more "inhospitable" job market than widowers. Id. at 355. A similar scheme was upheld in Califano v. Webster, 430 U.S. 313 (1977), where the Court allowed a different calculation of earning years for women than for men because to do so would help to reduce the economic disparity caused by the long history of sex discrimination against women.
206. See Dohard v. Rawlinson, 433 U.S. 321 (1977), upholding a gender assignment rule for prison guards on the grounds that the guard's "very womanliness" would undermine her ability to do the job. Id. at 335-36.

Goldberg, the Court upheld the constitutionality of a draft registration law which expressly excluded women. The Court took comfort in the fact that the decision to exclude women from registration was not an "accidental by-product" of traditional stereotypes but a reasonable policy given the fact that women were excluded from combat. But the Court was oblivious to the underlying sexist assumptions in a law which excludes women from combat. Moreover, the Court ignored the impact its decision would have on women as citizens. Given the importance of military service in our society, exempting women from the draft denies their status as citizens. This disparity in citizenship echoes the discredited perspective of the Slaughterhouse Cases, which diluted the concept of national citizenship.

Thus, although the Court occasionally recites the relevance of history, it lacks a full understanding of the context in which discrimination occurs. Rather than providing a means for understanding how women have been systematically victimized by society, discrimination law abstracts women from their history, and blames them for their status as victims. It cannot distinguish between differential classifications that perpetuate that victimization, and which ones alleviate it.

E. Special Treatment of "Innocent Victims"

The Court's recent fascination with the rights of "innocent victims" is another manifestation of how discrimination law rejects the relevance of the "long and unfortunate history of sex discrimination," the school desegregation cases were a harbinger of this trend. In Brown, the victims were the black school children who were forced to attend

208. Id. at 74.
209. Id. at 75.
210. Kane, supra note 126, at 55.
211. 83 U.S. (16 Wall.) 36 (1872).
212. This formulation is derived from W. Ryan, Blaming the Victim, 28-29 (1971). The court is not alone in this approach. See R. Lester, Antithesis Regulation of Universities, (1974) ("Much of what is loosely called sex discrimination in employment is, at least partly, the consequence of choices made by women . . . .") Id. at 34. Accord, Sowell, Affirmative Action Reconsidered, 42 THE PUBLIC INTEREST 47, 63 (1976).
racially segregated schools. Later cases postulated new victims: the white school children who suffer by being bussed to integrated schools. Discrimination law's focus on individual culpability apart from the social context in which subordination occurs compels the conclusion that defendants or third parties who lack invidious intent are the true innocent victims. Thus, women bringing discrimination suits find their claims being overshadowed by the concern for the plight of the "innocent" victim. The bona fide seniority system cases exemplify the degree to which the law sympathizes with those who have benefited from admittedly racist and/or sexist seniority systems.

Although the Court has labelled the reconciliation of the interests of these victims with the victims of discrimination as a "delicate" task, that adjustment is usually made against women and minorities.

For example, in Ford Motor Co. v. EEOC, the Court held that an employer could toll the accrual of back pay liability to three successful female plaintiffs by offering the jobs previously denied them, albeit without retroactive seniority. The Court pointed out that requiring the employer to offer retroactive seniority would place a "particularly onerous burden" on the innocent employees who had accrued seniority while the case was being litigated. This holding ignored the compelling reality of the desire for job security. The plaintiffs testified that they rejected Ford's initial reinstatement offer of a job without seniority because of concern that they might be laid off. Requiring women who have already proved sex discrimination to accept either a smaller back pay award or a job without security in order to protect an "innocent" male employee's job security is a ludicrous application of the antidiscrimina-

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218. For example, in Teamsters, the Court held that Congress specifically intended that Title VII not "destroy or water down the vested seniority rights of employees simply because their employment would, according to the Court, subordinate those vested rights to the claims of "pre-Act discrimination without seniority." Id. at 345.


220. Id. at 239. The dissent aptly characterizes this holding as the Court's "repeated invocation of and preoccupation with the rights of innocent third parties." Id. at 254 (Blackmun, J., dissenting).

221. Id. at 256-57 (Blackmun, J., dissenting).

222. The doctrine of victim specific relief also illustrates the Court's transformation of the victims of discrimination from those burdened by discrimination to those who might be burdened by anti-discrimination remedies. Franks v. Bowman, 424 U.S. 747, 750 (1976), limited retroactive seniority to those identifiable applicants who were seeking relief from post-Act hiring discrimination. Similarly, in International Bhd. of Teamsters v. United States, 431 U.S. 363-72 (1977), the Court limited relief to actual specific victims of the post-Act discrimination. Mere membership in a certified plaintiff class was not enough. In order to be awarded retroactive seniority each individual must prove that the discrimination had a specific impact on him or her. Firefighters Local No. 1784 v. Stotts, 467 U.S. 561, 578-79 (1984).


225. It is not our purpose to review (or even to cite) the scholarly debate about either the legality or the wisdom of affirmative action. That literature is extensive and explores a wide range of positions. See, e.g., N. GLAZER, AFFIRMATIVE DISCRIMINATION: ETHNIC INEQUALITY AND PUBLIC POLICY (1975); Bell, Bakke, Minority Admissions, and the Usual Price of Racial Remedies, 67 CAL. L. REV. 3 (1979); Ely, The Constitutionality of Reverse Racial Discrimination, 41 U. CHI. L. REV. 723 (1974); Sandalow, Racial Preferences in Higher Education: Political Responsibility and the Judicial Role, 42 U. CHI. L. REV. 653 (1975); Sullivan, supra note 213.
short-term efforts will help rectify historical discrimination. However, if one assumes that familial obligations will remain a characteristic of American society, something more than a short-term remedial program is necessary. Affirmative action is aimed at allowing everyone access to the paid labor market, but it requires everyone to enter that realm on the terms in which it is currently structured. That is the antithesis of true equality.

Although the defendant’s motivation is not directly at issue in the affirmative action cases, particularized fault is as critical as in the discrimination cases. Many affirmative action cases hold that race or gender conscious relief is not available unless there has been a preexisting violation of discrimination law. “Societal discrimination, without more, is too amorphous a basis” upon which to predicate a remedy.

To be sure, some cases have upheld carefully tailored affirmative action plans even in the absence of a showing of prior discrimination.

226. As Professor Kay has shown, there are fundamental empirical differences between affirmative action in race discrimination cases and sex discrimination cases. Kay, supra note 40, at 60-77. In race reverse discrimination cases whites never seek the position formerly held by blacks; in gender bias cases, on the other hand, men may want the rights or privileges formerly held by women. For example, men may want disability leave comparable to maternity disability leave, or they may want parenting leave.

227. And as we have seen, the requirement of proof of impermissible motivation before any defendant can be found liable for discrimination in the post-Washington v. Davis era is really another way of defining the perpetrator’s fault.

228. Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) reh’g denied, 478 U.S. 1014 (1986); University of Cal. Regents v. Bakke, 438 U.S. 265, 294-98, 307-310 (1978). This was made even clearer by a case decided as this article was going to press. In City of Richmond v. Croson, 57 U.S.L.W. (U.S. Jan. 23, 1989), the Supreme Court struck down a local ordinance setting aside for minority owned businesses thirty percent of city construction contracts. After Richmond, it is clear that any state or local affirmative action efforts must be predicated on detailed findings of specifically identified violations and that the remedies therefor must be narrowly tailored to the findings of prior discrimination. (“Proper findings in this regard are necessary to define both the scope of the injury and the extent of the remedy…” Id. at 4143.)

229. Wygant v. Jackson Bd. of Educ., 476 U.S. at 276. Wygant is an example of the absurd lengths to which the Court is willing to go in its search for specificity. Despite the extensive litigation in that case, the Court refused to find sufficient evidence to support a finding of prior discrimination by the defendant.

230. Cf. Fulilove v. Klutznick, 448 U.S. 448, 477-78, 484-85 (1980) (upholding the constitutionality of a provision of the Public Works Employment Act of 1977 setting aside certain monies for projects which purchased services and/or supplies from minority owned businesses because Congress does not need the kind of “record” that judges and administrators need.) University of Cal. Regents v. Bakke, 438 U.S. at 306 n.43. The Richmond Court distinguished Fulilove on the rather surprising theory that under § 5 of the Fourteenth Amendment, Congress has greater authority to implement race conscious remedies than the states have under § 1. (“That Congress may identify and redress the effects of society-wide discrimination does not mean that . . . the states . . . are free to decide that such remedies are appropriate.” 57 U.S.L.W. at 4138).


For example, in Johnson v. Transportation Agency, the Court approved a voluntary affirmative action plan to “remedy the effects of past practices and to permit attainment of an equitable representation of minorities, women and handicapped persons.” Such cases suggest that affirmative action can be an effective tool for the woman who is seeking a job in a category from which women have been traditionally excluded. But even where an affirmative action plan serves the narrow goal of integrating previously segregated job classifications, it must be limited. Not only must there be a “manifest imbalance” relating to a “traditionally segregated job category,” but the plan’s goals must be based on the number of women who are qualified rather than the number of women in the labor market. Moreover, the plan can only require consideration of “qualified” women; “blind” hiring to rectify numerical imbalances is not permitted.

The efficacy of affirmative action remedies has been further eroded by the excessive judicial concern for the rights of the potential “innocent victims” of that remedy, a concern that often overwhelms the rights of the plaintiffs. The test seems to be the remedy’s impact upon the “innocent victim.” Hiring goals are often permitted because their burden “is diffused to a considerable extent among society generally.” Layoffs, on the other hand, “impose the entire burden of achieving . . . equality on particular individuals.” The key is therefore not the social necessity for an antidiscrimination remedy but rather a weighing of the injury to the plaintiffs against a theoretical injury to an undefined class of potential.”

202-04 (1979). Such voluntary plans must “eliminate manifest racial imbalance in traditionally segregated job categories.” Id. at 197. The validity of these holdings is questionable after City of Richmond v. Croson, 57 U.S.L.W. 4132.


233. Id., at 621.

234. Id. at 622. An affirmative action plan can only “attain” a balanced workforce, but may not “maintain” one. Id.

235. “[T]here is a measure of inequity in forcing innocent persons in respondent’s position to bear the burdens of redressing grievances not of their making.” University of Cal. Regents v. Bakke, 438 U.S. 265, 298 (1978). In our view, the disagreement between the various opinions in Bakke about the level of scrutiny to be applied to racial classifications which potentially victimize members of the majority race is really a disagreement about how much protection the judiciary owes to white nonperpetrators. Alan Bakke “bear[s] no responsibility for whatever harm the beneficiaries of the [California] special admissions program are thought to have suffered.” Id. at 380.
innocent victims. This balancing process consumes the judicial attention and, indeed, seems to end the inquiry.

At bottom, the affirmative action cases teach once again that a woman’s claim is her purely individual problem. The law sees the woman plaintiff in a bipolar, adversarial posture with the “innocent” male victim. Viewed apart from the larger group of women subject to discrimination and the social context in which it arises, the woman’s claim is hers alone. The full force of the public interest does not stand behind it. The law does not recognize that so-called private sphere activities are not merely private or voluntary but serve society as a whole. To the Court, any “special” treatment to alleviate this burden is not justified. Therefore, protection of the “innocent victim” becomes paramount.

G. The Metaphysics of Process

An emphasis on process rather than result is common to both the affirmative action cases and the post Geduldig/Washington v. Davis line of discrimination cases. The process used to reach a decision is considered significantly more important than the result or impact of that decision. In other words, what is critical is not whether the defendant’s behavior had a discriminatory impact on women or minorities, but rather whether the process itself was free of subjectively motivated bias. The question becomes whether the process was applied equally to blacks and whites, to women and men. If the process was free of intentional racism or gender bias, the outcome is immune from scrutiny.

Viewed most favorably, these cases are more concerned with decision making free from overt racial or gender considerations than whether the decision has furthered or hindered racial or gender equality. The plaintiff’s perspective does not inform the process; instead, the discrimination cases examine the process from the perspective of the defendant or of the “innocent victim.” In other words, process is not scrutinized for the purpose of protecting plaintiff’s rights but rather for the purpose of limiting defendant’s liability and protecting the rights of potential innocent victims of the remedy. Such an approach stands the concepts of equality and due process on their heads. For example, in Village of Arlington Heights v. Metropolitan Housing Development Corp. the Court refused to infer that a town might have been motivated by “opposition to minority groups,” despite extensive evidence of segregation in the area and the town’s exploitation of that segregation. The Court limited its examination to the process used by the municipality in denying plaintiff’s rezoning request. The Court seemed to assume that as long as the town did business as usual, there could be no discrimination. The only process due to plaintiffs was the same treatment offered to other developers before the zoning board, thus ignoring the fact that the plaintiffs were in a very different position from other developers. The Court not only sacrificed the result to the purity of the process, but it also refused to look at the process in context.

Elevation of process over result has hurt women and has severely damaged their quest for equality. For example, one of the aims of the reformers advocating no-fault divorce was the abolition of non-neutral assumptions underlying divorce law, such as women’s financial dependency and male support obligations. These reformers created facially gender neutral rules for no-fault divorce. In this they succeeded. No-fault divorce created a process treating men and women as similar at the
time of the divorce. But this ignores what Weitzman refers to as the “structural inequality” between men and women; in fact their economic situations are radically different. The result has been that “while most divorced men find that their standard of living improves after divorce, most divorced women and the minor children in their households find that their standard of living plummets.”

Thus, the illusory promise of the gender neutral process is belied by the harsh reality of the result.

The reluctance of the judiciary to review faculty tenure decisions is another example of deference to established facially neutral processes. Although there are other factors inhibiting judicial examination of those decisions, the cases exemplify a willingness to accept the validity of process notwithstanding discriminatory results. In the tenure cases, defendant universities typically cite plaintiff’s failure to meet high standards for scholarship as a nondiscriminatory reason for denial of tenure. Plaintiffs have difficulty in showing that the subjective evaluation of scholarly work was motivated by gender bias. As long as the same procedural steps are applied to male and female candidates, the courts are unwilling to question the results of the procedure. Indeed, the courts have enshrined the tenure process and have virtually immunized it from discrimination claims. Thus once again, discrimination law ignores the context in which inequality occurs.

284. Id. at 35. She is, of course, referring to the fact that women are more likely than men to be victimized by discrimination in the labor market and that women are more likely to be restricted by child care responsibilities. Weitzman also notes that typically women’s career prospects have been diminished by marriage and the different sexual roles filled by husbands and wives during that marriage. Id. at 36.

285. See, e.g., Zahorik v. Cornell Univ., 729 F.2d 85 (2d Cir. 1984) (tenure selection criteria legitimately related to job notwithstanding claim of subjectivity); Laborde v. Regents of the Univ. of California, 866 F.2d 715, 718-19 (9th Cir. 1989); cert. denied, 495 U.S. 133 (1989) (plaintiff unable to show pretext notwithstanding her publication of four books of scholarly criticism, two volumes of poetry and numerous articles and reviews). But see Kunda v. Muhlenberg College, 621 F.2d 532 (3d Cir. 1980) (upholding close judicial supervision of remedy in tenure case); Sweeney v. Board of Trustees of Kean State College, 604 F.2d 106, 112-13 (3d Cir. 1979) cert. denied, 444 U.S. 1045 (1980) (evidence showed that women faculty “were evaluated by a stricter standard than their male colleagues and that the institution generally was unresponsive to the concerns of its female faculty.”); see Taub, supra note 19, at 340-41 for an interesting discussion of the effect of attitudinal factors concerning gender on employment decisions.

H. Affirmative Duty

The approach to institutionalized prejudice reflected in Geduldig, Feeney, and Washington v. Davis illustrates the severe constrictions of discrimination law. A woman’s right to equality is no more than a right to compete with men, and the rules of this competition are male.

This limited focus puts to rest any notion that there is an affirmative duty on government to eliminate institutional sexism and racism. The strongest support for the existence of such a duty appears in Green v. County School Board. Under Green, merely refraining from futher discriminatory acts is tantamount to acquiescing in segregated schools and this acquiescence, without more, violates the fourteenth amendment. Green imposed a duty on government to take affirmative steps to rectify inequality and to achieve equality. Yet, although Green has never been overruled (and is still occasionally cited with approval), it is clear that its precedential value is very limited.

The various opinions in Bazemore v. Friday reflect the Justices’ disagreement about the existence of an affirmative duty. Bazemore involved several issues arising out of alleged race discrimination by the North Carolina Educational Extension Service. Justice White, concurred, opining that Green had no application beyond school desegregation. Justice Brennan, dissenting in part, criticized White for “winking” at the constitutional requirement that states have an obligation to eliminate the last vestiges of segregation. According to Brennan, defendants have an affirmative duty to eliminate the effects of de jure segregation that is not predicated upon evidence of specific acts of discrimination. Nor is this duty satisfied simply by refraining from further segregation and declaring a neutral policy for future activities. Fulfillment of the duty requires active and not passive measures.
The majority's rejection of Brennan's position is hardly surprising. The concepts of intent and affirmative duty are intimately connected. Restricting constitutional violations to behavior involving specific malevolent intent limits governmental responsibility to refraining from those specific acts which constitute purposeful discrimination. Predicating constitutional violations upon a breach of an affirmative duty requires that defendants take positive acts to achieve equality.

The absence of an affirmative duty to rectify gender inequality limits both the definition of sex discrimination and the remedies available for it. A defendant has no duty to modify conditions to enable women to participate equally with men. For example, in upholding draft registration for men only, the Court effectively held that the government has no affirmative duty to promote gender equality in the armed services. Similarly, the pregnancy cases clarify that there is no affirmative duty to provide benefits to pregnant women.

Nor does Title VII impose any affirmative duty to achieve equality. The Supreme Court cases clearly limit its scope to equality of access and do not extend it to equality of achievement. In other words, the Title VII defendant has no affirmative duty beyond refraining from discrete, perniciously motivated acts of gender bias. In Phillips v. Martin Marietta Corp., the Court implied that an employer could refuse to hire women with pre-school age children if the record demonstrated that some women have family responsibilities that interfere with job performance. An employer has no duty to provide day care, or flexible hours, or make any accommodation to the needs of working parents. Similarly, in Dohard

262. In Crawford v. Board of Educ. of the City of Los Angeles, 458 U.S. 527, 535 (1982), the Supreme Court recognized that under a state constitution a school board might have a greater duty than under the federal constitution.

263. In Washington v. Davis, the Court overruled several lower court opinions which had suggested that it was not necessary to prove discriminatory purpose. Many of these cases recognized an affirmative duty on the part of government to correct inequality and to administer programs in a way that affirmatively addresses the needs of minorities. See Washington v. Davis, 426 U.S. 229, 244-45 n.12 (1976).


265. See supra text accompanying notes 115, 174-87 and infra text accompanying notes 335-37.

266. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 259 (1981) (Title VII does not obligate an employer to select a woman or member of a minority group from among equally well-qualified applicants); Furnco Construction Corp. v. Waters, 438 U.S. 567, 577-78 (1978) (Title VII does not obligate an employer to maximize the number of women and minority employees).


268. Frug. supra note 46, at 56, 94. Thus, as Littleton states, the Court in Martin Marietta "presupposes the legitimacy of the employment structure itself." Littleton, supra note 2, at 1053.
leaves women with no meaningful remedies: the law effectively sanctions the disparities extant in society.

IV. THE LIMITATIONS OF CONSTITUTIONAL RIGHTS ANALYSIS

Discrimination law is unable to provide meaningful gender equality. The doctrine that has evolved relies on an ostensibly neutral, formalistic analysis, making it incapable of recognizing or responding to the needs of women.

The implications of the law's blindness are profound. Discrimination law's insistence on similar treatment for those similarly situated prevents it from responding to the claims of women who are differently situated from men. Thus, discrimination law cannot value the diversity which is so crucial to women's equality. Women suffer as a result, but so does society as a whole, which loses the enrichment of a more varied and multifaceted set of norms. Similarly, the ahistorical, abstract nature of discrimination law, and its reliance on a fault-based principle, effectively prevents the recognition of society's role in creating and perpetuating women's economic dependence. More fundamentally, discrimination doctrine fails to recognize the interdependence of women and society.

The limitations of discrimination law should not be surprising. They merely reflect the more general failure of constitutional jurisprudence to achieve a vision of equal citizenship.

A. The Negative Constitution

The claim for equality is in essence a claim for an entitlement to resources and respect. It is a claim for a right to economic security (at least at some minimal level), and the economic and legal means to maintain certain values and engage in certain previously undervalued activities, such as caregiving and childrearing. Ultimately, these claims are not made against particular defendants who have committed malfeasance, but against the community as a whole. But, as long as the obligation is limited to particular wrongdoers, the scope of equality becomes trivialized, and the critical connection between the condition of women, and of society at large, becomes lost.

The recognition that gender equality entails, indeed requires, certain obligations from the community, provides a clue as to why discrimination doctrine cannot remedy problems of gender inequality. To redress gender inequality, society must be willing to restructure its baseline norms and expectations to accept and make room for the life experiences of women. Yet because of the very fact that women's experiences are devalued by the predominant ideology of the public sphere, this claim is seen as a request for some special protection, or affirmative assistance, from the state. As such, it is seen as inconsistent with the dominant vision of constitutional law.

Prevailing constitutional jurisprudence holds that the Constitution incorporates a liberal, individualistic theory of government. Under this view, the founders were influenced by English liberal theorists such as John Locke and Thomas Hobbes, and conceived of the individual as existing prior to, and as the primary constituent of the state. The most important function of government is to preserve the peace and protect property. However, a potential danger exists that government will exceed its limited role and trample upon the prior, natural rights of the individual. Thus the essential freedom that was preserved by the Constitution, the Bill of Rights, and later the Fourteenth Amendment, was freedom from governmental impingement on the rights of individuals. This freedom is believed to be in sharp opposition to the "positive" right to governmental assistance.

In recent years, there has been considerable scholarly debate over whether the framers actually adopted a liberal, individualistic political theory or were in fact deeply influenced by a contrasting republican vi

276. See supra text accompanying notes 112-19.
277. See, e.g., Karst, supra note 245, at 486-96 (adding women's perspective will broaden the constitutional horizon); Sherry, Civic Virtue and the Feminine Voice in Constitutional Adjudication, 72 Va. L. Rev. 543, 585-93 (1986) (women have a different perspective that can reinforce a classical perspective into our jurisprudence). Scales emphasizes the importance of a different perspective, but stresses that women's values cannot be simply "incorporated onto" the dominant approach. See Scales, supra note 54, at 1382, 1391.
278. See supra text accompanying notes 119-48.
279. See supra text accompanying notes 59-63.
280. See Black, Further Reflections on the Constitutional Justice of Livelihood, 86 Colum. L. Rev. 1103, 1112 (1986); Karst, supra note 245, at 486-87.
282. THE FEDERALIST NO. 37, at 227 (J. Madison) (Modern Library ed.); id. at 145 (A. Hamilton); THE FEDERALIST NO. 2, at 8 (J. Jay) (Modern Library ed.).
284. This view was most clearly evident in cases such as Lochner v. New York, 198 U.S. 45, 56-57 (1905), and Coggin v. Kansas, 236 U.S. 11, 11 (1915), which viewed the Fourteenth Amendment as a protector of freedom of contract and property.
sion emphasizing civic values and the public good over individualism.\textsuperscript{286} Recently, legal theorists have attempted to incorporate a republican strand into constitutional jurisprudence.\textsuperscript{287} However, regardless of the proper resolution of the debate, it is clear that the belief that the framers were influenced by the liberty tradition has had a profound effect on constitutional jurisprudence.\textsuperscript{288} This can be seen most vividly in the laissez-faire ideology animating the \textit{Lochner} era court.\textsuperscript{289} The demise of \textit{Lochner} hardly expunged that view.

At first blush, the question is whether the Constitution mandates only rights against coercion by the government, which have been called negative rights, or whether it recognizes affirmative entitlements against society, that is, so-called positive rights.\textsuperscript{290} This question has arisen most recently in the fundamental rights branch of fourteenth amendment law. In the 1960s and early 1970s, the Supreme Court decided a series of cases which suggested that perhaps the state has an affirmative obligation to provide certain minimal benefits.

\textit{Harper v. Virginia Board of Elections}\textsuperscript{291} is a good example. In \textit{Harper} the question was the constitutionality of Virginia's poll tax for state elections. The Court found that the tax violated the equal protection clause. The Court stated that although the right to vote in state elections is not expressly mentioned in the Constitution, it is a "fundamental political right" because it is preservative of other rights.\textsuperscript{292} In addition, the Court found the poll tax to be an invidious classification because it predicated suffrage on the basis of wealth.\textsuperscript{293} Finally, the Court noted that "notions of what constitutes equal treatment for purposes of the Equal Protection Clause do change."\textsuperscript{294}

The Court's reasons evoked an expansive vision of equality and substantive entitlements. The declaration that suffrage was a fundamental right suggested that there were certain entitlements which were so basic that their allocation could not be left to legislative discretion. Doctrinally, this evolved into a mandate that states demonstrate a compelling interest when they infringe on such rights.\textsuperscript{295} Theoretically, it suggested that the Court was adopting a notion of welfare rights which could potentially presage a recognition of individual entitlements to social resources.\textsuperscript{296} In addition, the Court's statements about the inappropriateness of wealth as a classification hinted that poverty might be a suspect classification. This would have had dramatic implications for issues of economic security. And, the majority's insistence that equal protection law reflect changing values suggested a flexible approach to the Constitution that protected contemporary egalitarian values.\textsuperscript{297}

Cases such as \textit{Shapiro v. Thompson}\textsuperscript{298} and \textit{Memorial Hospital v. Maricopa},\textsuperscript{299} seemed to advance the recognition of welfare rights. In both

\textsuperscript{286} See, e.g., B. BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967); J.G.A. POPCORN, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION, 506-52 (1975); Sunstein, Interest Groups in American Public Law, 38 STAN. L. REV. 29, 39-45 (1985). Even if the framers were unreconstructed Lockeans, the more critical question for purposes of equal protection jurisprudence is the vision held by the 39th Congress that drafted the Fourteenth Amendment. Clearly, the Congress that enhanced federal power in order to implement the abolition of slavery did not endorse a pure libertarian state. See Kast, The Supreme Court, 1976 Term-Forward: Equal Citizenship Under the Fourteenth Amendment, 91 HARV. L. REV. 1, 17 (1977); see also Shelley v. Kramer, 334 U.S. 1, 23 (1948) (Fourteenth Amendment embodies a principle of equal citizenship). Nevertheless, the Court treats the Fourteenth Amendment as if it embodies the individualistic philosophy that the Court attributes to the original framers. See, e.g., Harris v. McRae, 448 U.S. 287, 316 (1980); Malley v. Hogan, 378 U.S. 1, 10-11 (1964).

\textsuperscript{287} E.g., Michelman, The Supreme Court, 1985 Term-Forward: Traces of Self Government, 100 HARV. L. REV. 4 passim (1986); Sherry, supra note 277, passim; Sunstein, supra note 286, at 68-75. Interestingly, both Michelman and Sherry see a close relationship between republican values and those values long associated with women. Michelman, Traces of Self Government, supra at 17 n.68; Sherry, supra note 277, passim.

\textsuperscript{288} Sherry, supra note 277 at 543. See MacKinney, supra note 65, at 644 (1983) ("The state is male in the feminine sense.").


\textsuperscript{290} Professor Fried, borrowing from the Kantian tradition, has developed a theory of positive and negative rights in which negative rights are founded on absolute categorical imperatives. C. FRIED, RIGHT AND WRONG 110-63 (1978). Positive rights, in contrast, are less absolute and require balancing the rights of individuals. Fried's definition is very different than our own. Nevertheless, his insight that positive rights require balancing is exemplified by the generally held belief that positive rights are somehow more difficult to define and manage. See infra text accompanying notes 304-09.

\textsuperscript{291} 383 U.S. 663 (1966).

\textsuperscript{292} Id. at 667, quoting Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

\textsuperscript{293} Id. at 668.

\textsuperscript{294} Id. at 669.


\textsuperscript{297} Much of the legal literature discussing the incorporation of egalitarian norms into equal protection jurisprudence was influenced by the work of J. Rawls, A THEORY OF JUSTICE (1971). See, e.g., Kast, supra note 286, at 6; Michelman, Welfare Rights, supra note 296, at 670; Michelman, Protecting the Poor, supra note 296, at 15.

\textsuperscript{298} 394 U.S. 618 (1969).

\textsuperscript{299} 415 U.S. 230 (1974).
cases, the Court found that durational residency requirements for government benefits unduly burdened the “fundamental” right of interstate travel. As in Harper, the Court was unwilling to permit legislative classifications that adversely affected the poor’s ability to exercise certain unwritten rights. These cases could be read to say that once the government created welfare programs, it lost at least some of its ability to exercise discretion over the administration of benefits. In essence, welfare programs, once legislated, became positive entitlements.

The potential for the achievement of welfare rights was always limited. First, echoing the specter of Lochner, it raised problems of judicial legitimacy. As Justice Harlan stated in his dissent in Shapiro, “I know of nothing which entitles this Court to pick out particular human activities, characterize them as ‘fundamental,’ and give them added protection under an unusually stringent equal protection test.”

By determining that certain nontextual rights were substantive, the Court was vulnerable to the charge of using equal protection analysis to construe governmental activities in light of the Court’s own substantive values. This is what the Court had refused to do through due process analysis.

Moreover, the recognition of welfare rights raised issues of judicial competence. In Maricopa, for example, the Court held that a one year residency requirement for free nonemergency medical care infringed upon the right to travel. While infringement on travel was remote at best, the law did deny indigents health care. Therefore, Maricopa could be read as a recognition of a right to medical care, which raises exceedingly complex questions. What is medical need? What needs must be satisfied? How shall the right be financed? To many, these questions appear particularly ill-suited for judicial, as opposed to legislative, resolution.

Thus any recognition of welfare rights threatened to involve the judiciary in difficult policy issues which, no doubt, seemed all the greater during the years of inflation and recession in the 1970s.

Ultimately, however, the acknowledgment of welfare rights was limited by the apparent inconsistency between substantive entitlements and deeply held political philosophies. The creation of substantive entitlements appeared to clash with the liberal, individualistic ideology predominant in constitutional jurisprudence. It was therefore not surprising that, with the change of the Court’s composition, other cases signaled a rejection of welfare entitlements.

In Dandridge v. Williams, for example, plaintiffs challenged a Maryland policy that set a maximum cap on AFDC payments regardless of family size. The Court held that the cap only need be scrutinized by the rational basis test, because the issue was one of social and economic regulation. Undoubtedly influenced by issues of judicial competence and legitimacy, the Court said that the intractable economic, social, and philosophical problems posed by public welfare were political, not constitutional questions. This reasoning implied that there is no right to minimal sustenance. Thus to Justice Marshall, in dissent, the majority

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300. For a listing of similar cases, see Michelman, Welfare Rights, supra note 296, Appendix A, at 666-93.
301. Id. at 663.
303. 394 U.S. at 662. (Harlan, J., dissenting).
306. This is particularly true when Maricopa is considered alongside other cases that upheld durational residency requirements. Sosna v. Iowa, 419 U.S. 393 (1974) (durational residency requirements for divorce); Starns v. Malkerson, 401 U.S. 985 (1971), aff’g mem., 326 F.Supp. 224 (D. Minn. 1970) (durational residency requirement for reduced tuition to state schools). The distinction in Maricopa and Shapiro v. Thompson, 394 U.S. 618 (1969), therefore, appears to be the importance of the “plus” factor, the welfare benefit at stake. See Michelman, supra note 296, at 662-63.
308. See Michelman, Welfare Rights, supra note 296, at 663; Black, supra note 280, at 1113. Michelman argues that because of the problems of judicial competence, the Court must predicate the recognition of positive rights on the existence of legislatively created entitlement programs. The role of the Court is to constrain congressional and administrative discretion and validate substantive entitlements with respect to legislatively created programs. Id.; supra note 296, at 674. Professor Black points out that many constitutional rights cannot be competently executed by the judiciary. Nevertheless, he argues such rights continue as constitutional rights. Black, supra note 280, at 1113-14. The problem with both Michelman’s and Black’s theses is a variation on the old “right without a remedy” problem: once you concede that rights are dependent on legislative enactments and are not otherwise enforceable by the judiciary, they are not really constitutional rights.
310. See Michelman, Welfare Rights, supra note 296, at 683.
311. The Court has not overruled the precedent and continues to adhere to the view that the imposition of a fundamental right triggers strict scrutiny. See, e.g., City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985); Plyer v. Doe, 457 U.S. 202, 216-17, 217 n.15 (1982). The fundamental rights doctrine, however, has not been allowed to develop into a full and clear recognition of substantive entitlements. See infra notes 318-24 and accompanying text.
313. Id. at 484-45.
"emasculated" the equal protection clause, by failing to recognize the poverty and powerlessness of the plaintiffs.314

Other cases reaffirmed the lack of substantive constitutional entitlements and indicated that the Constitution was in fact limited to protecting individuals against government coercion.315 While upholding parts of Oregon's summary eviction proceeding in Lindsey v. Normet,316 for example, the Court stated:

We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality, or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease . . . .317

San Antonio Independent School District v. Rodriguez,318 shows most clearly the Court's rejection of welfare rights and its adoption of a narrow, negative view of the Constitution. Plaintiffs claimed that Texas' reliance on property taxes to finance education violated the equal protection clause because it created a wealth-based classification that infringed on the fundamental right to an education. Rodriguez involved both a wealth classification319 and an important benefit, education. Despite this similarity to Shapiro, the Court rejected Shapiro's approach. First, it held that wealth classifications alone never trigger strict scrutiny.320 Only

314. Id. at 508, 529 (Marshall, J., dissenting). Justice Marshall's use of the term "emasculate" is interesting because it reveals his own blindness to the underlying issues of gender inherent in the case.

315. A recent example is Lyng v. Int'l Union United Auto Workers & Agric. Implement Workers of Am., 108 S. Ct. 1184 (1988). The Court has not been totally consistent. Cases such as United States Dep't of Agric. v. Murray, 413 U.S. 508 (1973) (§ 5(b) of the Food Stamp Act creates an unconstitutional irrebuttable presumption) and United States Dep't of Agric. v. Moreno, 413 U.S. 528 (1973) (§ 3(e) of the Food Stamp Act lacks a rational basis) continued to evidence support for finding substantive welfare rights. More recently, Plyer v. Doe, 457 U.S. 220 (1982), demonstrated the Court's occasional willingness to use fundamental rights doctrine flexibly to invalidate classifications denying important governmental benefits, such as public education. Id. at 221-22.

316. 405 U.S. 56 (1972).

317. Id. at 74. Some state courts have found that their constitutions require the provision of housing, shelter, and/or education. See, e.g., Burlington County Nat'l Ass'n for the Advancement of Colored People v. Mt. Laurel Township, 92 N.J. 587, 456 A.2d 390 (1983) (obligations to provide realistic opportunity for low and moderate income housing); Callahan v. Carey, 116 N.J. 305 (1993); Serrano v. Priest, 5 Cal.3d 548, 487 P.2d 1241 (1971) (obligation to provide education).


319. The Court actually denied that there was any wealth-based classification on the theory that districts with low property values could not be assumed to be districts with poor individuals. Id. at 23.

320. Id. at 24.

1987] THE FAILURE OF GENDER EQUALITY 625

where wealth is used absolutely to deny any access to a benefit was strict judicial review mandated.321 Second, the Court stated that despite the undeniable link between education and economic and political power, education was not a fundamental right, because it was not implicitly or explicitly granted by the Constitution.322 Except where the Constitution or precedent otherwise commanded, the Constitution would not be read to require rights to the provision of resources or the means to achieve full citizenship. Thus, the Court saw a clear distinction between positive and negative rights, and held that only negative rights were constitutionally mandated. The Court thus refused to construe the equal protection clause to give special protection to important substantive needs. In essence, the Court failed to uphold claims based on the interdependency of individuals. Although in some later cases such as Maricopa323 the Court occasionally appeared to uphold a welfare right, such as Rodriguez the Court generally has read the Constitution as essentially a guarantor of what the Court deems to be negative rights.324

B. The Impact of the Negative Rights Thesis on Gender Equality

The view that the Constitution does not create rights against the community has major implications for women's equality.325 The most obvious connection is economic. Because women as a group are economically disadvantaged,326 the view that the government need not provide
welfare benefits, disparately impacts upon women.

Dandridge is a clear example. Since at the time of the decision, AFDC was available only to single custodial parents (who are usually mothers), and their dependent children, and in some states, families with unemployed fathers, most recipients were single women and their children. Given the structure of AFDC, the Court's opinion becomes especially telling. The state's decision to place a per family cap on payments was accepted by the Court as a rational method of encouraging employment. But limiting per family rather than per capita grants is more tailored to restricting family size than to encouraging employment. As Professor Sunstein has noted, "[q]uite possibly, the statute reflected stereotypical conceptions about the poor in general and poor women in particular; that their poverty is a product of sloth, and they breed children to increase their welfare payments." Dandridge reflected an insensitivity to the gender bias of the state's policy.

Of equal importance, however, is Dandridge's message that women and not the state are responsible for problems of poverty and family size. Poor women with children have no claims of entitlement against the state. Indeed, just as discrimination law teaches that pregnant women are not entitled to "special treatment," so, too, Dandridge teaches that impoverished women with large families are not entitled to additional benefits. In both Dandridge and the pregnancy cases, the Court sees the benefits which women need because of their childbearing and childrearing roles as a matter of legislative grace, not constitutional entitlement.

The judicial inability to recognize the societal responsibility for women's economic condition is even more striking in the Supreme Court’s abortion funding cases. After the Supreme Court decided Roe v. Wade, many states covered the cost of elective abortions under the Medicaid program. As opposition to Roe intensified, several states discontinued coverage of elective abortions. In Maher v. Roe, the Court upheld that practice.

Maher stands as a polemic on the individualistic, liberal presuppositions of constitutional jurisprudence. It also demonstrates the limits of that jurisprudence for gender discrimination. The Court began its analysis by emphasizing that the Constitution does not create substantive entitlements. "The Constitution imposes no obligation on the states to pay the pregnancy-related medical expenses of indigent women, or indeed to pay any of the medical expenses of indigents." Nevertheless, the Court conceded, constitutional limitations must be observed with respect to the lines drawn by the state in dispensing benefits it has chosen to give. The question was whether the state drew the lines in a permissible fashion.

First, the Court relied on Dandridge and Rodriguez to find that although the Medicaid limitation affects only indigent women, it is not constitutionally suspect. Second, it found that although Roe v. Wade declared the right to an abortion to be fundamental, it was a purely negative right not to have the state unduly burden women's ability to have an abortion. This right was not impinged by the state's action because...

327. See Law, supra note 73, at 1255-56. The blatant sex-bias of the unemployed fathers program, which assumed that only male incomes are critical to a family, was remediable under standard discrimination theory. The unemployed father program was held unconstitutional in Califano v. Wescott, 443 U.S. 76 (1979). In some sense, the structure of AFDC can be seen as benefitting women because it denies coverage to single men. On the other hand, this is a reflection of the assumptions made in the 1930s about the inability of single women to support their children. While these assumptions may have been, and still are, rooted in economic reality, the structuring of the program that separates AFDC from other benefit programs, such as social security, reinforces the stigmatization and marginalization of poor women. For an excellent discussion of the patriarchal foundations of AFDC, see Law, supra note 73, at 1249.


329. Sunstein, supra note 286, at 73.

330. Undoubtedly the Maryland statute was also influenced by racial stereotypes. See also San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973), in which the Court was blind to the race discrimination issues underlying the state's policy.

331. See supra notes 312-14 and accompanying text.
tion). The indigency that may make it difficult — and in some cases, perhaps impossible — for some women to have abortions is neither created nor in any way affected by the Connecticut regulation.\(^{340}\)

As a result, the state regulation need only be scrutinized under the rational basis test, which it passed as a "rational means of encouraging childbirth."

In *Harris v. McRae*,\(^ {342}\) the Court reaffirmed and expanded its holding in *Maher*. *McRae* involved the federal Hyde amendment,\(^ {343}\) which prohibited the federal government from paying for Medicaid abortions except where the life of the woman would be endangered by carrying the fetus to term, or in cases of rape or incest that had been reported to a law enforcement or public health agency.\(^ {344}\)

The issues in *McRae* were even more difficult than those in *Maher*, because the Court was faced with the question whether medically necessary abortions could be excluded from the Medicaid program, which usually pays for medical services. With the issue thus framed, the government's action came perilously close to penalizing a woman for the exercise of a constitutionally protected choice,\(^ {345}\) an act proscribed by a considerable body of precedent.\(^ {346}\) Nevertheless, the Court upheld the Hyde amendment,\(^ {347}\) because the government placed no obstacle in the woman's path, but merely encouraged childbirth, in lieu of abortion.\(^ {348}\) In addition, the Court stated that even if *Roe* was concerned with a woman's health:


341. *Id.* at 479.


344. 448 U.S. 297, 302 (1980). In Williams v. Zbaraz, 448 U.S. 358, 369 (1980), the Court ruled that states need not pay under Medicaid for abortions which were not reimbursed by the federal government.


347. Justices Brennan, Marshall, Blackmun and Stevens dissented. Only Justice Stevens voted with the majority in *Maher v. Roe*, 432 U.S. 464 (1977), and dissented in *McRae*. His ground for the scope of Medicaid, while medically necessary abortions were within the scope of the statute. 448 U.S. at 349-50 (Stevens, J., dissenting).


349. *Id.* at 316. The Court also held that the Hyde amendment did not violate the equal protection clause of the fifth amendment. *Id.* at 322. Relying on *Maher*, the Court found that the amendment did not impose on a suspect class, *id.* at 323, and that it served the rational basis of protecting potential life, *id.* at 324. In addition, the Court held that the amendment did not violate the religion clauses of the first amendment. *Id.* at 319-21.

350. *Id.* at 318.

351. *Id.*

352. MacKinnon argues that this limited view follows directly from *Roe v. Wade*, 410 U.S. 113 (1973), and its view that abortion is a private, voluntary matter. See C. *MacKINNON*, supra note 1, at 93-102. The future of even this limited view of abortion rights now appears questionable. See supra note 333.

353. Although the *McRae* Court was untroubled by the effect of a government policy encroaching on the right to abortion, in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) the Court established a more exacting standard for determining the validity of a state's exercise of police powers that might infringe on property rights. In *Nollan* the Court held that a public access easement to private beachfront property, imposed as a condition to a rebuilding permit, amounted to a taking under the fifth amendment. The Court did not discuss whether the easement significantly diminished the value of the property and was unconvinced that the partial or indirect nature of the access rights amounted to less than a violation of the owner's rights under the fifth amendment.

woman's indigency is not the result of any state action. Yet, at least since the Legal Realists, it has been clear that the distribution of resources is partially a function of the legal allocation of property rights. This is especially true in the case of abortion. To say that women's indigency is prior to the state is to ignore the state's role in supporting discriminatory practices which have kept women from participating fully in the labor market. Indeed, it ignores the very lessons of those cases which recognized that centuries of discrimination have led to disparities in economic opportunities between men and women. Further, the Court is blind to the many subtle ways that the law interacts with the structure of the workplace to make women economically dependent. Indeed, what is so ironic about McRae and Maher is their failure to see that the inaccessibility of free abortions, combined with a legal system which does not require employers to grant maternity leaves, child-care leaves, or a flexible work schedule, creates the very indigency which prevents women from exercising the choice to have an abortion. As Justice Marshall has noted, the restrictions on Medicaid abortions may not force a woman either to risk an illegal abortion, or to give up all hope of escaping the cycle of poverty. Indeed, after McRae a woman must face

accord with our thesis that the positive/negative rights distinction is critical to understanding these cases. However, she is less critical of the Court's distinction. Id. at 730-31. State courts have also been highly critical of Maher v. Roe, 432 U.S. 464 (1977) and Harris v. McRae, 448 U.S. 297 (1980). See infra note 397.

355. Harris v. McRae, 448 U.S. at 316-17; Maher v. Roe, 432 U.S. at 474. Even Justice Brennan's dissent in McRae seemed to accept the validity of that assertion. 448 U.S. at 334 (Brennan, J., dissenting) (characterizing Medicaid benefits as "governmental largesse" and "governmental favors").

356. See, e.g., Cohen, Property and Sovereignty, 13 Cornell L.Q. 8, 13-14, 21-26 (1927) (discussing the role of law in protecting property and regulating property acquisition); Hale, Bargaining, Durest, and Economic Liberty, 43 Colum. L. Rev. 603, 605-06, 625-28 (1943) (describing the acquisition of property rights through market relationships).

357. See, e.g., Women's WORK, Men's WORK, supra note 43, at 41-46, passim (documenting institutional and legal factors supporting employment discrimination); Law, supra note 73, at 1286-1305 (describing how the welfare system and U.S. Department of Labor contribute to sex discrimination).


359. See supra notes 97-103 and accompanying text.

360. This is especially true in the case of women seeking Medicaid abortions. Other than dependent minors, most women seeking Medicaid abortions are single mothers. See Law, supra note 73, at 1256-79. Indeed, the eligibility of single mothers for AFDC represents some recognition by the legal system that this group is economically disadvantaged precisely because it is comprised of single mothers. See Law, supra note 73, at 1253-56, 1258-59, 1281.


1987]

THE FAILURE OF GENDER EQUALITY

that dilemma even when the pregnancy will not only impose an economic liability, but also a risk to her health, further jeopardizing her earning capacity.

The Court's inability to perceive the context of women's financial dependence recalls the sex discrimination cases. Although the doctrines are technically distinguishable, both the sex discrimination and abortion funding cases rely on an abstracted, ahistorical vision. Discrimination law follows a fault model in order to determine when plaintiffs may be treated differently. This inquiry centers upon the invidiousness of the defendant's motives. Similarly, the abortion funding and other fundamental rights cases rely heavily on the supposed "motives" and coerciveness of the legislature. Thus, in Dandridge the Court found the AFDC cap constitutional because the state could articulate a legitimate motive. And in McRae, the Court exonerated the legislature because it did not "cause" the underlying problem. All of these cases reflect the decontextualized nature of the inquiry, which sees neither individual defendants, nor the government, as having any responsibility to ensure that individuals achieve full equality and citizenship.

Other parallels between the fundamental rights and discrimination doctrines are equally striking. The Court's willingness to view the Hyde amendment as a decision not to fund abortions, rather than as a penalty imposed on women who have abortions, is premised on the assumption that abortions are somehow "different" from other medical services and can therefore be considered separately for funding purposes. Thus, McRae echoes Geduldig. Both presume that pregnancy is a "special" physical condition, and that benefits generally available need not be provided for pregnancy related conditions. The crucial assumptions are that pregnancy is a voluntary condition and that the norm is male — nonpregnancy. Thus, the same biases and limitations that appear in discrimination law inform fundamental rights analysis.

C. The Negative Rights Thesis and the Limits of Discrimination Law

The negative rights thesis suggests the limits of discrimination law

362. See supra notes 119-27 and accompanying text.


365. See id. at 317, n.19.

366. See Appleton, supra note 285, at 749.
to redress issues of gender inequality. Without a recognition that women's needs arise in the context of discrimination and interdependency, women will always be subject to the accusation that since their problems are of their own making, any solutions constitute special or preferential treatment. As a result, many essential claims of women will remain unfulfilled.

Any broad attempt to scrutinize the differential allocation of rights and benefits would thus recognize interdependency and society's obligations to ensure that women have the means for achieving full citizenship. This would not only run counter to the Court's denial of social responsibility for class and gender subordination, but it would make society an active provider of individual rights. The very nature of the relationship between the individual and the state would change.

Neither the similar treatment nor the different treatment theories can transcend this fundamental problem. The similar treatment approach is deficient in two essential ways. First, as the difference scholars point out, it cannot claim rights where women are not perceived to be situated similarly to men. Second, it cannot achieve its goal—gender-neutral solutions—because in so doing it runs up against the wall of individualism and the belief in negative rights. Thus, proponents of the similar treatment approach, who believe that the solution to the maternity leave conundrum is universal parenting leave are short-sighted. Equally short-sighted are the biological difference scholars who argue that courts should recognize the gender differences between the sexes and accommodate those differences by establishing maternity leaves.

The fundamental rights cases teach that the legal regime is not about to establish a constitutional right to either maternity leaves for women or parenting leaves for both sexes. Current jurisprudence dictates that in either case there is no constitutionally explicit or implicit right at stake. Of course, the legislature may provide such a right, but it is not required to do so. After all, the burdens faced by those who cannot afford the consequences of either losing a job or paying for childcare are not the government's "fault." The government did not force the individual to have a child; nor is it responsible for the lack of parental resources to hire a caregiver. Thus, the failure to provide parenting leaves does not "impinge" on any rights. After all, "the Constitution does not provide judicial remedies for every social and economic ill." Of course, most feminists do not claim a constitutional right to maternity or parenting leaves. What they advocate are legislative programs. But even if enacted, such programs are vulnerable both judicially and politically to the force of the negative rights thesis. Indeed, the thesis is so powerful in constitutional law precisely because it resonates with deeply held political visions and intuitions that extend beyond constitutional interpretation.

This is not to say that there are no social welfare programs. Rather, it is to say that women seeking programs to accommodate their needs are vulnerable to the charge of being a "special interest group," whether or not the program advocated is couched in gender neutral terms. Our society does not recognize the deep interrelationships between its own structure and the needs of women seeking substantive rights. Thus, the history of social welfare legislation primarily affecting women (such as AFDC), is the history of political vulnerability and increased marginalization. Like pregnancy, these programs are not seen as fulfilling the public interest.

367. Professor Fox-Genovese argues that individualistic ideology represents a major stumbling block for the women's movement. See Fox-Genovese, Women's Rights, Affirmative Action and the Myth of Individualism, 54 GEO. WASH. L. REV. 338 passim (1986). Others have argued even more broadly that legal rights themselves can never advance equality. See, e.g., Olsen, supra note 22 (discussing incoherencies that arise from application of rights theory to sexuality); Tushnet, An Essay on Rights, 62 TEX. L. REV. 1363, 1364-94 (1984) (discussing inherent instability of right of reproductive choice). For a feminist response arguing that rights dialectically interact with political movements, see Schneider, The Dialectic of Rights and Politics: Perspectives From the Women's Movement, 61 N.Y.U. L. REV. 589 (1986). In this Article, we do not engage in the debate over the nature or efficacy of rights in the abstract. We primarily examine the limitations in the current interpretation of rights i.e., as negative rights.

368. See 410 U.S. at 33.
The vulnerability of such legislation is exacerbated by a jurisprudence which considers social welfare classifications to be matters of legislative discretion, and upholds them if they are minimally rational.\textsuperscript{378} Thus, while there is good reason and a strong need for feminists to pursue the political process and seek legislative redress for their claims, they need to recognize that the deep, underlying negative view of government's role that hampers their success in the courtroom will also affect their success in the legislative arena.

D. The Gender Bias of the Negative Rights Thesis

Thus far we demonstrated how the Court has relied upon a highly individualistic, abstracted view of rights in both discrimination and welfare rights cases. This narrow, negative vision of women's legal rights fails to see the social context in which women's claims arise and consequently devalues their experiences. The result is that women's entitlements against society are dismissed as demands for special treatment.

Notwithstanding the Court's limited view of the Constitution in these areas, the Court in other areas is far more expansive. Indeed, in many cases the Court has effectively recognized the type of right rejected in \textit{Rodríguez} and \textit{McRae}. In the next two sections we show how the demarcation between the claims the Court accepts or rejects as positive or negative rights is a contingent one, and how the determination reached is itself influenced by non-sex neutral norms.

A comparison between \textit{Sherbert v. Vernor}\textsuperscript{379} and \textit{Wimberly} is illustrative. Both involved unemployment compensation claims by individuals unable to work because of the structure of the workplace. In \textit{Sherbert} the plaintiff was a Seventh Day Adventist who was unable to secure employment because of her unwillingness to violate her faith by working on Saturday. As a result, she was deemed "able to work and... available for work" and thus ineligible for unemployment compensation under state law.\textsuperscript{380}

The \textit{Sherbert} Court saw that the denial of unemployment benefits burdened the exercise of religion.\textsuperscript{381} The fact that the statute did not expressly discriminate against religion, and that technically plaintiff was denied benefits because of her inability to work, did not lessen the coer-

\textsuperscript{379} \textit{Id.} 374 U.S. 398 (1963).
\textsuperscript{380} \textit{Id.} at 400-01.
\textsuperscript{381} \textit{Id.} at 404. This holding was recently reaffirmed in \textit{Hobbie v. Unemployment Appeals Comm'n}, 480 U.S. 136 (1987).

[1987] THE FAILURE OF GENDER EQUALITY

... on religious liberty.\textsuperscript{382} Nor did the fact that the state had no duty to provide anyone with unemployment compensation absolve the state of its obligation to draw lines in a noncoercive manner.\textsuperscript{383}

The \textit{Sherbert} Court did not hold that the plaintiff was entitled to special treatment,\textsuperscript{384} which could arguably be viewed as a violation of the establishment clause. Rather, the Court held that the government could not penalize the plaintiff. In \textit{Wimberly}, however, despite FUTA's clear prohibition against discrimination due to pregnancy, which can be seen as paralleling the Constitution's explicit protection of the free exercise of religion, the Court failed to see the coercion inherent in the state scheme or how the state program adversely impacted on pregnancy. Instead, the Court charged the plaintiff with seeking a special exception for women.\textsuperscript{385} Thus, the special treatment (or establishment) question which was downplayed in \textit{Sherbert} became dispositive in \textit{Wimberly}. What treatment is "special" depends on how you look at it.

Clearly, \textit{Wimberly} was influenced once again by the primacy of the public sphere ideology and its assumption that women who are pregnant are unique and can be treated differently. In contrast, religious observance is not a "peculiarly female" activity. Some accommodations for religion, particularly those religions which do not deviate much from the majoritarian faiths,\textsuperscript{386} are not viewed as extraordinary but necessary. What \textit{Wimberly} and \textit{Sherbert} together show is that what appears as "special treatment" and therefore a violation of the negative rights thesis, is predicated on deeply held assumptions and values, which are not sex-neutral.\textsuperscript{387}

The abortion funding cases provide an even more telling example of

\textsuperscript{382} \textit{Sherbert v. Vernor}, 374 U.S. at 404.
\textsuperscript{383} \textit{Id.}
\textsuperscript{384} Justice Stewart in a concurring opinion saw the holding as requiring special treatment, and approved of it on that account. He stated "[I] think our Constitution commands the positive protection by government of religious freedom. . . ." 374 U.S. at 416 (Stewart, J., concurring).
\textsuperscript{385} 479 U.S. at 518.
\textsuperscript{387} This is not to say that "sexism" explains \textit{Sherbert}. Rather, it is to say that the importance and value of religion and religious tolerance is widely recognized and valued, albeit not in all court cases, e.g., \textit{Wisconsin v. Yoder}, 406 U.S. 205, 224 (1972); \textit{Abington School Dist. v. Schempp}, 374 U.S. 203, 240 (1963) (Brennan, J., concurring); \textit{Zorach v. Clauson}, 343 U.S. 306, 313 (1952). These activities are traditionally associated with the male or public sphere. Pregnancy and child-rearing are associated with the private sphere. Accommodations for them in the public sphere are seen as preferential treatment, rather than the lack of coercion.
the impact of the gender bias behind the Court’s categorization of rights as positive or negative. In *Maher* and *McRae* the Court saw the issue as whether or not a governmental obligation existed to finance abortions. So framed, the answer clearly was ‘no.’ There are, however, other ways to state the issue.

Professor Tribe, for example, sees the right to an abortion as a relational right of women as a group against the subordination that follows when any woman lacks control over her reproductive destiny. Under this vision, Tribe is able to argue that abortion rights are inalienable because they concern the place of women in society. Therefore abortion rights, like suffrage, cannot be predicated on financial resources. Although few jurists have gone as far as Tribe in portraying the right to an abortion in non-individualistic terms, many have found the Hyde amendment or similar state laws to infringe on the right to abortion.93

For Justice Brennan, Congress’ decision to fund one potential outcome of pregnancy—childbirth—while not funding another potential outcome, abortion, is critical.92 By not treating the two outcomes equally, Brennan argues, the state has effectively coerced the indigent woman into choosing childbirth93 and has made “an offer that the indi-

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938. See Tribe, supra note 354, at 335-36.
939. Id. at 334-38.
940. Cf. Fox-Genovese, supra note 367, at 372 (feminists have espoused the right to an abortion in radically individualistic terms, which is in contradiction to feminists’ calls for affirmative action and comparable worth).
933. Id. at 333-34. The problem with Brennan’s analysis is his acceptance of the proposition that the state has no prior obligation to fund either abortion or childbirth. Id. at 330. Were the state to take that position, indigent women would certainly be worse off than they are under the Hyde amendment. This is not to say that the majority was correct in its formalistic assertion that the greater power implies the lesser. Rather, it demonstrates the relational and contextual nature of the problem, and the fact that the need for abortion funding cannot be severed from the overarching need for economic support for childbearing activities. See Tribe, supra note 354, at 341-43.
against governmental interference with decisions about family size. The interesting question is why the Court chooses to exercise its power to denominate rights as negative in some cases and not in others.

There is no fully satisfactory answer. Some of the inconsistencies in the caselaw are no doubt due in large part to the changing composition of the Court, the changing political climate in the nation, and the fears of judicial illegitimacy and manageability. In addition, the choices the Court makes coincide, to a large degree, with deep-seated intuitive beliefs about baseline norms of society. And these norms, in turn, reflect the underlying public sphere ideology of the nature of rights and obligations. Thus the universality of this ideology causes difficulties not only for discrimination law, but also for a fuller vision of rights.

For example, the issues at stake in a decision to abort are seldom purely individualistic. Rather, a woman is often faced with concerns not only for herself, but for her other children and family. But the Court's individualistic stance blinds it to the relationships involved in the decision. Moreover, the Court fails to see that the control over procreation affects the status and citizenship of all women. Unless all women have that power, their subordination and dependency is perpetuated. In addition, the problems faced by pregnant poor women stem in large part from the legal and institutional structures which have kept women financially dependent. Thus, the Court's analysis derives from its inability to see the interdependency between indigent women and society.

The hidden assumptions in the abortion funding cases reflect more than a mere insensitivity to the problems faced by poor women. Like Geduldig and Wimerly, they are evidence that the baseline assumptions the Court (and, to a large degree, society) make about the obligations among individuals reflect a model predicated on the images of white, middle-class males. The image of the individual as autonomous, and as wielding procreative rights only against the state, is an image reflecting the male experience. For most women, for whom sexuality itself has tra-nectionally been an experience of dependency, the notion of a self-sufficient individual independently exercising her right to an abortion is terribly incomplete. The interrelationship among reproduction, economic dependence, morality, and private sphere values is far more complex than the Court comprehends. Yet, the decision about an affirmative right or, indeed, any right to an abortion, has been based on the underlying notion that individuals are self-sufficient and autonomous in that regard.

Many feminists, perhaps for strategic reasons, have made the same error as the Court and have asserted that the right to an abortion is a private, negative right. On the other hand, opponents of abortion take what at first glance appears to be a relational approach, emphasizing the woman's responsibility to the fetus and the primacy of public morality. Both sides fail to recognize the critical point; women and society are not in an adversarial relationship. Women's right to abortion is hollow without a recognition of society's obligation to provide for both procreative control and childrearing. More generally, women cannot be fully equal citizens unless their interdependency with the rest of society is recognized. At the same time, society and its children are impoverished by the disempowerment of women. Thus, equality requires both the independence and the interdependence of women and society. As the abortion cases show, however, reliance on the ideology of the public sphere and its distorted emphasis on independence makes equality for women impossible.

E. The Rights of the Public Sphere

The influence of this ideology explains the lack of positive entitlements to private sphere needs such as medical care, housing and personal income. These are the "goods" that most central to women's concerns. Yet, under public sphere ideology, despite their undeniable necessity, society feels no obligation to provide for these needs. Whatever is offered is mere privilege.

406. C. MacKINNON, supra note 1 at 36; Olen, supra note 46, at 1574-75.
On the other hand, as Sherbert illustrates, the law does sometimes recognize a broader vision of rights, in which society is obligated to accommodate the needs of individuals. Rights of access to the legal system are a prime example. In several cases, the Court has found a substantive entitlement to at least minimal access to the courts.412 In part this reflects the centrality of the legal process itself in our system. Access to suffrage is another example.413 The question arises, why are these rights recognized by a legal system which often rejects claims for social entitlements?

The Court justifies its decisions on the theory that voting and legal representation are preservative of other rights.414 But, of course, as dissenters have pointed out, there are other goods which are necessary to preserving freedom.415 What distinguishes voting and legal access from these goods is their connection to the public sphere. Access to them, therefore, is access to the world of men.

In addition, both rights to the court system and to suffrage are process rights. They do not require taking diversity or "special" needs into account. Nor do they threaten the apparent distinctions between the public and private spheres. They are consistent with formalistic notions of equality.

As in the case of discrimination law, the Court is elevating concerns for process over substantive result.416 Process rights are seen as critical because they ensure a "level playing field,"417 and thus give each citizen the "equal opportunity" to compete in the public sphere. The equal opportunity that is achieved, however, exists—if at all—only in the abstract. The emphasis on process therefore is formalistic and decontextual. It reflects the individualistic, competitive, rights-based ethos associated with the public sphere ideology. It stands in stark contrast to the relational, interdependent, and highly contextualized world associated with the private sphere. Thus the rights we recognize are due in part to a non-gender neutral value system.

Rights that coincide with individualistic notions of equal access and fair procedures are not perceived as special rights, but as rights necessary to prevent coercion or unfair advantage. While such rights also apply to women, they do not address the burdens and disadvantages of women's lives. Yet, other rights are denied to women because their claims are seen as affording preferential treatment for private concerns, and thereby expanding the role of government into the private realm. Thus we have no access rights to childcare, medical or nursing care. Finding such rights sounds constitutionally dissuasive and therefore judicially illegitimate. Indeed, such rights seem so foreign that their recognition appears to be unmanageable. The result is that we see such rights as demands for substantive entitlements contrary to a liberal society.

Thus the dilemma: discrimination law cannot achieve gender equality because to do so violates the negative rights thesis, but the negative rights thesis is itself a product of non-sex neutral norms. Thus the issues and problems under both discrimination law and fundamental rights law are the same. Each strand of constitutional discourse reinforces the perception that what women claim is beyond the reach of the law. Thus, feminist claims are dissuasive, and somehow beyond the scope of our jurisprudence.

V. CONCLUSION

The way out of the conundrum impeding gender equality is difficult to locate. We can postulate clever doctrinal models to establish a right to this or that to benefit women, but all such arguments will have little impact. All will appear to demand some special, substantive entitlement from government, to which no one is entitled.

As we have shown, discrimination law fails to provide any but the


415. See, e.g., San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. at 63 (Brennan, J., dissenting). Education is a good that certainly falls in that category. The Court has effectively made education a quasi-positive right. Rodriguez held that it was not a fundamental right, but suggested that the state was required to provide a minimal amount of education. Id. at 24. Plyler v. Doe, 457 U.S. 202 (1982), repeated that education was not a fundamental right, but nevertheless held that it was a right entitled to greater judicial protection than other social welfare programs. Id. at 221. Thus in Plyler, the Court scrutinized the state statute denying illegal aliens public education with more rigor than usual under the rational basis test. Id. at 226-28.

416. See supra text accompanying notes 238-52.

417. This is one of the assumptions that underlies Ely's representation—reinforcing theory of judicial review. J. ELY, DEMOCRACY & DISTRUST (1980), passim.
most narrow and interstitial of remedies. It cannot address the structural
inequities of the labor market that make rights of equal access hollow for
women struggling to fulfill familial obligations. Nor can it provide the
broadened vision of social entitlements or affirmative obligations neces-
sary for achieving gender equality.

Moreover, the same shortcomings impede constitutional jurispru-
dence, which perceives a distinction between positive and negative rights,
and dismisses the social, particularly economic, entitlements necessary
for gender equality as improper claims for positive rights. Thus, neither
discipline can recognize the interdependency of public and private life
that is critical for gender equality.

Ultimately, the problem lies not so much with any single legal doc-
trine, but with the ways in which legal doctrine itself is formulated.418 In
discrimination law, it is the abstraction and denial of the historical and
social context of cases that blinds the Court to the sex-biased results that
derive from supposedly sex-neutral rules. The same method of reasoning
is employed to the same end in the fundamental rights cases. The manip-
ulation of both doctrines obscures the Court's inability to recognize the
non-sex neutral baseline assumptions behind the Court's analysis. In
both doctrines, the concern for process, for formal rules, and for clearly
delineated rights takes precedence over an understanding of the real-
world context in which cases arise.419

The indictment is more than a charge of excessive formalism. It is,
instead, a criticism of doctrines that view equality and the need to decide
similar cases similarly from far too limited a perspective. Some scholars
have argued that a feminist perspective would broaden and expand these
broad horizons.420 It would infuse into the Court's vision an apprecia-
tion of the relational, non-individualistic aspects of legal problems.421
Such an additional perspective would certainly have changed the Court's
analysis in the pregnancy and abortion funding cases.

418. Others have also made the charge that legal doctrine cannot be neutral. See, e.g., D.
Kennedy, From Substance to Privilege Law: The Case of German Constitutional Law, 58 HARV. L. REV. 771, 778-79
(1945).

419. See Finley, Book Review, supra note 57, at 914-23; Scales, supra note 54, at 1360.
420. See Karst, supra note 245, at 486-96; Sherry, supra note 277, at 615. Our approach is
influenced by Professor Scales who argues that merely "incorporating" the feminist or feminine
perspective into our current notion of rights is inadequate. Scales, supra note 54, at 1382. She argues
that feminism reveals the need radically to alter our jurisprudential priorities and stress facts over
rules. Id. at 1388. She sees a feminist jurisprudence as emphasizing differentiation. Id. at 1387. We
depart from her, however, when she turns to a psychoanalytically-based model. See Minow, The
421. See Karst, supra note 245, at 494-95; Sherry, supra note 277, at 581-82.

422. See supra text accompanying notes 55-107.
and rights. Again, the context would disappear and we would lose sight of how to achieve equality for real individuals, facing experiences and dilemmas both unique to them and interconnected with society.

The result of a more multifaceted or contextual approach to equality may at first glance appear to be discordant with traditional ideals of justice. After all, it would not attempt to develop rules that cross-cut factual contexts. Nor would it provide outcome determinative formulas. It would instead attempt to recognize the context in which claims arise, and in such a setting strive as best as possible to promote goals such as independence, interdependence, and diversity, which are crucial to ensuring full citizenship for all individuals and an end to subordination.

The charge against such an approach is that it invites excessive judicial discretion and bias. The charge is not specious, but must itself be taken in context for the regime we now have is not one of neutral rules.\textsuperscript{425} On the contrary, it is a regime of rules that support male values and perpetuate institutional arrangements which have subordinated women. Thus, a move to a more contextualized understanding will not add to the power or function of the courts. It will only change the nature of the inquiry, hopefully to one which, by its actual process, does not discount the very real social and biological lives experienced by over one half of the human race.

\textsuperscript{425} This is a central teaching of both the legal realists and the critical legal studies scholars. See R. Gordon, \textit{New Developments in Legal Theory}, in \textit{The Politics of Law} 281 (D. Kairys ed. 1982).