SEX DISCRIMINATION IN THE SUPREME COURT—A COMMENT ON *SEX EQUALITY, SEX DIFFERENCES, AND THE SUPREME COURT**

EARL M. MALTZ**

Like jurisprudence generally, constitutional theory is currently suffering through something of an identity crisis. The rhetoric of neutral principles no longer dominates scholarly discourse; in its place one finds a diverse variety of approaches to constitutional analysis, each claiming to provide unique insights into the process. Prominent among these approaches are explicitly normative theories which argue that one should evaluate the work of the Supreme Court in terms of its effect either on some specific substantive value such as economic efficiency or on a more general scheme of political or economic values such as democracy or socialism.

Feminist jurisprudence is one of the most vibrant of the explicitly normative theories. Downplaying institutional concerns, this approach focuses on the effect that constitutional adjudication has on the ongoing efforts to redefine sex roles in America. Typically, adherents to the feminist approach argue for greater judicial activism to advance the cause of sexual equality.

Professor Ann Freedman's recent *Yale Law Journal* article, "Sex Equality, Sex Differences, and the Supreme Court"[1] is a paradigmatic example of the feminist approach to constitutional jurisprudence. Ambitiously surveying a wide range of sex discrimination cases, Professor Freedman explores the impact that the various analytic frameworks adopted by the Court have not only on the law itself, but also on more general societal attitudes toward sex role differentiation. Her article yields important insights into these issues; it also, however, reveals the limitations of feminist jurisprudence as a tool for understanding the process of constitutional adjudication.

Using Professor Freedman's article as a model, this comment will explore those limitations. The comment will briefly outline her approach, analysis, and conclusions, and then discuss their limitations.

---

* Freedman, *Sex Equality, Sex Differences, and the Supreme Court*, 92 YALE L.J. 913 (1983).

** Associate Professor of Law, Rutgers University School of Law, Camden, N.J.

1. 92 YALE L.J. 913 (1983).

I. PROFESSOR FREEDMAN'S APPROACH—AN OVERVIEW

Professor Freedman's analysis begins with a description of the Supreme Court's performance in sex discrimination cases. She views the Court as split into "warring factions"[2] and as having "oscillated between two different approaches to legislative sex classifications, reflecting opposing views about the nature and significance of such classifications."[3] According to Freedman, one faction is composed of Chief Justice Burger, Justice Rehnquist, and now-retired Justice Stewart, the other of Justices Brennan and Marshall, "usually supported by Justice White and recently joined by Justice O'Connor."[4] Each faction is described as pursuing a generally unified approach. The balance of power is seen as resting with a group of "swing" justices—Blackmun, Powell, and Stevens—whose own perspectives do not consistently align them with one faction or the other.[5]

Although Professor Freedman is dissatisfied with the approaches of both major factions, she is unsparing in her criticisms of Justices Rehnquist and Stewart. Viewing their approach as one based on the theory that sex discrimination is lawful if related to a "real" difference between the sexes, she argues that Justices Rehnquist and Stewart have an unduly broad conception of the "reality" of the differences between the sexes.[6] This conception she contends, is derived on large part from "unreflective biological determinism."[7] Thus, Professor Freedman concludes that the Rehnquist-Stewart approach "obscures our collective responsibility for making the choices that will determine whether pervasive inequalities between the sexes will remain or be eliminated."[8]

By contrast, Professor Freedman views the Brennan-Marshall approach with some ambivalence. Perceiving this approach as based on a moral critique of sexism, Professor Freedman lauds Justices Brennan and Marshall for "contribut[ing] in important ways to the ongoing debate about the meaning and desirability of equality between the sexes . . . [by] demonstrat[ing] the feasibility of sex-neutral alternatives to the stereotyped thinking about the sexes that underlies the challenged rules."[9] But while generally satisfied with their ultimate conclusions, she is less enamored of the primary thrust of the Brennan-Marshall opinions.

2. *Id.* at 922.
3. *Id.* at 924.
4. *Id.* at 925, 927.
5. *Id.* at 929-30.
6. *Id.* at 944-45.
7. *Id.* at 952.
8. *Id.* at 949.
9. *Id.* at 952.

These opinions, she notes, typically argue that the challenged discrimination is invalid because it lacks a sufficiently close relationship to the government's objective. Professor Freedman contends that this mode of argument conveys the message that "only irrational sex classifications are harmful or necessary to change" and therefore does not adequately deal with "hard" cases—"situations in which the pursuit of sex equality is difficult or costly and in which the use of sex classifications is therefore arguably rational."[10]

To address these "difficult" situations, Professor Freedman proposes that the Court adopt an "explicitly normative theory of sex equality that identifies with some particularity the dynamics and harmful consequences of sexism."[11] She first argues that such an approach would be consistent with American constitutional history.[12] The article then describes the parameters of her proposed theory, and concludes by asserting that an "increased emphasis in judicial decisions on explicit debate about the values at stake in sex discrimination cases would contribute significantly to the struggle for equality between the sexes."[13]

Professor Freedman thus deals with the Supreme Court's sex discrimination jurisprudence on a number of different levels. She is quite successful in her attempts to place the developing case law in the overall context of the more general debate on the meaning of sex roles in society. However, to the extent that her article purports to describe the process by which the Court reaches its decisions in sex discrimination cases, it leaves a somewhat incomplete and misleading impression.

II. THE VOTING PATTERN OF THE JUSTICES

One of the most striking features of her analysis is its treatment of the three justices who might be collectively referred to as the "conservatives." While conceding that the positions of the conservatives differ somewhat with respect to sex discrimination cases,[14] Professor Freedman views these differences as relatively unimportant. She regards the approaches of Chief Justice Burger, and of Justices Rehnquist and Stewart as sufficiently similar to characterize them as a cohesive group with an essentially unitary form of analysis—an analysis that can be effectively contrasted with both that of Justices Brennan and Marshall and those of the various "swing" justices. As a result, her article substantially under-

10. *Id.* at 952, 960-61.
11. *Id.* at 961.
12. *Id.* at 961-64.
13. *Id.* at 968.
14. *See id.* at 927-28.

states the depth and significance of the differences among the three conservatives.

This point is illustrated by the voting patterns in cases involving constitutional challenges to facially discriminatory statutes. The patterns of former Justice Stewart and Chief Justice Burger are quite similar; the two split on the results in only two cases,[15] and in one of those Chief Justice Burger relied on a procedural ground.[16] Justice Rehnquist, by contrast, has shown more divergence from each of his conservative colleagues. He split with Chief Justice Burger on four occasions,[17] three explicitly on the merits,[18] and from former Justice Stewart no less than six times, four of which were on the merits.[19]

The significance of these figures becomes more apparent when one compares Justice Stewart's record with that of each of the swing justices. He differed from Justice Powell in only three cases—one of which focused on a procedural issue[20]—and from Justices Stevens and Blackmun on two occasions each.[21] Thus, Justice Stewart's voting record would

15. Orr v. Orr, 440 U.S. 268 (1979) (Stewart, J., joining the majority opinion striking down statute; Burger, C.J., joining the dissent on a procedural ground); Craig v. Boren, 429 U.S. 190 (1976) (Stewart, J., concurring in the judgment striking down statute; Burger, C.J., dissenting).

16. *See* Orr v. Orr, 440 U.S. 268, 290-300 (1979) (Burger, C.J., joining in the dissenting opinion of Rehnquist, J., which was based on a lack of standing).

17. Wengler v. Druggist Mut. Ins. Co., 446 U.S. 142 (1980); Stanton v. Stanton, 421 U.S. 7 (1975); Taylor v. Lousiana, 419 U.S. 522 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973).

Taylor was not an equal protection case per se; instead, it was a sixth amendment challenge to a Louisiana system which automatically made men eligible for jury service but required women to file a written declaration of their desire to be chosen. Nonetheless, the Court clearly dealt with the case as one involving sex discrimination, repeatedly framing the issue in terms of the "systematic exclusion of women," *Taylor*, 419 U.S. at 531, and rejecting by implication the argument that the criminal defendant would have to show prejudice ultimately to prevail. *See id.* at 538 (Rehnquist, J., dissenting).

18. Rehnquist dissented in Stanton v. Stanton, 421 U.S. 7 (1975), on procedural grounds. *See id.* at 18-20 (Rehnquist, J., dissenting) (arguing that the Court should have declined to reach the constitutional issue in view of policy against unnecessary constitutional adjudication).

19. Rehnquist and Stewart disagreed on the merits in Wengler v. Druggist Mut. Ins. Co., 446 U.S. 142 (1980), Craig v. Boren, 429 U.S. 190 (1976), Taylor v. Louisiana, 419 U.S. 522 (1975), and Frontiero v. Richardson, 411 U.S. 677 (1973); *see also* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (constitutionality of requiring pregnant women to take unpaid maternity leave) (Rehnquist, J., dissented from the majority opinion authored by Stewart, J.—which held the mandatory maternity leave rules unconstitutional because they relied on an irrebuttable presumption of incapacity—on grounds that disapproving irrebuttable presumptions would jeopardize the validity of many other statutes). See *infra* note 38 on *LaFleur* and other cases involving discrimination on the baisis of pregnancy.

Justices Rehnquist and Stewart differed on proeedural issues in Orr v. Orr, 440 U.S. 268 (1979), and Stanton v. Stanton, 421 U.S. 7 (1975).

20. On the merits, Justices Stewart and Powell differed in Caban v. Mohammed, 441 U.S. 380 (1979), and Califano v. Goldfarb, 430 U.S. 199 (1977). They split on a procedural question in Orr v. Orr, 440 U.S. 268 (1977).

21. The cases in which Justices Stewart and Blackmun split were Caban v. Mohammed, 441 U.S. 380 (1979), and Parham v. Hughes, 441 U.S. 347 (1980). The cases in which Justiees Stewart

suggest that he was more closely aligned with the Court "moderates" than with the extremely conservative Justice Rehnquist.

Further, Justice Stewart's basic mode of analysis differs substantially from that of Justice Rehnquist in a number of areas of sex discrimination law. Professor Freedman herself notes these differences in her discussion of cases involving facial discrimination against men.[22] Although joining with Justice Rehnquist and Chief Justice Burger in most such cases, former Justice Stewart demonstrated a willingness to apply a standard of review at least marginally more stringent than the traditional rational basis test.[23] Justice Rehnquist and Chief Justice Burger, by contrast, have evinced no such inclination.[24]

If Justice Stewart's "defection" in these cases were the only contrary evidence, one might still plausibly maintain that the three conservatives pursue the same basic approach to sex discrimination cases. But differences emerge in other areas as well. One such area is the analysis of the scope of disparate impact analysis under Title VII. In *Dothard v. Rawlinson*,[25] all three conservatives agreed that proof that an employment criterion has a disproportionate sexual impact places a burden of justification on the employer. The concurring opinion of Justice Rehnquist and Chief Justice Burger, however, indicates that they believe the burden should be less onerous than that suggested by former Justice Stewart's majority opinion.[26]

---

and Stevens reached different conclusions were Michael M. v. Superior Ct., 450 U.S. 464 (1981), and Califano v. Goldfarb, 430 U.S. 199 (1977).

22. Freedman, *supra* note 1, at 928 & n.72.

23. *See* Orr v. Orr, 440 U.S. 268, 279 (1979) (Stewart, J., joining majority opinion) (gender classifications must be substantially related to important government objectives); *see also* Craig v. Boren, 429 U.S. 190, 214-15 (1976) (Stewart, J., concurring in the result) (state's discretion to control alcoholic beverages does not empower it to act irrationally or to discriminate invidiously). *See generally* Maltz, *The Concept of the Doctrine of the Court in Constitutional Law*, 16 GA. L. REV. 357, 383-87 (1982) (describing framework of Stewart's approach to discrimination against males).

24. In Michael M. v. Superior Ct., 450 U.S. 464 (1981), Justice Rehnquist and Chief Justice Burger did acknowledge that the Court has held that the traditional rational basis test takes on a "somewhat sharper focus" in cases involving discrimination against men. *Id.* at 468 (plurality opinion of Rehnquist, J., joined by Burger, C.J., et al.). Each, however, has indicated that he would prefer to use rational basis analysis in such cases. Craig v. Boren, 429 U.S. 190, 217-18 (1976) (Rehnquist, J., dissenting); *id.* at 215-17 (Burger, C.J., dissenting). Further, Justice Rehnquist has never voted to strike down as unconstitutional a statute that discriminates against men. Although Chief Justice Burger did cast such a vote on one occasion, *see* Wengler v. Druggist Mut. Ins. Co., 446 U.S. 142, 142 (1980), his vote in that case seems to have been a product of other factors. *See* Maltz, *supra* note 23, at 379-80 (stare decisis the principal factor).

25. 433 U.S. 321 (1977).

26. *Compare id.* at 337-40 (Rehnquist, J., concurring in the result) *with id.* at 328-31 (Stewart, J., writing for the majority). Professor Freedman notes the existence of these different opinions without comment. Freedman, *supra* note 1, at 928 & n.73.

In cases involving constitutional challenges to facial discrimination against women, the differences among the conservatives are even more striking. A full analysis of the six such cases in which all three of the conservatives participated suggests that Justice Rehnquist is pursuing an independent course. Justice Rehnquist did join in an opinion with the other conservatives in *Califano v. Westcott*.[27] In that case, a unanimous Court struck down a provision of the Social Security Act that discriminated against women. Rather than joining the majority opinion in *Westcott*, the three conservatives concurred in Justice Powell's separate opinion, but that concurring opinion did not discuss the standard against such discriminations were to be measured; instead, after acknowledging in one sentence that the challenged discrimination was unconstitutional, the opinion was directed entirely to the issue of the appropriate remedy.[28] And in in one case—*Kirchberg v. Feenstra*[29]—Justice Rehnquist joined Justice Stewart in a concurring opinion that found the challenged discrimination to be unconstitutional.[30] But the five other cases contain little evidence of a joint approach; instead, there are a number of indications that Justice Rehnquist is committed to an approach quite different from that of any other member of the Court. In two of these cases—*Frontiero v. Richardson*[31] and *Taylor v. Louisiana*[32]—he stood alone in voting to reject the constitutional challenge, while the other conservatives both voted with majorities that struck down the challenged statutes. In *Stanton v. Stanton*,[33] Rehnquist was once more alone in dissent; in this case, however, his dissent was on procedural grounds.[34] Finally, while joining a unanimous Court in voting to strike down the gender-based discrimination at issue in *Weinberger v. Wiesenfeld*,[35] Justice Rehnquist concurred only in the result; his separate opinion argued that the statute was unconstitutional because the discrimination did "not rationally serve any valid legislative purpose."[36] By contrast, Chief Justice Burger and Justice Stewart joined in Justice Brennan's majority opinion which focused on the fact that male and female wage-earners with minor children were "similarly situated."[37]

27. 443 U.S. 76 (1979).

28. *Id.* at 93-96. (Powell, J., concurring in part, dissenting in part).

29. 450 U.S. 455 (1981).

30. *Id.* at 463 (Stewart, J., concurring in the result); *see also* Geduldig v. Aiello, 417 U.S. 484 (1974), *discussed infra* note 38.

31. 411 U.S. 677 (1973).

32. 419 U.S. 522 (1975).

33. 421 U.S. 7 (1975).

34. *See supra* note 18.

35. 420 U.S. 636 (1975).

36. *Id.* at 655 (Rehnquist, J., concurring in the result).

37. *Id.* at 653. Burger also joined Justice Powell's concurring opinion. *See id.* at 654-55.

In short, in sex discrimination cases,[38] Justice Rehnquist has exhibited a substantial degree of independence from both Chief Justice Burger and former Justice Stewart. If one is concerned solely with implications for feminist theory, these differences might well be dismissed as insignificant. The differences are largely confined to "easy" cases—cases in which even a large number of those who would not identify themselves as feminists might find the challenged discrimination to be so arbitrary as to be objectionable. In virtually all of the "hard" cases—cases in which some plausible justification exists for the sex classification—the conservatives have voted together. Because it is primarily with the latter group of cases that feminist theory is concerned, from that perspective the differences among the conservatives might seem uninteresting or even trivial. But if one is concerned more specifically with the functioning of *the Court* in sex discrimination cases, these differences assume far more importance. They reflect significant differences in the viewpoints of the justices regarding the judicial role generally—differences that are reflected not only in sex discrimination cases, but in other areas as well.[39] The next section will explore the role played by factors that are outside the scope of—and hence ignored by—feminist theory, but which nonetheless influence judicial decisionmaking in sex discrimination cases.

---

38. Although most commentators view discrimination on the basis of pregnancy as a species of sex discrimination, *see* Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 983-84 (1984), cases such as Geduldig v. Aiello, 417 U.S. 484 (1974), are better analyzed separately. In *Geduldig*, Justice Rehnquist joined Justice Stewart's majority opinion applying the rational basis test to reject a challenge to a California law which excluded expenses resulting from normal pregnancy from coverage by a disability program. Justice Stewart's analysis, however, was based on the proposition that pregnancy-based classifications do not constitute sex discrimination. *See id.* at 496-97. Thus, the *Geduldig* opinion does not necessarily reflect the views of either justice on the question of what standard of review should be applied generally in cases involving sex discrimination.

In any event, *Geduldig* cannot be considered in isolation. The Supreme Court has decided a number of constitutional cases dealing with pregnancy-based discrimination in a variety of forms, and in two of those cases Justices Rehnquist and Stewart have split. Turner v. Department of Employment Sec., 423 U.S. 44 (1975) (per curiam opinion; Stewart, J., in the majority; Rehnquist, J., dissenting) (state statute rendering pregnant women ineligible for unemployment compensation for period extending from twelve weeks before birth to six weeks after birth found to violate the fourteenth amendment); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (Stewart, J., writing for the majority; Rehnquist, J., dissenting) (school board rule requiring all pregnant teachers to take leave without pay five months prior to delivery violated the fourteenth amendment). Thus, even if one focuses on the issue of pregnancy-based discrimination, the positions of Justices Stewart and Rehnquist differ significantly.

39. *Compare* Roe v. Wade, 410 U.S. 113, 171-78 (1973) (Rehnquist, J., dissenting) (arguing that the restrictions on abortion at issue did not violate the fourteenth amendment) *with id.* at 167-71 (Stewart, J., concurring) (concluding that the restrictions on abortion violated the due process clause).

III. The Role of Institutional Factors

The main thrust of the descriptive component of Professor Freedman's analysis is established early in her article:

> The struggle within the Court over the meaning of sex equality can be framed in terms of three questions. First, are sex differences and their social consequences natural (and thus inevitable) or cultural (and hence subject to change)? Second, if particular sex differences or their social consequences are cultural in origin, are they desirable or harmful? Third, assuming that they are harmful, are they sufficiently important to justify major social investment to reduce both the extent and the consequences of various types of sex differences?[40]

At various stages, Professor Freedman does suggest or imply that other factors may influence the justices' votes and the manner in which they articulate their respective positions.[41] But her basic message is clear: The primary factor which divides the Court in sex discrimination cases is the justices' differing views concerning the nature and appropriateness of sex-role stereotyping.

Certainly such differences play an important role in the divisions of the Court. Other considerations are, however, also important in the judicial decisionmaking process. Foremost among these are institutional factors—those concerns that move judges not because of any direct bearing on the substantive issues at stake in a given case, but rather because of connections with a general theory about the proper role of the judiciary in the governing process.

A. *Generally Accepted Institutional Factors.*

At times, the institutional factors at work in sex discrimination cases seem so obvious that one takes them for granted. *Dothard v. Rawlinson*[42] provides an example of this phenomenon. Although Professor Freedman focuses primarily on the issue of the segregation of male and female prison guards,[43] the Court's disposition of the height and weight requirements in *Dothard* poses a greater challenge to her method of analysis.

The justices were unanimous in striking down the use of these physical requirements. All agreed that the plaintiffs were not required to

40. Freedman, *supra* note 1, at 917; *see also id.* at 952 (approach of conservatives largely premised on "unreflective biological determinism"); *id.* at 924 (different approaches of justices reflect opposing views about nature and significance of sexual differences).

41. *See id.* at 929 (discussing the personal perspectives which the "swing" justices—Justices Blackmun, Powell, and Stevens—employ in their decisionmaking). *See generally id.* at 961-64 (addressing the role of normative considerations in constitutional decisionmaking).

42. 433 U.S. 321 (1977).

43. Freedman, *supra* note 1, at 934-38.

prove that the height and weight restrictions were adopted with a discriminatory intent. Instead, the Court concluded that the existence of a disparate impact on women as a class was sufficient to shift the burden of persuasion to the employer. Admittedly, Chief Justice Burger and Justices Blackmun and Rehnquist expressed the view that the so-called "effects" test should have a more limited scope than that suggested by Stewart's majority opinion.[44] But all of the justices agreed that when a requirement has the effect of putting women at a disadvantage, a substantial burden of justification is placed upon the employer.

In the later case of *Personnel Administrator v. Feeney*,[45] all of the justices except Justices Brennan and Marshall agreed that the mere fact that a facially neutral law had the effect of disproportionately excluding women from government employment was not sufficient to raise the level of scrutiny under the equal protection clause. In terms of sex discrimination theory, *Dothard* had presented precisely the same issue. Viewed solely through the prism of Freedman's analysis, seven of the votes on this issue in *Dothard* appear totally anomalous. If the two cases are to be reconciled, other factors must be at work.

The key point, of course, is that the *Dothard* challenge was based not on the equal protection clause, but rather on Title VII of the Civil Rights Act of 1964.[46] Thus, *Griggs v. Duke Power Co.*[47] became relevant. In *Griggs*, the Court had unanimously held that where an employment practice had a disparate impact on a group protected by Title VII, then that practice was illegal unless it could be justified by a business necessity. Once *Griggs* had been decided, the doctrine of stare decisis came into play in later Title VII cases such as *Dothard*.

But the application of the traditional common law doctrine of stare decisis alone would not have been sufficient to generate the unanimous vote in *Dothard*. *Griggs* was a race discrimination case, and much of the opinion is devoted to a discussion of race-specific factors; a large part of the Court's rationale was the assumption that the inability of blacks to compete effectively on the test at issue there was the result of widespread discrimination in the past.[48] By contrast, height and weight differences between the sexes are largely independent of social conditions. Thus if *Dothard* had been a common law case, *Griggs* could have been easily distinguished.

---

44. *Compare* Dothard v. Rawlinson, 433 U.S. 321, 337-40 (1977) (Rehnquist, J., concurring in the result) *with id.* at 328-31 (majority opinion).

45. 442 U.S. 256 (1979).

46. 42 U.S.C. §§ 2000e to 2000e-17 (1982).

47. 401 U.S. 424 (1971).

48. *See id.* at 430-31.

What made *Griggs* a compelling precedent in *Dothard* was a second institutional convention—one of statutory interpretation. The same sentence in Title VII prohibits discrimination on the basis of either race or sex.[49] Given this juxtaposition, the linguistic conventions of statutory interpretation require that the standards for establishing "discrimination" on the basis of sex be the same as the standards for establishing "discrimination" on the basis of race. Thus, once the effects test had been adopted in *Griggs*, the Court was constrained to adopt the same standard in *Dothard*.

In *Dothard*, institutional factors influenced justices to vote to strike down the challenged requirement. In other contexts, however, these factors can have precisely the opposite impact. *Feeney*[50] provides an example of this phenomenon. Considering only the facts, *Dothard* would have been a highly relevant precedent. As already noted, *Feeney*, like *Dothard*, involved the employment practices of a state agency, and the challenged criterion in both cases had a disparate, negative impact on women. In rejecting the challenge in *Feeney*, however, the Court did not mention *Dothard*; instead, the majority relied[51] on *Washington v. Davis*,[52] a case that involved racial discrimination rather than sex-based discrimination. Once again, the key factor was the difference between constitutional and statutory analysis. Like *Davis*, but unlike *Dothard*, the *Feeney* challenge was based on the Constitution rather than an antidiscrimination statute. The conventions of the doctrine of stare decisis indicate that while distinctions between facts are often important, a difference in the legal bases of the complaints is always critical. The *Feeney* Court's decision to rely on *Davis* rather than *Dothard* is thus entirely consistent with legal convention.

The *Dothard* and *Feeney* examples illustrate the impact on sex discrimination law of institutional conventions that are universally respected. Even where such conventions are controversial, however, they may affect the approach of individual justices to such cases. The next subsection will examine the effect of institutional concerns on the sex discrimination jurisprudence of three justices—Justice Rehnquist from the "Right," Justice Stevens from the "Center," and Justice White from the "Left."

49. 42 U.S.C. § 2000e-2 (1982).
50. 442 U.S. 256 (1979)
51. *Id.* at 273-74, 275, 277.
52. 426 U.S. 229 (1976).

B. *Idiosyncratic Institutional Concerns.*

1. *Justice Rehnquist.* Justice Rehnquist is the leading apostle of judicial restraint on the Burger Court. In the context of equal protection law, his approach is predicated on two basic tenets. First, he has an extremely narrow conception of the rational basis test. As his opinion in *Railroad Retirement Board v. Fritz*[53] demonstrates, he does not require classifications in general to satisfy an *articulated* governmental purpose. Instead, he asks only if there might be a "plausible reason" for the legislative decision. In his opinion, once such a plausible reason is discovered, "our inquiry is at an end."[54] The result is that he has voted to defer to presumed legislative judgment in virtually all rational basis cases.[55]

The second major component of Justice Rehnquist's approach to equal protection issues is his view that there shonld be virtually no exceptions to rational basis analysis. Arguing from a traditional interpretivist position, he would limit the exercise of elevated scrutiny to discriminations based on race or national origin. While he has not explicitly made this argument in any sex discrimination case, he has forcefully espoused this approach in cases involving classifications based on alienage[56] and illegitimacy.[57] It is in the context of these two factors that Justice Rehnquist's discussions of the "reality" of sex differences must be considered. Since sex is not race or national origin, in his view the rational basis test applies. And for the purposes of his rational basis analysis, he is concerned with the "reality" of differences only in a very special sense. The question is not whether differences are created by physical or social circumstance, but instead whether *any* difference between two groups exists and whether that difference might plausibly be viewed as related to some governmental purpose which would justify the challenged classification.[58]

Even the most egregious discriminations based on sex satisfy this

53. 449 U.S. 166 (1980).

54. *Id.* at 179.

55. One clear exception is Logan v. Zimmerman Brush Co., 455 U.S. 422, 443-44 (1982) (Powell, J., joined by Rehnquist, J., concurring in the result) (denial of the right to a hearing because of failure of state to provide a hearing on the claim within 120 days, created a classification not rationally related to a legitimate state interest); *see also* Weinberger v. Weisenfeld, 420 U.S. 636, 655 (1975) (Rehnquist, J., concurring) (disputed provision of Social Security Act did not rationally serve a valid governmental purpose).

56. Sugarman v. Dougall, 413 U.S. 634, 649-64 (1973) (Rehnquist, J., dissenting).

57. Trimble v. Gordon, 430 U.S. 762, 777-86 (1977) (Rehnquist, J., dissenting). *Cf.* Freedman, *supra* note 1, at 928 n.70 (observing that Justice Rehnquist apparently believes the minimum rationality standard applies to gender classifications).

58. *See, e.g.,* Sugarman v. Dougall, 413 U.S. 634, 661-64 (1973) (Rehnquist, J., dissenting); *see also* Weber v. Aetna Casualty & Surety Co., 406 U.S. 106, 183-84 (1972) (Rehnquist, J., dissenting).

standard. For example, in *Reed v. Reed*[59] the Court was faced with an Idaho statute which provided that with regard to the selection of persons to administer an intestate estate, "[o]f several persons claiming and equally entitled to administer, males must be preferred to females."[60] With Justice Rehnquist not participating, the Court had no trouble in unanimously finding this discrimination unconstitutional. Yet in American society, males are more likely than females to possess business expertise, and such expertise is plausibly related to skill in estate administration. Thus, under a pure Rehnquistian rational basis analysis, the Idaho statute might well have been found constitutional.

Against this background, it is not surprising that Rehnquist has been generally unsympathetic to constitutional attacks on laws that discriminate on the basis of sex. Indeed, what is somewhat surprising is that he has voted to invalidate sex-based classifications in cases such as *Weinberger*, *Westcott*, and *Feenstra*.[61] The latter votes can probably be explained as tactical responses to the problem of obtaining practical results on a multimember Court. The voting pattern in *Frontiero* and *Taylor* demonstrated clearly that Rehnquist was completely alone in his belief that the rational basis test should be applied to laws that on their faces discriminate against women.[62] Thus, only by joining a coalition of justices with less extreme views than his own could Justice Rehnquist hope to have a practical impact on the shape of the developing law in this area. Justice Rehnquist's approaches in *Weinberger* and *Feenstra* can be seen as attempts to provide a framework within which such a coalition could be built.

In short, Justice Rehnquist's theories of the constitutional status of laws that discriminate on the basis of gender can be explained in terms of institutional factors that transcend his substantive views on the issue of sex discrimination per se. He does not claim that legislatures are generally correct in choosing to discriminate on the basis of sex; he would simply argue that the decisions are not wholly irrational and thus that he is bound to respect them. It might be suggested that Justice Rehnquist's decision to adopt this mode of analysis in sex discrimination cases is nothing more than a device to disguise his views on the specific substantive issues at stake. In evaluating this claim, however, two factors must be kept in mind. First, historically the theory of judicial restraint has not had a one-to-one correspondence with political conservatism. Felix Frankfurter, for example, was a leading civil libertarian in the early

59. 404 U.S. 71 (1971).
60. *Id.* at 73.
61. *See supra* notes 27-30 & 35-36 and accompanying text.
62. *See supra* notes 31-32 and accompanying text.

twentieth century. Yet after being appointed to the Supreme Court, he was one of the least "activist" of the justices on the early Warren Court. Second, and equally important, is the evidence of Justice Rehnquist's overall voting record. If his advocacy of judicial restraint were simply a device to advance conservative substantive positions, then he would tend to espouse a different institutional philosophy in cases where judicial activism would advance conservative causes. Yet, while it is possible to find some evidence of this phenomenon,[63] no consistent pattern emerges. Justice Rehnquist has, for example, voted to reject constitutional challenges to state laws requiring private property owners to give access to those seeking to advance political causes[64] and limiting the influence of corporations in the political process.[65] Given his conservative political views, these votes would be rather surprising if only specific substantive elements were considered. Thus the only plausible explanation is that Rehnquist was moved by general institutional concerns in these cases.

Of course, to suggest that Justice Rehnquist's advocacy of judicial restraint is unrelated to his political conservatism would be extremely naive. Moreover, as already noted, there are examples of cases where other factors have moved Justice Rehnquist to abandon his generally deferential posture. But the point is that Justice Rehnquist's voting pattern is not solely a product of his attitude toward sex discrimination; the pattern also reflects his more general view of the appropriate role of the Supreme Court in American society.

2. *Justice Stevens.* Justice Stevens' concurring opinion in *California v. Goldfarb*[66] is the key to understanding his approach to the constitutional law of sex discrimination. *Goldfarb* was a challenge to a provision of the federal Social Security program which automatically paid survivor's benefits to the widow of a deceased insured but paid such benefits to a widower only if he had been actually dependent on his deceased wife. Analyzing the relevant discrimination as being against men

63. *See, e.g.*, National League of Cities v. Usery, 426 U.S. 833, 852 (1976) (Rehnquist, J.) (holding that applications of the wage and hour provisions of the Fair Labor Standards Act to all employees of states did not comport with the federal system of government and was not within Congress' commerce power); Buckley v. Valeo, 424 U.S. 1, 290-94 (1976) (Rehnquist, J., concurring in part, dissenting in part) (arguing that Congress, in preferring the major political parties in election legislation, impermissibly discriminated against minor parties and independents).

64. Pruneyard Shopping Center v. Robbins, 447 U.S. 74 (1980) (Rehnquist, J., writing for the majority).

65. *See, e.g.*, Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 551 (1980) (Rehnquist, J., joining Blackmun, J., dissenting) (economic restrictions on political advertising by utilities found to be constitutional); First Nat. Bank v. Bellotti, 435 U.S. 765, 827 (1978) (Rehnquist, J., dissenting) (adopting a restrictive view of the political liberties of business corporations).

66. 430 U.S. 199, 217 (1977) (Stevens, J., concurring in the result).

rather than against women,[67] Stevens nonetheless concluded that the provision was unconstitutional. His analysis began by noting that the discrimination did not "add to the burdens of an already disadvantaged discrete minority."[68] In addition, he noted two "hypothetical justifications" that, if proven to be the actual impetus for the statute, might justify the discrimination. Upon a close analysis of these possibilities, however, he concluded that neither had provided the actual justification for the statutory distinction.[69] Instead, he argued, the discrimination was "merely the accidental by-product of a traditional way of thinking about females."[70] Reasoning that "a rule which effects an unequal distribution of economic benefits solely on the basis of sex is sufficiently questionable that 'due process requires that there be a legitimate basis for presuming that the rule was actually intended to serve [the] interest' put forward by the Government as its justification,"[71] Stevens concluded that the challenged discrimination was invalidated by the fifth amendment.[72]

Justice Stevens further clarified his approach in *Michael M. v. Superior Court.*[73] Considering the constitutionality of a law which punished men but not women for statutory rape, Justice Stevens divided laws that discriminate against men into two classes. Where the physical differences between the sexes are "obviously irrelevant," he would view the classification as presumptively invalid. By contrast, where there is an "apparent connection" between inherent physical differences and the challenged classifications, then the classification would be presumed valid.[74] This presumption could be overcome, however, by a showing that the apparent justification was "illusory or wholly inadequate."[75] Finding that the justification in *Michael M.* was "illusory," Justice Stevens dissented from the holding that the classification was constitutionally unobjectionable.[76]

Taken together, the *Goldfarb* and *Michael M.* opinions reflect a complex interaction between substantive and institutional elements. The choice to subject discrimination against males to a test more stringent than traditional rational basis analysis is based on a substantive judgment that, as a general matter of political morality, such discrimination re-

67. *Id.* at 218.
68. *Id.*.
69. *Id.*.
70. *Id.* at 223.
71. *Id.* (quoting Hampton v. Mow Sun Wang, 426 U.S. 88, 103 (1976)).
72. *Id.* at 116-17.
73. 450 U.S. 464, 496 (1981) (Stevens, J., dissenting).
74. *Id.* at 497 n.4 (Stevens, J., dissenting).
75. *Id.*
76. *Id.* at 499-500.

quires special justification. On the other hand, Justice Stevens' apparent application of a test for discrimination against males which is less strict than that for discrimination against females implies a rejection of the standard feminist argument that almost all sex discrimination ultimately redounds to the disadvantage of women.[77] Finally, again on a substantive level, Justice Stevens' distinction between those classifications based on physical differences and those that are based on socially created distinctions might be viewed as a rejection of the feminist position on the nature of "real" sex differences.[78]

But Justice Stevens' approach clearly reflects institutional concerns as well. The basic theme of the *Goldfarb* and *Michael M.* analyses is not that the Supreme Court should displace the judgment of the legislature in sex discrimination matters whenever the Court finds that judgment to be unsound. Instead, Justice Stevens considers the judicial role to be process-oriented. Where he views the legislature as having based its discrimination against men on a good faith analysis of appropriate considerations, Justice Stevens will allow the discrimination to stand.[79] In contrast, when he perceives the legislative decision to have been based on pure prejudice or stereotypical generalizations, he will vote to strike down that decision, as he did in *Goldfarb* and *Michael M.* Justice Stevens' distinction between sex classifications based on physical characteristics and those which are not is entirely consistent with this conception of the judicial role. Where a classification is related to physical differences between the sexes, a plausible reason for legislative action is immediately apparent and the likelihood that the action is based on pure prejudice is significantly reduced. Conversely, where no such physical difference can be pointed to as a justification for a classification, the suspicion of prejudice is greater. Thus, the analysis in *Michael M.* can be viewed as reflecting the basic institutional thrust of Justice Stevens' approach.

Of course, absent other evidence, it might be argued that Justice Stevens simply seized on these institutional concepts as convenient support for his views on the specific substantive issue of sex discrimination. A similar institutional orientation, however, appears in a wide range of contexts throughout Justice Stevens' equal protection jurisprudence. Indeed, he first expressed these institutional views not in a sex discrimination case, but rather in *Hampton v. Mow Sun Wong*[80]—a case involving a

77. *See, e.g.*, Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 987-1002 (1984).

78. *See, e.g.*, Freedman, *supra* note 1, at 944-47.

79. *See, e.g.*, Caban v. Mohammed, 441 U.S. 380, 401 (1979) (Stevens, J., dissenting).

80. 426 U.S. 88 (1976) (Stevens, J., writing for the majority).

civil service regulation that discriminated on the basis of alienage. Justice Stevens has used essentially the same approach in cases involving discrimination against whites,[81] discrimination among various Indian tribes,[82] and the problem of evaluating electoral systems which have the effect of diluting the voting power of blacks.[83] In short, it is not possible to describe accurately Justice Stevens' approach to sex-based discrimination solely in specific substantive terms; as in the case of Justice Rehnquist, one must also recognize his important commitment to certain general institutional values.

3. *Justice White.* Viewed solely from the perspective of the struggle for sex equality, Justice White's voting pattern appears almost schizophrenic. On one hand, he has joined consistently with the most activist members of the Court—Justices Brennan and Marshall—in cases involving constitutional challenges to facial discrimination.[84] Taken alone, this pattern would seem to indicate that Justice White is generally in sympathy with those who believe that the Court should take a strong stand and move vigorously to eradicate sex discrimination in American society. On the other hand, he has voted against attempts to subject classifications to stringent constitutional scrutiny solely because those classifications have a disparate negative impact on women.[85] Under Professor Freedman's analysis, these votes would suggest that Justice White is something less than fully committed to the cause of sexual equality.

In large measure, this seeming anomaly can be explained by reference to institutional factors. The best evidence of Justice White's concern with such factors is his opinion in *Washington v. Davis*.[86] *Davis* involved a challenge to the use of a standardized test as a criterion for employment as a police officer. The essence of the complaint was that the test excluded a disproportionately high number of blacks from the police force. In general, Justice White has been relatively sympathetic to the claims of minority races;[87] nonetheless, he wrote the majority opin-

81. Fullilove v. Klutznick, 448 U.S. 448, 532 (1980) (Stevens, J., dissenting).

82. Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73, 91 (1977) (Stevens, J., dissenting).

83. Rogers v. Lodge, 458 U.S. 613, 631 (1982) (Stevens, J., dissenting); City of Mobile v. Bolden, 446 U.S. 55, 83 (1980) (Stevens, J., concurring in the result).

84. *See supra* note 4 and accompanying text.

85. Personnel Adm'r v. Feeney, 442 U.S. 256, 281 (1979) (failure to demonstrate that the challenged law reflects a purpose to discriminate on the basis of sex); *see also* Dothard v. Rawlinson, 433 U.S. 321, 347 (1977) (White, J., concurring) (no prima facie case of sex discrimination merely because statistics show that height and weight requirements would exclude a larger percentage of women).

86. 426 U.S. 229 (1976).

87. *See, e.g.*, Rogers v. Lodge, 458 U.S. 613 (1982) (White, J., writing for the majority) (expansive view of the scope of fourteenth and fifteenth amendment restrictions on representation schemes that dilute minority voting strength); Columbia Bd. of Educ. v. Penick, 443 U.S. 449 (1979) (White,

ion in *Davis*, explaining why the Court rejected the constitutional challenge. He reasoned that:

> 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 black than to the more affluent white.
>
> Given that rule, such consequences would perhaps be likely to follow. However, in our view, extension of the rule beyond those areas where it is already applicable by reason of statute . . . should await legislative prescription.[88]

The import of this analysis is clear. While Justice White might believe that, in general, race and sex discrimination are social evils that should be eradicated, he views large-scale alterations in the basic structure of society as a legislative prerogative. The same considerations no doubt led him to follow *Davis* in *Feeney*[89]; certainly, active judicial intervention against all institutional arrangements that had a disproportionate sexual impact would be no less disruptive than analogous judicial action to ameliorate effects on minority races.

To summarize, like Justices Stevens and Rehnquist, Justice White seems to be influenced by both specific substantive factors and institutional concerns. His voting pattern in cases involving facial discrimination reflects a general distaste for sex discrimination and its consequences. On the other hand, he is unwilling to commit the judiciary to a major restructuring of society, viewing that task as the role of the legislature.

C. *Summary.*

The development of sex discrimination law in the Supreme Court clearly has been influenced by institutional as well as specific substantive factors. Of course, this observation does not imply that specific substantive factors have not had a strong effect on the respective voting patterns of the justices; the various justices' views on the nature and significance of sex discrimination and on the role of government as a whole in dealing with the problem have had a profound impact on the development of the jurisprudence in this area. Moreover, the nature of the interaction between institutional and specific substantive factors varies greatly from

---

J., writing for the majority) (expansive view of the federal courts' remedial powers in school desegregation cases).

88. 426 U.S. at 248 (footnote omitted).

89. *See supra* notes 45 & 51-52 and accompanying text.

justice to justice. In the case of Justice Rehnquist, for example, the substantive and institutional factors seem to reinforce one another; for Justice White, by contrast, institutional concerns act to restrain his willingness to implement his specific substantive judgments. But the crucial point remains the same—one cannot accurately describe the development of sex discrimination law without reference to the role of institutional factors.

IV. CONCLUSION

One can argue, of course, that institutional considerations should not play a large role in sex discrimination litigation generally. A system in which the justices generally ignored both precedents and legislative judgments and simply voted on the basis of their independent analyses of specific substantive elements might seem strange; nonetheless one can—at least in theory—conceive of such a system. But if a commentator attempts to describe the actual decisionmaking dynamic of the contemporary Court, her analysis must reflect the important influence of institutional concerns on the justices' decisionmaking process.

The difficulty with feminist jurisprudence—and normative approaches generally—is that they are simply not constructed with a view to appreciating and analyzing institutional considerations. This is not to suggest that normative analysis is without value. As Professor Freedman has amply demonstrated, the use of a normative approach can generate important insights into the relationship between judicial decisions and the larger issues facing society. But only by combining normative techniques with a more traditional approach can one paint a truly accurate picture of the process of constitutional decisionmaking.